

Griswold v. Connecticut

MR. JUSTICE BLACK, with whom MR. JUSTICE STEWART joins, dissenting.

I agree with my Brother STEWART's dissenting opinion. And, like him, I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise, or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers HARLAN, WHITE and GOLDBERG, who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe -- except their conclusion that the evil qualities they see in the law make it unconstitutional.

Had the doctor defendant here, or even the nondoctor defendant, been convicted for doing nothing more than expressing opinions to persons coming to the clinic that certain contraceptive devices, medicines or practices would do them good and would be desirable, or for telling people how devices could be used, I can think of no reasons at this time why their expressions of views would not be [Page 381 U. S. 508](#) protected by the First and Fourteenth Amendments, which guarantee freedom of speech. *Cf. Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, [377 U. S. 1](#); *NAACP v. Button*, [371 U. S. 415](#). But speech is one thing; conduct and physical activities are quite another. *See, e.g., Cox v. Louisiana*, [379 U. S. 536](#), [379 U. S. 554-555](#); *Cox v. Louisiana*, [379 U. S. 559](#), [379 U. S. 563-564](#); *id.* [379 U. S. 575-584](#) (concurring opinion); *Giboney v. Empire Storage & Ice Co.*, [336 U. S. 490](#); *cf. Reynolds v. United States*, [98 U. S. 145](#), [98 U. S. 163-164](#). The two defendants here were active participants in an organization which gave physical examinations to women, advised them what kind of contraceptive devices or medicines would most likely be satisfactory for them, and then supplied the devices themselves, all for a graduated scale of fees, based on the family income. Thus, these defendants admittedly engaged with others in a planned course of conduct to help people violate the Connecticut law. Merely because some speech was used in carrying on that conduct -- just as, in ordinary life, some speech accompanies most kinds of conduct -- we are not, in my view, justified in holding that the First Amendment forbids the State to punish their conduct. Strongly as I desire to protect all First Amendment freedoms, I am unable to stretch the Amendment so as to afford protection to the conduct of these defendants in violating the Connecticut law. What would be the constitutional fate of the law if hereafter applied to punish nothing but speech is, as I have said, quite another matter. The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth [Page 381 U. S. 509](#) Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just

as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used. *See, e.g., New York Times Co. v. Sullivan*, 376 U. S. 254, 376 U. S. 293 (concurring opinion); cases collected in *City of El Paso v. Simmons*, 379 U. S. 497, 379 U. S. 517, n. 1 (dissenting opinion); Black, *The Bill of Rights*, 35 N.Y.U.L.Rev. 865. For these reasons, I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from [Page 381 U. S. 510](#) one or more constitutional provisions. [\[Footnote 2/1\]](#) I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons, I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

This brings me to the arguments made by my Brothers HARLAN, WHITE and GOLDBERG for invalidating the Connecticut law. Brothers HARLAN [\[Footnote 2/2\]](#) and WHITE would invalidate it by reliance on the Due Process Clause of the Fourteenth Amendment, but Brother GOLDBERG, while agreeing with Brother HARLAN, relies also on the Ninth Amendment. I have no doubt that the Connecticut law could be applied in such a way as to abridge freedom of [Page 381 U. S. 511](#) speech and press, and therefore violate the First and Fourteenth Amendments. My disagreement with the Court's opinion holding that there is such a violation here is a narrow one, relating to the application of the First Amendment to the facts and circumstances of this particular case. But my disagreement with Brothers HARLAN, WHITE and GOLDBERG is more basic. I think that, if properly construed, neither the Due Process Clause nor the Ninth Amendment, nor both together, could under any circumstances be a proper basis for invalidating the Connecticut law. I discuss the due process and Ninth Amendment arguments together because, on analysis, they turn out to be the same thing -- merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive.

The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." [\[Footnote 2/3\]](#) If these formulas based on "natural justice," or others which mean the same thing, [\[Footnote 2/4\]](#) are to prevail, they require judges to determine [Page 381 U. S. 512](#) what is or is not constitutional on the basis of their own

appraisal of what laws are unwise or unnecessary. The power to make such decisions is, of course, that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. I readily admit that no legislative body, state or national, should pass laws that can justly be given any [Page 381 U. S. 513](#) of the invidious labels invoked as constitutional excuses to strike down state laws. But perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose. While I completely subscribe to the holding of *Marbury v. Madison*, 1 Cranch 137, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." [\[Footnote 2/5\]](#) Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom, and transfers that power to this Court for ultimate determination -- a power which was specifically denied to federal courts by the convention that framed the Constitution. [\[Footnote 2/6\]](#) [Page 381 U. S. 514](#)

Of the cases on which my Brothers WHITE and GOLDBERG rely so heavily, undoubtedly the reasoning of two of them supports their result here -- as would that of a number of others which they do not bother to name, *e.g.*, [Page 381 U. S. 515](#) *Lochner v. New York*, 198 U. S. 45, *Coppage v. Kansas*, 236 U. S. 1, *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504, and *Adkins v. Children's Hospital*, 261 U. S. 525. The two they do cite and quote from, *Meyer v. Nebraska*, 262 U. S. 390, and *Pierce v. Society of Sisters*, 268 U. S. 510, were both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in *Lochner v. New York*, *supra*, one of the cases on which he relied in *Meyer*, along with such other long-discredited decisions as, *e.g.*, *Adams v. Tanner*, 244 U. S. 590, and *Adkins v. Children's Hospital*, *supra*. *Meyer* held unconstitutional, as an "arbitrary" and unreasonable interference with the right of a teacher to carry on his occupation and of parents to hire him, a [Page 381 U. S. 516](#) state law forbidding the teaching of modern foreign languages to young children in the schools. [\[Footnote 2/7\]](#) And in *Pierce*, relying principally on *Meyer*, Mr. Justice McReynolds said that a state law requiring that all children attend public schools interfered unconstitutionally with the property rights of private school corporations because it was an "arbitrary, unreasonable and unlawful interference" which threatened "destruction of their business and property." 268 U.S. at [268 U. S. 536](#). Without expressing an opinion as to whether either of those cases reached a correct result in light of our later decisions applying the First Amendment to the States through the Fourteenth, [\[Footnote 2/8\]](#) I merely point out that the reasoning stated in *Meyer* and *Pierce* was the same natural law due process philosophy which many later opinions repudiated, and which I cannot accept. Brothers WHITE and GOLDBERG also cite other cases, such as *NAACP v. Button*, 371 U. S. 415, *Shelton v. Tucker*, 364 U. S. 479, and *Schneider v. State*, 308 U. S. 147, which held that States in regulating conduct could not, consistently with the First Amendment as applied to them by the Fourteenth, pass unnecessarily

broad laws which might indirectly infringe on First Amendment freedoms. [Footnote 2/9] See *Brotherhood of Railroad Trainmen v. Virginia ex rel. Bar*, 377 U. S. 1, 377 U. S. 7-8. [Footnote 2/10] Brothers WHITE and GOLDBERG now apparently would start from this requirement that laws be narrowly drafted so as not to curtail free speech and assembly, and extend it limitlessly to require States to justify any law restricting "liberty" as my Brethren define "liberty." This would mean at the Page 381 U. S. 518 very least, I suppose, that every state criminal statute -- since it must inevitably curtail "liberty" to some extent -- would be suspect, and would have to be Justified to this Court. [Footnote 2/11]

My Brother GOLDBERG has adopted the recent discovery [Footnote 2/12] that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks Page 381 U. S. 519 violates "fundamental principles of liberty and justice," or is contrary to the "traditions and [collective] conscience of our people." He also states, without proof satisfactory to me, that, in making decisions on this basis, judges will not consider "their personal and private notions." One may ask how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll. [Footnote 2/13] And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the "[collective] conscience of our people." Moreover, one would certainly have to look far beyond the language of the Ninth Amendment [Footnote 2/14] to find that the Framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine. The whole history of the adoption of the Constitution and Bill of Rights points the other way, and the very material quoted by my Brother GOLDBERG shows that the Ninth Amendment was intended to protect against the idea that, "by enumerating particular exceptions to the grant of power" to the Federal Government, "those rights which were not singled out were intended to be assigned into the hands of the General Government [the United States], and were consequently Page 381 U. S. 520 insecure." [Footnote 2/15] That Amendment was passed not to broaden the powers of this Court or any other department of "the General Government," but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the "[collective] conscience of our people" is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court. This fact is perhaps responsible for the peculiar phenomenon that, for a period of a century and a half, no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs. Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.

I repeat, so as not to be misunderstood, that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision Page 381 U. S. 521 of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative

policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts, and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up, and, at the same time, threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have. [Footnote 2/16] Page 381 U. S. 522

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time, and that this Court is charged with a duty to make those changes. For myself, I must, with all deference, reject that philosophy. The Constitution makers knew the need for change, and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and, being somewhat old-fashioned, I must add it is good enough for me. And so I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause, with an "arbitrary and capricious" or "shocking to the conscience" formula, was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. *See, e.g., Lochner v. New York*, 198 U. S. 45. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like *West Coast Hotel Co. v. Parrish*, 300 U. S. 379; *Olsen v. Nebraska ex rel. Western Reference & Bond Assn.*, 313 U. S. 236, and many other Page 381 U. S. 523 opinions. [Footnote 2/17] *See also Lochner v. New York*, 198 U. S. 45, 198 U. S. 74 (Holmes, J., dissenting).

In *Ferguson v. Skrupa*, 372 U. S. 726, 372 U. S. 730, this Court two years ago said, in an opinion joined by all the Justices but one, [Footnote 2/18] that

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

And only six weeks ago, without even bothering to hear argument, this Court overruled *Tyson & Brother v. Banton*, 273 U. S. 418, which had held state laws regulating ticket brokers to be a denial of due process of law. [Footnote 2/19] *Gold Page 381 U. S. 524 v. DiCarlo*, 380 U. S. 520. I find April's holding hard to square with what my concurring Brethren urge today. They would reinstate the *Lochner*, *Coppage*, *Adkins*, *Burns* line of cases, cases from which this Court recoiled after the 1930's, and which had been, I thought, totally discredited until now. Apparently

my Brethren have less quarrel with state economic regulations than former Justices of their persuasion had. But any limitation upon their using the natural law due process philosophy to strike down any state law, dealing with any activity whatever, will obviously be only self-imposed. [Footnote 2/20]

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

"[I]t has been the policy of all the *American states* which have individually framed their state constitutions since the revolution, and of the people of the *United States* when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void, though I admit that, as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law within the [Page 381 U. S. 525](#) general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject, and all that the Court could properly say in such an event would be that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice."

Calder v. Bull, 3 Dall. 386, [3 U. S. 399](#) (emphasis in original). I would adhere to that constitutional philosophy in passing on this Connecticut law today. I am not persuaded to deviate from the view which I stated in 1947 in *Adamson v. California*, [332 U. S. 46](#), [332 U. S. 90-92](#) (dissenting opinion):

"Since *Marbury v. Madison*, 1 Cranch 137, was decided, the practice has been firmly established, for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision, thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is another."

"In the one instance, courts, proceeding within clearly marked constitutional boundaries, seek to execute policies written into the Constitution; in the other, they roam at will in the limitless [Page 381 U. S. 526](#) area of their own beliefs as to reasonableness, and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people."

"*Federal Power Commission v. Pipeline Co.*, [315 U. S. 575](#), [315 U. S. 599](#), [315 U. S. 601](#), n.4. [Footnote 2/21]"

(Footnotes omitted.) The late Judge Learned Hand, after emphasizing his view that judges should not use the due process formula suggested in the concurring opinions today or any other formula like it to invalidate legislation offensive to their "personal preferences," [Footnote 2/22] made the statement, with which I fully agree, that:

"For myself, it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I Page 381 U. S. 527 knew how to choose them, which I assuredly do not. [Footnote 2/23]"

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

[Footnote 2/1]

The phrase "right to privacy" appears first to have gained currency from an article written by Messrs. Warren and (later Mr. Justice) Brandeis in 1890 which urged that States should give some form of tort relief to persons whose private affairs were exploited by others. The Right to Privacy, 4 Harv.L.Rev.193. Largely as a result of this article, some States have passed statutes creating such a cause of action, and, in others, state courts have done the same thing by exercising their powers as courts of common law. See generally, 41 Am.Jur. 926-927. Thus, the Supreme Court of Georgia, in granting a cause of action for damages to a man whose picture had been used in a newspaper advertisement without his consent, said that "A right of privacy in matters purely private is . . . derived from natural law," and that

"The conclusion reached by us seems to be . . . thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law. . . ."

Pavesich v. New England Life Ins. Co., 122 Ga.190, 194, 218, 50 S.E. 68, 70, 80. Observing that "the right of privacy . . . presses for recognition here," today this Court, which I did not understand to have power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with "privacy."

[Footnote 2/2]

Brother HARLAN's views are spelled out at greater length in his dissenting opinion in *Poe v. Ullman*, 367 U. S. 497, 367 U. S. 539-555.

[Footnote 2/3]

Indeed, Brother WHITE appears to have gone beyond past pronouncements of the natural law due process theory, which at least said that the Court should exercise this unlimited power to declare state acts unconstitutional with "restraint." He now says that, instead of being presumed constitutional (see *Munn v. Illinois*, 94 U. S. 113, 94 U. S. 123; compare *Adkins v. Children's*

Hospital, 261 U. S. 525, 261 U. S. 544), the statute here "bears a substantial burden of justification when attacked under the Fourteenth Amendment."

[Footnote 2/4]

A collection of the catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment laws which offend their notions of natural justice would fill many pages. Thus, it has been said that this Court can forbid state action which "shocks the conscience," *Rochin v. California*, 342 U. S. 165, 342 U. S. 172, sufficiently to "shock itself into the protective arms of the Constitution," *Irvine v. California*, 347 U. S. 128, 347 U. S. 138 (concurring opinion). It has been urged that States may not run counter to the "decencies of civilized conduct," *Rochin, supra*, at 342 U. S. 173, or "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U. S. 97, 291 U. S. 105, or to "those canons of decency and fairness which express the notions of justice of English-speaking peoples," *Malinski v. New York*, 324 U. S. 401, 324 U. S. 417 (concurring opinion), or to "the community's sense of fair play and decency," *Rochin, supra*, at 342 U. S. 173. It has been said that we must decide whether a state law is "fair, reasonable and appropriate," or is rather "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into . . . contracts,"

Lochner v. New York, 198 U. S. 45, 198 U. S. 56. States, under this philosophy, cannot act in conflict with "deeply rooted feelings of the community," *Haley v. Ohio*, 332 U. S. 596, 332 U. S. 604 (separate opinion), or with "fundamental notions of fairness and justice," *id.* 332 U. S. 607. See also, e.g., *Wolf v. Colorado*, 338 U. S. 25, 338 U. S. 27 ("rights . . . basic to our free society"); *Hebert v. Louisiana*, 272 U. S. 312, 272 U. S. 316 ("fundamental principles of liberty and justice"); *Adkins v. Children's Hospital*, 261 U. S. 525, 261 U. S. 561 ("arbitrary restraint of . . . liberties"); *Betts v. Brady*, 316 U. S. 455, 316 U. S. 462 ("denial of fundamental fairness, shocking to the universal sense of justice"); *Poe v. Ullman*, 367 U. S. 497, 367 U. S. 539 (dissenting opinion) ("intolerable and unjustifiable"). Perhaps the clearest, frankest, and briefest explanation of how this due process approach works is the statement in another case handed down today that this Court is to invoke the Due Process Clause to strike down state procedures or laws which it can "not tolerate." *Linkletter v. Walker, post*, p. 381 U. S. 618, at 381 U. S. 631.

[Footnote 2/5]

See Hand, *The Bill of Rights* (1958) 70: .

"[J]udges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that, taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary, they wrap up their veto in a protective veil of adjectives such as 'arbitrary,' 'artificial,' 'normal,' 'reasonable,' 'inherent,' 'fundamental,' or 'essential,' whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that, in fact, lie behind the decision."

See also *Rochin v. California*, 342 U. S. 165, 342 U. S. 174 (concurring opinion). But see *Linkletter v. Walker*, *supra*, n. 4, at 631.

[Footnote 2/6]

This Court held in *Marbury v. Madison*, 1 Cranch 137, that this Court has power to invalidate laws on the ground that they exceed the constitutional power of Congress or violate some specific prohibition of the Constitution. See also *Fletcher v. Peck*, 6 Cranch 87. But the Constitutional Convention did, on at least two occasions, reject proposals which would have given the federal judiciary a part in recommending laws or in vetoing as bad or unwise the legislation passed by the Congress. Edmund Randolph of Virginia proposed that the President

" . . . and a convenient number of the National Judiciary ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final, and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by ___ [original wording illegible] of the members of each branch."

1 The Records of the Federal Convention of 1787 (Farrand ed.1911) 21.

In support of a plan of this kind, James Wilson of Pennsylvania argued that:

" . . . It had been said that the Judges, as expositors of the Laws, would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive, and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature."

2 *id.* at 73.

Nathaniel Gorham of Massachusetts

"did not see the advantage of employing the Judges in this way. As Judges, they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures."

Ibid. Elbridge Gerry of Massachusetts likewise opposed the proposal for a council of revision: ". . . He relied, for his part, on the Representatives of the people as the guardians of their Rights & interests. It [the proposal] was making the Expositors of the Laws the Legislators, which ought never to be done."

Id. at 75. And, at another point: "Mr. Gerry doubts whether the Judiciary ought to form a part of it [the proposed council of revision], as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on

their Constitutionality. . . . It was quite foreign from the nature of ye. office to make them judges of the policy of public measures."

1 *Id.* at 97-98. Madison supported the proposal on the ground that "a Check [on the legislature] is necessary." *Id.* at 108. John Dickinson of Delaware opposed it on the ground that "the Judges must interpret the Laws; they ought not to be legislators." *Ibid.* The proposal for a council of revision was defeated. The following proposal was also advanced:

"To assist the President in conducting the Public affairs, there shall be a Council of State composed of the following officers -- 1. The Chief Justice of the Supreme Court, who shall from time to time recommend such alterations of and additions to the laws of the U.S. as may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union. . . ." 2 *id.* at 342. This proposal too was rejected.

[Footnote 2/7]

In *Meyer*, in the very same sentence quoted in part by my Brethren in which he asserted that the Due Process Clause gave an abstract and inviolable right "to marry, establish a home and bring up children," Mr. Justice McReynolds also asserted the heretofore discredited doctrine that the Due Process Clause prevented States from interfering with "the right of the individual to contract." 262 U.S. at 262 U. S. 399.

[Footnote 2/8]

Compare *Poe v. Ullman*, 367 U.S. at 367 U. S. 53-54 (HARLAN, J., dissenting).

[Footnote 2/9]

The Court has also said that, in view of the Fourteenth Amendment's major purpose of eliminating state-enforced racial discrimination, this Court will scrutinize carefully any law embodying a racial classification to make sure that it does not deny equal protection of the laws. See *McLaughlin v. Florida*, 379 U. S. 184.

[Footnote 2/10]

None of the other cases decided in the past 25 years which Brothers WHITE and GOLDBERG cite can justly be read as holding that judges have power to use a natural law due process formula to strike down all state laws which they think are unwise, dangerous, or irrational. *Prince v. Massachusetts*, 321 U. S. 158, upheld a state law forbidding minors from selling publications on the streets. *Kent v. Dulles*, 357 U. S. 116, recognized the power of Congress to restrict travel outside the country so long as it accorded persons the procedural safeguards of due process and did not violate any other specific constitutional provision. *Schwartz v. Board of Bar Examiners*, 353 U. S. 232, held simply that a State could not, consistently with due process, refuse a lawyer a license to practice law on the basis of a finding that he was morally unfit when there was no evidence in the record, 353 U.S. at 353 U. S. 246-247, to support such a

finding. Compare *Thompson v. City of Louisville*, 362 U. S. 199, in which the Court relied in part on *Schwartz*. See also *Konigsberg v. State Bar*, 353 U. S. 252. And *Bolling v. Sharpe*, 347 U. S. 497, merely recognized what had been the understanding from the beginning of the country, an understanding shared by many of the draftsmen of the Fourteenth Amendment, that the whole Bill of Rights, including the Due Process Clause of the Fifth Amendment, was a guarantee that all persons would receive equal treatment under the law. Compare *Chambers v. Florida*, 309 U. S. 227, 309 U. S. 240-241. With one exception, the other modern cases relied on by my Brethren were decided either solely under the Equal Protection Clause of the Fourteenth Amendment or under the First Amendment, made applicable to the States by the Fourteenth, some of the latter group involving the right of association which this Court has held to be a part of the rights of speech, press and assembly guaranteed by the First Amendment. As for *Aptheker v. Secretary of State*, 378 U. S. 500, I am compelled to say that, if that decision was written or intended to bring about the abrupt and drastic reversal in the course of constitutional adjudication which is now attributed to it, the change was certainly made in a very quiet and unprovocative manner, without any attempt to justify it.

[Footnote 2/11]

Compare *Adkins v. Children's Hospital*, 261 U. S. 525, 261 U. S. 568 (Holmes, J., dissenting):

"The earlier decisions upon the same words [the Due Process Clause] in the Fourteenth Amendment began within our memory, and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later, that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts."

[Footnote 2/12]

See Patterson, *The Forgotten Ninth Amendment* (1955). Mr. Patterson urges that the Ninth Amendment be used to protect unspecified "natural and inalienable rights." P. 4. The Introduction by Roscoe Pound states that "there is a marked revival of natural law ideas throughout the world. Interest in the Ninth Amendment is a symptom of that revival." P. iii.

In Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U.L.Rev. 787, Professor Redlich, in advocating reliance on the Ninth and Tenth Amendments to invalidate the Connecticut law before us, frankly states:

"But for one who feels that the marriage relationship should be beyond the reach of a state law forbidding the use of contraceptives, the birth control case poses a troublesome and challenging problem of constitutional interpretation. He may find himself saying, 'The law is unconstitutional -- but why?' There are two possible paths to travel in finding the answer. One is to revert to a frankly flexible due process concept even on matters that do not involve specific constitutional prohibitions. The other is to attempt to evolve a new constitutional framework within which to meet this and similar problems which are likely to arise."

Id. at 798.

[Footnote 2/13]

Of course, one cannot be oblivious to the fact that Mr. Gallup has already published the results of a poll which he says show that 46% of the people in this country believe schools should teach about birth control. Washington Post, May 21, 1965, p. 2, col. 1. I can hardly believe, however, that Brother GOLDBERG would view 46% of the persons polled as so overwhelming a proportion that this Court may now rely on it to declare that the Connecticut law infringes "fundamental" rights, and overrule the longstanding view of the people of Connecticut expressed through their elected representatives.

[Footnote 2/14]

U.S.Const., Amend. IX, provides:

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

[Footnote 2/15]

1 Annals of Congress 439. *See also* II Story, Commentaries on the Constitution of the United States (5th ed. 1891):

"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. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies."

Id. at 651 (footnote omitted).

[Footnote 2/16]

Justice Holmes, in one of his last dissents, written in reply to Mr. Justice McReynolds' opinion for the Court in *Baldwin v. Missouri*, 281 U. S. 586, solemnly warned against a due process formula apparently approved by my concurring Brethren today. He said:

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course, the words 'due process of law,' if taken in their literal meaning, have no application to this case, and while it

is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass."

281 U.S. at 281 U. S. 595. See 2 Holmes-Pollock Letters (Howe ed.1941) 267-268.

[Footnote 2/17]

E.g., in *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421, 342 U. S. 423, this Court held that

"Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."

Compare *Gardner v. Massachusetts*, 305 U.S. 559, which the Court today apparently overrules, which held that a challenge under the Federal Constitution to a state law forbidding the sale or furnishing of contraceptives did not raise a substantial federal question.

[Footnote 2/18]

Brother HARLAN, who has consistently stated his belief in the power of courts to strike down laws which they consider arbitrary or unreasonable, see, e.g., *Poe v. Ullman*, 367 U. S. 497, 367 U. S. 539-555 (dissenting opinion), did not join the Court's opinion in *Ferguson v. Skrupa*.

[Footnote 2/19]

Justice Holmes, dissenting in *Tyson*, said:

"I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."

273 U.S. at 273 U. S. 446.

[Footnote 2/20]

Compare *Nicchia v. New York*, 254 U. S. 228, 254 U. S. 231, upholding a New York dog-licensing statute on the ground that it did not "deprive dog owners of liberty without due process of law." And, as I said concurring in *Rochin v. California*, 342 U. S. 165, 342 U. S. 175,

"I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards"

urged by my concurring Brethren today.

[Footnote 2/21]

Gideon v. Wainwright, 372 U. S. 335, and similar cases applying specific Bill of Rights provisions to the States do not, in my view, stand for the proposition that this Court can rely on its own concept of "ordered liberty" or "shocking the conscience" or natural law to decide what laws it will permit state legislatures to enact. *Gideon*, in applying to state prosecutions the Sixth Amendment's guarantee of right to counsel, followed *Palko v. Connecticut*, 302 U. S. 319, which had held that specific provisions of the Bill of Rights, rather than the Bill of Rights as a whole, would be selectively applied to the States. While expressing my own belief (not shared by MR. JUSTICE STEWART) that all the provisions of the Bill of Rights were made applicable to the States by the Fourteenth Amendment, in my dissent in *Adamson v. California*, 332 U. S. 46, 332 U. S. 89, I also said:

"If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process."

Gideon and similar cases merely followed the *Palko* rule, which, in *Adamson*, I agreed to follow if necessary to make Bill of Rights safeguards applicable to the States. *See also Pointer v. Texas*, 380 U. S. 400; *Malloy v. Hogan*, 378 U. S. 1.

[Footnote 2/22]

Hand, *The Bill of Rights* (1958) 70. *See note 5, supra. See generally id.* at 35-45.

[Footnote 2/23]

Id. at 73. While Judge Hand condemned as unjustified the invalidation of state laws under the natural law due process formula, *see id.* at 35-45, he also expressed the view that this Court, in a number of cases, had gone too far in holding legislation to be in violation of specific guarantees of the Bill of Rights. Although I agree with his criticism of use of the due process formula, I do not agree with all the views he expressed about construing the specific guarantees of the Bill of Rights.