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Black and White: What Law and  
Literature Can Tell Us About the  
Disparate Opinions in *Griswold*  
*v. Connecticut*

*The great ordinances of the Constitution do not establish and divide fields of black and white.*<sup>1</sup>

*[T]he heart of law is what we always knew it was: the open hearing in which one point of view, one construction of language and reality, is tested against another. The multiplicity of readings that the law permits is not its weakness but its strength, for it is this that makes room for different voices and gives a purchase by which culture may be modified in response to the demands of circumstance. It is a method at once for recognizing others, for acknowledging ignorance, and for achieving cultural change.*<sup>2</sup>

Recent political battles have rekindled the ever-present and contentious debate over the extent of privacy rights guaranteed by the Constitution.<sup>3</sup> More than simply another example of partisan bickering, this political strife typifies the divide that

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<sup>1</sup> *Springer v. Gov't of the Phil. Is.*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

<sup>2</sup> JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* 273 (1984).

<sup>3</sup> See, e.g., Timothy Egan & Adam Liptak, *Fraught Issue, but Narrow Ruling in Oregon Suicide Case*, N.Y. TIMES, Jan. 18, 2006, at A16 (on assisted suicide); Edward Lazarus, *Kennedy Center*, NEW REPUBLIC, Nov. 14, 2005, at 16 (chronicling the most politicized areas of constitutional law, and hypothesizing how the Court's rulings will change with new Court members); Cass R. Sunstein, *Minimal Appeal*, NEW REPUBLIC, Aug. 1, 2005, at 17 (describing the different theoretical factions on the Court and how they would decide major national issues); Michael Kinsley, *Abolish Marriage: Let's Really Get the Government Out of Our Bedrooms*, SLATE, July 2, 2003, <http://www.slate.com/id/2085127> (on gay marriage); Michael Kinsley, *What*

separates those who view the Constitution as preserving explicit rights and those compelled to infer from the text a more expansive set of guarantees. While the dispute is frequently argued narrowly in terms related to the landmark 1973 decision *Roe v. Wade*,<sup>4</sup> the fundamental underlying disagreement is about far more.<sup>5</sup> The national polarization is alternatively characterized as liberal versus conservative, Republican versus Democratic, “Red State” versus “Blue State,” or more generally as the “Culture Wars.” But it is noteworthy that many of the disputes that make up these broader differences emanate from constitutional elucidation, and ultimately come down to a question of the judiciary’s role in reading and interpreting the Constitution. Accusations of judicial activism and the condemnation of “freewheeling” judges highlight the national discussion now taking place about the meaning of the Constitution and the judiciary’s role in interpreting it. In fact, this is the criticism most often reserved for Justice Blackmun’s decision in the landmark case *Roe v. Wade*, where it is thought by many that the judiciary effectively usurped the role of the legislature.<sup>6</sup>

It is evident that this national polemic did not emerge solely from the controversy over the moral implications associated with the decision in *Roe*. Rather, *Roe* has acted as the adjudicative lightning rod, or microcosmic moral battleground, for a larger

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*Abortion Debate?: Why There Is No Honesty About Roe*, SLATE, NOV. 18, 2005, <http://www.slate.com/id/2130607> (abortion).

<sup>4</sup> 410 U.S. 113 (1973).

<sup>5</sup> The debate can be characterized as attempting to articulate where the judiciary derives its authority and how it should interpret the Constitution. See, e.g., discussion *infra* Conclusion.

<sup>6</sup> See, e.g., Jules B. Gerard, *Roe v. Wade Is Constitutionally Unprincipled and Logically Incoherent: A Brief in Support of Judicial Restraint*, 15 AM. J.L. & MED. 222 (1989) (vociferously critiquing the line of precedent used to decide *Roe* and the rationale of the decision’s holding); Arnold H. Loewy, *Why Roe v. Wade Should Be Overruled*, 67 N.C. L. REV. 939, 940 (1989) (fearing the rise of a “judicial dictatorship”); William Van Alstyne, *Closing the Circle of Constitutional Review from Griswold v. Connecticut to Roe v. Wade: An Outline of a Decision Merely Overruling Roe*, 1989 DUKE L.J. 1677, 1681 (arguing that the Court in *Roe* “substituted judicial hubris for judicial deference” in placing its views before those of the state legislatures). But cf. Neal Devins, *The Countermajoritarian Paradox*, 93 MICH. L. REV. 1433, 1452 (arguing that many legislators preferred the “*Roe*-created ‘status quo’”) (reviewing DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994)); Note, *The Evolution of the Right to Privacy After Roe v. Wade*, 13 AM. J.L. & MED. 368, 378 (noting the post-*Lochner* deference to social legislation and how *Roe* apparently contradicts that tradition, but ultimately finding that “[j]udicial action does not offend the separations of powers doctrine”).

constitutional debate. As such, the controversy over *Roe* has obscured the fundamental argument that continues to take place—namely, is the Constitution a document to be interpreted by successive generations, with a concomitant expansion or contraction of rights? Or, is what was written in the Constitution in 1787 the absolute limit of the rights expressed therein? This larger, more fundamental judicial question is implicitly addressed in *Griswold v. Connecticut*, the 1965 case that Justice Blackmun relied on in formulating the majority opinion in *Roe*.<sup>7</sup>

This Comment attempts to elicit a more thorough understanding of the Justices' views of the Constitution and its guarantees of privacy rights as articulated in *Griswold*. Since its publication in 1965, *Griswold v. Connecticut* has been a source of debate and intellectual examination, with the resulting conclusions frequently spawning as many questions as they attempt to answer.<sup>8</sup> This Comment does not seek answers to academic or cultural questions where others who are far more qualified have already ventured. Rather, by utilizing the techniques and tools proffered by Law and Literature studies, this Comment broadly attempts to glean more meaning from the Justices' words than the casual reader could hope to ascertain, and, perhaps concomitantly, shed new light on the cultural debate currently taking place in America.

According to Professor James Boyd White, “[T]he Supreme Court has established itself as a central institution for the self-conscious and authoritative reconstitution of our language, culture, and community.”<sup>9</sup> It follows that, through examining the reasoning and techniques employed by the Justices in *Griswold*, we will be better equipped to understand the way in which American culture post-*Griswold* was remade, and hopefully be

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<sup>7</sup> 381 U.S. 479 (1965).

<sup>8</sup> See, e.g., Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1536 (1994) (attempting to come to terms with the “constitutional conundrums” faced post-*Griswold* by attributing the Court’s ruling to radical changes in the American family structure); David Helsencher, *Griswold v. Connecticut and the Unenumerated Right of Privacy*, 15 N. ILL. U. L. REV. 33, 34 (1994) (attempting to ascertain whether the right of privacy can be considered implicit in human existence); Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1046 (1990) (seeking to square Robert Bork’s theory of jurisprudence with *Griswold*).

<sup>9</sup> WHITE, *supra* note 2, at 264; see also discussion *infra* Part II.A (addressing this issue in more depth).

better able to articulate and participate in the debate that has emanated from this renovation. To assist in analyzing *Griswold*, as well as to define the scope of the analysis under Law and Literature, this Comment first broadly summarizes the positions of the most pertinent intellectuals in the Law and Literature movement and provides a brief synopsis of the movement's history.

Part I of this Comment outlines the development of the Law and Literature movement and articulates, through example, the viability of various theories within the movement's subsets of law-in-literature and law-as-literature. Part II of this Comment describes various theories of judicial and constitutional interpretation developed by the Law and Literature movement and critiques how the movement's theorists incorporate literature into their reasoning. Finally, Part III applies the theories and reasoning articulated by Law and Literature theorists White, Richard Weisberg, and Sanford Levinson to the judicial reasoning in *Griswold v. Connecticut*.

## I

### THE LAW AND LITERATURE MOVEMENT

#### A. *The Pre-History*

The Law and Literature movement, like any multidisciplinary school of thought, must be examined as a historical development to be adequately understood.<sup>10</sup> Foreshadowing the distinction that subsequently arose within academia, the prehistory of Law and Literature was marked by the development of two separate submovements.<sup>11</sup> Law and Literature has its birth in the law-in-literature movement started in the mid-nineteenth century.<sup>12</sup> The movement was marked initially by Dean John Wigmore's ef-

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<sup>10</sup> See GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 150-51 (1995), and IAN WARD, *LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES* 3-27 (1995), for a modern history of the development of the movement, including an account of the disparate, and often acrimonious, theorizing within it.

<sup>11</sup> See, e.g., Michael Pantazakos, *Ad Humanitatem Pertinent: A Personal Reflection on the History and Purpose of the Law and Literature Movement*, 7 *CARDOZO STUD. L. & LITERATURE* 31, 38-39 (1995) (noting the differences between law-in-literature and law-as-literature, distinctions that marked the beginning of the Law and Literature movement).

<sup>12</sup> *Id.* at 38.

forts to chronicle the rise of literature about the law.<sup>13</sup> Nearly contemporaneously, what became known as law-as-literature developed when Benjamin Cardozo began utilizing literary tools to examine and more effectively create judicial opinions.<sup>14</sup> Thus, the movement was born of two seemingly disparate theories; although neither theory appeared to offer much in the way of a cohesive approach to the law, both were intent on humanizing the law.<sup>15</sup>

While the Law and Literature movement initially was composed of these two separate strands of thought, many contemporary scholars argue that this fundamental distinction no longer exists.<sup>16</sup> However, to better understand the potential of the Law

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; see, e.g., Benjamin Cardozo, *Law and Literature*, 48 *YALE L.J.* 489 (1939) (originally published in the *Yale Review*, July 1925); Dan Simon, *The Double-Consciousness of Judging: The Problematic Legacy of Cardozo*, 79 *OR. L. REV.* 1033, 1045-46 (2000) (describing Cardozo’s work as a subjective, creative process that “entails creation of law”). In “Law and Literature,” Cardozo stated:

One marvels sometimes at the ingenuity with which texts the most remote are made to serve the ends of argument or parable. But clearness, though the sovereign quality, is not the only one to be pursued, and even if it were, may be gained through many avenues of approach. The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb and the maxim. Neglect the help of these allies, and it may never win its way. With traps and obstacles and hazards confronting us on every hand, only blindness or indifference will fail to turn in all humility, for guidance or warning, to study of examples.

Cardozo, *supra*, at 492-93.

<sup>15</sup> Pantazakos, *supra* note 11, at 38 (noting that Wigmore’s attempts to chronicle the Great Books involving the law resulted from his desire to teach attorneys to deal with the multitude of personality types that they were sure to encounter in their practice). Furthermore, by integrating literature into his opinion writing, Justice Cardozo sought to make judicial pronouncements more accessible to common understanding. For example, consider the following statement by Justice Cardozo:

Perhaps there are opinions by Mr. Justice Holmes in which [the magisterial method] can be discerned. The sluggard unable to keep pace with the swiftness of his thought will say that he is hard to follow. If that is so, it is only for the reason that he is walking with a giant’s stride. But giants, after all, are not met at every turn, and for most of us, even if we are not pygmies, the gait of ordinary men is the safer manner of advance. We grope and feel our way. What we hand down in our judgments is an hypothesis. It is no longer divine command.

Cardozo, *supra* note 14, at 496.

<sup>16</sup> See, e.g., MINDA, *supra* note 10, at 151 (suggesting that some Law and Literature scholars, including Ronald Dworkin, Stanley Fish, and Owen Fiss, have “different conceptions about law and adjudication,” rejecting the “law and literature” dichotomy altogether in finding that legal and literary criticism are deeply unified in method and temperament”); WARD, *supra* note 10, at 3 (explaining that while the

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and Literature movement and provide a convenient organizational tool, this Comment examines selected examples from the preeminent theorists within each school, as well as an amalgamation of law-in-literature and law-as-literature—James Boyd White’s *The Legal Imagination*.

B. The Legal Imagination

James Boyd White’s 1973 publication of *The Legal Imagination: Studies in the Nature of Legal Thought and Expression*<sup>17</sup> introduced the Law and Literature movement to a broader legal community overrun by formalism.<sup>18</sup> This textbook is widely regarded as the official beginning of Law and Literature as a legitimately distinct field of jurisprudential scholarship.<sup>19</sup> Professor White, through this publication, sought to place Law and Literature squarely within the accepted mores of legal education by designing the textbook to be used in the law school curriculum.<sup>20</sup>

delineation is convenient, it is not always feasible or desirable because of the complementary relationship that the two branches of thought share); Pantazakos, *supra* note 11, at 40-41 (arguing that despite the multifaceted approach taken to Law and Literature, there exists a “greater unity above the seeming disorder”).

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<sup>17</sup> JAMES B. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973).

<sup>18</sup> See, e.g., Anthony Julius, *Introduction* to 2 *LAW AND LITERATURE: CURRENT LEGAL ISSUES* 1999, at xi (Michael Freeman & Andrew D.E. Lewis eds., 1999) (characterizing White’s work as “retriev[ing] the study and practice of law from . . . legal formalism”) [hereinafter 2 *LAW AND LITERATURE*]; Gary Minda, *Cool Jazz but Not So Hot Literary Text in Lawyerland: James Boyd White’s Improvisations of Law as Literature*, 13 *CARDOZO STUD. L. & LITERATURE* 157, 159 (2001) (hypothesizing, and convincingly showing, that White’s work was written in response to Posner’s law-as-economics theory).

<sup>19</sup> See, e.g., Michael Freeman & Andrew Lewis, *Preface* to 2 *LAW AND LITERATURE*, *supra* note 18, at ix (characterizing James Boyd White as the “doyen” of the Law and Literature movement); MINDA, *supra* note 10, at 149 (characterizing White as “establish[ing] the groundwork for the modern movement of law and literature”); C.R.B. Dunlop, *Literature Studies in Law Schools*, 3 *CARDOZO STUD. L. & LITERATURE* 63 (1991) (referring to the publication of White’s book as the starting point for an extreme growth in Law and Literature course offerings at law schools); Julius, *supra* note 18, at xi (referring to White’s book as a catalyst for the Law and Literature movement); Minda, *supra* note 18, at 157 (noting that White is “famous for the idea of ‘law as literature’”); Pantazakos, *supra* note 11, at 39 (stating that White’s text constituted the “formal beginnings” of the movement); David Ray Papke, *Problems with an Uninvited Guest: Richard A. Posner and the Law and Literature Movement*, 69 *B.U. L. REV.* 1067, 1067-69 (1989) (reviewing RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988)) (referring to the text as “influential” and White as “the most prominent figure in the modern law and literature movement”).

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<sup>20</sup> See WHITE, *supra* note 17, at xx-xxi (explaining how he intended the text to be used in the classroom).

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Nearly a thousand pages in length, it begins by addressing the student individually, extolling the virtue of applying his or her personal experience to the study of law.<sup>21</sup> Professor White characterizes the act of learning and practicing the law as deeply personal, where the individual skills and weaknesses of the student and practitioner should be recognized.<sup>22</sup> Thus, he seeks not to teach the student the “science” of law, but rather to contribute to the self-actualization of the student as an “artist,” or literary lawyer.<sup>23</sup> The law student, like an art student given canvas or clay with instruction in their operation but essentially left alone to create, is given the artistic lawyer’s medium of rules elsewhere.<sup>24</sup> It is for Professor White, like the art teacher, to instruct not in the usage of rules, but in how to critique and speculate.<sup>25</sup>

The text, made up predominantly of various works of literature from short stories to essays on linguistics, attempts to engage the student through the Socratic technique of questioning.<sup>26</sup> Each

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<sup>21</sup> *Id.* at xxxiv-xxxv.

<sup>22</sup> *See id.* at xxxiv.

<sup>23</sup> *See id.* at xxxiv-xxxv.

<sup>24</sup> *Id.* at xxxv.

<sup>25</sup> *See id.*; James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 437 (1982) (“Students seek out good teaching to learn not the rules but the culture, for the rules are everywhere the same.”).

<sup>26</sup> By Socratic discourse, I mean a classical approach to problem solving and argument as exemplified by Socrates. According to White, the classic Socratic exchange is composed of “two minds . . . engaged with each other, responding and pushing, the movement of the argument is from disagreement to agreement, and then (it is hoped) to new agreement on the matter in dispute.” WHITE, *supra* note 17, at 821; *see also* James Boyd White, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014, 2018 (1989) (reviewing POSNER, *supra* note 19). For good descriptions of two different conceptions of the Socratic technique, see Clark D. Cunningham, *Learning from Law Students: A Socratic Approach to Law and Literature?*, 63 U. CIN. L. REV. 195, 201-03 (1994) (distinguishing White’s version of the Socratic method from the more widely understood “Kingsfieldian” technique, which was named from the professor in the film *The Paper Chase* and consists mainly of badgering students with questions that increase their anxiety), and Andrew J. McClurg, *Poetry in Commotion: Katko v. Briney and the Bards of First-Year Torts*, 74 OR. L. REV. 823, 830 (attributing many of the “creative failings” of the law classroom to the Socratic method, which consists of questions to which the law professor has “prefabricated answers”). Professor McClurg also laments the dearth of participation by law students:

*Watching.* It is what the vast majority of law students do best in the classroom. And who can blame them? After seeing the Socratic method in action a couple of times, the decision to stay on the sidelines is an entirely logical one. Indeed, participating—volunteering one’s ideas—is somewhat illogical given the certain knowledge that every word spoken will be subjected to rigorous critical scrutiny. Why should we expect rational human beings to willingly expose themselves to the risk of public ridicule for such

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chapter begins with a short introduction followed by a series of literary excerpts, which are each in turn accompanied by a series of questions posed by Professor White for the student to answer.<sup>27</sup> Each chapter ends with a writing assignment for the student to complete.<sup>28</sup> His unique approach replaces the case excerpts and statutes that are the staples of the typical law text with works as varied and diverse as Herman Melville's *Billy Budd*<sup>29</sup> or William Labov's 1969 study on nonstandard Negro English (NNE), *The Logic of Nonstandard English*.<sup>30</sup> Through his pointed questioning, he challenges the reader to look deeper into the texts than a tertiary reading would allow. He asks the students to identify how the author, in creating an environment through language, establishes the roles that the reader and author play. He wants students to place themselves in the role of the writer to better understand the relationship the author seeks to create with the language, and better evaluate the effectiveness of the writer's control over language.

Control, traditionally at least, has been exerted by authors over language using three rhetorical devices: metaphor, irony, and ambiguity.<sup>31</sup> Professor White instructs the student in their usage, both through example by providing literary excerpts, and through a line of questioning intended to reveal how, as an individual, the reader regards the work—thus demonstrating how effective metaphor, irony, and ambiguity can be in controlling the language. The use of metaphor, irony, and ambiguity, however, are frequently restricted to the users of ordinary language and not typically available to legal language users.<sup>32</sup> This distinction

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little gain? Watching in silence becomes an almost instinctive survival maneuver.

*Id.* at 848.

<sup>27</sup> See, e.g., WHITE, *supra* note 17, 7-10.

<sup>28</sup> See, e.g., *id.* at 34-37.

<sup>29</sup> *Id.* at 70-73.

<sup>30</sup> *Id.* at 27-32.

<sup>31</sup> *Id.* at 57. It is instructive that White provides examples of these three literary tools and encourages readers "to analyze how others have controlled their language" to help them through their own struggles with language. *Id.* The good lawyer will utilize these techniques as well, but in a far more limited capacity. For example, White notes that "our Constitution is certainly ambiguous, and irony is often heard in the courtroom." *Id.*

<sup>32</sup> Throughout his work, Professor White highlights the difference between "ordinary language" (i.e., normal, everyday communication) and "legal language" (i.e., the language utilized by law students, lawyers, and judges), noting that they have features in common but differ in many ways. See, e.g., *id.* at 57, 76-77, 81, 188.



between the ordinary language users and legal language users is a prominent theme throughout the text and receives serious attention in the section on the lawyer's distinct power of language making.<sup>33</sup>

While Professor White acknowledges that the lawyer and law student work within a specific legal language and that the mastery of the language of law is important to their success, the true mark of a successful attorney is her relationship with the language—the use and control of the language and the language's use and control of the attorney.<sup>34</sup> Through practice and example the student will be better prepared to write, and evaluate, the writings of legal texts—skills that are frequently neglected in traditional legal curricula. Unlike the writer of literature, the legal writer makes the language system she uses.<sup>35</sup> That is to say, the lawyer, judge, or legislator can argue for the reformation of the language or, if a judge, can decree its change.<sup>36</sup> Therefore, one distinct advantage the lawyer has over the poet or novelist is that if the lawyer does not like what she sees her language system doing, she can argue for its change.<sup>37</sup> Thus, the lawyer can reconstitute the relationship between the writer and reader, thereby shaping the boundaries within which the legal culture itself is constituted.<sup>38</sup>

Professor White's approach calls for the legal writer to view her work from both inside and outside the realm of legal discourse. To successfully create the right relationship with the language of law, the writer must be conscious of how she speaks of the law outside of the professional context, as well as how the

<sup>33</sup> See *id.* at 77; see also discussion *infra* Part II.A.

<sup>34</sup> See WHITE, *supra* note 17, at 765 (“[S]uccess for the artist was defined as a relationship with language, as a way of making his words work to his will, differentiating his statement from all others.”). Also, for an in-depth article on *The Legal Imagination*, with an especially detailed account of the use of language in the law, see Thomas D. Eisele, *The Legal Imagination and Language: A Philosophical Criticism*, 47 U. COLO. L. REV. 363, 372 (1976).

<sup>35</sup> See, e.g., JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW xii (1985) (“[E]very time we act as lawyers we create and claim a set of meanings: about the events, about the institutions of which we are part, about the very language in which we speak; and for the meanings that we make we are deeply responsible.”).

<sup>36</sup> WHITE, *supra* note 17, at 77.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* This approach will become especially relevant when this Comment examines Justice Douglas's opinion in *Griswold v. Connecticut*. See *infra* Part III.B.1. Additionally, in Part II, the discussion concerning the “culture of argument” addresses the subject in far greater detail. See *infra* Part II.A.

legal language is used within the legal setting.<sup>39</sup> Furthermore, to efficiently utilize the relationship between the writer and the language, the lawyer must be aware of what is left out—to stand outside of the language and express recognition of what is missing. Through this multifaceted approach, the user of the legal language will become cognizant of how legal language is both inexorably linked to ordinary language, while still distinct in its nature. In utilizing the legal language from within while turning a critical eye on it from without, the legal language user will be better able to note, and hopefully rectify, the paucity and inadequacies of legal language vis-à-vis ordinary language.<sup>40</sup>

Therefore, Professor White asks in *The Legal Imagination* that law students move outside of the traditionally understood realm of legal study. While they must still utilize the various media of law (rules and statutes), they must also understand the tools and techniques of literature so that they may better scrutinize and critique legal writing, and in turn create a better alternative. With this mission in mind, the Law and Literature movement was born; while its theorists and students are often at odds, and frequently acrimonious, the common theme of utilizing literature to further the practice of law remains the primary goal among the movement's diverging schools of thought.<sup>41</sup>

With Professor White's goal in mind, this Comment will attempt to move away from the traditionally understood, result-oriented reading of *Griswold v. Connecticut*. Rather, in examining the opinion through the prism of prominent theories of judicial interpretation from the Law and Literature school, this Comment shows how what may appear at first blush as a straightforward case of constitutional overreach or judicial activism can be read as much more.

## II

### THEORIES ON JUDICIAL INTERPRETATION

To attempt to encapsulate each theory of judicial interpretation posited by Law and Literature scholars in a succinct all-encompassing whole would be a Herculean task. Therefore, se-

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<sup>39</sup> WHITE, *supra* note 17, at 50.

<sup>40</sup> *See id.*

<sup>41</sup> *See* MINDA, *supra* note 10, at 151-52; Pantazakos, *supra* note 11, at 41-42 (“The carping criticism of the movement's eclectic disorganization is thus, in my opinion, misguided . . .”).

lected works and articles from within Law and Literature have been chosen for their preeminence within each field and their relevance to the goal at hand, i.e., interpreting *Griswold*. First, Professor White's theory of judicial interpretation will be posited as both an amalgamation of the law-in-literature and law-as-literature schools, and also as an overview of an effective model to be employed. Next, Professor Weisberg's paradigm of the law-as-literature school of thought, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, will be examined with a particularly close look at Weisberg's theory on the manipulative power of certain forms of adjudicative language. Finally, Professor Levinson's *Law as Literature* will provide an overview of alternative theories of constitutional and judicial interpretations, along with critiques of relevant schools of thought.

#### A. *Professor White's Culture of Argument*

Professor White has articulated a theory of judicial interpretation that calls for an understanding of the relationship between the author and reader focusing on the literary way in which their community, or culture, is formed.<sup>42</sup> According to White, it is not enough to search a text for its "true meaning"—as if, contained within the text, there is a key to unlocking the author or authors' intent.<sup>43</sup> Rather, one must interpret the culture created by the authors and readers of judicial writings by examining the interaction between the two.<sup>44</sup> The law in its broadest terms is the "constitution of a world by the distribution of authority within it; it establishes the terms on which its actors may talk in conflict or cooperation among themselves."<sup>45</sup> Far more than a set of rules and doctrines or a bureaucratic construct intent on social control, the law is a culture.<sup>46</sup> As in any culture, law establishes roles and relationships, voices and positions from which one may speak, and audiences that one may reach.<sup>47</sup> It gives the speakers the materials and methods of the conversation.<sup>48</sup> It is a culture re-

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<sup>42</sup> See JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 91 (1990).

<sup>43</sup> See WHITE, *supra* note 2, at 19.

<sup>44</sup> See *id.* at 15-19.

<sup>45</sup> *Id.* at 266.

<sup>46</sup> *Id.* at 267.

<sup>47</sup> *Id.* at 266.

<sup>48</sup> See *id.* at 267.

plete with its own language—a language focused on the process of agreement and disagreement, within which both the legal culture and our broader culture are defined and transformed.<sup>49</sup>

The give and take, or back and forth, that shapes legal discourse plays a prominent role in the larger legal argument.<sup>50</sup> Like a pendulum swinging from one end to another, the language is shaped amid the extremes of two opposing positions, within the realm of concession and compromise.<sup>51</sup> Here, in the middle, after each proposal for change has been made, the individual attorney must accept what she cannot change. This mutual concession creates a common language that makes the dispute intelligible and the community possible. Arguments ultimately breed agreement, because nothing is gained in argument by refusing to move from a strictly held position. Thus, in forcing agreement, “the law makes disagreement at once intelligible, limited, and amenable to resolution.”<sup>52</sup>

The same can be said for the disagreements that pervade the broader American culture: it is within the middle ground of concession that the language of argument is formed. For only through compromise can a discernible language of debate be fashioned. As in the legal culture, with its language of argument, it is the compromise of the judicial opinion, the back and forth between the extremes, that shapes the broader American culture and becomes the battlefield upon which our greater cultural wars are fought. Thus, one of the primary functions of the culture of argument is to provide a rhetorical coherence to public life by compelling those who disagree about an issue to express their disagreements articulately.

In the most important sense, this constituting and reconstituting of our language or legal culture takes place in the judicial

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *See id.* at 267-68. White’s basic premise is very much like Hegel’s three-step dialectic process of “thesis, antithesis, synthesis” presented in Hegel’s *Philosophy of History*. *See* PETER SINGER, HEGEL: A VERY SHORT INTRODUCTION 100-03 (2001). Namely, that a “thesis” (e.g., the Ancient Greek community built on “customary morality”) would cause the creation of its “antithesis” (e.g., a world that promotes the “right of individual conscience” such as the Reformation), and would eventually result in a “synthesis” (e.g., the “German society of Hegel’s time” because it was an “organic community” that still preserved “individual freedom”). *Id.* at 100-02.

<sup>52</sup> WHITE, *supra* note 2, at 268. Thus, in many ways attorneys, judges, and legislators are “creating” their own language. *See id.*; *see also supra* note 35.

opinion, where the collective attempts to come to terms with a legal or social problem are best exemplified.<sup>53</sup> However, before discussing the judicial opinion, one must examine the document about which these fundamental disputes have frequently arisen: the United States Constitution.

### 1. *The Constitution*

It is through the Preamble that the Constitution purports to speak through one unanimous voice.<sup>54</sup> Under the Preamble, the Constitution merges the people of the United States, including the reader, into a single, self-constituting identity.<sup>55</sup> Thus, “the People” constitutes both the author and audience of the document.<sup>56</sup> The “We” is an energetic and youthful voice of a people on the move striving to form a “more perfect [u]nion.”<sup>57</sup> Thus, in order to “establish,” “insure,” “provide for,” “promote,” and “secure” this ideal form of life, a perfect unity must be maintained—but only long enough to deal with the emergency of the moment.<sup>58</sup> For it is only in the Preamble that the Constitution speaks as one unanimous voice. Once in the body of the document, the energetic proclamation of unity labeled “the People” is divided into many separate, self-interested parts: the various offices, separate states, different office holders, and the citizens.<sup>59</sup>

The voice of the Constitution becomes far more authoritative after the Preamble. The document is no longer speaking to us as part of the collective “We”; the address now has a tone that is both definitive in what it allows and revealing in its silence.<sup>60</sup> The document is no longer concerned with principle. Rather, it focuses on the details of government, defining the powers of each branch and how, notwithstanding an amendment, those powers are final. Once the Constitution establishes its right over the people as a whole, the people are free to go their separate ways.

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<sup>53</sup> See WHITE, *supra* note 42, at 89-90.

<sup>54</sup> See U.S. CONST. pmb. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).

<sup>55</sup> WHITE, *supra* note 2, at 240.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 240-41.

<sup>58</sup> *Id.* at 241.

<sup>59</sup> *Id.*

<sup>60</sup> See *id.*

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They are free to compete in trade and political affairs, pursue conflicting interests, form disparate organizations, and seek and exercise power, so long as they do so in accordance with the Constitution's original mandate.<sup>61</sup>

However, because of the ingrained inertness of the Constitution, the citizenry is compelled to find answers in the courts, the ultimate arbitrator of constitutional discourse. The Court, through its unique form of expression, the judicial opinion, shapes the contours and rough edges of the Constitution. Expressive in ways the Constitution is silent, the judicial opinion dictates how differing interests should interact, where and how rights and power are allotted, and the extent to which the government interacts with the citizenry.<sup>62</sup> Thus, the judicial opinion, even more than the Constitution, shapes and directs our culture.

## 2. *The Judicial Opinion*

Unlike the President and Congress, the Supreme Court is given no explicit power by the Constitution to operate on its own. Rather, it must wait until it is asked, by others, to act.<sup>63</sup> Once the conflicting parties come before the Court and present their views via briefs and oral arguments, the Court reaches a decision and speaks publicly on the issue. This pronouncement announces changes in the manner in which future actors interact; it fills in the silent contours of the Constitution. However, with every pronouncement, one side or movement is left feeling slighted. Thus, the judicial opinion acts as both a harbinger of change and a future forum for criticism.

At its most fundamental level, the judicial opinion is a conversation.<sup>64</sup> Each individual or group speaks to another: the litigants speak to one another in their briefs, the judges or justices speak to one another through their individual opinions, and the court speaks to future generations through the publication of the opinion. The judicial opinion is not created in a vacuum. There is a give and take, a kind of jostling and conciliation, to its crea-

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<sup>61</sup> *Id.*

<sup>62</sup> *See id.* at 264 (using *McCulloch v. Maryland*, 17 U.S. 36 (1819), as an example of how "the judicial opinion is . . . not an isolated exercise of power but part of a continuing and collective process of conversation and judgment").

<sup>63</sup> *Id.* at 247. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treatises made, or which shall be made, under their Authority . . . ." U.S. CONST. art. III, § 2, cl. 1.

<sup>64</sup> *Id.* at 264.

tion. It focuses primarily on the highly formal authoritative question at hand while being cognizant of the ruling's effects on the future. In this way, the judicial opinion shapes culture, "acknowledg[ing] the necessity of cultural change and creat[ing] a method for effecting it."<sup>65</sup> Rather than occurring in isolation, the process looks to the past for its authority and speaks to the future as authority to be followed.<sup>66</sup> Thus, the judicial opinion is itself a self-conscious instrument of change.

However, with each disposition of a conflict there will be a "winner" and a "loser." But it is not enough for the losing side and its supporters to condemn the judicial opinion for its failure to take their side. Indeed, it is insufficient to criticize an opinion for deciding a case "wrongly," or to disagree with an opinion for political, moral, or policy reasons, though this is obviously the most prevalent form of criticism judicial opinions face in our culture today. To "look through" the text of the opinion, to find in the result of the case something more, is to ignore the fact that the law is unique.<sup>67</sup> To search for answers to the results of opinions in the fields of sociology, psychology, or economics is to ignore the legal nature of the opinion and regard it solely in terms of policy or politics.<sup>68</sup> This "legal realism," or results-centered approach, denies what the law is at its most fundamental: the interpretation and composition of authoritative texts.<sup>69</sup>

Therefore, in applying literary criticism to the judicial opinion, it is far more relevant to analyze the process of supplication and ask how or from where the judge's authority is obtained and maintained. Did the judge or judges draw the authority to rule from a document like the Constitution, or was the ruling a product of judicial fiat? Is the ruling derivative of the democratic process, or is it the whim of one or more individuals appointed for life? To answer these questions and effectively critique judicial opinions, Professor White instructs us to focus on three interre-

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*; see also 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 59-60 (1991) (arguing generally that the Supreme Court preserves past constitutional periods by invoking precedent and articulates the revolutionary changes brought about by the popularly elected officials during different "constitutional regimes").

<sup>67</sup> WHITE, *supra* note 42, at 95.

<sup>68</sup> *Id.*

<sup>69</sup> See *id.* For a thorough critique of "legal realism" see PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 42-44 (1997), in which the author posits a theory of legal interpretation he dubbed "archeology."

lated points of interest concerning judicial authority: the language and culture within which the judges, as writers, work; the act by which judges reconstitute language as they use it; and the kind of community judges establish with readers through the experience offered by their opinions.<sup>70</sup>

While Professor White works in a realm that easily blends the tenets of the two divergent schools of thought within Law and Literature, it is necessary to examine each in turn to better understand the potential of the movement as a whole. Within Law and Literature, the two dominant “intellectual axes”<sup>71</sup> remain as articulated prior to the evolution of the movement: law-in-literature and law-as-literature.

*B. Professor Weisberg and Law-in-Literature*

The law-in-literature movement evolved from compiling and chronicling legal literary works<sup>72</sup> to a more sophisticated use of literature to examine and better understand how legal themes, such as revenge and guilt, operated within our culture.<sup>73</sup> From comparing Kafka’s views on human motivation with Posner’s theories on law and economics,<sup>74</sup> to reading Charles Dickens to formulate a theory of ethical adjudication,<sup>75</sup> law-in-literature scholars, through critique and examination, seek to discover answers to our culture’s fundamental moral and adjudicative issues within the Great Books of literature. In 1982, Richard Weisberg had done just that.

In his article *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, Professor Weisberg provides an example of how law-in-literature theory can be used to critique specific instances of al-

<sup>70</sup> WHITE, *supra* note 42, at 99.

<sup>71</sup> Pantazakos, *supra* note 11, at 38-39.

<sup>72</sup> *Id.* at 38; *see also supra* note 15. Dean John Wigmore’s work best exemplifies the early law-in-literature movement. *See, e.g.,* John H. Wigmore, *A List of Legal Novels*, 2 ILL. L. REV. 574 (1908).

<sup>73</sup> *See* MINDA, *supra* note 10, at 150; *see also* Dunlop, *supra* note 19, at 63 (describing law-in-literature as “the study of representations of the legal order in fiction, usually novels and plays”).

<sup>74</sup> *See* Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 386 (1985).

<sup>75</sup> *See* Michael K. McChrystal, *At the Foot of the Master: What Charles Dickens Got Right About What Lawyers Do Wrong*, 78 OR. L. REV. 393, 402-04 (1999).

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legedly objective judicial behavior.<sup>76</sup> Here, Professor Weisberg illustrates how language, as utilized in Melville's novella *Billy Budd*, can establish an authoritative force even when the analytical logic of the argument is flawed.<sup>77</sup>

Professor Weisberg thoroughly summarizes the novella's main plot, a trial at which the stutter-struck and naively "overt" sailor, Billy Budd, is convicted and sentenced to death by Captain Vere and his devious and sophisticatedly "covert" master-at-arms, John Claggart.<sup>78</sup> Through this summary, Professor Weisberg articulates Melville's main theory of adjudicatory communication: the considerate technique.<sup>79</sup> "Considerate communication," as Weisberg interpreted Melville, consists of three elements in the relationship between the speaker or author and the audience.<sup>80</sup> First, the communicator's primary motive must be the well-being of the audience, regardless of any secondary motives.<sup>81</sup> Second, any factual distortions must consist of omissions or minor insignificant misstatements of fact.<sup>82</sup> Finally, the speaker or author must convey the essence of the underlying message, despite the omissions or minor misrepresentations of detail.<sup>83</sup> News accounts that subtly manipulate the facts to present a more patriotic message utilize this considerate technique, and are regarded, at least by Melville, as nonpejorative.<sup>84</sup> It is for the greater good that a journalist may exercise soothing, paternalistic verbal control over her audience in order to preserve or bolster morale at home.<sup>85</sup> It is only when this technique fails to consider the greater good of the audience, or is utilized for the communicator's personal advantage as a tool to manipulate, that Melville

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<sup>76</sup> Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1, 5 (1982).

<sup>77</sup> *Id.* at 34.

<sup>78</sup> *Id.* at 9. Weisberg uses the terms "overt" and "covert" to describe Billy Budd's "innate openness" and to juxtapose it with Claggart's "ingratiating indirectness": two "types in opposition" throughout the novella that are further highlighted by the land-based and sea-based juxtaposition present throughout Melville's entire work. *Id.*

<sup>79</sup> *Id.* at 34-35.

<sup>80</sup> *Id.* at 35.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Melville's accounts of mutinies at sea by reporters exemplify the considerate approach and are intentionally juxtaposed with Captain Vere's bastardization of the technique. *Id.* at 36-37.

<sup>85</sup> *Id.* at 37.

condemns the speaker or author.<sup>86</sup>

Melville's portrayal of the trial of Billy Budd speaks to the persuasive force of the considerate technique. Captain Vere, despite numerous facts and adjudicative hurdles that should have limited a verdict against Billy to no more than manslaughter, manages to convince the drumhead court that Billy was attempting to incite mutiny and should be executed. Therefore, Vere's use of the considerate technique, ultimately masking the procedural and substantive weaknesses in his argument in order to condemn the good-hearted Billy, is both a gross manipulation of the method, and, on a much broader level after the hanging, a warning to beware the corrosive effects of an overly rigid form of adjudication, devoid of morality and ethics.

What then can an understanding of a masterful piece of literature, such as Melville's *Billy Budd*, lend to the practice of law? The answer is far from simple, and, depending on the approach chosen, it can be as varied and multifarious as the different metaphors in Melville's works. However, within law-in-literature, Professor Weisberg effectively analogizes the communicative technique employed by Captain Vere with those used by Justice Rehnquist in *Paul v. Davis*.<sup>87</sup> In doing so, he demonstrates, in the abstract at least, that within literature there operates persuasive techniques of communication frequently employed in judicial opinions. By learning to identify and critique the implementation of these techniques in literature, the legal reader will be better served to discover their use in the adjudicative setting. Furthermore, by showing the way in which "language frequently controls the outcome of adjudication" and how some of the narrative techniques employed by Melville are present in Justice Rehnquist's opinion in *Paul v. Davis*,<sup>88</sup> his article acts as both a warning and as a condemnation of considerate communication.

Professor Weisberg likens Justice Rehnquist, the "considerate communicator" in *Paul v. Davis*, to Captain Vere in *Billy Budd*, and asks the reader not to critique the legal analysis in the opinion, but rather to "appreciate the cleverly persuasive manner in

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<sup>86</sup> Captain Vere's use of the considerate technique is questioned when it is revealed that he operates out of a personal desire to see Billy hanged. *Id.* at 37-38.

<sup>87</sup> See *id.* at 43-58 (discussing *Paul v. Davis*, 424 U.S. 693 (1976)).

<sup>88</sup> *Id.* at 5. For an informative analysis of Weisberg's article, see MINDA, *supra* note 10, at 153-55.

which Justice Rehnquist, ever considerate of his audience's needs, uses language to dispel critical probing into his logic and use of precedent."<sup>89</sup> Professor Weisberg begins by juxtaposing the various recitations of the "facts" of the case, illustrating how the subjective way in which the case is presented, either by Justice Rehnquist or as it is portrayed in a law review comment by Curtis Henry Jacobsen,<sup>90</sup> alters the emotive effect on the reader.<sup>91</sup>

Justice Rehnquist, for example, emphasized the suspicious nature of Davis's arrest for shoplifting, while contrasting that imagery with the devoted police officers who sought nothing more than to prevent crime during the Christmas season.<sup>92</sup> Through this presentation, Justice Rehnquist subtly places in the reader's mind a notion that Davis is the criminal on trial, and that the officers were doing nothing more than their jobs.<sup>93</sup> Thus, through subtle techniques such as referring to Davis's shoplifting charge as being "finally dismissed" (as though his innocence should be doubted because of how long the dismissal was in coming), Justice Rehnquist plants the seeds of doubt regarding Davis's claim for libel.<sup>94</sup> Conversely, Jacobsen begins with a quote from *Othello* expressing the value of one's reputation over mere personal possessions.<sup>95</sup> Jacobsen describes the proceedings in terms related to Davis's libel, rather than Davis's dismissed shoplifting charge.<sup>96</sup> While Justice Rehnquist portrayed the police officers as the protagonist and Davis as the antagonist, Jacobsen portrays Davis as a victim deserving of a remedy and the police officers as the perpetrators of a crime.<sup>97</sup>

Moving from how the facts are expressed to the manner in which the law is utilized, Professor Weisberg examines Rehn-

<sup>89</sup> Weisberg, *supra* note 76, at 43.

<sup>90</sup> Curtis Henry Jacobsen, Comment, Paul v. Davis: *The Taming of 1983*, 43 BROOKLYN L. REV. 147 (1976).

<sup>91</sup> Weisberg, *supra* note 76, at 44-45. Professor Weisberg acknowledges that "it is of course impossible to restate any fact situation without adding subjective color to the pristine original reality." *Id.* at 44.

<sup>92</sup> *Id.* at 45.

<sup>93</sup> *See id.*

<sup>94</sup> *Id.* (citing Paul v. Davis, 424 U.S. 693, 696 (1975)).

<sup>95</sup> Jacobsen, *supra* note 90, at 147 ("Who steals my purse steals trash; 'tis something, nothing; / Twas mine, 'tis his, and has been slave to thousands. / But he that filches from me my good name / Robs me of that which not enriches him, / And makes me poor indeed.") (quoting WILLIAM SHAKESPEARE, *OTHELLO* act III, sc. 3).

<sup>96</sup> *Id.* at 147-48.

<sup>97</sup> Weisberg, *supra* note 76, at 44.

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quist's "deneutralization" of the law.<sup>98</sup> From his subtle questioning of the Court's jurisdiction by suggesting the case involved merely defamation fit for Kentucky courts,<sup>99</sup> to his utilization of the "slippery slope" argument by portraying Davis's action as opening the flood gate of superfluous claims against law enforcement officers,<sup>100</sup> Justice Rehnquist is shown to mirror Captain Vere through his use of mischaracterization and exaggerated hypotheticals.<sup>101</sup> Like Captain Vere, whose underlying message is that Billy presents a threat to the order of the entire empire, Justice Rehnquist depicted Davis's claim as challenging the entirety of our legal order.<sup>102</sup> Thus, Melville's vision of a considerate communicator is exemplified in both Captain Vere and Justice Rehnquist, as each seeks to provide his court with a litigant who, for the greater good, cannot be allowed to prevail.<sup>103</sup>

Professor Weisberg's article is illustrative of the law-in-literature movement as a whole. It seeks to utilize a literary work to illuminate a theme in modern jurisprudence. More specifically, it examines "the values and normative structures likely to inhere in many judges today," and how those values "may pose barriers to objective judicial behavior."<sup>104</sup> Thus, a tale like *Billy Budd* is far more than an examination of the human condition or Melville's moral critique of a specific instance of judicial imperfection; it is a tool that can be utilized to examine ways in which legal texts are convincing or authoritative, as it illustrates the power that the masterful use of language can have in an adjudicative setting.

Professor Weisberg's article demonstrates how a seemingly objective opinion, such as that written by Justice Rehnquist in *Paul v. Davis*, can contain much more than a tertiary reading will reveal. It shows how a skeptical reader, conscious of literary tech-

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<sup>98</sup> *Id.* at 45-49.

<sup>99</sup> *Paul*, 424 U.S. at 698 ("Concededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since petitioners are respectively an official of city and of county government, his action is thereby transmuted into one for deprivation by the State of rights secured under the Fourteenth Amendment.").

<sup>100</sup> *Id.* ("If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under § 1983.").

<sup>101</sup> See Weisberg, *supra* note 76, at 47-49.

<sup>102</sup> *Id.* at 49.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 5.

niques, can assess a judicial opinion, not for the end result of who “won,” but rather for how well-reasoned and intellectually honest the opinion is. For it is not enough to merely critique an opinion that the reader perceives to have a negative result, or attack one that is not politically agreeable. In assessing the quality of an opinion, it is crucial to determine from where the author derived her authority, and how she reached her conclusions. Therefore, Professor Weisberg’s article can be read as both a warning against the persuasive force of “considerate communication” in the dissemination of justice and a template by which the critical legal reader can measure those judicial opinions that attempt to persuade through deceptive means.

To use the Great Books of literature as a guide in assessing adjudicative writing can be an intellectually fruitful means of critique. Others, however, insist that the act of writing, whether in an opinion or a work of fiction, always involves the same fundamental processes. As such, it requires the same analysis and intellectual examination. These scholars adhere to the law-as-literature template and espouse a doctrine that analyzes the meaning of texts, whether they are constitutions or judicial opinions, to derive the author’s intent. For it is only with an understanding of the text’s meaning that we can effectuate its commands.

Searching for the “true” meaning of the Constitution is an acrimonious affair, to say the least. However, Sanford Levinson’s *Law as Literature*<sup>105</sup> manages to capture the essence of the movement, along with the parameters of the debate within it.

### C. *Professor Levinson and Law as Literature*

Sanford Levinson’s aptly titled article “Law as Literature” is illustrative of the entire law-as-literature movement. The article persuasively advocates for literary techniques to be employed in adjudicatory activities, advances various theories utilized to further the law-as-literature discipline, and presents arguments in defense of, and against, various theorists within the Law and Literature movement. Written within the intellectual framework of literary studies, Professor Levinson’s article demonstrates the enormous potential of the law-as-literature movement in constitutional scholarship, as well as the philosophical division that

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<sup>105</sup> Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

separates various scholars within the field. Through a thorough examination of the authors' purpose in writing the Constitution and an intellectual critique of the varying ways in which scholars believe the Constitution can be interpreted, Professor Levinson lays the groundwork for a theory of constitutional scholarship that effectively blends law and literature.

The United States is unique (from Britain, for example) because politicians, citizens, and judges argue not necessarily the ethical or moral implications of a particular issue, but rather whether the issue comports with the dictates of a comprehensible Constitution.<sup>106</sup> This constitutional comprehensibility is derived from the very fact that it is written.<sup>107</sup> While to hear someone speak or see someone move requires the interpretation of a listener or viewer, it is thought that by writing an idea, its true meaning is preserved in perpetuity. However, literary criticism has shown that a written work's very "writtenness" presents an illusory authoritativeness.<sup>108</sup> Merely relying on the fact that something is written to ensure that its meaning is preserved is to erroneously overvalue the ability of the text to transcend time and make its meaning known. Furthermore, by utilizing the works of literary theorists, Professor Levinson shows that the writing of the text for future generations acts to "harden" the language, and thus control actions by future readers through its illusory authoritativeness.<sup>109</sup>

Constitutions are written to "freeze time," for it is the lack of faith in subsequent generations that constitutional drafters address by crafting the document in the first place.<sup>110</sup> Thus, it is through its very language that a constitution retains its authority or defers its meaning for later readers to interpret or decipher. Because ultimately retaining its authority was the primary goal of

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<sup>106</sup> *Id.* at 375.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* ("The physical presentation of a text . . . gives it a stability . . . . Writing has something of a character of an inscription, a mark offered to the world and promising, by its solidity and apparent autonomy, meaning which is momentarily deferred.") (quoting the literary theorist Jonathan Culler in *STRUCTURALIST POETICS* 131, 134 (1975)).

<sup>109</sup> *Id.* (citing the literary theorist Jonathan Culler and the French critic Roland Barthes to illustrate the power of the written work, especially in controlling the actions of future generations).

<sup>110</sup> If the crafters of the Constitution had confidence in future generations, why not just intone them to "be good" or "do what you think best"? *Id.* at 376. The role of the Constitution is to control future activity, by proscribing some actions while allowing others. *Id.*

the drafters, the “hardening” of a constitution’s language takes on great importance, and as such the writers of constitutions must have great faith in the ability of language to both “harden” and control.<sup>111</sup>

However, the meaning of a word as written in the eighteenth century can change to mean something entirely different in the modern context. Thus, because the “hardening” of a work is greatly limited by the changing nature of language, any writer, including the framers of constitutions, must imagine a relationship between the reader and the text whereby the reader attempts to make out what the writer means by “putting into play a linguistic and literary expertise that he shares with the author.”<sup>112</sup> Thus, by assuming what the author sought to signify, the reader attempts to understand what the language of the work means, and, in the legal context, what the reader is authorized to enforce.<sup>113</sup> This attempt by the reader to ascertain the meaning of the text through a shared understanding with the author should be applied by judges to constitutional interpretation. Therefore, in treating law as literature, the constitutional theorist will be better prepared than the legal textualist, who searches for meaning only within the text, to ascertain the intended meaning of the Constitution.

While Professor Levinson dismisses “originalist” theories as “increasingly without defenders,” he recognizes and addresses the viability of a textualist approach to the Constitution.<sup>114</sup> Although he likens the sole reliance on the text of the Constitution to construe its meaning to viewing the document “through a glass darkly,”<sup>115</sup> he provides two options for those who remain interested in interpreting the actual text and glean objective mean-

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (quoting M.H. Abrams, *How to Do Things with Texts*, 46 *PARTISAN REV.* 566 (1979)).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 378. Professor Levinson goes on to say:

There is not time in this essay to canvass the problems of originalism. Suffice it to say that the plain meaning approach inevitably breaks down in the face of the reality of disagreement among equally competent speakers of the native tongue. Intentionality arguments, on the other hand, face not only the problem of explaining why intentions of long-dead people from a different social world should influence us, but also, perhaps more importantly, the problem of extracting intentions from the collectivity of individuals and institutions necessary to give legal validity to the Constitution.

*Id.* at 379.

<sup>115</sup> *Id.* at 378.

ing from it free of its outside influence: weak textualism and strong textualism.<sup>116</sup>

Weak textualists are characterized as attempting to break the text's code through the utilization of a scientific method of criticism.<sup>117</sup> The meaning of the text, according to the weak textualist, will be revealed in the overall structure of the document. The reader must read "between the lines" to reveal the abstract composition that determines the documents "one-and-only truth."<sup>118</sup> Thus, the Constitution can be authoritatively said to yield its meaning in the "interplay of conceptual structures—states, nation, citizens, republican government—that are undoubtedly present in the constitutional text."<sup>119</sup> However, this technique presupposes the vocabulary that reveals the true essence of the Constitution because the very terms contained within the Constitution are continually used to define it.<sup>120</sup> Because weak textualists maintain the belief that there is something contained in the Constitution that can be determined by the utilization of the proper method, they in many ways embody the law-as-science archetype and act as the discredited Langdellian<sup>121</sup> searching for the proper principle with which to break the code.<sup>122</sup>

The "strong" textualist (called such to emphasize the power of the critic, not the text) rejects the whole idea of searching for the meaning of a text.<sup>123</sup> The reading of a text for its meaning is a passive and illusorily self-satisfying approach because the true meaning of the text is created by each reader. Texts provide an illusory objectiveness in that their meaning appears self-contained.<sup>124</sup> The strong textualist emphasizes the reader's active

<sup>116</sup> *Id.* at 379-81 (describing Richard Rorty's characterization of the two courses of analysis left open to those "interested in interpreting the relevant texts").

<sup>117</sup> *Id.* at 380.

<sup>118</sup> *Id.* (critiquing John Hart Ely, who Levinson regarded as the best example of a "weak" textualist).

<sup>119</sup> *Id.*

<sup>120</sup> *See id.*

<sup>121</sup> *See id.* at 373-74 (referring to Christopher Langdell's "false science" of the law).

<sup>122</sup> *Id.* at 381.

<sup>123</sup> *Id.* (describing Stanley Fish as the leading proponent of the "strong" textualist approach).

<sup>124</sup> *Id.* ("The objectivity of the text is an illusion and, moreover, a dangerous illusion, because it is so physically convincing. The illusion is one of self-sufficiency and completeness. A line of print or a page is so obviously *there* . . . that it seems to be the sole repository of whatever value and meaning we associate with it.") (quoting STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 327 (1989)) (omission in original).



role in creating meaning from texts, rather than the disinterested, impersonal approach professed by the weak textualists.<sup>125</sup> The approach taken by strong textualists, however, does not attempt to defend the position that any explanation is just as good as any other.<sup>126</sup> Rather, it advocates an individual interpretation and is willing to give up on the notion that a collective meaning can be ascertained. Thus, for the “strong” textualist, it is enough that readers find an interpretation of the text to their liking. Anything more, any attempt to ascertain a universal meaning, is an “exercise in social deception” utilized by the reader to shape the text to serve her own meaning.<sup>127</sup> Thus, we are in no position to say that an interpretation by one judge or justice is more “right” than any other; we can only acknowledge that the judge or justice, in reading and interpreting the Constitution, is simply fulfilling his own political vision.<sup>128</sup>

Therefore, like the frustrated viewer of art or reader of literature who must turn to critics and literati to return the stability of meaning to the art form, American lawyers who search for meaning in the Constitution must inevitably look to the Court’s precedents to stabilize and define the document. In a time when the Court lacks a prominent “strong” textualist, there are many different Constitutions—all devoid of any substantive meaning and open to each individual to interpret as she sees fit.<sup>129</sup>

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<sup>125</sup> *Id.* (“[D]ifferent notions of what it is to read . . . are finally different notions of what it is to be human. In [one] view, the world, or the world of the text, is already ordered and filled with significances and what the reader is required to do is get them out (hence the question, ‘What did you get out of that?’). In short, the reader’s job is to extract the meanings that formal patterns possess prior to, and independently of, his activities. In my view [on the other hand], these same activities are constitutive of a structure of concerns which is necessarily prior to any examination of meaningful patterns because it is itself the occasion of their coming into being.”) (quoting FISH, *supra* note 124, at 94, regarding his characterization of the difference between weak and strong textualists).

<sup>126</sup> *See id.* at 383 (“[W]hatever exists, having somehow come into being, is again and again reinterpreted to new ends, taken over, transformed, and re-directed by some power superior to it; all events in the organic world are a subduing, a *becoming master*, and all subduing and becoming master involves a fresh interpretation, an adaptation through which any previous ‘meaning’ and ‘purpose’ are necessarily obscured or even obliterated.”) (quoting FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 77 (Walter Kaufmann & R.J. Hollingdale trans., 1967)).

<sup>127</sup> *Id.* at 385.

<sup>128</sup> *Id.* at 389 (citing Justices John Marshall, Earl Warren, and William Rehnquist as “dynamic innovator[s]” of constitutional interpretation).

<sup>129</sup> Professor Levinson’s constitutional nihilism has clearly drawn the ire of several prominent constitutional and literary theorists. He directly addresses each opponent, namely Professor Owen Fiss, by articulating what each contends, and then

Professor Levinson concludes his article without providing an articulated and cohesive theory with which to interpret the Constitution. Instead, we are left with the evocation to wait with faith for a future conjuncture of an author and reader that will provide a common language of constitutional discourse. While this Comment does not presume to create the common language that he craves, it will attempt to illustrate how the theories of judicial interpretation, as articulated above, can be applied to what has become one of the foremost arenas for constitutional debate: *Griswold v. Connecticut*.

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attacking it. For example, Professor Fiss first asserts that the judiciary has a “[s]pecial competence to interpret a text such as the Constitution, and to render specific and concrete the public morality embodied in that text.” *Id.* at 394 (quoting Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982)). Moreover, Professor Fiss argues that this assignment of authority is structured within limits—the judge is not granted the Nietzschean, or *carte blanche*, right to create meaning out of whole cloth. *Id.* The judge must work within the rules of interpretation, and within each branch of the law there are specific rules for the varying texts (e.g., contractual interpretation varies from statutory interpretation and both in turn vary from constitutional interpretation). *Id.* Thus, the interpretive process is transformed from a subjective act to an objective one by furnishing the judge with standards by which the accuracy of the interpretation can be judged. The rules of interpretation emanate from the “interpretive community consisting of those who recognize the rules as authoritative.” *Id.*

Professor Levinson’s retort to Professor Fiss is limited to questioning the very idea that there is an interpretive community with a sense of rules that are authoritative. He counters Professor Fiss by referring to an article recently written by him in which he and a coauthor criticized Justice Rehnquist for failing to adhere to precedent and engaging in judicial activism. *See id.* at 396-99 (referring to Owen Fiss & Charles Krauthammer, *The Rehnquist Court*, NEW REPUBLIC, Mar. 10, 1982, at 14, 14-16). If the interpretive community creates the rules and objective processes by which judges interpret the Constitution, then how, rhetorically asks Professor Levinson, can Professor Fiss write that Justice Rehnquist, as chief interpreter of the Constitution, is not adhering to the authoritative rules that he has created and is bound to observe? *See Levinson, supra* note 105, at 396-99. Ultimately, Professor Fiss’s conception of the Constitution rests on the optimistic notion that there is no conflict among the values of the American public, and that judges, as objective observers, will read the Constitution in such a way as to preserve this coherent set of American values. *Id.* at 399. However, as his own article makes clear, Professor Fiss fails to see that the Constitution, rather than reconciling the differing values of the plurality, has become and will continue to act as the arena in which those differences are fought. *See id.* (quoting BRAY HAMMOND, BANKS AND POLITICS IN AMERICA, FROM THE REVOLUTION TO THE CIVIL WAR 120 (1957)).

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## III

*GRISWOLD V. CONNECTICUT*

From *Griswold* came six written opinions.<sup>130</sup> Justice Douglas wrote the majority opinion, holding that an implicit guarantee emanated through “penumbras” from the express protections of the Bill of Rights and the Fourteenth Amendment. Justice Goldberg, in a concurring opinion joined by two Justices, found a constitutionally protected interest among rights the people retained in the express language of the Ninth Amendment. Justice Black wrote a powerful dissent, stating that there was no explicit textual support for a right of privacy, and that by implicating the Ninth Amendment, the Court opened the door to a whole slew of rights predicated on the whim of judges.<sup>131</sup>

*A. Facts and Background of the Case*

On November 10, 1961, the Executive Director of the Planned Parenthood League of Connecticut, Estelle T. Griswold, and the Medical Director for the League at its Center in New Haven, Dr. C. Lee Buxton, were arrested for giving advice and providing medical services to aid married couples in preventing conception.<sup>132</sup> Both defendants were found guilty of two of the General Statutes of Connecticut. The first, section 53-32, provided:

Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.<sup>133</sup>

The second, section 54-196, sought to punish “[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense . . . as if he were the principal offender.”<sup>134</sup> Both were found guilty as accessories and fined \$100 each.<sup>135</sup> The defendants appealed, and both Connecticut’s Appellate Division of the Circuit Court and Supreme Court of Errors affirmed the judgment.<sup>136</sup> The defendants appealed to the U.S.

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<sup>130</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965). For a comprehensive look at *Griswold v. Connecticut*, see Helscher, *supra* note 8.

<sup>131</sup> In addition, Justices Harlan and White wrote concurring opinions, and Justice Stewart wrote a dissenting opinion.

<sup>132</sup> *Griswold*, 381 U.S. at 480.

<sup>133</sup> *Id.* (quoting CONN. GEN. STAT. § 53-32 (1958 rev.)).

<sup>134</sup> *Id.* (quoting CONN. GEN. STAT. § 54-196).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

Supreme Court and were granted standing to raise the constitutional rights of the married people that they had treated.<sup>137</sup> The Supreme Court ultimately ruled that each of the Connecticut statutes “unconstitutionally intrudes upon the right of marital privacy.”<sup>138</sup>

### B. *Majority and Concurring Opinions*

#### 1. *Justice Douglas*<sup>139</sup>

The appellants offered the Court three reasons for overturning their convictions. First, they argued that the anticontraceptive statutes deprived appellants of the right to liberty and property without due process of law, in violation of the Fourteenth Amendment.<sup>140</sup> Second, they argued that the statutes violated due process as an unwarranted invasion of privacy.<sup>141</sup> Third, they argued that the statutes violated the First Amendment.<sup>142</sup> In what was ultimately the most controversial path, Justice Douglas opted for the second argument, writing that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>143</sup> He went on to find that the “penumbral” rights that emanated from the First, Third, Fourth, Fifth, and Ninth Amendments acted to create a “zone of privacy” within which the state could not enter.<sup>144</sup>

Justice Douglas utilized the power of analogy and precedent to lend authority to the otherwise rather outrageous assertion that there is a constitutionally guaranteed right of privacy.<sup>145</sup> For no-

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<sup>137</sup> *Id.* at 481. The Court took time to establish the legitimacy of standing by citing a long line of precedent and distinguishing the case at bar with strictly construed standing requirements articulated in *Tileston v. Ullman*, 318 U.S. 44 (1943). *Id.*

<sup>138</sup> *Id.* at 486 (Goldberg, J., concurring).

<sup>139</sup> Some have suggested that Justice Douglas lent his name to an opinion he did not craft or compose. See, e.g., Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L.J. 93, 147 (1995) (suggesting that Justice Brennan exerted “behind-the-scenes influence in securing constitutional recognition for the right of privacy”). However, for this Comment’s purposes he will be regarded as the author and source of the ideas contained within the opinion.

<sup>140</sup> Brief for Appellants at 21, *Griswold*, 381 U.S. 479 (No. 496), 1965 WL 115611.

<sup>141</sup> *Id.* at 79.

<sup>142</sup> *Id.* at 90.

<sup>143</sup> *Griswold*, 381 U.S. at 484.

<sup>144</sup> *Id.* at 484-85.

<sup>145</sup> Drawing on the work of Dorothy J. Glancy, I refer to the right of privacy, rather than the right to privacy. See Dorothy J. Glancy, *Douglas’s Right of Privacy*:

where in the text of the Constitution does the word “privacy” appear. Indeed, Connecticut contended that it was well within the police powers of the state, as prescribed explicitly by the Constitution, to regulate the dissemination of contraceptives.<sup>146</sup> If appellants sought to change the laws, the State argued, they should do so through the legislative mechanisms provided.<sup>147</sup> In dismissing Connecticut’s arguments, Justice Douglas drew heavily on the appellant’s brief and the amicus brief of the ACLU. Utilizing a long and diverse line of precedent, he found that out of several of the enumerated constitutional rights there were areas that, while unstated, created protective zones in which the state could not unduly intrude.<sup>148</sup> According to Justice Douglas, emanating from the rights expressly guaranteed by the Constitution are penumbras of protected areas that ensured “a harmony in living.”<sup>149</sup>

As Justice Douglas noted, the First Amendment contains several “peripheral” rights that are not mentioned in the text of the document, but have been established by the Court over time.<sup>150</sup> These rights include: the right to be free from a state’s efforts to “contract the spectrum of available knowledge”;<sup>151</sup> a guarantee of the right to distribute, receive, and read publications;<sup>152</sup> the freedom to teach, inquire, and think;<sup>153</sup> and the freedom of association.<sup>154</sup> Without these and other peripheral, unenumerated rights, the rights expressly guaranteed by the Constitution would be less secure and potentially inconsequential.<sup>155</sup> Thus, while a guarantee like the freedom of association “is not expressly in-

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*A Response to his Critics, in “HE SHALL NOT PASS THIS WAY AGAIN”: THE LEGACY OF WILLIAM O. DOUGLAS* 155, 157 (Stephen L. Wasby ed., 1990). She hypothesizes that Justice Douglas was conscious of the distinction and made it in order to “distinguish his concept of a constitutional right of privacy from the tort right to privacy.” *Id.*

<sup>146</sup> Brief for Appellee at 13-14, *Griswold*, 381 U.S. 479 (No. 496), 1965 WL 115613.

<sup>147</sup> *Id.* at 28.

<sup>148</sup> See *Griswold*, 381 U.S. at 482-86.

<sup>149</sup> *Id.* at 486.

<sup>150</sup> See *id.* at 482-83.

<sup>151</sup> *Id.* at 482 (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

<sup>152</sup> *Id.* (citing *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)).

<sup>153</sup> *Id.* (citing *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952)).

<sup>154</sup> *Id.* at 483 (citing *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)).

<sup>155</sup> *Id.* at 482-83.

cluded in the First Amendment[,] its existence is necessary in making the express guarantees fully meaningful.”<sup>156</sup>

Similarly, the Third Amendment acts to reinforce the notion that there is a zone of privacy free from governmental intrusions by prohibiting the quartering of soldiers in the homes of citizens in times of peace without the owner’s consent.<sup>157</sup> The Fourth and Fifth Amendments protect against government’s intrusion “of the sanctity of a man’s home and the privacies of life.”<sup>158</sup> The Ninth Amendment provides that none of the enumerated rights “shall . . . be construed to deny or disparage others retained by the people,” thereby ensuring that citizens’ privacy rights are not limited to the express provisions of the Constitution, but rather also emanate from the unstated penumbral rights of the document.<sup>159</sup>

Thus, by providing multiple analogues to case law and painting a vivid picture of the Constitution expanding outside of its express mores to include territory that is deemed implicit by its very necessity, Justice Douglas created the authority for the notion that a privacy right exists. His tone of voice is authoritative, and mildly conciliatory, as he turns down the invitation by appellants to implicate the Due Process Clause, conceding early on that the Court does “not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”<sup>160</sup> While Justice Douglas resisted the temptation to return to the early twentieth-century jurisprudence of *Lochner v. New York*<sup>161</sup> where the Supreme Court found that the right to contract was guaranteed within the “liberty” prescribed by the Fourteenth Amendment, he did not hesitate in finding the sacred union of marriage to be a fundamental right that predated the Bill of Rights.<sup>162</sup> Apparently drawing on his Protestant heritage, Justice Douglas read the text of the Constitution as a sacred text, but presumably with more of a concern for the spirit, as opposed to the letter, of the

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<sup>156</sup> *Id.* at 483.

<sup>157</sup> *Id.* at 484.

<sup>158</sup> *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

<sup>159</sup> *Id.* (quoting U.S. CONST. amend. IX).

<sup>160</sup> *Id.* at 482.

<sup>161</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>162</sup> *Griswold*, 381 U.S. at 486 (stating that the Court was dealing with a “right of privacy older than the Bill of Rights—older than our political parties, older than our school system”).

document.<sup>163</sup> Thus, Justice Douglas, through analogy to the shadowy rights that emanate from the express guarantees of the Constitution, and an appeal to the ancient natural law of the sanctity of marriage, created the right of privacy.

Justice Douglas's opinion embodies much of what Professor White maintains is the creative potential of the legal writer. Justice Douglas expanded the narrow specifics of the legal conversation to include areas only hinted at by appellants.<sup>164</sup> He embraced his power to reconstitute the legal language, and in so doing, transformed American culture. He utilized the tools at his disposal (the First, Third, Fourth, Fifth, and Ninth Amendments) to create an entirely new way of viewing the objectively delineated proscriptions of the Constitution, thereby making it far more subjective. Thus, Justice Douglas's opinion is evidence of both the transformative power of the language in law and the law's revolutionary potential relative to our culture.

Justice Douglas, therefore, embodies the spirit of the strong textualist. He created the meaning necessary from the Constitution to achieve his desired political vision. He read the Constitution and precedent and *created* the meaning rather than discovering it. This is not to suggest that his opinion is illegitimate in any way, but merely to point out that, in this particular instance, it was Douglas's far-reaching interpretation of the Constitution that dictated the direction of the Court.

## 2. *Justice Goldberg*

Justice Goldberg agreed with Justice Douglas and rested his belief that "the concept of liberty . . . embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution" on both the precedent provided by Justice Douglas and the language and history of the Ninth Amendment.<sup>165</sup> Gleaning his authority from the text of the Constitution, namely the Ninth Amendment, and the thoughts of the Framers, he ar-

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<sup>163</sup> WHITE, *supra* note 42, at 172; *see also* WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* 6 (1974) (noting that his father was an ordained minister). Professor White refers in passing to Justice Douglas's Protestant upbringing and its possible influence on his opinion in *Griswold v. Connecticut*. WHITE, *supra* note 42, at 172. He specifically suggests that Douglas "like all Protestants" focused on "the sacred text rather than the tradition," but he was one "who read the text with an eye not to its letter but to its spirit." *Id.*

<sup>164</sup> *See* Brief for Appellants, *supra* note 140.

<sup>165</sup> *Griswold*, 381 U.S. at 486-87 (Goldberg, J., concurring).

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gued that “fundamental rights exist that are not expressly enumerated in the first eight amendments.”<sup>166</sup> The Ninth Amendment makes it clear that there was “an intent that the list of rights included there [are] not [to] be deemed exhaustive.”<sup>167</sup> However, just as Justice Douglas was authoritative in his assertion that penumbral rights created the right of privacy, Justice Goldberg was defensive in maintaining the historical relevance of the Ninth Amendment.

Justice Goldberg was quick to point out that he is not arguing for a decree that judges can decide *carte blanche* which rights are fundamental, and thus guaranteed under the Ninth Amendment.<sup>168</sup> Rather, he based his notion of fundamental rights on the “traditions and [collective] conscience of our people.”<sup>169</sup> In other words, a determination must be made as to whether the right in question is one which “lie[s] at the base of all our civil and political institutions.”<sup>170</sup> Thus, Justice Goldberg relied on a rather nebulous and poorly defined assortment of concepts—traditions, civil and political institutions, and the collective conscience of the people—to define the guarantees of the Ninth Amendment. While the authority is certainly legitimate—in that the precedent was good law—Justice Goldberg presaged future controversy by couching his language in defensive, qualifier-laden sentences that are frequently written in reply to positions put forth by the dissenters.<sup>171</sup>

Furthermore, Justice Goldberg, like Justice Rehnquist in *Paul v. Davis*,<sup>172</sup> relied on the age-old tactic of hyperbolic analogue to drive his point home. He utilized the “slippery slope” tactic to argue that if the logic of the dissenters is employed and allowed

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<sup>166</sup> *Id.* at 492.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 493.

<sup>169</sup> *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

<sup>170</sup> *Id.* (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

<sup>171</sup> *See, e.g., id.* at 490-91 (“While this Court has had little occasion to interpret the Ninth Amendment . . . [i]n interpreting the Constitution ‘real effect should be given to all the words it uses.’” (quoting *Myers v. United States*, 272 U.S. 52, 151 (1926))); *id.* at 492 (“A dissenting opinion suggests that my interpretation of the Ninth Amendment somehow ‘broaden[s] the powers of this Court.’” (quoting *id.* at 520 (Black, J., dissenting))); *id.* at 493 (“Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a *State’s* infringement of a fundamental right.”); *id.* at 498-99 (“Finally, it should be said of the Court’s holding today that it in no way interferes with a *State’s* proper regulation of sexual promiscuity or misconduct.”).

<sup>172</sup> *See supra* text accompanying notes 87-103.



to take its natural course, then a state's implementation of a statute limiting family size through sterilization would be constitutional.<sup>173</sup> This oft-employed tactic effectively expresses the gravity of the situation and makes a counterruling by any of the Justices very difficult, for it invokes frightening images of communist-implemented social structuring.

### 3. *Justice Harlan*

Justice Harlan acknowledged the importance of "judicial self-restraint" and paid lip service to the dissenting Justices' concerns with the unchecked judicial freedom granted in the majority opinion.<sup>174</sup> However, he was quick to point out that the Due Process Clause of the Fourteenth Amendment "stands . . . on its own bottom."<sup>175</sup> That is to say, Justice Harlan thought the Connecticut statutes should have been overturned because they violated basic values contained within the "concept of ordered liberty" protected by the Fourteenth Amendment.<sup>176</sup>

Therefore, Justice Harlan shifted the parameters within which the judicial conversation took place. Authority for overturning the Connecticut statutes should not be linked to some amorphous rights that emanate from the prescribed guarantees of the Constitution, but rather from the Fourteenth Amendment itself. There is no need for the Court to search for answers in the shadows of the explicit rights guaranteed in the Bill of Rights; the Fourteenth Amendment's guarantee of liberty is enough to prevent the state from intruding into the marital bedroom.

### 4. *Justice White*

Justice White relied on the judicially established doctrine of strict scrutiny to find the Connecticut statute unconstitutional.<sup>177</sup> He utilized precedent to first determine that marriage falls under the broad evocation of "liberty" in the Fourteenth Amendment and cannot be deprived without "due process."<sup>178</sup> Next, he reasoned that because the Connecticut anticontraceptive statute

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<sup>173</sup> See *Griswold*, 381 U.S. at 496-97 (Goldberg, J., concurring).

<sup>174</sup> See *id.* at 501 (Harlan, J., concurring in the judgment).

<sup>175</sup> *Id.* at 500.

<sup>176</sup> *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>177</sup> *Id.* at 507 (White, J., concurring in the judgment).

<sup>178</sup> *Id.* at 502. Justice White cites *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), and *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), to show that "there is a 'realm of family life which the state

substantially dealt with the marriage relationship, it was required to withstand the rigors of strict scrutiny to survive.<sup>179</sup> To justify the infringement, the law would have to be narrowly tailored to the goals of the statute.<sup>180</sup> Finally, Justice White addressed the reasons given by Connecticut in support of the statute's enactment, namely to curtail "promiscuous or illicit sexual relationships," and found no nexus between the stated goal of the statute and the way it was effectuated.<sup>181</sup> Thus, Justice White, utilizing previously enunciated judicial rules and processes, found that the Connecticut statute did not meet the Court's strict scrutiny standard, for it was not narrowly tailored to meet the goals expressed.<sup>182</sup>

It appears on its face that Justice White crafted an opinion that should withstand the withering attacks of those who condemn judicial activism, while still maintaining a liberal view of personal sexual autonomy. Nevertheless, he took great pains to emphasize that the state could regulate sexual relationships.<sup>183</sup> His opinion seems deliberately crafted in such a way as to not touch on the substantive rights at issue. Furthermore, he belabored the due process element of Fourteenth Amendment analysis, while steering clear of Justice Douglas's broad penumbral view. In fact, it appears that had Connecticut more effectively rationalized the restriction on access to contraceptives by stating that contraceptives were "immoral" or the ban was necessary to promote "population expansion," Justice White would have determined that the statute fell within the state's legitimate police powers, and would have found no reason to deem the statute unconstitutional.<sup>184</sup>

Thus, Justice White redefined the parameters of the judicial conversation in a manner that allowed him to overturn the stat-

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cannot enter' without substantial justification." *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

<sup>179</sup> *Id.* at 503-04.

<sup>180</sup> *See id.* at 504.

<sup>181</sup> *Id.* at 505 ("I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships.").

<sup>182</sup> *See id.* at 507 ("I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law.").

<sup>183</sup> *See id.* at 505 (referring to the statute's goal of regulating promiscuous or illicit sexual relationships as "concededly a permissible and legitimate legislative goal").

<sup>184</sup> *See id.* at 505-06.

ute without requiring him to sift through the Bill of Right’s shadowy penumbral guarantees. However, in so doing, Justice White had to rely on disingenuous and somewhat specious reasoning regarding Connecticut’s anticontraceptive statute and its tailoring. While the regulation of morals is well within the state’s police powers,<sup>185</sup> Justice White was quick to emphasize that the statute restricted the use of contraceptives to *married couples*, and in so doing, unduly restricted their liberty to engage in family planning.<sup>186</sup> His articulated rationale was that the proscription was not narrowly tailored; however, he failed to address similar proscriptions that did not warrant examination by the Supreme Court in New York and Massachusetts.<sup>187</sup> Justice White equated the anticontraception statute with an anti-birth control statute and dismissed the state’s proffered rationale of limiting extramarital affairs,<sup>188</sup> completely ignoring the state’s argument that married couples have alternative avenues of family planning.<sup>189</sup> Moreover, Justice White never mentioned the state’s expert testimony regarding the potential health problems associated with using the contraceptives provided at the clinic.<sup>190</sup> Finally, Justice White noted that population control would be a legitimate motive for the state to assert,<sup>191</sup> completely disregarding that the state addressed the issue in its brief.<sup>192</sup>

Therefore, it appears, after a cursory reading at least, that Justice White was warranted in overturning the statute. His posited

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<sup>185</sup> See *id.* at 505.

<sup>186</sup> *Id.* at 505-06.

<sup>187</sup> See *id.* The state offered examples from New York and Massachusetts where the Supreme Court had refused to take cases involving legislation that prohibited the dissemination of contraceptives. Brief for Appellee, *supra* note 146, at 15.

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<sup>188</sup> See *Griswold*, 381 U.S. at 503, 506 (White, J., concurring in the judgment). Connecticut had several statutes in place, such as proscriptions on adultery and fornication, that sought to impede “extramarital indulgence, as to which risk of illegitimate pregnancy is a recognized deterrent.” Brief for Appellee, *supra* note 146, at 15 (quoting *State v. Nelson*, 11 A.2d 856, 861 (Conn. 1940)).

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<sup>189</sup> See *Griswold*, 381 U.S. at 502-07 (White, J., concurring in the judgment). The state offered studies to show that couples could engage in “[a]bstinence, withdrawal and the rhythm method” as effective alternatives to the contraceptives offered at the clinic. Brief for Appellee, *supra* note 146, at 16.

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<sup>190</sup> The state introduced doctors’ testimony that the use of contraceptives was detrimental to users’ health. Brief for Appellee, *supra* note 146, at 21-22.

<sup>191</sup> *Griswold*, 381 U.S. at 505 (White, J., concurring in the judgment) (“There is no serious contention that Connecticut thinks . . . the anti-use statute is founded upon any policy of promoting population expansion.”).

<sup>192</sup> See Brief for Appellee, *supra* note 146, at 28. The state’s brief cites an Associated Press release that indicates that the populations of both the nation and Connecticut were decreasing. *Id.*

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rationale—there were more efficient ways for Connecticut to look after the morality and health of its population—seems justified. However, in requiring the state’s rationale to be articulated with the utmost specificity, Justice White disingenuously engaged the issue. It is clear that Connecticut expressed, in at least some form, each of the valid reasons that Justice White gave for an anticontraceptive statute. The fact that the reasons were post hoc and not given upon the drafting of the legislation did not seem to bother Justice White. In fact, had Justice White obtained a majority of the votes, Connecticut probably could have re-drafted the statute to include a clear articulation of its legitimate purposes and met the narrowly tailored element of the constitutional standard.

Therefore, it is clear Justice White had reservations about the constitutionality of the statute, but was unwilling to limit it on substantive grounds. His attack was limited to the procedural mechanisms in place that, while effective in limiting Connecticut’s particular legislation, had little or no effect on future state attempts to regulate personal sexual autonomy.

Unwilling to take the potentially revolutionary stance of Justice Douglas, nor able to sanction a statute that clearly pervaded a citizen’s liberty (whether or not that liberty is expressly articulated in the Constitution), Justice White’s opinion straddles the two extremes and is firmly planted in the status-quo-preserving middle ground. It is here, within the realm of concession and compromise, that Professor White claims the language of the dispute is shaped and a common understanding of the dispute becomes intelligible.<sup>193</sup> However, while an opinion such as Justice White’s can clearly lead to the resolution of the specific, narrow conflict presently being addressed, it is wholly inadequate for formulating solutions to the broader and more contentious general debate. Nowhere does Justice White offer a standard with which to assess those rights not expressly articulated in the Constitution. Nor does Justice White enunciate a theory of judicial interpretation that could potentially lead to the resolution of future conflicts.

Justice White utilized the tools of the “considerate communicator” in crafting his concurrence.<sup>194</sup> He subtly misstated and slightly manipulated several of the facts (e.g., the state’s reasons

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<sup>193</sup> See WHITE, *supra* note 2, at 268.

<sup>194</sup> See *supra* Part II.B.

for drafting the statute) in order to advance his primary motive—the overturning of the statute. Justice White was likely motivated by the fact that he, like Justice Stewart, may have felt the statute was “unwise, or even asinine.”<sup>195</sup> Perhaps Justice White deemed the statute morally or ethically offensive,<sup>196</sup> but was constrained by the procedural mechanisms of the Court, and was therefore forced to employ the considerate communicator techniques for the greater good. Ultimately, however, Justice White’s opinion can be valued for providing a procedural and uncontroversial solution to a difficult problem, but it wholly lacks what Professor White values—the power to reconstitute our language, culture, and community.

### C. *Dissenting Opinions*

In their dissents, Justices Black and Stewart maintained that the power to reconstitute our language, culture, and community is a power wholly reserved for the legislature, and to hold otherwise is to promote anti- or undemocratic principles. They scathingly chastised Justice Douglas for straying into the realm of the undemocratic with his searching penumbral inquiry.<sup>197</sup>

In his dissent, Justice Black confronted Justice Douglas’s strong textualist approach, and criticized the Court’s reliance on the vagaries of natural law and judicial lawmaking.<sup>198</sup> He took issue with the majority’s substitution of constitutional doctrine

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<sup>195</sup> See *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting).

<sup>196</sup> Even Justice Black in the dissent concedes that there are “evil qualities” to the law and that it “is every bit as offensive to me as it is to my Brethren of the majority.” See *id.* at 507 (Black, J., dissenting).

<sup>197</sup> Even though Justices Black and Stewart wrote separate dissents, I combine both dissents in my analysis because each Justice joined the other’s dissent, Justice Black clearly articulates the feelings of both, and Justice Stewart’s individual dissent lends little new material to the discussion.

<sup>198</sup> *Id.* at 520-21 (Black, J., dissenting) (“My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court’s belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.”).

for personal preference.<sup>199</sup> According to Black, nowhere in the Constitution is the judiciary given the right to exercise a “supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous.”<sup>200</sup> The power to veto laws, he noted, is the power to make laws, and as such, was specifically denied the courts by the Convention that framed the Constitution.<sup>201</sup> Furthermore, the precedent the majority relied on in formulating their “natural law due process philosophy” was in many cases later “repudiated.”<sup>202</sup>

Thus, Justice Black plainly saw the issue as the unwarranted conferment of legislative duties to the judiciary, rather than the proscription of rights of individuals by the state. Unless restrained by an express prohibition in the Constitution, “a state legislature can do whatever it sees fit to do.”<sup>203</sup> To substitute democratically elected legislators with unelected, life-tenured judges would be to submit “to be ruled by a bevy of Platonic Guardians.”<sup>204</sup> While Justice Black clearly took issue with the majority’s reliance on “natural law,” he conceded that “interpretation” of the Constitution is a requisite element of the Court’s duty.<sup>205</sup> Once involved in interpretation, the result of the Court’s inquiry may be a “contraction or extension of the original pur-

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<sup>199</sup> *Id.* at 511-12 (“If 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. The power to make such decisions is of course that of a legislative body.”).

<sup>200</sup> *Id.* at 512.

<sup>201</sup> Quoting several of the Framers of the Constitution for support, Justice Black notes that “the Constitutional Convention did on at least two occasions reject proposals which would have given the federal judiciary a part in recommending laws or in vetoing as bad or unwise the legislation passed by the Congress.” *Id.* at 513-14 n.6.

<sup>202</sup> Justice Black specifically refers to *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Id.* at 516.

<sup>203</sup> *Id.* at 523 n.19 (quoting *Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting)).

<sup>204</sup> *Id.* at 526 (quoting LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES*, 1958, at 73 (1958)).

<sup>205</sup> *See id.* at 525 (“Since *Marbury v. Madison* . . . was decided, the practice has been firmly established, for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision, thereby affecting policy.”) (quoting *Adamson v. California*, 332 U.S. 46, 90-91 (1947) (Black, J., dissenting)).

pose of a constitutional provision, thereby affecting policy.”<sup>206</sup> However, the Court was never granted the *carte blanche* right to apply undefined concepts such as “natural law.” Rather, it must proceed “within clearly marked constitutional boundaries [and] seek to execute policies written into the Constitution.”<sup>207</sup>

Therefore, in dissenting, Justice Black countered the strong textualist approach by Justice Douglas with his own form of weak textualism. The Constitution was written with particular and very specific roles for the judiciary and legislature. Above all else, those roles must be maintained. The interaction of the different “conceptual structures”<sup>208</sup> operates to reveal the true meaning of the Constitution. The Constitution works not to provide the Court with a set of substantive rights from which to extrapolate additional rights, but rather as a framework within which the different branches must interact. The interpretation of the text of the Constitution by the Court, when necessary, is part of its function. However, the determination of substantive rights treads on the duties limited to the legislature and thus violates the very tenets upon which the Constitution was established.

#### CONCLUSION

Justice Black’s dissent in *Griswold* succinctly poses the question facing our society, occupying our judicial scholars, and frequently being advanced before our courts: Are we to change the Constitution from time to time, or is it a static document?<sup>209</sup> Are we to rely solely on the prescribed procedural remedy of constitutional amendments, or is the Court qualified to extrapolate substantive rights from those expressly articulated?

Many of Justice Douglas’s most vociferous critics argue that

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<sup>206</sup> *Id.* (quoting *Adamson*, 332 U.S. at 90-91).

<sup>207</sup> *Id.* (quoting *Adamson*, 332 U.S. at 91-92).

<sup>208</sup> See *supra* Part II.C.

<sup>209</sup> See *Griswold*, 381 U.S. at 522 (Black, J., dissenting) (“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. The 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.”).

his opinion represents a clear-cut case of undemocratic judicial activism.<sup>210</sup> To expand the meaning of the Constitution past its written context is to pervert the structure of the American system created at the Founding so that judges, not legislatures, are making the law.<sup>211</sup> Judges can rely only on the clearly prescribed written authority; to do otherwise is to invite judicial despotism.

However, when viewed through the eyes of Law and Literature scholars, it becomes clear that Justice Douglas should be lauded for his creativity. The law is an imperfect expression of the popular will. Judges are not changing the Constitution they inherited from 1787; rather, they are articulating what has become a very different Constitution.

Constitutional scholar Bruce Ackerman argues that since the Founding, the Court has played a part in fine-tuning what were momentous changes in American history.<sup>212</sup> The Court has been involved in a synthesizing process, connecting past political events such as the Founding, Reconstruction Amendments, or New Deal era changes, with what “the People” want for the future.<sup>213</sup> Popular upheaval has led the reshaping of the Constitution at every instance. First, the Founding after the American Revolution reshaped the Articles of Confederation. Next, the Constitution was amended after the Civil War to provide others with the rights previously reserved for whites only. Finally, through the actions of a popularly elected president and a majority in Congress, the Democrats created the New Deal, where the state’s economic paternalism subsumed the individual’s uninhibited right to contract. In each instance the Court was charged, after momentous popular movements, to structure a new adjudicative regime—one that added conservative stability to the mix by looking back to past judicial rulings while moving forward to where the will of the people pushed for change. In doing so, the Court has kept America connected to the Founders’ ideals while actualizing the will of the people. Therefore, despite criticism to

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<sup>210</sup> See JAMES F. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* 348-49 (1980); Glancy, *supra* note 145, at 160-62; see also Gerard, *supra* note 6; Loewy, *supra* note 6; Van Alstyne, *supra* note 6.

<sup>211</sup> For an interesting argument concerning claims of judicial activism, see Sanford Levinson, *Poison Pen*, *NEW REPUBLIC*, Oct. 9, 2006, at 12. Professor Levinson argues that critics, in pointing out the antidemocratic nature of judicial review, have failed to acknowledge the very antidemocratic nature of the presidential veto. *Id.*

<sup>212</sup> See 1 ACKERMAN, *supra* note 66, at 40-41.

<sup>213</sup> See *id.*



the contrary, the Court’s incremental changes in granting substantive rights are not undemocratic. Rather, they are examples of the democratic process perfecting itself.

Justice Douglas was not the first Supreme Court Justice to make use of the penumbra metaphor.<sup>214</sup> Prior to *Griswold*, the metaphor had a rich history in which Justices Holmes, Cardozo, and Frankfurter used it to aid judicial interpretation.<sup>215</sup> Additionally, the legal theorist H.L.A. Hart, in his 1958 article “Positivism and the Separation of Law and Morals,” characterized the issues arising outside of the settled meaning of the law as “problems of the penumbra.”<sup>216</sup> While Hart’s characterization of the penumbra is related more to the specific meaning of a settled denotation of a word within a legal document, it is characteristic of the understood meaning of the term in legal scholarship prior to *Griswold*.<sup>217</sup> According to Hart, outside of a legal term’s settled meaning is a penumbra within which the judge or justice is free to shape “what the law ought to be.”<sup>218</sup> Therefore, Professor Hart, like Professor White and Justice Douglas, saw the affirmative potential of the judiciary and sought to explain how, in interpreting various legal uncertainties within the law, the judiciary should keep in mind that “the existing law imposes only limits on our choice and not the choice itself.”<sup>219</sup>

Even as he dissented in *Griswold*, Justice Black was willing to

<sup>214</sup> Burr Henly, “Penumbra”: *The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81, 83 (1987) (“Commentators sometimes discuss Douglas’ *Griswold* penumbra as if the metaphor had never before appeared in American jurisprudence. . . . In fact, the penumbra metaphor had a long and distinguished history prior to *Griswold*, beginning with Justice Oliver Wendell Holmes.”); see also Glancy, *supra* note 145, at 162.

<sup>215</sup> See Henly, *supra* note 214, at 83-89.

<sup>216</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958). Hart famously explained the “problems of the penumbra” utilizing the legal rule regarding a “vehicle.” *Id.* While a rule that forbids you to take a vehicle into the public park clearly forbids an automobile, does it also include bicycles, airplanes, or roller skates? “There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.” *Id.*

<sup>217</sup> See Henly, *supra* note 214, at 91.

<sup>218</sup> Hart, *supra* note 216, at 608.

<sup>219</sup> *Id.* at 629; see also Glancy, *supra* note 145, at 162 (“For Douglas, the Constitution was not a source of shadows, but rather of a grand aurora borealis, of which the right of privacy was a part. In contrast to Holmes’s use of penumbra as half shadow, Douglas emphasized it as half light. To the extent that we too can see the outlines of an implied right of privacy, Douglas’s penumbral right of privacy has affected the way we see the world, and the Constitution.”).

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concede that within the understood meaning of the law, gray areas require judicial interpretation for further clarification.<sup>220</sup> Justice Douglas utilized a form of interpretation that took into account the changing mores of the populace and saw within the gray areas of the law room to move it forward. Ultimately, Justice Douglas preserved the abstract ideals of the Founding by extrapolating from the sum total of the Bill of Rights the rather nebulous right of privacy.<sup>221</sup> This creative undertaking exemplifies the Law and Literature ideal and fits squarely within the models posited by Professors Ackerman and Hart. But more importantly, Justice Douglas formulated an articulate method for an expansion of substantive rights and the concomitant cultural change. He personified Professor White's ideal by using the law to modify our culture in response to the demands of modern circumstances.

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<sup>220</sup> See *supra* notes 205-06 and accompanying text.

<sup>221</sup> See 1 ACKERMAN, *supra* note 66, at 155-56.