Liberty, Privacy, and the Penumbra

The Oxford English Dictionary defines penumbra as "the partially shaded outer region of the shadow cast by an opaque object." As you read the two cases below, think about the following questions:

1. Using the definition above and the interpretation in the two cases, how would you define penumbra in a legal sense?
2. Does the majority opinion uphold or invalidate the state statute at issue?
3. What is the "holding" of each case? In other words, if you had to summarize the opinion in one or two sentences, what would you say?
4. What reasoning does each Justice use to come to their conclusion? Which Amendments or judicial doctrines do they rely on?
5. Which opinion in each case did you find the most persuasive? Why?

Griswold v. Connecticut

Supreme Court of the United States

March 29, 1965, Argued ; June 7, 1965, Decided

No. 496

Reporter
381 U.S. 479 *; 85 S. Ct. 1678 **; 14 L. Ed. 2d 510 ***; 1965 U.S. LEXIS 2282 ***

GRISWOLD ET AL. v. CONNECTICUT

Prior History: [**1]** APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

Disposition: *151 Conn. 544, 200 A. 2d 479*, reversed.

Case Summary

Procedural Posture
Defendants, a director of medical clinic and a doctor, challenged a decision from the Supreme Court of Errors of Connecticut, which convicted them of violating a state law that prohibited the dispensing or use of birth control devices to or by married couples.

Overview

In examining the United States Constitution, the Court found a right of privacy implicit in the *Third Amendment's* prohibition against the quartering of soldiers, the *Fourth Amendment's* right of people to be secure in their persons, the *Fifth Amendment's* right against self-incrimination, and the *Ninth Amendment's* right to retain rights not enumerated in the Constitution. The right of privacy to use birth control measures was found to be a legitimate one. Thus, the Court concluded that Conn. Gen. Stat. § 53-32 (rev. 1958) was unconstitutional.

Outcome
The Court reversed defendants' convictions.

Judges: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

Opinion

[*480] [*512] [**1679]** MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven -- a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to *married persons* as to the means of preventing conception. They examined the wife and prescribed **[****3]** the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are §§ 53-32 and *54-196* of the General Statutes of Connecticut (1958 rev.). The former provides:

"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."

Section 54-196 provides:

"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."

The appellants were found guilty as accessories and fined $ 100 each, against the claim that the accessory statute as so applied violated the *Fourteenth Amendment*. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. *151 Conn. 544, 200 A. 2d 479*. We noted probable jurisdiction. *379 U.S. 926*.

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Coming to the merits, we are met with a wide range of questions that implicate the *Due Process Clause of the Fourteenth Amendment*. Overtones of some arguments **[*482]** suggest that *Lochner v. New York, 198 U.S. 45*, should be our guide. But we decline that invitation as we did in *West Coast Hotel Co.* v. *Parrish, 300 U.S. 379*; *Olsen v. Nebraska, 313 U.S. 236*; *Lincoln Union v. Northwestern Co., 335 U.S. 525*; **[****6]** *Williamson v. Lee Optical Co., 348 U.S. 483*; *Giboney v. Empire Storage Co., 336 U.S. 490*. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the *Bill of Rights*. The right to educate a child in a school of the parents' choice -- whether public or private or parochial -- is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the *First Amendment* has been construed to include certain of those rights.

By *Pierce v. Society of Sisters, supra*, the right to educate one's children as one chooses is made applicable to the States by the force of the *First* and *Fourteenth Amendments*. By *Meyer v. Nebraska, supra*, the same dignity is given the right to study the German language **[***514]** in a private school. In other words, ***HN2***[⬆] the State may **[****7]** not, consistently with the spirit of the *First Amendment*, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin v. Struthers, 319 U.S. 141, 143)* and freedom of inquiry, freedom of thought, and freedom to teach (see *Wieman v. Updegraff, 344 U.S. 183, 195)* -- indeed the freedom of the entire university community. *Sweezy v. New Hampshire, 354 U.S. 234, 249-250, 261-263*; *Barenblatt v. United States, 360 U.S. 109, 112*; **[**1681]** *Baggett v. Bullitt, 377 U.S. 360, 369*. Without **[*483]** those peripheral rights the specific rights would

be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In NAACP v. Alabama, 357 U.S. 449, 462, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, **[****8]** we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Ibid*. In other words, ***HN3***[⬆] the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. NAACP v. Button, 371 U.S. 415, 430-431. In Schware v. Board of Bar Examiners, 353 U.S. 232, we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party" (id., at 244) and was not action of a kind proving bad moral character. Id., at 245-246.

Those cases involved more than the "right of assembly" -- a right that extends to all irrespective of their race or ideology. De Jonge v. Oregon, 299 U.S. 353. ***HN4***[⬆] The right of "association," like the right of **[****9]** belief (Board of Education v. Barnette, 319 U.S. 624), is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

[*484] The foregoing cases suggest that ***HN5***[⬆] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman, 367 U.S. 497, 516-522 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra **[***515]** of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against **[****10]** unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

HN6[⬆] The Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." * We **[**1682]** recently referred **[*485]** in Mapp v. Ohio, 367 U.S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See Beaney, The Constitutional Right to Privacy, 1962 Sup. Ct. Rev. 212; Griswold, The Right to be Let Alone, 55 Nw. U. L. Rev. 216 (1960).

[**11]** We have had many controversies over these penumbral rights of "privacy and repose." See, *e. g.,* Breard v. Alexandria, 341 U.S. 622, 626, 644; Public Utilities Comm'n v. Pollak, 343 U.S. 451; Monroe v. Pape, 365 U.S. 167; Lanza v. New York, 370 U.S. 139; Frank v. Maryland, 359 U.S. 360; Skinner v. Oklahoma, 316 U.S. 535, 541. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

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* The Court said in full about this right of privacy:

"The principles laid down in this opinion [by Lord Camden in *Entick* v. *Carrington*, 19 How. St. Tr. 1029] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, -- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." 116 U.S., at 630.

The present case, then, concerns ***HN7***[ ] a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot **[***516]** stand in light of the familiar principle, so often applied by this Court, that ***HN8***[ ] a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily **[****12]** broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama, 377 U.S. 288, 307*. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The **[*486]** very idea is repulsive to the notions of privacy surrounding the marriage relationship.

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.

Reversed.

Concur

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

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that "due process" **[****13]** as used in the *Fourteenth Amendment* incorporates all of the first eight Amendments (see my concurring opinion in *Pointer v. Texas, 380 U.S. 400, 410*, **[**1683]** and the dissenting opinion of MR. JUSTICE BRENNAN in *Cohen v. Hurley, 366 U.S. 117, 154)*, I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the *Bill of Rights*. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution [1] is supported both **[***517]** by numerous **[*487]** decisions of this Court, referred to in the Court's opinion, and by the language and history of the *Ninth Amendment*. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the *Bill of Rights*, the Court refers to the *Ninth Amendment*, *ante*, at 484. I add these words to emphasize the relevance of that Amendment to the Court's holding.

[**14]** The Court stated many years ago that the Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts, 291 U.S. 97, 105*. In *Gitlow v. New York, 268 U.S. 652, 666*, the Court said:

"For present purposes we may and do assume that freedom of speech and of the press -- which are protected by the

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[1] My Brother STEWART dissents on the ground that he "can find no . . . general right of privacy in the *Bill of Rights*, in any other part of the Constitution, or in any case ever before decided by this Court." *Post*, at 530. He would require a more explicit guarantee than the one which the Court derives from several constitutional amendments. This Court, however, has never held that the *Bill of Rights* or the *Fourteenth Amendment* protects only those rights that the Constitution specifically mentions by name. See, *e. g., Bolling v. Sharpe, 347 U.S. 497*; *Aptheker v. Secretary of State, 378 U.S. 500*; *Kent v. Dulles, 357 U.S. 116*; *Carrington v. Rash, 380 U.S. 89, 96*; *Schware v. Board of Bar Examiners, 353 U.S. 232*; *NAACP v. Alabama, 360 U.S. 240*; *Pierce v. Society of Sisters, 268 U.S. 510*; *Meyer v. Nebraska, 262 U.S. 390*. To the contrary, this Court, for example, in *Bolling v. Sharpe, supra*, while recognizing that the *Fifth Amendment* does not contain the "explicit safeguard" of an *equal protection clause*, *id., at 499*, nevertheless derived an equal protection principle from that Amendment's Due Process Clause. And in *Schware v. Board of Bar Examiners, supra*, the Court held that the *Fourteenth Amendment* protects from arbitrary state action the right to pursue an occupation, such as the practice of law.

First Amendment from abridgment by Congress -- are among the *fundamental* personal rights and 'liberties' protected by the *due process clause of the Fourteenth Amendment* from impairment by the States." (Emphasis added.)

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

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

This Court, in a series of **[****15]** decisions, has held that the *Fourteenth Amendment* absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal **[**1684]** rights. The language and history of the *Ninth Amendment* reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

The **[****16]** *Ninth Amendment* reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential **[*489]** rights and that the specific mention of certain rights **[***518]** would be interpreted as a denial that others were protected. [4]

[**17]** In presenting the proposed Amendment, Madison said:

"It has been objected also against a *bill of rights*, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a *bill of rights* into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the **[*490]** last clause of the fourth resolution [the *Ninth Amendment*]." I Annals of Congress 439 (Gales and Seaton ed. 1834).

[1685]** Mr. Justice Story wrote of this argument against a *bill of rights* and the meaning of the *Ninth Amendment*:

"In regard to . . . [a] suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say that such a course of reasoning could

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

"I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power." *Id., at 579*.

The *Ninth Amendment* and the *Tenth Amendment*, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," were apparently also designed in part to meet the above-quoted argument of Hamilton.

never be sustained upon any solid basis . . . **[****18]**. But a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a *bill of rights* that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people." II Story, Commentaries on the Constitution of the United States 626-627 (5th ed. 1891).

He further stated, referring to the *Ninth Amendment*:

"This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others." *Id., at 651*.

These statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.

[**19]** While **[***519]** this Court has had little occasion to interpret the *Ninth Amendment*, "it cannot be presumed that any **[*491]** clause in the constitution is intended to be without effect." *Marbury v. Madison, 1 Cranch 137, 174*. In interpreting the Constitution, "real effect should be given to all the words it uses." *Myers v. United States, 272 U.S. 52, 151*. The *Ninth Amendment to the Constitution* may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the *Ninth Amendment* and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because **[**1686]** it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the *Ninth Amendment*, which **[****20]** specifically states that **[*492]** "the enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people." (Emphasis added.)

[**21]** A dissenting opinion suggests that my interpretation of the *Ninth Amendment* somehow "broaden[s] the powers of this Court." *Post*, at 520. With all due respect, I believe that it misses the import of what I am saying. I do not take the position of my Brother BLACK in his dissent in *Adamson v. California, 332 U.S. 46, 68*, that the entire *Bill of Rights* is incorporated in the *Fourteenth Amendment*, and I do not mean to imply that the *Ninth Amendment* is applied against the States by the Fourteenth. Nor do I mean to state that the *Ninth Amendment* constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the *Ninth Amendment* shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be **[***520]** deemed exhaustive. As any student of this Court's opinions knows, this Court has held, often unanimously, that the *Fifth* and *Fourteenth Amendments* protect certain fundamental personal liberties from abridgment by the Federal Government or the States. See, *e.* **[****22]** *g., Bolling v. Sharpe, 347 U.S. 497*; *Aptheker v. Secretary of State, 378 U.S. 500*; *Kent v. Dulles, 357 U.S. 116*; *Cantwell v. Connecticut, 310 U.S. 296*; *NAACP v. Alabama, 357 U.S. 449*; *Gideon v. Wainwright, 372 U.S. 335*; *New York Times Co.* v. *Sullivan, 376 U.S. 254*. The *Ninth Amendment* simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the authority **[*493]** of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights.

Nor am I turning somersaults with history in arguing that the *Ninth Amendment* is relevant in a case dealing with a *State's* infringement of a fundamental right. While the *Ninth Amendment* -- and indeed the entire *Bill of Rights* -- originally concerned restrictions upon *federal* power, the subsequently enacted *Fourteenth **[****23]** Amendment* prohibits the States as well from abridging fundamental personal liberties. And, the *Ninth Amendment*, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the *Ninth Amendment* simply lends strong support to the view that the "liberty" protected by the *Fifth* and *Fourteenth Amendments* from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. Cf. *United Public Workers v. Mitchell, 330 U.S. 75, 94-95*.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." *Snyder v. Massachusetts, 291 U.S. 97, 105*. The inquiry is whether a right involved "is of such a character that it cannot be denied without **[****24]** violating those 'fundamental principles of liberty and justice **[**1687]** which lie at the base of all our civil and political institutions' . . . ." *Powell v. Alabama, 287 U.S. 45, 67*. "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." *Poe **[*494]** v. Ullman, 367 U.S. 497, 517* (dissenting opinion of MR. JUSTICE DOUGLAS).

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

"The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men."

[*495] The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy -- **[****26]** that of the marital relation and the marital home. This Court recognized in *Meyer v. Nebraska, supra*, that the right "to marry, establish a home and bring up children" was an essential part of the liberty guaranteed by the *Fourteenth Amendment*. *262 U.S., at 399*. In *Pierce v. Society of Sisters, 268 U.S. 510*, the Court held unconstitutional an Oregon Act which forbade parents from sending their children to private schools because such an act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *268 U.S., at 534-535*. As this Court said in *Prince v. Massachusetts, 321 U.S. 158, at 166*, the *Meyer* and *Pierce* decisions "have respected the private realm of family life which the state cannot enter."

I agree with MR. JUSTICE HARLAN'S statement in his dissenting opinion in *Poe v. Ullman, 367 U.S. 497, 551-552*: "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. **[****27]** And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted **[**1688]** Constitutional right. . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

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

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution **[*496]** explicitly forbids the State from disrupting the traditional relation of the family -- a relation as old and as fundamental as our entire civilization -- surely does not show that the Government was meant to have the power to do so. Rather, as the *Ninth Amendment* expressly recognizes, there are fundamental personal rights such **[****28]** as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

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

rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government.

[**29]** The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born **[*497]** to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be "silly," no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory **[****30]** birth control also would seem to **[***523]** be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be **[**1689]** abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," *Bates v. Little Rock, 361 U.S. 516, 524*. The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida, 379 U.S. 184, 196*. See *Schneider v. Irvington, 308 U.S. 147, 161*.

Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any "subordinating [state] interest which is compelling" or that it is "necessary . . . **[*498]** to the **[****31]** accomplishment of a permissible state policy." The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern -- the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception, see *Tileston v. Ullman, 129 Conn. 84, 26 A. 2d 582*. But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. See *Aptheker v. Secretary of State, 378 U.S. 500, 514*; *NAACP v. Alabama, 377 U.S. 288, 307-308*; **[****32]** *McLaughlin v. Florida, supra, at 196*. Here, as elsewhere, "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button, 371 U.S. 415, 438*.

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[1690]** In sum, I believe that the right of privacy in the marital relation is fundamental and basic -- a personal right "retained by the people" within the meaning of the *Ninth Amendment*. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the *Fourteenth Amendment* from infringement by the States. I agree with the Court that petitioners' convictions must therefore be reversed.

Dissent

[*529]** 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 **[****46]** 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 **[*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 **[****47]** one thing; conduct and physical activities are quite another. See, *e. g., Cox v. Louisiana, 379 U.S. 536, 554-555*; *Cox v. Louisiana, 379 U.S. 559, 563-564*; *id., 575-584* (concurring opinion); *Giboney v. Empire Storage & Ice Co., 336 U.S. 490*; cf. *Reynolds v. United States, 98 U.S. 145, 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 **[****48]** the Amendment **[**1695]** 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 **[***530]** designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the *Fourth* ***[*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 **[****49]** 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. **[****50]** See, *e. g., New York Times Co.* v. *Sullivan, 376 U.S. 254, 293* (concurring opinion); cases collected in *City of El Paso v. Simmons, 379 U.S. 497, 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 **[*510]** one or more constitutional provisions. I like **[**1696]** my privacy as well **[***531]** 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.

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[**66]** 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 **[*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 **[**1702]** 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 **[****67]** plainly intended them to have. [16]

[**68]** **[*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 **[***538]** the *Ninth Amendment* or any mysterious and uncertain natural law concept as a reason for striking down this state law.

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I am not persuaded to deviate from the view which I stated in 1947 in *Adamson v. California, 332 U.S. 46, 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 **[****74]** 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 **[***540]** the Constitution: in the other, they roam at will in the limitless **[*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, 599, 601, n. 4*." **[****76]** (Footnotes omitted.)

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So far as I am concerned, Connecticut's **[****75]** law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.

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[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 595*. See 2 Holmes-Pollock Letters (Howe ed. 1941) 267-268.

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

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private **[****77]** choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to **[***541]** hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. **[*528]** But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

We *are* told that the *Due Process Clause of the Fourteenth Amendment* is not, as such, the "guide" in this case. With that much I agree. There is no claim that this law, duly enacted by the Connecticut Legislature, is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day **[****78]** has long passed since the Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws. Compare *Lochner v. New York, 198 U.S. 45*, with *Ferguson v. Skrupa, 372 U.S. 726*. My Brothers HARLAN and WHITE to the contrary, "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." *Ferguson v. Skrupa, supra, at 730*.

As to the *First*, *Third*, *Fourth*, and *Fifth Amendments*, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States. [1] It has **[*529]** not even been argued **[**1706]** that this is a law "respecting an establishment of religion, or prohibiting the free exercise thereof." [2] **[****80]** And surely, unless the solemn process of constitutional adjudication is to descend to the level of a play on words, there is not involved here any abridgment of "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and **[****79]** to petition the Government for a redress of grievances." [3] No soldier has been quartered in any house. There has been no search, and no seizure. Nobody has been compelled **[***542]** to be a witness against himself.

The Court also quotes the *Ninth Amendment*, and my Brother GOLDBERG's concurring opinion relies heavily upon it. But to say that the *Ninth Amendment* has anything to do with this case is to turn somersaults with history. The *Ninth Amendment*, like its companion the Tenth, which this Court held "states but a truism that all is retained which has not been surrendered," *United States v. Darby, 312 U.S. 100, 124*, was framed by James Madison and adopted

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[1] The Amendments in question were, as everyone knows, originally adopted as limitations upon the power of the newly created Federal Government, not as limitations upon the powers of the individual States. But the Court has held that many of the provisions of the first eight amendments are fully embraced by the *Fourteenth Amendment* as limitations upon state action, and some members of the Court have held the view that the adoption of the *Fourteenth Amendment* made every provision of the first eight amendments fully applicable against the States. See *Adamson v. California, 332 U.S. 46, 68* (dissenting opinion of MR. JUSTICE BLACK).

[2] *U.S. Constitution, Amendment I*. To be sure, the injunction contained in the Connecticut statute coincides with the doctrine of certain religious faiths. But if that were enough to invalidate a law under the provisions of the *First Amendment* relating to religion, then most criminal laws would be invalidated. See, *e. g.*, the Ten Commandments. The Bible, Exodus 20:2-17 (King James).

[3] *U.S. Constitution, Amendment I*. If all the appellants had done was to advise people that they thought the use of contraceptives was desirable, or even to counsel their use, the appellants would, of course, have a substantial *First Amendment* claim. But their activities went far beyond mere advocacy. They prescribed specific contraceptive devices and furnished patients with the prescribed contraceptive materials.

by the States simply to make clear that the adoption of the *Bill of Rights* did not alter the plan **[****81]** that **[*530]** the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the *Ninth Amendment* meant anything else, and the idea that a federal court could ever use the *Ninth Amendment* to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the *Bill of Rights*, in any other part of the Constitution, or in any case ever before decided by this Court.

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Roe v. Wade

Supreme Court of the United States

December 13, 1971, Argued ; January 22, 1973, Decided

No. 70-18

Reporter
410 U.S. 113 *; 93 S. Ct. 705 **; 35 L. Ed. 2d 147 ***; 1973 U.S. LEXIS 159 ****

ROE ET AL. v. WADE, DISTRICT ATTORNEY OF DALLAS COUNTY

Subsequent History: **[****1]** Reargued October 11, 1972.

Rehearing denied by *Roe v. Wade, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694, 1973 U.S. LEXIS 3282 (1973)*

Motion denied by *McCorvey v. Hill, 2003 U.S. Dist. LEXIS 12986 (N.D. Tex., June 19, 2003)*

Prior History: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

Roe v. Wade, 314 F. Supp. 1217, 1970 U.S. Dist. LEXIS 11306 (N.D. Tex., 1970)

Disposition: *314 F.Supp. 1217*, affirmed in part and reversed in part.

Case Summary

Procedural Posture

Plaintiffs, a pregnant single woman and a married couple, sued defendant district attorney challenging the constitutionality of Tex. Code Crim. Proc. Ann. arts. 1191-1194, and 1196 (abortion laws). The United States District Court for the Northern District of Texas declared that the laws violated *U.S. Const. amends. IX* and *XIV* privacy rights

and was vague and overbroad.

Overview
The Court held that abortion was within the scope of the personal liberty guaranteed by the Due Process Clause. This right was not absolute, but could be regulated by narrowly drawn legislation aimed at vindicating legitimate, compelling state interests in the mother's health and safety and the potentiality of human life. The former became compelling, and was thus grounds for regulation after the first trimester of pregnancy, beyond which the state could regulate abortion to preserve and protect maternal health. The latter became compelling at viability, upon which a state could proscribe abortion except to preserve the mother's life or health. The Texas statutes made no distinction between abortions performed early in pregnancy and those performed later, and it limited the legal justification for the procedure to a single reason --saving the mother's life -- so it could not survive the constitutional attack.

Judges: Blackmun, J., delivered the opinion of the Court, in which Burger, C. J., and Douglas, Brennan, Stewart, Marshall, and Powell, JJ., joined. Burger, C. J., post, p. 207, Douglas, J., post, p. 209, and Stewart, J., post, p. 167, filed concurring opinions. White, J., filed a dissenting opinion, in which Rehnquist, J., joined, post, p. 221. Rehnquist, J., filed a dissenting opinion, post, p. 171.

Opinion

[*116] [*156] [**708]** MR. JUSTICE **BLACKMUN** delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, *Doe* v. *Bolton, post*, p. 179, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among **[****7]** physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend **[**709]** to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, **[***157]** free of emotion and of predilection. We seek earnestly to do this, and, because we do, we **[*117]** have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York, 198 U.S. 45, 76 (1905)*:

"[The Constitution] is made for people of fundamentally differing views, and the accident of our finding **[****8]** certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

I

The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code. [1] **[****9]** These

[1] "Article 1191. Abortion

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any

make it a crime to "procure an abortion," as therein **[*118]** defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.

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[**11] [*120]** II

Jane Roe, [4] a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the *First*, *Fourth*, *Fifth*, *Ninth*, and *Fourteenth Amendments*. **[****12]** By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women" similarly situated.

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V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the **[***164]** *Fourteenth Amendment's Due Process Clause*; or in personal, marital, familial, and sexual privacy said to be protected by the *Bill of Rights* or its penumbras, see *Griswold v. Connecticut, 381 U.S. 479 (1965)*; *Eisenstadt v. Baird, 405 U.S. 438 (1972)*; *id., at 460* **[****26]** (WHITE, J.,

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drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

"Art. 1192. Furnishing the means

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

"Art. 1193. Attempt at abortion

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

"Art. 1194. Murder in producing abortion

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

"Art. 1196. By medical advice

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

The foregoing Articles, together with Art. 1195, compose Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:

"Art. 1195. Destroying unborn child

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

[4] The name is a pseudonym.

concurring in result); or among those rights reserved to the people by the *Ninth Amendment*, *Griswold v. Connecticut, 381 U.S., at 486* (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

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VIII

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co.* v. *Botsford, 141 U.S. 250, 251 (1891)*, the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the *First Amendment*, *Stanley v. Georgia, 394 U.S. 557, 564 (1969)*; in the *Fourth* and *Fifth Amendments*, *Terry v. Ohio, 392 U.S. 1, 8-9 (1968)*, *Katz v. United States, 389 U.S. 347, 350 (1967)*, **[****62]** *Boyd v. United States, 116 U.S. 616 (1886)*, see *Olmstead v. United States, 277 U.S. 438, 478 (1928)* (Brandeis, J., dissenting); in the penumbras of the *Bill of Rights*, *Griswold v. Connecticut, 381 U.S., at 484-485*; in the *Ninth Amendment*, *id., at 486* (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the *Fourteenth Amendment*, see *Meyer v. Nebraska, 262 U.S. 390, 399 (1923)*. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut, 302 U.S. 319, 325 (1937)*, are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities **[***177]** relating to marriage, *Loving v. Virginia, 388 U.S. 1, 12 (1967)*; procreation, *Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942)*; contraception, *Eisenstadt v. Baird, 405 U.S., at 453-454*; *id., at 460, 463-465* **[*153]** (WHITE, **[****63]** J., concurring in result); family relationships, *Prince v. Massachusetts, 321 U.S. 158, 166 (1944)*; and child rearing and education, *Pierce v. Society of [**727] Sisters, 268 U.S. 510, 535 (1925)*, *Meyer v. Nebraska, supra.*

This right of privacy, whether it be founded in the *Fourteenth Amendment's* concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the *Ninth Amendment's* reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, **[****64]** psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The **[*154]** Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that **[****65]** govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts, 197 U.S. 11 (1905)* (vaccination); *Buck v. Bell, 274 U.S. 200 (1927)* (sterilization).

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be **[***178]** considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgment of rights. *Abele v. Markle, 342 F.Supp. 800 (Conn. 1972)*, **[****66]** appeal docketed, No. 72-56; *Abele v. Markle, 351 F.Supp. 224 (Conn. 1972)*, appeal docketed, No. 72-730; *Doe v. Bolton, 319 F.Supp. 1048 (ND Ga. 1970)*, appeal decided today, *post*, p. 179; *Doe v. Scott, 321 F.Supp. 1385 (ND Ill. 1971)*, appeal docketed, No. 70-105; *Poe v. Menghini, 339 F.Supp. 986 (Kan. 1972)*; *YWCA v. Kugler, 342 F.Supp. 1048 (NJ 1972)*; *Babbitz v. McCann, **[*155]** 310 F.Supp. 293 (ED Wis. 1970)*, appeal dismissed, *400 U.S. 1 (1970)*; *People v. Belous, 71 Cal. 2d 954, 458 P. 2d 194 (1969)*, cert. denied, *397 U.S. 915 (1970)*; *State v. Barquet, 262 So. 2d 431 (Fla. 1972)*.

Others have sustained state statutes. *Crossen v. Attorney General, 344 F.Supp. 587 **[**728]** (ED Ky. 1972)*, appeal docketed, No. 72-256; *Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217 (ED La. 1970)*, appeal docketed, No. 70-42; *Corkey v. Edwards, 322 F.Supp. 1248 (WDNC 1971)*, **[****67]** appeal docketed, No. 71-92; *Steinberg v. Brown, 321 F.Supp. 741 (ND Ohio 1970)*; *Doe* v. *Rampton* (Utah 1971), appeal docketed, No. 71-5666; *Cheaney v. State, Ind. , 285 N. E. 2d 265 (1972)*; *Spears v. State, 257 So. 2d 876 (Miss. 1972)*; *State v. Munson, 86 S. D. 663, 201 N. W. 2d 123 (1972)*, appeal docketed, No. 72-631.

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," *Kramer v. Union Free School District, 395 U.S. 621, 627 (1969)*; *Shapiro v. Thompson, 394 U.S. 618, 634 (1969)*, *Sherbert v. Verner, 374 U.S. 398, 406 (1963)*, **[****68]** and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold v. Connecticut, 381 U.S., at 485*; *Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964)*; *Cantwell v. Connecticut, 310 U.S. 296, 307-308 (1940)*; see **[*156]** *Eisenstadt v. Baird, 405 U.S., at 460, 463-464* (WHITE, J., concurring in result).

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the **[***179]** reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary **[****69]** to support a compelling state interest, and that, although the appellee presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." 314 F.Supp., at 1222-1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the *Fourteenth Amendment*. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, **[*157]** for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. On the other **[****70]** hand, the appellee conceded on reargument that no case could be cited **[**729]** that holds that a fetus is a person within the meaning of the *Fourteenth Amendment*.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States."

The word also appears both in the Due Process Clause and in the *Equal Protection Clause*. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3; [53] in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § **[****71]** 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the *Fifth*, *Twelfth*, and *Twenty-second Amendments*, as well as in §§ 2 and 3 of the *Fourteenth Amendment*. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application. [54]

[**72]** **[*158]** **[***180]** All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the *Fourteenth Amendment*, does not include the unborn.

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This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing **[****74]** young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold, Stanley, Loving, Skinner*, and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the *Fourteenth Amendment*, life begins **[***181]** at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of **[****75]** man's knowledge, is not in a position to speculate as to the answer.

[*160] It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. **[****77]** It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less

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[53] We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

[54] When Texas urges that a fetus is entitled to *Fourteenth Amendment* protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

There are other inconsistencies between *Fourteenth Amendment* status and the typical abortion statute. It has already been pointed out, n. 49, *supra*, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, **[****76]** even at 24 weeks. The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from **[*161]** the moment of conception. The latter is now, of course, the official belief of the Catholic Church. As one brief *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial **[**731]** problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs.

[**78]** **[***182]** In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few **[*162]** courts have squarely so held. In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented **[****79]** by guardians *ad litem*. Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

X

In view of all this, we **[****80]** do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches **[*163]** term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical **[**732]** fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation **[****81]** reasonably relates to the preservation and protection of maternal health. Examples of permissible **[***183]** state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical **[****82]** and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion **[*164]** during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

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XI

This holding, we feel, is consistent with the relative **[****85]** weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important **[*166]** state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

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Dissent

[*196]** MR. JUSTICE **REHNQUIST**, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.

I

The Court's opinion decides that a State may impose virtually no restriction on the performance **[****95]** of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff **[***197]** who was in her first trimester of pregnancy at some time during the pendency of her lawsuit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others. *Moose Lodge v. Irvis, 407 U.S. 163 (1972)*; *Sierra Club v. Morton, 405 U.S. 727 (1972)*. The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her *last* trimester of pregnancy as of the date the complaint was filed.

Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abortion as written to a woman in that stage of pregnancy. Nonetheless, the Court uses her complaint against the Texas statute as a fulcrum for deciding that States may **[*172]** impose virtually no restrictions on medical abortions **[****96]** performed during the *first* trimester of pregnancy. In deciding such a hypothetical lawsuit, the Court departs from the longstanding admonition that it should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration, 113 U.S. 33, 39 (1885)*. See also *Ashwander v. TVA, 297 U.S. 288, 345 (1936)* (Brandeis, J., concurring).

II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of

"privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the *Fourth Amendment to the Constitution*, **[****97]** which the Court has referred to as embodying a right to privacy. *Katz v. United States, 389 U.S. 347 (1967)*.

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the *Fourteenth Amendment*, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the *Fourteenth **[*173]** Amendment* protects, embraces more than the rights found in the *Bill of Rights*. But that **[**737]** liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson v. Lee Optical **[***198]** Co., 348 U.S. 483, 491 (1955)*. The *Due Process Clause of the Fourteenth Amendment* undoubtedly does place a limit, **[****98]** albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson, supra.* But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

The Court eschews the history of the *Fourteenth Amendment* in its reliance on the "compelling state interest" test. See *Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 179 (1972)* (dissenting opinion). But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the *Equal Protection Clause of the Fourteenth Amendment* to this case arising under the *Due Process Clause of the Fourteenth Amendment*. Unless I misapprehend the consequences of this transplanting **[****99]** of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

[*174] While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York, 198 U.S. 45, 74 (1905)*, the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the *Fourteenth Amendment*.

The fact that a majority of the States reflecting, after all, the majority sentiment **[****100]** in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)*. Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the scope of the *Fourteenth Amendment* a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, **[***199]** the first state law dealing directly with abortion was enacted by the Connecticut Legislature. Conn. Stat., Tit. 20, §§ 14, 16. By the time of the adoption of the *Fourteenth **[*175]** Amendment* in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting **[**738]** abortion. **[****102]** While many States have amended or updated **[*176]** their laws, 21 of the laws on the books in 1868 **[***200]** remain in effect today. Indeed, **[****101]** the Texas statute **[**739]** struck down today was, as the majority notes, first enacted in 1857 **[*177]** and "has remained substantially unchanged to the present time." *Ante*, at 119.

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the *Fourteenth Amendment* was adopted. The only conclusion possible from this history is that the drafters did not intend to have the *Fourteenth Amendment* withdraw from the States the power to legislate with respect to this matter.

III

Even if one were to agree that the case that the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. **[****103]** The Texas statute is struck down *in toto*, even though the Court apparently concedes that at later periods of pregnancy Texas might impose these selfsame statutory limitations on abortion. My understanding of past practice is that a statute found **[*178]** to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply "struck down" but is, instead, declared unconstitutional as applied to the fact situation before the Court. *Yick Wo v. Hopkins, 118 U.S. 356 (1886)*; *Street v. New York, 394 U.S. 576 (1969)*.

For all of the foregoing reasons, I respectfully dissent.

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