

CIVILLY SPEAKING: THE FOURTH AMENDMENT IN A CIVIL CONTEXT PROTECTING PRIVACY AND AUTONOMY RIGHTS

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Abstract

The Supreme Court's ruling in *Dobbs v. Jackson Woman's Health* has opened the door to a reexamination of privacy and autonomy rights that have been recognized since *Griswold v. Connecticut*. Justice Thomas's concurrence goes as far as suggesting that all substantive due process cases should be overturned. This article addresses that argument and suggests that there is a textual route to protect those rights in the fourth amendment. By examining the language and usage of the amendment, it suggests that the fourth amendment protects against more than illegal searches by law enforcement but is instead a broader right.

Keywords: Constitutional rights, privacy, fourth amendment, autonomy, abortion, search and seizure

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The reversal of *Roe v. Wade* has exposed a weakness in the Supreme Court's protection of privacy/autonomy interests under the fourteenth amendment. As shown in *Dobbs v. Jackson Woman's Health Organization*, the due process clause of the fourteenth amendment serves as a poor vehicle for privacy protection in a variety of circumstances. In his concurrence in *Dobbs*, Justice Thomas argued that all the cases decided by the Court under the theory of substantive due process should be reexamined. Given that the Court in *Dobbs* dealt a serious blow to substantive due process, landmark cases such *Griswold v. Connecticut* and *Lawrence v. Texas*, which rest on that doctrine, are now on shaky ground. Does this mean a new era of banning birth control and regulating intimate consensual sexual relationships? Is there another textual provision the Court should use in protecting citizens' privacy and security interests? Literature indicates that another path existed before the Court decided *Griswold* that was referenced in *Poe v. Ullman*. Since *Griswold*, certain aspects of the right to privacy were viewed through substantive due process while other privacy rights that involved traditional search and seizure claims were grounded in the fourth amendment. Can the paths converge to form a textual based protection for privacy? This study will explore whether the fourth amendment can be substituted for the substantive due process protection that flows from the *Griswold* case. Some scholars argue that the fourth amendment is a more textual argument that could survive conservative attack. After extensive analysis, this author believes that the fourth amendment can protect those claims made under *Griswold*.

The United States Supreme Court has utilized the fourth amendment in protecting persons from unreasonable governmental intrusion in criminal investigations. However, in a handful of cases, the fourth amendment has been used to protect against both unreasonable searches and seizures outside of the criminal investigative process. *Soldal v. Cook County* (1992) and *Chandler v. Miller* (1997) serve as examples of how the fourth amendment has been applied in that context. Prior cases have discussed the nature and objects of the fourth amendment when it was enacted. This leads to

the question at issue here: can the fourth amendment support a broader right of privacy?¹

Conservatives on the Supreme Court in the 1980s and 1990s cut back on fourth amendment protections but in recent years, the fourth amendment has seen a resurgence in protecting privacy type claims. The fourth amendment has been relied upon in many of the Court's decisions to protect the privacy and security of individuals involved in criminal investigations, especially as it is related to technology. As technology has advanced, however, it has eroded the privacy of those individuals in ways that just a few decades ago were improbable. The Court has stepped up protection in some of those cases. An example of this expansion is shown by use of GPS technology discussed in the concurrence of Justice Sotomayor in the case of *United States v. Jones* (2012):

GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. (Citations omitted) ("Disclosed in [GPS] data ... will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on"). The government can store such records and efficiently mine them for information years into the future. (Citations omitted) *United States v. Jones* Justice Sotomayor concurring.

¹ This argument was the basis for an amicus brief filed in *Dobbs* by this author. This study borrows extensively from that brief and expands upon its concept into other areas such as the right to use birth control. Brief of Amicus Curiae Scott Pyles in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (cert. granted May 17, 2021) 2021 WL 4427559.

Thus, information collection that was only possible by extensive ongoing surveillance by law enforcement can now be performed with the flick of a switch. In addition, activities inside of a home, once thought to be first among equals in fourth amendment interpretation, can now be detected through technology. The Court, in response, has applied the fourth amendment to continue to protect privacy interests. *Kyllo v. United States*, (2001) for example, involved the search of the inside of a home by merely using a thermal imager. This search revealed information on the activities inside the home that were previously not observable without technology. The Court, however, ruled that the search in *Kyllo*, without a warrant, violated the fourth amendment.

The fourth amendment also protects the privacy of one's effects. Cell phones are a significant collector of information about us and our activities and an inspection of such a device would be a significant invasion into one's privacy. However, US Supreme Court protected those privacy interests in *Riley v. California*, (2014). In *Riley*, the Court, in an opinion by Chief Justice Roberts, held that the search of a criminal suspect's cell phone required a warrant. Although *Riley* had been arrested and the police had the cell phone, a search of its contents would not be justified under the search incident to his arrest exception pursuant to *Chimel v. California*, (1969). Chief Justice Roberts reasoned that cell phones with their enormous capacity to retain information and to record the daily tasks of a person required a warrant before law enforcement officials could conduct a search. The opinion went to great lengths to describe the technology that was involved and held that a search, of what could be the equivalent to thousands of pages of documents and detailed reports of the owner's activities, required a warrant. This unanimous decision also applied to information which can be retrieved through the use of cloud services or other locations despite the fact that the information was shared with a third party. The ability to read a person's mail, track their comings and goings, know which books they read and which apps they use, presents months' worth of tracking surveillance not traditionally

available to law enforcement.² While the preceding examples show the Court has recently been protective of informational privacy rights, particularly considering technology advances, the Court has not followed this path in the areas of sexual or intimate related privacy/autonomy claims due to the presence of *Griswold*. As the Court has utilized the fourth amendment to protect informational privacy claims on a more extensive basis, can it be expanded to cover other types of privacy related claims outside the criminal context such those covered by *Griswold*?

Scholars continue to debate whether the Constitution provides a textual protection to privacy especially outside the context of a criminal investigation. In the past, arguments supporting protection of certain privacy rights drew upon substantive due process policy considerations. In *Roe v. Wade*, (1973) the Court invalidated a state statute which allowed an abortion only when the mother's life was at stake. Nearly two decades later, the Court in *Planned Parenthood v. Casey* (1992) held that prior to viability, a woman had a fourteenth amendment liberty interest in seeking an abortion without undue interference by the State. *Casey* sustained several restrictions placed by the state legislature on the procedure. However, *Casey's* joint opinion as in *Roe*, rested its decision to invalidate the spousal notification requirement enacted by the Pennsylvania legislature using the liberty clause of the fourteenth amendment following the precedent of *Roe*. Through such analysis, both cases became unmoored from *Griswold v. Connecticut* and its reliance on the fourth amendment among other things and more akin to the discredited *Lochner* substantive due process theory.

² There will be some discussion of the balancing of interests in this study regarding whether a search or seizure is reasonable. *Riley* and *Jones* give reason to believe that the Court will give a fair balancing of the interests unlike *Michigan State Police v. Sitz*, 496 U.S. 444 (1990) (upholding a suspicionless roadblock stop of vehicles)

The complaint over that past several decades by legal scholars and citizens alike is that the “liberty clause” could be interpreted to invalidate any number of different enactments by legislatures given it had the support of five Justices of the Court.³ Justice Black in his dissent in *Griswold* did not believe that the text of the Constitution supported a right to privacy.⁴ Justice Scalia argued in his *Casey* dissent that the invalidation of abortion regulations, supported by merely five unelected judges, which interpreted a single general word (liberty) to invalidate a statute enacted by the people’s representatives, violated democratic principles underlying the Constitution.⁵ In theory, I agree with these sentiments and would instead use the textual provision of the fourth amendment.

Advocates of privacy have relied on precedent and stare decisis to preserve the *Griswold* type of privacy cases. However, given the current composition of the United States Supreme Court, those approaches are no longer persuasive as demonstrated in *Dobbs*.⁶ The

³ Part of the issue relates to the way the Court has addressed various disputed cases. The support for a decision in a case mattered less than the policy outcome. Bob Woodward and Scott Armstrong’s book *The Brethren* (1979) gives an inside look at how majorities for cases were formed and the sacrifices made in opinion drafting in order to achieve a certain result. For example, the book details the “give and take” involved in the drafting of *Roe v. Wade*.

⁴ Justice Black felt selective incorporation gave judges too much discretion to invalidate legislation. His dissent in *Griswold* is problematic for my theory, however, Justice Black was working through the incorporation of the Bill of Rights through the fourteenth amendment during his tenure. I believe that Justice Black would have come around to a fourth amendment privacy argument if it had been properly presented and briefed to the Court.

⁵ There is a logic to this argument. As the court has become more conservative, theories such as the unitary executive could become more prominent. Howell and Moe (2020). As such, substantive due process can be a dangerous tool in the wrong hands.

⁶ For example, substantive due process has been used to protect same-sex relationships in court battles for decades. See Jason Pierceson, (2014). *Same-*

protection of other privacy interests, which in the past relied on substantive due process arguments, are at risk. To help preserve those privacy interests, I propose to attack the issue with arguments based on textualism. The textual basis for that argument is the fourth amendment, and the interest sought to be protected are those involved in *Griswold* and its progeny. Notwithstanding Justice Alito's and Justice Thomas's dicta, the fourth amendment wording under textualist analysis provides protection for the privacy and security of an individual beyond its past use, primarily a right for criminal defendants to assert following an arrest.

The fourth amendment has been recognized as an important right protected in the Constitution. As law enforcement has evolved in the 21st century, so has the interpretation of the fourth amendment in protecting criminal suspects. Yet, when enacted, the fourth amendment was primarily used in a civil context to protect against British style general warrants used to root out revenue and tax evasion. Despite this background, a review of the words using a textualism styled interpretation shows a protection of not only privacy but also autonomy type interests as used in *Griswold*.

METHODOLOGY

A critical part of this theory involves looking at the commonly understood meaning of the wording of the fourth amendment using the late Justice Scalia's textualism method as a starting point (Scalia and Garner 2012). In distilling the meaning, dictionaries from the time the fourth amendment was enacted are utilized. In this theory, deciding the meaning of the wording of the fourth amendment determines whether a given action is a search or seizure. Also, one must determine whether the subject action involves a person, house, paper or effect (using existing court interpretation of those areas) of the subject challenging the action. If the subject action involves a search or a

sex marriage in the United States: The road to the Supreme Court. Rowman & Littlefield Publishers.

seizure of a party's person, house, paper or effect, the next step is to decide whether the challenged action is unreasonable. A balancing of the privacy interest against the government interest alleged in the action is examined. If the privacy interest outweighs the governmental interest, the challenged action (statute or regulation) is ruled unconstitutional and unenforceable. A more concrete application of this methodology is discussed later in this article.

This method of interpretation does not differ much from regular statutory interpretation principles. (See *People v. Ariaza* (2020) for an example). It would be difficult for the Court to ignore a frontal examination of the text of the fourth amendment when used in this context given both Justice Gorsuch and Justice Barrett's endorsement of this method in their confirmation hearings. It is important to note that despite favoring Scalia's (or Justice Black's) textual method, I do not agree with many of Scalia's opinions. As Segall (2018) has pointed out, Scalia was inconsistent in his application of textualism, and I often disagreed with his opinions. Whether or not Justice Scalia would have favored this extension of *Griswold* style claims via the fourth amendment is a question not likely to be answered. In a perfect world, there would have been rotating appointments to the Court, and stare decisis would have preserved the Court's past precedents. However, such is not the case, and this is the environment we must live in.

Before diving into this theory, it is also important to define the concept of rights I am seeking to protect. Professor Adam Moore (2016) acknowledges, as other authors have, the difficulty of defining privacy.⁷ After reviewing several of the options available in the literature, Moore (2016) defines privacy as "a right to control access to and uses of, places, bodies and personal information". That definition

⁷ Adam Moore's book *Privacy, Security and Accountability* (2016) gives an overview of some of the issues involved in protecting privacy. See also Schoeman, F. D. (2007). *Philosophical dimensions of privacy: An anthology*. Cambridge Univ. Press. for a grouping of several foundational privacy articles.

encapsules the rights sought to be protected in cases such as *Griswold*. Warren and Brandeis' (1890) article "the Right to Privacy" first began by developing privacy in tort law as "the right to be left alone". Although the Warren and Brandeis (1890) article addressed privacy as it relates to tort law, that view was crystallized in Justice Brandeis' dissent in the fourth amendment case of *Olmstead* discussed later in this study. It is important to note that the concept of privacy used by Moore (2016) encompasses both access (informational) and use (control) aspects of privacy which involves both the searches and seizures of the fourth amendment. To combine the protections of both the fourth amendment and the *Griswold* right, that definition of privacy is important.

A critical part of getting the Court to adopt this reasoning, however, is to have it argued and presented in both written brief and oral presentation. Some may argue that this theory was not adopted in the earlier cases of *Poe* or *Griswold*, so why should we think it would be adopted now. However, this theory has not been fully raised and argued to the Court. As stated earlier, this argument was brought forth in an amicus brief in *Dobbs*. That is a far cry from a party brief that is fully presented in open court by a party. As noted by Girgis (2022), that brief was the only one out of 175 filed in *Dobbs* that offered a substantive alternative path to either affirming or reversing *Roe* in that case. Advocates must assist in the Court in developing arguments to support their cases. As will be discussed later in this article, Garrow (1998) found that the briefs in *Griswold* did not assist the Court in developing a cohesive textual based argument for the Court to rely on. In fact, it is noted by Garrow, the Court in *Griswold* did in fact base the opinion in part on the brief filed by the Appellant *Griswold*. If the Court was presented with this argument, I believe it could attract a majority of the Court, which is the object of this study.

LITERATURE REVIEW

The protection of some of the most personal and intimate decisions has in essence been set on fire by the *Dobbs* decision. Before charting

a course out of the “fire”, it is important to review how it started, why we are now in danger, and how can we put it out? In this study, I will review material that looks at the historical significance of the *Griswold* case, look at why substantive due process can no longer protect privacy interests, what states have done in this area, as well as an analysis of articles using the fourth amendment to protect privacy rights.

Despite the current criminal procedure interpretation of the fourth amendment, the Supreme Court in the 1960s considered expanding the fourth amendment to issues that were raised in *Griswold v. Connecticut*. In “Keeping Police out of the Bedroom: Justice John Marshall Harlan, *Poe v. Ullman*, and the Limits of Conservative Privacy”, Andrew Schroeder (2000) studies the work of Justice Harlan both before the *Griswold* decision and after *Griswold*. Schroeder (2000) looks at the papers and opinions of Harlan and concludes that “the great dissenter of the Warren court” was in favor of a substantive privacy component to the fourth amendment when it pertained to the home especially personal activities in the bedroom. The data used in his research consisted of memos, documents and papers culled from the justice’s collections. The author got an inside look of the negotiation and research conducted during that period and saw that Justice Harlan, considered to be conservative on the court, thought that “privacy in the home” was a basis for invalidation of the birth control statute in *Poe*. This view was eclipsed by the decision *Griswold* in 1965.

Schroeder (2000) argues that part of the reason that the fourth amendment was not utilized at that time was that the Court was still grappling with how to incorporate the Bill of Rights to the states through the fourteenth amendment. Many decisions involving search and seizures cited the fourteenth amendment as its authority given that the fourth amendment was incorporated through the fourteenth amendment. For example, the privacy in the home articulated by Justice Harlan was only available for use against the states by virtue of the fourteenth amendment incorporation. As Schroeder notes in this research, Justice Harlan thought that the fourth amendment had a

substantive component that could be applied as to the state legislatures as opposed to only police activities. Justice Harlan used some of the quoted material in this article to support his position that the fourth amendment would not allow regulation of marital activities such as use of birth control in the bedroom.

Schroeder (2000) argues that Harlan's position was not limited to married couples. Schroeder discusses Harlan's vote in *Stanley v. Georgia*. Schroeder (2000) shares that Justice Harlan generally voted against protecting obscenity however, in *Stanley*, which involved a case of a private possession of pornography in the privacy of the home, Justice Harlan voted in favor of reversal of the conviction. Schroeder makes the case that Justice Harlan's vote relied on privacy grounds. Schroeder (2000) also recounts a memo by Justice Harlan to Justice Marshall asking him to remove "distribute" from his quote "the right to receive information and ideas" under the first amendment protection described in the majority opinion. Justice Harlan felt that a legislature had no right to tell someone what they could read, draw or paint in their own home. Justice Harlan's approach serves as an example of my approach to these types of claims. Given that the fourth amendment was at least a potential avenue for conservative justice in the 1960's, can it make a resurgence in the 21st century?

In *Liberty and Sexuality*, David Garrow (1998) recounts the working of the U.S. Supreme Court during the time before and after *Griswold* was decided. Cited in Schroeder (2000), Garrow (1998) shows that Justice Douglas offered the fourth amendment as a basis for striking down the Connecticut birth control statute in *Griswold* among other theories. However, Justice Douglas was persuaded to use the now famous "penumbras and emanations" formula to support the decision, in part, based on the briefs filed in the case. After researching the papers of the late justices, Garrow (1998) found a lot of back-and-forth negotiation between the justices regarding this case and found the fourth amendment path too limiting for the Court. However, Garrow's (1998) research shows that the fourth amendment was a part of the support in the decision in *Griswold*. Garrow (1998) points out

that Justice Douglas's approach had problems in attracting the five votes needed for a majority. Chief Justice Warren had difficulty supporting the Douglas opinion as it appeared to embrace the discredited *Lochner* substantive due process approach. Although Douglas' opinion disclaimed using substantive due process, the opinion still followed a similar path. The cases following *Griswold* (*Roe* and *Casey*) appear to agree. Garrow (1998) notes at different times in his book that the Justices many times were not aided by the arguments and briefs supplied by the parties in the case. If a party did not raise a particular theory or support sufficiently in the brief, it would be difficult in most instances for the Court to draw it up out of thin air. Garrow (1998) also notes that Justice Douglas during this period was not producing tight opinions to support his majorities as he was nearing the end of his long tenure on the Court. If the opinion had been assigned to Justice Harlan back in 1965, a lot of ink may have been saved.

Another facet to this is the discussion by Garrow (1998) of the involvement of Justice Harlan's then clerk, former Solicitor General Charles Fried from the Bush administration. Fried, as a clerk, was involved in drafting the memo for Harlan regarding privacy for the *Poe* case. Garrow (1998) recounts Fried's later argument in the *Webster* abortion case in 1989 in which Fried argued to the Supreme Court that *Griswold* was really a fourth amendment case and not as a substantive due process case. *Webster v. Reproductive Health Services* (1989). Although that argument was disputed by Justice Brennan during oral argument, it can give some insight into the conservative mindset. Fried advocated Harlan's *Poe* opinion in *Webster* to uphold *Griswold* but to show that *Roe* had abandoned that textual support of the "privacy in the home" analysis found in *Poe*. This argument was also used by the *Dobbs*' petitioners in their brief in stating that *Griswold* was based on the fourth amendment.

The preceding material is provided mostly to show perspective on the viability of the fourth amendment in this area. Schroeder (2000) discusses many of the doctrinal obstacles in play during the 1960s that

made the application of the fourth amendment to *Poe* and *Griswold* difficult such as the incorporation doctrine. Further, having read hundreds of Court opinions, the writing and analysis were much different back then and the Court was not as politicized as it is today. Court appointments had little scrutiny and there was no Federalist Society grooming candidates for the bench. As such, this author does not consider the abandonment of the fourth amendment in *Griswold* as a major obstacle to the theory posed in this study. However, it does offer evidence that the following arguments were considered prior to the decision in *Griswold*.

Some may ask if the courts have been using substantive due process for decades, why is there now a problem? Over the years as the Court has shifted rightward, conservative legal scholars have mounted an unrelenting attack on substantive due process and specifically on abortion rights. Hollis-Brusky (2016) discusses the advent of the Federalist Society, whose members currently make up a majority on the United States Supreme Court and for years have sought the overturn of *Roe v. Wade*. This book gives insight into how arguments were developed particularly regarding the second amendment that were successful in the Supreme Court. Hollis-Brusky (2015) points out that the Federalist Society is made up of different kinds of conservatives and has different types of members. Many members are from academic institutions while others are students or lawyers or judges. Some conservatives are libertarians which favor very limited government and object to *Roe* based on judicial overreach. Then there are religious conservatives that object to *Roe* on moral grounds such as sex outside of marriage (*Griswold*) and killing of potential life (*Roe*). Those forces are sometimes in conflict. The limited government members would like the government kept out of people's bedrooms (like Fried) and would support a textual support for privacy. The religious conservatives would oppose this libertarian view and would want the state to outlaw it. Despite their differences, both sides wanted to jettison *Roe* as blatant judicial policy making that it is better left to the states. A textual argument that can bring aboard

the libertarian element of the Federalist Society such as Justice Gorsuch may help bring a successful case.

Another factor in this analysis is that the conservative justices are not as respectful of precedent as prior Court members. As demonstrated in *Dobbs*, the conservative wing of the Court is not afraid to jettison cases that are not in line with view of the Constitution. A large part of the *Dobbs* decision was dedicated to dispatching the arguments made in *Casey* to follow the precedent in *Roe*. In one sense this is quite disturbing in that the foundation of our common law system is the following of the reasoning in prior cases. As Hollis-Brusky (2015) points out, the new conservative judges will not let precedent stand in the way of following their ideology.

Howell and Moe (2020) in their book, *Presidents, Populism, and the Crisis of Democracy* discuss, among other things, the influx of young conservative judges having been appointed by Republican presidents which furthered the rightward movement of the courts. This shift has emboldened the critics of substantive due process to the point of uselessness. Howell and Moe (2020) point out some of the shortcomings associated with these judges such as the fidelity to originalism and belief in the “unitary executive theory” which believes in a powerful executive branch. I do not necessarily disagree with their statement that originalism is wrong because we are “forced to accept the interpretations of people who lived 230 years ago, who were designing a government for a tiny nation of four million farmers and who had no idea about the problems and complexities of a modern society” (Howell and Moe 2020 pg. 290). However, from an interpretation standpoint, an evolving constitution is not too enticing either. Howell and Moe (2020) are correct in that we are now confronted with a significant segment of the federal judiciary who share the philosophy of originalism and oppose the use of substantive due process. This transformation of the federal judiciary has brought the need for a revision to privacy that for years went unneeded.

As the courts have shifted to the right, their methods and ideology has also come under examination. Segall (2018) finds that

despite the fidelity some of the Justices have towards originalism, it is not consistently applied by any so-called originalist judge, and there really is no requirement that originalism be applied in the interpretation of constitutional texts. Segall (2018) concludes that there is no single version of originalism as it has evolved, nor can it work as constraint on Supreme Court decision making. Segall (2018) has some eminent scholars on his side of this debate in that interpretation of many important cases such as *Lawrence* are not decided in accordance with originalism. But despite Segall's criticisms, originalism is not going anywhere soon. Howell and Moe (2020) discuss the flood of younger and more conservative judges including three Supreme Court Justices by the 45th president as evidence of that assertion. Yet this mode of interpretation does put some limits of federal court decision making. Limits are going to be needed to stop the influx of very conservative lower court rulings for decades to come. A few restraints on decision making in the federal courts is not a bad thing.

Segall (2018) conceptualizes some of my thoughts regarding the restraints needed on federal judges:

The only effective way to restrain judges from overturning state and federal laws based on ideology rather than law is for them to adopt a clear error rule where they would act only when the evidence of constitutional error is overwhelmingly clear. Such a deferential system of judicial review is coherent and plausible, but highly unlikely to be adopted by the Supreme Court, which has exercised strong judicial review for well over a century. Like other government officials, the justices are unlikely to limit their own power.

It is understandable that law students, law professors, lawyers, judges, and the American people wish to have faith that the justices decide cases based on prior law such as text, originalist evidence, and previous cases. But this book has shown that justices, not bound by precedent, who have largely unreviewable authority to

decide society-defining issues, will not allow imprecise text and contested historical evidence from generations ago to stand in the way of their preferred policy preferences. (Emphasis added) Segall, 2018 p.192-93.

This author would prefer that before a court exercises judicial review (which is not in the Federal constitution), the court be able to point to a specific and clear provision that the subject action violates. A variation of his “clear error rule” is already in place in Illinois courts when a constitutional violation is alleged but not raised in a post-trial brief. *People v. Schroeder* (2012). While it may be nice to have flexibility for the courts to be able to do the right thing, that power, in the hands of hundreds of conservative judges placed on the federal courts, could operate in unexpected ways as shown by Howell and Moe (2020).

Gizzi and Curtis (2016) in their book, *The Fourth Amendment in Flux*, posit that Court ideology has a lot to do with how cases get decided. Gizzi and Curtis (2016) provide the needed background to put the current interpretation of the fourth amendment into perspective. Gizzi and Curtis (2016) observe that in the 1960s, the Supreme Court used a due process model in deciding fourth amendment cases which often lead to the expansion of rights afforded criminal defendants. As Republican presidents, often on the back of “law and order” campaigns, began an unbroken string of appointments to the Court that spanned from 1969 to 1991, the composition of the Court shifted right. As a result, those appointments shifted the Court’s decision-making process to a crime control model which reversed the trend of favoring criminal defendants (Gizzi and Curtis 2016). During the 45th President’s term of office, three new Justices have arrived at the Court and with them come new methods of deciding cases. The preferred method of analysis used by most of the new conservative members is “originalism”, a method advanced by Justice Scalia. Gizzi and Curtis (2016) concluded that “originalism” played a role in expanding fourth amendment protection in technology and digital privacy. Originalism as explained by Gizzi and Curtis (2016) is an

approach to constitutional interpretation based on the idea that the constitution means today what it meant when it was enacted.⁸ Gizzi and Curtis observe, however, that with the addition of Justice's Sotomayor and Kagan, that pendulum had started a shift back especially in digital privacy cases. That observation provides support for possibly expanding fourth amendment rights to other areas such as *Griswold* style claims.

How would "originalism" factor into the Court's decision-making in the future given the recent appointments? An article by Howard and Segal (2002) entitled "An Original Look at Originalism" looks at the Court's use of text and meaning in their decisions by analyzing the arguments used by counsel in briefs before the Court. They code the arguments raised in the briefs looking at the language used in the briefs themselves. By looking at the arguments raised by the parties, it can help determine if the Court is recognizing those types of arguments in its opinions. The Howard and Segal article (2002) has great potential in terms of the methodology used to determine how the Court reacted to a text and meaning (originalist) argument. Howard and Segal (2002) concluded that while the Justices did support such arguments, that ideology continued to be the main factor in decision-making. Further study of that conclusion is needed as the article was written before the use of originalism really took hold in the Court and has since evolved.

Although the United States Supreme Court has not yet looked at the fourth amendment search and seizure clauses for *Griswold* type protection, some states have been asked to do just that under their state constitutions. As protection for privacy rights have faded, some commentators have noted the increased use of state constitutions for the protection of privacy and autonomy rights. Hickey (2002) and Kincaid (1988) both have reviewed the use of state constitutions and

⁸ Originalism is defined in a way similar in Gizzi and Curtis (2016) to textualism. However, as Segall (2018) points out, there are many different versions of originalism over the years that differ from this definition.

have found that similar clauses to the fourth amendment have provided privacy protection that extends farther than that given under the federal constitution. These articles reinforce the proposition that search and seizure provisions in state constitutions have given citizens more protection than its federal counterpart. Adam Hickey in “Between Two Spheres: Comparing State and Federal Approaches to the Right to Privacy and Prohibitions against Sodomy”, argues that some states have adopted what he calls “spatial zones of privacy” in which State courts have found that certain zones or spaces were entitled to privacy, regardless of the activity performed. Hickey (2002) examined the case of *Bowers v. Hardwick* which held that a conviction for sodomy was not barred by the United States Constitution. Hickey (2002) examined court decisions in Kentucky, Georgia and Tennessee which for somewhat different reasons had expanded the right to privacy beyond the federal approach by empathizing where the conduct challenged took place. This was the position of the dissent by Justice Blackmun in *Bowers*. One year after this article was published, the United States Supreme Court held in a similar fashion that gay rights were protected under the United States Constitution in the Supreme Court’s decision in *Lawrence v. Texas* which overruled *Bowers*. Kincaid (1988) finds that state constitutions can institutionalize conceptions of justice and quality of life. Kincaid cites the Montana constitution which includes environmental rights and a right to privacy. Kincaid also notes that state constitutions have an advantage over its federal counterpart in that state constitutions have been rewritten and improved unlike the United States Constitution which has never been completely rewritten. While protection for some in states with better privacy protection, that is a poor system for uniformity in the law which should be the object for the courts. This material, however, serves as an example of how states have used their fourth amendment style clauses to protect privacy in a fashion superior to that of the federal courts. As noted by some scholars, the states can serve as a laboratory for this type of theory and provide an example for the federal courts.

Given that the text of the Constitution appears to have a renewed emphasis, scholars are now in search of new paths to protect privacy. In “Rethinking the Substantive Due Process Right to Privacy: Grounding Privacy in the Fourth Amendment” Mary Wimberly (2007) reviews the current state of privacy protection. Wimberly (2007) argues that the court could scrap the *Griswold* line of cases relying on the substantive due process under the liberty clause of the fourteenth amendment and instead offers an alternative protection under the fourth amendment. This harkens back to Schroeder’s article regarding the dissent of Justice Harlan in *Poe* wanting to provide a substantive component to the fourth amendment. Wimberly (2007) argues that the wording to the text of the fourth amendment can be interpreted literally to provide many of the functions of the *Griswold* line of cases. By grounding the privacy right in the fourth amendment, it can eliminate the substantive due process argument of the past and can be used to expand privacy as new technologies and circumstances arise. Given the decision of *Dobbs* and given the current composition of the Court, substantive due process advances are unlikely soon.

Wimberly (2007) begins by pointing out that criticism of the substance due process has some merit. She argues that critics point to three things that protection under the due process clause bring: 1) subjectivity by the Court, 2) contradictory construction, and 3) politicization of the Court. Wimberly (2007) discusses in detail each of the shortcomings and concludes that the Court should find a “clearer constitutional foundation” may remedy many of the due process analysis’s shortcomings.

Wimberly (2007) argues that the fourth amendment can provide that foundation. Wimberly proceeds to argue that the history provides that the fourth amendment provides a substantive guarantee (similar to Justice Harlan’s *Poe* dissent) as opposed to the fourteenth amendment process guarantee. Wimberly (2007) advocates for the use of intermediate scrutiny of privacy level claims in determining whether certain laws in and of themselves violate the “right of the people to be secure in their persons, houses, papers and effects”. Wimberly (2007)

acknowledges (as do I) that this protection would allow some regulation that may have been prohibited under *Roe*. Wimberly notes that this shift could link the “autonomy and personhood” analysis to the word person as used in the fourth amendment.

The Harvard Law Review Note (2015) “Physically Intrusive Abortion Restrictions as Fourth Amendment Searches and Seizures: A new conceptual avenue for challenging abortion restrictions” makes a similar argument in that if a state statute required an unwanted ultrasound in the context of abortion treatment, it could be considered an unreasonable search or seizure under the fourth amendment. The Note (2015) offers similar criticism of the current state of privacy protection. Unlike some of the other reviews, the Note (2015) also explores the use of the fourth amendment in a civil context as it examines the *Soldal v. Cook County* eviction case from 1984, which held a taking of a mobile home, with only a deputy supervising the removal, as an unlawful seizure. This case is significant as it extends the reach of the fourth amendment into a purely civil matter in which the government plays only a passive role in the seizure. One of the challenges this study recognizes is to get courts and scholars out of the habit of thinking that the fourth amendment is involved only in the criminal context.

The Note (2015) offers a compelling argument that statutes and regulations that require ultrasounds in the care of a pregnant woman are unreasonable searches and seizures. As a statute requires an invasion of a constitutionally protected area, it amounts to a search under the fourth amendment. The Note (2015) weaves several of the recent fourth amendment cases to marshal support for the argument that mandated ultrasounds are unreasonable searches and seizures. The Note (2015) concludes with this thought:

As mid- and late-term abortion prohibitions do not involve probes for information but do involve preventing the woman from being free to leave the state of pregnancy, they could arguably be conceptualized as seizures. The argument could proceed as follows: though the woman

became pregnant without involvement of the state, prohibitions on abortions after a certain period in pregnancy essentially mandate that she remain pregnant. Pregnancy's all-encompassing nature and a state mandate that it continue can be conceptualized as the state "seizing" the woman's body for pregnancy. Moreover, forcing a woman to continue to undergo the physical contact between her body and the fetus could amount to state-mandated physical contact sufficient for a seizure under the not-free-to-leave test. Note (2015) p.972

The Note (2015) acknowledges the conceptual difficulties involved, yet this supports my argument regarding regulations as seizures.

Wilke (2015) makes a similar argument in "Fourth Amendment, a Woman's Right: An Inquiry into Whether State-Implemented Transvaginal Ultrasounds Violate the Fourth Amendment's Reasonable Search Provision" when discussing required ultrasounds prior to an abortion. Similarly to the analysis of the Note (2015), Wilke (2015) observes that a required ultrasound constitutes a search of the person. Wilke (2015) reasons that although a private physician performs the search, a state regulation or statute that requires the physician to perform it fulfils the requirement of state action to invoke the fourth amendment. Wilke (2015) compares the requirement to that examined in *Ferguson v. City of Charleston* (2001). In *Ferguson*, the state hospital was required to test the of urine of a pregnant woman. The court in that case found that requirement to be an illegal search outside the fourth amendment.

Wilke (2015) examined the ultrasound requirement by determining 1) was there a state action, 2) did the person have an expectation of privacy, and 3) was the search reasonable? Wilke (2015) also recognizes that a balancing of the interests is involved in this protection in determining reasonableness. Wilke (2015) concludes that at times this determination is fact intensive. With *Roe* having been overturned, however, this balancing which in many instances will

provide protection to woman is preferable to no protection at all. The preceding material shows that the fourth amendment is a relevant vehicle for privacy protection as well as protecting woman.

Lastly, Kamin (2022) discusses the potential impact of *Dobbs* on the fourth amendment. Kamin (2022) argues that based on the logic of the majority in *Dobbs*, *Katz v. U.S.* could be subject to review and reversal. Kamin (2022) reviews the concurrence of *Katz* and Justice Harlan's test as to whether a search has occurred. Kamin (2022) posits that *Katz's* attempt to write out the property distinctions of the fourth amendment would not fare well in the Court's current majority.⁹ While anything is possible, I would think that it is unlikely that a major revision is coming for *Katz*. The Court has often used tests such the "special needs" doctrine (*Skinner*) and the third-party doctrine (*Carpenter*) to help guide Court decision-making, and the *Katz* test falls within that scope. Given that recent Court decisions have continued to utilize *Katz*, unlike *Griswold*, Kamin's (2022) concern probably will not come to fruition.

Almost all the scholarship has a section which argues that the current interpretation of privacy through substantive due process is less than what is desired. Simply put, the opinion in *Griswold* is poorly reasoned and has not been a strong tool to base the extension of the liberty involved. Except for abortion (which has been overruled) and same-sex rights, *Griswold* like protections have not been extended to areas as one would expect. Much like a tree that does not grow or bear fruit, *Griswold* and substantive due process arguments in the current

⁹ I would argue that Justice Harlan's concurrence did not attempt to write out the property distinctions in the fourth amendment but that instead it was merely an effort to identify a test that could be used to determine whether a search of a person had occurred in certain circumstances. Given the definition of the word "person", I would suggest that a search of a person would encompass more than a pat-down styled frisk. I acknowledge that the Court has never used that argument, but that idea would be consistent with the wording of the amendment and be a response to Justice Black's dissent. This argument could be the subject of another entire study.

Court climate are essentially worthless. The articles by Wimberly (2007), Wilke (2015) and the Note (2015) all stress this weakness and have the pieces, which put together, that can underpin my theory regarding an expansion of the fourth amendment to protect *Griswold* privacy claims. As such, based on the review of the literature, my hypothesis is that an argument advancing a theory expanding the fourth amendment to *Griswold* style liberty claims is consistent with prior Supreme Court decisions. Garrow (1998) confirms that the fourth amendment was a conservative alternative to the current *Griswold* substantive due process doctrine. Howard and Segal (2002) give an example of how to study counsel arguments (use of originalism) and move the Justices away from their base ideology. Given that Segal was one of the originators of the attitudinal model, this example is a good place to start. After reviewing key fourth amendment cases involving non-criminal applications of search and seizure protection, I believe my hypothesis will be borne out. This article will build upon the work of Wimberly (2007) and the Harvard Law review Note (2015) which provide good analytical support from which to develop a sound theory.

THE DECLINE OF SUBSTANTIVE DUE PROCESS

In *Dobbs*, the opposition to *Roe* acknowledged that the case of *Griswold v. Connecticut* (1965) has textual support in the Constitution, namely the fourth amendment. U.S. Const. Amend. IV. Although the *Griswold* decision referenced a penumbral theory in its decision, the opinion quotes and relies on the fourth amendment.¹⁰ Some have argued that since the *Griswold* court grounded their decision in the “privacy of the home” *Griswold* was one of the supports used in *Roe v. Wade*, which had

¹⁰ As previously noted, at different times, *Griswold* has been identified as a “fourth amendment” case. There is support for that conclusion given the extensive reliance on the fourth amendment in the opinion in *Griswold*. An argument could be made that the penumbral references are merely dicta in the opinion, given the support offered in this study.

its “central holding” upheld in *Casey*. However, *Roe* primarily relied upon the substantive due process clause of the fourteenth amendment in striking an abortion ban enacted in Texas. The joint opinion’s defense in *Casey* of *Roe*’s reasoning was weak and its phrase regarding “the mysteries of life” is widely criticized. This is where *Dobbs* reversed *Roe* and *Casey* in finding that application of substantive due process reasoning following a historical analysis did not support a constitutional right to abortion. Although *Dobbs* observed that the Due Process Clause guarantees more than fair process, and the “liberty” it protects includes more than the absence of physical restraint, *Washington v. Glucksberg* (1997) (Due Process Clause “protects individual liberty against “certain government actions regardless of the fairness of the procedures used to implement them”), it recognized its reluctance to expand the concept of substantive due process because guideposts for responsible decision making in this unknown area are scarce and open-ended.”¹¹ By extending constitutional protection to an asserted right or liberty interest, the Court, to a large extent, places the matter outside the arena of public debate and legislative action. The Court exercises care whenever asked to break new ground in this area, “as the liberty protected by the Due Process Clause could be transformed into the policy preferences of the members of this Court”. *Washington v. Glucksberg* 521 U.S. 702 (1997).

Glucksberg was the main precedent used to reverse *Roe* and *Casey*. The test used in *Glucksberg* and by *Dobbs* is heavily reliant on historical analysis that can be subjectively interpreted to achieve a certain result.¹² One benefit of the argument based on a textual

¹¹ Justice Thomas disputes any basis for substantive due process in his concurrence in *Dobbs*.

¹² In *Michael H. v. Gerald D.* 491 US 110 (1989) Justice Scalia attempted to impose a strict mode of historical analysis like that used in *Dobbs*. Justice O’Connor rejected that attempt: “This footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area. See *Grissold v. Connecticut*,

provision such as the fourth amendment is that unlike a claim of unenumerated right, a deep historical analysis is not needed as the right and its objects are self-evident.

Dobbs' reversal of *Roe* marked a watershed moment for the Court as it is arguably the first time the Court has taken back a liberty provided by the Court. Justice Alito wrote the majority opinion in that case, which held that the fourteenth amendment due process did not protect a woman's right to an abortion. Justice Alito examined the arguments of stare decisis and found that *Roe* and *Casey* were flawed and must be reversed. But it was Justice Thomas' concurrence that offered the grimmest assessment of substantive due process protection of privacy and autotomy. Justice Thomas in *Dobbs* summarized his position regarding substantive due process as follows:

Considerable historical evidence indicates that "due process of law" merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. See, e.g. *Johnson v. United States*, 576 U.S. 591, 623, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) . . . the Due Process Clause at most guarantees process. It does not, as the Court's substantive due process cases suppose, "forbi[d] the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided." *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); . . . "substantive due process" is an oxymoron that "lack[s] any basis in the Constitution." *Johnson*, 576 U.S. at 607–608, 135 S.Ct. 2551 (opinion of THOMAS, J.); ("[T]ext and history provide little support for modern substantive due process doctrine").

381 U. S. 479 (1965); *Eisenstadt v. Baird*, 405 U. S. 438 (1972). On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be "the most specific level" available. Ante, at 127-128, n. 6. See *Loving v. Virginia*, 388 U. S. 1, 12 (1967) . . . However, Justice O'Connor was replaced by the author of *Dobbs*, Justice Alito. If the right to receive medical treatment was used as opposed to abortion, thus using a more general level, the result in *Dobbs* may have been different.

“The notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.” *McDonald v. Chicago*, 561 U.S. 742, 811, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment); . . . For that reason, in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is “demonstrably erroneous,” *Ramos v. Louisiana*, 590 U.S. —, —, 140 S.Ct. 1390, 1424, 206 L.Ed.2d 583 (2020) (THOMAS, J., concurring in judgment), we have a duty to “correct the error” established in those precedents, *Gamble v. United States*, 587 U.S. —, —, 139 S.Ct. 1960, 1984-1985, 204 L.Ed.2d 322 (2019) (THOMAS, J., concurring)

Justice Thomas was not joined in his concurrence, but his argument can be applied to the other substantive due process cases noted in *Dobbs* and a result like *Dobbs* could be reached. Hollis-Brusky (2016) observes that Justice Thomas’s opinion is not isolated and is standard orthodoxy of members of the Federalist Society, whose members now form a majority on the Court. This effort is part of a long battle by some to reverse a right to use birth control which impact marital relations and a right to engage in same sex conduct which is against Christian orthodoxy. (Hollis-Brusky 2016).

In essence, *Dobbs* has severely undercut a theory of rights going back over a half century. In reversing *Roe v. Wade*, *Dobbs* called into question the doctrine of substantive due process. In its approach in *Dobbs*, the Court utilized history in determining whether a right is protected under the fourteenth amendment. In recognizing that most states criminalized abortion at the time of the adoption of the fourteenth amendment, the Court found that abortion was not a right protected under substantive due process. Justice Thomas in his concurrence questioned the continued viability of other substantive due process cases as the theory was flawed. In a brief filed with the Court in that case, this author did not disagree that substantive due

process was a poor vehicle to protect a woman's right to secure her body. Instead, as one commentator noted, the brief provided a narrower protection for privacy and autonomy in the Constitution namely the fourth amendment. (Girgis 2022).

BACKGROUND OF THE FOURTH AMENDMENT

Law schools have relegated the fourth amendment to criminal procedure study but other privacy claims such as *Griswold* to constitutional law. This article argues that the better approach is to assess privacy claims only under the fourth amendment, thereby providing a textual basis to strengthen privacy protection. There are many policy choices made by legislatures that impact on privacy. It is black letter constitutional doctrine that where reasonable people disagree, the government can adopt one position or the other and legislate on the subject. See *Williamson v. Lee Optical of Okla., Inc.*, (1955). That theory, however, assumes a situation in which the choice does not intrude upon a protected liberty especially one found in the Bill of Rights. Thus, while some people might disagree about whether the flag should be saluted or disagree about the proposition that it may not be defiled, the Supreme Court has ruled that a State may not compel or enforce one view or the other under the first amendment. See *Texas v. Johnson*, (1989). Here, despite some arguments to the contrary, an unreasonable search or physical restraint (seizure) which hinders the securing of their person is protected within the text of the Constitution and some aspects of regulation of private matters must remain outside the realm of legislatures and executives. The following excerpts from the Court's fourth amendment jurisprudence gives a starting point for extending its coverage.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The "basic purpose of this amendment," cases have recognized, "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials". *Camara v. Municipal Court of City and County of San Francisco*,

(1967). This analysis is informed by the historical understandings “of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.” *Carroll v. United States*, (1925).¹³ On this, cases have acknowledged some basic reference points. It has been recognized that the Amendment seeks to secure “the privacies of life” against “arbitrary power.” *Boyd v. United States*, (1886). Further, the fourth amendment has been applied in circumstances outside the criminal procedure area. Fourth amendment rights have been vindicated in a civil context on several occasions as shown by *Chandler v. Miller* and *Soldal v. Cook County*, (1992).

In the seminal Fourth Amendment case of *Boyd v. United States* (1886), the Court wrote, in frequently quoted language stating that the Fourth Amendment’s prohibitions apply:

to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property.” *Id.*, at 630.

¹³ Justice Thomas correctly pointed out in his dissent in *Indianapolis v. Edmonds* that: [T]aken together, our decisions in *Michigan Dept. of State Police v. Sitz*, 496 U. S. 444 (1990), and *United States v. Martinez-Fuerte*, 428 U. S. 543 (1976), stand for the proposition that suspicionless roadblock seizures are constitutionally permissible if conducted according to a plan that limits the discretion of the officers conducting the stops. I am not convinced that *Sitz* and *Martinez-Fuerte* were correctly decided. Indeed, I rather doubt that the Framers of the Fourth Amendment would have considered “reasonable” a program of indiscriminate stops of individuals not suspected of wrongdoing... *City of Indianapolis et al. v. Edmond et al.* 531 U.S. 32 (2000) Dissent of Thomas J.

Justice Thomas correctly observed in that historical analysis that roadblock stops of those not suspected of a crime would not have been favored and serves as an example of the type of analysis that should be employed.

The Court in *Terry v. Ohio* found that “This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.” The Court further found:

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 251 (1891).

Perhaps the most comprehensive statement of the principle of liberty underlying these aspects of the fourth amendment was given by Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U. S. 438, at 478:

The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone— the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. . . . *Olmstead v. United States*, 277 U. S. 438, at 478.

The Court in the often-cited *Boyd v. U.S.* is the first case that expanded the recognition of the fourth amendment as a protector of privacy in discussing the applicability of a subpoena to a particular request. *Boyd* and *Union Pacific* have served as cited material in most cases involving fourth amendment privacy. Additionally, the dissent of Justice

Brandies in *Olmstead* is the foundational quote in several cases involving privacy and its anchor is the fourth amendment. Both cases stand for the proposition that the fourth amendment is not just to protect criminals and allow them to go free because “the constable blundered” but exists to stand for the right to people to protect and defend things from being open to government sanctioned scrutiny or control from every unjustified intrusion.

In *Katz v. U.S.*, the Court began to move away from a property-based interpretation of the fourth amendment and substituted the privacy approach articulated in the concurrence of Justice Harlan. In overruling *Olmstead*, the Court held that eavesdropping on someone in an enclosed telephone booth without a warrant violated the fourth amendment. *Katz* has been criticized for being circular in its reasoning (*Carpenter*) and has opened the door to the “third-party doctrine” which was a major breach of privacy protection. However, the Court in 2012, revived the property-based approach. In *United States v. Jones*, (2012), Justice Scalia found that a beeper attached to a vehicle to track movement over a significant amount of time without a valid warrant violated the fourth amendment. Scalia noted that *Katz* did not eliminate the pre-existing view of not allowing a trespass onto one’s property and held that the surveillance of the suspected drug dealer utilizing GPS tracking technology violated the fourth amendment. In so holding, Scalia noted that the law of trespass had not been written out of fourth amendment protection and in this case, the government had trespassed onto Jones’s vehicle to attach a beeper.

Justice Sotomayor concurred and argued that a reevaluation of the third-party doctrine was in order. She directly called into question “the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.” She observed:

This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that

they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers.... I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection. *United States v. Jones* Concurrence of Justice Sotomayor.

Justice Sotomayor posited that people do not give up privacy of their daily activities simply because technology has made observation of those activities easier. The Supreme Court has since cut back the third-party doctrine. In *Carpenter v. United States*, the Court found a fourth amendment violation despite cell site data having been shared with a third cell phone carrier. Justice Sotomayor's suggestion may have been heeded, as *Carpenter* and *Riley v. California* have all but gutted the third-party doctrine.

Given the current conservative composition of the Court, traditional substantive due process analysis is not sufficient in protecting privacy or autonomy rights. However, textualism as used in fourth amendment cases such as *Jones* can be used to protect privacy in other areas. The textualism method currently used by the Court is one proposed by the late Justice Scalia which is fleshed out in his book, *A Matter of Interpretation*. His method was further refined in the book *Reading Law*, that he co-authored with Bryan Garner. His method focuses on the meaning of the words at the time the subject clause was enacted. This is differentiated from original intent which looks at the

intent of the framers at the time of enactment, a method used by Justice Thomas most recently in *Carpenter*.¹⁴

A TEXTUALIST INTERPRETATION OF THE FOURTH AMENDMENT

The most prolific proponent of textualism was the late Justice Scalia.¹⁵ In numerous books, articles and speeches, articulated (and somewhat modified) his method of interpreting legal text:

In their full context, words mean what they conveyed to reasonable people at the time they were written-with the understanding that general terms may embrace later technological innovations. Scalia and Garner (2012) pg. 20

¹⁴ *Carpenter v. U.S.* contains an excellent display of the different methodologies of constitutional interpretation in discussing fourth amendment privacy regarding cell site location data. *Carpenter v. U.S.* ___ U.S. ___, 138 S.Ct. 2206 (2018). Justice Kennedy observed that the balancing test used in *Carpenter* should have come in favor of the government in that case. Kennedy also recognized that the provision of fourth amendment protection to CLSI data held by the cell providers was in fact a departure from past precedent. Justice Gorsuch argued in dissent that the interests in CLSI should be resolved with the help of bailment law principles in a textualist opinion. Justice Gorsuch would look to discard the third-party doctrine and rely on bailment law. Gorsuch observed that *Katz v. U.S.* had created much of the difficulty in this area and that a return to property law would assist in protecting privacy of information such as in *Carpenter*. *Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2206 (2018). The dissent of Justice Thomas argued that the original intent of the Constitution did not support the Defendant's claims. Thomas argues that CLSI is not a person, home, paper or effect of *Carpenter* within the meaning of the fourth amendment.

¹⁵ It is difficult to definitively define what is textualism vs. originalism. Justice Scalia often referred to both and as time went on, he seemed to use them interchangeably. See Scalia, A., Kagan, E., Sutton, J. S., & Whelan, E. (2020). *The Essential Scalia on the Constitution, the courts, and the rule of law*. Crown Forum.

An example of such an interpretation is found in *District of Columbia v. Heller*, (2008). In that case, Justice Scalia broke down the wording in the second amendment to find that a right to bear arms was an individual right.

The language used in the fourth amendment prohibits unreasonable searches and seizures of persons, houses, papers, and effects. In *Katz v. US*, the Court stated that the fourth amendment could not be translated into a general right to privacy. *Katz v. U.S.*, (1967). While there is some agreement with that statement, the language and places used is quite extensive given the items offered protection. In assessing the coverage of the fourth amendment, the meaning of the words when the fourth amendment was enacted gives us a starting point under textualism (originalism). The word “search” had the same meaning then as it has today: “[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the woods for a thief.” *Kyllo v. United States*, (2001) (quoting N. Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989)). If the search occurs in a private house under the fourth amendment, certainly if a book is inside the person’s home, it must be on private property as opposed to leaving the book outside in public. If the book is kept in the house, the person presumably is attempting to keep it private or in other words seeking privacy. However, if someone exposes something to the public, there can be no search as it is not hidden. The word “seizure” is also used in the amendment. A seizure is defined as an attempt to interfere with a possessory interest or a person’s liberty. A person is seized if they are stopped by a police officer and their freedom to leave is curtailed as well as a government regulation that prevents physical movement or actions. Secure is defined as to guard effectively from danger; to make safe. N. Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989) If the fourth amendment gives the right to a person to be secure, it allows that person to perform actions that allow them to be safe such as securing certain medical treatment. Looking at the items listed in

the amendment, it protects people from unreasonable inspections and examination of hidden (private) aspects of their persons, homes (and offices, hotels rooms, or commercial buildings), papers, and effects (personal property including vehicles and cell phones). When one considers the itemized aspects worthy of protection in the fourth amendment, it does have a very broad coverage for places and things a person may expect to be acknowledged as private.

Another key word in the fourth amendment in this case is the definition of “person”. A person is defined as “An individual human being consisting of body and soul”. N. Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989). That definition is very similar to its modern definition. Reading the word “person” together with “secure” helps answer the kind of protection one is entitled in the amendment. A reasonable construction of those words indicate that the fourth amendment is to allow a human being with body and soul to be able to resist attack or be safe from danger. This recalls notions referenced by some scholars of the concept of “personhood”. See Jed Rubenfeld, (1989). “The right of privacy”. *Harv. L. Rev.*, 102(4), 737. In fact, the meaning of “person” goes beyond what is typically associated with physical arrests. I think that is important when looking at the type of interests that can be protected by a search or seizure of a person.¹⁶ It certainly goes beyond physical touching by law enforcement.

Further, there needs to be a discussion of what is not present in the language of the fourth amendment. Unlike the sixth amendment

¹⁶ Although Professor Rubenfeld gave me the idea of “personhood”, I use it in a different way. Personhood includes the body and soul as defined in the dictionary and thus is more than physical pat down type search associated with a search of a person. Given the expansive definition, use of communication to others that is sought to be personal (or private) would be entitled to protection under the concept of personhood. It could be argued that the ability to communicate and to express feelings and ideas are an important element for the preservation of one’s soul. This view is bolstered by first amendment interests as well.

which limits its application to “[I]n all criminal prosecutions. . .”, no such limitation is contained in the fourth amendment.¹⁷ Although the fourth amendment has the warrant clause, the clauses generally have been construed separately as an indication of whether a search is reasonable in the criminal context. Given the lack of limiting language, there is nothing in the amendment which would prevent its use outside the criminal context.

As with most documents drafted to cover a wide variety of subjects, certain broad language is used that is subject to interpretation. The fourth amendment uses the word reasonable in drawing the line of when a search or seizure is allowed. The courts have used tools of interpretation when reviewing the reasonableness clause, such as traditions and actions that were allowed at the time the fourth amendment was adopted, as well as prior court decisions. In his book, *A Matter of Interpretation*, Justice Scalia sketches a method of textual interpretation that looks at what was allowed when it was adopted but also relies on a trajectory of the provision to account for advances or changes to those actions. He points out that constitutional provisions should be given an expansive interpretation, but not one which the language would not bear. As Justice Scalia points out, not strict construction, but reasonable construction is required in interpreting constitutional texts. (Scalia 1997).

Using the above, how would *Griswold* have been handled under this analysis? The Connecticut statute in *Griswold* read as follows: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty

¹⁷ The sixth amendment reads in full: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. Const. Amend VI

dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.” This statute references using birth control. Under a textualism analysis, a **person** is being physically **restrained** from performing an act that prevents pregnancy. Additionally, an act involving the use of a prophylactic for example is typically performed in a **house** or hotel room most times. In essence, the state has legislated a physical restraint from performing an act on a person when such action takes place in the home. Under the ordinary meaning of the words of the fourth amendment, this could be considered a seizure. The question then becomes whether the seizure is reasonable. It goes without saying that there are thousands of statutes that restrain persons from performing certain acts such as murder, theft, assault and battery, for example. However, no one could question whether prohibiting those acts is unreasonable. But is using a birth control device in the home a reasonable physical restraint? Under a textualist analysis, such a statute would be violative of the fourth amendment as an unreasonable seizure. Even under a balancing test under the “special needs” doctrine the State would be hard pressed to counter the interest in preventing an unwanted pregnancy. Although there would be certainly more discussion in such a case, the base interpretative analysis would provide a remedy to challenge the statute. See *Chandler v. Miller*, (1997).

CIVIL CASES USING THE FOURTH AMENDMENT

Some may point out that in the adoption of a new theory such as this would require a major rewrite on existing fourth amendment law. I believe however, in this case that such a reorganization is not needed as this theory will fit in rather easily with existing case law. The fourth amendment throughout much of recent history has been relegated to primarily criminal cases involving searches and seizures of suspects, people involved in traffic stops, or warrants issued to procure evidence. See e.g. *People v. Ariaza* (2020). As noted however, the language of the amendment contains no such qualification. In fact, at founding, the fourth amendment was addressed to prohibit searches

for illegal or untaxed goods which was mostly a civil infraction. As will be shown, the framework of the fourth amendment has been used in a civil context and in areas not involving searches of criminals. Indeed, it acknowledged what is evident from the Courts's precedents that the Amendment's protection applies in the civil context as well. See *O'Connor v. Ortega*, (1987); *New Jersey v. T. L. O.*, (1985); *Michigan v. Tyler*, (1978); *Marshall v. Barlow's, Inc.*, (1978); *Camara v. Municipal Court of San Francisco*, (1967).¹⁸

In moving toward a more civil law interpretation of the fourth amendment beyond its traditional home, how does the amendment apply in situations involving private parties which typically does not invoke fourth amendment protections (as it involves no governmental entities)? The Supreme Court has recognized that intrusions upon fourth amendment-protected areas that are compelled by law but conducted by private actors nonetheless constitute fourth amendment events entitled to protection. In *Skinner v. Railway Labor Executives' Ass'n*, the Court reviewed the constitutionality of a regulation compelling private railroad companies to administer blood and urine tests to employee involved incidents. The Court reasoned that,

¹⁸ Many of these cases involved an analysis of the "special needs" doctrine summarized as follows: [E]xcept in certain well-defined circumstances, a search or seizure is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. See, e.g., *Payton v. New York*, 445 U.S. 573, 586 (1980). We have recognized exceptions to this rule, however, "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context. See, e.g., *Griffin v. Wisconsin*, supra, 483 U.S., at 873 (1987) (search of probationer's home). This is just an example of deciding if a search or seizure is reasonable under the fourth amendment. I would also note that the special needs doctrine is one of those Court utilized tests that are not found in the text of the amendment much like the *Katz* test.

“[although the fourth amendment does not apply to a search or seizure . . . effected by a private party on his own initiative, the amendment protects against such intrusions if the private party acted as an instrument or agent of the government.” Because a railroad performing the tests “[did] so by compulsion of sovereign authority, the lawfulness of its acts [was] controlled by the fourth amendment. Although the Court found the restriction reasonable under the ‘special needs’ doctrine given the facts in the case, it did apply the fourth amendment in the context of a statutory requirement.

The Supreme Court has also applied the fourth amendment outside of the investigation context in different circumstances. In *Soldal v. Cook County*, the Court applied the fourth amendment to a civil landlord/tenant dispute seizure of a mobile home, which was part of an eviction proceeding. *Soldal*, although not a *Griswold* style claim, provides an example of employment of state action regarding a civil dispute. A landlord, to evict a couple from a mobile home park, enlisted the aid of sheriff’s deputies to prevent any disruption. The mobile home was removed from its location despite the lack of a court order permitting the removal. The couple filed a Section 1983 action alleging a violation of the fourth amendment in the seizure of their home. 42 U.S.C. Sec. 1983. On appeal to the United States Supreme Court, the Justices found a violation of the fourth amendment. Indeed, the Court was “puzzled” by the suggestion in the Court of Appeals opinion that the fourth amendment did not apply to a non-investigatory seizure. Thus, the fact that a matter does not involve law enforcement, or a traditionally investigatory purpose, does not preclude the utility of fourth amendment challenges in this context. In *Soldal*, the Court held that a seizure within the scope of the fourth amendment had occurred when county deputies were present during an illegal eviction and seizure of a mobile home occurred. The deputies sole action was the prevention of the owners from stopping the removal of the mobile home.

In *Chandler v. Miller*, (1997), the Georgia legislature enacted a statute requiring a drug test of anyone who intended to run for office.

That statute was challenged on the basis that the statute violated the fourth amendment. This Court found that statute did violate the fourth amendment as an unreasonable search. This case is important as it involved an application of the fourth amendment to a non-criminal setting to a legislative enactment as opposed to a judicial warrant or action by the police and did not involve suppressing evidence in a criminal case. In *Chandler*, a statute was challenged simply for being an unreasonable search under the fourth amendment. The common thread of the above cases are that each involve a civil law application of the fourth amendment which does not involve an arrest but instead an application of the benefit of the fourth amendment in a civil law context.

In a state case, the Illinois appellate court applied the fourth amendment (and the corresponding Illinois Constitution version of the fourth amendment) to reverse a civil court discovery order. In *Carlson v. Jerousek* (2016), the trial court ordered as part of discovery in an auto collision case that an expert make a copy of the entire contents of a plaintiff's computers. In reversing the trial court, the Illinois Appellate court found that the fourth amendment required a court to make a relevance and proportionality finding before allowing the search of a computer. The *Carlson* Court used relevance as a standard for reasonableness as used in the amendment. Again, a non-criminal case involving private parties with only a court ordering a search, the Court provided privacy protection from an overreaching examination of one's computer. Additionally, this case did not involve a discussion of the special needs doctrine that existed in some of the other cases.

The preceding cases show that the fourth amendment can cover a variety of circumstances that do not originate from the criminal justice system. The seizure of *Soldal's* mobile home was conducted by a private party but was attended by a county deputy whose sole function was found to be merely prevent *Soldal* from preventing the removal. In *Carlson*, the court's discovery order was found to violate the fourth amendment. In *Chandler*, a legislative enactment which allowed an illegal search violated the fourth amendment. In each of

those cases, no arrests or searches in the typical sense were conducted. Yet the courts utilized the amendment to protect both privacy (searches to find private/hidden items) and autonomy (seizure of private items) to uphold privacy claims.

CRITIQUES OF THE DISSENTING VIEWS

Notable arguments have been raised by those who disagree that the Federal Constitution protects privacy. In *Carpenter v US*, Justice Thomas correctly points out in his dissent that the word “privacy” is nowhere to be found in the Constitution. (Though the derivative word “private” is used in the fifth amendment). However, that is a disingenuous argument given the language in the fourth amendment. Searches are conducted to locate information or items that are hidden (or kept private). If someone is trying to keep something private, they are seeking privacy.¹⁹ Arguments that suggest privacy was not one of the textual intents of the fourth amendment should be easily dismissed. This approach is distinguished from the approach of Justice Thomas in his dissent in *Carpenter*. There Justice Thomas attempted to divine the original intent of the drafters of the fourth amendment and not the original meaning of the words in the amendment itself. *Carpenter v. United States*, (2018)

One of the dissenters in *Roe*, Justice Rehnquist stated that “privacy” that the Court found is not a distant relative of the freedom

¹⁹ Some would argue this is a stretch. I would argue that “private” as used in the fifth amendment referred to a person’s private property. The fourth amendment simply itemizes certain private property for protection (their person, houses, papers, and effects). If something is owned by an individual, it is considered private property as opposed to property that is owned by the public such as a government building. If someone has private property and is seeking to prevent a search, they are seeking privacy. It is fascinating to read the earlier attempts to protect privacy as in *Poe v. Ullman* and for the court not to recognize this and utilize the fourth amendment. A lot of trouble may have been avoided if the Court had followed through on earlier attempts by some of the Justices to do just that.

from searches and seizures protected by the fourth amendment to the Constitution, which the Court has referred to as embodying a right to privacy in *Katz v. United States*, (1967). Also, Justice Rehnquist found that physicians' treatment of patients seeking abortions could not be considered private. However, a statute that interferes with the ability of a woman to secure her person from a pregnancy implicates fourth amendment concerns. I would also disagree with the statement that one's medical procedures and findings are not "private". Surgical medical procedures certainly do not take place in public and are in fact private as protected by federal law. HIPAA, Pub L 104-191, 110 US Stat 1936 [1996] codified at 42 U.S.C. § 1320d (Note: HIPAA was not in effect at the time Justice Rehnquist wrote his dissent in *Roe*).

Justice Stewart in *Katz v. U.S.* pointed out that the fourth amendment protected more than just privacy. I agree with that statement in that the fourth also allows a person to reasonably secure themselves from "seizure". As stated earlier, a person has the right to freedom from unreasonable physical restraint under the terms of the fourth amendment. Although some of the criminal procedure cases decided under the fourth amendment require an actual touching, there is no such requirement in the definition of seizure. An argument can be made that when the state passes a statute as was done in *Chandler* that precludes an action by a person to protect themselves in some manner, it implicates fourth amendment rights. Using abortion as an example, court cases have noted that a pregnancy in and of itself is a disabling condition that can give rise to a host of medical conditions and issues. Why is a person prohibited from taking action to secure themselves of a disabling condition?

Some may argue that prior Supreme Court cases require a physical restraint such as the laying of hands to have a "seizure". Unreasonable seizures are defined as a 'seizure' triggering the fourth amendment's protections which occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" *Graham v. Connor*, (1989) (omissions in original) (quoting *Terry v. Ohio*, (1968)). I would submit

that as the Court did in *Soldal v. Cook County*, it need not apply the technical rules regarding seizures that involve probable cause and arrests as done in criminal cases. See also *California v. Hodari D.*, (1991). In the civil context, the Court simply determined whether there was some meaningful interference with an individual's possessory interests. Unlike *Soldal*, the fourth amendment protection is requested for a person. Applying the logic of *Soldal*, possession means control or ownership. *Soldal v. Cook County*, (1992). Applying the fourth amendment in a seizure context, a statute which interferes with a person's ownership or control of their persons, houses, papers, and effects can possibly implicate fourth amendment interests. Although there was discussion of the balancing of interests, the "special needs" doctrine was not analyzed in *Soldal*.

Justice Stewart in his opinion in *Katz*, also noted that the fourth amendment protects only certain things and places and thus does not allow for a general right of privacy. However, as noted by Amsterdam (1974), the coverage of the items in the fourth amendment are quite extensive. The "houses" used in the amendment covers not only a person's house or home but also their offices, workplaces, hotel rooms, and overnight guest rooms. A person's effects include their vehicles, phones, and other electronic devices.²⁰ If one considers where a person occupies space and the activities they engage in, the items listed in the fourth amendment would cover 80-90 percent of a person's location and activities.²¹

²⁰ See Amsterdam, Anthony G. (1974). "Perspectives on the Fourth Amendment", 58 *Minn. L. Rev.* 349 cataloging the different areas afforded fourth amendment protection.

²¹ Most people spend most of their time at home or at work or driving between the two places. Given that those are all protected by the fourth amendment, I would disagree with Justice Stewart's assessment regarding a general right to privacy. Again, I think judges and lawyers suffer from myopia and sometimes cannot see the forest through the trees.

APPLICATIONS OF THE THEORY

Given that this Court has analyzed statutes in a civil context within the framework of the fourth amendment, can it apply situations such as abortion regulations? Although the legal reasoning basis of *Roe* and *Casey* are now overruled, the interests of women that are discussed in each of the opinions are still present. The fourth amendment states that one has the right to be secure in their persons from unreasonable seizures or in other words an unreasonable physical restraint. As stated in *District of Columbia v. Heller*, persons have a right to protect themselves or a right to self-defense which forms the basis for the second amendment right to bear arms. *District of Columbia v. Heller*, (2008). Similar language is found in the fourth amendment which provides that persons have the right to be secure in their persons from unreasonable physical restraint. In the same vein, the prohibition of using birth control could be considered a physical restraint as well. As discussed in *Roe* and *Casey*, a woman that is pregnant faces health consequences and disabilities relating to a pregnancy.²² A statute which

²² Although the American with Disabilities Act does not recognize pregnancy as a disability, pregnancy related issues can result in one. I catalogue in my amicus brief in *Dobbs*, the different medical complications that can occur with a pregnancy. From that brief: Several medical conditions, some caused by pregnancy and some by pre-existing conditions which then complicate pregnancy that may necessitate an abortion to protect the mother's health. These include, but are not limited to, the following: heart disease, congestive heart failure; anemia and other diseases of the blood; urinary tract infections, acute renal failure; endocrine disorders, such as diabetes, which can either pre-exist or be caused by pregnancy, and which often produce seriously adverse effects on the woman; or diseases of the nervous system, including epilepsy, which is a condition that may be exacerbated by pregnancy, resulting in an increase in frequency of seizures. There are also sorts of mental health conditions that might necessitate an abortion. Doctors have also opined that pregnancies resulting from rape or incest pose severe threats to the mother's mental health. See *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 488–89 (E.D. Va. 1999), *aff'd*, 224 F.3d 337 (4th Cir. 2000) To not allow a

prohibits the termination of a pregnancy when a woman faces health consequences or is forced to endure a nonconsensual pregnancy (rape or incest) would be unreasonable physical restraint (seizure) that would implicate the fourth amendment. Again, a seizure occurs when the target of the government action at issue reasonably believes that she is not free to leave, or that she is “being ordered to restrict [her] movement”. *California v. Hodari D.*, (1991). Being unable to defend herself from an unhealthy circumstance resulting from pregnancy would restrain her from keeping herself safe as permitted under the fourth amendment. Although the fourth amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the amendment protects against such intrusions if the private party acted as an instrument or agent of the Government. *Skinner v. Ry. Labor Execs.’ Ass’n*, (1989).²³

Whether a seizure is deemed unreasonable is determined by balancing the public interest in the seizure with the “severity of the interference with individual liberty”. As applied to the abortion restrictions context, the question whether the restriction constitutes a seizure is whether a reasonable person undergoing the restriction would believe she was physically restrained from performing an act. The question whether the seizure is unreasonable is whether the public interest outweighs the severity of the intrusion. Some scholars have written on the application of the fourth amendment to abortion restrictions. This research supports the application of the fourth amendment to abortion restrictions.²⁴

woman to protect herself or to secure her person from this risk would seem to run counter to analysis in this study.

²³ It can be argued that any governmental action from the passing of a statute to a court order involving actions required by private parties could form the basis for invoking the fourth amendment. The ultimate question however is whether the action is unreasonable under a balancing test.

²⁴ See Note. 2015. “Physically Intrusive Abortion Restrictions as Fourth Amendment Searches and Seizures: A new conceptual avenue for challenging abortion restrictions”. *Harv. L. Rev.*, 128(3), 951–972. Mary H. Wimberly,

In that vein, the fourth amendment has also been applied in a medical setting. A compelled surgical intrusion into an individual's body implicates expectations of privacy and security of such magnitude that the intrusion may be "unreasonable" even if likely to produce evidence of a crime. *Schmerber v. California*, (1966). Labor and delivery pose additional health risks and physical demands. In short, restrictive abortion laws forcing women to endure physical invasions due to government regulation are far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts. See *Winston v. Lee*, (1985) (invalidating surgical removal of bullet from murder suspect); *Rochin v. California*, (1952) (invalidating stomach pumping). *Ferguson v. City of Charleston et al.* (2001) (invalidating a search of a pregnant woman's urine). An abortion is typically a medical procedure, done in the safety and privacy of a doctor's office or clinic. Getting the procedure done with a physician was one of the motivating factors that started the case in *Roe*.

How does the decision of *Dobbs* factor into this analysis? The analysis of *Dobbs* would not apply in this context for two reasons. First, as the fourth amendment is a textual guarantee, it is not subject to the historical analysis used in *Dobbs* to identify unenumerated rights. Second, any reference to history would start from 1791 (date of enactment of the fourth amendment) and not 1866 (date of enactment

2019. "Rethinking the Substantive Due process Right of Privacy: Grounding Privacy in the Fourth Amendment", 60 *Vand. L. Rev.* 283 Wilke, Janelle T., (2015) "Fourth Amendment, a Woman's Right: An Inquiry into Whether State-Implemented Transvaginal Ultrasounds Violate the Fourth Amendment's Reasonable Search Provision", 18 *Chap. L. Rev.* 921. Wimberly (2007), Wilke (2015) and the Note author (2015) and I share a similar view on the potential of fourth amendment protections in this area. Although they may have published on the subject before this author, this theory was the subject of an independent study project by this author in 1990 while at Northern Illinois University. I have the dot matrix printer copy to prove it. *Roe v. Wade* was under attack back then prior to the decision in *Casey* and I was exploring an alternative theory.

of the fourteenth amendment). As the fourth amendment has been incorporated and made applicable to the states in *Mapp v. Ohio*, (1961) there would be no question as to its use regarding state action.

This author does note that the protection provided by the fourth amendment is narrower than provided by *Roe v. Wade* as only unreasonable searches and seizures are prohibited. (Girgis 2022). In the context of abortion, many regulations may pass muster that previously had been disallowed. Unlike the absolute protections of the first amendment, the fourth amendment allows for reasonable searches and seizures. As such, many restrictions on abortion may be considered reasonable under the language of the fourth amendment. Issues of parental consent or notification, presentation of information regarding abortion alternatives, funding of abortions, or requirements for facilities are possible examples of what could be deemed reasonable under the fourth amendment analysis sketched here. I would submit however, that regulations used such as what was enacted in *Whole Woman's Health v. Hellerstedt*, (2016) which amounted to a denial of access as well as required testing such as ultrasounds should be deemed as an unreasonable seizure.²⁵ Furthermore, whether the health of the woman is implicated would seem to be a matter for the woman and her physician and not for the scrutiny of the government. Yet the balancing of interests in deciding of reasonableness is going to limit the reach of the protection unlike the absolutist protection of *Roe* in the context of abortion.

The base protection of a woman to seek medical treatment would be provided under a fourth amendment analysis. The same analysis can also be used to supplant the substantive due process opinion of *Lawrence v. Texas*.²⁶ Like *Griswold*, the fourth amendment

²⁵ See Note. (2015). "Physically Intrusive Abortion Restrictions as Fourth Amendment Searches and Seizures: A new conceptual avenue for challenging abortion restrictions". *Harvard Law review*, 128(3), 951–972.

²⁶ There are many parallels to *Griswold* and *Lawrence*. Both cases involved consensual sexual (private) conduct that occurred in the home. In fact, in

would protect the intimate relationships of consenting adults. The fourth amendment is a textual source of both privacy (search) and autonomy (seizures) rights of individuals. It is not subject to a constricted historical analysis that substantive due process endures such as used in *Dobbs*. The meaning of the words used in the amendment support the analysis of these rights even in a conservative United States Supreme Court. However, many of the arguments presented in this article were before the Court in *Dobbs*. But these arguments were not addressed as they were only presented in the form of an amicus brief. Hopefully these arguments can be used in a party brief with argument before the Court to see if they will follow their methodology.

Privacy and the ability to be free from unreasonable physical restraints are valued rights in the United States. The *Dobbs* decision was a blow to those rights and to the methodology used to support other rights now in existence in our country. While it is easy to blame this on a conservative Supreme Court, part of the blame is on the advocates presenting the challenges of these issues to the courts. It is up to the advocates to make the case that privacy/autonomy rights are not up for grabs to the current Supreme Court. By presenting this theory, I want to provide yet another rowboat to add to the fleet of those seeking to protect privacy and autonomy rights. It is not a perfect theory and when balancing tests are involved there is risk, however, it is better than the current scheme. Using arguments that the conservative majority can support can go a long way in cementing in

the dissent in *Bowers v. Hardwick*, 478 US 186 (1986) Justice Blackmun used the fourth amendment as a support for his position. That view was not used in *Lawrence*. Given that many opponents to substantive due process have stated that *Griswold* is a “fourth amendment” case, *Lawrence* should be given similar treatment. *Obergefell* however is different in that I believe that the equal protection clause provides the authority for the right to marry as opposed to due process. U.S. Const. Amend IXV

those rights for future generations. The fourth amendment has the potential to help secure those rights.

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