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CONSTITUTIONAL PRIVACY

I. THREE VIEWS OF CONSTITUTIONAL PRIVACY

There is a profound problem for anyone who seeks to defend a constitutional right to privacy for American citizens. Nowhere in the Constitution is the concept of, let alone the right of, privacy ever mentioned. Nor is the problem one simply of the constitutional text. None of the founding documents, nor the scholarly prose of the founders, nor the theoretical works that influenced them, discusses a right to privacy. There are at least three possible responses to this problem.

Legal realists have long been saying that law is "the prophecies of what the court will do, and nothing more pretentious."[1] This cynicism has been turned into an empirical methodology by the contemporary school of political jurisprudence:

> First is the behavior that is being examined, not the *law*. The judge is viewed as a political actor, his decisions constitute his behavior, and that behavior is examined in the same way as the behavior of other political actors. Secondly, it is not the legal rhetoric but the actual vote on the case that become the center of attention.[2]

I would like to reject this view a priori, but it is obvious that external considerations do play a large role in the Court's decisions. Who could have failed to predict where Justice Marshall, or Chief Justice Rehnquist would vote on controversial privacy issue?

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[1] O. W. Holmes, Jr., "The Path of the Law," *Harvard Law Review* **4** (1897): 457–78; reprinted in M. P. Golding, ed., *The Nature of Law* (New York: Random House, 1966), p. 179.

[2] Martin Shapiro, *Law and Politics in the Supreme Court* (New York: Free Press, 1964), p. 13.

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Furthermore the pejorative language of "legal rhetoric" even seems justified when we investigate the judges' own thoughts.

> [Chief Justice Charles Evans] Hughes made a statement to me which at the time was shattering but which over the years turned out to be true: "Justice Douglas, you must remember one thing. At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections."[3]

Jurisprudence, and indeed normative thought generally, is concerned with the behavior of human beings. Anything that helps us to understand human behavior is therefore relevant. External disciplines, the sociology of law, human psychology, or neuroscience, are to be welcomed for any help they can provide in explaining, predicting, and evaluating legal behavior. It is a serious mistake, however, to assume that since insight is offered at some particular level, understanding at other levels is somehow illusory.[4] Ronald Dworkin fully concedes the value in external approaches to the law (sociology of law, political jurisprudence, etc.), but insists that the very empirical realism that this approach demands requires discussion of the internal nature of law, as well.

> Of course, law is a social phenomenon. But its complexity, function, and consequence all depend on one special feature of its structure. Legal practice, unlike many other social phenomena, is *argumentative*. Theories that ignore the structure of legal argument for the supposedly larger questions of history and society are therefore perverse. They ignore questions about the internal character of legal argument, so there explanations are impoverished and defective, like innumerate histories of mathematics.[5]

In this essay I simply assume the legitimacy of internal jurisprudential discussion of important constitutional issues like privacy.

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[3] William O. Douglas, *The Court Years 1937–1975* (New York: Random House, 1980), p. 8.

[4] See for example, D. C. Dennett, "Intentional Systems," in Dennett, *The Intentional Stance* (Cambridge: MIT Press, 1987).

[5] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), p. 13.

There still is a specific debate to be resolved, however, since many would concede that the Court's internal legal reasoning is appropriate, and much more than simply "rhetoric," while insisting at the same time that their use of judicial review be conservative. The Court is charged with the responsibility of interpreting the Constitution, and this may require the limited use of judicial review; nevertheless, they must not substitute their views on controversial substantive issues for those of a democratically elected legislature. "Judicial activism" is to be feared both for reasons of political theory and on jurisprudential grounds. Many have argued that when the Court nullifies criminal statutes, not by pointing to specific constitutional language, but by finding controversial rights between the lines in the text, they are simply reintroducing substantive due process under a new name, or worse, the "nonsense on stilts" of natural rights that must be constitutionalized.

This line of attack, which has no convenient name, could focus in two different ways. The circumspect dissenter could look within the "penumbras" of the Bill of Rights and fail to see the right to privacy. I may disagree, but our dispute is substantive, not methodological. Clearly this kind of controversy is what makes constitutional jurisprudence worth doing in the first place. The second strategy, however, is implicit in the pejorative "judicial activism." Many feel that the flaw in the Court's privacy cases is that the right emerges as the product of the Court's decision, not its basis. Here the Court is charged with illegitimately inventing or constructing new substantive legal rights. The critic who seeks "narrow," or "strict," or "literal" interpretations of the Constitution finds the Court's constructionist methodology inherently objectionable. It is this last sort of criticism that I am concerned with here.

The most candid, and ultimately most successful, approach to constitutional privacy simply concedes that, in a certain sense, the right to privacy has been constructed in the Court's decisions. It rejoins, however, with the claim that all interesting constitutional decisions are constructed, and that there is nothing suspect about this from either a normative or methodological perspective. After

all, a literal reading of the text says nothing about the right to attend integrated schools,[6] or to be free from bugs on telephones,[7] or the right to wear jackets that say "Fuck the draft."[8] The production of interesting theories in any serious intellectual context always has these constructionist overtones.

II. A WORKING THEORY OF CONSTITUTIONAL INTERPRETATION

Let us agree at the outset that the job of the Supreme Court is to interpret the Constitution and not to use judicial review as just another way of making political decisions based on personal calculations of what is best for society, either from a policy standpoint or one of personal moral judgment. The problem before us, therefore, is what relevant data must be accounted for in methodologically legitimate constitutional interpretations. The official conservative position is clear. They insist that the range of data must be severely limited. Ideally, one would stipulate that the words of the document are all that is relevant – judicial review must be exercised in accordance with what the Constitution says. This proves unworkable, of course, since virtually every interesting bit of constitutional language is capable of more than one plausible reading. It is at this point that the founders' intentions are brought in.

There are well-known problems with authorial intent theories of literature.[9] Original intent theories of constitutional interpretation inherit most of them, but also generate new problems. The following are two particularly serious puzzles. Who counts as a

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[6] *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 497 (1954).
[7] *Katz v. United States*, 389 U.S. 347 (1967).
[8] *Cohen v. California*, 403 U.S. 15 (1971).
[9] See, W. K. Wimsatt, Jr. and Monroe C. Beardsley, "The Intentional Fallacy," in W. K. Wimsatt, Jr., *The Verbal Icon* (Lexington: University of Kentucky Press, 1954), reprinted in J. Margolis, ed., *Philosophy Looks at the Arts* (Philadelphia: Temple University Press, 1978).

"founder"? Does Jefferson? (He was out of the country at the time the document was drafted and debated.) How about the state conventions that ratified? Whoever we decide the founders were, they constitute a collective. What do we do about disagreements, or compromises? (Consider the deals that were struck with regard to slavery.) These problems might be classified as practical; they are the sorts that might concern historians. They are serious, but that does not mean they are unanswerable. Presumably, scholars could offer evidence in support of particular theories about whose intentions should count, and how much. We can expect at the very least, however, that these proposals will be controversial. A much more serious problem to my mind has recently been raised by Dworkin.[10]

He distinguishes concrete intentions from abstract intentions. Suppose a colleague asks my advice on a particularly tricky question that the personnel committee must decide. I tell her that I think teaching and research must be balanced, and that tenure decisions must always be based on a judgment of what is in the overall best interests of the institution. Suppose further that the personnel case involves Professor Green, that I am aware of this fact, and that my colleague knows that I am so aware. I believe that Green's reputation as a teacher is based more on personal charisma and easy grading than on pedagogic skill. I also think his research is sketchy and superficial. I have made no secret that applying my formula to Green's case results in a nonfavorable tenure decision. Although I am offering advice, not authoring a constitutional document, my concrete intention is that Green be fired. The language I used to my colleague, however, expressed my abstract intentions about tenure decisions. What should my colleague do if she admires me enough to apply my abstract formula, but comes to a different concrete calculation? Dworkin hints, and I fully agree,

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[10] A very nice discussion of some of the major problems for "original intent" theories is in Ronald Dworkin, "The Forum of Principle," in Dworkin, *Matters of Principle* (Cambridge: Harvard University Press, 1985).

that my colleague takes my advice more seriously if she applies my abstract intentions about tenure. It is irrelevant what I think about Green; she was elected to the personnel committee, not me.

I take it to be obvious how this distinction applies to constitutional controversies. The language of "cruel and unusual punishment" is abstract, the views of the founders on capital punishment were concrete. The notion of "equal protection" is abstract, while the fact of segregated schools is a manifestation of concrete attitudes.

As problematic as authorial intent theories of constitutional jurisprudence are, they express a compelling insight. One of the most important things about the Constitution is that it is a written document. The rights and responsibilities of citizens and their government are spelled out in language, however vague and abstract that language may be. Questions of textual meaning seem inexorably tied to the intentions of language users. Hirsch is willing to grant the obvious epistemological problems, but insists that authorial intent is nevertheless essential to the interpretive process.

> The most important argument to consider here is the one which states that the author's intended meaning cannot be *certainly* known. This argument cannot be successfully met because it is self-evidently true. I can never know another person's intended meaning with certainty because I cannot get inside his head to compare the meaning he intends with the meaning I understand, and only by such direct comparison could I be certain that his meaning and my own are identical. But this obvious fact should not be allowed to sanction the overly hasty conclusion that the author's intended meaning is inaccessible and it is therefore a useless object of interpretation.[11]

The problem is not the relevance of authorial intent to the interpretive process, but rather the attempt to make intent the objective and independent standard for interpretive truth. Fish claims that intention is not the reality against which interpretation is tested but the end product of the entire interpretive process.

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[11] E. D. Hirsch, Jr., *Validity in Interpretation* (New Haven: Yale University Press, 1967), pp. 16–17.

[I]t is only "natural" to assign agency first to an author's intentions and then to the forms that assumably embody them. What really happens, I think, is something quite different: rather than intention and its formal realization producing interpretation (the "normal" picture), interpretation creates intention and its formal realization by creating the conditions in which it becomes possible to pick them out . . . formal units are always a function of the interpretive model one brings to bear; they are not "in" the text, and I would make the same argument for intentions. That is, intention, like a formal unit is made when perceptual or interpretive closure is hazarded; it is verified by an interpretive act, and I would add, it is not verifiable in any other way.[12]

Fish is well known for the provocative way he expresses his theoretical views. The above quote is sure to offend many, both in literary criticism and jurisprudence. His point can be made, however, in more modest terms. Intentions, like readings, must be constructed. Intentions are not objectively "out there." We may have evidence that some author had strong feelings on some point, or that the founders were particularly concerned to protect some right. The postulation of an intention, therefore, is an explanatory theory – it allows us to make sense of what we know about the text and the author.

The question now becomes what additional data is relevant to interpreting the Constitution. The most plausible "a-contextual" meaning of the language is surely important. Also the intentions of the authors (assuming, of course, that we are agreed who the authors were, and whether they were speaking abstractly or concretely) must be included. Michael Perry characterizes himself as a "non-originalist" because he argues that the Court should not be tied exclusively to interpretations that focus on original intent; intentions are relevant, but not the only relevant factors.[13] In particular, Perry claims that the Court must explicitly bring in ethical considerations.

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[12] Stanley Fish, *Is There a Text In this Class?: The Authority of Interpretive Communities* (Cambridge: Harvard University Press, 1980), pp. 163–64.

[13] Michael J. Perry, *Morality, Politics, and Law* (Oxford: Oxford University Press, 1988).

On what moral beliefs ought a person to rely, in her capacity as a judge, in deciding whether public policy regarding some matter is constitutionally valid? The originalist answer, as we've seen, is: original beliefs (in conjunction with whatever beliefs are supplemental to them). The non-originalist answer is: with respect to certain provisions of the constitutional text, original beliefs, the fundamental beliefs of the American political tradition signified by the provisions – beliefs or aspirations as to how the community's life, the life in common, should be lived.[14]

Part of the non-originalist project requires the collection of data about the "American political tradition," that is, historical data. Richards has recently emphasized the importance of "a self-understanding of our historical constitutional traditions, and the larger moral, religious, and political ideals they reflect."[15] While Richards focuses on the discovery of values through historical scholarship, Perry candidly endorses moral philosophy. He is quite comfortable defending particular moral stands on controversial issues as being correct, at least from within an interpretive community. For many, the introduction of moral considerations is enough to taint the present project so much that any "value-free" methodology is to be preferred. We must remember, however, that even in the realm of the natural sciences such an antiseptic view has proven illusory. To the degree that individual researchers should suppress their idiosyncratic views about the nuclear industry while writing reports on reactor safety, the point about value neutrality is trivially obvious. At a deeper level, however, the very basis of scientific reasoning is normative.

'Coherent' and 'simple' have too many characteristics in common with the paradigmatic value words. Like 'kind', 'beautiful', and 'good', 'coherent' and 'simple' are often used as terms of *praise*. Our conceptions of coherence, simplicity, and justification are just as historically

[14] Ibid., p. 122.
[15] David A. J. Richards, *Toleration and the Constitution* (Oxford: Oxford University Press, 1986), p. viii.

conditioned as our conceptions of kindness, beauty, and goodness; these epistemic terms figure in the same sort of perennial philosophical controversies as do the terms for ethical and aesthetic values.[16]

In the past two decades, Ronald Dworkin has been articulating a theory of legal interpretation that brings together many of the themes discussed above. In his recent book, *Law's Empire*, he states his methodological presupposition as follows:

> [L]egal reasoning is an exercise in constructive interpretation[;] . . . our law consists in the best justification of our legal practices as a whole[;] . . . it consists in the narrative story that makes of these practices the best they can be. The distinctive structure and constraints of legal argument emerge, on this view, only when we identify and distinguish the diverse and often competitive dimensions of political value, the different strands woven together in the complex judgment that one interpretation makes law's story better on the whole, all things considered, than any other can.[17]

Dworkin sees constructive interpretation as different, in kind, from scientific explanation because of the normative dimension. I think he makes too much of this point. Any interesting scientific hypothesis, "consists in the narrative story that makes of [the data] the best that they can be." It consists "in the complex judgment that one interpretation makes [science's] story better on the whole, all things considered, than any other can." All theory evaluation is normative; anytime we rank the best explanation or the best interpretation, we must make normative judgments, including very general background judgments about the point of the whole enterprise – science, literature or law – in the first place.

Dworkin is perhaps most famous or notorious for his "rights thesis":

> when no settled rule disposes of the case, one party may still have a right to win. It remains a judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively.

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[16] Hilary Putnam, *Reason, Truth and History* (New York: Cambridge University Press, 1981), p. 136.

[17] Dworkin, 1986, op. cit., p. vii.

> . . . [Unfortunately no] mechanical procedure exists for demonstrating what the rights of parties are in hard cases. . . . [T]he argument supposes that reasonable lawyers and judges will often disagree about legal rights.[18]

Positivism says that law consists of usually explicit rules, and when the rules do not speak to the issue, or they speak with confused and contradictory voices, there is no law on the case, and the judge must exercise discretion and invent new law. Dworkin demurs on both theoretical grounds, discretion makes the judge's decision ex post facto, and on descriptive grounds, judges and lawyers (though not academic lawyers) characterize their disagreements as being about what the law is, not whether there is relevant law in the first place. Rights, and legal principles generally, are explanatory devices. They allow us to best explain or interpret a whole range of legal data having a long history, and comprising the actions and reflective attitudes of a number of individuals.

There are two particularly troublesome misunderstandings of Dworkin's theory, both having to do with the candidly normative nature of the project. He is sometimes characterized as a proponent of the natural law theory.[19] Rights talk seems to inevitably raise ontological questions. Although abstract legal and constitutional principles – rights – are the cornerstone of Dworkin's jurisprudence, he is at pains to deny that they are in any way ontologically suspect. Rights are theoretical constructions that explain legal texts, previous legal decisions, and prevailing views within the legal community. They are objective; they are communal, not idiosyncratic.[20] But their ontological status is social and cultural, not cosmic.

Related to the charge of Dworkin's being a closet natural law theorist is the claim that his theory reduces jurisprudence to moral philosophy. His preferred methodology, constructive interpretation,

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[18] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), p. 81.

[19] Lief H. Carter, *Reason in Law* (Boston: Little, Brown, 1984).

[20] The communical and intersubjective nature of standards is stressed in Fish, op. cit.

can indeed yield results in the arena of morals. Dworkin imagines a philosopher charged with articulating an imaginary community's conventions with respect to courtesy. Her theory will include explicitly normative proscriptions on what is morally required to be courteous. This example is a pedagogic device to illustrate the general methodology. Jurisprudence is not simply moral philosophy. Constructive interpretation applied to law will restrict itself to a particular sub-community, what Dworkin identified in earlier works as the institution of law. Not every moral or political value is a part of this community. Lying to a friend may be wrong, but it is in no sense illegal. At the same time, there exist quite specific procedures and principles within the law that have no coherent use in the wider moral community. One of Dworkin's favorite examples is precedent. The best interpretation of some area of law must include relevant previous decisions. A judge may consider these decisions unfair, but will nevertheless be required to take them into account as relevant data. Even if the precedent is reversed – declared to be a mistake – the judge must still take it very seriously. Our job is to best explain law, or in the present context, constitutional law, not all of the moral conventions governing privacy.

III. *GRISWOLD V. CONNECTICUT*

Equivocation is an intellectual sin against which all beginning logic students are warned. A disturbingly plausible case can be made that the Court puns in its use of the concept of privacy. I believe that this is both mistaken and unfair, but I concede that their use of the concept is at times careless, unclear, and highly confusing.

In the early nineteen-sixties the state of Connecticut had the following laws on its books.

> Any person who uses any drug, medical 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 both fined and imprisoned [53–32].

Any person who assists, abets, counsels, causes, hires or commands another person to commit any offense may be prosecuted and punished as if he were the principle offender [54–196].[21]

The Executive Director of the Planned Parenthood League of Connecticut (Ms. Griswold) and the Medical Director for the League at its office in New Haven were arrested, found guilty as accessories, and fined one hundred dollars. They appealed their convictions on the grounds that the anti-contraception statute was unconstitutional.

The Court took special notice of the fact that the Connecticut law did not distinguish between single and married persons, and that at least some of the clients at the New Haven center had been married. The case came to focus exclusively on whether the statute, as applied to married persons, was constitutional. The Court ruled that the law in question indeed violated the right to marital privacy.

Justice Douglas wrote the Court's opinion. Faced with the problem of the Constitution's failure to explicitly mention the right to personal privacy, he employed a strategy that has continued to fascinate and confound constitutional scholars.

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the First Amendment is one. . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in times 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."[22]

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[21] The Connecticut legislation is cited in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[22] Ibid.

Douglas thus argues that the best interpretation of the Bill of Rights and a whole series of previous decisions by the Court is that there exist certain "zones of privacy" within the Constitution which it is the responsibility of the Court to protect even when there is no specific mention of the zone in the text. One of these zones is the right to marital privacy.

> 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 coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. . . . [I]t is an association for as noble a purpose as any involved in our prior decisions.[23]

Douglas's argument is a fascinating example of Dworkin's constructive interpretation. When the question of where in the constitutional text is the right to marital privacy to be found, Douglas's answer is delightfully candid – in the penumbras of the specific guarantees articulated in the Bill of Rights. A not uncharitable paraphrase would be that the right to privacy is not explicitly in the constitutional text, but is discovered by reading "between the lines." We are asked to consider the text as a whole, and more than a century's history of how that text has been interpreted. Douglas goes so far as to suggest that we must even consider (political and legal?) values that predate the Constitution itself. Citing a right to (marital) privacy as an explanatory construct for making sense of perhaps two centuries' worth of political thought, and several decades' explicit constitutional law is clearly in keeping with the methodological approach that I endorsed above.

Most commentators on *Griswold*, rather than being attracted by Douglas's strategy, have been appalled. The lines of attack have been diverse. One, of course, is the charge that the right to privacy is simply constructed out of thin air as a means of legitimizing the Justices' own assessments of wisdom and moral value; the penumbra argument is seen as opening the door for unrestrained "judicial activism." Although it is seldom articulated in so many words, there

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[23] Ibid.

is suspicion that the *Griswold* decision is anti-democratic. This implicit argument is based on doubts about the legitimacy of judicial review in all but the most straightforward kinds of constitutional case. A full defense of judicial review is, of course, the subject of a different analysis; I simply assume its legitimacy in the present context.

We need to discuss two related criticisms of the decision that focus explicitly on the opinion itself. One has to do, as much as anything else, with constitutional style. It seems that academic lawyers, philosophers, and most of the Justices themselves are uncomfortable with vague appeals to document as a whole. Conventional practice requires that whenever a state action or legislative statute is nullified, the Court must appeal to some specific constitutional provision – the text as a whole or the penumbras of the Bill of Rights is simply too indeterminate. The right to attend integrated schools is a plausible example of Dworkin's constructive interpretation. Nevertheless, when the Warren Court was challenged to show where in the Constitution the right resided, they could answer unequivocally that it was implied by the Equal Protection Clause of the Fourteenth Amendment. Similarly, those who insist that capital punishment is unconstitutional appeal directly to the Eighth Amendment. Clearly the insistence that we focus on circumscribed portions of the constitutional text in the process of judicial interpretation has practical value; it is easier, and the interpretive disagreements are more tightly focused. And this holds true, even when we are forced (as we always are) to consider history and wider political and constitutional values. Although it is true that we often need to offer interpretive theories of entire literary texts, or corpuses, or even genres, it is apparent that the interpretive community of constitutional jurisprudence requires much narrower textual references.

Distinct from this stylistic worry, though directly related to it, is the charge that the argument in *Griswold* is confused. In particular, there is the very serious charge that Douglas equivocates about privacy as he surveys the various enumerated rights. The penumbra argument in *Griswold* mentions the right of association

from the First Amendment, the quartering of soldiers from the Third, search and seizure from the Fourth, self-incrimination from the Fifth, and ends with the strong suggestion that privacy is one of the non-enumerated rights retained by the people under the Ninth Amendment. The rights appealed to here seem distinct enough. Our reading of the argument begins, therefore, with the suspicion that distinct concepts have been gerrymandered together in a confusing and perhaps disingenuous manner.

It is interesting to look at the Court dynamics in this connections. Seven other Justices went on record with interpretations significantly different from that of Justice Douglas. Justice Goldberg, with Warren and Brennan joining, argued that the right to marital privacy was to be located exclusively in the Ninth Amendment.

> I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and . . . [I] agree that the concept of liberty protects those 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 ant that it embraces the right to marital privacy though that right is not mentioned explicitly in the Constitution is supported . . . by the language and history of the Ninth Amendment.[24]

Justice White found the right to marital privacy exclusively in the Fourteenth Amendment.

> 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.[25]

Justice Harlan also appealed to the due process clause as justification for his vote in *Griswold*, and referred the Court back to his detailed defense of such an interpretation in his dissent in *Poe v. Ullman*.

> I consider that this Connecticut legislation . . . violates the Fourteenth Amendment. I believe that a statute making in a criminal offense for

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[24] Ibid., Justice Goldberg concurring.
[25] Ibid., Justice White concurring.

married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life . . .

[I]t is not the particular enumeration of right in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights "which are . . . *fundamental*; which belong . . . to citizens of all free governments," . . . [D]ue process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions . . .

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.[26]

Justices Black and Stewart looked at the same piece of legislation, the same history of Court decisions, and of course, the same constitutional text, and failed to find any constitutionally protected right to privacy.

I think this is an uncommonly silly law. . . . [W]e are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.[27]

The Court talks about a constitutional "right of privacy" as though there was some constitutional provision or provisions forbidding any law ever to be passed which might abridge the privacy of individuals. But there is not. . . . 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.[28]

The appeal to the Fourteenth Amendment's due process clause resurrects one of the most controversial concepts in twentieth

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[26] *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan dissenting.
[27] *Griswold*, note 20, Justice Stewart dissenting.
[28] Ibid., Justice Black dissenting.

century constitutional jurisprudence. The debate goes back to the Court's infamous decision in *Lockner v. New York*. Here the Court interpreted the concept of liberty in the Fourteenth Amendment to be a substantive right. But as Justice Holmes pointed out, virtually every governmental action interferes with some citizen's liberty in some way or another. Thus, the question becomes which infringements on personal liberty, if any, does the amendment preclude. Substantive due process came to be a widely acknowledged constitutional evil in the thirties, when conservative justices interpreted certain economic liberties, like liberty to contract, as fundamental and deserving of constitutional protection. Thus, the police and administrative powers of the New Deal executive and legislative branches were frustrated by the Court. The liberal response to these decisions was that the due process clause of the Fourteenth Amendment should be understood as a procedural safeguard, not as a substantive one. If any state is to deprive a person of life, liberty or property, the Amendment stipulates that this is legitimate only if there has been due process of law. Read this way, it appears that the state can infringe on any non-articulated liberty, as long as they have followed proper legal procedure.

Justice Douglas was clearly sensitive to this bloody bit of constitutional history.

> [W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lockner 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.[29]

To some degree this misses the point. To read the charge of substantive due process as applying only to economic issues is to confuse history with conceptual analysis. It is important to remember that substantive due process was first applied by appel-

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[29] Ibid.

late courts in the last half of the nineteenth century. Notions of laissez-faire capitalism so dominated our social consciousness in this time of unprecedented industrial expansion that the recognition of the "fundamentality" of economic liberties was not as activist as it would sound now, or even in the late thirties.

A hard and fast distinction between substantive and procedural due process is counterproductive. To decide whether some state action deprives people of their liberty without due process of law requires some examination of the importance of the liberty in question. There is always a substantive element in deciding questions of "fundamentality." Justice Holmes admits as much in his famous *Lockner* dissent.

> A constitution is not intended to embody a particular economic theory, . . . [i]t is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel or even shocking ought not to conclude our judgment upon the question of whether statutes embodying them conflict with the Constitution of the United States. . . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[30]

The key is the decision of "a rational and fair man" about the "fundamental principles" embodied in "the traditions of our people and our law." We can read the majority of the Court, almost fifty years later, as going on record and saying that the right to marital privacy is in this sense fundamental.

The appeal to the Ninth Amendment is in its own way even more interesting. Substantive due process was a tried, though largely discredited, approach; the articulation of an unenumerated constitutional right warranting the exercise of judicial review was virtually unheard of. Even critics must concede, however:

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[30] *Lockner v. New York*, 198 U.S. 45 (1905), Justice Holmes dissenting.

that read for what it says the Ninth Amendment seems open-textured enough to support almost anything one might wish to argue and that thought can be pretty scary.[31]

What Ely finds scary is that the Court should have the authority to pick out rights never mentioned in the document – or in the case of concrete rights or liberties like abortion, probably never even thought of by the "founders" – and use them to overrule the will of democratically elected legislatures. But, as he fully concedes, exactly the same worry applies to the due process clause, and perhaps to the privileges and immunities clause as well. The general problem is one of intentionally vague and abstract language. Interpretivists like Ely and Black will inevitably worry that:

> [i]f a principled approach to judicial enforcement of the constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them.[32]

The Court's evolving privacy jurisprudence can be read as an attempt to articulate precisely such "a principle approach to judicial enforcement of the Constitution's open-ended provisions." Consider the majority's three doctrinal options in *Griswold*. They could locate the right to marital privacy in the penumbras of the Bill of Rights, in the Fourteenth Amendment's due process clause, or treat it as a non-enumerated right under the Ninth Amendment. Douglas correctly saw that the penumbra argument required broad appeal to the constitutional text, careful analysis of legal and constitutional history, and the sparing use of widely shared political and legal values. As we have seen, the decision seems to be a paradigm of constructive interpretation. Exactly the same considerations are required for the due process strategy and for that of the Ninth Amendment. Harlan makes the beginnings of a case for the fun-

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[31] John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), p. 34.
[32] Ibid., p. 41.

damentality of marital privacy. Presumably this will require the examination of constitutional history and appeal to political and legal morality – precisely the strategy employed by Douglas in the penumbra argument. We have little doctrinal guidance for what the Ninth Amendment opinion would look like. Presumably the author of the opinion would be concerned to win the support of his or her colleagues, to give some guidance to future courts who might use the decision as precedent, and perhaps would desire a favorable critical assessment of the opinion by professional colleagues on the bench and in the academy. The obvious strategy would, once again, be that of Douglas. Make the case that the right to marital privacy is one of the non-enumerated ones within the Ninth Amendment by appealing to the whole of the constitutional text, relevant legal history, and to those political and legal values where one can expect wide consensus. There is a sense, therefore, in which this highly technical concern with where the right to privacy is to be found in the constitutional text ignores the important point. The candid answer, as I have been arguing above, is that it is a product of constructive interpretation. Whether the starting point for this constructive process is the penumbras of the individual protections in the Bill of Rights, the due process clause, or the Ninth Amendment is not all that critical, since the same general sort of evidence will be required to make a plausible constitutional argument.

None of the above handles the worry of equivocation and incoherence. We still find ourselves being distracted by the constructive nature of interesting constitutional findings. Our growing confidence in constructive interpretation does not resolve our questions about the nature of constitutional privacy. And we should duly note at this point that all talk of marital privacy ceases as soon as *Griswold* is decided. The case really concerns the general *right to privacy*, and applies it to married couples. We still have not addressed the very serious charge that the Court's use of this concept is a misleading and perhaps disingenuous pun.

Apart from worries about the charge of substantive due process and the constitutional home for privacy rights, there seems to be

genuine indecision about the nature of these rights. One sees this in Douglas's original argument.

> 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. . . . Would we allow the police to search the sacred precincts of the marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.[33]

The Connecticut law clearly sought to "control or prevent activities." The Court ruled that the choice to engage in these activities, at least for married couples, was constitutionally protected. This seems quite different from the concerns a married couple might have were "the police to search the sacred precincts of" their bedroom. The state violates their privacy in the first instance by proscribing certain kinds of behavior, by restricting their liberty. The violation in the second instance involves snooping. To be sure, state snooping may lead to a restriction on behavior, both because of the threat of prosecution, and because the very act of snooping may discourage the behavior. But one can be concerned about state snooping quite independently of legal or social censure.

At this point the problem seems one of equivocation. If several different substantive rights are all being called the right to privacy, confusion will certainly result. And the prima facie case is powerful. To begin to sort this out we need to turn attention to a line of privacy cases that seems quite distinct from the above.

IV. PRIVACY AND THE FOURTH AMENDMENT

Most constitutional scholars tend to treat the concept of privacy in the line of decisions that descended from *Griswold* as technical jargon. A distinction is drawn between a concept of Fourteenth

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[33] *Griswold*, note 20.

Amendment privacy, and the much more colloquial sense of privacy that is addressed in the line of cases dealing with the Fourth Amendment's concern with search and seizure. Perhaps the single most eloquent statement of this sense of constitutional privacy was issued by Justice Brandeis in dissent.

> The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be a deemed a violation of the [Constitution].[34]

I have argued elsewhere that the analysis of privacy in terms of being let alone is another excellent example of constructive interpretation.[35] Brandeis was never suggesting that a failure to be let alone was a sufficient condition for a violation of personal privacy, neither in the seminal article in 1890,[36] nor in *Olmstead* in 1928. Those critics who make heavy weather of the fact that – "If I hit Jones on the head with a brick I have not let him alone" – distract us from the stated point of the analysis.[37] The original purpose was to unpack the different uses of privacy in tort law. Cooley's aphorism about being let alone is adapted as an explana-

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[34] *Olmstead v. United States*, 277 U.S. 438 (1928), Justice Brandeis dissenting.

[35] Jeffery L. Johnson, "Liberty, Privacy and Integrity," *Public Affairs Quarterly* **3** (1989): 15–34.

[36] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* **4** (1890): 193–220, reprinted in Schoeman, infra.

[37] See, for example, W. A. Parent, "Privacy, Morality and the Law," *Philosophy and Public Affairs* **12** (1983): 269–88, and Judith Jarvis Thomson, "The Right to Privacy," in Ferdinand D. Schoeman, ed., *Philosophical Dimensions of Privacy* (New York: Cambridge University Press, 1984).

tory hypothesis to unite the different uses of privacy that Warren and Brandeis were able to identify by the close of the nineteenth century. By the time of *Olmstead*, the explanatory model is considerably expanded to include the right to be let alone by government, particularly with respect to state searches and seizures.

Almost forty years later, in *Katz v. United States*, the Court finally endorsed Justice Brandeis' views about the confidentiality of telephone conversations. Justice Stewart begins with some cautionary words about how to read the Fourth Amendment, but in the end his argument focuses on the centrality of personal privacy.

> [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy – his right to be let alone by other people – is, like the protection of his very life, left largely to the law of the individual States. . . . [T]he Fourth Amendment protects people, not places. . . . [A] person in a telephone booth may rely upon the protection of the Fourth Amendment. One . . . is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.[38]

It is beyond dispute that the Constitution protects individuals only from "state actions" and "state actors"; a *general* right to privacy, therefore, must be protected by statute, or more likely, the informal sanction of moral outrage. Perhaps slightly more debatable is the implicit claim that unconstitutional seizures of property are not privacy issues. Still, I think we can grant the general point that the main implication for personal privacy addressed in the Fourth Amendment is the protection of the individual from unjustified, and unauthorized, state searches.

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[38] *Katz*, note 7.

Recent Fourth Amendment jurisprudence has taken quite a distressing turn. We see a steady pattern of exclusions to the warrant requirement,[39] and even more disheartening, a relaxation of the state's need to show probable cause.[40] The conservative strategy in many of these cases has been one of balancing.[41] What is interesting in the present context, however, is that even the rulings that have sanctioned the most indiscriminate state searches, have consistently included language that reaffirms the citizen's right to privacy within the Fourth Amendment. State need for public order and safety, and the need for efficient law enforcement takes precedence with distressing frequency over the individual's concern with personal privacy. Unlike the Fourteenth Amendment cases, however, there is little debate about whether the Fourth Amendment articulates at least one sense of a constitutional right to privacy.

To see why "privacy" is the correct concept to capture this concern, one need only ask why the state would have an interest in searching its citizens. The answer is obvious; they want to find something out. Their goal is clearly the acquisition of information. Philosophical analyses of the concept of privacy have been diverse. It is easy to find, however, just one level beneath the surface clear consensus that the non-technical concept of privacy is linked in some fairly strong semantic sense to the control of personal information.

> It is apparent that there are a number of different claims that can be made in the name of privacy. A number – and perhaps all – of them involve the question of the kind and degree of control that a person ought to be able to exercise in respect to knowledge or the disclosure of information about himself or herself. This is not all there is to privacy, but it is surely one central theme.[42]

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[39] See for example, *Cardwell v. Lewis*, 417 U.S. 583 (1974) and *California v. Carney*, 471 U.S. 386 (1985).

[40] See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

[41] See Donald Crowley and Jeffery L. Johnson, "Balancing and the Legitimate Expectation of Privacy," *Public Law Review* **7** (1988): 337–58.

[42] Richard A. Wasserstrom, "Privacy," in Schoeman, op. cit., p. 317.

V. IMMUNITY FROM THE JUDGMENT OF THE STATE

I believe that the following three cases are all clear violations of personal privacy. I am talking, here, about the non-technical, non-legal sense of personal privacy that competent speakers of English might concern themselves with in their day-to-day transactions with their fellow citizens.

Case One. You are my dean. You have heard distressing campus gossip to the effect that I engage in sexual liaisons with my female advisees in the privacy of my campus office. You instruct the crew from the physical plant to enter my office late one night and install concealed videocameras and listening devices. You then carefully monitor my actions within my office during the semester. You discover the following information. I am hard-working and totally professional in my dealings with students, male or female. You also discover certain eccentricities – my addiction to caffeine and my tendency to nap in the late afternoon. Confident that the rumors are unfounded, you finally discontinue the surveillance.

Case Two. I enroll in a life drawing course. I have no real interest in studio art, and even less talent. What I really enjoy is looking at naked young coeds who model in the course. The overwhelming emotion I feel during the course is lust. I convince one of the models to allow me to photograph her in the nude "so I can complete my term project." In fact, I only use the photograph for masturbatory purposes.

Case Three. I am the chair of the Republican Party in our small community. I am actively involved in local politics, and certainly make no attempt to hide my political loyalties. My research and teaching interests, however, lie in the area of mathematical logic. I make it a practice not to discuss politics with my colleagues, and would never think of discussing something so "real world" in my courses. My liberal colleagues are appalled at my political leanings, and take every opportunity to lecture me on how misguided I really am.

None of these cases are directly concerned with personal infor-

mation. Information is clearly gained in the first case, but it somehow misses the point of my offense were I to learn about the surveillance. I might be happy that my dean learns about my professional virtue, and probably a little embarrassed that he learns about the minor vices, but the information that I would have seemed most likely to have wanted to keep confidential turns out to be absent. In the second case the connection with information is even more tenuous. There are incredibly complex conventions in our culture that deal with nudity, sexuality, and observation. I don't enroll in the class to gain knowledge or information, but for cheap sexual thrills. The young women whose privacy is invaded do not seek to keep something confidential or secret. The models have no complaint with the serious art students, and the photograph is unproblematic when used for legitimate artistic purposes. What seems offensive is psychological, my attitudes and emotions when I observe the young women or look at the photograph. The last case is designed to sever the connection between privacy and information as completely as possible. My politics are common knowledge and I have no problem with the fact that my colleagues possess this information. That they would presume to lecture and harass me about my political beliefs is what raises privacy issues.

I have argued on a number of occasions that there is something seriously misleading about information models of personal privacy.[43] I want to concede, nevertheless, that there no doubt exists some kind of genuine semantic connection between the concepts. It is no accident, therefore, that the professional literature favors these analyses, that most competent speakers insist on some connection, and that lexicographers consistently include informational concepts in their definitions of privacy. At the same time, I take

[43] See Jeffery L. Johnson, "Privacy and the Judgment of Others," *The Journal of Value Inquiry* **23** (1989): 157–68; Jeffery L. Johnson and Donald W. Crowley, "*T.L.O.* and the Student's Right to Privacy," *Educational Theory* **36** (1986): 211–24.

it to be obvious that an immunity from the illegitimate possession of personal information is not a necessary condition of personal privacy.

Consider a case where privacy does seem connected with the control of personal information. Ever since I was in graduate school I have been writing cheap pornographic novels under pseudonyms. Although totally tasteless and devoid of literary value, they are nonviolent and do not exploit children. I am not a tax-cheat, and I dutifully report the extra income, which is now considerable, when I file my returns. I desire to keep this interesting information about my personal life secret for the following reasons. I come from a conservative midwestern family; my parents would be shocked and offended to learn that their son is a pornographer. I am widely known on campus for my outspoken defense of liberal causes; I am worried that my feminist colleagues would consider me a sexist hypocrite. I am up for tenure this year, and fear that the personnel committee would take this as further evidence of my less than stunning research capabilities.

It would be quite natural to analyze the privacy interests here in terms of my control of his personal information. The more fundamental concern, however, focuses on the judgment of – not the knowledge of – others. What I really seek to protect myself from is the attitudes and opinions of others, and not their possession of certain facts about me. It is quite true, of course, that in normal circumstances the acquisition of the relevant knowledge is a necessary condition of their coming to have these judgmental attitudes; and this explains why knowledge and information loom so large in our thinking about personal privacy. It is also true that others coming to have these negative attitudes will likely act as a powerful disincentive to the behavior in question, and hence serve to limit my personal freedom. Thus, once again, we see how concepts that have been traditionally linked, privacy and freedom, can be conveniently explicated by the immunity from the judgment of others model. I want to keep my pornographic literary career confidential; I seek to block the knowledge of it from my family,

my feminist colleagues, and the senior faculty on the personnel committee. But controlling their knowledge about me is merely a means to my real end of blocking their judgment.

This model works perfectly for my third case above. More candidly, the case was constructed to show the virtues of the immunity from the judgment of others model of personal privacy. The knowledge of my political loyalties is already widely known, and even if it were not, I would have no real interest in keeping them secret. I am confident enough, or perhaps stubborn enough, that my political and academic liberties are not really compromised. I feel that my colleagues intrude on my privacy simply by forming, and even more by so publicly expressing, their negative judgments about my politics.

It is important to notice that I have no general immunity from the judgment of others, including my colleagues. If I continually express racist sentiments in my lectures, or if I wear plaid pants and paisley shirts, there is nothing inappropriate in others forming and expressing strong negative judgments about me. The concept of privacy is clearly limited to the particular conventions of where and when one can expect immunity from the judgment of others that are recognized within a culture or interpretive community. In ours – academia, the United States, or contemporary Western civilization – political belief is an area where one can expect this immunity; racism and lack of fashion sense are not.

Privacy norms, thus, protect the individual in his or her beliefs and actions, at least within certain culturally relative domains. Personal privacy is also concerned with the protection of location, personal space, and special contexts. I have no general immunity from the judgment of my dean when it comes to the discharge of my professional duties with my female advises. I do have, however, a "legitimate expectation of privacy" within the confines of my office. This has partly to do with some vague notion of "personal space." Not everyone is lucky enough to have privacy expectations in their place of employment, but many do. A person's office, or desk, or locker is generally recognized as personal and private; that person expects immunity from the judgment of others

regarding this space. More significantly in the academic context, a person's office is considered private because the goings-on in the office – advising students, discussing campus issues with colleagues, transacting professional business on the telephone – are granted an immunity from the judgment of others. We reserve the right to judge others negatively for their unprofessional conduct in their offices – seducing students, or placing bets with bookies – but we grant them immunity nevertheless because we value the general importance of these spaces or relationships. Thus, society's need to control unacceptable behavior is overridden by the importance, within these carefully circumscribed contexts, of an immunity from the judgment of others.

This model of privacy has the most difficult time with my second kind of case. Snoops sometimes eavesdrop for the pure pleasure of it; any judgments they form are incidental. Voyeurs may form no judgments at all. The immunity from the judgment of others model, nevertheless, has clear analytic advantages over information models of personal privacy in these kinds of cases. The latter stress epistemological notions. We have already seen how implausible data, knowledge, and personal facts are in understanding these types of privacy concerns. The judgment of others reminds us that affective attitudes, not passive knowledge, are much more important. I fully grant that my judgment of the models in the life drawing class are not central in unpacking the privacy violation. Similar kinds of attitudes, however, lust, curiosity, and the like, come much closer than knowledge and information.

The analytic task is easier in the present context. We are not seeking a general model for the concept of personal privacy. Our goal is a constructive interpretation of the right to privacy within the constitutional context. I have been assuming that a plausible analysis will be tied in some rather direct fashion to our everyday non-technical conventions governing privacy, but the concepts will not be univocal. Violations of personal privacy often involve notions of sexuality and nudity, though this aspect is virtually ignored in the professional literature. In the constitutional context, however, this aspect of privacy almost never arises. The only excep-

tions I can think of involve sensitive state searches, such as those involving strip searches of public school children,[44] or Justice Douglas's worry about "the police search[ing] the sacred precincts of marital bedrooms."[45] Even in these cases, however, there is a straightforward sense in which these individuals are claiming an immunity from the judgment of the state. After all, it is precisely because they are suspected of some infraction of the school rules, or of illegal contraceptive behavior, that the searches are initiated in the first place.

Thus, I propose as a working hypothesis – as the best explanation of two hundred years of political and legal tradition, of more than one hundred years of the Court's rulings, of the abstract intentions of "the founders," of the liberal consensus of scholars in the community of academic jurisprudence, of the past twenty-five years of the Court's privacy decisions, and a great deal of other relevant data – the following constructive interpretation of the constitutional right to privacy. Citizens have the right to certain socially defined "areas" within their lives in which they can expect an immunity from the judgment of the state. We do not have an all-purpose right to be "let alone" by government; without some interference there could be no legislation, nor taxes, nor government itself. The non-technical sense of personal privacy helps us identify some of those areas where we can expect immunity from the judgment of the state. Personal spaces like one's home,[46] or luggage,[47] or body[48] will be likely candidates for this immunity. Other personal aspects of a person's life, her financial records or telephone conversations,[49] will be included. So will private relationships between

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[44] *Doe v. Renfrow*, 475 F.Supp. 1012 (N.D. Ind. 1979), 451 U.S. 1022 (1981), cert. denied.
[45] *Griswold*, note 20.
[46] *Stanley v. Georgia*, 394 U.S. 557.
[47] *United States v. Chadwick*, 433 U.S. 1 (1977).
[48] *Schmerber v. California*, 384 U.S. 757 (1966).
[49] *Katz*, note 7.

counselors and clients,[50] or married couples,[51] or other "intimate associations."[52]

The most significant analytic virtue of the immunity from the judgment of the state model of constitutional privacy is that it allows us to see why the Fourth Amendment's search and seizure protection, and the Fourteenth Amendment's due process protection, are both aspects of a more general right of constitutional privacy. When the state proscribes certain kinds of behavior – marital birth control, abortion,[53] homosexuality,[54] personal use of marijuana,[55] – it clearly casts judgment on the behavior in question and those individuals who engage in it. Since the whole purpose of the legislative proscriptions is to deter individuals from the behavior, questions of individual liberty and freedom are certainly relevant. Again, we have no blanket right to liberty. Even Mill's principle of harm to others is too liberal to describe the conventions in our political and constitutional community.[56] It is still relevant to ask, however, whether legislation intrudes into those areas that are truly private, that is to say, into those areas where political and constitutional tradition ensure us an immunity from the judgment of the state.

The concept of constitutional privacy can be seen as providing a workable test for when "a rational and fair man would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[57] The due process clause can be read as protecting substantive liberty rights when the state seeks to proscribe behavior

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[50] *Tarasoff v. Regents of the University of California*, 13 Cal.3d 177 (1974).
[51] *Griswold*, note 20.
[52] See Kenneth Karst, "The Freedom of Intimate Association," *Yale Law Journal* **80** (1980): 624–92.
[53] *Roe v. Wade*, 410 U.S. 113 (1973).
[54] *Hardwick v. Bowers*, 478 U.S. 186 (1986).
[55] *Ravin v. State*, 537 P.2d 494.
[56] See Johnson, 1989, op. cit.
[57] *Lockner*, note 29.

where "the traditions of our people and our law" recognize the individual's immunity from state judgment.

The discussion is distressingly abstract. I have employed the model of constructive interpretation to suggest that a non-articulated constitutional right to privacy makes conceptual sense. We have as yet to make the complete case that the existence of such a right is the best explanation of the relevant constitutional and political data. I am confident, however, that such a case is plausible, and indeed, that all the ingredients for making it are readily available, if we survey the philosophical and jurisprudential literature. In the legal realist's sense, of course, the constitutional right to privacy clearly exists because that Court has said so in so many words. The present argument is designed to show that these pronouncements from the Court are not as "activist" as many commentators now believe.

Much work remains. The sympathetic moral, political, and historical analyses started by theorists like Perry,[58] Richards,[59] and most especially Dworkin,[60] must be continued. We need a constitutional context in which it is obvious and commonsensical that individuals are granted areas within their lives where they can expect and insist upon immunity from the judgment of the state. Only then can we hope to win the more interesting constitutional battles about specifics. The model of immunity from the judgment of the state is articulated – as is the case with most constitutional principles – in extremely general language. The only direct guidance we receive about how to identify these postulated areas of immunity is to examine the privacy conventions within society, generally, and the specific institution of constitutional law. It is not surprising, therefore, to discover raging controversies as to whether these areas of immunity extend to homosexual relationships, or even to abortion. Similarly, we find consensus that the police cannot simply

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[58] See Perry, op. cit.
[59] See Richards, op. cit.
[60] See Dworkin, 1986, op. cit.

search a person's home without a warrant based on probable cause. We find little consensus, however, regarding searches of a high school student's purse on school grounds,[61] nor whether the area of immunity from the judgment of the state extends to searches of an individual's urine.[62]

I take it as a given that the present Court is less concerned with protecting an individual's right to constitutional privacy than their predecessors of only a decade and a half ago were. Political jurisprudents will explain this, plausibly enough, in terms of the changing membership of the Court, and the more conservative biases of the recent appointees. This is only part of the problem. Liberals must share some of the blame. We were much too quick to accept the results of decisions like *Katz, Griswold*, and *Roe*, without supplying the theoretical underpinning to show that these decisions made political and constitutional sense, and were not simply exercises of judicial power during a rare liberal moment in our history. The changing climate forces concerned liberal theorists to go back and provide these constructive interpretations that should have been produced at the time.[63]

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[61] *T.L.O.*, note 38.

[62] *National Treasury Employees Union v. Von Raab*, 57 LW 4338 (1989).

[63] My thanks, as always, to Donald Crowley.