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# Constitutional Privacy

PHIL 102

Ethics, Politics, & Law

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# The Dissenters

- Justice Hugo Black
- Justice Potter Stewart
- Constitutional conservatives
- Each wrote a dissenting opinion
- Each signed on to the other's
- Law is silly, asinine, etc.
- Democratic majorities have the right to pass silly laws
- No right to privacy in the Constitution



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## D Penumbra Argument

- H • Justice William O. Douglas
- I • Opinion of the Court
- L • Only one other taker
- 1 • Charge of “Substantive Due Process”
- 0 • “specific guarantees ... have penumbras, formed by emanations from those guarantees that help give them life and substance”
- 2 • “zones of privacy”
- [Marital] privacy is to be found in the penumbra of the Bill of Rights
- Implications of the argument



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## D Ninth Amendment Argument

- H • Arthur Goldberg
- I • Two other takers
- L • Law journal article
- 1 • ACLU’s strategy
- 0 • Sympathetic to the 14<sup>th</sup> Amendment argument
- 2 • [Marital] privacy is an unenumerated right under the Ninth Amendment

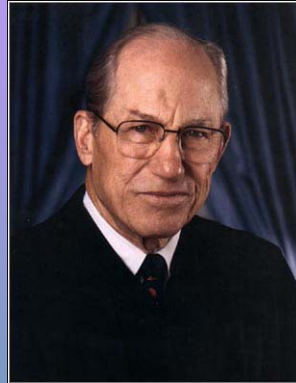


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## Procedural Due Process Argument

- Justice Byron White
- Procedure/substance
- Proper legal procedure
- Connecticut law is incoherent
- State's oral argument
- Purpose of the law
- Protecting the integrity of marriage makes no sense when the law is applied to married couples

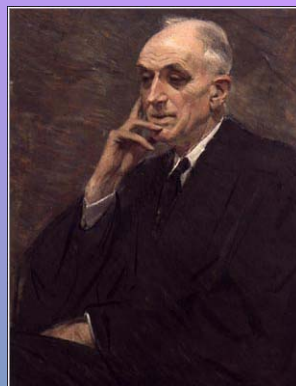


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## Substantive Due Process Argument

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



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## D History of the Article

- H • Law journal submission
- I • *Yale Law Journal*
- L • The tease
- The rejection
- Revision
- 1 • Submission to *Law and Philosophy*
- 0 • Surprise phone call
- Citation



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## D Three Views of Constitutional Privacy

- H
- I • Problem of constitutional language
- L • Legal realism
- “Judicial activism”
- 1 • Constructivism
- 0
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# Constitutional Interpretation

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- Plain meaning
- Original intent
  - Whose?
  - How do we know?
  - Abstract/concrete intention
- Non-originalism
- Ronald Dworkin
- Law as integrity
- Natural law?



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# *Griswold v. Connecticut*

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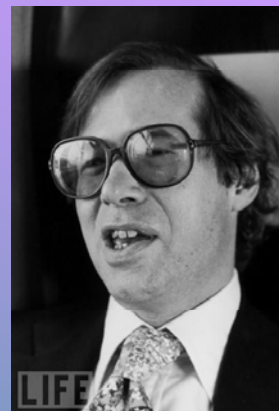
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- Dissenters
- Penumbra
- Ninth Amendment
- Substantive Due Process
- How to defend any of these?
- Constructive interpretation
  - Constitutional language
  - Constitutional precedent
  - What casts all of this in the “best” light?



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# What Is Constitutional Privacy?

- Fourth Amendment
- Fourteenth Amendment
- Privacy from search and seizure
- Privacy to do things
- Equivocation?
- My attempt at a unifying model

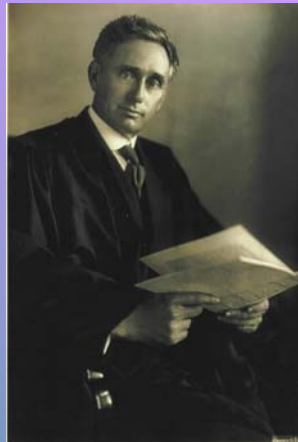
All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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# Privacy

- Being let alone
- Liberty
- Information
- None of your business
- Immunity from the judgment of others
- Constitutional privacy
- Immunity from the judgment of the state



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