



William O. Douglas

## *Griswold v. Connecticut*

**M**R. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven—a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to *married persons* as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are §§ 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides:

Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

Section 54-196 provides:

Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

The appellants were found guilty as accessories and fined \$100 each, against the claim that the accessory statute, as so applied, violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. 151 Conn. 544, 200 A.2d 479. We noted probable jurisdiction. 379 U.S. 926.

We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. *Tileston v. Ullman*, 318 U.S. 44, is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation, we thought that the requirements of standing should be strict, lest the standards of "case or controversy" in Article III of the Constitution become blurred. Here, those doubts are removed by reason of a criminal conviction for serving married

Supreme Court of the United States, 1965.

couples in violation of an aiding should have standing to assert that it is not, or cannot constitute

This case is more akin to *Tru* permitted to assert the rights of 358 U.S. 510, where the owners rights of potential pupils and the 249, where a white defendant, p being sued for damages by the co to Negroes, was allowed to ra violated the rights of prospective i no Negro was a party to the suit. *Board of Education*, 342 U.S. 48 *Buxton*, 371 U.S. 415. The rights of diluted or adversely affected unless those who have this kind of confi

Coming to the merits, we implicate the Due Process Clause some arguments suggest that *Lo* grade. But we decline that invitati 300 U.S. 379; *Olsen v. Nebraska*, 3 335 U.S. 525; *Williamson v. Lee Opi* Ca., 336 U.S. 490. We do not sit a need, and propriety of laws that t social conditions. This law, howev husband and wife and their physio

The association of people is the Bill of Rights. The right to choice—whether public or private the right to study any particular s Amendment has been construed i

By *Pierce v. Society of Sisters*, su chooses is made applicable to the s Amendments. By *Meyer v. Nebraska* study the German language in a p not consistently with the spirit of of available knowledge. The right only the right to utter or to print, b the right to read (*Martin v. Struther* freedom of thought, and freedom 183, 195)—indeed, the freedom c *New Hampshire*, 354 U.S. 234, 2 360 U.S. 109, 112; *Baggett v. Bullitt*, rights, the specific rights would be of the *Pierce* and the *Meyer* cases.

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couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime.

This case is more akin to *Truax v. Raich*, 239 U.S. 33, where an employee was permitted to assert the rights of his employer; to *Pierce v. Society of Sisters*, 268 U.S. 510, where the owners of private schools were entitled to assert the rights of potential pupils and their parents; and to *Barrows v. Jackson*, 346 U.S. 249, where a white defendant, party to a racially restrictive covenant, who was being sued for damages by the covenantors because she had conveyed her property to Negroes, was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection, although no Negro was a party to the suit. And see *Meyer v. Nebraska*, 262 U.S. 390; *Adler v. Board of Education*, 342 U.S. 485; *NAACP v. Alabama*, 357 U.S. 449; *NAACP v. Button*, 371 U.S. 415. The 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.

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, 198 U.S. 45, should be our guide. But we decline that invitation, as we did in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; *Olsen v. Nebraska*, 313 U.S. 236; *Lincoln Union v. Northwestern Co.*, 335 U.S. 525; *Williamson v. Lee Optical Co.*, 348 U.S. 483; *Giboney v. Empire Storage Co.*, 336 U.S. 490. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters*, *supra*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, *supra*, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin v. Struthers*, 319 U.S. 141, 143) and freedom of inquiry, freedom of thought, and freedom to teach (see *Wieman v. Updegraff*, 344 U.S. 183, 195)—indeed, the freedom of the entire university community. *Sweezy v. New Hampshire*, 354 U.S. 234, 249–250, 261–263; *Barenblatt v. United States*, 360 U.S. 109, 112; *Baggett v. Bullitt*, 377 U.S. 360, 369. Without those peripheral rights, the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In *NAACP v. Alabama*, 357 U.S. 449, 462 we protected the "freedom to associate and privacy in one's associations," noting that freedom of association

was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid.

as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association.

*Ibid.* In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense, but pertain to the social, legal, and economic benefit of the members. *NAACP v. Button*, 371 U.S. 415, 430-431. In *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, we held it not permissible to bar a lawyer from practice because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party" (*id.* at 244), and was not action of a kind proving bad moral character. *Id.* at 245-246.

Those cases involved more than the "right of assembly"—a right that extends to all, irrespective of their race or ideology. *De Jonge v. Oregon*, 299 U.S. 353. The right of "association," like the right of belief (*Board of Education v. Barnette*, 319 U.S. 624), is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion, and, while it is not expressly included in the First Amendment, its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. *See Poe v. Ullman*, 367 U.S. 497, 516-522 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."<sup>1</sup> We recently referred in *Mapp v. Ohio*, 367 U.S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See Beane, *The Constitutional Right to Privacy*, 1962 *Sup. Ct. Rev.* 212; Griswold, *The Right to be Let Alone*, 55 *Nw. U.L. Rev.* 216 (1960).

We have had many controversies over these penumbral rights of "privacy and repose." See, e.g., *Breard v. Alexandria*, 341 U.S. 622, 626, 644; *Public Utilities*

*Commey v. Pollak*, 343 U.S. 451; *Allen v. W. B. Ewing & Co.*, 370 U.S. 139; *Frank v. Maryland*, 359 U.S. 192. These cases bear witness that the action here is a legitimate one.

The present case, then, concerns a law which, in forbidding their manufacture or sale, has a maximum destructive impact upon the right of free speech. In light of the familiar principle, :

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NAACP v. Alabama, 377 U.S. 221, 238 (1964). To search the sacred precincts of marital bedrooms for tell-tale signs of the use of contraceptives? The very idea is repulsive to the notion of privacy. . . . The marriage relationship.

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involved in our prior decisions.

*Reversed.*

## Notes

1. The Court said in full about

The principles laid down in *Carrington*, 19 How.St.Tr. 102, liberty and security. They reach then before the court, and apply to all invasions on the part of the sanctity of a man's home arising of his doors, and the rummaging of his person; but it is personal security, personal liberty has never been forfeited by him is the invasion of this sacred essence of Lord Camden's judgment, boxes and drawers are circumscribed and compulsory extortion of papers to be used as evidence of goods is within the condemnation of the Fourth and Fifth Amendment.

116 U.S. at 630.

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*Commv v. Pollak*, 343 U.S. 451; *Monroe v. Pape*, 365 U.S. 167; *Lanza v. New York*,  
370 U.S. 139; *Frank v. Maryland*, 359 U.S. 360; *Skinner v. Oklahoma*, 316 U.S. 535,  
541. These cases bear witness that the right of privacy which presses for recog-  
nition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of  
privacy created by several fundamental constitutional guarantees. And it con-  
cerns a law which, in forbidding the use of contraceptives, rather than regu-  
lating their manufacture or sale, seeks to achieve its goals by means having a  
maximum destructive impact upon that relationship. Such a law cannot stand  
in light of the familiar principle, so often applied by this Court, that a

governmental purpose to control or prevent activities constitutionally  
subject to state regulation may not be achieved by means which sweep  
unnecessarily broadly and thereby invade the area of protected freedoms.

*NAACP v. Alabama*, 377 U.S. 288, 307. Would we allow the police to  
search the sacred precincts of marital bedrooms for telltale signs of the use of  
contraceptives? The very idea is repulsive to the notions of privacy surround-  
ing the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older  
than our political parties, older than our school system. Marriage is a com-  
ing together for better or for worse, hopefully enduring, and intimate to the  
degree of being sacred. It is an association that promotes a way of life, not  
causes; a harmony in living, not political faiths; a bilateral loyalty, not com-  
mercial or social projects. Yet it is an association for as noble a purpose as any  
involved in our prior decisions.

*Reversed.*

## Notes

1. The Court said in full about this right of privacy:

The principles laid down in this opinion [by Lord Camden in *Entick v. Carrington*, 19 How.St.Tr. 1029] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other.

116 U.S. at 630.

## *Griswold v. Connecticut*

**M**R. JUSTICE BLACK, with whom MR. JUSTICE STEWART joins, dissenting.

I agree with my Brother STEWART's dissenting opinion. And, like him, I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise, or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers HARLAN, WHITE and GOLDBERG, who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe—except their conclusion that the evil qualities they see in the law make it unconstitutional.

Had the doctor defendant here, or even the nondoctor defendant, been convicted for doing nothing more than expressing opinions to persons coming to the clinic that certain contraceptive devices, medicines or practices would do them good and would be desirable, or for telling people how devices could be used, I can think of no reasons at this time why their expressions of views would not be protected by the First and Fourteenth Amendments, which guarantee freedom of speech. Cf. *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1; *NAACP v. Button*, 371 U.S. 415. But speech is one thing; conduct and physical activities are quite another. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 554–555; *Cox v. Louisiana*, 379 U.S. 559, 563–564; *id.* 575–584 (concurring opinion); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490; cf. *Reynolds v. United States*, 98 U.S. 145, 163–164. The two defendants here were active participants in an organization which gave physical examinations to women, advised them what kind of contraceptive devices or medicines would most likely be satisfactory for them, and then supplied the devices themselves, all for a graduated scale of fees, based on the family income. Thus, these defendants admittedly engaged with others in a planned course of conduct to help people violate the Connecticut law. Merely because some speech was used in carrying on that conduct—just as, in ordinary life, some speech accompanies most kinds of conduct—we are not, in my view, justified in holding that the First Amendment forbids the State to punish their conduct. Strongly as I desire to protect all First Amendment freedoms, I am unable to stretch the Amendment so as to afford protection to the conduct of

these defendants in violating the constitutional fate of the law if hereafter, as I have said, quite another meaning of "right of privacy" as though there were forbidding any law ever to be made of individuals. But there is not. There are no specific constitutional provisions which apply at certain times and places with regularity. The Fourth Amendment's guarantee is not "privacy." But I think it belittles the protection which the Constitution affords by interpreting it, not the kind of liberty which should be given. The average person is not comforted any more by having his person searched privately and by stealth. He is not comforted by a person who can be just as much, if not more, arrested by a public officer as by a private person of his office or home.

One of the most effective way of guaranteeing a right is to substitute a constitutional guarantee another word of less restricted in meaning. This fact of "right of privacy" as a comprehensive guarantee against "unreasonable search and seizure" is an abstract and ambiguous concept which can also, on the other hand, be used against many things other than privacy. I view many times that First Amendment from a failure of the courts to stick to the meaning in construing it, instead of in the sense the Framers used. See, e.g., *Nebraska v. Omaha*, 308 U.S. 293 (concurring opinion); cases coll. 497, 517, n. 1 (dissenting opinion) 1965. For these reasons, I get nowhere by using "right of privacy" as an emanation of the Constitution. I like my privacy as well as anyone, but I am compelled to admit that government has a right to regulate some specific constitutional provisions. I like the Court's judgment and the reason for it, but I think it is unconstitutional.

This brings me to the argument of my Brother STEWART and GOLDBERG for invalidating the Connecticut law. My Brother WHITE would invalidate it by the Fourteenth Amendment, but my Brother HARLAN, relies also on the First Amendment. The Connecticut law could be applied to speech and press, and therefore viol



the nondoctor defendant, been expressing opinions to persons concerning devices, medicines or practices or for telling people how devices work, this time why their expressions are protected by the First and Fourteenth Amendments. *International Brotherhood of Railroad Trainmen v. E. E. Hawley*, 342 U.S. 199, 72 S.Ct. 442, 66-2 USTC ¶10,000, 30 AFTR2d 66-5711 (S.Ct., 1953); *NAACP v. Button*, 371 U.S. 415, 62 S.Ct. 1805, 3 L.Ed.2d 1364 (S.Ct., 1963). Political activities are quite another matter. *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 304, 32 L.Ed. 671 (S.Ct., 1933); *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 453, 13 L.Ed.2d 483 (S.Ct., 1965); *Giboney v. Empire Storage & Ice Co.*, 98 U.S. 145, 163-164. The two organizations which gave physicians that kind of contraceptive device, a monopoly for them, and then supplied them on a scale of fees, based on the family size, engaged with others in a planned conspiracy to violate Connecticut law. Merely because the law forbids the conduct—just as, in ordinary life, the law forbids the conduct—we are not, in my view, bound to forbid the State to punish the conduct. First Amendment freedoms, I am sure, afford protection to the conduct of

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunk in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (concurring opinion); cases collected in *City of El Paso v. Simmons*, 379 U.S. 497, 517, n. 1 (dissenting opinion); Black, *The Bill of Rights*, 35 N.Y.U.L.Rev. 865. For these reasons, I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons, I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

This brings me to the arguments made by my Brothers HARLAN, WHITE and GOLDBERG for invalidating the Connecticut law. Brothers HARLAN and WHITE would invalidate it by reliance on the Due Process Clause of the Fourteenth Amendment, but Brother GOLDBERG, while agreeing with Brother HARLAN, relies also on the Ninth Amendment. I have no doubt that the Connecticut law could be applied in such a way as to abridge freedom of speech and press, and therefore violate the First and Fourteenth Amendments.

My disagreement with the Court's opinion holding that there is such a violation here is a narrow one, relating to the application of the First Amendment to the facts and circumstances of this particular case. But my disagreement with Brothers HARLAN, WHITE and GOLDBERG is more basic. I think that, if properly construed, neither the Due Process Clause nor the Ninth Amendment, nor both together, could under any circumstances be a proper basis for invalidating the Connecticut law. I discuss the due process and Ninth Amendment arguments together because, on analysis, they turn out to be the same thing—merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive.

The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." If these formulas based on "natural justice," or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is, of course, that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. I readily admit that no legislative body, state or national, should pass laws that can justly be given any of the invidious labels invoked as constitutional excuses to strike down state laws. But perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose. While I completely subscribe to the holding of *Marbury v. Madison*, 1 Cranch 137, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom, and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution.

My Brother GOLDBERG has adopted the recent discovery that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates

fundamental principles of liberties and [collective] conscience satisfactory to me, that, in making their personal and private considerations. Our Court cannot be a Gallup Poll. And the scientific gadget which the Court can use to look far beyond the language of the Framers vested in this Court any power either by the States or by the Constitution Amendment offer any support to the history of the adoption of the Constitution, and the very material quoted in the Ninth Amendment was intended to give particular exceptions to the "those rights which were not surrendered to the hands of the General Government, and were consequently insecure." That Amendment of this Court or any other department of this Court, every student of history knows, that all its provisions was intended to be granted expressly or by necessary implication to hold laws unconstitutional be the "[collective] conscience of the Ninth Amendment, the Fourteenth Amendment, it was not given by the Court by the Court. This is a phenomenon that, for a period of time, was ever made that the Ninth Amendment against federal invasion, could be used to state legislatures from passing laws in such affairs. Use of any such broad, unbridled power by this Court's members a day-to-day

I repeat, so as not to be misunderstood, which it should exercise, to hold laws unconstitutional by the Federal Constitution. The Constitution which either expressly or by necessary implication gives to sit as a supervisory agency over the laws and set aside their laws because their policies adopted are unreasonable. The adoption of such a loose, flexible, unconstitutional, if ever it is final, shift of power to the courts will be bad for the courts, and will be bad for the state laws to such an unrestrained wisdom of legislative enactment.

holding that there is such a violation of the First Amendment in a similar case. But my disagreement with the majority is more basic. I think that the First Amendment Clause nor the Ninth Amendment can be a proper basis for a due process and Ninth Amendment claim, they turn out to be the same thing for this Court and the federal government act which the judges find irrational.

Brothers HARLAN and WHITE dissent, on the premise that this Court has the power to strike down state laws that it considers to be unconstitutional, or on this Court's belief that "rational or justifying" purpose, "justice." If these formulas based on the same thing, are to prevail, they are not constitutional on the basis of the Constitution, wise or unnecessary. The power of a legislative body. Surely it has no constitution specifically gives such a supervisory veto over the wisdom of laws. I would hold unconstitutional those laws which readily admit that no legislative body can justly be given any of the excuses to strike down state laws. No legislative body ever does pass a law which is not a sane, rational, wise and just law. I subscribe to the holding of *Marbury v. Madison*, that our Court has constitutional authority to strike down laws, state or federal, that violate commands of the Constitution. We are granted power by the Constitution to hold laws unconstitutional provision or provisions to which the Constitution is arbitrary, capricious or offensive to our sense of justice. Such an appraisal of the wisdom of laws, not of the power of such a formula or doctrine or doctrine which takes away from Congress and leaves to their own judgment of fairness and justice for ultimate determination—a power which the federal courts by the convention that

the recent discovery that the Ninth Amendment can be used by this Court as a basis in which this Court thinks violates

"fundamental principles of liberty and justice," or is contrary to the "traditions and [collective] conscience of our people." He also states, without proof satisfactory to me, that, in making decisions on this basis, judges will not consider "their personal and private notions." One may ask how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the "[collective] conscience of our people." Moreover, one would certainly have to look far beyond the language of the Ninth Amendment to find that the Framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine. The whole history of the adoption of the Constitution and Bill of Rights points the other way, and the very material quoted by my Brother GOLDBERG shows that the Ninth Amendment was intended to protect against the idea that, "by enumerating particular exceptions to the grant of power" to the Federal Government, "those rights which were not singled out were intended to be assigned into the hands of the General Government [the United States], and were consequently insecure." That Amendment was passed not to broaden the powers of this Court or any other department of "the General Government," but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the "[collective] conscience of our people" is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court. This fact is perhaps responsible for the peculiar phenomenon that, for a period of a century and a half, no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs. Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.

I repeat, so as not to be misunderstood, that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts, and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of

governmental powers that the Framers set up, and, at the same time, threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time, and that this Court is charged with a duty to make those changes. For myself, I must, with all deference, reject that philosophy. The Constitution makers knew the need for change, and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and, being somewhat old-fashioned, I must add it is good enough for me. And so I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause, with an "arbitrary and capricious" or "shocking to the conscience" formula, was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, e.g., *Lochner v. New York*, 198 U.S. 45. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; *Olsen v. Nebraska ex rel. Western Reference & Bond Assn.*, 313 U.S. 236, and many other opinions. See also *Lochner v. New York*, 198 U.S. 45, 74 (Holmes, J., dissenting). . . .

## POSTSCR

# Does the Bill U.S. Constitution a Right

This is a challenging question. The Constitution has rights that are not explicitly stated in the Bill of Rights that form a "penumbra," or a zone of protection from governmental interference. The Court has found that a constitutional right to privacy is implied by the Bill of Rights. Therefore, the Court's judgment of the Connecticut law is highly objectionable.

After reading the case excerpt, the more compelling case, Justice Black took the position that "specific guarantees by emanations from those guaranties and also "create zones of privacy, Justice Black's assertion that:

The due process argument wh on the premise that this Co: state laws that it considers to oppressive, or on this Court scrutiny has no 'rational or 'sense of fairness and justice tice,' or others which mean tl judges to determine what is o own appraisal of what laws make such decisions is, of co

Another important issue is the *Griswold* principle. Seven years ago in U.S. 438 (1972), the Supreme Court held that the right of privacy should be extended to unmarried persons so that contraceptives could only be sold to and only to married persons. The Court provided contraceptive foam to Boston University. A Massachusetts law was struck down and held that the lecture by the United States Court of Appeals is a violation of the human rights of unmarried persons.

