The Legacy of Anthony M. Kennedy

Adam Lamparello
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By Adam Lamparello

“[I]t is an accident of politics but an accepted fact of life that, in this nation of 314 million people, the only person whose opinion counts most of the time is that of [Anthony] Kennedy.”

INTRODUCTION

Commonly described as the Court’s “swing vote,” Justice Anthony M. Kennedy’s legacy on the United States Supreme Court can be summarized with one word: power. Justice Kennedy’s reliance on “liberty” to recognize new rights under the Fourteenth Amendment’s Due Process Clause is anything but libertarian, and it has resulted in an unprecedented expansion of judicial power.

1 Assistant Professor of Law, Indiana Tech Law School.
3 Id. David Freed explains as follows:

Kennedy has been abandoned by fellow moderates Sandra Day O’Connor and remains the main swing vote on the Court. He was on the winning side in 91 percent of cases argued before the Court this term, including 20 of the 23 cases divided 5-4. Kennedy dissented only seven times on the year, the lowest on the Court. While he was on the losing side of last year’s Obamacare decision, voting to strike the law down in its entirety under the limited power of the commerce clause, Kennedy’s vote often determines the winning side. Id.

5 See U.S. Const., Amend. XIV, Sec. 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).
Specifically, when determining the “protections guaranteed to … liberty,” Justice Kennedy has relied on sweeping, standardless, and largely subjective formulations, the result of which has been to give the Court extraordinary—and unguided—authority to recognize rights that are not grounded in any reasonable interpretation of the Constitution’s text. Additionally, Kennedy’s broad characterization of liberty, in cases such as Planned Parenthood of Southeastern Pennsylvania v. Casey, has had the unintended effect of motivating many states to enact legislation that undermines, even constructively eliminates, newly-created rights. As a result, the groups for whom a particular right was created, including women after Roe v. Wade, have often been left without meaningful ways to enforce that right at the state level. At its core, Justice Kennedy’s reliance on liberty to recognize new fundamental rights amounts to a “substantial reinterpretation[] of the Constitution,” and has validated Alexis de Tocqueville’s statement that there is “hardly a political question in the United States which does not sooner or later turn into a judicial one.”

Accordingly, Justice Kennedy’s legacy will not be one of enhancing liberty. It will be one of enhancing judicial power at the expense of liberty. Part II discusses Justice Kennedy’s

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10 See generally Jeffrey D. Jackson, Be Careful What You Wish For: Why McDonald v. City of Chicago Rejection of the Privileges and Immunities Clause May Not Be Such a Bad Thing for Rights, 115 PENN ST. L. REV. 561, 579-81 (2011) (discussing the Court’s history of creating unenumerated rights under the Fourteenth Amendment).
11 Moore, 431 U.S. at 543 (White, J., dissenting); see also Planned Parenthood, 505 U.S. at 844 (affirming Roe based on the right to “define one’s own concept of existence ... and of the mystery of human life”).
13 Jack Wade Nowlin, The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights, 78 NOTRE DAME L. REV. 171, 185 (2002) (“a sweeping lawmaking role for the unelected federal judiciary is ultimately incompatible with robust conceptions of other constitutional principles of fundamental importance,
judicial philosophy, examines the Court’s development of the substantive due process doctrine, and analyzes Kennedy’s opinions in *Planned Parenthood v. Casey*\(^{14}\) and *Lawrence v. Texas*.\(^{15}\) Part III proposes a more restrained but principled understanding of liberty that guards against judicial overreaching but gives the Court a meaningful role in protecting and, in some cases, creating new fundamental rights. It argues that the Court should focus its inquiry on whether a right is “‘implicit in the concept of ordered liberty,’”\(^{16}\) not on whether the right is rooted in history and tradition or consistent with contemporary norms. If a right is implicit in the concept of ordered liberty, the Court should narrowly—and specifically—define that right to ensure that it provides a categorical, baseline level of protection, but does not lay the groundwork for creating more implied rights in future cases. This approach provides the Court with authority to create unenumerated fundamental rights, but also results in an incremental jurisprudence that reflects judicial restraint, respect for the democratic process, and a commitment to create rights that can be enforced.

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\(^{14}\) 505 U.S. 833.

\(^{15}\) 539 U.S. 558 (2003).

PART II
JUSTICE KENNEDY’S LIBERTY, JUSTICE SCALIA’S DEMOCRACY, AND THE SOMEWHERE IN-BETWEEN

The defining moments in Justice Kennedy’s tenure on the Court came in Planned Parenthood, Lawrence, and United States v. Windsor, where the Court did to the Constitution—in the name of liberty—what it also did—in the name of democracy—to Florida’s citizens in Bush v. Gore. In all three cases, Justice Kennedy’s reliance on a broad conception of liberty, rather than equal protection principles, shifted the balance too heavily in favor of judicial, rather democratic, creation of unenumerated fundamental rights.

A. THE FOURTEENTH AMENDMENT, SUBSTANTIVE DUE PROCESS, AND LIBERTY

The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” On its face, the Fourteenth Amendment only protects procedural rights, but the Court has relied on the word “liberty” to create substantive

17 133 S.Ct. 2675 (2014).

Casey stands as an extraordinary example of Justice Kennedy's commitment to an expansive interpretation of the protections afforded by the liberty clause. The plurality opinion again rejected the claim that “the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified” as “inconsistent with our law.” More importantly, Casey spoke to the appropriate level of deference the Court must give legislative judgments when reviewing due process claims. The Court explained that “[i]t is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Id.

19 See U.S. Const., Amend. XIV, Sec. 1, Cl. 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).
rights that are not enumerated in the Constitution. This approach is not inherently anti-
democratic, as the Ninth Amendment expressly provides that “the enumeration in the Constitution,
of certain rights, shall not be construed to deny or disparage others retained by the people citizens retain
fundamental rights that are not enumerated in the Bill of Rights.”\(^\text{21}\) The problem is with the
Court’s failure to establish meaningful standards to guide its unenumerated rights jurisprudence.

By way of background, the Court’s current and former Justices have developed three
radically different conceptions of liberty, all of which implicate the extent to which new rights
are recognized. One view, championed by Justices Antonin Scalia, Clarence Thomas, and
former Chief Justice William Rehnquist, holds that the Due Process Clause primarily safeguards
procedural rights.\(^\text{22}\) Only rights that are deeply rooted in history and tradition and “essential to
the American ‘scheme of ordered liberty,’”\(^\text{23}\) qualify as fundamental. Another view, endorsed by
former Justice John Paul Stevens, supports the creation of rights that are “implicit in the concept
of ordered liberty,”\(^\text{24}\) but does not require that such rights be firmly rooted in history and
tradition. Justice Stevens’s jurisprudence was characterized by balancing the importance of an
asserted right with respect for the democratic process, and emphasizing the need to exercise
cautions and humility when creating new rights.\(^\text{25}\)

\(^{21}\) \textit{See} U.S. Const., Amend. IX.
\(^{22}\) \textit{See generally, e.g.,} Jeffrey D. Jackson, \textit{Be Careful What You Wish For: Why McDonald v. City of Chicago Rejection of the Privileges and Immunities Clause May Not Be Such a Bad Thing for Rights}, 115 Penn St. L. Rev. 561, 579-810 (2011) ("[t]he notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words") (quoting \textit{McDonald v. City of Chicago}, 561 U.S. 742, 811 (2010)) (Thomas, J., concurring).
\(^{24}\) \textit{Id.}
\(^{25}\) \textit{See, e.g.,} \textit{McDonald v. City of Chicago}, 561 U.S. 742, 880 (2010) (Stevens, J., dissenting) (arguing that “sensitivity to the interaction between the intrinsic aspects of liberty and the practical realities of contemporary society provides an important tool for guiding judicial discretion”).
The third category, to which Justice Kennedy adheres, views the Constitution is a living document whose rights evolve based on the needs of contemporary society. Consequentially, neither history nor tradition, or a determination of whether a right is implicit in the concept of ordered liberty, is controlling. Each category has played a role in shaping the Court’s unenumerated rights jurisprudence.

B. JUSTICE KENNEDY’S EMERGING AWARENESS OF RIGHTS BASED ON CONTEMPORARY UNDERSTANDINGS OF LIBERTY

Justice Kennedy’s jurisprudence embraces an interpretive philosophy commonly known as living constitutionalism. Adherents view the Constitution a “flawed” document that employs broad language for the purpose of allowing the Court, based on “evolving standards of decency,” to determine constitutional meaning. This view has engendered substantial

26 See, e.g., Jack Landau, Some Thoughts About State Constitutional Interpretation, 115 Penn St. L. Rev. 837, 855 (2011). Professor Landau describes living constitutionalism as follows:

Living constitutionalism is generally justified by one of three arguments, one pragmatic, one descriptive, and a third—ironically—originalist. The pragmatic argument is that, aside from the fact that originalism cannot deliver on its promise of objectivity, relying on the process of formally amending a constitution is simply unrealistic. Changes in society and technology, adherents argue, simply happen too quickly for the cumbersome amendment process to keep up. Id.

27 See generally Ethan J. Leib, The Perpetual Anxiety of Living Constitutionalism, 24 Const. Comment. 353, 361 (2008). Professor Leib explains the distinction between living constitutionalism and originalism:

A core difference between the originalists and the living constitutionalists turns on what we might call interpretative mechanics—and Balkin aligns himself with the originalist form. Originalists exclude many “extrinsic” constitutional modalities in their first pass at any particular constitutional question: living constitutionalists let it all in from the start. Discussions of consequences, underlying principles of political morality, prudence, doctrine, rule of law considerations: all these are relevant (even if not, perhaps, equally relevant) for living constitutionalists at the first moment that a question of constitutional interpretation presents itself. Originalists either rule these considerations out of the interpretive game entirely or admit them only in later conceptual stages of the interpretive enterprise. Id.


29 In the Eighth Amendment context, the Court has invalidated punishments that were once thought to be proportionate to a particular crime, but which are now viewed as excessive. See Roper v. Simmons, 543 U.S. 551, 560 (2006) (holding that juvenile executions violated the Eighth Amendment). In Roper, Justice Kennedy stated:
controversy from opponents who argue that living constitutionalism gives the Court excessive power to create unenumerated rights, particularly where the textual basis for those rights is dubious and reasonable people can disagree about constitutional meaning. Justice Kennedy’s opinions in Planned Parenthood and Lawrence engendered this type of criticism, and underscore Kennedy’s broader judicial philosophy.

1. **PLANNED PARENTHOOD: THE RIGHT TO DEFINE ONE’S OWN CONCEPT OF EXISTENCE**

In Planned Parenthood, Justice Kennedy cast the fifth and deciding vote to affirm the central holding in Roe v. Wade, which interpreted the Fourteenth Amendment’s implied right to privacy, which was first established in Griswold v. Connecticut to protect a woman’s right to terminate a pregnancy prior to viability. Regardless of one’s view on abortion, the flaw in Planned Parenthood was less about the outcome and more about the reasoning. Writing for the majority, Justice Kennedy relied on a sweeping definition of liberty, a half-hearted allegiance

The prohibition against “cruel and unusual punishments,” like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be cruel and unusual. Id. (quoting Trop Dulles, 356 U.S. 86, 101 (1958); see also U.S. Const., Amend. XIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”).

30 See Planned Parenthood, 5050 U.S. at 851 (reiterating the “conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other”).
32 381 U.S. 479, 484 (1965) (invalidating Connecticut’s ban on contraceptives based on an implied right to privacy, stating, “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”).
33 Roe, 410 U.S. at 164 (holding that, “[f]or the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician”).
34 See Planned Parenthood, 505 U.S. at 847. With respect to the Court’s role in protecting unenumerated rights, Justice Kennedy stated:

It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. It is also
to stare decisis, and a view of the Constitution that, quite frankly, embraced invention more than interpretation.

At the outset of the opinion, Justice Kennedy repeated the well-settled proposition that “there is a real of personal liberty which the government may not enter.”

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of stare decisis is not an “inexorable command,” and certainly it is not such in every constitutional case … when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case … So in this case we may enquire whether Roe's central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left Roe's central rule a doctrinal anachronism discounted by society; and whether Roe's premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed … Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution. Id. at 854-56.

Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since the Clause has been understood to contain a substantive component as well, one “barring certain government actions regardless of the fairness of the procedures used to implement them.” As Justice Brandeis (joined by Justice Holmes) observed, “[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States” … “[T]he guaranties of due process, though having their roots in Magna Carta's 'per legem terrae' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'” Id. (quoting Mugler v. Kansas, 123 U.S. 623, 660–661 (1887); Daniels v. Williams, 474 U.S. 327, 331 (1986); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring), overruled on other grounds, Brandenburg v. Ohio, 395 U.S. 444 (1969)); Hurtado v. California, 110 U.S. 516, 532 (1884)).
example, was “mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most states in the 19th Century.” Notwithstanding, the Court “was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component if the Due Process Clause.”

The problem arose when Justice Kennedy relied on the Fourteenth Amendment’s broad language to expand the Court’s authority to recognize new rights. Kennedy concluded that “[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.” In fact, “[d]ue process has not been reduced to any formula … [and] its content cannot be determined by reference to any code.” Thus, the Court had authority “in interpreting the Constitution to exercise ‘reasoned judgment,’ the limits of which are not susceptible of expression as a simple rule.” Based on these principles, Justice Kennedy affirmed Roe based, in part, on a broad right to “define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.” These words transformed the Court’s substantive due process jurisprudence into standardless exercise that, among other things, disregarded the “conventional constitutional doctrine that where reasonable people

37 Planned Parenthood, 505 U.S at 848.
38 Id.
40 Planned Parenthood, 505 U.S. at 848.
41 Id.
42 Id. at 849.
43 Id.
44 Id. at 851 (Justice Scalia dissented, stating, “I have never heard of a law that attempted to restrict one's 'right to define' certain concepts; and if the passage calls into question the government's power to regulate actions based on one's self-defined 'concept of existence, etc.,' it is the passage that ate the rule of law”). Id. at 587 (Scalia, J., dissenting).
disagree the government can adopt one position or the other.” As a practical matter, it gave the Court the power to do anything it wanted in Planned Parenthood—and in future cases where the Court determined that a law infringed an individual’s right to define the mystery of human existence.

What’s worse, the right recognized in Planned Parenthood was also predicated on Griswold’s implied right to privacy, which the Griswold Court had created from “penumbras, formed by emanations from [the Bill of Rights] that help give them life and substance.” As a result, the reasoning in Planned Parenthood bore no relationship to the Fourteenth Amendment—or any other constitutional provision—and the sheer breadth of the holding underscored the power it gave to the Court in the rights-creation enterprise.

To understand the impact of Planned Parenthood on the rule of law, one must consider Roe’s shortcomings. Unlike Justice Kennedy’s sweeping rhetoric in Planned Parenthood, the Roe majority made no attempt to giftwrap its decision with expansive language or to seek shelter under Griswold’s penumbras. Instead, the majority simply declared that “the right of privacy, however based, is broad enough to cover the abortion decision.” If nothing else, the Roe Court should be respected for its honesty. Notwithstanding, Roe is among the worst Supreme Court decisions in history, and it was not made better by the fact that allowing pre-viability abortions is

45 Id.; see also Rochin v. California, 342 U.S. 165, 171-72 (1952) (“To believe that … judicial exercise of judgment could be avoided by freezing ‘due process of law’ at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges”).

46 Griswold, 381 U.S. at 484 (brackets added).

47 See Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (In Webster, the Court upheld significant restrictions on a woman’s right to obtain an abortion, which the Court upheld by a 5-4 margin. The restrictions included a ban on using public employees and public facilities to perform or assist abortions, and required viability tests on women beginning in their twentieth week of pregnancy).

48 Griswold, 381 U.S. at 484.

49 Roe, 410 U.S. at 155 (emphasis added).
arguably an important step to ensuring gender equality and reproductive freedom.\textsuperscript{50} The Court acted like a vigilante who kills in broad daylight before a sea of stunned onlookers to avenge the senseless murder of a family member by a bunch of thugs, convinced that the crime is justified by a higher moral purpose. Much like the vigilante who disregards the law, the \textit{Roe} Court ignored constitutional constraints to reach a pre-determined outcome.

To the surprise of some, Justice Ruth Bader Ginsburg, a staunch supporter of abortion rights, criticized \textit{Roe}’s broad language in favor of an incremental approach that allowed the Court to “put its stamp of approval on the side of change and let that change develop in the political process”\textsuperscript{51} In \textit{Planned Parenthood}, Justice Kennedy had the opportunity to abandon \textit{Roe}’s tedious reasoning, or to provide an alternative \textit{constitutional} basis upon which to support the right to abortion. Instead, Kennedy’s went even further than \textit{Roe}, writing an opinion that was unprecedented in its scope, unapologetic in its tone, and paternalistic in its effects.

2. \textit{Lawrence: Liberty in Its More Spatial and Transcendent Dimensions}

In \textit{Lawrence}, Justice Kennedy authored a plurality opinion invalidating a Texas law that banned sodomy between same-sex couples.\textsuperscript{52} In so doing, Kennedy overturned \textit{Bowers v. Hardwick},\textsuperscript{53} which upheld by a 5-4 margin a Georgia law banning sodomy among same \textit{and}

\textsuperscript{50} See Reva B. Siegal, \textit{Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression}, 56 EMORY L.J. 815, 836 (2007) (stating that, “even as courts continue to expand sex equality analysis as a limit on laws regulating women, they might develop this analysis as an additional constitutional basis for reproductive rights as Casey did, one that supplements and illuminates the liberty values Roe and Casey protect”).


\textsuperscript{52} \textit{Lawrence}, 539 U.S. at 581 (O’Connor, J., concurring) (stating that TEX. PENAL CODE ANN. § 21.06(a) (2003) “makes sodomy a crime only if a person ‘engages in deviate sexual intercourse with another individual of the same sex’”).

\textsuperscript{53} 478 U.S. 186 (1986).
opposite-sex couples. In his plurality opinion, Justice Kennedy eschewed reliance on history and tradition, noting that it was “the starting point but not in all cases the ending point of the substantive due process inquiry.” Rather, “our laws and traditions in the past half century are of most relevance here,” and “show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” In support of this proposition, Kennedy cited a decision from the European Court of Human Rights that invalidated a law banning homosexual conduct, and asserted that “the right petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”

In a manner similar to Planned Parenthood, Justice Kennedy framed the right in overly broad terms, asserting that the Texas law implicated “liberty of the person both in its spatial and

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54 Id. (In overturning Bowers, Justice Kennedy held that, although stare decisis is “essential to the respect accorded to the judgments of the Court and to the stability of the law,” it is not “an inexorable command”); compare Lawrence, 539 U.S. at 566. (“[o]ne difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex”).

55 Lawrence, 539 U.S. at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)) (Kennedy, J., concurring).

56 Lawrence, 539 U.S. at 571. In Lawrence, Kennedy gave lesser weight to history and tradition, holding that the “issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law,” and that “[o]ur obligation is to define the liberty of all, not to mandate our own moral code”; see also Bowers, 478 U.S. at 196 (“Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo–Christian moral and ethical standards”).

57 Lawrence, 539 U.S. at 570-71. Justice Kennedy stated that “it was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so” (citing 1977 ARK. GEN. ACTS NO. 828; 1983; KAN. SESS. LAWS p. 652; 1974 KY. ACTS p. 847; 1977 MO. LAWS p. 687; 1973 MONT. LAWS p. 1339; 1977 NEV. STATS. p. 1632; 1989 TENN. PUB. ACTS ch. 591; 1973 TEX. GEN. LAWS ch. 399; Post v. State, 715 P.2d 1105 (Okla.Crim.App.1986) (invalidating a sodomy law as applied to opposite-sex couples). Justice Kennedy also held that “[p]ost-Bowers even some of these States did not adhere to the policy of suppressing homosexual conduct,” and “States with same-sex prohibitions have moved toward abolishing them” (citing Jegley v. Picado, 80 S.W.3d 332 (2002); Gyczan v. State, 942 P.2d 112 (1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky.1992); see also 1993 NEV. STATS. p. 518 (repealing NEV.REV.STAT. § 201.193)).


59 Lawrence, 539 U.S. at 576.
in its more transcendent dimensions,”⁶⁰ and infringed “the right to make certain decisions regarding sexual conduct.”⁶¹ Relying on Griswold, Justice Kennedy held that the Bowers Court “misapprehended the claim of liberty”⁶² when characterizing it as the “fundamental right upon homosexuals to engage in sodomy.”⁶³ Kennedy stated as follows:

That statement [in Bowers] … discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.⁶⁴

Justice Kennedy reasoned that the right to engage in private sexual conduct involved “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”⁶⁵ As such, these decisions are “central to the liberty protected by the Fourteenth Amendment”⁶⁶ and reflect the “respect the Constitution demands for the autonomy of the person in making these choices.”⁶⁷

Notably, Kennedy refused to base Lawrence on equal protection principles. Instead, he overturned Bowers and invalidated all state bans on sodomy, not merely those, like the one at issue in Lawrence, that applied exclusively to same-sex couples. Stating that Bowers’

⁶⁰ Id. at 562.
⁶¹ Id. at 565.
⁶² Id. at 567.
⁶³ Id. at 566.
⁶⁴ Id. at 567 (brackets added).
⁶⁵ Id. (quoting Planned Parenthood, 505 U.S. at 851); see also Romer v. Evans, 517 U.S. 620, 624 (1996) (invalidating an amendment to Colorado's Constitution “which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by “orientation, conduct, practices or relationships”) (as quoted in Lawrence, 539 U.S. at 574) (brackets added).
⁶⁶ Lawrence, 539 U.S. at 574.
⁶⁷ Id. (Justice Kennedy also relied on the Court prior case law, which afforded “constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education”).
“continuance as precedent demeans the lives of homosexual persons,” Kennedy held that “[i]f protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.” Perhaps most importantly, Justice Kennedy intimated that the Constitution’s text should not limit the Court’s ability to create new rights:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

This passage highlights the fatal flaw in Justice Kennedy’s judicial philosophy: it contains no meaningful constraints on the Court’s ability to do what it wants, when it wants, and for whatever reason it wants.

Simply put, the problem with Planned Parenthood was “not in entertaining inquiries concerning the constitutionality of social legislation but in applying the standards that [Kennedy] did.” Although Kennedy correctly noted that “this Court has not attempted to define with exactness the liberty thus guaranteed [by the Due Process Clause],” his reasoning in Lawrence defined liberty so expansively that its bore no relation to “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” In essence, Justice Kennedy invoked liberty on behalf of every citizen, but to simultaneously stripped them of the

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68 Id. at 575.
69 Id. (stating “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects,” and a “decision on the latter point advances both interests”) (Kennedy, J., plurality opinion).
70 Id. at 584 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–411 (1932)) (Brandeis, J., dissenting).
72 Lawrence, 539 U.S. at 593 (Scalia, J., dissenting) (emphasis added).
right to determine liberty’s meaning through the democratic process, or “in its spatial and … transcendent dimensions.”

This is particularly troublesome because the substantive content of the Due Process Clause “is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments.” As Justice White held in Moore v. City of East Cleveland, “[t]he emphasis of the Due Process Clause is on ‘process,’ and largely limited “to a guarantee of fairness” that prevents “abuses by [the] Court of its reviewing power.” These concerns have prompted the Court to rely on the “conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other.”

This is not to say that the Court has no role in creating unenumerated rights, or that the implied rights of privacy and liberty cannot justify the recognition of new rights. It is to say that the Court should exercise restraint and proceed with caution when considering if an asserted liberty interest qualifies as a fundamental right. Furthermore, newly-created rights should be narrowly described, particularly when they are based on implied—and judicially-created—rights. To be sure, each time the Court relies on an implied substantive right, such as privacy and liberty, to create a new unenumerated fundamental right, its decisions become further removed, if not entirely divorced, from the text, and from the structural constraints on the Court’s power. The practical result, regardless of the desirability of a particular outcome, is to undermine the

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73 Id. at 562.
74 Moore, 431 U.S. at 543-44 (White, J., dissenting) (brackets added).
75 431 U.S. 494.
76 Id. at 542 (White, J., dissenting).
77 Id. (quoting Whitney, 274 U.S., at 373); Davidson v. New Orleans, 96 U.S. 97, 104 (1878)).
78 Moore, 431 U.S. at 542 (White, J., dissenting) (quoting Poe, 367 U.S. at 540) (brackets added).
79 Planned Parenthood, 505 U.S. at 851; see also Moore, 431 U.S. at 548-49 (White, J., dissenting) (stating that “some interests would appear almost impregnable to invasion, such as the freedoms of speech, press, and religion, and the freedom from cruel and unusual punishments”).
democratic process in favor of centralized, federalized, and largely subjective decision-making. Thus, however “reasoned” the Court’s judgment, the fact remains that liberty, for all intents and purposes, means what the Justices say it means, not what the citizens of each state decide it should mean.

This does not mean that judging should, or even can, be an entirely objective endeavor. When interpreting broad and ambiguous provisions in the Constitution, or a complex federal statute, judges invariably make value judgments. This does not mean, however, that judging should become a predominantly subjective enterprise, if for nothing else than to ensure the judiciary does not become a third political branch. Although Justice Kennedy stated in Windsor that “[t]he power the Constitution grants it also restrains,”80 his decision in Planned Parenthood “pre-empt[s] for [the Court] another part of the governance of the country without express constitutional authority.”81

Importantly, the states’ ability to adopt legislation in social, criminal, political and economic contexts is compromised when the Court relies on broad formulations of liberty to impose unenumerated rights on every state. After all, how is a legislator to know whether a law infringes on a right that is predicated on vague and open-ended language? How do broadly phrased rights constrain the Court from recognizing additional implied rights in future cases? Moreover, since the level of scrutiny applied to state and federal laws depends on a threshold determination of whether it implicates a fundamental right, what is to stop the Court from applying the most exacting scrutiny to laws that do not facially violate the Constitution’s text,

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81 Id. (brackets added).
but violates Justice Kennedy’s understanding of liberty. The answer to that question is obvious: nothing.

At its core, Justice Kennedy’s judicial philosophy is best expressed by his statement that “[w]e must never lose sight of the fact that the law has a moral foundation, and we must never fail to ask ourselves not only what the law is, but what the law should be.” That is true, but it depends on who you ask. If the Court is providing most of the answers, then liberty and autonomy will engender precisely the “jurisprudence of doubt” that Justice Kennedy held in Planned Parenthood was anathema to liberty.

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82 **Lawrence**, 539 U.S. at 593 (Scalia, J., dissenting). The Court applies different levels of judicial review depending on whether legislation infringes a “suspect class” or a fundamental right. Currently, race, national origin, religion, and alienage are the only suspect classes. See **Hirabayashi v. United States**, 320 U.S. 81 (1944); **Korematsu v. United States**, 323 U.S 214 (1944). Factors for deciding suspect-class status include: (1) prejudice against a discrete and insular minority; (2) history of discrimination against the group; (3) the ability of the group to seek political redress (e.g., political powerlessness); (4) the immutability of the group’s defining trait; and (5) the relevancy of that trait. See Marcy Strauss, Reevaluating Suspect Classifications, 35 SEATTLE U. L. REV. 135, 146 (2011); Julie A. Greenberg & Marybeth Herald, *You Can’t Take It With You: Consequences of Inter-state Gender Identity Rulings*, 80 WASH. L. REV. 819, 977 (2005). Legislation discriminating against a suspect class or infringing a fundamental right is subject to strict scrutiny, which requires the government to demonstrate that the legislation is narrowly tailored to achieve a compelling government interest, and the least restrictive means of achieving that interest. See Matthew D. Bunker, Clay Calvert, & William C. Nevin, *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349, 356-57 (2006). Laws discriminating on the basis of gender are subject to intermediate scrutiny, which requires that a law: (1) advance important or substantial government interests; (2) be substantially related to advancing those interests; and (3) not be substantially more burdensome than necessary to advance those interests. See R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Other Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 234 (2012). All other legislation is subject to the higher deferential rational basis review, which merely requires the government to demonstrate that legislation is rational related to a legitimate government objective. See *e.g.*, *Meyer*, 262 U.S. at 399-400 (“liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect”); **Munn v. Illinois**, 94 U.S. 113 (1877) (legislation is valid if “if a state of facts could exist that would justify such legislation”)

83 See R. Reuben, Man in the Middle, CALIFORNIA LAWYER, October, 1992, at 35.

84 **Planned Parenthood**, 505 U.S. at 844.
C. Justice Scalia’s View: The Due Process Clause Only Protects Rights Deeply Rooted in History and Tradition

Justices Scalia and Clarence Thomas argue that the Due Process Clause protects procedural rights and enumerated fundamental rights. 85 Scalia and Thomas acknowledge that, to the extent the Fourteenth Amendment protects unenumerated rights, such rights must be deeply rooted in history and tradition. 86 Accordingly, interpreting the Due Process Clause to include unspecific substantive liberties amounts to a manipulation of the Constitution’s text, 87 and is “far too open ended,” 88 to guide the Court’s discretion. Indeed, the Court “comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.” 89 Put differently, although the Court held in Marbury v. Madison, 90 that it has the power to say what the law is, that does give courts the power to say what the law ought to be. 91

In Planned Parenthood, Justice Scalia wrote the first of several stinging dissents attacking Justice Kennedy’s broad reasoning. Scalia wrote that the “permissibility of abortion, attacking Justice Kennedy’s broad reasoning.

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85 See Melissa L. Saunders, Equal Protection, Class Legislation, and Colorblindness, 96 Mich. L. Rev. 245, n. 367 (1997) (citing Albright v. Oliver, 510 U.S. 266, 275 (1994)) (Scalia, J., concurring) (accepting the proposition that the Due Process Clause of the Fourteenth Amendment includes “certain explicit substantive protections of the Bill of Rights” but rejecting the proposition that it “guarantees certain (unspecified) liberties”); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 470 (1993)) (Scalia, J., concurring) (conceding that the Due Process Clause of the Fourteenth Amendment “incorporates certain substantive guarantees specified in the Bill of Rights” but denying “that it is the secret repository of all sorts of other, unenumerated, substantive rights”).
86 Saunders, supra note 82, n. 368 (quoting Michael H. v. Gerald D., 491 U.S. 110, 122, n.2 (1989)). (“a right cannot be considered ‘fundamental’ for substantive due process purposes if there is “a societal tradition of enacting laws denying [it]”).
87 See, e.g., Nelson Lund and John O. McGinnis, Lawrence v. Texas and Judicial Hubris, 102 Mich. L. Rev. 1555, 1575-1581 (2004) (discussing Lawrence and stating that “[i]t is hard to think of a more ad hoc and manipulable basis for interpreting the United States Constitution, and the use of foreign decisions to bolster substantive due process is yet another example of the way Lawrence maximizes and reflects the Court’s now completely undisciplined discretion”); Edward Whelan, The Meta-Nonsense of Lawrence, 115 Yale L.J. Pocket Part 133, 134 (2006) (criticizing Lawrence and stating, “[w]hy aren't nudists equally entitled to define the concept of their own existence, of meaning, of the universe and of the mystery of human life?”).
88 Moore, 431 U.S. at 543 (White, J., dissenting).
89 Id. at 544.
90 5 U.S. 137 (1803).
91 John Tuskey, Do As We Say and Not (Necessarily) As We Do: The Constitution, Federalism, and the Supreme Court Exercise of Judicial Power, 34 Cap. U. L. Rev. 153, 176 (2005) (“saying what the law is (as defined by the law’s actual content) is not the same as saying what the law ought to be”).
and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”

Abortion cannot be considered “a liberty protected by the Constitution of the United States” because “the Constitution says absolutely nothing about it, and … the longstanding traditions of American society have permitted it to be legally proscribed.” For Justice Scalia, the majority opinion was a classic example of judicial overreaching:

When it is in the mind of a Court that believes the Constitution has an evolving meaning, see … that the Ninth Amendment’s reference to “other” rights is not a disclaimer, but a charter for action, and that the function of this Court is to “speak before all others for [the people's] constitutional ideals” unrestrained by meaningful text or tradition—then the notion that the Court must adhere to a decision for as long as the decision faces “great opposition” and the Court is “under fire” acquires a character of almost czarist arrogance.

In fact, the “reasoned judgment” standard established “a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but … philosophical predilection and moral intuition.”

In Lawrence, Justice Scalia attacked Kennedy’s majority opinion on nearly every front. Arguing that Bowers is utterly unassailable,” Justice Scalia relied on history and tradition to show that “[s]odomy was a criminal offense at common law and was forbidden by the laws of

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92 Planned Parenthood, 505 U.S. at 979 (Scalia, J., dissenting).
93 Id. (citing Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 520-521 (1990)).
94 Planned Parenthood, 505 U.S. at 979 (Scalia, J., dissenting). Justice Scalia stated:

It is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution—not, that is, without volunteering a judicial answer to the nonjusticiable question of when human life begins. Leaving this matter to the political process is not only legally correct, it is pragmatically so. That alone—and not lawyerly dissection of federal judicial precedents—can produce compromises satisfying a sufficient mass of the electorate that this deeply felt issue will cease distorting the remainder of our democratic process. The Court should end its disruptive intrusion into this field as soon as possible. Id.

95 Id. at 999-1000 (internal citations omitted).
96 Id.
97 Lawrence, 539 U.S at 597 (Scalia, J., dissenting).

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the original 13 States when they ratified the Bill of Rights.” 98 Scalia also disputed Kennedy’s conclusion that the historical record over the last fifty years showed “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” 99 Apart from the fact that an “emerging awareness does not establish a fundamental right,” 100 the states “continue to prosecute all sorts of crimes by adults ‘in matters pertaining to sex’: prostitution, adult incest, adultery, obscenity, and child pornography.” 101 Moreover, “sodomy laws have been enforced ‘in the past half century’ in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy.” 102 Additionally, Justice Scalia characterized Kennedy’s reliance on foreign law as “[d]angerous dicta,” 103 noting that “this Court ... should not impose foreign moods, fads, or fashions on Americans.” 104

Most notably, Scalia predicted that the majority opinion would lead to the invalidation of laws “against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.” 105 These laws are “sustainable only in light of Bowers' validation of laws based on moral choices,” 106 and therefore undermined Justice Kennedy’s claim that Lawrence did not implicate “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” 107 Justice Scalia argued:

Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of

98 Id. at 594 (quoting Bowers, 478 U.S. at 192-93).
99 Id. (emphasis in original).
100 Id. at 598.
101 Id. at 594.
102 Id.
103 Id. at 598.
104 Id. (quoting Foster v. Florida, 537 U.S. 990, n., 123 (2002)) (Thomas, J., concurring in denial of certiorari).
105 Lawrence, 539 U.S. at 590 (Scalia, J., dissenting).
106 Id.
107 Id. at 603-04.
homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct … what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution,” Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortably assures us, this is so.

For Justice Scalia, reasoned judgment would have given citizens the authority to resolve this issue through the democratic process. Stating that he has “nothing against homosexuals, or any other group, promoting their agenda through normal democratic means,” Scalia argued that “persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else.” Thus, although “later generations can see that laws once thought necessary and proper in fact serve only to oppress … it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.” As discussed below, after Windsor, history is proving Scalia correct.

The Due Process Clause should not, however, be interpreted to only protect procedural rights. This view assumes that the Constitution is the primary source of all fundamental rights or that the Ninth Amendment confers primary, if not exclusive, authority upon the states to create unenumerated fundamental rights. The text of the Ninth Amendment, which states that the Bill of Rights shall not be construed to “deny or disparage others retained by the people,” casts doubt on this conclusion. The word ‘retain,’ which means “to keep in possession or use,” suggests that there are other fundamental rights, independent of the Constitution, that the states infringe.

108 Id. at 603.
109 Id.
110 Id. at 603-04. (stating that the Court “has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed”). Id at 602.
112 See Merriam Webster Dictionary, available at http://www.merriam-webster.com/dictionary/retain, (‘retain’ is defined as “to keep in possession or use,” or “to hold secure or intact”).
If the States had exclusive authority to create rights, they could simply refuse to recognize new rights not based on a strict or literal interpretation of the text. This would limit the rights “retained by the people”\textsuperscript{113} to those enumerated in the Constitution, thus nullifying the Ninth Amendment. Consequently, a reasonable interpretation of the Ninth Amendment would permit the Court to create at least some unenumerated rights, particularly those that are reasonably inferable from the text, and necessary to protect enumerated rights.

Furthermore, some laws can be so arbitrary and injurious that no procedures, regardless of how fair, can compensate for the infringement on an individual’s basic right to freedom, autonomy, and self-determination.\textsuperscript{114}

In \textit{Buck v. Bell},\textsuperscript{115} for example, the Court upheld a state statute authorizing the compulsory sterilization of “feeble-minded”\textsuperscript{116} individuals who were likely to give birth to mentally unfit offspring. The Court, per Justice Oliver Wendell Holmes, refused to import a substantive component into the Fourteenth Amendment. Holding that “[t]hree generations of imbeciles are enough,”\textsuperscript{117} Justice Holmes held that “it is better for … the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”\textsuperscript{118} For these reasons, “[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.”\textsuperscript{119} \textit{Buck v. Bell} demonstrates that a process-based interpretation of the Fourteenth Amendment would lead to arbitrary and intolerable deprivations of individual liberty. As such,

\begin{itemize}
\item \textsuperscript{113}U.S. Const., Amend. IX, \textit{supra} note 21.
\item \textsuperscript{114}See \textit{Daniels}, 474 U.S. at 331 (The Due Process Clause prohibits “certain government actions regardless of the fairness of the procedures used to implement them”); see also \textit{Murray’s Les v. Hoboken Land & Improvement Co.}, 59 U.S. 272, 277 (1856) (prohibiting government from being used “for purposes of oppression”).
\item \textsuperscript{115}274 U.S. 200 (1927).
\item \textsuperscript{116}Id. at 202.
\item \textsuperscript{117}Id. at 207 (quoting \textit{Jacobson v. Massachusetts}, 197 U. S. 11 (1905)).
\item \textsuperscript{118}\textit{Buck}, 274 U.S. at 207.
\item \textsuperscript{119}Id.
\end{itemize}
Justice Kennedy was correct to conclude that the Court has interpreted the Due Process Clause to contain a substantive component. The problem is how Kennedy applies that principle.

Interestingly, in Planned Parenthood Justice Kennedy could have affirmed Roe’s core holding, and in Lawrence could have invalidated Texas’s ban while simultaneously guarding against judicial overreach. In Planned Parenthood, Kennedy could have defined the liberty interest as, for example, a categorical right to terminate a pregnancy prior to viability. In Lawrence, Kennedy could have invalidated Texas’s sodomy ban on equal protection grounds, holding that the law intentionally—and arbitrarily—discriminated against same-sex couples. A narrower formulation of these rights would prevent litigants from asserting in future cases that a broad formulation of liberty requires the Court to recognize additional rights not contemplated in a prior holding.

A middle ground between the philosophies championed by Justices Scalia and Kennedy would allow the Court to develop meaningful standards to guide its discretion without centralizing power in the judicial branch. Specifically, the Court should recognize new fundamental rights under the Fourteenth Amendment if they are “implicit in the concept of ordered liberty,” even if those rights are not rooted in history or tradition. Furthermore, newly-created rights should be narrowly defined and establish a categorical baseline level of protection that no state can circumvent or eviscerate through legislation. This avoids the unintended problem that arises when rights are broadly characterized: states can make access to and enjoyment of those rights difficult. For example, in the wake of Roe, states have enacted statutes requiring abortion providers to secure hospital admitting privileges, narrowed the pre-

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120 Palko, 302 U.S. at 325.
viability window,\textsuperscript{122} and enacted fetal homicide laws.\textsuperscript{123} When rights are phrases in expansive terms, they introduce uncertainty into the law, and enable states to interpret such terms in a way that undermines those rights. Specificity—and precision—more effectively protects the right, and facilitate lawmakers flows from the bottom up.

\textbf{PART III}

\textbf{CREATING NARROWLY-DESCRIBED RIGHTS THAT ARE IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY}

Recognizing narrow rights that are implicit in the concept of ordered liberty, even if they are not rooted in history and tradition, avoids the problem presented in \textit{Buck}, gives liberty a substantive component, and show respect for the democratic process.

\textbf{A. PROTECTING LIBERTY AND PROMOTING DEMOCRACY}

Liberty should have a substantive component. For many years the Court has recognized that “[i]n a Constitution for a free people, there can be no doubt that the meaning of ‘liberty’ must be broad indeed.”\textsuperscript{124} In \textit{Moore}, Justice White recognized that the Due Process Clause has “been construed to … protect from invasion by the States ’all fundamental rights comprised

\begin{footnotesize}
\begin{enumerate}
\item \textit{Moore}, 431 U.S. at 546 (White, J., dissenting) (citing \textit{Board of Regents v. Roth}, 408 U.S. 564, 570-571 (1972); \textit{Bolling v. Sharpe}, 347 U.S. 497, 499-500 (1954); \textit{Stanley v. Illinois}, 405 U.S. 645 (1972)). The Court has construed liberty broadly to create various fundamental rights:
\begin{quote}
While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. \textit{Moore}, 431 U.S. at 545 (quoting \textit{Meyer}, 262 U.S. at 399).
\end{quote}
\end{enumerate}
\end{footnotesize}
within the term liberty.””¹²⁵ Thus, “liberty is not … to be given a crabbed construction,”¹²⁶ and “may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.”¹²⁷

At the same, liberty has limits. Justice White argued that liberty should not be construed as a license to “to strike down merely unreasonable or arbitrary legislation.”¹²⁸ Moreover, although the Court has “ample precedent for the creation of new constitutional rights,”¹²⁹ that does not mean it should “repeat the process at will.”¹³⁰ In Moore, Justice White explained:

The Judiciary, including this Court is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare.¹³¹

These sentiments echo Justice Black’s dissent in Griswold, where he wrote that the Due Process Clause does not give “blanket power to courts to exercise such a supervisory veto over

¹²⁵ Moore, 431 U.S. at 542 (quoting Whitney, 274 U.S. at 373), overruled on other grounds, Brandenburg v. Ohio, 395 U.S. 444 (1969)).
¹²⁶ Moore, 431 U.S. at 547 (White, J., dissenting).
¹²⁷ Id. (quoting Meyer, 262 U.S. at 399-400).
¹²⁸ Moore, 431 U.S. at 547 (White, J., dissenting); but see Poe, 367 U.S. at 543 (holding that liberty “is not a series of isolated points … [but] 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”) (citing Allgeyer v. State of Louisiana, 165 U.S. 578 (1897); Holden v. Hardy, 169 U.S. 366 (1898); Booth v. Illinois, 184 U.S. 425 (1902); Nebbia v. New York, 291 U.S. 502 (1934); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Skinner v. Oklahoma, 316 U.S. 535 (1942); Bolling, 347 U.S. 497).
¹²⁹ Moore, 431 U.S. at 543 (White, J., dissenting).
¹³⁰ Id.
¹³¹ Id. at 544.
the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous.”

132 Of course, creating new rights can serve a democratic purpose, including granting equal status to traditionally underrepresented or disenfranchised groups, but it can become undemocratic if the Court creates rights that no interpretation of the Constitution could reasonably support. In Griswold, Justice Black stated:

The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would … jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.

133 For these reasons, the Constitution should not be interpreted to provide “the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive.”

134 In Washington v. Glucksberg, the Court developed a workable standard to enable and constrain its authority to create new rights under the Fourteenth Amendment. In Glucksberg, the Court assessed whether the Fourteenth Amendment supports a fundamental right to assisted suicide. The Court, by a 7-2 vote, answered in the negative. Writing for the majority, former Chief Justice William Rehnquist held that an asserted right must be “deeply rooted in this

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132 Griswold, 381 U.S.at 512 (Black, J., dissenting).
133 Id. at 520-21.
134 Id. at 511, 522 (stating that decisions based “on subjective considerations of ‘natural justice,’ [are] no less dangerous when used to enforce this Court's views about personal rights than those about economic rights”) (brackets added).
135 521 U.S. 702.
136 Id. at 705.
Nation’s history and tradition,” or “implicit in the concept of ordered liberty... so that neither liberty nor justice would exist if [it] were sacrificed.” Additionally, there must be a “careful description of the asserted fundamental liberty interest.” Justice Rehnquist wrote that this standard “tends to rein in the subjective elements that are necessarily present in due-process judicial review,” and “avoids the need for complex balancing of competing interests in every case.”

Rehnquist stated:

By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore ‘exercise the utmost care whenever we are asked to break new ground in this field,’ lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

Applying this framework, the Court described the asserted right to physician-assisted suicide as “whether there is a liberty interest in determining the time and manner of one's death.” Neither history nor tradition supported recognition of this right as fundamental; to hold otherwise would require the Court to “reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.” The Glucksberg Court acknowledged that the Court should have a role in creating fundamental rights. If the Constitution’s enumerated provisions were construed as the sole source of fundamental rights, states might be permitted to require sterilization of “feeble minded mother” or as in Rochin v.

\[\text{(References to specific cases and statutes are omitted for brevity.)}\]
California, strap a suspect to an operating table, force a tube into his mouth, and give the suspect an emetic solution that causes him to vomit incriminating evidence.\textsuperscript{147}

By the same token, that role should be circumscribed and guided by principles of judicial restraint. In \textit{McDonald v. City of Chicago},\textsuperscript{148} former Supreme Court Justice John Paul Stevens discussed the importance of proceeding with restraint and caution when creating new rights. Stevens argued that, “while the ‘liberty’ specially protected by the Fourteenth Amendment is ‘perhaps not capable of being fully clarified’ … it is capable of being refined and delimited.”\textsuperscript{149}

Justice Stevens also acknowledged that a “key constraint on rights-creation is respect for the democratic process.”\textsuperscript{150} Thus, “[i]f a particular liberty interest is already being given careful consideration in, and subjected to ongoing calibration by, the States, judicial enforcement may not be appropriate.”\textsuperscript{151} Stevens stated:

Recognizing a new liberty right is a momentous step. It takes that right, to a considerable extent, ‘outside the arena of public debate and legislative action’ … Sometimes that momentous step must be taken; some fundamental aspects of personhood, dignity, and the like do not vary from State to State, and demand a \textit{baseline level of protection}. But sensitivity to the interaction between the intrinsic aspects of liberty and the practical realities of contemporary society provides an important tool for guiding judicial discretion.\textsuperscript{152}

These concerns counsel in favor of exercising “humility and caution,”\textsuperscript{153} particularly because “the relevant constitutional language is so ‘spacious.’”\textsuperscript{154} Indeed, “no serious theory of

\begin{itemize}
\item \textsuperscript{147} See \textit{Rochin}, 342 U.S. at 166.
\item \textsuperscript{148} 561 U.S. 742 (2010)
\item \textsuperscript{149} Id. at 879 (Stevens, J., dissenting) (emphasis added) (quoting \textit{Glucksberg}, 521 U.S. at 722, 761); \textit{Griswold}, 381 U.S. at 482; \textit{Paul v. Davis}, 424 U.S. 693, 713 (1976)).
\item \textsuperscript{150} \textit{McDonald}, 561 U.S. at 880 (Stevens, J., dissenting).
\item \textsuperscript{151} Id. (stating that the “conceptual core” of substantive due process includes “the ability independently to define one's identity,” “the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny,” and the “right to be respected as a human being”).
\item \textsuperscript{152} Id. (quoting \textit{Glucksberg}, 521 U.S. at 720) (emphasis added).
\item \textsuperscript{153} \textit{McDonald}, 561 U.S. at 881 (Stevens, J., dissenting).
\item \textsuperscript{154} Id. (quoting \textit{Duncan v. Louisiana}, 391 U.S. 145, 148 (1968)).
\end{itemize}
Section 1 of the Fourteenth Amendment yields clear answers in every case, and “[n]o formula could serve as a substitute, in this area, for judgment and restraint.”

At bottom, Justice Stevens rejects “any all-purpose, top-down, totalizing theory of ‘liberty,’” and “attests to the dangers of judicial overconfidence in using substantive due process to advance a broad theory of the right or the good.” Importantly, however, Justice Stevens would not require that newly-asserted fundamental rights be grounded in history or tradition:

[I]f it were really the case that the Fourteenth Amendment’s guarantee of liberty embraces only those rights “so rooted in our history, tradition, and practice as to require special protection,” ... then the guarantee would serve little function, save to ratify those rights that state actors have already been accorded the most extensive protection ... That approach is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently ‘‘rooted’’; it countenances the most revolting injustices in the name of continuity, for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history; and it effaces this Court’s distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes.

Simply put, relying on history and tradition is a “judicial abdication in the guise of judicial modesty,” because “the liberty safeguarded by the Fourteenth Amendment is not merely preservative in nature but rather is a ‘dynamic concept.’”

Similarly, in *Rochin*, Justice Felix Frankfurter stated:

Due process of law thus conceived is not to be derided as resort to a revival of ‘natural law. To believe that this judicial exercise of judgment could be avoided

155 *McDonald*, 561 U.S. at 881 (quoting Poe, 367 U.S. at 542) (Harlan, J., dissenting).
156 *McDonald*, 561 U.S. at 878 (Stevens, J., dissenting).
157 Id.
158 Id. at 875-76 (internal citations omitted).
159 Id.
by freezing ‘due process of law’ at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior. Even cybernetics has not yet made that haughty claim. To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.\(^{161}\)

This does not mean, however, the Due Process Clause entitles judges to rule in a manner that comports with their policy predilections. As former Justice Felix Frankfurter stated in *Rochin*, “[t]he vague contours of the Due Process Clause do not leave judges at large … [w]e may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function.”\(^{162}\) Thus, although “the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process.”\(^{163}\) In the criminal context, for example, the Court has “the duty of exercising a judgment, *within the narrow confines of judicial power* in reviewing State convictions, upon interests of society pushing in opposite directions.”\(^{164}\)

Justice Kennedy’s jurisprudence has developed precisely what the *Glucksberg* majority, and Justice Stevens to a lesser extent, warned against: a “totalizing theory of liberty.”\(^{165}\) Tellingly, in *Lawrence*, former Justice Sandra Day O’Connor issued a concurring opinion, arguing that Texas’s sodomy ban violated the Equal Protection Clause because it intentionally and unjustifiably discriminated against same-sex couples.\(^{166}\) In so holding, O’Connor

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\(^{161}\) *Rochin*, 342 U.S. at 171-72.

\(^{162}\) *Id.* at 170.

\(^{163}\) *Id.* at 170 (citing Cardozo, *The Nature of the Judicial Process; The Growth of the Law; The Paradoxes of Legal Science.* (1921)).

\(^{164}\) *Roching*, 342 U.S. at 171 (emphasis added).

\(^{165}\) *McDonald*, 561 U.S. at 878 (Stevens, J., dissenting).

\(^{166}\) *Lawrence*, 539 U.S. at 585 (O’Connor, J., concurring).
eschewed Kennedy’s focus on liberty in favor of a narrower right that concentrated solely on the issue before the Court:

That this law [the sodomy ban] as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.167

Unlike Justice Kennedy, O’Connor refused to embrace decide “[w]hether a sodomy law that is neutral both in effect and application … would violate the substantive component of the Due Process Clause”168 because it was not before the Court and thus “need not be decided today.”169 O’Connor’s concurrence speaks to a fundamental point: the Constitution’s broad language counsels in favor of restraint and incrementalism. When Justice Kennedy recognizes a new right based on “liberty in its more spatial and in its more transcendent dimensions,”170 and the right to define the mystery of life,171 the Court becomes detached from anything resembling judicial restraint. The cost is not merely to democracy. It is to the public’s perception of the Court’s institutional legitimacy, and to the Court’s capacity for exercising precisely type of reasoned judgment Kennedy champions.

167 Id. at 582, 585 (emphasis added) (brackets added) (stating that “[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause”); see also McCleskey v. Zant, 499 U.S. 467 (1991) (“A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense”).

168 Lawrence, 539 U.S. at 584 (O’Connor, J., concurring) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

169 Lawrence, 539 U.S. at 584 (O’Connor, J., concurring).

170 Id. at 562.

171 Planned Parenthood, 505 U.S. at 851.
The proper framework for reconciling the tension between judicial review and deference to the democratic process is to account for societal changes while recognizing that judicial restraint is itself a way to ensure political and democratic liberty. Echoing Justice Stevens’s reasoning in *McDonald*, the Court should protect rights that are “implicit in the concept of ordered liberty,” but narrowly and specifically describe those rights to effect incremental changes in the law. Of course, this does not require the Court to “define the asserted right at the most specific level, thereby sapping it of a universal valence and a moral force it might otherwise have,” but it does mean that the Court should “pay close attention to the precise liberty interest the litigants have asked us to vindicate.”

This approach would provide a minimum or baseline level of protection, and thus prevent states from undermining basic freedoms. It would also permit states to decide through the political and democratic process whether additional protections are necessary. For example, in *Roe* the Court could have held that the Fourteenth Amendment’s liberty interest supported giving women an unconditional right to terminate a pregnancy for a period of twenty weeks. The states would retain the authority to decide through the democratic process whether further protections or restrictions after the first trimester were appropriate. Issues such as partial birth abortion, therefore, would be left to each state, and prevent the Court from deciding on a case-by-case basis whether restrictions such as a twenty-four hour waiting period or a parental notification law are constitutional. As it stands now, the undue burden standard Kennedy adopted

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172 *Cruzan by Cruzan*, 497 U.S. at 341.
173 *McDonald*, 561 U.S. at 881 (Stevens, J., dissenting) (“[e]ven if the most expansive formulation of a claim does not qualify for substantive due process recognition, particular components of the claim might”).
174 *Id.*
in *Planned Parenthood* provides little guidance to lower courts or state legislatures, and a tremendous amount of latitude to states wishing to undercut the abortion right entirely.\(^{175}\)

Ultimately, Justice Harlan correctly observed that liberty is a “rational continuum … rather than an ‘isolated pinpricks’” of fundamental rights.”\(^{176}\) Statutes infringing on fundamental rights or liberty interests certainly require “closer judicial scrutiny,”\(^{177}\) and some “would appear almost impregnable to invasion, such as the freedoms of speech, press, and religion, and the freedom from cruel and unusual punishments.”\(^{178}\) Additionally, “the right of association, the right to vote, and various claims sometimes referred to under the general rubric of the right to privacy, also weigh very heavily against state claims of authority to regulate.”\(^{179}\) At some point on that continuum, however, the balance must shift in favor of resolving policy issues through the democratic process. Sometimes there is no right answer to whether a particular law is constitutional, and reasonable minds can differ about whether a right should be deemed fundamental. If states and citizens are not entitled to make these choices, then liberty is more an expression of paternalistic governance than it is of true autonomy.

The Tables below provide examples of the rights that would be recognized under the approaches discussed above.


\(^{176}\) Moore, 431 U.S. at 542-43 (White, J., dissenting) (*quoting Poe*, 367 U.S. at 543).

\(^{177}\) Moore, 431 U.S. at 542-43 (White, J., dissenting).

\(^{178}\) Id.

\(^{179}\) Id.
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<sup>180</sup> Although the Court has not yet recognized a constitutional right to polygamy, some commentators argue that this right flows logically from the right to same-sex marriage. See, e.g., Mark Strasser, Marriage, Free Exercise, and the Constitution, 26 LAW & INEQ. 59, 104-05 (2008) (discussing the right to polygamy in light of a constitutional right to same-sex marriage).
Constitutional interpretation should be guided by the principle that the text “is not to be regarded as establishing a separate sphere of life or language; it must be seen as an integral part of the culture of which it is made and which it, in turn, reconstitutes.”181 The Constitution is “not … a mere legal instrument, resting on some abstract authority, but as a true constitution: of language, of community, and of culture.”182 When newly-created rights are based on the Court’s conception of liberty, the Constitution’s evolution is not a product of community discourse, political participation, or popular will. That, in a nutshell, is the problem with Justice Kennedy’s liberty jurisprudence. It imposes liberty on citizens, and that it anything but libertarian.

In United States v. Windsor, Justice Kennedy made the same mistake as he did in Planned Parenthood and Lawrence: Kennedy reached the right result, but through reasoning that

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Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass *1538 laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the decree [sic] of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power. Id.

182 Vogel, supra note 179, at 1537.
left both sides less certain about their rights, and the Court more powerful in determining what rights would be worthy of constitutional protection.

B. *U.S. v. Windsor* and Justice Kennedy’s Legacy

In *Windsor*, the Court invalidated Section 5 of the Defense of Marriage, which confined marriage (for the purpose of receiving federal benefits), to opposite-sex couples.\(^{183}\) Again writing for a 5-4 Court, Justice Kennedy invalidated DOMA on the grounds that it violated the Due Process Clause’s liberty and equal protection guarantees. Stating that Congress “cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment,”\(^{184}\) Kennedy held that the purpose of DOMA was to “demean those persons who are in a lawful same-sex marriage,”\(^{185}\) and disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”\(^{186}\) In so holding, Justice Kennedy relied in *Lawrence*:

Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form ‘but one element in a personal bond that is more enduring.’ By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.\(^{187}\)

\(^{183}\) *See* 1 U.S.C § 7 (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife”).

\(^{184}\) *Windsor*, 133 S.Ct. at 2695.

\(^{185}\) *Id.*

\(^{186}\) *Id.* at 2696.

\(^{187}\) *Windsor*, 133 S.Ct. at 2692-93 (quoting *Lawrence*, 539 U.S. at 567). Justice Kennedy stated that DOMA “is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect.” (citing *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003); An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 CONN. PUB. ACTS NO. 09–13; *Varnum v.*
Kennedy concluded that the “avowed purpose and practical effect of … [DOMA] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”  

Like his decision in Planned Parenthood, Justice Kennedy did not apply a particular standard of review, such as strict scrutiny or rational basis, and therefore avoided the issue of whether homosexual conduct is a fundamental right. Instead, Kennedy interspersed his typically broad conception of liberty equal protection principles, stating that DOMA was “motivated by an improper animus or purpose.” Furthermore, “a bare congressional desire to harm a politically unpopular group” cannot “justify disparate treatment of that group.”

Justice Scalia’s dissent echoed the sentiments expressed in Lawrence and Planned Parenthood. Scalia argued that Kennedy’s opinion undermined the democratic process and infringed upon the states’ authority to define the marriage relationship:

We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide. But that the majority will not do. Some will rejoice in today’s decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better.

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188 Windsor, 133 S.Ct. at 2693 (brackets added).
189 Id. (quoting Romer, 517 U.S. at 633).
190 Windsor, 133 S.Ct. at 2693 (quoting Department of Agriculture v. Moreno, 413 U.S. 528, 534–535 (1973)).
191 Windsor, 133 S.Ct. at 2693.
192 Id. at 2711 (Scalia, J., dissenting).
For Justice Scalia, “[a] reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament.”\textsuperscript{193}

Justice Scalia rightly observed that Kennedy’s view of the Constitution as a living document, which is reflected in statements such as “the case for freedom, the case for our constitutional principles the case for our heritage has to be made anew in each generation,”\textsuperscript{194} ventures too far into subjective and normative waters. This is not to say, of course, the bans on homosexual sodomy or same-sex marriage are constitutional. They are not. As Justice O’Connor held in \textit{Lawrence}, these laws violate the Equal Protection Clause because the government has not—and cannot—set forth any rational basis upon which to justify this discrimination.\textsuperscript{195} The critical difference between O’Connor’s concurrence and Kennedy’s plurality opinion is how they got there.\textsuperscript{196} And how you get there is just as important as where you end up.

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\textsuperscript{193} Id.
\textsuperscript{195} \textit{Lawrence}, 539 U.S. at 585 (O’Connor, J., concurring).
\textsuperscript{196} Kennedy’s decisions in other cases undermine the liberty he sought to expand in \textit{Planned Parenthood} and \textit{Lawrence}. See \textit{Clinton v. New York}, 524 U.S. 417 (1998); \textit{Citizens United}, 558 U.S. 310 (2010); \textit{McCutcheon}, 134 S.Ct. 1434 (2014); \textit{Shelby County v. Holder}, 133 S.Ct. 2612 (2013). In \textit{Clinton}, for example, the Court held that the Line Item Veto Act, which gave the President authority to veto specific provisions in duly-enacted legislation for the purpose of reducing wasteful government spending, violated the Constitution’s Presentment Clause. Pursuant to the Act, Congress retained the power, to issue a “disapproval bill” that would render a specific veto “null and void.” \textit{Id.} at 436. Justice Kennedy concurred, arguing that the Act was an affront to liberty:
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When the legislative and executive powers are united in the same person or body … ‘there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.’ Again: ‘Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor’ … [t]he Constitution’s structure requires a stability which transcends the convenience of the moment.” \textit{Clinton}, 524 U.S. at 449 (Kennedy, J., concurring) (internal citations omitted).
CONCLUSION

Justice Kennedy has stated that “[t]he essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around.” He has also stated “[t]he Constitution doesn’t belong to a bunch of judges and lawyers. It belongs to the people.” Justice Kennedy’s legacy, particularly his unenumerated rights jurisprudence, has given the Court an unprecedented degree of authority to define liberty and to decide what rights are worthy of constitutional protection. Justice Kennedy may be celebrated for safeguarding reproductive freedom and championing sexual autonomy for same-sex couples, but underneath the black robe and behind the curtain is a troubling history of manipulating the Constitution’s text and disregarding the constraints on judicial power. In the final analysis, Justice Kennedy will be remembered in part for being a progressive jurist and the Court’s swing voter. Kennedy’s lasting legacy will be one of enhancing judicial power, and of relying on a concept of liberty that was anything but libertarian.

197 Hollingsworth v. Perry, 133 S.Ct. 2652, 2675 (Kennedy, J., dissenting).