***Griswold v. Connecticut* (1965) - Justice Douglas** - 7/2.

This case dramatically defines the fight between "strict constructionists" and "judicial activists."
The Griswold v. Connecticut Court
Majority (7): Douglas, Harlan, White, Goldberg, Brennan, Warren, Clark.
Minority (2): Black, Stewart.

This contraceptive case is the precursor of *Roe v. Wade* — very important!

Issue: The defendants were convicted of "assisting and counseling another to use contraceptives" in violation of a Connecticut criminal statute. Is this statute constitutional?

Held: No. Convictions reversed.

Reasoning: Justice Douglas...The challenged statute makes it a crime for "any person to use a drug or instrument to prevent conception" and for "any person to assist, abet, or counsel another to do so." The defendants gave instruction and medical advice to **married persons.**

Justice Douglas begins by looking to other cases where rights have been recognized that are not specifically mentioned in the Constitution.

The right to educate a child in a school of the parents' choice...is not mentioned in the Constitution or the Bill of Rights; yet, the First Amendment has been construed to include such a right per ***Pierce v. Society of Sisters*** where 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**.

This is a mystery because *Pierce* does not mention the First Amendment at all, just "due process" concepts of "liberty" found in the Fourteenth Amendment. Go figure!

The right of freedom of speech includes not only the right to utter or to print, but the right to distribute, receive, read, think, etc. Without peripheral rights,...specific rights would be less secure.

It is certainly true that "freedom of speech" has been interpreted to include all manner of "communication." But, doesn't the "freedom to print" "emanate" from the **existing** "freedom of speech." In like manner, under this theory, don't we first need to find a "right to privacy" in the Constitution **before** a right to make contraceptive decisions "emanates" from it? Does Justice Douglas have it backwards? Or, is he deriving a general right of privacy from the broad concept of "liberty"?

Prior 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.

"Penumbra"
A space of partial illumination between the perfect shadow on all sides and the full light.

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one of them. 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." These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

Yes, the concept of "privacy" is apparent in the Third Amendment. But, surely Justice Douglas would not find a "penumbral" right to contraception in the Third Amendment's prohibition of quartering soldiers. Where is the amendment or article from which Justice Douglas would "penumbrize" the "right to contraception?"

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. 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 surrounding the marriage relationship. **We deal with a right of privacy older than the Bill of Rights...Convictions reversed.**

Is Douglas saying that because **concepts** of privacy emanate from **some** amendments, there exists a **right** to privacy that emanates from the **totality** of these amendments? Why isn't there a "zone of privacy" in the marital bedroom for the **nurture and growth of marijuana?** Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of illegal drugs? Yes, we would and we do.

Note that Douglas never specifically states where he finds a "right to privacy" --- at least not in the context of the marital bedroom.

CONCURRENCE: Justice Goldberg/Warren/Brennan...I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the **right of marital privacy**, but I have not accepted the view that "due process" as used in the Fourteenth Amendment incorporates all of the first eight Amendments. **I do agree that the concept of liberty protects those personal rights that are fundamental and is not confined to the specific terms of the Bill of Rights**. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is **not mentioned explicitly** in the Constitution is supported by language and history of the **Ninth Amendment**.

The Court stated many years ago that the Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as **fundamental**." For example, in *Gitlow v. New York* the Court said:

> "For present purposes we may and do assume that freedom of speech and of the press -- which are protected by the First Amendment from abridgment by Congress -- are among the *fundamental* personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

While this is true, still, the *"fundamental right of free speech/press"* was specifically mentioned in the 1st Amendment. A *"fundamental right of privacy"* is **not** so mentioned...anywhere!

The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. The Ninth Amendment reads:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

James Madison drafted the Ninth Amendment. It was introduced in Congress to quiet fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and

that the specific mention of certain rights would be interpreted as a denial that others were protected. Clearly, the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people. The Tenth Amendment similarly made clear that the States and the people retained all those powers not expressly delegated to the Federal Government. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "the enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage **others retained by the people**."

But, where is the "right of privacy" retained by the people to be found? And, what is it, anyway? Privacy is such a broad concept. It would appear to include anything done within marriage. But, we know that is not the case. Mr. Reynolds found that out when his conviction was upheld for marrying more than one woman. *Reynolds v. U.S.*

I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth.

This statement contradicts his closing rationale. See the end of this concurrence.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the **"traditions and collective conscience of our people"** to determine whether a principle is "so rooted there as to be ranked as fundamental."

Are the people of Connecticut not "**our people**"? Were a majority of the "**people of Connecticut**" (through their elected representatives) out of step with the "traditions and collective conscience of **the rest of us**" when they passed these laws? Is that a question that should be decided by a majority of 9 unelected persons or would a majority of the voters of an entire state be better equipped to determine for themselves what is "rooted in the collective conscience"? And, if a majority of the people of Connecticut (through their elected representatives) are embarrassed by this law on their books, would letting their legislative process work be a solution more in line with our brand of democracy? Discussion, anyone?

The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, **absent a showing of a compelling subordinating state interest**, **could not decree that all husbands and wives must be sterilized after two children have been born to them.** Yet by their reasoning such an invasion of

marital privacy would not be subject to constitutional challenge because, while it might be "silly," no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

I guess I am not convinced Goldberg is right. **Consider the case of *Buck v. Bell* (1927)**. In an 8/1 decision, the Supremes upheld a Virginia statute permitting the superintendent of a state institution to sterilize a woman inmate if found to be afflicted with an hereditary form of **insanity or imbecility**. Her mother, herself and her daughter were found to be "imbeciles." Per **Justice Oliver Wendell Holmes**: "The public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes (*Jacobson v Massachusetts*). **Three generations of imbeciles are enough**." Apparently, there were no "PC Police" in 1927.

Although these statutes encroach upon a fundamental personal liberty, the State does not show that the law serves any "subordinating state interest which is compelling or that is necessary to the accomplishment of a permissible state policy."

In sum, I believe that **the right of privacy in the marital relation is fundamental** and basic -- a personal right "retained by the people" within the meaning of the **Ninth Amendment**. Connecticut cannot constitutionally abridge this fundamental right, **which is protected by the Fourteenth Amendment from infringement by the States**. I agree with the Court that petitioners' convictions must therefore be reversed.

This is simply contradictory to his prior statement about the relationship between the Ninth & Fourteenth Amendments.

CONCURRENCE: Justice Harlan...[The Court's approach to this case seems to be] very much like that taken by my Brothers Black and Stewart in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights.

In other words, what I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to *restrict* the reach of Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to *impose* upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them.

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the **Due Process Clause of the Fourteenth Amendment** because the enactment violates basic values "**implicit in the concept of ordered liberty.**" I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their **radiations**...

Is Justice Harlan poking fun at Justice Douglas' "emanations" and "penumbras"?

Judicial self-restraint will be achieved only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.

CONCURRENCE: Justice White...In my view this Connecticut law as applied to married couples **deprives them of "liberty" without due process of law**, as that concept is used in the **Fourteenth Amendment**.

An examination of the justification offered, however, cannot be avoided by saying that the Connecticut anti-use statute invades a protected area of privacy and association or that it demeans the marriage relationship. The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under the cases of this Court, require "strict scrutiny" and "must be viewed in the light of less drastic means for achieving the same basic purpose." "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." But such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause.

DISSENT: Justice Black/Stewart...I do not 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. It is every bit as offensive to me as it is to my Brethren.

Had the defendants been convicted for doing nothing more than expressing opinions to persons

coming to the clinic that certain contraceptive devices 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**.

Really? Is there no limit to what can be taught? Is it constitutionally OK to teach one how to commit crime and get away with it? We will explore this when we return to "speech" issues.

But speech is one thing; conduct and physical activities are quite another. *Reynolds v. United States.*

You remember *Reynolds* — the bigamy conviction in Utah.

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

"Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken 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. 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.

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 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" 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.

I have to go with the dissenting opinions here. Not because I believe the statute is wise. I would just rather see more power in the people and less in 5 unelected justices. Neither do I have a problem with amending the Constitution, like some. There is a way to do it – check out Article V. What do you think?

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* that our Court has constitutional power to strike down statutes...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.**

Of the cases on which my Brothers White and Goldberg rely so heavily, I merely point out that the reasoning stated in *Meyer* and *Pierce* was the same natural law due process philosophy which many later opinions repudiated, and which I cannot accept. Brothers White and Goldberg now apparently would require States to justify any law restricting "liberty" as my Brethren define "liberty." This would mean at the very least, I suppose, that every state criminal statute -- since it must inevitably curtail "liberty" to some extent -- would be suspect, and would have to be justified to this Court.

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 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.

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.

Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.

In my estimation, Justice Black is absolutely correct. Is anyone alarmed at the prospect of 9 unelected folks holding a "day-to-day constitutional convention?"

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.

In *Ferguson v. Skrupa,* this Court two years ago said in an opinion joined by all the Justices but one:

> "The doctrine... that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

In 1798, when this Court was asked to hold another Connecticut law unconstitutional, Justice Iredell

said:

> "It has been the policy of all the states and of the people of the United States to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. **If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice**. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice." *Calder v. Bull*.

...Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.

DISSENT: Justice Stewart/Black...Since **1879** Connecticut has had on its books a law which forbids the use of contraceptives by anyone. **I think this is an uncommonly silly law.** As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. **BUT WE ARE NOT ASKED IN THIS CASE TO SAY WHETHER WE THINK THIS LAW IS UNWISE...WE ARE ASKED TO HOLD THAT IT VIOLATES THE UNITED STATES CONSTITUTION AND THAT I CANNOT DO**.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

Stewart is referring to the majority opinion authored by Douglas.

We *are* told that the Due Process Clause of the Fourteenth Amendment is not, as such, the "guide" in this case. With that much I agree. There is no claim that this law, duly enacted by the Connecticut Legislature, is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the

Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws.

For Stewart, 14th Amendment "due process" only permits two inquiries: vagueness and procedure. A look at the "wisdom" of legislation would not be permitted. That is for the legislature.

As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States. It has not even been argued that this is a law "respecting an establishment of religion, or prohibiting the free exercise thereof." And surely, unless the solemn process of constitutional adjudication is to descend to the level of a play on words, there is not involved here any abridgment of "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." No soldier has been quartered in any house. There has been no search, and no seizure. Nobody has been compelled to be a witness against himself.

The Court also quotes the Ninth Amendment and my Brother Goldberg's concurring opinion relies heavily upon it. But to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history. **The Ninth Amendment, like its companion the Tenth, was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder**.

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court. At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." **But it is not the function of this Court to decide cases on the basis of community standards.** We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to **persuade their elected representatives to repeal it**. That is the constitutional way to take this law off the books.