What Natural Law Theory And Legal Positivism Have To Say About The Constitutional Right Of Privacy And The Griswold Opinion: Arguments Against Justice Douglas’s Arguments

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Justice William O. Douglas’s majority opinion in the case of Griswold v. Connecticut stands as one of the most famous (although some would say infamous) and important decisions in Supreme Court history, not only for its substantive content in establishing an implicit constitutional right of privacy but also for the implications it has for future Court decisions. In using the theoretical frameworks of natural law theory, legal positivism, and the Harm Principle to better understand common intuitions regarding matters relevant to the opinion, it will be demonstrated that the constitutional right of privacy to which Justice Douglas appeals finds its basis within the Lockean tradition of natural rights, its most defensible conception under the harm principle of John Stuart Mill, and its ultimate justification under legal positivism. Justice Douglas’s particular arguments supporting a right of privacy, though, do not withstand counter-arguments to the contrary, and so do not warrant the Court to enforce any such right on the basis of his argument. The ultimate purpose of this inquiry is not to end with absolute and incontrovertible answers to these difficult legal issues but rather to further the debate and demonstrate the weaknesses of Justice Douglas’s opinion as a means to helping others who share his conclusions to provide better justifications for them.

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INTRODUCTION

Much tumult has been generated over the alleged “right of privacy” established by the Supreme Court in the case of Griswold v. Connecticut. The two Connecticut laws relevant to the case made it illegal (1) for a person to use “any drug, medicinal article or instrument for the purposes of preventing conception” and (2) for a person to assist, abet, or counsel another in breaking a law. The state of Connecticut charged Estelle Griswold, of Planned Parenthood, and Dr. C. Lee Buxton with assisting married couples in gathering information about contraception, thus violating the latter law. However, Justice William O. Douglas, in writing the opinion of the Court, struck down the former law that led to Griswold’s and Buxton’s fines. Justice Douglas’s opinion appealed to a doctrine which supposed that the Constitution protects certain ‘zones of privacy.’ With this doctrine in place, the Court struck down the law allowing state intrusion into private marital affairs central to this case, thereby implicitly acknowledging and establishing a broad and penumbral (extra-textual) constitutional right of privacy.

Those who adhere to a particular school of thinking related to a form of natural law may argue that a general right of privacy stems from the political and philosophical traditions that date back to the American founding, finding root in the

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1 See Griswold v. Connecticut, 381 U.S. 479, 480 (1965). The relevant statutes at the heart of this case were § 53-32 and § 53-196 of the General Statutes of Connecticut (1958 rev.). The exact language of the former: “Any person who uses any drug, medicinal 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 be both fined and imprisoned.” And the exact language of the latter: “Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.”

2 See Id. At the outset, both were charged and convicted as accessories and fined $100 each. The Appellate Division of the Circuit Court affirmed the judgment and then the Supreme Court of Errors affirmed as well.

3 The phrase ‘zones of privacy’ is something Justice Douglas used many times in his opinion.
natural rights theory of John Locke. It will be demonstrated that the constitutional right of privacy to which Justice Douglas appeals finds its basis within this Lockean tradition, its most defensible conception under the harm principle of John Stuart Mill, and its ultimate justification under legal positivism. Justice Douglas’s particular arguments supporting a right of privacy, though, do not withstand counter-arguments to the contrary, and so do not warrant the Court to enforce any such right on the basis of his argument. This paper will therefore (I) elaborate upon Locke’s political philosophy and its effects on the American political tradition as well as demonstrate that Justice Douglas’s opinion can be best defended in light of Locke’s natural rights theory and understood in terms of Mill’s harm principle, as all supporting a constitutional right of privacy. It will then (II) address the role of the Supreme Court in relation to state law. Following that analysis, the focus will turn to (III) refuting Justice Douglas’s opinion in the case and, on the grounds of that refutation, concluding with an argument against the notion of a constitutional right of privacy based on legal positivism and legal realist—or pragmatic—grounds. The ultimate purpose of this inquiry is not to end with absolute and incontrovertible answers to these difficult legal issues but rather to further the debate and demonstrate the weaknesses of Justice Douglas’s opinion as a means to helping others who share his conclusions to provide better justifications for them.

4 The conception of natural rights theory explained in this section of the paper relates to the libertarian (or minimalist government) formulation, which stems largely from the Lockean tradition—the liberal tradition. Advocates of this view will naturally support an inherent constitutional right of privacy since it accords with their notions of the proper role of government as gathered from Locke’s state of nature framework. As will be explained in a later part of the paper, there are other formulations of ‘natural rights’ as well as other ways for legal positivists to view the Constitution, in its present form, as protecting a right of privacy.

5 Pragmatism, generally defined, denotes a school of philosophic thought that holds that something is true only to the extent that it serves or furthers some human purpose or interest; or in Richard Rorty’s weaker sense pragmatism means that metaphysical concepts or theories should be judged according to their practical value in serving some human purposes rather than their ability to represent the world (reality) as it really is. See generally Anthony Gottlieb, The Most Talked-About Philosopher, N.Y. TIMES, June 2, 1991, at Archives. As applied to this situation, to judge something on pragmatic grounds simply means to consider the likely and practical consequences that will occur under a given legal judgment as well as the degree of desirability of those consequences. Furthermore, it should be emphasized that the legal positivistic and legal realist critiques hinge on the refutation of Justice Douglas’s opinion establishing a right of privacy in the Griswold case. The legal realist critique merely admonishes the negative consequences that may happen if the judicial intervention that occurs is grounded upon a weak foundation of constitutional support. If those who support a right of privacy can establish their view on different and justifiable constitutional grounds, then this particular argument collapses since the Constitution stands as the ‘supreme law of the land.’ See U.S. Const. art. VI. Therefore, the right of privacy would be law, thus destroying the legal positivist critique, and it would not be judicial legislation, thus destroying the legal realist critique.
I. THE THEORETICAL FRAMEWORKS: NATURAL LAW THEORY, LEGAL POSITIVISM, AND THE HARM PRINCIPLE

A. The Philosophical Roots of American Politics: The Natural Lawyers’ Interpretation

The debate over a constitutional right of privacy ultimately goes back to the classic debate between natural law theory and legal positivism. One should note that expounding the debate according to legal philosophy does not necessarily mean that arguments deal merely in the abstract, without any bearing in the world of experience, but instead provides the rational and ultimate justification for preferring one position over another. It also furthers one’s understanding of the roots from which common intuitions regarding these matters arise. With this in mind, defenders of the right of privacy will quite naturally find their philosophic roots in the natural rights theory of Locke.

In contradistinction to his fellow Englishman Thomas Hobbes, Locke believed that the concept of justice transcends particular social conceptions or constructions of it; that is, justice stands above mankind—constitutes a universal truth—and has an eternal essence, or certain properties without which justice would not be justice. He observed that the state of nature is a state of natural liberty,
where liberty is understood in the negative sense of individuals being free from physical constraint. He notes, however, that human beings who use their reason will recognize the following moral limitation on their actions:

The state of nature has a law of nature to govern it, which obliges every one: And reason, which is that law, teaches all mankind, who will but consult it, that being equal and independent no one ought to harm another in his life, health, liberty, or possessions.\(^8\)

One could therefore suppose that natural rights to ‘life, health, liberty, and possessions’ hold universally under all particular societies, and must be respected as the ends of any society worthy of being deemed as just.

The motivation behind the individual’s leaving the state of nature—the state of liberty—lies in the uncertainty and insecurity of enjoying life, liberty, and physical goods.\(^9\) Locke recognized that individuals would perceive themselves in the following way: “For all being kings as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state [of nature] is very unsafe, very unsecure.”\(^10\) Individuals, therefore, must remain in a state of vigilance against others who do not properly use their reason to recognize the truth of natural rights. Instead of living peacefully, acquiring property, and pursuing their own conception of happiness, individuals must stay vigilant against those who are willing to violate another’s life, liberty, or property, thus presenting a barrier for others from enjoying any or all of them. Hence, it is rational to consent to a social contract, even for those who would not follow the natural law in the state of nature (since others may commit injustices to them in the

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9 Locke, 254. Locke specifically says, “and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties, and estates, which I call by the general name, property.” From here on, the phrase life, liberty, and property will be used since it accords much better with more contemporary language, making property equate to physical goods notwithstanding the fact that Locke conceived of property as denoting all of life, liberty, and physical goods.
10 Locke, 254. Locke in addressing this matter: “For though the law of nature be plain and intelligible to all rational creatures; yet men being biased by their interest, as well as ignorant for want of studying it, are not apt to allow of it as a law binding to them in the application of it to their particular cases.”
same way), and establish a government that quells this state of “continual danger.”

The end—or purpose and final cause—of “uniting into [a] commonwealth” and erecting a government, therefore, is “the preservation of property”—where property is understood to include life, liberty, and property.\footnote{11}{Locke, 254.}

Citizens relinquish some of their powers from the state of nature; more specifically, these include the powers of “\textit{doing whatsoever he [thinks] fit for the preservation of himself}” and “\textit{punishing others}” whom he thinks committed injustices against him.\footnote{13}{Locke, 55.} Locke believed that citizens should first establish general and promulgated law “received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them.”\footnote{14}{Locke, 54.} Citizens should then authorize an \textit{impartial} judge to adjudicate according to established law since he believed that the specified powers that individuals have in the state of nature—the powers to be both judge and executioner with respect to cases of injustices—will all too often, if they are not relinquished, result in chaos as well as unnecessary physical harms and destruction between the two disputing parties, as they will have their rational judgment clouded by the fog of partiality and revenge, or other such vindictive emotions.\footnote{15}{Locke, 54.} Citizens should also authorize an independent executive power to carry out punishments since vigilante justice, reminiscent of the state of nature, will all too often result in unnecessary physical harms as well, as the act of carrying out punishments is frequently destructive and dangerous to those who attempt it.\footnote{16}{Locke, 254.} With these institutional structures in place, citizens in the commonwealth will have a greater capacity to circumvent physical harms that detract away from enjoying life, liberty, and property. So like Hobbes before him, Locke attempted to establish a political philosophy that did not rely on viewing human communities and governments as directed toward perfecting human nature by pursuing excellence through virtue—like Plato and Aristotle\footnote{17}{For instance, see \textsc{Aristotle}, \textsc{Politics} 81 (C.D.C. Reeve trans., Hackett Publishing Company 1998). Aristotle makes his... but...}
instead relied on primitive and instinctual motivations common to all individuals, especially those who do not seek to elevate their reason to a higher plane for the purpose of virtue. He sought to appeal to liberty and security as the bedrock and ends of human society.

The effects of Locke’s political philosophy on the roots of the American polity can be seen most clearly in the Declaration of Independence. It is commonly held that Thomas Jefferson relied on the natural law theory espoused by Locke when providing the philosophical and moral justification for seceding from the legal authority of Great Britain with his appeal to the “unalienable rights…to Life, Liberty and the pursuit of Happiness.” Natural lawyers, or those who advocate from the natural law perspective, may argue that the ultimate end of government rests in preserving natural rights to the greatest extent possible while ensuring individual safety. This end of preserving natural rights provides the reason for government in the first place, and so laws or policies that run contrary to it should be declared legally invalid. Under such an analysis, the United States Constitution implicitly protects natural rights to such actions as consensual sexual privacy in the home, liberty to economic freedom, and liberty over one’s body—all of which may not be

view on the ultimate ends of the city-state clear:

a city-state is not a sharing of a common location, and does not exist for the purpose of preventing mutual wrongdoing and exchanging goods. Rather, while these must be present if indeed there is to be a city-state, when all of them are present there is still not yet a city-state, but only when households and families live well as a community whose end is a complete and self-sufficient life….The end of the city-state is living well, then, but these other things [location, marriage, brotherhoods, religious worship, and leisured pursuits] are for the sake of the end. And a city-state is the community of families and villages in a complete and self-sufficient life, which we say is living happily and nobly.


We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed; that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, so as to them shall seem most likely to effect their safety and happiness.

Jefferson, therefore, clearly adheres to Locke’s idea that people are created equal, meaning that there is no inherent right to rule; that is, at birth, any person potentially has the capacity to serve in government and rule, in a certain sense. This idea is also embodied in the common maxim, which holds that everyone should be given an ‘equal opportunity’ to succeed. Moreover, the famous idea of ‘self-evident truths’ alludes to Locke’s notion of individuals being able to use reason to recognize certain natural rights as obligating their actions in certain ways. Jefferson also agrees with Locke’s notion of a social contract theory as the foundation of a state.
textually enumerated in it. Natural lawyers may argue that the Constitution implicitly preserves these rights since it must be understood in light of the Declaration of Independence, which declares the first principles of government.

The Bill of Rights, together with subsequent Amendments that further individual rights, such as the Fourteenth Amendment guarantee of equal protection under the law, support the notion that there are certain inalienable rights that transcend any government interference. These rights rest in the deontological as opposed to consequentialist realm of moral normativity, which means that society holds these rights as intrinsically valuable as opposed to valuable for the consequences that may follow from protecting them. For instance, even if national security could be increased if government had the authority to arbitrarily intrude into any private household without any reason whatsoever, the United States prohibits such a policy since the Constitution upholds the moral principle that individuals have rights against such unreasonable government measures. Moral value is placed in protecting certain actions and procedures, such as rights to freedom of speech, assembly, due process, and equal protection of the laws, and not on the consequences that may follow from them, good or bad notwithstanding. Natural lawyers may then conclude that these particular legal rights are moral rights. They may extend Locke’s natural law theory of natural rights to these constitutional rights and argue that fidelity to the Constitution lies in its embrace of the moral principles of natural rights. This results in limiting government interference and protecting a sphere of personal autonomy—of forming a government according to Locke’s model of government. Such patriotic zeal and admiration for the Constitution can be explained by its restriction on government power and preservation of individual rights. Consequently, one cannot understand the authority of the Constitution, or reasons for citizens obeying and respecting it, without acknowledging the moral principles embedded within it. Thus, morality becomes a necessary condition for understanding the reasons for the Constitution’s authority.

Since the majority may sometimes test the thresholds of how far and under what conditions constitutional rights extend, natural lawyers will hold that an entity distinct from the majority must protect a minority’s sphere of autonomy when threatened with certain paternalistic policies. The philosopher Gerald Dworkin defines paternalism as “the interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced.”¹⁹ These consist of policies meant to coerce an individual from performing an action that he perceives as good on the grounds that

the legal authority truly knows the individual’s own good, and, therefore, coerces him to act contrary to the better judgment as perceived by himself.\textsuperscript{20} The majority of citizens elects the congressional and executive branches on both the federal and state levels and so may dictate government laws and policies with their vote.\textsuperscript{21} Alexis de Tocqueville, one of the most insightful students to have ever studied American democracy, observed, “The absolute sovereignty of the will of the majority is the essence of democratic government, for in democracies there is nothing outside the majority capable of resisting it.”\textsuperscript{22} Minority rights and freedoms get squashed if in opposition to deeply-held majority interests and consequently need protection from such government transgressions. It therefore follows that the congressional and executive branches on both levels of government should not be trusted with protection over constitutional rights since they may tend to fall prey to a tyranny of majority due to plurality election.\textsuperscript{23}

One clear illustration occurred when the Supreme Court held in the case

\textsuperscript{20} Some examples of paternalistic policies include gambling, prostitution, and marijuana laws—the so called ‘victimless crimes.’ Individuals would not consent to engage in these behaviors if they did believe that it served their interests in some way. Moreover, negative consequences that result from partaking in such activities do not, in most cases, harm external parties to a significant extent; that is, negative consequences are primarily limited to harm against the individual performing the activity. Some would argue, though, that society’s justification for outlawing these activities consists in an attempt to protect people from potential harm as well as furthering social order and public morality.

\textsuperscript{21} However, this may not be completely true with the federal election of the president because of the Electoral College, for instance. As documented in the 2000 presidential election, Al Gore garnered a larger share of aggregate votes yet lost the election to his opponent George W. Bush because of the distribution of electoral votes across the states, which tipped the Electoral College calculus in Bush’s favor. In addition, the United States reflects the principle of checks and balances that helps to deter a tyranny of majority by disproportionately allowing states with lesser populations to have the same force of representation in the U.S. Senate, manifested through the number of senators elected to Congress, as large states. For instance, Vermont has the same amount of power in Senate as California. This distribution of power, however, does not apply to the House of Representatives since the 435 congressional seats that it is composed of get re-distributed each ten years after the U. S. Census. The point, though, is that important legislative or executive measures need support from a majority of citizens in order to be effective; otherwise, the legislation or policy can be overturned with the next election cycle if it is wildly unpopular, or on the contrary, sustained for long periods of time if backed by a solid majority. Moreover, rights need protection because they are by definition, something that cannot be \textit{prima facie} taken away; therefore, it follows \textit{from this perspective} that certain inalienable rights should not be left up to the whims of democracy. Also, it should be noted that there may be different configurations for each of the state governments.

\textsuperscript{22} Alexis de Tocqueville, \textit{Democracy in America}, \textit{in Classics of Modern Political Theory: Machiavelli to Mill} 723 (Oxford University Press 1997).

\textsuperscript{23} Tocqueville thinks that separating powers among the three branches of government can solve, to a significant extent, the potential threat of a tyranny of majority. \textit{See generally} Tocqueville, 726-727. He make the point:

But suppose you were to have a legislative body so composed that it represented the majority without being necessarily the slave of its passions, an executive power having a strength of its own, and a judicial power independent of the other two authorities; then you would still have a democratic government, but there would be hardly any remaining risk of a tyranny.
of *Texas v. Johnson* that Texas’s conviction of a protestor, who was found to have desecrated the American flag near the location of the 1984 Republican National Convention, violated that person’s First Amendment rights. The Texas law used in the conviction made it illegal for any person to desecrate a state or national flag, with an additional restriction being that such an act seriously offends others who observe or discover it. The Court upheld the principle that the “State’s interest in preserving the flag as a symbol of nationhood and national unity” does not “justify…criminal conviction for engaging in political expression.” The Court thereby opposed the popular sentiment of the majority, in outlawing expressive flag burning, and protected the minority’s First Amendment right. Therefore, the Supreme Court, which is the only federal branch of government that does not rely on election by the people, rests as a defense against a tyranny of majority; one could say it is the counter-majoritarian branch of government. Natural lawyers, therefore, may argue that Supreme Court justices must protect unpopular rights and liberties when assaulted by paternalistic or liberty-restricting laws.

### B. Natural Rights through Legal Positivism

Putting aside for the moment the question of whether the Constitution actually protects a natural right of privacy, one must note that justification for natural rights—including a right of privacy—need not rely on natural law. The *Declaration of Independence*, in fact, stands as one of the four organic laws comprising the United States Code and therefore, one may argue, imports the principles of natural rights into constitutional law. Natural lawyers will often mistakenly appeal to natural law theory to support certain inalienable, constitutional rights when they in fact need not do so. These compose the kinds of rights that one can find neither in the text of the Constitution nor in the tradition of American law and society. This issue harks back to the question concerning the foundations of

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25 See Id. at 400. The Texas law related to the case can be found in the Texas Penal Code Ann. § 4.09 (1989) called the “Desecration of Venerated Object.” (a) “A person commits an offense if he intentionally or knowingly desecrates:” (1a) “a public monument,” (2a) “a place of worship or burial,” or (3a) “a state or national flag.” (b) “For the purposes of this section, ‘desecrate’ means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.” (c) “An offense under this section is a Class A misdemeanor.” Although the state argued that the law increased public safety and security from offensive actions, like flag burning, that may incite public disturbances or riots, the Supreme Court upheld the finding that no such public safety concerns pertained to this case. See Id. at 408.
26 Id. at 420.
27 See *Declaration of Independence*. 
law examined by legal philosophers who have sought to capture, by means of conceptual analysis, the essence—necessary and sufficient conditions—of law in order to answer the question: “what is law?”

Natural lawyers would reply with the contention that one cannot conceptually divorce law from morality and justice, for in order to understand law one must understand the normative dimensions of its enactment, enforcement, and authority. Independent of some kind of government protection, rights to freedom of speech and assembly as well as rights not to be enslaved or tortured, for instance, would nonetheless merit status as inalienable rights.

Yet if they traverse this path, they commit the fallacy that the prominent legal philosopher H.L.A. Hart scrutinized: conflating law as it is from law as it ought to be. Simply because a current legal rule (or norm, for that matter) does not accord with normative beliefs about what it should be does not mean that the legal rule is not a legal rule; they confuse prescription with description, or value and fact.

This idea comprises what has come to be known as the ‘separability thesis’ and marks the essence of legal positivism—the concept of law does not necessarily contain morality!

While natural lawyers will often claim that liberty interests should be constitutionally-protected by the Supreme Court, it appears they have a choice to make as to which path they will follow, given this premise. They may either (1) accept that if the Court does not uphold a right of privacy, then the Court’s judgment must still be law and therefore legally valid (physically enforceable), or (2) disregard the judgment of the Court and maintain that the law in question is no law at all. This disjunction exhausts all logical possibility since it follows the form: an object is either law or not law.

If they accept the former judgment, then they really do not rely on natural law theory but instead implicitly rely on a form of legal positivism, since legal positivism allows one to morally criticize and find a moral basis to disobey the law, while maintaining that the law is still law. For according to the ‘separability thesis,’ it is not necessary in legal systems that for laws to be laws they must possess substantive moral value. In logicians’ terms, morality and justice do not constitute

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28 This does not mean merely to find a definition of law (like arbitrarily providing definitions to terms), but, in a Socratic fashion, to find the fundamental nature of law, or that abstract concept of law, which yields the cognitive content involved when thinking about and reflecting upon the concept of law. Natural lawyers hold that morality and justice cannot be separated from the concept of law.


30 The logical possibility stated simply means that it follows the form of the law of excluded middle; ‘something is either p or not p.’
a ‘necessary condition’ for law. On the contrary, if they accept the latter judgment then they must account for the legal authority of law that contradicts their notion of natural rights. Citizens who disagree with the wisdom or morality of the Supreme Court’s decrees will accept, although reluctantly, that their decrees surely have physical sanction against non-compliance and that the law is nevertheless law, even though unpopular or immoral. Although one could reasonably argue that the ultimate motivation to change or preserve law ultimately stems from motivations for justice, this fails to explain the reason why those who disagree with the justness of the law still respect and follow it, recognizing that the law is still legally valid. Anti-abortion advocates recognize the Supreme Court’s decision in Roe v. Wade as law, and therefore attempt to garner enough votes on the Court to overturn the decision. If the natural lawyer were to hold on stubbornly to the view that immoral laws are no laws at all, then completing this argument to its conclusion, she would have to accept that bad, or unjust, laws do not exist, which contradicts common intuition. To emphasize the point, natural lawyers who implicitly defend natural law theory when arguing for natural rights conflate value and fact, which means their reliance on natural rights theory, as being inherent in the American political tradition, really ought to mean reliance on legal positivism.

**C. Justice Douglas’s Opinion: Legal Positivism in Disguise**

Justice Douglas’s opinion has been commonly acknowledged as appealing to natural law theory. The structure of his argument may be summarized in the following form:

1. Constitutional rights enumerated in the text extend to certain penumbral instances.
2. The right of privacy falls under a penumbral instance when understood in light of the First Amendment freedom of

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31 The point here is that legal positivism does not equal moral relativism (the idea that normative moral statements are neither true nor false) but that it can accommodate moral realism (the idea that certain normative moral statements are true). Legal positivists, moreover, can consistently adhere to the normative claims of natural law; they disagree with natural law theorists, appropriately understood, over the proper role of each branch of government and over what constitutes law. Natural law theorists may claim that the right of privacy constitutes law and therefore is legally enforceable, but legal positivists may reply that such a right is not a right until it is actually recognized as law and thus made legally (physically) enforceable. Following the law, therefore, means a different thing to each side. This is a subtle distinction, but it is a distinction nonetheless and necessary for the sake of conceptual clarity.
assembly; Third Amendment prohibition against quartering soldiers during peace time; Fourth Amendment protections against unreasonable searches and seizures; Fifth Amendment right not to self-incriminate that affords one a “zone of privacy which government may not force him to surrender”; and Ninth Amendment right that enumerated constitutional rights are “not to be construed to deny or disparage others retained by the people.”

(3) Marital affairs fall under the constitutional right of privacy.
(4) The Connecticut law, which prohibits use of contraceptives, violates the right of privacy over marital affairs.
(5) Therefore, the Connecticut law violates the Constitution.

Although his opinion only establishes the right of privacy over marital affairs, one must note the importance of his relying on principles not explicitly found in the text of the Constitution. In order to establish a right of privacy over marital affairs, he must first establish an un-enumerated, penumbral right of privacy in the Constitution.

The natural lawyer may take this idea and hold that Justice Douglas argues on the basis of natural law theory when he writes that the Constitution protects certain principles and therefore penumbral rights. Consequently, one must interpret the Constitution as protecting these un-enumerated rights, since they accord with notions of justice.

This way of interpreting the Constitution, though, need not be the case since the natural rights and notions of justice to which Justice Douglas appeals may simply be imported into the law, being social norms that precede the law. These natural rights may have been embedded into the social fabric of the rule of law and so need not rely purely on morality for their authority as law; the legal positivist Jules Coleman called this idea “incorporationism.” Under legal positivism, society adopts a rule of recognition that validates all particular rules or laws, with the additional caveat being that no rules or laws can contradict it; in the United States, the rule of recognition is the federal Constitution. Moral principles,

32 Griswold, 381 U.S. at 484.
33 Note that this syllogistic structure follows from a close reading of Douglas’s opinion. While there may be other ways to formulate the argument, I believe that the structure specified accurately captures the essence of the argument.
34 Jules Coleman and Brian Leiter, Legal Positivism, in PHILOSOPHY OF LAW 112 (Wadsworth, 7th ed. 2004).
35 No law that directly contradicts the Constitution can have legal authority since the Constitution stands as the “supreme law of the land.” See U.S. CONST. art. VI.
therefore, can be embedded within the rule of recognition, which means that judges can appeal to abstract moral principles when deciding cases without abandoning legal positivism.

Justice Douglas seems to accept legal positivism as a defense to a right of privacy over marital affairs with the following passage:

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 for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes, a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.\(^3.6\)

Thus, he appears to maintain that natural rights to privacy, especially over marital affairs, have been embedded as a social norm and therefore as a tradition of American society. While one may object that he appeals to normative beliefs about a right of privacy, one can easily explain this as being imported into the Constitution and established as one of the socially-erected principles of law.

Justice Douglas also relies on several Amendments in the Bill of Rights to establish the right of privacy. If he relied on natural law theory, as has been commonly supposed, he would find no need to appeal to the text of the Constitution. After all, natural rights transcend any society and Constitution, making their recognition and legal enforcement dependent, in some cases, on judges who discover them through reason, experience, or intuition. This appeal to the text of the Constitution demonstrates his reliance on legal positivism.

Nevertheless, it may be contested that Justice Douglas used other constitutional rights in an attempt merely to ground his opinion in text, like a debater trying to raise as many points (or arguments) as possible in order perhaps to satisfy the unique predilections of different audiences. While the natural lawyer may find satisfaction with appeal to abstract moral principles inherent in the ends of government and embedded within the Constitution, the legal positivist may find satisfaction in deriving the right of privacy through the principles of other constitutional rights. If this is the case, then Justice Douglas’s opinion relies on the former as his primary argument and the latter as reserve. Even so, his argument

\(^{3.6}\) Griswold, 381 U.S. at 486.
still relies on legal positivism through the concept of incorporationism and textual appeal, in conjunction. His reasoning in this opinion, therefore, need not find its bearing in natural law theory but instead can find it in legal positivism.

This does not suggest, however, that what he concludes as moral principles inherent in the Constitution are actually inherent, meaning that epistemic confusion about which rights deserve protection naturally leads to disagreements over the proper interpretation of the Constitution, even while accepting the legal positivism stance. Legal positivism, therefore, does not make it inconsistent to hold that moral principles inhere in the Constitution while maintaining that there may be disagreement about what those principles are and what they protect.

D. Justice Douglas’s Opinion Understood under Mill’s Harm Principle

Justice Douglas’s conception of a right of privacy tends to hide away in ambiguity. He does not elaborate upon what he means by this right and how far this right extends. For instance, does it prohibit government interference (or prohibit government knowledge) over any actions performed by married individuals in private? or any actions by any individual—marital status, race, age, or sexuality notwithstanding?

The most defensible interpretation of Justice Douglas’s conception of a right of privacy aligns with Mill’s ‘harm principle.’ Mill explains the harm principle in the following:

That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant….In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.37

Consequently, the right of privacy extends only over circumstances—of a private nature—where rational individuals consent to an action, and where that action does not physically or emotionally harm others. Dworkin understands Mill as supporting at least two principles: “one asserting that self-protection or the prevention of harm to others is sometimes a sufficient warrant and the other claiming that the individual’s

own good is *never* a sufficient warrant for the exercise of compulsion either by the society as a whole or by its individual members.\textsuperscript{38} In other words, with respect to the second part of the harm principle, society cannot base its motivation or rationale for paternalistic policies *solely* upon an attempt to further the individual’s own good—there must be some other government interest that will be served, such as promoting public health or safety, for example.

This conception of a right of privacy, moreover, remains consistent with Locke’s idea that the ends of government lie in preserving life, liberty, and property. Government power must be limited by conforming to this moral constraint, which implies that it must respect individual liberty. This presupposes respect for individual autonomy, or the idea that the individual can rationally decide what is in her own good within the context of living in a community. Since Locke also believes that individuals consent to the social contract to protect their safety, government has justification for making laws that prevent individuals from harming others. Mill’s harm principle, with its goal of protecting individual autonomy while preventing physical harm to others, stays in accordance with Locke’s idea of limiting the extent of government power and protecting individual rights. Since one can reasonably argue that the United States incorporated the general form of Locke’s conception of the state, natural lawyers have an inclination to believe that justices would be justified in interpreting the Constitution under Mill’s harm principle, as it *clarifies* the meaning of a natural right of privacy with respect to constitutional rights and to the powers of government.\textsuperscript{39} Such a conception of a right of privacy, for example, excludes protection for domestic abuse in the household, since no rational individual would willingly consent to such an arrangement unless coerced by fear and excludes protection for malicious yet private plots to commit other serious crimes like assault, theft, or murder, since such actions *intend* to incur harm on others.\textsuperscript{40}

Justice Douglas appears to think that the marital choice of whether to use contraception falls under those acts that do not harm others, and so, in a way consistent with Mill, will presumably think that those who believe that contraception ought to be outlawed should instead seek to persuade or reason with those contemplating the use of contraception. Persuasion ought to replace legal punishment in such a circumstance.


\textsuperscript{39} In order to avoid the controversial question of whether contraception, or at least certain forms of it, constitutes abortion (and therefore taking of life), focus will be placed on the incorporation of a right of privacy into constitutional law instead.

\textsuperscript{40} Although it is less clear if the harm principle protects such an activity as using illegal narcotics, the precise nature and scope of the harm principle need not be of concern in this essay.
II. THE SUPREME COURT IN RELATION TO STATE LAWS

It appears that the Supreme Court can strike down laws through three methods: declare the law in question as either (1) violating a constitutional right, as (2) exceeding the scope of constitutional powers, or as (3) enacting a law that serves no government purpose. Since the Connecticut law was created by a state government, judicial review over such matters is more restricted in comparison to judicial review over laws created by the federal government. According to the Tenth Amendment, “The powers not reserved for the United States by the Constitution nor prohibited by it to the States, are delegated to the States respectively, or to the people.” The federal government has limited powers, meaning they may not transgress the scope of their constitutional authority. This Amendment reserves powers for state or local governments to enact laws or create rights according to their own constitutional powers and limited by their own courts, or they may choose to restrict or restrain their power. These governments may proceed on this course so long as they do not violate federal law accepted as constitutional or violate rights protected under the Constitution. Since the case dealt with Connecticut state law, the Supreme Court must invalidate the law either by declaring it as violating a constitutional right or as serving no government purpose.

It is an accepted doctrine that the Constitution leaves for states the ‘police power’ to promote the health, safety, and values of its residents. Connecticut can justify its law by arguing that preventing contraception, as well as the means of obtaining it, promotes the societal value of “marital fidelity and stable families by discouraging attempts to avoid the possible consequences of non-marital sexual relations through the use of contraceptives.” Under such reasoning, married

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41 This last one stems from the ‘rational basis test’ that the Court has often used in its jurisprudence. This test holds that the Court should defer to the Congress, president, or states regarding government laws, provided the Court simply finds some legitimate government interest promoted—the test has traditionally been considered very lenient and deferential toward these other government entities. See generally Michael Dorf, The Unanimous Supreme Court Decision in The Iowa Gambling Case: When Is a Difference Also an Inequality?, FindLaw, June 11 (2003), available at http://writ.news.findlaw.com/dorf/20030611.html.
42 U.S. Const. amend. X.
43 See Kurt Lash, The Lost Original Meaning of the Ninth Amendment, 83 Texas Law Review 331 (2004), available via ProQuest Databases. The author of this essay provides excellent analysis of the Ninth Amendment by tracing its history through ratification and application as well as by revealing James Madison understanding of that Amendment through his documented speeches.
44 This follows largely from the Tenth Amendment.
individuals will be less likely to commit extra-marital affairs because the threat of conceiving an illegitimate child rises; in addition, this child would typically reveal the affair, which is something the married individual certainly would not want her spouse to know. Therefore, only married couples would tend to engage in sexual intercourse, while others would be discouraged from partaking in it. Such an incentive structure means less sexual promiscuity and more sexual restraint, which may lead to significant decreases in sexually-transmitted diseases, thereby promoting the legitimate government interest of furthering public health.

The problem with such a law, however, rests in its neglect of the particular circumstances around which married couples must wrestle in preparation of having a child. Such preparation requires significant planning and foresight with respect to burdening questions such as whether the married couple currently possesses a decent enough income level to support a child, whether the neighborhood they currently live in allows the child to flourish, whether their schedules can be devoted to the child during the integral years of development, and whether they have the emotional wherewithal and resolve to handle the turbulence that naturally accompanies with raising a child. By enacting such a law, the state of Connecticut discourages, and effectively restricts, sexual intercourse among married couples while coldly disregarding the facts surrounding each particular case. Married couples, it appears, should be encouraged to engage in sexual intercourse, without these burdening questions coming to bear, for such an act signifies the uniquely human consummation of love between two people—achieving the higher self. The human purpose of sexual intercourse does not lie merely in reproduction, like in animals, or in bodily pleasure, like individuals, but can include these two purposes yet excel beyond them; it is commonly supposed that the ineffable quality love reaches a higher plane between two people when complemented with that sacred act. Married couples, one may rightly conclude, should be able to reach this higher plane while still deliberating over whether their circumstances properly call for having a child.

Even if sexual intercourse among married couples were to increase significantly, the worry that more sexually-transmitted diseases will soar will not indeed occur since the sex is between the same two persons; any disease transmission will be contained within the two married persons. Moreover, sexual promiscuity, as it has been ridiculed by moralists, usually means sexual intercourse between multiple partners, and does not mean sexual intercourse with the same person. Indeed, if one accepts a loose version of Freud’s notion that one of the fundamental human passions rests in the subconscious dictates of the libido (in the particular form of the...
‘human sex drive’ directed toward fulfillment of the pleasure principle),\textsuperscript{46} married persons who have to worry about becoming pregnant will seek other means of satisfying their human desires, which one could reasonably foresee them satisfying through extra-marital affairs conducted in other states—business trips may provide the necessary cover, for instance. The Connecticut law, in effect, would appear to create incentive for such promiscuous behavior, to destroy marriages, and to promote sexually-transmitted diseases among many more people. These criticisms mount on top of the concern that the law ignores the circumstances around which married couples must make the serious and life-altering choice regarding whether they are ready to have a child.

If, after taking this analysis, one weakened the strength of the Connecticut law and claimed that it is only symbolic, then one will encounter other difficulties. To start with, two individuals have already been charged and convicted under the law, so it is clearly enforceable. Putting this difficulty aside, why would the Connecticut legislature pass a law on this matter, when they could simply pass a resolution making their sentiments felt? Laws imply physical enforcement of some kind, and enacting laws without that quality would call into question every law made in the past or in the future; the consequence would be that every law must explicitly state whether it is enforceable or unenforceable, or subsequent laws must be passed making past laws enforceable or unenforceable. Legislatures, in practice, would not pass laws and declare them unenforceable—which would, of course, encourage confusion about the enforceability of laws and thus create real and major concern. If police officers were uncertain about the nature regarding the enforceability of the contraception law and one officer were to impose a fine on a married couple for using contraception whereas another officer would not impose such a fine, then this would amount to unequal protection of the laws, which violates the Fourteenth Amendment of the Constitution. One could easily foresee this occurring, if one were to reason from the premise that this law is merely symbolic. However, if the law were recognized as a law in the full sense of that term, meaning that violations accompany state-sanctioned punishments, then these equal protection enforcement concerns would perish.

While it may be conceded that the Connecticut law fails the standard of good taste, judges, on principle, should not adjudicate the wisdom or ignorance of laws but merely enforce them, provided they were created lawfully. Even if the judge thinks that the law in question does not serve any good purpose, her role as

\begin{footnote}
\textsuperscript{46} See Leo Bersani, ‘Can Sex Make Us Happy?’, 21 \textit{Raritan} 15 (2002), available via ProQuest Databases.
\end{footnote}
judge does not allow her to strike down laws she thinks bad and enforce laws she thinks good; for to do so would amount to judicial usurpation of legislation—a taking away of power from the democratic process and from citizens. The traditional idea of states being the bold experimenters of representative democracy would be suppressed if the Supreme Court would have to adjudicate every case that caused controversy.\footnote{The motivation behind changing or maintaining the status quo presupposes some kind of conception of justice that moves an individual to prefer one political action over another. All too often what one thinks just may be considered unjust by others.}

The culture that grows with a state’s traditions and laws—which express the values those states hold high—would tend to flower to a much lesser extent; Southern states should be able to have different cultures, embodied through different laws, than Western states, for instance. The principle of federalism holds that federal power should not be exercised where state power suffices because citizens cannot escape the bounds of federal laws, but they certainly can escape the bounds of a particular state’s laws by moving to other states. As Justice Louis Brandeis observed with his dissenting opinion in \textit{New State Ice Co. v. Liebmann}, ““It is one of the happy accidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.””\footnote{G. Alan Tarr, \textit{Laboratories of Democracy? Brandeis, Federalism, and Scientific Management}, 25 \textit{Publius} 37 (2001), available via ProQuest Databases. The author provides a wonderful discussion in analyzing Brandeis’s own conception of the federalist principle.}

Moreover, citizens and interest groups would have the perverse incentive of bringing lawsuits to the Court with the hope that a majority of justices would find a particular state law as unreasonable, which leads to increases in litigation—meaning that states have to spend more time and state funds arguing lawsuits through the various federal court levels.

Nevertheless, one may interject, from a different perspective, that the controlling issue in this case does not revolve around the reasonableness of the Connecticut law but around the transgression of a constitutional right. The Court, as it so happened, followed this strategic course, and consequently attention will now turn toward Justice Douglas’s opinion. Although there may be better arguments in support of a right of privacy, it will be argued that Justice Douglas’s opinion does not pass the test.
III. THE CRITIQUE OF JUSTICE DOUGLAS’S OPINION

A. The Problem with Justice Douglas’s Opinion

The principal problem with Justice Douglas’s opinion lies in its shaky judicial reasoning. His interpretation of the Constitution invites judicial usurpation of legislative power since it greatly expands the discretion over what actions, activities, or circumstances warrant right of privacy protections. It appears that he conceives of the role of judges as protecting rights to the Constitution, and while legal positivists would not deny this, the controversy arises over the importation of a right of privacy that is allegedly inherent in the principles within it, as no such mention of it appears in the text.

Justice Douglas’s opinion relies on the concept of penumbras, both as lying within the Constitution and extending the scope of textually enumerated constitutional rights. He argues that, in the past, the Supreme Court has found and upheld principles protecting zones of privacy under certain circumstances. Justice Douglas cites Pierce v. Society of Sisters, where the First and Fourteenth Amendments were used to uphold a right of parents in choosing their child’s education (whether public or private school); Meyer v. Nebraska, where the Court upheld the right of private schools to study the German language; NAACP v. Alabama, where the Court invalidated the disclosure of membership lists of private companies or associations; and Schware v. Board of Bar Examiners, where membership in a political organization (the Communist party, in this case) does not, by itself, preclude one from membership in a private organization—the American Bar Association (ABA)—since it violates freedom of assembly protection; as all demonstrating cases where “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”49 Through analogical reasoning, Justice Douglas concludes that the First Amendment freedom of association; Third Amendment prohibition against quartering soldiers during peace time; Fourth Amendment protections against unreasonable searches and seizures; Fifth Amendment right not to self-incriminate that affords one a “zone of privacy which government may not force him to surrender”; and Ninth Amendment right that enumerated constitutional rights are not “not to be construed to deny or disparage others retained by the people”50 all support the notion that these rights protect a penumbral right of privacy.

49 Griswold, 381 U.S. at 484.
50 Id.
This chain of reasoning fails, however, since the relevant difference between the analogical premise (precedents) and analogical consequence (penumbral right of privacy) is that only the former gives effect to undisputed, textually enumerated constitutional rights while the latter does not. The ultimate reason Justice Douglas upholds penumbral rights lies in the principle that “Without those peripheral rights the specific rights would be less secure.”51 This principle, however, vanishes if penumbral rights do not support one in engaging in activities pursuant toward those specific constitutional rights. In Schware v. Board of Bar Examiners, for instance, the Court’s judgment, that political party membership does not intrinsically imply ‘bad moral character’ and therefore warrant excluding one from the practice of law, finds justification through the First Amendment freedom of assembly. The Court rightly decided that one’s personal association with a political party or philosophic position does not provide the only basis to make judgments of that person’s character in gaining admission to a private organization like the ABA—where this organization, in practical effect, has a virtual monopoly control on the labor supply of lawyers—since it would severely and effectively limit freedom of association due to the social ostracism and work restrictions one will likely encounter if associated with an unpopular group. The Court, therefore, made it possible for one to effectively engage the exercise of a right, and thus truly made “express guarantees fully meaningful.”52

On the contrary, the right of privacy over marital affairs does not protect any of the Amendments Justice Douglas cites. The Third Amendment protection against quartering soldiers in one’s household without consent would not be protected any further if the Court recognized a right of privacy; neither would the Fourth Amendment protection against unreasonable searches and seizures or Fifth Amendment protection against self-incrimination. These constitutional rights would not be disparaged in any way had the Supreme Court not recognized a general right of privacy.53 Moreover, the Ninth Amendment protection against ‘denying’ other rights retained by the people does not necessarily invoke natural rights to liberty in the broad sense but instead seeks to respect rights already granted to the people by the states; the Ninth, along with Tenth, Amendment restricts the power of the federal government, so that both Amendments can be understood to work in conjunction—they constitute the federalist principles that come after the first eight

51 Id. at 483.
52 Id.
53 In order to understand the thrust of this contention, one should simply know that it flows from a thought experiment, or hypothetical, where one imagines the right of privacy having never been recognized. The purpose of thought experiments, of course, is to test intuitions regarding matters in question.
Amendments, which relate to individual rights.\textsuperscript{54} Therefore, not establishing a right of privacy does not restrict states in furthering rights protections under state laws. The First Amendment protection to freedom of association is not furthered to any significant degree because using contraception is strictly private, and it would quite likely be rare and inconsequential if anyone ever found out. Moreover, consultation with organizations like Planned Parenthood would be confidential, so the same result follows.

Justice Douglas, it appears, commits the fallacy of composition.\textsuperscript{55} By supposing that the First, Third, Fourth, Fifth, and Ninth Amendments each protect a right of privacy, he concludes that they all protect the same right of privacy, as a principle.\textsuperscript{56} Yet this does not necessarily follow, since each of these Amendments protects a limited sphere of privacy in their own sphere of application; they do not necessarily invoke a general right of privacy, of the kind Justice Douglas presumes.\textsuperscript{57}

Then, in an attempt to appeal to the authority of precedence to justify defense of a constitutional right of privacy, Justice Douglas refers to two cases in which the Court upheld a form of the right in question. When referring to \textit{Boyd v. United States}, he describes the Court’s using the Fourth and Fifth Amendments “as protection against all governmental invasions ‘of the sanctity of a man’s home and the privacies of life.’”\textsuperscript{58} Similarly, when referring to \textit{Mapp v. Ohio}, he describes the Court in using the Fourth Amendment “as creating a ‘right to privacy, no less important than any other right carefully and particularly reserved to the people.’” He concludes that these cases “bear witness that the right of privacy which presses for recognition here [the Griswold case] is a legitimate one.”\textsuperscript{59}

This conclusion, however, only follows if one accepts that the Fourth and

\textsuperscript{54} See Lash.

\textsuperscript{55} The fallacy of composition denotes the idea that simply because each part of a whole has a certain quality, then it necessarily follows that the whole has the quality in question. For example, each marble may have the quality of roundness, but it does not necessarily follow that gathering all of the marbles together and supposing them one unit means that the unit has the quality of roundness.

\textsuperscript{56} See \textit{Griswold}, 381 U.S. at 484.

\textsuperscript{57} Although not formulated in the same way, Justice Hugo Black alluded to this mistake in his dissenting opinion. See \textit{Id.} at 508 (Black, H., dissenting). His observation:

\textit{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.}

\textsuperscript{58} \textit{Id.} at 484.

\textsuperscript{59} \textit{Id.} at 485.
Fifth Amendments entail the right of privacy, and this need not be the case. To begin, one wonders if there is a principled difference with respect to whether the Fourth Amendment or the Fifth Amendment entails the right of privacy, or perhaps both. The ambiguity permeating this line of reasoning makes it clear, if it was not clear already, that he relies on the concept of penumbras in order to justify the constitutional right of privacy. For the sake of reasonably interpreting the text of the Constitution as well as for the sake of conceptual clarity, rather than viewing those Amendments as protecting a right of privacy, it is more reasonable to view those Amendments as protecting rights in their own respective spheres of application. For to stipulate and assert a ‘right of privacy’ leads to muddled and confused thinking, as those Amendments clearly would not protect child abuse, rape, murder, or use of illegal narcotics in the privacy of one’s own home. Language dictates a person’s thinking to a rather large extent, particularly in relation to understanding abstract concepts and in the application of those concepts to particular instances. Hence, irregardless of the correctness of those particular decisions—perhaps the Fourth or Fifth Amendments were correctly applied, but gratuitous and sweeping language was unfortunately used—appealing to a right of privacy merely confuses the matter, and simply relying on the authority of past cases does not suffice to establish a right of privacy since the Fourth and Fifth Amendments should be reasonably understood in light of their own respective spheres without the need for extraneous recourse to the notion of a broad right of privacy—this criticism faintly echoes the fallacy of composition charge leveled against him.

The common appeal to substantive rights protected under the Fifth and Fourteenth Amendments due process clauses, furthermore, does not work, as these Amendments merely protect procedural rights when the government deprives a person of life, liberty, or property, and therefore do not necessarily protect substantive rights. As Justice Antonin Scalia remarks, “Property can be taken by the state; liberty can be taken, even life can be taken; but not without the process that our traditions require—notably, a validly enacted law and a fair trial.”

Justice Douglas then appeals to precedent from *NAACP v. Alabama* to set forth a “familiar principle” previously recognized by the Court:

> ‘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

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freedoms.’ Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.\footnote{Griswold, 381 U.S. at 485.}

He fails to account, however, for the fact that the Fourth Amendment right “against unreasonable searches and seizures…but upon probable cause”\footnote{U.S. Const. amend. IV.} still applies, meaning that police officers would not have the power to freely roam around private households (especially bedrooms), as Justice Douglas seems to presume, but rather have to acquire some basis grounded in evidence or some reasonable suspicion in order to first obtain a court warrant to investigate the dwelling. In this case, one must make the crucial distinction between the substantive content of the law and how the actual enforcement of the law proceeds. For the idea of granting police officers the power of virtually unlimited access to private households would surely constitute an ‘unreasonable search.’ Moreover, his appeal toward sheltering the ‘area of protected freedoms’ presupposes that one accepts a constitutional right of privacy in this case, for which he does not adequately establish. Consequently, this brief rhetorical flurry demonstrates nothing more than shadow boxing.

\textbf{B. Griswold, Natural Law, Legal Positivism, and the Proper Role of the Court}

Those who support a right of privacy, being those who would most likely adhere to natural law theory, may respond by arguing that, while liberty interests may not receive as much protection as they would wish in all circumstances, the principle of liberty ought to be assumed when adjudicating cases—perhaps the Constitution protects a right of liberty. This suggests that the burden of proof shifts from individuals needing to prove that the Constitution protects a certain right to the government needing to prove that society has some compelling interest to restrict liberty—perhaps for the health, safety, or values of society. Since the burden of proof shifts, it becomes more difficult to restrict liberty—and therefore more respect is given to natural rights—since the individual wins by default if the government cannot provide compelling positive arguments for its side.

This argument, though, rests on the assumption that legal and moral principles of the kind they support, namely substantive liberty rights, were imported into the Constitution. The legal positivist, however, may accept that liberty and
moral principles were imported into the Constitution, but that the rights flowing from them are restricted to those textually enumerated. Natural lawyers and legal positivists may simply disagree over the extent of those rights. Legal positivists, one can say, hold that the Bills of Rights as well as Amendments outlawing slavery and guaranteeing an equal protection of the laws, for instance, embody liberty and moral principles in themselves. It is a principle of American government to distinguish between the *proper roles* of each branch, for the Constitution grants Congress, not the Supreme Court, the power to make law, provided they accord with certain constitutional constraints regarding both their enumerated powers and every individual’s protected rights.

In regards to liberty protection afforded to marital privacy, where the two sides disagree lies in whether the Constitution protects such a right. The legal positivist position, which may be represented by Justice Scalia, holds that the Constitution does not protect such a right, and therefore the role, or duty, as a judge would be to uphold the Connecticut law in question as legally binding.\(^{63}\) Words have a limited scope of reference and since the text does not even mention privacy, any reasonable interpretation of the *words* in the Constitution would not obligate justices to uphold a right of privacy. If the framers would have thought so highly of a right of privacy, thus thinking that it deserved protection, they would have made it explicit in the text of the Constitution, which would have thereby quelled all controversy over whether the Constitution protects such a right. As Justice Scalia correctly points out, “the text is the law,” so the chief obligation of the judge rests in interpreting the law as promulgated—through the language used in the text of the law.\(^{64}\) This effectively limits judicial discretion, for to abandon this mode of interpretation leads to justice’s relying on some conception of justice, or of the good, in order to prefer one interpretation of the Constitution over another. Importing such conceptions of justice leads to a lack of judicial restraint, and leads to the consequence where justices create law according to their own political philosophy, or worse, their own raw personal feelings. The legal philosopher John Hart Ely satirizes such an arrangement, “‘We like Rawls, you like Nozick. We win, 6-3.”

\(^{63}\) To be fair, it is not a necessary consequence that legal positivism leads to this conclusion; Justice Scalia happens to be both a justice on the Supreme Court and a prominent advocate for the legal positivist position, as he argues against applying natural law theory because of its tendency toward judicial expansion of ‘penumbral’ rights. From the concession in the previous paragraph with respect to the question concerning the extent of liberty and moral principles ‘incorporated’ into the Constitution, it is possible for the legal positivist to use this idea and go on to argue for a constitutional right of privacy. This paper, though, restrains itself by focusing upon the right of privacy arguments made by Justice Douglas.

\(^{64}\) Scalia, 190.
Statute invalidated.”

Natural lawyers, if they happen to base their justification for a constitutional right of privacy in accordance with Justice Douglas, would seem to have the almost natural tendency of expanding the scope of constitutional rights, consequently having the effect of increasing judicial discretion and taking away deliberation through the democratic process. While the Constitution protects certain rights, these rights are limited, which makes the judicial role consist in merely protecting those rights; limiting the federal government and state governments (although to a lesser extent for the latter) to their constitutional powers; and leaving other rights open to enactment and enforcement through representative democracy. Excessive judicial discretion actually decreases deliberation among citizens since deliberation tends to revolve around the proper role of judges as opposed to whether specific laws should be passed or not. The citizens can decide whether they think individuals should have other rights and can embed them into the Constitution through Amendments, or more weakly through ordinary laws—the latter, of course, may be more easily repealed. The United States was founded as a democratic republic, which means that although it upholds a separation of powers by granting judicial review, thus enabling judges to protect certain substantive rights in the Constitution, it also respects the judgment of the citizenry to create their own substantive rights or pursue their own policies, therefore upholding the principle of self-government.

Deriving abstract moral principles from the text, moreover, would warrant justices perhaps to derive moral principles that would be more controversial. Just like, for example, if a judge interpreted the framers of the Constitution as understanding ‘natural rights’ in a more classical, conservative sense, where government protected only those rights that promoted virtue and led individuals to act according to their nature or essence. Natural rights would then be interpreted as outlawing homosexual conduct since it runs contrary to nature and sexual reproduction. Or as protecting freedom of speech only when that speech leads to deliberative discussion about government policies, philosophy, art, science, or other subjects associated with the use of the rational faculty. Freedom of speech, then, would not be understood as a general freedom of expression since the latter tends to protect such vulgar activities as pornography, and this devalues the conception of a freedom of speech that the framers thought warranted protection. Therefore, when judges rely upon a form of natural law theory to justify a decree, the result may lead to social consequences one may abhor, depending upon one’s political predilections and the particular judge adjudicating the case.

Cynics may argue that rights need judicial enforcement precisely because they cannot and should not be taken away under any circumstance; for leaving them open to legislative approval disrespects the dignity of those individuals who ought to be able rightfully to exercise them. This argument, however, does not consider the historical development of certain constitutional rights. The Thirteenth Amendment right not to be enslaved, Fourteenth Amendment right to equal protection under the law, Nineteenth Amendment right for the women’s vote, and Twenty-sixth Amendment right for the eighteen-year old vote all mark rights granted through representative democracy. Natural rights do not necessarily need protection from courts in every circumstance, since it does not follow that citizens cannot recognize natural rights for themselves and cast their votes accordingly, and since society can circumvent the undesirable consequences previously specified. Natural rights in the particular conception and form of liberty rights would seem to draw appeal to all individuals, which imply that everyone will have at least some interest in their enactment.

**Conclusion**

Justice Douglas’s opinion, therefore, contains flaws that do not warrant the establishment of a right of privacy. Although different constitutional arguments may be advanced, the particular arguments used by Justice Douglas do not do the trick. Furthermore, unlike the natural lawyers who agree with Locke’s model of government, the particular Constitution of the United States protects certain rights but the right of privacy is *not necessarily* one of them—or cannot be presumed to be one of them.

On the strictly pragmatic analysis of Douglas’s opinion, invoking rights not enumerated or reasonably implied by the text of the Constitution encourages judicial usurpation of legislative powers, since law not enumerated or understood with respect to the original understanding of the words inevitably means that justices rely on their own conception of justice in order to prefer one interpretation of the Constitution over another. While not denying that there exists an objective concept of justice—of maintaining moral realism—one must remain skeptical over a majority of justice’s imposition of their own conception, which may prove nearly irreparable because of the authority of judicial review. One may prefer such a

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66 See U.S. Const. amend. XIII, §1; U.S. Const. amend. XIV, §1; U.S. Const. amend. XIX; U.S. Const. amend. XXVI, §1.

67 See generally Robert P. George & David L. Tubbs. The authors of this essay note the effects resulting from the Griswold opinion, particularly its vagueness with respect to the definition of a ‘right of privacy’.
system, only to the extent that one likes the particular composition of the Court. Controversies over rights not enumerated in the text of the Constitution ideally should be deliberated through representative democracy, so that citizens can exercise their power of self-government in working through different conceptions of justice—and in hopefully realizing true justice—while being always constrained by powers and rights protected by the Constitution. The Supreme Court’s role, then, merely consists in protecting rights enumerated, or originally understood, in the text of the Constitution. Douglas’s opinion, in itself, does not establish a constitutional right of privacy, and so the justification for the ruling in Griswold collapses and the right of privacy purportedly established in that case does not warrant constitutional protection. Those who believe that the Constitution protects such a right, or other formulations of it like a right of liberty, will simply have to find other arguments to justify their view.

In *Eisenstadt v. Baird* (1972), the Court changed a right of spouses—justified in *Griswold* precisely by reference to the importance of marriage—into a right of unmarried adults to buy and use contraceptives. Then, in a move that plunged the United States into a “culture war,” the Court ruled in *Roe v. Wade* and *Doe v. Bolton* (1973) that this generalized ‘right of privacy’ also encompassed a woman’s virtually unrestricted right to have an abortion.