

*Griswold v. Connecticut*

**MR. JUSTICE GOLDBERG, whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN join, concurring.**

I agree with the Court that Connecticut's birth control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that "due process," as used in the Fourteenth Amendment, incorporates all of the first eight Amendments (*see* my concurring opinion in *Pointer v. Texas*, [380 U. S. 400](#), [380 U. S. 410](#), and the dissenting opinion of MR. JUSTICE BRENNAN in *Cohen v. Hurley*, [366 U. S. 117](#), [366 U. S. 154](#)), 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, [[Footnote 1](#)] is supported both by numerous [Page 381 U. S. 487](#) decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment, *ante* at [381 U. S. 484](#). I add these words to emphasize the relevance of that Amendment to the Court's holding.

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." *Snyder v. Massachusetts*, [291 U. S. 7](#), [291 U. S. 105](#). In *Gitlow v. New York*, [268 U. S. 652](#), [268 U. S. 666](#), 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."

(Emphasis added.)

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And, in *Meyer v. Nebraska*, [262 U. S. 390](#), [262 U. S. 399](#), the Court, referring to the Fourteenth Amendment, stated:

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also [for example,] the right . . . to marry, establish a home and bring up children. . . ."

This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights. [[Footnote 2](#)] 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." The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him, and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights [\[Footnote 3\]](#) could not be sufficiently broad to cover all essential [Page 381 U. S. 489](#) rights, and that the specific mention of certain rights would be interpreted as a denial that others were protected. [\[Footnote 4\]](#)

In presenting the proposed Amendment, Madison said:

"It has been objected also against a bill of rights that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow, by implication, that those rights which were not singled out were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system, but I conceive that it may be guarded against. I have attempted it, as gentlemen may see by turning to the [Page 381 U. S. 490](#) last clause of the fourth resolution [the Ninth Amendment]."

I *Annals of Congress* 439 (Gales and Seaton ed. 1834). Mr. Justice Story wrote of this argument against a bill of rights and the meaning of the Ninth Amendment:

"In regard to . . . [a] suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis. . . . But a conclusive answer is that such an attempt may be interdicted (as it has been) by a positive declaration in such a bill of rights that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people."

II *Story, Commentaries on the Constitution of the United States* 626-627 (5th ed. 1891). He further stated, referring to the Ninth Amendment:

"This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well known maxim that an affirmation in particular cases implies a negation in all others, and, *e converso*, that a negation in particular cases implies an affirmation in all others."

*Id.* at 651. These statements of Madison and Story make clear that 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. [\[Footnote 5\]](#)

While this Court has had little occasion to interpret the Ninth Amendment, [\[Footnote 6\]](#) "[i]t cannot be presumed that any [Page 381 U. S. 491](#) clause in the constitution is intended to be without effect." *Marbury v. Madison*, 1 Cranch 137, [5 U. S. 174](#). In interpreting the Constitution, "real effect should be given to all the words it uses." *Myers v. United States*, [272 U. S. 52](#), [272 U.](#)

[S. 151](#). The Ninth Amendment to the Constitution may be regarded by some as a recent discovery, and may be forgotten by others, but, since 1791, it has been a basic part of the Constitution which we are sworn to uphold. 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 [Page 381 U. S. 492](#) "[t]he enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people." (Emphasis added.)

A dissenting opinion suggests that my interpretation of the Ninth Amendment somehow "broaden[s] the powers of this Court." *Post* at [381 U. S. 520](#). With all due respect, I believe that it misses the import of what I am saying. I do not take the position of my Brother BLACK in his dissent in *Adamson v. California*, [332 U. S. 46](#), [332 U. S. 68](#), that the entire Bill of Rights is incorporated in the Fourteenth Amendment, and I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments, and an intent that the list of rights included there not be deemed exhaustive. As any student of this Court's opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States. *See, e.g., Bolling v. Sharpe*, [347 U. S. 497](#); *Aptheker v. Secretary of State*, [378 U. S. 500](#); *Kent v. Dulles*, [357 U. S. 116](#), *Cantwell v. Connecticut*, [310 U. S. 296](#); *NAACP v. Alabama*, [357 U. S. 449](#); *Gideon v. Wainwright*, [372 U. S. 335](#); *New York Times Co. v. Sullivan*, [376 U. S. 254](#). The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the authority [Page 381 U. S. 493](#) of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights.

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a State's infringement of a fundamental right. While the Ninth Amendment -- and indeed the entire Bill of Rights -- originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. *Cf. United Public Workers v. Mitchell*, [330 U. S. 75](#), 330 U. S. 94-95.

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." *Snyder v. Massachusetts*, [291 U. S. 97](#), [291 U. S. 105](#). The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' . . ."

*Powell v. Alabama*, [287 U. S. 45](#), [287 U. S. 67](#). "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees," and "from experience with the requirements of a free society." *Poe* Page [381 U. S. 494](#) v. *Ullman*, [367 U. S. 497](#), [367 U. S. 517](#) (dissenting opinion of MR. JUSTICE DOUGLAS). [[Footnote 7](#)]

I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live." *Id.* at [367 U. S. 521](#). Mr. Justice Brandeis, dissenting in *Olmstead v. United States*, [277 U. S. 438](#), [277 U. S. 478](#), comprehensively summarized the principles underlying the Constitution's guarantees of privacy:

"The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. 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. " [Page 381 U. S. 495](#)

The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy -- that of the marital relation and the marital home. This Court recognized in *Meyer v. Nebraska, supra*, that the right "to marry, establish a home and bring up children" was an essential part of the liberty guaranteed by the Fourteenth Amendment. 262 U.S. at [262 U. S. 399](#). In *Pierce v. Society of Sisters*, [268 U. S. 510](#), the Court held unconstitutional an Oregon Act which forbade parents from sending their children to private schools because such an act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at [268 U. S. 534-535](#). As this Court said in *Prince v. Massachusetts*, [321 U. S. 158](#), at [321 U. S. 166](#), the *Meyer* and *Pierce* decisions "have respected the private realm of family life which the state cannot enter."

I agree with MR. JUSTICE HARLAN's statement in his dissenting opinion in *Poe v. Ullman*, [367 U. S. 497](#), [367 U. S. 551-552](#):

"Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole 'private realm of family

life,' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution [Page 381 U. S. 496](#) explicitly forbids the State from disrupting the traditional relation of the family -- a relation as old and as fundamental as our entire civilization - - surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government, though not specifically mentioned in the Constitution.

My Brother STEWART, while characterizing the Connecticut birth control law as "an uncommonly silly law," *post* at [381 U. S. 527](#), would nevertheless let it stand on the ground that it is not for the courts to "*substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.*" *Post* at [381 U. S. 528](#). Elsewhere, I have stated that, "[w]hile I quite agree with Mr. Justice Brandeis that . . . 'a . . . State may . . . serve as a laboratory, and try novel social and economic experiments,' *New State Ice Co. v. Liebmann*, [285 U. S. 262](#), [285 U. S. 280](#), [285 U. S. 311](#) (dissenting opinion), I do not believe that this includes the power to experiment with the fundamental liberties of citizens. . . . [[Footnote 8](#)]"

The vice of the dissenters' views is that it would permit such experimentation by the States in the area of the fundamental personal rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government.

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 [Page 381 U. S. 497](#) 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.

In a long series of cases, this Court has held that, where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose.

"Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling,"

*Bates v. Little Rock*, [361 U. S. 516](#), [361 U. S. 524](#). The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, [379 U. S. 184](#), [379 U. S. 196](#). See *Schneider v. Irvington*, [308 U. S. 147](#), [308 U. S. 161](#).

Although the Connecticut birth control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any "subordinating [state] interest which is compelling," or that it is "necessary [Page 381 U. S. 498](#) . . . to the accomplishment of a permissible state policy." The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern -- the discouraging of extramarital relations. It says that preventing the use of birth control devices by married persons helps prevent the indulgence by some in such extramarital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth control devices for the prevention of disease, as distinguished from the prevention of conception, see *Tileston v. Ullman*, 129 Conn. 84, 26 A.2d 582. But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. See *Aptheker v. Secretary of State*, [378 U. S. 500](#), [378 U. S. 514](#); *NAACP v. Alabama*, [377 U. S. 288](#), [377 U. S. 307-308](#); *McLaughlin v. Florida*, *supra*, at [379 U. S. 196](#). Here, as elsewhere, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, [371 U. S. 415](#), [371 U. S. 438](#). The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication. See Conn.Gen.Stat. §§ 53-218, 53-219 *et seq.* These statutes demonstrate that means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to "invade the area of protected freedoms." *NAACP v. Alabama*, *supra*, at [377 U. S. 307](#). See *McLaughlin v. Florida*, *supra*, at [379 U. S. 196](#).

Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation [Page 381 U. S. 499](#) of sexual promiscuity or misconduct. As my Brother HARLAN so well stated in his dissenting opinion in *Poe v. Ullman*, *supra*, at [367 U. S. 553](#).

"Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . , but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which, always and in every age, it has fostered and protected. It is one thing when the State exerts its power either to forbid extramarital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."

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.

[\[Footnote 1\]](#)

My Brother STEWART dissents on the ground that he "can find no . . . 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."

*Post* at [381 U. S. 530](#). He would require a more explicit guarantee than the one which the Court derives from several constitutional amendments. This Court, however, has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name. *See, e.g., Bolling v. Sharpe*, [347 U. S. 497](#); *Aptheker v. Secretary of State*, [378 U. S. 500](#); *Kent v. Dulles*, [357 U. S. 116](#); *Carrington v. Rash*, [380 U. S. 89](#), [380 U. S. 96](#); *Schwartz v. Board of Bar Examiners*, [353 U. S. 232](#); *NAACP v. Alabama*, [360 U. S. 240](#); *Pierce v. Society of Sisters*, [268 U. S. 510](#); *Meyer v. Nebraska*, [262 U. S. 390](#). To the contrary, this Court, for example, in *Bolling v. Sharpe*, *supra*, while recognizing that the Fifth Amendment does not contain the "explicit safeguard" of an equal protection clause, *id.* at [347 U. S. 499](#), nevertheless derived an equal protection principle from that Amendment's Due Process Clause. And in *Schwartz v. Board of Bar Examiners*, *supra*, the Court held that the Fourteenth Amendment protects from arbitrary state action the right to pursue an occupation, such as the practice of law.

[\[Footnote 2\]](#)

*See, e.g., Chicago, B. & Q. R. Co. v. Chicago*, [166 U. S. 226](#); *Gitlow v. New York*, *supra*; *Cantwell v. Connecticut*, [310 U. S. 296](#); *Wolf v. Colorado*, [338 U. S. 25](#); *Robinson v. California*, [370 U. S. 660](#); *Gideon v. Wainwright*, [372 U. S. 335](#); *Malloy v. Hogan*, [378 U. S. 1](#); *Pointer v. Texas*, *supra*; *Griffin v. California*, [380 U. S. 609](#).

[\[Footnote 3\]](#)

Madison himself had previously pointed out the dangers of inaccuracy resulting from the fact that "no language is so copious as to supply words and phrases for every complex idea." The Federalist, No. 37 (Cooke ed.1961) at 236.

[\[Footnote 4\]](#)

Alexander Hamilton was opposed to a bill of rights on the ground that it was unnecessary, because the Federal Government was a government of delegated powers, and it was not granted the power to intrude upon fundamental personal rights. The Federalist, No. 84 (Cooke ed.1961), at 578-579. He also argued,

"I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted, and, on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power."

*Id.* at 579. The Ninth Amendment, and the Tenth Amendment, which provides,

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,

were apparently also designed in part to meet the above-quoted argument of Hamilton.

[\[Footnote 5\]](#)

The Tenth Amendment similarly made clear that the States and the people retained all those powers not expressly delegated to the Federal Government.

[\[Footnote 6\]](#)

This Amendment has been referred to as "The Forgotten Ninth Amendment," in a book with that title by Bennett B. Patterson (1955). Other commentary on the Ninth Amendment includes Redlich, Are There "Certain Rights . . . Retained by the People"? 37 N.Y.U.L.Rev. 787 (1962), and Kelsey, The Ninth Amendment of the Federal Constitution, 11 Ind.L.J. 309 (1936). As far as I am aware, until today, this Court has referred to the Ninth Amendment only in *United Public Workers v. Mitchell*, [330 U. S. 75](#), 330 U. S. 94-95; *Tennessee Electric Power Co. v. TVA*, [306 U. S. 118](#), [306 U. S. 143-144](#), and *Ashwander v. TVA*, [297 U. S. 288](#), [297 U. S. 330-331](#). See also *Calder v. Bull*, 3 Dall. 386, [3 U. S. 388](#); *Loan Assn. v. Topeka*, 20 Wall. 655, [87 U. S. 662-663](#).

In *United Public Workers v. Mitchell*, *supra*, at 330 U. S. 94-95, the Court stated:

"We accept appellants' contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments [is] involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus, we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. And, if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment."

[\[Footnote 7\]](#)

In light of the tests enunciated in these cases, it cannot be said that a judge's responsibility to determine whether a right is basic and fundamental in this sense vests him with unrestricted personal discretion. In fact, a hesitancy to allow too broad a discretion was a substantial reason leading me to conclude, in *Pointer v. Texas, supra*, at [380 U. S. 413-414](#), that those rights absorbed by the Fourteenth Amendment and applied to the States because they are fundamental apply with equal force and to the same extent against both federal and state governments. In *Pointer*, I said that the contrary view would require

"this Court to make the extremely subjective and excessively discretionary determination as to whether a practice, forbidden the Federal Government by a fundamental constitutional guarantee, is, as viewed in the factual circumstances surrounding each individual case, sufficiently repugnant to the notion of due process as to be forbidden the States."

*Id.* at [380 U. S. 413](#).

[[Footnote 8](#)]

*Pointer v. Texas, supra* at [380 U. S. 413](#). See also the discussion of my Brother DOUGLAS, *Poe v. Ullman, supra*, at [367 U. S. 517-518](#) (dissenting opinion).