*In Poe v Ullman(19610 the Court dismissed on procedural grounds a challenge to the constitutionality of an 1870 Connecticu law prohibiting the use of contraception devices by married women. The challenge was brought by a Doctor who wanted to prescribe it for two women related to their problems if they conceived a child. For one it was potentially life threatening for the other three children had died in infancy. The statute was not being enforced when challenged.*

*The majority consisted of Warren, Frankfurter, Brennan, Whittake, Clark. Dissenters were  
Black, Douglas, Harlan and White.*

In his long dissent a part of which is below , Justice Harlan talks about many of the cases we have already covered related to the meaning of due process.

READ CAREFULLY

*Constitutionality*

I consider that this Connecticut legislation, as construed to apply to these appellants, violates the Fourteenth Amendment. I believe that a statute making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life. I reach this conclusion even though I find it difficult and unnecessary at this juncture to accept appellants' other argument that the judgment of policy behind the statute, so applied, is so arbitrary and unreasonable as to render the enactment invalid for that reason alone. Since both the contentions draw their basis from no explicit language of the Constitution, and have yet to find expression in any decision of this Court, I feel it desirable at the outset to state the framework of constitutional principles in which I think the issue must be judged.

**I**

In reviewing state legislation, whether considered to be in the exercise of the State's police powers or in provision for the health, safety, morals or welfare of its people, it is clear that what is concerned are "the powers of government inherent in every sovereignty." [*The License Cases*](https://supreme.justia.com/cases/federal/us/46/504/case.html)*,* 5 How. 504, [46 U. S. 583](https://supreme.justia.com/cases/federal/us/46/504/case.html#583). Only to the extent that the Constitution so requires may this Court interfere with the exercise of this plenary power of government. [*Barron v. Mayor of City of Baltimore*](https://supreme.justia.com/cases/federal/us/32/243/case.html)*,* 7 Pet. 243. But precisely because it is the Constitution alone which warrants judicial interference in sovereign operations of the State, the basis of judgment as to the constitutionality of state action must be a rational one, approaching the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government. [*M'Culloch v. Maryland*](https://supreme.justia.com/cases/federal/us/17/316/case.html)*,* 4 Wheat. 316. But as inescapable as is the rational process in constitutional adjudication in general, nowhere is it more so than in giving meaning to the prohibitions of the Fourteenth Amendment, and, where the Federal Government is involved, the Fifth Amendment, against the deprivation of life, liberty or property without due process of law.

It is but a truism to say that this provision of both Amendments is not self-explanatory. As to the Fourteenth, which is involved here, the history of the Amendment also sheds little light on the meaning of the provision. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights, 2 Stan.L.Rev. 15. It is important to note, however, that two views of the Amendment have not been accepted by this Court as delineating its scope. One view, which was ably and insistently argued in response to what were felt to be abuses by this Court of its reviewing power, sought to limit the provision to a guarantee of procedural fairness. *See Davidson v. City of New Orleans,* [96 U. S. 97](https://supreme.justia.com/cases/federal/us/96/97/case.html), [96 U. S. 105](https://supreme.justia.com/cases/federal/us/96/97/case.html#105); Brandeis, J., in *Whitney v. California,* [274 U. S. 357](https://supreme.justia.com/cases/federal/us/274/357/case.html), at [274 U. S. 373](https://supreme.justia.com/cases/federal/us/274/357/case.html#373); Warren, The New "Liberty" under the 14th Amendment, 39 Harv.L.Rev. 431; Reeder, The Due Process Clauses and "The Substance of Individual Rights," 58 U.Pa.L.Rev. 191; Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property," 4 Harv.L.Rev. 365. The other view which has been rejected would have it that the Fourteenth Amendment, whether by way of the Privileges and Immunities Clause or the Due Process Clause, applied against the States only and precisely those restraints which had, prior to the Amendment, been applicable merely to federal action. However, "due process," in the consistent view of this Court, has even been a broader concept than the first view, and more flexible than the second.

Were due process merely a procedural safeguard, it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. *Compare, e.g., Selective Draft Law Cases,* [245 U. S. 366](https://supreme.justia.com/cases/federal/us/245/366/case.html); *Butler v. Perry,* [240 U. S. 328](https://supreme.justia.com/cases/federal/us/240/328/case.html); *Korematsu v. United States,* [323 U. S. 214](https://supreme.justia.com/cases/federal/us/323/214/case.html). Thus the guaranties of due process, though having their roots in Magna Carta's "*per legem terrae*" and considered as procedural safeguards "against executive usurpation and tyranny," have in this country "become bulwarks also against arbitrary legislation." *Hurtado v. California,* [110 U. S. 516](https://supreme.justia.com/cases/federal/us/110/516/case.html), at [110 U. S. 532](https://supreme.justia.com/cases/federal/us/110/516/case.html#532).

However, it is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights "which are . . . fundamental; which belong . . . to the citizens of all free governments," *Corfield v. Coryell,* 4 Wash.C.C. 371, 380, for "the purposes (of securing) which men enter into society," [*Calder v. Bull*](https://supreme.justia.com/cases/federal/us/3/386/case.html)*,* 3 Dall. 386, [3 U. S. 388](https://supreme.justia.com/cases/federal/us/3/386/case.html#388). Again and again, this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights. [*The Slaughter-House Cases*](https://supreme.justia.com/cases/federal/us/83/36/case.html)*,* 16 Wall. 36; *Walker v. Sauvinet,* [92 U. S. 90](https://supreme.justia.com/cases/federal/us/92/90/case.html); *Hurtado v. California,* [110 U. S. 516](https://supreme.justia.com/cases/federal/us/110/516/case.html); *Presser v. Illinois,* [116 U. S. 252](https://supreme.justia.com/cases/federal/us/116/252/case.html); *In re Kemmler,* [136 U. S. 436](https://supreme.justia.com/cases/federal/us/136/436/case.html);

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*Twining v. New Jersey,* [211 U. S. 78](https://supreme.justia.com/cases/federal/us/211/78/case.html); *Palko v. Connecticut,* [302 U. S. 319](https://supreme.justia.com/cases/federal/us/302/319/case.html). Indeed, the fact that an identical provision limiting federal action is found among the first eight Amendments, applying to the Federal Government, suggests that due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions. *See Mormon Church v. United States,* [136 U. S. 1](https://supreme.justia.com/cases/federal/us/136/1/case.html); *Downes v. Bidwell,* [182 U. S. 244](https://supreme.justia.com/cases/federal/us/182/244/case.html); *Hawaii v. Mankichi,* [190 U. S. 197](https://supreme.justia.com/cases/federal/us/190/197/case.html); *Balzac v. Porto Rico,* [258 U. S. 298](https://supreme.justia.com/cases/federal/us/258/298/case.html); *Farrington v. Tokushige,* [273 U. S. 284](https://supreme.justia.com/cases/federal/us/273/284/case.html); *Bolling v. Sharpe,* [347 U. S. 497](https://supreme.justia.com/cases/federal/us/347/497/case.html).

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that, through the course of this Court's decisions, it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

It is this outlook which has led the Court continuingly to perceive distinctions in the imperative character of constitutional provisions, since that character must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, *see Allgeyer v. Louisiana,* [165 U. S. 578](https://supreme.justia.com/cases/federal/us/165/578/case.html); *Holden v. Hardy,* [169 U. S. 366](https://supreme.justia.com/cases/federal/us/169/366/case.html); *Booth v. Illinois,* [184 U. S. 425](https://supreme.justia.com/cases/federal/us/184/425/case.html); *Nebbia v. New York,* [291 U. S. 502](https://supreme.justia.com/cases/federal/us/291/502/case.html); *Skinner v. Oklahoma,* [316 U. S. 535](https://supreme.justia.com/cases/federal/us/316/535/case.html), 544 (concurring opinion); *Schware v. Board of Bar Examiners,* [353 U. S. 232](https://supreme.justia.com/cases/federal/us/353/232/case.html), and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. *Cf. Skinner v. Oklahoma, supra; Bolling v. Sharpe, supra.*

As was said in *Meyer v. Nebraska,* [262 U. S. 390](https://supreme.justia.com/cases/federal/us/262/390/case.html), [262 U. S. 399](https://supreme.justia.com/cases/federal/us/262/390/case.html#399),

"this court has not attempted to define with exactness the liberty thus guaranteed. . . . Without doubt, it denotes, not merely freedom from bodily restraint. . . ."

Thus, for instance, when, in that case and in *Pierce v. Society of Sisters,* [268 U. S. 510](https://supreme.justia.com/cases/federal/us/268/510/case.html), the Court struck down laws which sought not to require what children must learn in schools, but to prescribe, in the first case, what they must *not* learn, and in the second, *where* they must acquire their learning, I do not think it was wrong to put those decisions on "the right of the individual to . . . establish a home and bring up children," *Meyer v. Nebraska, ibid.,* or on the basis that

"The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only,"

*Pierce v. Society of Sisters,* 268 U.S. at [268 U. S. 535](https://supreme.justia.com/cases/federal/us/268/510/case.html#535). I consider this so even though today those decisions would probably have gone by reference to the concepts of freedom of expression and conscience assured against state action by the Fourteenth Amendment, concepts that are derived from the explicit guarantees of the First Amendment against federal encroachment upon freedom of speech and belief. *See West Virginia State Board of Education v. Barnette,* [319 U. S. 624](https://supreme.justia.com/cases/federal/us/319/624/case.html) and [319 U. S. 656](https://supreme.justia.com/cases/federal/us/319/624/case.html#656) (dissenting opinion); *Prince v. Massachusetts,* [321 U. S. 158](https://supreme.justia.com/cases/federal/us/321/158/case.html), [321 U. S. 166](https://supreme.justia.com/cases/federal/us/321/158/case.html#166). For it is the purposes of those guarantees and not their text, the reasons for their statement by the Framers and not the statement itself, *see Palko v. Connecticut,* [302 U. S. 319](https://supreme.justia.com/cases/federal/us/302/319/case.html), [302 U. S. 324](https://supreme.justia.com/cases/federal/us/302/319/case.html#324)-327; *United States v. Carolene Products Co.,* [304 U. S. 144](https://supreme.justia.com/cases/federal/us/304/144/case.html), [304 U. S. 152](https://supreme.justia.com/cases/federal/us/304/144/case.html#152)-153, which have led to their present status in the compendious notion of "liberty" embraced in the Fourteenth Amendment.

Each new claim to constitutional protection must be considered against a background of constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yard-stick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come." *Irvine v. California,* [347 U. S. 128](https://supreme.justia.com/cases/federal/us/347/128/case.html), [347 U. S. 147](https://supreme.justia.com/cases/federal/us/347/128/case.html#147) (dissenting opinion). The matter was well put in *Rochin v. California,* [342 U. S. 165](https://supreme.justia.com/cases/federal/us/342/165/case.html), [342 U. S. 170](https://supreme.justia.com/cases/federal/us/342/165/case.html#170)-171:

"The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these

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that are fused in the whole nature of our judicial process. . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession."

On these premises, I turn to the particular constitutional claim in this case.

**II**

Appellants contend that the Connecticut statute deprives them, as it unquestionably does, of a substantial measure of liberty in carrying on the most intimate of all personal relationships, and that it does so arbitrarily and without any rational, justifying purpose. The State, on the other hand, asserts that it is acting to protect the moral welfare of its citizenry, both directly, in that it considers the practice of contraception immoral in itself, and instrumentally, in that the availability of contraceptive materials tends to minimize "the disastrous consequence of dissolute action," that is fornication and adultery.

It is argued by appellants that the judgment, implicit in this statute -- that the use of contraceptives by married couples is immoral -- is an irrational one, that, in effect, it subjects them in a very important matter to the arbitrary whim of the legislature, and that it does so for no good purpose. Where, as here, we are dealing with what must be considered "a basic liberty," *cf. Skinner v. Oklahoma, supra,* at [316 U. S. 541](https://supreme.justia.com/cases/federal/us/316/535/case.html#541), "[t]here are limits to the extent to which the presumption of constitutionality can be pressed," *id.,* at [316 U. S. 544](https://supreme.justia.com/cases/federal/us/316/535/case.html#544) (concurring opinion), and the mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify alone any and every restriction it imposes. *See Alberts v. California,* [354 U. S. 476](https://supreme.justia.com/cases/federal/us/354/476/case.html).

Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical wellbeing of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed, to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any constitutional doctrine in this area must build upon that basis. *Compare McGowan v. Maryland,* [366 U. S. 420](https://supreme.justia.com/cases/federal/us/366/420/case.html).

It is in this area of sexual morality, which contains many proscriptions of consensual behavior having little or no direct impact on others, that the Connecticut has expressed its moral judgment that all use of contraceptives is improper. Appellants cite an impressive list of authorities who, from a great variety of points of view, commend the considered use of contraceptives by married couples. What they do not emphasize is that, not too long ago, the current of opinion was very probably quite the opposite, [[Footnote 3/12](https://supreme.justia.com/cases/federal/us/367/497/" \l "F3/12)] and that, even today, the issue is not free of controversy. Certainly, Connecticut's judgment is no more demonstrably correct or incorrect than are the varieties of judgment, expressed in law, on marriage and divorce, on adult consensual homosexuality, abortion, and sterilization, or euthanasia and suicide. If we had a case before us which required us to decide simply, and in abstraction, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views. *Cf. Alberts v. California,* [354 U. S. 476](https://supreme.justia.com/cases/federal/us/354/476/case.html), [354 U. S. 500](https://supreme.justia.com/cases/federal/us/354/476/case.html#500)-503 (concurring opinion).

But, as might be expected, we are not presented simply with this moral judgment to be passed on as an abstract proposition. The secular state is not an examiner of consciences: it must operate in the realm of behavior, of overt actions, and where it does so operate, not only the underlying, moral purpose of its operations, but also the choice of means becomes relevant to any constitutional judgment on what is done. The moral presupposition on which appellants ask us to pass judgment could form the basis of a variety of legal rules and administrative choices, each presenting a different issue for adjudication. For example, one practical expression of the moral view propounded here might be the rule that a marriage in which only contraceptive relations had taken place had never been consummated, and could be annulled. *Compare, e.g.,* 2 Bouscaren, Canon Law Digest, 307-313. Again, the use of contraceptives might be made a ground for divorce, or perhaps tax benefits and subsidies could be provided for large families. Other examples also readily suggest themselves.

**III**

Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law. Potentially, this could allow the deployment of all the incidental machinery of the criminal law, arrests, searches and seizures; inevitably, it must mean, at the very least, the lodging of criminal charges, a public trial, and testimony as to the *corpus delicti.* Nor could any imaginable elaboration of presumptions, testimonial privileges, or other safeguards, alleviate the necessity for testimony as to the mode and manner of the married couples' sexual relations, or at least the opportunity for the accused to make denial of the charges. In sum, the statute allows the State to enquire into, prove and punish married people for the private use of their marital intimacy.

This, then, is the precise character of the enactment whose constitutional measure we must take. The statute must pass a more rigorous constitutional test than that going merely to the plausibility of its underlying rationale. *See* pp. [367 U. S. 542](https://supreme.justia.com/cases/federal/us/367/497/case.html#542)-545, *supra.* This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of "liberty," the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to "strict scrutiny." *Skinner v. Oklahoma, supra,* at [316 U. S. 541](https://supreme.justia.com/cases/federal/us/316/535/case.html#541). That aspect of liberty which embraces the concept of the privacy of the home receives explicit constitutional protection at two places only. These are the Third Amendment, relating to the quartering of soldiers, [[Footnote 3/13](https://supreme.justia.com/cases/federal/us/367/497/" \l "F3/13)] and the Fourth Amendment, prohibiting unreasonable searches and seizures. [[Footnote 3/14](https://supreme.justia.com/cases/federal/us/367/497/" \l "F3/14)] While these Amendments reach only the Federal Government, this Court has held in the strongest terms, and today again confirms, that the concept of "privacy" embodied in the Fourth Amendment is part of the "ordered liberty" assured against state action by the Fourteenth Amendment. *See Wolf v. Colorado,* [338 U. S. 25](https://supreme.justia.com/cases/federal/us/338/25/case.html); *Mapp v. Ohio,* [367 U. S. 643](https://supreme.justia.com/cases/federal/us/367/643/case.html).

It is clear, of course, that this Connecticut statute does not invade the privacy of the home in the usual sense, since the invasion involved here may, and doubtless usually would, be accomplished without any physical intrusion whatever into the home. What the statute undertakes to do, however, is to create a crime which is grossly offensive to this privacy, while the Constitution refers only to methods of ferreting out substantive wrongs, and the procedure it requires presupposes that substantive offenses may be committed and sought out in the privacy of the home. But such an analysis forecloses any claim to constitutional protection against this form of deprivation of privacy, only if due process in this respect is limited to what is explicitly provided in the Constitution, divorced from the rational purposes, historical roots, and subsequent developments of the relevant provisions. Perhaps the most comprehensive statement of the principle of liberty underlying these aspects of the Constitution was given by Mr. Justice Brandeis, dissenting in *Olmstead v. United States,* [277 U. S. 438](https://supreme.justia.com/cases/federal/us/277/438/case.html), at [277 U. S. 478](https://supreme.justia.com/cases/federal/us/277/438/case.html#478):

"The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. . . ."

I think the sweep of the Court's decisions, under both the Fourth and Fourteenth Amendments amply shows that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character.

"[These] principles . . . affect the very essence of constitutional liberty and security. They reach farther than [a] concrete form of the case . . . before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. . . ."

*Boyd v. United States,* [116 U. S. 616](https://supreme.justia.com/cases/federal/us/116/616/case.html), [116 U. S. 630](https://supreme.justia.com/cases/federal/us/116/616/case.html#630).

"The security of one's privacy against arbitrary intrusion by the police -- which is at the core of the Fourth Amendment -- is basic to a free society."

*Wolf v. Colorado, supra,* at [338 U. S. 27](https://supreme.justia.com/cases/federal/us/338/25/case.html#27). In addition, *see, e.g., Davis v. United States,* [328 U. S. 582](https://supreme.justia.com/cases/federal/us/328/582/case.html), [328 U. S. 587](https://supreme.justia.com/cases/federal/us/328/582/case.html#587); *Oklahoma Press Pub. Co. v. Walling,* [327 U. S. 186](https://supreme.justia.com/cases/federal/us/327/186/case.html), [327 U. S. 202](https://supreme.justia.com/cases/federal/us/327/186/case.html#202)-203; *Frank v. Maryland,* [359 U. S. 360](https://supreme.justia.com/cases/federal/us/359/360/case.html), [359 U. S. 365](https://supreme.justia.com/cases/federal/us/359/360/case.html#365)-366; *Silverman v. United States,* [365 U. S. 505](https://supreme.justia.com/cases/federal/us/365/505/case.html), [365 U. S. 511](https://supreme.justia.com/cases/federal/us/365/505/case.html#511).

It would surely be an extreme instance of sacrificing substance to form were it to be held that the constitutional principle of privacy against arbitrary official intrusion comprehends only physical invasions by the police. To be sure, the times presented the Framers with two particular threats to that principle, the general warrant, *see Boyd v. United States, supra,* and the quartering of soldiers in private homes. But though

"[l]egislation, both statutory and constitutional, is enacted . . . from an experience of evils . . . , its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. . . . [A] principle, to be vital, must be capable of wider application than the mischief which gave it birth."

*Weems v. United States,* [217 U. S. 349](https://supreme.justia.com/cases/federal/us/217/349/case.html), [217 U. S. 373](https://supreme.justia.com/cases/federal/us/217/349/case.html#373).

Although the form of intrusion here -- the enactment of a substantive offense -- does not, in my opinion, preclude the making of a claim based on the right of privacy embraced in the "liberty" of the Due Process Clause, it must be acknowledged that there is another sense in which it could be argued that this intrusion on privacy differs from what the Fourth Amendment, and the similar concept of the Fourteenth, were intended to protect: here, we have not an intrusion into the home so much as on the life which characteristically has its place in the home. But, to my mind, such a distinction is so insubstantial as to be captious: if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw

to its protection the principles of more than one explicitly granted constitutional right. Thus, Mr. Justice Brandeis, writing of a statute which made "it punishable to teach [pacifism] in any place [to] a single person . . . , no matter what the relation of the parties may be," found such a

"statute invades the privacy and freedom of the home. Father and mother may not follow the promptings of religious belief, of conscience or of conviction, and teach son or daughter the doctrine of pacifism. If they do, any police officer may summarily arrest them."

*Gilbert v. Minnesota,* [254 U. S. 325](https://supreme.justia.com/cases/federal/us/254/325/case.html), [254 U. S. 335](https://supreme.justia.com/cases/federal/us/254/325/case.html#335)-336 (dissenting opinion). This same principle is expressed in the *Pierce* and *Meyer* cases, *supra.* These decisions, as was said in *Prince v. Massachusetts,* [321 U. S. 158](https://supreme.justia.com/cases/federal/us/321/158/case.html), at [321 U. S. 166](https://supreme.justia.com/cases/federal/us/321/158/case.html#166), "have respected the private realm of family life which the state cannot enter."

Of this whole "private realm of family life," it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations. We would indeed be straining at a gnat and swallowing a camel were we to show concern for the niceties of property law involved in our recent decision, under the Fourth Amendment, in *Chapman v. United States,* [365 U. S. 610](https://supreme.justia.com/cases/federal/us/365/610/case.html), and yet fail at least to see any substantial claim here.

Of course, just as the requirement of a warrant is not inflexible in carrying out searches and seizures, *see Abel v. United States,* [362 U. S. 217](https://supreme.justia.com/cases/federal/us/362/217/case.html); *United States v. Rabinowitz,* [339 U. S. 56](https://supreme.justia.com/cases/federal/us/339/56/case.html), so there are countervailing considerations at this more fundamental aspect of the right involved. "[T]he family . . . is not beyond regulation," *Prince v. Massachusetts, supra,* and it would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary for crime. The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication, and incest are immune from criminal enquiry, however privately practiced. So much

has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare. *See* pp. [367 U. S. 545](https://supreme.justia.com/cases/federal/us/367/497/case.html#545)-548, *supra.* But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home would entirely misconceive the argument that is being made.

Adultery, homosexuality, and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which, always and in every age, it has fostered and protected. It is one thing when the State exerts its power either to forbid extramarital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

In sum, even though the State has determined that the use of contraceptives is as iniquitous as any act of extramarital sexual immorality, the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy, is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection.

In my view, the appellants have presented a very pressing claim for constitutional protection. Such difficulty as the claim presents lies only in evaluating it against the State's countervailing contention that it be allowed to enforce, by whatever means it deems appropriate, its judgment of the immorality of the practice this law condemns.

In resolving this conflict, a number of factors compel me to conclude that the decision here must most emphatically be for the appellants. Since, as it appears to me, the statute marks an abridgment of important fundamental liberties protected by the Fourteenth Amendment, it will not do to urge in justification of that abridgment simply that the statute is rationally related to the effectuation of a proper state purpose. A closer scrutiny and stronger justification than that are required. *See* pp. [367 U. S. 542](https://supreme.justia.com/cases/federal/us/367/497/case.html#542)-545, *supra.*

Though the State has argued the constitutional permissibility of the moral judgment underlying this statute, neither its brief, nor its argument, nor anything in any of the opinions of its highest court in these or other cases even remotely suggests a justification for the obnoxiously intrusive means it has chosen to effectuate that policy. To me, the very circumstance that Connecticut has not chosen to press the enforcement of this statute against individual users, while it nevertheless persists in asserting its right to do so at any time -- in effect, a right to hold this statute as an imminent threat to the privacy of the households of the State -- conduces to the inference either that it does not consider the policy of the statute a very important one or that it does not regard the means it has chosen for its effectuation as appropriate or necessary.

But conclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the use of contraceptives a crime. [[Footnote 3/15](https://supreme.justia.com/cases/federal/us/367/497/" \l "F3/15)] Indeed, a diligent search has

revealed that no nation, including several which quite evidently share Connecticut's moral policy, [[Footnote 3/16](https://supreme.justia.com/cases/federal/us/367/497/" \l "F3/16)] has seen fit to effectuate that policy by the means presented here.

Though undoubtedly the States are and should be left free to reflect a wide variety of policies, and should be allowed broad scope in experimenting with various means of promoting those policies, I must agree with Mr. Justice Jackson that

"There are limits to the extent to which a legislatively represented majority may conduct . . . experiments at the expense of the dignity and personality"

of the individual. *Skinner v. Oklahoma, supra.* In this instance, these limits are, in my view, reached and passed.

I would adjudicate these appeals and hold this statute unconstitutional insofar as it purports to make criminal the conduct contemplated by these married women. It follows that if their conduct cannot be a crime, appellant Buxton cannot be an accomplice thereto. I would reverse the judgment in each of these cases