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THE NATURAL LAW DUE PROCESS PHILOSOPHY*

Robert P. George

I am grateful to Joseph Koterski and James Fleming for their comments on my paper. Father Koterski and I agree more than we disagree. Things are the other way with Professor Fleming, so I will devote this response to his comments (though I will not address every point on which we disagree).

The terms “natural law” and “legal positivism” have no stable meaning in contemporary legal, political, and philosophical discourse. It is therefore incumbent upon scholars who participate in discussions in which these terms are employed to attend carefully to the different meanings assigned to them by different writers or by a given writer in different contexts. The price of carelessness in this regard is error and confusion.

Unfortunately, James Fleming’s comment on my paper demonstrates my point. Fleming imagines that there is a striking “anomaly” in my “embracing” Hugo Black’s “harangue” against natural law.¹ “I can certainly understand,” Fleming avers, “why a positivist like Robert Bork would revel in Black’s trashing of natural law. I never thought, however, I would see the day when an able defender of natural law [that would be me] would embrace Black’s dissent [in *Griswold v. Connecticut*].”² “Notwithstanding George,” he goes on, “one might expect most natural lawyers to defend the dignity and honor of natural law against Black’s critique [of it].”³

Anyone who pauses, however, to consider what Hugo Black was rejecting when he condemned “the natural law due process philosophy” of judging (or what Robert Bork is affirming when he accepts the label “legal positivist”) will see that Fleming is deeply mistaken. The anomaly he thinks he finds in my analysis is an illusion generated by his failure to observe that the “natural law due process philosophy” that Black rejects has no necessary connection to the

* This is Professor George’s Response to Professor James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 *Fordham L. Rev.* 2285 (2001).

1. James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 *Fordham L. Rev.* 2285, 2285 (2001).

2. *Id.* at 2286.

3. *Id.* at 2287.

“natural law” I affirm. Indeed, no proposition central to Black’s criticism of the opinion for the Court in *Griswold* contradicts any proposition I hold or have asserted in defending natural law.

In *Natural Law and Natural Rights*—the 1980 book that revived interest in natural law theory among contemporary legal philosophers in the analytic tradition—John Finnis elaborated an argument to show that “[t]here are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy.”⁴ It is this proposition that I join Finnis and a number of other contemporary natural law theorists in defending against moral skeptics and relativists, as well as those particular “legal positivists,” such as Hans Kelsen,⁵ who make the rejection of the objectivity of human goods and moral requirements integral to their jurisprudential theories.

Plainly Robert Bork is not a legal positivist of the Kelsenian stripe. His “positivism” is expressly restricted to the claim that under our Constitution courts are entitled to enforce only the positive law of the Constitution and are obligated to defer to legislative judgments where the positive law does not forbid legislative action.⁶ It is simply a mistake to imagine him “reveling” in a “trashing” (to use Fleming’s deeply pejorative term) of the “natural law” that Finnis and I defend.

What about Hugo Black? “According to Justice Black,” Fleming asserts, “it is specious to maintain that the Constitution incorporates natural law.”⁷ I do not think that Fleming has any basis for drawing this interpretative conclusion. In condemning “the natural law due process philosophy” of judging, Black rejects the idea that judges have been given authority by the Constitution to enforce natural law principles *that have not been incorporated into the constitutional text*. But nowhere in his *Griswold* dissent—the sole authority cited by Fleming for his interpretation of Black in this matter—does Black deny *that the text incorporates natural law principles as the framers and ratifiers understood them*. Nor does he deny that when judges properly enforce certain constitutional guarantees they are enforcing the Constitution’s understanding of natural law and natural rights.

4. John Finnis, *Natural Law and Natural Rights* 3 (1980).

5. See Hans Kelsen, *The Natural-Law Doctrine Before the Tribunal of Science, in What is Justice? Justice, Law and Politics in the Mirror of Science: Collected Essays* by Hans Kelsen 137, 141 (1957). I criticize Kelsen’s thought in *Kelsen and Aquinas on ‘the Natural-Law Doctrine,’* 75 *Notre Dame L. Rev.* 1625 (2000).

6. “I am far from denying that there is a natural law, but I do deny both that we have given judges the authority to enforce it and that judges have any greater access to that law than do the rest of us.” Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 66 (1990). Of course, my own view is that in enforcing the positive law of the Constitution, judges in many cases will be carrying out one of the Constitution’s strategies for giving effect to principles of natural law and natural rights. I would be surprised if Bork disagreed, though I do not propose to put words in his mouth.

7. Fleming, *supra* note 1, at 2286.

Nothing in what Black says contradicts my claim that the framers and ratifiers of the Constitution sought to craft a Constitution that would, as I said in my paper, “conform to [natural law’s] requirements, as they understood them, and embody its basic principles for the design of a just political order.”⁸

I do not know what Hugo Black’s views were on fundamental metaethical questions, or whether he ever revealed them. Perhaps he was inclined towards some form of metaethical skepticism. There are certainly notable jurists who have been so inclined—begin the list with Kelsen, or even before Kelsen, with Black’s influential predecessor on the Supreme Court of the United States, Oliver Wendell Holmes.⁹ Indeed, metaethical skepticism might have been the (misguided) subjective basis of Black’s rejection of “the natural law due process philosophy.”¹⁰ It is possible to interpret references to “subjective considerations of ‘natural justice’” or “any mysterious and uncertain natural law concept” in Black’s *Griswold* dissent¹¹ as suggesting metaethical skepticism, though, read in context, one certainly need not interpret them in that way. In that dissent, Black was concerned with the specific question of the scope of judicial authority to enforce principles of natural law not fairly discoverable in the text. I would be reluctant to try to infer from the limited data provided in that context anything very strong about his more general philosophical opinions.¹²

Whatever Black’s views were on metaethical questions, the key point is that one need not be a metaethical skeptic—one need not reject “natural law” in Finnis’ sense and mine—to recognize the force of Black’s critique of William O. Douglas’ claim in *Griswold* to have divined a right to contraception in “penumbras formed by emanations” of constitutional guarantees that have nothing to do with any alleged right to be free from the legal enforcement of traditional norms of sexual morality.¹³ Indeed, someone who accepts “natural

8. Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *Fordham L. Rev.* 2269, 2269 (2001) [hereinafter George, *Natural Law*].

9. See Richard Posner, *The Essential Holmes* 116 (1992) (“[V]alues are simply generalizations emotionally expressed.”).

10. See *Griswold v. Connecticut*, 381 U.S. 479, 507-27 (1965) (Black, J., dissenting).

11. *Id.*

12. I set forth my defense of natural law against the skeptical critique in Robert P. George, *A Defense of the New Natural Law Theory*, 41 *Am. J. Juris.* 47 (1996), reprinted with corrections of multiple printer’s errors in Robert P. George, *In Defense of Natural Law* 18-33 (1999).

13. Please note, however, that my willingness to acknowledge the force of Black’s critique of the majority opinion in *Griswold* should not be interpreted as a wholesale endorsement of Black’s constitutional jurisprudence, any more than it is an endorsement of his metaethical views, whatever they were. While I believe there is more to be said for Black’s dissent in *Griswold* than Fleming allows, there are many points of constitutional law and theory on which I disagree with Black—in some cases profoundly.

law" in Finnis' sense and mine can without logical inconsistency reject what Black denounced as "the natural law due process philosophy" of judging—that is, the idea that judges are empowered as a matter of natural law, to invalidate legislation as "unconstitutional" even where that legislation does not violate any norm fairly discoverable in the constitutional text, or, I would add, its structure, logic, or original understanding, on the basis of the judges' personal—and, in that sense, one might say (without suggesting anything about their metaethical status) "subjective"—beliefs about natural law and natural rights.

As I argued in my paper, the issue of the scope and limits of judicial power is not resolved by natural law; it is settled, rather, by the positive law of the Constitution. And, entirely compatibly with the requirements of natural law, it may reasonably be settled differently, by way of different constitutional arrangements, in different societies. There is nothing in principle unjust or otherwise immoral about a constitution that vests a significant measure of law-making authority in courts as a check on legislative power; but there is nothing unjust or otherwise immoral about a constitution that does not confer upon courts even a limited power of judicial review. Among the things natural law requires of judges and other officials of a basically just regime is that they respect the limits of their own authority under the Constitution, whatever those limits are, and avoid usurping authority settled by the Constitution on others.

James Fleming is a thoughtful and careful scholar. I am therefore extremely reluctant to attribute to him the simple-minded mistake of supposing that every natural law theorist should have an interest in defending just anything that someone chooses to label "natural law." Perhaps he believes that Black's rejection of "the natural law due process philosophy" necessarily presupposes or entails metaethical skepticism. If in fact this is what Fleming believes, I can't imagine what his reason is for believing it. He does not challenge the fundamental point of my article, namely, that the natural law itself confers no authority on judges to go beyond the text, logic, structure, or original understanding of the Constitution to enforce principles of natural justice as they understand them. If and when judges possess such authority, they possess it, not as a matter of natural law, but, rather, as a power conferred upon them by the Constitution. But that means that the natural law does not itself demand, though neither does it preclude, what Black referred to as "the natural law due process philosophy" of judging. It all depends on whether this or that particular constitution—the Constitution of the United States, for example—in fact empowers judges to enforce their understandings of natural justice, and to displace the contrary understandings of the people's elected representatives in legislatures, *even in the absence of*

a warrant provided by the constitutional text, its structure, logic, or original understanding.

Fleming rightly says that I “report” my conclusions about the scope and limits of judicial power under the Constitution of the United States, rather than argue for them. As he knows, that is because my paper is not about that question. It is about the question whether natural law itself licenses free wheeling judicial review of the sort exemplified by *Griswold*. It does not. Does it forbid free wheeling judicial review? Not in principle. Such review violates natural law when (and only when) it constitutes a usurpation under the positive law of a given constitution. Judges, being human (particularly when they are exercising power that is itself not in practice subject to formal review by other officials), will naturally be tempted to engage in usurpative acts for the sake of causes they favor, whether these causes are liberal or conservative, whether they have to do with contraception, abortion, campaign finance, affirmative action, the death penalty, *laissez faire* economics, socialist economics, the election of George Bush, or the election of Al Gore. For the sake of the rule of law, a conscientious and responsible judge will resist the temptation. A proper “judicial restraint” consists precisely in such personal judicial self-discipline. In a basically just regime, judicial usurpations of constitutionally established popular or legislative authority, even in what judges take to be good causes, are themselves unjust. The willingness to do injustice—even for the sake of ends one believes, perhaps rightly, to be just—is what I referred to at the end of my paper as a “bargain with the devil.”¹⁴

Fleming says that “no one proposes breaking with fidelity to the Constitution (as they understand it) in order to achieve the results that they desire.”¹⁵ Yet Fleming’s own approach to constitutional interpretation, one he substantially shares with liberal legal theorist Ronald Dworkin, is one that, according to Dworkin himself, “would . . . be *revolutionary* for a judge openly to recognize.”¹⁶ Although liberal (and, Dworkin supposes, conservative) judges frequently put into practice what he approvingly calls “the moral reading” of the Constitution (a reading that corresponds roughly to what Black labeled “the natural law due process philosophy”), Dworkin admits that “against all the evidence, they deny its influence and try to explain their decisions in other—embarrassingly unsatisfactory—ways.”¹⁷ I certainly agree with Dworkin on this point.

In fact, I do not see how it can honestly be denied that judges have often exercised power that is simply unjustifiable on the terms of their

14. George, *Natural Law*, *supra* note 8, at 2283.

15. Fleming, *supra* note 1, at 2296.

16. See Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 3 (1996) (emphasis added).

17. *Id.*

stated theories of constitutional interpretation. In many cases, perhaps most, their motivation is not some raw lust for power; it is, rather, a desire to produce what they are persuaded are the right policy outcomes in the face of what they take to be retrograde, unenlightened, morally obtuse, or prejudiced legislators or voters. Fleming's response, of course, is that two can play at this game.¹⁸ So he tries to play it. In criticizing my position, he asserts that it "reflects political judgments about what institutions are most likely to realize [my] particular conservative conception of natural law."¹⁹ Really? Fleming's accusation that I am the one who is letting "political judgments" color his view of the scope of judicial power under the Constitution is amazing.

Fleming has moral views, and makes political judgments, about contraception, abortion, homosexuality, and other controversial issues. I do too. In notable cases our moral views and political judgments conflict: He is a liberal; I am, as he reports, a conservative. The depth and intensity of his liberal faith are nicely conveyed by his story about choosing to read at his wedding ceremony from William O. Douglas' opinion in the *Griswold* case. He believes that courts should enforce liberal political judgments about contraception, abortion, and the like.²⁰ I say that the courts should enforce *neither his liberal political judgments nor my conservative ones* in the absence of a warrant rooted in the text, structure, logic, or original

18. See Fleming, *supra* note 1, at 2296.

19. *Id.* at 2286 n.10.

20. Fleming insists not only that *Griswold* was rightly decided, but that it ought not even to be questioned. It is, he says, a "fixed star in our constitutional constellation" right up there with *Brown v. Board of Education*. *Id.* at 2288 (quoting James E. Fleming, *Securing Deliberative Autonomy*, 48 *Stan. L. Rev.* 1, 13 (1995)). Indeed, he accuses me of "obstinacy" in going "against the grain of *our* constitutional practice by continuing to criticize *Griswold* as wrongly decided." Fleming, *supra* note 1, at 2288 (emphasis added). It is certainly true that liberal ideology, particularly on questions of sexual morality and the sanctity of human life, has achieved the status of orthodoxy in American law schools and in elite sectors of the legal profession (as manifested, for example, in the positions officially taken and advocated by the American Bar Association on issues pertaining to homosexuality and abortion). And this, in turn, gives *Griswold* the standing of a core doctrine in something like an established faith. Dissenters will therefore feel the chill force of what is packed into Fleming's reference to *our* constitutional practice and the putative illegitimacy of any dissent from it. *Our* practice is the practice of the people who are "in charge around here," who "run the show," who have the power to decide who is included and excluded from faculty posts and perhaps from judicial appointments, and which views may or may not be dissented from on pain of being declared "obstinate," "out of the mainstream," and "out of line with *our* constitutional practice." (I do not know whether Fleming himself believes it would be right to deny an otherwise well-qualified candidate a judicial appointment because the candidate is "obstinate" enough to believe that Black had the better argument in *Griswold*. I do know, however, and should here point out in fairness to him, that to his great credit he has been willing to support faculty appointments in his own law school scholars who dissent from the liberal orthodoxy on social issues that less fair-minded scholars are willing to enforce ruthlessly).

understanding of the Constitution. Where no such warrant can be identified—where the American people cannot fairly be said to have incorporated into their fundamental law a principle that either transfers legislative authority over a subject matter to the judiciary or resolves the issue one way or another without the need for a judicial foray into abstract questions of natural justice—our Constitution leaves the matter to the deliberation and judgment of democratically constituted and accountable legislatures at the state or national level. That is not because the Constitution is not concerned with natural law and natural rights; it is because that is part of the strategy of the Constitution's framers and ratifiers for giving effect to the principles of natural law and protecting natural rights. Now, you the reader decide: Which one of us is allowing our view of the Constitution and the legitimate scope of judicial power to be driven by his "political judgments?"

Fleming may still question my motives. There is nothing I can do about that. He may insist that in my heart of hearts the reason for my willingness to let legislators resolve questions of public policy pertaining to a fairly wide range of morally significant issues without being subject to a judicial veto is a judgment on my part that conservative views will more likely prevail with the people's representatives than in the courts. The truth is, however, that I have no idea whether overall and in the long run the licensing of judges to enact into law their personal moral and political judgments under the guise of interpreting the Constitution would conduce to the advantage of Fleming's moral and political views or my own. Even a cursory review of the historical record should make someone reluctant to predict how things will go in the future. It all depends on unforeseeable social and political developments. One historical constant seems to be that judges will generally come to share elite views where salient divisions develop between elite and popular opinion. And, of course, today elite opinion tends to be on the liberal side of moral and cultural issues. (Does anyone doubt that a poll of the Princeton or Fordham faculty on "partial birth abortion" or "same-sex marriage" will produce results rather different from a poll of the first seven hundred names in the Trenton or Pelham telephone book?). But it has not always been thus; nor is there any reason to suppose that it cannot change.

Fleming suggests that I would be scandalized by the thought that "it is a good thing for democracy for New York to decide that women have a natural right to decide whether to terminate a pregnancy through having an abortion."²¹ While I think that pro-abortion policies, whether put into place legislatively or by judicial action, are unjust to their unborn victims, I am not in the least troubled by the

21. Fleming, *supra* note 1, at 2295.

proposal to settle the question of abortion via the processes of representative democracy, even in states like New York that are likely to resolve the question in what I judge to be the wrong direction. And, just to be clear, I do in fact think that it is proper (and even "good for democracy") for the people and their elected representatives to deliberate and decide matters of high moral import. It would, in my opinion, be a mistake to remove all such matters from the domain of ordinary democratic deliberation. At the same time, I think it is proper for the people, upon due deliberation, to "constitutionalize" certain matters, thus removing them from the domain of ordinary democratic deliberation, by enshrining in the constitutional text judicially enforceable principles of natural law and natural rights that are incompatible with what misguided legislative majorities might wish to do in the future.

As for abortion itself, it is clear to me that no principle to which the American people have committed themselves in their Constitution is incompatible with the legal protection of human beings *in utero*. So *Roe v. Wade*²² strikes me as a constitutionally unjustified decision. Frankly, it is not so clear to me that the American people have not, by ratification of the equal protection clause, committed themselves to a principle that is incompatible with laws that generally permit the killing of such human beings by abortion.²³ The issue is complicated and requires reflection on the publicly understood meaning of the principle of equal protection that was ratified in the post-Civil War period. If the more careful, rigorous, and historically informed reading of the equal protection clause leads to the conclusion that the American people have, in fact, *not* committed themselves to a principle incompatible with the general legal permission of abortion, then the matter is properly within the scope of legislative authority and it is the responsibility of the people and their elected representatives to resolve the issues of natural law and natural rights at the heart of the debate about abortion justly. I do not find anything scandalous about that. I see no reason to suppose that those of my fellow citizens who are not Supreme Court justices are less trustworthy on matters of moral import than are my fellow citizens who are. Certainly nothing in the historical record inclines me to believe that judges are better at discovering moral truth than non-judges.

In the context of his efforts to depict my views as somehow alienated from "the classical, interpretive justification of judicial review,"²⁴ Fleming asserts that I argue "from a conception of *What* is the Constitution like Dworkin's (rather than Bork's)—through a

22. 410 U.S. 113 (1973).

23. See Robert P. George, *Justice, Legitimacy, and Allegiance: "The End of Democracy?" Symposium Revisited*, 44 Loy. L. Rev. 103, 110-13 (1998).

24. Fleming, *supra* note 1, at 2293.

justification of judicial review that is agnostic between a conception of *What* like Dworkin's and a conception of *What* like Bork's—to a conclusion or conception of judicial review like Bork's (as distinguished from Dworkin's).²⁵ While I do not find this assertion particularly pedantic, it is inaccurate. I agree that the question *What* is the Constitution is an important one. And, like Dworkin, I believe that the Constitution embodies principles of natural law and natural rights. However, I further believe that the Constitution includes various strategies for giving effect to natural law and protecting natural rights. And unlike Dworkin (but like Bork, as I understand his thought) I do not think that provisions such as the “equal protection” and “due process” clauses are “abstract principles” or “majestic generalities” whose content is to be supplied by the unrestricted practical (moral) reasoning of judges. Where the content or its application in particular circumstances is unclear, these provisions are to be interpreted by reflection on their legal, historical, and textual context, as well as on the purposes they were meant to serve and goals they were designed to achieve. It is their *legal* meaning that is the object of this particular interpretative quest. Often, disputes about the meaning of constitutional provisions in concrete circumstances can be resolved by such reflection, or by consideration of the logical implications of the content of provisions thus interpreted.

Fleming goes on to say, as if I would disagree, that “if the Constitution embodies principles of natural law and natural rights, [the classical, interpretive justification] entails that judges should interpret and enforce those principles.”²⁶ Of course they should. That isn't the question. The question is *Who* has been given authority under the Constitution to decide and enforce principles of natural law and natural rights *in the many cases in which the Constitution leaves them unspecified*. As I read the document, it falls to the institutions of democratic self-government, not to the courts, to resolve them. Not only is our Constitution not one that attempts to settle in the text every matter of high moral import, it is not one that shifts responsibility for every question of natural law and natural rights to the judiciary, leaving to democratic institutions only mundane matters of policy. I repeat: From this it does not follow that our Constitution is not concerned with natural law and the protection of natural rights. The fact is that our Constitution places a considerable measure of responsibility for resolving disputed questions of natural law and natural rights in the hands of the people and their elected representatives. Again, I find nothing scandalous about that; nor should other believers in natural law.²⁷

25. *Id.* at 2294.

26. *Id.*

27. I am baffled by Fleming's attribution to me of the view that “judges have no

Let me conclude with brief remarks about Professor Fleming's treatment of *Griswold* (not at his wedding, but in his paper).

He argues that I am wrong to say that there was anything "remarkable" about the first draft of Justice Douglas' opinion for the court in the *Griswold* case, which would have struck down the Connecticut statute on the basis of a First Amendment "freedom of association" claim, rather than on a theory of privacy found in "penumbras formed by emanations." He claims that the Supreme Court has, in fact, since adopted an analysis in line with Douglas' original theory in *Roberts v. Jaycees*.²⁸ The "penumbras formed by emanations" metaphysics is not something that supporters of the *Griswold* decision have been eager to advertise or defend. Yet the Court itself, while citing *Griswold* many times, has not formally proposed an alternative justification for the ruling. *Griswold* has been categorized and treated in different ways by different justices in different opinions. But it is, in my view, worse than a stretch for Fleming to suggest that the opinion for the court in *Roberts* restores the First Amendment "freedom of association" justification that Douglas originally proposed as the ground for invalidating the statute at issue in *Griswold*, and which his fellow justices rejected. The original Douglas opinion has been published.²⁹ Readers who are curious can easily compare it with what Justice William Brennan says in his opinion for the Court in *Roberts* and judge for themselves whether my view or Fleming's is the superior one.

Fleming claims that I am also in error in saying that "Douglas' opinion in *Griswold* rests on the essentially undefended assertion that the availability of contraceptives is good for the institution of marriage."³⁰ It does not presuppose any such belief, Fleming insists. Rather, it is based on the conjunction of two different propositions that "lead to another proposition: that it is good that the partners of the marital association have the privacy and the freedom to make

authority to enforce natural law and natural rights against legislative encroachment." Fleming, *supra* note 1, at 2287. That is not my view, nor do I assert such a thing in my paper or anywhere else. Often, by enforcing principles fairly discoverable in the constitutional text, its structure, logic, and original understanding, judges enforce natural law and natural rights, as embodied in the Constitution, against legislative encroachment. Thus, judicial review is among the strategies by which the Constitution gives effect to natural law and protects natural rights—though it is not the only one. As I said in my paper, judicial review, properly practiced, "help[s] to make the natural law ideal of constitutional government a reality." George, *Natural Law*, *supra* note 8, at 2282. I honestly do not see how I could have made myself clearer about this.

28. 468 U.S. 609 (1984).

29. The opinion is in Bernard Schwartz, *The Unpublished Opinions of the Warren Court* 231-36 (1985). Professor Schwartz, a scholar of liberal sympathies who plainly approves of the outcome in *Griswold*, states that "[i]t must be conceded that the Douglas draft *Griswold* opinion is not legally convincing." *Id.* at 237.

30. Fleming, *supra* note 1, at 2288.

important decisions about whether or when to have children.”³¹ Although Fleming does not use the word “contraception” or “contraceptives” in the statement of his conclusion, I take him to be stating that it is good for spouses to have contraception legally available to them. His point against me is that this is a conclusion that Douglas argued in support of, not an undefended assertion, which is what I said it was.

The quick way to begin seeing that the error here is Fleming’s, not mine, is simply to ask how *Griswold* would and should have been resolved had Douglas and the other justices in the majority shared the view, adopted by the State of Connecticut in defending its statute, that the availability of contraceptives would be damaging to the institution of marriage. The majority justices, in fact, had to assume that the State’s view was wrong in order to reach their conclusion; yet nothing in the Constitution can be taken to imply an answer one way or another to the question of whether the availability of contraceptives is good or bad for the institution of marriage.

But there is more to be said. The two propositions whose conjunction Fleming believes generate his conclusion are the following: (a) that “it would be destructive to the marriage relationship if we allowed ‘the police to search the sacred precincts of marital bedrooms for the telltale signs of the use of contraceptives;’” and (b) that “the marriage relationship or association deserves special protection because it is ‘intimate to the degree of being sacred’ and ‘it is an association for as noble a purpose as any involved in our prior decisions.’”³² Proposition (b) need not detain us. Connecticut defended its law precisely on the basis of its judgments as to the sources of threats to marriage and the means required to protect so noble and important an institution. Douglas’ rhetoric about marriage, however, “stirring” Fleming may find it, does not prove that he and those justices who joined his opinion cared more about marriage than Connecticut’s legislator’s did, or that they better understood what threatened the institution and what was needed to protect it. So the real issue is proposition (a). The point that I want to make is that this proposition, if it is to do any work towards generating the conclusion Fleming wants, must itself presuppose the very proposition that he is at pains to insist the ruling in *Griswold* does not presuppose, namely, that the availability of contraceptives is good for the institution of marriage.

The “sacred precincts of the bedroom” (or, for that matter, the living room, bathroom, or den) are protected by the Constitution by the Fourth Amendment’s restrictions on searches. These restrictions protect *space* that *may* be used for a wide range of activities, sexual

31. *Id.* at 2289.

32. *Id.* at 2288-89 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965)).

and nonsexual, lawful and unlawful. They protect bedrooms and other rooms against unreasonable searches whether, as it happens, people are using those rooms for price fixing, bomb making, prohibited sexual conduct, or drug use. Now, the Court has never discovered that “penumbras formed by emanations” of the Fourth Amendment and other constitutional guarantees create a “right to privacy” that would entail invalidation of laws against, say, using hallucinogens, despite the fact that people can use them in bedrooms and can be motivated to use them precisely by a desire to heighten sexual experience and even enhance marital intimacy, as they see it. Why not? Indeed, why doesn’t *Griswold* stand for such a right? The answer is that even most judges who are willing to practice the free-wheeling judicial review on display in *Griswold* have a different attitude towards drug use than they have towards contraception. Most happen not to believe that LSD, for example, is good or good for marriage. Most judges disagree with people who believe otherwise. They agree with state policies prohibiting such drugs. They find them reasonable. And they would likely be altogether unimpressed by an invocation of *Griswold’s* “sacred precincts” language in the case of a couple arrested—even in their bedroom—for possession of LSD.

On top of this, it is worth noting that the *Griswold* decision struck down not only Connecticut’s ban on the *use* of contraceptives, but on their *distribution and sale*, as well. Distribution and sale were not occurring in bedrooms. No “sacred precincts” required searching to discover breaches of the law. Fleming’s proposition (a) could be fully complied with, even on his own terms, while enforcing key parts of the Connecticut law that the Court invalidated in the name of “marital privacy.” The conclusion is unavoidable: It was the majority justices’ undefended moral presuppositions about contraception, and not anything they could actually find in the Constitution’s protections of bedrooms and other private places, that accounts for their sweeping decision.