of constitutional provisions.[554] Not only was this right to be protected again governmental intrusion, but there was apparently little or no consideration to be given to what governmental interests might justify such an intrusion upon the marital bedroom.

The apparent lack of deference to state interests in *Griswold* was borne out in the early abortion cases, discussed in detail below, which required the showing of a "compelling state interest" to interfere with a woman's right to terminate a pregnancy.[555] Yet, in other contexts, the Court appears to have continued to use a "reasonableness" standard.[556] More recently, the Court has complicated the issue further (again in the abortion context) by the addition of yet another standard, "undue burden." [557]

A further problem confronting the Court is how such abstract rights, once established, are to be delineated. For instance, the constitutional protections afforded to marriage, family, and procreation in *Griswold* have been extended by the Court to apply to married and unmarried couples alike.[558] However, in *Bowers v. Hardwick*,[559] the Court majority rejected a challenge to a Georgia sodomy law despite the fact that it prohibited types of intimate activities engaged in by married as well as unmarried couples.[560] Then,

---

[554] The analysis, while reminiscent of the "right to privacy" first suggested by Warren and Brandeis, still approached the matter in reliance on substantive due process cases. It should be noted that the separate concurrences of Justices Harlan and White were specifically based on substantive due process, 381 U.S. at 499, 502, which indicates that the majority's position was intended to be something different. Justice Goldberg, on the other hand, in concurrence, would have based the decision on the Ninth Amendment. 381 U.S. at 486–97. *See* analysis under the Ninth Amendment, "Rights Retained By the People," *supra*.

[555] *See* Roe v. Wade, 410 U.S. 113 (1973).

[556] When the Court began to extend "privacy" rights to unmarried person through the equal protection clause, it seemed to rely upon a view of rationality and reasonableness not too different from Justice Harlan's dissent in Poe v. Ullman. Eisenstadt v. Baird, 405 U.S. 438 (1972), is the principal case. *See also* Stanley v. Illinois, 405 U.S. 645 (1972).

[557] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[558] *See*, *e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972). "If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453.

[559] 478 U.S. 186 (1986).

[560] The Court upheld the statute only as applied to the plaintiffs, who were homosexuals, 478 U.S. at 188 (1986), and thus rejected an argument that there is a "fundamental right of homosexuals to engage in acts of consensual sodomy." Id. at