IN DEFENSE OF \textit{GRISWOLD V. CONNECTICUT}: PRIVACY, ORIGI
NALISM, AND THE ICEBERG THEORY OF OMISSION

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I. INTRODUCTION

Supreme Court Justice Clarence Thomas has a plaque hanging in 
his chambers that reads, “Please don’t emanate in the penumbras,”\textsuperscript{1} 
which is a jab at Justice William Douglas’s oft-ridiculed \textit{Griswold v. 
Connecticut} opinion.\textsuperscript{2} In \textit{Griswold}, Douglas wrote for the Court in 
explaining the constitutional right to privacy, upon which rest the 
constitutional rights to use contraception,\textsuperscript{3} to engage in same sex 
intercourse and marriage,\textsuperscript{4} and to have an abortion.\textsuperscript{5} Douglas’s

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\textsuperscript{1} David J. Garrow, \textit{The Tragedy of William O. Douglas}, NATION (March 27, 2003), 
\textsuperscript{2} 381 U.S. 479 (1965).
\textsuperscript{3} Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that the right to privacy permits 
unmarried individuals to purchase and use contraception).
\textsuperscript{4} Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 135 S. Ct. 2584 
\textsuperscript{5} Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 
opinion did not cite specific text in the Constitution that addresses the right to privacy, because no such text exists. Instead, he infamously cited as evidence constitutional “penumbras” that he claimed surrounded the Bill of Rights.6 The right to privacy, opined Douglas, is an implied constitutional right that lies beneath the surface of the Constitution’s text. Judicial originalists like Justice Thomas vehemently disagree with Douglas’s reasoning with regard to the right to privacy.7 Originalists interpret the Constitution by attempting to determine the original intent behind each provision and the document’s original public meaning at the time of ratification.8 Originalists say that the Constitution’s textual silence regarding privacy is prima facie evidence that the right to privacy is not a constitutional right but instead the byproduct of liberal judicial activism. To judicial originalists, Douglas’s Griswold opinion is playing “charades with the Constitution.”9 Even constitutional scholars who are ideologically sympathetic to the right to privacy have dismissed Griswold as “difficult to take seriously.”10

Recent events have brought increased scrutiny on both Griswold and the right to privacy. President Trump has vowed to nominate as many judicial originalists as possible to an aging Supreme Court in order to “repeal” Roe v. Wade—a decision that rests on the right to privacy as established in Griswold.11 If, as originalist judges claim,

6. Griswold, 381 U.S. at 484.
8. Randy E. Barnett, Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism, 75 U. CIN. L. REV. 7 (2006) [hereinafter Barnett, Scalia’s Infidelity]. Barnett explains that “originalism” has three different meanings, or schools of thought: original framers’ intent, original ratifiers’ understanding, and original public meaning. Randy E. Barnett, The Ninth Amendment: It Means What It Says, 85 TEX. L. REV. 1, 5 (2006) [hereinafter Barnett, The Ninth Amendment]. The first school of thought, as the name implies, focuses on the intent of those men who drafted the Constitution—and only those men. Id. The second school expands the focus to the source of intent, looking at not only the drafters but also to the intent of those who voted to ratify the Constitution. Id. The third form of originalism—the one that has eclipsed the other two in theory and action—is the most expansive of the three and is the type of originalism that this Article addresses. Id. The original public meaning school of originalism looks not only to the intent of the drafters and ratifiers, but also to what a reasonable member of the public would have understood the Constitution to mean when it was written, ratified, and enacted. Id. at 5–6. Original public meaning is the “originalism” that judicial originalists such as Bork, Scalia, Thomas, and Gorsuch claim to apply to their respective judicial philosophies. Id. at 10.
11. 410 U.S. 113 (1973); George Leef, The Ideal Trump Supreme Court Pick: An
Douglas invented the right to privacy, the other civil liberties that rest upon it are in a legally precarious position. If, instead, Douglas correctly identified that the Constitution contemplates and protects the right to privacy, then the only way to revoke this right would be to amend the Constitution or engage in judicial activism, the underlying behavior for which judicial originalists have consistently attacked and derided *Griswold*.

This Article argues that these originalist critiques of *Griswold* are ill conceived and fail to comport with the basic tenets of the originalist method. Justice Douglas’s analysis of the right to privacy correctly interprets the Constitution’s text and history in a manner that abides by the strictest standards of constitutional originalism. Douglas recognizes a drafting device in the Constitution that reconciles textual absence and original intent with regard to the right to privacy. His *Griswold* opinion accurately identifies that the Ninth Amendment’s rights “retained by the people” casts a penumbra, or shadow, around the Bill of Rights. Within this penumbra reside the rights, including the right to privacy, which the original American public held to be self-evident and inalienable. Recognizing that no enumeration of rights could possibly list every right retained by the people, the drafters intentionally utilized the principle of the penumbra to protect against an imperfect, or incomplete, enumeration of rights in the Bill of Rights. As *Griswold* suggests, the Founders believed that implied omission would best secure the widest range of American civil liberties.

This Article in defense of *Griswold* has four primary sections. First, Part II tracks the jurisprudential evolution of the right to privacy, culminating in *Griswold*. Part III details the originalist critique that judges levy against *Griswold* and the reproductive rights cases that followed in its wake. In each case, originalist judges insist that constitutional silence on the issue of privacy is determinative of the fact that no such constitutional right to privacy exists. Part IV demonstrates that there is indeed a long-standing mode of authorship that reconciles original intent with the Constitution’s textual silence on privacy. To explain this drafting style, I employ as a model Ernest Hemingway’s iceberg theory of omission, whereby the drafter of a
Part V shows that *Griswold* correctly identifies the fact that the Founders utilized this technique of implied omission while drafting the Constitution. In order to protect certain fundamental rights like the right to privacy, they drafted the Constitution on the theory of the iceberg or, as Douglas phrases it, on the theory of the penumbra. The penumbra of rights that Douglas identified in *Griswold* comports with the drafters’ original intent and the Constitution’s original public meaning. In short, the originalist method actually reinforces Douglas’s explication of the constitutional right to privacy.

II. THE JURISPRUDENTIAL HISTORY OF THE RIGHT TO PRIVACY

The right to privacy, or even the word “privacy,” does not appear in the text of the Constitution.13 The word “private” appears once, in the Fifth Amendment, but this is in relation to the government’s responsibility to provide compensation for takings of private property.14 Yet, the right to privacy appears early and often in Supreme Court jurisprudence. It arises in relation to issues across the spectrum of constitutional law: search and seizure,15 choosing what and where to teach children,16 the ability to marry whom we choose,17 the right to die,18 and, of course, our reproductive rights relating to sex, contraception, and abortion.19 This Part briefly surveys the seminal cases and key legal actors in the Court’s centuries-long articulation of the right to privacy. This articulation culminates in *Griswold v. Connecticut*, the case that officially—and controversially—established a constitutional right to privacy in 1965.

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13. See generally U.S. Const.
Boyd v. United States is among the early Court decisions that tackled the right to privacy from a constitutional perspective. The case involved an importer’s scheme to avoid paying a customs tax on foreign glass. The government brought its case under the 1874 Customs Act, which allowed government agents to obtain a court order compelling suspects to produce private documents and papers (i.e., customs invoices). The Act authorized the government to use these documents against the suspect as evidence to prove that they illegally imported goods without paying tax. The Court analyzed the case under both search and seizure and self-incrimination theories, but ultimately invalidated the Act on broader privacy grounds. The Court determined that both the Fourth and Fifth Amendments and their underlying principles apply to:

[I]nvasions on the part of the government and its employees of the sanctity of a man’s home and privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .22

The Court determined that the Constitution’s drafters and early American diplomats were all too familiar with English “writs of assistance,” which allowed British tax officers to search the colonists’ homes for evidence of tax evasion. These invasions of privacy tolled against the essence of security and liberty that the Founders intended the Constitution to protect. In other words, the Court determined that the drafters of the Constitution abhorred such invasions of privacy, so they necessarily contemplated such invasions as violating the Constitution.

Just four years after Boyd, a thirty-four-year-old Louis Brandeis and his law partner Samuel Warren penned a series of arguments in response to an increasingly invasive press and the rise of tabloid journalism. Their 1890 article “The Right to Privacy” proved a

20. 116 U.S. 616 (1886).
21. Id. at 636.
22. Id. at 630 (emphasis added).
23. Id. at 625.
24. Id. at 630.
groundbreaking and influential contribution to American law; it paved the way for the right to privacy in both common law (as the invasion of privacy tort) and constitutional law.\textsuperscript{25} Brandeis and Warren bemoaned new photographic technologies, such as snap photography, and the press’s impropriety in using these technologies to produce salacious stories connected to compromising photographs.\textsuperscript{26} They reinforced the notion that “the individual shall have full protection in person and property” and that such protection “is a principle as old as the common law,” and essential to these protections was a “right to life.”\textsuperscript{27} The right to life, they famously continued, is the “right to be let alone.”\textsuperscript{28} Brandeis and Warren proceeded to set out a number of guidelines and recommendations for legal reform in curtailing the press’s invasiveness, such as eliminating truth as a libel defense and curtailing the “absence of malice” doctrine.\textsuperscript{29} Their argument was simple: the very dignity of human existence is in knowing that what we do in private, so long as it does not implicate or compromise the public or general welfare, will remain private. For Brandeis and Warren such rights are implicit in the very concept of American liberty.

Brandeis, of course, would go on to become one of the most famous lawyers in the United States and ultimately a member of the Supreme Court in 1916.\textsuperscript{30} As a Justice, Brandeis continued advocating for privacy rights and a general right to privacy. Perhaps the most significant development in his advocacy for privacy was his iconic 1928 dissent in \textit{Olmstead v. United States}.\textsuperscript{31} \textit{Olmstead} is one of the Court’s historical embarrassments, in which Chief Justice Taft opined that a warrantless wiretap of a gang of bootleggers was not an

\textsuperscript{28} Id.
\textsuperscript{29} Id. at 218. The absence of malice doctrine holds that a false statement published about a public figure is only actionable if the person publishing the statement had knowledge that the statement was false or acted with reckless disregard to its truth. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).
\textsuperscript{31} 277 U.S. 438 (1928).
reasonable search and seizure. Taft’s reasoning fails the most basic level of logical scrutiny: “There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only.” In other words, Taft claimed that you could not search for something with your sense of hearing. Brandeis was unimpressed with the Court’s ruling and used his dissent to make a compelling case for the right to privacy:

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.

Brandeis lost the battle, but won the war. Olmstead was overruled in Katz v. United States, at least in part due to an emergent right to privacy and the Court’s greater recognition of personal liberty rights against government intrusion. The Court was slowly coming to recognize that privacy was a fundamental right.

A decade later Brandeis engaged in another battle in his campaign for the right to privacy. He personally picked and vetted his replacement to fill the so-called privacy seat on the Court, Justice William O. Douglas. A graduate of Columbia Law School and a

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32. Id. at 466.
33. Id. at 464.
34. Id. at 478 (emphasis added).
36. Richard A. Posner, The Anti-Hero, NEW REPUBLIC, Feb. 24, 2003, at 27. There was in a very real sense a “privacy seat” on the Court. Id. It was unofficial, of course, but Brandeis sought another privacy advocate as his successor. See DARIN A. McWHIRTER & JON D. BIBLE, PRIVACY AS A CONSTITUTIONAL RIGHT 91 (1992).
former professor at Yale, Douglas was appointed as the Chairman of
the newly founded Securities and Exchange Commission in 1934. 37
Several years later in 1939, President Roosevelt nominated Douglas,
at just the age of forty, to serve on the Court. Justice Douglas would
proceed to serve the longest tenure, thirty-six years, in the Court’s
history (1939–1975). 38 He was a mercurial and dissatisfied man and,
in many ways, a reluctant justice. Raul Berger described him as “the
oldest duck to ever serve on the United States Supreme Court.” 39
This reputation colored the way critics viewed Douglas’s body of
jurisprudence, including his privacy advocacy. 40 He had higher
political aspirations than a seat on the Court, twice lobbying for the
vice-presidential nomination with his eyes fixed, ultimately, on the
presidency itself. 41 Adding to his colorful character, Douglas married
four times, divorced three times, and carried on countless open and
notorious extramarital affairs. 42 Judge Richard Posner, who served as
Justice Brennan’s clerk during Douglas’s tenure on the Court, writes
of Douglas:

Apart from being a flagrant liar, Douglas was a
compulsive womanizer, a heavy drinker, a terrible
husband to each of his four wives, a terrible father to
his two children, and a bored, distracted, uncollegial,
irresponsible, and at times unethical Supreme Court
justice who regularly left the Court for his summer
vacation weeks before the term ended. Rude, ice-cold,
hot-tempered, ungrateful, foul-mouthed, self-
absorbed, and devoured by ambition, he was also
financially reckless—at once a big spender, a
tightwad, and a sponge—who, while he was serving
as a justice, received a substantial salary from a
foundation established and controlled by a shady Las
Vegas businessman. 43

37. SEC Historical Summary of Chairmen and Commissioners, U.S. SEC. AND EXCH.
38. Garrow, supra note 1, at 25.
39. Johnson, supra note 9, at 129.
40. Posner, supra note 36, at 27.
41. BRUCE MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS 231
(2003).
42. Id. at 400.
43. Posner, supra note 36, at 27.
Whether just an odd duck or a potentially compromised Justice, Douglas was nevertheless a steadfast proponent of the right to privacy and his checkered personal history would cast a shadow over his privacy jurisprudence from start to finish.

Among Douglas’s first salvos in defense of the right to privacy was his so-called privacy spring of 1952, when he dissented in three separate and unrelated cases in an effort to educate the Court on privacy rights. The first case, *On Lee v. United States*, involved the government’s use of evidence obtained, without a warrant, by an undercover agent wearing a wire. The Court upheld this warrantless search (they had yet to overrule *Olmstead*) as constitutional. In his dissenting opinion, Douglas merely quoted Brandeis’s classic *Olmstead* dissent, noting, “What [Brandeis] wrote is an historic statement of that point of view. I cannot improve on it.” During the same session in *Beauharnais v. Illinois*, a case in which the Court held a racist pamphlet to be libelous, Douglas dissented and compared the sanctity of privacy to that of free speech. Privacy, he observed, is “equally sacred to some.” Finally, Douglas dissented on privacy grounds in *Public Utilities Commission v. Pollak*. In that case, the Court found—in an 8-1 decision, with Douglas as the lone dissenter—that a private transit company could, for compensation, play a radio station over loudspeakers in its city busses. Douglas dissented on the grounds that the bus passengers were a “captive audience,” and the city forcing them to listen to the radio’s message was an impermissible invasion of privacy under the Fifth Amendment. He closed his dissent by stating that “[t]he right of privacy, today violated, is a powerful deterrent to any one who would control men’s minds.”

Douglas’s next important articulation of the constitutional right to privacy came nearly a decade later in *Poe v. Ullman*, a case dealing

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44. See Johnson, *supra* note 9, at 72. Legal scholars have dubbed the spring of 1952 Douglas’s “privacy spring,” since he spent much of the session making commentaries on the right to privacy in a wide range of cases that seem to have little to no connection with one another. *Id.* He appeared to be making a conscious push to advocate for a constitutional right to privacy. *Id.*

45. 343 U.S. 747 (1952).

46. *Id.* at 762–63.

47. 343 U.S. 250, 285 (1952).

48. *Id.*


50. *Id.* at 468.

51. *Id.* at 469.
with a married couple’s right to use contraception. The Court did not decide the case on its merits. Instead, it determined that the defendants lacked standing because the state of Connecticut was not reasonably likely to enforce the outdated anti-contraception law.

Douglas once again dissented, noting that if Connecticut is authorized to make the law, they are likewise authorized to enforce it (even if they had not yet done so); the prospect of potential prosecution alone was ample reason to rule on the law’s constitutionality. Douglas insisted that the contraception ban was unconstitutional, as it deprived a married couple of their liberty without due process under the Fourteenth Amendment.

Douglas was treading on dangerous ground. His reasoning harkened back to the Lochner Era, where the Court infamously invalidated numerous progressive labor laws along the same line of legal reasoning. Today, many people refer to this kind of reasoning pejoratively as substantive due process or judicial activism. Douglas carefully differentiated his reasoning from that of Lochner Era substantive due process, noting that the Lochner Court invalidated economic, business, and commercial regulations, which are the type of commerce laws that states clearly have the power to regulate. In Poe, the law did not deal with the sale or manufacture of a product, but with the personal choice to use the product. And, importantly, in order to prove that somebody used the contraceptive device, the state must enter the “innermost sanctum of the home” and engage in an “inquiry into the relations between man and wife.”

Douglas found that to be “an invasion of the privacy that is implicit in a free society.” Douglas continued his articulation of the implied right to privacy, writing that: “This notion of privacy is not drawn

53. Id. at 502.
54. Id. at 521.
55. Id. at 515.
56. See Lochner v. New York, 198 U.S. 45 (1905). The Lochner Era witnessed a Court with a strong ideological leaning toward the economic principles of laissez-faire capitalism and government. The Court overturned countless “pro-labor” state laws that capped the number or hours worked per day and per week, that called for safer working conditions, and which curbed the powers of the employer over the cheap labor supply. The Court invalidated these laws as unconstitutional under the Due Process Clause of the Fifth and Fourteenth Amendments. Legal scholars view the Lochner Era as one of the Court’s darker eras characterized by judicial overreach. After nearly thirty years, this era of substantive due process came to an abrupt end. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
57. 367 U.S. at 519.
58. Id. at 521.
59. Id.
from the blue. It emanates from the totality of the constitutional scheme under which we live.” With his dissent in *Poe*, Douglas laid the framework for the Court to establish the constitutional right to privacy on Fourteenth Amendment due process grounds.

After four years of wrangling and posturing, the same Connecticut contraception law once again came before the Court in *Griswold v. Connecticut*. Chief Justice Warren signaled the Court’s readiness to recognize a constitutional right to privacy in assigning the opinion to Douglas, who just four years earlier in *Poe* stated his belief—based on privacy grounds—that this same contraception ban was unconstitutional. Some Court historians believe the Chief Justice Warren may have had other, less pragmatic, motivations in assigning the case to Douglas. Members of the Court suspected Warren was engaging in an ironic rebuke in asking “the Supreme Court’s most profligate adulterer” to extol “the sanctity of marriage.” Once again, Douglas’s tarnished reputation played a role in the production and reception of his explication of the constitutional right to privacy. In any event, Douglas wrote the opinion in his signature style. He drafted it very quickly while standing up, made few (if any) revisions, and took no advice from his legal clerks, whose suggestions he held in utter contempt. His *Griswold* opinion was not what his colleagues expected.

Douglas made several significant departures from his earlier privacy-driven dissents. Perhaps most significantly, he abandoned the main thrust of his legal reasoning in *Poe*. Griswold’s counsel had argued that the contraception statute violated a married couple’s “liberty” under the Fourteenth Amendment’s Due Process Clause. They had made this due process argument, understandably, because Douglas had suggested this approach as the successful line of legal reasoning in his earlier privacy dissents. However, fearing that opponents would accuse him of engaging in substantive due process akin to the Lochner Court, Douglas radically changed his reasoning and announced that: “We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic

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60. *Id.*
61. 381 U.S. 479 (1965).
63. Garrow, *supra* note 1, at 27.
64. Johnson, *supra* note 9, at 162 (describing Douglas’s distaste for his law clerks).
problems, business affairs, and social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician’s role is one aspect of that relation.”

Instead of revisiting the Lochner Era, Douglas grounded privacy more directly in the Constitution’s text by returning to his earlier motif of constitutional “emanations.” His opinion enumerates several past instances in which the Court recognized implied constitutional rights: free association, choice in venue of where to educate a child, to study a foreign language, to read, and to teach students. None of these rights appears specifically in the Constitution. These rights, he argued, reside instead in the periphery of the Bill of Rights. That is, “[w]ithout [these] peripheral rights, the specific rights would be less secure.” Douglas thought privacy, too, was this sort of peripheral right that the Constitution’s very structure implied, assumed, and even necessitated.

The opinion proceeds to double-down on this language of the periphery. In perhaps the modern Court’s most famous (and infamous) passage, Douglas writes:

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his

66. Griswold, 381 U.S. at 482.
68. Griswold, 381 U.S. at 482.
69. Id. at 483.
70. Id.
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detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The Bill of Rights, Douglas argued, creates a general “zone of privacy” that exists in the penumbras (or the edges of shadows) that emanate from these other privacy-related rights that the Constitution enumerates more explicitly. These specific constitutional protections and the precedent they produced bears witness that, like other implied rights, the right to privacy “is a legitimate one.” Indeed, Douglas added: “We deal with a right to privacy older than the Bill of Rights—older than our political parties, older than our school system.” The right to privacy, in other words, predates and supersedes the written Constitution and Douglas believed that the drafters recognized this fact.

Douglas and the Court finally established the constitutional right to privacy in Griswold, but they did so in a radically unexpected fashion. As such, controversy, even derision, followed close in the opinion’s wake. This controversy arose because Douglas was himself a controversial figure. A disinterested Justice and a known adulterer opined on the very sanctity of the marital relationship. He also made some exceptional claims in his opinion. First, he conceded that the right to privacy is not written explicitly in the Constitution. Instead, the Constitution implies the right. Next, he abandoned the reasoning that the Court was prepared to sanction, that the right to privacy derives from the “liberty” Due Process Clause. He switched instead to seemingly new language and reasoning that rested on constitutional “penumbras” and “emanations.” Finally, in a dramatic parting shot he suggests that the right to privacy is older and more fundamental than the written Constitution itself. These factors contributed to an immediate judicial backlash against Griswold and the right to privacy.

71. Id. at 484 (internal citation omitted).
72. Id. at 485.
73. Id. 486.
74. Douglas’s use of the term “penumbra” with regard to the Constitution is not quite as sudden, unexpected, or as silly as many critics of Griswold seem to suggest. See Johnson, supra note 9, at 167–68. Indeed, the term “penumbra” appears 24 times in Supreme Court opinions that predate Griswold. Id. In fact, Justice Oliver Wendell Holmes was the first to use it (in 1916) and he even employed the term “penumbra” in the context of privacy rights. Id.
The next section details and analyzes this backlash, which emerged from the fundamental principles of constitutional originalism.

III. THE ORIGINALIST BACKLASH AGAINST GRISWOLD AND THE RIGHT TO PRIVACY

Douglas’s Griswold opinion and the right to privacy served as catalysts for a new jurisprudence of original intent. Indeed, scholars believe that Griswold actually spawned modern judicial originalism. Judicial originalists believe that every clause of the Constitution has a clear, ascertainable, and unchanging meaning. To discover this meaning, the interpreter must engage in a close reading of the constitutional text and then determine what those words would have meant to a reasonable member of the general public in the United States at the time the Framers drafted and ratified the constitutional provision in question. In most cases, ascertaining the constitutional text’s “original public meaning” requires engaging in an historical investigation of the ratification debates, colonial American usage of certain words and phrases, and what the drafters declared their intent to be in their notes, speeches, and other documents. This is no easy task, but it is worth the substantial effort it requires. Indeed, there are many people (myself included) who attest that originalism is the only legitimate method of constitutional interpretation. That is, if the Constitution means anything at all, that meaning must be fixed, and the only way to fix that meaning is to anchor it to its original meaning. This original meaning remains unchanged until the people change the original meaning through constitutional amendment.

Originalists hold this stance because if the Constitution is a living document whose meaning is subject to constant change over generations, then the document has no real meaning at all. It serves only as a mirror for the Court’s political ideology at any given historical moment. As Randy Barnett puts it, “For a written constitution to perform its legitimacy-enhancing function, judges

76. Barnett, Scalia’s Infidelity, supra note 8, at 18.
77. Id.
78. Id.
79. See generally id.
80. Id.
81. Id.
82. Id.
cannot alter the meaning of the written Constitution they swear an oath to uphold.” In other words, a judge cannot swear to uphold her own opinion—as that is no oath at all. Using this hermeneutic, judicial originalists dismiss the right to privacy as the byproduct of irresponsible judicial activism with no grounding in the constitutional text. After all, the Constitution is silent as to privacy. Textual absence, so the argument goes, does not require an interpreter to investigate the historical record. If there are no words to interpret, then there is no meaning to discern; the founders had no original intent concerning a subject if they wrote no words about that subject in the Constitution. The privacy case is a simple one: constitutional silence on the right to privacy means that there is no constitutional right to privacy.

Judges immediately mobilized this originalist critique against Griswold’s articulation of the right to privacy. Justice Hugo Black—one of the Court’s earliest originalists—dissented from Justice Douglas’s enunciation of the right to privacy in Griswold. For Justice Black, the Connecticut contraception ban “is not forbidden by any provision of the Federal Constitution as that Constitution was written.” Justice Black continued by stating that

I get nowhere in this case by talk about a constitutional “right to privacy” as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.

The Constitution is silent on both the right to privacy and the regulation of contraception. Therefore, Justice Black argued, the Connecticut law does not raise a constitutional issue and is not a

83. Id. at 18.
84. See generally U.S. CONST.
86. Id.
90. Id. at 509–10 (emphasis added).
91. See generally U.S. CONST.
matter upon which the Court is authorized to make a determination. \(^{92}\)

Justice Black echoed the familiar originalist rejection of the living document theory of constitutional interpretation, pointing to the fact that the “Constitution makers” included a mechanism for change in the Constitution—duly ratified amendments. \(^{93}\) It is the role of the people and their representatives, not the Court, to instantiate constitutional change. Somewhat glibly, Justice Black concludes, “[The amendment] method of change was good for our Fathers, and, being somewhat old-fashioned, I must add it is good enough for me.” \(^{94}\)

Over the decades, this same originalist critique would follow the right to privacy from issue to issue and case to case.

Despite this immediate criticism in *Griswold*, the Court continued to develop the right to privacy and applied it to an expanding array of social issues. First, in *Eisenstadt v. Baird*, the Court determined that a law violated the constitutional right to privacy if it prevented unmarried couples from accessing contraception. \(^{95}\) In his dissent, Chief Justice Berger observed that the majority and concurring opinions “rely on no particular provision of the Constitution,” and proceeded to question the right to privacy’s “tenuous moorings to the text of the Constitution.” \(^{96}\)

This same line of originalist dissent continued in *Carey v. Population Services International*, in which the Court determined that the right to privacy creates a constitutional right to access contraception for unmarried minors. \(^{97}\) This time, Justice Rehnquist took up the originalist drum, and beat the now familiar tune:

> If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men’s room of truck stops, notwithstanding the considered judgment of the New

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93. *Id.* at 522.
94. *Id.* at 522.
95. See 405 U.S. 438, 453 (1972).
96. *Id.* at 471–72 (Burger, J., dissenting).
York Legislature to the contrary, it is not difficult to imagine their reaction.98

The Founders, in other words, never intended the Constitution to include a right to privacy, as evidenced by the fact that they inscribed no such right in the constitutional text. The debate’s timbre grew only more discordant as the Court extended the right to privacy into the arena of abortion law.

The Court ruled in its 1973 decision in Roe v. Wade that the right to privacy created a constitutional right, free from any state interference, to have a first trimester abortion.99 In its companion case, Doe v. Bolton, Justice White dissented passionately against the right to privacy and abortion rights, noting, “I find nothing in the language or history of the Constitution to support the Court’s judgment.”100 Justice White, like other dissenters against the right to privacy, asked the Court to look to the Constitution’s text and to its history; if the Court undertook such an examination, he claimed, it might observe through this originalist lens that the Constitution contemplates no such right.101

This became the common refrain in a string of cases related to abortion rights. To originalist judges, the Court appeared to be inventing a new constitutional right for pregnant women and, with scarcely any textual support for its actions, investing that right with sufficient constitutional authority to override existing state abortion statutes. Justice Scalia dissented in Planned Parenthood v. Casey and cited the lack of constitutional text relating to privacy-based abortion rights. This lack of textual support signaled to Scalia that “we should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.”102 Justice Scalia, again dissenting in Stenberg v. Carhart, warned that “the Court should return this matter to the people – where the Constitution, by its silence on the subject, left it – and let them decide, State by State . . . .”103 Justice Thomas wrote a concurring opinion in Gonzales v. Carhart, to make clear that the Court’s privacy-based abortion

98. Id. at 717 (Rehnquist, J, dissenting).
101. See id. at 221-223.
jurisprudence simply “has no basis in the Constitution.”\textsuperscript{104} Textual absence, the argument goes, is determinative evidence that an “unenumerated right” is no right at all.

Judicial originalists dismiss any suggestion that the Constitution contemplates a right to privacy. Justice Douglas’s \textit{Griswold} opinion and its progeny are “playing charades” with the United States’ founding legal document.\textsuperscript{105} Interpreters who find implied rights in the constitutional text are simply judicial activists, because an interpreter of the Constitution, no matter how ingenious, cannot interpret words that do not appear on the page. Robert Bork, who lost a seat on the Court due to, among other things, his stance against implied constitutional rights, makes the most succinct originalist case against \textit{Griswold}’s right to privacy. Bork observed, in no uncertain terms, that “The Constitution simply does not address the subject.”\textsuperscript{106} Each side of the debate is dug in. The logic (or, as originalists might suggest, the illogic) behind each position is now set in stone. However, what if somebody could demonstrate that some authors do, in fact, intentionally omit words from the text in order to convey important meanings to the reader? That is, what if original intent and textual absence can coexist? What if an author intended omitted words to remain a part of the text? In the next section, I show that some writers employ precisely this method when drafting a text, and to great effect. They intentionally exclude text to convey fundamental meaning. This demonstration disrupts the standard originalist position in the debate over the constitutional right to privacy and asks the reader to reexamine \textit{Griswold} through a more refined originalist lens.

\section*{IV. ERNEST HEMINGWAY’S ICEBERG THEORY OF OMISSION}

In the tradition of James Boyd White, Sanford Levinson, and Judge Richard Posner, I turn now to literature to help explain the law and to demonstrate that Douglas’s \textit{Griswold} opinion is operating in ways that critics have until now failed to recognize.\textsuperscript{107} In doing so, I

\textsuperscript{104} See 550 U.S. 124, 169 (2007).
\textsuperscript{105} See JOHNSON, supra note 9, at 192.
\textsuperscript{106} BORK, supra note 85, at 111.
\textsuperscript{107} James Boyd White is the father of the law and literature movement; he first identified the powerful role that literature and literary interpretation can play in legal hermeneutics. See JAMES B. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION (1973). Sanford Levinson co-edited an excellent work that applies literary theory to legal issues and texts to help extract new meanings and interpretations. See INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER
analyze the writing of Ernest Hemingway, an author whose prose style Supreme Court Justices have praised as being the paradigmatic form of legal writing. Indeed, teachers of legal writing instruct lawyers to “[w]rite like an Ernest Hemingway,” due to his clear and concise drafting style. This clarity arises from Hemingway’s drafting technique known as the “iceberg theory” of omission. According to Hemingway’s theory, “There is seven-eighths of [the story] underwater for every part that shows. Anything you know you can eliminate and it only strengthens your iceberg.” The iceberg method allows a text to communicate on two levels at once—the explicit and the implicit. There are words on the page and implications that often go beyond those words. Hemingway once demonstrated how the iceberg method works to win a bet with friends. He wagered that he could write a six-word novel; the novel (that he wrote on a bar napkin) included just one sentence: “For sale, baby shoes, never worn.” The text states explicitly only that unused baby shoes are for sale. But, it implies much more—somebody’s baby died (or could not be conceived) under seemingly tragic circumstances. Most of the story is submerged beneath the text, yet few readers fail to grasp Hemingway’s intended meaning. Those six words tell a larger and more important story through intentional authorial omission and implication. After detailing specific examples of how the iceberg theory of omission works, I demonstrate how Justice Douglas accurately identified in Griswold the fact that the


108. Supreme Court Justices have praised Ernest Hemingway’s style and, in fact, have encouraged legal writers to emulate Hemingway’s prose in making legal arguments. See Bryan A. Garner, Justice Anthony M. Kennedy, 13 SCRIBES J. OF LEGAL WRITING 79, 82 (2010). Justice Kennedy advises lawyers to read Hemingway in order to improve their drafting, noting that Hemingway “is one of my favorites because he’s concise.” Id. The irony here, of course, is that Hemingway was “concise” because he submerged so much of his content beneath the surface of the text on the page. Id.


111. Id (emphasis added).


114. Id.
Founders drafted the Constitution using precisely this style of implied omission.

In many cases, Hemingway’s implied omissions are clear and the reader can discern the implications from the text alone. Famously, in *Hills Like White Elephants*, a couple is having a tense conversation at a train station about an unstated issue.\(^{115}\) The man tells the woman, “It’s really an awfully simple operation, Jig,” adding, “It’s not really an operation at all.”\(^{116}\) They proceed to skirt around the issue of the unnamed operation. Later in the story, the woman asks, “Doesn’t it mean anything to you? We could get along,” to which the man replies, “Of course it does. But I don’t want anybody but you. I don’t want any one else. And I know it’s perfectly simple.”\(^{117}\) The story, agree critics and readers alike, is about a couple’s discussion of whether or not to have an abortion. The implication is clear. The “perfectly simple” operation is undoubtedly an abortion and that meaning is not lost on any reader of the text, despite the fact that Hemingway never writes the word abortion in the narrative.\(^{118}\) He submerges beneath the text the fact that the woman wants to keep the child and the man does not. Indeed, this omitted detail serves as the text’s most fundamental meaning. The intentionally omitted abortion argument *is* the story.

The same theme is implied in Hemingway’s short story *Out of Season*.\(^{119}\) In *Out of Season*, another young couple is engaged in a tense conversation.\(^{120}\) The “young gentleman” turns to his wife and tells her that “I’m sorry you feel so rotten, Tiny . . . I’m sorry I talked the way I did at lunch. We were both getting at the same thing from different angles,” to which the woman replies, “It doesn’t make any difference . . . None of it makes any difference.”\(^{121}\) Here, the abortion theme is submerged even deeper in the text, but readers and critics again agree that this dialogue and the story’s context (the narrative recounts an “out-of-season” fishing expedition that anticipates the illegal and premature killing of newly hatched spawn) imply that the


\(^{116}\) Id. at 212.

\(^{117}\) Id. at 214.

\(^{118}\) See generally id.

\(^{119}\) See ERNEST HEMINGWAY, *Out of Season*, in *In Our Time* 97, 97 (First Scribner ed. 2003).

\(^{120}\) See generally id.

\(^{121}\) Id. at 99.
couple is arguing about abortion. Indeed, the historical record corroborates the fact that the abortion issue was very much on Hemingway’s mind during this time period, as he and his wife Hadley were having an identical debate about whether or not to have an abortion when he drafted *Out of Season*. Gertrude Stein, Hemingway’s erstwhile confidante, recounts that after he returned from a fishing trip in northern Italy, Hemingway

came to the house about ten o’clock in the morning and he stayed, he stayed for lunch, he stayed all afternoon, he stayed for dinner and he stayed until about ten o’clock at night and then all of a sudden he announced that his wife was enceinte and then with great bitterness, and I, I am too young to be a father.

As the above example indicates, excavating Hemingway’s implied omissions sometimes require close readings of the text and secondary sources, such as personal quotations, the historical record, and other contextual support to determine precisely what he submerges beneath the words that appear on the page. This interpretive effort reveals the most fundamental meanings in Hemingway’s stories. Indeed, these implied omissions help create the effect that critic Malcolm Cowley identified, whereby “the end of a Hemingway story typically comes on the next page after the end.” Hemingway’s stories often continue after the text itself comes to a stop. Like the iceberg metaphor, only part of the story appears above the surface of the text—the bulk of the content lies beneath the surface.

This is precisely what occurs at the end of *Out of Season*. The couple walks through a town in northern Italy with Peduzzi, the town drunk, who guides them toward the stream where they intend to

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124. *Id*.
illegally fish. We first meet Peduzzi while he is spading dung, miserably, at a local hotel to earn enough money to get drunk. The young couple has hired him, not knowing about his abject alcoholism, as their fishing guide. As they walk through town they realize their mistake. All the townspeople—including Peduzzi’s own daughter—look upon the town drunk with scorn as they proceed to turn their backs on him. When they arrive at the stream the husband is panicking that the game police will arrive to arrest them. The befuddled Peduzzi has forgotten the lead sinkers for the fishing lines, giving the young man the pretext for cancelling the trip and rescheduling for the next morning. The young man gives Peduzzi a bottle of marsala wine, and Peduzzi drinks deeply, happily observing that “This was a great day, after all. A wonderful day . . . Days like this stretched out ahead.” Peduzzi sees a few happy days of easy money and drink in his future as the couple’s fishing guide. Peduzzi asks for an advance for the next day’s fishing trip, but the young man abruptly announces, “I may not be going,” then quickly adds, “Very probably not. I will leave word with the padrone at the hotel office.”

The story ends there. Hemingway tells the reader nothing more about Peduzzi and his fate, but the reader senses tragedy in the drunkard’s sudden reversal of fortune. There is something tragic in the cancellation that remains beneath the surface. An examination of the historical record reveals that Hemingway very much intended the story to have an implied tragic ending—indeed, there is critical consensus that Peduzzi kills himself “on the page after the story ends.” How can critics reach such a specific conclusion about such an admittedly obscure implication in the text? Because Hemingway, who drafted the story, explained on several occasions that implying

127. Id.
128. Id.
129. Id.
130. Id.
131. Id. at 100.
132. Id.
133. Id.
134. Id. at 102.
135. Id.
136. Id. at 103.
Peduzzi’s suicide was precisely what he intended. 138 In a letter to F. Scott Fitzgerald, Hemingway writes:

I meant [Out of Season] to be a tragic [story] about the drunk of a guide because I reported him to the hotel owner—the one who appears in Cat in the Rain—and he fired him and as that was the last job he had in town and he was quite drunk and very desperate, hanged himself in the stable. At that time I was writing the In Our Time chapters and I wanted to write a tragic story without violence. So I didn’t put in the hanging. Maybe that sounds silly. I didn’t think the story needed it. 139

Hemingway echoed these sentiments in his memoir A Moveable Feast. 140 Commenting on his iceberg theory of omission in Out of Season, Hemingway states that

I had omitted the real end of it which was that the old man hanged himself. This was omitted on my new theory that you could omit anything if you knew that you omitted [it] and the omitted part would strengthen the story and make people feel something more than they understood. 141

The author omitted words in order to include content in a non-traditional fashion.

Hemingway’s own words corroborate other instances of implied omissions in his stories. About Big Two-Hearted River, a story that details the character Nick Adams’s solitary fishing expedition, Hemingway later reveals explicitly what readers of the story sensed implicitly: the story is about a young man addressing the psychological trauma of war. 142

139. Id. at 180–81 (emphasis added).
140. See ERNEST HEMINGWAY, A MOVEABLE FEAST 75 (1964).
141. Id.
142. See JOSEPH M. FLORA, ERNEST HEMINGWAY: A STUDY OF THE SHORT FICTION
war trauma) explained that the story is about a veteran coming to grips with his war experiences. However, this man cannot bear to mention or even hear about the war, so “the war, all mention of the war, anything about the war, is omitted.” Still, the reader senses this because, as Hemingway again puts it, “I left the story out. But it is all there. It is not visible but it is there.” Context, too, aids the reader in accessing this implied meaning. The story appears in a collection where the protagonist, Nick Adams, goes to war, experiences war’s horror, and returns home to recover. Knowing the story’s context in a larger body of work allows the reader to be much more impressed by what has been left out, impressed by the craftsmanship of a writer who has managed as a third-person narrator to avoid telling us what his hero has avoided thinking about. The effect is hard, stoic, controlled, and the reader who understands what has been left unsaid finds himself initiated into a cult.

The effect is truly impressive. Hemingway intentionally omits his stories’ most fundamental meanings and themes, only to communicate them more effectively and persuasively to his reader through textual (and contextual) implication.

Hemingway was not alone in drafting on the theory of the iceberg. Critics have identified other authors, before and after Hemingway, who apply roughly the same principle of authorship to their texts. The trick, according to both Hemingway and his critics, is to ensure that both the author and the reader know what has been omitted. If the author writes truly enough and the reader reads closely enough, the omitted subject matter is “implied and clear, and

143. Id.
144. Id.
145. Id. at 131.
147. Id.
149. Id. at 46.
the reader both feels and understands it.” When a drafter of a text properly puts the iceberg theory into practice, the implied meanings are sometimes clearer and more impactful than the text’s more explicit themes and content. Armed with an understanding of the iceberg theory of implied omission, a closer review of Justice Douglas’s Griswold opinion and the constitutional text upon which it comments proves to be an eye-opening experience. This second reading of Griswold (and the Constitution) reveals that Justice Douglas’s legal analysis was more astute than most people realize. Douglas recognized that the Founders drafted the Bill of Rights on the theory of the iceberg. They intentionally omitted words from the text to include specific content in a less traditional but more fundamental fashion.

V. Griswold Revisited: Illuminating the Constitutional Penumbras

Judicial originalists should not so easily dismiss Justice Douglas, the longest-tenured Justice in Supreme Court history and the author of over thirty books on law. This Part demonstrates that his oft-ridiculed Griswold opinion—and its articulation of the constitutional right to privacy—adheres meticulously to the tenets of judicial originalism and accurately captures the original public meaning of the Constitution. That is, the Constitution contemplates a right to privacy, the drafters very much intended it to do so, and Justice Douglas adroitly demonstrates these facts in Griswold. Justice Douglas’s opinion recognizes that the Founders drafted the Constitution with a method akin to Hemingway’s iceberg theory of omission. Instead of drafting on the metaphor of the iceberg, they utilized the penumbral concept. They used the Ninth Amendment to cast a shadow of important rights over and around the Bill of Rights. They omitted the right to privacy (and a bevy of other rights) from the constitutional text out of pragmatic necessity. The Ninth Amendment’s shadow ensures that the Constitution protects privacy rights and countless other fundamental rights that were too numerous and robust in detail to specifically enumerate in the text. The drafters could never

150. Id.
151. Garrow, supra note 1, at 25.
152. Id.
153. Id.
enumerate all civil liberties and rights in a single document, so they had to submerge these unenumerated rights beneath the surface of the text—or in its shadow. Residing in this shadow are the natural law rights relating to life, liberty, property, and the pursuit of happiness that the original American public understood to be implicit in the free society that they were in the process of forming. The right to privacy is foremost among these “self-evident” civil liberties.

In *Griswold*, Justice Douglas quotes the Ninth Amendment in its entirety; this is the only Amendment that receives such complete attention in the opinion. The Ninth Amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The decision of a married couple to procreate (or not to procreate) is, opines Justice Douglas, one of these unenumerated rights retained by the people. Justice Douglas’s *Griswold* opinion simply engages in a plain, close reading of the constitutional text, which is precisely the starting point upon which any originalist analysis should begin. Indeed, Randy Barnett reinforces this plain reading argument, noting that the “Ninth Amendment’s public meaning in the founding era is identical to what ordinary readers take it to mean today (until they enter law school and are told otherwise).” That is, it means just what it says: the Constitution contemplated additional unenumerated rights that would be retained in the people.

Judicial originalists inexplicably resist this plain reading of the text. They refuse to adhere to the prime directive of their own interpretive model. The typical originalist response to this plain reading is that such an open-ended construction of the Ninth Amendment turns it into a “bottomless well,” from which the Court can dip for undreamed of rights at their limitless discretion. They attest that the Ninth Amendment’s “certain rights” is an expression too vague and open to interpretation to mean anything at all.

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1127, 1162 (1987).
156. *see Johnson*, supra note 9, at 54.
158. U.S. CONST. amend. IX.
159. *see Griswold*, 381 U.S. 479, 485–86.
162. *see e.g.*, id.
such, judicial originalists declare the Ninth Amendment to be an “inkblot” on the constitutional text—something that, due to its obscurity, we should ignore entirely. However, to erase the Ninth Amendment is to engage in an act of violence to both the Constitution and the drafters’ original intent behind the Ninth Amendment. Every word in the Constitution must have had some original public meaning. Yet, the question remains: which unenumerated rights did the Ninth Amendment mean to protect?

The Ninth Amendment protects those self-evident rights that a person would possess in a free society, so long as the Constitution does not specifically proscribe or limit those rights. The Ninth Amendment protects those rights implicit in the very concept of American liberty—rights so obvious that the Constitution need not explicitly enumerate them. To this effect, Justice Douglas points out in Griswold that

the association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents’ choice — whether public or private or parochial — is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

Justice Douglas might add to his list the right to travel between the states and, for that matter, the power of judicial review itself, neither of which are enumerated in the Constitution but both of which the Court has recognized because they are clearly implied in the American legal order. Justice Douglas’s Griswold opinion is merely demonstrating that a Constitution cannot possibly enumerate every right an individual possesses. Many rights, like the right to

164. See Barnett, The Ninth Amendment, supra note 8, at 80.
166. See Paul v. Virginia, 75 U.S. 168 (1869) (establishing the implied right to travel); Marbury v. Madison, 5 U.S. 137 (1803) (establishing the implied power of judicial review, whereby a court may declare a law void if it is deemed to contradict the Constitution).
educate your children, to travel, or to engage in consensual sex and procreate, are implicit in the Constitution’s vision of ordered liberty. 167

As was the case with Hemingway’s implied omissions, the drafters’ own statements and notes relating to the Ninth Amendment corroborate Justice Douglas’s interpretation in *Griswold*. These historical documents reveal that the drafters feared that a so-called imperfect enumeration of rights in the Bill of Rights (i.e., naming some retained rights, but not others deemed too obvious to include) might create the appearance that the unnamed rights were ceded to the government. 168 The Ninth Amendment was not a “bottomless well” of rights, but it was in fact intended to protect a very broad spectrum of essential liberties. 169 A great constitutional debate raged between Federalist and Antifederalists as to the wisdom of including a Bill of Rights in the Constitution at all. James Madison cautioned against enumerating specific individual liberties as both unnecessary and dangerous. 170 As to the danger, he observed that,

*It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system.* 171

What if the drafters forgot to include just one or two rights in their Bill of Rights? What if they deemed some rights too obvious to enumerate in the Bill of Rights, but the government later argued that any right not listed in the Constitution was sacrificed? Enumerating a list of rights suggests that the drafters contemplated other rights but determined not to include them in the Bill of Rights. That

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167. See generally *Griswold*, 381 U.S. 479.
169. Id.
171. Id (quoting James Madison).
determination might lead an interpreter (for instance, modern judicial originalists) to suggest that any unenumerated rights were in fact ceded to the government.

Other Federalists shared Madison’s concerns. Future Supreme Court Justice James Iredell noted that it would be impossible to enumerate every right retained by the people. He wrote that you could “[l]et anyone make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.” James Wilson, who would also join the first Supreme Court, echoed this concern, describing how an imperfect enumeration would cede all implied power to the government and would undermine the rights of the people. Another influential jurist and drafter of the Constitution, Theodore Sedgwick, scoffed at the possibility of a perfect enumeration of civil liberties. He lampooned that a complete Bill of Rights must, by necessity, declare that “a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper; but he would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights.”

Despite the Federalist argument about the danger of a Bill of Rights, an enumeration of rights became a sticking point for opponents of a written Constitution and the Federalists caved on the issue mostly as a matter of public relations. In turn, however, they insisted upon including an amendment—which became the Ninth Amendment—that would guarantee constitutional protections, via implication, of the countless rights that the Bill of Rights necessarily would not (and could not) fully enumerate. But, what were these rights and how would the drafters and the early Americans know what these unenumerated but implied rights were supposed to be?

Justice Douglas’s Griswold opinion once again adeptly answers this key interpretive question. The Ninth Amendment protects the natural law rights that eighteenth-century Americans held to be the fundamental rights in a free society. In Griswold, Justice Douglas

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172. Sherry, supra note 154, at 1116–63.
173. Id. at 1116 (quoting James Iredell).
174. See Barnett, The Ninth Amendment, supra note 8, at 27.
175. See Sherry, supra note 154, at 1165.
176. Id. at 1165–66.
177. Id. at 1166.
closes his opinion by stating that “[w]e deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.” Justice Douglas, as we will see, is signaling to the reader that marital privacy is among the natural law rights that the Founders and the general public understood as self-evident and sacred liberties that predated the written Constitution. The historical record shows that the Founders and the early American republic were deeply influenced by natural law and natural rights theory.

Natural law theory does not always comport with our modern vision of justice (“self-evident” truths are, of course, tautological in nature), but that does not change the fact that the Founders relied heavily on natural law rights in framing and drafting the Constitution. Natural law theory posits that there are self-evident and inalienable rights that every individual possesses and that we access through god, reason, or some combination of the two. The Founders famously articulated these natural law rights in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” Eighteenth-century Americans believed that they retained all of the natural law rights that they did not specifically surrender to the government. Upon entering society, eighteenth-century Americans authorized the state—through a written constitution—to exercise its coercive powers on their behalf in order to protect their life, liberty, and property. The people empowered the state to curb rape, murder, theft, plundering, and other conduct that one individual might use to deprive another individual of his life, liberty, or property. In its most basic form, natural law theory posits that any person of sound mind and proper

179. Id. at 486 (emphasis added).
181. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 32 (2d ed. 2011).
182. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).
184. Id.
185. Id. at 334.
age is free to do what she pleases privately, whether individually or in a group, so long as it causes no harm to another’s fundamental rights.  

The Founders and the general American public widely (if not universally) embraced the tenets of natural law theory. In an illustrative example, Thomas Jefferson wrote that natural law rights were an “expression of the American mind” and, moreover, served as the underlying principles of all American law. Alexander Hamilton, perhaps America’s strongest proponent for a written constitution, asserted of natural law rights that “[t]he sacred rights of mankind are not to be rummaged for, among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power.” The general public in the eighteenth-century United States knew, understood, and believed in the natural law rights related to life, liberty, and property. These were the nation’s fundamental and founding legal principles.

The original intent behind the Ninth Amendment—to embed natural law rights in the penumbra of the constitutional text—is likewise demonstrable through the originalist method. Roger Sherman, one of the Constitution’s primary draftsmen, left behind notes that included a draft of the Ninth Amendment, which states “the people have certain natural rights which are retained by them when they enter into society.” Madison, who ultimately drafted the Ninth Amendment, made clear in a 1789 speech that the Constitution needed to clearly differentiate between “the preexisting rights of nature” and those rights “resulting from a social compact.” If any ambiguity still remains, Madison’s notes relating to the Ninth Amendment include the term “natural rights retained.” A close examination of the historical record makes explicit what the Ninth

186. Garvey, supra note 180, at 934.
189. Sherry, supra 154, at 1134 (emphasis added).
190. See Broyles, supra note 188, at 348.
Amendment’s text leaves implicit. The Founders and reasonable members of the American public originally intended and understood that the Constitution secured natural liberty rights that predated the written Constitution itself, just as Justice Douglas opined in *Griswold*.

Early Supreme Court jurisprudence further reinforces this conclusion. The Court—consisting of the men who drafted and ratified the Constitution—consistently used natural law principles in resolving constitutional issues. In the 1798 case *Calder v. Bull*, Justice Chase spoke of the unwritten constitutional law, or the “vital principles” of natural law, that can overrule the “manifest injustice” of positive law. A decade later in *Fletcher v. Peck*, Chief Justice Marshall noted that in addition to the written Constitution, there are “certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded” in answering constitutional questions. Indeed, from 1789 until 1820 the Court routinely relied on both natural law and the written Constitution in its decisions. Natural law fell out of favor later in the nineteenth century, but this fact has no bearing on the Founders’ original intent and the Ninth Amendment’s original public meaning. The Founders imbedded natural law in the Constitution through textual penumbras and implied omission and, as this Article demonstrates, the historical record is clear on this point. However, the question remains whether the right to privacy, and in particular marital privacy regarding the decision of whether or not to procreate, was among these implied natural law rights.

Again, the answer to this question appears to be yes—the Constitution did contemplate the right to privacy and Justice Douglas’s opinion accurately demonstrates this fact. Justice Douglas examines the privacy inherent in the First Amendment (the right to not disclose your associations to the government), the Third Amendment (the right to keep the government out of your home),

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195. 3 U.S. 386, 388 (1798).
196. 10 U.S. 87, 133 (1810).
197. *See Sherry, supra note 154, at 1175.*
198. *See id.* The First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.
199. The Third Amendment reads: “No Soldier shall, in time of peace be quartered in
the Fourth Amendment (again, the right to keep the government out of your home and away from your possessions), and the Fifth Amendment (the right to keep your actions, words, and thoughts secret from the government). Together, Justice Douglas writes, these enumerated rights imply and create “zones of privacy.”

Additional items in the historical record reveal that privacy was fundamentally important to the colonial and revolutionary-era American public. Many of the Founders chose to publish their political writings anonymously—they believed they had a right to keep their political identities private. In fact, six future American presidents published under pen names during the revolutionary period. Colonial-era attorney (and patriot) James Otis stated that one of the fundamental principles of natural law liberty was that “[a] man’s house is his castle; and while he is quiet he is as well guarded as a prince in his castle.” Historical natural law theorists such as John Locke, John Stuart Mill, and others wrote that man was free to do as he pleases privately, so long as he caused no harm to another person or society through his actions.

The decision to marry and procreate was also, as Justice Douglas put it, considered “sacred” and in the realm of natural law rights when the Constitution was ratified. Indeed, natural law theorists identify consensual sex between adults and the decision of whether or not to have a child to be among the paradigmatic natural law rights.

any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” U.S. CONST. AMEND. III.

200. The Fourth Amendment reads: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

201. The Fifth Amendment reads: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

203. See JOHNSTON, supra note 9, at 55.
204. Id.
205. Id. at 54.
206. See Garvey, supra note 180, at 934.
207. See Griswold, 381 U.S. at 486.
208. MASSEY, supra note 183, at 331.
Leading natural law theorist John Finnis, in his encyclopedic summary of the history of natural law, determines that the decision to procreate (or not to procreate) is among the seven “basic goods” that are fundamental to natural law theory. Relevant, too, is the historical fact that during the era of the Constitution’s ratification American women were free to have an abortion privately and with legal impunity prior to “quickening,” or about five months into the pregnancy. This right dates back to time immemorial in English common law and continued unabated in the United States until the 1880s. Indeed, the “quickening doctrine” relating to abortion rights went unchallenged until the American Medical Association sought, in the late nineteenth century, to undermine abortion rights (in order to put midwives out of business) so as to “monopolize the heath-care business generally.” The constitutional text and the history of its production confirm that the Founders intended the Constitution, through the penumbra of rights that the Ninth Amendment cast over the Bill of rights, to protect the right to privacy. Justice Douglas’s Griswold opinion accurately analyzes the Constitution and explains the Ninth Amendment’s original public meaning in a fashion that satisfies the most rigorous originalist standards.

VI. CONCLUSION

Returning to the present, President Donald Trump has vowed to pack an aging Supreme Court with judicial originalists for the purpose of overruling Roe v. Wade and undermining the constitutional right to have an abortion. The holding in Roe relies on the constitutional right to privacy, as do various other cases that deal with issues of same-sex intercourse and marriage and other important reproductive rights. Judicial originalists, like Justices Thomas and Gorsuch, have shown that they believe Griswold v. Connecticut is improperly decided and is “play[ing] charades” with the Constitution. Many

209. FINNIS, supra note 181, at 86–87.
211. See, e.g., Commonwealth v. Bangs, 9 Mass. 387 (1812); State v. Slagle, 82 N.C. 653 (1880).
212. See HALL, supra note 210, at 335.
215. JOHNSON, supra note 9, at 192.
critics dismiss *Griswold* with ridicule. Judicial originalists point, time and again, to the fact that the Constitution is silent on the right to privacy and conclude therefore that no such constitutional right exists. Justice Douglas, they say, was a moral reprobate and a sloppy and unethical jurist. These are dangerous and inaccurate conclusions about *Griswold*, the Constitution, and Justice Douglas.

As this Article demonstrates, Justice Douglas’s *Griswold* opinion is, among other things, a top-notch originalist analysis of the Constitution. Douglas does not play charades with the Constitution, but instead explicates with precision and accuracy the original public meaning of the Bill of Rights in general and the Ninth Amendment more specifically. The drafters intended the Ninth Amendment to function as a fail-safe mechanism to protect against an imperfect enumeration of fundamental natural law rights. Justice Douglas identifies this function and correctly determines that the right to privacy was among the natural law rights that eighteenth-century and early nineteenth-century Americans held to be sacred, inalienable, and self-evident truths. Douglas recognized that the drafters wrote on the principle of the iceberg—they engaged in a mode of authorship identical to Ernest Hemingway’s theory of implied omission. Like Hemingway, they submerged content beneath the surface of the text that both the authors and the readers understood to be implied and fundamentally important to the overall sense and meaning of the document.

Text, context, and history demonstrate that the drafters intended to include implied rights, including the right to privacy, in the Constitution. The drafters used the Ninth Amendment to cast a penumbra of rights over the Bill of Rights to obviate the danger of an imperfect enumeration of civil liberties. If Justice Thomas and his interpretive school still wish to dismiss the right to privacy and the reproductive rights it guarantees, they must do so through the only means available to them; that is, they must ignore the Constitution’s original public meaning and engage in the same substantive due process they uniformly condemn. Ironically, judicial originalists who wish to invalidate the constitutional right to privacy must abandon


originalism and become instead judicial activists who impose their own subjective and ideological interpretations on the Constitution.