Principles of Constitutional Interpretation

THE RIGHT OF PRIVACY:
The Construction of a Constitutional Time Bomb*

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The 1965 decision in *Griswold v. Connecticut* was insignificant in itself but momentous for the future of constitutional law. Connecticut had an ancient statute making it criminal to use contraceptives. The state also had a general accessory statute allowing the punishment of any person who aided another in committing an offense. On its face, the statute criminalizing the use of contraceptives made no distinction between married couples and others. But the statute also had never been enforced against anyone who used contraceptives, married or not. There was, of course, no prospect that it ever would be enforced. If any Connecticut official had been mad enough to attempt enforcement, the law would at once have been removed from the books and the official from his office. Indeed, some Yale law professors had gotten the statute all the way to the Supreme Court a few years previously, and the Court had refused to decide it precisely because there was no showing that the law was ever enforced. The professors had some difficulty arranging a test case but finally managed to have two doctors who gave birth control information fined $100 apiece as accessories.

Such enforcement in the area as there was consisted of the occasional application of the accessory statute against birth control clinics, usually clinics that advertised. The situation was similar to the enforcement of many antigambling laws. They may cover all forms of gambling on their faces, but they are in fact enforced only against commercial gambling. An official who began arresting the priest at the church bingo party or friends having their monthly poker game at home would have made a most unwise career decision and would be quite unlikely to get a conviction. There are a number of statutes like these in various state codes, such as the statutes flatly prohibiting sodomy and other "unnatural practices," which apply on their faces to all couples, married or unmarried, heterosexual or homosexual. The statutes are never enforced, but legislators, who would be aghast at any enforcement effort, nevertheless often refuse to repeal them.

There is a problem with laws like these. They are kept in the codebooks as precatory statements, affirmations of moral principle. It is quite arguable that this is an improper use of law, most particularly of

criminal law, that statutes should not be on the books if no one intends to enforce them. It has been suggested that if anyone tried to enforce a law that had molded in disuse for many years, the statute should be declared void by reason of desuetude or that the defendant should go free because the law had not provided fair warning.

But these were not the issues in Griswold. Indeed, getting off on such grounds was the last thing the defendants and their lawyers wanted. Since the lawyers had a difficult time getting the state even to fine two doctors as accessories, it seems obvious that the case was not arranged out of any fear of prosecution, and certainly not the prosecution of married couples. Griswold is more plausibly viewed as an attempt to enlist the Court on one side of one issue in a cultural struggle. Though the statute was originally enacted when the old Yankee culture dominated Connecticut politics, it was now quite popular with the Catholic hierarchy and with many lay Catholics whose religious values it paralleled. The case against the law was worked up by members of the Yale law school faculty and was supported by the Planned Parenthood Federation of America, Inc., the Catholic Council on Civil Liberties, and the American Civil Liberties Union. A ruling of unconstitutionality may have been sought as a statement that opposition to contraception is become widespread and, therefore, a statement about whose cultural values are dominant. Be that as it may, the upshot was a new constitutional doctrine perfectly suited, and later used, to enlist the Court on the side of moral relativism in sexual matters.

Justice Douglas’s majority opinion dealt with the case as if Connecticut had devoted itself to sexual fascism. “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.” That was both true and entirely irrelevant to the case before the Court. Courts usually judge statutes by the way in which they are actually enforced, not by imagining horrible events that have never happened, never will happen, and could be stopped by courts if they ever seemed about to happen. Just as in Skinner he had treated a proposal to sterilize three-time felons as raising the specter of racial genocide, Douglas raised the stakes to the sky here by treating Connecticut as though it was threatening the institution of marriage. “We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.” The thought was incoherent. What the right of privacy’s age in comparison with that of our political parties and school system had to do with anything was unclear, and where the “right” came from if not from the Bill of Rights it is impossible to understand. No court had ever invalidated a statute on the basis of the right Douglas described. That makes it all the more perplexing that Douglas, in fact purported to derive the right of privacy not from some pre-existing right or law of nature, but from the Bill of Rights. It is important to understand Justice Douglas’s argument both because the method, though without merit, continually recurs in constitutional adjudication and because the “right of privacy” has become a loose canon in the law. Douglas began by pointing out that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” There is nothing exceptional about that thought, other than the language of penumbras and emanations. Courts often give protection to a constitutional freedom by creating a buffer zone, by prohibiting a government from doing something not in itself forbidden but likely to lead to an invasion of a right specified in the Constitution. Douglas cited NAACP v. Alabama, in which the Supreme Court held that the state could not force the disclosure of the organization’s membership lists since that would have a deterrent effect upon the members’ First Amendment rights of political and legal action. That may well have been part of the purpose of the statute. But for this anticipated effect upon guaranteed freedoms, there would be no constitutional objection to the required disclosure of membership. The right not to disclose had no life of its own independent of the rights specified in the first amendment.

Douglas named the buffer zone or “penumbra” of the First Amendment a protection of “privacy,” although, in NAACP v. Alabama, of course, confidentiality of membership was required not for the sake of individual privacy but to protect the public activities of politics and litigation. Douglas then asserted that other amendments create “zones of privacy.” These were the first, third, (soldiers not to be quartered in private homes), fourth (ban on unreasonable searches and seizures), and fifth (freedom from self-incrimination). There was no particularly good reason to use the word “privacy” for the freedoms cited, except for the fact that the opinion was building toward those “sacred precincts of marital bedrooms.” The phrase “areas of freedom” would have been more accurate since the provisions cited protect both private and public behavior.
None of the amendments cited, and none of their buffer or penumbral zones, covered the case before the Court. The Connecticut statute was not invalid under any provision of the Bill of Rights, no matter how extended. Since the statute in question did not threaten any guaranteed freedom, it did not fall within any "emanation." Griswold v. Connecticut was, therefore, not like N.A.A.C.P. v. Alabama. Justice Douglas bypassed that seemingly insuperable difficulty by simply asserting that the various separate "zones of privacy" created by each separate provision of the Bill of Rights somehow created a general but wholly undefined "right of privacy" that is independent of and lies outside any right or "zone of privacy" to be found in the Constitution. Douglas did not explain how it was that the Framers created five or six specific rights that could, with considerable stretching, be called "privacy," and, though the Framers chose not to create more, the Court could nevertheless invent a general right of privacy that the Framers had, inexplicably, left out. It really does not matter to the decision what the Bill of Rights covers or does not cover.

Douglas closed the Griswold opinion with a burst of passionate oratory. "Marriage is a coming 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 commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." It is almost a matter for regret that Connecticut had not threatened the institution of marriage, or even attempted to prevent anyone from using contraceptives, since that left some admirable sentiments, expressed with rhetorical fervor, dangling irrelevantly in midair. But the protection of marriage was not the point of Griswold. The creation of a new device for judicial power to remake the Constitution was the point.

The Griswold opinion, of course, began by denying that any such power was being assumed. "We are met with a wide range of questions that implicate the Due Process Clause of the 14th Amendment. Overtones of some arguments suggest that [Lochner v. New York] should be our guide. But we decline that invitation. . . . 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." Griswold, as an assumption of judicial power unrelated to the Constitution is, however, indistinguishable from Lochner. And the nature of that power, its lack of rationale or structure, ensured that it could not be confined.

The Court majority said there was now a right of privacy but did not even intimate an answer to the question, "Privacy to do what?" People often take addictive drugs in private, some men physically abuse their wives and children in private, executives conspire to fix prices in private, Mafiosi confer with their button men in private. If these sound bizarre, one professor at a prominent law school has suggested that the right of privacy may create a right to engage in prostitution. Moreover, as we shall see, the Court has extended the right of privacy to activities that can in no sense be said to be done in private. The truth is that "privacy" will turn out to protect those activities that enough Justices to form a majority think ought to be protected and not activities with which they have little sympathy.

If one called the zones of the separate rights of the Bill of Rights zones of "freedom," which would be more accurate, then, should one care to follow Douglas's logic, the zones would add up to a general right of freedom independent of any provision of the Constitution. A general right of freedom—a constitutional right to be free of regulation by law—is a manifest impossibility. Such a right would posit a state of nature, and its law would be that of the jungle. If the Court had created a general "right of freedom," we would know at once, therefore, that the new right would necessarily be applied selectively, and, if we were given no explanation of the scope of the new right, we would know that the "right" was nothing more than a warrant judges had created for themselves to do whatever they wished. That . . . is precisely what happened with the new, general, undefined, and unexplained "right of privacy."

Justice Black's dissent stated: "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." He found none. "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."

He pointed out that there are "certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities." But there was no general right of the sort Douglas had created. Justice Stewart's dissent referred to the statute as "an uncommonly silly law" but noted that its asininity was not before the Court. He could
"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." He also observed that the "Court does not say how far the new constitutional right of privacy announced today extends." That was twenty-four years ago, and the Court still has not told us.

1. 381 U.S. 479 (1965).
2. Id. at 485–86.
4. 381 U.S. at 486.
5. Id. at 481–482.
6. 381 U.S. at 507, 509, 510 (Black, J., dissenting).
7. 381 U.S. at 527, 530m.7 (Stewart, J., dissenting).

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**DISCOVERING FUNDAMENTAL VALUES**

_John Hart Ely_

"It remains to ask the hardest questions. Which values . . . qualify as sufficiently important or fundamental or what have you to be vindicated by the Court against other values affirmed by legislative acts? And how is the Court to evolve and apply them?"

—Alexander Bickel

_No answer is what the wrong question being..._

—Alexander Bickel

Since interpretivism—at least a clause-bound version of interpretivism—is hoist by its own petard, we should look again, and more closely, at its traditional competitor. The prevailing academic line has held for some time that the Supreme Court should give content to the Constitution's open-ended provisions by identifying and enforcing upon the political branches those values that are, by one formula or another, truly important or fundamental. Indeed we are told this is inevitable: "there is simply no way for courts to review legislation in terms of the Constitution without repeatedly making difficult substantive choices among competing values, and indeed among inevitably controverted political, social, and moral conceptions."

"[C]onstitutional law must now be understood as the means by which effect is given to those ideas that from time to time are held to be fundamental. . . ." The Court is "an institution charged with the evolution and application of society's fundamental principles," and its "constitutional function," accordingly, is "to define values and proclaim principles."

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**The Judge's Own Values**

_The ultimate test of the Justices' work, I suggest, must be goodness. . . ._

—J. Skelly Wright

The view that the judge, in enforcing the Constitution, should use his or her _own values_ to measure the judgment of the political branches is a methodology that is seldom endorsed in so many words. As we proceed

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