

*Griswold v. Connecticut*

**MR. JUSTICE HARLAN, concurring in the judgment.**

I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion. The reason is that it seems to me to evince an approach to this case very much like that taken by my Brothers BLACK and STEWART in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights. [Page 381 U. S. 500](#)

In other words, what I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to restrict the reach of Fourteenth Amendment Due Process. For me, this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to impose upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them. *See, e.g.*, my concurring opinions in *Pointer v. Texas*, [380 U. S. 400](#), [380 U. S. 408](#), and *Griffin v. California*, [380 U. S. 609](#), [380 U. S. 615](#), and my dissenting opinion in *Poe v. Ullman*, [367 U. S. 497](#), [367 U. S. 522](#), at pp. [381 U. S. 539-545](#).

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," *Palko v. Connecticut*, [302 U. S. 319](#), [302 U. S. 325](#). For reasons stated at length in my dissenting opinion in *Poe v. Ullman*, *supra*, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

A further observation seems in order respecting the justification of my Brothers BLACK and STEWART for their "incorporation" approach to this case. Their approach does not rest on historical reasons, which are, of course, wholly lacking (*see* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *Stan.L.Rev.* 5 (1949)), but on the thesis that, by limiting the content of the Due Process Clause of the Fourteenth Amendment to the protection of rights which can be found elsewhere in the Constitution, in this instance, in the Bill of Rights, judges will thus be confined to "interpretation" of specific constitutional [Page 381 U. S. 501](#) provisions, and will thereby be restrained from introducing their own notions of constitutional right and wrong into the "vague contours of the Due Process Clause." *Rochin v. California*, [342 U. S. 165](#), [342 U. S. 170](#). While I could not more heartily agree that judicial "self-restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times" (post, p. [381 U. S. 522](#)). Need one go further than to recall last Term's reapportionment cases, *Wesberry v. Sanders*, [376 U. S. 1](#), and *Reynolds v. Sims*, [377 U. S. 533](#), where a majority of the Court "interpreted" "by the People" (Art. I, § 2) and "equal protection" (Amdt. 14) to command "one person, one vote," an interpretation that was made in the face of irrefutable and still unanswered history to the

contrary? *See* my dissenting opinions in those cases, 376 U.S. at [376 U. S. 20](#); 377 U.S. at 377 U.S. 589.

Judicial self-restraint will not, I suggest, be brought about in the "due process" area by the historically unfounded incorporation formula long advanced by my Brother BLACK, and now in part espoused by my Brother STEWART. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. *See Adamson v. California*, [332 U. S. 46](#), [332 U. S. 59](#) (Mr. Justice Frankfurter, concurring). Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition [Page 381 U. S. 502](#) will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.\*

\* Indeed, my Brother BLACK, in arguing his thesis, is forced to lay aside a host of cases in which the Court has recognized fundamental rights in the Fourteenth Amendment without specific reliance upon the Bill of Rights. *Post*, p. [381 U. S. 512](#), n. 4.