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## The Legacy of Griswold

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## The Legacy of *Griswold*

LACKLAND H. BLOOM, JR.\*

The *Griswold* case, you cannot believe how much time we have spent on that nutty case, and how much mileage the opponents of Bork got out of it. This was the key. This must have been the one that kept them up late. This was the green eyeshade special here. The *Griswold* case. A goofy kind of thing.\*\*

Now we go back to the general right of privacy, upon which *Roe v. Wade* is based coming out of *Griswold*, and you had two, one Justice Goldberg out of the ninth amendment and the other one from Justice Douglas, which is called penumbra, which is sort of a vague term, but I understand that is something to do with astronomy and various shadows and unclear things. . . .\*\*\*

*Griswold v. Connecticut*<sup>1</sup> is a landmark case. Indeed, it may be considered a landmark case for several different reasons. It recognized the existence of a new constitutional right—the right of privacy. *Griswold* led to an extremely controversial line of cases protecting abortion rights, including *Roe v. Wade*<sup>2</sup> and *Webster v. Reproductive Health Services*.<sup>3</sup> It helped to focus the current debate on the legitimacy of unenumerated fundamental rights jurisprudence both “on” and “off” the Court. It has become a well-known and widely accepted civil liberties precedent. Finally, it played a significant role in the Senate’s rejection of the nomination of Judge Robert Bork to the Supreme Court of the United States.

Even as a landmark case, *Griswold* is not without its peculiarities. The specific factual and legal issues resolved by *Griswold* were not of great practical significance. The Court struck down a Connecticut law prohibiting distribution of contraceptives to married couples for purposes of preventing conception (as opposed to disease prevention).<sup>4</sup> Justice Stewart’s apt characterization of the law as

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\*\* Statement of Senator Alan Simpson in *Hearings before the Committee on the Judiciary of the United States Senate on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, September 21, 1987 at 1176.

\*\*\* Statement of Senator Howell Heflen, *id.* September 16, 1987 at 291.

1. 381 U.S. 479 (1965).

2. 410 U.S. 113 (1973).

3. 109 S. Ct. 3040 (1989).

4. The law, section 53-32 of General Statutes of Connecticut provided, “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

"uncommonly silly" is well remembered.<sup>5</sup> There was no indication that the law ever had been or ever would be enforced against users of contraceptives (as opposed to distributors).<sup>6</sup> Moreover, Justice Douglas, writing for the Court, decided the case almost as if it involved an offensive search of the marital bedroom when, of course, it was a test case brought by a physician at the Yale Medical School and the head of the Connecticut Planned Parenthood Association. They had succeeded in getting themselves charged as aiders and abettors by distributing contraceptives to married couples.<sup>7</sup> Finally, Justice Douglas' opinion for the Court has developed a reputation in the law schools as one of the more unusual examples of constitutional analysis<sup>8</sup> with its somewhat creative reliance on "penumbras, emanations and peripheries."<sup>9</sup>

This article will attempt to explore what the true legacy of *Griswold* is after twenty-five years in terms of constitutional theory, doctrine and public perception.

### THE RIGHT OF PRIVACY

If *Griswold* is remembered for one thing, it is surely for having effectively given birth to the concept of an independent constitutional right of privacy. At a conceptual level, the right of privacy has fascinated many commentators. Thousands of pages in law reviews have been devoted to attempting to define the right and explore its potential coverage.<sup>10</sup> At the very least, then, *Griswold* has helped to provide a better life for many law professors and student writers.

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sixty days nor more than one year or be both fined and imprisoned." 381 U.S. at 480 (quoting CONN. GEN. STAT. § 53-32 (repealed 1958)).

5. 381 U.S. at 527.

6. *Id.* at 506 (White, J., concurring) (citing *Poe v. Ullman*, 367 U.S. 497, 501 (1961)). A birth control clinic had been prosecuted in 1940. Apparently the clinic and others like it ceased doing business prior to final resolution of the case. See Transcript of Oral Argument at 15. The case is reported as *State v. Nelson*, 128 Conn. 412, 11 A.2d 856 (1940). *Nelson* was apparently brought as a test case. *Poe v. Ullman*, 367 U.S. 497, 501 (1961).

7. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

8. See, e.g., Kauper, *Penumbras, Pereipheries, Emanations, Things Fundamental & Things Forgotten*, 64 MICH. L. REV. 235, 242-44, 252-54 (1965) [hereinafter Kauper]; Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43, 84 [hereinafter Dixon, *Prolegomenon*]; Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 205-06, 218 (1965) [hereinafter Dixon, *Charter*].

9. 381 U.S. at 384-86. See Greely, *A Footnote to "Penumbra" in Griswold v. Connecticut*, 6 CONST. COMM. 251 (1989); Henly, *"Penumbra": The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81 (1987) (history of the judicial usage of the word "penumbra" prior to *Griswold*).

10. See, e.g., Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699; Fried, *Privacy*, 77 YALE L.J. 475 (1968); Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977); Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983) [hereinafter Hafen]; Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974) [hereinafter Henkin]; Karst, *Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Lupu,

However, from a doctrinal standpoint the Court has done remarkably little with the right of privacy as such. It has decided additional contraception cases under the privacy banner of *Griswold*.<sup>11</sup> Also, it relied on the right of privacy as an aspect of the constitutional source for its abortion decisions from *Roe* onward.<sup>12</sup> But in neither of these lines of cases did it do much more than invoke the concept of privacy, and move on.<sup>13</sup> It has made no meaningful effort to explain what the concept of privacy consists of beyond noting that it has something to do with certain kinds of important decisions pertaining to family matters, contraception, child bearing, and education.<sup>14</sup> The Court has provided neither substance to nor boundaries around the right of privacy and it has failed to invoke it in some contexts in which it might have.<sup>15</sup> Perhaps the notion of a constitutional right to privacy was misconceived from the very outset.<sup>16</sup> Presumably, there were reasons why the Court, especially Justice Douglas, spoke the language of privacy.

The legal challenge which ultimately resulted in *Griswold v. Connecticut* began some seven years earlier when a married couple attending the Yale Law School complained to Professor Fowler Harper about the law banning the use of contraceptives.<sup>17</sup> Professor Harper brought a declaratory judgment suit which ended up in the United States Supreme Court. However, in 1961, in *Poe v. Ullman*,<sup>18</sup> the Court dismissed that constitutional challenge for lack of justiciability.<sup>19</sup> In *Poe*, Justice Harlan wrote a very influential dissenting opinion in which

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*Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1977) [hereinafter Lupu]; Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173 [hereinafter Posner]; Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295 (1975); Wilkinson & White, *Constitutional Protection of Privacy by the Supreme Court*, 62 CORNELL L. REV. 563 (1977); Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*, 64 CALIF. L. REV. 1447 (1976).

11. See *infra* notes 191-205 and accompanying text.

12. See *infra* notes 70-73 and accompanying text.

13. See *infra* notes 68-104 and accompanying text.

14. See *infra* notes 71 & 81 and accompanying text.

15. See, e.g., *Kelley v. Johnson*, 425 U.S. 238, 244 (1976) (no right of privacy protection against hairstyle regulation for police officers); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974) (no privacy right against single family zoning ordinance). It will be interesting to see whether the right of privacy plays a major role in the Court's decision in *Cruzan v. Missouri Dep't of Health*, argued December 6, 1989, 58 U.S.L.W. 3395 (Dec. 19, 1989); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973) (no privacy right to view obscene films in a public theatre). *Cruzan* raises the question of whether the Constitution permits the state to prohibit a hospital from refusing to provide nutrition and hydration to a person in a permanent vegetative state. See Mayo, *Constitutionalizing the "Right to Die"*, 49 MD. L. REV. (1989) (for the argument that the Supreme Court should not constitutionalize the "right to die").

16. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971) [hereinafter Bork, *Neutral Principles*].

17. Emerson, *Fowler Vincent Harper*, 74 YALE L.J. 601, 602 (1965).

18. 367 U.S. 497 (1961).

19. *Id.* at 501-09.

he characterized the due process liberty right that he would have relied on to invalidate the statute. The Justice attempted to show that the concept of privacy was protected to some extent by various constitutional provisions, including the third, fourth and fifth amendments.<sup>20</sup> Justice Douglas also filed a dissent in *Poe* in which he relied on the first amendment as well as a right of privacy developed as an aspect of substantive due process.<sup>21</sup>

Following the dismissal of the suit in *Poe*, the physician-plaintiff in that case became medical director of a Planned Parenthood center in New Haven.<sup>22</sup> The doctor and the executive director of the clinic were arrested and convicted of violating the Connecticut anti-contraceptive law.<sup>23</sup> Professor Harper represented them, and their case became known as *Griswold v. Connecticut*.<sup>24</sup>

In the Jurisdictional Statement he filed in *Griswold* prior to his death, Professor Harper set forth the basic right of privacy argument which Justice Douglas ultimately adopted in his opinion for the Court.<sup>25</sup> Admitting that the Constitution did not explicitly embody a right of privacy, he argued that it was nevertheless embodied in the composite of a variety of amendments including the first, third, fourth, fifth and ninth, as well as the due process clause of the fourteenth amendment.<sup>26</sup>

In the wake of Professor Harper's death, Professor Thomas Emerson and Catherine Roraback presented essentially the same privacy argument in their brief for the appellants in *Griswold*.<sup>27</sup> Amicus Briefs filed on behalf of the appellant by the American Civil Liberties Union,<sup>28</sup> Planned Parenthood,<sup>29</sup> and the Catholic Council on Liberty<sup>30</sup> all presented the right of privacy argument, though in somewhat less detail. The state did not respond to the privacy theory in its brief.<sup>31</sup> Most of oral argument was consumed with discussion of the history, purpose and interpretation of the statute along with the question of

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20. *Id.* at 539-55.

21. *Id.* at 509, 514, 517-527.

22. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

23. *Id.*

24. 381 U.S. 479 (1965).

25. Jurisdictional Statement of Appellant at 13-18, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 64-496).

26. *Id.*

27. Brief for Appellant at 79-89, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 64-496).

28. Brief for American Civil Liberties Union and Connecticut Civil Liberties Union as Amicus Curie at 6-9, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 64-496).

29. Brief for the Planned Parenthood Federation of America, Inc. as Amicus Curie at 12-14, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 64-496).

30. Brief for the Catholic Council on Civil Liberties as Amicus Curie at 7-19, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 64-496).

31. See Brief for Appellee, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 64-496).

standing.<sup>32</sup> Professor Emerson apologized to the Court because he had been unable to find an opportunity to explain the privacy thesis in any detail.<sup>33</sup>

Writing the opinion of the Court, Justice Douglas referred initially to the concept of privacy while quoting from *NAACP v. Alabama*<sup>34</sup> to the effect that a "peripheral First Amendment right" of "freedom to associate and privacy in one's associations" was constitutionally protected.<sup>35</sup> Unlike *Griswold*, the concept of privacy invoked in *NAACP* pertained to privacy in its more common sense of "confidentiality" or "secrecy."<sup>36</sup> Nevertheless, Justice Douglas was able to use the concept of, or at least the word, privacy, as a bridge between a precedent in which a so called peripheral right had been recognized and the instant case in which he wanted to recognize one. Combining the *NAACP* case and a few other right to associate and assemble cases<sup>37</sup> with the old substantive due process education cases of *Pierce v. Society of Sisters*<sup>38</sup> and *Meyer v. Nebraska*,<sup>39</sup> which he had previously rationalized as protecting rights peripheral to the first amendment,<sup>40</sup> Justice Douglas concluded that various constitutional "guarantees create zones of privacy."<sup>41</sup>

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32. See generally Transcript of Oral Argument, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 64-496). The due process privacy theory was discussed briefly. Transcript of Oral Argument at 7, 12-13, Transcript of Oral Argument following recess at 23.

33. Transcript of Oral Argument following recess at 21, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 64-496).

34. 357 U.S. 449 (1958).

35. 381 U.S. at 483. In an early draft of the *Griswold* opinion, Justice Douglas relied almost exclusively on a first amendment right of association theory even though he had developed the privacy rationale previously in his *Poe* dissent, see *Poe v. Ullman*, 367 U.S. 497, 509 (1961). Apparently, Justice Brennan convinced him to shift the focus to the concept of privacy. See B. SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 227-39 (1985). Criticizing Justice Douglas' right of association rationale in conference, Justice Black noted that the "[r]ight of association is for me right of assembly and right of husband and wife to assemble in bed is a new right of assembly to me." *Id.* at 237.

36. 357 U.S. 449 (1958). There, the Court held that the first amendment right of association protected the Alabama NAACP against forced disclosure of their membership list to the state. *Id.*

37. Justice Douglas also cited *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

38. 268 U.S. 510 (1925).

39. 262 U.S. 390 (1923).

40. The cases were originally decided under the rubric of the substantive due process right to contract as part of the *Lochner v. New York* line of precedent. 198 U.S. 45 (1905). In *Griswold*, Justice Douglas reinterpreted these cases to hold that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Appellants relied on *Meyer* and *Pierce* in their brief and in oral argument. However, they did not draw the first amendment principle out of them as did Justice Douglas. Brief of Appellants at 16-17, 22, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 64-496); Transcript of Oral Argument at 7, 381 U.S. 479 (1965) (No. 64-496).

41. 381 U.S. at 484.

Justice Douglas then noted how the concept of privacy was implied in the third, fourth, fifth and ninth amendments,<sup>42</sup> quoting language from the famous old fourth and fifth amendment case of *Boyd v. United States*<sup>43</sup> and the much more recent fourth amendment case of *Mapp v. Ohio*,<sup>44</sup> which referred to "the privacies of life" and "the right to privacy" respectively. Justice Douglas was thus able to establish that some sort of "right of privacy" had been recognized as a constitutional concept in a variety of contexts. He also used these rights of privacy to establish, at least to some extent, that the Court had recognized "peripheral rights" (or zones, emanations or penumbras) which reached beyond the core of the explicit rights for the purpose of providing some degree of strategic protection.<sup>45</sup> Citing a series of other cases decided pursuant to the first amendment, the fourth amendment and the equal protection clause,<sup>46</sup> Justice Douglas declared that "[t]hese cases bear witness that the right of privacy which presses for recognition here is a legitimate one."<sup>47</sup> This declaration was primarily the point of Justice Douglas' whole line of argument in *Griswold*: to show that this newly characterized right of privacy was legitimate and that in turn the decision to invalidate Connecticut's eccentric law was legally justifiable.<sup>48</sup> Justice Douglas closed his opinion noting that the relationship at issue (marriage) lay within a "zone of privacy created by several fundamental constitutional guarantees" and that the right to privacy at issue was older than the Bill of Rights, as well as the political parties and the school systems.<sup>49</sup>

As was immediately apparent, Justice Douglas was preoccupied in *Griswold* with avoiding the vigorous charges by Justices Black and Stewart in dissent that the Court's decision was ultimately based on the same sort of illegitimate substantive due process principles<sup>50</sup> that had been at the core of the infamous line of cases identified with

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42. *Id.* at 484-85.

43. 116 U.S. 616 (1886).

44. 367 U.S. 643 (1961).

45. 381 U.S. at 485.

46. *Id.*

47. *Id.*

48. See Sutherland, *Privacy in Connecticut*, 64 MICH. L. REV. 283, 288 (1965) [hereinafter Sutherland]; Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 541-42 (1989) [hereinafter Ackerman].

49. 381 U.S. at 486.

50. Early in his opinion Justice Douglas noted that, despite some suggestions during oral argument, *Lochner* was not implicated in the case. *Griswold*, 381 U.S. at 482 (citing *Lochner v. New York*, 198 U.S. 45 (1905)). Justices Black and Stewart both charged that the Court was reviving the vices of *Lochner*'s widely condemned imposition of judicial value preferences pursuant to due process. *Id.* at 515-17, 522-24, 529. The subject had been raised during oral argument in *Griswold*. The Court asked Thomas Emerson, counsel for appellant whether he was asking it to follow *Lochner*. He replied no, that he was asking it to follow *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. Transcript of Oral Argument at 8, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 64-496).

*Lochner v. New York*.<sup>51</sup> The discovery of and reliance on a constitutional right of privacy was a means of avoiding substantive due process while at the same time attempting to provide a textual basis for the Court's decision.

However, Justice Black was not fooled, and in his dissent stated:

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. . . .

One of the most effective ways of diluting or expanding a constitutional 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 shrunk 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. . . . For these reasons I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.<sup>52</sup>

In spite of all that has been written about *Griswold* and its right of privacy analysis over the past twenty-five years, no one has revealed the difficulties with its approach more clearly and more articulately than Justice Black did in his dissent.<sup>53</sup> Justice Douglas was surely correct in noting that various constitutional guarantees are surrounded by strategic penumbras. While his language may be slightly exotic, the idea is scarcely radical. Likewise, the notion that some of these penumbras protect some form of privacy to some extent is a point that even Justice Black was prepared to concede.<sup>54</sup> However, as both Justice Black and later Judge Bork<sup>55</sup> pointed out, Justice Douglas took a significant and untenable leap when he asserted that these various penumbras could somehow be combined into an independent free standing right of privacy capable of extending its protection

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51. 198 U.S. 45 (1905). See Ackerman, *supra* note 48, at 536-45 for a recent favorable analysis of Justice Douglas' use of privacy as a means of avoiding the difficulties of *Lochner*.

52. *Griswold v. Connecticut*, 381 U.S. 479, 508-10 (1965).

53. *Id.* at 507-27.

54. *Id.* at 508-10.

55. *Id.*; Bork, *Neutral Principles*, *supra* note 16, at 9. See also Kauper, *supra* note 8, at 257.



beyond the sum of its parts. At that point, as Justice Black recognized, the facade collapsed revealing that the Court was engaging in a freewheeling value-oriented style of "interpretation" that was no easier to justify than was *Lochner*.<sup>56</sup>

It is likely that Justice Douglas turned to the concept of privacy not simply as a means of legitimizing his decision but also because of its rhetorical power.<sup>57</sup> Again as Justice Black recognized, the concept of privacy seems like a good thing which ideally should be protected to some degree.<sup>58</sup> However undefined the right of privacy may be, it is hard to stand against it without seeming mean-spirited and unenlightened. Justice Douglas understood this well as he literally rhapsodized about the revered status of the right to privacy in our society.

Since *Griswold*, privacy as a meaningful constitutional concept has amounted to very little. However, privacy as a rhetorical weapon has been used to the utmost by the courts, advocates, and commentators.<sup>59</sup> From a straight doctrinal standpoint, it is impossible to discern exactly what the right to privacy protects or how the Connecticut law interfered with it. At one point, Justice Douglas expressed concern over the degree to which privacy of the home would be invaded by a search for "tell-tale signs" of contraceptive<sup>60</sup> usage. Any such threat seems almost ludicrous in light of the record before the Court, the history of non-enforcement and the likely uprising that would occur in Connecticut if the police suddenly began breaking down bedroom doors in search of contraceptives.<sup>61</sup>

In his concurring opinion, Justice Goldberg agreed that a right to marital privacy was indeed basic and fundamental.<sup>62</sup> It would appear that by the concept of marital privacy Justice Goldberg probably meant the right to make certain types of intimate decisions within a marriage such as whether to use contraceptives or take the risk of becoming pregnant. Unlike Justice Douglas, Justice Goldberg did not need to rely on privacy as a means of avoiding substantive due process since like Justices White and Harlan he was prepared to argue that due process "liberty" could legitimately be the source of substantive constitutional rights.<sup>63</sup> Justice White was prepared to go even further and rely directly on due process liberty without any reliance on the intermediate concept of privacy.<sup>64</sup>

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56. 381 U.S. at 510-24 (citing *Lochner*, 198 U.S. at 45).

57. See Dixon, *Charter*, *supra* note 8, at 199.

58. 381 U.S. at 509-10.

59. See *infra* notes 246, 268, 282 and accompanying text.

60. 381 U.S. at 485-86.

61. See Testimony of Judge Robert Bork in *Hearings before the Committee on the Judiciary of the United States Senate on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, Sept. 16, 1987, at 241-42 [hereinafter *Bork Hearings*].

62. 381 U.S. at 486, 495.

63. *Id.*

64. *Id.* at 502-03.

In his lengthy dissenting opinion in *Poe v. Ullman*<sup>65</sup> which he essentially incorporated by reference into his *Griswold* concurrence,<sup>66</sup> Justice Harlan relied on the concept of marital privacy and privacy in the home. He clearly thought of privacy not as an independent constitutional right but rather as a specific and important manifestation of due process liberty.<sup>67</sup> In his much briefer opinion in *Griswold*, Justice Harlan wrote of due process liberty without mentioning privacy.

From a doctrinal standpoint the legal concept of privacy has not played a significant role in the series of "privacy-oriented" cases that have followed in the wake of *Griswold*. In the contraceptive distribution case of *Eisenstadt v. Baird*,<sup>68</sup> decided on equal protection grounds in 1972, Justice Brennan seized the opportunity in his plurality opinion to extend the right of privacy from the marital couple to the individual, but having done so, he declined to explain what he meant by privacy in the context of that case.<sup>69</sup> Likewise, the following year in *Roe v. Wade*,<sup>70</sup> Justice Blackmun, writing for the majority, seemed to use the right of privacy as something of a constitutional peg to hang the Court's decision on without any explanation of what the concept of privacy meant with respect to abortion regulation. Initially Justice Blackmun stated that there is a constitutional right of privacy "that . . . has some extension to activities relating marriage . . . procreation . . . contraception . . . family relationships . . . and child rearing."<sup>71</sup> Without any attempt to discern what that relationship was, Justice Blackmun then concluded that the right, whether found in due process as the Supreme Court believed or the ninth amendment as the lower court had suggested, was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>72</sup> To the Court in *Roe*, privacy apparently meant the right to make certain types of intimate decisions such as whether to have an abortion. As Justice Rehnquist pointed out in dissent, the majority left its concept of privacy largely undefined, although it was obviously using the word as a specialized term of art rather than in its more familiar sense.<sup>73</sup> However, it certainly did not appear that the concept of privacy played any significant role in the analysis or resolution of the case.

In *Whalen v. Roe*,<sup>74</sup> a case raising a more traditional privacy issue, the Court noted that its privacy decisions actually consisted of

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65. 367 U.S. 497, 522 (1961).

66. 381 U.S. at 499.

67. 367 U.S. at 543, 549-50.

68. 405 U.S. 438 (1972).

69. *Id.* at 453.

70. 410 U.S. 113 (1972).

71. *Id.* at 152 (citations omitted).

72. *Id.* at 153.

73. *Id.* at 171-72.

74. 429 U.S. 589 (1977).

separate lines of cases protecting confidentiality in information and independence with respect to certain types of decisions, as in *Roe*.<sup>75</sup> Building on language in earlier cases, *Maher v. Roe*<sup>76</sup> focused the analysis in the abortion funding area on whether the laws "unduly burden the right to seek an abortion."<sup>77</sup> While this seems to represent a major shift away from the stricter standards of *Roe*, the Court introduced this change without discussing the concept of privacy at all. Indeed, in *Harris v. McCrae*,<sup>78</sup> the subsequent abortion funding case involving the constitutionality of the Hyde Amendment, Justice Stewart, writing for the Court, seemed to go out of his way to characterize the right involved in *Roe* as one of due process "liberty" as opposed to privacy.<sup>79</sup>

In the course of invalidating several significant restrictions on the right to abortion in *Akron v. Akron Center for Reproductive Health*,<sup>80</sup> the Court defined the *Roe* right of privacy as protecting "freedom of personal choice in matters of marriage and family life."<sup>81</sup> The Court was forced to lift this definition out of Justice Stewart's concurring opinion in *Roe* rather than Justice Blackmun's opinion for the Court. Justice O'Connor wrote a lengthy dissent arguing that the "unduly burdensome" approach of the abortion funding cases should apply in all abortion regulation cases without addressing the meaning or utility of the constitutional right of privacy.<sup>82</sup>

In the highly controversial case of *Bowers v. Hardwick*,<sup>83</sup> the Supreme Court refused to recognize a broad right of privacy that would invalidate the enforcement of a Georgia anti-sodomy law against a homosexual plaintiff.<sup>84</sup> Rather than aggregate all of the various constitutional strands of privacy into a coherent whole as Justice Douglas seemingly attempted to do in *Griswold*, Justice White divided the privacy cases into particularized themes enabling him to characterize the issue as "whether there is a fundamental right of homosexuals to engage in acts of consensual sodomy."<sup>85</sup> The Court had no interest in developing privacy as an analytical tool, perhaps because to do so would make it easier to reach the result favored by the dissenters.

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75. *Id.* at 598-99.

76. 432 U.S. 464 (1977).

77. *Id.* at 473-74 (citation omitted).

78. 448 U.S. 297 (1980).

79. *Id.* at 313-15.

80. 462 U.S. 416 (1983).

81. *Id.* at 427 (quoting *Roe v. Wade*, 410 U.S. 113, 169 (1973)).

82. *Id.* at 452-53.

83. 478 U.S. 186 (1986).

84. *Id.*

85. *Id.* at 190. See Richards, *Constitutional Legitimacy and Constitutional Privacy* N.Y.U. L. REV. 800 (1986) for a vigorous criticism of Justice White's opinion in *Bowers* as well as a detailed analysis of *Griswold*.

The challenge raised in *Bowers v. Hardwick*<sup>86</sup> had been anticipated by virtually all of the Justices who wrote in *Griswold*. In his seminal dissent in *Poe v. Ullman*,<sup>87</sup> Justice Harlan explicitly stated that, unlike marital intimacy which the state has traditionally "fostered and protected," "adultery, homosexuality, fornication and incest" would not be protected by the right of privacy since the state has traditionally forbidden them altogether.<sup>88</sup> In his concurrence in *Griswold*, Justice Goldberg quoted this very language from Justice Harlan's *Poe* opinion with approval,<sup>89</sup> and the working premise of Justice White's concurring opinion in *Griswold* was that the anti-contraceptive ban was unjustified since that state could prohibit illicit non-marital sexual activity directly.<sup>90</sup> Although Justice Douglas did not address the prohibition of homosexual activity directly, the sanctity of marriage was the very foundation of his opinion.<sup>91</sup> Thus, whatever the *Griswold* majority meant by the right of privacy that it crafted, it was quite clear that it did not intend for it to extend protection to traditionally forbidden homosexual conduct. Somewhat surprisingly, neither Justice White's opinion for the majority nor the concurring opinions of Justices Burger or Powell noted this point.<sup>92</sup>

In his dissent, Justice Blackmun presented perhaps the most comprehensive synthesis and explanation of the constitutional right to autonomy-based privacy yet offered in a Supreme Court opinion.<sup>93</sup> Initially, he noted that the case at hand raised issues pertaining to both privacy in decision-making and privacy of place.<sup>94</sup> Relying on earlier precedents, Justice Blackmun explained that the "decisional" autonomy privacy cases were based on the recognition of the importance of allowing individuals to define their own identity, often through intimate associations with others, and in ways that may be offensive to majoritarian sensibilities.<sup>95</sup> Given that *Hardwick* was arrested in his home, Justice Blackmun was able to build on the place-oriented privacy cases as well, which really derive more from fourth amendment jurisprudence than from *Griswold*.<sup>96</sup> While Justice Blackmun demonstrated how many of the privacy precedents can at least arguably be woven into a coherent legal concept (though not necessarily the one understood by the court in *Griswold*), Justice White demonstrated just as forcefully that at the moment, a majority of the Court has no intention of doing so.

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86. 478 U.S. 186 (1986).

87. 367 U.S. 497 (1961).

88. *Id.* at 553.

89. *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (citing *Poe v. Ullman*, 367 U.S. at 553).

90. *Id.* at 505.

91. *Id.* at 486.

92. See *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986).

93. *Id.* at 199. See R. BORK, *THE TEMPTING OF AMERICA* 119-26 (1989) [hereinafter *BORK*] for a strong criticism of Justice Blackmun's opinion in *Hardwick*.

94. 478 U.S. at 203-04.

95. *Id.* at 205-06.

96. *Id.* at 206-08.

Finally, in the recent case of *Webster v. Reproductive Health Services*,<sup>97</sup> Justice Rehnquist, writing for a plurality of the Court, spoke of *Griswold* and the right of privacy only in response to a claim by the dissent that it was ignoring them.<sup>98</sup> Even then, Justice Rehnquist explained that *Griswold* was not really pertinent since unlike *Roe*, it did not create a complex analytical framework based on medical trimesters.<sup>99</sup> In his dissent, Justice Blackmun seemed eager to argue that *Roe* had properly concluded that *Griswold's* "right of privacy" "extends to matters of childbearing and family life, including abortion."<sup>100</sup> Considering that Justices Rehnquist and O'Connor were unwilling to join issue with him on these points, he responded instead to Justice Rehnquist's assertion that the trimester analysis of *Roe* was unwarranted.<sup>101</sup> Justice O'Connor concurring and Justice Stevens in dissent argued about *Griswold* but focused on its holding with respect to state regulation of contraception rather than as the source of a constitutional right of privacy.<sup>102</sup>

Although *Griswold v. Connecticut*<sup>103</sup> is perhaps best remembered for having given official birth to the constitutional right of privacy, that part of its legacy has had little actual impact. As a legal concept or as an analytical tool, privacy has contributed almost nothing. The Court has never adequately explained what it means by the constitutional right of privacy. In the typical abortion or contraception case which we have come to think of as raising privacy issues, the Court tends to spend as little time as possible talking about the "right of privacy." Arguably, this is because some Justices (such as Stewart, White and Rehnquist) never believed that talking in terms of privacy advanced analysis and that it would be more intellectually honest to simply approach these questions as specialized instances of due process "liberty."<sup>104</sup>

### *The Ninth Amendment*

*Griswold* is also remembered for Justice Goldberg's attempt to revive the "forgotten Ninth Amendment."<sup>105</sup> Justice Douglas had mentioned the ninth amendment in passing as he attempted to catalogue those constitutional provisions which to some extent protected a right of privacy.<sup>106</sup> Inspired perhaps to some extent by a recent provoca-

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97. 109 S. Ct. 3040 (1989).

98. *Id.* at 3072.

99. *Id.* at 3058.

100. *Id.* at 3072.

101. *Id.* at 3056-57.

102. Compare *id.* at 3059 (O'Connor, J., concurring) with *id.* at 3079 (Stevens J., dissenting).

103. 381 U.S. 479 (1965).

104. See Hafen, *supra* note 10, at 517-27.

105. 381 U.S. at 486-87. As Justice Goldberg noted, "[t]his Amendment has been referred to as 'The Forgotten Ninth Amendment,' in a book with that title by Bennett B. Patterson." *Id.* at 491 n.6.

106. 381 U.S. at 481.

tive article by Professor Redlich,<sup>107</sup> Justice Goldberg wrote a special concurrence simply to emphasize the role of the ninth amendment.<sup>108</sup> He was careful to note that he did not claim that the ninth amendment could serve as an independent source of unenumerated constitutional rights.<sup>109</sup> Rather, it was an important reminder that the framers recognized that such fundamental rights did exist and could be grounded in due process liberty.<sup>110</sup>

Both Justice Black and Justice Stewart took sharp issue with Justice Goldberg's reliance on the ninth amendment.<sup>111</sup> They argued that the ninth amendment was intended to protect the people against federal encroachment on retained rights and not to provide the federal government, through the courts, a method of invalidating state legislation.<sup>112</sup> As Justice Stewart noted, Justice Goldberg was "turn[ing] somersaults with history" and the partial incorporation of the Bill of Rights did not change that.<sup>113</sup>

*Griswold* helped to reawaken the academic debate over the meaning and utility of the ninth amendment. Today the debate rages on, as some commentators suggest that the ninth amendment was better left forgotten while others call for a vigorous revival.<sup>114</sup> However, as far as the Supreme Court is concerned, it would appear that Justice Goldberg's concurrence in *Griswold* was the ever-so-brief high water mark of modern ninth amendment jurisprudence. The Court has made no significant use of the ninth amendment since that time nor is there any reason to believe that it will in the foreseeable

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107. Redlich, *Are there "Certain Rights . . . Retained by the People?"*, 37 N.Y.U. L. REV. 787 (1962). Professor Redlich discussed the issues raised by *Poe* in his article. *Id.* at 796-98.

108. 381 U.S. at 486. Both Professor Harper in his Jurisdictional Statement and Professor Emerson and Ms. Roraback in their Brief for Appellant placed some reliance on the ninth amendment and cited the Redlich article. Jurisdictional Statement of Appellant at 15-17, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 64-496); Brief for Appellant at 82-83, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 64-496). During oral argument, Professor Emerson explained to the Court that "the Ninth Amendment wasn't clearly raised below . . . and in that sense we didn't feel that we could pitch it squarely on the Ninth Amendment. But we refer to that as a basis for the right to privacy." Transcript of Oral Argument at 7, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 64-496).

109. 381 U.S. at 492.

110. *Id.*

111. *Id.* at 517-19 (Black, J., dissenting); *id.* at 529-30 (Stewart, J., dissenting).

112. *Id.*

113. *Id.* at 529.

114. Compare Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980); Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983) with J. ELY, *DEMOCRACY AND DISTRUST* 34-38 (1980); Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1989); Barnett, *Two Conceptions of the Ninth Amendment*, 12 HARV. J. LAW & PUB. POLICY 29 (1989). See generally Symposium, *Interpreting the Ninth Amendment*, 64 CHI.-KENT L. REV. 37 (1988).

future.<sup>115</sup> There is little, if any, support for the proposition that the ninth amendment vests the federal courts with authority to "create" new constitutional rights and to the extent that courts may be inclined to purport to "recognize" unenumerated "retained" rights, they will most likely do so under the rubric of due process liberty, as in fact the Court did in *Griswold*. The ninth amendment adds only the slightest additional support.<sup>116</sup>

*Substantive Due Process and the Legitimacy of Unenumerated Fundamental Rights Jurisprudence*

As Justices Harlan,<sup>117</sup> Black,<sup>118</sup> and Stewart<sup>119</sup> noted in their opinions, Justice Douglas' creative analysis and Justice Goldberg's reliance on the ninth amendment seemed motivated to a large degree by a desire to distance themselves from the negative connotations associated with the substantive due process analysis of *Lochner v. New York*.<sup>120</sup> In the wake of the repudiation of *Lochner*, judicial enforcement of substantive (as opposed to procedural aspects of) liberty against the states had become closely associated with the illegitimate imposition of judicial value preferences.<sup>121</sup> In spite of the attempts by Justices Douglas and Goldberg to avoid reliance on substantive due process—or perhaps because those attempts were considered unconvincing—*Griswold* was a crucial step in its resurrection as a viable legal concept. Four years earlier in *Poe v. Ullman*,<sup>122</sup> Justice Harlan had staked out a strong defense of substantive due process liberty as legitimate analysis. As for *Griswold*, Justices Harlan, White, and for the most part Goldberg, were prepared to rely on substantive due process liberty as their source of constitutional authority.<sup>123</sup> By the time of *Roe v. Wade*<sup>124</sup> in 1972, a seven member majority of the Court seemed unembarrassed to explicitly base its decision on "liberty."<sup>125</sup> Indeed, even Justice Stewart, who had criticized the due process analysis in his *Griswold* dissent, wrote a concurrence in *Roe* accepting its legitimacy.<sup>126</sup>

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115. The Court cited the ninth amendment in passing in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 n.16 (1980), while arguing that the public possesses an unenumerated right to attend criminal trials supplementary to the first amendment.

116. See Kauper, *supra* note 8, at 254 (ninth amendment theory was only an "ornament").

117. *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965).

118. *Id.* at 510-26.

119. *Id.* at 528.

120. 198 U.S. 45 (1905).

121. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). See also McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

122. 367 U.S. 497, 549-55 (1961).

123. *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring); *id.* at 499 (Harlan, J., concurring), *id.* at 502 (White, J., concurring).

124. 410 U.S. 113 (1973).

125. *Id.* at 153.

126. *Id.* at 167.

*Griswold* certainly did not start the debate on the legitimacy of judicial recognition of unenumerated fundamental rights. In the somewhat different context of incorporation of the Bill of Rights against the states, the question of whether the Court could identify and apply rights that were not specifically set forth in the Constitution had raged for decades with perhaps its most notable expression coming in the famous case of *Adamson v. California*.<sup>127</sup> With respect to substantive rights, in no series of cases has the issue been presented more clearly than in the "privacy" cases commencing with Justice Harlan's dissenting opinion in *Poe* and extending through *Griswold* to *Roe* and *Bowers*.

Ultimately, the issue is whether the Court should interpret the Constitution to protect fundamental rights or values which have little, if any, textual, historical, or structural support. Perhaps no Justice has ever addressed the matter more forthrightly than did Justice Harlan in his dissenting opinion in *Poe v. Ullman*.<sup>128</sup> There the Court avoided considering on the merits the same "silly" Connecticut law that it ultimately invalidated in *Griswold*.<sup>129</sup> The opinion is especially powerful coming as it does from one of the Court's most articulate champions of judicial restraint.<sup>130</sup> As noted above, if there was a fundamental constitutional right which invalidated the Connecticut statute, Justice Harlan would identify it as an aspect of due process liberty. Justice Harlan attempted to meet the fundamental rights challenge head-on, conceding that the Court was required to "supply . . . content to this constitutional concept,"<sup>131</sup> but at the same time, he set out to prove that in doing so judges are not "free to roam where unguided speculation might take them."<sup>132</sup> Essentially in response to Justice Black's more textually oriented approach, Justice Harlan argued that due process liberty "is not a series of isolated points pricked out in terms of . . . specific enumerated guarantees but is rather . . . a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."<sup>133</sup> Justice Harlan argued that in confronting the dimensions of due process "liberty," the judge will be constrained not simply by whatever textual limitations exist, but by our history and traditions as well.<sup>134</sup> He made the same point, more briefly, in his concurring opinion in *Griswold*.<sup>135</sup> In the remainder of his opin-

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127. 332 U.S. 46 (1947).

128. 367 U.S. 497, 522 (1961).

129. *Id.* at 497. The Court declined to hear the challenge on the merits in *Poe* for lack of justiciability. *Id.* at 508.

130. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 234 (1965).

131. 367 U.S. at 542.

132. *Id.*

133. *Id.* at 543.

134. *Id.* at 542-43.

135. *Griswold v. Connecticut*, 381 U.S. 479, 499-501 (1965).



ion in *Poe*, Justice Harlan attempted to demonstrate that a "liberty" right to privacy protecting a married couple's decision to use contraceptives lies within the core of our historical tradition.<sup>136</sup>

Although the fundamental rights issue was central to the decision in *Griswold*, none of the justices confronted it as honestly as did Harlan in *Poe*. Nevertheless, Justice Harlan's *Poe* analysis exerted a presence in the *Griswold* case. He essentially incorporated it by reference into his short concurring opinion.<sup>137</sup> In his *Griswold* concurrence, Justice Goldberg quoted from and relied upon Justice Harlan's *Poe* analysis.<sup>138</sup> A great deal of Justice Black's dissent in *Griswold* was as much directed at Justice Harlan's analysis in *Poe* as at anything in the *Griswold* majority or concurring opinions.<sup>139</sup> Although the *Griswold* opinions do not reflect the degree of explicit concern with the issues of interpretational propriety and restraint that Justice Harlan emphasized in *Poe*, they do evince the need to bolster their legitimacy by making some type of textual connection.<sup>140</sup> *Griswold* also states or assumes the legitimacy of reliance on factors such as tradition and history.

Cases such as *Griswold*, *Roe*, and *Hardwick* have played a large role in igniting the predominant contemporary debate among constitutional theorists over the legitimacy of the Court's fundamental rights jurisprudence. *Griswold* itself may not have seemed deeply controversial in that it only invalidated an essentially unenforced and unenforceable law. What was there to be so upset about? *Roe* touched off a controversy with respect to fundamental rights jurisprudence because the underlying issue—abortion—was so politically and emotionally divisive, and because the Court's attempt at justification was so cavalier and unpersuasive.<sup>141</sup> *Bowers* also fueled the controversy in that it seemed, at least to some in the academic community, to be a step backward from where the Court had been headed.<sup>142</sup>

Since *Griswold*, the Court has tended simply to decide the cases as they have come along, without agonizing over or attempting to

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136. *Poe v. Ullman*, 367 U.S. 497, 552-55 (1961).

137. 381 U.S. at 500.

138. *Id.* at 495-99 (Goldberg, J., concurring).

139. *Id.* at 510 n.2.

140. See Sutherland, *supra* note 48.

141. See, e.g., R. BORK, *supra* note 93, at 112 ("in the entire opinion there is not one line of explanation, not one sentence that qualifies as legal argument"); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 821 (1983) ("We might think of Justice Blackmun's opinion in *Roe* as an innovation akin to Joyce's or Mailer's. It is the totally unreasoned judicial opinion. . . ."); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935-36 (1973).

142. See Maltz, *The Court, the Academy and the Constitution: A Comment on Bowers v. Hardwick and Its Critics*, 1989 B.Y.U. L. REV. 59, 60 n.4 (1989) (extensive list of largely critical articles about *Bowers*).

justify its fundamental rights jurisprudence.<sup>143</sup> Indeed, in *Webster*, Justice Blackmun chided the plurality in his dissent for failing to "mention, much less join, the true jurisprudential debate underlying this case: whether the Constitution includes an 'unenumerated' general right to privacy as recognized in cases such as *Griswold v. Connecticut* and *Roe*. . . ."<sup>144</sup>

The commentators have scarcely been so reticent. The fundamental rights jurisprudence of *Griswold* and *Roe* has resulted in a truly massive outpouring of scholarship and argument.<sup>145</sup> To be sure, other lines of fundamental rights precedent including school desegregation, reapportionment, and criminal process rights have contributed to the controversy.<sup>146</sup> However, no area of the law fueled the fire to the degree that the privacy cases did since it was in those cases that the question of constitutional legitimacy was posed so starkly.

Generally, the initial academic response to *Griswold* and its right to privacy was positive,<sup>147</sup> although some commentators could not resist taking potshots at the rather unusual opinion of Justice Douglas.<sup>148</sup> In what still may be the most significant theoretical attack on *Griswold*, then-Professor Bork contested its legitimacy in a now renowned article in the *Indiana Law Journal* in 1971.<sup>149</sup> *Roe v. Wade* launched a new wave of criticism aimed chiefly at the Court's fundamental rights methodology. The classic challenge came in John Hart Ely's 1973 *Yale Law Journal* article, *The Wages of Crying Wolf: A Comment on Roe v. Wade*.<sup>150</sup> Many other noted academics, including Archibald Cox,<sup>151</sup> Richard Epstein,<sup>152</sup> John Noonan<sup>153</sup> and Guido Calabesi<sup>154</sup> attacked *Roe*. Others such as Richard Posner<sup>155</sup> and Louis Henkin<sup>156</sup> critiqued the constitutional right of privacy, while still others,

143. See Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93 (1984).

144. *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040, 3044-45 (1989).

145. See *infra* notes 159-196.

146. Professor Wechsler's classic article *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 9 (1959), was to a large extent a response to the Court's decision in *Brown v. Board of Education*. Alexander Bickel's classic *The Least Dangerous Branch* (1962) which delved deeply into the proper role of the Court as constitutional interpreter also predated *Griswold*.

147. See, e.g., Emerson, *supra* note 130 (Professor Emerson argued and won the case); Sutherland, *supra* note 48, at 124.

148. See *supra* note 8 and accompanying text.

149. See Bork, *Neutral Principles*, *supra* note 16, at 7-11. Judge Posner also criticized the case vigorously. See Posner, *supra* note 10, at 190-96.

150. Ely, *supra* note 141.

151. A. COX, *THE ROLE OF THE SUPREME COURT* 113-14 (1976).

152. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (1973).

153. Noonan, *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668 (1984).

154. G. CALABESI, *IDEALS, BELIEFS, ATTITUDES AND THE LAW* 95-97 (1985).

155. See Posner, *supra* note 10.

156. See Henkin, *supra* note 10.

including Henry Monaghan,<sup>157</sup> William Van Alstyne,<sup>158</sup> Lino Graglia<sup>159</sup> and Raoul Berger,<sup>160</sup> objected to some or all of the Court's fundamental rights jurisprudence at a more general level.<sup>161</sup> Some like Judge Bork<sup>162</sup> and Raoul Berger<sup>163</sup> attempted to avoid many of the problems of fundamental rights adjudication by developing a jurisprudence of original intent.<sup>164</sup>

Not surprisingly, many rose in defense of *Griswold*, *Roe*, the right to privacy, and fundamental rights adjudication. A few, such as Heyman and Barzely,<sup>165</sup> sought to defend *Roe* on its own terms. Others, like Donald Regan,<sup>166</sup> Laurence Tribe<sup>167</sup> and Catherine MacKinnon,<sup>168</sup>

157. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117 (1978).

158. Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1984); Van Alstyne, *Notes on a Bicentennial Constitution: Part II, Antinomial Choices and the Role of the Supreme Court*, 72 IOWA L. REV. 1281 (1987).

159. Graglia, "Constitutional Theory": *The Attempted Justification of the Supreme Court's Liberal Political Program*, 66 TEX. L. REV. 789 (1987); Graglia, *Constitutional Mysticism: The Aspirational Defense of Judicial Review* (Book Review), 98 HARV. L. REV. 1331 (1985).

160. Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1 (1986).

161. See Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1 (1981); Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361 (1979).

162. See R. BORK, *supra* note 93 at 143-87; Bork, *Neutral Principles*, *supra* note 16; Bork, *Styles in Constitutional Theory*, 26 S. TEXAS L.J. 383 (1985); Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695.

163. R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350 (1988); Berger, "Original Intention" in *Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986).

164. For a discussion of original intent methodology, see, e.g., Brest, *The Misconceived Quest for Original Understanding*, 60 B.U.L. REV. 204 (1980); Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177 (1987); Dworkin, *The Forum Principle*, 56 N.Y.U. L. REV. 469 (1981); Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226 (1988); Maltz, *Forward: The Appeal of Originalism*, 1988 UTAH L. REV. 1 (1988); Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMM. 43 (1987); Maltz, *Some New Thoughts on An Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U.L. REV. 811 (1983); Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987); Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986); Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507 (1988); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CALIF. L. REV. 1482 (1985).

165. Barzelay & Heymann, *The Forest through the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765 (1973).

166. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1659 (1979).

167. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1340-60 (1988) [hereinafter L. TRIBE]; Tribe, *Foreward: Toward a Model of Roles in the Due Process of Law and Life*, 87 HARV. L. REV. 1 (1973).

168. MacKinnon, *Roe v. Wade: A Study in Male Ideology* in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 45 (J. Garfield & P. Hennessey ed. 1984). See also Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

attempted to justify the constitutionalization of the abortion decision on alternative grounds.<sup>169</sup> Still others attempted to explain and defend the fundamental rights jurisprudence of which *Roe* was an important part. Though he disapproved of *Roe* vigorously, John Hart Ely attempted to save most of the remainder of fundamental rights jurisprudence through a process-oriented theory in his important book *Democracy and Distrust*.<sup>170</sup> With somewhat different emphasis, Harry Wellington<sup>171</sup> and Owen Fiss<sup>172</sup> argued that the common-law oriented adjudicatory approach of the courts justified value-oriented fundamental rights jurisprudence. Thomas Grey suggested that "noninterpretivist" fundamental rights jurisprudence was a legitimate successor to an earlier acceptance of natural law.<sup>173</sup> David Richards claimed that it was appropriate for the courts to derive fundamental rights from principles of moral and political philosophy,<sup>174</sup> while Michael Perry argued that in this area the Court should act as a moral prophet.<sup>175</sup> Laurence Tribe<sup>176</sup> and Paul Brest<sup>177</sup> asserted that it was proper and indeed inevitable that the Court must make hard and controversial substantive value choices which may be guided—but are in no sense dictated—by the Constitution.

In *Democracy and Distrust*, Ely provided a classic critique and rejection of several of these alternative sources of constitutional values, including judges' personal preferences, natural law, neutral principles, reason, tradition, consensus, and predicting progress.<sup>178</sup> Ely's critics responded in turn.<sup>179</sup> The general debate on unenumerated rights rages

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169. Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 BUFFALO L. REV. 107 (1982); Perry, *Abortion, the Public Morals and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976); Perry, *Substantive Due Process Revisited*, 71 NW. U.L. REV. 417 (1976).

170. J. ELY, *DEMOCRACY AND DISTRUST* (1980) [hereinafter J. ELY].

171. Wellington, *Common Law Rules and Constitutional Double Standards*, 83 YALE L.J. 221 (1973).

172. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

173. Grey, *Do We Have an Unwritten Constitution*, 27 STAN. L. REV. 703 (1975); Grey, *The Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1980). See also Sherry, *The Founder's Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

174. See D. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986); Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 S. CAL. L. REV. 647 (1985).

175. See M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982).

176. L. TRIBE, *CONSTITUTIONAL CHOICES* 1-20 (1985).

177. Brest, *The Fundamental Rights Controversy: The Essential Contradiction of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981) [hereinafter Brest, *Fundamental Rights*].

178. J. ELY, *supra* note 170, at 43-72.

179. See, e.g., Berger, *Ely's Theory of Judicial Review*, 42 OHIO ST. L.J. 87 (1981); Brest, *Fundamental Rights*, *supra* note 177, at 1090-96; Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Parker, *The Past of Constitutional Theory and Its Future*, 42 OHIO ST. L.J. 223 (1981); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Tushnet, *Darkness on the Edge of*

on as each new book or article joins issue with that which has come before.<sup>180</sup> Indeed, the Senate hearings on the nomination of Robert Bork to the Supreme Court, discussed in detail below, provided a peculiarly public forum for an elaboration of the unenumerated fundamental rights debate.<sup>181</sup>

*Griswold* was a major judicial milestone in the fundamental rights debate. It demonstrated that in the proper case the Court was prepared to venture beyond a strict interpretation of text, and protect what it considered to be fundamental constitutionally secured rights against infringement by the state. However, at the same time, most of the justices who joined the majority opinion seemed to be sensitive to the troublesome implications of an unbounded fundamental rights jurisprudence. Consequently, they strained to show that there was at least some textual connection underlying their holding as well as other real constraints on their interpretative freedom such as

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*Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

180. See, e.g., E. CHERMERINSKY, CONSTITUTIONAL INTERPRETATION (1987); R. DWORKIN, LAW'S EMPIRE (1986); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); S. LEVINSON, CONSTITUTIONAL FAITH (1988); M. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); Ackerman, *supra* note 48; Alexander, *Painting Without The Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447 (1983); Ball, *Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law*, 59 TEX. L. REV. 787 (1981); Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984); Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603 (1985); Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984); Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821 (1985); Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982); Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978); Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); Hafen, *supra* note 10; Lupu, *supra* note 10; Lupu, *Constitutional Theory and the Search for a Workable Premise*, 8 U. DAYTON L. REV. 579 (1983); Maltz, *Murder in the Cathedral—The Supreme Court as Moral Prophet*, 8 U. DAYTON L. REV. 623 (1983); Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985); Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 489 (1985); Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417 (1981); Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); Saphire, *Enough About Originalism*, 15 N. KY. L. REV. 513 (1988); Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, 78 NW. U. L. REV. 1435 (1984); Saphire, *Making Non-Interpretivism Respectable: Michael J. Perry's Contributions to Constitutional Theory*, 81 MICH. L. REV. 782 (1983); Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745 (1983); Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93 (1984); Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603 (1985); Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809 (1983).

181. See *infra* notes 213-301 and accompanying text. See also R. BORK, *supra* note 93, at 187-235 (critique of many of the theorists cited in the text and footnotes above).

tradition, history, or even the nebulous concept of privacy.<sup>182</sup> Even so, Justices Douglas, Goldberg, and Harlan demonstrated a willingness to be creative and take risks in the interpretative enterprise when confronted with an unusual and challenging case. This in itself has served as an inspiration to those who favor a bold judiciary.

Finally, it must be acknowledged that the *Griswold* Court was by no means able to find a universally acceptable means of providing adequate judicial protection for unenumerated rights, and at the same time demonstrate that it is interpreting rather than conceiving. Others have shown that tradition and history may provide little actual constraint, since it is often difficult to discover our relevant traditions with any confidence.<sup>183</sup> Judges may not be professionally equipped to identify the relevant aspects of our history and traditions. They also may discover that we are heir to inconsistent competing traditions with little to guide alternative choices.<sup>184</sup> Moreover, the level of generality at which a tradition is stated can often be outcome determinative.<sup>185</sup> Even if the proper tradition can be identified, there is reason to question whether historically grounded practice (which by definition is likely to be majoritarian in nature) will be capable of protecting fundamental rights against majoritarian infringement in a modern and dynamic world, absent an interpretation of the underlying tradition.<sup>186</sup> To be successful, reliance on tradition and history as sources of fundamental values would almost inevitably depend upon interpretation by judges with the intellect, wisdom, and sense of self-restraint of a Justice Harlan.<sup>187</sup>

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182. See Sutherland, *supra* note 48, at 288.

183. See J. ELY, *supra* note 170, at 60-63. But see L. TRIBE, *supra* note 167, at 1427-28.

184. J. ELY, *supra* note 170, at 62; R. BORK, *supra* note 93, at 119.

185. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1427-28 (1988); Brest, *Fundamental Rights*, *supra* note 177, at 1084-85; Dworkin, *The Forum Principle*, 56 N.Y.U. L. REV. 469, 488-97 (1981); Nagel, *Forgetting the Constitution*, 6 CONST. COMM. 289, 290-91 (1989) [hereinafter Nagel].

186. J. ELY, *supra* note 170, at 62.

187. See Lupu, *supra* note 10, at 1032-50 (argument that the Court should only recognize unenumerated fundamental rights which are supported by our traditions as well as contemporary consensus). In the recent case of Michael H. v. Gerald D., 109 S. Ct. 2333 (1989), a plurality, a concurrence and a dissent became involved in a quarrel over the application of "tradition" analysis in determining whether substantive or procedural due process recognized a putative father's liberty interest in establishing visitation rights with his daughter who was living with her mother and her mother's husband and who had been born during that marriage. Justices Scalia and Rehnquist argued that the Court should examine the tradition in issue at the greatest level of specificity where there is evidence that such a tradition has been protected or denied. *Id.* at n.6. They denied that such an approach was inconsistent with *Griswold*. *Id.* Justice Brennan, writing for two other justices in dissent, argued that tradition should be described and examined at a greater level of generality. *Id.* at 2349-59. Justice O'Connor, joined by Justice Kennedy, indicated that she would not foreclose the possibility of analyzing tradition at a greater level of generality. *Id.* at 2346-47. Both Justices Brennan and O'Connor suggested that Justice Scalia's approach was inconsistent with *Griswold*. *Id.* at 2349-63. A plurality of the Court refused to find a liberty interest on the bizarre facts of the case.

Ultimately, it is necessary to decide whether tradition and history constitute a legitimate source of unenumerated fundamental constitutional rights. In resolving that issue the interpreter will almost inevitably be influenced by his conception of the Constitution and its role in society, his confidence in or skepticism of judicial review, and his assessment of existing precedent and practice. If history and tradition may serve as guideposts for discerning unenumerated fundamental rights, courts may be inclined to adopt other non-textual sources as well, including contemporary societal consensus, or evolving principles of public morality. Whether this is a "slippery slope" to be feared or welcomed is a matter of intense debate.

*Griswold as a Contraception Rights Precedent*

At a less theoretical and more doctrinal level, *Griswold* ultimately became a precedent providing relatively broad protection for individual decisions pertaining to matters of contraception and family planning. Certainly in a more extreme context, the Court's protection of the ability to (as opposed to the choice whether to) procreate extends back to the equal protection sterilization case of *Skinner v. Oklahoma*.<sup>188</sup> *Skinner* was itself one of the building blocks for *Griswold's* penumbra analysis.<sup>189</sup> However, Justice Douglas' opinion in *Griswold* itself scarcely developed the theme of contraception as a protected choice, emphasizing instead privacy and marital intimacy. The notion that constitutional protection extends to matters pertaining to contraception was drawn out to a much greater degree by Justice White, who subjected the Connecticut statute to a rigorous means-ends analysis in an attempt to demonstrate that it was not closely tailored to serve any compelling state interest.<sup>190</sup>

The recognition that *Griswold* created a right to make decisions pertaining to contraception was bolstered—although in a somewhat indirect way—in *Eisenstadt v. Baird*.<sup>191</sup> Relying on equal protection analysis, the Court reversed a conviction under a Massachusetts statute for distribution of a contraceptive to an unmarried person.<sup>192</sup> After concluding that the statute was not intended to deter illicit

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188. 316 U.S. 535 (1942).

189. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

190. *Id.* at 502-07. During the oral argument, counsel for the state was pressed hard by the Court to explain what the purpose of the Connecticut statute was. He was unable to offer a coherent explanation and at one point seemed to suggest that it was justified as a matter of "pure power." Transcript of Oral Argument following recess at 1-4, *Griswold v. Connecticut*.

191. 405 U.S. 438 (1972). During the oral argument in *Griswold*, the Court repeatedly asked Professor Emerson whether he had an equal protection challenge to the statute. He responded that it had not been raised below. Transcript of Oral Argument at 2, 5 & 7, *Griswold v. Connecticut*. Justice Brennan, who wrote the plurality opinion in *Eisenstadt* was most interested in an equal protection approach in *Griswold*. Emerson, *supra* note 147, at 220-21.

192. 405 U.S. 438 (1972).

sexual relations<sup>193</sup> or to promote public health,<sup>194</sup> the Court held that *Griswold* precluded the state from prohibiting the distribution of contraceptives to unmarried individuals simply for the purpose of discouraging contraception.<sup>195</sup> Veering from the *Griswold* emphasis on marital intimacy, which seemed to have played a major role in all the justices' analyses in that case, Justice Brennan wrote that, "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>196</sup>

Ultimately, that statement would essentially prevail as the principle of *Griswold* with respect to contraception. In *Eisenstadt* itself, however, Justice Brennan, in the very next sentence, concluded that the statute would violate the equal protection clause independent of *Griswold*, since the distinction between married and unmarried with respect to access to contraceptives was simply irrational.<sup>197</sup> As such, the interpretation of *Griswold* was arguably dictum. Justices White and Blackmun concurred in the result but not the opinion,<sup>198</sup> because of the reliance on *Griswold*. Thus Justice Brennan was writing for only a four justice plurality in *Eisenstadt*.<sup>199</sup>

The following year in *Roe v. Wade*,<sup>200</sup> the Court hardly made any use of *Griswold* as a case protecting contraceptive choice, although it easily could have. Indeed, in *Roe's* catalogue of interests protected by the constitutional right to privacy, it cited *Skinner* for procreation and *Eisenstadt* for contraception, with no mention of *Griswold*.<sup>201</sup>

Finally, four years later in *Carey v. Population Services*,<sup>202</sup> with a working majority behind his opinion, Justice Brennan returned to *Griswold* and explained that it must be read in conjunction with *Eisenstadt*, *Roe*, and *Whalen v. Roe*.<sup>203</sup> Put in that perspective, "*Gris-*

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193. *Id.* at 448.

194. *Id.* at 450-52.

195. *Id.* at 452-54.

196. *Id.* at 453. The *Eisenstadt* Court may have been deliberately attempting to pave the way for *Roe* which had already been argued before the *Eisenstadt* opinion was published. NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 21 (1979).

197. *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

198. *Id.* at 460-65.

199. *Id.* at 438-61.

200. 410 U.S. 113 (1973).

201. *Id.* at 152. During the oral argument in *Griswold* itself, however, the Court anticipated the potential application of appellant's theory to abortion. The Court specifically asked Professor Emerson whether his theory would not invalidate state regulation of abortion. He replied that it would not since, unlike the contraception decision at issue in *Griswold*, abortion is less likely to take place within the sanctity of the home, and a life in being apart from the married couple is affected. Transcript of Oral Argument following recess, at 23-24, *Griswold v. Connecticut*.

202. 431 U.S. 678 (1977).

203. *Id.* at 687.



would may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in the light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."<sup>204</sup> Thus, after a long and somewhat tortured journey, *Griswold* came to stand—in doctrine as well as in fact—for a relatively broad principle of constitutionally protected autonomy with respect to contraceptive and procreative matters.

The significance of *Griswold* as a contraception rights case was discussed in some detail by Justice Stevens in his dissenting opinion in *Webster v. Reproductive Health Services*.<sup>205</sup> He argued that the preamble of the Missouri statute<sup>206</sup> which stated that the legislature had found that "the life of each human being begins at conception"<sup>207</sup> and that "unborn children have protectable interests in life, health and well being"<sup>208</sup> violated *Griswold's* principle of contraceptive autonomy by apparently prohibiting "post-conception" contraception.<sup>209</sup> In her concurring opinion, Justice O'Connor responded by noting that such a construction might well violate *Griswold*.<sup>210</sup> However, the state had made no effort to give the preamble such an interpretation, or to give it any legally enforceable effect at all.<sup>211</sup>

Conceivably, much of the same form of protection for contraceptive decisions may have developed even without *Griswold*, perhaps through equal protection, as in *Eisenstadt*. However, *Griswold* has proven to be the key decision with respect to contraceptive autonomy. This in itself is a significant aspect of its legacy.

### *The Rejection of Judge Bork and the Public Conception of the Right of Privacy*

Arguably, *Griswold's* most significant legacy is its contribution to the defeat of the nomination of Judge Robert Bork to the Supreme Court of the United States.<sup>212</sup> It is difficult to determine exactly how large a role Judge Bork's criticism of *Griswold* played in his defeat, but there can be little question that it was a very significant factor. Judge Bork's trouble began in 1971 when he published the text of a speech he had delivered at the University of Indiana Law School in

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204. *Id.*

205. 109 S. Ct. 3040, 3081-82 (1989).

206. MO. REV. STAT. § 1.205.1(1)-(2) (Vernon 1985).

207. *Id.*

208. *Id.*

209. 109 S. Ct. at 3082. Justice Stevens argued that the state could only have had an illicit sectarian justification for a distinction between pre and post-conception contraception. *Id.*

210. *Id.* at 3059.

211. *Id.*

212. As one of Judge Bork's supporters, this author does not consider this to be a positive aspect of its legacy. See E. BRONNER, *BATTLE FOR JUSTICE* (1989) for a detailed study of the Bork nomination battle.

the *Indiana Law Journal* under the title *Neutral Principles and Some First Amendment Problems*.<sup>213</sup> The article was an explanation of Professor Bork's conception of the role of the Supreme Court in our democratic system of government. Judge Bork argued that ours is a Madisonian system in which we are generally governed by majoritarian decision-making, except to the extent that "enduring principles" of constitutional law as applied by the courts remove certain subjects from the democratic process.<sup>214</sup> However, the Madisonian system requires that the courts override democratic decision-making only if they are in fact applying "neutral principles of constitutional law," as opposed to their own value choices or philosophy.<sup>215</sup> Judge Bork criticized Judge Skelley Wright's defense of Warren Court activism<sup>216</sup> on the ground that it tended to justify a style of free-wheeling constitutional interpretation that he considered unprincipled and illegitimate.<sup>217</sup> Bork examined three legal issues to illustrate his point: the Supreme Court's decision in *Griswold*; its evolving equal protection doctrine; and its first amendment doctrine in the area of seditious speech.<sup>218</sup> He asserted that

[T]he choice of "fundamental values" by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.<sup>219</sup>

Bork then argued that the decision in *Griswold* violated this principle in that it inexplicably concluded that the various penumbral "zones of privacy" could be combined to create an independent right of privacy, which the Court wholly failed to define.<sup>220</sup> He maintained that the Constitution simply did not mark off the domain of marital intimacy secured in *Griswold* as specially protected.<sup>221</sup> This led him to ask rhetorically, "Why is sexual gratification more worthy than moral gratification? Why is sexual gratification nobler than economic gratification?"<sup>222</sup>

He noted that a colleague derisively accused him of adopting an "equal gratification clause"—a charge to which he pled guilty without embarrassment.<sup>223</sup> A few years prior to the Indiana article, Judge Bork

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213. See Bork, *Neutral Principles*, *supra* note 16.

214. *Id.* at 2-3.

215. *Id.* at 3.

216. See Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

217. Bork, *Neutral Principles*, *supra* note 16, at 4-5.

218. *Id.* at 7-35.

219. *Id.* at 8.

220. *Id.* at 8-9.

221. *Id.* at 9-10.

222. *Id.* at 10.

223. *Id.*

had actually published an article in *Fortune* magazine<sup>224</sup> endorsing *Griswold* and its reasoning.<sup>225</sup> However, as he explained in the Senate hearings, his colleague, the late Professor Alexander Bickel, persuaded him that the decision could not be justified by legitimate methods of constitutional analysis and thus he reversed his position.<sup>226</sup>

During the early-to-mid-eighties when Judge Bork wrote and spoke frequently against the excesses of judicial activism, he often used *Griswold* as a case in point, repeating his earlier criticisms.<sup>227</sup> While sitting on the United States Court of Appeals for the District of Columbia, Judge Bork had the opportunity to return to the subject of *Griswold* and the right to privacy in the case of *Dronenberg v. Zech*.<sup>228</sup> Rejecting a challenge by an admitted homosexual to his discharge from the navy, Judge Bork traced the development of the right of privacy from *Griswold* on.<sup>229</sup> In his discussion of *Griswold*, he repeated in somewhat milder terms his earlier criticism that a right of privacy independent of the various penumbral zones was difficult to justify, and that the privacy right identified in *Griswold* was quite undefined.<sup>230</sup> In a footnote, Judge Bork acknowledged that he had "when in academic life, expressed the view that no court should create new constitutional rights . . . [but since] [t]he Supreme Court has decided that it may create new constitutional rights . . . we are bound absolutely by that determination."<sup>231</sup> After analyzing the entire line of privacy cases, Judge Bork concluded that they did not recognize a principle which would protect homosexual conduct nor did they suggest that the majority was precluded from basing legislation on its choice of moral values.<sup>232</sup> Judge Bork's opinion provoked an impassioned response from several other judges on the court, in dissent from a denial of a rehearing en banc.<sup>233</sup>

When President Reagan nominated Judge Bork to a seat on the Supreme Court two years later, an extensive debate took place before the Senate Judiciary Committee on Judge Bork's judicial philosophy, culminating in the rejection of his nomination. Although every aspect

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224. Bork, *The Supreme Court Needs a New Philosophy*, *FORTUNE*, Dec. 1968, at 170.

225. *Id.*

226. *Bork Hearings*, *supra* note 61, at 117 (testimony of Judge Bork).

227. *See Report of the Senate Committee on the Judiciary, Bork Hearings*, *supra* note 61, at 6216.

228. 741 F.2d 1388 (D.C. Cir.), *rehearing denied*, 746 F.2d 1579 (D.C. Cir. 1984).

229. 741 F.2d at 1391-98.

230. *Id.* at 1391-92.

231. *Id.* at 1396 n.5.

232. *Id.* at 1397-98.

233. In a dissent joined by Judges Wald, Mikva and Edwards, Judge Robinson scolded Judge Bork for attempting to engage in "a general spring cleaning of constitutional law." 746 F.2d at 1580. Judge Bork responded in an opinion in which he declared that "[t]he judicial hierarchy is not, as the dissent seems to suppose, properly modeled on the military hierarchy in which orders are not only carried out but accepted without any expression of doubt." *Id.* at 1583.

of Judge Bork's writings and philosophy were probed, no issue was discussed at such length and by as many witnesses as Judge Bork's views on the *Griswold* case and the constitutional right of privacy. As Senator Spector aptly put it, "*Griswold* is the most discussed case in America today."<sup>234</sup> Early in his own testimony, Judge Bork restated and defended his dual critique of *Griswold* from the Indiana article—that there was no basis for deriving an independent constitutional right of privacy, and that the concept of privacy identified in *Griswold* had no discernible meaning or boundaries.<sup>235</sup> Consequently he argued that the Court has been unable to apply the privacy principle in a consistent and neutral manner.<sup>236</sup> Addressing the approaches of the various opinions in *Griswold*, Judge Bork contended that Justice Douglas' reliance on penumbras was "less analysis than metaphor,"<sup>237</sup> Justice Goldberg's discussion of the ninth amendment was unhelpful because no one really knew what the ninth amendment was intended to mean,<sup>238</sup> and that Justice Harlan's reliance on substantive due process revived the vices of the *Lochner* era.<sup>239</sup>

During the four days in which Judge Bork testified before the Senate Committee, he was questioned extensively about his views on *Griswold*, the right to privacy, and unenumerated fundamental rights jurisprudence. At one point referring to the prior hearings on his nominations as Solicitor General and Circuit Court Judge, he commented that "I have been confirmed twice and I have had to eat that [Indiana] article twice page by page."<sup>240</sup> Judge Bork was challenged for adopting too narrow a view of constitutional "liberty."<sup>241</sup> He replied that a jurisprudence which permits the judge to construe concepts such as liberty more broadly on a selective basis inevitably rests on the judge's personal hierarchy of values.<sup>242</sup>

*Griswold* was a useful case for Judge Bork's critics in that, from a factual standpoint, the holding was obviously consistent with popular opinion. Few would approve of a law which prohibited the use of contraceptives by married couples. Like Justice Stewart in his *Griswold* dissent, Judge Bork expressed his strong disagreement with the policy of the law.<sup>243</sup> Because of his vigorous criticism of the legal rationale of *Griswold*, Judge Bork was forced to respond to a parade

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234. *Bork Hearings*, *supra* note 61, at 3789 (comment of Sen. Spector).

235. *Bork Hearings*, *supra* note 61, at 116-21, 182-84 (testimony of Judge Bork).

236. *Id.* at 150.

237. *Id.* at 290.

238. *Id.* at 130, 249.

239. *Id.* at 315, 717-18. Judge Bork has continued his vigorous criticism of *Griswold* since the rejection of his nomination. See R. BORK, *supra* note 93, at 95-100, 256-59, 262-63.

240. *Bork Hearings*, *supra* note 61, at 269 (testimony of Judge Bork).

241. *Id.* at 315-16 (comment of Sen. Simon); *id.* at 716-17 (comment of Sen. Spector).

242. *Id.* at 441, 717 (testimony of Judge Bork).

243. *Id.* at 184, 250, 753.

of horrors. It was asserted that if Judge Bork was confirmed he would not vote to invalidate laws which prohibited the use of contraceptives by married people, or which permitted the intrusive "bedroom searches" hypothesized by Justice Douglas in *Griswold*.<sup>244</sup> Judge Bork tried to explain that it was highly unlikely that any legislature would pass such laws in this day or that any prosecutor would dare bring such a charge.<sup>245</sup> Still his opponents were able to portray Judge Bork as a serious threat to sexual and contraceptive privacy.<sup>246</sup> This may have been the single most damaging blow to his nomination. Bork tried to minimize the threat posed by his critique of *Griswold* by pointing out that it was essentially a contrived test case and that no married couples in Connecticut had ever been prosecuted under the Act.<sup>247</sup> An attorney for Planned Parenthood responded that birth control clinics had been officially suppressed under the law in the forties.<sup>248</sup>

Faced with the charge that he would overrule *Griswold* if the issue arose again, Judge Bork responded that his criticisms were aimed at the rationales suggested by the Court and that if the case were presented to him he would consider another rationale for invalidating the law.<sup>249</sup> When pressed to suggest such a rationale however, he explained that he had not made any attempt to work through the problem.<sup>250</sup> This admission allowed his critics to charge that he was shifting his position to gain confirmation, or that he was not a very thorough scholar if he had not considered alternative rationales for such a major decision with which he disagreed.<sup>251</sup>

Following Judge Bork's testimony before the Committee, a parade of witnesses followed in support of and in opposition to his nomination. Judge Bork's critique of *Griswold* was probably discussed with greater frequency than any other item. Some witnesses explained that *Griswold* was a case that has been subjected to strong academic

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244. See *id.* at 149 (comments of Sen. Kennedy, asking whether compulsory abortion would be constitutional); *id.* at 241 (comments of Sen. Biden, suggesting that searches and wiretapping of bedrooms would be permitted); *id.* at 315 (comments of Sen. Simon asking whether the state could require the use of contraceptives).

245. *Bork Hearings*, *supra* note 61, at 151, 241, 315 (testimony of Judge Bork).

246. *Id.* at 1268 (testimony of Prof. Laurence Tribe); *id.* at 3104 (testimony of Prof. Kathleen Sullivan); *id.* at 4786 (statement of Richard Licht). See also, R. BORK, *supra* note 93, at 291.

247. *Bork Hearings*, *supra* note 61, at 241 (testimony of Judge Bork). In that regard, Sen. Simpson referred to *Griswold* as "a green eyeshade special" by which he meant a test case. *Id.* at 1176-77 (comments of Sen. Simpson).

248. *Bork Hearings*, *supra* note 61, at 711 (letter from Harriet Pilpel and Catherine Roraback). See *supra* note 6 and accompanying text.

249. *Bork Hearings*, *supra* note 61, at 324, 753 (testimony of Judge Bork).

250. *Id.* at 325.

251. *Id.* at 2394 (testimony of Prof. Sylvia Law); *id.* at 2493 (testimony of Prof. Owen Fiss); *id.* at 3077-78 (statement of Prof. Kathleen Sullivan).

criticism.<sup>252</sup> Former Secretary of H.U.D., Hills, compared *Griswold* to *Lochner*.<sup>253</sup> Former Attorney General Smith publicly scolded Senator Metzenbaum for propagandizing the *Griswold* issue in a manner that bordered on dishonesty.<sup>254</sup>

Many of Judge Bork's critics seemed to base their opposition to his nomination on little more than his disagreement with cases whose substantive result they favored, such as *Griswold*.<sup>255</sup> Thus, for some, it appeared that *Griswold* and its right of privacy had achieved the status of sacred cow unchallengeable by anyone with Supreme Court ambitions. Others, such as Professors Tribe,<sup>256</sup> Kay,<sup>257</sup> and Richards<sup>258</sup> met Judge Bork on the level of constitutional methodology and argued that his interpretive approach was out of step with that consistently applied by the Court and the academic world, and that the fundamental rights jurisprudence of *Griswold* was defensible and legitimate.<sup>259</sup> They emphasized that *Griswold*, at least by its own self-interpretation, was part of a line of cases such as *Meyer v. Nebraska*,<sup>260</sup> *Pierce v. Society of Sisters*<sup>261</sup> and *Skinner v. Oklahoma*<sup>262</sup> which protected significant liberties and to which Judge Bork appeared equally hostile.<sup>263</sup> Ultimately, the point of this critique was to attempt to demonstrate that Judge Bork was outside the mainstream on matters of constitutional interpretation and thus should not be appointed to the Court.<sup>264</sup>

252. *Bork Hearings*, *supra* note 61, at 2466 (statements of Prof. Ronald Rotunda); *id.* at 6018 (letter of Prof. Frederick Schauer); *id.* at 4362 (statement of a committee for a fair confirmation hearing).

253. *Bork Hearings*, *supra* note 61, at 1348 (testimony of the Hon. Carla Hills).

254. *Id.* at 1135-36 (testimony of the Hon. William French Smith).

255. *See, e.g., id.* at 1789 (statement of public citizen); *id.* at 399 (testimony of Sarah Harder); *id.* at 4033-36 (statements of the American Civil Liberties Union); *id.* at 4130 (statement of American Medical Students Ass'n); *id.* at 4174 (statement of various lawyers); *id.* at 4271 (statement of the Children's Defense Fund); *id.* at 4539-40 (statement of Federation of Women Lawyers Judicial Screening Panel); *id.* at 4878 (statement of Abortion Rights Council); *id.* at 4945-54 (statement of the NAACP and the People for the American Way); *id.* at 5565 (statement of Dean M. Kelly, National Council of Churches of Christ); *id.* at 5593 (statement of Haywood Burns, Pres., National Lawyers Guild); *id.* at 6145-46 (testimony of Daniel Press on behalf of Youth for Democratic Action).

256. *Bork Hearings*, *supra* note 61, at 1268-68, 1276-83, 1299 (testimony of Prof. Laurence Tribe).

257. *Id.* at 3027-46 (testimony of Prof. Herman Kay).

258. *Id.* at 3050-69 (testimony of Prof. David Richards).

259. *Id.*

260. 262 U.S. 390 (1923).

261. 268 U.S. 510 (1925).

262. 316 U.S. 535 (1942).

263. *See Bork Hearings*, *supra* note 61, at 3072-74 (testimony of Prof. Kathleen Sullivan); *id.* at 3036 (testimony of Prof. Herma Hill Kay).

264. *See Bork Hearings*, *supra* note 61, at 1296 (testimony of Prof. Laurence Tribe) ("Judge Bork's beliefs [are] outside the acceptable range of judicial philosophy"); *id.* at 5107 (Prof. Stephen Gillers) ("Judge Bork's wholesale rejection of a constitutional right to privacy . . . is beyond the pale of permissible constitutional meaning"). *Id.*

Bork was criticized by many for stating that he considered *Roe* an illegitimate and unconstitutional decision.<sup>265</sup> It was inferred that if appointed, he might provide the decisive vote to overrule *Roe*.<sup>266</sup> Certainly the reversal of *Roe* would have a far greater immediate impact on the public than the reversal of *Griswold*. However, as a practical matter, reversal of the former would lead to the reversal of the latter (along with many other subsequent cases as well).<sup>267</sup> Judge Bork's critics emphasized his stance on *Griswold* because factually, and to some extent legally, *Griswold* was a far less controversial case than *Roe*.<sup>268</sup> The country was deeply polarized over moral issues raised by abortion. There was certainly no similar dispute with respect to married couples' use of contraceptives. While Justice Douglas' opinion for the Court had been subjected to a significant amount of academic criticism, the decision as a whole was probably accepted as a legitimate exercise in constitutional interpretation.

That was certainly not the case with *Roe v. Wade*.<sup>269</sup> The very legitimacy of the decision had been criticized vigorously by many prominent academics.<sup>270</sup> Laurence Tribe, one of *Roe*'s defenders, conceded that it was exceedingly difficult to justify.<sup>271</sup> In short, there was no mainstream position on *Roe*. Thus, it is highly unlikely that Judge Bork's opponents could have characterized him as such a threat to American justice if he had limited his criticism to the significantly more controversial *Roe* decision. In a very insightful letter to the committee, Professor Frederick Schauer of the University of Michigan School of Law, who opposed Judge Bork arguing that his views on the first amendment were "beyond the pale," admitted that both *Griswold* and *Roe* were "tough cases." He cautioned that "the charge that Judge Bork is in some way radically out of step with almost all of his academic professional peers is at the least, seriously overblown."<sup>272</sup>

Following the hearings, the senate subcommittee on the judiciary, by a vote of nine to five, recommended that the Senate reject the nomination of Judge Bork to the Supreme Court.<sup>273</sup> The majority

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265. See, e.g., *Bork Hearings*, *supra* note 61, at 5175-76; (statement of the Nation Institute); *id.* at 5270 (statement of the National Abortion Rights Action League); *id.* at 584-42 (statement of the NAACP Legal Defense Fund and People for the American Way); *id.* at 5894-97 (statement of Fay Wattleton, President of Planned Parenthood of America).

266. *Id.*

267. *Bork Hearings*, *supra* note 61, at 3104-06 (testimony of Prof. Kathleen Sullivan).

268. *Id.* at 1299 (testimony of Prof. Laurence Tribe); *id.* at 6101 (statement of various University of Texas law professors). See also R. BORK, *supra* note 93, at 291.

269. 410 U.S. 113 (1973).

270. See *supra* notes 150-54 and accompanying text.

271. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1351 (2d ed. 1988) ("by far the most troublesome in modern constitutional law").

272. *Bork Hearings*, *supra* note 61, at 6018 (letter from Prof. Frederic Schauer).

273. *Report of the Senate Committee on the Judiciary on the Nomination of Robert Bork to the Supreme Court*, *supra* note 61, at 6188 [hereinafter *Report*].

issued a ninety-nine page report in support of its recommendation, covering the entire range of objections raised against the nomination. However, twenty pages near the beginning of the report were devoted to a critique of Judge Bork's unwillingness to recognize unenumerated fundamental rights,<sup>274</sup> and his views on privacy.<sup>275</sup> The committee summarized Judge Bork's position that the Court lacked the authority to recognize unenumerated fundamental rights and that the ninth amendment did not provide authority for such an enterprise.<sup>276</sup> It relied on testimony from Professors Tribe, and Kurland, former Secretary of Transportation Coleman, and others for the proposition that this was an unduly narrow and historically inaccurate view of constitutional liberty and the Court's role in defining it.<sup>277</sup> The committee then quoted several Supreme Court Justices including those who favored judicial restraint (Harlan, Black, Frankfurter, Powell and Burger) in support of the view that substantive due process was constitutionally legitimate.<sup>278</sup>

The committee summarized Judge Bork's frequent attacks on the *Griswold* privacy right.<sup>279</sup> The section of the committee report on privacy focused almost exclusively on *Griswold*,<sup>280</sup> arguing that even if Judge Bork accepted *Griswold* as precedent, as he had indicated in his testimony that he well might, he would be unwilling to expand the doctrine in future cases.<sup>281</sup> It concluded that

Judge Bork's position on the right to privacy exposes a fundamentally inappropriate conception of what the Constitution means. Judge Bork's failure to acknowledge the "right to be let alone" illuminates his entire judicial philosophy. If implemented on the Supreme Court, that philosophy would place at risk the salutary developments that have already occurred under the aegis of that right and would truncate its further elaboration.<sup>282</sup>

Several members of the majority added their own concurring opinions to the report. In a rather lengthy statement, Senator Leahy placed great weight on Judge Bork's continuing criticism of *Griswold* and the privacy decisions as reason for voting against the nomination.<sup>283</sup> In response to Bork's contention that judicial recognition of unenumerated fundamental rights was an "utterly subjective enterprise," Senator Leahy responded that "the role of a Justice of the Supreme Court in these cases is to draw lines . . . relying on a keen intellect, a deep understanding of history, a sense of justice, and that

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274. *Id.* at 6194-6207.

275. *Id.* at 6216-22.

276. *Id.* at 6195-99.

277. *Id.* at 6199-6206.

278. *Id.*

279. *Id.* at 6216-22.

280. *See id.* at 6216 & 6218 (it cited *Roe* only in passing).

281. *Report, supra* note 273, at 6220.

282. *Id.* at 6222.

283. *Report, supra* note 273, at 6298-6301 (statement of Sen. Leahy).



undefinable mixture of prudence and boldness we call good judgment."<sup>284</sup> Without explicitly mentioning *Griswold* or the right of privacy, Senator Spector noted that he was troubled by Judge Bork's "insistence on Madisonian majoritarianism in the absence of an explicit constitutional right to limit legislative action."<sup>285</sup> He noted that the decision was "especially hard" but concluded that he had decided to vote against Judge Bork.<sup>286</sup>

The five senators in the minority filed a ninety-five page response.<sup>287</sup> They attempted to refute the case against Judge Bork, point for point, devoting nine pages to the right of privacy.<sup>288</sup> The minority response summarized Judge Bork's position on *Griswold*, the right of privacy and fundamental rights and pointed out that Justices Stewart and Black shared that position in *Griswold*. The minority also pointed out that several justices including Scalia, Rehnquist, O'Connor and White have questioned expansive application of the right to privacy in the contexts of abortion and the criminalization of homosexual conduct.<sup>289</sup> Quite correctly, the *Minority Report* recognized that, as Bork had explained, the crucial issue is not merely whether the Court can recognize unenumerated rights but rather how the Court can legitimately justify recognizing some, but not other, alleged fundamental rights.<sup>290</sup> In other words, why is the right of privacy of *Griswold* and *Roe* legitimate when the right of contract of *Lochner* and *Adkins* is not?<sup>291</sup> In that regard, the *Minority Report* cited some of the leading scholars who contend that the right of privacy suffers from the same vices as *Lochner*.<sup>292</sup> The nomination of Judge Bork was ultimately rejected by the Senate.<sup>293</sup>

There is no way to tell exactly how much Judge Bork's persistent attacks on *Griswold* contributed to his rejection by the Senate; however, it is fair to say that it was a significant factor. *Griswold* was a useful case for Judge Bork's opponents because its general right to privacy and its specific holding with respect to the use of contraceptives by married couples could be presented to the public at large in a comprehensible and appealing manner. The opposition portrayed Judge Bork as a threat to privacy; he could only defend himself by talking about confusing notions such as substantive due process, *Lochner*, neutral principles, and the Madisonian model.<sup>294</sup> In

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284. *Id.* at 6299.

285. *Report, supra* note 273, at 6306 (statement of Sen. Spector).

286. *Id.*

287. *Report, supra* note 273, at 6308-6403 (minority report).

288. *Id.* at 6346-55.

289. *Id.* at 6349-50.

290. *Id.* at 6350-51.

291. *Id.* at 6351. See also Kauper, *supra* note 8, at 253.

292. *Report, supra* note 273, at 6352.

293. Greenhouse, *Bork's Nomination is Rejected*, 58-42; Reagan "Saddened," N.Y. Times, Oct. 24, 1987, at 1, col. 3.

294. See *supra* note 229 and accompanying text.

retrospect, it became clear that Judge Bork may have spent too much of his career attacking the wrong case. *Roe* had not quite arrived when Judge Bork leveled his initial attack on *Griswold* in 1971. However, had he directed more of his criticism at *Roe* rather than *Griswold* in the early eighties, he would have presented a smaller target, since *Roe* was significantly more controversial.

That is not to say that Judge Bork was incorrect in his assessment of *Griswold*. A funny thing happened on the way to the Senate—*Griswold*'s status as an accepted precedent became significantly more secure. *Griswold* had been subjected to some criticism from the outset. For many, it was tolerated as a somewhat bizarre decision emblematic of Justice Douglas' eccentricities. On its facts it did little harm, and until *Roe* was decided and challenged it may have seemed little more than a law professor's dream come true. However, from 1973 on, an attack on *Griswold* became an attack on *Roe* and that was a matter of serious concern for many people. By challenging *Griswold*, Judge Bork provoked those who were committed to the defense of constitutionalized abortion rights; yet, in the ensuing battle, *Roe*'s defenders could focus on *Griswold*. As a result, Judge Bork was not able to fully exploit *Roe*'s weaknesses. Opponents of Judge Bork such as Professors Tribe, Sullivan, Richards, and Kay apparently were successful in convincing a majority of the senate committee that it could use allegiance to *Griswold* as a useful litmus test for membership in "the mainstream" of constitutional thought. At least up to the time of the hearing this was clearly an exaggeration, if not an outright misrepresentation.<sup>295</sup> If the Bork hearings accomplished anything beyond the rejection of the Bork nomination itself, it was the enshrinement of *Griswold v. Connecticut*<sup>296</sup> as "a fixed star in our constitutional" firmament,<sup>297</sup> at least on its narrow facts. Who would now question the case, at the risk of immediate expulsion from the fraternity of solid mainstream constitutional thinkers?

Despite arguments to the contrary by some of Judge Bork's opponents,<sup>298</sup> the hearings should not be interpreted as a "constitutional moment" during which the public embraced freewheeling unenumerated fundamental rights jurisprudence.<sup>299</sup> As the committee report demonstrated, bits and pieces in support of unenumerated

295. See Nagel, *supra* note 169, at 290-91.

296. 381 U.S. 479 (1965).

297. See West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

298. See Chemerinsky, *The Constitution is not "Hard Law": the Bork Rejection and the Future of Constitutional Jurisprudence*, 6 CONST. COMM. 29 (1989).

299. See generally Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (theory that on occasion "the people amend" the Constitution informally during "constitutional moments"—periods of general heightened awareness of constitutional matters). In discussing the rejection of the Bork nomination itself, Professor Ackerman notes that it would be far more difficult to interpret the Bork rejection as a public validation of all of the various legal doctrines and approaches that Judge Bork criticized than as a public rejection of the President's attempt to "carry the People with him in his critique of the Warren and Burger Courts" through

rights methodology can be found in a wide array of sources, spanning a lengthy period. As a counterpoint, however, the demise of *Lochner*, the decision in *Bowers v. Hardwick*,<sup>300</sup> and the uncertain fate of the constitutional right of privacy in the area of abortion caution that the judicial debate is far from settled. Considering that the newest participant in the debate on the Court, Justice Kennedy, may share many of Judge Bork's views,<sup>301</sup> it would not be surprising to find that a present majority of the Court finds itself closer to the position of Judge Bork than to that of his critics.<sup>302</sup>

It is probable that a majority of the constitutional academic community supports the type of unenumerated rights interpretation that Judge Bork abhors. Even so, fierce divisions exist with respect to the source of such rights and the criteria for applying them. And there remain strong dissenting voices.<sup>303</sup> A review of the United States Supreme Court advance sheets along with several of the leading law reviews over the past year as well as the next will reveal that the culmination of the Bork hearings scarcely concluded this argument.

## CONCLUSION

Twenty-five years after Professor Harper introduced us to the right of privacy in *Griswold*, its legacy is great.<sup>304</sup> It created a constitutional right which has had minimal doctrinal significance, but major rhetorical and symbolic power. It reawakened interest in the ninth amendment, although the Court itself has declined to follow through. It re-established substantive due process as a viable, though controversial, constitutional doctrine. It fueled the ongoing academic and judicial debate regarding the legitimacy of recognizing unenumerated fundamental constitutional rights. It ultimately resulted in a lengthy and controversial line of cases protecting certain decisions pertaining to contraceptive use and distribution and abortion rights. It contributed significantly to the Senate's rejection of the nomination of Judge Robert Bork to the United States Supreme Court and in the process became the "most talked about case in America."<sup>305</sup> Who would have believed such a wide array of provoking social and political issues would develop out of one man's determined challenge to Connecticut's "uncommonly silly law?"

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a "transformative appointment." Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1179 n.20 (1988). See G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 7 (Supp. 1989) (alternative assessments of the meaning of the Bork rejection).

300. 478 U.S. 186 (1986).

301. In *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040 (1989), Justice Kennedy joined the plurality opinion of Chief Justice Rehnquist which arguably undermined the foundation of *Roe v. Wade*, 410 U.S. 113 (1973). Judge Bork has indicated that he would vote to overrule *Roe*. R. BORK, *supra* note 93, at 116.

302. See Chemerinsky, *The Supreme Court, 1988 Term: Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 44, 45 (1989).

303. See *supra* notes 146-52, 154, 156, 160 and accompanying text.

304. 381 U.S. 479 (1965).

305. See *supra* note 233 and accompanying text.