

KEYNOTE

“LIBERTY”: ENUMERATED RIGHTS? UNENUMERATED RIGHTS? PENUMBRAL RIGHTS? OTHER?

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My assigned task today is to keynote this symposium. But, before I undertake that task, in view of Dean Fitts's gracious introduction, I do want to take a moment to reassure the Dean on one subject. The Dean kindly suggested that I am a demonstration that one can survive after having been a dean. I think it's more than survival. I am, to be sure, a recidivist dean, but the important fact is not that I have survived but that there is a far better survival example here in our group. We have in Professor Jesse Choper, a distinguished graduate of this school, a scholar who has not merely survived being a dean but who actually thinks after being a dean. And that's an example surely to be cherished and emulated.

I was really pleased to have been invited to be your keynoter. But I was also a little puzzled about the invitation. I kind of wondered what the job of a keynoter is. I had a vague recollection that, when I was young, very young, a keynoter was somebody like Sam Rayburn or maybe it was Daniel Webster or William Jennings Bryan, who would come and whip up enthusiasm at some party convention, and I thought that would be great to be. But I didn't really know what it was, and so I did some research. I have a handy copy of the Constitution and so I read all seven articles to find out what it said about keynotes. The word "keynote," at least in the edition of the Constitution which I have, does not appear in any of those seven articles, and that was sort of a downer. And then I saw that there, in the edition of the Constitution I have, well, it has an annex in which they have a lot of amendments. Did you know that there are twenty-seven amendments? That seemed too daunting a task but happily I have, well,

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three law clerks—Jesse Shumway, Samantha Chaifetz, and Brian Nelson—and the number seemed to come out very well. So, I asked each of them to look through nine of the amendments, and so Jesse looked through one, four, seven and so forth, and Samantha, two, five, eight, etc., and Brian, three, six, nine and whatever comes next, and they came back with very good memoranda. You know what the Constitution says? Zippo. There's nothing, not even in any of the amendments, at least on my law clerks' report, with anything about keynotes.

So then I did some more research, and I went to our library. We still have a library at the courthouse, and I looked up "keynote" in the OED¹ — oh, look, may I request, in the confidence of this room, that you kindly not let anybody in Congress know that we have this foreign book—this book from Oxford—in the library? Actually, it's not used very often and—well, I did look, and I don't feel guilty about it. Anyhow, a "keynote," it says in the OED, is a "leading idea of a discourse, composition, or course of action."² So what I'm to do, as I understand it, is to come up with the "leading idea" of the "course of action" for this symposium and then essentially instruct you as to what you should do or not do from here on.

The place I want to start is with the current issue of the *New York Review*, actually it's dated February 23, 2006, but even though today is February 10, 2006, the editors of the *New York Review* seem to have allowed it already to hit the newsstands. As some of you know, it has an essay by Ronald Dworkin.³ Now again, in deference to Congress and for the record, I want to make it clear that I'm talking about the domestic Ronald Dworkin, the law professor who used to teach at Yale and now is at N.Y.U.⁴ I'm not talking about the alien Ronald who taught at Oxford and is now at University College London.⁵ It's the American homegrown Dworkin that I'm talking about.

In that essay, Dworkin indicts the essential vacuity of the process by which the Judiciary Committee of the Senate of the United States goes about the job of deciding whether a person who's nominated by the President to be a Justice of the Supreme Court should be confirmed.⁶ The point that Dworkin makes is that the nominee is expected to, and indeed does, decline to speak at a confirmation hear-

¹ OED stands for Oxford English Dictionary.

² 8 OXFORD ENGLISH DICTIONARY 409 (2d ed. 1989).

³ Ronald Dworkin, *The Strange Case of Judge Alito*, 53 N.Y. REV. OF BOOKS, Feb. 23, 2006, at 12.

⁴ See Ronald Dworkin, Professor of Philosophy, Frank Henry Sommer Professor of Law, <http://www.nyu.edu/fas/Faculty/DworkinRonald.html>.

⁵ See Ronald Dworkin, Bentham Professor of Jurisprudence, <http://www.ucl.ac.uk/laws/academics/profiles/index.shtml?dworkin>.

⁶ Dworkin, *supra* note 3, at 12.

ing with any specificity, not only about particular issues that are likely to be presented in litigation before the Court—and one can understand the reservations there—but also at a considerably more general level about what the nominee regards as appropriate modes of judicial approach to the types of problems that may come before the Court in the future or that indeed have already arisen and been addressed by the Court in opinions of large consequence. Now the result, according to Dworkin, is that quite frequently senators and the public at large wind up knowing very little about the nominee.⁷ These days the nominee usually is a federal circuit court judge, who is already charged with important authority and to whom the nation is now being asked to entrust authority of far greater magnitude and who can be expected to exercise that authority well beyond the term of the appointing President and a number of his successors—and even beyond the term of the chairperson of the Federal Reserve.

Now, for more than a decade, persons nominated to the Court by presidents of quite divergent political persuasion have received essentially the free pass that Dworkin is complaining about, and Dworkin thinks the system should be changed. Dworkin has a large target and his aim is good. I would suggest that few people would quarrel with his indictment but getting a consensus as to what should be done in the future to remedy any of this would be quite difficult. But my purpose this morning is not to urge any particular course of action on senators who confirm or indeed presidents who nominate Supreme Court Justices, or even lower court judges. I have some notions about some of these questions but they're far a field from the phenomenon that brings us together today. That phenomenon is what is designated here as "unenumerated rights."

A couple of days ago I got a phone call from my good friend and longtime colleague, an eminent graduate of this law school, Judge William Ditter.⁸ He said he was going to be unable to attend the symposium, but he wanted to know what was all this stuff about unenumerated rights. I explained to him it was a typographical error; what it means is UN, United Nations enumerated rights, and that satisfied him.

Now, why have I mentioned the Dworkin essay to you? The reason is as follows. Dworkin points out that a nominee appearing before the Judiciary Committee can be expected, under questioning as to the nominee's views about any of the Court's past biggies, for example, *Roe v. Wade*,⁹ to circumnavigate any such questions with ritual expressions of deference to precedent (obligatory but non-

⁷ *Id.*

⁸ Senior Judge, United States District Court for the Eastern District of Pennsylvania.

⁹ 410 U.S. 113 (1973).

mandatory), but neither avowal nor disavowal of agreement with, interest in, or respect for, the particular decision that's inquired about. But then Dworkin goes on to say that there are a couple of cases that have now reached a point, after long-lasting-enough unquestioned acceptance, that a nominee can be asked about them and can profess total allegiance to such precedent without worrying.¹⁰ The two cases that Dworkin offers up as examples are *Brown v. Board of Education*¹¹—still good law after half a century—and *Griswold v. Connecticut*, which is forty years old.¹² *Griswold*, you will recall, is the case which held unconstitutional, at least as applied to married couples, a Connecticut statute criminalizing the use of contraceptives. The *Griswold* that I'd like to talk about is in a significant sense a catalyst of this symposium since *Griswold* was the forerunner of important things to follow: most particularly, *Roe v. Wade*¹³ and *Lawrence v. Texas*,¹⁴ and perhaps also other major developments, such as global warming and Harry Potter.

But my preaching at this symposium is not the obvious fact that *Griswold* is important. My preaching is that in paying homage to *Griswold*, we let it be clearly understood that in subscribing to the holding in *Griswold*, we are not vouching for the Court's opinion. I am talking about the opinion written by Justice Douglas—and joined by Chief Justice Warren, and Justices Clark, Brennan and Goldberg—that undertook to explain the Court's holding.¹⁵ I will argue that the Douglas opinion is a non-starter. My preaching is actually somewhat broader than that. I make the further submission that Justice Goldberg's concurring opinion,¹⁶ in which the Chief Justice and Justice Brennan joined, was itself somewhat below par in judicial performance.

What then supports the Court's holding? Well, I would say that Justice White's concurrence,¹⁷ though not very exciting, is at least competent. And I regard as masterly Justice Harlan's separate concurrence,¹⁸ a concurrence which built on his dissent four years before in *Poe v. Ullman*,¹⁹ which in turn built on Justice Cardozo's 1937 opinion in *Palko v. Connecticut*.²⁰ *Palko*, I remind you, is the opinion in

¹⁰ Dworkin, *supra* note 3, at 12.

¹¹ *Id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

¹² *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

¹³ 410 U.S. 113, 152 (1973) (citing *Griswold* among the line of decisions that have established a right of privacy).

¹⁴ 539 U.S. 558, 564 (2003) (citing *Griswold* as "the most pertinent beginning point" in examining "the substantive reach of liberty under the Due Process Clause").

¹⁵ *Griswold*, 381 U.S. at 480.

¹⁶ *Id.* at 486.

¹⁷ *Id.* at 502.

¹⁸ *Id.* at 499.

¹⁹ 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

²⁰ *Id.* at 544 (citing *Palko v. Connecticut*, 302 U.S. 319, 324–327 (1937)).

which Justice Cardozo developed the concept of “ordered liberty”,²¹ which tests claims of right against whether they subscribe or conform to what, drawing on the older cases, Cardozo saw as those fundamental rights which are essential to a system of “liberty and justice.”²²

Now, why do I urge that we disassociate ourselves from Justice Douglas’s opinion for the Court? I do so for two reasons: The first reason is that the Justice’s opinion—and I say this respectfully (“respectfully” is what a dissenting judge says when the dissenter thinks the majority opinion is a real bummer)—seriously misrepresented the two twenties-era Supreme Court decisions that Justice Douglas invoked as the constitutional wellsprings of his opinion. The second (and not unrelated) reason is that the Justice’s opinion, although deciding the case in favor of appellants, seriously misrepresented the argument made on their behalf by their counsel. Counsel for appellants was Thomas I. Emerson, the eminent First Amendment scholar.²³ Emerson had been a law student at Yale in the thirties, when Douglas was on the Yale faculty, and like Douglas, Emerson soon migrated to the New Deal where he, too, was a lawyer/administrator of major accomplishment. By the time of the *Griswold* argument Emerson had been back in New Haven, as a professor, for almost twenty years, and he was to continue professing for another score. There are some in this room who had the good fortune of studying the Constitution under Emerson’s tutelage. My point here, however, is not to expatiate on Emerson’s remarkable career. My point is to establish that Justice Douglas misconstrued the argument made by that scrupulously careful lawyer, and to suggest that the misconstruction may itself have been a factor in the Justice’s flawed analysis—an analysis to which four of his colleagues subscribed—of the Court’s earlier case law on which the opinion chiefly rested.

I will address the second problem—the misconstruction of the argument for appellants—first. To do so I will undertake to present a guided tour of the Court’s opinion.

The Court’s opinion begins appropriately by discussing the threshold question of standing. The question was whether Estelle Griswold, as the Executive Director of the Planned Parenthood League of Connecticut, and Lee Buxton, a physician who was the Medical Director of the Planned Parenthood Center in New Haven and gave advice to married women about contraceptives, had standing to assert the constitutional claims of their patients, the married couples to whom they gave counsel. Justice Douglas concluded, quite

²¹ *Palko*, 302 U.S. at 325.

²² *Id.* at 326–27.

²³ See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

properly, that they do have that standing.²⁴ "The rights of husband and wife," he said, "pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them."²⁵

Then, Douglas turned to the merits. "Coming to the merits," said Justice Douglas to the Court, "we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation . . ."²⁶ Well, the invitation that Justice Douglas and his four colleagues of the majority decided to decline was an invitation which, in fact, had not been issued: quite the contrary. On argument Professor Emerson had said "we are not asking this Court to revive *Lochner* against *New York*"²⁷ and then ensued the following colloquy:

The Court: It sounds to me like you're asking us to follow the constitutional philosophy of that case.

Mr. Emerson: No, Your Honor. We are asking you to follow the philosophy of *Meyer* against *Nebraska* and *Pierce* against the *Society of Sisters*, which dealt with—*Meyer* against *Nebraska*—

The Court: Was the one that held it was unconstitutional, as I recall it, for a state to try to regulate the size of loaves of bread—

Mr. Emerson: No, no, no.

The Court:—because people were being defrauded; was that it?

Mr. Emerson: That was the *Lochner* case, Your Honor.²⁸ *Meyer* against *Nebraska* held that it was unconstitutional for a state to enact a law prohibiting the teaching of the German language to children who had not passed the eighth grade. And *Pierce* against the *Society of Sisters* held that it was unconstitutional for a state to prevent the operation of private schools in a state. And those were both due process cases, were decided as due process cases. . . . All were due process cases which related to individual rights and liberties, and we distinguish those from the cases which in-

²⁴ *Griswold*, 381 U.S. at 481.

²⁵ *Id.*

²⁶ *Id.* at 481–82 (citations omitted).

²⁷ Transcript of Oral Argument, *Griswold v. Connecticut* (Mar. 29, 1965), in 61 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 413 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS]. The transcript of the argument does not disclose the identity of the Justice who was "The Court" in this colloquy. The anonymity of "The Court" has been a standard feature of Supreme Court transcripts of argument for a long time.

²⁸ Actually, Professor Emerson had that wrong. *Lochner v. New York*, 198 U.S. 45 (1905), invalidated a New York statute limiting the hours bakery workers could work. The case invalidating a state law regulating the size of loaves of bread was *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924).

volved commercial operations like *Lochner* against *New York* and *West Coast Hotel* against *Parrish*. We make that very definite distinction.²⁹

At this point I would guess that at least some of you must be thinking, what's going on? Why is Pollak making such a muchness out of that? Judges misconstrue and misrepresent lawyers' arguments all the time. It's part of the understood process that judges inadvertently or otherwise beat up on defenseless lawyers, and lawyers grin and say, "Thank you, Your Honor." Provided that the judicial miscue doesn't turn a win into a loss, lawyers go back to their offices with their win and get big bucks, and judges go back to their chambers with their big egos inflated some more and get little bucks.

Now, certainly some of you must be thinking, Emerson couldn't have cared less if the Court misstated his argument, since the Court went on to decide in his favor. Well, given that Emerson, in addition to being a very able advocate, was a constitutional scholar of highest rank and dedication, he must have cared a good deal about the way in which the Court undertook to explain its thinking in *Griswold*, thereby adding another cubit of learning to the Constitution.

What did Douglas say, speaking for the Court? First, he turned to the two cases chiefly invoked by Emerson: *Pierce v. Society of Sisters*, striking down an Oregon law requiring all children between the ages of eight and sixteen to attend public rather than private schools, and *Meyer v. Nebraska*, invalidating a Nebraska statute making it a crime to conduct instruction for school children who had not completed eighth grade in any language other than English. "By *Pierce v. Society of Sisters*," said Douglas, "the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments."³⁰ Douglas went on, "By *Meyer v. Nebraska*, the same dignity is given to the right to study the German language in a private school."³¹ Douglas undertook to show, through the case law, that the First Amendment had a variety of other aspects and implications, including, notably, rights of association and concomitant rights of privacy. These "cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."³² Douglas then pointed to the Third, Fourth, and Fifth Amendments as particularly protective of a person's privacy in one's home.³³ "The present case, then, concerns a relationship lying within the zone of privacy created by

²⁹ 61 LANDMARK BRIEFS, *supra* note 27 (citing *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1945); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); and *Lochner v. New York*, 198 U.S. 45 (1905)).

³⁰ *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (citations omitted).

³¹ *Id.* (citations omitted).

³² *Id.* at 484.

³³ *Id.*

several fundamental constitutional guarantees.”³⁴ And so, as applied to married couples, the Connecticut statute criminalizing the use of contraceptives failed.

My concern is not, of course, with the outcome (the Connecticut statute was grossly unconstitutional), but with the Court’s points of constitutional departure: *Pierce v. Society of Sisters* and *Meyer v. Nebraska*. Both opinions were written by James Clark McReynolds, that honorable bigot. (As you may remember, he had some distaste for blacks and Jews.)³⁵ Neither of the McReynolds’ opinions invoked by Douglas so much as mentioned the First Amendment. Nor indeed could they have, because both antedated the Court’s abandonment in 1925 of its previously announced view that the liberty protected by the Fourteenth Amendment did not embrace freedom of speech or press.

The chronology was this: In February of 1923 the Court heard argument in *Meyer v. Nebraska*. In April the Court heard argument in an appeal challenging, on Fourteenth and First Amendment grounds, a conviction, and resultant prison sentence, for violation of a New York statute making it a crime to advocate criminal anarchy. The offensive conduct consisted of the publication and circulation of 16,000 copies of a Communist tract, *The Left Wing Manifesto*, which lauded “the immediate revolutionary struggle,” a struggle which “may last for years and tens of years.” In June of 1923 the Court decided *Meyer v. Nebraska*. In November of 1923 the New York criminal anarchy case was re-argued, but then silence fell.

The criminal anarchy case had still not been decided in June of 1924 when the Court’s term ended. In March of 1925, *Pierce v. Society of Sisters* was argued. It was decided on June 1. On June 2, Justice Holmes began a letter to his friend, Sir Frederick Pollock—yet another letter in a correspondence that had begun half a century before. Holmes broke off writing in mid-letter, explaining to Pollock that he and Mrs. Holmes were about to drive “round by the river side to get a little air and see the wonderful look by night.”³⁶ The next day Holmes went back to the letter to Pollock. “I am bothered by a case

³⁴ *Id.* at 485.

³⁵ Discussing McReynolds, some have stated:

Most notoriously, for someone in his position, he was unashamedly anti-Semitic and racist. He detested Justices Brandeis and Cardozo . . . His racial views were unreconstructed products of his rural Kentucky youth—paternalistic and decidedly patronizing. . . . [In 1937] McReynolds was sharply criticized when he publicly defended his judicial equanimity by claiming that he tried to protect “the poorest darky in the Georgia backwoods as well as the man of wealth in a mansion on Fifth Avenue.”

Dennis J. Hutchinson & David Garrow, *Foreword* to JOHN KNOX, THE FORGOTTEN MEMOIR OF JOHN KNOX, at xix (Dennis J. Hutchinson & David Garrow eds., 2002).

³⁶ 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874–1932, at 162 (Mark DeWolfe Howe ed., 1941).

in which conscience and judgment are a little in doubt concerning the constitutionality under the 14th amendment of a State law punishing the publication of a manifesto advocating the forcible overthrow of government."³⁷ Holmes again stopped writing, and then, after an interval, again resumed:

Such is the effect of putting doubt into words, that I turned aside from this letter and wrote my views which are now waiting to go to the printer. The theme is one on which I have written majority and minority opinions heretofore and to which I thought I could add about ten words to what I have said before.³⁸

On June 8, the week after the decision in *Pierce v. Society of Sisters*, the Court, in the New York criminal anarchy case, upheld the conviction of Benjamin Gitlow.³⁹ But in so doing the Court said, "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."⁴⁰ In dissent, Holmes, joined by Justice Brandeis, agreed that, "[t]he general principle of free speech . . . must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used."⁴¹ But Holmes and Brandeis felt, as their colleagues of the majority did not, that under "the general principle of free speech," Gitlow's conviction could not be sustained since "whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration."⁴² Thus, application of free speech doctrine to the states commenced as of June 8, 1925, not with the two McReynolds opinions mis-relied on by the five Justices of the *Griswold* majority.

On June 18, 1925, with Holmes now at his beloved country home of Beverly Farms, Holmes wrote again to Pollock:

My last performance during the term, on the last day, was a dissent (in which Brandeis joined) in favor of the rights of an anarchist (so-called) to talk drool in favor of the proletarian dictatorship. But the prevailing notion of free speech seems to be that you may say what you choose if you don't shock me.⁴³

I wondered, as I read that, whether Holmes could have remembered back almost two years to the initial argument in the *Gitlow* case.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Gitlow v. New York*, 268 U.S. 652 (1925).

⁴⁰ *Id.* at 666.

⁴¹ *Id.* at 672 (Holmes, J., dissenting).

⁴² *Id.* at 673.

⁴³ HOLMES-POLLOCK LETTERS, *supra* note 36, at 163.

This was, of course, not in the Court's present grandeur, but in the beautiful small courtroom in the Capitol—the room that had once been the Senate Chamber. When the argument began, appellant's counsel began by inquiring of the Court whether the Court would kindly grant him an additional fifteen minutes to present his argument because the case was of such complexity and importance. Chief Justice Taft shifted his magisterial bulk to his right, to seek, *sotto voce*, the advice of the senior associate Justice, who was Holmes. Holmes gave due consideration to counsel's request for more time, and then whispered back to the Chief, in a whisper easily heard throughout the courtroom, "I'll see him in hell first."

You may wonder what basis I have for this narrative. I acknowledge that this is a hearsay report, but I would add that the out-of-court declarant on whose long-ago recital I rely was the lawyer who presented the Supreme Court argument for Gitlow, my father, Walter Pollak.

The five Justices in *Griswold* signed on to an opinion for the Court—the Douglas opinion—so shoddy in craftsmanship, I suggest, that under current grading standards in a good American law school it would barely earn an A minus. In addition, three of the five Justices filed a concurring opinion—Justice Goldberg's paean to the Ninth Amendment—the purpose and implication of which were obscure at the time and in my judgment remain so today. The Douglas opinion for the Court quoted the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁴⁴ But the Court's opinion said nothing about the Ninth Amendment after quoting it. In what way, if at all, it connected with the Court's holding was not disclosed. But the Goldberg concurrence undertook to "emphasize the relevance of that Amendment to the Court's holding."⁴⁵ The concurrence went about this in the following way: Justice Goldberg acknowledged that he and presumably his fellow concurers did not believe that every one of the first eight amendments that bind the United States were incorporated into the Fourteenth as restraints on the states.⁴⁶ But they did believe that the liberty enshrined in the Fourteenth Amendment was not confined to the first eight amendments.⁴⁷ Now, these linked propositions could not have comfortably made their way into the Court's opinion since Justice Douglas, as Justice Black's junior partner in the latter's celebrated dissent

⁴⁴ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (quoting U.S. CONST. amend. IX).

⁴⁵ *Id.* at 487 (Goldberg, J., concurring).

⁴⁶ *Id.* at 492.

⁴⁷ *Id.* at 486.

in *Adamson v. California*⁴⁸ more than twenty years before, appeared committed to the view that the Fourteenth Amendment imposes on the states all of the restraints that the Bill of Rights imposes on the federal government, no fewer and no more. Abandonment of that rigorous particularity betokened in Justice Black's view a readiness to surrender rigorously defined constitutional limitations to be replaced by what Justice Black regarded as the vaporous value judgments of a Justice Frankfurter,⁴⁹ or, as in the *Palko* case, a Justice Cardozo.⁵⁰ Justice Black's steadily maintained position was, of course, re-asserted in dissent in *Griswold*.⁵¹

The Goldberg concurrence in *Griswold* looked to the Ninth Amendment, long allowed to rusticate in peace, as a device giving a measure of greater legitimacy to expanding rights beyond those specified in the Bill of Rights.⁵² The oddity of the Goldberg approach, however, was that it utilized, as support for imposing restraints on states, an amendment which had been designed and advertised by Madison in 1789 to reassure those who were fearful of the authority of the new national government. As Madison saw it, adding the Ninth Amendment to the particular restraints on national authority that had been informally but effectively bargained for in the ratification debates and then enumerated in the first eight amendments would enable the people to assert other rights retained by the people but not yet codified.⁵³

Now, the awkwardness of Goldberg's adoption of the Ninth Amendment as a protection against states was enhanced by two other factors. Goldberg was at pains to say that he was not contending "that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government."⁵⁴ Thus, Goldberg seemed to leave the Amendment in a sort of hortatory limbo, not far from where it had for so long resided. Perhaps more important, Goldberg summed up by saying that, "the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from in-

⁴⁸ 332 U.S. 46, 68 (1947) (Black, J., dissenting).

⁴⁹ *Id.* at 67 (Frankfurter, J., dissenting) ("Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . .").

⁵⁰ *Palko v. Connecticut*, 302 U.S. 319 (1937). It is to be noted that Justice Black, who joined the Court less than two months before *Palko* was argued, joined the Cardozo opinion for the Court. But he was to repent.

⁵¹ *Griswold*, 381 U.S. at 507 (Black, J., dissenting). Justice Stewart also dissented. *Id.*

⁵² *Id.* at 486 (Goldberg, J., concurring).

⁵³ See *id.* at 488–90 (discussing the contributions of James Madison to the framing of the Ninth Amendment).

⁵⁴ *Id.* at 492.

fringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.”⁵⁵

I would wonder why, if the Ninth Amendment is to be read with the full breadth of its wording, it should be confined to elaborations of “liberty”; unenumerated rights other than “liberty” rights might be postulated. But if we are to remain with “liberty” as the playing field within which new rights are to be brought to fruition, I see no persuasive reason why Justice Harlan’s reliance on “ordered liberty,” the Cardozo concept deployed in *Palko*⁵⁶ in reliance on the earlier cases about liberty and justice, should not command endorsement. In *Griswold* only Harlan cited *Palko*,⁵⁷ and the case has not fared very well in the past forty years. I would like to see it revived and reinvigorated.

Members of the symposium, I thank you for giving me the opportunity to talk about what judges did long ago. I look forward now to being instructed by you on what judges and lawyers and others should be doing in the future to strengthen and expand the rights of the people for all of us.

⁵⁵ *Id.* at 493.

⁵⁶ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

⁵⁷ *Griswold*, 381 U.S. at 500 (Harlan, J., concurring).