

May 1992

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Repository Citation

Rodney A. Smolla, *Limitations on Family Size: Potential Pressures on the Rights of Privacy and Procreation*, 1 Wm. & Mary Bill Rts. J. 47 (1992), <https://scholarship.law.wm.edu/wmborj/vol1/iss1/3>

**LIMITATIONS ON FAMILY SIZE: POTENTIAL PRESSURES ON THE
RIGHTS OF PRIVACY AND PROCREATION***

By Rodney A. Smolla**

IN THE SUPREME COURT OF THE UNITED STATES

HEIDEN v. WEBSTER

(Argued November 15, 2022; Decided May 20, 2023)
541 U.S. 919, 23 L.Ed. 3d 766, 143 S.Ct. 880 (2023)

CHIEF JUSTICE CALVIN delivered an opinion announcing the judgment of the Court.

I. INTRODUCTION

This case requires us to consider the constitutionality of the Quality of Life Act of 2020.¹ In response to intense pressures placed upon the quality of life and economy of the United States, including a growing environmental crisis, an escalating trade imbalance, and a dramatic population explosion, the United States Congress in 2020 enacted sweeping limitations on the size of American families. The Quality of Life Act, with certain exceptions, limits the size of American families to two children. The petitioners have asked this Court to strike down that limitation on the ground that it violates the Due Process Clause of the Fifth Amendment and the Free Exercise of Religion Clause of the First Amendment to the United States Constitution.

II. FACTUAL BACKGROUND

A. The Events Leading to the Passage of the Act

The Quality of Life Act of 2020 on review before this Court is one of a series of congressional enactments passed in response to an increasing sense of national crisis caused by the economic and environmental catastrophes which have beset this nation since the turn of the century.²

* In this fictional Supreme Court opinion, set in the year 2023, Rodney A. Smolla explores the future of the rights to privacy and procreation, against the backdrop of 21st Century pressures on the environment and economy.

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¹ 108 U.S.C. §§ 2084-2091 (2020).

² See, e.g., The Outer Space Citizenship Allegiance Act of 2017, 108 U.S.C. § 2001 (2017).

Constitutional liberties do not exist in a vacuum of intellectual abstraction, but in the flesh-and-blood world of war, hunger, confrontation, and conflict. A Constitution is of little value if there is no nation in existence to preserve, protect, and defend it. Constitutional liberties, and the reasonable restraints that must always, of necessity, be placed upon those liberties if the nation is to survive, cannot be intelligently discussed except against the backdrop of living history. We thus do not evaluate the constitutionality of the Quality of Life Act in the pristine, antiseptic, intellectual world of law professors sitting in their offices while pondering legal theory, but rather in the pragmatic world of jurists deciding practical matters of law as working magistrates of government. We evaluate this Act of Congress, in short, against the historical realities that formed its genesis. The constitutionality of the Quality of Life Act must, therefore, be analyzed in light of the cataclysmic events precipitating its passage.³

At the Treaty of Athens, signed in 2018, the United States was forced to make concessions to the world's developing nations, to Japan, and to the European Confederation that would have been beyond contemplation in the twentieth century.⁴ These concessions included an "open border" policy, in which the United States agreed to exert no controls over the free flow of goods, currency, and people across its frontiers for a period of ten years. This meant that the United States could not prevent migration into the nation from other countries, nor could it enact trade or monetary policies designed to favor American interests at the expense of other nations.⁵

Congress in the year 2020 was looking at frightening changes in life in the United States and, indeed, the world. The nation had been aware of dangers to the environment as far back as the 1970s, when the first significant American environmental laws were passed. But for the most part, the United States and other nations on the globe were content to slide by with half-measures concerning environmental protection. While an oil spill, a nuclear power plant accident, or the death of a lake or a forest from acid rain would occasionally capture the public imagination, for the most part political forces were never sufficiently galvanized by the gradual, incremental corrosion of the ecosystem to generate decisive action. By 2020, however, the basic life-support systems of "spaceship earth" were beginning to deteriorate to the point that replenishment and regeneration were in serious doubt. The United States suffered acutely from these global trends. American agriculture was particularly hard hit by environmental changes, finding itself in a state of profound distress. Once the breadbasket of the nation, the American Midwest was turned into a dustbowl wasteland, and for the first time in its history the United States became a net importer of food.

Despite these setbacks, the open door policy mandated by the Treaty of Athens generated a huge influx of immigration from the beleaguered peoples of the world, arriving in teeming masses from South America, Africa, and Asia, as the tired, oppressed, poor, and hungry sought the refuge they had so often found on America's sweet shores. For notwithstanding its recent military and economic embarrassments, the United States still enjoyed a standard of living far above that of most nations of the world. And the openness of its culture, its tradition of respect for elemental civil rights and civil liberties, its commitment to ethnic, racial, and religious tolerance, its centuries of orderly legal

³ This Court has previously expounded on the significance of these events. See generally *Dodson v. United States*, 538 U.S. 202 (2020) (rejecting challenges to the Outer Space Citizenship Allegiance Act of 2017).

⁴ See generally Linda Malone, *The Treaty of Athens: An Historical and Jurisprudential Analysis*, 129 HARV. L. REV. 1 (2019).

⁵ These open market and open migration policies were similarly applied to all other signatories to the Treaty.

stability, its well-established system of free public education, and perhaps above all else, the optimistic sense of hope and opportunity that has always characterized the special promise of American life, combined to make America still among the most appealing places to live in the world.

These events, however, made it increasingly obvious to Congress that the quality of life in the United States would be irreversibly damaged if certain immediate steps were not taken to rejuvenate the economy and to restore stability and recovery to the environment. Among the measures required, Congress determined, was population control. The Treaty of Athens foreclosed the obvious step of stemming the tide of immigration. The precarious international position of the United States convinced the President and Congress that repudiation of the obligations of the Treaty of Athens would be reckless foreign policy. The economic leverage exerted by Japan and the European Confederation, as well as the jittery military instability caused by the proliferation of nuclear arms, convinced the executive and legislative branches that population control measures, at least for the ten-year moratorium on immigration controls set by the Treaty of Athens, would have to be internal.⁶

Changes in medical technology also influenced passage of the Quality of Life Act. In 2010, a series of breathtaking advances in the science of immunology led to the virtual elimination of all sexually-transmitted diseases in the United States. AIDS, syphilis, gonorrhea, herpes, and other diseases associated with sexual contact were wiped out as health threats. The amelioration of death and human suffering caused by these diseases marked one of the great victories in the history of science. Yet the silver lining had its cloud; one of the few remaining deterrents to sexual permissiveness in society had been eliminated.

The increased sexual freedom brought on by the elimination of serious health threats from sexual activity was further encouraged by changes in birth control technology. With the advent in 2012 of the so-called "on-off" birth control pill, contraception became easier than ever. For years, the "morning after" pill had been freely marketed throughout the United States. A woman taking this pill within forty-eight hours after intercourse was assured that no pregnancy would ensue. Because the "morning after" pill terminated incipient pregnancies after the sperm cell had fertilized the egg cell, some objected to the pill on religious grounds, claiming that to end the days-old pregnancy after conception was a form of abortion as morally repugnant as abortions at more developed stages of fetal life. Exercising the freedom granted to the states to regulate abortion that

⁶ See generally JOINT CONF. REP. ON S. 1209, available in 209 CONG. REC. DATABASE, File No. 39-A (2020). All parties stipulate that the Joint Conference Report is the most informative and authoritative source for the legislative history of the Act. The congressional purposes underlying the Act, and the meaning of its applicable provisions, are not disputed in this litigation.

came with this Court's holding in *Dixon v. Delaware*,⁷ overruling the ill-fated decision in *Roe v. Wade*,⁸ the "morning after" pill was illegal in many states.

The "on-off" pills eliminated that legal and moral quandary, by interdicting the sperm cells prior to fertilization and preventing conception entirely. A woman taking a red "off" pill is immunized from pregnancy indefinitely — one pill, indeed, could last a lifetime, though most physicians recommend a "booster" once every ten years. The "off" pill had no known negative side effects. At any time, however, a woman could mute the operation of the "off" pill by taking a green "on" pill. The "on" pill reversed the operation of the "off" pill, permitting a woman to become pregnant according to her normal fertility periods within her regular menstrual cycle. At any point, a woman could go back to a status of infertility by simply taking another "off" pill. "On-off" pills are widely and cheaply available throughout the United States without a prescription, and have made birth control exceptionally easy. The pills have no medical side effects of any kind. The legislative history of the Quality of Life Act reveals that many members of Congress were heavily influenced in favor of voting for the bill by the fact that the birth control practices required to comply with the law were not burdensome.⁹

B. The Provisions of the Act

The Quality of Life Act of 2020 is grounded in a concept of zero-population growth, beyond whatever population increases result from international migration.¹⁰ The Act forbids the bearing of children outside wedlock. Married couples are permitted to bear only two children. Adopted children do not count against the limit. If a child dies before reaching the age of majority, the couple is permitted to bear a new child. Elaborate regulations govern most of the unusual situations that may arise under the Act.¹¹

The principal exception to the driving zero-population growth philosophy of the Act lies in the case of divorce and remarriage. Congress determined that every marriage should carry with it at least the potential for bearing a child, if the couple so desires. In cases of divorce and remarriage, spouses who enter the new marriage with the custody of children are permitted to combine their families without violating the Act, which normally results in a family size of no more than four children. Couples who enter a

⁷ 525 U.S. 212 (2005). In *Dixon* this Court finally repudiated, in its entirety, *Roe v. Wade*. See *id.* This Court first began its retreat from *Roe* in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). During the 1990s, this Court continued to undermine *Roe*, but never explicitly rejected the notion that women enjoy a constitutional right of privacy that includes decisions concerning procreation. See, e.g., *Doe v. Pennsylvania*, 505 U.S. 572 (1996); *Duke v. Louisiana*, 503 U.S. 1760 (1995). In the years since *Webster*, Justice Scalia's prediction appears to have come true: "The mansion of constitutionalized abortion-law, constructed overnight in *Roe v. Wade*, must be disassembled door-jamb by door-jamb, and never entirely brought down, no matter how wrong it may be." *Webster v. Center for Reproductive Services*, 492 U.S. 490, 537 (1989) (Scalia, J., concurring). The unseemliness of our waffling on the abortion question drew criticism even from those who supported the notion of the constitutional right recognized in *Roe*. See Lisa Entress and Matthew Pullen, *The Curious Fate of Roe v. Wade, or How to Overrule a Case Without Really Trying*, 10 WM. & MARY BILL OF RTS. J. 35, 37 (2000) ("Whatever one's views on the merits of the abortion question, the Court has done the nation a disservice by temporizing.").

⁸ 410 U.S. 113 (1973).

⁹ See generally JOINT CONF. REP. ON S. 1209, available in 209 CONG. REC. DATABASE, File No. 97-F (2020).

¹⁰ 108 U.S.C. § 2084(1)(a) (2020).

¹¹ The Act directs the Secretary of the Environment to promulgate regulations to enforce its provisions. The regulations promulgated by the Secretary generally enforce the zero-population growth concept strictly, with narrow exceptions for such eventualities as twins and other multiple-births. See 509 C.F.R. §§ 7630-7641 (2021).

marriage with one or more prior children within the primary custody of one or both spouses are permitted to bear one additional child. This additional child is permitted even if it would otherwise place the remarried couple above the two-child limit. Once again, special regulations are in place to govern situations such as joint custody upon divorce. A divorced person who does not have children from the prior marriage, or who did not obtain custody of the children from that marriage, is not barred from having children up to the two-child limit in a subsequent marriage.¹²

Violation of any provision of the Act is a felony, punishable by up to one year of imprisonment and a \$50,000 fine. Both parents are made criminally responsible for the violation.¹³

C. The Litigants

Three distinct sets of petitioners have filed lawsuits attacking the constitutionality of the Quality of Life Act. The first petitioner is Mary Heiden, a thirty-two-year-old, unmarried, single woman. Ms. Heiden wishes to bear one or more children outside marriage. She testified at trial that she does not believe in marriage and has no desire to be married. She is a successful surgeon, well able, financially, to support children. She testified that it is her wish to attempt to become pregnant within the next year. When asked on cross-examination how she intended to become pregnant, she answered that she would either use the resources of a sperm bank or a male sexual partner, and that she considered that choice "her private business." Ms. Heiden claims that the prohibition on the bearing of children outside wedlock denies her "the equal protection of the laws" guaranteed under the Fourteenth Amendment and violates her Fifth Amendment right not to be deprived of "life, liberty, or property without due process of law."

The second petitioners are Jonathan and Alice Goodale, a married couple with two children. They testified at trial that they wish to have an indeterminate number of additional children. Jonathan and Alice "love children, and love family life, and have always planned on having a big family." They were "shocked" by the passage of the Quality of Life Act, and they have sued to enforce what they consider to be "their constitutional right to have as many children as they please." The Goodales claim that this right is guaranteed them as part of the Fifth Amendment's prohibition against the taking of "life, liberty, or property without due process of law."

Catherine and Ronald O'Meara are the third petitioners. The O'Mearas are married, have two children, and profess to be devout Roman Catholics. The O'Mearas testified at trial that their religious beliefs do not permit them to utilize any form of contraceptive medication or device as a form of birth control. They believe, as a matter of religious doctrine, that sexual intercourse, even for a married couple, should not be engaged in purely for physical gratification or as an act of personal love, and that to engage in sexual intercourse with the use of contraceptives to preclude any possibility of procreation is sinful and unnatural. They also believe that it is God's will that they "be fruitful and multiply." Compliance with the federal law would require the O'Mearas to choose between total abstinence during periods in which Mrs. O'Meara is potentially fertile, and the use of contraceptives in violation of their religious beliefs. The O'Mearas argue that, at least as applied to them, the Quality of Life Act violates their right to the free exercise of religion guaranteed by the First Amendment.

In the brief filed on behalf of the United States, the Solicitor General concedes that all of the factual assertions made by the petitioners are truthful, and that all of the

¹² 108 U.S.C. § 2086(3) (2020).

¹³ 108 U.S.C. § 2088 (2020).

petitioners are completely sincere in their beliefs and convictions. The United States, nevertheless, maintains that the Quality of Life Act is constitutional, and that the beliefs and desires of the petitioners must, for the greater good of society, yield to the law.

III. ANALYSIS

A. The Due Process Claims

1. The Activist Epoch

Eighteen years ago, this Court in *Dixon v. Delaware*,¹⁴ overturned forty years of precedent and held that the Bill of Rights does not embody any rights of privacy, intimacy, procreation, or sexual freedom.¹⁵ The federal and state legislatures, we held, are free to legislate in matters relating to marriage, sexual practices, contraception, and procreation without fear of having such legislation struck down by this Court, provided that the law meets minimal standards of rationality. The *Dixon* decision marked the end of an epoch of judicial activism in which this Court labeled matters relating to procreation and contraception as so-called "fundamental rights," and then forced legislative enactments involving those fundamental rights to meet highly rigorous standards of judicial review.¹⁶ Laws relating to procreation and contraception were routinely invalidated by this Court under this approach.

This activist epoch began in 1965, during the tenure of Chief Justice Earl Warren, and was a period of relatively unchecked judicial exuberance for the practice of finding "rights" in the Constitution not explicitly articulated in the document.¹⁷ In that year this Court decided *Griswold v. Connecticut*,¹⁸ a case involving a Connecticut law prohibiting the use of "any drug, medicinal article or instrument for the purpose of preventing conception."¹⁹ Justice William O. Douglas, writing the opinion of the Court, claimed that "[w]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."²⁰ The Connecticut law, Justice Douglas nevertheless held, was different, for it "operates

¹⁴ 525 U.S. 212.

¹⁵ See *supra* note 7.

¹⁶ This was usually accomplished by employing so-called "strict scrutiny," in which the law would be upheld only if it was passed to further a "compelling" governmental interest, and was "narrowly tailored" to effectuate that interest. Among the forces that led this Court to abandon much of its "fundamental rights" jurisprudence was the widely-shared perception that various tiers of judicial review were largely contrived and arbitrarily applied. For an excellent review of the persistence of these themes in the opinions of various members of the Court prior to the *Dixon* decision, see William W. Van Alstyne, *The Demise of the Fundamental Rights Concept in American Constitutional Law: A Critical Guide to Dixon v. Delaware*, 2010 DUKE L.J. 1 (2010).

¹⁷ Nothing is wrong, of course, with "judicial activism" in the sense of vigilant protection of rights that are explicitly guaranteed in the Constitution, particularly when the intent of the framers concerning the contours of those rights is clear. I have frequently been called an "activist" in my interpretation of the Takings Clause of the Fifth Amendment — a characterization that I quite proudly accept. See Jan Laitos, *Taking Takings Seriously: In Praise of the Takings Clause Jurisprudence of Chief Justice Staunton Calvin*, 97 MICH. L. REV. 349 (2009); David Barnes, *Our Calvinistic Takings Clause: A Reply to Jan Laitos*, 98 MICH. L. REV. 49 (2010).

¹⁸ 381 U.S. 479 (1965).

¹⁹ CONN. GEN. STAT. ANN. § 53-32 (1958 rev.).

²⁰ *Griswold*, 381 U.S. at 482.

directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."²¹

No one will argue, of course, that the sexual practices and procreative decisions of a man and woman within the institution of marriage are not "intimate." But is that intimacy protected anywhere in the Constitution? Justice Douglas argued in *Griswold* that it is, introducing the "penumbra" theory into twentieth-century constitutional law.²² Justice Douglas maintained that specific guarantees in the Bill of Rights have "emanations" that radiate "zones of privacy."²³ These include the rights of freedom of speech and press, which Justice Douglas construed as including "not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach — indeed the freedom of the entire university community."²⁴ The First Amendment, he maintained, further protects the peripheral right of "freedom to associate and privacy in one's associations."²⁵ Justice Douglas also listed the Third Amendment's prohibition against the quartering of soldiers "in any house" in peacetime,²⁶ the Fourth Amendment's guarantee against unreasonable search and seizure,²⁷ and the Fifth Amendment's protection against self-incrimination as driven by more global concerns for privacy, and as generating penumbral rights that serve as buffers to make the specifically enumerated rights more secure.²⁸

The "right of procreation," Justice Douglas wrote, is located in those penumbral zones. "Would we allow the police to search the sacred precincts of marital bedrooms," Justice Douglas asked, "for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."²⁹

Other members of the Court in *Griswold*, perhaps nervous over the wispy, ethereal nature of Justice Douglas' analysis, authored concurring opinions searching for alternative grounds upon which to strike down the Connecticut law. Justice Arthur Goldberg, with whom Chief Justice Earl Warren and Justice William Brennan concurred, argued that the fundamental right to procreative privacy was located in the open-ended language of the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."³⁰ Justice John Marshall Harlan refused to follow either the penumbral or Ninth Amendment approaches.³¹ He instead held against the constitutionality of the Connecticut law on the basis that interference with the prerogatives of married couples concerning the birth of children violated "the concept of ordered liberty"³² implicit in the Due Process Clause of the Fourteenth Amendment. The Harlan "ordered liberty" concept seemed the least expansive

²¹ *Id.*

²² *Id.* at 482-86.

²³ *Id.*

²⁴ *Id.* at 482 (citing *Baggett v. Bullitt*, 377 U.S. 360, 369 (1964); *Barenblatt v. United States*, 360 U.S. 109, 112 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234, 249-50 (1957); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952); *Martin v. Struthers*, 319 U.S. 141, 143 (1943)).

²⁵ *Griswold*, 381 U.S. at 483.

²⁶ *Id.* at 484.

²⁷ *Id.* (describing the Fourth and Fifth Amendments "as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'" (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))).

²⁸ *Griswold*, 381 U.S. at 484-85.

²⁹ *Id.* at 485-86.

³⁰ *Id.* at 486 (Goldberg, J., concurring) (quoting U.S. CONST. amend. IX.).

³¹ *Griswold*, 381 U.S. at 499 (Harlan, J., concurring).

³² The phrase "ordered liberty" originated in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

of the various formulations in *Griswold*; it was based on history, recognizing only those liberties of ancient vintage, about which there was overwhelming societal consensus. Justice Harlan took pains not to recognize a general right of "sexual freedom," but a much more narrow and traditional right of privacy within the confines of conventional marriage. Harlan thus emphasized that his ruling would not justify adultery or fornication, on the theory that there was some broad constitutional right to engage in consensual sex.³³

Not every member of the Supreme Court in *Griswold* was persuaded by these opinions. Justice Potter Stewart pithily observed that Connecticut's contraception legislation "is an uncommonly silly law."³⁴ Indeed, Justice Stewart opined that "[a]s a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs."³⁵ He further observed that as "a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made."³⁶ But Stewart admonished that "we are not asked in this case to say whether we think this law is unwise, or even asinine."³⁷ Rather, Stewart pointedly observed, "We are asked to hold that it violates the United States Constitution. And that I cannot do."³⁸

Justice Hugo Black grounded his indictment against the ruling in *Griswold* in the broader march of intellectual history.³⁹ All of the formulas espoused by his judicial colleagues, he maintained, amounted to nothing more than elegant elaborations on "natural law" philosophy.⁴⁰ Black wrote that "[i]f these formulas based on 'natural justice,' or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary."⁴¹ This, Justice Black argued, is nothing short of judicial legislation, the exercise of the power to "make law," a power specifically denied the judicial branch under the Constitution.⁴²

In a ringing protest against the jurisprudence that the "modern" Supreme Court was about to embrace, Justice Black spoke elegantly against the notion that Supreme Court Justices should attempt to keep the Constitution "in tune with the times":

³³ Justice Harlan had previously expounded on this notion of ordered liberty in a prior opinion involving Connecticut's regulation of contraceptives. See *Poe v. Ullman*, 367 U.S. 497, 539-45 (1961) (Harlan, J., dissenting). One of the principal distinctions between Justice Harlan's method of analysis and the approach of Justice Douglas was Harlan's refusal to cabin his analysis to specific clauses in the Bill of Rights, or even their broader emanations. Harlan instead articulated a theory of judicial review predicated largely on tradition, resting on the general notion of "liberty" in the Fifth and Fourteenth Amendments. According to Justice Harlan, "This 'liberty' is not a series of isolated points pricked out in terms of [the] freedom of speech, press, and religion; [the] freedom from unreasonable searches and seizures; and so on." *Id.* at 543. Rather, maintained Harlan, the liberty "is a rational continuum, which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints [and] which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Id.* (citations omitted). See also *Griffin v. California*, 380 U.S. 609, 615 (1965) (Harlan, J., concurring); *Pointer v. Texas*, 380 U.S. 400, 408 (1965) (Harlan, J., concurring).

³⁴ *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 507-27 (Black, J., dissenting).

⁴⁰ *Id.* at 521-23.

⁴¹ *Id.* at 511-12 (footnote omitted).

⁴² *Id.* at 513.

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. This idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law.⁴³

Justices Stewart and Black lost the battle in *Griswold*, but they would eventually come to win the war. The victory, however, took time. The Court in 1972 held in *Eisenstadt v. Baird*⁴⁴ that a Massachusetts law making it a felony to distribute contraceptives except by prescription to married persons was void. In extending the *Griswold* decision's recognition of the constitutional right to contraceptives to unmarried persons, Justice Brennan wrote that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up."⁴⁵ According to Justice Brennan in *Eisenstadt*, "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."⁴⁶

The Court's most controversial extension of the constitutional right of privacy, however, came in its infamous 1972 decision in *Roe v. Wade*,⁴⁷ in which it held that the privacy right emanating from the *Griswold* line of cases was broad enough to encompass a woman's decision whether or not to terminate her pregnancy. *Roe* upheld, on privacy grounds, a woman's "freedom of choice" to obtain an abortion in the first two trimesters of pregnancy, prior to the viability of the fetus.

2. The Beginning of the Counter-Revolution

The first signs that the right of privacy recognized in *Griswold* might have been unraveling came in this Court's 1986 decision in *Bowers v. Hardwick*.⁴⁸ The case posed the question of whether the Constitution embodies a fundamental right of privacy over sexual matters between consenting adults sweeping enough to guarantee a gay couple the right to engage in acts of sodomy. Writing for the Court, Justice Byron White held that no such fundamental right existed. *Bowers* did not overrule *Griswold*, *Eisenstadt*, or *Roe*. It did, however, seem to hint that those cases were decisions in search of a theory. Justice White spoke openly of the Court's "striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the

⁴³ *Id.* at 522.

⁴⁴ 405 U.S. 438 (1972).

⁴⁵ *Id.* at 453.

⁴⁶ *Id.* (citing *Stanley v. Georgia*, 394 U.S. 557 (1969); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905)).

⁴⁷ 410 U.S. 113 (1972).

⁴⁸ 478 U.S. 186 (1986).

imposition of the Justices' own choice of values on the States and the Federal Government."⁴⁹ Echoing the cautious approach of Justice Harlan, who had refused to embark down the road of recognizing a general right of sexual privacy in the Constitution, Justice White in *Bowers* held that nothing in the Supreme Court's prior decisions "would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."⁵⁰ Noting that laws against homosexual sodomy have "ancient roots," Justice White stated that any claim that a right to engage in such activity is deeply rooted in the Nation's history, or embedded in the concept of ordered liberty, "is, at best, facetious."⁵¹ Justice White then offered a circumspect view of the nature of judicial review and constitutional interpretation:

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. This Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.⁵²

For nearly twenty years following *Bowers*, this Court struggled through a series of inconsistent rulings, upholding claims to privacy on matters related to sex in some cases, and denying them in others. The one consistent thread in the opinions was a bias against all claims of privacy to engage in sexual acts outside heterosexual family relationships. An uneasy Court tended to limit the reach of the prior cases to the "wholesome" areas of family and marital life. One by one, *Griswold*, *Eisenstadt*, and *Roe* were overruled or severely limited.

3. The End of Activism

By the year 2005, the brazen hypocrisy of the Court's privacy jurisprudence could not be ignored. Cures and immunizations for AIDS and other sexually-transmitted diseases eliminated gay sex as an easy public health scapegoat for what, all along, had clearly been "morals legislation" reflecting an historical cultural aversion to homosexuality. This Court, like society at large, had simply been discriminating between "good sex" and "bad sex," treating one as a fundamental right, the other not. In *Dixon v. Delaware*,⁵³ the Court ended this duplicity. The Constitution either included a right of privacy for adults over intimate sexual matters or it did not. If it did, then it must be broad enough to include all consensual adult practices, heterosexual or homosexual, and all decisions relating to contraception or procreation, whether or not the individuals were married or unmarried.

In *Dixon* this Court repudiated the entire line of cases emanating from *Griswold*, at long last adopting the positions in *Griswold* taken by Justices Stewart and Black. Today

⁴⁹ *Id.* at 191.

⁵⁰ *Id.* at 192.

⁵¹ *Id.* at 194.

⁵² *Id.* at 194-95.

⁵³ 525 U.S. 212 (2005).

we reaffirm *Dixon*, and uphold the Quality of Life Act. Whether we would have enacted a two-child limit, whether we think the law wise or unwise, silly or even asinine, is irrelevant. We simply cannot strike down a law for violating a constitutional provision that does not exist.

There is no such thing as natural law. There may or may not be natural justice, just like there may or may not be a God. Those basic questions of existence are beyond the ken of the secular state and its courts. We are empowered to enforce only human law, law we can see, feel, and touch, law promulgated by human beings for the governance of other human beings. The Constitution is one such law, enacted by real people, in language with real meaning. The framers were not mythical figures, like gods from Mount Olympus. They were lawmakers. When a law passed by the framers collides with a law passed by a subsequent federal Congress or state legislature, it goes without saying that the Constitution controls, and we must strike the statute down. But when the Constitution is silent, those subsequent legislatures may do what they please.

No fundamental right to privacy exists under the Constitution, we held in *Dixon*, outside the specific rights actually listed in the constitutional text. The words "sex," "intimacy," "procreation," "contraception," "abortion," and "privacy" do not appear in the document. We resolutely reaffirm that ruling today. There is a right to bear arms, but no right to bear children.

B. The Free Exercise of Religion Claims

The Petitioners Catherine and Ronald O'Meara assert that whatever our analysis under the Due Process Clause, the Quality of Life Act violates the First Amendment's guarantee of the free exercise of religion because it places an intolerable burden on their Roman Catholic beliefs concerning contraception. We reject the O'Mearas' claim.

Nothing in the Quality of Life Act regulates religious belief. The Act takes no position on when life begins, on whether contraception is consistent with God's commands, or on whether God even exists. It does not require the O'Mearas, or anyone else, to act in a manner contrary to their religion, or even to act at all. The O'Mearas are not ordered by the law to use contraceptives.

Rather, the Quality of Life Act merely does what all secular laws do: regulate conduct and create sanctions for violation of that regulation. Indeed, the very first free exercise of religion case ever decided by the Court, the 1879 decision in *Reynolds v. United States*,⁵⁴ upheld an act of Congress forbidding polygamy in the face of a claim by a Mormon that it was his religious duty to practice it. This Court established the dichotomy between the regulation of religious opinion and the regulation of religious conduct that still governs the area: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."⁵⁵

Our holding in *Reynolds* effectively disposes of the religious free exercise claims in this case. If the government may place limits on the number of wives, it may place limits on the number of children.

Realistically, of course, it is true that compliance with the Quality of Life Act will work an especially acute hardship on the O'Mearas. Once the two-child limit is reached, most American married couples will be forced to forego children, but not sex.

⁵⁴ 98 U.S. 145 (1878).

⁵⁵ *Id.* at 164.

That hardship, however, is not the result of the law, but of the O'Mearas' religious convictions, and they must have the courage of those convictions.

The O'Mearas rely on a series of decisions decided by this Court in which the Free Exercise Clause was held to require government to make special exceptions to otherwise valid secular regulations in order to accommodate the religious beliefs of individuals indirectly burdened by those regulations. In *Sherbert v. Verner*,⁵⁶ for example, we held that South Carolina could not deny unemployment compensation to a Seventh-Day Adventist who had been discharged by her employer because she would not work on Saturday, the Sabbath Day of her faith. It violated the Constitution, we held, to condition the availability of benefits on the willingness of an individual to disregard cardinal principles of religious faith because this "effectively penalizes the free exercise" of constitutional liberties.⁵⁷ *Sherbert* was followed by a series of decisions that forced government to accommodate laws of general applicability to the special religious needs of individuals, creating what was, in effect, a First Amendment "conscientious objector" doctrine.⁵⁸

In 1990, this Court first began to express doubt about the soundness of *Sherbert v. Verner* and its progeny. In *Employment Div., Dep't of Human Resources of Oregon v. Smith*,⁵⁹ the Court was presented with the question of whether the Free Exercise Clause permitted the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on the use of that drug. We held that the First Amendment did not require Oregon to make a "sacramental use" exception to its drug laws. Native Americans who used peyote as part of their religious rituals could thus be sent to jail for that usage, as long as the law was one of general applicability not passed for the purpose of penalizing religious belief. As Justice Scalia cogently observed:

[T]he "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statutes that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

... We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.⁶⁰

We choose today to disown *Sherbert v. Verner* and other similar cases because we are convinced that they are based on an analytically flawed premise. When the government passes a law that has nothing whatsoever to do with religious beliefs, but

⁵⁶ 374 U.S. 398 (1963).

⁵⁷ *Id.* at 406.

⁵⁸ See, e.g., *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

⁵⁹ 494 U.S. 872 (1990).

⁶⁰ *Id.* at 877-79.

happens, through circumstance, to place some persons in the position of adhering to their religious beliefs and forgoing certain benefits or conveniences, or accepting those benefits or conveniences at the expense of violating their religious beliefs, is that "penalty on free exercise" sufficient to violate the Constitution? We conclude that it is not, and that the *Sherbert* line of cases actually demeaned and trivialized religion by permitting individuals "an easy way out."

We hold today that as long as a governmental regulation is enacted for a neutral secular purpose, and not for the invidious purpose of penalizing religious beliefs, the law will be upheld, even though it may have the incidental effect of requiring some individuals to forfeit benefits if they are to comply with the law. As Justice Frankfurter wisely observed, "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."⁶¹ Adhering to one's religion is not always easy or cost-free. In a pluralistic, religiously diverse country like the United States, neutral laws will, inevitably, from time to time come into conflict with some religions. Society cannot accommodate every variation in religious doctrine, however, permitting any citizen to "opt out" of laws whenever observance of law renders observance of religion costly.

IV. CONCLUSION

In the landmark 1803 decision in *Marbury v. Madison*,⁶² the great Chief Justice John Marshall established the elemental constitutional principle that the Supreme Court could declare acts of Congress repugnant to the Constitution void.⁶³ It would subvert the very foundations of all written constitutions, Marshall held, if courts were not empowered to enforce them against contrary acts of ordinary legislation.⁶⁴ We do not shrink from the principles enunciated in *Marbury*, but wholeheartedly embrace them.

To acknowledge the constitutional role of this Court, however, is not to embrace the well-intentioned but tragically misguided illusions of our dissenting colleagues. This is 2023, a time for realism, not mysticism. As this Court acknowledged in *Erie R.R. Co. v. Tompkins*,⁶⁵ there is no body of general or natural law binding on men existing like some brooding omnipresence in the sky, and it is unconstitutional for this Court to behave as if there is.⁶⁶ There is a difference in kind between the law as applied by philosophers and treatise writers, the "law in the books," so to speak, and the *real* law, which can exist only with the force of authority behind it. This Court is free only to apply such real law.

It was Justice Oliver Wendell Holmes who led the charge to emancipate this Court from the natural law mysticism in which it had been mired in the 19th Century. In the words of Justice Holmes:

Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeal, from the State Courts, from England and the Colonies of England indiscriminately, and criticize them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is

⁶¹ Board of Educ. of Minersville School Dist. v. Gobitis, 310 U.S. 586, 594-95 (1940).

⁶² 5 U.S. (1 Cranch) 137 (1803).

⁶³ *Id.* at 177.

⁶⁴ *Id.* at 178.

⁶⁵ 304 U.S. 64 (1938).

⁶⁶ *Id.* at 68.

one august corpus, to understand which clearly is the only task of any court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it.⁶⁷

We agree with Justice Holmes. Our role is to apply the law of the Constitution, not to create it.⁶⁸ As the legal philosopher John Austin so succinctly put it, "The existence of law is one thing; its merit or demerit another."⁶⁹

In one of his most famous and influential statements, John Marshall declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁷⁰ We agree. Our emphatic province and duty, however, is to modestly and conscientiously say what the law *is*, not what we think it *ought to be*.⁷¹ Justice Iredell, writing in the very decade in which the Bill of Rights was ratified, captured the essence of the constitutional role of this Court:

If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or of the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.⁷²

The petitioners are not powerless in this matter. This is a democracy. They may write letters to their congressional representatives; they may speak and march and publish their views, working to have the law repealed. They may go even farther, and try to get the rights they wish to entrench in the Constitution placed there in the only way that rights may ever legitimately be added to the Constitution, through amendment.

Some individuals may wish that the Constitution already contained sexual and procreative rights. It does not. Their proper recourse is to seek a constitutional amendment

⁶⁷ *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

⁶⁸ See *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Whence does that law issue? Certainly not from us.").

⁶⁹ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 184 (1832).

⁷⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) at 137.

⁷¹ See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990).

⁷² *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring).

explicitly placing those rights in the document. It is not for judges to read rights into the Constitution that are not there, placing the burden on the people to amend the Constitution to remove rights that never existed in the first place. To strike down an act of Congress or a state legislature on the amorphous basis that it violates the "penumbras" of the Bill of Rights, or the Ninth Amendment's vague invocation of unspecified rights "retained by the people," or the grandiloquent oxymoron "ordered liberty," is simply to assert a right to hold laws passed by legislatures void because they contradict laws promulgated by God, or the natural order. Such invocation of natural law is in turn nothing more than an invitation to the judge to substitute his or her policy judgment for that of the elected representatives of the people.

The Constitution is not a creature of this Court. This Court is a creature of the Constitution. Nothing in the Constitution creates a right to privacy. Nothing in the Constitution creates a right to bear children. We uphold the Quality of Life Act of 2020 against all challenges. The decision of the Court of Appeals below striking down the Act is

REVERSED.

JUSTICE DANIELS, concurring in the judgment.

I concur in the result reached by the Chief Justice and the three other members of this Court who join in his opinion. I am in full agreement with the analysis of the Chief Justice with regard to the Free Exercise of Religion Clause claims asserted by the petitioners Catherine and Ronald O'Meara. I do not agree, however, with many of the extravagant statements made in the course of the Chief Justice's analysis of the right to privacy claims asserted by the various petitioners. I respectfully believe that many of the rather extreme statements made in the Chief Justice's opinion go well beyond what is necessary to decide this case. I thus join in the judgment of the Court, but not its opinion.

The Chief Justice states categorically that natural law does not exist. Justice Narducci, in his moving dissent, states with religious fervor that natural law does exist, that it is knowable, and binding on this Court. Justice Rawlings, in his dissent, is as scornful of the existence of natural law as the Chief Justice — indeed, there are passages in Justice Rawlings' dissent that seem to call into question the very existence of all law. Justice Rawlings, nevertheless, is also willing to cast his vote striking down the Quality of Life Act, and Justices Bailey and Zevon have joined him. With four votes cast on each side, I find myself in the middle of a legal and jurisprudential battle that invites a flighty philosophical excursion into celestial questions concerning the existence of God, and the source and legitimacy of law and moral obligation.

This is a journey I choose not to make. I find it unnecessary to enter this metaphysical debate. I am a Supreme Court Justice, a governmental official working in a governmental building with an address in Washington, D.C. I am a simple magistrate, charged with the duty of deciding concrete cases and controversies. I am a lawyer. I am not a theologian, charged with defending the existence of God; I am not a theoretical physicist, charged with explaining the origins of the universe; I am not a moral philosopher, charged with articulating the contours of ethical human behavior. I am a mere Supreme Court Justice, a governmental official, a lawyer; I decide cases.

I approach that role as a realist and pragmatist. "The life of the law has not been logic," Oliver Wendell Holmes instructed, "it has been experience."⁷³ Neither grand theories nor the mechanistic application of the language in the constitutional text move me to a clear-cut conclusion as to the constitutionality of the Quality of Life Act. I am

⁷³ OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (1881) (Mark DeWolfe ed., 1963).

moved, instead, by pragmatic judgments, common sense, modest deference to the intelligence and good faith of the President and Congress who enacted the law, and whatever wisdom and insights are borne of experience.

One of the elemental pieces of wisdom I have garnered from experience is to never say never. To quote again from Holmes, "Certitude is not the test of certainty. We have been cock-sure of many things that were not so."⁷⁴

The Chief Justice states that no rights exist under the Constitution except those specifically enumerated in the text. I am not prepared to go so far. Many of the sweeping, majestic phrases in the Constitution seem to positively invite elaboration: "life, liberty, or property," "due process of law," "equal protection of the laws," "privileges and immunities of citizenship," "free exercise" of religion — the list goes on. These are open-ended phrases of aspiration, phrases that seem to vex and cajole each generation to fill them with new meaning, constantly mediating the past and the future. That ongoing organic process is what constitutional law is all about. The Constitution is never static; it is always evolving, always becoming, always working itself more pure.⁷⁵

Does natural law exist? Does the Ninth Amendment's statement about rights "retained by the people" import natural law into the Constitution? If natural law does exist, and is part of the Constitution, does it embrace a right of procreation? These questions are intellectually fascinating, but irrelevant to the pragmatic, judicial mind. I am perfectly willing to assume, without actually deciding, that a fundamental right to procreation does exist in our Bill of Rights. Whether in the penumbras of specific rights, or within the phrase "life, liberty, or property," or implicit in the Ninth Amendment does not really matter. The Due Process Clause and the Ninth Amendment must mean *something*, after all, and it hardly strains credulity to think that their meanings might be sufficiently latitudinous to include privacy rights over a choice as personal and intimate as whether or not to have a child.⁷⁶

I am perfectly comfortable assuming the existence of a fundamental right of procreation because, as a realist, I understand that such an assumption does not end the inquiry; it only begins it. No rights exist in a vacuum. In complex social life all rights are qualified, subject to reasonable restrictions for the greater good of the polity. In practical terms, indeed, the notion of a "legal right" is meaningless unless annexed to a "legal remedy." The term "right" is more an after-the-fact conclusion than a pre-existing absolute; it is the label we affix to an enforceable judicial decree bringing to bear the

⁷⁴ Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

⁷⁵ See Jaime Kalven, *Editor's Introduction to HARRY KALVEN, JR., A WORTHY TRADITION* xvii (Jaime Kalven ed., 1988).

⁷⁶ Contrary to the Chief Justice's characterization of the case, I do not read *Dixon v. Delaware*, 525 U.S. 212 (2005), as a complete repudiation of the line of decisions emanating from *Griswold v. Connecticut*, 381 U.S. 479 (1965). The principal issue in *Dixon* was whether this Court should, once and for all, flatly overrule *Roe v. Wade*, 410 U.S. 113 (1973). The plurality opinion in *Dixon* completely repudiated *Roe*, and in *dicta* made passing references to *Griswold* and the notion of substantive due process that might be understood as undermining the continued vitality of *Griswold* and its progeny. See *Dixon v. Delaware*, 525 U.S. at 222 (plurality opinion). But the plurality in *Dixon* never uttered the words "*Griswold v. Connecticut* is overruled." The plurality *did* utter the words "*Roe v. Wade* is overruled." Only the concurring opinion in *Dixon* of Chief Justice Calvin — whose vote provided the five-justice majority necessary for the result — expressly repudiated *Griswold*. *Id.* at 248 (Calvin, C.J., concurring). Because a reexamination of *Griswold* was not necessary to render a decision in *Dixon*, I believe that *Griswold* arguably remains part of the law of the land. Even if I am wrong in my understanding of *Dixon*, I will not acquiesce in the repudiation of the notion that privacy is a fundamental constitutional right when a ruling on that issue is not necessary to dispose of this case. I thus assume, without deciding, the continued vitality of *Griswold*.

force of the sovereign state against a private party or public official who has invaded an interest that the court has been moved to protect.⁷⁷

A right to privacy exists if this Court says a right to privacy exists. Charles Evans Hughes, who would himself become a Chief Justice of this Court, stated in a speech in 1907, "We are under a Constitution, but the Constitution is what the judges say it is."⁷⁸ Hughes did not intend that remark as an arrogant defense of the power of the Court, but rather as a realistic reminder of the cautious approach the Court should take to constitutional interpretation. As the wisdom goes, we are not final because we are infallible, but infallible because we are final. Precisely because we are "the last word" within the American legal system as to the meaning of the Constitution, we should be extremely loath to ever ascribe to that document a meaning at odds with the interpretation that has already been arrived at through the political process. This is not to say that we should never strike down a law, but only that such an exercise should be an exceedingly rare event. We do not own the Constitution. It belongs to the people of the United States. We should be eternally vigilant against presuming that the people, through their elected representatives, have acted in a manner inconsistent with the Constitution that we all collectively cherish.

Whether this Court chooses to recognize the existence of a constitutional right in a particular case will thus always depend on what that right is being balanced against under the circumstances, and we owe great deference to the balance already struck through the political process. In this case, the balance is close — agonizingly close.

In a carefree world government ought to leave the choice of the individual to have or not to have children well enough alone. In everyday life we certainly think of such a decision as quintessentially "private," and it does no great violence to legal theory or the constitutional text to translate that common understanding into the status of a "constitutional right."⁷⁹ But this is not a carefree world. Rather, it is a world recently shaken to the marrow by a war fought with tactical nuclear weapons, a world teetering on the brink of an environmental crisis that could throw the natural ecology of the planet so out of kilter as to make the earth uninhabitable, a world teeming with political and economic confusion.

The President and Congress of the United States, through an open and democratic deliberative process, weighed the competing policy interests and found that the exigencies of the moment justify some curtailment of the privacy interest in procreation. The same balance might not have been struck in 1791, when the Bill of Rights was ratified, because an entirely different set of historical circumstances would have generated an entirely different policy judgment. The same balance might not have been struck thirty years ago, and might not be struck thirty years hence. But it *was* the balance struck by this Congress and this President, in an open and vigorous public debate in which all sides were freely able to press their arguments.⁸⁰

⁷⁷ See Stephen Wermeil, *The "Rule of Five": A Comment on Theory and Practice in the United States Supreme Court*, 79 TEXAS L. REV. 19 (2001).

⁷⁸ Speech by Charles Evans Hughes (1907), in WILLIAM B. LOCKHART, YALE KAMISAR, JESSE H. CHOPER, AND STEVEN H. SHIFFRIN, *CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS* 8 (7th ed. 1991).

⁷⁹ See Paul Marcus, *Ruminations on Privacy and the Criminal Law*, 70 U. CHI. L. REV. 987, 992-93 (2003).

⁸⁰ See Jesse Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 831 (1974) ("A distinguishing feature of our system, perhaps impelled by heritage of sectional division and heterogeneity, is that our governmental structure, institutional habits, and political parties with their internal factional divisions, have combined to produce a system in which major programs and major new directions cannot be undertaken unless supported by a fairly broad popular

As a Supreme Court Justice, my only task is to determine whether the decision to curtail freedom of choice over procreation was within the realm of possible reasonable policy options. Whether I would have voted for the bill is not important. For who am I, an appointed member of a Court consisting of only nine people, to second-guess the considered judgment of the other two branches of government? Unless the decision reached through the crucible of public political debate is so utterly devoid of any plausible supporting rationale as to be patently unreasonable, this Court has no mandate to strike down the decision.

I find the nice legal tests traditionally bandied about to support rulings on such momentous controversies somewhat disingenuous and misleading, and have purposefully avoided their invocation in this opinion.⁸¹ My conclusions are not affected by whether I cast my ruling in the glittery garb of "strict scrutiny," with its formula of "compelling state interests" and "precisely tailored" means, or simply in the more common clothes of "reasonableness." For whatever the words invoked after-the-fact to rationalize the conclusion, my conclusion would be the same; both the claims of procreative autonomy and religious free exercise asserted by the petitioners in these cases must, in a free and democratic society, be subject to reasonable restrictions. Congress did not, it must be remembered, cut off all procreative rights. This is not a no-children law, but a two-children law. This is not a law passed on whimsy; it has no smell of "the fix." It was passed, rather, in the midst of a very real and palpable crisis, a crisis that is still far from having run its appointed course. I cannot in good conscience say it is unreasonable, and I cannot in good conscience declare it unconstitutional.

JUSTICE NARDUCCI, dissenting.

There is a creeping darkness on the edge of town, a squalid depressing blackness that threatens to envelope and smother that greatest of all embodiments of human dignity and promise: the Constitution of the United States. In a decision that I pray will some day be remembered as an evil abomination to rival *Dred Scott v. Sandford*,⁸² a majority of this Court refuses to recognize in our Constitution one of the most basic of all natural human rights, the right to bear children.

The Court today upholds a law that would have been unthinkable to the framers, unthinkable to the great Chief Justice Marshall, and unthinkable to this Court itself as recently as the turn of this century. Caught up in rigid and mechanical formalism, the Chief Justice has written an opinion so devoid of courage and imagination as to disgrace the memory of John Marshall and the legacy of the framers that he so superficially

consensus.") (quoting ROBERT DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 10 (1968)).

⁸¹ See Neal Devins, *The Collapse of Doctrinal Integrity in Modern Supreme Court Opinions*, in XVII INSTITUTE OF BILL OF RIGHTS LAW, *CHARTING THE FUTURE COURSE OF CONSTITUTIONAL THEORY* (Neal Devins ed., 2008).

⁸² 60 U.S. 393 (1856).

invokes.⁸³ The cryptic concurring opinion of my dear colleague Justice Daniels saddens me all the more, for she should know better.⁸⁴

I.

The opinion of the Chief Justice turns the Constitution upside down. It speaks as if the civil liberties of men and women are somehow created by the Constitution and the Bill of Rights. The opposite is true. Civil liberties — basic human rights — preexist the Constitution. The basic liberties of man are fundamental aspects of humanity with which all persons are born; they do not come from governments or constitutions; they are not dependent upon the grace of the state. In the words written by Thomas Jefferson in our Declaration of Independence: "We hold these truths to be *self-evident*: that man is *endowed by his Creator* with certain *inalienable rights*. . . ."⁸⁵ Governments are instituted among men not to create these rights but to secure them.

The opinion of the Chief Justice speaks as if somehow any right that did not make its way explicitly into the Constitution was somehow expunged and forgotten. The Chief Justice's opinion, like this Court's unfortunate holding in *Dixon v. Delaware*,⁸⁶ unceremoniously discards doctrines that have time out of mind flourished at the core of our constitutional jurisprudence.⁸⁷

Let me begin with the oldest decision of this Court cited by the Chief Justice, *Calder v. Bull*.⁸⁸ The Chief Justice disingenuously quotes only from the concurring opinion of Justice Iredell, ignoring the lead opinion of the Court, delivered by Justice Chase. In the opinion of Justice Chase, it was made abundantly clear that the Constitution was meant to *incorporate* pre-existing natural law principles, not to *expunge* them. Thus Justice Chase explained:

There are certain vital principles in our free Republican governments, which will determine and over-rule [sic] an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the Legislature (for I cannot call it a law) contrary to the great first

⁸³ In reading Chief Justice Calvin's opinion, I am reminded of lines from the poet W. H. Auden:

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.

WYNSTAN HUGH AUDEN, *Law Like Love*, in *SELECTED POETRY OF W. H. AUDEN* 62, 63 (1958).

⁸⁴ Because I consider the invasion of the petitioners' constitutional right of privacy so obvious, I will not write separately on the Free Exercise of Religion Clause issue, except to say that I, like my other dissenting colleagues, would find that the O'Mearas' First Amendment rights to the free exercise of religion have indeed been violated. I join in that part of my brother Rawlings' dissenting opinion.

⁸⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

⁸⁶ 525 U.S. 212 (2005).

⁸⁷ See DAN BRAVEMAN, WILLIAM C. BANKS, AND RODNEY A. SMOLLA, *CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM* at v-xii (10th ed. 2018).

⁸⁸ 3 U.S. (3 Dall.) 386 (1798).

principles of the social compact, cannot be considered a rightful exercise of legislative authority.⁸⁹

Similarly, Chief Justice John Marshall, whom the current Chief Justice is more fond of quoting than emulating, understood the role of a Supreme Court Justice as far more ambitious than that of a mere clerical scrivener parsing the literal language of the constitutional text. Chief Justice Marshall's opinion in *Fletcher v. Peck*⁹⁰ is illustrative. The Supreme Court was faced with an attempt by the State of Georgia to repudiate certain land contracts. Marshall observed:

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions.⁹¹

This Quality of Life Act, passed over 200 years after those words were written by John Marshall, reflects a similar tide of "sudden and strong passions" borne out of the "feelings of the moment." Can anyone really doubt what John Marshall would do if confronted with this legislation? Would he follow the brittle jurisprudence of Chief Justice Calvin and accede to this statute merely because he could locate no specific language in the Bill of Rights rendering the statute void? Surely John Marshall and his colleagues on the Court would have found a limitation on the number of children an American couple may bear an utter abomination, repugnant to the first principles of law and government upon which the nation was founded.

And let there be no doubt that Chief Justice Marshall was willing to rest on first principles in enunciating the decisions of the Court. Returning to *Fletcher v. Peck*, for example, Marshall in his opinion stated, "It is, then, the unanimous opinion of the court, that . . . the state of Georgia was restrained, *either by general principles, which are common to our free institutions*, or by the particular provisions of the constitution of the United States, from passing [this] law. . . ."⁹²

II.

Throughout our history, this Court has risen to the challenge put to it by Chief Justice Marshall, rising up to strike down legislation repugnant to the general principles of liberty and due process embedded in the Bill of Rights, notwithstanding the lack of any direct textual statement in the Constitution describing the fundamental rights at issue.

⁸⁹ *Id.* at 388 (opinion of Chase, J.).

⁹⁰ 10 U.S. (6 Cranch) 87 (1810).

⁹¹ *Id.* at 137-38.

⁹² *Id.* at 139 (emphasis added). Justice Johnson wrote a concurring opinion in *Fletcher* in which he based his holding "on a general principle, on the reason and nature of things: a principle which will impose laws *even on the Deity*." *Id.* at 143 (Johnson, J., concurring) (emphasis added). I must say that Justice Johnson's rhetorical flourish is a bit much even for me; it stretches the notion of natural law somewhat far to assert that the "bona-fide purchaser for value rule" is binding even on God.

Decisions of this Court have held that there is a fundamental right to vote, but no such fundamental right is contained in the text of the Constitution.⁹³ This Court has recognized a fundamental right to travel, but the word "travel" does not appear anywhere in the constitutional text.⁹⁴ This Court has recognized a fundamental right of freedom of association, though no such right is mentioned in the Constitution.⁹⁵

This Court has been particularly generous in its willingness to hold that questions concerning child-bearing and child-rearing fall presumptively within the sovereignty of the family, and not the sovereignty of the state.⁹⁶ In *Pierce v. Society of Sisters*,⁹⁷ for example, we struck down a law that forced parents to send their children to public schools. *Nothing* in the constitutional text speaks of schools, or the education of children. But this Court in *Pierce* properly observed that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."⁹⁸

Similarly, in *Meyer v. Nebraska*,⁹⁹ this Court struck down a law that prohibited grade schools from teaching subjects in any language other than English — again, despite the lack of any discussion in our Constitution of education or official languages. In *Meyer* we expounded on the meaning of the word "liberty" in the Fourteenth Amendment:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹⁰⁰

If this Court is to take the language of *Meyer* seriously, as it should, then certainly decisions concerning the number of children to bear must be understood as embraced by the phrases "to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."¹⁰¹ Indeed, on numerous occasions this Court has stated precisely that. In *Skinner v. Oklahoma*,¹⁰² this Court struck down a sterilization law for habitual criminals, speaking of "a right which is basic to the perpetuation of a race — the right to have offspring."¹⁰³ In *Skinner* we referred to "marriage and procreation" as "fundamental,"

⁹³ See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁹⁴ See *Zobel v. Williams*, 457 U.S. 55 (1982); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁹⁵ See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *NAACP v. Alabama*, 357 U.S. 449 (1958).

⁹⁶ See generally KAY P. KINDRED, *EDUCATION LAW: THEORY AND PRACTICE* § 1.09 (1999).

⁹⁷ 268 U.S. 510 (1925).

⁹⁸ *Id.* at 535.

⁹⁹ 262 U.S. 390 (1923).

¹⁰⁰ *Id.* at 399. For an excellent overview of this strain of constitutional law throughout history, see JOHN NOWAK AND RONALD ROTUNDA, *CONSTITUTIONAL LAW* (10th ed. 2015).

¹⁰¹ *Meyer*, 262 U.S. at 399.

¹⁰² 316 U.S. 535, (1942).

¹⁰³ *Id.* at 536.

and as among "the basic civil rights of man."¹⁰⁴ And in *Griswold v. Connecticut*,¹⁰⁵ Justice Douglas powerfully captured the essence of the right of procreation:

We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁰⁶

III.

The Chief Justice could use a bit of a history lesson, for he has fallen prey to exactly the concern that caused trepidation among the framers, a concern that they later specifically addressed in the Ninth Amendment.

The absence of a bill of rights was one of the major arguments advanced by the Anti-Federalists in their opposition to ratification of the Constitution.¹⁰⁷ The argument that the Constitution was flawed without a bill of rights posed difficult questions of substance and strategy for the Federalists. Some friends of the Constitution, like Thomas Jefferson, essentially agreed with the Anti-Federalist argument, believing as a matter of principle that the Constitution should have a declaration of basic rights. In outlining his critique of the Constitution, for example, Jefferson wrote to James Madison that he regretted:

First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of the fact triable by the laws of the land and not by the law of Nations. . . . Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on influence.¹⁰⁸

Other proponents of the Constitution, however, felt that the inclusion of a bill of rights would not enhance the protection of liberty, and might even pose dangerous threats

¹⁰⁴ *Id.* at 541. As Justice Walter Dellinger eloquently expressed the point in *Dixon v. Delaware*, 525 U.S. 212, 263 (2005) (Dellinger, J., dissenting), "The time has come for this Court to once again embrace the fundamental notion upon which our nation was founded: that men and women are not the creatures and servants of the state, but that the state is the creature and servant of men and women." *Id.*

¹⁰⁵ 381 U.S. 479 (1965).

¹⁰⁶ *Id.* at 486. As Justice Goldberg stated in *Griswold*: "Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them." *Id.* at 496-97 (Goldberg, J., concurring).

¹⁰⁷ See HERBERT STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 64-65 (1981). (This alleged deficiency in the Constitution was sincerely pressed by many, but was also a merely convenient and somewhat less sincerely advanced argument by others, who were determined to oppose ratification on any grounds that might prove effective.) *Id.*

¹⁰⁸ Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in XII THE PAPERS OF THOMAS JEFFERSON 140 (Julian Boyd ed., 1955).

to the protection of essential rights. In the early stages of the ratification debates, for example, James Madison raised basic objections to a bill of rights, maintaining that the Constitution did not grant the federal government affirmative power to invade basic rights, and so no bill of rights was necessary to proscribe what the federal government could not do in any event. Madison was worried that a bill of rights might hinder rather than enhance protection of liberties because their enumeration would tend to imply the exclusion of other rights not listed and because there was reason "to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude."¹⁰⁹ Madison believed that the federal structure of the Constitution, particularly the jealousy of the states of the national government, would afford greater security against encroachment on basic rights. He argued that:

[E]xperience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. . . . Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.¹¹⁰

The Federalists, of course, managed to win ratification, but only with the understanding that a list of amendments declaring basic rights would quickly be added. Madison's views changed.¹¹¹ Madison became the primary architect of the Bill of Rights.

Among Madison's proposals was the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹¹² Madison's language could not be clearer. Nor could his intent. As Madison stated to the House of Representatives:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hand of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted

¹⁰⁹ 5 THE WRITINGS OF JAMES MADISON 269, 271 (Gaillard Hunt ed., 1904).

¹¹⁰ *Id.* at 272 (emphasis in original).

¹¹¹ In 1789 Madison wrote to a campaign worker, George Eve:

[I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants . . .

Id. at 320, n. 1.

¹¹² U.S. CONST. amend. IX.

it, as gentlemen may see by turning to the last clause of the fourth resolution.¹¹³

That "last clause of the fourth resolution" to which Madison referred would become the present Ninth Amendment.

My colleague Justice Rawlings says that the Ninth Amendment is but a "rule of construction" and not an "independent font of substantive legal rights." I must confess that I do not grasp his distinction. If the Ninth Amendment is but a rule of construction, it is nonetheless a profound rule, a rule that instructs that we are not to approach the Constitution as if it were an internal revenue code, but rather as a broad bulwark of liberty designed to preserve the fundamental natural rights of man.

IV.

The twilight of my own long career on this Court is now consumed in a deepening gray darkness, as I sense not only the winter of my own life, but of the human dignity and autonomy that I had thought the Constitution would preserve, even against the inexorable onslaughts of modernity. I will not surrender without a fight. I will instead admonish the words of the poet Dylan Thomas:

Do not go gentle into that good night,
Old age should burn and rave at close of day;
Rage, rage against the dying of the light.¹¹⁴

I know of no right more fundamental than the freedom to bear children. It is a right as old as Adam and Eve, a right self-evident in the very construction of man and woman. If government is not required to refrain from regulating a matter so personal and intimate as this, then government may do anything, and men and women are but robots. The invasion of privacy created by this statute is more than an unseemly insinuation into the bedroom; it is an insidious and brutal exercise of power that works inexorably to strip human beings of that which makes life worth living: *love* — love between man and woman, parent and child, humankind and Creator.

I will not go gentle into this good night. For as long as I am on this Court, I will rage against the dying of the light. I dissent.

JUSTICE RAWLINGS, with whom JUSTICE BAILEY and JUSTICE ZEVON join, dissenting.

I respectfully dissent.

I should say at the outset that I fully agree with Justice Daniels in her jurisprudential approach to this case. I, too, find the excesses in the Chief Justice's opinion disturbing. I, too, find the mystical netherworld of my dear brother Narducci incomprehensible, and well beyond the scope of my duties as a judge in a secular state charged with administration of the law of man, not the law of God. Applying instead the very earthy and mundane law of the United States, I would hold that the Quality of Life Act violates the Constitution.

¹¹³ 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1834).

¹¹⁴ See DYLAN THOMAS, *Do Not Go Gentle Into That Good Night*, in COLLECTED POEMS 128, 128 (1957).

As a matter of legal doctrine, I find this case is quite simple. Procreation is a fundamental constitutional right, anchored in the "liberty" explicitly protected under the Due Process Clause.¹¹⁵ Government may thus limit the number of children an individual may have only to serve compelling interests, and only by means narrowly tailored to serve those interests. The free exercise of religion is also a fundamental constitutional right. The Free Exercise Clause protects more than direct regulation of religious belief; it also prevents indirect and incidental penalties on the free exercise of religion whenever the government cannot demonstrate a compelling justification for not carving out an exception to its regulatory scheme accommodating free exercise interests. The Quality of Life Act comes up short under both the Due Process and the Free Exercise Clauses, and I would strike it down.

The Chief Justice writes as if the words "procreation" or "privacy" would literally have to appear in the Constitution to be recognized as constitutional rights. Justice Narducci writes as if the Ninth Amendment incorporates the indeterminate universe of "natural law" into the Constitution, authorizing the Supreme Court to serve as an ongoing constitutional convention, somehow absorbing the currents of universal being and translating them into constitutional law. As Justice Daniels ably demonstrates, they are both wrong.

I add to Justice Daniels' opinion only the two following observations. If the Chief Justice must find a word in the constitutional text to support every asserted right, then surely the word "liberty" in the Due Process Clause will do for this case. The word is in the Constitution; it must have been intended to mean *something*. Contrary to the Chief Justice, who snidely labels Justice Harlan's famous phrase "ordered liberty" a "grandiloquent oxymoron," I find the phrase to capture the essence of constitutional democracy: the never ending tension between freedom and order. The word "liberty" is not an open-ended mandate to subsequent generations of Supreme Court Justices to read whatever they wish into the Constitution. It is rather a constitutional command to enforce against government encroachments upon affairs of life that, by tradition and consensus, have been universally understood as off-limits to the state in a free society. When, by long and unwavering custom and practice, certain principles of justice become so rooted in the traditions and conscience of society as to take on a virtually instinctual status as "fundamental," this Court acts well within its proper institutional role in declaring those principles part of the Constitution. The right to be left alone on matters of procreation falls within that zone of deeply rooted tradition, and should be recognized by this Court as part of the ordered liberty protected by Due Process Clause.

I sincerely believe that this would be our undisputed law today, and that a substantial segment of this Court would never have hinted to the contrary in *Dixon v. Delaware*,¹¹⁶ had not certain zealots in the history of this Court abused the notion of invasion of privacy by attempting to create privacy rights that had not been long recognized in the traditions of the culture. Government must avoid dictating how many children one may have, but government is not required to abstain from all regulation of sex and marriage. The right to privacy does not encompass the right to commit adultery, fornication, or homosexual intercourse. For that would be to push the asserted right well beyond the customs of the culture. This Court is not to be in the lead, forcing constitu-

¹¹⁵ I believe Justice Daniels accurately characterizes the true holding of *Dixon v. Delaware*, 525 U.S. 212 (2005), in her assertion that the plurality opinion, while coming quite close in *dicta* to an outright repudiation of *Griswold v. Connecticut*, 381 U.S. 479 (1965), never actually did so. I thus feel no compunction about my continued adherence to the theories espoused by Justice Harlan in *Griswold*. See generally Michael Gerhardt, *Stare Decisis: Opus 5*, 99 CAL. L. REV. 88 (2009).

¹¹⁶ 525 U.S. 212 (2005).

tional rights from on high down upon the body politic. Rather, this Court's function is more that of a nagging conscience of the people, reminding them of principles that they already by long practice have recognized, but perhaps discarded in the heat of the political moment.

The unfortunate ruling of the Court today is also the product, I believe, of resort by some members of this Court over the years to exotic and untenable theories of constitutional law. My brother Narducci is guilty of this. He mistakes passion for analysis. To ground constitutional rights in "penumbras" and the Ninth Amendment is to invite ridicule and parody. These truly are nothing but natural law theory dressed up in constitutional garb. On this point, I agree with the Chief Justice. Natural law does not exist. Humans invented natural law for the same reason that they invented God: a quaking fear of the dark existential loneliness of the universe.¹¹⁷

Justice Narducci's reliance on the Ninth Amendment is particularly foolhardy. The Amendment was never intended as an independent font of substantive rights, but as a mere rule of construction, making clear that the Bill of Rights should not by implication be read to increase the powers of national government in any areas not enumerated.

I, therefore, come out very much where Justice Daniels comes out: a pragmatist treating procreation as a fundamental right because the people have by custom long so treated it. It is all practical judgment, common sense. I part ways with Justice Daniels, however, in my application of that common sense. She sees the current crisis facing the United States as a justification for holding that the infringement upon fundamental rights caused by the Quality of Life Act is outweighed by the national benefits that the Act will achieve. She defers to the balance struck by the political process because she trusts the benign good faith of that process. She is optimistic about government. Government is your friend. This act of legislation, as its very name promises, will improve our quality of life.

I approach the balance of interests, however, from precisely the opposite presumption. When fundamental rights are implicated, I am a pessimist about the political process. Government is not your friend.¹¹⁸ I would have thought that, in practical terms, this is at bottom what the label "fundamental right" means to the jurist: assume the worst. When a fundamental right is involved, the judge should rigorously cross-examine the political branches, putting them to this test: are there not some other methods that you

¹¹⁷ I no more believe in natural law than I believe in religion. As Karl Marx correctly observed, "Religion is the sigh of the oppressed creature, the heart of a heartless world and the soul of soulless conditions. It is the *opium* of the people." KARL MARX, CRITIQUE OF HEGEL'S "PHILOSOPHY OF RIGHT" 131 (Joseph O'Malley ed. & trans. & Annette Jolin trans. 1970) (emphasis added).

¹¹⁸ Because my colleagues on the Court find it quite the fashion these days to cite history and philosophy, I offer the insights of James Madison on this point:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to controul the governed; and in the next place oblige it to controul itself. A dependence on the people is, no doubt, the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.

THE FEDERALIST NO. 51, at 354-55 (James Madison) (Tudor Pub. Co., 1937).

could have employed that would have accomplished your goals, methods that would not have impacted so severely on these rights? Perhaps those methods would be somewhat less effective, somewhat less efficient, but the price of more cumbersome effectuation of public policy goals is well worth it if pressures on long-established civil liberties are relieved. For the reasons carefully delineated in the opinion of the Court of Appeals below, I am not convinced that the government has sustained this burden.¹¹⁹ I would uphold the petitioners' right to privacy claims.

I would also uphold the Free Exercise Clause claims of Ronald and Catherine O'Meara. My own agnosticism and antipathy for religion do not prevent me from conscientiously applying the First Amendment's guarantee of free exercise. The Chief Justice's opinion would render that guarantee a virtual nullity, for it would apply the Amendment only to the rare act of government actually presuming to legislate religious beliefs. Surely the Amendment must go farther than that, also interdicting governmental actions that have an incidental "spillover" effect on religion, when government cannot justify that negative effect with a compelling interest and a demonstration that the government has used the narrowest possible mechanism for achieving those interests. I think that the Court makes a tragic error in overruling *Sherbert v. Verner*.¹²⁰

Under this Court's stultifying literalism, there is, in the words of the Chief Justice, "a right to bear arms, but no right to bear children." The offensive crassness of this observation supplies its own refutation.

JUSTICE ZEVON, with whom JUSTICE BAILEY joins, dissenting.

I join in the dissenting opinion of Justice Rawlings, and concur in all of his legal analysis. I write separately to state that I do not wish to be understood as accepting the gratuitous personal observations contained in Justice Rawlings' opinion, such as his remarks about God and religion.

¹¹⁹ See *Webster v. Heiden*, 88 F.3d 1008, 1012-16 (15th Cir. 2001).

¹²⁰ 374 U.S. 398 (1963). At this point my Due Process Clause and Religion Clause arguments merge, for I do not find the heavy-handed measures of the Quality of Life Act narrowly tailored enough to meet the demands of a Constitution that embraces elemental notions of fundamental liberty. Again, I am content to rely on the thoughtful analysis of the Court of Appeals below.