

# THE PATHS TO *GRISWOLD*

Ryan C. Williams\*

## INTRODUCTION

Critics have long viewed *Griswold v. Connecticut*<sup>1</sup> as “in many ways a typical decision of the Warren Court.”<sup>2</sup> But *Griswold* was hardly a “typical” Warren Court decision. The doctrinal themes with which the Warren Court is most closely associated—such as the protection of racial and religious minorities, refashioning the law of democracy, and solicitude for First Amendment values and for the rights of the criminally accused and the poor<sup>3</sup>—played either no role or only a tangential role in *Griswold*. With its focus on sexual privacy, procreative liberty, and unenumerated rights, *Griswold* shares a much greater affinity with the decisions of the later Burger Court of the 1970s—the period when *Griswold* first developed significant generative force as a constitutional precedent.<sup>4</sup>

---

© 2014 Ryan C. Williams. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

\* Careers in Law Teaching Fellow, Columbia Law School. My thanks to Serena Mayeri and Sophia Lee for helpful comments and conversations during the early stages of this project and to the participants at the Notre Dame Symposium on *The Evolution of Theory: Discerning the Catalysts of Constitutional Change* for their helpful comments and suggestions.

1 381 U.S. 479 (1965).

2 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 7 (1971).

3 See, e.g., MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 3 (1998) (referring to the initiation of a “revolution in race relations,” expansion of equal protection and First Amendment freedoms, the overturning of “unequally apportioned legislative districts,” and the “massively expanded constitutional protections” accorded criminal defendants as among the Warren Court’s signature accomplishments); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 485 (2000) (identifying “judicial reapportionment of legislative bodies, the federalization of criminal procedure, the protection of sexually arousing depictions, [and] the safeguarding of the economic rights of the poor” as among the Warren Court’s “revolutionary” doctrinal contributions).

4 See, e.g., *Doe v. Bolton*, 410 U.S. 179 (1973) (holding that the constitutional privacy right recognized in *Griswold* limits states’ ability to prohibit abortion); *Roe v. Wade*, 410 U.S. 113 (1973) (same); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending *Griswold*’s holding to bar criminalization of contraceptive use by unmarried couples).

*Griswold's* atypical status among Warren Court decisions suggests that conventional causal accounts of that Court's decision making may have difficulty explaining the Court's decision to embrace an unenumerated right to marital privacy. Consider, for example, Professor Burt Neuborne's recent argument that "concern over racial injustice and state institutional failure . . . played a significant role in shaping" many of the Warren Court's most important decisions.<sup>5</sup> While racial concerns almost certainly exerted significant influence across a broad range of Warren Court doctrines,<sup>6</sup> it seems doubtful that such concerns loomed particularly large in *Griswold*, which involved a criminal prosecution of two upper middle class white defendants. Likewise, analyses that focus on the ideological compatibility between the later Warren Court of the 1960s and that era's dominant national political coalition seem incomplete as an explanation of *Griswold*.<sup>7</sup> To be sure, by 1965, national public opinion had tipped decidedly against the policy reflected in the Connecticut contraception statute.<sup>8</sup> But unlike other major social issues addressed by the Warren Court—such as racial justice, voting rights, and protecting the rights of the impoverished—neither contraception nor sexual privacy implicated core concerns of the era's dominant national political coalition.<sup>9</sup> Other general explanatory theories of the Warren Court's approach to constitutional decision making have similar difficulties accounting for *Griswold*.<sup>10</sup>

---

5 Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 60.

6 See *id.* (identifying "federalism; separation of powers; criminal law and procedure; freedom of speech, association, and religion; procedural due process . . . ; and [the law of] democracy" as doctrinal areas influenced by the Warren Court's overarching concern with racial justice).

7 See, e.g., POWE, *supra* note 3, at 494 (describing the Warren Court as "a functioning part of the Kennedy-Johnson liberalism of the mid and late 1960s" that "demanded national liberal values be adopted in outlying areas of the United States"); Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1554 (2004) (arguing that "much of the Warren Court's jurisprudence in the 1960s . . . reflected the political dominance of the liberal wing of the Democratic Party").

8 See Brief for Appellants at 48, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496) (citing national public opinion data indicating eighty-one percent approval for freely available birth control information).

9 See, e.g., PHYLLIS TILSON PIOTROW, *WORLD POPULATION CRISIS* 12–87 (1973) (discussing the general reticence of national political leaders to openly discuss policies relating to birth control throughout the 1950s and early 1960s).

10 For example, Professor John Hart Ely's well-known effort to rationalize Warren Court decision making by reference to a "representation reinforcing" theory of judicial review has difficulty accounting for *Griswold*. See Mark V. Tushnet, *Foreword*, 77 VA. L. REV. 631, 634 (1991) (observing that "[n]ot even Ely contends that *Griswold* can be understood in representation-reinforcing terms"); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 219 n.118 (1980) (conceding that the mere antiquity and unpopularity of the statute at issue in *Griswold* would not have justified invalidation on representation reinforcement grounds).

To the extent scholars have attempted to develop explanatory accounts focusing on *Griswold* specifically, such accounts have tended to emphasize the social movement activism of birth control advocates and shifting public attitudes toward sexuality, contraception, and women's rights.<sup>11</sup> These influences, combined with the Warren Court's well-known penchant for constitutional perfectionism, are generally presumed to account for both the timing of the Court's decision and for the Court's decision to embrace a doctrine of unenumerated constitutional rights.<sup>12</sup> Contrary to the conventional portrait of the Warren Court as an "activist" tribunal, this account portrays the Justices as playing a largely passive and reactive role—as occupying a place in the rearguard, rather than in the vanguard of constitutional change.<sup>13</sup> To put it in slightly different terms, the social movement account of *Griswold* tends to emphasize factors external to the judicial process, such as political activism and changes in public opinion and societal mores, rather than doctrinal, intellectual, and other considerations that are more internal to that process.<sup>14</sup>

There is a good deal of truth in these narratives. It is difficult to understate the importance of the sustained efforts by the Planned Parenthood League of Connecticut and its supporters in the academic and legal communities who fashioned a litigation campaign that succeeded in placing questions regarding the constitutional status of the right to marital privacy on the Court's agenda and (eventually) persuading the Court to provide an answer. And given the state of national public opinion at the time, the Court's decision to invalidate the Connecticut law was hardly surprising.<sup>15</sup>

---

11 For scholarly works discussing *Griswold* within this frame, see DAVID J. GARROW, *LIBERTY AND SEXUALITY* 1–269 (1998); HORWITZ, *supra* note 3, at 106–11; Neal Devins, *The Countermajoritarian Paradox*, 93 MICH. L. REV. 1433, 1438–41 (1995) (reviewing GARROW, *supra*), Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut*, 75 IOWA L. REV. 915 (1990); and William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2236–40 (2002).

12 See, e.g., Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519, 531 (2008) (characterizing *Griswold* as "a classic example of the Warren Court's penchant for reaching a result deemed fair (and sensible to most Americans), then trying to find some constitutional justification for it").

13 See, e.g., David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 878 (2009) (observing that the "*Griswold* Court . . . was following, not resisting, a [national] trend"); cf. Balkin, *supra* note 7, at 1549–50 (contending that the role of courts in social reform movements usually involves "confirm[ing] what has already been happening in the larger legal and political culture" rather than leading the direction of constitutional change).

14 Cf. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 3–7 (1998) (discussing "externalist" and "internalist" perspectives of the New Deal "constitutional revolution").

15 See Robert B. McKay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259, 261 (1965) (characterizing the Court's "ruling on th[e] narrow question" of the Connecticut statute's constitutionality as "almost anticlimatic").

But as is the case with most narratives, the truths told by the social movement account of *Griswold* are partial and incomplete.<sup>16</sup> For example, if social movement activism and national public opinion alone were sufficient to account for the Court's decision, it would be difficult to explain why a declaration of the Connecticut law's unconstitutionality did not occur until 1965. The litigation campaign seeking to overturn restrictive contraception laws had emerged decades earlier and had already achieved a substantial measure of national success prior to the outbreak of World War II.<sup>17</sup> A constitutional challenge to the specific statute that was eventually invalidated in *Griswold* first reached the Supreme Court in 1943.<sup>18</sup> And even at that early date, the policy reflected in Connecticut's law—i.e., the criminalization of contraceptive use by married couples—was opposed by overwhelming majorities at the national level.<sup>19</sup> The Court nonetheless chose to dodge the question, as it did again when the issue reached the Court a second time in 1961.<sup>20</sup>

Nor does the social movement story explain the Court's choice of doctrinal framework to rationalize its decision. Although it is perhaps understandable for modern observers to assume that the approaches surveyed by the various opinions in *Griswold* exhausted the conceptual possibilities available to the Justices,<sup>21</sup> contemporary observers recognized the availability of other possible bases for the Court's decision that would not have required accord-ing the unenumerated right to "privacy" the type of strong constitutional protection that had previously been reserved to rights specifically listed in the Constitution.<sup>22</sup>

The goal of this Article is to develop a fuller picture of *Griswold* by situating the case within a series of doctrinal and jurisprudential debates and developments that were prominent at the time of the Court's decision but that have faded in significance over time. This alternative picture of *Griswold* shifts the focus away from viewing the case as one about birth control, sexual privacy, and women's autonomy and toward viewing the decision as one

---

16 Cf. Lawrence B. Solum, *Narrative, Normativity, and Causation*, 2010 MICH. ST. L. REV. 597, 602 (observing that "[n]arratives tell a story, but they cannot tell the 'whole story'").

17 See Eskridge, *supra* note 11, at 2117–21 (describing success of early birth control proponents in persuading courts to narrowly construe anti-contraception laws).

18 See *Tileston v. Ullman*, 318 U.S. 44 (1943) (per curiam).

19 See GARROW, *supra* note 11, at 42–43 (citing public opinion polling from 1936 and 1937 showing between sixty-three and seventy percent approval for legalized birth control for married couples); cf. Tom W. Smith, *The Sexual Revolution?*, 54 PUB. OPINION Q. 415, 429 (1990) (reporting polling data from the 1940s showing more than sixty percent approval for government-operated birth control clinics).

20 See *infra* Part I.

21 See, e.g., Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2002–2003 CATO SUP. CT. REV. 21, 30 (suggesting that Douglas's rationale "was probably the best he could do to reach the result in the case while ostensibly staying within the prevailing constitutional theory of [*Carolene Products*'] Footnote Four").

22 See, e.g., Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 220–28 (1965) (acknowledging the existence of possible alternative doctrinal bases for the Court's decision that were not adopted by any of the Justices, including equal protection and the First Amendment).

about interpretive method, constitutional theory, and the Supreme Court's role within the national political system. This alternative perspective on *Griswold* has by no means gone unnoticed in the massive volume of scholarship discussing the case. But for the most part, such discussions have focused on efforts to either rationalize the result of the case<sup>23</sup> or to criticize its reasoning.<sup>24</sup> This Article approaches the case from a different perspective—seeking to neither rationalize nor criticize, to neither praise nor condemn—but rather to simply understand.<sup>25</sup>

\* \* \*

The history of the litigation campaign that culminated in *Griswold* is a story that has been told, and told well, by others.<sup>26</sup> Summarizing greatly, the story can be encapsulated as follows: in the late nineteenth century, a social reform movement led by moral campaigner Anthony Comstock persuaded Congress and the legislatures of multiple states to pass “obscenity” laws that, among other things, prohibited or greatly restricted the sale and use of contraceptives.<sup>27</sup> The Connecticut legislature enacted one such law in 1879, which prohibited the “use[ ]” of “any drug, medicinal article or instrument for the purpose of preventing conception.”<sup>28</sup>

During the early decades of the twentieth century, birth control advocates succeeded in persuading courts at the federal level and in many states to interpret similar statutes narrowly, by imputing to them an implied “health” exception that allowed for widespread circumvention.<sup>29</sup> But this

---

23 See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 151–59 (1991) (defending *Griswold* as an example of “intergenerational [constitutional] synthesis” that seeks “to make sense of the Founding texts in a constitutional regime no longer committed to the strong protection of property and free contract”); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 27–30 (arguing that *Griswold* can be understood as an “American variation on the old English idea of desuetude”).

24 See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 286–88 (2d ed. 1997); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 97–98 (1990); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1568–70 (2004).

25 Cf. POWE, *supra* note 3, at xiv–xv (observing that though “everyone seems to turn into a partisan once the Warren Court is mentioned,” the historian’s “job is neither to cheer nor boo” but rather “to understand and explain”).

26 The definitive history is provided by David Garrow, who has recounted the story of the litigation campaign that culminated in *Griswold* in exhaustive detail. See GARROW, *supra* note 11, at 1–269.

27 Eskridge, *supra* note 11, at 2117 (observing that “[b]y 1885, twenty-four states had enacted their own versions of the Comstock Act, many of which were more stringent than the federal law”).

28 CONN. GEN. STAT. § 53-32 (1958); see also Dudziak, *supra* note 11, at 920 n.41 (observing that, with the exception of a non-substantive recodification in 1888, the text of the statute “would remain unchanged until it was invalidated in *Griswold*”).

29 See, e.g., *United States v. One Package*, 86 F.2d 737, 739 (2d Cir. 1936) (interpreting the federal Comstock Act as not having been intended “to prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and

strategy did not succeed everywhere. In 1940, Connecticut's highest court refused to interpret the 1879 statute as containing a broad "medical needs" exception of the type that had been recognized by other courts.<sup>30</sup> Birth control advocates in Connecticut thereafter embarked on a multi-pronged campaign to repeal the law, including both efforts aimed at legislative repeal and litigation challenging the law's constitutionality.

## I. THE PATH TO JUSTICIABILITY

The procedural path that the constitutional challenges to the 1879 Connecticut law were forced to navigate was long and arduous, even by the standards of modern constitutional litigation. The principal obstacles standing in the way of an early resolution by the Supreme Court were a set of self-imposed constraints that limited the Court's ability to decide constitutional questions. These limitations were just beginning to take on their modern form at around the time the first constitutional challenges to the Connecticut law arrived at the Court.

It is now conventional to trace the development of the Supreme Court's modern doctrines of standing and related justiciability limitations to the middle decades of the twentieth century and particularly to the decisions of the post-New Deal Court under Chief Justices Stone and Vinson.<sup>31</sup> The development of these doctrines reflected the influence of certain prominent strains of progressive and New Deal legal thought, which emphasized judicial restraint and the importance of allocating decision-making authority to the most competent institutions.<sup>32</sup> The doctrines also had a more practical dimension as a means of insulating New Deal regulation from judicial review.<sup>33</sup>

---

competent physicians for the purpose of saving life or promoting the well being of their patients").

30 See *State v. Nelson*, 11 A.2d 856, 862 (Conn. 1940).

31 See, e.g., Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 889 (2008) (noting the existence of an "emerging consensus on the historical origins of standing doctrine" that traces the doctrine's origins to the New Deal period).

32 These ideas were most closely associated with a group of mid-twentieth century scholars who have been retrospectively categorized as adherents of the "legal process school" of legal thought. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to THE LEGAL PROCESS*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS*, at li (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (discussing ideas associated with the legal process school and their influence on jurisdictional thinking during the post-War period); Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688 (1989) (book review) (same).

33 See, e.g., Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179 (1992) (arguing that justiciability limitations were "designed to limit the occasions for judicial intervention into democratic processes" and thereby "insulate progressive and New Deal legislation from frequent judicial attack"); cf. Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591 (2010) (questioning

In his 1936 concurrence in *Ashwander v. Tennessee Valley Authority*,<sup>34</sup> Justice Brandeis identified seven self-limiting principles through which the Court might “avoid [ ] passing upon . . . constitutional questions” unnecessarily.<sup>35</sup> These limitations included the principle that courts should not “anticipate a question of constitutional law in advance of the necessity of deciding it,”<sup>36</sup> nor “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,”<sup>37</sup> nor “pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.”<sup>38</sup> Brandeis’s synthesis was immediately influential and provided a set of principles that would guide the development of justiciability doctrines over the ensuing decades.

It was against this backdrop that the first constitutional challenge to Connecticut’s contraception ban arrived at the Supreme Court in 1943. The plaintiff in that case, Dr. Wilder Tileston, had initiated an action in Connecticut state court seeking a declaratory judgment that he could not be prosecuted for prescribing contraceptives to three of his married female patients whose lives would be threatened by pregnancy.<sup>39</sup>

Tileston’s appeal implicated at least two of the self-limiting principles identified in Brandeis’s *Ashwander* concurrence—namely, the principle that the Court should not “pass upon the validity of” a law unless the litigant requesting relief could show “that he is injured by its operation,” and the principle that the Court should not “anticipate a question of constitutional law” before the need to resolve it had arrived.<sup>40</sup> In a terse per curiam opinion, the Court concluded that Tileston lacked standing to assert the constitutional rights of his patients.<sup>41</sup> Noting that the “sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life” and that there was “no allegation or proof” that Tileston’s life was in danger, the Court concluded that “the proceedings in the state courts present no constitutional question which appellant has standing to assert.”<sup>42</sup>

The brevity of the Court’s opinion left the scope of its holding ambiguous. On one reading, the case could be understood as standing for a broad

---

certain aspects of this “insulation thesis” but agreeing that liberal Justices consistently favored stringent justiciability limits throughout the late 1930s and 1940s).

34 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

35 *Id.* at 346. Brandeis’s concurrence was joined by Justices Stone, Roberts, and Cardozo. *Id.* at 356.

36 *Id.* at 346 (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885)) (internal quotation marks omitted).

37 *Id.* at 347 (quoting *Liverpool*, 113 U.S. at 39) (internal quotation marks omitted).

38 *Id.*

39 See *Tileston v. Ullman*, 26 A.2d 582, 584 (Conn. 1942) (describing Dr. Tileston’s claims).

40 *Ashwander*, 297 U.S. at 346–47 (Brandeis, J., concurring) (quoting *Liverpool*, 113 U.S. at 39).

41 *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam).

42 *Id.*

prohibition on asserting the constitutional rights of others at all. But the opinion was also susceptible to a narrower reading in which the critical defect was simply the plaintiff's failure to allege that he himself had been injured.<sup>43</sup> This latter reading left open the possibility that a plaintiff who could allege some legally cognizable injury in his own right might also challenge aspects of a law that did not affect him directly.

By the time the second constitutional challenge to the Connecticut law began working its way through the courts, it had become apparent that a categorical prohibition on third-party standing was stronger medicine than the Court was willing to swallow. In a 1953 ruling, for example, the Court allowed a white property owner to assert the constitutional rights of third-party African Americans in defending against a suit seeking to enforce a racially restrictive covenant.<sup>44</sup> In another case decided shortly thereafter, the Court held that the NAACP had standing to assert the First Amendment rights of its members.<sup>45</sup>

Despite the Court's seeming openness to recognizing third-party standing in appropriate cases, Connecticut birth control advocates were understandably wary of again testing the limits of the Court's standing doctrine. The lead plaintiff named in the second major constitutional challenge to the Connecticut law was again a physician—Dr. Charles Lee Buxton.<sup>46</sup> But this time, the lawyers representing Buxton were careful to include in their complaint an allegation that enforcement of the statute would not only threaten the life and liberty of Buxton's patients but would also deprive Buxton himself of constitutionally protected "liberty" and "property" interests relating to his ability to practice medicine effectively.<sup>47</sup> More importantly, Buxton was joined by other plaintiffs who alleged direct injury by reason of the contraception ban, including two of his patients (both of whom sued under pseudonyms) for whom pregnancy posed a substantial risk of severe disability or death.<sup>48</sup> As in the earlier *Tileston* litigation, Buxton and his co-plaintiffs brought an unsuccessful declaratory judgment action in Connecticut state court and appealed from the Connecticut Supreme Court's ruling rejecting their arguments.<sup>49</sup>

With the procedural deficiencies that had plagued the earlier *Tileston* appeal seemingly resolved, the path to a Supreme Court ruling on the merits seemed clear. But addressing the "who" questions at the center of the standing inquiry did not answer the separate "when" questions that regulate the

---

43 See William M. Wiecek, *The Debut of Modern Constitutional Procedure*, 26 REV. LITIG. 641, 661 (2007) (noting this ambiguity in *Tileston*).

44 *Barrows v. Jackson*, 346 U.S. 249 (1953).

45 *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

46 See GARROW, *supra* note 11, at 152–54.

47 *Id.*

48 *Id.*

49 *Buxton v. Ullman*, 156 A.2d 508 (Conn. 1959).

timing of constitutional adjudication.<sup>50</sup> The *Tileston* Court had briefly noted such concerns in its per curiam opinion but its resolution of the standing question had rendered it unnecessary to decide whether the declaratory nature of the relief sought rendered the case non-justiciable.<sup>51</sup>

By the time the second set of appeals reached the Supreme Court under the caption *Poe v. Ullman*,<sup>52</sup> these timing issues were very much the focal point of jurisdictional concern. Justice Frankfurter's opinion for a four-Justice plurality emphasized the apparent paucity of reported prosecutions under the Connecticut statute, asserting that there had been only one such prosecution "[d]uring the more than three-quarters of a century since [the statute's] enactment," and dismissing that prosecution as a mere "test case."<sup>53</sup> Implicitly acknowledging that the petitioners had made out a sufficient "case or controversy" for Article III purposes, Frankfurter invoked the self-limiting principles articulated in Brandeis's *Ashwander* concurrence as support for his conclusion that the petitioners' appeal lacked "the immediacy which is an indispensable condition of constitutional adjudication."<sup>54</sup>

Justice Brennan provided the critical fifth vote against reaching the merits. Brennan refused to join Frankfurter's opinion but agreed that the petitioners' appeal did not present "a real and substantial controversy which unequivocally calls for adjudication of the rights claimed in advance of any attempt by the State to curtail them by criminal prosecution."<sup>55</sup> Critical to Brennan's conclusion was the fact that Connecticut had not sought to prevent "the use of contraceptives by isolated and individual married couples" but had instead focused its enforcement efforts on preventing "the opening of birth-control clinics on a large scale."<sup>56</sup> Brennan saw this as the "true controversy in th[e] case,"<sup>57</sup> and he concluded that there would be "time enough to decide the constitutional questions urged upon us when, if ever, that real controversy flares up again."<sup>58</sup>

---

50 Cf. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 *YALE L.J.* 1363, 1364 (1973) (describing justiciability doctrines as fundamentally concerned with determining "who may obtain constitutional declarations and when").

51 See *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam).

52 367 U.S. 497 (1961).

53 *Id.* at 501 (plurality opinion). The supposed "test case" referred to by Frankfurter involved the prosecution of individuals connected with a Connecticut birth control clinic and culminated in the Connecticut Supreme Court's decision in *State v. Nelson*, 11 A.2d 856 (Conn. 1940). See *Poe*, 367 U.S. at 501. In dissent, Justice Harlan took issue with this characterization, observing that "the respect in which *Nelson* was a test case is only that it was brought [by the State] for the purpose of making entirely clear the State's power and willingness to enforce" the statute. *Id.* at 533 (Harlan, J., dissenting); see also Dudziak, *supra* note 11, at 920–24 (describing the background of the *Nelson* case).

54 *Poe*, 367 U.S. at 508 (plurality opinion).

55 *Id.* at 509 (Brennan, J., concurring).

56 *Id.*

57 *Id.*

58 *Id.*

The majority's holding drew lengthy dissents from both Justice Harlan and Justice Douglas.<sup>59</sup> While professing his "unreserved[ ]" support for the "policy against premature constitutional decision,"<sup>60</sup> Harlan nonetheless faulted the plurality and Justice Brennan for "postulat[ing] a security from prosecution for open defiance of the statute which I do not believe the record supports."<sup>61</sup> Justice Douglas was more adamant in condemning the choice to which the petitioners would be put by the majority's ruling:

What are these people—doctor and patients—to do? Flout the law and go to prison? Violate the law surreptitiously and hope they will not get caught? By today's decision we leave them no other alternatives. It is not the choice they need have under the regime of the declaratory judgment and our constitutional system. It is not the choice worthy of a civilized society. . . . We should not turn them away and make them flout the law and get arrested to have their constitutional rights determined.<sup>62</sup>

As Douglas's remarks suggested, the Court's opinions in *Tileston* and *Poe* left open only one reasonably clear path for forcing the question of the Connecticut law's constitutionality onto the Court's agenda—someone needed to "get arrested." After some deliberation, this was the path that Connecticut birth control advocates chose to pursue. In November 1961, Planned Parenthood of Connecticut opened a birth control clinic at its headquarters in New Haven.<sup>63</sup> Within two weeks of opening, the New Haven police arrested the clinic's Medical Director, Dr. Buxton, and its Executive Director, Estelle Griswold, for violating the 1879 statute.<sup>64</sup> Following yet another trip through the Connecticut state court system and yet another opinion from the Connecticut Supreme Court upholding the statute, the constitutional challenge to the Connecticut law was again ready to go before the Supreme Court. *Griswold v. Connecticut* had at long last arrived.

But even at this point, a ruling on the merits was not without obstacles. The state's decision to prosecute Buxton and Griswold obviated the ripeness objections that had stood in the way of resolving *Poe*. But the standing difficulties that had plagued Dr. Tileston's appeal two decades earlier once more reared their heads. As Brennan predicted, the state had not focused its enforcement efforts on the intimate activities of particular married couples but rather on those who sought to provide contraceptives in publicly accessible clinics. To the extent Buxton and Griswold hoped to challenge the law's constitutionality based on its interference with marital privacy, their argu-

---

59 Justices Black and Stewart each filed brief dissents stating their belief that the Court should have reached the merits. See *id.* at 509 (Black, J., dissenting); *id.* at 555 (Stewart, J., dissenting).

60 *Id.* at 525 (Harlan, J., dissenting) (quoting *id.* at 507 (plurality opinion)) (internal quotation marks omitted).

61 *Id.* at 534–35.

62 *Id.* at 513 (Douglas, J., dissenting).

63 Dudziak, *supra* note 11, at 936.

64 *Id.* at 937.

ments bore an uncomfortable resemblance to Dr. Tileston's earlier effort to vindicate the rights of his third-party patients.

By 1965, however, the Court no longer seemed interested in grappling with the intricacies of third-party standing as a means of avoiding constitutional questions. An important development in this regard was the retirement in 1963 of Justice Frankfurter, who had long been one of the Court's leading proponents of jurisdictional restraint.<sup>65</sup> Even before Frankfurter's retirement, the Court had begun stretching the boundaries of its self-imposed jurisdictional limits, most notably in *Baker v. Carr*,<sup>66</sup> where the Court refashioned more than a century of precedent under the political question doctrine in order to allow for greater judicial oversight of the political process.<sup>67</sup> This trend toward more relaxed standing and justiciability doctrines would continue in the years following *Griswold*.<sup>68</sup>

In *Griswold* itself, the standing question was disposed of relatively briskly. Justice Douglas's majority opinion—the only opinion in the case to mention standing—distinguished *Tileston* on the ground that the plaintiff in that case sought only declaratory relief.<sup>69</sup> After citing several cases in which parties had been allowed to rely upon the constitutional interests of others, Douglas asserted that “[t]he rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.”<sup>70</sup>

The decisions in *Tileston*, *Poe*, and *Griswold*, considered together, provide illuminating snapshot views of three important moments in the evolution of standing doctrine during the middle decades of the twentieth century. *Tileston* arrived as the Court's newly dominant cohort of Roosevelt appointees was busy consolidating the constitutional victories of the so-called New Deal “revolution.” The restrictive standing limitations to which Dr. Tileston's appeal fell victim were part of that consolidation, as the Court's dominant liberal faction sought to limit opportunities for judicial review of New Deal regulatory programs.<sup>71</sup> By the time *Poe* reached the Court in 1961, liberal support for restrictive justiciability limits had begun to crumble.<sup>72</sup> Though

---

65 See, e.g., Ho & Ross, *supra* note 33, at 640 (observing that Frankfurter “disfavored standing throughout his career”); Wiecek, *supra* note 43, at 661 (noting that it was “[n]ot until Frankfurter had retired and died” that the Court was “able to get beyond procedural scruples to reach the merits in *Griswold*”).

66 369 U.S. 186 (1962).

67 *Id.* at 226–29.

68 See, e.g., Flast v. Cohen, 392 U.S. 83 (1968); Stearns, *supra* note 31, at 891–95 (discussing the broadening of standing and justiciability doctrines during the Warren Court).

69 *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

70 *Id.*

71 See, e.g., Ho & Ross, *supra* note 33, at 640–44 (discussing the restrictive view of standing embraced by the Court's the newly dominant liberal cohort of Justices during the early 1940s).

72 *Id.* at 643 (observing that “[b]y 1950 at the latest, progressive insulation was a thing of the past” and that liberal Justices increasingly divided on standing questions after that point).

Frankfurter and a few other holdouts continued to adhere to a strongly self-limiting vision of justiciability, other of the Court's leading liberals, including Justices Black and Douglas, had come to embrace a more permissive view that would allow the Court to decide a broader range of constitutional questions.<sup>73</sup> By the time of *Griswold* four years later, the Warren Court was well on its way toward developing the latitudinarian justiciability doctrines with which that Court is typically associated.

## II. THE PATH (BACK) TO SUBSTANTIVE DUE PROCESS

One of *Griswold's* most enduring doctrinal legacies involves its contribution to the late twentieth-century resurgence of substantive due process.<sup>74</sup> But in order to understand the case's significance in this respect, one must get past a simplifying myth that has grown up around that controversial doctrine. According to this myth, substantive due process perished with the so-called "switch in time" of 1937 only to reemerge suddenly and unexpectedly in *Griswold* and later decisions of the Warren and Burger Courts.<sup>75</sup> While this myth bears certain elements of truth, it can be highly misleading if taken as an accurate characterization of the mid-twentieth century status of "substantive due process" as a constitutional concept.

The decisions of the Stone and Vinson Courts clearly established that the Court would not use the Due Process Clauses to police economic regulations. The edentulous "rational basis" test, which received its canonical formulation in Justice Douglas's 1955 opinion in *Williamson v. Lee Optical, Inc.*,<sup>76</sup> unmistakably signaled that those seeking judicial protection of economic rights would face long odds in securing redress before the Supreme Court. But contrary to the assumptions of many modern commentators, the Court's newfound hostility toward *economic* substantive due process did not signal a similarly hostile attitude toward substantive due process more generally.

There were, however, relatively few pre-1937 substantive due process precedents that focused specifically on non-economic rights. A handful of cases from the early twentieth century had begun the process of extending substantive due process beyond the economic sphere, including *Pierce v. Soci-*

---

73 See *id.* at 640 (noting Douglas's consistent endorsement of broad standing principles after the late 1940s).

74 See, e.g., Strauss, *supra* note 13, at 875 (characterizing *Griswold* as "the first of the modern substantive due process decisions").

75 See, e.g., POWE, *supra* note 3, at 372 (stating that "substantive due process . . . had not been used since the revolution in 1937" and had effectively "ceased to exist (or so it seemed)" by the time of the *Griswold* decision); Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 218-19 (1987) (characterizing *Griswold* as having "resurrected" substantive due process "some thirty years after the Court's initial abandonment" of the doctrine).

76 348 U.S. 483, 487-88 (1955) (holding that a law "need not be in every respect logically consistent with its aims to be constitutional" but rather that there need only be "an evil at hand for correction," for which "it might be thought that the particular legislative measure was a rational way to correct it").

*ety of Sisters*, *Meyer v. Nebraska*, and *Farrington v. Tokushige*, all of which involved the rights of parents to direct their children's education.<sup>77</sup> In a closely related line of cases decided during the same period, the Court had also begun to recognize areas of overlap between the "liberty" protected against state infringement by the Fourteenth Amendment's Due Process Clause and the specific guarantees set forth in the Bill of Rights.<sup>78</sup> To complicate matters further, this latter line of decisions coexisted with a separate body of cases specifically declaring that certain other Bill of Rights protections were *not* embraced by the Fourteenth Amendment.<sup>79</sup>

The post–New Deal Court eventually settled on an approach that preserved the precedential significance of most of its earlier non-economic due process decisions while signaling that the degree of overlap between a particular claimed "liberty" and some other textually specified right—particularly those set forth in the Bill of Rights—would matter greatly to the Court's assessment of constitutionality.<sup>80</sup> Beginning with Justice Cardozo's 1937 opinion in *Palko v. Connecticut*,<sup>81</sup> the Court gradually set about the difficult task of rationalizing the various doctrinal threads of its earlier substantive due process case law into a coherent account of the relationship between the Fourteenth Amendment's Due Process Clause and the Bill of Rights.<sup>82</sup>

By the late 1940s, at least three distinct positions regarding the relationship between the Fourteenth Amendment and the Bill of Rights had come to be embraced by different factions on the Court. These three positions were

77 *Farrington v. Tokushige*, 273 U.S. 284 (1927) (invalidating a law restricting teaching of languages other than English); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (invalidating a law mandating education in public, rather than private schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a law restricting teaching of languages other than English).

78 *See, e.g.*, *Near v. Minnesota*, 283 U.S. 697 (1931) (dealing with freedom of the press); *Stromberg v. California*, 283 U.S. 359 (1931) (dealing with freedom of speech); *Gitlow v. New York*, 268 U.S. 652 (1925) (dealing with freedom of speech and the press).

79 *See, e.g.*, *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) (concluding that the privilege against self-incrimination is not guaranteed by Fourteenth Amendment); *Maxwell v. Dow*, 176 U.S. 581, 605 (1900) (stating that the twelve-person jury requirement is not required by Fourteenth Amendment); *Hurtado v. California*, 110 U.S. 516, 535 (1884) (concluding that the Fourteenth Amendment does not guarantee a grand jury requirement).

80 *See, e.g.*, Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 496–512 (2001) (discussing the post–New Deal Court's increasing emphasis on textual considerations in identifying constitutionally protected due process "liberty"). The famous "footnote four" of *Carolene Products* suggested this new approach by declaring that the "presumption of constitutionality" attaching to most state lawmaking may have a "narrower scope for operation" when the challenged "legislation appears on its face to be within a specific prohibition of the Constitution." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

81 302 U.S. 319 (1937).

82 *Id.* at 324–25 (attempting to rationalize the two lines of doctrine by concluding that only those immunities that are "implicit in the concept of ordered liberty" should be held applicable against the states).

illustrated by the competing opinions in *Adamson v. California*.<sup>83</sup> One position, endorsed by the majority opinion of Justice Reed as well as by the separate concurrence of Justice Frankfurter, attached relatively little significance to the existence of a similar textual guarantee in the Bill of Rights. Rather, the critical inquiry focused on whether the right in question was sufficiently fundamental to be recognized as “implicit in the concept of ordered liberty,” thus meriting protection under the Due Process Clause.<sup>84</sup> As Frankfurter explained in his concurrence, this view conceived of the Due Process Clause as “inescapably impos[ing] upon th[e] Court an exercise of judgment” to determine whether a challenged practice “offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples.”<sup>85</sup>

Justice Black’s dissent, which Douglas joined, endorsed an approach that Akhil Amar has characterized as “mechanical incorporation.”<sup>86</sup> Under this alternative conception, which reflected the view to which Black would adhere throughout his long career on the Court, the Fourteenth Amendment’s Due Process and Privileges or Immunities Clauses are effectively read as “simply terms of art referring to the first eight amendments in every jot and tittle, and to nothing else.”<sup>87</sup>

A third view of the relationship between the Fourteenth Amendment and the Bill of Rights was reflected in the separate dissenting opinion of Justice Murphy (joined by Justice Rutledge), who agreed with Black and Douglas “that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment” but resisted the implied corollary “that the [Fourteenth Amendment] is entirely and necessarily limited by the Bill of Rights.”<sup>88</sup>

Though the Court’s attention in the substantive due process sphere during the 1940s and 1950s focused primarily on identifying areas of overlap between the requirements of due process and specific Bill of Rights guarantees, the problem of “unenumerated” rights did not go wholly unaddressed. In an important 1952 opinion authored by Frankfurter, the Court held that admitting evidence obtained by forcibly pumping a suspect’s stomach “shock[ed] the conscience” of the Court and therefore violated the defendant’s due process rights.<sup>89</sup> That same year, the Court held that denial of public employment based solely on membership in an organization designated by the state as “subversive” constituted an “assertion of arbitrary power”

83 332 U.S. 46 (1947).

84 *Id.* at 54 (quoting *Palko*, 302 U.S. at 325) (internal quotation marks omitted).

85 *Id.* at 67 (Frankfurter, J., concurring).

86 See AKHIL REED AMAR, *THE BILL OF RIGHTS* 174 (1998).

87 *Id.*; see also *Adamson*, 332 U.S. at 89 (Black, J., dissenting) (“To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.”).

88 *Adamson*, 332 U.S. at 124 (Murphy, J., dissenting).

89 *Rochin v. California*, 342 U.S. 165, 172–74 (1952).

that “offends due process.”<sup>90</sup> Two years later, in *Bolling v. Sharpe*, the Court famously relied upon the Fifth Amendment’s Due Process Clause in holding that the federal government, like the states, was prohibited from maintaining a system of racially segregated public schools.<sup>91</sup> And in *Schwartz v. Board of Bar Examiners*, decided in 1957, the Court concluded that the Due Process Clause precluded states from excluding persons from admission to the practice of law based solely on their past membership in the Communist Party.<sup>92</sup>

The approach adopted by the Court in these cases differed markedly from its approach in cases involving “incorporation” of particular Bill of Rights guarantees. Outside the incorporation context, substantive due process review during the 1940s and 1950s typically focused on policing particularly “arbitrary” or egregious state conduct.<sup>93</sup> But in cases that implicated the incorporation issue, the Court adopted a different standard that focused on whether the particular liberty interest in question was “implicit in the concept of ordered liberty”<sup>94</sup> or occupied a “preferred position”<sup>95</sup> in the hierarchy of rights and thus should be singled out for particularly strong constitutional protection.<sup>96</sup>

By the end of the 1950s the distinction between these two lines of substantive due process doctrine had begun to blur. An important early challenge to the distinction arrived in 1952 in the context of a case challenging a decision by Washington, D.C.’s public transit regulator to allow the broadcast of radio programs in buses and streetcars. The U.S. Court of Appeals for the D.C. Circuit concluded that the policy violated the passengers’ Fifth Amendment due process rights, holding that “forced listening” would destroy the “[f]reedom of attention,” which was “a part of liberty essential to individuals and to society.”<sup>97</sup> The Supreme Court reversed, holding that “[t]he liberty of each individual in a public vehicle or public place is subject to reasonable limitations in relation to the rights of others.”<sup>98</sup> Justice Black concurred in

90 *Wieman v. Updegraff*, 344 U.S. 183, 190–91 (1952).

91 347 U.S. 497, 500 (1954).

92 353 U.S. 232, 246–47 (1957).

93 See, e.g., *id.* at 249 (Frankfurter, J., concurring) (“Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause.”); *Bolling*, 347 U.S. at 500 (noting that racial segregation “constitutes an arbitrary deprivation of . . . liberty in violation of the Due Process Clause”); *Wieman*, 344 U.S. at 191 (stating that an “assertion of arbitrary power . . . offends due process”).

94 *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

95 *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943).

96 On the development and subsequent evolution of the “preferred position” doctrine and the controversy over the nature of the protection that Bill of Rights guarantees should receive, see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986*, at 245–70, 308–22 (1990). See also *infra* notes 183–90 and accompanying text.

97 *Pollak v. Pub. Utils. Comm’n*, 191 F.2d 450, 456 (D.C. Cir. 1951), *rev’d*, 343 U.S. 451 (1952).

98 *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451, 465 (1952).

the Court's due process holding but dissented in part on First Amendment grounds.<sup>99</sup>

Justice Douglas, who had joined Black's *Adamson* dissent only three years earlier, rejected both the majority's reasoning and Black's effort to fit the case into a pure First Amendment framework.<sup>100</sup> Instead, Douglas essentially adopted the lower court's position that the forced listening to which passengers had been subjected violated their substantive "liberty" interests protected by the Fifth Amendment's Due Process Clause.<sup>101</sup> "Liberty in the constitutional sense," wrote Douglas, "must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom."<sup>102</sup>

Six years later, in *Kent v. Dulles*,<sup>103</sup> a majority of the Court for the first time suggested a willingness to consider certain non-textually specified rights as warranting the type of heightened protection for which Douglas had argued in his *Pollak* dissent. Technically, the Court's holding in *Kent* addressed only a question of statutory interpretation—narrowly construing the President's statutory authority to "designate and prescribe" rules concerning the issuance of passports.<sup>104</sup> But this narrow construction was itself premised on the Court's assumption that "[t]he right to travel" was "a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment," a freedom that the Court characterized as both "deeply engrained in our history" and "basic in our scheme of values."<sup>105</sup>

Any lingering uncertainty regarding the constitutional status of the right to travel was put to rest by Justice Goldberg's 1964 opinion for the Court in *Aptheker v. Secretary of State*.<sup>106</sup> In that opinion, Goldberg reaffirmed the Court's earlier declaration in *Kent* "that the right to travel abroad is 'an important aspect of the citizen's liberty' guaranteed in the Due Process Clause of the Fifth Amendment."<sup>107</sup> More importantly, Goldberg relied upon this newly recognized due process liberty not merely to narrowly construe a statute, as had been done in *Kent*, but rather to hold a federal statute "unconstitutional on its face."<sup>108</sup>

Situating the *Griswold* opinions within these mid-twentieth-century debates regarding substantive due process and the relationship between the Fourteenth Amendment and the Bill of Rights sheds useful light on the

99 *Id.* at 466 (Black, J., concurring in part and dissenting in part).

100 *Id.* at 467 (Douglas, J., dissenting).

101 *Id.* at 467–70.

102 *Id.* at 467.

103 357 U.S. 116 (1958).

104 *Id.* at 123, 129–30.

105 *Id.* at 125–26.

106 378 U.S. 500 (1964).

107 *Id.* at 505 (quoting *Kent*, 357 U.S. at 127) (internal quotation marks omitted).

108 *Id.* at 514.

nature of the doctrinal innovation that *Griswold* itself represented. *Griswold* is often characterized as having “revived” a line of substantive due process precedents that had lain dormant since the pre–New Deal period.<sup>109</sup> But whatever accuracy this characterization may hold, it must be qualified by recognition of the fairly significant body of post–New Deal substantive due process precedent that existed in 1965.<sup>110</sup>

The most explicit endorsement of substantive due process as a basis for the Court’s holding in *Griswold* was provided by Justice Harlan’s separate concurrence, which essentially incorporated by reference Harlan’s own earlier dissent in *Poe v. Ullman*. At first glance, the relatively conservative Harlan might seem like an unlikely champion of the open-ended due process theory articulated in his *Poe* and *Griswold* opinions.<sup>111</sup> But this flexible and open-ended interpretation of the Due Process Clause was entirely in keeping with the approach preferred by Justice Harlan and his fellow conservatives, who repeatedly invoked this vision of due process in the incorporation context as a means of allowing state decision makers a wider ambit of authority than would have been permitted by the total incorporation approach favored by Justices Douglas and Black.<sup>112</sup> Though the influence of this particular mode of due process analysis had already begun to wane in the incorporation context by 1965,<sup>113</sup> Justice Harlan’s opinions in *Griswold* and *Poe* helped to ensure that the conservatives’ vision of due process as a broad and flexible

109 See *supra* note 75.

110 See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 487 n.1 (1965) (Goldberg, J., concurring) (invoking *Aptheker*, *Schwartz*, *Bolling*, *Kent*, and other substantive due process cases in responding to the dissenters’ objections to extending protection to rights not explicitly enumerated in the text); cf. Paul G. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 251 (1965) (opining that “[i]nsofar as the result in *Griswold* rests on the fundamental rights interpretation of the due process clause of the fourteenth amendment, . . . the case states no new theory and is consistent with the main line of development under the substantive rights interpretation of the liberty protected by the due process clause”).

111 See, e.g., Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CAL. L. REV. 1101, 1105 & n.14 (2012) (identifying Harlan as the Justice who “most consistently espoused” a philosophy of judicial conservatism “[w]hen the Warren Court was at its apex from 1962 to 1969”).

112 See, e.g., *Roth v. United States*, 354 U.S. 476, 502 (1957) (Harlan, J., concurring in part and dissenting in part) (“It seems to me that nothing in the broad and flexible command of the Due Process Clause forbids California to prosecute one who sells books whose dominant tendency might be to ‘deprave or corrupt’ a reader.”); *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring) (contending that “due process of law” is “not a stagnant formulation of what has been achieved in the past but a standard for judgment in the progressive evolution of the institutions of a free society” (internal quotation marks omitted)).

113 See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 15 (1964) (Harlan, J., dissenting) (criticizing the majority’s view “that the Due Process Clause of the Fourteenth Amendment” allowed the Court “to pick and choose among the provisions of the first eight Amendments and apply those chosen, freighted with their entire accompanying body of federal doctrine, to law enforcement in the States”); cf. *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3034–35 (2010) (describing subsequent ascendance of this “selective incorporation” approach).

guarantor of “fundamental” individual rights continued to exert a strong influence over cases decided outside the context of the “incorporation” controversy.<sup>114</sup>

### III. THE PATH TO THE NINTH AMENDMENT

One of the most remarkable features of *Griswold*—both at the time of the decision and in retrospect—involved the decision by both Justice Douglas and, more pointedly, Justice Goldberg, to invoke the Ninth Amendment<sup>115</sup> as support for invalidating the Connecticut law. Given the prevailing assumption that the Ninth Amendment had gone virtually unnoticed since its adoption more than a century and a half earlier,<sup>116</sup> the Justices’ willingness to give that Amendment new vitality struck many observers as little short of “astonishing.”<sup>117</sup>

The individual-rights-focused gloss Justice Goldberg placed on the Ninth Amendment has cast a long shadow over subsequent academic and judicial discussions of the Amendment.<sup>118</sup> By claiming to have located a specific textual source that would support extending judicial protection to unenumerated individual rights, Justice Goldberg’s concurrence promised a way forward for unenumerated rights protection that would avoid both the “Lochnerian” overtones of Justice Harlan’s “pure” substantive due process approach and the seeming eccentricity of Justice Douglas’s “penumbral” approach.<sup>119</sup>

This reading did not, however, originate with Justice Goldberg. Principal credit for the mid-twentieth century revival of interest in the Ninth Amendment belongs to Bennett B. Patterson and his 1955 book, *The Forgotten*

114 See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 756 & n.4 (1997) (Souter, J., concurring) (characterizing Justice Harlan’s *Poe* dissent as the foundation for the Court’s modern substantive due process jurisprudence).

115 U.S. CONST. amend. IX (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”).

116 Justice Goldberg claimed that “this Court has had little occasion to interpret the Ninth Amendment” and declared in a footnote that he had been able to locate only three prior Supreme Court discussions of the Ninth Amendment. *Griswold v. Connecticut*, 381 U.S. 479, 490–91 & n.6 (1965) (Goldberg, J., concurring). For an argument that Justice Goldberg overlooked a significant body of Ninth Amendment case law from the nineteenth and early twentieth centuries, see Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 710 (2005).

117 See, e.g., Emerson, *supra* note 22, at 227 (noting “the astonishment of many observers” at the Justices’ willingness to “consider the ninth amendment as a basis for invalidating” the statute); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 149 (referring to the “astonishing resuscitation” of the Ninth Amendment in *Griswold*).

118 See Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 504–08 (2011) (discussing the influence of Justice Goldberg’s concurrence in shaping subsequent academic debates regarding the Ninth Amendment’s original meaning).

119 See *infra* Part IV (discussing Douglas’s “emanations” and “penumbras” theory).

*Ninth Amendment*.<sup>120</sup> Patterson, a practicing attorney in Texas, was hardly a likely figure to inspire a serious academic debate regarding constitutional interpretation. But his book and the theory of the Ninth Amendment it espoused have had a lasting impact on judicial and academic discussions of the Amendment.<sup>121</sup>

Patterson characterized the Ninth Amendment as potentially “the most significant and forceful clause in the entire Constitution” and the only constitutional provision that “makes a declaration of the sovereignty and dignity of the individual.”<sup>122</sup> Though he acknowledged the existence of “a number of cases which briefly mention[ed]” the Amendment “by grouping it with the Tenth Amendment,” Patterson asserted that these cases were “actually” about the Tenth Amendment and did not address the meaning of the Ninth.<sup>123</sup> With the bulk of pre–New Deal case law discussing the Ninth Amendment thus disposed of, Patterson was free to characterize the Amendment as an essentially “forgotten” provision that had been included in the Bill of Rights as a “basic statement of the inherent natural rights of the individual.”<sup>124</sup>

Initial reaction to Patterson’s book was less than favorable. A reviewer in the *Notre Dame Lawyer* lamented that Patterson’s argument “never jells into complete intelligibility” and dismissed his interpretation as “a melange of nineteenth century laissez faire theory and eighteenth century contractarianism.”<sup>125</sup> Another reviewer similarly criticized Patterson’s argument as reflecting “an amazing reversion to . . . the wholly discredited [natural law] philosophy.”<sup>126</sup> A particularly caustic review published in the *Vanderbilt Law Review* suggested that Patterson’s arguments might induce readers to conclude “that it is just as well the Ninth Amendment has been forgotten.”<sup>127</sup>

Arriving as it did at the height of the legal process school’s ascendance within the legal academy, the critical reaction to Patterson’s book—with its overtones of natural law and unbounded judicial discretion—was perhaps to be expected.<sup>128</sup> Somewhat more surprising was the fact that Patterson’s arguments did not fade entirely from the public legal consciousness following their harsh initial reception. Two articles published in the late 1950s—one by Tulane law professor Mitchell Franklin and the other by former Roosevelt Justice Department official O. John Rogge—gave Patterson’s arguments a relatively respectful treatment, while stopping short of fully endors-

120 BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (2d prtq. 2009).

121 See, e.g., Lash, *supra* note 116, at 708 (observing that Patterson’s book “has been cited by almost every significant work on the Ninth Amendment since 1965”).

122 PATTERSON, *supra* note 120, at 1.

123 *Id.* at 32. *But cf.* Lash, *supra* note 116, at 708–09 (criticizing Patterson’s characterization of the prior case law).

124 PATTERSON, *supra* note 120, at 19.

125 Stanley J. Parry, Book Review, 31 *NOTRE DAME LAW.* 329, 330 (1956).

126 Donald J. Farage, Book Review, 60 *DICK. L. REV.* 288, 289 (1956).

127 Robert J. Harris, Book Review, 10 *VAND. L. REV.* 161, 162 (1956).

128 See Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 *CONST. COMMENT.* 463, 474–80 (1995), for a discussion on the influence of the legal process school within the legal academy during the early 1950s.

ing his expansive view of the Ninth Amendment's role in the constitutional scheme.<sup>129</sup>

But the crucial development that would elevate Patterson's theory to a position of true academic respectability arrived in the form of a 1962 law review article by Professor Norman Redlich.<sup>130</sup> Redlich opened his article by observing that the era epitomized by the "*Adamson* [c]ontroversy," which focused on the relationship between the Bill of Rights and the Fourteenth Amendment, was drawing to a close.<sup>131</sup> Noting that the Court had already "incorporated" many of the most significant Bill of Rights guarantees, Redlich cautioned that "we may be approaching an era where human dignity and liberty will require the protection of rights other than those contained in the first eight amendments."<sup>132</sup>

Redlich took as his central example of a case illustrating the possible need for additional rights protection the "well-publicized case concerning the constitutionality of Connecticut's birth control laws."<sup>133</sup> Redlich rejected the "flexible due process" approach reflected in Justice Harlan's *Poe* dissent, noting the "grave danger that Justices may fail to regard as fundamental the more important provisions of the Bill of Rights."<sup>134</sup> A better approach, in Redlich's view, lay in reinvigorating the Ninth Amendment as a restraint on state and federal power.<sup>135</sup> Echoing Patterson's individual-rights-focused interpretation, Redlich argued that the Ninth Amendment reflected the Framers' recognition that "there were rights, not enumerated in the Constitution, which were 'retained . . . by the people,' and that because the people possessed such rights there were powers which neither the federal government nor the states possessed."<sup>136</sup>

Redlich's gloss on Patterson's Ninth Amendment theory had immediate influence, most significantly on Yale law professor Fowler Harper, one of the lawyers representing Griswold and Buxton.<sup>137</sup> Inspired by Redlich, Harper incorporated a Ninth Amendment argument into the appellate brief he submitted to the Supreme Court, contending that the Amendment "should be interpreted to protect aspects of what has been called the rights of privacy as a protection additional to that afforded by other Amendments."<sup>138</sup> And

129 See Mitchell Franklin, *The Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution*, 4 HOW. L.J. 170, 173-77 (1958); O. John Rogge, *Unenumerated Rights*, 47 CAL. L. REV. 787, 799-804, 806-11 (1959).

130 See Norman Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787 (1962).

131 *Id.* at 787-94.

132 *Id.* at 787.

133 *Id.* at 795.

134 *Id.* at 799.

135 *Id.* at 804-08.

136 *Id.* at 807.

137 See GARROW, *supra* note 11, at 216-17 (discussing Harper's "considerable intellectual excitement" upon learning of Redlich's article).

138 GARROW, *supra* note 11, at 225 (quoting appellate brief of Harper Fowler) (internal quotation marks omitted).

though only two paragraphs of the appellants' merits brief mentioned the Ninth Amendment specifically,<sup>139</sup> the Amendment would play an important role in the Justices' internal deliberations regarding the case.<sup>140</sup>

Following oral argument, it was clear that seven Justices would vote to reverse the convictions. But no single rationale attracted the support of five Justices. Justice Douglas's draft opinion had already garnered the support of Justices Brennan, Goldberg, and Clark. But Chief Justice Warren was skeptical of both that approach and Justice Harlan's "pure" substantive due process rationale. After some initial dithering, the Chief Justice indicated that he would join Justice White's opinion, which concurred in the judgment but not in the reasoning of any of the other opinions. Had this alignment held, *Griswold* would have been decided on a plurality basis with no single opinion attracting majority support.<sup>141</sup>

Justice Goldberg, sensing the Chief Justice's dissatisfaction with Justice Douglas's draft, tasked one of his clerks—future Supreme Court Justice Stephen Breyer—with drafting a separate concurrence focusing particularly on the Ninth Amendment. Chief Justice Warren found the resulting opinion sufficiently persuasive to switch his vote from Justice White's opinion to Justice Goldberg's newly drafted concurrence. And though Chief Justice Warren refrained from joining Douglas's opinion directly, Justice Goldberg opened his opinion with a statement of general agreement with Justice Douglas's reasoning, allowing the Chief Justice's vote to be imputed to Douglas's opinion and producing a clear five-vote majority.<sup>142</sup>

The critical role of Justice Goldberg's Ninth Amendment argument in capturing Chief Justice Warren's vote illustrates an underappreciated aspect of the Court that bears Warren's name. It has become commonplace to characterize the Warren Court as one that cared little about text or original understanding.<sup>143</sup> But as Professor Frank Cross has shown, at least when judged by their choice of interpretive sources, the Warren Court Justices were not appreciably less "originalist" than their predecessors.<sup>144</sup> To the contrary, citations to interpretive sources typically associated with originalist interpretation—such as *The Federalist* and the records of debates in the Philadelphia Convention and in the state ratifying conventions—reached new highs during Chief Justice Warren's tenure.<sup>145</sup> And while it is, of course,

139 See Brief for Appellants, *supra* note 8, at 82–83.

140 The discussion in the next two paragraphs is drawn from GARROW, *supra* note 11, at 242.

141 *Id.*

142 *Id.*

143 See, e.g., JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 36 (2005) (contending that Warren Court decision making was characterized by a "revolt against formalism" and that considerations of "text and original meaning . . . receded into the jurisprudential background" (internal quotation marks omitted)).

144 See Frank B. Cross, *Originalism—The Forgotten Years*, 28 CONST. COMMENT. 37, 41–43 (2012) (comparing citations of sources associated with originalist interpretation during the Warren Court era to citations of such sources during earlier periods).

145 *Id.*

difficult to arrive at objectively verifiable determinations regarding the actual influence of such sources, avowedly originalist arguments did feature prominently in several of the Court's most significant and controversial constitutional decisions.<sup>146</sup> It is likely no coincidence that the first prominent complaints by professional historians about judicial misuse of "law office history" began to emerge during these years.<sup>147</sup>

Even if one accepts the view that some or all of the Warren Court Justices viewed historical arguments of this kind as little more than a fig leaf for results reached on other grounds,<sup>148</sup> it would not necessarily warrant the conclusion that the fig leaf itself was unimportant. Even Justices who may have been unwilling to follow the historical evidence to a result they deemed unpalatable may nonetheless have viewed the availability of a historically grounded rationale as a relevant factor in choosing a doctrinal framework within which to rationalize a desired result. At a minimum, the availability of the individual-rights interpretation of the Ninth Amendment may have provided some level of psychological comfort to some Justices by reassuring them that a strong doctrine of unenumerated rights protection could be reconciled with (or at least could be made to appear reconcilable with) the constitutional design that the Framers envisioned.

#### IV. THE PATH TO "PENUMBRAS" AND "EMANATIONS"

Of course, neither the Ninth Amendment nor substantive due process provided the analytic framework for the opinion that would serve as the official statement endorsed by a majority of five Justices. That opinion, authored by Justice Douglas, instead identified a novel explanatory account of how the Constitution protected a freestanding right to privacy, which was inspired by multiple Bill of Rights provisions but immediately traceable to none. In Justice Douglas's memorable phrasing, the "specific guarantees in the Bill of

---

146 See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273–77 (1964) (invoking the late eighteenth-century controversy over the Alien and Sedition Acts as grounds for speech-protective restrictions on libel actions); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (invoking the records of the Philadelphia Convention and *The Federalist* in holding that congressional districts must be equal in size); *Engel v. Vitale*, 370 U.S. 421, 425–36 (1962) (invoking English and colonial history, as well as James Madison's *Memorial and Remonstrance Against Religious Assessments*, in holding that prayer in public schools violated the Establishment Clause).

147 The still-classic statement of this critique—and the one in which the phrase "law office history" was originally coined—arrived the same year as *Griswold* and offered Justice Goldberg's Ninth Amendment argument as an illustration of the phenomenon. See Kelly, *supra* note 117, at 122, 149–55; see also Mark DeWolfe Howe, *Split Decisions*, N.Y. REV. BOOKS, July 1, 1965, at 14, 16 (complaining that "[o]nly within recent years . . . have the Justices, who have discovered and embraced the solacing simplicities endeavored to persuade us that a careful reading of history confirms their confidence").

148 See Cross, *supra* note 144, at 43 (discussing this characterization of certain Warren Court Justices).

Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>149</sup>

To characterize Justice Douglas’s “penumbras” and “emanations” reasoning as unsuccessful would be an understatement. The line is at once among the most widely recognized statements written by Justice Douglas during his long judicial career and “one of the most ridiculed sentences in the annals of the Supreme Court.”<sup>150</sup> Douglas’s reasoning has struck many observers as so far beyond the pale of conventional constitutional reasoning as to defy explanation.<sup>151</sup>

Before probing into the logic underlying Justice Douglas’s “penumbras and emanations” approach, it will be useful to take a step back and consider how *un*-remarkable some of the general ideas animating his opinion may have seemed in 1965. Though the concept of a legal “right to privacy” originated in tort law, the concept soon found its way into the constitutional realm through the intervention of one of its principal originators—Justice Brandeis.<sup>152</sup> In his famous 1928 dissent in *Olmstead v. United States*, Justice Brandeis identified privacy as the key animating value underlying the Fourth Amendment and equated that provision with the Founders’ recognition of a “right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”<sup>153</sup> During the years following World War II, privacy ideas gradually spread to adjacent doctrines, becoming associated with not only the Fourth Amendment, but also the First Amendment freedoms of speech and association.<sup>154</sup> By the early 1960s, privacy ideas had so proliferated through constitutional doctrine that Harvard Law Dean Erwin Griswold<sup>155</sup> could refer to Justice Brandeis’s “right to be let alone” as “the underlying theme of the Bill of Rights.”<sup>156</sup>

Nor was the idea that the Constitution might protect a free-standing substantive “right to privacy” completely off the wall in 1965. Justice Douglas

149 *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

150 Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1485–86 (2008); *see also*, e.g., David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 28 (1999) (“This passage, with its penumbras and emanations, is a strange one, and I can attest from personal experience that it attracts a great deal of ridicule in law school faculty lounges.”).

151 *See, e.g.*, Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 387 n.53 (1982) (suggesting that Justice Douglas’s *Griswold* opinion might be so far outside the conventional “genre” of constitutional reasoning as to defy attempts at parody).

152 *See generally* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1343–57, for an analysis of Justice Brandeis’s influence on the development of the tort law right to privacy. *See also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

153 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in part by* *Katz v. United States*, 389 U.S. 347 (1967).

154 *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 543–46 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 522–24 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

155 “[N]o relation to Estelle.” GARROW, *supra* note 11, at 417.

156 Erwin N. Griswold, *The Right to Be Let Alone*, 55 NW. U. L. REV. 216, 217 (1960).

himself had embraced the idea as early as 1952 in his *Pollak* dissent.<sup>157</sup> And both he and Harlan had embraced versions of the idea in their separate dissenting opinions in *Poe*.<sup>158</sup> Professor Redlich's 1962 article endorsing a revival of the Ninth Amendment had argued for an unenumerated privacy right in terms very similar to those reflected in Justice Douglas's *Griswold* opinion, urging courts to look to "the entire Constitution" in order to identify rights "adjacent to, or analogous to" textually specified rights.<sup>159</sup> And two years before *Griswold*, the U.S. Court of Appeals for the Ninth Circuit had held that a section 1983 damages action could be maintained against government officials based on an alleged violation of the plaintiff's "privacy," which the Ninth Circuit concluded was "comprehended within the 'liberty' of which one may not be deprived without due process of law."<sup>160</sup>

Given the existence of a reasonable amount of preexisting precedential and intellectual support for viewing privacy as both a key theme underlying the Bill of Rights and as a freestanding constitutional interest warranting judicial protection, why did Justice Douglas's effort to extrapolate such a right from various Bill of Rights guarantees fall so flat? Part of the blame must undoubtedly be placed on the opinion itself.<sup>161</sup> Justice Douglas's explanation for how he derived a right to privacy from the specific guarantees in the Bill of Rights was so "convoluted," "confusing," and "opaque"<sup>162</sup> that a small cottage industry of scholarship has grown up around the project of trying to figure out exactly what he was trying to say.<sup>163</sup>

The conventional explanation of Justice Douglas's opinion starts with the conception of particular Bill of Rights guarantees "emanat[ing]" a sphere

157 See *supra* notes 100–02 and accompanying text (discussing Justice Douglas's *Pollak* dissent).

158 See *Poe v. Ullman*, 367 U.S. 497, 516–22 (1961) (Douglas, J., dissenting); *id.* at 539–55 (Harlan, J., dissenting).

159 Redlich, *supra* note 130, at 810, 812.

160 *York v. Story*, 324 F.2d 450, 454–55 (9th Cir. 1963); see also *Silverman v. United States*, 275 F.2d 173, 179 (D.C. Cir. 1960) (Washington, J., dissenting) (arguing that police eavesdropping that does not violate the Fourth Amendment could nonetheless be found to "violate . . . our fundamental concept of ordered liberty, as embodied in the due process clauses of the Fifth and Fourteenth Amendments"), *rev'd*, 365 U.S. 505 (1961).

161 See, e.g., Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 722 (2010) (observing that "the initial criticism of Justice Douglas's opinion . . . went less to its promiscuity than to its inscrutability").

162 See, e.g., Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1283 (2007) (characterizing Justice Douglas's opinion as "convoluted"); Kent Greenawalt, *Criminal Law and Population Control*, 24 VAND. L. REV. 465, 478 (1971) ("rather opaque"); Pierre Schlag, Commentary, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1113 (2002) ("confusing").

163 See, e.g., BORK, *supra* note 24, at 97–98 (parsing the apparent underlying logic of Justice Douglas's argument in the course of criticizing the opinion); Luban, *supra* note 150, at 31–37 (providing a sympathetic reconstruction of Justice Douglas's reasoning); Mark Tushnet, *Two Notes on the Jurisprudence of Privacy*, 8 CONST. COMMENT. 75, 75–79 (1991) (arguing that Justice Douglas's "opinion offers a defensible form of legal argument").

of additional rights whose judicial protection is necessary to protect the core rights specified in the constitutional text.<sup>164</sup> So far so good. Though judicial enforcement of such “peripheral” or “prophylactic” rights is not entirely free from controversy, such rights are now a familiar part of constitutional law.<sup>165</sup> Nor is it wholly implausible that certain activities might fall within the periphery of multiple constitutionally protected rights or that the existence of such overlap might affect the judicial assessment of how much protection those activities should receive. But Justice Douglas’s *Griswold* opinion failed to connect the dots by showing that the ability of married couples to use contraceptives was necessary to the protection of *any* of the “core” textually enumerated rights to which he referred. How, for example, would protecting the “peripheral” right to contraceptive use protect the “core” Third Amendment right against having troops quartered in one’s private home?<sup>166</sup> Instead, some of Douglas’s language conveys the impression of what Robert Bork derided as a “miracle of transubstantiation”—the transformation of various peripheral rights into an entirely new and freestanding “core” right.<sup>167</sup>

There is, however, another way of understanding what Douglas may have had in mind. Professor David Luban has provided a sympathetic reconstruction of Douglas’s opinion that rejects the conventional view’s starting point—namely, that Douglas conceived of the right to privacy as a peripheral protection necessary to protect the core Bill of Rights guarantees.<sup>168</sup> Rather, Luban argues that Douglas conceived the privacy right itself as the background principle or purpose that motivated the adoption of particular textually specified provisions. On this understanding, the right to privacy is not a mere peripheral right that is necessary to protect “core” interests underlying enumerated rights, such as the First, Third, and Fourth Amendments; rather the right to privacy is itself the core interest and the textually specified guarantees are the peripheral rights that were adopted, in whole or in part, for the purpose of protecting individuals’ core interest in privacy.<sup>169</sup>

When understood in this way, Justice Douglas’s key interpretive moves—i.e., identifying a perceived background “purpose” underlying the textually expressed language of the Constitution and then giving that perceived pur-

164 See, e.g., BORK, *supra* note 24, at 97 (expressing this understanding of Justice Douglas’s reasoning); Anthony R. Blackshield, *Constitutionalism and Comstockery*, 14 U. KAN. L. REV. 403, 445–47 (1966) (same); Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 190–96 (same).

165 See generally David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) (arguing that “‘prophylactic’ rules are . . . a central and necessary feature of constitutional law”).

166 See Posner, *supra* note 164, at 191 (describing Justice Douglas’s invocation of the Third Amendment as “singularly inapt”).

167 Bork, *supra* note 2, at 8; see also BORK, *supra* note 24, at 97–98.

168 Luban, *supra* note 150, at 31.

169 *Id.* at 31–32; see also Richard D. Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. RTS. L. REV. 43, 62–63 (1986) (offering a similar reading of Justice Douglas’s *Griswold* opinion).

pose direct legal effect—were fully consistent with the Warren Court’s preferred interpretive approach. As Professors William Eskridge and Philip Frickey observe, the Warren Court’s statutory interpretation jurisprudence was characterized by a “strongly purposive” approach that “rendered the plain meaning rule virtually a dead letter.”<sup>170</sup> Justice Brennan had explicitly encouraged Douglas to pursue such a purposive approach to the *Griswold* opinion early in the drafting process. After reviewing Douglas’s initial draft, which proposed to ground the right to marital privacy in the First Amendment freedom of association, Justice Brennan urged him to take a different tack that focused less explicitly on text and more centrally on the underlying purposes of the Bill of Rights:

Instead of expanding the First Amendment right of association to include marriage, why not say that what has been done for the First Amendment can also be done for some of the other fundamental guarantees of the Bill of Rights? In other words, where fundamentals are concerned, the Bill of Rights guarantees are but expressions or examples of those rights, and do not preclude applications or extensions of those rights to situations unanticipated by the Framers.<sup>171</sup>

Had Douglas followed this advice and written a more overtly purposive opinion—rather than straining for an obscure astronomical metaphor—his opinion might very well have been better received, or at least better understood, by subsequent generations of commentators.

Of course, to say that Douglas’s *Griswold* opinion can be understood as reflecting a (somewhat) recognizable form of conventional legal reasoning is not to say that either the reasoning itself or its application was uncontroversial. The Warren Court’s strongly purposive interpretive methods often came in for criticism, both from other Justices writing in dissent and from outside commentators.<sup>172</sup> And one need hardly be a die-hard textualist to believe that “when the Constitution sought to protect private rights it specified them” and that its explicit protection of “some elements of privacy, but not others,” therefore “suggests that it did not mean to protect those not mentioned.”<sup>173</sup>

---

170 See Eskridge & Frickey, *supra* note 32, at cv–cvi; see also Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 456 (2005) (observing that “[f]rom the 1950s until the 1970s . . . the interpretive conventions associated with [purposivism] dominated American jurisprudence”).

171 William Brennan, Note from William Brennan to William O. Douglas (Apr. 24, 1965) (on file with the Library of Congress, the Papers of William J. Brennan, box II: 6) (quoted in KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* 326 (2009)).

172 See, e.g., *Nat’l Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 663 (1967) (Stewart, J., dissenting) (complaining that the majority ignored the “plain meaning of the statute” and “substituted its own notions of sound labor policy for the word of Congress”); Harry H. Wellington & Lee A. Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547, 1562–63 (1963) (arguing that strong purposivism was inappropriate in certain categories of cases, including those requiring “resolution of contested issues touching upon sensitive areas of our social and economic life”).

173 Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1422 (1974).

Perhaps most critically, Justice Douglas defied convention by refusing to tie his structurally derived right to privacy back into the interpretation of some particular textually specified right. Earlier efforts to justify such a right had started with reasoning similar to Douglas's but ultimately honed in on a particular textual provision as the authoritative source of the right in question, such as the Ninth Amendment or the Due Process Clauses. The type of free-form structural reasoning attempted by Douglas was not wholly alien to American constitutional practice.<sup>174</sup> But it remained (and remains) a deeply controversial interpretive move—at least when the structurally derived principle is not eventually tied back to the interpretation of some specific textual provision as to which there is some reasonable level of ambiguity.<sup>175</sup>

Douglas's refusal to connect his "penumbral" theory of privacy to a particular constitutional provision is conventionally attributed to his presumed hostility toward substantive due process.<sup>176</sup> This explanation is complicated, however, by Douglas's embrace of substantive due process in earlier opinions, including his *Pollak* dissent,<sup>177</sup> his majority opinion in *Kent v. Dulles*,<sup>178</sup> and his dissenting opinion in *Poe v. Ullman* from just four years earlier.<sup>179</sup> In each of those opinions, Douglas had relied upon an unambiguously "substantive" interpretation of due process liberty as a basis for extending constitutional protection to non-textually grounded rights. Douglas's *Griswold* opinion, by contrast, contained only a single reference to the Fourteenth Amendment Due Process Clause, which appears in a passage designed to distance the opinion from the philosophy of *Lochner v. New York*<sup>180</sup> and other cases from the pre–New Deal era.<sup>181</sup>

---

174 See, e.g., *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43–49 (1867) (inferring a prohibition on state interference with interstate movement of citizens based largely on structural reasoning regarding the relationships between the states, citizens, and the federal government). The now-classic defense of this form of structural reasoning as a legitimate method of constitutional argument would not appear until four years after *Griswold* was handed down. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 3–32 (1969).

175 Cf. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2067–68 (2009) (distinguishing between these two uses of structural reasoning and observing that modern textualists "readily embrace" the latter use while rejecting the former).

176 See, e.g., Devins, *supra* note 11, at 1440; Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1366 (2010) (claiming that "Douglas had long opposed protecting substantive rights under the due process clause" and identifying *Griswold* as a case in which he "performed somersaults" in order "to avoid resort to . . . substantive due process").

177 *Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting); see *supra* notes 101–02 (discussing Justice Douglas's *Pollak* dissent).

178 357 U.S. 116 (1958) (majority opinion); see *supra* notes 103–05 (discussing *Kent*).

179 *Poe v. Ullman*, 367 U.S. 497, 515–17 (1961) (Douglas, J., dissenting).

180 198 U.S. 45 (1905), *overruled in part by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

181 *Griswold v. Connecticut*, 381 U.S. 479, 481–82 (1965) ("Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Four-

It is not clear why Douglas shifted away from the more straightforward substantive due process rationale he had relied upon in *Poe* and earlier cases in favor of his newly fashioned “penumbral” theory. But whatever the reason, Douglas’s refusal to connect his theory of constitutional privacy to any particular constitutional provision rendered his *Griswold* opinion too eccentric to provide a strong foundation for the subsequent development of the Court’s unenumerated rights jurisprudence. Eight years later in *Roe v. Wade*, the Court itself would tacitly acknowledge this point by, somewhat awkwardly, re-grounding the constitutional right to privacy squarely in substantive due process.<sup>182</sup>

## V. THE PATH TO “STRICT SCRUTINY”

Identifying marital privacy as a constitutionally protected liberty interest—whether under Justice Douglas’s penumbral reasoning, Justice Goldberg’s Ninth Amendment theory, Justice Harlan’s “pure” substantive due process approach, or some other rationale—was not enough to resolve the constitutional challenge in *Griswold*. In addition to identifying the constitutional status of the right in question, the Court needed to assess that right in relation to Connecticut’s asserted interest in regulating the use of contraceptives by married couples. This aspect of the case implicated another important doctrinal development that was taking place during the period surrounding *Griswold*—namely, the rise of “strict scrutiny.”

Under contemporary doctrine, the strict scrutiny standard demands that the government be able to show that challenged measures “are narrowly tailored” and that they “further compelling governmental interests” in order to avoid a finding of unconstitutionality.<sup>183</sup> Despite its seeming present ubiquity, this standard is of relatively recent vintage. Courts of the late nineteenth and early twentieth centuries did not spend much time discussing the level of scrutiny they would apply in assessing the constitutionality of challenged legislation. Instead, judicial review during this period focused principally on conceptual line drawing, seeking to identify the proper ambit of state regulatory authority.<sup>184</sup> In general, cases falling within the conceptual

---

teenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation . . . .” (citation omitted)).

182 See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

183 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); see also Fallon, *supra* note 162, at 1273–74.

184 See generally G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 35–65 (discussing the emergence and eventual collapse of this “boundary tracing” model of judicial review).

boundary lines drawn by the Court were deemed constitutional while those falling outside those boundaries were held unconstitutional.<sup>185</sup>

This “boundary tracing” model of constitutional review did not survive the constitutional transformations that accompanied the New Deal. Beginning in the 1930s, the Court moved away from its focus on conceptual line-drawing in favor of a more capacious understanding of state regulatory authority.<sup>186</sup> But it was not immediately clear what model of constitutional review would replace the boundary-tracing model. The famous “footnote four” of Justice Stone’s *Carolene Products* opinion had signaled that the generous “presumption of constitutionality” attaching to most legislation might apply with lesser force in certain categories of cases.<sup>187</sup> But that opinion did not spell out how such a lessened presumption would be implemented or what judicial review under the new model would look like.

Beginning in the 1940s, language started appearing in some opinions suggesting that certain Bill of Rights guarantees—particularly the First Amendment freedoms of speech, press, and religion—would be singled out for particularly strong judicial protection.<sup>188</sup> But the Justices failed to agree on the precise significance of such heightened protection. Justice Frankfurter and other “low protectionists” generally viewed the involvement of a “preferred” liberty as doing little more than removing the question from the extremely lenient “rational basis” framework and subjecting the challenged governmental action to something more like a “reasonableness” standard.<sup>189</sup> By contrast, Justices Black and Douglas endorsed a strongly rights-protective standard that verged on absolute protection.<sup>190</sup>

At around the same time the Justices were grappling with the “preferred position” doctrine in cases involving First Amendment liberties, the Court began to grapple with a closely related set of problems in the equal protection context. The first reference to “strict scrutiny” in a Supreme Court opinion came in Justice Douglas’s 1942 opinion for the Court in *Skinner v. Oklahoma*—a case involving a constitutional challenge to a law mandating

185 See, e.g., *id.* at 44–46; Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 *POL. RES. Q.* 623, 637 (1994).

186 See White, *supra* note 184, at 63–65.

187 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

188 See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (“[F]reedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.”).

189 See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250, 261 (1952) (Frankfurter, J.) (upholding a state law prohibiting group libel on racial or religious grounds because the state’s legislature was not “without reason in seeking ways to curb false or malicious defamation of racial and religious groups”).

190 See, e.g., *id.* at 275 (Black, J., dissenting) (“I think the First Amendment, with the Fourteenth, ‘absolutely’ forbids . . . laws [making it a crime to petition for or publicly discuss proposed legislation] without any ‘ifs’ or ‘buts’ or ‘whereases.’”); *Dennis v. United States*, 341 U.S. 494, 590 (1951) (Douglas, J., dissenting) (“Unless and until extreme and necessitous circumstances are shown, our aim should be to keep speech unfettered . . .”).

compulsory sterilization for certain categories of offenders.<sup>191</sup> Refusing to apply the deferential rational basis standard, Justice Douglas emphasized the “fundamental” nature of the liberty at stake, characterizing the right to procreate as “one of the basic civil rights of man” and one that was “fundamental to the very existence and survival of the race.”<sup>192</sup> Justice Douglas thus urged that “strict scrutiny” of the legislative classification was “essential, lest . . . invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.”<sup>193</sup>

Despite the “potentially pathbreaking” implications of its decision, the *Skinner* Court “did not pause to specify what ‘strict scrutiny’ entailed,” and the “fundamental rights” equal protection framework the Court suggested went largely undeveloped over the next two decades.<sup>194</sup> Instead, equal protection doctrine in the years following *Skinner* focused almost exclusively on racial discrimination.<sup>195</sup> In *Korematsu v. United States*,<sup>196</sup> decided in 1944, the Court declared that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and that “courts must subject them to the most rigid scrutiny.”<sup>197</sup> It went on, however, to uphold the challenged military order excluding all persons of Japanese descent from certain designated areas of the West Coast.<sup>198</sup> Following World War II, the Court gave more bite to its “rigid scrutiny” standard in cases involving race, striking down a series of state laws discriminating against Japanese Americans and showing an increasing willingness to invalidate laws and policies involving racial segregation.<sup>199</sup> But even these cases stopped short of declaring that all race-based legal classifications would trigger “strict scrutiny” in its modern form, as did the Court’s landmark 1954 decisions invalidating racial segregation in public schools.<sup>200</sup>

---

191 316 U.S. 535 (1942).

192 *Id.* at 541.

193 *Id.*

194 Fallon, *supra* note 162, at 1282.

195 See CURRIE, *supra* note 96, at 360 (observing that, with a handful of exceptions, “the Vinson Court was most unreceptive to arguments that equal protection had been denied” outside the racial discrimination context).

196 323 U.S. 214 (1944).

197 *Id.* at 216.

198 *Id.* at 217–18; cf. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 232 (1991) (arguing that “notwithstanding the grandiose rhetoric” regarding heightened scrutiny, the *Korematsu* Court “actually applied its most deferential brand of rationality review”).

199 See, e.g., McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950) (invalidating university policy providing for racial segregation); *Oyama v. California*, 332 U.S. 633 (1948) (invalidating state law restricting the ability of U.S. citizens of certain descent to own land).

200 See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954); see also Fallon, *supra* note 162, at 1276–77 (arguing that when *Brown* and *Bolling* are read together with *Korematsu*, “it becomes impossible to say that the doctrine requiring that all race-based classifications must fail unless necessary to promote compelling governmental interests began in 1954”).

Because the strict scrutiny formula emerged gradually and incrementally, it is difficult to pinpoint a single case in which the Court first recognized the modern version of the test.<sup>201</sup> There is, however, a growing scholarly consensus that the strict scrutiny standard began to take on its modern form during a period that was roughly contemporaneous with the Court's consideration of *Griswold*. For example, Professor Stephen Siegel locates "the development of the compelling interest standard and strict scrutiny in" a series of First Amendment cases decided during the "late 1950s and early 1960s."<sup>202</sup> Professor Michael Klarman has noted a similar set of transformations in the equal protection context during this period, identifying the mid-1960s as the period during which the Court first adopted a "presumptive rule against racial classifications"<sup>203</sup> and revived the "fundamental rights strand of equal protection" that had lain dormant since *Skinner* in 1942.<sup>204</sup> Combining these two sets of developments, Professor Richard Fallon argues that the modern strict scrutiny formula "evolved simultaneously in a number of doctrinal areas" during the 1960s, including First Amendment free exercise, freedom of speech, and freedom of association cases, as well as in both the racial classification and fundamental rights strands of equal protection doctrine.<sup>205</sup>

Although Justice Douglas's majority opinion in *Griswold* made no reference to "strict scrutiny" or any of the related concepts associated with the modern strict scrutiny standard, other opinions in the case borrowed freely from First Amendment and equal protection case law in considering the interests asserted by Connecticut in support of the statute. Professor Fallon singles out Justice Goldberg's concurring opinion as one that "at least arguably played a pioneering role in formulating strict scrutiny's canonical requirements."<sup>206</sup> The key passage in Justice Goldberg's opinion declared: "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. The law must be shown necessary, and not merely rationally related, to the accomplishment of a permissible state policy."<sup>207</sup> According to Fallon, this statement reflected "[t]he first articulation of the strict scrutiny test that is wholly consonant with formulations that have survived into the twenty-first century."<sup>208</sup>

---

201 See Fallon, *supra* note 162, at 1274–75 (noting "the diversity of possible origins").

202 Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 356 (2006).

203 Klarman, *supra* note 198, at 255. Klarman identifies the Court's 1964 decision in *McLaughlin v. Florida*, 379 U.S. 184 (1964), as the first to adopt the presumptive ban on racial classifications. Klarman, *supra* note 198, at 255.

204 *Id.* at 264–69.

205 See Fallon, *supra* note 162, at 1273–85.

206 *Id.* at 1283.

207 *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring) (citation omitted) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960), and *McLaughlin*, 379 U.S. at 196) (internal quotation marks omitted).

208 Fallon, *supra* note 162, at 1283.

And while Justice Goldberg perhaps deserves pride of place for bringing together the disparate strands that would eventually coalesce into the modern strict scrutiny formula, the opinions of other Justices in the case reflect broadly similar thinking regarding the standard by which to assess the constitutionality of Connecticut's contraception ban. Justice White's separate concurrence relied upon the same language Justice Goldberg had borrowed from an earlier First Amendment case as support for insisting upon a "compelling" state interest where a "significant encroachment upon personal liberty" was at issue.<sup>209</sup> He further urged that such statutes must be "reasonably necessary" for the effectuation of a "legitimate and substantial state interest, and not arbitrary or capricious in application."<sup>210</sup> Justice Harlan's separate concurring opinion did not discuss the standard of review but his earlier dissenting opinion in *Poe v. Ullman* had quoted the "strict scrutiny" language from *Skinner* and indicated that "not only the underlying, moral purpose" at which the statute was aimed but also the state's "choice of means" would be "relevant to any Constitutional judgment."<sup>211</sup>

Considered collectively, the *Griswold* opinions thus clearly indicated that in future cases involving the newly recognized constitutional privacy right, the government would be required to show a "compelling" interest as well as some degree of means-ends tailoring to avoid a finding of unconstitutionality.<sup>212</sup> This implication of the Court's decision was only bolstered by cases decided shortly after *Griswold* that employed compelling interest and narrow tailoring concepts in analogous doctrinal settings, particularly in cases involving the "fundamental rights" strand of equal protection doctrine.<sup>213</sup>

Though the *Griswold* Court's recognition of a new "fundamental" right to privacy is the case's most famous contribution to modern doctrine, the Justices' suggestion that the newly recognized right would be assimilated to the developing "strict scrutiny" framework marked a significant innovation in its own right. The introduction of the compelling state interest and narrow tailoring criteria suggested a new model of unenumerated rights protection that had never before existed.<sup>214</sup> Under this new model, rights were not simply byproducts that existed by virtue of the state's presumptively limited

209 *Griswold*, 381 U.S. at 504 (White, J., concurring) (quoting *Bates*, 361 U.S. at 524) (internal quotation marks omitted).

210 *Id.*

211 *Poe v. Ullman*, 367 U.S. 497, 547 (1961) (Harlan, J., dissenting).

212 *Cf.* Kauper, *supra* note 110, at 250 (observing that "several members of the Court" in *Griswold* appeared to believe that "an exacting judicial scrutiny, like that employed in cases involving first amendment freedoms," should be required "when legislation impinges upon the realm of the family life and marital relationship").

213 *See* Fallon, *supra* note 162, at 1281–83 (describing the emergence of strict scrutiny standard in "fundamental rights" equal protection cases).

214 *See, e.g.,* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408, 426–27 (2010) (contrasting rights protection under pre–New Deal substantive due process jurisprudence with rights protection under *Griswold* and other modern "fundamental rights" due process decisions); *see also* Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 *U. PA. J. CONST. L.* 983, 995–99 (2006) (same).

regulatory authority (the model of rights protection that had predominated prior to the New Deal). Rather, the conception of unenumerated rights that the Warren Court embraced called for singling out values for particularly strong constitutional protection, even from actions that were concededly within the scope of the state's legitimate authority. When viewed in this light, *Griswold* and later cases can be seen not so much as involving a "revival" of substantive due process decision making from an earlier era—the frame in which the case is often discussed<sup>215</sup>—but as marking an important innovation in the structure of rights protection under the Due Process Clauses.<sup>216</sup>

### CONCLUSION

It would strain plausibility to describe the outcome of *Griswold* as strictly a byproduct of incremental, internal developments in Supreme Court doctrine. Both the Justices themselves and the attorneys pressing the constitutional challenge to Connecticut's contraception ban recognized the limitations of existing doctrine as the principal "obstacle" standing in the way of the law's invalidation.<sup>217</sup> From this perspective, *Griswold* can thus be seen as a case in which the preexisting doctrinal resources were strained to reach a result that the Justices—and an overwhelming national majority—viewed as just. This is the perspective from which *Griswold* is commonly discussed.<sup>218</sup>

At the same time, however, it is important to recognize that the doctrinal innovations with which *Griswold* has come to be associated did not spring forth *ex nihilo*. Rather, the Justices' attempt to explain why the Constitution should be understood to prohibit a law that all agreed was "uncommonly silly" implicated a number of important and ongoing doctrinal and jurisprudential debates regarding the institutional authority of the Supreme Court, the relationship between the Fourteenth Amendment and the Bill of Rights, the constraints placed on judicial review by constitutional text, history, and precedent, and the degree of deference owed to more democratically accountable decision makers. Viewing *Griswold* solely from the "outside"—as a creative judicial response to influences emanating from the broader society—risks missing the extent to which the Court's response was shaped and

---

215 See, e.g., Strauss, *supra* note 13, at 878 (characterizing the view "that *Griswold* recapitulates *Lochner*" as "the standard criticism of" the case and "a concern" that is "acknowledged even by its defenders").

216 Cf. Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 752–53 (2009) (contrasting the "weak" conception of rights that predominated prior to the New Deal with the "strong" conception of rights reflected in current doctrine).

217 See, e.g., Brennan, *supra* note 171 (agreeing with Douglas that the absence of specific mention of marriage in the Bill of Rights was "the obstacle we must hurdle to effect a reversal in this case"); Emerson, *supra* note 22, at 219–20 (conceding that "the issues [in *Griswold*] did not readily fit into any existing legal pigeonhole" and that invalidating the statute would therefore force the Court into "uncharted waters").

218 See *supra* notes 11–13 and accompanying text.

constrained by the need to situate the resulting decision within the broader framework of preexisting constitutional law.

Both the decades-long journey that the constitutional challenges to the Connecticut law were forced to navigate and the deeply fractured nature of the opinions the case produced speak to the seriousness with which the Justices approached this task, as well as their implicit recognition that “[w]hatever course the Court took, its action was bound to be pregnant with possibilities crucial to the development of the law in a vital area of American life.”<sup>219</sup> And though these possibilities were as yet only dimly glimpsed in 1965,<sup>220</sup> the after-effects of *Griswold* continue to exert a powerful influence on both the theory and practice of constitutional law.<sup>221</sup>

---

219 Emerson, *supra* note 22, at 220.

220 See Devins, *supra* note 11, at 1441 (noting “[t]hat neither the reproductive rights community nor legal academics saw *Griswold* as the first step to court-ordered abortion rights” in the immediate aftermath of the decision).

221 Cf. Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 623 (2006) (observing that more than “[f]our decades after [*Griswold*], the fundamental controversy regarding the exercise of judicial review by the Supreme Court in our constitutional system remains the legitimacy of the Court’s practice of deriving individual rights that are not textually explicit, and enforcing those rights against majoritarian legislative enactment” (footnote omitted)).