ABSTRACT

Justice Anthony M. Kennedy and Substantive Due Process: Why the Most Powerful Judge in American History Isn't as Crazy as Everyone Thinks He Is

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This dissertation seeks to challenge the widely accepted characterization of Associate Justice Anthony Kennedy as a political moderate or 'swing' Justice. Looking at one of the most contentious areas of constitutional law–substantive due process–the dissertation considers the major substantive due process cases that the Court has heard during Kennedy's tenure, and, by explaining how the apparent contradictions in his jurisprudence reveal that, rather than inconsistency, Kennedy has a consistent methodology for approaching substantive due process cases that is both respectful of precedent, as well as one which seeks to limit the Court's power in this area of constitutional law. The dissertation will demonstrate that while Justice Kennedy is neither a true moderate like the late Justice Lewis Powell, nor a political ideologue, but a judicial and political conservative who seeks to rest the Court's decision-making on a stable and methodical approach, rather than an inherently unstable political ideology.

Justice Anthony M. Kennedy and Substantive Due Process:
Why the Most Powerful Judge in American History Isn't as Crazy as Everybody Thinks He Is

by

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In Memory Of

A.B.C.

And

B.M.E.

Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super cum ibimus, nec super cum mittemus, nisi per legale judicium parium suorum vel per legem terre.

No Freeman shall be taken or imprisoned, or be disseised, or be outlawed, or exiled, or any other wise destroyed; nor will we proceed against him, or send others to do so, but by lawful judgment of his Peers, or by the *Law of the Land*.

—Magna Carta, June, 1215

But by the Law of the Land. For the true sense and exposition of these words, see the Statute of Edward, where the words, by the law of the Land, are rendered, without due process of Law.

—Lord Edward Coke, 1606

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.

—U.S. Constitution, Amendment XIV, 1868

CHAPTER ONE

The Most Powerful Judge in American History

Anthony McLeod Kennedy, Associate Justice of the Supreme Court of the United States, is the most powerful judge in modern American history. On issues ranging from parental rights to abortion to gun control, Justice Kennedy has been one of the most influential policy-makers of the last thirty years. His choices–expressed through his votes and the Court's opinions–have often trumped the considered policy decisions of elected representatives on issues where there is no broad consensus amidst an acrimonious public debate. While Republican President Ronald Reagan appointed Kennedy, he has disappointed conservatives who expected him to be a reliable conservative vote on the Court, disagreeing with more conservative Justices in several high-profile cases.

Since the retirement of Justice O'Connor, Kennedy has become the deciding vote in areas of law where the other eight Justices are evenly divided along ideological lines. With the outcome of so many issues of constitutional importance depending on Kennedy's vote, his willingness to join with the more liberal members of the Court on occasion is important both for understanding the current Court dynamic, as well as predicting what direction constitutional law might take in the future.

Primus Inter Pares?

Justice Kennedy's influence today is as great as it has ever been while he has been on the Court. Consider two pieces of evidence. First, note that among the 677 cases

where an opinion was issued from the 1991 term to the 1997 term, Justice Kennedy was in dissent only 43 times. As Earl Maltz states, "in this period, [Kennedy's] positions essentially defined those of the Court as a whole."[1] Secondly, as shown in the table below,[2] Kennedy's vote has been the most frequently 'decisive' vote since Justice O'Connor's retirement in 2004.

Table 1. Kennedy's Influence on 5-to-4 Decisions

Term	Number of 5-4 Decisions	Number of 5-4 Decisions AK in Majority	Number of 5-4 Decision next highest Justice in Majority
2005	11	8	8
2006	24	24	17
2007	12	8	8
2008	23	18	16
2009	16	11	11
2010	16	14	12
2011	15	12	10

The evidence presented above shows that no Justice more frequently controls the direction of the Court–particularly in close cases–than Justice Kennedy.

With that control comes tremendous influence over particularly controversial areas of the law. And among the many controversial areas of constitutional law, there is no area more controversial than that of substantive due process law. Substantive due process law is a sub-category of the law derived from the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution. While the older–and less

[1] Earl M. Maltz, "Anthony Kennedy and the Jurisprudence of Respectable Conservatism," in *Rehnquist Justice: Understanding the Court Dynamic*, ed. Earl M. Maltz (Lawrence, KS: University Press of Kansas, 2003), 140.

[2] "Stat Pack: SCOTUSblog, 1995-2011 terms," last accessed January 23, 2013. http://www.scotusblog.com/reference/stat-pack/.

controversial–part of due process law deals largely with *procedure*, substantive due process is the claim that the Due Process clause protects rights from infringement even if the law fulfilled all of the proper procedural requirements. From its inception, the theory of substantive due process generated tremendous controversy. In fact, it was controversy over the case law of substantive due process that led to Justice Kennedy's nomination to the Supreme Court. Justice Kennedy, in return, has had more of an impact on substantive due process law than any other Justice in recent memory. Much of his impact the direction of due process law is because of his understanding of the American constitutional system and its unique features. His understanding of the system, and respect for its peculiar institutional features, has led him to take an approach grounded in method rather than ideology. It is his method, rather than any imagined political 'moderation' that has driven his work in this area of the law. Recognizing that there is a unifying principle to Kennedy's substantive due process jurisprudence helps reconcile his work with his many statements on judicial philosophy.

The Man in the Middle?

During his tenure on the Supreme Court, Kennedy's votes have not been as ideologically consistent as some of his colleagues. Some Court-watchers, attempting to explain his behavior, have accused Kennedy of being either unprincipled, arrogant, or fame seeking.[3] However, his decision-making has led to a 'popular' explanation for why Kennedy votes as he does: he is a "moderate" or "swing Justice" whose views (and votes) are up for grabs on a Court otherwise divided evenly on ideological grounds. For

[3] Edward Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* (New York: Times Books, 1998), 427, 470-471, 478, 482.

example, Jeffrey Toobin calls Kennedy, "a politically as well as temperamentally moderate person,"[4] while Jeffrey Rosen notes that, "he [Kennedy] has been a swing vote, [and] … he seems to relish his unique status as a swing vote."[5] The assertion that Justice Kennedy is a moderate has been made throughout the academic press,[6] and has been repeated in the popular press as well. For example, an Associated Press article from 2009 described Kennedy as "a moderate conservative, often serves as the Supreme Court's swing vote,"[7] while another article notes that, "his record on the court is generally conservative, though he has cast several swing votes that brought the court to the center on divisive issues."[8]

While Justice Kennedy takes offense at being labeled a "swing justice,"–he has insisted that, "the cases swing; the justices don't,"[9]–the Justice's importance on the Court has only been enhanced by the perception that he might be 'persuaded' by advocates and their argument. This image of being a 'persuadable' Justice has led scholars of all political persuasions to set forth analyses of Kennedy, attempting to explain why he makes the choices he does, with no single consensus emerging.

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[4] Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York: Doubleday, 2007), 55.

[5] Rosen, *Supreme Court*, 15.

[6] Cf. Greenburg, *Supreme Conflict*, 177, and Peter Charles Hoffer, Williamjames Hoffer, and N.E. Hull, *The Supreme Court: An Essential History* (Lawrence, K.S.: University Press of Kansas, 2007), 411.

[7] Murray Evans, "Justice Kennedy concerned about 'lack of civility'," AP State and Local Newswire, October 3, 2009.

[8] Lisa Thompson, "Justice Kennedy speaks about Constitution at Chautauqua," *Erie Times-News* (Erie, PA), August 29, 2009.

[9] Greenburg, *Supreme Conflict*, 177.

The Numbers Say…

While popular commentators may have decided to label Justice Kennedy a moderate, does an actual analysis of Kennedy's general voting record, when external factors are considered, support the claim that Justice Kennedy is a moderate or "swing" Justice?

A survey of the agreement statistics for the 1995-2011[10] Supreme Court terms provides the following data:

Table 2. Agreement Statistics for Kennedy and Closest Ally

Term	Justice Kennedy Agrees With	Percentage Agreement
October 1995	Rehnquist/O'Connor	74%
October 1996	Rehnquist	85%
October 1997	Rehnquist	84%
October 1998	No Data Available	No Data Available
October 1999	O'Connor	82%
October 2000	Rehnquist	82%
October 2001	Rehnquist	81%
October 2002	Rehnquist	86%
October 2003	Rehnquist	77%
October 2004	Rehnquist	77%
October 2005	O'Connor	88%
October 2006	Roberts/Alito	79%
October 2007	Roberts	79%
October 2008	Roberts	78%
October 2009	Roberts	78%
October 2010	Roberts	82%
October 2011	Roberts	82%

The statistics show that for nine of the ten years that both Kennedy and Chief Justice Rehnquist both served on the Court, Kennedy was more often in agreement with the

[10] "Stat Pack: SCOTUSblog, 1995-2011 terms," last accessed January 23, 2013. http://www.scotusblog.com/reference/stat-pack/. SCOTUSblog defines an 'agreement' between the Justices as being when both Justices vote in favor of the same party in a case. The statistics used in this table are for 'full agreement'–when two Justices both voted for the same party and joined the same opinion without reservations.

Chief Justice than any of his other colleagues.[11] For two years of their shared tenure, Justice Kennedy was most often in agreement with Justice O'Connor (1999 and 2005). Since the departure of Justice O'Connor and death of Chief Justice Rehnquist, Kennedy's most frequent rate of agreement is with Chief Justice John Roberts (for the 2006 to 2011 terms). This evidence makes some claims about Kennedy's increasing 'liberal' tilt extremely suspect. During no term for which there is data available was Kennedy most often in agreement with one of the 'liberal' Justices. Furthermore, even though Justice O'Connor is sometimes categorized as a 'moderate' Justice, Kennedy's rate of agreement with her exceeded all other rates of agreement for two terms. Justice Kennedy's most frequent 'teammate' during Rehnquist's lifetime was the Chief Justice–Rehnquist cannot be plausibly categorized as anything but a conservative–and since Rehnquist's death, Chief Justice Roberts has been Kennedy's most frequent 'teammate.'[12] These agreement statistics do not support commentator's assertions that Kennedy is a "moderate" Justice.

However, simple agreement statistics only tell part of the story. Other, more sophisticated evaluations of Kennedy's record might yield a different answer. Using the Washington University Supreme Court Database, I first identified a population of 400 constitutionally significant cases for the period of the 'natural' Rehnquist Court (1994–

[11] Chief Justice Rehnquist died in September of 2005, before the 2005 Term began. There are ten years (1995–2004) where Kennedy and Rehnquist served together on the Court. Also note that for 1995, Justice Kennedy agreed with Rehnquist and O'Connor at the same rate (74% of cases).

[12] Following the decision in *NIFB v. Sebelius*, 567 U.S. ___ (2012), in which Chief Justice Roberts voted to uphold the Affordable Care Act, disagreement has emerged over whether the Chief Justice is a true 'conservative.' Beyond the fact that one case does not define a Justice's ideological preference, *Sebelius* had a number of factors that may have contributed to the Chief Justice's decision to uphold the law, even though he may personally have opposed the law. It is worth noting that in *Sebelius*, Justice Kennedy was in dissent with Justices Scalia, Thomas and Alito, who believed the ACA to be unconstitutional.

2004 terms).[13] From the sample population, fifty cases were selected at random and a regression was run using 'dummy' variables, with each variable representing a potential influence on Kennedy's decision making.

The dependent variable in the regression was whether Kennedy is voting 'conservative,' which is defined as voting for the same party as at least two of the three following Justices: Chief Justice Rehnquist, Justice Scalia, or Justice Thomas. The three Justices whose votes serve as markers of Kennedy's 'conservatism' were chosen because all three are considered 'conservatives' by Court scholars and popular commentators. The dependent variable was set at only 2 out of 3 Justices in scoring a Kennedy vote as 'conservative' to account for single-issue deviations by one of the Justices.[14] The independent variables were chosen to measure whether political or topical factors influenced Kennedy's vote. A chart detailing the independent variables is below.

Table 3. Independent Variables

Variable	Operationalization	Theoretical Relationship
Conservative Majority Writer	Rehnquist/Scalia/Thomas writes Majority Opinion	If Conservative writes opinion, will attract conservative Justices votes
Five-to-Four Vote	Justices' vote	Justice will agree with natural allies in close cases
GOP Presidency Control	Date of Argument	Control of Presidency by GOP will result in Justices voting 'conservative'
No. of GOP Representatives	Date of Argument	More GOP Representatives will result in Justices voting 'conservative'

[13] The sample was limited to the 1994–2004 terms in order to exclude the additional complication of shifting voting patterns due to personnel changes on the Court.

[14] This was done in order to account for Justice Scalia's criminal procedure jurisprudence, where he less consistently favors the State than Thomas or Rehnquist. For an example, see *Coy v. Iowa* 478 U.S. 1012 (1988).

Table 3 continued

Variable	Operationalization	Theoretical Relationship
Due Process case topic	Due Process claim made by party to case	Due Process issue influences vote

The regression was run as a binary probit function, and delivered the following results:

Table 4. Regression Results

'Dummy' Variable	B	Statistical Significance
Conservative Majority Writer	1.443	.082
5-to-4 Vote	.326	.660
GOP White House Control	-1.413	.026
No. of GOP Representatives	.131	.104
Due Process Case	.706	.355

Dependent variable = Kennedy votes with at least 2 of 3 conservatives (No=0, 1=Yes)

Kennedy's high rate of agreement with Chief Justices Rehnquist and Roberts that was derived from the SCOTUSblog data supported a conclusion that he is a 'conservative' Justice. The results from the regression support a similar conclusion.

Three of the variables were statistically significant: Conservative Majority Writer, Republican White House Control, and the number of Republican House Members. For the Conservative Majority Writer variable, there is a strong positive correlation, supporting the conclusion that when one of the three consistently conservative Justices writes an Opinion of the Court that attracts at least one other consistent conservative, Kennedy will vote with the conservative bloc.

The variable reflecting the number of Republican House Members was also significant, and the positive correlation suggests that a larger number of Republicans in Congress also tends to motivate Kennedy to vote with the consistent conservatives. Whether this effect is the result of a 'reassuring' effect that a larger Republican caucus in

the House reflects a public endorsement of 'conservative' policy positions, and this endorsement attracts Kennedy to vote more with the conservatives, or simply because a larger Republican House caucus means that the conservative Justices have more political 'cover' from their ideological allies, and thus Kennedy is more willing to follow his instincts and vote with the conservatives more often, the effect still suggests that Kennedy is a 'conservative' Justice.

The third significant variable–Republican Control of the Presidency–surprisingly suggests the exact opposite. The negative correlation means that Kennedy is less likely to vote with the consistent conservatives when there is a Republican President. Even though this variable does suggest that Kennedy is less likely to vote with the consistent conservatives when there is a Republican in the Oval Office, it does not prove that Kennedy is voting more 'liberally.' There are other factors that could explain why the regression returned this result, such as an increase in cases where the three consistent conservatives divided with two of the three taking a less 'conservative' position, which would result in a data point that could obscure the real-world situation.

Overall, the agreement statistics and the regression results strongly suggest that Justice Kennedy is a more consistently conservative-voting Justice than commentators and the mass media claim. What, then, could account for the divide between the perception of Kennedy and the statistical evidence–and how can that question be answered?

The method adopted by this dissertation will be to look at the individual cases themselves, with a focus on an area of law where several decisions have been major contributors to the perception that Justice Kennedy is not a true conservative.

Narrowing the Focus

While quantitative analyses produce contradictory results about Kennedy's 'moderation' in his overall voting record, there is a complicating factor. Justice Kennedy has stated that he does not have a single, unifying 'theory' of constitutional interpretation.[15] If there is no attempt by the Justice himself to consciously impose a unifying structure to his work, it may not be possible to discern any useful pattern in his overall voting record. However, it remains an open question as to whether there are factors that guide his decision-making in particular areas of law.

Among the many controversial areas of constitutional law, one area where Justice Kennedy has had a disproportionate influence is in substantive due process law. In particular, the contrast between his decision-making in two of the most high-profile substantive due process cases of the last decade illustrate why investigating Kennedy's jurisprudence in this particular area of law could be a fruitful one for scholarly research.

The 2003 case *Lawrence v. Texas*,[16] which invalidated Texas' criminalization of homosexual sodomy, was one of the most controversial decisions handed down by the Court in the last decade, and one that particularly angered conservatives.[17] Kennedy's majority opinion in the case has been interpreted[18] as abolishing one of the traditional

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[15] Senate Committee on the Judiciary, *Hearings on the Nomination of Anthony Kennedy to be Associate Justice of the Supreme Court of the United States*, S. Hrg. 100-1037,100th Cong., 1987, 154; Terry Carter, "Crossing the Rubicon," *California Lawyer*, October 1992, 104.

[16] 539 U.S. 558 (2003).

[17] Patrick Buchanan, "What the Court Betrayals Portend," *Human Events*, 14 July 2003, 651.

[18] This assertion is made by Justice Antonin Scalia in his dissent in *Lawrence.* See 539 U.S. 558, 586–605.

'police powers' that have been used since *New York v. Miln*[19] to justify the regulatory actions of the states. According to Justice Scalia's dissent in *Lawrence*, Kennedy's conclusion means that mere moral disapproval of an act is not sufficient to justify its criminalization.[20] In short, morality is no longer a sufficient basis for law.

However, Kennedy's majority opinion in *Gonzales v. Carhart*[21]–a challenge to the federal Partial Birth Abortion Ban Act of 2003–uses language and a rationale in upholding the law that rely on standards of morality as a justification. The apparent conflict between the reasoning of the two cases raises the questions of whether Kennedy did exclude moral justifications for laws with his ruling in *Lawrence*, and whether he has backtracked on that decision with his opinion in *Gonzales*. The apparent inconsistency in his substantive due process jurisprudence highlighted by the decisions in *Lawrence* and *Gonzales* only deepens if other substantive due process cases are considered.

This dissertation will examine a series of cases towards the larger goal of reaching an understanding of and providing a consistent explanation for Justice Kennedy's decision-making in substantive due process cases. It will be necessary to trace Kennedy's substantive due process jurisprudence from his early years on the Court using a method of close textual analysis of Court opinions in order to shed light on the underlying principles of his constitutional jurisprudence that the dissertation as a whole seeks to explore.

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[19] 36 U.S. 102 (1837).

[20] 539 U.S. 558, 571 (2003).

[21] 550 U.S 124 (2007)

This examination will highlight a number of apparent contradictions in his substantive due process jurisprudence between the abortion cases and other substantive due process cases, tracing these tensions up through *Lawrence* and *Gonzales,* and then setting out an explanation for Kennedy's substantive due process decision-making that will find additional support in the Court's opinion in *McDonald v. Chicago*.[22]

Thesis

The central thesis of this dissertation is that Justice Kennedy is incrementally adjusting substantive due process jurisprudence as a whole, moving it slowly away from the approach Justice Blackmun took in *Roe*, where even un-enumerated rights could be given status as "fundamental," and thus subject to the protection of strict scrutiny, towards a position that both narrows the category of rights that may be classified as "fundamental," (which he does in his opinion in *Lawrence v. Texas*) as well as setting the standard for judicial review of laws challenged under substantive due process back to a "rational basis" standard, as is the case in Justice Alito's opinion in *McDonald v. Chicago*. Furthermore, this dissertation will argue that Justice Kennedy's substantive due process jurisprudence has been carefully crafted to build a line of precedents which have been supported by Justices on both ideological wings of the Court, thereby giving those precedents more legitimacy under the principle of *stare decisis*, as well as making it more difficult for politically liberal Justices to use substantive due process to advance their ideological agenda.

[22] 561 U.S. ___ (2010).

Literature Review

As Justice Kennedy's influence on the Court increased over the last decade, there has been a marked increase in academic interest in Kennedy. While several competing scholarly theories about his overall jurisprudence have appeared, up to this point no book-length work has focused solely on his substantive due process jurisprudence. This literature review will examine a variety of theories about Justice Kennedy's general decision-making, as well as several shorter works which deal directly with Justice Kennedy and substantive due process in order to place this work in the context of the scholarly literature.

Prior to 2003, scholarly literature tended to focus on particular opinions or cases, with relatively few attempts to elucidate Kennedy's method of constitutional interpretation.[23] However, the decision in *Lawrence v. Texas* proved to be a catalyst for scholarly interest in Justice Kennedy's jurisprudence. The most influential early piece in the discussion was Randy Barnett's article "Justice Kennedy's Libertarian Revolution: *Lawrence v. Texas.*"[24]

In his article, Professor Barnett notes that in the 1992 decision in *Planned Parenthood v. Casey*, Justice Kennedy was part of a three-justice plurality that shifted the language of their opinion from the "right to privacy," as was expected given the precedents in *Griswold v. Connecticut*[25] and *Roe*, to one of "liberty." Until the decision

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[23] Akhil Reed Amar, "Justice Kennedy and the Ideal of Equality," *Pacific Law Journal* 28 (1996-1997): 515.

[24] Randy Barnett, "Justice Kennedy's Libertarian Revolution: *Lawrence v. Texas,*" *Cato Supreme Court Review* 23 (2003): 21–41.

[25] 381 U.S. 479 (1965).

in *Lawrence*, Professor Barnett argued that it was unclear if the "liberty" language would appear again.[26] However, with the focus on "liberty," instead of "privacy," by Kennedy's opinion in *Lawrence*, Barnett claimed that the Court–led by Kennedy–was moving away from the post-New Deal dichotomy of the "presumption of constitutionality/ 'fundamental' rights" to a more logically consistent "implicit presumption of liberty."[27]

Barnett's claim that Kennedy is using a "presumption of liberty"–a standard which requires the government to "justify its restriction on liberty, instead of requiring the citizen to establish that the liberty being exercised is 'fundamental'"[28]–leads to the conclusion that if the Court continued down this path, it would have profound implications for many different areas of constitutional law.[29] However, later cases–especially *Stenberg v. Carhart*[30] and *Gonzales v. Carhart*–have undermined Barnett's claim, and some other scholars (Steven Calabresi) have even claimed that *Lawrence* is the exception in Kennedy's jurisprudence, not the rule. While Barnett's thesis has not fared well over time, Barnett's article spurred others to investigate Kennedy's jurisprudence.

The literature that appeared following Professor Barnett focused largely on *Lawrence* as a case, and less on Kennedy as a Justice. A prototypical example of this literature is Mitchell F. Park's 2006 article "Defining One's Own Concept of Existence

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[26] Barnett, "Revolution," 33.

[27] Barnett, "Revolution," 34.

[28] Barnett, "Revolution," 36.

[29] Barnett, "Revolution," 41.

[30] 530 U.S. 914 (2000).

and the Meaning of the Universe: The Presumption of Liberty in *Lawrence v. Texas*."[31]

In his article, Park extends the claim made by Professor Barnett, stating that,

> *Lawrence* stands for a presumption of liberty protecting the private acts of individuals under the Due Process clause. Simply put … if the government fails to show that its restrictions on individual exercises of liberty are not necessary and proper regulations of behavior harmful to others, the mere claim that the government is upholding morality … should not justify restrictions on liberty. This reading of *Lawrence* … [returns to] an accurate understanding of the libertarian underpinnings of American constitutionalism.[32]

Park's article goes on to give a more detailed exegesis of the libertarian potential of *Lawrence* than Barnett did, and agrees with Justice Scalia's claim in his dissent that the ruling "decrees the end of all morals legislation."[33] While Professor Barnett had been much more limited in his claim about *Lawrence*, Park is an example of the libertarian interpretation of the case at its broadest reach.

But, like Barnett's article, later cases–both in and outside of the area of substantive due process law–have essentially discredited the claim that Kennedy is a jurisprudential libertarian. As Ilya Shapiro states, "there are a host of cases in which Justice Kennedy did not exactly unfurl the libertarian flag. This non-libertarianism is especially apparent in doctrinal areas … such as criminal law, property rights, and governmental powers."[34] Several cases in other areas of the law–such as *Hiibel v. Sixth*

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[31] Mitchell F. Park, "Defining One's Own Concept of Existence and the Meaning of the Universe: The Presumption of Liberty in *Lawrence v. Texas*," *Brigham Young University Law Review* (2006): 837–887.

[32] Park, "Defining," 838.

[33] Park, "Defining," 875. Quoting Scalia, J, from 539 U.S. at 599.

[34] Ilya Shapiro, "A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy," *Harvard Journal of Law & Public Policy* 33, no. 1 (Winter 2010): 333–360, 355. Internal citations omitted.

Judicial District Court of Nevada and *Kelo v. City of New London*–render the 'extended libertarian' claim of Park's article even less convincing than Barnett's original theory.[35]

As Kennedy's importance on the Roberts Court became clear, scholars began to interpret his jurisprudence in the context of his role on the Court. For example, John F. Basiak's article "The Roberts Court and the Future of Substantive Due Process: The Demise of 'Split-the-Difference' Jurisprudence,"[36] argues that the Court's substantive due process jurisprudence has been "results-oriented," and which has expanded the Court's power at the "expense of legitimately exercised democratic judgment."[37]

Basiak claims Justice Kennedy has been one of the instigators of this trend towards 'split-the-difference' jurisprudence, and spends a section of the article taking an in-depth look at Kennedy's substantive due process jurisprudence. Basiak notes that Kennedy's position as the decisive vote in divisive cases makes it "important to scrutinize his decisions and evaluate whether his reasoning is fundamentally based upon the text, structure and history of the Constitution."[38]

Basiak's evaluation of Kennedy's substantive due process jurisprudence draws largely on the opinion in *Lawrence*, and he claims that Kennedy's jurisprudence discounts both the usefulness of "history and tradition," as well as lends itself to a dangerous vagueness that will only complicate future cases and expand the Court's

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[35] Ibid. 542 U.S. 177 (2004) and 545 U.S. 469 (2005). In both cases, Justice Kennedy supported expansions of government power at the expense of individual rights.

[36] John F. Basiak, Jr., "The Roberts Court and the Future of Substantive Due Process: The Demise of 'Split-the-Difference' Jurisprudence?" *Whittier Law Review* 28 (Spring 2007): 861–904.

[37] Basiak, "Split," 861.

[38] Basiak, "Split," 894.

power. [39] While Basiak's examination of Kennedy's substantive due process jurisprudence is superior to other articles that over-emphasize the *Lawrence* decision, it still does not deal with the broad scope of substantive due process case law. The narrow focus allows Basiak to make conclusions about Justice Kennedy's substantive due process thought while excluding cases–such as *Washington v. Glucksberg*[40]–which are in fact critical to a proper understanding of the Kennedy's work.

One of the first attempts to come to terms with Kennedy's overall jurisprudence comes from Temple University Philosophy Professor Stephen O'Hanlon. Professor O'Hanlon's 2008 article "Justice Kennedy's Short-Lived Libertarian Revolution," claims that Kennedy's jurisprudence, when considered as a whole, demonstrates that the Justice is a paternalistic liberal–espousing an ideology that allows people considerable latitude in their personal lives, but which allows "a degree of 'enlightened paternalism, permitting the law to stop self-inflicted harm.'"[41] O'Hanlon claims that understanding Kennedy as a 'paternalistic liberal' explains his positions in abortion cases like *Casey*, while still explaining the paternalistic reasoning set out in *Gonzales*. Furthermore, O'Hanlon notes that Kennedy has taken positions in Free Speech and economic and regulatory cases that more easily fit into a 'liberal' ideology than a libertarian one.[42]

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[39] Basiak, "Split," 896–897.

[40] 521 U.S. 702 (1997).

[41] Stephen O'Hanlon, "Justice Kennedy's Short Lived Libertarian Revolution: A Brief History of Supreme Court Libertarian Ideology," *Cardozo Public Law, Policy & Ethics Journal* 7 (Fall 2008): 1–44.

[42] O'Hanlon, "Revolution," 42–43.

O'Hanlon's argument, while original and thought-provoking, never addresses Justice Kennedy's often-reiterated claim that he has no over-arching judicial philosophy or theory.[43] It also runs counter to the numerous assertions of Kennedy's conservatism that have been made by his associates,[44] and does not offer an explanation for the Justice's noted emphasis on the term 'liberty' in his opinions.

Helen Knowles' 2009 monograph *The Tie Goes to Liberty* was the first book-length treatment of Kennedy's method of constitutional interpretation. By looking at several different areas of law–Freedom of Speech, Equal Protection, and Substantive Due Process–Knowles identifies three "intertwined components"[45] which, following partly in Barnett's footsteps, she argues make it possible to classify Kennedy's jurisprudence as "*modestly* libertarian."[46]

Each of the three intertwined elements Knowles discusses–a toleration of diverse views, preserving and protecting human dignity, and personal responsibility[47]–roughly corresponds to an area of constitutional law. Knowles places Kennedy's First Amendment jurisprudence in a section by itself, but the substantive due process cases are split between the other two sections of "human dignity" and "personal responsibility."

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[43] Senate Committee on the Judiciary, *Hearings on the Nomination of Anthony Kennedy to be Associate Justice of the Supreme Court of the United States*, S. Hrg. 100-1037, 100th Cong., 1987, 154; Terry Carter, "Crossing the Rubicon," *California Lawyer*, October 1992, 104.

[44] Lazarus, *Closed Chambers*, 252–254.

[45] Helen J. Knowles, *The Tie Goes to Freedom: Justice Anthony Kennedy on Liberty* (Lanham, MD: Rowman & Littlefield Publishers, 2009), 4.

[46] Knowles, *Tie*, 4.

[47] Knowles, *Tie*, 4.

For example, Knowles discussion of the Justice's concern for 'personal responsibility' dwells almost entirely on abortion rights cases, and is the section that deals most directly with substantive due process law. The essence of Knowles' argument in this section is that Justice Kennedy seeks to structure the law so that it protects abortion rights, but those rights are counter-balanced against the "twin principles of personal responsibility and informed decision making."[48] However, this approach creates a dichotomy that splits substantive due process law in half, a conceptual move that puts Knowles analysis at odds with how lawyers (and Justices) conceptualize constitutional law.

While Professor Knowles book broke important new ground in the literature on Justice Kennedy, her rather limited claim about Kennedy's overall jurisprudence – "modest libertarianism"–is so vague that it fails to explain Kennedy's decisions outside of the particular ones she discusses. Furthermore, her division of cases on the grounds of these three amorphous "components" does not allow for the development of a comprehensive interpretation of Kennedy's substantive due process jurisprudence.

Knowles book was not the only book on Kennedy to come to press in 2009. Frank Colucci's *Justice Kennedy's Jurisprudence: the Full and Necessary Meaning of Liberty* advances a claim that the Justice adopts a "moral" reading of the Constitution, not unlike that advanced by legal scholar Ronald Dworkin and former Justice William Brennan;

[48] Knowles, *Tie*, 194.

however, Colucci asserts that Kennedy's moral reading emphasizes "liberty" rather than the "equality" approach favored by Dworkin and Brennan.[49]

Colucci makes a broader survey of Kennedy's jurisprudence than Knowles, covering Free Speech, abortion, and Equal Protection, but also covering an area of law that is essential to consider in respect to substantive due process law: Federalism. Colucci includes an entire chapter that deals with Kennedy's Federalism jurisprudence, ultimately concluding that while the Justice takes the principle of Federalism seriously, his jurisprudence has done little to turn back the trend of expanding Federal power.[50]

Colucci's concludes that Kennedy does have an "identifiable, coherent, and distinct approach to constitutional interpretation," but one that leads to an expansive role where the judiciary should vigorously protect the liberty of the individual.[51] While Colucci does make a more substantial and coherent claim than Knowles, his argument does not address the fact that Justice Kennedy insists he has no overriding 'theory' about how to interpret the Constitution. Colucci must disavow the Justice's own statements in order to put together an argument whose individual parts may have more merit standing on their own than together.

A more recent interpretation of Kennedy's substantive due process jurisprudence comes from Stephen Calabresi's article, "Substantive Due Process after *Gonzales v.*

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[49] Frank J. Colucci, *Justice Kennedy's Jurisprudence: the Full and Necessary Meaning of Liberty* (Lawrence, KS: University Press of Kansas, 2009), 5.

[50] Colucci, *Liberty*, 169.

[51] Colucci, *Liberty*, 170–171.

Carhart."[52] In his article, Professor Calabresi argues that while *Lawrence* continues to be a valid precedent, it is Justice Kennedy's opinion in *Gonzales* and its citations to Chief Justice Rehnquist's "history and tradition" based opinion in *Washington v. Glucksberg* that point the way forward for the Court's substantive due process methodology.[53] Calabresi makes the explicit claim that Justice Kennedy "favors the approach of *Glucksberg* over [that of] *Lawrence*."[54]

Calabresi goes on to note several aspects of Kennedy's *Gonzales* opinion that he claims demonstrate that Kennedy's substantive due process approach more resembles *Glucksberg* than *Lawrence*. Among those aspects are the attention given in the *Gonzales* opinion to the State interest in promoting fetal life,[55] the lack of a corresponding discussion of a woman's liberty to obtain an abortion, and the rejection of the *prima facie* challenge to the abortion regulation.[56] As Calabresi himself notes,

> If Justice Kennedy sticks with an insistence on as applied over facial challenges in future substantive due process cases, there will be a whole lot fewer new constitutional rights that will be found either by the Supreme Court or by lower federal and state courts relying on the Supreme Court's loose language. Kennedy's opinion in Gonzales seems not to regard the courts as the arbiters of our liberty but as the modest adjudicators of very concrete cases and controversies in situations where the Court absolutely must rule because the facts force it to do so.[57]

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[52] Steven Calabresi, "Substantive Due Process after *Gonzales v. Carhart*," *Michigan Law Review* 106 (June 2008): 1517–1541.

[53] Calabresi, "Substantive Due Process," 1516.

[54] Calabresi, "Substantive Due Process," 1520.

[55] Calabresi, "Substantive Due Process," 1520.

[56] Calabresi, "Substantive Due Process," 1520.

[57] Calabresi, "Substantive Due Process," 1521.

Calabresi considers at length Justice Kennedy's jurisprudence in the area of substantive due process rights. He notes that over Kennedy's tenure on the Court, the Justice has signed onto many "restraintist" substantive due process opinions.[58] Calabresi notes Kennedy's transition between *Michael H. v. Gerald D.,*[59] where Kennedy joined a short O'Connor concurrence that was partly at odds with the substantive due process methodology of the Opinion of the Court, to *Washington v. Glucksberg*, where Kennedy joined in full an opinion that used a methodology identical to the one he refused to join in full in *Michael H*.[60]

Calabresi then explores the relationship between *Griswold v. Connecticut* and other key substantive due process decisions, such as *Lawrence v. Texas*. Calabresi's conclusion is that *Lawrence* has much more in common with *Griswold* than it does with *Roe v. Wade*. He concludes that both *Lawrence* and *Griswold* "[are not] in fact …big, judicially mandated, social change opinion[s], like Roe, [but] symbolic opinion[s] that changed very little in practice."[61]

While the thrust of Calabresi's argument is that Justice Kennedy's substantive due process jurisprudence is considerably more "conservative" than some commentators have suggested, the examination is limited in that it is only one section in a law review article. However, Calabresi's article brings the literature on Justice Kennedy to a point that this dissertation will attempt to build on by elucidating an explanatory theory for Justice

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[58] Calabresi, "Substantive Due Process," 1522–23.

[59] 491 U.S. 110 (1989).

[60] Calabresi, "Substantive Due Process," 1522 - 23.

[61] Calabresi, "Substantive Due Process," 1525.

Kennedy's substantive due process jurisprudence that takes into account the full range of substantive due process decisions.

Methodology

Qualitative Analysis

Case selection. The bulk of the dissertation will be a series of case studies, combined with a close reading of the legal reasoning, rhetoric, and long-term significance of the case to the area of substantive due process law. The criteria for selecting the individual cases–beyond the necessary presence of Justice Kennedy on the Court–was as follows:

1. The case is a "substantive due process" case–This is defined as a case where the Court, in the majority opinion, explicitly acknowledges that the case at bar involves a substantive claim of a limitation on state power via the due process clause of the Fourteenth Amendment.

2a. The case is a "significant" substantive due process case–This is defined as the case at bar resulting in a decision that marked a significant change (such as the rejection of past Court reasoning, or the imposition of a different level of scrutiny) in substantive due process law, or the overturning (in part or wholly) of a prior substantive due process ruling by the Court.

2b. The case is a "minor" substantive due process case–This is defined as a case at bar being one which involves a substantive due process claim, but which resulted in a holding by the Court that made only a minor adjustment in that particular area of substantive due process law and/or did not overrule precedent.

3. The case does not involve criminal procedure. This criterion was added to reduce the number of potential cases, and help narrow the overall focus of the dissertation.

Chapter Two

Chapter Two will begin by discussing Justice Kennedy's nomination to the Supreme Court, in the context of attempts by the Reagan Administration to select and nominate a political conservative to the Court to replace moderate Justice Louis Powell. The main portion of the chapter will focus on Kennedy's confirmation hearings before the Senate Judiciary Committee. The evidence from the nomination hearings will demonstrate that at the time of his confirmation, Kennedy was considered to be a political conservative, although not as conservative as Robert Bork.

The Chapter's analysis will focus on explicating Kennedy's understanding of the American constitutional system. By developing an understanding of Kennedy's view of the role of the judiciary and judges within the constitutional system, this chapter will demonstrate how characteristics of the system will come to influence and constrain Kennedy's substantive due process jurisprudence.

Chapter Three

The next Chapter will examine a set of cases from Kennedy's early tenure on the Court: *Michael H. v. Gerald D.*, *DeShaney v. Winnebago County Dept. of Social Services*,[62] *Webster v. Reproductive Health Services*,[63] *Ohio v. Akron Center for Reproductive Health*,[64] and *Cruzan v. Director, Missouri Dept. of Health*.[65]

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[62] 489 U.S. 189 (1989).

[63] 492 U.S 490 (1989).

[64] 497 U.S. 502 (1990).

[65] 497 U.S. 261 (1990).

The examination of *Michael H.* will focus on Justice O'Connor's concurrence (which Justice Kennedy joined) in which she expressed concerns about the method of substantive due process analysis Justice Scalia used in the majority opinion. This section will show that Justice Kennedy acted in a way that both limited the rightward movement of the law in this case, as well as expressed concern with the strict "history and tradition" approach to discovering substantive due process rights that the majority opinion attempted to adopt.

The section on *DeShaney* will focus on a minor–but still important aspect of substantive due process law that indicates a dispositional conservatism on Justice Kennedy's part. His acceptance of Chief Justice Rehnquist's opinion in *DeShaney* helped solidify the Court's rejection of any substantive due process claim to so-called 'positive' rights.

The section on *Webster* will show how the Court's internal politics can have a significant impact on the Court's decision-making process. The section on *Webster* will also show how Justice Kennedy used the conservative 'defeat' in the case to as an early opportunity for his judicial method to influence the pace and result of constitutional law.

The discussion of *Ohio v. Akron Center for Reproductive Health* will examine the first written opinion by Justice Kennedy on a substantive due process topic: abortion. The investigation of Kennedy's opinion here will demonstrate that there are elements present in his jurisprudence–even at this early point in his career–that will appear repeatedly in his later work, and which in practice amount to the application of structurally conservative limiting principles in constitutional adjudication.

The section on *Cruzan* will argue that this "right-to-die" case, in which Kennedy joined Chief Justice Rehnquist's majority opinion, stalled the expansion of substantive due process liberty to the "right-to-die," but which did so with a less rigorous application of the "history and tradition" approach to substantive due process than Justice Scalia called for in his concurring opinion. Rehnquist's opinion–which upheld Missouri's power to require "that evidence of an incompetent's wishes as to the withdrawal of life-sustaining treatment be proved by clear and convincing evidence"[66]–provides the best available evidence for Kennedy's then-contemporary approach to substantive due process on a topic that the Court would confront again in only a few years, and is useful for marking changes in the Court's jurisprudence in this area.

Chapter Four

Chapter Four will examine Justice Kennedy's role in the joint opinion in *Planned Parenthood v. Casey*. Relying on evidence from *Closed Chambers* and *The Nine*, this chapter will detail the behind-the-scenes maneuvering that went on between the oral argument and the announcement of the Court's opinion in the case. As Lazarus and Toobin reveal, at first Kennedy appeared inclined to uphold the challenged law in its entirety (which would have made Chief Justice Rehnquist's opinion in the case the majority opinion) before he was approached by Justices O'Connor and Souter with the proposition to craft a "compromise" position on the abortion debate that would hopefully end the rancorous national debate on the issue.

[66] 497 U.S. 261, 262 (1990).

The essence of the chapter will be an examination of Kennedy's contribution to the joint opinion (Sections I and II), as well as the significant changes the *Casey* opinion made in abortion law generally. Kennedy's participation in the joint opinion can be seen as an attempt to join in what he hoped would be a grand legal compromise that would settle the abortion question. However, when it is noted that the supposed 'compromise' Kennedy was involved with in *Casey* was a clear limiting, if not repudiation of, many of the most important principles of *Roe*–the greater purpose behind Kennedy's participation becomes begins to reveal itself. While many conservatives thought that *Casey* represented an abandonment of principle by Kennedy, given what *Casey* actually accomplished–a significant limiting of the protection accorded reproductive rights–Kennedy's opinion takes on an entirely different meaning–making it masterful piece of judicial writing that helped Kennedy chip away at the established precedent of *Roe*.

Chapter Five

Chapter Five deals with three cases: the 1996 equal protection case of *Romer v. Evans*,[67] 1997's *Washington v. Glucksberg,* and 1998's *Sacramento County v. Lewis*.[68] While *Romer* is an equal protection case, the discussion will focus on one particular characteristic of that opinion–Justice Kennedy's application of a rational basis standard of review to the provision of the Colorado Constitution that was challenged in this case. With Kennedy's opinion in *Lawrence v. Texas* still to come, Kennedy's opinion in *Romer*

[67] 517 U.S. 620 (1996).

[68] 523 U.S. 833 (1998).

becomes more significant than it would otherwise appear, and a closer examination is warranted.

Following the discussion of *Romer,* the chapter will turn to the discussion of *Washington v. Glucksberg*. In *Glucksberg*, Kennedy joins in full Chief Justice Rehnquist's opinion rejecting a substantive due process challenge to Washington's assisted suicide ban. In doing so, the Chief Justice adopts a substantive due process methodology that mirrors Justice Scalia's methodology in *Michael H.* (which Kennedy rejected in part in 1989). Kennedy's joinder (without reservation) of the Chief Justice's opinion indicates a change in Kennedy's thinking on substantive due process since *Michael H.* and *Casey*. An examination of Rehnquist's opinion will demonstrate what those changes were.

The final case covered in this chapter will be *Sacramento County v. Lewis*, a minor substantive due process case where a concurrence by Kennedy gives additional insight into the Justice's views of the weaknesses of the Court's substantive due process jurisprudence. A discussion of Kennedy's concurrence will give both a critique of the Court's majority opinion due process methodology, as well as discuss the changes Kennedy would make to the Court's approach in his own words. Overall, the information from *Sacramento County* will show that Kennedy's substantive due process approach is nearly identical to the 'history and tradition' approach used by Rehnquist in *Glucksberg* than the more flexible 'Harlanesque' approach favored by the more liberal members of the Court.

Chapter Six

Chapter Six will discuss the Court's 2000 decisions in *Troxel v. Granville*[69] and *Stenberg v. Carhart*. In *Troxel v. Granville*–a dispute over Washington's third-party child visitation law–Justice Kennedy found himself in dissent, where he attacked the Court's holding as an example of judicial overreach through substantive due process law. There are two main elements in the opinion important for understanding Kennedy's due process jurisprudence.

First is his continuing defense of the conclusion of the joint opinion from *Casey*– that even "fundamental rights" claims should be evaluated under a less stringent standard than "strict scrutiny." Secondly, there is the dissent's emphasis on the incrementalist practice of common law. The evidence will demonstrate that his understanding of the limited nature of rights and the importance of common law incrementalism are durable features of his due process jurisprudence.

The subsequent section will cover *Stenberg v. Carhart*, which invalidated Nebraska's ban on the abortion procedure called "dilation and extraction" or "D&X," and which resulted in a particularly impassioned dissent by Justice Kennedy. The dissent will show that he viewed the *Stenberg* decision to be a betrayal of principles by his *Casey* co-authors, Justices O'Connor and Souter. His language makes clear the emotional anguish he feels over this case, and his rhetorical choices demonstrate that he is willing to let states use their laws to take a moral position on issues.

[69] 530 U.S. 57 (2000).

Additionally, we will consider how Justice Kennedy describes the various state interests at stake in an abortion, such as the health of the mother and the life of the fetus,[70] as well as his claims about the proper application of *Casey*.

This section will also examine Kennedy's reasoning about exercises of state power, and the factors that influence his reasoning. When these exogenous factors are taken into account, they explain why Kennedy focuses on the power of the state to enact the Nebraska D&X ban on the grounds of protecting the moral integrity of the medical profession. For Kennedy, "*Casey* recognized the point, holding the physician's ability to practice medicine was 'subject to reasonable . . . regulation by the state.'"[71]

Chapter Seven

Chapter Seven will examine Justice Kennedy's majority opinion in *Lawrence v. Texas*. A close reading of his opinion in the case will show its connections to his previous substantive due process jurisprudence, as well as how it is the most important case in Kennedy's substantive due process jurisprudence.

The chapter will begin by reviewing the background of the case, as well as the large public discussion that followed the decision before moving on to investigate several different scholarly views of Kennedy's opinion in *Lawrence.* Taking into consideration articles by Randy Barnette, Rachel Sweeney, and Lawrence Tribe, the chapter will seek to establish the areas where there is broad scholarly agreement on *Lawrence*, as well as those areas where there is significant disagreement.

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[70] 530 U.S. 914, 960 (2000).

[71] 530 U.S. 914, 968-969 (2000).

As the section examining contemporary scholarship on *Lawrence* will demonstrate, there is considerable division over two elements in *Lawrence*: what 'right' Kennedy's opinion protected, and how the opinion protected that 'right.' These two elements will structure the remainder of the chapter, as each question will be considered in turn.

Evidence from the opinion in *Lawrence* will demonstrate several important things about how Kennedy characterizes the 'right' at stake in the case, and then explain their significance within the larger framework of Kennedy's substantive due process jurisprudence. When considering the *method* by which Kennedy protects the 'right,' it will be shown that Kennedy adopts wholesale a method of substantive due process analysis that has been favored by the 'traditionalist' Justices. Since the invalidation of anti-sodomy laws in *Lawrence* is generally considered to be a politically liberal decision, Kennedy's adoption of the method of substantive due process analysis that has long been associated with the conservative wing of the Court could be interpreted as a pointed challenge to that wing. The chapter will also note that Kennedy's adoption of the 'history and tradition' approach to substantive due process supports the claim that the Texas law is being invalidated under the rational basis test, the lowest level of judicial scrutiny. The chapter will conclude with a discussion of how the use of the "history and tradition" analysis method of the more "conservative" justices–is significant since his opinion gains the assent of the Court's four most liberal justices.

Chapter Eight

Chapter Eight will cover Justice Kennedy's majority opinion in the 2006 case of *Gonzales v. Carhart,* as well as the opinion in the landmark 2010 case of *McDonald v.*

Chicago. The *Gonzales* case–which upheld the constitutionality of the Federal Partial-Birth Abortion Ban Act–marks a significant point in Justice Kennedy's jurisprudence for several reasons. The evidence presented in this chapter will show how Kennedy's majority opinion–which drew heavily from his dissent in *Stenberg v. Carhart*–employs legal and rhetorical devices that he has used in previously discussed cases in order to slowly alter the trajectory of substantive due process law, with the result being an effective repudiation of the Court's decision in *Stenberg*.

The section on *Gonzales* will be structured around two questions: What is the specific state interest that Kennedy uses to justify the PBABA, and how Justice Kennedy weights that 'state interest.' Kennedy's opinion in *Gonzales* has many notable elements to it–his continued use of the 'history and tradition' methodology, another application of the 'consensus' argument, graphic descriptions of the D&X procedure, his refusal to directly overrule *Stenberg* (which is related to his desire to strengthen the principle of *stare decisis*), and his replacement of the word "fetus" when referring to the statute with the word "child"–that, when considered together framework described above–will demonstrate that Justice Kennedy is engaged in making substantial alterations to substantive due process law.

The second part of Chapter Nine, which will cover the 2010 decision in *McDonald v. Chicago*, will provide the final piece of evidence for the dissertation's thesis. While Justice Kennedy did not write the opinion in *McDonald*, he did join it in full, so there is a parallel to the *Glucksberg* case. Justice Alito clearly had *Roe v. Wade* on his mind when writing the opinion for the case, as a number of the Court's pronouncements on the question of substantive due process rights would carry over from

the immediate context of *McDonald* to the broader venue of substantive due process law as a whole.

Alito's opinion is significant for substantive due process law since it officially "incorporated" the provisions of the Second Amendment against the States, thereby invalidating the City of Chicago's handgun ban. All cases which have incorporated the specific provisions of the Bill of Rights against states have relied on substantive due process–cases which deal with the "enumerated" rights–as have all cases which have claimed an "un-enumerated" right, with cases like *Griswold, Roe*, and *Lawrence* all in this second category.

The particular element of Justice Alito's opinion which is most significant for understanding Justice Kennedy's substantive due process jurisprudence comes when Justice Alito holds that the Second Amendment protects a "fundamental right;"[72] however, Justice Alito then proceeds to note that the Court's holding in the case will continue to allow "[s]tate and local experimentation with reasonable firearms regulations."[73] He then goes on to note that the fundamental right to bear arms is "not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[74] The crux of the holding for substantive due process law is this: even an *enumerated fundamental right* may be subject to "reasonable regulations."

The chapter will also note additional relevant evidence–such as citations from other substantive due process cases where Kennedy wrote (such as *Casey*) or cases where

[72] 561 U.S. ___, 31 (2010).

[73] 561 U.S. ___, 38 (2010).

[74] 561 U.S. ___, 39 (2010).

Kennedy joined the opinion in full, but are relevant to the thesis of the dissertation (such as *Glucksberg*), and the fact that in order to determine the status of the substantive "right" at issue in *McDonald*, Justice Alito engages in an investigation of "history and traditions" that parallels Justice Rehnquist's action in *Glucksberg*.

Chapter Nine

In the final chapter, the dissertation will review the evidence from the various opinions, in order to make the connection between the numerous elements of Justice Kennedy's jurisprudence that have been discussed. The first section of the chapter will deal with the issue of precedent and *stare decisis*, and will review how Kennedy's concern with *stare decisis* has in many ways guided his substantive due process jurisprudence from *Webster v. Reproductive Services* forward.

The second section of the concluding chapter will discuss Kennedy's transition from an open-ended "history and tradition" type of substantive due process analysis–as evinced by his concurrence in *Michael H. v. Gerald D.*–to a version of the analysis that is narrower and essentially identical to the one favored by Justices Rehnquist and Scalia.

The third section of the chapter will discuss the issue of 'alliance building,' noting how Justice Kennedy has used substantive due process cases with results favored by the Court's liberal Justices to gain their 'agreement' (through joining his opinions) for his substantive due process methodology and application of judicial tests.

The final section of the chapter will focus on the most important element of proof–Justice Kennedy's rhetorical choices. Referring back to the evidence throughout the work, the final section will show how Justice Kennedy has repeatedly used carefully crafted rhetoric to make incremental changes in the law that, when considered over the

entirety of his tenure on the Court, demonstrate not only his commitment to a more conservative version of substantive due process, but also his skill as a strategist of the Court's internal politics.

CHAPTER TWO

Mr. (Judge) Kennedy Comes to Washington

Justice Lewis F. Powell's retirement in 1986 gave President Ronald Reagan his third opportunity to make an appointment to the Court–and, more importantly, to replace the moderate Powell with a strong conservative vote. Reagan, knowing the importance of this appointment, nominated one of the most prominent conservative legal scholars in the nation: former Yale Law Professor and Federal Judge Robert Bork.

Bork's nomination was controversial for two reasons. The first reason was that Bork, if confirmed, would replace Justice Powell, who had voted with the Court's liberal bloc in numerous cases conservatives reviled, especially *Roe v. Wade*.[1] On a Court with no stable partisan majority, the replacement of the moderate Powell with a consistent conservative would alter the balance of power on the Court and lead to dramatic changes in the direction of Constitutional law. Secondly, Bork was the leading intellectual advocate of the legal philosophy of "original intent," which argued that Judges should interpret the Constitution according to the intention of the Framers of the document. Following this approach would limit judges' ability to find new constitutional rights, and (in theory) place the most contentious social issues in the hands of the political branches of government.

The outcry from the political left following Bork's nomination was unusually shrill. Massachusetts Senator Edward M. Kennedy took to the Senate floor, and

[1] 410 U.S. 113 (1973).

delivered an over-the-top speech in which he claimed that confirming Bork to the Court would lead to a parade of horribles including "back-alley abortions" and a return to segregation.[2] Other liberals followed Senator Kennedy's lead, and, when Bork finally came before the Senate Judiciary Committee, he was already defensive because of the rhetorical attacks. Bork was combative in his testimony before the Senate Judiciary Committee, and between his testimony and political opposition to his appointment, his nomination was rejected by the Senate.

With the nominee of choice defeated, the Reagan Administration had to find a replacement quickly. They settled on Douglas Ginsberg, a young Judge on the D.C. Appeals Court who had previously served as an Assistant Attorney General and Harvard Law Professor.[3] However, before the nomination was officially announced, news reports broke which claimed that Ginsburg had used marijuana a few times while he was a Professor at Harvard during the 1970's. Ginsburg's nomination came crashing down before it had even been officially made, and he withdrew from consideration.[4]

Having had one nominee fail due to opposition in the Senate, and another nomination flounder before it was even made, the Administration now needed a nominee who would be easily confirmable. That nominee turned out to be Anthony Kennedy. Far

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[2] Earl M. Maltz, "Anthony Kennedy and the Jurisprudence of Respectable Conservatism," in *Rehnquist Justice: Understanding the Court Dynamic*, ed. Earl M. Maltz (Lawrence, KS: University Press of Kansas, 2003), 141.

[3] Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York: Penguin Press, 2007), 56–57.

[4] Greenburg, *Supreme Conflict*, 60.

from being the Administration's first choice, his background now became his greatest asset.

Anthony McLeod Kennedy was born and raised in Sacramento, California, where his father was a successful lawyer and lobbyist. A Phi Beta Kappa graduate of Stanford University, Kennedy attended Harvard Law School before returning to Sacramento, where, following his father's death, the future Justice took over the family law firm/lobbying business.

Kennedy's parents were well-connected among the Republican elite of California–as Rosen notes, Kennedy's parents were friends of Earl Warren[5]–and Kennedy continued to be involved in the Republican Party in California after Harvard. During the governorship of future President Ronald Reagan, Kennedy drafted a tax limitation proposal that Governor Reagan put forward as a ballot initiative.[6] While the proposal failed, Kennedy's assistance did lead to Ed Meese–Reagan's Chief of Staff–putting in a good word about the young attorney with the Ford Administration. That good word paid off in spades when, in 1978, Gerald Ford appointed Kennedy to the Ninth Circuit Court of Appeals. Following confirmation by the Senate, Anthony Kennedy became the youngest Appeals Court Judge in the United States at the age of 38.[7]

Kennedy was personally conservative, a devout Roman Catholic, and, at the time of his nomination he lived with his wife and three children in the same house he had

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[5] Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries That Defined America* (New York: Times Books, 2006), 15.

[6] Greenburg, *Supreme Conflict*, 62.

[7] Maltz, "Respectable Conservatism," in *Rehnquist Justice: Understanding the Court Dynamic*, ed. Earl M. Maltz, 140–141.

grown up in. However, some members inside the Reagan Administration were concerned that while serving on the Ninth Circuit, he had cited *Roe v. Wade* "very favorably," as well as "somewhat grudgingly" upheld a challenged military regulation prohibiting homosexual activity among members of the military in the 1980 case of *Beller v. Middendorf*.[8] While the conflict between his longstanding Republican pedigree and some aspects of his jurisprudence might have been enough to prevent his nomination in other circumstances, the political fallout from the Bork nomination helped push Reagan to nominate Kennedy to the Supreme Court.

Ronald Reagan officially nominated Anthony Kennedy to be an Associate Justice of the U.S. Supreme Court on November 12th, 1987.[9] Within a few weeks of his nomination, the Senate Judiciary Committee began its hearings on Judge Kennedy's nomination, beginning with two days of testimony by the Judge on December 14th, 1987.[10] Kennedy's testimony before the committee provides a wealth of information on his understanding of the law and the intellectual framework that informed his view of the proper role and function of the judiciary. Furthermore, his nomination hearings provide a unique type of evidence because they are driven in part by the Senate's concern with his thought process, and also because the hearings are not bound by the procedural rules of a court or the language of legal opinions.

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[8] Greenburg, *Supreme Conflict*, 54; 632 2d. 788 (9th Cir. 1980).

[9] Linda Greenhouse, "Reagan Nominates Anthony Kennedy to Supreme Court," *The New York Times*, 11/12/1987, last accessed November 8, 2012, http://www.nytimes.com/1987/11/12/us/reagan-nominates-anthony-kennedy-to-supreme-court.html.

[10] Senate Committee on the Judiciary, *Hearings on the Nomination of Anthony Kennedy to be Associate Justice of the Supreme Court of the United States*, S. Hearing No. 100-1037, 100th Cong., 1987, i.

While there are several possible ways to proceed through the record of the hearings, a thematic approach will simplify matters by making certain concepts and themes more evident. With that in mind, consider one of Judge Kennedy's statements midway through his testimony in front of the Judiciary Committee. He stated that, "If you had a visitor coming to this country, and he asked: What is it that makes America unique? … I think most people would say America is committed to the Constitution and to the rule of law."[11] Kennedy's response provides an insight into his understanding of the legal and constitutional system of the United States, as well as suggesting a convenient way to order an investigation of his testimony.

Kennedy's quote identifies two things that make the United States unique. The first is the "rule of law," an expression that can describe a variety of legal features. Fortunately, Kennedy did explain what he meant by the rule of law in greater detail in an exchange with Committee Chairman Sen. Joseph Biden of Delaware. He stated that

> the framers had an idea which is central to Western thought … [the idea] is central to our American tradition. It is central to the idea of the rule of law. That [idea] is that there is a zone of liberty, a zone of protection, a line that is drawn where the individual can tell the Government: Beyond this line you may not go.[12]

Based on that quote, we can distill several concepts to give a more specific content to what Kennedy meant by the "rule of law." From his comment, it seems safe to say that the "rule of law" has something to do with the concept of limited government power, as well as the other side of the philosophical coin, the concept of rights. For Judge Kennedy, the "rule of law" is a characteristic of a government that may not exercise its

[11] S. Hrg. 100-1037, 172.

[12] S. Hrg. 100-1037, 86.

powers in particular ways, even if it could do so. The full importance of this concept in Kennedy's thought will become clearer as we proceed.

A commitment to the "rule of law" is decidedly not unique to the United States. The rule of law is now a principle shared among many different nations. The Constitution, however, is unique to the United States. Judge Kennedy was correct when he noted that it was the dual commitment to these two things–the written Constitution and the principle of the "rule of law"–has made the United States "unique." The Constitution and the "rule of law" are the two wellsprings from which the structural and procedural characteristics of the constitutional system flow.

Going forward, first we will examine Kennedy's thoughts on structural 'features' that distinguish the American constitution. The three structural 'features' that he most frequently discussed during his hearings were: the Separation of Powers, Federalism, and Judicial Independence. Additionally, there are the procedural and substantive elements–such as the common law heritage, the incremental nature of the system, and the influence of *stare decisis*–that have their basis in the concept of the "rule of law," and which will help explain why he pursues the course that will be fully discussed in later chapters. We begin by taking each one of the structural features in turn.

The tripartite scheme of government created by the Constitution is one of the most distinguishing characteristics of American Government. Kennedy's comments demonstrate how the separation of powers informs his understanding of the roles of the three branches in the system. An important element in Kennedy's understanding of separation of powers emerges during a discussion of the political questions doctrine, when Kennedy states:

> One of the great ironies of our system is that a branch of the Government that is not supposed to be political in nature has historically resolved disputes of great political consequences … But the point is that a court must recognize that its function is not a political function; it is a judicial one. We manipulate different symbols. We apply different standards.[13]

This statement shows that the Judge recognizes one of the key aspects of separation of powers–the 'uniqueness' of the powers as allocated to each specific branch. Kennedy understands that there are some powers that are 'political' in nature, and thus consigned by the constitution to the executive and legislative branches. His comments also demonstrate that while he recognizes that the Constitution also specifies a specific role–the judicial role–to the Court. While all of the powers given by the Constitution are in some way dependent on each other, the exercise of those powers must be by the branch that is institutionally and temperamentally suited to their exercise. The understanding that there are certain powers allocated to particular branches provides a constitutional limiting principle from which a member of the third branch could reason in the process of mediating inter-branch disputes.

However, the most important part of Kennedy's view of separation of powers can be found in his answer to Senator Strom Thurmond's question regarding the durability of the Constitution:

> The first is the skill with which it was written … Then there is the respect that the American people have for the rule of law. We have a remarkable degree of compliance with the law in this country, because of the respect that the people have for the Constitution and for the men who wrote it. My third suggestion for why there has been a great success in the American constitutional experience is the respect that each branch of the government shows to the other. This is a vital part of our constitutional tradition.[14]

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[13] S. Hrg. 100-1037, 169.

[14] S. Hrg. 100-1037, 92.

His claim that the system has worked so well *because* of the 'respect' between the branches is the most important part of his remark. This 'respect' is an institutional disposition which inclines the branches to avoid encroaching on the prerogatives of the other branches. The separation of powers is the structural feature behind this 'respect,' partly because it commits specific functions to particular institutions, and partly because it provides mechanisms through which the branches can defend their 'territory' through the system of checks and balances. For Kennedy, the separation of powers is an important 'limiting' factor in the constitutional system, and that he sees the separation of powers as a limiting factor is important for what it tells us about his understanding of the role of judges inside the system.

Federalism is another one of the structural 'features' of the Constitution which Kennedy frequently discussed during his nomination hearings. In one exchange, he remarked that,

> The framers thought of [Federalism] as really one of the most essential safeguards of liberty. They thought it was improper, that it was spiritually wrong, morally wrong, for a people to delegate so much power to a remote government that they could no longer have control over their own destiny, their own lives.[15]

When Kennedy identifies federalism as one of the "essential safeguards" through which the Framers sought to preserve liberty, we begin to see a consistent theme in Kennedy's views of the various structural features of the Constitution - those structural elements all act as restraints on the exercise of government power.

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[15] S. Hrg. 100-1037, 200.

Additionally, Kennedy said this about the federal-state relationship:

> The framers thought of the States as really a check-and-balance mechanism, operating, obviously, not on the national level. The idea of preserving the independence, the sovereignty, and the existence of the separate States was of course critical to the Constitution.[16]

This reaffirms the view that Kennedy sees most of the structural elements of the Constitution as serving a common purpose–maintaining the exercise of government power within its proper limits.

One unusual example of how thoroughly Kennedy thinks restraint permeates the federal structure of the Constitution comes during a discussion on the Ninth Amendment. When asked by several Senators to discuss the meaning of the Ninth Amendment, Kennedy responded by saying,

> So [Madison] first of all wanted to make it clear that the first eight amendments were not an exhaustive list of all human rights. Second, he wanted to make it clear that State ratifying conventions, in drafting their own constitutions, could go much further than he did. And the ninth amendment was in that sense a recognition of State sovereignty and a recognition of State independence and a recognition of the role of the States in defining human rights. That is why it is something of an irony to say that the ninth amendment can actually be used by a federal court to tell the State that it cannot do something.[17]

Few thinkers would have responded in this fashion, considering the context was a discussion of the Court's un-enumerated rights jurisprudence. Rather than answering the question from the perspective of what rights the Ninth Amendment might protect, Kennedy asserted the Ninth Amendment was meant to enhance federalism's protection of state power, an unusual choice when it is the Tenth Amendment that is most commonly

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[16] S. Hrg. 100-1037, 92.

[17] S. Hrg. 100-1037, 179–80.

associated with federalism. The greatest significance of this quote is that it demonstrates Kennedy's extraordinary concern with federalism; it also suggests that he thinks federalism as a structural principle has not been given its proper weight. Kennedy's understanding of the constitutional system is that it promotes a similar 'respect' for the States by the Federal government as the system promotes between the Federal branches. For Kennedy, the pervasiveness of federalism in the Constitution is another reminder that the system divides power and that judges must remember and respect that division of power.

The structural feature of judicial independence may seem as if it is contrary to the emphasis on 'restraint' that Kennedy's testimony so often presented. To understand why judicial independence is so important to Kennedy, consider his remark when he was discussing a speech he had made opposing the Nunn-DiConcini Bill, which would have created a panel of Federal Judges with the power to evaluate, and possibly remove, other Federal Judges from office. In defense of his speech, Kennedy made the following statement:

> I took … the position that [the bill] was a serious threat to the independence of the judiciary. The judges of the United States must be in a position where they can agree with each other and also disagree with each other very vigorously … one of the serious defects of Nunn-DiConcini [was] that it would set judge against judge in an arena where previously the Constitution had committed that responsibility solely to the U.S. Senate.[18]

Kennedy's comments contain several points that should be highlighted. First, while most nominees will attempt to obfuscate when presented with evidence from their past where they took a position on an issue that could come before the Supreme Court, his statement

[18] S. Hrg. 100-1037, 216.

is unusual in that Kennedy not only acknowledged his statement, but essentially re-stated his original conclusion that Nunn-DiConcini was constitutionally questionable. Second, one of his reasons for opposing the bill is because judges "must be in a position where they can agree with each other and also disagree with each other very vigorously."[19] This statement goes to the heart of why judicial independence as a constitutional feature is so important to Kennedy: it is because he views judicial independence as the defining structural feature of the "judicial role."

It is towards the consideration of the "judicial role" that the examination of Kennedy's thoughts on the structural features of the Constitution has been directing us. The "judicial role," for Kennedy, is unique-and not only because of the special qualities bestowed on Article III judges by the Constitution. It is also the 'link' between the two wellsprings of America's Constitutional success: the Constitution and the principle of the "rule of law." A close examination into how he describes the "judicial role" and its practice through the "judicial method" because it will provide valuable insights into how Kennedy will behave in his role as Justice.

The central prudential characteristic element behind Kennedy's view of the "judicial role" is the principle of judicial restraint. His views on judicial restraint come to light in several different exchanges during the hearings, such as one with Sen. Grassley:

> Sen. Grassley: What exactly is–using your words–the "unrestrained exercise of judicial power?"
>
> Judge Kennedy: The unrestrained exercise of judicial power is to declare laws unconstitutional merely because of a disagreement with their wisdom.[20]

[19] S. Hrg. 100-1037, 216.

[20] S. Hrg. 100-1037, 142.

Kennedy's wording in his comment is demonstrative in and of itself. He speaks of "unrestrained... judicial power," necessitating the existence of a *restrained* judicial power as an antecedent. His comment also shows that he thinks that there *is* a prudential limit to judicial power–a limit beyond which judicial power *should not* go (although it is clear from his statement that he recognizes that judicial power can go beyond that limit.) That he recognizes a proper sphere for the exercise of judicial power-and that he speaks of the 'unrestrained' exercise of judicial power in a negative light prove that there is definitely a principle which Kennedy holds as an important characteristic of the "judicial role." That principle is judicial restraint.

The concept of judicial restraint is more than a point of philosophical speculation for Kennedy. It was an element of his practice while an Appeals Court Judge as well, and came across so clearly in his jurisprudence that it was noticed by some members of the Judiciary Committee even without the benefit of his testimony. For example, Sen. DeConcini made the following statement:

> I read that case very carefully more than once because of the significance of what I consider judicial restraint, and my compliments about the case … I really wanted to say that that opinion, as many of your opinions, have impressed upon me your real strict understanding of what you think judicial restraint is, and trying to exercise it.[21]

Beyond the restraintist elements in the particular opinion Sen. DeConcini was referring to (the case of *Beller v. Middendorf*[22]) it is noteworthy that DeConcini was so impressed with the *consistency* of Kennedy's dedication to the principle of judicial restraint. For

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[21] S. Hrg. 100-1037, 124.

[22] 632 F.2d 788 (9th Circ., 1980).

Kennedy, the principle of judicial restraint is one that is an integral part of his practice of the "judicial role."

A second characteristic of the "judicial role"-in the United States, at least-is the power of judicial review: courts may evaluate the compatibility of ordinary legislation with the 'higher law' of the Constitution, and, when there is a conflict, a court may refuse to enforce the conflicting law, declaring it unconstitutional. This extraordinary power shapes the judicial role in the United States, and Kennedy's cognizance of that influence is evident in his testimony. For example, when discussing judicial review, he stated:

> The underpinning for the doctrine of *Marbury v. Madison*[23] is that the court pronounces on the Constitution because it has no other choice. It is faced with a case, and it must decide the case one way or the other. It cannot avoid that responsibility, and so the constitutional question is necessarily presented to it. Chief Justice Marshall says that very clearly. He said we do not have the responsibility, or the institutional capability, or the constitutional obligation, to pronounce on the Constitution, except as we must in order to decide a case.[24]

This particular comment is a profoundly important statement on Kennedy's view of how judicial review impacts the judicial role. His interpretation of Marshall's opinion in *Marbury* is one which claims that the Court should *only* pronounce on the meaning of the Constitution when doing so is *unavoidable* in order to decide the case. Kennedy's claim logically denies that the Court has discretion over the exercise judicial review over constitutional questions. A court applying Kennedy's version of judicial review as its guidepost would avoid constitutional questions that might be properly presented but unnecessary to answer in order to resolve the case. Such a constrained vision of the use

[23] 5 U.S. 137 (1803).

[24] S. Hrg. 100-1037, 142.

of judicial review is clearly one developed under the influence of a powerful vision of judicial restraint.

While the power of judicial review is something that is possessed by most courts of general jurisdiction in the United States, there is one thing that makes the Supreme Court unique: it serves as the 'final' interpreter of the Constitution. When the Court pronounces on the meaning of the Constitution, that pronouncement is unalterable by the other branches, and in that sense the Court's pronouncement is authoritative. Judge Kennedy made it quite clear during his nomination hearings how much power this constitutional fact places in the Court, and how that power affects the "judicial role" of the Justices.

For example, an exchange between Kennedy and Sen. Arlen Specter near the end of the Judge's testimony is powerful evidence that Kennedy sees the Court's unique position as interpreter as counseling–if not mandating–a modest approach by the Justices. During the exchange, Sen. Specter badgers Judge Kennedy repeatedly, at times coming close to demanding that Kennedy "recognize that the Supreme Court is the final arbiter of the Constitution, just as rockbed."[25] Kennedy hedges, and refuses to accept as an absolute the conclusion that the Court is the sole final interpreter of the Constitution.[26]

Kennedy's refusal to accept what, to many, seems a fairly uncontroversial statement about the Court's role and power is evidence that he sees the role of the Court–and of judges–as a modest one. Kennedy's position is hardly that of a member of the

[25] S. Hrg. 100-1037, 223.

[26] Ibid. Although Kennedy ends up agreeing with Specter's statement as a "general proposition" he insists that he is "not sure there are not exceptions" to Specter's 'rule.'

'Imperial Judiciary.' To accept that the Justices are *the* authoritative interpreter of the meaning of the Constitution is to envision a judicial role that would be at odds with the structure of the Constitution.

Even when there are other demands on the Justices because of the Court's institutional position, Kennedy still prefers a more limited role for the Justices. For example, take note of the exchange he has with Sen. Grassley:

> Sen. Grassley: Can you think of any situation where it is appropriate for a Supreme Court Justice to depart from the issue at hand, and announce broad, sweeping constitutional doctrine?
>
> Judge Kennedy: I think that the constitutional doctrine that is announced should be no broader than necessary to decide the case at hand … When the Supreme Court has only 150 cases a year, and it is charged with the responsibility of supervising the lower courts, it has to write with a somewhat broader brush, in order to indicate what its reasons are. This does not mean, however, that it is free to go beyond the facts of the particular case, or that it is free to embellish upon the constitutional standard.[27]

There are several important elements present in the statement. Partly, we see Kennedy's recognition that the Court must fulfill its institutional role as the head of the Federal Court System. However, he is acutely aware of the fact that once the Court makes a constitutional ruling, that decision is almost impossible to alter.[28] Even with this tension, Kennedy forcefully makes the case for the importance of judicial restraint since there is nothing but the Justices own self-restraint that prevents them from exceeding the scope of the case.

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[27] S. Hrg. 100-1037, 145.

[28] The only two ways for a constitutional Supreme Court ruling to be overturned are by constitutional amendment, as was the case with the Fourteenth Amendment's overruling of *Dred Scott v. Sandford*, or by the Court taking a similar case and overruling the prior case, as happened when *Mapp v. Ohio* overruled *Wolf v. Colorado*.

Leaving nothing but the moral principles of the Justices as a safeguard against judicial overreach would be dangerous. Fortunately, while the structural features of the system only provide some limitations on judicial power, the practice of the 'judicial role' has given the system a feature that assists judges in their quest for self-restraint: the 'judicial method.'

The particular 'way' that a court goes about its work is where the differences between the courts and the political branches of government most clearly manifest themselves. As Kennedy stated, "a court must recognize that its function is not a political function; it is a judicial one. We manipulate different symbols. We apply different standards."[29] The specific elements of the judicial method, and how the Judge spoke about those elements during his confirmation hearings, will show that Kennedy sees the judicial method as being composed of elements meant to limit the power of judges. The reasons for this limitation are clear: the craft of judging is fundamentally different from ordinary politics, and its mechanisms must be constructed to achieve different goals. The judicial method is constructed to help ensure the law is consistent, its application impartial, and that a court's decisions are viewed as legitimate.

However, there are many different features of the judicial method which contribute towards these three goals. Fortunately, there are two broad 'categories' within which it is possible to group the many attributes of the judicial method. The first category, which we will term 'textualism,' includes both the approach to constitutional interpretation, as well as a broader, more general emphasis on the 'text' of the Constitution. The second category, the 'common law' approach, covers a set of

[29] S. Hrg. 100-1037, 169.

intertwined elements, such as the use of precedent, the principles of incrementalism and *stare decisis*, and the use of historical evidence in interpretation of the law. By looking at what elements Judge Kennedy emphasized during his testimony, a solid picture of his vision of judging can finally be seen.

Textualism is made up of two related attributes, but in a constitutional sense it is a constant emphasis on the text. For example, in responding to a question from Sen. Biden, Kennedy said, "the words of the Constitution must be the beginning of our inquiry."[30] In this statement, Kennedy specifically identifies that the "words of the Constitution" are the proper starting point for questions of constitutional analysis. The judicial method as Kennedy describes it must begin with the most concrete element of the case at hand: the constitutional text.

While the actual text serves as the starting point for a constitutional inquiry, other statements by the Judge help show the other elements of textualism. In responding to a question about applying the Constitution to situations unimaginable to the framers, Kennedy said,

> The framers, because they wrote a constitution, I think well understood that it was to apply to exigencies and circumstances that they could never foresee. So any theory which is predicated on the intent the framers had, what they actually thought about, is just not helpful … What I do think is that we can follow the intention of the framers in a different sense. They did do something. They made certain public acts. They wrote. They used particular words. They wanted those words to be followed.[31]

It is significant that Kennedy's answer pointed to the text as the best source for the framers' intent. For the judicial method Kennedy is describing, the words of the

[30] S. Hrg. 100-1037, 86.

[31] S. Hrg. 100-1037, 139.

document, being the knowable manifestation of the intentions of the framers, are the bedrock from which inquiry must begin. While it may only seem to be a difference of degree, it is the primacy of the *text,* as opposed to the primacy of the framers' intentions that is an important difference between Kennedy's understanding of the judicial method and the view of an originalist like Judge Bork.

Of course, text–particularly ambiguous text like many phrases in the Constitution–is not by itself an effective limitation on meaning. Sophistry is an art at which lawyers excel. However, the textualist element of the judicial method Kennedy describes does have a mechanism for cabining the acceptable range of meaning that may be given to a word. For example, early in the hearings, Kennedy admitted that the word "liberty" as it appears in the Due Process Clause is "quite expansive."[32] So, how does the judicial method create a limit on the things the word liberty might be understood to protect? Judge Kennedy gave this answer one afternoon:

> I had made an assumption but not stated it … the assumption is [judges] are [interpreting the Constitution] in order to determine if [a law] fits with the text and purpose of the Constitution. That is why we are doing it. We are not doing it because of our own subjective beliefs. We are not doing it because of our own ideas of justice. We are doing it because we think that there is a thread, a link to what the framers provided in the original document.[33]

Here, Kennedy shows that the judicial method, even as it applies to "expansive" words like liberty, has a mechanism providing content and limiting the meaning of particular words. That mechanism comes from the 'common law approach' that is the other half of the judicial method and is intertwined with the method's use of history. But, before we

[32] S. Hrg. 100-1037, 164.

[33] S. Hrg. 100-1037, 209.

examine the elements of the 'common law approach' that are integral to the judicial method, we must flesh out the remaining nuances of textualism. To this end, there are several exchanges worth examining.

Early on in the hearings, Kennedy responded to a question from Sen. Biden about un-enumerated rights, stating that,

> it may well be the better view, rather than talk in terms of un-enumerated rights to recognize that we are simply talking about whether or not liberty extends to situations not previously addressed by the courts, to protections not previously announced by the courts.[34]

Rather than discuss 'un-enumerated rights,' Kennedy re-frames Biden's question by linking it back to the constitutional text–in this example, the word "liberty" as found in the Due Process clause of the Fourteenth Amendment. Textualism as a means of interpretation will try to avoid using synonyms or neologisms where a word in the actual constitutional text will suffice. The relative paucity of language that a textualist approach favors is another way that the judicial method that Kennedy describes limits the discretion of judges. It is more difficult (although not impossible) to make a major change in the meaning of a phrase without replacing one word with another. By favoring the use of the original words, textualism makes it less likely that this 'alteration-by-substitution' will occur.

Another example of a defining characteristic of textualism comes from the written questions submitted by members of the Judiciary Committee, and answered by the Judge after his hearings. In answering a question relating to the doctrine of 'original intent,' Kennedy wrote the following:

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[34] S. Hrg. 100-1037, 87.

> I maintained that [the] specific intent of the framers, that is to say their actual thought process, is not an adequate basis for interpreting the Constitution. The framers chose their words with great care. Those words have an objective meaning that we should ascertain from the perspective of history and our constitutional experience. The words of the Constitution, their objective meaning, and the official consequence of their enactment as a constitutional rule, are the principle guides to constitutional interpretation.[35]

Again, Kennedy shows how central the actual words of the Constitution are to the judicial method. The three textual features he notes: the words themselves, their "objective meaning," and their "official consequence," show that while the method may examine the text from a variety of perspectives in order to discern meaning, the text itself remains the at the core of the method. The quote also shows that the judicial method incorporates other elements besides the text, and it is to an examination of those other elements that we now turn.

The group of features which make up the other component of the judicial method we will call the "common law" approach, since they are part of the United States' legal system as a result of its English heritage. The "common law" approach is not an articulated theoretical system, but rather a set of mutually reinforcing practices and principles that do not easily separate out into distinct categories. For the sake of organization, we will categorize Kennedy's comments during his nomination hearings, with an understanding that while the categories are somewhat arbitrary, the underlying principles of the common law system are not.

The first category we will term 'incrementalism.' By incrementalism, we refer to the common-law feature whereby legal principles and doctrines develop slowly, with a

[35] S. Hrg. 100-1037, 742–3.

doctrine arising from in a series of cases heard over time. The incrementalist approach of common law systems eschews 'whole-cloth' doctrines or theories being created within the context of a single case by one judge (or a small number of judges). Rather, incrementalism allows for the 'organic growth' of doctrines over several cases at the least, and frequently over several generations worth of judges. In this way, incrementalism both limits the power of any one judge, as well as drawing on an inter-generational 'institutional wisdom,' with doctrines being the aggregation of many small contributions by numerous judges.

While incrementalism is intertwined with the principle of *stare decisis* (the second category in use here), it is still worthwhile to examine several of Judge Kennedy's statements from the hearings to illustrate his thinking on it as a unique element of the judicial method. Take, for example, his statement to Sen. Patrick Leahy in regards to the judicial method:

> Judge Kennedy: The Constitution is not weak because we do not know the answer to a difficult problem. It is strong because we can find the answer. Now it takes time to find it, and the judicial method is slow.
>
> Sen. Leahy: It is also an evolutionary method, is it not?
>
> Judge Kennedy: It is the gradual process of inclusion and exclusion, as Mr. Justice Cardozo called it.[36]

Judge Kennedy makes quite clear his understanding of the "gradual process of inclusion and exclusion" that characterizes the judicial method applies to constitutional interpretation as well. The way that courts go about building the law is through a slow accretion of decisions. The system operates in a way that minimizes the possibility of

[36] S. Hrg. 100-1037, 166.

radical changes over short periods of time. While each case that comes before a court will be different, any substantive changes to the doctrine governing the law will be so small in a particular case that any major changes will be the result of a general consensus emerging from among the judiciary over time.

Another statement by Judge Kennedy emphasizes the cautious and restrained nature of the common-law method:

> [T]he whole judicial process … proceeds on a case-by-case basis as judges slowly and deliberately decide the facts of a particular case and hope their decision yields a general principle that may be of assistance to themselves and to later courts.[37]

Again, Kennedy's statement emphasizes the slow movement of the law, as well as revealing how incrementalism helps produce legal principles from the collective 'wisdom of the bench.' As the judicial method developed, its way of operation ensures that principles will develop in light of repeated and careful examination of the issues by different judges at different times, thus greatly limiting the power of any individual judge to affect much beyond the case immediately at bar.

The principle of *stare decisis*–Latin for "let [the decision] stand"–is the practice of applying principles derived from previous cases (the use of precedent) to make determinations in contemporary cases of a similar nature. Essentially, once a legal principle emerges, the system should 'stick to it.' Judge Kennedy discussed his views of *stare decisis* and precedent at length during the hearings, giving a detailed picture of their role as attributes of the judicial method.

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[37] S. Hrg. 100-1037, 135–6.

On the first day of his nomination hearings, Judge Kennedy made the following statement about *stare decisis*:

> *Stare decisis* ensures impartiality. That is one of its principal uses. It ensures that from case to case, from judge to judge, from age to age, the law will have a stability that the people can understand and rely upon, that judges can understand and rely upon, and that attorneys can understand and rely upon.[38]

Judge Kennedy's statement makes clear how *stare decisis* limits judicial discretion. It is a mechanism which ensures both impartiality and consistency–two qualities which are fundamental to any legal system operating under the "rule of law."

In a later exchange, Kennedy brings up additional points that further explain the role that *stare decisis* occupies as part of the judicial method. The Judge said:

> *[S]tare decisis* has an element of certainty to it … *Stare decisis* is the guarantee of impartiality. It is the basis upon which the case system proceeds, and without it we are simply going from day to day with no stability, with no contact with our past. And so *stare decisis* is very important.[39]

The Judge's comments aptly demonstrate that *stare decisis* helps provide the law with its impartiality, as well as its stability–another important character of law. Stare decisis keeps the administration of the law 'impartial' as well as grounded and connected to the historical context in which it operates, and thus points the way towards the final feature of the common law approach–the use of 'history.' History has several possible meanings in the context of our discussion, so it is necessary to provide a definition before proceeding further.

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[38] S. Hrg. 100-1037, 136.

[39] S. Hrg. 100-1037, 230.

In one sense, 'history' in a common law system may be thought of simply as the legal precedents which are still applicable law. In another sense, history may be the practices and habits of a common law system which do not have any grounding in statutory law. In a third sense, history refers to the non-legal traditions and practices of the society in which a particular legal system operates.

It is this third sense of 'history' that characterizes some of the most interesting comments by Judge Kennedy. History and tradition, as he uses it, may cover such diverse things as the "ideas of the framers"[40] to the "unwritten Constitution" of values, morals, and principles that Kennedy believes the American people share as part of their common vision.[41]

What history brings to the judicial method comes to light during an exchange between Kennedy and Sen. Charles Grassley of Iowa. In that exchange, Judge Kennedy said:

> We have a great benefit, Senator, in that we have had 200 years of history. History is not irrelevant. History teaches us that the framers had some very specific ideas. As we move further away from the framers, their ideas seem almost more pure, more clarified, more divorced from the partisan politics of their time than before. So, a study of the intentions and the purposes and the statements and the ideas of the framers, it seems to me, is a necessary starting point for any constitutional decision.[42]

The Judge's comments demonstrate that he views history as having two important functions. The first of these functions is one of clarification. History makes the framers ideas more clear, not more obscure, and thus serves the judge in his inquiry into the

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[40] S. Hrg. 100-1037, 141.

[41] S. Hrg. 100-1037, 167.

[42] S. Hrg. 100-1037, 139.

meaning of the Constitution. The second function is that history provides "a necessary starting point" for constitutional decision-making. It is a source that a judge can turn to *in* every case, and which will provide useful information *for* every case (hence why Kennedy finds a historical starting point a 'necessary' one.) His supposition that history and tradition serve both to clarify and ground judicial decision-making is an excellent demonstration of how important they are to his vision of the judicial method. Referring to the past helps constrain judicial decision-making.

However, the most important function that the use of history plays in the judicial method is something else entirely. Consider this statement:

> [T]he object of our inquiry is to use history, the case law, and our understanding of the American constitutional tradition in order to determine the intention of the document broadly expressed. One of the reasons why, in my view, the decisions of the Supreme Court of the United States have such great acceptance by the American people is because of the perception by the people that the Court is being faithful to a compact that was made 200 years ago.[43]

Kennedy's statement shows that while many of the things that he thinks are essential for achieving a 'proper' inquiry into the meaning of the Constitution are 'historical,' it is the historical link between the "declarations and language of the framers,"[44] that gives the Court's decisions *legitimacy*. A historical link to the ideas of the framers, and to the Constitution they wrote, is essential if the pronouncements of unelected, life-tenured judges are to have any claim to legitimacy in a system of republican government.

We are left with what to make of Judge Kennedy's understanding of the American constitutional system. As demonstrated, Kennedy has a particular vision of the

[43] S. Hrg. 100-1037, 86.

[44] S. Hrg. 100-1037, 148.

system as a whole, as well as a vision of the judiciary's role within that system. And, with more than a decade's worth of experience as a Circuit Court Judge, Kennedy had developed a methodology sensitive to the constraints of that system to assist him in his role as a judge. The 'judicial method,' as it has been described here, is not solely a creation of Kennedy, but he places emphasis on certain aspects of that method that other judges might not.

It is best, for the time being, to conclude from Kennedy's nomination testimony the same thing the Judiciary Committee did: that Judge Kennedy, in the words of Sen. Biden is "conservative, mainstream and fundamentally different than Judge Bork."[45] But, what would a "conservative [and] mainstream" Circuit Judge become like when he finally took his seat on the Supreme Court following a unanimous confirmation vote in the Senate?

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[45] S. Hrg. 100-1037, 226.

CHAPTER THREE

W.W.J.A.K.D?
(What Will Justice Anthony Kennedy Do?)

Anthony Kennedy was confirmed as the 104th Associate Justice of the U.S. Supreme Court on February 3rd, 1988 by a vote of 97 - 0.[1] He took his seat on the Court on February 18th, 1988.[2] With Kennedy's appointment, President Ronald Reagan had made three appointments to the Court, and the Court now had six Republican-appointed Justices. From a purely political standpoint, it appeared likely that a conservative pushback against the liberal precedents of the Warren and Burger Courts would now begin.

However, the results from Justice Kennedy's first several years on the bench would place a considerable damper on Republican hopes for an era of conservative domination of the Court. While six major substantive due process cases from 1988–1991 were conservative 'victories,' several of those victories would be hollow. The willingness of Justice Sandra Day O'Connor to issue concurring opinions frequently limited the scope of more conservative majority opinions. Additionally, Kennedy's positions in these six cases hinted that he was going to be more independent of the Rehnquist-Scalia alignment than conservatives would have preferred.

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[1] "Justice Anthony M. Kennedy," Supreme Court Historical Society, http://supremecourthistory.org/history-of-the-court/the-current-court/justice-anthony-kennedy/. Last accessed December 12, 2012.

[2] "Biographies of Current Justices of the Supreme Court," Supreme Court of the United States, http://www.supremecourt.gov/about/biographies.aspx. Last accessed December 5, 2011.

Kennedy's early years on the Court must be understood in the context of a Justice settling into a new and unique judicial role. New Justices must develop views on topics unique to their new role, so early positions may change as the Justice matures. However, Kennedy's votes in these six substantive due process cases do provide an insight into how he came to occupy such an influential position in a highly-contested area of constitutional law. These cases demonstrate that initially, Justice Kennedy followed the jurisprudential lead set out by his senior conservative colleagues (Chief Justice Rehnquist and Justice Scalia), and while he took a conservative approach to the law, his approach was not dogmatic, which allowed him room to disagree with his more conservative brethren.

The first major substantive due process case of Justice Kennedy's tenure was 1989's *Michael H. v. Gerald D.*[3] The facts of this case were unique: a married fashion model (Carole D.) began an adulterous affair with her neighbor (Michael H.) which resulted in conception. After the birth, Carole's husband (Gerald D.) moved from California to New York for business reasons, and Carole and her daughter (Victoria) moved in with Michael. Blood tests later confirmed that Michael was Victoria's biological father.[4] However, Carole and Michael's on-again-off-again relationship eventually dissolved, Carole reconciled with Gerald and moved to New York with Victoria in tow. Michael filed for visitation rights, but Gerald sought dismissal of the visitation petition, citing California Evidence Code §621, which establishes a conclusive presumption that the issue of a married woman are legally the offspring of the woman's husband. The trial court then dismissed Michael's visitation petition, citing §621 as

[3] 491 U.S. 110 (1989).

[4] 491 U.S. 110, 113–114 (1989).

depriving him of any legal claim to the fatherhood of Victoria.[5] Michael claimed that §621 violated the Due Process Clause of the Fourteenth Amendment, both on procedural and substantive grounds. The core of Michael's substantive due process claim was that the California law deprived him of his right to maintain a parental relationship with his biological daughter.[6]

The case was a 5-4 split, with conservative Antonin Scalia authoring a plurality opinion. Justice Kennedy joined Scalia's opinion, with the sole exception of one footnote, which will be discussed below. Scalia's opinion–and Kennedy's joinder–provide a baseline from which to build an understanding of how a 'conservative' Justice would deal with a substantive due process case.

The first important characteristic of Scalia's opinion is its use of 'history and tradition.' As Scalia examines Michael's claim, he engages in a thorough examination of the history of relevant laws as well as customary practice. As Scalia writes,

> [i]n an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" … but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections "so rooted in the conscience of our people to be ranked as fundamental."[7]

As Justice Scalia proceeds through his examination of the relevant laws and traditions, he notes that

> [we] have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental

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[5] 491 U.S. 110, 115 (1989).

[6] 491 U.S. 110, 116 (1989).

[7] 491 U.S. 110, 122 (1989). Internal citations omitted.

> rights over a child born into a woman's existing marriage to another man. Since it is Michael's burden to establish that such a power is so deeply embedded within our traditions as to be a fundamental right, the lack of evidence alone might defeat his case.[8]

The formulation Justice Scalia sets out here is clear. If there is no historical evidence for the asserted "fundamental right," it is unlikely that the Court will recognize a claim that is put forth with nothing more than personal preference to support it.

Scalia's emphasis on the importance of history and tradition in examining the asserted due process right should be clear. While Kennedy agrees with Scalia that historical and traditional practice should be used to help determine the existence of an asserted right, Scalia goes beyond using history and tradition as a guide. In footnote #6, Scalia asserts that

> [when evaluating due process claims] we refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is a more specific tradition, and it unqualifiedly denies protection to such a parent.[9]

The method that Scalia sets out in this footnote is unique. Scalia believes that the Court must formulate the asserted right as narrowly as possible before proceeding with the historical investigation into the right's existence. The 'most specific tradition' element of the substantive due process methodology that Scalia sets out here is an attempt to severely curtail the ability of the Court to recognize and protect unconventional un-enumerated rights.

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[8] 491 U.S. 110, 125 (1989).

[9] 491 U.S. 110, 127 n.6 (1989).

Scalia's due process methodology–which prompted him to see if there was a 'specific tradition' of "States in fact award[ing] substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child"[10]–caused Justices O'Connor and Kennedy to decline to fully endorse his method. In a short concurrence, O'Connor, writing for both herself and Kennedy, claimed that Scalia's method "may be somewhat inconsistent with our past decisions in this area," and that she would not "foreclose the unanticipated by the prior imposition of a single mode of historical analysis."[11] Essentially, adopting a due process methodology that incorporated the 'most specific tradition' element was too limiting for Justice O'Connor–it would improperly limit judicial independence.

So what can be inferred about Kennedy's understanding of substantive due process from the decision in *Michael H.?* First, Kennedy agrees with Scalia about the application of a historical methodology to substantive due process claims. Even in O'Connor's concurrence, there is no indication that Kennedy *does not* agree with the use of 'history and tradition' as the basis for due process inquiries. As later opinions will show, Kennedy himself will follow Scalia's lead and use history and tradition as part of a due process methodology. Secondly, Kennedy's joinder of O'Connor's concurrence does highlight an important difference between his and Scalia's views on substantive due process methodology. Kennedy, like O'Connor, had some concerns about limiting the methodological scope of due process inquiry, a position that is consistent with the emphasis Kennedy placed on judicial independence in his nomination hearings.

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[10] 491 U.S. 110, 127 (1989).

[11] 491 U.S. 110, 132 (1989).

However, *Michael H*. was only the first substantive due process case Kennedy encountered in his first term. The next significant case, *DeShaney v. Winnebago County*,[12] provides additional evidence about Kennedy's views on substantive due process during his early years on the Court.

DeShaney v. Winnebago County is one of the most tragic to come before the Court in recent memory. The case involved Joshua DeShaney, who, following his parents' divorce in 1980, was placed into the custody of his father, who physically abused the boy over the next several years.[13] The local authorities in Winnebago County, Wisconsin, opened an investigation into the abuse, but never acted to remove Joshua from his father's custody. Following a particularly severe beating in 1984, Joshua fell into a coma resulting from brain hemorrhages caused by the beatings. Emergency surgery saved his life, but the cumulative effect of the beatings and hemorrhages left Joshua with severe brain damage, and likely to spend the rest of his life in an institution.[14]

The failure of the Winnebago County DSS to remove Joshua from his father's custody–despite considerable evidence that he was being abused–led to a §1983 lawsuit being filed by Joshua's mother (on her son's behalf) against the County. The core of the suit was that the DSS "had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect

[12] 489 U.S. 189 (1989).

[13] 489 U.S. 189, 191–192 (1989).

[14] 489 U.S. 189, 193 (1989).

him against a risk of violence at his father's hands of which they knew or should have known."[15]

In the majority opinion by Chief Justice Rehnquist (which Justice Kennedy joined in full), the Court rejected the DeShaney's substantive due process claim. The Court's opinion is important in constitutional law because it categorically rejected the proposition that the Due Process Clause of the Fourteenth Amendment "requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[16]

One of the core elements of the DeShaney's due process argument is a claim that the Constitution creates what are known as 'positive rights,' which are obligations that the state act to provide its citizens *with* something, as opposed to 'negative rights,' which are restrictions on the scope of state power. With the majority opinion in *DeShaney*, Kennedy accepts (without reservation) the Court's categorical denial of the existence of 'positive' substantive due process rights. Since joining O'Connor's short concurrence in *Michael H.* had already shown his willingness to limit the scope of controlling opinions, his failure to do so here amounts to an endorsement of Chief Justice Rehnquist's position. When this case is considered alongside his joinder of Scalia's opinion in *Michael H*., it suggests that Kennedy is hesitant–as it would seem logical a 'conservative' would be–to recognize or constitutionalize 'new' un-enumerated substantive due process rights.

The next major substantive due process case–*Webster v. Reproductive Health Services*[17]–was the most politically significant case of Kennedy's early years on the

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[15] 489 U.S. 189, 193 (1989).

[16] 489 U.S. 189, 195 (1989).

[17] 492 U.S. 490 (1989).

Court. *Webster* is also the most significant of the early cases in terms of Kennedy's substantive due process jurisprudence as well. The *Webster* case holds these two distinctions because of what it *almost* did in terms of constitutional law–it was nearly the end of *Roe v. Wade*.[18]

The law at issue in *Webster* was a Missouri statute which sought to place additional restrictions on abortion. Several of its specific provisions were challenged. Among those challenged provisions was the preamble of the law, which stated that "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and wellbeing."[19] Another provision of the law "prohibit[ed] the use of public employees and facilities to perform or assist abortions not necessary to save the mother's life," as well as prohibiting "the use of public funds, employees, or facilities for the purpose of 'encouraging or counseling' a woman to have an abortion not necessary to save her life."[20] The core of the law–and the most controversial provision–provided that:

> [b]efore a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn

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[18] 410 U.S. 113 (1973).

[19] 492 U.S. 490, 501 (1989) quoting Mo. Rev. Stat. §§ 1.205.1(1), (2) (1986).

[20] 492 U.S. 490, 501 (1989) quoting Mo. Rev. Stat. §§ 188.205, 188.210, 188.215 (1986).

> child and shall enter such findings and determination of viability in the medical record of the mother.[21]

The law was challenged by five employees of the State of Missouri, as well as Planned Parenthood of Kansas City, and the named plaintiff Reproductive Health Services.[22] Edward Lazarus, a law clerk for Justice Blackmun during the term *Webster* was heard, describes the situation as follows:

> In the sixteen years since *Roe*, the decision … had come to be a case about women's autonomy and equality, and properly so. Second, given the settled expectations of millions of women–and the prospect of turning them into potential criminals–the principle of *stare decisis* weighed heavily in favor of retaining *Roe* … And, third, from where I sat, reading the tea leaves about O'Connor and Kennedy, there appeared to be every chance that the Court would overrule *Roe*.[23]

While Lazarus was correct about the factors weighing on the Court's decision in *Webster*, he was not correct about the eventual outcome. *Roe* survived, but only just. In a plurality opinion by Chief Justice Rehnquist (which was joined in full by Justice Kennedy), the Court upheld all of the challenged provisions of the Missouri act. Rehnquist's opinion is full of language that was carefully chosen to do as much damage as possible to the stability of the Court's decision in *Roe v. Wade*. Many of the rhetorical tactics that Rehnquist used in his opinion will be employed by Justice Kennedy in later cases with great effect.

First, consider Rehnquist's discussion of the rights which the plaintiffs assert are violated by the law. He writes,

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[21] 492 U.S. 490, 513 (1989) quoting Mo. Rev. Stat. § 188.029 (1986).

[22] 492 U.S. 490, 502 (1989).

[23] Lazarus, *Closed Chambers*, 395–396.

> Plaintiffs, appellees in this Court, sought declaratory and injunctive relief on the ground that certain statutory provisions violated the First, Fourth, Ninth, and Fourteenth Amendments to the Federal Constitution. They asserted violations of various rights, including the "*privacy rights of pregnant women seeking abortions*"; the "*woman's right to an abortion*"; the "*righ[t] to privacy in the physician-patient relationship*"; the physician's "*righ[t] to practice medicine*"; the pregnant woman's "*right to life due to inherent risks involved in childbirth*"; and the woman's right to "*receive . . . adequate medical advice and treatment*" concerning abortions.[24]

While Rehnquist did not choose how the plaintiffs phrased the rights they were claiming, the language the plaintiffs used does tell us something about how Rehnquist–and Kennedy–view substantive due process rights. The plaintiff's claims were phrased in the 'language of *Roe*'–as a group of un-enumerated rights, many related to or subsidiaries of the "right to privacy" first identified in the *Griswold-Roe* line of cases. This choice–and the wholesale rejection of the claims to those asserted rights by Rehnquist and Kennedy–is significant for two reasons.

The first reason is that *Webster* represents a rejection by Rehnquist and Kennedy of a whole set of 'un-enumerated privacy rights'–such as the "right to an abortion." Particularly for Justice Kennedy, if he did believe that there was a "right to an abortion" protected by the Due Process Clause, joining Rehnquist's opinion would have been an impossibility, made even less likely because of the potential to join the concurring opinion of Justice O'Connor, which does not categorically reject the plaintiff's claims like Rehnquist's opinion does.

The second reason is that the rejection of a set of 'un-enumerated privacy rights' helps establish a pattern in Justice Kennedy's substantive due process jurisprudence. In

[24] 492 U.S. 490, 501–502 (1989). Italics added for emphasis.

each of the first three major substantive due process cases of his tenure–*Michael H.*, *DeShaney*, and *Webster*–Kennedy has refused to recognize a new 'un-enumerated right' of *any* variety, whether related directly to the *Roe-Griswold* "right to privacy" or not. While this point will be developed more fully in later chapters, the importance of Kennedy's refusal to recognize any new 'un-enumerated rights' cannot be overemphasized.[25]

Another aspect of Rehnquist's opinion–and another tactic that Kennedy will adopt in his own later work–is the careful use of citations. For most engaged in an academic career, it is understood that the most 'important' works in a particular area will also be among the most cited in other works. A theoretical example from the discipline of Political Science would be that no scholar would write a work about twentieth century elections without discussing works by V.O. Key. The same principle applies in the legal world, but in *Webster* Rehnquist used that principle in an unusual fashion.

While discussing the portion of the Missouri law which prohibited public employees from participating in an abortion, Rehnquist quotes the following passage from *DeShaney*:

> [O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.[26]

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[25] It is also worth noting that the Court of Appeals for the Eight Circuit did explicitly recognize a "right to abortion," as Rehnquist notes on 492 U.S. 503. If anything, the action by the Eight Circuit makes Justice Kennedy's joinder in this case more supportive of the pattern of non-recognition of un-enumerated rights, since by joining Rehnquist's opinion, Kennedy was not only rejecting the claims of the plaintiffs, but also the decision and judgment of the Circuit Court Judges.

[26] 492 U.S. 490, 507 (1989), quoting 489 U.S. 189, 196 (1989).

Since *DeShaney* was a contested decision–it was a case where Rehnquist and Justice Brennan 'fought it out' over their competing visions of the Due Process Clause–Rehnquist is using *DeShaney* to support his argument in *Webster*, while at the same time conferring a retrospective legitimacy on the decision in *DeShaney* by citing it. The reason that this 'retroactive legitimacy' tactic works is because the more often a case is cited in subsequent Court opinions, the greater the weight of *stare decisis* that must be overcome to overturn it, since overruling a case undermines the stability of later decisions where it was cited. Additionally, the citation to *DeShaney* is another blow against the claim that the Due Process Clause creates any 'positive' rights–which, in *Webster,* was a claim to a right to have an abortion at a public hospital.

Shortly after the citation to *DeShaney*, Rehnquist employs another tactic that will be adopted and put to great use by Justice Kennedy. That tactic is to attach a particular level of 'scrutiny' to an area of law in an indirect or roundabout manner. The authoring Justice may be concerned that they will lose support for their opinion on the Court if they overtly change the level of scrutiny, so they may try to 'slip one past' their colleagues. The reason why Rehnquist does this in *Webster* is complex, and will be fully discussed later. For now, it is only important to identify and demonstrate the tactic.

In discussing the 1980 case *Harris v. McRae*,[27] Rehnquist notes that the Court upheld a legislatively-imposed ban on Federal Medicaid monies funding abortions. He writes:

> As in *Maher* and *Poelker*, the Court required only a showing that Congress' authorization of 'reimbursement for medically necessary

[27] 448 U.S. 297 (1980).

> services generally, but not for certain medically necessary abortions' was rationally related to the legitimate governmental goal of encouraging childbirth.[28]

The language Rehnquist quotes is the familiar formula for the lowest level of judicial scrutiny–the rational basis test. While Rehnquist is using this particular quote to justify upholding a provision of the Missouri statute, consider his choice of language in a larger, more strategic context. If the rational basis test becomes the 'established' test for evaluating abortion regulations relating to public facilities and employees, it becomes easier to expand the use of the rational basis test to other closely-related areas of law.

Since law proceeds by analogy, it should be obvious why a Justice would want to attach their preferred judicial standard to an aspect of related law. For Rehnquist, attaching the rational basis test to any area of abortion law is in line with his longstanding commitment to overturn *Roe*.

There is another subtle linguistic shift later in the opinion that also furthered the Chief Justice's assault on the principles underlying *Roe*. When discussing the requirement in the law that physicians perform viability tests on any woman who may be carrying a fetus older than 20 weeks, Rehnquist wrote: "[t]he viability testing provision of the Missouri Act is concerned with promoting the State's interest in *potential human life*, rather than in maternal health."[29] Compare Rehnquist's language with the language of the opinion of the Court in *Roe*, which Rehnquist quotes slightly later in his own opinion: "In *Roe v. Wade*, the Court recognized that the State has "important and

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[28] 492 U.S. 490, 508–9 (1989), quoting 448 U.S. 325 (1980).

[29] 492 U.S. 490, 515 (1989). Emphasis added.

legitimate" interests in protecting maternal health and in *the potentiality of human life.*"[30] While the difference in language may seem minor, simply reaffirming *Roe* would require no need to change the language related to human life. However, the Chief Justice changed the language precisely because he wanted to alter the underlying legal principle.

In *Roe*, it is apparent that the State's interest in the "potentiality of human life" is linked to the State interest in maternal health. By asserting that the State has an interest in "potential human life," Rehnquist is giving the State an interest in regulating abortion that is not linked to or dependent on an interest in maternal health. By giving the State an independent ground for regulating abortion, Rehnquist is directly undermining the logic of the Court's holding in *Roe*.

Another aspect of the Chief Justice's *Webster* opinion that impacts Justice Kennedy's later abortion jurisprudence is the assault on the "trimester scheme" of *Roe*. When discussing–and then dismissing–potential challenges to the provisions of the Missouri law (on the issue of whether the requirement that the physician administer certain tests to ascertain viability, and the subsequent increase in the cost of the procedure), Rehnquist states:

> We think that the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in *Roe* has resulted in subsequent cases like *Colautti* and *Akron* making constitutional law in this area a virtual Procrustean bed … *Stare decisis* is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in

[30] 492 U.S. 490, 516 (1989), quoting 410 U.S. 162 (1973). Emphasis added.

> principle and unworkable in practice.' We think the *Roe* trimester framework falls into that category.[31]

Rehnquist's assault on the trimester scheme is additional evidence that the Chief Justice was willing to attack *Roe* to the greatest extent possible given the legal questions presented in *Webster*.[32] While the Chief Justice does not gather enough support to directly invalidate the trimester scheme in his opinion, his failure to end the trimester scheme in *Webster* gives Justice Kennedy's actions in *Planned Parenthood v. Casey*[33] a greater significance. However, for our purposes here, we need only note that Rehnquist attacked the trimester scheme in the harshest terms possible, and was prepared to eliminate it from constitutional jurisprudence in 1989.

The final significant element in Chief Justice Rehnquist's opinion in *Webster* is closely related to the trimester scheme; it is the issue surrounding the so-called 'point of viability.' The point of viability first became an element of abortion law in *Roe*, when the Court's opinion described it as "the interim point at which the fetus … is potentially able to live outside the mother's womb, albeit with artificial aid."[34] The *Roe* Court held that, "[i]f the State is interested in protecting fetal life after viability, it may go so far as to

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[31] 492 U.S. 490, 517–8 (1989). Internal citations omitted.

[32] Lazarus argues that Kennedy pressured Rehnquist to avoid confronting the holding of *Roe* directly. However, as Rehnquist points out later in his opinion, the facts of the case did not allow the Court to properly review the holding in *Roe* without going beyond the permissible limits of Court power. Rehnquist is aware that the issues in *Webster* do have an impact on the holding in *Roe*, but he is also aware that a direct overruling of *Roe* in *Webster* would be impossible (as well as imprudent), and chooses rather to undermine the integrity of *Roe* as much as possible.

[33] 505 U.S. 833 (1992).

[34] 410 U.S. 113, 160 (1973).

proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."[35]

Essentially, the Court's holding in *Roe* was that the point of viability marked the point at which the State could constitutionally ban the procedure. Rehnquist uses the *Roe* Court's decision about the point of viability as his last target in his attack on *Roe* in his *Webster* opinion.

The Chief Justice writes:

> [i]n the second place, we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability. The dissenters in *Thornburgh* … would have recognized this fact by positing against the "fundamental right" recognized in *Roe* the State's "compelling interest" in protecting potential human life throughout pregnancy. "[T]he State's interest, if compelling after viability, is equally compelling before viability." *Thornburgh*, 476 U.S. at 795 … "[a] State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist *throughout pregnancy*."[36]

The language used by the Chief Justice was chosen to assert that the point of viability is an arbitrary point at which to assert that the State's interest in potential human life overcomes the woman's rights. With his citations to the dissents from *Thornburgh v. ACOG*,[37] the Chief Justice emphasizes that the Court's choice in *Roe* was not the necessary result of logical reasoning, but rather an arbitrary choice supported by a majority of the Court. Since the Court is supposed to have principled reasons for its

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[35] 410 U.S. 113, 163–4 (1973).

[36] 492 U.S. 490, 519 (1989) quoting 476 U.S 795 and 476 U.S. 828 (1983). Some internal citations omitted.

[37] 476 U.S. 747 (1986).

decisions other than the 'majority rule' of five lawyers, accusations of arbitrary decision-making are a serious charge. Rehnquist's comments on the point of viability are an attack on the integrity of the Court and the decision in *Roe*.

There is one final issue surrounding the Chief Justice's opinion in *Webster* that needs to be examined. Edward Lazarus, author of *Closed Chambers*, served as a law clerk to Justice Harry Blackmun during the 1988–89 term. In his book, Lazarus asserts that it appeared that Rehnquist had enough votes to overrule *Roe* at the initial conference on *Webster*, but that subsequent decisions by both Justice O'Connor and Justice Kennedy denied Rehnquist the support necessary to explicitly overrule *Roe*.[38] Lazarus' unique position as a clerk during *Webster* makes his claim worth investigating; additionally, a thorough investigation of Lazarus' claims will end up supporting a different conclusion about the role Justice Kennedy played in the *Webster* decision.

The version of events given by Lazarus is that following the oral arguments in *Webster*, the Justices met in their weekly conference where cases are discussed. During that conference, both Kennedy and Scalia voted to explicitly overturn *Roe v. Wade*, with Kennedy going so far as to call *Roe* a "contemporary *Dred Scott.*"[39] However, Lazarus claims that while Kennedy was prepared to sign on to Rehnquist's first draft opinion, one of Kennedy's clerks–Harry Litman–argued against doing so. Litman claimed that the Chief Justice's opinion amounted to a *sub silentio* overruling of *Roe*, because of its use of 'rational basis test' language. He argued that if the Court was going to overturn *Roe*, it should do so explicitly and with a thorough explanation of its reasons for doing so.

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[38] Lazarus, *Closed Chambers*, 399–400; 405–407.

[39] Lazarus, *Closed Chambers*, 399–400.

Litman's argument swayed Justice Kennedy, who responded to the Chief Justice with a memo saying that since the draft opinion was not directly overruling *Roe*, Kennedy "preferred" changing the "reasonableness" reference to the State's interest in fetal life to language stating that the law "permissibly furthers" the State's interest.[40] Lazarus conclusion about this episode is that Kennedy acted to limit the power of the Court's conservative wing.[41]

However, Lazarus later discloses that Kennedy attempted to write a concurring opinion in *Webster*. While Kennedy never finished his concurrence, Lazarus claims that the concurrence was Kennedy's attempt to reconcile the Court's other substantive due process cases such as *Griswold v. Connecticut*[42] (and that case's 'expanded' view of rights protection) with the necessity of overruling *Roe*.[43] Given that by that point in the term, O'Connor had already made clear that she would not consent to an opinion which overturned *Roe* (her claim was that there was no need to re-consider *Roe* given the facts in *Webster*[44]), Lazarus' claims do not satisfactorily explain why Kennedy would have even attempted to draft such a concurrence.

So what was happening with the opinions in *Webster*? A close reading of the final three pages of Rehnquist's opinion in the case shows that Lazarus' portrayal of Kennedy

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[40] Lazarus, *Closed Chambers*, 406–407. The specific passage with which Kennedy was concerned is on 492 U.S. 419. The sentence, following Kennedy's suggested emendation, reads "But we are satisfied that the requirement of these tests permissibly furthers the State's interest in protecting potential human life, and we therefore believe §188.029 to be constitutional."

[41] Lazarus, *Closed Chambers*, 407.

[42] 381 U.S. 479 (1965).

[43] Lazarus, *Closed Chambers*, 417.

[44] Lazarus, *Closed Chambers*, 405.

as moderating the opinion in *Webster* is in error. Furthermore, Kennedy's actions in *Webster* provide a framework for re-interpreting his decision in *Planned Parenthood v. Casey* which will demonstrate that *Casey* is properly understood as a conservative decision that considerably undermined *Roe* while creating an opportunity for an overruling in the future.

On the first point of Kennedy's supposed 'moderation' of the Chief Justice's opinion in *Webster*, one need only consider a passage in Rehnquist's opinion that follows the paragraph where Justice Kennedy requested the 'reasonably-to-permissibly' change:

> The experience of the Court in applying *Roe v. Wade* in later cases suggests to us that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a "fundamental right" to abortion, as the Court described it in *Akron*, a "limited fundamental constitutional right," which JUSTICE BLACKMUN today treats *Roe* as having established, or a liberty interest protected by the Due Process Clause, which we believe it to be. The Missouri testing requirement here is *reasonably designed* to ensure that abortions are not performed where the fetus is viable–an end which all concede is legitimate–and that is sufficient to sustain its constitutionality.[45]

This passage accomplished a great deal. First, while it denies that it "attempts to elaborate … differences" between different 'kinds' of rights (and thus the different levels of scrutiny that the Court would use to protect those rights), the passage does exactly that. It openly admits that at least three Justices (Rehnquist, Kennedy and White) see abortion as a "liberty interest" which, as the Court's ruling in *Michael H*. held, is only entitled to the rational basis test when challenging legislative interferences with the asserted interest.

Secondly, the passage also clearly holds that the testing requirement is "reasonably designed" to prevent post-viability abortions. This is another example of

[45] 492 U.S. 490, 520 (1989). Emphasis added, internal citations omitted.

Rehnquist attaching the language of his preferred 'test' to a particular area of law in any way possible. Simply inserting the word 'reasonably' into an opinion in the context of a case on abortion, Rehnquist places a line in the U.S. Reports that he knew could someday be used as evidence to support a full-on return to the pre-*Roe* application of the rational basis test to *all* abortion regulations.

So, why then does Kennedy ask Rehnquist to change the language from "reasonably" to "permissibly" in the earlier passage, while leaving intact the later passage, which is just as damaging to the precedent of *Roe*? One possibility is that Kennedy and Litman simply missed the importance of the latter passage, but given the high profile of the case, and Kennedy and Litman's own intellectual gifts, such a mistake is unlikely. Kennedy, at least, must have been comfortable with the Chief Justice's language in the later passage, since he allowed it to stand untouched. However, two other Justices (Blackmun and Scalia) state quite explicitly in their own opinions[46] that the language in Part II-D of the Chief's opinion would overrule *Roe v. Wade*. Given Kennedy's statement in the *Webster* conference that *Roe* should be overruled, why did he insist on one change in Part II-D, supposedly to prevent a *sub silentio* overruling of *Roe*, while leaving another passage that was damaging to *Roe* intact?

The answer lies in Kennedy's attachment to the judicial method outlined in the previous chapter. When it became apparent that Rehnquist did not have five solid votes to overrule *Roe* in *Webster*, Kennedy pursued a more judicially appropriate way of overturning *Roe*: by establishing a series of cases which would chip away slowly at the reasoning and precedential value of *Roe*, eventually the case would be overturned, or at

[46] 492 U.S. 490, 555 (Blackmun), 532 (Scalia).

least rendered so hollow as to be all but overturned. Additionally, the undermining of *Roe* through a series of cases–a tactic compatible with the common law system–had a decided political advantage.

One frequent criticism of many of the Warren and Burger Courts most controversial decisions was that they were examples of "results-based" judging.[47] The Court, critics contended, had abandoned longstanding precedent in many of its more famous decisions (*Brown v. Board*,[48] *Mapp v. Ohio,*[49] *Miranda v. Arizona,*[50] and *Gideon v. Wainwright,*[51] among others), and was applying the political preferences of a majority of the Justices, rather than neutral legal principles. In most of these cases, the abandonment of past precedent was immediate–there was little to no indication in any of the Court's prior jurisprudence of what it was about to do.[52] *Roe v. Wade* was another case where the Court engaged in a sudden break from past practice, both in the result (the legalization of abortion, which as then-Justice Rehnquist pointed out, had been regulated

[47] Starr, *First Among Equals*, 124–125.

[48] 347 U.S. 483 (1954).

[49] 367 U.S. 643 (1961).

[50] 384 U.S. 436 (1966).

[51] 372 U.S. 335 (1963).

[52] *Brown* and *Miranda* are somewhat exceptions in this respect. There were two significant race cases between *Plessy v. Ferguson* and that case's eventual overruling in *Brown*. Likewise, *Miranda* had been preceded by a case (*Escobedo v. Illinois*) that in some ways had primed the Court, albeit slightly, for the legal change it wrought in *Miranda*.

by states for well over 100 years), and in the Court's adoption of a 'right to privacy' based on the legal theory of substantive due process.[53]

By avoiding a sudden break with 'past practice' and *not* overturning *Roe* in *Webster*, *Roe's* opponents on the Court fortuitously avoided making themselves subject to the same criticism which their ideological allies had leveled against the Warren and Burger Courts' most liberal decisions. Whether Kennedy realized this at the time of *Webster* is unknown, but his attachment to the incrementalist, common-law system, as well as his post-*Webster* jurisprudence, will show that avoiding the "results-based" judging critique has become a factor in his substantive due process case law.

The conclusions about Kennedy that can be drawn from *Webster* are, when considered in the light of *Michael H.* and *DeShaney*, unsurprising. Kennedy behaved in a way that no one who agreed with Sen. Biden's characterization of Kennedy as a "mainstream conservative" would have found alarming. Kennedy essentially followed the lead set out by Scalia and Rehnquist, voting with the conservative bloc of the Court in all three major decisions discussed here. Kennedy clearly appeared to be a choice of which President Reagan could be proud.

Shortly after the 1989 decision in *Webster*, the Court had another opportunity to revisit the abortion issue, although in a slightly different context. That case, *Ohio v. Akron Center for Reproductive Health*,[54] also provides us with our first written opinion

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[53] As a series of cases, from 1937's *West Coast Hotel v. Parrish* onwards had supposedly made clear, substantive due process was supposedly a dead letter in constitutional law by 1965. However, despite the Court's abandonment of the theory in the 1930's, substantive due process famously made its re-emergence in Justice William O. Douglas' opinion in *Griswold v. Connecticut*, and had been used again in Justice Brennan's majority opinion in *Eisenstadt v. Baird.*

[54] 497 U.S. 502 (1990).

by Justice Kennedy on a topic of law related to substantive due process. The law at issue in *Ohio v. Akron Center for Reproductive Health* was a parental notification statute–it prohibited any physician from performing an abortion on an un-emancipated minor female without first attempting to notify one of her parents. If the minor did not want to notify her parents, the law allowed for a court to grant permission, with provisions in the law for expedited review by the Ohio court system.

Justice Kennedy's opinion upheld the law in its entirety, and his opinion in *Ohio* has many elements that will become characteristic conservative markers of his jurisprudence as a whole. For example, early on in the opinion, Kennedy makes an effort to avoid challenging earlier (but related) precedents in his ruling, a practice in line with the principle of judicial restraint and the doctrine of constitutional avoidance. Kennedy writes:

> We have decided five cases addressing the constitutionality of parental notice or parental consent statutes in the abortion context … We do not need to determine whether a statute that does not accord with these cases would violate the Constitution, for we conclude that [the Ohio law] is consistent with them.[55]

Kennedy makes several more statements about what the Court is not doing in following paragraphs:

> Although our cases have required bypass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures … We leave the question open, because, whether or not the Fourteenth Amendment requires notice statutes to contain bypass procedures, [the Ohio law]'s bypass procedure meets requirements identified for parental consent statutes in *Danforth*, *Bellotti*, *Ashcroft*, and *Akron*.[56]

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[55] 497 U.S. 502, 510 (1990).

[56] 497 U.S. 502, 510 (1990).

By essentially 'narrowing' the scope of his ruling, and leaving open the question of whether the Constitution *requires* bypass provisions in parental consent statutes, Kennedy shows a judicial conservatism that is consistent with a limited judicial role, as well as being compatible with the practice of *stare decisis*, in that he does not seek to use this case to reach a question that might cut back or even overrule one of the earlier, related precedents.

A later passage in the opinion which demonstrates how Kennedy's judicial method can yield conservative political results is his rejection of a 'theoretical' challenge to the law. A requirement that minors seeking judicial bypass disclose their full names on court pleading forms was challenged on privacy grounds. In response, Kennedy wrote:

> We refuse to base a decision on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosures by state employees. [The Ohio law], like many sophisticated judicial procedures, requires participants to provide identifying information for administrative purposes, not for public disclosure.[57]

Kennedy's unwillingness to invalidate the law based on a 'theoretical' situation has an established pedigree in common law, as well as a basis in the "case or controversy" requirement of Article III of the U.S. Constitution. While this practice of judicial self-restraint can–and has been–ignored by the Court, in this case its practice shows how a conservative judicial method can lead to a conservative political result.

Another example of Kennedy applying a judicial method which achieves a conservative political result comes when he deals with a facial challenge to the judicial

[57] 497 U.S. 502, 513 (1990).

bypass procedure. The Akron Center had asserted that even with the law's provisions for accelerated judicial decision-making on bypass petitions for minors, the law itself was facially unconstitutional. In rejecting the respondent's claim, Kennedy holds that

> In addition, because appellees are making a facial challenge to a statute, they must show that "no set of circumstances exists under which the Act would be valid." The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur.[58]

By refusing to grant a facial invalidation unless there is "no set of circumstances under which the Act would be valid," Kennedy again employs another rule grounded in the doctrine of judicial restraint to achieve a conservative political result in upholding the law. But, both the most recent example and the earlier examples of 'narrowing' his ruling and rejecting 'theoretical' challenges to the law have a greater effect than merely upholding the law at hand.

The larger pattern that these practices establish is that Kennedy actually practices the judicial method he described during his nomination hearings. While applying these devices is itself an act of restraint, using this method in a substantive due process case is analogous to Rehnquist's attachment of 'reasonableness' language to the Missouri statute under challenge in *Webster*. By using a restrained judicial method in an abortion case, Kennedy makes it more difficult for Justices in future abortion cases to diverge from the method he used, since any who did so would have to justify their departure from the established method to their peers out of respect for *stare decisis.*

[58] 497 U.S. 502, 514 (1990). Internal citations omitted.

Later in the opinion, Kennedy continues to use the same tactics that Rehnquist employed in *Webster*. For example, Kennedy identifies the asserted 'right' at stake as a "liberty interest," writing:

> Second, appellees ask us to rule that a bypass procedure cannot require a minor to prove maturity or best interests by a standard of clear and convincing evidence. They maintain that, when a State seeks to deprive an individual of liberty interests, it must take upon itself the risk of error … This contention [by appellees] lacks merit.[59]

As discussed above when dealing with *Michael H.* and *Webster*, the use of the phrase "liberty interest" in due process cases equates to evaluating infringements on the law under the rational basis standard, and that is indeed what Justice Kennedy does. The purpose of the tactic should be clear to readers at this point–it is another example of a Justice attempting to alter the course of the law (in this case, to limit the 'right to abortion') by the way he identifies the right at issue.

The final part of the opinion, Section V, was only joined by three other Justices, with Justices O'Connor and Stevens failing to join this critical last section (O'Connor and Stevens otherwise joined Kennedy's opinion). Reading the section makes it quite clear why O'Connor and Stevens rejected this section: it contains an evaluation of the law phrased entirely in the language of the rational basis test. Kennedy writes:

> We believe, in addition, that the legislature acted in a rational manner in enacting H.B. 319 … It is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature. The statute in issue here is a rational way to further those ends. It would deny all dignity to the family to say that the State cannot take this reasonable step in regulating its health professions to ensure that, in most cases, a young woman will receive guidance and understanding from a parent.[60]

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[59] 497 U.S. 502, 515 (1990). Internal citations omitted.

[60] 497 U.S. 502, 520 (1990).

Kennedy's use of the language of rational basis so many times in the space of a short paragraph was far more flagrant than Chief Justice Rehnquist's use in *Webster*–so it is unsurprising that neither Justice Stevens nor Justice O'Connor joined Section V of the opinion. Had Section V garnered a majority, it would have done considerable damage to the integrity of *Roe*, if not overruling it entirely.

Overall, Justice Kennedy's opinion in *Ohio v. Akron Center* bears many similarities to other 'conservative' substantive due process opinions, particularly Chief Justice Rehnquist's opinion in *Webster v. Reproductive Health Services*. Employing similar rhetorical tactics, *Ohio* is solid evidence that Justice Kennedy was an ardent opponent of abortion during his early years on the Court, and that he fully supported the conservative attempt to limit the judicial adventures in legislating from the bench that had become a common feature of substantive due process law since 1965.

The last major substantive due process case of Kennedy's early years on the Court is another one as tragic as *DeShaney*. Nancy Cruzan, a 23 year-old Missouri woman, suffered severe brain damage as a result of an automobile accident. Physicians determined that she was in a "persistent vegetative state" with no hope of recovery. Accordingly, her parents sought to have life-sustaining food and hydration withdrawn. However, the state hospital where Cruzan was cared for refused to end life-sustaining treatments without a court order. A state trial court ordered an end to the hydration and

nutrition, finding that Cruzan had a "fundamental right … to direct … the withdrawal of death prolonging procedures" under both the State and Federal Constitutions.[61]

The Missouri Supreme Court reversed, holding that the Missouri Constitution did not protect a "broad right to privacy that would support an unrestricted right to refuse treatment." The State Supreme Court also held that the State Living Will statute established a policy of "strongly favoring the preservation of life," and that the evidence presented at trial suggesting that Cruzan would have wanted treatment withdrawn did not meet the correct legal standard of "clear and convincing evidence."[62]

Cruzan v. Director, Missouri Department of Health[63] was, as Chief Justice Rehnquist wrote for the Court, "the first case in which we have been squarely presented with the issue of whether the United States Constitution grants what in common parlance referred to as a 'right to die.'"[64] The case is part of substantive due process law because Cruzan's claim was based on the "right to privacy" derived from *Griswold* and *Roe*.

Chief Justice Rehnquist's opinion engages in the same tactics that have been discussed in the context of prior cases covered in this chapter–tactics such as limiting the scope of the inquiry,[65] the use of "liberty interest" language to categorize the right at

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[61] 497 U.S. 261 (1990). While both *Ohio v. Akron* and *Cruzan* were handed down on the last day of the 1990 term (June 25th), *Ohio* was actually argued in November of 1989, while *Cruzan* was argued in December. I have decided to cover the cases in order of argument before the Court.

[62] 497 U.S. 261, 265 (1990).

[63] 497 U.S. 261 (1990).

[64] 497 U.S. 261, 277 (1990).

[65] 497 U.S. 261, 277 (1990).

issue,[66] and citations to other cases which used a limited substantive due process methodology or which reached a desired result.[67] The use of these tactics holds the same significance for Kennedy's substantive due process jurisprudence as they did in earlier cases. However, there is one unique item in the Chief's opinion worth closer examination.

That unique element in the Chief Justice's opinion comes rather late in the opinion, when Rehnquist writes,

> Finally, we think a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual. In our view, Missouri has permissibly sought to advance these interests through the adoption of a "clear and convincing" standard of proof to govern such proceedings.[68]

The critical part of the passage is the assertion by the Chief Justice that a State has an "unqualified interest in the preservation of human life." To assert that a State has an "unqualified" interest–an interest that is subject to no limitations–would be a bold claim in any area of law, but in this case, that claim must be read within the greater context of the national dispute over abortion.

Rehnquist understands that if the Court announces that a state has an unqualified interest in human life, it is only a single logical step away from overturning *Roe.* That necessary element of *Roe*-destroying logic can be found in the Chief's opinion in

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[66] 497 U.S. 261, 277 - 278 (1990).

[67] 497 U.S. 261, 281 (1990), citing 497 U.S. 515, 516 (1990).

[68] 497 U.S. 261, 282 (1990).

Webster,[69] as well as Justice Kennedy's opinion in *Ohio*.[70] In both cases, the Justices use the phrase "potential human life," as opposed to the more ambiguous phrasing Justice Blackmun used in *Roe*–the "potentiality of human life."[71]

The logic is this: if the state has an unqualified interest in protecting human life, then there cannot be many qualifications on the State's interest in protecting "potential human life."[72] Combine that with the fact that the Chief's opinion in *Cruzan* goes on to find that Missouri's implementation of an enhanced evidentiary standard, and you have the foundations for a legal argument that would certainly allow for State regulations to chip away at *Roe*, if not cancel it out entirely.

Justice Kennedy's early years on the Supreme Court were eventful ones in the area of substantive due process law, and they were partly so because of his willingness to sign on to the approach of Rehnquist and Scalia. With the sole aberration being his joinder of the limiting concurrence by Justice O'Connor in *Michael H.*, Kennedy followed the ideological line set down by his two senior conservative colleagues. Additionally, Kennedy's first years on the Court were a time when the more conservative Justices were able to establish a 'conservative' substantive due process methodology to counter both the anything-goes methodology of the Court's left wing and the formless due process methodology suggested by Justice Harlan the Younger.

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[69] Cf. note 29.

[70] Cf. note 60.

[71] 410 U.S. 113, 162 (1973).

[72] 492 U.S. 490, 515 (1989).

The conservative due process methodology may be summarized as having the following core elements:

1. A rejection of the "fundamental rights" language of *Griswold* and *Roe*, and replacing that language with the phrase "liberty interests."

2. The application of a "reasonableness" or "rational basis" standard when evaluating government infringements on asserted "liberty interests."

3. The use of history, particularly (if not solely) American History, when evaluating substantive due process claims seeking protection for a previously unannounced "liberty interest."

These three elements are present to some extent in all of the cases discussed above; however, there are other elements which, while less widespread, address particular concerns of Justice Kennedy. They are:

1. The correct 'level' of tradition at which to investigate due process claims (the issue behind O'Connor's concurrence in *Michael H.*).

2. The application of common-law judging methods in evaluating cases, and especially methods which are exercises of judicial "self-restraint."

While this discussion of the conservative due process method is meant more as an outline than a model, it does help to establish certain common characteristics which will make the importance of subsequent changes in the law easier to spot and evaluate.

Beyond the emergence of a conservative due process methodology, the early Kennedy years did give hope to those who opposed the progressive tilt of the Warren and Burger Courts. While *Roe* still stood, several cases had chipped away at its foundations, and from all indications, the Court had severely limited–if not ended–its willingness to 'create' new rights under substantive due process. With two more years left in the Presidency of George H.W. Bush, a further transformation of substantive due process law seemed no more distant than the appointment of a single Justice. However, the events of

the next two years–and the case that came to dominate the Court's 1992 term–would throw the certainty of the conservative counter-revolution into question, and leave many across the United States wondering just *who* Justice Anthony M. Kennedy really was.

CHAPTER FOUR

The First Watershed - Planned Parenthood v. Casey

More than any other case the Court heard during the 1990's, *Planned Parenthood of Southwestern Pennsylvania v. Casey*[1] defined the careers of several Justices, and not Justice would be more impacted than Justice Kennedy. The decision he made in *Casey* made him the toast of certain groups, the target of others, and thrust him onto the national stage in a way that he had not been before *Casey* was decided. After *Casey*, it became clear that he would not march in ideological lock-step with Rehnquist and Scalia; instead, Kennedy would break with the conservative bloc of the Court when he found it necessary or desirable to do so. But what, then, of the case that apparently wrought such a transformation on the Court and Justice Kennedy?

Planned Parenthood v. Casey resulted from a revision of the Pennsylvania Abortion Control Act of 1982 following the Court's decision in *Webster v. Reproductive Health Services*.[2] The legislature's revision added regulations which created an "informed consent" requirement, a 24-hour waiting period provision, both parental consent and spousal notification requirements, as well as record-keeping requirements applicable to facilities offering abortion services.[3] However, the path the case took to the Court was hardly typical. It was one filled with a volatile mixture of constitutional and

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[1] 505 U.S. 833 (1992).

[2] 492 U.S. 490 (1989).

[3] 505 U.S. 833, 833 (1992).

moral issues, intra-Court politicking, and the 1992 Presidential Election. Understanding the background of the case is essential to a proper understanding of the Court's decision and Justice Kennedy's role in it.

The case entered the national consciousness on October 21, 1991, when a three judge panel of the Third Circuit upheld the majority of the Pennsylvania law.[4] With Clarence Thomas having been confirmed to his seat on the Court only six days before the Third Circuit handed down its opinion, *Casey* came down on the heels of Thomas' extraordinarily contentious confirmation hearings. With Thomas now on the Supreme Court, eight of the nine sitting Justices had been appointed by Republican Presidents who had openly called for overruling *Roe v. Wade*.[5]

Furthermore, the Third Circuit's decision had made a decisive break from the doctrine of *Roe*. Influenced by the Court's decisions in *Webster* and *Ohio v. Akron Center*,[6] the Circuit Court rejected *Roe's* application of "strict scrutiny," applying instead the "undue burden" test to the Pennsylvania law.[7] The Circuit Court reasoned that a majority of Supreme Court Justices no longer supported the use of strict scrutiny, as was clear from the decision in *Webster*. But, because there had been no explicit endorsement for the application of the rational basis test to abortion regulations, the Third Circuit went with Justice O'Connor's "undue burden" test.[8]

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[4] Lazarus, *Closed Chambers*, 459; Toobin, *The Nine*, 37.

[5] Toobin, *The Nine*, 36; 410 U.S. 113 (1973).

[6] 497 U.S. 502 (1990).

[7] Lazarus, *Closed Chambers*, 459.

[8] Lazarus, *Closed Chambers*, 460.

Following the Third Circuit's decision, the lead ACLU attorney on the case– Kathryn Kolbert –faced a difficult decision. She could seek an *en banc* re-hearing by the Third Circuit, and hope that the full court would reverse the three judge panel. However, that process would take months, and Kolbert realized that the future of abortion law rested as much with the result of the Presidential election as it did with the Third Circuit.[9] Kolbert, along with other pro-choice advocates, understood that *Roe* was under attack, and that a victory by President George H.W. Bush in the 1992 election would give him another four years to make appointments which would push the Court further rightward.

So Kolbert decided on a risky strategy. She immediately appealed the Third Circuit ruling to the Supreme Court, with the hope that if the Court did overrule *Roe*, the public would 'punish' the Republican-dominated Court, and favor the Democratic candidate in the Presidential election.[10] Timing was critical. The appeal had to be filed quickly, so that the Court would be able to hear the case during the 1991-1992 term, and issue a decision in the spring of 1992, only a few months before the Presidential election. Kolbert and her associates worked with lightning speed, and filed the petition for certiorari with the Supreme Court on November 7th, 1991, not even three weeks after the Third Circuit handed down its ruling.[11] The petition framed the issue at stake in a stark and purposely provocative way: it asked the Justices to decide whether "the Supreme

[9] Toobin, *The Nine*, 40–41.

[10] Lazarus, *Closed Chambers*, 461. Public opinion polling at the time suggested that a majority of Americans supported a woman's "right to choose." This was a key factor in Kolbert's calculation of whether or not to appeal the Third Circuit decision to the Supreme Court.

[11] Toobin, *The Nine*, 41.

Court has overruled *Roe v. Wade*, holding that a woman's right to choose abortion is a fundamental right protected by the United States Constitution?"[12]

With the petition filed, the wait was on to see what the Justices would do with the petition for certiorari. Chief Justice Rehnquist understood that the pro-choice forces were attempting to use *Casey* to influence the Presidential election. He was disgusted by the attempt to use the Court in a political fashion, and as well as by Kolbert's attempt to manipulate the Court's docket by filing a quick petition for certiorari. So, Rehnquist used the prerogatives of the Chief Justiceship to "relist" the *Casey* petition–essentially, preventing the petition from coming up for discussion and vote during the Justices weekly conferences.[13] The *Casey* petition was relisted for several weeks; Rehnquist was attempting to postpone the granting of certiorari long enough that the Court's docket for the spring of 1992 would fill up, and the case would not be heard (and decided) until long after the Presidential election in November.[14]

After the *Casey* petition had been re-listed for several weeks, Justice Harry Blackmun, the author of the Court's majority opinion in *Roe*, complained in an internal memo about the Chief Justice's attempt to neutralize the political maneuvering of Kolbert and her pro-choice allies, but it was Justice John Paul Stevens who threatened to write a dissent over Rehnquist's re-listing. As far as anyone could tell, no Justice had ever dissented from a re-listing, so Stevens' action would have generated considerable publicity. Furthermore, Stevens' likely would have accused the Chief Justice of playing

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[12] Lazarus, *Closed Chambers,* 461–462; Toobin, *The Nine*, 41.

[13] Lazarus, *Closed Chambers*, 462–463; Toobin, *The Nine*, 41.

[14] Lazarus, *Closed Chambers*, 463.

politics with abortion law in an election year–an accusation that could be as (or even more) useful to the pro-choice forces than an outright decision on *Casey*. The Chief was forced to relent, and the petition for certiorari was accepted. The oral argument in *Casey* was set for April 22, 1992–the last argument day of the term.[15]

When oral argument finally occurred, there were no major surprises. Both Justice O'Connor and Justice Kennedy pressed Kolbert on her position that the Court either retain *Roe* in its entirety, or overrule it outright. Edmund Lazarus described one of Justice Kennedy's interactions with Kolbert in *Closed Chambers*:

> As became apparent over the remainder of the argument, Kolbert's answer was basically no, even after Justice Kennedy joined O'Connor in suggesting that Kolbert compromise on her strict scrutiny reading of *Roe*. Kolbert's insistence annoyed Kennedy especially. Glaring at her over the bench, he practically accused her of irresponsible lawyering–alienating her potential swing votes. "If you are going to argue that *Roe* can survive only in its most rigid formulation, that is an election you can make as counsel," Kennedy said with obvious disapproval. "I am suggesting to you that is not the only logical possibility in this case." Still, Kolbert refused to budge.[16]

Given Justice Kennedy's comments during the *Webster* discussion, and his opinion in *Ohio v. Akron Center*, his question seems to be somewhat unusual. Whether it was a harbinger of what would eventually happen in *Casey*, or whether it was simply Justice Kennedy exhibiting his frustration with Kolbert's intransigence, the exchange is worth noting. The exchange does suggest that Kennedy was already aware of the possibility of a moderating partial change to *Roe*.

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[15] Toobin, *The Nine*, 41–42.

[16] Lazarus, *Closed Chambers*, 465.

What occurred at the Justices weekly conference after arguments in *Casey* is unclear. Lazarus claims that there was minimal discussion during the conference, and that one tally put the vote at 5-4 for upholding the entire law.[17] However, Jeffrey Toobin reports that seven of the Justices wanted to uphold most of the Pennsylvania law, and yet there was no five-vote bloc willing to overturn *Roe* outright.[18] If Toobin is correct, then what was Justice Kennedy's position? Was he part of the 5 described by Lazarus who were willing to uphold the entire law–and did that include either an explicit or implicit commitment to overrule *Roe*? Or was Kennedy only willing to uphold a portion of the law, and if so, how clear about that was he at the conference?

The only hard evidence available about the results of the conference comes from the fact that Rehnquist assigned the opinion to himself.[19] According to the information provided by Lazarus and Toobin, Rehnquist took the opinion on the grounds that he had a majority of Justices willing to uphold the whole Pennsylvania law; whether he planned to uphold the law by simply gutting *Roe* in practice, or whether he would overrule it in the opinion is not clear from the information about the conference.[20]

While the Chief Justice was drafting what he believed would be the Opinion of the Court, Justices Souter and O'Connor met separately at Souter's request to discuss the case. Neither of them was fully comfortable with the likely outcome of Rehnquist's opinion, and after some discussion, they decided to approach Justice Kennedy about

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[17] Lazarus, *Closed Chambers*, 467.

[18] Toobin, *The Nine*, 47.

[19] Lazarus, *Closed Chambers*, 468; Toobin, *The Nine*, 47.

[20] Lazarus, *Closed Chambers*, 468; Toobin, *The Nine*, 47.

joining the two of them in drafting a 'compromise' opinion in *Casey*.[21] Souter and O'Connor convinced Kennedy to join them in their effort at compromise, and the result surprised even experienced Court-watchers.

The opinion by Kennedy, O'Connor, and Souter was issued as a "joint opinion," a rare, but not unprecedented occurrence. This choice was important because of the other two instances in Court history when there had been joint opinions issued. The most famous joint opinion was the unanimous joint opinion in *Cooper v. Aaron*,[22] which rejected attempts by Southern state officials to avoid enforcement of the Court's decision in *Brown v. Board of Education*.[23] The other famous joint opinion was issued in *Gregg v. Georgia*,[24] in which three Justices issued a joint opinion ending the temporary moratorium on capital punishment in the United States. Lazarus asserts that the Justices self-consciously made the choice to associate their opinion in *Casey* with the aforementioned cases as part of their appeal to compromise on the highly divisive issue of abortion.[25] While Lazarus is correct in his assertion, the joint opinion was also a clever way of creating a political shelter from the fallout that would come from three Republican-appointed Justices refusing to overturn *Roe*. That the *Casey* opinion was joint says as much about the Justices' views about the potential repercussions as it does about their desire to follow in the footsteps of a tradition of "great judicial compromises."

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[21] Lazarus, *Closed Chambers*, 470–471; Toobin, *The Nine*, 52–53.

[22] 358 U.S. 1 (1958).

[23] 347 U.S. 483 (1954); Lazarus, *Closed Chambers*, 474.

[24] 428 U.S. 153 (1976); Lazarus, *Closed Chambers*, 474.

[25] Lazarus, *Closed Chambers*, 474.

Since the opinion itself was jointly written,[26] it does not lend itself as well to the careful textual analysis as the opinions discussed in the last chapter. Fortunately, however, the most important elements of the opinion in relation to Kennedy's substantive due process jurisprudence are 'large-scale,' and can be evaluated without a close parsing of the language of the opinion.

The portions of the opinion that are widely believed to have been authored by Justice Kennedy are Sections I and II, which deal with the plurality's interpretation of the word "liberty" in the Due Process Clause of the Fourteenth Amendment. He quickly confronts the central issue of the case head on, writing: "the United States, as it has done in five other cases in the last decade, again asks to overrule *Roe*."[27] However, after this mention, he reviews the contents of the Pennsylvania statute, and various alternative positions on the central question before noting three factors which, the opinion concludes, require "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[28]

A declaration from Justice Kennedy (albeit speaking for the plurality) reaffirming the decision of *Roe v. Wade* seems, on its face, a startling reversal by a Justice who had opposed retaining *Roe* in other, prior, decisions by the Court. Lazarus and Toobin both suggest that the reason for Kennedy's 'switch' in Casey was due to a 'vulnerable' aspect of Kennedy's personality. As Lazarus put it, this was

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[26] Most journalists and Court scholars believe that Kennedy wrote the first portion of the opinion, Souter the second, and O'Connor the third. Both Lazarus and Toobin adhere to this view. Cf. Lazarus, *Closed Chambers*, 474–475, and Toobin, *The Nine*, 56.

[27] 505 U.S. 833, 844 (1992).

[28] 505 U.S. 833, 846 (1992).

> the Kennedy that hard-nosed conservatives feared and mocked –the one who liked to be liked, thought of himself as reasonable and judicious, and showed flashes of attachment to the idealistic judicial pronouncements of the Warren era. This Justice Kennedy seemed increasingly to view the judiciary as an oasis of rectitude within a regrettably fractious and partisan society.[29]

Toobin describes this aspect of Kennedy as

> Relish[ing] his public role and [seeking out] the opinions that would make the newspapers … Kennedy had a much more romantic notion of a robed crusader for the rule of law … Kennedy's peculiar combination of traits– his earnestness and his ambition, his naiveté and his grandiosity, his reverence for the law and his regard for his own talents–made him receptive to Souter [and O'Connor]'s appeal. Kennedy thought there was nobility in judging; saving *Roe* would show the world that the justices were something more than mere pols.[30]

The overall character of Kennedy's sections of the joint opinion do lend support to the characterization of Justice Kennedy as an idealist. Other portions of the sections he wrote specifically endorse a broad interpretation of "liberty" that "affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[31] His rhetoric, in places, becomes grandiloquent, such as in the much-derided passage where he wrote, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state."[32]

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[29] Lazarus, *Closed Chambers*, 470–471.

[30] Toobin, *The Nine*, 52–53.

[31] 505 U.S. 833, 848, 851 (1992).

[32] 505 U.S. 833, 851 (1992); Toobin, *The Nine*, 56.

However, while the portion of the joint opinion authored by Justice Kennedy does lend support to the idea of Kennedy as some sort of sensitive, well-meaning idealist, neither Lazarus, Toobin, nor any other commentators reviewed in preparing this work are able to convincingly account for *why* Kennedy, who had been a consistent conservative on substantive due process matters in prior cases, suddenly changed his position in *Casey*. The most frequent explanation offered is Kennedy was seeking to help build a "grand compromise" on the divisive issue of abortion.[33]

There is, however, an explanation for Kennedy's position in *Casey* that resolves the tension between the "grand compromise" and his prior actions. Simply put, Kennedy's judicial conservatism led him to the 'compromise' in *Casey* because he understands the damage that is done to both the Court's prestige and constitutional law when the Justices mandate a sudden and dramatic shift in the law, particularly when that change seems politically motivated. The truth of this proposition is made quite clear from the controversy surrounding the judicial revolution that took place during the Warren Court, when that Court–often without warning–overruled precedents which had been reaffirmed on multiple occasions, blatantly ignoring the principle of *stare decisis*. The Warren Court's willingness to engage in what has been called 'judicial activism' was one of the political factors that helped the Republican Party build much of its post-Goldwater success. For a Court filled with Justices appointed by Republican Presidents to engage in the same type of judicial tactics as the Warren Court would seem to many to be flagrant hypocrisy.

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[33] Lazarus, *Closed Chambers*, 470.

As the evidence from Kennedy's nomination hearings demonstrated, his understanding of the role of the judiciary is based on his method of judging, and the common law legal system. Additionally, as Lazarus notes, Kennedy has a "perception of the Court's proper role as a mediator in society's most divisive disputes."[34] Together, these attributes have produced in Kennedy a judge whose behavior is shaped by institutional, constitutional and legal concerns –and that unique combination of traits is what led to his decision in *Casey*.

The changes *Casey* brought about in abortion law show just how conservative a decision *Casey* really was, and will support the claim that it furthered the broad conservative goal of restraining substantive due process law. There are five major changes that the decision in *Casey* brought about that impact the understanding of Justice Kennedy's jurisprudence. Those five changes in *Casey* are: 1) the replacement of the 'privacy' rationale of *Roe* with a rationale based on the language of 'liberty'; 2) the moderate treatment of the rule of *stare decisis*; 3) the abandonment of the 'trimester' scheme of *Roe*; 4) its replacement of the strict scrutiny language of *Roe* with the 'undue burden' standard; and 5) upholding the Third Circuit's decision in the case, meaning that the debate in the future would be between a pre-*Roe* position (such as a total ban) and the Court's position in *Casey*. We take each of these points in turn.

The first, and one of the most noticeable changes, was the joint opinion's shift from the 'privacy' language of *Roe* and its associated precedents to one built upon the word 'liberty,' which, unlike 'privacy,' is actually present in the constitutional text. The joint opinion begins, "Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years

[34] Lazarus, *Closed Chambers*, 471.

after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, that definition of liberty is still questioned."[35] Beyond making such a bold statement at the outset of the opinion, the joint opinion notes early on in Section II, "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment … The controlling word in the cases before us is "liberty.""[36]

The controlling word, indeed. Section II drives home the point, its bulk being nothing more than a review of the development of the 'expansive' version of substantive due process that led to the decision in *Roe v. Wade*. However, during that lengthy review, Kennedy emphasizes the word "liberty," all while avoiding the word "privacy." He writes of the "promise of the Constitution that there is a realm of personal liberty which the government may not enter,"[37] and that, "matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment,"[38] before concluding that "the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."[39] Considering the centrality of the privacy rationale to *Roe*, as well as the substantive due process cases which both preceded and

[35] 505 U.S. 833, 844 (1992). Internal citations omitted.

[36] 505 U.S. 833, 846 (1992).

[37] 505 U.S. 833, 847 (1992).

[38] 505 U.S. 833, 851 (1992).

[39] 505 U.S. 833, 853 (1992).

followed it, the absence of the word "privacy" from the joint opinion makes it clear that the joint opinion has fully abandoned the nebulous and extra-constitutional concept of "privacy" for what the opinion's authors consider a more solid (and textual) constitutional foundation for their argument.

The replacement of "privacy" with "liberty" in the opinion not only lends more constitutional legitimacy to the Court's ruling, but it brings with it other benefits as well. Foremost among those benefits is the considerable amount of Court precedent relating to the proper interpretation of the word "liberty." While some might object that replacing "privacy" with "liberty" is simply replacing one content-free term with another, such an objection misunderstands the limiting power of the Court's precedents. Early twentieth century incorporation cases such as *Snyder v. Massachusetts*[40] and *Palko v. Connecticut*[41] had set down rules of interpretation regarding the content of 'liberty' which limited judicial discretion far more than the "privacy" right of *Griswold v. Connecticut*,[42] *Eisenstadt v. Baird,*[43] and *Roe v. Wade*.

The Court's treatment of *stare decisis* in *Casey* is divided between its rhetorical reaffirmation of *Roe*, and the actual, substantive changes the decision made in the law. While the joint opinion (in the section penned by Justice Souter) identifies four factors that would support a reversal of *Roe*,[44] it finds that none of these factors weigh so heavily

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[40] 291 U.S. 97 (1934).

[41] 302 U.S. 319 (1937).

[42] 381 U.S. 479 (1965).

[43] 405 U.S. 438 (1971).

[44] 505 U.S. 833, 855 (1992).

as to overcome the weight of *stare decisis*. The establishment of a set of theoretically objective (or at least determinate) factors for applying the rule of *stare decisis*, is, in and of itself, a limitation on judicial discretion. In the future, should the law evolve in such a way that the Court's holding in *Roe* came to be in violation of one of the four factors identified in Part III of the joint opinion, the Court would be all but compelled to follow its own rules and reverse *Roe*.

However, a more significant aspect of the treatment of *stare decisis* in *Casey* comes in Part IV, with the joint opinion's demonstrated willingness to overrule previous cases which it identifies as having incorrectly applied the underlying principle from *Roe*. The critical passage from the opinion reads:

> Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition … Although we must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent with *Roe's* statement that the State has a legitimate interest in promoting the life or potential life of the unborn.[45]

With this passage–and the overruling of *Thornburgh* and *Akron I*, the joint opinion begins to reveal the transformation it is making in abortion law. *Thornburgh*, a 1983 case which invalidated Pennsylvania's 1982 attempt to institute informed consent requirements, statistical reporting requirements, and a requirement of a second physician during late-term abortions was written by Justice Blackmun, who authored *Roe.*[46] *Akron Center for Reproductive Health v. Akron*,[47] was a 1983 case which invalidated an Akron city

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[45] 505 U.S. 833, 870 (1992).

[46] 476 U.S. 747, 759 (1986).

[47] 462 U.S. 416 (1983).

ordinance which enacted a 24-hour waiting period, parental consent, and informed consent requirements.[48] By overruling *Thornburgh* and *Akron I*, the joint opinion is claiming that the author of *Roe*–who wrote *Thornburgh* and concurred in *Akron I*–did not understand the principles of his own most well-known opinion. Beyond that, the joint opinion is willing to set aside *stare decisis* and uphold regulations which had been held invalid on previous occasions. So, even though the joint opinion does reaffirm *Roe*, it blatantly overrules the two most important 'pro-choice' cases since *Roe*, and thus allowed states to place additional restrictions on abortion. The application of *stare decisis* in *Casey* may have saved *Roe* in name, but in practice it was, for supporters of *Roe*, a draw at best.

The joint opinion made another landmark change in the law with its explicit abandonment of the "trimester scheme" from *Roe*. According to the law post-*Roe*, the trimester scheme dictated when (and to what extent) a state could regulate abortion, with the result that virtually no restrictions on first-trimester abortions were found permissible, and only a limited number of restrictions were permissible in the second trimester. Justice Blackmun had constructed this scheme based on the traditional medical division of the stages of pregnancy.[49] The joint opinion did away with this distinction, calling it an "elaborate but rigid construct … unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers."[50]

In its place, the joint opinion announced that

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[48] 462 U.S 416, 417 (1983).

[49] 410 U.S. 113 (1973); Lazarus, *Closed Chambers*, 358–359.

[50] 505 U.S. 833, 872 (1992).

> the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy … the viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.[51]

Without making explicit what they had done, the joint opinion overruled a portion of *Roe* itself. While the removal of the trimester scheme may not seem like a major shift in and of itself, when coupled with the joint opinion's next move, it was one-half of the largest shift in abortion law since *Roe v. Wade*.

The other half of that shift was "replacing *Roe's* legal mainspring"[52] by abandoning the "strict scrutiny" standard Justice Blackmun had put in place, which required States to have a "compelling governmental interest" in order to curtail a woman's right to abortion. The joint opinion notes that

> *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." That portion of the decision in *Roe* has been given too little acknowledgement … Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest. Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her. In resolving this tension, we choose to rely upon *Roe*, as against later cases.[53]

Having eliminated the strict scrutiny standard, the joint opinion goes on to state that

> Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the

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[51] 505 U.S. 833, 870 (1992).

[52] Lazarus, *Closed Chambers*, 473.

[53] 505 U.S. 833, 871 (1992).

> incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where a state regulation imposes and undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.[54]

When the Court replaced the strict scrutiny standard of *Roe* with the "undue burden" test, it accomplished a change in the law that Justice O'Connor had repeatedly urged since her dissent in *Akron I*. The less-stringent standard of the "undue burden" test permitted the imposition of restrictions on abortion that had previously been held as beyond the power of states to enact. As the joint opinion moved forward, it upheld almost the entire Pennsylvania act, finding that the "informed consent," a 24-hour waiting period, parental consent, and record-keeping requirements did not impose an "undue burden" on a woman's choice.[55] The only element of the Pennsylvania law found to be unconstitutional was the "spousal notification" requirement.[56]

Beyond the specifics of the ruling, the joint opinion also 're-framed' the abortion debate. By affirming the decision of the Third Circuit, the debate–at least in terms of constitutional law–is now between those who want the Court to allow even more state restrictions on abortion (call this the pre-*Roe* point-of-view) and the opinion espoused by the point-of-view in *Casey*. All future arguments relating to abortion laws would have to be evaluated under (and phrased in) terms of the decision in *Casey*. And, with the Court's holding regarding the Pennsylvania statute as controlling precedent, a wide

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[54] 505 U.S. 833, 874 (1992).

[55] 505 U.S. 833, 879–901 (1992).

[56] 505 U.S. 833, 879–901 (1992).

variety of restrictions would likely be upheld. The effect of the shift in *Casey* is unmistakably clear–it was not a decided loss for the "pro-choice" forces.

The significance of *Casey* in Justice Kennedy's substantive due process jurisprudence is difficult to fully understand with only the Justice's early decisions on the Court as context. The reaffirmation of *Roe* that took place in *Casey* seems to conflict with Kennedy's positions in *Webster* and *Ohio v. Akron Center*. However, when the opinion in *Casey* is judged in terms of the effect it had on abortion laws in the United States (in granting states considerably more latitude to regulate abortions) and the effect it had on substantive due process law (moving away from the extra-textual claim of "privacy" to the textually-demonstrable "liberty" claim) the opinion marked a decidedly conservative shift away from the doctrine of *Roe*, while at the same time providing the Court some protection that a decision overruling *Roe* would not have provided. The joint opinion allowed the Court to present itself as something other than a vehicle for promoting the Justices' policy preferences, since by the time of *Casey*, a clear majority of the Justices held a political or moral opposition to abortion.

Kennedy's "betrayal" of the conservatives in *Casey* was the event that established the foundation for the claim that he isn't an "authentic" conservative–he was the one whose switch denied the Court's conservatives the fifth vote needed to overturn *Roe*. But, while Kennedy did prevent the overruling of *Roe*, he did provide the States with considerably more room to regulate abortion than they had pre-*Casey*. Kennedy's "method" of providing the States with more regulatory range was one that comports with his espoused *judicial* conservatism, something that is totally separate from his political conservatism. In his post-*Casey* decisions, Kennedy will follow the dictates of judicial

conservatism as he leaves his decisive mark on the law, sometimes reaching results that are widely opposed by political conservatives. While the result in a case is what captivates the attention of the media and Court-watchers, it is in the reasoning and legal details of the opinions where Kennedy will do his work, playing the manufactured role of "swing justice" as he bounces back and forth between the ideological blocs of the Court. The character of his work, when examined *in toto*, will reveal a justice whose substantive contributions to the law have promoted the institutional integrity and stability of the Court, while at the same time limiting the scope and influence of a constitutional theory that has had tremendously damaging effects on the public perception of the Supreme Court.

CHAPTER FIVE

Kennedy after *Casey*: Just Who Is This Guy, Anyway?

After the Court's decision in *Planned Parenthood v. Casey*,[1] Justices Kennedy and O'Connor were pilloried in the conservative press for their 'betrayal' in *Casey*. As Justice Souter continued to drift leftwards, eventually becoming a reliably liberal vote, Kennedy and O'Connor became the votes that their more ideological colleagues sought to attract in order to form a majority. With O'Connor and Kennedy's voting not predictably partisan, both were saddled with the label of 'swing Justice,' suggesting that they would 'swing' back and forth between the ideological poles of the Court, and the label stuck. However, Kennedy's substantive due process opinions during the late 1990's took on an increasingly restraintist character, and thus challenge the perception that Kennedy was a 'swing Justice.' While he did break with the conservative bloc in some areas of law, his work, when examined with a critical eye, will demonstrate that he played the "swing Justice" role with success, with effects in both the Court's substantive due process jurisprudence, as well as other controversial areas.

The most important area outside of substantive due process law where Kennedy had a major impact in the late 90's was in the expanding field of equal protection. During the early 1990's, some Colorado municipalities–such as Boulder, Aspen, and Denver–modified their public accommodations laws to prohibit discrimination based on sexual orientation. While these changes were widely supported in the municipalities

[1] 505 U.S. 833 (1992).

where they were enacted, more traditional citizens of the state took exception to this progressive policy move.

In response, opponents of these laws managed to have an amendment to the Colorado Constitution adopted which read as follows:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions … shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status.[2]

The result of the amendment was that the municipal code provisions which extended non-discrimination protection to homosexuals were effectively invalidated. The 1996 case *Romer v. Evans*[3] was an equal protection challenge to that amendment to the Colorado State Constitution. Supporters of the gay rights provisions sued the State, claiming that the Colorado Amendment (referred to as Amendment 2) was a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Justice Kennedy, writing for a divided Court, held Amendment 2 in violation of the Equal Protection Clause. In doing so, Kennedy made two choices which bear on his later substantive due process jurisprudence. Additionally, *Romer* is a notable case because of the combination of Kennedy's reasoning and the composition of the Court majority, and how they presage *Lawrence v. Texas*.[4] But first, a short discussion of equal protection law is needed.

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[2] 517 U.S. 620, 624 (1996).

[3] 517 U.S. 620 (1996).

[4] 539 U.S. 558 (2003).

In interpreting the Equal Protection Clause of the Fourteenth Amendment, the Court has created something known as "suspect class doctrine," which holds that government classifications of individuals may be constitutionally suspect if they divide individuals into groups based on certain characteristics, such as race. If a characteristic is deemed a "suspect classification" by the Court, any government action which invokes a suspect class must typically pass the Court's "strict scrutiny" test. Race-based classifications have long been held to be "suspect," and thus both discriminatory and so-called "benign" classifications have been subject to strict scrutiny.[5]

While race was the original "suspect class," the Court has considered, and in part extended, suspect class protections to other groups, such as illegitimate children.[6] The Court has never held specifically that gender-based discriminations constitute a "suspect class" per se, but the Court has accorded a 'heightened' form of judicial scrutiny to gender discriminations.[7] Prior to *Romer*, the Court had never considered whether homosexual orientation could be considered a "suspect class," although they had upheld Georgia's anti-sodomy statute against a due process challenge in *Bowers v. Hardwick*.[8]

With the issue of whether homosexuality should be considered a "suspect class" in the background, Justice Kennedy begins Section III of the opinion stating that, "We

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[5] *Regents v. Bakke* 438 U.S. 265 (1978), held that benign race-based classifications were required to pass strict scrutiny, as did *Wygant v. Jackson Board of Education* 476 U.S. 267 (1986). The original foundation for applying "a more searching judicial inquiry" to protect "discrete and insular minorities" developed out of Justice Stone's opinion in *U.S. v Carolene Products Co.* 304 U.S. 144 (1938).

[6] *Lalli v. Lalli*, 439 U.S. 259 (1978).

[7] Cf. *Frontiero v. Richardson* 411 U.S. 677 (1973), *Mississippi University for Women v. Hogan* 458 U.S. 718 (1982), and *United States v. Virginia* 518 U.S. 515 (1996) as examples of cases where the Court has weighed the question of whether gender is a suspect class.

[8] 478 U.S. 186 (1986).

have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."[9] This language is that of the Court's least stringent standard of judicial evaluation–the "rational basis" test.

Kennedy goes on to state that, "Amendment 2 fails, indeed defies, even this conventional inquiry … its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus towards the class it affects; it lacks a rational relationship to legitimate state interests."[10] Kennedy's ruling is that Amendment two fails the *lowest* standard of constitutional evaluation–the level on which *any* rational relationship between the law and *any* legitimate government interest is sufficient to sustain its constitutionality. By invalidating the law using the rational basis test, Kennedy departed from the reasoning relied upon by the Colorado Supreme Court–which had held Amendment 2 invalid through an application of the Court's strict scrutiny standard.[11]

By using the rational basis test to evaluate Amendment 2, Justice Kennedy is asserting that homosexuality *does not* constitute a "suspect classification"–a position with which the Court's dissenters (Chief Justice Rehnquist, and Justices Scalia and Thomas) would wholeheartedly agree.[12] This conclusion–that homosexuality is not a suspect

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[9] 517 U.S. 620, 631 (1996).

[10] 517 U.S. 620, 632 (1996).

[11] 517 U.S. 620, 626 (1996).

[12] 517 U.S. 620, 637 (1996).

classification–puts the politically liberal justices in a situation where their future decision-making may be severely constrained by this precedent. While it is not impossible to overcome an early invocation of the rational basis test,[13] once a test has been established in an area of law it is uniquely difficult for a Justice who endorsed that initial position to switch sides. Justices typically try to maintain consistent views once they go 'on the record,' since taking alternative positions on a constitutional question without fully explaining their reasons for the change opens them up to the charge that their decisions are influenced by personal preference rather than law.

Additionally, Kennedy's application of the rational basis test in *Romer* is analogous to Chief Justice Rehnquist's use of the rational basis test in *Webster*. By using the test to evaluate this law, Kennedy has 'anchored' the rational basis test to the broader topic of gay rights. At the time *Romer* was handed down, Kennedy's choice to use rational basis was not deemed particularly significant. However, it established a legal principle which he used to great effect in *Lawrence v. Texas*.[14]

The year after *Romer,* the Court confronted its first major substantive due process case since *Casey–Washington v. Glucksberg*[15]–which dealt with a challenge to Washington State's ban on physician-assisted suicide. Several physicians and terminally ill patients sued, claiming that the Washington law–which criminalizes assisting suicide

[13] *Goaesaert v. Clearly* 355 U.S. 464 (1948) was the first attempt to challenge a law that discriminated on the basis of gender under the Equal Protection Clause. In the majority opinion, Justice Frankfurter rejected this claim. While the decision did not prevent *Goaesaert*'s overruling in *Reed v. Reed*, 404 U.S. 71 (1971), it would have been much more difficult for a Justice who endorsed *Goaesaert* to reverse course within only a few years. The best historical example of the fallout from politically-motivated reversals is the controversy surrounding *Barnette v. West Virginia Board of Education.*

[14] 539 U.S. 558 (2003).

[15] 521 U.S. 702 (1997).

per se–prohibited them from assisting patients in ending their lives. The plaintiffs asserted, "the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide."[16] After victories in front of the District Court and the Ninth Circuit (sitting *en banc*), the Supreme Court voted unanimously to reverse. However, the Justices fractured along ideological lines when it came to the precise reasoning for upholding the Washington law, with only Justices O'Connor, Scalia, Thomas and Kennedy joining Chief Justice Rehnquist's opinion.[17]

The reason for the ideological fragmentation among the Justices is clear: Rehnquist used his opinion in *Glucksberg* to push back against the due process formulation of *Casey*–with the ever-present ghost of *Roe* hovering in the background. What makes the opinion significant in the context of Justice Kennedy's substantive due process jurisprudence is his willingness to join Rehnquist's opinion in full, in spite of the tension between the opinion in *Casey* and much of what Rehnquist says in his opinion. Viewed in this way, Kennedy's willingness to join Rehnquist in full–and notably, avoid joining Justice O'Connor's concurrence–marks another step in Kennedy's slow and subtle transformation of substantive due process law.

The Chief Justice opened the substantive portion of his opinion in *Glucksberg* with a dramatic flourish that made clear his intent to apply what he thinks is the proper methodology for the constitutional adjudication of substantive due process claims. He writes, "We begin, as we do in all due process cases, by examining our Nation's history,

[16] 521 U.S. 702, 708 (1997).

[17] 521 U.S. 702, 704 (1997).

legal traditions, and practices."[18] By building his due process methodology on a foundation of 'history and tradition,' he is limiting judicial discretion, as well as undercutting the attempt by the Court's more liberal Justices to further their less-restrained due process methodology, which derives in part from Justice Harlan's dissent in *Poe v. Ullman*.[19]

The first part of Rehnquist's opinion establishes the two core elements of the Court's due process methodology. The Chief Justice writes that:

> First, we have regularly observed those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition" … "so rooted in the traditions and conscience of our people as to be ranked fundamental," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*.[20]

The first of those two elements in Rehnquist's due process methodology is the use of 'history and tradition' as the source for identifying what rights are protected by due process. By citing previous due process cases which used such language as "deeply rooted [rights]" and "[rights] ranked [as] fundamental," the argument he is setting forth is that any due process "rights" the Court has legitimately recognized in the past are those which had a clearly discernible presence in the historical record. He reinforces his point later, writing, "[due process rights] have at least been carefully refined by concrete

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[18] 521 U.S. 702, 710 (1997).

[19] 367 U.S. 497 (1961). The core of Harlan's dissent was his assertion that, "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property … and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." Harlan's dissent has subsequently been used to defend the protection of un-enumerated rights by the Court, particularly in *Griswold v. Connecticut* and *Roe v. Wade*.

[20] 521 U.S. 702, 720–721 (1997). Some internal citations omitted.

examples involving fundamental rights found to be deeply rooted in our legal tradition."[21] The purpose behind this is, of course, to "reign in the subjective elements that are necessarily present in due process judicial review"[22] –and thus placing an important limitation on the power of the Court.

The historical examination of anti-suicide laws, which takes up ten pages of the opinion, is the textbook example of Rehnquist's approach to substantive due process in practice. He covers 700 years of Anglo-American legal practice, from the time of the Magna Carta up to contemporary legal developments by the states.[23] By drawing out and emphasizing the traditional elements–repeated practice over time–Rehnquist is following a substantive due process methodology that constrains judicial decision-making to a narrow field, and leaves more divisive questions to the political branches of government. The other rhetorical tactics Rehnquist employs throughout his opinion serve this overriding end.

Rehnquist then goes on to write that, "we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults."[24] This is the capstone of the historical exploration of anti-suicide laws from the early part of the opinion. Rehnquist was setting out the evidence he wanted before he presented the conclusion of his argument. In closing out the section, he states, "to hold for

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[21] 521 U.S. 702, 722 (1997).

[22] 521 U.S. 702, 722 (1997).

[23] 521 U.S. 702, 710–719 (1997).

[24] 521 U.S. 702, 723 (1997).

respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State."[25] The overwhelming weight of 'history and tradition' is enough evidence to conclusively settle this question for the Court.

The second element of his substantive due process methodology is, "a 'careful description' of the asserted fundamental liberty interest … Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decision-making,' that direct and restrain our exposition of the Due Process Clause."[26] This element of the due process methodology should immediately recall Justice Scalia's opinion in *Michael H. v. Gerald D.*,[27] where he set out the proposition that when evaluating an asserted liberty interest, the Court must examine it at the most specific level possible.[28] As a matter of analysis, defining the asserted right as specifically as possible increases the difficulty of successfully asserting a right, since there must be a tradition of protecting that *specific* right.

To that end, Rehnquist writes that,

> [the Court] has a tradition of carefully formulating the interest at stake in substantive due process cases. For example, although *Cruzan* is often described as a "right to die" case … we were, in fact, more precise: We assumed that the Constitution granted competent persons a 'constitutionally protected right to refuse life-saving hydration and nutrition.'[29]

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[25] 521 U.S. 702, 723 (1997).

[26] 521 U.S. 702, 721 (1997).

[27] 491 U.S. 110 (1989).

[28] 491 U.S. 110, 127 (1989).

[29] 521 U.S. 702, 722–723 (1997) quoting *Cruzan*, 497 U.S. 287 (1989).

By drawing on *Cruzan*, Rehnquist is able to invoke the weight of precedent to reassert that the proper due process methodology is one which focuses on a narrow definition of the asserted right being claimed.

Once Rehnquist proceeds to the actual formulation of the right being considered in *Glucksberg*, the parallel with Justice Scalia's opinion in *Michael H*. becomes even more evident. In describing the right being sought, Rehnquist writes, "the question before us is whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so."[30] The specificity of the right is an exemplary application of Scalia's "most specific level"[31] method from *Michael H.*

This aspect of Rehnquist's opinion in is especially important in relation to Justice Kennedy. Recall that in *Michael H. v. Gerald D*., Justice Kennedy joined Justice O'Connor's concurrence which specifically rejected the "most specific level" analysis Scalia used in the case, essentially on the grounds that it was too restrictive. Here, in *Glucksberg*, Justice Kennedy joins–without reservation–an opinion that applies a due process methodology that is identical in substance to the methodology Justice Scalia set out in *Michael H*. Kennedy's acceptance of the 'history and tradition' based substantive due process approach in Glucksberg is the strongest indication that Kennedy is engaged in an intentional reshaping of substantive due process law. Keep in mind that Casey itself was a significant shift from the "strict scrutiny" based approach of Roe; consequently, Glucksberg looks like another incremental 'step down' towards a more judicially

[30] 521 U.S. 702, 723 (1997).

[31] 491 U.S. 110, 127 n.6 (1989).

restrained substantive due process approach–only in Glucksberg, it is the method that is being changed, as opposed to the 'test.' When Justice Kennedy joined the Court in 1987, Roe was the pre-eminent substantive due process case; yet, during the next decade, the Court essentially reversed much of Roe, and beyond that, the Court had rejected every 'new' substantive due process claim brought before it, in cases like Michael H. and Glucksberg. Since the shift towards a more restrained substantive due process approach has been both slow and incremental (taking multiple cases over many years, with no one case changing too much at one time), the resulting restrained substantive due process methodology has the added protection of multiple precedents supporting it. The result of building an approach over multiple cases is that the method itself becomes more ingrained in the law–a sort of stare decisis applied to a method. However, before concluding the analysis of Justice Kennedy's due process views and the Court's opinion in *Glucksberg*, there are a few more elements in Rehnquist's opinion that should be discussed.

As an additional enhancement towards a more limited view of substantive due process rights, Rehnquist quotes the 1995 case *Reno v. Flores*: "The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it."[32] By establishing a presumption against 'novel' substantive due process claims, Rehnquist is able to insert a distinction in the law separating cases like *Griswold v. Connecticut*–where the Court recognized a right "older than the Bill of Rights"[33] of "marital privacy"–and

[32] 521 U.S. 702, 723 (1997) citing 503 U.S. 292, 303 (1996).

[33] 381 U.S. 479, 485–486 (1965).

cases such as *Roe v. Wade,*[34] and *Michael H. v. Gerald D.*, where the asserted rights truly were novel. Since some commentators such as Lazarus claim that Kennedy views *Griswold* favorably,[35] the distinction Rehnquist made may have been a subtle way of reconciling Kennedy to the opinion in *Glucksberg*. Also, since distinguishing 'novel' substantive rights claims from claims with a basis in tradition serves Rehnquist's immediate end of upholding the Washington law, the citation to *Reno* fits with the overall thrust of the opinion.

Having delineated the appropriate method and the liberty interest at issue, the Chief Justice moves to the final part of his opinion: the application of the appropriate judicial standard, or "test," to the law. He writes,

> The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests.[36]

The application of the rational basis test to the Washington law is the final element in Rehnquist's opinion. Firstly, it further solidifies the Court's 'history and tradition' based substantive due process approach that the Chief Justice has used in his opinion. Secondly, the application of the rational basis test undermines, in a small but significant way, the "undue burden" standard from *Casey*. Nowhere the opinion does the Chief Justice suggest that any non-fundamental liberty interests deserve the protection of any

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[34] 410 U.S. 113 (1973).

[35] Lazarus, *Closed Chambers*, 381.

[36] 521 U.S. 702, 728 (1997).

level of heightened scrutiny; indeed, the formulation given by Rehnquist is binary–there are two types of liberty interests (fundamental and not fundamental) and two levels of judicial scrutiny applied (strict scrutiny protects fundamental interests, rational basis review protects non-fundamental interests). There is no point of purchase for the undue burden test.

Rehnquist's opinion also clearly has *Roe v. Wade* in his sights. The first page of Section I says, "The States' assisted suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life."[37] His statement recognizes that States do have an interest in life that they may act to protect by passing certain laws. However, he does not limit his statement to saying that the states may protect "human life," instead choosing the telling phrase "*all* human life."[38] This is an attempt to assert that the State's power to protect the unborn–as recognized in *Casey*–extends to all concepts of human life, and thus, to fetuses pre-viability.

Several pages later, Rehnquist turns to a discussion of the precedent of *Planned Parenthood v. Casey*. Since Justice Kennedy was one of the authors of the joint opinion, Rehnquist's interpretation of *Casey* is one aspect of the *Glucksberg* opinion that Kennedy would have paid special attention to, especially since the focus of the *Casey* discussion is on that case's definition of "liberty"–the part of the joint opinion authored by Kennedy. Rehnquist writes:

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[37] 521 U.S. 702, 710 (1997).

[38] 521 U.S. 702, 710 (1997). Emphasis added.

> The [*Casey*] opinion moved from the recognition that liberty necessarily includes freedom of conscience and belief about ultimate considerations to the observation that 'though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise.' That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.[39]

This passage, though it draws on Justice Kennedy's portion of the *Casey* opinion, seeks to limit *Casey*'s application. Indeed, Rehnquist's interpretation of *Casey* cuts deeply towards the philosophical core of the abortion argument–even though a decision may be 'personal and intimate'–that is not necessarily enough of a reason to constitutionally exclude that decision from regulation by the State.

Another key strategy for transforming a particular area of jurisprudence is to discredit competing approaches. For example, while Rehnquist does accept the overall legitimacy of substantive due process, Part II of his opinion notes that "we 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open ended.'"[40] While the sentiment expressed in this quote is unsurprising coming from a Justice with Rehnquist's judicial views, the internally-quoted text comes from a substantive due process opinion written by liberal Justice John Paul Stevens in the 1992 case of *Collins v. Harker Heights*.[41] Rehnquist is intentionally quoting Stevens–and a Stevens opinion that was written on behalf of a unanimous Court–in an attempt to show Justice Stevens' inconsistency, since he was now supporting a contrary view. Justices typically try to

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[39] 521 U.S. 702, 727 (1997).

[40] 521 U.S. 702, 720 (1997) quoting 503 U.S. 115 (1992).

[41] 503 U.S. 115 (1992).

maintain consistent views once they go 'on the record,' since taking alternative positions on a constitutional question without fully explaining their reasons for the change opens them up to the charge that their decisions are influenced by personal preference rather than law. Here, Rehnquist puts this quote on the record as a way of undermining Justice Stevens' concurrence, which advocated support for the more "open-ended" substantive due process methodology of Justice Harlan.[42]

The Chief Justice also takes on Justice Souter's concurring opinion, which also argued in favor of using Harlan's methodology, even though Souter claimed it would have led to the same result in *Glucksberg*. Rehnquist attempts to cut off Souter's use of the Harlan methodology–which Rehnquist sees as dangerously open-ended–by including a lengthy footnote. Footnote 17 goes to great length to demonstrate that not only has Justice Harlan's approach never been adopted by the Court, let alone successfully replaced the 'history and tradition' based approach Rehnquist is using in *Glucksberg.* Rehnquist also notes that in the 1993 case of *Reno v. Flores*,[43] the Court had issued an extensive opinion dealing with a substantive due process claim–an opinion in which Souter joined–that had no mention whatsoever of Harlan's methodology or the dissent in *Poe.*[44]

As the *coup de grâce*, Rehnquist concludes the Footnote with the following discussion of the joint opinion in *Planned Parenthood v. Casey*:

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[42] 521 U.S. 702, 742 - 744 (1997). Cf. n. 19 for a full discussion of Harlan's due process approach.

[43] 507 U.S. 292 (1993).

[44] 521 U.S. 702, 721 (1997), n. 17.

> True, the Court relied on Justice Harlan's dissent in *Casey* … but, as *Flores* demonstrates, we did not in so doing jettison our established approach. Indeed, to read such a radical move into the Court's opinion in *Casey* would seem to fly in the face of that opinion's emphasis on *stare decisis*.[45]

Particularly since it was Justice Souter who authored the section of *Casey* on *stare decisis*, Rehnquist's footnote does a great deal to point out to readers how hypocritical Justice Souter's position in *Glucksberg* is. Rehnquist's work here may not change Justice Souter's opinion, but it certainly makes clear one of the professional hazards of serving on the Supreme Court.

With *Glucksberg*, it appears that is switching his methods from case-to-case, accepting a heightened scrutiny requirement for the asserted 'liberty interest' at stake in *Casey*, while abandoning a heightened scrutiny requirement for the 'liberty interest' at stake in *Glucksberg*. In *Casey,* the opinion had its roots in Justice Harlan's flexible substantive due process methodology, while in *Glucksberg*, Kennedy signs on to an opinion which explicitly rejects that methodology, adopting the 'history and tradition' based approach. However, while Kennedy's switching positions seem to indicate indecisiveness on his part, when viewed in the whole, they are actually part of a consistent trend towards incrementally shifting substantive due process from the *Roe*-era approach back to a more restrained, judicially conservative, due process methodology.

However, Justice Kennedy's substantive due process jurisprudence did not cease its development with the holding in *Glucksberg*. Little over a year later, in *Sacramento County v. Lewis*,[46] Kennedy wrote a concurring opinion that provides additional insights

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[45] 521 U.S. 702, 722 (1997), n. 17.

[46] 523 U.S. 833 (1998).

into his substantive due process jurisprudence. *Lewis* involved a civil lawsuit against Sacramento County, CA, which resulted from the death of sixteen year-old Philip Lewis during a high-speed police pursuit. Lewis was the passenger on a motorcycle driven by Brian Willard, who ignored a command by Sacramento County Sheriff's Deputy Murray Stapp to stop. After Willard ignored the officer's command (and drove between two police cars which were blocking the road) Sacramento County Sheriff's Deputy James Smith gave pursuit. According to the Court, the subsequent chase lasted for a little over a minute, but the vehicles involved exceeded 100 m.p.h. at times. When Willard attempted a sharp left turn, the motorcycle overturned, dumping Lewis into the path of Deputy Smith's oncoming patrol car, which hit him even after Deputy Smith slammed on his breaks. Lewis' injuries from the impact were fatal.[47]

Lewis' parents filed a lawsuit under 42 U.S.C. §1983, claiming that the State had unconstitutionally deprived their son of his substantive "right to life" protected by the Fourteenth Amendment. The Court took the case to determine the "standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case."[48] The Court held for Sacramento County in an opinion written by Justice Souter. Justice Kennedy joined the Opinion of the Court, but he also added his own concurrence, and it is in that concurrence–speaking for himself and Justice O'Connor–made several statements relevant for understanding his substantive due process jurisprudence.

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[47] 523 U.S. 833, 836–837 (1998).

[48] 523 U.S. 833, 839 (1998).

Justice Kennedy begins his concurrence with a statement that is, for the subject, radical. He writes, "I join the opinion of the Court, and write this explanation of the *objective character of our substantive due process analysis*."[49] To write of the "objective character" of substantive due process is a curious statement at best, especially considering that one of the major criticisms of substantive due process has been its unqualifiedly *subjective* element. While one might expect such a statement coming from a Justice in the majority in a closely divided case, the Justices all held for the State in *Lewis* (albeit with several concurrences). Given that there was no need to defend the majority ruling from the all-too-familiar accusations of subjectivism in a due process case, Kennedy's opening line becomes even more unusual.

Instead of a defense of substantive due process, Kennedy's statement is a demonstration of his recognition that substantive due process must be limited in its scope, with attributes that can be understood and applied properly by a court. Kennedy wants to make clear that any sort of method that departs from an objective substantive due process analysis is not *proper* substantive due process, even though the fallacious reasoning may carry the day. There are several elements in his concurrence that support this view.

Kennedy's first disagreement with the Opinion of the Court comes out of the Court's use of the "shocks the conscience" test from *Rochin v. California*.[50] Kennedy writes that the "phrase [shocks the conscience] has the unfortunate connotation of a standard laden with subjective assessments. In that respect, it must be viewed with

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[49] 523 U.S. 833, 856 (1998). Emphasis added.

[50] 523 U.S. 833, 857 (1998), citing 342 U.S. 165, 172–173 (1952).

considerable skepticism."[51] A clearer condemnation of the 'subjective' nature of the "shocks the conscience" test is hard to imagine.

But, Kennedy's follow-up, which states that, "the [shocks the conscience] test can be used to mark the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning,"[52] is a rhetorical move striking in both its importance and clarity. By making the "shocks the conscience" test the "beginning point" of an investigation into "our traditions, precedents, and historical understanding of the Constitution," Justice Kennedy has given substance and limits to the otherwise infinitely-malleable "shocks the conscience" test. And the limits Kennedy places on the test are nothing other than the familiar conservative refrain of 'history and tradition.'

Following this, Justice Kennedy continues discussing of the problems with the "shocks the conscience" test, writing,

> Though I share Justice Scalia's concerns about using the phrase "shocks the conscience" in a manner suggesting that it is a self-defining test, the reasons the Court gives in support of its judgment go far toward establishing that objective considerations, including history and precedent, are the controlling principle, regardless of whether the State's action is legislative or executive in character.[53]

Kennedy restates his concerns with the "shocks the conscience" test–that it has the potential to become subjective, rather than remain objective. He notes that while the Court did give some supporting reasons which help define the nature of the test–and thus

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[51] 523 U.S. 833, 857 (1998).

[52] 523 U.S. 833, 857 (1998).

[53] 523 U.S. 833, 858 (1998).

make it less prone to subjectivity–his major reason for concurring is to ensure that the limiting factors of history and precedent are included as necessary elements of the test.

His willingness to limit the potential scope of the "shocks the conscience" test is first-hand evidence of his judicial conservatism; Kennedy recognizes the limited role of the judiciary, and wants to restrain the subjective elements inherent in the judge's job as much as is practically possible. While *Lewis* only dealt with substantive due process in a technical and limited way, Kennedy's desire to limit the due process inquiry to "objective elements" is part of his overall trend towards a more methodologically restrained version of substantive due process.

Kennedy's work on the Court during the mid-1990's was more complex than the 'swing Justice' label allows for. He would not be another Blackmun or Souter–a Republican appointee who moved ever-leftwards. Kennedy was something else entirely. While the consensus among Court-watchers was that Kennedy was some sort of political moderate, thanks to the apparent inconsistency of his votes, those same Court-watchers failed to take into account what the Justice said at his nomination hearings–and see how the principles he discussed there appeared in his jurisprudence on the Court.

However, as a closer look has shown, Kennedy's apparent inconsistency is not inconsistent at all. Instead, his substantive due process jurisprudence reveals a remarkable consistency, both in principle and method. Rather than any back-and-forth movement, the substantive due process cases which the Court heard during this period show Kennedy continuing to refuse to acknowledge new substantive due process 'rights,' as well as advocate for a restrained substantive due process methodology grounded in national history and tradition.

CHAPTER SIX

The End of the *Casey* Truce?

The year 2000 was a tumultuous one for the Supreme Court. It heard several high-profile cases, and ended the year with *Bush v. Gore*,[1] which determined the outcome of the 2000 Presidential Election. With the most contentious cases–including *Bush v. Gore*–being decided by 5 to 4 votes, Justice Kennedy's position as one of the 'persuadable' votes on the Court raised his profile in the public eye, yet this did not always translate into more influence over the outcome of cases. In both of the Court's two major substantive due process decisions during the 2000 term, *Troxel v. Granville*[2] and *Stenberg v. Carhart,*[3] Kennedy was on the losing side. However, both decisions prompted thoughtful dissents which are useful for understanding his substantive due process jurisprudence. These cases will show that Justice Kennedy is consistent with his principles, since in dissent he would continue to advocate for a version of substantive due process that is cautious in its classification of rights, shows an adequate respect for state power, applies lower standards of review, respects precedent, and only seeks to make incremental changes to the law.

The first of the two cases, *Troxel v. Granville,* was a challenge to Washington's 'third-party' child visitation statute. This particular case involved an unwed mother

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[1] 531 U.S. 98 (2000).

[2] 530 U.S. 57 (2000).

[3] 530 U.S. 914 (2000).

(Tommie Granville) who wished to limit the time her children spent with their now-deceased father's parents (Jenifer and Gary Troxel). While Ms. Granville was willing to allow her children to visit their paternal grandparents, the Troxels wanted more visitation than Granville was willing to allow.[4] A Washington State law allowed "any person [to] petition the court for visitation rights at any time … [the] court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances."[5]

The Troxels filed for visitation under the law, and the Superior Court granted the request, finding that doing so was in the best interests of the children.[6] The Supreme Court of Washington reversed, holding that the law unconstitutionally infringed on the "fundamental right of parents to raise their children,"[7] since it allowed a court to grant visitation to third parties without a finding that a denial of visitation would result in harm to the child. The U.S. Supreme Court affirmed the Washington Supreme Court's invalidation of the law, with O'Connor's plurality opinion grounding its ruling in the 1920's-era substantive due process rulings *Meyer v. Nebraska*[8] and *Pierce v. Society of Sisters*.[9]

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[4] 530 U.S. 57, 60–61 (2000).

[5] 530 U.S. 57, 61 (2000) quoting Wash. Rev. Code §§26.29.240 and 26.10.160(3) (1994).

[6] 530 U.S. 57, 61 (2000).

[7] 530 U.S. 57, 63 (2000).

[8] 262 U.S. 390 (1923).

[9] 268 U.S. 510 (1925).

Kennedy's dissent charges the Court with overreaching by requiring a finding of "harm to the child" before a court may order visitation, as opposed to the less-stringent "best interests of the child" standard. Grounding his dissent on the premise that the right of parents to raise their children is not an unqualified right, Kennedy's critique of the decision will share its focus and method with his other substantive due process opinions.

Among those methods is how he defines the right at stake in a case, something seen before in his broader substantive due process jurisprudence. For example, when Justice Kennedy quotes the relevant portion of the Washington Supreme Court's opinion, he cites, "'[s]hort of preventing harm to the child,' the court considered the best interests of the child to be 'insufficient to serve as a compelling state interest overruling a parent's fundamental rights.'"[10] Even though the Washington Supreme Court (as well as the U.S. Supreme Court[11]) chose to frame the parent's rights as a 'fundamental right,' Justice Kennedy's dissent pointedly avoids the use of that formulation, choosing instead to speak of a "constitutional right."[12] Other than the quotation from the Washington Supreme Court's opinion, Justice Kennedy never uses the fundamental rights formulation. The significance of this is parallel to the abandonment of the "fundamental rights" language of *Roe v. Wade*[13] for the ambiguous "liberty interest" language of *Planned Parenthood v.*

[10] 530 U.S. 57, 96 (2000).

[11] 530 U.S. 57, 66 (2000). While Justice O'Connor's opinion does not always use the term 'fundamental rights' to refer to the right of parental control over children, it does so on numerous occasions. Page 66 is merely the first of these instances.

[12] 530 U.S. 57, 94, 95, 97, 101 (2000).

[13] 410 U.S. 113 (1973).

Casey.[14] Justice Kennedy's avoidance of the term "fundamental rights" is a way of rejecting the related inference that strict scrutiny is the appropriate judicial test here. As has been demonstrated earlier, avoiding the use of strict scrutiny is an example of Kennedy's long-term transformation substantive due process law back towards a more limited and manageable role.

Another method he has used in re-working substantive due process deals with the application of the appropriate judicial test. At one point in the opinion, Kennedy writes that "[a]s our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the State, how best to raise, nurture, and educate the child."[15] This statement is the first indication of the level of scrutiny Kennedy believes appropriate to this case. His phrase–"undue interference"–invokes the "undue burden" test of *Casey,* and is part of his argument against the Court's decision to use a strict scrutiny standard.

The significance of Kennedy's application of a version of the "undue burden" test to the due process right being asserted by Ms. Granville fits in the broader pattern of his due process jurisprudence, which seeks to protect the legitimate powers of the state. Kennedy's attempt to apply a lowered version of judicial scrutiny in this case has a particular significance in that he is calling for a lowered version of scrutiny to protect an un-enumerated right which not only has an older origin within the Court's own jurisprudence (the *Meyer* and *Pierce* cases of 1923 and 1926, respectively), but also an un-enumerated right which truly *is* as old as society. If there is an un-enumerated right

[14] 505 U.S. 833 (1992).

[15] 530 U.S. 57, 95 (2000).

which deserves constitutional protection on the grounds of its ancient origins and traditional practice, the right of parents to raise their children would be one of the most convincing examples available.

When Kennedy moves on to the question of whether there is a corresponding 'right to visitation' that could be a factor in the case, he turns to a familiar element of due process methodology: 'history and tradition.' He notes that

> On the question whether one standard must always take precedence over the other in order to protect the right of the parent or parents, 'our Nation's history, legal traditions, and practices' do not give us clear or definitive answers.[16]

By reviewing historical evidence which indicates that the practice of court-ordered visitation is "a 20th-century phenomenon,"[17] citing cases considered to be foundational in court-ordered visitation, as well as several cases which explicitly stated that "the obligation ordinarily to visit grandparents is moral and not legal,"[18] Kennedy is stating that there is no clear historical support for the Washington Supreme Court's requirement that the 'harm to the child' standard be applied in all cases regarding visitation. Additionally, he uses the history of the case law to demonstrate that there is no 'right to visitation'–effectively heading off a due process claim by the Troxels. He brings this point to its conclusion, noting that "contemporary state-court decisions acknowledge that '[h]istorically, grandparents had no legal right of visitation."[19] This refusal to

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[16] 530 U.S. 57, 96 (2000).

[17] 530 U.S. 57, 96 (2000).

[18] 530 U.S. 57, 97 (2000).

[19] 530 U.S. 57, 97 (2000).

acknowledge–indeed, foreclose–the possibility of a novel due process right (of grandparental visitation) fits in well with Kennedy's pattern of refusing to acknowledge new due process rights.

The influence of the incrementalist, common-law approach abounds in Kennedy's opinion. For example, consider the following passage, where Kennedy writes that

> *Pierce* and *Meyer*['s] formulation and subsequent interpretation … found in Fourteenth Amendment concepts of liberty an independent right of the parent in the 'custody, care and nurture of the child,' free from state intervention. The principle exists, then, in broad formulation; yet courts must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right.[20]

As the Justice notes in the passage, an incremental approach to the adjudication and definition of rights is fact-driven: only cases where the actual differ from prior cases even present an opportunity to make changes in the law. A case with identical (or nearly identical) facts as a prior case would typically be disposed of under the guidance of the controlling precedent. Secondly, when there is reason to make a change in the law, the incremental approach cautions judges to make only the smallest changes necessary to decide the case. When applied in due process cases, these incrementalist principles would limit the depth and breadth of rulings, which is one reason Justice Kennedy brings up the issue as a charge against the decision of the Court.

The influence of incrementalism can also be seen in the section where he discusses the lack of conclusive evidence establishing that grandparents have a "legal right of visitation."[21] Kennedy argues that the absence of a right of visitation does not

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[20] 530 U.S. 57, 95–96 (2000).

[21] 530 U.S. 57, 97 (2000).

necessarily lead to the conclusion that "a parent has a constitutional right to prevent visitation in all cases not involving harm."[22] For Kennedy, finding that one right does not exist does not require the Court to acknowledge a different right. Kennedy goes on to caution that "contemporary practice [of various domestic arrangements] should give us some pause before rejecting the best interests of the child standard in all third-party visitation cases."[23] His concern is that the Court's decision goes too far in protecting the parent's right, and that it would be more prudent to "conclude that the constitutionality of the application of the best interests standard depends on more specific circumstances."[24] Kennedy's critique highlights the difference between the Court's approach in this case and his substantive due process method with its emphasis on the common law heritage, incrementalism, and judicial restraint. It gives the reader a clear understanding of Justice Kennedy's disposition regarding substantive due process cases; Kennedy reveals himself to be a judge who understands the danger present when the Court wades into substantive due process and wants the Court to proceed with extra caution (and greater deference to the incrementalist heritage of the common law) when it is necessary to rule on such cases.

Another example of the influence of the common law heritage comes when he argues that the requirement of the "harm to the child" standard to all visitation requests "rest[s] upon assumptions that the Constitution does not require."[25] His critique is that the Court is going 'too far' in requiring the harm standard in all cases. This objection is

[22] 530 U.S. 57, 97 (2000).

[23] 530 U.S. 57, 99 (2000).

[24] 530 U.S. 57, 100 (2000).

[25] 530 U.S. 57, 98 (2000).

rooted in his incrementalism. Rather than wait for additional cases to arise and help determine if the "harm to the child" standard is necessary, the Court goes against the practice of incrementalism and draws a broad, bright-line rule that may create additional problems.

The last one of Kennedy's objections to the Court's decision in *Troxel,* like many others Kennedy levels against the Court in this case, is rooted in his well-developed respect for the incrementalist (and fact-sensitive) common law system. However, this particular critique is noteworthy for another reason, since it provides an interesting contrast with one of Kennedy's later substantive due process opinions. When he discusses the issue of "contemporary practice," the Justice makes a point about the unnecessary scope of the Court's imposition of the "harm to the child" rule. He writes that,

> My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's caregivers and that the third parties who seek visitation have not legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households … Cases are sure to arise–perhaps a substantial number of cases–in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with the child which is not necessarily subject to absolute parental veto.[26]

Kennedy wants to emphasize the potential 'impact' that the Court's decision may have on future cases. As he correctly points out, the increasing diversity of domestic arrangements in the United States makes it likely–if not inevitable–that the Court's "harm

[26] 530 U.S. 57, 98 (2000).

to the child" rule will lead to situations where a child will be deprived of an emotionally significant relationship because the loss of that relationship does not rise to meet the level of the "harm to the child" standard.

The core of his argument is that the Court's decision will have a much broader 'impact' than the majority expects. His argument is a consequentialist one, since it rests on the possibility that the Court's rule will have a negative impact on a significant number of family-law cases. Where the potential 'impact' is great, Kennedy wants to adhere even more faithfully to the cautious incrementalist approach. His critique comes back to his concern for restraint and caution when the judiciary acts. Contrast this with his decision in *Lawrence v. Texas*,[27] where the dissenters accuse him of issuing an opinion that creates broad change. While Kennedy's positions in the cases appear contradictory, the reason behind his unwillingness to join the majority in *Troxel* and his opinion in *Lawrence* is actually a consistency on the 'impact' the decision would have. His positions in both cases actually resulted in little actual change, and are consistent with his respect for the incrementalism of the common law system.

Later in 2000, the Court returned–for the first time since *Casey*–to the thorny issue of abortion in *Stenberg v. Carhart*. In *Stenberg*, the Court confronted an attempt by the State of Nebraska to ban a particular late-term abortion procedure, known medically as 'intact dilation and extraction,' (or D&X) that had popularly become known as "partial-birth abortion."[28] There is, however, another closely-related late-term abortion procedure known as 'dilation and evacuation' (D&E), which the Nebraska law

[27] 539 U.S. 558 (2003).

[28] 530 U.S. 914, 915 (2000).

purportedly did not target.[29] A provider of late-term abortions in Nebraska, Dr. Leroy Carhart, sought an injunction barring the enforcement of the law on the grounds that it was an unconstitutional restriction on a woman's right to an abortion. After Dr. Carhart won at the District and Appeals Court levels, Nebraska appealed to the Supreme Court, which granted certiorari.[30]

The Court held the Nebraska law was invalid in a contentious 5-4 vote. This case marked the first time the Court itself attempted to apply the principles it announced in *Casey*–and that application created intense disagreement among the three *Casey* co-authors.[31] Justice Kennedy wrote a long and detailed dissent, which is made even more relevant due to the fact that his *Casey* co-authors voted to invalidate the law.

For Kennedy, the central legal issue in the case is his disagreement with the majority over the application of *Casey*. Writing in dissent, he is aware that his opinion will not be controlling precedent, so he uses his opinion to undercut the majority opinion, principally by showing how the Court has misapplied the principles of *Casey*. For example, he writes that

> The Court, as I read its opinion … [misunderstands] *Casey* and the authorities it confirmed. *Casey* held that cases decided in the wake of *Roe v. Wade* had "given [state interests] too little acknowledgement and implementation." The decision turned aside any contention that a person has the "right to decide whether to have an abortion without 'interference from the State,'" and rejected a strict scrutiny standard of review as

[29] 530 U.S. 914, 917–8 (2000).

[30] 530 U.S. 914, 922 (2000).

[31] Justice Souter joined the Opinion of the Court, as did Justice O'Connor. However, Justice O'Connor filed a concurring opinion to emphasize her differences with the rest of the majority.

> "incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy."[32]

In this quote, Kennedy seeks to remind his readers of three specific points from the *Casey* decision–the acknowledgement that *Roe* and its progeny had underweighted the state interest in regulating abortion, *Casey*'s abandonment of a strict scrutiny standard for the "undue burden" test, and the rejection of the claim that the abortion decision may be made completely free from state interference–that he believes conflict with the Court's holding here and support his claim that the Court is misapplying the principles in *Casey* to the Nebraska law.

One tactic that is unique to Kennedy's dissent in *Stenberg* is his use of emotionally charged language. While part of the reason for Kennedy's exaggerated language is that he viewed the Court's ruling as a betrayal of the principles *Casey,*[33] his rhetoric in this case is still important to understanding his substantive due process jurisprudence. For example, consider the overwrought language of the following quote:

> The Court's approach in this regard is revealed by its description of the abortion methods at issue, which the Court is correct to describe as "clinically cold or callous. The majority views the procedures from the perspective of the abortionist, rather than the perspective of a society shocked when confronted with a new method of ending human life.[34]

There are two things in this quote worth discussing. First, there is Kennedy's use of the word "abortionist." Contrast that with the majority opinion, which does not use this term for a medical professional who performs abortions, using instead the far more

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[32] 530 U.S. 914, 960–961 (2000). Internal citations omitted.

[33]Toobin, *The Nine*, 135–136.

[34] 530 U.S. 914, 957 (2000). Internal citations omitted.

commonplace terms of "physician" and "doctor."[35] Clearly, Justice Kennedy's word choice here is meant as a moral pejorative–he characterizing the physicians who perform these procedures in the most negative way possible, and by proxy, challenging the moral validity of the Court's decision protecting "abortionists."

Secondly, note that the quote calls D&X "a new method of ending human life." By making that statement, Justice Kennedy is classifying a fetus as fully human–a position that the Court has never adopted. By describing the fetus as a "human life," the Justice is suggesting that D&X is similar (if not identical to) homicide, and that State power in this situation is at its apogee–the State may go as far as banning D&X outright. Secondly, by characterizing the fetus as a "human life," Kennedy provides grounds for an extensive use of state regulatory power. Furthermore, by characterizing the fetus as a "human life," the Justice makes clear his understanding that the exercise of state power in this instance clearly meets the "compelling state interest" prong of strict scrutiny.[36]

Another example of Kennedy using emotionally charged language comes with his inclusion of gruesome details about the abortion procedures that are at issue in this case. He does this partly to counter the clinical description given in the majority opinion, and partly as a way of undermining the moral legitimacy of the Court's judgment for sanctioning such an appalling procedure. While the descriptions Kennedy includes in his dissent cover both the D&E and D&X, the description of D&X–the procedure the Nebraska law sought to ban–is particularly graphic:

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[35] 530 U.S. 914, 916–946 (2000).

[36] This is not an isolated claim. Kennedy made a similar statement elsewhere in his dissent, and that other instance will be discussed later in this chapter.

> The other procedure implicated today is called "partial birth abortion" or D&X . . . In the D&X, the abortionist initiates the woman's natural delivery process … The fetus' arms and legs are delivered outside the uterus while the fetus is alive; witnesses to the procedure report seeing the body of the fetus moving outside the woman's body. At this point, the abortion procedure has the appearance of a live birth … With only the head of the fetus remaining in utero, the abortionist tears open the skull … Witnesses report observing the portion of the fetus outside the woman react to the skull penetration. The abortionist then inserts a suction tube and vacuums out the developing brain and other matter within the skull … Brain death does not occur until after the skull invasion, and, according to Dr. Carhart, the heart of the fetus may continue to beat for minutes after the contents of the skull are vacuumed out. The abortionist next completes the delivery of a dead fetus, intact except for the damage to the head and the missing contents of the skull.[37]

The description is so jarring that it borders on the voyeuristic. Kennedy confirms his objectives for describing the procedure in the following paragraph, writing, "[i]n light of the description of the D&X procedure, it should go without saying that Nebraska's ban on partial birth abortion furthers purposes States are entitled to pursue."[38] So, while Kennedy cannot uphold the law in this case, he can challenge the morality of the decision and call down moral opprobrium on the Court–to shame the majority, if you will–as a way of combating the changes the majority opinion sought to make in substantive due process law.

However, the bulk of Kennedy's dissent is built around the issue that defined *Casey*: the 'state interest' in regulating abortion. Recall that in *Casey*, the Court rested its argument for abandoning the structure of *Roe* on the ground that *Roe* had not given adequate recognition to certain state interests, such as the power to protect 'potential

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[37] 530 U.S. 914, 959–960 (2000). Internal citations omitted.

[38] 530 U.S. 914, 960 (2000).

human life.' Thus, it is unsurprising that Justice Kennedy would return to this issue here. What is surprising is how the Justice defines those state interests:

> When [in *Casey*] the Court reaffirmed the essential holding of *Roe*, a central premise was that the States retain a *critical and legitimate role* in legislating on the subject of abortion, as limited by the woman's right the Court restated and again guaranteed.[39]

The wording that Justice Kennedy used to describe the state interest–"critical and legitimate"–was chosen because it parallels the language the Court has long used in its three broad levels of judicial tests. However, the formulation Kennedy used introduced a different word–critical. This is in contrast to the typical formulation of strict scrutiny, which speaks only of a "compelling" governmental interest. In defining the state interest as "critical," Kennedy is arguing that it is of even more importance than a "compelling" state interest.

Given a "critical" state interest, any state action which seeks to protect a "critical" state interest would, in theory, be given more flexibility in its method. To put it another way, if a state is protecting a "critical interest," there are far fewer limitations on the scope of state power when protecting that interest. If the Nebraska law is protecting a critical state interest, then even a broad ban on the procedure is constitutionally permissible because of the overwhelming weight of the state's interests.

But what about the word "legitimate?" Why include it in the formulation? To fully understand why "legitimate" appears in this new formulation, look at the rest of the above cited passage: "legitimate role in legislating on the subject of abortion." Partly, Kennedy was reinforcing the claim that the states may legislate on the issue of abortion *at*

[39] 530 U.S. 914, 956 –7 (2000). Emphasis added.

all; furthermore, Justice Kennedy used "legitimate" because of its association with the rational basis test–the weakest form of judicial scrutiny. By suggesting that the State has not only "a" role in legislating on abortion, but a "legitimate role" in legislating on this matter, Kennedy advanced the claim that states have considerable power to regulate abortion *in general*. But add together the two–a "critical" state interest within the States "legitimate" legislative sphere–and you have a formula that is extraordinarily deferential towards state regulatory action. This is a tremendous change from the "undue burden" test of *Casey*.

In its merits brief, Nebraska asserted three specific state interests in support of the law. Kennedy's discussion of those interests helps clarify why the issue of state interests is so important to the case at hand, as well as sheds additional light on Kennedy's substantive due process jurisprudence as a whole. The three interests Nebraska asserted in support of the ban on D&X were as follows: 1. "concern for the life of the unborn and 'for the partially-born,'" 2. "preserving the integrity of the medical profession," and 3. "erecting a barrier to infanticide."[40] It is particularly important to note that all three of the state interests Nebraska asserted have a clear element of *moral* judgment to them. Considering that element, it is possible to categorize all three interests as being "protected" through the state's traditional police power to protect the "morals" of its people. While this element may not seem immediately significant, when the connection to the State's morality police power in this case is considered in the context of the Court's subsequent decisions in *Lawrence v. Texas* and *Gonzales v. Carhart*, the importance of Kennedy's willingness to accept state action to protect morality will become clearer.

[40] 530 U.S. 914, 961 (2000).

Another passage where Kennedy brings up the issue of moral disapproval as a basis for laws comes when he writes that

> The Court's refusal to recognize Nebraska's right to declare a moral difference between the procedures is a dispiriting disclosure of the illogic and illegitimacy of the Court's approach to the entire case.
>
> Nebraska was entitled to find the existence of a consequential moral difference between the procedures. We are referred to substantial medical authority that D&X perverts the natural birth process to a greater degree than D&E … American Medical Association publications describe the D&X abortion method as "ethically wrong." … D&X's stronger resemblance to infanticide means Nebraska could conclude the procedure presents a greater risk of disrespect for life and a consequent greater risk to the profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect. The Court is without authority to second-guess this conclusion.[41]

Kennedy's conclusion here is that the Court may not simply invalidate laws because a state is making a moral judgment, nor may the Court overrule the moral judgment of the State simply because of disagreement. The Court must confine itself to invalidating State action *only* when the State has exceeded the constitutional limits on its power. Furthermore, it also demonstrates how he views the relationship between the State's ability to regulate things on a purely "moral" basis and the limits put on State power by the Constitution. The Constitution, for Kennedy, does permit states to concern themselves with the morals of society. Due Process law does not prohibit states from making moral judgments and basing laws on those moral judgments.

When Kennedy turns to discussing each of the particular interests in depth, he begins by discussing the most controversial of those interests: protecting the "life" of the unborn. He writes, "States also have an interest in forbidding medical procedures which,

[41] 530 U.S. 914, 962–963 (2000). Internal citations omitted.

in the States reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful to life, including life in the human fetus."[42]

This marks the second instance where Kennedy asserts that there is "life in the human fetus." As the chapter dealing with *Casey v. Planned Parenthood* noted, the Court as a whole has never adopted the *legal* position that a human fetus is "alive." To do so would have tremendous implications for abortion law, because protecting "human life" per se is among the most "compelling" of state interests (and also what underlies the State's power to enact statutes criminalizing homicide). That Justice Kennedy is openly stating that a human fetus possesses "life" is an indication of how far Kennedy is theoretically willing to go to defend what he sees as the proper interpretation of *Casey*. While this particular point should be qualified since Kennedy is writing in dissent, it remains significant since he does not use the "potential human life" language that was used in *Casey*. While it cannot be certain that Justice Kennedy would have used the same language in a majority opinion, his use of the "life" language here is either a step towards allowing more extensive abortion regulations, or a pointed reminder to the majority in this case that he is aware of how dramatically abortion law could be re-fashioned if he joined with the Court's hardline conservatives in a future case.

The same passage also contains the phrase "reasonable determination." Much like examples from earlier cases, whenever a Justice–particularly when they are writing in a case involving substantive due process–uses the language of 'reasonableness,' they are making a claim for the application of the rational basis test. Here, Kennedy's mention of the state's "reasonable determination" is tied in part to his contention that the

[42] 530 U.S. 914, 961 (2000).

Nebraska law does not actually *deny* any woman an abortion,[43] which would lead to the law being evaluated under the "undue burden" test of *Casey*. Rather, Kennedy interprets *Casey* as allowing regulations that do not deny a woman "the right to choose an abortion,"[44] to be evaluated under the rational basis test. This claim is a clear departure from the standard announced in *Casey*, since there was no explicit mention in that opinion of any exceptions to the use of the "undue burden" test, although Kennedy's interpretation is not one that fundamentally conflicts with the logic of *Casey*. Regardless, the fact remains that Kennedy acknowledges that there is a class of abortion regulations that should be evaluated (and likely sustained) under the rational basis test.

In addressing the third asserted state interest–the interest in protecting medical ethics–Kennedy makes the following statement that, "A State may take measures to ensure that the medical profession and its members are viewed as healers, sustained by compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others. *Ibid.; Washington v. Glucksberg,* 521 U.S. 702, 730–734 (1997)."[45] The Justice's citation to *Glucksberg* is noteworthy because the *Glucksberg* opinion held that the State had broad regulatory authority in acting to protect the integrity of the medical profession by outlawing physician-assisted suicide. The citation to *Glucksberg* also recalls Chief Justice Rehnquist's argument in *Glucksberg* that non-fundamental "liberty interests" are only

[43] 530 U.S. 914, 957 (2000). As Kennedy interprets the Nebraska statute, the law does not deny a woman an abortion *per se*, but rather denies her a particular *method* of abortion, and is thus qualitatively different from an outright ban on all procedures.

[44] 530 U.S. 914, 957 (2000).

[45] 530 U.S. 914, 962 (2000).

protected from State interference by the rational basis test. Kennedy's citation is yet another attempt to suggest the Nebraska law is within the state's power, as well as 'associate' the rational basis test with a restriction on abortion.

Having examined Kennedy's specific statements in his dissent, the essential point one should draw from Kennedy's dissent in *Stenberg* is that there is no indication from this case that he categorically objects to laws that have their basis in the State's police power to protect the 'morals' of the people. Indeed, his dissent in *Stenberg* is a lengthy defense of the State's prerogative to make moral distinctions through its laws.

Looking at both of the substantive due process cases the Court confronted during 2000, Justice Kennedy continued to hold true to the principles which he espoused during his nomination hearings. Kennedy refused to recognize any new substantive due process 'rights,' and went to great lengths to drive home the point that even those 'rights' or 'liberty interests' which have ancient roots and have long been recognized by the Court are not exempt from regulation by the State. As was clear in his dissent in *Troxel*, Kennedy is even willing to allow considerable State interference with Granville's right to raise her children–arguing that the Court has misapplied the strict scrutiny standard when it has not been *shown* to be necessary to adequately protect the parent's rights. The positions Kennedy takes in these cases are not ones which can be easily reconciled with a progressive philosophy, either in the broader scope of the decisions themselves, or in the nuances of the opinions.

While 2000 marked the last set of substantive due process cases the Court would confront for several years, when the Court returned to the topic in 2003, Kennedy's actions in a single case would single-handedly re-orient the Court's substantive due

process jurisprudence. *Lawrence v. Texas* was claimed by many liberal commentators to be a return to–and perhaps a herald of–an era of progressive Court decisions that would build on the legacy of the Warren Court. However, a careful examination of Kennedy's opinion in *Lawrence* will show that it was, in fact, a jurisprudential master-stroke which, metaphorically speaking, let the political progressives on the Court win a single battle, but lose the entire war.

CHAPTER SEVEN

Lawrence v. Texas–The Second Watershed

The significance of *Lawrence v. Texas*[1]–for the Court, for Scholars, and for Justice Kennedy–has been much greater than one might have expected from a case that began as a weapons disturbance call made to the Harris County (Houston, TX) Police Department. Officers responding to the call entered the apartment indicated in the emergency call, and found John Lawrence and Tyrone Garner engaged in "a sexual act."[2] Texas law prohibited certain sexual acts when engaged in by members of the same sex. Lawrence and Garner were charged with "deviate sexual intercourse," convicted of a misdemeanor, and fined $200.[3] They challenged the constitutional validity of the Texas law on both equal protection and substantive due process grounds.[4]

When the Court overturned Lawrence and Garner's convictions on June 26th, 2003, in an opinion authored by Justice Kennedy, the reaction in the media was extraordinary. Supporters of the Court's decision called it a "landmark gay-positive decision,"[5] which issued a "sweeping declaration of constitutional liberty for gay men

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[1] 539 U.S. 558 (2003).

[2] 539 U.S. 558, 563 (2003).

[3] 539 U.S. 558, 558 (2003).

[4] 539 U.S. 558, 563 (2003).

[5] Vincent J. Samar, "The Supremes Gay Rights; A closer look at Lawrence v. Texas," *In These Times*, August 11, 2003, 17.

and lesbians;"[6] noted that it "strengthened the U.S. Constitution's protection of privacy for all Americans,"[7] and that it had effectively "commanded the states to get out of the business of attempting to regulate what can or can't happen within private, intimate relationships between consenting adults."[8]

More conservative commentators, however, differed. Columnist Mona Charen slammed the Court's opinion, writing that, "In Lawrence vs. Texas, the high court's majority actually relied on everything but the actual words of the Constitution."[9] David Limbaugh intoned that, "the Supreme Court's opinion [in Lawrence] had little to do with protecting … privacy and much more to do with legitimizing homosexuality, moral relativism and the concept of the Constitution as an evolving document."[10] One called the decision a "confusion between liberty and license,"[11] while another claimed that, "[the Justices] know full well that if states cannot ban gay sodomy under our Constitution, then it's only a matter of time before bans on gay marriage are struck down."[12]

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[6] Linda Greenhouse, "The Supreme Court: Homosexual Rights; Justices, 6-3, Legalize Gay Sexual Conduct In Sweeping Reversal of Court's '86 Ruling," *The New York Times*, June 27, 2003.

[7] "Court Expands Privacy in Texas Sex Case; Justices strike down law aimed at private sexual conduct," *The Detroit News*, June 27, 2003.

[8] Linda Feldman and Warren Ritchie. "Big boost for privacy rights," *Christian Science Monitor*, June 27, 2003.

[9] Mona Charen, "Court's 'Legislation' Undermines Democracy," *The Augusta Chronicle*, July 10, 2003.

[10] David Limbaugh, "Sodomy Ruling Part II: A Liberal Gold Mine," *Human Events Online*, July 7, 2003, accessed June 1, 2012, Lexis-Nexis Academic.

[11] Tom Neven, "Should the court stay out of our bedrooms? NO: Founders assured liberty, not license," *The Denver Post*, July 3, 2003.

[12] Laura Ingraham, "Take Back the Constitution," *The New York Sun*, July 1, 2003.

Criticism of Justice Kennedy's opinion was not limited to the popular press. Noted conservative legal scholar Kenneth Starr said that,

> I [am] troubled by the logic of the opinion [because] it raises the serious question of the judicial role in the interpretation of the Constitution. And the logic and the potential of this opinion is really quite sweeping. As observers are noting, it raises some serious questions about the limitation of marriage to the traditional marriage form and the like. So I find it troubling.[13]

However, Justice Kennedy's opinion did lead to a thought-provoking article by Randy Barnett, a leading libertarian legal scholar. His article, entitled, "Kennedy's Libertarian Revolution,"[14] argued that the decision in *Lawrence* marked a major shift in Constitutional law, "because Justice Kennedy (and at least four justices who signed on to his opinion without separate concurrences) have finally broken free of the post-New Deal constitutional tension between a "presumption of constitutionality" on the one hand and "fundamental rights" on the other."[15] While Professor Barnett later recanted his claim that Kennedy–and the Court–had moved towards a "presumption of liberty,"[16] many of the points that Professor Barnett made in his article still hold true. However, *Lawrence* remains important not because it signaled the beginning of an era of libertarian jurisprudence, but rather the most significant step on Justice Kennedy's long and winding path towards the restoration of a more restrained (and politically conservative) version of substantive due process law.

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[13] CNN Late Edition With Wolf Blitzer, "Interview with Kenneth Starr," CNN, June 29, 2003.

[14] Randy Barnett, "Kennedy's Libertarian Revolution," *National Review Online*, July 10, 2003.

[15] Randy Barnett, "Kennedy's Libertarian Revolution," *National Review Online*, July 10, 2003.

[16] Randy Barnett, *Restoring the Lost Constitution* (Princeton, NJ: Princeton University Press, 2004), 5.

Professor Barnett's article was merely the first of a veritable avalanche of commentaries on *Lawrence* from the legal academy. Of the many interpretations of *Lawrence*, we will consider two articles, each of which offers a different understanding of the case's place in constitutional jurisprudence. The articles will help highlight the many different constitutional issues that Justice Kennedy had to take into account, as well as provide an indication of how divided the legal academy is over the proper interpretation of *Lawrence*. The articles will also help establish a contrast with the interpretation of the case that will be presented here.

The first article, by Rachel Sweeney, presents the 'standard' interpretation of *Lawrence*–the case is a substantive due process case that belongs in–and extends–the Court's "right to privacy" jurisprudence. Sweeny states that *Lawrence* "determined whether the Due Process Clause of the Fourteenth Amendment guarantees consenting, same-sex adults a right to freely engage in private sexual conduct."[17] Additionally, Sweeney notes that "Although the Court decided in *Bowers* that there is no fundamental right to homosexual sodomy, the Court in *Lawrence* rejected this analysis as erroneous, redefining the issue as whether adults possess a right to engage in consensual sexual conduct in the privacy of their own home."[18]

When examining how the Court) came to this conclusion, Sweeney states the following: "the Court reaffirmed the line of authority creating a right to privacy regarding personal decisions that implicate familial, marital, and procreation choices. In following

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[17] Rachel Sweeney, "Casenote: Constitutional Law—Right Of Privacy--Statute Criminalizing Homosexual Conduct Violates Due Process Clause of Fourteenth Amendment," *Cumberland Law Review* 34, (2003-2004): 171.

[18] Sweeney, "Right," 183.

this line of authority, the Court held that the Texas law interfered with personal decisions falling within the recognized right to liberty, and was therefore unconstitutional."[19] Furthermore, Sweeney's analysis claims that the Court "[found] support in the proposition of *Casey*, decided after *Bowers*, that the previously confirmed right to privacy is guaranteed because the liberty protected by the Fourteenth Amendment allows freedom in those choices central to personal dignity and autonomy."[20]

While Sweeney's note does not discuss in any detail the potential future impact of *Lawrence* on constitutional law, it is an excellent example of the "privacy right" interpretation of *Lawrence*, placing the decision firmly in a line of established (albeit controversial) substantive due process case law.

The second article, by Harvard Law Professor and Constitutional Law scholar Lawrence Tribe, gives a 'synthesis' interpretation, claiming that the version of 'liberty' the Court protected in *Lawrence* is a blend of equal protection and due process principles which represents a new approach to 'substantive liberty.' Tribe's evaluation is worth special consideration, since he was the attorney for Michael Hardwick in *Bowers v. Hardwick*,[21] and has been the leading academic critic of *Bowers* since the Court's decision.

Professor Tribe's article begins by contending that *Lawrence*

> gave short shrift to the notion that it was under some obligation to confine its implementation of substantive due process to the largely mechanical exercise of isolating "fundamental rights" as though they were a

[19] Sweeney, "Right,"172.

[20] Sweeney, "Right," 183.

[21] 478 U.S. 186 (1986).

> historically given set of data points on a two-dimensional grid, with one dimension representing time and the other representing a carefully defined and circumscribed sequence of protected primary activities (speaking, praying, raising children, using contraceptives in the privacy of the marital bedroom, and the like).[22]

Instead, Professor Tribe believes that *Lawrence* marks an important move towards a new methodology for deciding cases in this area of law–a methodology which he describes as "an explicitly equality-based and relationally situated theory of substantive liberty."[23] Additionally, Tribe believes that the change in the Court's methodology is "the core contribution of *Lawrence*."[24]

When Tribe takes up the question of what right is protected in *Lawrence*, he arrives at a peculiar–although interesting–conclusion. He writes that,

> the prohibition's principal vice was its stigmatization of intimate personal relationships between people of the same sex: the Court concluded that these relationships deserve to be protected in the same way that non-procreative intimate relationships between opposite-sex adult couples … are protected. Focusing on the centrality of the relationship in which intimate conduct occurs rather than on the nature of the intimate conduct itself, the Court … clearly proceeded from a strong constitutional presumption against allowing government, including its judicial branch, "to define the meaning of [any given personal] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects." . . . Had the Court done otherwise, it would have ceded to the state the power to determine what count as meaningful relationships and to decide when and how individuals might enter into such relationships.[25]

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[22] Lawrence Tribe, "Lawrence v. Texas: The 'Fundamental Right' that Dare Not Speak Its Name," *Harvard Law Review* 117, (April 2004): 1899.

[23] Tribe, "Fundamental Right," 1898.

[24] Tribe, "Fundamental Right," 1899.

[25] Tribe, "Fundamental Right," 1904–1905.

So, according to Professor Tribe, the Court was protecting a 'right to a relationship.' This is a critical element in Tribe's analysis, and his choice differentiates his analysis from the 'right to privacy' analysis that Sweeney's article used. As Professor Tribe certainly understood, a 'right to a relationship' fits much more comfortably with the more broadly accepted substantive due process cases of *Meyer*, *Pierce*, and *Griswold*.

Building on his assertion that the Court is protecting a 'right to a relationship,' Tribe notes, "[one] aspect of *Lawrence* that … is likely to generate confusion unless promptly put in proper perspective is the absence of any explicit statement in the majority opinion about the standard of review the Court employed to assess the constitutionality of the law at issue."[26] Since the Court's equal protection and substantive due process jurisprudence have traditionally been separate areas of law, Tribe writes that,

> the strictness of the Court's standard in *Lawrence***,** however articulated, could hardly have been more obvious . . . To search for the magic words proclaiming the right protected in *Lawrence* to be "fundamental," and to assume that in the absence of those words mere rationality review applied, is to universalize what is in fact only an occasional practice. Moreover, it requires overlooking passage after passage in which the Court's opinion indeed invoked the talismanic verbal formula of substantive due process but did so by putting the key words in one unusual sequence or another - as in the Court's declaration that it was dealing with a "protection of liberty under the Due Process Clause [that] has a substantive dimension of fundamental significance in defining the rights of the person."[27]

So, according to Professor Tribe's interpretation of *Lawrence*, Justice Kennedy's opinion clearly recognized a fundamental "right to a relationship." By placing the Justice's decision in this particular context, Tribe is suggesting that the opinion is much more 'moderate' (and politically tolerable) than other mainstream interpretations suggested. In

[26] Tribe, "Fundamental Right," 1916.

[27] Tribe, "Fundamental Right", 1917. Internal citations omitted.

short, to claim that *Lawrence* is a 'case about relationships' is to tailor the call to support the decision in a way that many more individuals would likely support than would be the case if *Lawrence* was characterized as 'a case about sodomy.'

Professor Tribe does his readers a great favor by charging head-first into a discussion of the most politically explosive potential consequence of *Lawrence*: same-sex marriages. He writes that,

> Same-sex marriage, as Justice Scalia predicted in his outraged dissent, is bound to follow; it is only a question of time. For what, after all, could be the rationale for permitting an otherwise eligible same-sex couple to enjoy the tangible benefits and assume the legal obligations of some version of civil union but withholding from them that final measure of respect - that whole that plainly exceeds the mere sum of its component legal parts … As Justice Scalia rightly recognized, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples."[28]

While Professor Tribe is unequivocally clear about what he believes the outcome of *Lawrence*'s logic demands, he does recognize that, "the process that might move the Supreme Court from *Lawrence* to the invalidation of restrictions on same-sex marriage might not be a speedy one."[29] Regardless of the speed of the change, Tribe clearly sees *Lawrence* as groundbreaking in both its effect on substantive due process law and its social impact.

So, what–if anything–do these three articles demonstrate about the Legal Academy's view of *Lawrence*? At the minimum, they show that there is wide disagreement over at least two issues of significance: what 'right' (if any) the Court protected with its opinion in *Lawrence*, and what level of scrutiny the Court used to

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[28] Tribe, "Fundamental Right", 1945–1946. Internal citations omitted.

[29] Tribe, "Fundamental Right", 1947.

evaluate the Texas law. With no consensus emerging from legal scholars on these two critical points of *Lawrence*, it is best to turn to the opinion itself for clarity.

We begin by considering how Justice Kennedy defined the 'right' that was being infringed by the statute. While Kennedy's definition of the 'right' is important for the legal resolution of the case, the process that Kennedy moves through as he discusses the interests at stake is equally important in terms of understanding his substantive due process jurisprudence.

The main thrust of the early part of the opinion is the discussion of the line of substantive due process decisions originating with *Griswold v. Connecticut*. Of particular interest is how Kennedy chooses to characterize the 'right' discussed in each particular case. For example, when discussing *Griswold*, he writes that, "[t]he Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom."[30] When discussing *Eisenstadt v. Baird*, he writes that the Court's decision, "quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights."[31] His discussion of *Roe v. Wade*[32] follows with a passage that says

> [a]lthough the Court held the woman's rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause … *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process

[30] 539 U.S. 558, 564–565 (2003). Curiously, here Kennedy refers to the 'right of privacy' that the Court protected in *Griswold* as an "interest." To discuss the implications of this fully would interrupt the flow of the narrative, but I believe the use of the word "interest" here is purposeful and significant.

[31] 539 U.S. 558, 565 (2003).

[32] 410 U.S. 113 (1973).

> Clause has a substantive dimension of fundamental significance in defining the rights of the person.[33]

All of these references to earlier substantive due process cases share a common trait: they recognize the asserted "right" as a "right," as well as asserting that the rights in question in those particular cases were "fundamental." These characterizations could be no more than a simple repetition of the decision of the Court in the discussed cases; however, Kennedy's willingness to characterize these 'rights' as *rights*–something that his more conservative Brethren might have been hesitant to do–presents the possibility that Kennedy is accepting the "fundamental rights"' formulation that emerged out of these three cases in preparation for placing *Lawrence* in the same line of jurisprudence.

As Kennedy's survey of the relevant case law continues, he cites *Carey v. Population Services International*,[34] and writes that, "[a]lthough there was no single opinion for the Court, the law was invalidated. Both *Eisenstadt* and *Carey*, as well as the holding and rationale in *Roe*, confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults."[35] Kennedy's emphasis as he discusses these opinions is on how they 'extended' the coverage of due process protections beyond the 'marital bedroom' of *Griswold* suggests that part of his reason for discussing these cases is *because* they justified the expansion of constitutional protection to groups of people who were not in a 'marital relationship.' The series of cases discussed here could be used for either purpose, but if Kennedy is using the past cases to

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[33] 539 U.S. 558, 565 (2003).

[34] 431 U.S. 678 (1977).

[35] 539 U.S. 558, 566 (2003).

build an argument for expanding constitutional protection to groups of non-married persons, then the cases discussed should be taken as less-than-authoritative when it comes to an identification of the 'rights' at issue.

When dealing with the 1986 case of *Bowers v. Hardwick*[36]–which challenged Georgia's gender-neutral sodomy law–Kennedy notes that the Court's opinion framed the 'right' at issue as "a fundamental right [of] homosexuals to engage in sodomy."[37] As the opinion continues, Kennedy writes, "[the Court's formulation in *Bowers*], we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake."[38] This statement continues the subtle ambiguity that has appeared in the discussion of each due process case when identifying the 'right' in question. In this particular instance, Kennedy *rejects* the Court's formulation from *Bowers*, but what he substitutes in its place is not an affirmative statement recognizing any 'right' per se, choosing instead to refer to a "liberty." While it may seem that the difference between a "right" and a "liberty" is small-to-nonexistent, the question remains as to *why* Kennedy did not simply use the word "right" in the context.

As Kennedy moves forward with his analysis of *Bowers*, he makes several other statements which continue to place in doubt exactly what 'right' Kennedy is focusing on in this case. Take, for example, his statement that, "[the] statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is

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[36] 478 U.S. 186 (1986).

[37] 539 U.S. 558, 566 (2003).

[38] 539 U.S. 558, 567 (2003).

within the liberty of persons to choose without being punished as criminals."[39] This passage does not speak of a right, instead saying that homosexual relationships are "within the liberty of persons"–never clearly identifying whether the relationship is a "right," or merely a "liberty interest." Additionally, this passage is noteworthy because it mentions the concept of 'choice'–almost suggesting that it is the 'choice' that is protected, rather than the relationship itself. This rhetorical ambiguity appears again in the next paragraph, which states that, "[it] suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons … The liberty protected by the Constitution allows homosexual persons the right to make this choice."[40]

The second passage is even more ambiguous than the first passage. In the final sentence, what is protected in this case is 'the right to choose.' Although he does use the word "right" in this sentence, It is evident that Kennedy is not referring to the relationship as a "right." While the 'right to a relationship' and the 'right to *choose* a relationship' might seem to be the same thing, the subtle difference between protecting a 'right to a thing' and a 'right to choose a thing' is critical for understanding Kennedy's larger purpose in his opinion in *Lawrence*.

Considering all of the evidence at hand, the claims scholars make about the 'right' that the Court protected in this case are, at best, a mixed bag. While the language of certain passages in the opinion does support the claim by Professors Tribe and Post that the Court was concerned with the 'relationship' aspect, the opinion itself does not provide

[39] 539 U.S. 558, 567 (2003).

[40] 539 U.S. 558, 567 (2003).

conclusive evidence that this particular aspect of the case was the Court's central focus. The Court's opinion, after all, only focuses explicitly on the relationship element for one paragraph in the middle of the opinion.[41]

As further evidence for the claim that the 'right' Kennedy recognizes in this case–if it is indeed a right at all–is a 'right to choose,' we turn to a portion of the *Lawrence* opinion where Kennedy quotes the much-derided (by Justice Scalia, at any rate) 'sweet-mystery-of-life' passage from *Casey*, and then follows that quote with another statement suggesting that he is focusing on a 'right to choose a thing.' Kennedy writes

> 'These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.' … Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.[42]

Note the 'choice' language in the quotation from *Casey* in the above passage, as well as Kennedy's comment that homosexuals may "seek autonomy" for certain purposes. The 'choice' language referenced turns the focus of the Court's inquiry towards protecting a 'right to choose' rather than protecting a 'right to engage in a specific activity.' The 'autonomy' language Kennedy uses in the sentence following the quote from *Casey* presents another possible interpretation–a 'right to autonomy.' Even though the language is different, the autonomy claim is subsumed in the 'right to choose.' Either way, sodomy *qua* sodomy is not being recognized as a 'right' by Kennedy at this point in the opinion.

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[41] 539 U.S. 558, 567 (2003).

[42] 539 U.S. 558, 574 (2003), quoting from 505 U.S. 833, 851 (1992).

The closest that Kennedy ever comes to actually recognizing a 'right to sodomy' in the opinion falls near the end of his discussion on the incorrect historical conclusions made by the Supreme Court in deciding *Bowers v. Hardwick*. He writes that,

> The European Court of Human Rights has not followed *Bowers* but its own decision in *Dudgeon v. United Kingdom* … Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct … The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.[43]

While Kennedy's does speak of a 'right to homosexual conduct,' the context in which this quote appears renders its apparent recognition less meaningful than it first appears.

This particular mention of a 'right' comes in the context of an extensive discussion on the historical errors committed by the majority and concurring opinions in the *Bowers* case. Kennedy's purpose in mentioning that European nations have recognized a 'right to homosexual conduct' both before and after the Court's decision in *Bowers* is to demonstrate the factual inaccuracy of the claims made by Justice White's majority opinion and Chief Justice Burger's concurrence that homosexual conduct had been universally and continuously condemned by "Western Civilization."[44] Given its context, the fact that Kennedy chose to use the same language that the *Bowers* opinion–as well as the various European court cases–used does not of itself amount to the recognition of a constitutional right.

A final reference to the 'right' in question appears at the end of the opinion. Having announced that *Bowers* is overruled, Kennedy goes on to state the following:

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[43] 539 U.S. 558, 576–577 (2003).

[44] 478 U.S. 186, 190, 192 (1986); 478 U.S 186, 196–197 (1986).

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey, supra,* at 847.[45]

There are several aspects to this passage that impact the issue at hand. First and foremost is that Kennedy *does* state that Lawrence and Garner have "the full right to engage in their conduct." This statement appears to be the recognition of a right to engage in homosexual conduct; however, Kennedy cabins this statement by making the 'right to engage in intimate conduct' a constituent part of the "right to liberty under the Due Process Clause."[46] What is not clear from Kennedy's statement is whether the 'right to intimate conduct' is a freestanding iteration of liberty, or whether it is merely a constituent part of liberty, although the structure of the sentence suggests that the right is an element of the larger 'right to liberty' rather than a freestanding right itself. The most important aspect of this statement for the purposes of this study is its ambiguity. Even when Kennedy decides to state that there is a 'right' at stake in this case, he does so in a cautious (and somewhat confusing) manner.

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[45] 539 U.S. 558, 578 (2003).

[46] 539 U.S. 558, 578 (2003).

The second important aspect of Kennedy's recognition of the 'right' comes from the numerous limitations he places on it. He begins the paragraph by noting that the case at hand does not involve minors, nor public conduct or prostitution. His recognition that the case at hand does not involve these specific elements is an attempt to make the ruling in *Lawrence* as narrow as possible while still invalidating the law. By so limiting the scope of the ruling, Kennedy knows that the decision will have less utility as a precedent for future cases that might seek to build on *Lawrence* in order to protect novel sexual 'liberties.' Of particular relevance to this point is Kennedy's explicit disavowal that this case deals with 'government recognition' of a homosexual relationship. While Kennedy's statement does curtail the prospects that the *Lawrence* opinion could be used to extend a constitutional right to 'gay marriage,' it leaves open the possibility for individual states to make a decision on the 'gay marriage' issue for themselves.

The third important aspect of this passage comes from the last sentence, where Kennedy quotes the Court's opinion in *Planned Parenthood v. Casey*: "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[47] Kennedy's closing the paragraph with this particular line from *Casey* is an excellent example of how Kennedy is intentionally confusing the issue of whether or not he has recognized a new 'right.' Keep in mind that one of the major changes in the law brought about by *Casey* was the re-framing of the "fundamental right" to abortion into the less-stringently protected "liberty interest." His restatement of a line from *Casey* that emphasizes the "realm of personal liberty" is intended to link the "exercise of liberty" at

[47] 539 U.S. 558, 578 (2003).

issue in *Lawrence* back to the indeterminate (and more flexible) concept of "liberty interests" from the *Casey* opinion.

Another point supporting the conclusion that Kennedy has classified the 'right' in *Lawrence* as a 'liberty interest' can be found in an earlier statement in which he criticizes the Court's opinion in *Bowers v. Hardwick.* There, he stated that the Court "fail[ed] to appreciate the *extent* of the liberty at stake"[48] when it claimed that Hardwick sought recognition of a 'fundamental right to homosexual sodomy.' Kennedy's rejection of the *Bowers* formulation was on the ground that it was overly narrow; however, given Kennedy's rejection of the formulation of *Bowers* (that there was a 'fundamental right to sodomy') it seems unlikely that he would reject that formulation in one part of his opinion, and then assert that the issue in *Lawrence* was one over a 'fundamental right to sodomy' at a later point.

If the 'right' Kennedy identifies in *Lawrence* is not a 'fundamental right,' it could only be something equivalent to a 'liberty interest,' the only other classification the Court has given to rights protected under the substantive element of the Due Process Clause. This fits well with Kennedy's rhetoric in the opinion, particularly with his cabining of the 'right to engage in conduct' within a larger 'right to liberty,' as was discussed above.

Considering the ambiguity throughout the opinion as a whole, the explanation that is most consistent with the evidence is that the 'right' Kennedy is protecting in *Lawrence* is a 'liberty interest' that has its roots in several areas. Broadly understood, the roots of the liberty interest at stake here found in "personal decisions relating to marriage,

[48] 539 U.S. 558, 567 (2003). Emphasis added.

procreation, contraception, family relationships, child rearing, and education."[49] The identification of the disputed 'right' in *Lawrence* as a 'liberty interest' is not only consonant with the opinion in terms of the language relating to 'rights,' but also consonant with the opinion in terms of the judicial test that is used to evaluate the Texas law, which will be discussed shortly.

However, the question over what 'right' is protected is only one element in *Lawrence*. Before attempting to draw broader conclusions about Kennedy's work in *Lawrence*, and his opinion's meaning in the larger context of his substantive due process jurisprudence, it is necessary to examine the *method* Kennedy used in his opinion. With the United States' legal system being grounded in the precedent-based common law method, the *way* that a Judge parses a case, and particularly how the Judge's approach dictates the questions asked in analyzing the facts, impacts the development of law in ways that can outlast and outweigh the importance of the facts of a particular case.

Much of the controversy in the area of substantive due process law has been over the method used by judges to identify the un-enumerated 'substantive' rights protected by the Due Process Clause. With the line of non-economic substantive rights cases beginning with *Meyer* and *Pierce*, the Justices have engaged in an often-acrimonious debate over the legitimacy of judicially-recognized substantive rights as well as the principles articulated in the recognition of those rights. As has been discussed in earlier chapters, the more politically conservative Justices–particularly Justice Scalia and Chief Justice Rehnquist–have been the primary forces behind the articulation of a 'conservative' due process methodology to counter the 'flexible' approach that resulted

[49] 539 U.S. 558, 574 (2003) quoting 505 U.S. 823, 851 (1992).

in decisions such as *Griswold*, *Roe*, and *Eisenstadt*. Justice Kennedy has, at times, expressed some discomfort with the methodology advocated by Scalia and Rehnquist; however, in the 1997 case of *Washington v. Glucksberg*,[50] Kennedy joined Rehnquist's application of that methodology without reservation. With the opinion in *Lawrence v. Texas* being authored by Kennedy, it is particularly important to examine how his due process methodology in this case compares with the methodology used in prior cases.

Kennedy nearly begins the opinion with an indication of his methodology, writing that, "[i]n our tradition, the State is not omnipresent in the home."[51] The invocation of "tradition" in the second sentence of the opinion is noteworthy because it indicates that Kennedy is pointedly *not* totally divorcing his approach from the 'history-and-tradition' approach of Scalia and Rehnquist. Knowing the eventual result of the case, it is significant that Kennedy chose to retain the language (and the content, as evidence will demonstrate) of the 'conservative' due process approach.

Another element of that first paragraph worth noting is Kennedy's statement that, "liberty protects the person from unwarranted government intrusions into a dwelling or other private place."[52] While the passage could be interpreted as being related to the Fourth Amendment's warrant requirement, a more appropriate interpretation would consider the context of the case. Taking into account the debate underlying the case, the sentence amounts to an important acknowledgement by Kennedy. Using the word 'unwarranted' to describe some government intrusion logically requires that there is

[50] 521 U.S. 702 (1997).

[51] 539 U.S. 558, 562 (2003).

[52] 539 U.S. 558, 562 (2003).

government intrusion which *is* warranted–and given that the case is not specifically dealing with a Fourth Amendment question–Kennedy seems to be leaving open the possibility that there could be warranted governmental intrusion, even in a case similar to *Lawrence*. The larger significance of this passage is that it is an indication that Kennedy's methodology in this case is not one which will be overly dismissive of government power.

One of the most interesting insights into Kennedy's methodology comes at the end of Part I of the opinion. He quotes the writ of certiorari granted in this case, which listed three questions to be considered by the high court. In order, those questions were whether the Texas law violated the Equal Protection Clause of the Fourteenth Amendment, whether the Texas law violated the Due Process Clause of the Fourteenth Amendment, and whether *Bowers v. Hardwick* should be overturned.[53] What is interesting is that at the beginning of Part II of the opinion–only one sentence after listing these three questions–Kennedy announces that "[we] conclude that the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause."[54]

That Justice Kennedy would announce–quote, even–the questions presented (which suggested that the Equal Protection issue was the central issue) before turning around and *ignoring* the very order of questions he set out suggests that there was a reason he chose to go the due process route. One potential explanation is the 'gay marriage' issue. If the Court had invalidated the Texas law on Equal Protection grounds,

[53] 539 U.S. 558, 564 (2003).

[54] 539 U.S. 558, 564 (2003).

holding that the Texas law unfairly discriminated against homosexuals by criminalizing acts that were legal for heterosexuals to perform, it would have opened the door to Equal Protection challenges of numerous state laws and constitutional provisions limiting 'marriage' to one man and one woman. Kennedy understood the potential disruption (and backlash) from opening up a constitutional challenge to marriage laws, and sought to avoid doing so by going the due process route.

However, another potential explanation is that Kennedy was not 'scared off' from going an Equal Protection route in *Lawrence*; rather, he *preferred* the due process route because it provided him with an opportunity to make substantive changes in due process law that he wanted to make. Kennedy could have made it abundantly clear in an opinion based on Equal Protection that the reasoning he was using would not be extended to a case involving marriage. In addition to that, it is worth noting Justice O'Connor's concurrence in *Lawrence*, which argued that the case should have been decided on Equal Protection grounds. Given that none of the other Justices (the 'liberal' four of Justices Stevens, Souter, Breyer, and Ginsburg) joined O'Connor's opinion, it seems unlikely that Kennedy needed to be concerned with the Equal Protection/gay marriage issue. With that in mind, it reinforces the point that Kennedy's due process approach in this case was chosen partly because of its potential to impact due process law.

The next important aspect of Kennedy's due process method comes out of his discussion of prior Court decisions. He does mention the early substantive due process cases of *Meyer* and *Pierce*, but he begins the core of his discussion by noting that, "the most pertinent beginning point is our decision in *Griswold v. Connecticut*."[55] *Griswold*

[55] 539 U.S. 558, 564 (2003).

was the 1965 case that resulted in the Court announcing a constitutionally-protected 'right to privacy' which was the intellectual foundation for the Court's decisions in *Eisenstadt v. Baird* and *Roe v. Wade*, which are the next two cases Kennedy discusses in his opinion. Kennedy makes an extensive discussion of the Court's decisions in both *Eisenstadt* and *Roe*, covering an entire page of his opinion between them,[56] before moving on to another controversial 'reproductive rights' case–*Carey v. Population Services Int'l*.[57] While all four cases are relevant as substantive due process precedents, it is noteworthy that all four also deal with the highly controversial area of reproductive rights, and all four cases build off of the same controversial 'right to privacy' theory first announced in *Griswold*.

While all three cases contain elements useful to his argument, he could have skipped them entirely without doing harm to his argument unless he was going to argue that Lawrence and Garner were protected by a 'right to privacy.' Since Kennedy did not go the 'right to privacy' route, a better explanation for why he included *Eisenstadt*, *Roe*, and *Carey* is that he is seeking to 'attach' those cases to his reasoning in *Lawrence* so that any changes he makes in substantive due process law will have a connection to–and impact on–the particular area of substantive due process law those cases involve (reproductive rights).

That a discussion of *Eisenstadt*, *Roe*, and *Carey* are strangely out of place is made even more obvious when Kennedy's lengthy discussion of the most relevant precedent–

[56] 539 U.S. 558, 565 (2003).

[57] 539 U.S. 558, 566 (2003).

Bowers v. Hardwick–appears. Unsurprisingly, many of the important elements in Kennedy's substantive due process method appear in his discussion of *Bowers*.

The first noteworthy methodological element in Kennedy's *Bowers* discussion is what can be termed a 'definitional' aspect. As was discussed extensively above, Kennedy takes note of how the *Bowers* majority defined the issue at stake in that case: "[the] issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of many of the States that still make such conduct illegal."[58] Kennedy rejected this 'definition' of the *Bowers* majority, stating that, "[that] statement … discloses the Court's own failure to appreciate the extent of the liberty at stake."[59] By changing the 'definition' of the 'right' in *Bowers*–from a 'fundamental right to engage in sodomy' to a 'liberty interest in personal relationships/intimate conduct'–Kennedy increases his flexibility within the pre-*Lawrence* due process framework, *particularly* in relation to the judicial test which the Court should apply in evaluating the Texas law.

The second noteworthy methodological element Kennedy applies in his evaluation of *Bowers* is one of several related to the element of 'history and tradition' in due process claim evaluation. As discussed beforehand, the Court's prior cases have attempted to place certain limits on what can be recognized as protected under the rubric of substantive due process; the foremost one of these limits is the requirement that the asserted right have a demonstrable presence in the 'history and tradition' of the American people. As is standard practice in substantive due process cases, the *Bowers* majority

[58] 539 U.S. 558, 566 (2003), citing 478 U.S. 186, 190 (1986).

[59] 539 U.S. 558, 567 (2003).

examined the asserted right in the case in the context of American history and traditional practices, and concluded that not only was there no acknowledgement of a 'right to sodomy,' there were longstanding prohibitions against it.[60]

Kennedy, in one of the longest unified parts of his opinion, systematically dismantles the historical claims made by the *Bowers* Court, and replaces it with his own historical investigation, which he uses as the basis for the invalidation of the Texas statute. While we will parse Kennedy's historical examination in more detail shortly, the central point is that Kennedy continues to rely on 'history and tradition' as the proper yardstick for evaluating substantive due process claims. While his results in this case may be radically different from those reached by Justice Scalia, his *method* is one which has been used by Scalia on many occasions.

For example, in *Lawrence*, Kennedy begins his undercutting of the *Bowers* Court's historical interpretation by stating that, "In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*."[61] He goes on to begin his examination of the actual historical claims, writing that, "[at] the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."[62] Kennedy goes on to examine the history of sodomy laws from colonial times, being sure to note that the colonial-era laws (and their English precedents) did not make any distinction based on

[60] 478 U.S. 186, 192 (1986).

[61] 539 U.S. 558, 567–568 (2003).

[62] 539 U.S. 558, 568 (2003).

the sexes of the participants. His general conclusion about the early American sodomy statutes is that they "sought to prohibit non-procreative sexual activity more generally."[63] The distinction he is making here is important in that it is the foundation for his refutation of the *Bowers* version of history.

It is particularly noteworthy that Kennedy spends so much space gutting the *Bowers* history. His voluminous refutation of the historical foundation of *Bowers* is evidence of how seriously he views the method by which he proceeds. He continues his examination of the history of sodomy statutes, noting that, "19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, [or] relations between adults implicating disparity in status."[64] Kennedy is slowly constructing an argument that runs contrary to the central assertion of the *Bowers* history: that there was a longstanding tradition of sodomy statutes directed at homosexuals. As the Justice seeks to place older sodomy statutes in context, he is careful to highlight their position in regulatory schemes which sought to limit *all* non-procreative sexual activity, regardless of the participants.

As the final example in this part of his argument, Kennedy sets out that, "far from possessing 'ancient roots,' American laws targeting same-sex couples did not develop until the last third of the 20th century."[65] Kennedy then notes that it was "not until the 1970's that any State singled out same-sex relations for criminal prosecution," and follows by noting that only nine States ever passed anti-sodomy statutes which applied

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[63] 539 U.S. 558, 568 (2003).

[64] 539 U.S. 558, 569 (2003).

[65] 539 U.S. 558, 570 (2003). Internal citations omitted.

specifically to the act when committed by homosexuals.[66] The evidence that Kennedy presents demonstrates that, at best, the *Bowers* Court dramatically oversimplified and overstated its claim that homosexual conduct had been illegal for "a very long time."[67]

Having covered the older history of sodomy statutes, Kennedy directs his attention to refuting the claim, made by Chief Justice Burger in his concurrence, that 'Western Civilization' had consistently and universally condemned homosexuality up to the date of the *Bowers* case.[68] Kennedy refutes this 'Western Civilization' claim in a particular way–through the discussion of foreign legal cases. Kennedy begins by noting that it was 1957 when a Parliamentary Advisory Committee recommended that England repeal its laws criminalizing homosexual conduct. Those recommendations were put into action ten years later, in 1967.[69] This decriminalization is particularly important for Kennedy's argument, since the Court has frequently referenced past British practices when interpreting the U.S. Constitution. While the British practices referenced in most cases are colonial-era or earlier, the fact remains that the British legal system is the closest international analogue to the U.S. legal system.

Kennedy then moves on to something he says is "of even more importance."[70] He is referencing the 1981 European Court of Human Rights case *Dudgeon v. United*

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[66] 539 U.S. 558, 570 (2003). Internal citations omitted. According to the citations provided by the opinion, the first homosexual sodomy laws were passed in 1973.

[67] 478 U.S. 186, 190 (1986).

[68] 478 U.S. 196, 196 (1986).

[69] 539 U.S. 558, 572–3 (2003).

[70] 539 U.S. 558, 573 (2003).

Kingdom.[71] The *Dudgeon* case came from a set of circumstances similar to the facts of *Bowers*. Dudgeon was a homosexual resident of Northern Ireland who was prohibited from engaging in homosexual conduct due to Northern Ireland's laws. He claimed that he had been targeted by Police due to his homosexuality, and that he was concerned that he would be prosecuted. The ECHR invalidated the law, holding that it contravened the European Convention on Human Rights.[72] Justice Kennedy writes that *Dudgeon*, which is, "authoritative in all countries that are members of the Council of Europe … the decision is at odds with the premise in *Bowers* that the claim put forward [by Hardwick] was insubstantial in our Western civilization."[73]

Having undermined *Bowers*' claim about 'Western Civilization,' Kennedy then goes on to confront another element in the *Bowers* opinion–the claim that banning sodomy was a traditional practice among the States. Kennedy notes that the *Bowers* opinion mentioned that all 50 States had legal bans on sodomy before 1961. At the time of the *Bowers* decision, 24 States and Washington, D.C. maintained bans, and this was also noted in the opinion.[74] However, Kennedy also notes that "[the] 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexuals."[75] He also notes that, "over the course of the last decades, States with same-sex prohibitions have moved toward

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[71] Appl. No. 7525/76 (Eur. Ct. Human Rts., 1981).

[72] 539 U.S. 558, 573 (2003).

[73] 539 U.S. 558, 573 (2003).

[74] 539 U.S. 558, 572 (2003).

[75] 539 U.S. 558, 573 (2003).

abolishing them."[76] After conceding that, "for centuries there have been powerful voices to condemn homosexual conduct as immoral," he states that "scholarship casts doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. In all events we think that our laws and traditions in the past half century are of most relevance here."[77] Where the *Bowers* opinion had used an argument based on the 'consensus' of States, Kennedy uses the same *method* of argument as *Bowers*, but ends with a different result due to the change among State laws.

However, these historical examples noted by Kennedy are only *part* of his method of using 'history and tradition' in a substantive due process case. He also examines other, related aspects of past practice as well. Take, for example his investigation of the history of the classification of 'homosexual.' Kennedy notes that, "[the] absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of homosexual as a distinct category of person did not emerge until the late 19th century."[78] As Kennedy goes on to note, "[this] does not suggest approval of homosexual conduct."[79] It does, however, further Kennedy's more important point that there is not a longstanding tradition of criminalizing homosexual conduct in the United States.

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[76] 539 U.S 558, 570 (2003).

[77] 539 U.S. 558, 571–572 (2003).

[78] 539 U.S. 558, 568 (2003).

[79] 539 U.S. 558, 568–569 (2003).

Another historical aspect Kennedy discusses in this part of his opinion is the history of enforcement of sodomy statutes. He notes that, "[laws] prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions for which there are surviving records were for predatory acts against those who could not or did not consent."[80] He goes on to note that under evidentiary rules common in the 19th century, prosecutions of consensual sodomy would have been nearly impossible, which, he concedes, "may explain in part the infrequency of these prosecutions."[81] His conclusion from the infrequency of prosecutions is that, "it [is] difficult to say that society approved of a rigorous and systematic punishment of the consensual acts … [of] adults."[82]

The final element of the 'history and tradition' analysis that Kennedy applies in *Lawrence* comes in reference to the enforcement of sodomy provisions. Kennedy begins by noting that even *after* the decision in *Bowers*, the states with homosexual sodomy prohibitions "did not adhere to the policy of suppressing homosexual conduct."[83] This point is reinforced later in the opinion, when Kennedy notes that the 1955 American Legal Institute (ALI) Model Legal Code recommended ending "criminal penalties for consensual sexual relations conducted in private," in part because "the laws were arbitrarily enforced and thus invited the danger of blackmail."[84] Furthermore, Kennedy

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[80] 539 U.S. 558, 569 (2003).

[81] 539 U.S. 558, 569 (2003).

[82] 539 U.S. 558, 569–570 (2003).

[83] 539 U.S. 558, 570 (2003).

[84] 539 U.S. 558, 572 (2003).

reminds his reader that in *Bowers*, Justice Powell made it clear that most states–including Georgia–did not actively seek to enforce these laws, writing that "the history of non-enforcement suggest the moribund character today of laws criminalizing this type of private, consensual conduct."[85]

These three elements lead Kennedy to the central point of this part of his argument: Texas' pattern of non-enforcement. In referencing a 1994 Federal lawsuit which sought to have Texas' law invalidated, Kennedy notes that the State conceded it had not prosecuted anyone for homosexual conduct committed by consenting adults in private.[86] Kennedy wants to note Texas' pattern of non-enforcement for several reasons. The extremely selective enforcement of the law–one that, apparently, had never been enforced in similar circumstances since the law's passage–is powerful evidence that enforcement was arbitrary and capricious, and that the law lacked the element of 'fair warning' that is a bedrock element of the rule of law.

When Justice Kennedy applies the evidence he has examined to *Bowers*, it again shows how he is systematically using 'history and tradition' to undermine the Court's conclusion in that case: "[the] longstanding criminal prohibition of homosexual sodomy on which the *Bowers* decision placed such reliance is as consistent with a general condemnation of non-procreative sex as it is with an established tradition of prosecuting acts because of their homosexual character."[87]

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[85] 539 U.S. 558, 572 (2003) quoting 478 U.S. 197–198 (1986). Internal citations omitted.

[86] 539 U.S. 558, 573 (2003) citing *State v. Morales*, 869 S.W. 2d 941, 943 (1994).

[87] 539 U.S. 558, 570 (2003).

Another important aspect of Kennedy's method in *Lawrence* is how he handles the Equal Protection claim. As Kennedy himself noted at the start of the opinion, the fact that the law only criminalized *homosexual* sodomy opened the law to a potential challenge on Equal Protection Grounds.[88] Kennedy finally reaches the part of the opinion where he confronts the Equal Protection challenge after discussing *Romer v. Evans*,[89] the 1996 case that would seem to *support* an Equal Protection evaluation of the Texas law. However, Kennedy writes,

> counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.[90]

Kennedy's avoidance of the Equal Protection issue rests on his assertion that it is requisite for the Court to reconsider *Bowers*. However, he follows his assertion with this statement:

> Equality 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 [of substantive due process] advances both interests … When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres.[91]

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[88] 539 U.S. 558. 564 (2003).

[89] 517 U.S. 620 (1996).

[90] 539 U.S. 558, 574–575 (2003).

[91] 539 U.S. 558, 575 (2003).

The passage above certainly contains themes that are at home in an Equal Protection analysis, and this fact has been noted by at least one notable legal scholar.[92] However, as Prof. Tribe discussed in his article, the Equal Protection element is "subsumed" into the due process argument. This 'blending' of Equal Protection and Due Process is unusual for several reasons, and its use by Kennedy in his opinion is an important indicator of the heretofore unacknowledged complexity of his opinion.

Since Kennedy goes out of his way to insist that the case be decided on substantive due process grounds, it raises the question of why he would even *discuss* the Equal Protection question. While it is true that the Equal Protection question was one of the questions set out for evaluation in Part I of the opinion, there is no necessity for the opinion to even mention it, let alone discuss it as Kennedy does. There are many possible reasons why Kennedy discusses the Equal Protection issue while not deciding the case on Equal Protection grounds: the cultural dispute over 'gay marriage' and the eventual use of the rational basis test being the two most prominent. A full discussion of these reasons will come later.

The final aspect of Kennedy's due process methodology is, perhaps, the most significant part of his due process jurisprudence in *Lawrence*–for it seeks to settle one of the most longstanding and contentious elements of substantive due process law. That aspect is the introduction and use of the rational basis test.

The first 'hint' of rational basis comes before Kennedy's more 'explicit' application of the test later in the opinion. While discussing the ECHR's continued reliance on *Dudgeon*, Kennedy writes that "[there] has been no showing that in this

[92] Tribe, "Fundamental Right," 1898.

country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[93] As has been noted before, the word "legitimate" has a strong connection to the rational basis test, since the phrase "a legitimate governmental interest" is part of the commonly quoted language of the test. Kennedy is well-schooled enough in the law to know that including the word 'legitimate' would immediately inform readers that the rational basis test has some connection to his thinking that if he were *not* using the rational basis test, he would have pointedly avoided the use of the word 'legitimate.'

While some legal scholars have suggested that it is *not* the rational basis test that Justice Kennedy applies in this case, Kennedy's own words later in the opinion leave little room for argument:

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government … The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.[94]

The fact that Kennedy uses the phrase "furthers no legitimate state interest"–which is the standard phrasing for the rational basis test–renders assertions that he is applying some other test with little to no support. The language that Kennedy does use is so strongly connected with the rational basis test that if he had any intention of applying a different test, it would be illogical for him to insert the language that is borrowed wholesale from the rational basis test.

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[93] 539 U.S. 558, 577 (2003).

[94] 539 U.S. 558, 578 (2003).

Having examined the opinion, both in terms of 'what right' and 'what method,' we are left with the most interesting question: why? Why did Kennedy structure this opinion in the way that he did, using the particular words that he chose? What–if any–purpose beyond the immediate facts of the case does his opinion serve?

The first point of significance to be discussed is Kennedy's lengthy dissection of the historical claims made by *Bowers*. Recall that the discussion in *Lawrence* goes to great lengths to undercut the assertion made by Justice White's opinion in *Bowers* that homosexual sodomy had been criminalized for "a very long time."[95] After examining the entire history (from the first English sodomy statutes of the Sixteenth Century until 2003), Kennedy held that, "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."[96]

The special significance of Kennedy's focus on laws "directed at homosexual conduct" requires us to recall a particularly disputed aspect of substantive due process methodology from the 1989 case of *Michael H. v. Gerald D.*[97] In that case, Justice Scalia asserted that the proper way to examine whether a particular liberty interest was protected by the substantive element of Due Process was to investigate American history and tradition and search for "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[98] While in *Michael H.*, Scalia used his methodology to search for a tradition relating to parental rights of

[95] 478 U.S. 186, 190 (1986).

[96] 539 U.S. 558, 568 (2003).

[97] 491 U.S. 410 (1989).

[98] 491 U.S. 110, 127, n. 6 (1989).

adulterous natural fathers, Kennedy adopts the methodology in *Lawrence*, but uses it for decidedly different ends.

Kennedy's historical search for a 'tradition' of specifically anti-homosexual laws is an application of Scalia's 'most specific level' method from *Michael H.* Rather than focusing on a more 'general' level of tradition–such as statutes banning sodomy–Kennedy drills down and searches to see if there is a tradition on the most specific level: laws criminalizing homosexual sodomy. While some might assert that Kennedy's approach in *Lawrence* is different from Scalia's approach in *Michael H*. because Kennedy is searching for a tradition of an exercise of government power, while Scalia was searching for a tradition of a recognition of rights, this objection is actually a false dichotomy. Implicit in both searches for a 'tradition' is the understanding that a tradition could be constituted in part by positive government action (such as a law allowing adulterous natural fathers to seek parental rights) as well as by a lack of governmental action.

However, the major importance of Kennedy's application of Scalia's 'most specific level' method is in terms of Substantive Due Process law as a whole. Scalia's 'most specific level' method was an attempt to limit the power of judges to recognize 'new' constitutionally protected 'rights.' While Kennedy did not endorse Scalia's method in 1990, by 2003 the method as a whole gains a strong foothold–if not an outright integration–into due process methodology thanks to Kennedy's willingness to use it in *Lawrence*.

Another unusual aspect of Kennedy's decision is why he used substantive due process to invalidate the law–especially given that there were other, less controversial

routes that he could have taken that would have achieved an identical result in the particular case. A particularly interesting perspective on this idea was set out by Cass Sunstein in his 2003 article "What Did *Lawrence* Hold? Of Autonomy, Desuetude, Sexuality, and Marriage."[99] The core of Sunstein's argument is as follows:

> The criminal prohibition on sodomy is unconstitutional because it intrudes on private sexual conduct without having significant moral grounding in existing public commitments. If this is the Court's holding, it is undergirded by a more general principle: Without strong justification, the state cannot bring the criminal law to bear on consensual sexual behavior if enforcement of the relevant law can no longer claim to have significant moral support in the enforcing state or the nation as a whole. This aspect of the opinion is connected to the old idea of desuetude. It suggests that, at least in some circumstances involving certain kinds of human interests, a criminal law cannot be enforced if it has lost public support.[100]

Professor Sunstein's idea is a particularly fascinating one, in that it suggests an alternative path that Kennedy *could* have chosen, but did not.

The concept of desuetude, and its application in a common law system, is fairly straightforward. In the most basic sense, desuetude is the idea that a law, if it has gone unenforced for a lengthy period of time (long enough to demonstrate a pattern of non-enforcement), during which violations have been 'open and notorious,' is no longer valid grounds for a criminal prosecution.[101] At its core is the rejection of capricious and arbitrary enforcement of laws that is the antithesis of political systems where 'the rule of law' exists. Desuetude, however, does not affect laws which cover relatively 'rare' events which are prosecuted when they occur–the principle only attaches to statutes

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[99] Cass R. Sunstein, "What Did *Lawrence* Hold? Of Autonomy, Desuetude, Sexuality, and Marriage," *The Supreme Court Review*, Volume 2003, (2003): 27–74.

[100] Sunstein, "Desuetude," 30.

[101] *Committee on Legal Ethics v. Printz*, 187 W.Va. 182, 416 S.E.2d 720 (1992).

which the government has declined to enforce despite their knowledge of ongoing violations.

In the context of *Lawrence*, desuetude appears to have numerous advantages that could have held great appeal for the Court, particularly in an institutional sense. The Justices were fully aware of the potential for political fallout when the case reached the Court, and the application of desuetude to the facts of *Lawrence* could have done much to preserve the Court's institutional integrity as well as its internal harmony. Texas admitted in a 1994 Federal Trial that sought to have the law invalidated that the law had not enforced the homosexual sodomy law at any point in between its passage in 1973 and 1994.[102] It seems possible that the prosecutions of Lawrence and Garner may have been the first time the law had ever been used. Considering the virtual absence of any prosecutions (save the one at issue here) as well as the fact that the State of Texas (and many of its localities) was perfectly cognizant that this law was being violated,[103] *Lawrence* presented a case that seems a perfect fit for desuetude. There was an established pattern of non-enforcement of a law that was being 'openly and notoriously' violated–nor does it appear that the State was even seriously *attempting* to enforce the law.

Consider the following scenario: presented with the facts of *Lawrence*, the Court, perhaps with a dissent or two, invalidates the convictions on grounds of desuetude. It

[102] 539 U.S. 558, 570 (2003); *State v. Morales*, 869 S.W. 2d. 941, 943 (1994). It cannot be said with absolute certainty, however, that the State did not attempt any prosecutions under the statute challenged in *Lawrence* after 1994.

[103] *Childers v. Dallas Police Department*, 513 F Supp 134 (ND Tex 1981). This case held that a police department could refuse to hire a gay activist because of doubts about his character, and demonstrates that the State of Texas had grounds to believe that there were ongoing violations of its homosexual sodomy law.

effectively achieves the same result as the opinion which Kennedy wrote (especially given that in *Bowers* in 1986, Justice Powell noted the "moribund character today of laws criminalizing this type of private, consensual conduct"[104]) while adhering to the doctrine of constitutional avoidance.[105] By avoiding the constitutional issue, an opinion based on desuetude would have avoided the application of substantive due process theory, as well as having the potential for having resulted in a more unified opinion from the Court.[106]

With that hypothetical in mind, it returns us to the question of *why* Kennedy chose to go with substantive due process reasoning. However, it does suggest that he specifically chose the substantive due process route *even though* there were other paths to resolution available that would achieved the same end, while protecting the Court's institutional image and avoiding political fallout.

The next element of Kennedy's decision to consider is his unusual 'half-application' of an Equal Protection Clause analysis. As several scholars have noted (Professors Tribe and Sunstein) there is evidence of Equal Protection analysis in the

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[104] *Bowers v. Hardwick*, 478 U.S. 186, 197–198, n2, (1986). A desuetude-based ruling would have put the States with sodomy laws on notice that since these laws had not been enforced for decades, they were no longer valid.

[105] This doctrine has roots as far back as Chief Justice Marshall's tenure (1801–1835) but its best known formulation is *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936), where Justice Louis Brandeis formulated the rule as follows: "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."

[106] Given the distaste for the law stated in his dissent, it would seem that Justice Thomas would likely have been the 'next' Justice to join an opinion invalidating the convictions, had the Court's opinion been based on principles other than substantive due process or equal protection. Whether Chief Justice Rehnquist or Justice Scalia would have signed on to an opinion invalidating the convictions on the basis of desuetude is less certain, although possible. Admittedly, all of these conjectures are purely hypothetical.

opinion. However, Kennedy himself explicitly states that he is *not* using Equal Protection.[107] He argues that

> the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently … to prohibit the conduct both between same-sex and different-sex participants.[108]

Kennedy's statement, while correct, is not fully convincing. There were other important reasons behind Kennedy's unwillingness to engage in a full-fledged Equal Protection analysis in *Lawrence*, and those reasons have an impact on a full understanding of the opinion's influence on substantive due process law.

The first, and most obvious reason, is the previously mentioned 'gay marriage' issue. As many commentators have noted, had the *Lawrence* opinion relied on an Equal Protection challenge, and held the law invalid because it treated homosexuals differently from heterosexuals, the result would have been a constitutional opening for challenges to marriage laws on Equal Protection grounds. Given the potential for political fallout had the Court gone the Equal Protection route, it is not surprising that Kennedy chose to go with the alternative substantive due process reasoning.

While Kennedy was unwilling to go a pure equal protection route in *Lawrence*, the equal protection elements of his opinion help facilitate one of the most important aspects of the opinion: the application of the 'rational basis' standard to the Texas law. While there is precedent for the use of rational basis in substantive due process cases, the application of the standard has been among the most intractable of the issues dividing the

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[107] 539 U.S. 558, 574–575 (2003).

[108] 539 U.S. 558, 575 (2003).

liberal and conservative Justices in substantive due process cases. Kennedy's invocation of vague 'equal protection' principles allows him to reference one of his prior opinions, 1996's *Romer v. Evans*, in which he applied the rational basis test to a Colorado Constitutional Amendment and held the amendment invalid on Equal Protection Grounds. He writes,

> *Romer* invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals … and deprived them of protection under state antidiscrimination laws. We concluded that the provision was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose.[109]

The linkage to *Romer* is significant, but only insofar as it possibly lessened opposition to Kennedy's use of the rational basis test among the more liberal Justices in the majority.

The most significant reason behind Kennedy's use of Equal Protection reasoning in the case is similar to the reason of its utility in bringing the rational basis standard to bear. Put simply, the Equal Protection analysis is a red herring, meant to distract the more politically liberal Justices from focusing on the underlying changes in substantive due process law.

The key aspect of the case and decision that supports this conclusion is that there was *no need* to discuss Equal Protection at all. Kennedy could have quite easily left out the reference to *Romer*, held that consensual sexual activity was a protected 'liberty interest,' and ended up with the same result. There was no *legal* reason for Kennedy to include the Equal Protection discussion; in fact, there was even greater reason for him to exclude it, since the presence of Equal Protection elements merely confuses and

[109] 539 U.S. 558, 574 (2003).

complicates the opinion. While it may seem unlikely that the more liberal Justices could be deceived in this way, keep in mind that none of the four most liberal Justices filed a concurrence. The lone concurrence was from Justice O'Connor, who wanted to take an Equal Protection Clause route and avoid overruling *Bowers v. Hardwick*. Given this, as well as the high-profile nature of the case, Justices should be *more* willing to file concurrences, particularly in areas of the law that are in great dispute. The lack of concurrences from the liberal Justices demonstrates that even *if* there were elements of Kennedy's opinion that they did not like, they were more concerned with having a 'true' majority opinion, rather than one that fragmented into a plurality that would only be a judgment of the Court.

The major legal change wrought in *Lawrence* was, however, a pure substantive due process issue. That change was the application of the rational basis test to a substantive claim in the area of "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[110] As discussed previously, the rational basis test *does* have a long history in the area of substantive due process, dating back to the doctrine's beginnings after the Civil War. However, the rational basis test fell out of favor when the Court reanimated substantive due process in *Griswold v. Connecticut*. Since *Griswold*, cases that fell into the above quoted areas of "personal decisions" had typically been protected through the application of strict scrutiny from *Griswold* until the Court ended this practice in 1992's *Planned Parenthood v. Casey*. In *Lawrence*, decided only eleven years after *Casey*, Kennedy moves the bar

[110] 539 U.S. 558, 574 (2003) quoting 505 U.S. 823, 851 (1992).

lower again, deciding that the proper test to apply in a personal rights substantive due process case is the deferential rational basis test.

Kennedy's use of the rational basis test in this case was groundbreaking in itself. The fact that he did so in an opinion that gained the assent of the Court's four most liberal Justices is nearly as important. Kennedy's 'bringing along' of his more liberal colleagues in *Lawrence* is every bit as important to his overall project as the more specific manipulation of constitutional law, since his ability to have the liberal Justices take a public stand on certain constitutional issues in the *Lawrence* opinion will factor in his later work. The reason why is this: when any Justice takes a public stand on a particular constitutional issue, there is great pressure for there to be consistency by that Justice on that issue. Partly, this is the result of the common law heritage of the U.S. legal system and the principle of *stare decisis*, but it is also the result of pressure on the Justices to rule on the basis of 'principles' rather than to apparently change their reasoning depending on the case at hand (the famous accusation of 'results-based' judging).

In *Lawrence*, Kennedy succeeded in getting the four more liberal Justices to take principled stands in several important constitutional debates, such as the 'fundamental rights/liberty interest' scheme and the related debate on which 'test' to use in substantive due process cases, to name but the two most important. Additionally, Kennedy's integration of Equal Protection reasoning moves the Court's EPC jurisprudence away from including homosexuality in 'suspect class' territory. Part of the brilliance of Kennedy's strategy is due to the psychological pressure on Justices to maintain theoretical 'consistency.' For one of the more liberal Justices to take a position in a later case that would be at odds with the determinations made in *Lawrence*, they would have to

overcome any personal hesitation at breaking with precedent, as well as try to explain away the apparent contradiction; at worst, they could be roundly criticized by scholars and their colleagues for 'results-based judging.'

There are many things going on in Kennedy's opinion in *Lawrence* beyond the evaluation and invalidation of the Texas homosexual sodomy law. There were alternative routes by which the case could have been resolved–such as desuetude–that would have avoided the constitutional issues while still producing the same result. The potential for the case to be resolved on Equal Protection grounds–which, to some commentators, would have been a more concise way of resolution–was rejected (in part) for reasons that are not entirely clear from the opinion itself. The application of substantive due process reasoning in this case was clearly a *choice* by Kennedy that he could have avoided had he wanted to.

Furthermore, Kennedy's rhetoric and obtuse reasoning led to two significant jurisprudential developments in law. He successfully re-classified the area of law relating to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"[111] as a less-stringently protected 'liberty interest' than the pre-*Casey* "fundamental rights" formulation. Additionally, he moved a step beyond the *Casey* approach, using the 'rational basis' test to evaluate the Texas law, rather than the less-deferential-to-state-power 'undue burden' test. These two changes were long sought by conservative Justices in the post-*Roe* era, and to have succeeded in having those two positions accepted in a majority opinion by the Court would, by itself, have been a major accomplishment.

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[111] 539 U.S. 558, 574 (2003) quoting 505 U.S. 823, 851 (1992).

Finally, Kennedy was able to set a jurisprudential 'trap' for his more liberal colleagues. By joining his opinion, the four more liberal members of the Court have endorsed the positions taken by Kennedy in the majority opinion, and should they choose to break with the precedent set in *Lawrence* in later cases, they would be subject to considerable criticism. The potential for criticism could restrain their decision-making in future cases. However, the endorsement is far more important since it helped establish precedent that will control future cases. It is to those future cases that we now turn.

CHAPTER EIGHT

Gonzales v. Carhart and McDonald v. Chicago

The two substantive due process cases that the Court has taken *Lawrence v. Texas*[1] have been every bit as important as the landmark cases which they have followed. Those two cases–*Gonzales v. Carhart*[2] and *McDonald v. Chicago*[3]–provide the final pieces necessary to see the full scope of Justice Kennedy's transformation of due process jurisprudence. Evidence from the opinions will demonstrate that not only has Kennedy been actively engaged in transforming substantive due process law, but also that his original contributions to the law have made a major impact in turning substantive due process into more restrained doctrine in constitutional law.

The opinion in the first case, *Gonzales v. Carhart,* was written by Justice Kennedy–and with good reason: it is a Federal-level rehash of *Stenberg v. Carhart*.[4] Following the Court's ruling in *Stenberg*, and the victory of Republican George W. Bush in the 2000 Presidential Election, the U.S. Congress passed the Partial-Birth Abortion Ban Act in 2003.[5] In passing the law, the Congress took care to fashion the PBABA to avoid the deficiencies that had doomed the Nebraska law. The federal law, like the

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[1] 539 U.S. 558 (2003).

[2] 550 U.S. 124 (2007).

[3] 561 U.S. ___ (2010).

[4] 530 U.S. 914 (2000).

[5] 18 U.S.C. § 1531 et seq.

Nebraska law, banned a particular method of late-term abortion, known medically as 'intact D&E' or 'D&X.'[6] Following the passage of the law and its signature by President Bush, multiple challenges were filed against the law, with the challenge filed by Dr. Leroy Carhart, the named plaintiff from *Stenberg*, being the one to reach the Justices in 2007.

While *Gonzales v. Carhart* has many similarities to *Stenberg v. Carhart*, the Court that heard *Gonzales* in 2007 was a markedly different body than the one that heard *Stenberg* in 2000. Justice Sandra D. O'Connor announced her retirement in early 2004 and Bush nominated John G. Roberts, Jr., a Judge on the D.C. Circuit Court of Appeals, to replace her. Before Roberts' confirmation hearings began, Chief Justice William Rehnquist succumbed to thyroid cancer, creating a second opening on the Court. Bush nominated Roberts to replace Rehnquist, and picked Third Circuit Court of Appeals Judge Samuel A. Alito to replace Justice O'Connor.

The Court that heard *Gonzales* was decidedly more conservative, since it included Justice Alito, who, notably, had been one of the Appellate Court Judges who decided *Planned Parenthood v. Casey*[7] when it was in front of the Third Circuit in 1990.[8] Unsurprisingly, the change in membership led to a change in outcome, with the Court upholding the Federal law in another 5-4 decision. Justice Kennedy, whose impassioned

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[6] In *Gonzales*, Kennedy refers to 'intact D&E,' rather than referring to the procedure as 'D&X,' as he did in *Stenberg*. To maintain consistency between the chapters, this chapter will refer to 'intact D&E' as 'D&X.'

[7] 505 U.S. 833 (1992).

[8] It is interesting to note that of the three-judge panel that considered *Casey*, Judge Alito was the only member of the panel who would have upheld all of the proposed restrictions in the Pennsylvania law.

dissent in *Stenberg* had graphically described the procedure given constitutional protection in *Stenberg,* was given his first opportunity since *Casey* to deal with the topic of abortion directly.

Many of the rhetorical strategies from Kennedy's dissent in *Stenberg v. Carhart* reappear in his opinion in *Gonzales v. Carhart*. The Justice cuts no corners in his description of the procedures, again contrasting a clinical description given by a physician with disturbing and emotionally wrenching testimony from a nurse who had witnessed the procedures in question.[9] Graphic descriptions, along with more subtle elements such as the repeated use of "fetal life" and other terms suggesting that a fetus has "life,"[10] are subtle ways of 'nudging' the Court's jurisprudence towards findings of fact that would considerably expand the permissible scope of abortion regulations. However, these are merely a reminder of the rhetorical tactics Kennedy has employed in the partial-birth abortion cases as a way of advancing his agenda.

Before turning to the two central questions that will dominate the analysis of *Gonzales v. Carhart*, it is important to note one element of the opinion that helps establish continuity with all of Justice Kennedy's other substantive due process opinions. That element is the use of the 'history and tradition' methodology. Kennedy spends an entire subsection of the opinion recounting the political and legal fight that has brought the law to the Court. Tellingly, this discussion is *not* at the beginning of the opinion, where one might expect such a summary. Its location in the opinion, along with its actual

[9] 550 U.S. _____, 7-8 slip op. (2007).

[10] 550 U.S. _____, 5, 8, 9, 14, 15, 16, 18, 21 slip op. (2007).

content, make the subsection another example of Kennedy's use of the 'history and tradition' based methodology.

The actual subsection itself begins with an analysis that should remind one of Kennedy's work in *Lawrence*. Kennedy writes that,

> By the time of the *Stenberg* decision, about 30 states had enacted bans designed to prohibit the procedure … In 1996, Congress also acted to ban partial-birth abortion. President Clinton vetoed the congressional legislation … Congress approved another bill banning the procedure in 1997, but President Clinton again vetoed it. In 2003, after this Court's decision in *Stenberg*, Congress passed the Act as issue here.[11]

Kennedy's recitation of the historical facts is more than just a simple application of the 'history and tradition' methodology. It is also a parallel to the 'consensus' argument he used in *Lawrence v. Texas*. While in *Lawrence*, the consensus he found in the "nation['s] history and traditions"[12] worked against the Texas law, here the consensus does the opposite: it supports it. By noting that Congress had attempted–on multiple occasions, over a span of several sessions–to pass a law banning the procedure, Kennedy is establishing the presence of a national consensus in favor of regulating certain late-term abortion procedures. When combined with the point about 30 States having bans in place prior to *Stenberg*, Kennedy has built an argument that there is an established national consensus *against* 'D&X.'

Noting the existence of a consensus is only the first step. Kennedy's discussion of the law's development subtly reminds the reader that the recent origins of this procedure mean that it lacks one of the two elements necessary to receive protection

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[11] 550 U.S. _____, 10 slip op. (2007).

[12] 521 U.S. 702, 721 (1997).

under the rubric of substantive due process: it is not "deeply rooted" in the "history and traditions"[13] of the American people. While Kennedy does not draw out the point at length here, it is worth noting that he applies the full 'history and tradition' based due process methodology in this case as well.

For clarity, it is helpful to frame the rest of the discussion of *Gonzales* around a set of questions. Like *Stenberg*, *Gonzales* revolves around the debate over asserted state interests and how those 'state interests' are weighted. From that debate, two questions can be framed:

1. What are the specific 'state interests' Kennedy uses in justifying the PBABA?
2. How does Kennedy 'weight' the individual state interests?

The importance of the first question should not need further explication; however, the second question does have an important derivative aspect that should be mentioned. The 'weight' that Kennedy gives to the state interest will have a direct relationship to the extent of the regulatory power that the State may use in protecting that particular state interest. To better understand this point, recall how the typical language strict scrutiny requires that the state have a "compelling state interest" in order to override the asserted liberty; thus, Kennedy's 'weighting' of the state interest will provide another way to evaluate the changes Kennedy makes in due process law in the opinion.

Part II begins by confronting the state interest issue head-on. Kennedy writes that "[w]hatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion–that the government has a legitimate and substantial interest in preserving and promoting fetal life–would be repudiated were the Court now to affirm

[13] 521 U.S. 702, 721 (1997).

the judgments of the Courts of Appeals."[14] This passage is the first mention of the state interest in the opinion, and it begins a pattern that will persist throughout the opinion.

The first reason this particular mention of the state interest is important is because of how Kennedy describes it. Here, he refers to the state interest in "preserving and promoting fetal life."[15] The key element here is that Kennedy refers to the fetus as having *life*–even though it is a limited type of life (fetal life).

The next mention of a state interest comes a few pages later, when Kennedy writes that, "[t]hough all three holdings [of *Casey*] are implicated in the instant cases, it is the third that requires the most extended discussion; for we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child."[16] Note how in this iteration of the state interest, the mention of the fetus is tied to the reference of a "child." While this statement may not appear controversial, the constitutional implications are profound. What Kennedy accomplishes by adding on an element denoting future potential 'personhood' is to strengthen the state interest. No one disputes that states have the power to limit individual rights in order to protect the lives of people, and the closer Kennedy can move the Court's jurisprudence towards a point where a fetus is seen as legally equivalent (or nearly so) to an infant, the more "compelling" the state's interest becomes.

The next description of the state interest comes when Kennedy writes that "[t]he State's interest in respect for life is advanced by the dialogue that better informs the

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[14] 550 U.S. _____, 14 slip op. (2007).

[15] 550 U.S. _____, 14 slip op. (2007).

[16] 550 U.S. _____, 15 slip op. (2007).

political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion."[17] This iteration of the state interest is another unique one–it is a *general* "respect for life" that is justified because of the "dialogue" that is fostered as the result of the ban on intact D&E. The significance of this particular state interest comes from the fact that Kennedy states it as an interest in "respect for life" generally, not only for "potential life" or "fetal life." By asserting the state interest is one in "respect for life," Kennedy is blurring the line between the accepted state interest in protecting people with the state interest in protecting "fetal life," essentially conflating 'fetus' with 'person' on purpose. This is another small step towards a more expansive interpretation of the state interest in "life" and a consequent expansion of state regulatory power over abortions.

In a later reference to the state interest, Kennedy writes that "the Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty … This traditional rule is consistent with *Casey,* which confirms the State's interest in promoting respect for human life at all stages in the pregnancy."[18] The most interesting aspect of this particular quotation is Kennedy's assertion that there is a "State interest in promoting respect for human life at all stages in the pregnancy."[19] While this assertion *does* follow along with the recognition by the Court in *Casey* that there is a state interest at stake throughout a pregnancy, Kennedy moves beyond *Casey* in claiming that the state's interest is one in "promoting respect for

[17] 550 U.S. _____, 30 slip op. (2007).

[18] 550 U.S. _____, 33 slip op. (2007). Internal citations omitted.

[19] 550 U.S. _____, 33 slip op. (2007). Internal citations omitted.

human life."[20] *Casey* never acknowledged that the State's interest was one in human life *qua* human life, instead using the *Roe*-derived phrase of "potentiality of human life."[21] Promoting the mere *respect* for life is different from promoting "fetal life" or even "life"– it is a much less concrete concept. As the state interest becomes more vague, the ability of the state to claim that a regulation is protecting that interest becomes correspondingly larger.

After an extended discussion of the many differences between the Federal Act and the law invalidated in *Stenberg*, Kennedy makes his next mention of state interest. He writes that,

> Congress was concerned, furthermore, with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion … There can be no doubt the government "has an interest in protecting the integrity and ethics of the medical profession." *Washington v. Glucksberg* …; see also *Barsky v. Board of Regents of Univ. of N.Y.* (indicating the State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine). Under our precedents it is clear the State has a significant role to play in regulating the medical profession.[22]

The 'state interest' Kennedy identifies here is an interest in "regulating the medical profession." But the content of that interest is more than the state simply assuring the professional competence of practicing physicians. Kennedy cites the conclusion from *Glucksberg* that "the government 'has an interest in protecting the integrity and ethics of

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[20] 550 U.S. _____, 33 slip op. (2007).

[21] 505 U.S. 833, 871 (1992) citing 410 U.S. 113, 162 (1973).

[22] 550 U.S. _____, 27 slip op. (2007) citing 521 U.S. 702, 731 (1997) and 347 U.S. 442, 451 (1954). Some internal citations omitted.

the medical profession.'"[23] The interest in regulating the medical profession is not phrased as 'maintaining' the ethics and integrity of the profession; Kennedy states that the State may *protect* it. While the difference between "protecting" a thing and an alternative word such as 'maintaining' may appear small, in the context of this case Kennedy intends for "protection" to denote a more active role for the state.

The next iteration of the 'state interest' is a more unusual one. It can be described loosely as a state interest in 'maternal health.' Why this is only a loose description is clear from the opinion:

> In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used … That is likely the case with the abortion procedures here in issue … It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning"). The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event [what the intact D&E procedure entails.][24]

The state interest Kennedy describes is one in which the state has a concern in the potential *future* mental health of a woman. Kennedy finds that the state has justification to *ban* a procedure because of the potential that what a woman may find out after having undergone an intact D&E *might* have an impact on her psychological well-being. The expansive nature of the reasoning attached to this state interest should be plain to all observers. If the Court is going to accept such tenuous justifications for exercises of state power, there will be little that will be beyond the State's regulatory scope.

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[23] 550 U.S. _____, 27 slip op. (2007) citing 521 U.S. 702, 731 (1997).

[24] 550 U.S. _____, 29 slip op. (2007) citing 505 U.S. 833, 873 (1992).

As Kennedy has moved through the opinion, the 'state interest' relating to "fetal life" has become more and more general, and thus more accommodating to a broader range of state regulations. Note as well that the other state interests in regulating physicians and maternal health were also formulated in a way that emphasized their indeterminacy rather than their clarity. This is another way in which Kennedy is framing his opinion to allow the state more room to regulate abortion.

Having covered how Kennedy uses a changing definition of state interest to illustrate how he changes the law, it is time to turn to the related aspect of what 'weight' he gives to the interests he maintains justify the passage of the PBABA. Recall that at the time that *Gonzales* was decided, the recognized judicial test in abortion rights cases was the "undue burden" standard, which was first accepted by a majority of the Court in *Casey*. The 'weight' Kennedy gives to the state's interest is central to how the decision on the law will play out under the "undue burden" test used in abortion rights substantive due process cases.

The first instance where Justice Kennedy has an opportunity to 'weight' the state interest comes at the beginning of Part II of the opinion. In reference to *Casey*, Kennedy notes that one of the central parts of the plurality opinion was that "the government has a legitimate and substantial interest in preserving and promoting fetal life."[25] As was discussed above, the *Casey* opinion never actually refers to the state interest in fetal life being "legitimate and substantial," instead using both of those terms separately at

[25] 550 U.S. _____, 14 slip op. (2007).

different places in the opinion.[26] However, calling the state interest "legitimate and substantial" has important consequences for the law.

While using the two terms together may appears to be a minor change, it is significant, because by combining the terms and insisting that the state interest is both "legitimate and substantial," Kennedy gives the state interest a greater weight than one that was merely "legitimate" or "substantial." Having defined the state interest as "legitimate and substantial," it would meet the necessary requirements if the Court evaluated the law under a rational basis standard.

But, the rational basis standard was not the test applied to abortion regulations under *Casey*. It makes little sense why Kennedy would 'weight' the state interest as "legitimate and substantial," only to have the interest *fail* the test–unless the Justice was preparing to make a substantive change to the applied test.

And that is precisely what Justice Kennedy does. In the most critical passage of the opinion, he writes:

> Where [the State] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn. The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives.[27]

In the passage, Kennedy conflates the rational basis test with the undue burden test of *Casey*. The result is a supposed application of the undue burden test that is in fact an application of the rational basis test. The confusing structure of the passage is intentional

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[26] 505 U.S. 833, 846 (1992) and 505 U.S. 833, 876 (1992).

[27] 550 U.S. _____, 28 slip op. (2007).

obfuscation by Kennedy, and supports this conclusion. When read carefully, the passage essentially says 'where the State doesn't create an undue burden, it only needs a rational basis–such as regulating the medical profession–in order to act' and then proceeds to apply the rational basis test because there is no undue burden created. The end result is clear: Kennedy has just applied a rational basis standard to evaluate an abortion regulation. While the test may parade about under the name of "undue burden," its substance is that of the rational basis test.

The significance Kennedy's action cannot be overstated. What he has done is create a class of abortion regulations that are subject to evaluation under the rational basis test. While the extent of the class is not clear, an announcement by the Court that there are some pre-viability abortion regulations that should be evaluated using the rational basis test marks a change in the Court's abortion rights jurisprudence that is singularly significant.

Furthermore, the test in *Gonzales* builds on another principle of *Casey* to permit an even broader scope for state regulation. Keep in mind that *Casey* announced that "the fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."[28] According to *Casey,* an "undue burden" is not created simply by a regulation which increases the cost or difficulty of obtaining an abortion. When the principle announced in *Casey*, is combined with Kennedy's test in Gonzales, the question becomes "what kind of regulation *would* create an 'undue burden' and be invalidated?" From the opinion in *Gonzales v. Carhart*, the answer to this

[28] 550 U.S. _____, 27 slip op. (2007) quoting 505 U.S. 833, 874 (1992).

question is not clear; however, it is plausible that the Court will not find an "undue burden" unless a regulation either placed an outright ban on pre-viability abortions, or create a regulatory scheme that 'virtually' banned all pre-viability abortions.

The next part of the opinion of concern is the section that deals with the law's lack of a "health exception." *Casey* and subsequent decisions required that any regulation on abortion have an exception allowing a physician to ignore the law, when, in the physician's professional medical judgment, the abortion procedure was "necessary … for the preservation of the … health of the mother."[29] As Kennedy notes earlier, the health exception "cannot be set at naught by interpreting *Casey*'s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer."[30] Dissenting Justices in earlier cases had noted that the "health exception" requirement could easily be manipulated to permit physicians to flout abortion laws, especially given the vague definition of "health."[31]

The PBABA did not have a "health exception." While it does have a narrower "life exception"–permitting the procedure if a woman's life is in jeopardy–the Federal law lacks any other exceptions. Kennedy confronts this aspect of the law head-on, noting that the medical community is divided on the utility of 'D&X,' with some physicians believing it is safer than the regular D&E procedure, and some believing that there is no meaningful difference between the relative safety and utility of the two procedures.[32]

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[29] 550 U.S. _____, 31 slip op. (2007) quoting 505 U.S. 833, 879 (1992).

[30] 550 U.S. _____, 28 slip op. (2007).

[31] 530 U.S. 914, 1012–1013 (2000).

[32] 550 U.S. _____, 31–32 slip op. (2007).

His conclusion finds that "Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law needs not give abortion doctors unfettered choice in the course of their medical practice."[33] The law stands even *without* a health exception, and this marks the first time since *Casey* that a law lacking a health exception had been upheld by the Court. This particular change opens up the possibility that "health exceptions" could be removed from even more abortion laws.

Justice Kennedy's opinion in *Gonzales v. Carhart* marks a shift in abortion law, with profound implications for abortions other than the 'D&X' procedure. By broadening the definition of the state interest at stake in abortions and gutting the "undue burden" test, Justice Kennedy has expanded the scope of permissible state regulations. With the final major change–the curtailment of the 'health exception'–Kennedy has refashioned abortion law as dramatically as did the plurality opinion in *Casey*.

The final case, *McDonald v. Chicago,* dealt with the constitutionality of handgun bans in the cities of Chicago and Oak Park, Illinois. The case arose following the Court's decision in *Heller v. District of Columbia,*[34] in which the Court invalidated the Washington, D.C. ban on handgun possession. Heller, a police officer, wanted to keep a handgun in his home for personal protection, and he sued the District of Columbia, claiming that the Second Amendment prohibited the type of ban the District had enacted. In a 5-4 opinion by Justice Scalia, the Court invalidated the District's law, holding was that the Second Amendment protected an *individual* right to firearm ownership, not

[33] 550 U.S. _____, 33 slip op. (2007).

[34] 554 U.S. 570 (2008).

merely the power of the States to have militias independent from the Federal Government.[35]

However, *Heller* was a simpler case than *McDonald*; since *Heller* involved the District of Columbia, it was a 'direct' application of the protections of the Amendment against an agent of the Federal Government. *McDonald*, which challenged bans in Chicago and Oak Park, Ill., involved the doctrine of incorporation. Incorporation is a doctrine which attempts to 'flesh out' the meaning of parts of Section 1 of the Fourteenth Amendment; in particular, it attempts to provide a clearer meaning to the phrases "privileges and immunities" and "due process of law" as they are used in the Fourteenth Amendment.

The incorporation doctrine, as it developed, has been the vehicle through which most of the enumerated guarantees of the Bill of Rights have been enforced against the States and their instrumentalities. Incorporation officially began in the 1925 case *Gitlow v. New York,*[36] and continued through the application of the Sixth Amendment's jury trial provision in *Duncan v. Louisiana*[37] in 1968, by which time the Supreme Court had applied most of the Bill of Rights against the States via the Due Process Clause of the Fourteenth Amendment. After *Duncan*, there were some enumerated guarantees that had not been incorporated against the States, and among those that remained unincorporated was the Second Amendment.

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[35] 554 U.S. ____, slip op. 11 (2008).

[36] 268 U.S. 652 (1925).

[37] 391 U.S. 145 (1968).

Following *Heller*, the National Rifle Association, in conjunction with several residents of Chicago and Oak Park, sued the cities claiming that the Second Amendment's right to individual firearm ownership prohibited absolute bans on handgun ownership. While the District Court and Seventh Circuit had held for Chicago and Oak Park, the Court struck down the handgun bans in an opinion written by Justice Samuel Alito. Since Kennedy did not file a concurrence, we may safely assume that Justice Alito's opinion accurately represents Justice Kennedy's thinking on the subject. As we will see, Alito's opinion certainly reflects Justice Kennedy's influence.

For purposes of analyzing the opinion, we will proceed by first examining the 'nature' of the right at issue in *McDonald*, before moving onto an examination of Justice Alito's due process methodology, and concluding with a consideration of the judicial test applied in this case and a summary of what this case tells us about the future of substantive due process jurisprudence.

McDonald v. Chicago is unique among the cases investigated in this work for one reason: it deals with an 'enumerated' right contained in the Bill of Rights, rather than the 'un-enumerated' rights that have been at the center of the other cases. Because enumerated rights are unquestionably protected by the Constitution, the debate is over their 'scope' rather than their mere inclusion. So, with this key difference in mind, let us turn to Justice Alito's opinion.

Justice Alito's opinion begins by tracing how the Court had understood the meaning of the phrase "Due Process" within Court's incorporation doctrine jurisprudence. He notes that in the 1908 case of *Twining v. New Jersey*,[38]

[38] 211 U.S. 78 (1908).

> The Court used different formulations in describing the boundaries of due process. For example, in *Twining*, the Court referred to 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'[39]

Other, later cases dealing with due process claims framed the content of the clause differently. *Snyder v. Massachusetts* held that only rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[40] were protected by the Due Process Clause, while *Palko v. Connecticut* held that Due Process protected the rights which are "the very essence of a scheme of ordered liberty" and central to "a fair and enlightened system of justice."[41]

The language that Alito chooses to cite here is key. The most critical reference is the one to *Snyder v. Massachusetts*, which is the case that put the word "fundamental" in the lexicon of due process law. By citing *Snyder* and due process cases concerning enumerated rights, Alito builds an argument about how certain *classes* of rights are treated.

Beginning with Section III of the opinion, Justice Alito confronts the first central question of the opinion:

> whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, or as we have said in a related context, whether this right is "deeply rooted in this Nation's history and tradition.[42]

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[39] 561 U.S. _____, slip op. 11, (2010) quoting 211 U.S. 78, 102 (1908).

[40] 291 U.S. 97, 105 (1934).

[41] 302 U.S. 319, 325 (1937).

[42] 561 U.S. _____, slip op. 19 (2010) citing 391 U.S. 149 (1968) and 521 U.S. 702, 721 (1997).

As becomes clear from the above quote, the first criterion which the Court will look at is whether the right to bear arms is one that is "fundamental to our scheme or ordered liberty."[43] Alito goes on to hold that "self-defense is a basic right, recognized by many legal systems from ancient times to the present day,"[44] before covering an extensive history which demonstrated that the right to bear arms has been considered a "fundamental right" from the Colonial Era forwards. The end-point of Justice Alito's argument is that the right to bear arms is a "fundamental" right in the American scheme of ordered liberty, and thus should be incorporated against the States. That he reaches that conclusion should be of no surprise; however, there are valuable insights to be found in a closer examination of how he reaches this conclusion.

The particular method that Alito uses to support his claim that the right to bear arms is a "fundamental" one is a method that should be familiar to readers at this point: it is the 'history and tradition' due process methodology that has been at the core of Justice Kennedy's substantive due process jurisprudence. The text of the opinion confirms this conclusion.[45]

For example, take Justice Alito's statement (quoted above) that begins Section III of the opinion. Alito openly grounds his due process method in a prior Court decision that is the most complete articulation of the 'history and tradition' methodology: Chief

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[43] 561 U.S. _____, slip op. 19 (2010) citing 391 U.S. 149 (1968) and 521 U.S. 702, 721 (1997).

[44] 561 U.S. _____, slip op. 19 (2010).

[45] While Justice Alito presents two 'histories' in the opinion–one focusing on the development of the incorporation doctrine, the other focusing on the status of the right to bear arms–I discuss only the second of the two, since the application of a 'history and tradition' based method to the question of appropriate incorporation approaches is not relevant to the evaluation of Justice Kennedy's due process jurisprudence.

Justice Rehnquist's opinion in *Washington v. Glucksberg*. Indeed, Alito directly quotes the *most* important passage from *Glucksberg*, writing "or as we have said in a related context, whether this right is 'deeply rooted in this Nation's history and tradition.'"[46] Alito's reliance on the 'history and tradition' method is, of course, plausible in part because of its application by Justice Kennedy in the most significant substantive due process cases the Court has heard since 1997. Had the post-*Glucksberg* cases developed a different methodology, its application would have been more suspect.

Justice Alito's opinion proceeds to apply the 'history and tradition' methodology with a thorough examination of the history of the right to bear arms. He begins with a reference to the 1689 English Bill of Rights guarantee of "a right to keep arms for self-defense," follows that with the fact that, "by 1795, Blackstone was able to assert that the right to keep and bear arms was 'one of the fundamental rights of Englishmen,'" and then notes that, "King George III's attempt to disarm the colonists in the 1760's and 1770's 'provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.'"[47]

Alito's history takes care to show that the right to bear arms has been considered a "fundamental" right throughout American history. He notes that during the Founding, the State ratifying conventions demanded the inclusion of a Bill of Rights since "[some] were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms."[48] He follows with references to views from the early

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[46] 561 U.S. _____, slip op. 19 (2010), quoting 521 U.S. 702, 721 (1997).

[47] 561 U.S. _____, slip op. 20 (2010). Internal citations omitted.

[48] 561 U.S. _____, slip op. 21 (2010).

Republic, pointing out that an authority no less than Supreme Court Justice Joseph Story wrote that "[t]he right of the citizens to keep and bear arms [is] the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."[49]

Following this, Justice Alito's historical analysis turns to the history of the right during the Civil War and Reconstruction Era. He notes that attempts to disarm "Free Soilers" during "Bloody Kansas" were specifically denounced by Sen. Charles Sumner of Massachusetts, who would later be a central figure in the framing and adoption of the Fourteenth Amendment, as well as the fact that the 1856 Republican Party Platform "protested that in Kansas the constitutional rights of the people had been 'fraudulently and violently taken from them' and the 'right of the people to keep and bear arms' had been 'infringed.'"[50] He then goes on to detail the post-War situation in the South (specifically noting Southern States prohibitions on former slaves owning *any* type of weapon) which led to the passage of the Freedmen's Bureau and Civil Rights Acts of 1866. Alito notes that both contemporary statements and modern scholarship agree that one of Congress' motivations in passing the 1866 laws was to protect the right to bear arms.[51]

Justice Alito concludes his examination of the history and tradition of the right to bear arms in the United States with a discussion of the framing and ratification of the

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[49] 561 U.S. _____, slip op. 22 (2010).

[50] 561 U.S. _____, slip op. 23 (2010).

[51] 561 U.S. _____, slip op. 26–27 (2010).

Fourteenth Amendment. He begins by noting that, "today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866,"[52] before detailing several quotes from supporters and opponents of the Fourteenth Amendment to demonstrate that it was widely understood that the right to bear arms was among the rights protected by the Amendment.[53]

To complete his historical examination, Justice Alito notes one final fact: the wide spread of *State* constitutional provisions protecting the right to bear arms. He notes specifically that "In 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms. Quite a few of these state constitutional guarantees, moreover, explicitly protected the right to keep and bear arms as an individual right to self-defense."[54] This last piece of evidence is a particularly telling instance of Justice Kennedy's influence on substantive due process methodology: it is an analogue of the "state consensus" argument Kennedy employed in *Lawrence v. Texas* and *Gonzales v. Carhart* as a means of demonstrating the presence (or absence) of a particular tradition with bearing on due process rights.

In sum, the thorough history presented here by Justice Alito follows the 'history and tradition' due process methodology arising from *Glucksberg*, but in a way that is cognizant of the changes that Justice Kennedy had made to the method in the interim. As a means of examining and establishing what 'rights' are protected by substantive due

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[52] 561 U.S. _____, slip op. 28 (2010).

[53] 561 U.S. _____, slip op. 28–29 (2010).

[54] 561 U.S. _____, slip op. 29–30 (2010).

process, the 'history and tradition' methodology has been adopted by a clear majority on the Court, as well as taken on a recognizable form and certain defining characteristics. It is, *de facto*, the dominant contemporary substantive due process methodology.

Having seen how Justice Alito builds his case for classifying the Second Amendment as a "fundamental right," we now turn to the final aspect of the opinion needing investigation: the identification and application of the appropriate judicial 'test.' Having decided the issue of incorporation in favor of the plaintiffs, Justice Alito states the following:

> Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values. As noted by the 38 States that have appeared in this case as *amici* supporting petitioners, "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment."[55]

This passage hints at what test Justice Alito will use to evaluate the handgun bans. He begins by noting that protecting the right merely *limits* state power to regulate handgun ownership–it does not amount to an absolute bar to government action. Secondly, his mention of the *amicus* brief filed by 38 States is particularly relevant, since he includes the phrase "reasonable firearms regulations."[56] The invocation of the word reasonable is the key element here, since it is so strongly associated with the rational basis test.

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[55] 561 U.S. _____, slip op. 37–38 (2010).

[56] 561 U.S. _____, slip op. 37–38 (2010).

The above passage is not the only piece of evidence supporting the conclusion that Justice Alito is applying the rational basis test to the Chicago law. Consider the following statement:

> It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding carrying of firearms in sensitive places such as schools and government buildings …. We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.[57]

Justice Alito repeats the statement from *Heller* that the incorporation of the Second Amendment does not 'extend' its coverage beyond what the Court had already held. The final sentence in the passage is the key piece of evidence: Alito states that the Court's decision "does not imperil every law regulating firearms."[58]

If there are laws which regulate firearms that are constitutional under the Court's applied standard, it is highly unlikely that Justice Alito is applying strict scrutiny. In one area of law where strict scrutiny has been frequently used–First Amendment law–the application of strict scrutiny has almost universally led to the invalidation of the challenged laws. Since the overwhelming majority of laws evaluated using strict scrutiny are struck down, Alito's announcement that there are constitutional firearms regulations means that he is not applying such a strict standard to the Chicago law.

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[57] 561 U.S. _____, slip op. 39–40 (2010).

[58] 561 U.S. _____, slip op. 39–40 (2010).

Furthermore, we have evidence that Alito is not using an intermediate scrutiny or "balancing" test. Shortly before the above quoted passage, he writes,

> Municipal respondents assert that, although most state constitutions protect firearms rights, state courts have held that these rights are subject to "interest balancing" and have sustained a variety of restrictions. In *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing, and this Court decades ago abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights."[59]

Given this unequivocal statement, it cannot be plausibly maintained that Alito is using any type of "intermediate" scrutiny. Having excluded strict scrutiny and intermediate scrutiny as potential "tests," we are left with only one possibility: the rational basis test.

There is, however, an additional element that supports this conclusion beyond the use of the word "reasonableness" and the exclusion of other possible judicial tests. Consider the following:

> As evidence that the Fourteenth Amendment has not historically been understood to restrict the authority of the States to regulate firearms, municipal respondents and supporting *amici* cite a variety of state and local firearms laws that courts have upheld. But what is most striking about their research is the paucity of precedent sustaining bans comparable to those at issue here and in *Heller*. Municipal respondents cite precisely one case in which such a ban was sustained.[60]

This is a critical point that will tie the decision in this case back to Justice Kennedy's prior due process jurisprudence. Justice Alito's statement here emphasizes the point that total bans on handgun ownership are extraordinary exceptions to common practice. He notes that there is a *single* Court decision supporting the validity of these types of bans.

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[59] 561 U.S. _____, slip op. 39 (2010). Internal citations omitted.

[60] 561 U.S. _____, slip op. 39 (2010). Internal citations omitted.

Holding those considerations in mind, recall what Justice Kennedy wrote in *Gonzales v. Carhart*, where he stated that "the fact that a law which serves a valid purpose, one not designed to *strike at the right itself*, has the incidental effect of making it more difficult or expensive to procure an abortion cannot be enough to invalidate it."[61] While Kennedy's statement is about abortion, it gives an insight into the type of law that *would* be impermissible: a law must do 'more' than simply create an obstacle to exercising the right–an invalid law would "*strike at the right itself*"–it would go after the 'core' or 'essential' aspect of a protected right.

The idea that an invalid law is one that forecloses the opportunity to exercise the 'essential' or 'core' aspect of a right is a unifying thread that runs from Kennedy's opinion in *Lawrence v. Texas*, through his opinion in *Gonzales v. Carhart*, to Justice Alito's opinion in *McDonald v. Chicago*. The reason the laws in *Lawrence* and *McDonald* were invalid (as opposed to the law in *Gonzales v. Carhart*) is that the two invalid laws were so restrictive that they left no choice in the matter at all. In *McDonald*, one could not own a handgun at all, and in *Lawrence,* certain activities were prohibited *per se*–there was no room for an individual to exercise personal judgment about handgun ownership or sexual activities.

Furthermore, consider the statement by Justice Alito about the virtual absence of any precedent supporting absolute bans on handgun ownership. Recall as well that in *Lawrence,* Kennedy noted that there was no record of the Texas homosexual sodomy law having been used to prosecute anyone *prior* to the *Lawrence* case. The 'exceptional' nature of the laws in both cases amounts to a collective judgment on their reasonableness.

[61] 550 U.S. _____, slip op. 27 (2007).

If homosexual sodomy laws and handgun bans were *reasonable*, there would have been more instances of enforcement (in the case of the Texas law), or enactment in other locales (in *McDonald*) and more widespread and unified judicial support. In contrast, remember that in *Gonzales,* Justice Kennedy noted that there had been several bi-partisan attempts to ban 'D&X' by Congress, as well as the fact that over 30 states had enacted bans on their own. Commonality and consensus speak strongly in favor of a law meeting a 'reasonableness' standard. In substantive due process cases where the law at issue is either a 'one-off' (or nearly so), the State has a much more difficult time claiming that the law meets any generally accepted standard of 'reason.'

Given the evidence at hand, it is clear that Justice Alito applied the rational basis test to the Chicago and Oak Park laws and found them lacking. Between the reference to "reasonable firearms regulations," the explicit rejection of any type of intermediate scrutiny, and the structural parallels between Justice Kennedy's earlier use of the rational basis test in substantive due process cases, the only plausible conclusion about the test applied in *McDonald* is that it is the rational basis test.

With the foundation for his application of the rational basis test coming directly from Justice Kennedy's work in *Lawrence* and *Gonzales*, the invalidation of the handgun bans in *McDonald* is powerful evidence of how effective Justice Kennedy's work in substantive due process law has been. Even though Kennedy did not write the opinion in *McDonald*, the reasoning is full of evidence of his impact on substantive due process jurisprudence. Kennedy's work in *Gonzales* furthered the changes in the law that were initiated in *Lawrence*, and with the Court's opinion in *McDonald*, there is now an established and dominant (although not universally accepted) methodology and set of

legal principles attached to substantive due process cases which are far more solicitous of *reasonably exercised* state power than the principles which dominated this area of constitutional law when Kennedy took his seat on the Court. Kennedy's work has brought about a slow revolution in the law, but a revolution nonetheless.

CHAPTER NINE

Justice Kennedy's Coup

Conclusion

Viewed as a whole, Justice Kennedy's substantive due process jurisprudence *does* have a central organizing principle. I t is not the result of aimless judicial meanderings by a political moderate or 'swing Justice.' In order to retrospectively assess Kennedy's substantive due process jurisprudence properly, we will proceed in four steps.

The First Step: 'The What'

What has Anthony Kennedy's contribution to the Supreme Court's substantive due process jurisprudence been? It has been a central contention of this work that Kennedy has redirected the trajectory of substantive due process since he became an Associate Justice. To appreciate Kennedy's impact on due process jurisprudence, one only need review the state of the law when he joined the Court in 1987 and compare it to how the law stands today.

In 1987, *Roe v. Wade*[1] stood as the pre-eminent substantive due process case in constitutional law. The Warren and Burger Courts had both adopted an expansive view of due process protections, beginning with the recognition of a 'right to privacy' in *Griswold v. Connecticut.*[2] In later cases, such as *Eisenstadt v. Baird*[3] and *Roe*, the Court expanded the coverage of the un-enumerated right to privacy to areas that had

[1] 410 U.S. 113 (1973).

[2] 381 U.S. 479 (1965).

[3] 405 U.S. 438 (1971).

traditionally been subject to extensive regulation by government. In doing so, the Court held that the rights protected under the 'right of privacy' were 'fundamental' rights, and should be protected by the most stringent judicial test–strict scrutiny.

After the Court adopted this position in *Roe v. Wade*, it maintained that position in all abortion-related cases that came before it prior to *Webster*. Even in the one substantive due process case where political conservatives were victorious–*Bowers v. Hardwick*[4]–Justice White's opinion did not abandon the 'fundamental right/strict scrutiny' due process formulation, focusing instead on the fact that there was no 'right' to engage in the practice of homosexual sodomy. However, with Reagan's appointment of Kennedy, the transformation began.

With Kennedy's presence on the Court, the early 90's cases ended in results that were at odds with the expansive version of substantive due process set out by the Warren and Burger Courts. In *DeShaney, Michael H*., and *Cruzan,* the Court declined to recognize new rights under the Due Process Clause. In *Webster v. Reproductive Health Services*,[5] the Court upheld all of Missouri's new abortion regulations, and came near to overruling *Roe*. As has been discussed, Kennedy's support was essential to the limitations placed on the reasoning of *Roe* by Rehnquist's opinion.

Kennedy's role in *Casey* actually supports the contention that he has been the driving force behind a transformation in substantive due process jurisprudence. *Casey* was, in fact, where the first set of major changes in substantive due process law took place. Large parts of *Roe* were repudiated, even though the joint opinion reaffirmed the

[4] 478 U.S. 186 (1986).

[5] 492 U.S. 490 (1989).

"central holding of *Roe.*"[6] However, when the case was over, States had much broader authority to regulate abortion than they held at any time since 1973.

In the years after *Casey,* Kennedy continued to join with the other conservatives on the Court in important substantive due process cases. Both of the major late-1990's cases–*Washington v. Glucksberg*[7] and *Sacramento County v. Lewis*[8]–rejected new substantive due process rights claims, with Kennedy providing the necessary fifth vote to make Chief Justice Rehnquist's opinion in *Glucksberg* the Opinion of the Court. Additionally, while Kennedy's concurrence in *Lewis* was primarily about limiting the use of the "shocks the conscience" test, the fact remains that *Lewis* rejected a novel substantive due process rights claim.

The two cases from 2000–*Troxel v. Granville*[9] and *Stenberg v. Carhart*[10]–provide evidence of a different type. Since Kennedy was in dissent in both cases, he was not able to alter the law as much as in *Casey*'; however, his positions in both cases were ones at odds with an expansive vision of substantive due process. Recall that in *Troxel*, Kennedy condemned the Court's insistence that parental control over their children *always* be subject to strict scrutiny protection. Kennedy was advocating for a less expansive interpretation of parental rights and room for the State to act, two positions clearly at odds with an expansive view of substantive due process rights.

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[6] 505 U.S. 833, 853 (1992).

[7] 521 U.S. 702 (1997).

[8] 523 U.S. 833 (1998).

[9] 530 U.S. 57 (2000).

[10] 530 U.S. 914 (2000).

In *Stenberg*, Kennedy is put in the odd position of *defending* his earlier work in *Casey*. He broke with his co-authors from *Casey*, insisting that the more limited conception of abortion 'rights' announced in *Casey* did in fact allow Nebraska to outlaw D&X. He fails to prevent the Court from establishing a requirement that any abortion regulation have a 'health' exception, a position more akin to the logic of *Roe* than that of *Casey*. In this case, he is defending the revolution against a counter-revolution.

Lawrence v. Texas[11] is the case most would claim undermines the contention that Kennedy has altered the trajectory of substantive due process law from the direction it went during the Warren and Burger Courts. In striking down Texas' homosexual sodomy law, Kennedy's majority opinion seemed to further the agenda of gay rights activists by removing the last vestiges of legal stigma attached to their lifestyle. However, in terms of due process law, *Lawrence* was much more in line with a judicially conservative version of substantive due process, particularly in how it defined the right in question and how the opinion evaluated the law. Practically, the decision had little real-world impact, since only thirteen states maintained criminal prohibitions against sodomy in 2003, and prosecutions under those statutes were so rare as to be nonexistent. While the case is rightly considered a progressive landmark in terms of the acceptance of gay rights, constitutionally the case fits into Kennedy's larger transformation of substantive due process law.

[11] 539 U.S. 558 (2003).

The final two cases, *Gonzales v. Carhart*[12] and *McDonald v. Chicago*,[13] show how transformative Kennedy's work in substantive due process has been. In *Gonzales*, Kennedy effectively undercuts the majority ruling from *Stenberg v. Carhart*, applying the principles of *Casey* in a way that permit an outright *ban* on a particular (although infrequently used) abortion procedure. The application of *Casey*'s principles in *Gonzales* leave great room for the state to have an active role in regulating abortion procedures, with the Court willing to be substantially more deferential towards the asserted state interests than was the case prior to Kennedy's appointment to the Court.

McDonald, of course, is the capstone–and the case which best demonstrates how complete the transformation in substantive due process law under Kennedy's influence and work has been. In *McDonald*, the Court takes an enumerated right–the guarantee of the Second Amendment–and evaluates an infringement on that right using the least stringent of judicial tests–the rational basis test. When *McDonald* is contrasted with the reasoning of *Griswold* and *Roe* (where the un-enumerated right to 'privacy' was protected by strict scrutiny) the dramatic change in substantive due process law is self-evident. The reasoning of *McDonald* would have been unimaginable at the time of Kennedy's appointment in 1987. Combined with the politically conservative outcome in *McDonald*, Justice Kennedy's impact on substantive due process jurisprudence has been incredibly significant.

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[12] 550 U.S. 124 (2007).

[13] 561 U.S. ___ (2010).

The Second Step: 'The How'

Having examined the substantial transformation of substantive due process law that has taken place during Kennedy's tenure on the Court, we now turn to an examination of *how* this transformation came about–with a special focus on the tactics used by Kennedy and other Justices in the writing of their opinions.

The most obvious way that Kennedy aided the transformation of substantive due process law was through a rejection of 'novel' substantive due process rights. He voted novel substantive due process claims in *Michael H.*, *DeShaney*, and *Sacramento County v. Lewis*. He refused to recognize a 'right to die' that overcame state statutes in *Cruzan* and *Glucksberg*, and his willingness to cut back against the expansiveness of the more recently established abortion right is well-documented in *Webster*, *Akron*, *Casey, Stenberg* and *Gonzales v. Carhart*.

Two cases appear to buck this trend–*Lawrence v. Texas* and *McDonald v. Chicago*. However, as was demonstrated in the chapter on *Lawrence*, Kennedy hedges on whether he is in fact recognizing a 'right.' For *McDonald*, the objection can be answered on grounds that the right to bear arms is not novel, since it has its roots in the Eighteenth-century Bill of Rights.

Another way that Kennedy furthered the transformation of the law was through his support and use of the 'history and tradition' methodology. The 'history and tradition' methodology inherently limits judicial discretion, since a right must have some grounding in the past practice of the American people. While something so broad as 'American History' possesses considerable flexibility, the Court's conservatives have incorporated the 'most specific tradition' requirement that Justice Scalia famously

articulated in *Michael H*. Other Justices have used the method to great effect, particularly Chief Justice Rehnquist in *Washington v. Glucksberg* and Justice Alito in *McDonald v. Chicago*. Kennedy's vote was critical to the outcome in both of these cases, and his support of the opinions is a clear endorsement of the methodology they used.

As Kennedy's tenure on the Court has continued, he has become more firmly aligned in with the application of the 'history and tradition' methodology, repeatedly calling on it for justification of his positions in cases like *Troxel*, *Stenberg*, and *Lawrence*. While the Justice is not as rigid as some of his brethren on whether 'history and tradition' is the end-all-be-all of substantive due process inquiry, his support has led to the 'history and tradition' methodology becoming an element of substantive due process law that no Justice will ignore.

The third way that Kennedy has transformed substantive due process jurisprudence is most pointedly shown in the transition between the 'right to privacy' of *Roe v. Wade* and the reliance on the word 'liberty' in *Planned Parenthood v. Casey*[14] and *Lawrence v. Texas*. The core of the criticism of *Griswold* and *Roe* was based on the fact that the Constitution nowhere mentions the word 'privacy.' Critics of the Court's decisions in those cases argued that the Court majority had created the 'privacy' right out of whole cloth, and that it had no basis whatsoever in the Constitution. Kennedy was fully aware of this critique, and this is why in *Casey* and *Lawrence*, the opinions eschew resting the Court's decision on the 'right to privacy,' choosing instead to rest the decisions on the word 'liberty' as it is found in the Due Process Clause of the Fourteenth Amendment. Both decisions held that certain activities–such as obtaining an abortion

[14] 505 U.S. 833 (1992).

pre-viability and sexual activity between consenting adults–were protected 'exercises' of liberty.

While the replacement of the 'right of privacy' with 'exercises of liberty' does not do a great deal to practically constrain the decision-making power of judges, it is an excellent example of Kennedy's commitment to grounding constitutional decision-making in the actual *text* of the Constitution–and a commitment to increasing textualism in substantive due process jurisprudence does help restrain its flexibility.

The fourth way that Kennedy has used to transform substantive due process jurisprudence is closely related to the use of the word 'liberty.' As most would recognize, there are a great many things that could plausibly be held to be elements of 'liberty.' Kennedy realizes this, and he did not simply leave the word 'liberty' as a *tabula rasa* to be inscribed with the mere preferences of future Justices. In numerous cases, Kennedy has acted to limit the definition of 'liberty' so that it is a limited term with utility for constitutional adjudication. Several 'ways' have already been discussed–the rejection of novel rights and the use of the 'history and tradition' methodology both help limit the content of 'liberty.' The rejection of novel rights tells us what is *not* included in 'liberty,' while the 'history and tradition' methodology helps us understand what *may* be included in 'liberty.'

The final, and most important, way that Justice Kennedy's work has transformed substantive due process jurisprudence is through his successful push to bring the rational basis test back as the proper level of judicial scrutiny in substantive due process cases. I t is true that this was not a feat Kennedy achieved on his own–it was a decades-long

concerted effort by all of the Court's conservative Justices. However, the success (as it stands today) would have been impossible *without* Kennedy's work.

At the beginning of his tenure on the Court, Kennedy supported the Court's conservative bloc in numerous cases where the majority tried (albeit with limited success) to return the rational basis test to a place of prominence in substantive due process law. The pre-*Casey* cases, such as *Michael H.*, *Webster*, and *Cruzan* fall into this category. Yet, when the conservatives only achieved limited success, Kennedy was instrumental in the Court's decision in *Casey*, where the plurality explicitly rejected the 'strict scrutiny' formulation of *Roe v. Wade*, replacing it with the less-stringent 'undue burden' test. Kennedy continued to support Court opinions where the rational basis test was applied in the substantive due process context after *Casey*–such as *Washington v. Glucksberg*–and argue for its application in cases where the Court abandoned a lowered standard of scrutiny–such as *Troxel v. Granville* and *Stenberg v. Carhart*.

Lawrence v. Texas remains Kennedy's major contribution to altering the level of test applied in substantive due process case. In *Lawrence*, not only did Kennedy manage to apply the rational basis test in a case in the contentious area of 'sexual rights,' he did so in a way that garnered the support of *all* of the Court's more liberal members–a signal accomplishment in terms of building secure precedent. Post-*Lawrence*, Kennedy's work in *Gonzales v. Carhart* and Justice Alito's opinion in *McDonald* have moved the Court's jurisprudence to a point where the argument is no longer over whether the Court should apply this test in substantive due process evaluations, but rather to a point over the exceptions to the application of the test.

When considered as a whole, the strategies used by Kennedy (and other conservative Justices) in working the transformation in substantive due process law have not always been the most subtle, but they have been consistently directed at a common goal.

The Third Step: 'The Why'

Having established how the transformation of substantive due process jurisprudence took place, it is now time to consider why the conservative Justices–and Kennedy in particular–have been so focused on moving substantive due process law back from the state it was in during the Warren and Burger Court eras. To the average citizen, the controversy over substantive due process boils down to the debate over *Roe v. Wade*, since it is that case that is the most controversial of the substantive due process decisions. However, Justice Kennedy's work in substantive due process law has roots that are far more complex than a simple hostility to *Roe*. There are four separate factors which account for Kennedy's willingness to transform substantive due process law, in short because the Warren/Burger Court version of substantive due process law threatened all of these individual factors which Kennedy values.

The first and most obvious of the four factors is political conservatism. Kennedy has had a long and well-established connection to the Republican Party throughout his life, and this is indicative of his personal political philosophy. Kennedy's considerable devotion to the Catholic faith is another factor which ties him to a conservative political philosophy. (Especially in relation to his moral opposition to abortion, as discussed by Lazarus.) This does not mean that Kennedy's substantive due process jurisprudence is controlled by his political preferences; it does mean that his conservative political outlook

predisposes him to view an expansive version of substantive due process with great suspicion.

The second factor is the United States' common law legal heritage. Recall the extensive references to the common law heritage from Kennedy's nomination hearings before the Senate, as well as his frequent recourse to exhaustive examinations of precedent and history in his opinions and those he joined. Kennedy is more likely than most other Justices to integrate the common law method into constitutional adjudication, because the slow and incremental development of juridical doctrines that takes place under the common law method appeals to the same cautious aspect of his personality that makes political conservatism appealing to him.

For example, consider the change in the level of judicial scrutiny that has taken place in substantive due process cases. Rather than simply return to the rational basis standard as soon as possible, Kennedy has been inclined to pursue a slower, incremental devolution from the strict scrutiny standard that prevailed when he joined the Court, through the 'undue burden' test of *Casey*, before finally arriving at the rational basis test as applied in *Lawrence* and *McDonald*. The advantages of pursuing the 'common law' method in constitutional adjudication are two-fold: Firstly, the Court avoids the accusation of unprincipled, 'results-based' judging that weighs so heavily against some of the Warren and Burger Court's decisions. Secondly, a legal change that is made with the backing of several 'precedential' cases has more durability thanks to the principle of *stare decisis*. Kennedy is aware of both of these advantages, and they have been influences which have increased his willingness to pursue incremental change in substantive due process jurisprudence.

The third factor is the constitutional principle of Federalism. While the Court's most important Federalism cases have not been discussed here, Kennedy has been one of the Court's most vocal defenders of the need to respect the powers of the States. Because substantive due process claims have most frequently been used to limit the regulatory powers of State and local governments, Kennedy's willingness to limit its scope is consistent with his insistence on protecting the 'sovereign dignity' of States in cases such as *Printz v. U.S.*,[15] *Boerne v. Flores*,[16] and *Alden v. Maine*.[17]

Consider, for example, Kennedy's dissent in *Troxel*. Among his numerous complaints against the Court's decision in that case is the fact that the Court's decision unduly limits the power of the States to craft visitation statutes that take into account factors other than parental rights; essentially, this critique is one with its roots in Federalism. In *Troxel*, it is a Federal entity (the Court) improperly extending its power (through substantive due process) into an area where the State should be able to retain control. While the federalism aspects of many of the cases herein discussed have not been particularly self-evident, Kennedy's respect for the federal nature of the American Constitutional System has exerted a powerful (if unseen) influence on his substantive due process decision-making.

The fourth, and most important factor, is the institutional integrity of the Supreme Court. Kennedy, like all of the Justices, is particularly conscious of the Supreme Court's unusual status within a political structure that is fundamentally based on representation.

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[15] 521 U.S. 898 (1997).

[16] 521 U.S. 507 (1997).

[17] 527 U.S. 706 (1999).

Nine unelected, life-tenured Justices exercise an incredible amount of power at the Federal level, often telling the elected representatives of the people what they may (or may not) do. The Court's status as a 'counter-majoritarian' element in the constitutional structure has been much-discussed by academics over several decades, particularly as a result of the Court's willingness–during the Warren and Burger eras–to use its power to foist substantive (and often dramatic) policy changes on broad sections of a sometimes-recalcitrant public, with the most important episode being the end of segregation in the wake of *Brown v. Board of Education*.[18]

Due to the institutional nature of the Court–it must rely on the executive branch to enforce its decisions–public support for the Court is essential if it is to play its proper role in the constitutional system. When the Court is seen as acting in a partisan or ideological way, the portion of the public who supports the losing position in a case will view the Court's decision as lacking in legitimacy; *Roe v. Wade* is the pre-eminent example of this phenomenon. The charge of illegitimacy, when leveled against a Court decision, is more likely to 'stick' when the decision lacks the support of precedent–for that is essentially what precedent does–it confers *legitimacy* on decisions of the Court. When the Court grounds its ruling in precedent, it is much more difficult to accuse the Justices of 'results-based' judging, since, in theory, they are merely applying the legal principles derived from precedent to the case at bar, without reference to their personal views on the issue at hand.

This is the core of Kennedy's concern about the institutional integrity of the Court. Particularly in the area of substantive due process law, the Court has long been

[18] 347 U.S. 483 (1954).

accused (and often rightly so) of imposing its own policy views, rather than deciding the case at bar according to legal principles. Since substantive due process law has been among the most 'dangerous' areas of law in terms of maintaining the Court's appearance of impartiality, it would make sense that Justices who are concerned about this would try to change substantive due process jurisprudence to minimize the potential for damage to the Court's reputation. The changes in substantive due process law that Kennedy has been an essential part of have all attempted to reign in the subjective element of due process jurisprudence for this reason.

A central, but sometimes overlooked, aspect behind the conservative opposition to substantive due process is not a simple opposition to the policies enacted in its name–it is, rather, a distaste with policy choices being made by un-elected judges. It is, in short, a majoritarian impulse that has pushed conservatives to oppose many of the substantive due process decisions, as well as substantive due process generally. While political progressives attack conservatives for their opposition to both the policies and method, Kennedy's institutional concerns take into account an important part of Supreme Court history: the so-called '*Lochner* era.'[19]

During the period of 1897–1937, the Supreme Court used the doctrine of substantive due process to define and protect what was called the 'liberty to contract,' and in the process of doing so, the Court invalidated a large number of state attempts to impose economic regulations on private businesses. The Court's willingness to overturn many state laws frustrated many reformers, who believed that the Court was imposing its own policy preference on the nation over the judgment of the elected representatives of

[19] Named after *Lochner v. New York* 198 U.S. 45 (1905), the prototypical case of the 'era.'

the public. Eventually, in the aftermath of the election of Franklin D. Roosevelt in 1932, the Supreme Court struck down several key pieces of New Deal legislation (although on Commerce Clause grounds, rather than substantive due process) and this provoked the institutional crisis of Roosevelt's 'Court-Packing' scheme and the subsequent 'Switch in Time'–when the Court suddenly abandoned its restrictive commerce clause jurisprudence, while also rejecting substantive due process. The lengthy debate over the legitimacy of substantive due process had damaged the Court's legitimacy with the public, and while that damage was not permanent, the historical episode provides an important lesson for Justices about the proper–and practical–limits of Court power.

When Justice Kennedy looks back on the history of the Court from his vantage point on the bench, he sees not only the damage done to the Court's institutional prestige by the post-*Griswold* substantive due process cases, but also the damage that was done to the Court by its original foray into substantive due process during the *Lochner* era. Importantly, the two eras demonstrate how substantive due process can be used to frustrate the wishes of political coalitions on both the right and left, since the *Lochner* era cases prevented the enactment of economic policies favored by progressives, while the more recent substantive due process cases have angered conservatives. With that perspective in hand, any Justice who has a concern with the institutional role of the Court should be able to see that the doctrine of substantive due process is dangerous to the functioning of the constitutional order, even if it might be used to advance a partisan viewpoint in the short term. While substantive due process is unlikely to ever be extirpated entirely from American constitutional jurisprudence, thoughtful and cautious Justices–like Kennedy–will attempt to minimize its influence in the law. Looking back

on Kennedy's tenure on the Court, this analysis has demonstrated that Kennedy has been the key player in transforming substantive due process law into a more limited, restrained, and, ultimately, judicially responsible, corpus that is more in harmony with fundamental elements of the American constitutional system.

BIBLIOGRAPHY

Amar, Akhil Reed. "Justice Kennedy and the Idea of Equality." *Pacific Law Journal* 28 (1996-1997): 515–532.

Barnett, Randy. "Justice Kennedy's Libertarian Revolution: *Lawrence v. Texas.*" *Cato Supreme Court Review* 23 (2003): 21–41.

———. "Kennedy's Libertarian Revolution." *National Review Online*, July 10, 2003.

———. *Restoring the Lost Constitution.* Princeton, NJ: Princeton University Press, 2004.

Basiak, John F., Jr. "The Roberts Court and the Future of Substantive Due Process: The Demise of 'Split-the-Difference' Jurisprudence?" *Whittier Law Review* 28 (Spring 2007): 861–904.

"Biographies of Current Justices of the Supreme Court." Supreme Court of the United States. Accessed December 10, 2012. http://www.supremecourt.gov/about/biographies.aspx.

Buchanan, Patrick. "What the Court Betrayals Portend." *Human Events*, July 14, 2003.

Calabresi, Steven. "Substantive Due Process after *Gonzales v. Carhart*." *Michigan Law Review* 106 (June 2008): 1517–1541.

Carter, Terry. "Crossing the Rubicon." *California Lawyer*, October 1992.

Charen, Mona. "Court's 'Legislation' Undermines Democracy." *The Augusta Chronicle (*Augusta, GA), July 10, 2003.

CNN Late Edition With Wolf Blitzer. "Interview with Kenneth Starr." CNN, June 29, 2003.

Colucci, Frank J. *Justice Kennedy's Jurisprudence: the Full and Necessary Meaning of Liberty*. Lawrence, KS: University Press of Kansas, 2009.

"Court Expands Privacy in Texas Sex Case; Justices strike down law aimed at private sexual conduct." *The Detroit News*, June 27, 2003.

Evans, Murray. "Justice Kennedy concerned about 'lack of civility'." AP State and Local Newswire, October 3, 2009.

Feldman, Linda and Warren Ritchie. “Big boost for privacy rights.” *Christian Science Monitor*, June 27, 2003. Sec. USA, 1.

Greenburg, Jan Crawford. *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court*. New York: Penguin Press, 2007.

Greenhouse, Linda. “Reagan Nominates Anthony Kennedy to Supreme Court.” *The New York Times*, November 12, 1987. Accessed November 8, 2012. http://www.nytimes.com/1987/11/12/us/reagan-nominates-anthony-kennedy-to-supreme-court.html.

———. “The Supreme Court: Homosexual Rights; Justices, 6-3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's '86 Ruling.” *The New York Times*, June 27, 2003.

Hoffer, Peter Charles, Williamjames Hoffer and N.E. Hull. *The Supreme Court: An Essential History*. Lawrence, KS: University Press of Kansas, 2007.

Ingraham, Laura. “Take Back the Constitution.” *The New York Sun*, July 1, 2003.

“Justice Anthony M. Kennedy.” Supreme Court Historical Society. Accessed December 3, 2011. http://supremecourthistory.org/history-of-the-court/the-current-court/justice-anthony-kennedy/.

Knowles, Helen J. *The Tie Goes to Freedom: Justice Anthony Kennedy on Liberty*. Lanham, MD: Rowman and Littlefield Publishers, 2009.

Lazarus, Edward P. *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*. New York: Times Books, 1998.

Limbaugh, David. “Sodomy Ruling Part II: A Liberal Gold Mine.” *Human Events Online*, July 7, 2003. Accessed June 1, 2012. Lexis-Nexis Academic.

Maltz, Earl M. “Anthony Kennedy and the Jurisprudence of Respectable Conservatism.” In *Rehnquist Justice: Understanding the Court Dynamic*, edited by Earl M. Maltz, 140-156. Lawrence, KS: University Press of Kansas, 2003.

Neven, Tom. “Should the court stay out of our bedrooms? NO: Founders assured liberty, not license.” *The Denver Post*, July 3, 2003.

O’Hanlon, Stephen. “Justice Kennedy’s Short Lived Libertarian Revolution: A Brief History of Supreme Court Libertarian Ideology.” *Cardozo Public Law, Policy & Ethics Journal* 7 (Fall 2008): 1–44.

Park, Mitchell F. "Defining One's Own Concept of Existence and the Meaning of the Universe: The Presumption of Liberty in *Lawrence v. Texas*." *Brigham Young University Law Review* (2006): 837–887.

Rosen, Jeffrey. *The Supreme Court: The Personalities and Rivalries That Defined America*. New York: Times Books, 2006.

Samar, Vincent J. "The Supremes Gay Rights; A closer look at Lawrence v. Texas." *In These Times*, August 11, 2003.

Senate Committee on the Judiciary. *Hearings on the Nomination of Anthony Kennedy to be Associate Justice of the Supreme Court of the United States*. S. Hearing. No. 100-1037, 100th Cong., 1987. Accessed October 3, 2012. ProQuest Congressional. HTTP://congressional.proquest.com/congressional/docview/t29.d30.hrg-1987-sjs-0039?accountid=7014

Shapiro, Ilya. "A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy." *Harvard Journal of Law & Public Policy* 33, no. 1 (Winter 2010): 333–360.

Starr, Kenneth W. *First Among Equals: The Supreme Court in American Life*. New York: Warner Books, Inc., 2002.

"Stat Pack: SCOTUSblog, 1995-2011 terms." Last Accessed January 23, 2013. http://www.scotusblog.com/reference/stat-pack/.

Sunstein, Cass R. "What Did *Lawrence* Hold? Of Autonomy, Desuetude, Sexuality, and Marriage." *The Supreme Court Review*, Volume 2003, (2003): 27–74.

Sweeney, Rachel. "CASENOTE: Constitutional Law—Right of Privacy–Statute Criminalizing Homosexual Conduct Violates Due Process Clause of Fourteenth Amendment." *Cumberland Law Review* 34, (2003-2004): 171–183.

Thompson, Lisa. "Justice Kennedy speaks about Constitution at Chautauqua." *Erie Times-News* (Erie, PA), August 29, 2009.

Toobin, Jeffrey. *The Nine: Inside the Secret World of the Supreme Court.* New York: Doubleday, 2007.

Tribe, Lawrence. "Lawrence v. Texas: The 'Fundamental Right' that Dare Not Speak Its Name." *Harvard Law Review* 117, (April 2004): 1893–1955.