Doing Without Privacy

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It's not often you find a real bargain in legal theory. But then it's not often you find a retailer like John Hart Ely.

A theory, as the Greek suggests, is a way of looking at something. The grander the theory, the more it takes in. The costs of inclusion, however, can go pretty high; to take a lot in you may have to leave a lot out. So long as it is no more than a stray detail or two, you're doing well. But with raw material as untidy as constitutional law, details tend to fall like trimmings in a garment shop. There isn't much in the way of really grand theory because whatever there is—or has been—costs, in this sense, so dearly. More or less everything is left out; it is all hole, as the politicians now say, and no doughnut.

Along comes Ely, then, with the bargain of the century. I can give you 40-odd years of constitutional law, he says, in one package. It's called (I know the tag is cumbrous) representation-reinforcement.[1] We'll call it (even the top salesman can use some help) the theory of *fair process,* understanding by that elections as well as other processes of government.[2] It makes sense of all the major cases in criminal procedure, voter representation, and race discrimination. And what is more, it allows us to build from these towards appealing results in sex discrimination and even homosexual rights. The cost? Simple and, to Ely, trivial: doing without privacy.

This essay is a reflection on that prospect.

I. INTERPRETIVE EMBARRASSMENT

Had it ended with *Griswold v. Connecticut*,[3] in 1965, the right to privacy might have gone largely without criticism. Connecticut's birth control statute was even then a matter of no great moment. True, other states had similar statutes, but these went mostly unenforced, and had it not been for the concurrence of general legislative prudery and particular religious doctrine, no one of any consequence would have given a hoot.[4] The right itself is hard to define, but taking it at its result—a right in married people to use contraceptives with impunity—it hardly shakes the foundations of the Republic.[5]

But of course it did not end there. An old Greek proverb has it that the adulterer and thief always win in the end because they are always more

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1. J. ELY, DEMOCRACY AND DISTRUST 88 (1980) [hereinafter cited as ELY].

2. *Id.* at 73–134.

3. 381 U.S. 479 (1965).

4. As it was, the wave of criticism took time to mount. But since Roe v. Wade, 410 U.S. 113 (1973), it has become more and more imposing. *See, e.g.*, Posner, *The Uncertain Protection of Privacy By the Supreme Court*, 1979 SUP. CT. REV. 173.

5. Nor do abortion rights, of course. But the contrast between these two privacy decisions could hardly be more dramatic than in the political reactions to them.

patient—and, we might add, more avid. So it was, some will say, with sex and the Constitution; one way or another privacy would win out over old-time virtue. Thus even the Court was embarrassed, not long after *Griswold*, when confronted with a case that *seemed* to raise the question of sex and the single girl. The embarrassment in *Eisenstadt v. Baird*[6] was doctrinal, of course, not sexual. But it was severe enough to prompt the majority of Justices into a relentless (and somewhat empty) equal protection analysis that would nearly avoid privacy altogether; the majority opinion in *Eisenstadt,* though written by Justice Brennan, and despite its if-privacy-means-anything rhetoric, says nothing at all about the extent of the *Griswold* right. *If* such a right exists, *then* equal protection requires an even hand. Yes, but does it exist? And if it does, does it invalidate restrictions on distribution? *Eisenstadt* does not say. The case is decided, as it was argued, in the alternative.

The *Eisenstadt* embarrassment characterizes privacy adjudication from beginning to end. As early as *Skinner v. Oklahoma*,[7] Justice Douglas preferred a flourish of rhetoric on the underlying issue—can the state sterilize felons?—to a decision on that basis.[8] Careful equal protection analysis yielded little justification for Oklahoma's practice of sterilizing in some categories of multiple conviction but not others: three-time chicken thieves but not three-time bank embezzlers. So the imperative of judicial economy alone, if taken seriously enough, *required* some such purely equal protection decision. The result after all is enough for the felons, who escape sterilization, but not too much for Oklahoma, which retained, in Justice Jackson's classic phrase of more or less the same period, the ability to "deal with the subject at hand."[9] Why use more constitutional power than is needed? Oklahoma may either sterilize all of its felons or none of them, the Supreme Court says. And that is all it says.

By the time of the Welfare Abortion Cases, however, such judicial economies begin to look less penny-wise than pound-foolish. Do we or don't we have a privacy right and what is its reach?

The decisions say that we do, that much is plain from *Griswold*,[10] from *Roe*,[11] from *Whalen*,[12] from *Moore*.[13] But an obvious unease haunts these decisions. They seem to suffer from either too much concreteness—piling up bits and pieces of text into jerrybuilt concepts—or too little. Of late it is rather less than more; the recent opinions tend to resolve constitutional questions in summary abstractions, "broad enough to encompass" the particular right at stake.[14] What hampers these efforts in constitutional decisionmaking is an

6. 405 U.S. 438 (1972).
7. 316 U.S. 535 (1942).
8. *Id.* at 541.
9. Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).
10. Griswold v. Connecticut, 381 U.S. 479 (1965).
11. Roe v. Wade, 410 U.S. 113 (1973).
12. Whalen v. Roe, 429 U.S. 589 (1977).
13. Moore v. City of East Cleveland, 431 U.S. 494 (1976).
14. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

interpretive embarrassment. There is still no better place to examine it than in the Douglas opinion in *Griswold v. Connecticut*.

Justice Douglas' majority opinion begins with a commonplace of what we may call, with irony but not without respect, the "class of '37": "Overtones of some arguments suggest that *Lochner v. New York* . . . should be our guide. But we decline that invitation . . . ."[15] Why? Well, of course, because "[w]e do not sit as a super-legislature . . . ." "This law, *however*," Douglas writes in the next sentence, "operates directly on an intimate relation of husband and wife . . . ." That "however" functions, if you will, as the blush to the interpretive embarrassment itself. What *Lochner* did, according to Douglas, was to legislate—to freely "determine the wisdom, need, and propriety of laws"—in certain areas: economics, business, "social conditions" generally. But *Griswold*, as his "however" suggests, presents another "area" altogether. The sexual intimacies of marriage, however much they partake of "social conditions" (or even economics), are simply not in the same category or even on the same scale as the manufacturing and marketing failures that prompted, say, the National Industrial Recovery Act.[16] Yet there is enough to the analogy between *Griswold* and *Lochner* to cause embarrassment.

It is, like all embarrassment, rooted in the unwilling or unwitting violation of an important convention. Here the convention is simply that there must be a text for any assertion of the power of judicial review. Going without a text is like going naked. While some bold souls can happily defy such a convention—"there's more enterprise in walking naked" wrote Yeats[17]—judges for the most part (and thank Heaven) cannot. To say that the king has no clothes, after all, is not to say that he is no longer king; but to say that the judge has no text is to say he has no authority at all. *Writtenness* plays a central part in our constitutional tradition. A judge without a text is not only streaking, if you will, he is usurping.

Now Douglas, whose reputation suffers from both too much praise and too little,[18] deserves at least as much credit as his academic critics for his acute sense of the interpretive embarrassment. And so he begins his affirmative argument in *Griswold* with "things not mentioned":

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language.[19]

These are examples, of course, but their number can easily be expanded, as

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15. *Id.* at 482.

16. National Industrial Recovery Act, ch. 90 48 Stat. 195 (1933).

17. YEATS, *A Coat*, in COLLECTED POEMS 125 (8th printing 1962).

18. *Compare* Countryman, *Justice Douglas and Freedom of Expression*, U. ILL. L.F. 301 (1978), *with* Dworkin, *Dissent on Douglas*, NEW YORK REVIEW OF BOOKS, February 19, 1981, at 3.

19. *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

both Thomas Grey and Jesse Choper have recently shown.[20] The Douglas point is obvious but no longer trivial: in the great body of settled constitutional precedent some important rights appear—whether to appointed counsel or integrated schooling—which are not "mentioned"[21] in the body of the Constitution or its amendments. Call this the first Douglas proposition, then, and simplify it: there *are* unstated constitutional rights.

Here we meet the first blush of the interpretive embarrassment, but it is no more than a blush, for at this point the text itself is embarrassing. The ninth amendment, as Ely has argued so well,[22] amply clothes this first Douglas proposition. Still the proposition comes to something almost entirely negative. It does not (and cannot) establish *which* unstated rights belong in constitutional jurisprudence. Some do, no doubt, but which?

The cases Douglas cites suggest no answer here, unless we take it from his citation that he favors those unstated rights closely *allied* either with freedom of expression—the most fundamental political right—or freedom in child-rearing—arguably the most fundamental personal right.[23] In part, then, Douglas makes out the contrast with *Lochner* in terms of the *subjects* of invalidated regulation rather than the *technique* of invalidating interpretation. Is this the whole burden of the very self-conscious distinction he makes between his own effort in *Griswold* and *Lochner*? Critics have said as much but they are pretty plainly wrong.[24]

Douglas suggests a second proposition that is actually quite rigorous (and surprisingly conservative) in its plausible applications. He spoke, of course, in dense, almost astrological obscurity, of penumbras and emanations: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[25] The simple point he would make to his critics on and off the Court is that "without . . . peripheral rights . . . specific rights would be less secure." This puts it weakly as well as obscurely. To strengthen "specific" rights, an indefinite if not infinite number of "penumbral" rights might be invented. How are we to settle on those that belong, as it were, to the unblushing Constitution?

The answer lies, I think, in Douglas' use of one of the great freedom of association cases, *NAACP v. Alabama*.[26] When the claim was first made that Alabama sought membership lists, under its general statute for the regulation of out-of-state corporations,[27] in order to suppress the NAACP, it met two

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20. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 70–79 (1980); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 716–17 (1975).

21. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

22. ELY, *supra* note 1, at 34–38.

23. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

24. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7–11 (1971).

25. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

26. 357 U.S. 449 (1958).

27. *Id.* at 451.

sharp rejoinders: first, that Alabama had indeed provided *equal* protection (or regulation) to the NAACP, since all such incorporated private associations were required to file membership lists; and, second, that Alabama had not passed a law "abridging the freedom of speech," since the NAACP's discussions or opinions, before or after filing, were no part of the regulation in question. In fact, of course, knowledge of Alabama's motivation would have given force to either charge. But motivation may be well hidden, and in this case was.[28]

The notion of association bridges both the equal protection claim and the free speech claims. Certain people are being picked out for abuse but also certain ideas. A conceptual bridge between two valid constitutional doctrines is not itself necessarily a valid constitutional doctrine: I might very well bridge liberty and equality, for instance, with Rawlsian principles of protecting the neediest, without thereby making out a persuasive principle for welfare rights adjudication.[29] To the extent (and I suspect it is large) that Douglas had some simple *bridging* technique in mind for privacy—as the bridge between various amendments, say—he must be wrong as a matter of technique. It proves too much; it proves even *Lochner*.[30]

But the second Douglas proposition can be made into much more than a simple bridge. The *Alabama* decision in fact rested on the *necessity* of confidentiality of membership for the continuance of the activities of the local NAACP. True, other, equally regulated private associations would have flourished in spite of the regulation. You cannot gainsay its formal equality. But informally, if you will, the NAACP would have lost most of its members. Few white Alabaman employers wanted black people with "uppity ideas," never mind an uppity organization to implement them. These ideas themselves, moreover, were hardly entertainable in the Alabama of the 1950s without some such confidential forum as the NAACP in which people could nurture and develop them—as well perhaps as put them into practice. It is true that the overbreadth doctrine, invalidating regulatory "*means* which sweep unnecessarily broadly," probably suffices as constitutional doctrine here. But the point of that doctrine, as Harlan articulated it in another notorious Alabama case, is that such regulations "invade the area of protected freedoms."[31] And it is not simply to bridge the race and speech problems of the NAACP to suggest that the confidential association of members is itself protected by the Constitution. In cases such as this, if you do not protect the associational activity you will lose all effective protection for the expressive activities. So understood, the second Douglas proposition is that among the unstated rights in the Constitution must be those that are *necessary* for the exercise of those that are stated.

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28. *Id.* at 465.
29. J. RAWLS, A THEORY OF JUSTICE 151–52, 250 (1971).
30. Lochner v. New York, 198 U.S. 45 (1905).
31. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 370 (1963).

If we begin with speech, then, we may say that to prevent, say, a despotic majority from allowing us our free speech only in insulated speech boxes or on isolated promontories (or, in Alabama, in absolutely exposed ones), we must have free association as well. And given such a freedom of association, in Alabama in the late 1950s, we must have some protection from its effective repression even by general and "rational" regulation in breach of confidentiality.

There are, however, three caveats to this interpretive technique. First, we must take care with the concept of necessity itself. Unless we can specify a legal or constitutional necessity as opposed to a material one—such as food or shelter—we will have a notion too big for our interpretive breeches.[32] "Necessity" in the broadest sense is in fact much less narrow a concept than that of the conjunction or bridging of two rights. If I cannot *speak* freely unless I can *eat* freely too, then I have shown a "necessity" that a right to free food comes along with a right to free speech, and so with free housing and free schooling. How then are we to narrow this notion of necessity? The answer is obvious, but tricky. The necessity at issue is negative; it is simply a requirement that the government *not* take away with the left hand what it has given with the right. Alabama, after all, had a suspect motive in what it required of the NAACP. Or did it? The state claimed in its argument and briefs that "whatever repressive effect compulsory disclosure of names of [NAACP's] members may have upon participation by Alabama citizens in petitioner activities follows not from *state* action but from *private* community pressures."[33] Shift your suspicion, in other words, to those who abuse the public record. But this is not to say that we have to shift it away from those who make that record. The state is an agent in all this, an indispensable one. "[I]t is only after the initial exertion of *state power*," wrote Harlan, "that private action takes hold."[34] The right to privacy in association runs against the *state's* actions—the only legitimately coercive actions here—and not against the actions of its private citizens. Thus, a constitutional "necessity" is one of *noninterference* only on the part of the state. This is not to lay to rest the real difficulties of the concept. Counter-examples come quickly to mind; what are we to say, for instance, of "necessity" in the divorce fees cases or the welfare residency cases? The point is that a core concept is available here and that, by and large, it works.

Second, however, comes the difficulty of distinguishing the *degrees* of necessity, in particular the difference between an unstated right that is helpful (or even needful) in the exercise of a stated right and an unstated right that is really necessary. Douglas wrote of "penumbras . . . that *help* give [the stated rights] life and substance."[35] There is only one way around this. We cannot

32. *See* Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. (1969).

33. NAACP v. Alabama, 357 U.S. 449, 463 (1958).

34. *Id.*

35. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

play Chief Justice Marshall in *McCulloch v. Maryland*.[36] The necessity at issue has to be real. In this at least we want strict construction; otherwise we will have no fixed principles at all. Is the unstated right in question one without which the stated right will go unexercised and unexercisable? Evidence to answer this question will vary in kind and quality. In the *Alabama* case, as in many of the race cases following *Brown*, the Court seems to have taken a sort of informal notice of prejudice in the state's legislative and executive chambers. Rhetoric in Douglas' *Griswold* opinion—"Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"[37]—notices the likely but unproven and unevinced consequences of enforcement of statutes like Connecticut's.

The *Alabama* case (and perhaps *Griswold* too) is one in which an agency of state government burdens given rights to free speech by general statutes and procedures more or less unexceptionable at a certain level of abstraction. Obviously, Alabama can ask for detailed information about foreign corporations within its borders (and Connecticut can search bedrooms to enforce its criminal legislation). What the Court's "notice" does, however, is to force the argument onto different *levels* of abstraction from those preferred by the state in its defense of regulation. These levels are both higher—what is the overall purpose and meaning of the first amendment?—and lower—what becomes of the NAACP in Alabama in 1958 when it hands in its membership lists? At whatever level the analysis occurs, the judgment of constitutional "necessity" remains disputable. This leads me to a third caution about the Douglas technique in *Griswold*.

To the extent that a majority of Justices see a constitutional necessity in the guarantee of an unstated right, they may seem to have their own way with the Bill of Rights. Or so thought Justice Black:

> One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning.[38]

Privacy, as Black then pointed out, is the perfect vehicle for such expansion and contraction. The real issue, he argued, is not constitutional necessity but constitutional substitution—"the use of the term 'right of privacy' as a comprehensive substitute for the Fourth Amendment's guarantee against 'unreasonable searches and seizures.'"[39]

Putting it this way begs some of the questions. *If* privacy merely *substitutes* for something else, then we are kidding ourselves when we get from privacy something over and above what we get from, say, the search and

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36. 17 U.S. (4 Wheat.) 316 (1819).
37. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
38. *Id.* at 509 (Black, J., dissenting).
39. *Id.*

seizure clause. But this perplexity boomerangs: would Black really suggest, after joining the *Alabama* decision, that "association" simply stands in for "speech"? If not, it is hard to know what he means when he says in *Griswold* that "First Amendment freedoms . . . have suffered from a failure of the courts to stick to the simple language of the First Amendment . . . instead of invoking multitudes of words for those the Framers used."[40]

Ely and others among us recently have found themselves less begrudging in recalling Justice Black "as the quintessential interpretivist."[41] Thomas Grey, who coined that phrase, writes more warily of "the great power and compelling simplicity" of Black's view of constitutional adjudication. True enough. But Justice Black, for all his power and charm, was still dead wrong to think that "sticking to the simple language" of the Constitution was enough for him—or for any other Justice, judge, or lawyer. By this conceit, Black had it that words do the work of ideas—or better the work of judges. His inconsistency in this was no less patent than frequent; witness the idea of freedom of association itself.

Over against this, the restated Douglas rule addresses ideas and not words (except insofar—and I suppose it is most or all of the way—as words are and are understood to be the carriers of ideas). Black's quarrel is not with the substitution of words but the substitution of ideas—or, more precisely, with the implication and extension of one idea in another. But unless he would have *no* such implications and extensions at all, the proposition is absurdly antithought. We will not get anywhere with constitutional interpretation unless we begin with the freedom to *think* about what it means; is freedom of association somehow implied by freedom of speech? Whatever else it is, Douglas' rule of necessity is a technique for disciplining thought and interpretation, for confining it within a range of ideas, and for making sure that the original ideas are put into modern practice.

All this is something of a prologue, however, to the actual argument in the Douglas opinion. But what follows is immensely dissappointing. Why and where *is* privacy a "necessary" part of the constitutional scheme? Here Douglas'—and everyone's—real trouble with privacy begins. "Various guarantees create zones of privacy," he wrote,[42] in one sentence that even Black might concede. But then came what Grey has called the "shuffle":

> The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of the right to privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.[43]

40. *Id.*
41. ELY, *supra* note 1, at 2.
42. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
43. *Id.*

To this Douglas adds, incongruously, the ninth amendment, which, whatever else you may say, most emphatically does not "create a zone of privacy." But do the other amendments? Yes and no.

If we mean by "zone of privacy," a figurative or literal place into which the government should not intrude without substantial justification, then the amendments cited suggest at least two: first, the literal place that is a private house—together perhaps with the persons, papers, and effects within it; and second, the more figurative place that is the mind in its convictions and impressions.[44] These "zones," however, are of quite disparate kinds. The first amendment *does* seem both to afford and to require, as a student note argued several years ago,[45] an ancillary set of protections for the privacy or confidentiality of thought as well as discussion. The NAACP case plainly protects that discussion for which association is only the occasion. And, on a strict account, freedom of thought *is* necessary to freedom of discussion. This applies the Douglas rule in an attenuated but not entirely hypothetical fashion; *Stanley v. Georgia*[46] is just such a case. But *Stanley* was at once a troublesome case—involving concededly obscene materials kept *at home*—and one whose outcome might well have varied without *Griswold*'s "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[47] Barring the technology of 1984, privacy of thought remains a sort of natural condition. We don't know and can't know, without some voluntary or involuntary sign, what anyone else is thinking. True, the fifth amendment will not allow the government even to try to find out by force what *crimes* are on your mind. But the relation between the very specific fifth amendment "privacy of thought" and the very general first amendment guarantee of this concept is precisely the problem.

At first glance, anyway, these very disparate ideas seem yoked by anything but a "necessity," whether logical or not. Thus it seems easy enough to imagine the one without the other; or does it?

You can certainly *conceive* of a constitutional regime that coerces confessions but not thought more generally—or, to put it the other way, coerces thought generally but not confessions in particular. But how fanciful is this conception? Logicians argue over possible worlds and this is one. But lawyers argue over the one practical world in which we live, and here the relation between the foreground right against self-incrimination and the background right against coercive self-revelation, is close, very close. Necessity is not too strong a word for the practical and political connection between them. In fact, it takes a rather hardy positivism—such as Justice Black's—to deny it. You can have one without the other, of course; meaning, you can conceive of it. But no constitutional system that respects the one can scorn the other. To do

44. Note, Roe *and* Paris: *Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161 (1974).
45. Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462 (1973).
46. 394 U.S. 557 (1969).
47. *Id.* at 564.

so would be to jeopardize the practice in question by taking away either its foreground application or its background context. The problem is not the mutual and reciprocal "necessity" of these two rights. It is the question *what else* that necessity implies. Between freedom of thought and freedom from coerced confession lie any number of possible freedoms. The fallacy of the "bridging" technique is nowhere more obvious; perhaps it is the right to rebellion (which Justice Douglas flirted with) which links them. How, in any case, is privacy—in the requisite sense of a freedom in the consensual intimacies at least of marriage—to prove itself the constitutionally favored relation or concept? Here Douglas' ingenious handiwork breaks down altogether. Only the rhapsody on marriage—"a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred"[48]—saves an opinion whose concepts fall suddenly in a heap. "As well him as another," Molly Bloom said of *her* sporadic companion in "coming together."[49] As well privacy, you may say, as any other right; as well *Griswold* as *Lochner*.

II. EQUALITY'S GAP

Ely writes at the end of his book of a law prohibiting the removal of gall bladders.[50] He lustily engages one or two of his past critics in a sober fools' dialogue on its constitutionality. At bottom, the contest is between improbability and absurdity. For Ely, to paraphrase Justice Black, would like to rid himself of his gall blader—presuming it is ailing—as soon as the next person; to him the hypothetical law is fully as ridiculous as Connecticut's birth control statute was to the most emphatically dissenting Justice in *Griswold*. But it is also a wildly improbable piece of legislation:

> "I don't think that law is unconstitutional. Curtains for my theory? . . . Well, no, since that law couldn't conceivably pass."
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> "But suppose it did."
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> "Come on, it wouldn't. We've got problems enough without hypothesizing absurdities."[51]

So the question Ely puts is, why fight it? Why fight over milk that no one threatens to spill? This is Ely's only example, throughout the book, of a privacy right *explicitly* without constitutional remedy. He writes disparagingly of contraception, of course, and so presumably, a law against *that*—scarcely an improbability before *Griswold v. Connecticut*—would be upheld despite absurdity under Ely's jurisprudence. On abortion, moreover, we already know his views, and in some detail.[52] But Ely strongly implies—as in

48. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
49. J. JOYCE, ULYSSES 768 (1946).
50. ELY, *supra* note 1, at 182.
51. *Id.*
52. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

the case of homosexuals—that the compass of his vigorous equal protection includes all that was of significance in privacy.

We are left without constitutional protection for our gall bladders, our abortions, our contraceptives. Subtracting for improbability, is this such a loss?

From whichever side of the controversy, privacy as a right-to-abort is of the utmost significance. However, that significance is qualified both by the political and, if you will, the interpretive economies involved. Alaska, Hawaii, New York, and Washington all permitted abortions at the time of the *Roe* decision.[53] The other states did not; but the political struggle had really just begun. It is a fair speculation that California, Oregon, Wisconsin, and others would have quickly followed suit. There would, of course, have been terrific political controversy and resistance; France and Italy (which are in fact not much less Catholic than Pennsylvania or Connecticut) show the pattern.[54] The results would have varied from state to state and region to region. Still both controversy and variation are in themselves more than acceptable in a federal democracy. And to the cry of "choice now," the interpretive economy can respond only with what it has available. In the case of abortion this was very little.

Thus contraceptives and gall bladders. Although Ely does not deliver on *Pierce*[55] and *Meyer*,[56] not to mention *Zablocki*[57] and *Moore*,[58] it is clear all along that privacy is not taken as an indispensable ground in those decisions. For what decisions then do we need privacy?

Consider, for instance, a law to limit—by a tax penalty, say—the number of children born to any given family in a state or the nation.[59] This is no Holocaust, nor even necessarily Eugenics with a fearsome capital E. It is population policy. And given sufficient crowding and scarcity, it could be very good population policy at that. Is it also unconstitutional?

An equal protection analysis might well avail. Presumably few of the legislators shared (or expected to share) in the condition against which they legislated. To that extent, a suspicion might arise of a thoughtless or even invidious burden cast on those without sufficient strength in the legislature to resist its imposition. On the other hand, literal thoughtlessness—such that the legislature had *no* reason for its legislation—does not obtain here.

The absurdity of the near-universal prohibition on gall bladder removal is literal; it makes no sense whatsoever. At the same time its improbability gives us a set-off against its absurdity. It simply is not something we have to fear. But a law on compulsory birth control is anything but absurd. It makes quite

53. Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 372.

54. For discussion of France's abortion controversy, *see* New York Times, April 5, 1971 at 28, col. 2. For Italian furor over contraception, *see* New York Times, May 13, 1969 at 9, col. 1 and Mar. 17, 1971 at 3, col. 3.

55. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

56. Meyer v. Nebraska, 262 U.S. 390 (1923).

57. Zablocki v. Redhail, 434 U.S. 374 (1978).

58. Moore v. City of East Cleveland, 431 U.S. 494 (1976).

59. Griswold v. Connecticut, 381 U.S. 479, 496–97 (1965) (Goldberg, J., concurring).

good sense. And (more or less as a consequence) it is not half so improbable. Indeed, the world's largest democracy tried it within the last decade.[60] So let us assume its passage into law by rational legislators who see it as necessary, wise, or at least politic.

If this legislature, like most (but unlike Ely's), has its reasons, are they somehow suspect? In equal protection analysis that can only mean suspect as prejudiced against a group, however the group is defined. Race sets the pattern. In every case of legislation or governance in which race has a part, the government must in effect rebut a presumption of prejudice—not simply by way of reasons but of necessities of policy. It must remove any doubt that the legislation had to pass in this form.

Some, like Mr. Justice Rehnquist, would stop there, with race and its cognates exhausting judicial suspicion.[61] But most of us, with Ely, remain at least somewhat suspicious of other classifications as well. Gender and legitimacy are two that the Court acknowledges in practice; poverty and homosexuality two more that it does not.[62]

Now Ely would be generous in his equal protection sympathies and so in his equal protection suspicions. But, as he acknowledges, generosity comes easier than generalization. From race we have derived a suggestive but inconclusive set of the symptoms of prejudice. Thus, race is said to be visible (like height) and immutable (like genes). The suggestion is that race is an obvious natural condition. Suspicion follows nature (at least when nature is obvious). This works for gender but not for illegitimacy or "alienage," both of which are strictly legal conditions. It is also said of race, and much more truly, that it is an irrational stereotype.[63]

All of this seeks a legal key to the social lock of prejudice. It would be easier if the key were always biological or even statistical. But it cannot be. The inescapability of race—which is what we point to when we talk of its "visibility" or "immutability"—is not a natural but a social condition. And it is of a piece with its irrationality and unfairness as a category of distinction in American life.

Ely's great contribution is in the elaboration of a specifically *political* theory of prejudice. "The whole point of the approach is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending."[64] Even this *Carolene Products* sort of analysis remains indeterminate, however. The premise is that majorities can fend for themselves at election time. But what then of women, who have had an electoral but not a representative majority for much of this century? In the end, suspicion can be no less searching than prejudice itself: gross, chronic,

60. New York Times, Jan. 2, 1976 at 2, col. 4.
61. Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).
62. ELY, *supra* note 1, at 162–64.
63. *Id.* at 156.
64. *Id.* at 151.

hurtful prejudice poisons the well of majoritarian democracy. Then, says Ely, only then should courts intervene.

So here I put the case of families with more than two children. Is *that* suspicious? It depends again on what you mean. Like race, in one sense, the trait "fits" the mischief; these are precisely the human reproductive units—to put it in science fiction talk—without which no overpopulation would occur (barring more science fiction horrors). And many people, including most legislators in the jurisdiction, have taken a dislike to them. (One hears snide reference to rabbits and so on.) So there is literal prejudice. But people do not much cater to the carriers of disease either. Is it justified, this (pre-)judgment? It is surely an arguable, even reasonable, basis for legislating. Is it then suspect? If by that we mean, is it an example of a chronic and irrational stereotype, premised on an irrelevant but inescapable condition, and in long and frequent use as a device of oppression, the answer is no. The condition is visible, and even natural, but it is also highly (if newly) relevant to the important policy goal of preventing overpopulation. And while the burdened group is by definition a minority in the legislature, it is not a minority *particularly* needful or deserving—*as a minority*—of special judicial solicitude.

Under privacy precedents—or, if you will, "family" or "sexuality" precedents—there is a remedy, of course, and a potent one: the right asserted is fundamental and no less secure than the immunity to racial classification. But many or most of these privacy decisions are susceptible to equal protection analysis, on the model of *Skinner v. Oklahoma*.[65] In *Pierce*[66] and *Meyer*,[67] religious and ethnic minorities were subjected to legislation that, although general in terms, was quite specific—and concededly so—in its burden on them.[68] In *Zablocki v. Redhail* a poverty classification arguably obtained. Again the question is, do we *need* privacy?

We have a good instance of what I see as its constitutional necessity in the recent case of *Moore v. East Cleveland*.[69] East Cleveland sought to regulate occupancy of so called units of housing by units, if you will, of legal and blood relationship. Mrs. Moore's two grandchildren were cousins rather than brothers and so fell—barely—outside the range of permissible relationships for "single family occupancy." To justify such legislation, East Cleveland had to do little more than cite zoning precedents together with its interest in adequate housing for its residents. Overcrowding, in particular, makes out an ostensibly valid state interest of some importance, and has been successfully employed for breaking up or preventing "family" units of certain kinds.[70] Granting this, however, the application of the rule to Mrs. Moore and her

65. 316 U.S. 535 (1942).

66. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

67. Meyer v. Nebraska, 262 U.S. 390 (1923).

68. *See* Justice McReynold's discussion of possible inequality in *id.* at 398. *See also* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

69. Moore v. City of East Cleveland, 431 U.S. 494 (1976).

70. *Id.* at 515–16.

grandchildren surely flirts with absurdity. A sizeable lot surrounded the several-room house in which she lived with her two grandchildren and one of her sons. Would East Cleveland's City Council be trying by sheer force of legislation to turn itself into Lake Forest or Beverly Hills?[71]

This comes *close* to absurdity, but perhaps not close enough. In *Belle Terre v. Boraas*,[72] a group of four or five students were evicted from a rented single-family house in Long Island. "No big deal," we may say, identifying all too easily with these casual undergraduate nomads. All of them, no doubt, went on to pass their exams and take jobs that might well land them once again—only this time legally, with wife or husband and two kids in tow—in one Belle Terre or another. *They* had no constitutional recourse. The purpose of Belle Terre's regulation amply justified eviction for the majority of the Court.[73] Yet the numbers cannot have made the difference. What did?

Now equal protection without privacy is still a powerful tool of fair constitutional treatment. And even when no suspect categories apply, the requirements of "fit" between legislative purpose and legislative tag can smooth off the jagged edges of legislatively sanctioned coercion—even in housing.[74] It may be that East Cleveland's application of a residential zoning ordinance to Mrs. Moore falls even under this scrutiny. But how?

The seemingly obvious answer lies in the very detail of the restrictions imposed. For East Cleveland, only *certain* lines and degrees of relation, whether by blood or law, will satisfy zoning requirements. Grandchildren, in particular, must all be in the same *line* in order to live with their grandparents. Thus, two sets of grandchildren—even two sets with only one child in each, as with the Moores—cannot live together under one roof. At the very least, line-drawing of such nicety has about it the *feel* of arbitrariness. Thus Ira Lupu writes:

> In *Moore* . . . the "family" definition in the ordinance seemed perfect for invalidation as an arbitrary classification: the limitation of permitted resident grandchildren to those in one and only one descendant line is rather remote from a concern to protect the character of a single-family neighborhood.[75]

But just what are the ingredients of the suggested "remoteness" and "arbitrariness" here? East Cleveland can hardly deny that there is no inherent *necessity* in the particular distinction drawn. They might just as well have let cousins live together, but not, let us say, second cousins. Or if *that* leaves something to be desired in the way of reducing density, they might have let no grandchildren reside with their grandparents—as is said to be the case in certain retirement communities in the Southwest. An outright ban on grand-

71. Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 390.
72. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).
73. *Id.* at 8–10.
74. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949)
75. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1017 (1979).

children, says Lupu,[76] would at least leave the city "on *safer* equal protection ground."

Perhaps, but the prior question is, what exactly constitutes safe and unsafe "equal protection ground"? What standard of equality applies to the definition, for zoning purposes, of families or family units?

This is an important question because its answer gives the measure of what I will call the equality gap: the cluster of privacy (or better, liberty) rights lost to us—even for argument's sake—by a pure equal protection theory of individual rights. Lupu's suggestion is that *Moore*'s interest lies in its *choice* of rationales: "it was the first decision since the 1937 revolution to invalidate a statute on naked substantive due process grounds *when equal protection grounds seemed readily available.*"[77] If so, the equality gap is slim indeed, spanning *Griswold* and *Roe* and very little else. To that extent, doing without privacy comes perhaps to a small sacrifice (although scarcely a negligible one). But Lupu is surely mistaken in his analysis.

There has been much water over the equal protection dam since the 1940s, and much of it murky. The dichotomy between strict and lax scrutiny has given way before the extension—and an almost inevitable extension it now seems—of some degree of "suspicion" to sex and other classifications once taken for granted as innocent legislative line-drawing corresponding to the real world of human differences. Nonetheless, and despite occasional obfuscation,[78] the dichotomy survives between the run of cases tested by rationality—the bare form of equality—and those tested by suspicion. Ely's own elaboration of suspicion, by way of majority motivation and minority vulnerability, rests squarely on this distinction between suspicion and rationality.[79] And while he extends to homosexuals and others a scrutiny the Court refuses, Ely scrupulously maintains the economy of suspicion under which the Court has reviewed equal protection claims since *Korematsu*[80] or even the *Slaughterhouse Cases*.[81] Moreover, this economy is a practical necessity. Only a very few legislative distinctions can be tested with anything like the rigors needed to protect racial minorities. If every distinction is so tested, we will have much more government by judiciary—or at least review by judiciary—than we can take. After all, the *Lochner* Court made as good a use of equality as of liberty itself.

Now whatever you may say of its "arbitrariness," in the strict sense,[82] the regulation in *Moore* is not irrationally arbitrary; it is not senseless. East

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76. *Id.* at 1017.

77. *Id.* (emphasis added).

78. *E.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971).

79. ELY, *supra* note 1, at 145.

80. Korematsu v. United States, 323 U.S. 214 (1944).

81. 83 U.S. (16 Wall.) 36 (1873).

82. That is, "fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance . . . decisive but unreasoned . . . ." WEBSTER'S NEW DICTIONARY 138 (2d ed. 1936).

Cleveland seeks to maintain the *single*-family character of its neighborhoods. To prohibit boarding houses, fraternities, and occupancy by unrelated groups of three or more, as in *Belle Terre*, is felt to be insufficient. Other forms of "crowding" are also objectionable to the majority on the City Council. Multi-family occupancy, in particular, *even by relatives*, that is, brothers, sisters, or what have you, with children of their own, could be precisely what the city Fathers (and Mothers) don't want. So the question arises in the Council's deliberations: how can we take another step against Tobacco Road without defeating our own purposes? Obviously, the majority is not about to ban single-family occupancy itself (which has become at this point something of an obsession). To prohibit "families" of grandparents and grandchildren would seem much too harsh. But then again to prohibit such families in more than one line of descent might work. It would exempt most of the hardship cases—where, say, the grandchildren had only their grandparents for guardians—while still achieving the city's objective. This way the Council distinguishes the cases of a Mrs. Moriarty living with her bachelor sons and a Mrs. McCarty living with her married sons and their families. But it fails to distinguish, you may say, Mrs. McCarty from Mrs. Moore.

That is true, and that is the trouble. The legislative failure to distinguish here works what will seem to most of us a hardship, and even an injustice. Is it for all that an *arbitrary* failure? Once the legislation is shown, as here, to bear "a rational relationship to a [permissible] state objective,"[83] its arbitrariness—in the requisite sense of irrationality or capriciousness—can no longer really be at issue. "Every line drawn by a legislature leaves some out that might well have been included."[84] The only recourse, then, is to argue that to leave out any *blood* relations in defining a family is arbitrary and irrational, however well it advances valid legislative purposes. But this requires either that we allow some special independent value to such relations—which surely is not a judgment of equality—*or* that we disallow all legislative use of bloodlines as suspicious—which is a judgment of equality, alright, but of a much different order.[85]

Had the fourteenth amendment been drafted for the dissolution of a feudal society (in which rights and privileges were tied to kinship) as opposed to a caste society (in which they were tied to race), it might well have made blood as suspect as race. But this was not the case. Our history counsels infinitely more caution about race than about kinship. In the Louisiana pilots case[86] even outright state nepotism withstood equal protection scrutiny of a relatively modern vintage.[87] But East Cleveland's legislation is nowhere near so focused or so suspect. Nothing in the record suggests any motivation

83. Moore v. City of East Cleveland, 431 U.S. 494, 538 (1976) (Stewart, J., dissenting).
84. *Id.*
85. A judgment, that is, of "strict scrutiny." ELY, *supra* note 1, at 148.
86. Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552 (1947).
87. *Id.* at 556.

besides the obvious (if priggish) one of "zoning for good neighborhoods." Mrs. Moore's particular situation, moreover, is neither fixed nor stereotyped.[88] The Council in all likelihood never even thought of hard cases like hers—until, that is, an overzealous neighbor or inspector complained. And even at that point, as the Chief Justice had it in dissent, administrative discretion under the usual waiver and variance proceedings might have saved the day for the Moores.[89] But what could not save them, on any analysis short of suspicion, was the equal protection of the laws as we now know it.

III. LOCHNER AND LIBERTY

If equality cannot do the job, why not liberty? The answer is in a sense quite simple. Liberty has become—has remained—an enormous interpretive embarrassment in constitutional law. The embarrassment is itself ambiguous; the lack of a text, by itself, cannot explain much. As Ely notes, there is really plenty of text available, beginning with the ninth amendment and concluding with the fourteenth; and even without a text, there is always room for an argument of constitutional necessity or implication—this much Douglas, along with time and the river of precedent, established once and for all. Nor is the lack of a principle the heart of the matter. There are principles galore here, and, since Mill, they can be as finely parsed as any in constitutional jurisprudence.[90] The real difficulty comes with the attempts to *connect* text and principle.

"A neutral principle may be a thing of beauty and a joy forever," writes Ely, "[b]ut if it lacks *connection* with anything the text has marked as special then it is not a constitutional principle . . . ."[91] But what exactly is to count as a connection? Ely's own "fair process" concept has the merits of a batch of articles and amendments suggesting a continuing and primary commitment to representative democracy. The content of that commitment can be seen, however, as either terribly uncertain or treacherously theoretical. (How else is Macaulay's "virtual" representation made to do such worthy service?[92]) And that is precisely the trouble with connections; they come in all sizes and qualities—close, loose, obvious, subtle, weak, strong. Almost all asserted connections are disputable; they are, as the philosophers have it, essentially contested (or contestable) concepts.[93] They are theories, in short, writ large or small.

Why not, then, a theory of liberty? For a thousand reasons, all of which come to one: *Lochner*.

The threshold argument that gathers round *Lochner* goes like this. First,

88. Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 390.
89. Moore v. City of East Cleveland, 431 U.S. 494, 521 (1976) (Burger, C. J., dissenting).
90. *See, e.g.*, the recent effort in Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).
91. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 1920, 949 (1979).
92. *See* ELY, *supra* note 1, at 82–83.
93. Gallie, *Essentially Contested Concepts*, 56 PROC. ARIST. SOC. 167 (1965).

Lochner is a decision without fair connection to the text (and thereby to the consent in majority will that the text embodies). Second, *Lochner* is a liberty decision, *the* representative liberty decision. And third, liberty has no fair connection to the text. This puts it crudely. There is a more refined or genteel version of the argument, sounding in prudence rather than logic. Still the crude version is met more often than one might think—even in Ely himself.[94] As a logical matter *Lochner* can stand for nothing so emphatic. The premises may be true but the deduction is false. The crude version is at bottom an induction from one instance—or a very few. That the *Lochner* decision lacked connection to the text gives us no basis to assume that all kindred decisions must suffer the same defect.

The genteel version of the argument invokes these premises to deduce the proposition not that liberty adjudication lacks a fair connection to the text but that it runs a *very high risk* of such a lack. So put, we have a proposition about *Lochner* that comes very close to the truth. Along with the other cases in its "line," *Lochner* suggests great hesitancy over asserted connections between liberty and the text. Literal connection is not the problem. Liberty appears twice in the text (and, by comparison, equal protection only once). But *that* connection, in itself, gives us only liberty as a cipher with a gloss: "No person shall be . . . deprived . . . of liberty . . . without due process of law . . . ." Since all that the gloss entails is "process"—however much is "due"—the cipher can be generalized with tolerable results. Thus, whatever liberty amounts to, we can take it away so long as we allow you judge, jury, counsel, and compulsory process. Drop the gloss of due process, however, and the very generality and emptiness of our cipher threatens to turn into a constitutional trump—a right that takes all other rights and powers. This is constitutional law's "bad infinite." And this is the terror of *Lochner*.

Is there a way to tame the wild card of liberty? Ely suggests that we reduce it to its gloss: "liberty" is a claim with only procedural remedies. This fixes *Lochner* and *Roe* for good; but it also fixes *Griswold* and *Moore*. Can we save liberty from *Lochner* without losing it to Ely?

Doctrinally, the *Lochner* opinion has very few moving parts, and so very few potentially broken ones that we can identify and repair. But unless we make sure of such repairs, the defense of privacy is likely to be futile. To Peckham, who wrote the opinion, the case was simple. New York's maximum hours legislation was to be examined on what are still embarrassingly familiar principles of "constitutional restraint":

> Is this a fair, reasonable and appropriate exercise of the police power of the State or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty . . . ?[95]

Here the first among these parts appears last: it is the now legendary assertion

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94. ELY, *supra* note 1, at vii.

95. Lochner v. New York, 198 U.S. 45, 56 (1905).

of a "personal" liberty of contract. While groundless, perhaps, it is not altogether textless. The Constitution mentions contracts once: "No state shall pass any . . . law impairing the obligation of contracts," says article I, section 10, clause 1. But the Constitution hardly suggests an absolute privilege to contract on conditions or terms entirely of one's own making. Indeed the federal government meets no obstacle under the contracts clause even if it should set out, flagrantly and directly (by forgiving debts, say), to dissolve contracts as such. To the argument, then, that this cipher too can drop its gloss—like liberty in the two due process clauses—we have an answer in the text: by its very terms the protection of the right is limited to protection from *state* violations. In that posture, the right cannot be altered by *any* reading of the fourteenth amendment.[96] Is textual interpretation, then, the weak link in *Lochner*? Hardly.

Anyone who would defend the various privacy decisions must concede the weakness of the available textual links. They are there, no doubt, and so the text does not foreclose them. But they are there as conceptual links only when we substitute one gloss on liberty for another—the gloss of fundamental rights, that is, for the gloss of due process. Why can't the "contractarians" substitute one gloss for another? They can, of course, but with less assurance: first, because they would assert a right that the text has glossed not as to remedy (e.g., due *process*) but as to reach (i.e., the *states* cannot impair); and second, because the gloss required to extend that reach (*back* from the states to the federal government) is both novel and structurally surprising—although not so surprising as to have deterred more or less the same structural move under equal protection.[97]

The interpretive going may be rougher, then, but the right to contract is not in a different textual universe from the right to privacy. If it is argued that contract is a less tractable concept than "privacy"—or even "family"—the rejoinder is the same: it is *less* tractable, perhaps, but not wholly *in*tractable. Any concept of liberty put forward as a "locator" of fundamental constitutional rights must be confined somehow without the textual gloss.[98]

Now the second, and often concealed, moving part in *Lochner* is the view, the very dim view, of the police powers of the states. Peckham argues, somewhat fatuously, that they are limited. After all, the majority cannot have its way in everything:

> Otherwise . . . it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and

96. *See* Bolling v. Sharpe, 347 U.S. 497 (1953).

97. *See, e.g.*, Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977).

98. Much the same holds for the first amendment's gloss that "*Congress* shall make no law . . . ." Did that mean the Executive might? or the Judiciary? or the States? *See* L. LEVY, LEGACY OF SUPRESSION 238 (1960).

> delusive name for the supreme sovereignty of the State to be exercised *free from constitutional restraint.*[99]

The curious thing here is not that the police power, the *majority's* power, should stop when it meets the right to contract. The logic of fundamental rights still suggests just that. What is curious, and even bizarre, is the imposition of a *generalized* burden of justification upon state power whenever exercised. In every case of state or federal action, says Peckham in effect, we must look for justification under the "fair, reasonable, and appropriate" standard. This standard is the third working part.

Criticism of *Lochner* has not neglected its "sweeping standard for judicial review of a state law":

> By equating a view that a law was unfair or inappropriate with a finding that it was wholly arbitrary, this test was broad enough to permit courts to "substitute their social and economic beliefs for the judgment of legislative bodies."[100]

But this criticism misses the mark if it suggests that the standard suffers only from overbreadth, as if to say that *Lochner* was yet another failure of judicial restraint. Were that all, some trimming and hedging would be all the lesson that these cases teach. But the standard of judicial review applied in *Lochner* suggests much more.

Holmes put us on the wrong track when he began his dissent by saying that "[t]his case is decided upon an economic theory which a large part of the country does not entertain."[101] Ever since, we have talked of *Lochner* in terms of the Court's imposition of its own judgments of wisdom upon legislation already approved by the majority. That comes to a venial and not a mortal sin, and one to which the Court has succumbed in many an era and doctrine, both before and since. Still Peckham's singular damnation is secure. The clue to it is his use of the word "pretext."

To any student of constitutional law, that word recalls a little heeded suggestion of Chief Justice Marshall in *McCulloch v. Maryland.*[102] "Should Congress," the Chief Justice wrote,

> *under the pretext* of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.[103]

Behind Marshall's warning was the idea of the federal government as one of enumerated powers. This is a view irretrievably lost to us now by the settled precedent of *McCulloch* itself, and by Marshall's interpretation therein of the necessary and proper clause. It is in any case an idea of federal, not state,

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99. Lochner v. New York, 198 U.S. 45, 56 (1905) (emphasis added).
100. *Developments in the Law—The Constitution and the Family,* 93 HARV. L. REV. 1156, 1167 (1980).
101. Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).
102. 17 U.S. (4 Wheat.) 316 (1819).
103. *Id.* at 423 (emphasis added).

power. Peckham simply asserts its relevance to the states, and indeed to all government whatsoever. His is not merely an "economic theory with which much of the nation disagrees"; it is a constitutional theory with which the Constitution disagrees.

All three of *Lochner*'s moving parts, then, come together in a curious political theory: no government, it holds, can legislate without coercion; this much is true enough. But liberty, it goes on, should never be coerced without special—even emergency—justification; again, we have enough of the truth to pass. But then comes the middle term: all coercion is *necessarily* upon liberty. This is an absurdity.

Now you may say that Peckham qualified this theory with a notion of "legislation of *this* character."[104] But to read his summary paragraph on the question of "a labor law, pure and simple," is to understand that his principles were absolutely general. It is not simply liberty of contract that gives the general rule, subject to special exceptions. The presumed invalidity of the police power is itself a general rule with Peckham. For the majority can only act when it has very, very good reason to do so—for coal miners, perhaps, but not for bakers. We have here, then, a standard of review premised on a wholesale suspicion of democracy, a suspicion as pervasive and searching as any now applied to race. For Peckham and his Court, the majority itself was a suspect category.

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"The question for the courts," Learned Hand wrote of *Lochner*, "is not whether the problems have been wisely answered, but whether they can be answered at all, or . . . are taboo."[105] At the other end of the century from *Lochner*, the question is still apt: are there, should there be, court-imposed taboos on legislation of certain kinds?

"Well," comes the retort, "what *kinds* do you have in mind?"

Hand had in mind what he called "the whole economic struggle." In a marvelous understatement, he saw no "constitutional necessity that the state should leave [it] untouched . . . ." For one thing, the "state" as we know it never had, in England or America. For another, "the whole matter [of economics] is yet to such an extent experimental that no one can with justice apply to the concrete problems the yardstick of abstract economic theory." He elaborated:

> We do not know, and we cannot for a long time learn, what are the total results of such "meddlesome interference with the rights of the individual." He would be as rash a theorist who should assert with certainty their beneficence, as he who would sweep them all aside by virtue of some pragmatical theory of "natural rights." The only way in which the right, or the wrong, of the matter may be shown, is by experiment; and the legislature, with its paraphernalia of com-

104. Lochner v. New York, 198 U.S. 45, 56 (1905).

105. Hand, *Due Process of Law and the Eight Hour Day*, 21 HARV. L. REV. 495, 507 (1908).

> mittee and commission, is the only public representative really fitted to experiment.[106]

This paragraph even now brings a welcome concreteness to discussion of the *Lochner* heresy. Judges may be as wise as legislators; but they have no time—or method—to experiment. They look backwards rather to assign rights and duties. It is the business of legislatures to look forward: to investigate and to debate, of course, but also to risk failure, to guess at results, to wager public funds—all without certainty and without finality. In this sense, the contrast between the new substantive due process and the old is not so much between "economic" rights and "personal" rights as between two views of democracy. In one, the majority, like classical liberalism's night watchman, makes its appointed rounds upon a fixed schedule of police powers and duties. Its only discretion lies in response to emergencies unforeseen by those from whom it took its key and task. In the other view, the majority, now something of a scientist, has a broad discretion to experiment as it will. It is subject only to a discrete set of restraints rooted in the guarantees of fundamental equality *and* liberty.

"But," comes the objection, "all of life is an experiment, not merely 'the whole economic struggle.' None of it can be taboo. All is open to experimentation, and to legislation." All of it short of an outright constitutional ban, he must mean: "A state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State . . . ."[107] With this sole qualification, Hand (and Holmes) took up this position, arguing for it rigorously and sincerely. "A man's 'time' is his life," Hand could write, "and to control it is to control what is often dearer to him than his health or personal safety."[108] Dearer even, we might say, than his sexuality or his family. For the distinction between "economic" rights and "personal" rights was entirely lost to Hand and Holmes (as it is now, sometimes, entirely lost to Mr. Justice Stewart).[109] But then their strictures on the judicial prerogative went much beyond liberty. Both Hand and Holmes would have dissented vigorously, with Harlan, from *Baker v. Carr*.[110]

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Ely and most of the rest of us can take no such uncompromising stand. "The impossibility of clause-bound interpretivism" must hold across the board, if at all. Were we to insist on "*pure* interpretivism," we would have not only much less liberty adjudication but much less equality (and even due

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106. *Id.* at 507–08, *quoting* Lochner v. New York, 198 U.S. 45, 61 (1905).

107. Tyson & Brother v. Banton, 273 U.S. 418, 445–46 (1927) (Holmes, J., dissenting).

108. Hand, *Due Process of Law and the Eight Hour Day*, 21 HARV. L. REV. 495, 504 (1908).

109. Lynch v. Household Finance Corp., 405 U.S. 538 (1972). *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 45–50 ("the Doubtful Distinction Between Economic and Civil Rights").

110. 369 U.S. 186, 330 (1962) (Harlan, J., dissenting).

process) adjudication as well; what besides fourteenth amendment liberty makes the states answerable for violations of the fourth amendment—or the first? We have made too much of this perhaps—for surely an agile interpretivist can wiggle free of the "lapses" in original intent. But better too much than too little. Liberty should no more be laid to rest by *Lochner v. New York*[111] than equality by *Plessy v. Ferguson*.[112]

What, then, remains in the way of liberty adjudication? Once we have done with *Lochner*'s terrors and equality's stringencies, the surest answer is not so much Ely's theory as our own. For while Ely has given to equality a conceptual structure and integrity, we have given nothing of the kind to liberty itself. The judges have done their common law best, but the scholars have done little to help. So we are back where we began, with the prospect of doing without privacy. Only now it should be clear what can be done to prevent it: we who have the time for theory must give an account of liberty that is definitive enough for adjudication, consistent with our theory of democracy, and drawn, if not from the text itself, from the history and tradition—moral and legal—that give to the text its sense and purpose.

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111. 198 U.S. 45 (1905).
112. 163 U.S. 537 (1896).