Notes

Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas

The principle of privacy was first applied in the law either as a subcategory of property or as a breach of trust, but it has developed during this century into a widely recognized, independent right in both tort and constitutional law. Although its precise scope has not always been clear, the "right of privacy" can usefully be defined as the individual's right to choose how to conduct the personal aspects


2. Privacy was first recognized as an independent right in a famous law review article by Samuel Warren and Louis Brandeis. See Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 205 (1890) ("[T]he protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts . . . is merely an instance of the enforcement of the more general right of the individual to be let alone.") Soon after the publication of the Warren and Brandeis article, several courts recognized the right of privacy. See, e.g., Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905) (recognition of privacy as independent right derived from natural law); Marks v. Jaffa, 6 Misc. 290, 292, 26 N.Y.S. 908, 909 (Super. Ct. 1893) (recognizing right to be let alone). But see Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902) (right of privacy not enforceable in equity). For a discussion of the subsequent development of the privacy right, see generally A. BRECKENRIDGE, THE RIGHT TO PRIVACY (1970); M. SLough, supra note 1; Bloustein, Privacy As An Aspect of Human Dignity: An Answer To Dean Prosser, 39 N.Y.U.L. REV. 962 (1964); Prosser, Privacy, 48 CALIF. L. REV. 383 (1960).

Privacy first appeared in constitutional law in the context of the Fourth Amendment's protection against unreasonable searches and seizures. See Boyd v. United States, 116 U.S. 616, 630 (1886) ("[I]ndefeasible right of personal security, personal liberty and private property" protected by Fourth Amendment); cf. Gouled v. United States, 255 U.S. 298 (1921) (following Boyd; holding private papers surreptitiously taken without search warrant inadmissible even without showing of force or coercion). Probably the most eloquent early plea for a constitutional right of privacy was Justice Brandeis's dissent in the wiretapping case, Olmstead v. United States, 277 U.S. 413, 438, 478 (1928) ("[T]he makers of our Constitution conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.")
of his life and when to share his personal affairs with others. A constitutional right of privacy has, in the last thirteen years, been the basis for successful challenges to state laws restricting the use of contraceptives and the right of a woman to abort her pregnancy. Moreover, the right of privacy also served as the basis for unsuccessful attacks against an anti-sodomy law and the government’s practice of compiling files on the drug uses of private citizens. In his opinion for the Court in Griswold v. Connecticut and his concurring opinion in Doe v. Bolton, Justice William O. Douglas forcefully argued for constitutional recognition of the right of privacy. Despite the importance of Douglas’s contribution, commentators have been generally unable to formulate a coherent explanation for his privacy opinions.

This Note attempts to provide a cogent explanation for Justice Douglas’s privacy opinions by placing them in the context of his concept of individuality. In Part I, the Note briefly traces the evolution of Douglas’s privacy opinions: the Justice slowly transformed his personal philosophy of individuality into a constitutional right of privacy, which ultimately won the support of a majority of the Court. The Note then argues that the right of privacy was, for Douglas, just one manifestation of the more general principle of individuality underlying the entire Bill of Rights. Finally, the Note sets forth the tensions within Justice Douglas’s judicial philosophy of individuality and assesses the extent of his achievement in the area of constitutional privacy.

I. The Historical Evolution of Justice Douglas’s Privacy Theory

Throughout his judicial career, Justice Douglas personally believed in the value of privacy, although some of his early opinions fail to

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reflect that belief. The evolution of Douglas's approach culminated with his recognition in 1961 of privacy as a basic "natural right," and his later opinions represent only a slight modification of that position.10

Justice Douglas ascended to the Court in 1939 as a New Deal regulator11 whose personal beliefs embodied a deep "[r]espect for the individual,"12 but his early legal positions provided only inconsistent protection for individual privacy.13 On the one hand, Douglas wrote opinions for the Court that upheld a warrantless search of a gas station14 and a criminal conviction for polygamy.15 Further, he joined the opinions of the Court in cases dismissing, on standing grounds, a...


12. Address of Mr. Justice William O. Douglas before the Brandeis Lawyers' Society (Nov. 21, 1945), reprinted in Douglas, THE LASTING INFLUENCE OF MR. JUSTICE BRANDIES, 19 TEMP. L.Q. 361, 362 (1946) [hereinafter cited as Brandeis Lawyers' Soc'y Address with page citations to 19 TEMP. L.Q.]; see id. at 366 ("[T]he democratic way when it places the worth and dignity of the individual first recognizes the essential unity of mankind. . . . The strength of the democratic way is its respect for the minority. . . . Foremost is the smallest minority of all—the individual conscience."); cf. W. DOUGLAS, DEMOCRACY AND FINANCE 16 (1948) ("Widespread submergence of the individual in a corporation has as insidious an effect on democracy as has his submergence in the state in other lands.").

In the 1930s and 1940s, however, Douglas's attention was focused mostly on the dangers of the moneved "Establishment," see Go East, supra note 11, at 289-91, 349-51, 355-56, and he viewed governmental intervention as basically salutary. See W. DOUGLAS, supra at 213-17 (arguing governmental agencies like SEC have been increasing in importance and dignity). See generally Go East, supra note 11, at 257-96.

13. Douglas's ambivalence can be partially attributed to his perception of government as protector of the individual, see note 12 supra, and partially attributed to the inexperience of a young neophyte judge, see supra note 10, at 405-07 (arguing Douglas needed several years to work out doctrinal underpinnings of his civil liberties beliefs). For a more cynical assessment, see F. FRANKFURTER, FROM THE DIARIES OF FELIX FRANKFURTER 309-38 (J. Lash ed. 1975) (criticizing Douglas's political ambitions and their effect on his opinions).

14. Davis v. United States, 328 U.S. 582 (1946) (Douglas, J.); cf. id. at 594 (Frankfurter, J., joined by Murphy, J., dissenting) (pro-privacy dissent).

challenge to Connecticut's anticontraception law\(^6\) and upholding a warrantless wiretap,\(^7\) despite a strong pro-privacy dissent in the latter case.\(^8\) On the other hand, several of Justice Douglas's early works and opinions provided legal protection for the individual's "right to be let alone" and his "opportunities for growth and development."\(^9\) For example, relying upon traditional constitutional doctrines, Douglas recognized the right to have children as "one of the basic civil rights of man,"\(^10\) and endorsed the application of the self-incrimination guarantees of the Fifth Amendment to the states through its incorporation into the due process clause of the Fourteenth Amendment.\(^11\)

Justice Douglas's conception of privacy began to crystallize in the late 1940s and early 1950s.\(^12\) In response to the increasing threats to

18. Id. at 136 (Murphy, J., dissenting) (relying on Brandeis's dissent in Olmstead v. United States, 277 U.S. 438, 471 (1928), to assert "the right of personal privacy" as "[o]ne of the greatest boons secured to the inhabitants of this country by the Bill of Rights").
22. See pp. 1583-84 & notes 24-32 infra. Indeed, in the late 1940s, Douglas was moving toward greater vigilance in protecting privacy and related interests. See McDonald v. United States, 335 U.S. 451, 455-56 (1948) (Douglas, J.) (finding warrantless search unconstitutional) ("The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals"); Giron v. United States, 328 U.S. 61, 68-70 (1946) (Douglas, J.) (recognizing "freedom of thought recorded in our Bill of Rights"); holding that alien could not be compelled
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personal privacy posed by the government, his judicial and nonjudicial writings advocated a constitutional right of privacy protecting free choice in personal matters and freedom from governmental invasion of one's personal domain. In 1952 Douglas's lone dissent in *Public Utilities Commission v. Pollak* rested upon an underlying constitutional right to privacy: "The right to be let alone is indeed the beginning of all freedom." Asserting that two passengers' rights of privacy had been violated by the broadcasting of radio programs in streetcars, Douglas argued for the people's right to make free personal choices. He derived the right from the Fifth Amendment's protection of liberty and the First Amendment's guarantees of "the sanctity of thought and belief" and the "freedom not to do nor to act as the government chooses."

Douglas refined this constitutional argument for personal privacy in his subsequent opinions. Stressing the affront to individual dignity, he objected on due process grounds to the admissibility, in a criminal case, of the results of a blood test done while the defendant was unconscious. Douglas extended Fourth Amendment protection against unreasonable searches to noncriminal cases. Arguing that "our sole...
concern should be with whether the privacy of the home was invaded," he flatly opposed the use of warrantless wiretaps. Finally, in applying the Fifth Amendment protection against self-incrimination, Douglas argued that the amendment was intended not only to protect a witness from potential criminal prosecution but to serve as "a safeguard of conscience and human dignity." As the decade progressed, Justice Douglas was increasingly influenced by the legal theories of Brandeis, Chafee, and Meiklejohn. In 1958, in his book The Right of the People, Douglas asserted that "[m]uch of this liberty of which we boast comes down to the right of privacy." Douglas believed that the specific constitutional source for the right is immaterial: privacy is a "natural right" of man.


32. Ullmann v. United States, 350 U.S. 422, 445 (1956) (Douglas, J., dissenting) (Fifth Amendment guarantee against self-incrimination applies to witness granted immunity from prosecution). See also id. at 449-54 (Fifth Amendment protects individual from "infamy"). Douglas's support for human dignity is reflected in the contempt he felt for the legislative committees and grand juries that investigated Communist practices in this country. See, e.g., Wilkinson v. United States, 365 U.S. 399, 423-25, 428 (1961) (Douglas, J., dissenting) (witness before Un-American Activities Committee was harassed for his criticism of Committee); W. DOUGLAS, POINTS OF REBELLION 6 (1969) [hereinafter cited as POINTS OF REBELLION]; W. DOUGLAS, THE RIGHT OF THE PEOPLE 94-113 (1959) [hereinafter cited as THE RIGHT OF THE PEOPLE].


35. THE RIGHT OF THE PEOPLE, supra note 32, at 90; id. at 144-57 (privacy protects human dignity). Indeed, Douglas's travels abroad had made him acutely aware of the dangers of powerful government. W. DOUGLAS, RUSSIAN JOURNEY 134-54, 174-91 (1956) (effects of totalitarian Russian government on freedom of expression and legal process); cf. Coleman v. Alabama, 399 U.S. 1, 15-16 (1970) (opinion of Douglas, J.) (Russian journey taught Douglas to protect rights of those accused of crimes). Douglas's visit to the Soviet Union convinced him that our Western form of democracy, with its emphasis upon self-determination and individual dignity, was superior to the Communist system. W. DOUGLAS, supra at 244.
The penumbra of the Bill of Rights reflects human rights which, though not explicit, are implied from the very nature of man as a child of God. These human rights were the products both of political thinking and of moral and religious influences. Man, as a citizen, had known oppressive laws from time out of mind and was in revolt. Man, as a child of God, insisted he was accountable not to the state but to his own conscience and to his God. . . . That, in short, was our beginning.36

Douglas reiterated these views in the 1961 case of Poe v. Ullman,37 in which he argued in dissent against Connecticut's anticontraception law. He asserted that the Fourteenth Amendment not only encompasses the express guarantees of the Bill of Rights but also incorporates constitutional protection for man's "natural rights," including the right of privacy.38 His dissent further suggested that the general right of privacy is an expansive concept ensuring individual freedom to move around, to establish a home and bring up children, and to be free of the intrusions on privacy imposed upon a captive audience.39

Griswold v. Connecticut,40 decided in 1965, is thus an anticlimax in Douglas's development, for its "penumbras and emanations" were foreshadowed both by his Poe dissent and by his book The Right of the People.41 Griswold is nevertheless important, for Douglas's opinion captured a majority of the Court and relied exclusively on the pe-

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36. The Right of the People, supra note 32, at 89-90; see McGowan v. Maryland, 366 U.S. 420, 562 (1961) (Douglas, J., dissenting) ("The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.")


38. Id. at 516-17, 521-22; see Clark, Constitutional Sources of the Penumbral Right to Privacy, 19 VILL. L. REV. 833, 836-37 (1974); Karst, supra note 11, at 725-32; Redlich, Are There "Certain Rights . . . Retained By the People"? 37 N.Y.U.L. REV. 787, 799 n.71 (1962).


40. 381 U.S. 479 (1965) (Douglas, J.). In Griswold, the executive director and medical director of the Planned Parenthood League of Connecticut were convicted under the state's anticontraception statute for giving married persons information and advice on how to avoid conception. Justice Douglas's majority opinion was joined by four other Justices: Chief Justice Warren and Justices Clark, Brennan and Goldberg. Although joining Douglas's majority opinion, Goldberg, joined by Warren and Brennan, wrote a separate concurring opinion, which utilized the Ninth Amendment as a justifi-

41. Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting) ("privacy is not drawn from the blue" but rather "emanates from the totality of the constitutional scheme"); The Right of the People, supra note 32, at 89 ("The penumbra of the Bill of Rights reflects human rights which, though not explicit, are implied from the very nature of man as a child of God.")
numbral theory rather than a natural rights approach. Drawing its justification from actual provisions of the Constitution, Griswold is an attempt at constitutional formalism and represents a retreat from Justice Douglas's earlier flirtation with natural rights.

During his last ten years on the Court, Justice Douglas sought, often unsuccessfully, to expand Griswold's privacy doctrine and its penumbral logic to a variety of contexts in which the rights of individuals were under the pressures of conformity imposed by a complex, technological society and a powerful government. Douglas re-

42. See note 40 supra (discussing composition of majority).

In a later opinion Douglas conceded that perhaps Murphy and Rutledge's natural law-due process theory was right, but it was "a bridge that neither I nor those who joined the Court's opinion in Griswold crossed." Doe v. Bolton, 410 U.S. 179, 212 n.4 (1973) (Douglas, J., concurring).

43. See Beaney, The Griswold Case and the Expanding Right to Privacy, 1966 Wis. L. REV. 979, 982 (Douglas's position in Griswold modified natural law); Note, supra note 9, at 677 (Douglas's Griswold opinion "limited natural law"; little practical difference between this theory and pure natural rights approach).

44. See Kauper, supra note 9, at 252-54 (favoring treatment of privacy in natural law manner; criticizing Douglas's apparent retreat from that position). Griswold is probably best understood as a calculated compromise. Douglas sacrificed the Poe dissent, which was closer to his own true philosophy, in an effort to attract a majority of the Court to an opinion that would constitutionally legitimate the right of privacy. See pp. 1599-600 infra; Beaney, supra note 43, at 992-93. But others have argued that Douglas actually abandoned natural law in Griswold. See Lackland, Toward Creating a Theory of Fundamental Human Rights, 6 COLUM. HUMAN RIGHTS L. REV. 473, 479 (1975).

45. Warden v. Hayden, 387 U.S. 294, 312 (1967) (Douglas, J., dissenting) (applying Griswold to search and seizure); Osborn v. United States, 385 U.S. 323, 340 (1966) (Douglas, J., dissenting) (applying Griswold to wiretapping). Since Douglas's retirement the Court has consistently resisted the expansion of the privacy doctrine. See Whalen v. Roe, 429 U.S. 184, 198 (1976) (approving government's practice of compiling computer files on drug uses of private citizens; rejecting appellee's privacy claim); id. at 608-09 (Stewart, J., concurring) (limiting Griswold to (1) marriage, (2) privacy in home, and (3) right to use contraceptives); Paul v. Davis, 424 U.S. 693, 713 (1976) (inclusion of individual's name and photograph in "flyer" of "active shoplifters" after his arrest but prior to conviction for shoplifting does not violate right of privacy).

46. Douglas, The Attack on the Right to Privacy, PLAYBOY, Dec. 1967, at 245 [hereinafter cited as The Attack on Privacy]; see Douglas, The Grand Design of the Constitution, 7 GONZAGA L. REV. 239, 240 (1972) ("In light of modern urban conditions and the propensity of officials to employ electronic eavesdropping, privacy and solitude are more important to the individual today than they ever have been.")

47. See United States v. White, 401 U.S. 745, 757 (1971) (Douglas, J., dissenting) ("[E]very person is the victim [of electronic surveillance], for the technology we exalt today is every man's master."); POINTS OF REBELLION, supra note 32, at 96 ("technology can be toxic as well as tonic" and can make individual "a servile thing in a vast industrial complex").

48. POINTS OF REBELLION, supra note 32, at 29. Douglas has argued that "the Constitution was designed to keep government off the backs of the people." Id. at 6; see Minor v. United States, 396 U.S. 87, 99 (1969) (Douglas, J., dissenting) (when "the present all-powerful, all-pervasive Government moves to curtail the liberty of the person, it too should turn square corners"); Flast v. Cohen, 392 U.S. 83, 111 (1968) (Douglas, J., concurring) ("[T]he Constitution [was] designed to keep government out of private domains. But the fences have often been broken down . . . .")
peated Griswold's formal justification for the right of privacy in his concurrence in the abortion case, *Doe v. Bolton,* and maintained that privacy was "one of the fundamental values" the Bill of Rights was designed to protect. Moreover, citing Griswold, Douglas argued that wiretapping and search warrants must be narrowly confined to a specific crime, because excessive wiretappings and searches would stifle creativity and discourage unorthodox opinions. He used similar reasoning to justify other personal rights in the penumbras of the Bill of Rights: the right to travel, the right of association, and the right to silence.

49. 410 U.S. 179, 209 (1973) (Douglas, J., concurring). Interests of bodily privacy also reached the Court in the form of due process challenges to state criminal procedures that allegedly violated the right to privacy. See, e.g., *Cupp v. Murphy,* 412 U.S. 291, 301 (1973) (Douglas, J., dissenting in part) (police took sample of defendant's fingernails without permission); *Schmerber v. California,* 384 U.S. 757, 779 (1966) (Douglas, J., dissenting) (taking blood sample) ("No clearer invasion of this right of privacy can be imagined than forcible bloodletting of the kind involved here.")

50. 410 U.S. at 209 n.2. Douglas categorized the three main groups of privacy rights: (1) freedom to express one's intellect, interests, taste, and personality; (2) freedom of choice in the basic decisions of one's life, such as marriage, divorce, contraception, and child rearing; (3) right to the integrity of one's body and freedom from bodily restraint and compulsion. Id. at 211-15.

51. See *Couch v. United States,* 409 U.S. 322, 342 (1972) (Douglas, J., dissenting) ("Inevitably, this will lead those of us who cherish our privacy to refrain from recording our thoughts or trusting anyone with even temporary custody of documents we want to protect from public disclosure."); *Warden v. Hayden,* 387 U.S. 294, 323 (1967) (Douglas, J., dissenting) (applying Griswold to search and seizure) ("[P]rivacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing."); *Osborn v. United States,* 385 U.S. 323, 352-54 (1966) (Douglas, J., dissenting) (applying Griswold to wiretapping; arguing all wiretap evidence is per se inadmissible because scope of invasions extends to all persons within range of listening device). See also *United States v. Kahn,* 415 U.S. 143, 160 (1974) (Douglas, J., dissenting) (warrant to tap suspect's telephone conversations does not authorize tapping of his wife's conversations); *Berger v. New York,* 388 U.S. 41, 65 (1967) (Douglas, J., concurring) (traditional wiretap "constitutes a dragnet, sweeping in all conversations within its scope—without regard to the participants or the nature of the conversations").

52. See *Palmer v. Thompson,* 403 U.S. 217, 233-35 (1971) (Douglas, J., dissenting) (right to recreation implicitly guaranteed by Constitution in same manner as privacy guaranteed by penumbral approach of Griswold). The possibility of applying Griswold to other areas was widely noted by the commentators. See *Beaney,* supra note 43, at 988-99 (possible application of Griswold theory to wiretapping, association, self-incrimination, and silence); *McKay,* The Right of Privacy: Emanations and Intimations, 64 Mich. L. Rev. 259, 278-79 (1966). But see *Gross,* supra note 9, at 40-46 (criticizing possible overapplication of Griswold to point that privacy would encompass all civil rights).

II. Justice Douglas's Privacy Opinions as Reflections
of a Broader Principle of Individuality

Douglas's right of privacy ultimately rests upon a “principle of individuality.” Douglas believed that the ultimate foundation for the constitutional right of privacy lies in the need for legal protection of individuality against government invasion, coercion or penalty. The rights embraced by Douglas's principle of individuality—self-fulfillment, nonconformity, dignified treatment by the government—protect fundamental human values embodied in the guarantees of the Bill of Rights. Moreover, Justice Douglas's support for the values of individuality appears in his approach to the other guarantees of the Bill of Rights.

A. The Principle of Individuality

As early as 1945, Justice Douglas recognized that “[t]he strength of the democratic way is its respect for the minority” and that democracy must rest upon “the worth and dignity of the individual.” Douglas's writings on privacy illustrate the development of this personal philosophy into a broader, constitutional principle of individuality. For Douglas, the Constitution guarantees the individual three basic, interrelated individual rights: self-fulfillment, nonconformity, and dignified treatment by the government. The presence of all three values in any particular case is not required to invoke an individuality argument. In some cases, Douglas focused on only one value; in others, he combined two or all three of the values into an aggregate principle of individuality.

1. Self-fulfillment

Implicit in the privacy right to use contraceptives and to have an abortion is the notion of free choice regarding one's sexual and family life. In Pollak, Douglas asserted the passengers' “right to pick and
choose from competing entertainments, competing propaganda, [and] competing political philosophies."54 Thus, the first facet of Justice Douglas's individuality principle is the right of personal choice: the individual should be free to pursue his own goals, to develop his talents and abilities in the way he deems most fitting, and to realize his potential as a human being.55 "If people are let alone in those choices," that freedom "will pay dividends in character and integrity."56 Society will benefit due to the "opportunities afforded man to press to new horizons."57

2. Nonconformity

The right to privacy also guards one's right to be different. Douglas opposed governmental wiretapping, searches and seizures,60 and collection of personal information61 because such governmental surveillance would instill a fear of being overheard and thereby stifle dissent and induce subservience. Hence, Douglas's principle of individuality ensures the individual's freedom to be different in his ideas and lifestyle. "The democratic way of life," Douglas suggested, "rejects standardized thought. It rejects orthodoxy."62 The presence of the unorthodox compels society to reassess its values and stimulates the diversity that is necessary for progress. "Without the freedom to expose the failings and abuses and frustrations of the status quo, existing conditions would be or become insufferable."63

57. Douglas's view of self-fulfillment is similar to that of Professor Thomas Emerson. See T. Emerson, The System of Freedom of Expression 6 (1970); T. Emerson, Toward a General Theory of the First Amendment 4-7 (1963).
58. 343 U.S. at 469.
60. See note 51 supra.

63. Freedom of the Mind, supra note 62, at 23.
3. **Dignified Treatment**

Justice Douglas's privacy opinions uniformly protect the sanctity of the human body and the inviolability of the individual conscience. In a case in which a conviction was obtained partially on the basis of a blood test performed on an unconscious defendant, Douglas decried the "indignity to the individual" that results when his body is "invaded and assaulted by the police." Similarly, in Douglas's view, the Fifth Amendment right of silence protects individual conscience against coercive invasion by the government. Douglas believed in "the sanctity of the person" and therefore strove to prevent "the indignity [that is] suffered when a lawless hand is laid upon him." To Douglas, "[m]an, as a child of God . . . [is] accountable not to the state but to his own conscience and to his God."

B. **The Principle of Constitutional Individuality Applied**

The tripartite conception of individuality appears prominently in Justice Douglas's opinions on a variety of other topics: freedom of speech, freedom of religion, and the peripheral rights of silence, travel, and association. Although quite diverse, these rights, for Douglas, are all imbued with one or more of the three values of individuality.

Justice Douglas's formulation of privacy as a manifestation of the broader individuality principle stands in stark contrast to traditional theories of privacy that seek to restrict the elusive concept to specific interests. The Douglas approach to privacy was macroscopic: in pro-

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64. Justice Douglas also sought to protect "the sanctity of the sanctuary of the home." Wyman v. James, 400 U.S. 309, 335 (1971) (Douglas, J., dissenting) (emphasis in original).
66. See pp. 1591-92 infra.
67. THE RIGHT OF THE PEOPLE, supra note 32, at 144.
68. Id. at 90.
69. See THE RIGHT OF THE PEOPLE, supra note 32, at 87-88 (right of privacy protects freedom of religion and freedom of conscience and involves problems of wiretapping and captive audience); The Attack on Privacy, supra note 46, at 189-92, 244 (other constitutional areas of privacy include free exercise of religion, freedom of speech, right of association, and right of silence).
70. See A. WESTIN, PRIVACY AND FREEDOM 7 (1967) ("Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others"); Gerety, Redefining Privacy, 12 HARV. C.R.-C.L. L. REV. 233, 261-81 (1977) (arguing for definition of privacy based upon intimacy and autonomy); Gross, supra note 9, at 35-36 ("[P]rivacy is the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited.") (original in italics); Parker, A Definition of Privacy, 27 RUTGERS L. L. REV. 275, 281 (1974) ("privacy is control over when and by whom the various parts of us can be sensed by others") (original in italics). But see Fried, Privacy, 77 YALE L.J. 475, 477 (1968) (privacy necessary for existence of broader principles of respect, love and friendship).
promoting the right of privacy, Douglas sought to protect not merely a particular activity but the basic value of individuality itself.\textsuperscript{71} For example, in \textit{Doe v. Bolton},\textsuperscript{72} Justice Douglas's concurring opinion was not limited to the Court's narrow protection of the right to have an abortion; rather Douglas viewed the case in terms of freedom of choice in the basic decisions of one's life and the right to the integrity of one's body. Privacy, for Douglas, was an expansive right involving the freedom of choice in basic decisions of one's life (self-fulfillment), no matter how unusual those decisions may be (nonconformity), and the right to control one's body and conscience (dignified treatment).

Justice Douglas's treatment of the peripheral rights of silence, travel, and association focuses on the three values of individuality. For example, an essential aspect of Justice Douglas's conception of the right of silence is its protection of individual dignity: "[T]he Fifth Amendment is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity . . . ."\textsuperscript{73} Defending the im-

\textsuperscript{71} See pp. 1588-90 \textit{supra}. The debate between Douglas's individuality macroanalysis and the privacy-specific microanalysis parallels a similar debate concerning the tort of privacy. Like those constitutional theorists who seek narrow definitions of privacy, Dean Prosser fashioned a narrowly defined tort concept. Prosser separated privacy into four distinct torts: (1) invasions upon the individual's seclusion or solitude or into his private affairs; (2) public disclosure of embarrassing private facts; (3) publicity that places the individual in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. See \textsc{W. Prosser, Handbook of the Law of Torts} \textsc{804-14} (4th ed. 1971); Prosser, \textit{supra} note 2, at 589-407. Under the Prosser approach, each separate aspect of the privacy tort serves to protect a separate interest: reputation, freedom from mental distress, or a proprietary interest in one's name or likeness.

Directly opposed to the Prosser position is the theory advocated by Professor Bloustein. See Bloustein, \textit{supra} note 2. Bloustein believes in a unitary tort of privacy under which, "[t]he injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered." \textit{Id.} at 1003. Under the Bloustein approach, privacy, no matter what its application, protects the same interests of individuality and dignity. For discussion of the Prosser-Bloustein debate, see, \textit{e.g.}, Gerety, \textit{supra} note 70, at 249-61; Parker, \textit{supra} note 70, at 291-92.

If the analogy is carried to its logical conclusion, Douglas and Bloustein emerge as proponents of a unitary right of privacy, grounded in concepts of individuality and possessing the possibility of wide application. Prosser and the constitutional theorists, on the other hand, attempt to define privacy as narrowly as possible in order to secure a rigorous and manageable definition.


\textsuperscript{73} Ullmann v. United States, 350 U.S. 422, 445 (1956) (Douglas, J., dissenting); see Kastigar v. United States, 406 U.S. 441, 462 (1972) (Douglas, J., dissenting) (witness before grand jury does not lose right of silence when given immunity from future prosecution). Douglas was willing to extend Fifth Amendment protection not only to those who feared possible criminal prosecution but also to those who feared that a substantial penalty might result from their testimony. \textit{See} George Campbell Painting Corp. v. Reid, 392 U.S. 286, 290-92 (1968) (Douglas, J., dissenting) (potential financial harm to individual's corporation sufficient penalty to invoke right of silence); Spevack v. Klein, 385
portance of the right of silence, Justice Douglas consistently opposed loyalty oaths, for they tended to cause those affected "to conform their thinking to orthodox views, to venture no bold theory or course of action, to tender no imaginative concept for dealing with a dangerous situation." Finally, the most important goal in many of the silence cases was the self-fulfillment right to seek the occupation of one's choice.

Interests of self-fulfillment were also central to Douglas's understanding of the right to travel. Freedom of travel allowed the individual "to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home." Indeed, the freedom to walk, wander, and stroll at will has "dignified the right of dissent and [has] honored the right to be non-conformists and the right to defy submissiveness." The right of association was also concerned with the value of nonconformity. A lack of tolerance for the right of association would "toss to the winds the tolerance which a Free Society shows for the unorthodox, as well as orthodox, views."


74. The Right of the People, supra note 32, at 122-23; see Speiser v. Randall, 357 U.S. 513, 556 (1958) (Douglas, J., concurring) (loyalty oaths intolerable because "the domains of conscience and belief have been set aside and protected from government intrusion").


76. Zemel v. Rusk, 381 U.S. 1, 24 (1965) (Douglas, J., dissenting); see Kent v. Dulles, 357 U.S. 116, 126 (1958) (Douglas, J.) (travel "may be as close to the heart of the individual as the choice of what he eats, or wears, or reads"); cf. Aptheker v. Secretary of State, 378 U.S. 500, 519 (1964) (Douglas, J., concurring) (member of Communist Party could not be denied passport because of intimate connection between free expression of ideas and right to travel).


Douglas's own personal experiences are clearly the source of much of his sympathy for the right to stroll and wander. See W. DOUGLAS, OF MEN AND MOUNTAINS (1950) (describing hiking experiences); Go East, supra note 11, at 41-55. In his autobiography, Douglas described how he "rode the rails" from his home in Washington State to law school in New York and related, with obvious affection, stories about the hoboes he had met on his journey. Id. at 127-33; cf. id. at 75-89, 87-91, 254 (other anecdotes indicating sympathy for nonconformists).

Even when dealing with the First Amendment, Douglas invoked his philosophy of individuality. Arguing for an absolute right of free speech, Douglas relied heavily on the values of individuality. For Douglas, one of the fundamental purposes of free speech is the propagation of the unorthodox, nonconformist views that "challenge the very postulates on which the existing regime rests." The corollary to this supposition implicates another individuality value: self-fulfillment. Once the full range of viewpoints is laid out, the people must be free to "pick and choose between competing offerings" in politics as well as in literature. And when granted this opportunity for freedom of choice, the individual will be able to realize his full potential.

In the context of freedom of religion, Douglas argued that individual self-fulfillment would be curtailed "if what in conscience one can do or omit doing is required because of the religious scruples of the community." His religion opinions are nearly unanimous in their tolerance for the unorthodox religious viewpoint. To protect the integrity of the conscience, Douglas opposed any "interference with

in the sanctuary of his home or his right to associate with others for the attainment of lawful purposes, the individual's interest in being free from governmental interference is the same . . .")


82. "Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. . . . Religious experiences which are as real as life to some may be incomprehensible to others." United States v. Ballard, 322 U.S. 78, 86 (1944) (Douglas, J.). Moreover, argued Douglas, "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) (Douglas, J.); see Loewit, The Man and the Mountain: Douglas on Religious Freedom, 73 YALE L.J. 975, 979-85 (1964).

Douglas was tolerant of religious beliefs outside of the traditional Judeo-Christian philosophy. See United States v. Seeger, 380 U.S. 163, 188-93 (1965) (Douglas, J., concurring) (Buddhism); Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953) (Douglas, J.) (Jehovah's Witnesses); United States v. Ballard, 322 U.S. 78, 86 (1944) (Douglas, J.) ("I Am" movement). Perhaps the only exception to this tolerance was his disdain for the Mormon practice of polygamy, but even that attitude seems to have diminished over the years. See note 62 supra.
the individual's scruples or conscience—an important area of privacy which the First Amendment fences off from government."

What emerges is a sense of individuality that not only underlies the Bill of Rights and the Fourteenth Amendment but extends beyond their borders. Justice Douglas, unlike Justice Black, believed that the Bill of Rights is more than just a list of rights to be read literally: "We need a spirit of liberty which extends beyond what a court can supply, and which accepts in our daily living and behavior the attitudes of toleration of unorthodox opinions and respect for the dignity and privacy of each human being, which our Bill of Rights reflects." Hence, the list of guarantees included within the Bill of Rights is not exhaustive but, for Douglas, indicates some of the specific embodiments of the principle of individuality. It is individuality

83. Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring). Douglas's belief in individual conscience in religious matters is reflected in his earlier opinions, as well:

The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Girouard v. United States, 328 U.S. 61, 68 (1946) (Douglas, J.).

Douglas's belief in the importance of individual conscience is also reflected in his opinions that deal with nonreligious, personal beliefs. See Gillette v. United States, 401 U.S. 437, 463 (1971) (Douglas, J., dissenting) (individuals lacking formal religious convictions should not be forced to serve in armed forces against dictates of conscience). To Douglas, "conscience and belief are the main ingredients of First Amendment rights." Id. at 465. See also THE RIGHT OF THE PEOPLE, supra note 32, at 136-44; W. DOUGLAS, A LIVING BILL OF RIGHTS 32 (1961) [hereinafter cited as A LIVING BILL OF RIGHTS].

84. A LIVING BILL OF RIGHTS, supra note 83, at 65. Douglas went on to describe the Bill of Rights as containing "principles of toleration and respect for others, of encouragement of differing opinions, of treating man with dignity. These are principles that put man above the state when it comes to his dignity, his beliefs, his conscience, his life and liberty." Id. at 68.

Douglas most clearly articulated this philosophy in an address that inaugurated the William O. Douglas Lecture Series at the Gonzaga University Law School. Douglas, The Grand Design of the Constitution, 7 GONZAGA L. REV. 239 (1972). In that lecture, Douglas outlined several theses that are "positing upon the principles and precepts embodied in the Constitution and Bill of Rights":

We need to encourage the development of the idiosyncracies of the individual, not to weed out the nonconformists so as to produce a more orderly and submissive people. . .

Private initiatives must be encouraged and the expenditures of private energies and resources . . . must be accentuated.

In light of modern urban conditions and the propensity of officials to employ electronic eavesdropping, privacy and solitude are more important to the individual today than they ever have been.

Id. at 240. The Justice continued:

Men do not live by bread alone. . . The aim is human dignity, liberty, and freedom and their development with the least possible interference or control by government. The ideals are spiritual; the aim is humanistic; the end product should be the full development of the potentials of the individual.

Id. at 253.
Privacy Opinions of Justice Douglas

—the self-fulfillment right to make free personal choices, the nonconformity right to be different, and the right to dignified treatment—that Douglas's interpretation of the Constitution ultimately protects.

III. Justice Douglas's Principle of Individuality as Constitutional Doctrine

Justice Douglas's support for the tripartite principle of individuality permeated his opinions on a wide range of constitutional and extraconstitutional rights. But Douglas could not translate these tenets of individuality into precise legal doctrine. His judicial opinions were therefore occasionally inconsistent. Although Justice Douglas successfully achieved constitutional recognition for the right of privacy, he was unable to secure similar explicit recognition for his broader principle of individuality.

A. Limitations Upon and Tensions Within the Principle of Individuality

Although many civil rights share common interests of individuality, Justice Douglas perceived that they are also different: Douglas recognized that the degree of permissible governmental interference may vary among specific civil rights. For example, Douglas's concurrence in Doe v. Bolton took the position that those aspects of individuality connected to the First Amendment are absolute and permit no restriction, whereas other aspects of individuality derived from the Fourth or Fifth Amendments or from the general philosophy of individuality may be regulated under the state's police power if a compelling state interest can be shown in support of that limitation. Thus, Douglas constructed a two-tiered theory of individuality under which rights that are derived from the First Amendment stand in a preferred position.

This distinction, however, is more apparent than real. Justice Douglas rarely found any state interest sufficiently compelling to justify

85. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 356 (1974) (Douglas, J., dissenting) (no accommodation of First Amendment freedoms can be proper but privacy right must be accommodated with reasonable searches and seizures and warrants); Beauharnais v. Illinois, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting) (“freedom of speech..shall not be abridged” but there may be “room for regulation of the ways and means of invading privacy”).

87. Id. at 211.
88. Id. at 211-15.
restriction. Indeed, Douglas maintained a near-absolutist position on all civil rights, whether derived from the First Amendment or not. The preferred position in which Douglas placed First Amendment interests becomes a factor only when they conflict with other interests of individuality. These cases of conflicting values reveal an unresolved tension in Douglas's opinions.

In cases involving competing values of individuality, Justice Douglas might have been expected to "balance" the competing claims under some consistent standard. But when presented with such cases, he chose not to formulate a "balancing equation"; instead he wrote near-abolutist opinions favoring one or the other of the competing interests. For instance, in *Time, Inc. v. Hill* the Court dismissed a privacy tort suit brought against the publishers of *Life* magazine who had printed an article that publicized a theatrical dramatization of an actual kidnapping. The thrust of Douglas's separate concurrence was that the guarantees of freedom of the press bar an action against the publishers and that "such privacy as a person normally has ceases when his life has ceased to be private." Admittedly, the facts of the case did not present a strong privacy claim, and the concurring opinion was consistent with Justice Douglas's preference for the First Amendment. Nevertheless, such a peremptory dismissal of the affront to individual dignity contrasts with his usual concern for privacy.

In the *Loudspeaker Cases,* Justice Douglas favored the free speech


90. In providing the strongest possible case for the values of individuality, Justice Douglas closed his eyes to the fact that these values sometimes conflict. Rather than attempting to reconcile competing values, Douglas believed that legal ideals should be sacrificed for practical results. For Douglas, when "the objective [was] a broad rule," it was "appropriate to paint with a broad brush." Karst, supra note 11, at 740.


rights of those who wished to speak with the aid of loudspeaker amplification over the competing privacy rights of those who did not wish to be subjected to the noise. On the other hand, in the “captive audience” cases, Public Utilities Commission v. Pollak and Lehman v. City of Shaker Heights, Douglas voted to invalidate certain intrusions on commuters’ right to be let alone, caused by radio broadcasts on streetcars and political placards on buses. The problem with these two lines of cases lies in Douglas’s failure to reconcile competing values of individuality. In both sets of cases, Douglas was apparently balancing the privacy interests of one party against the free speech interests of the other, but he refused to recognize the implicit balancing process and instead cloaked his opinions in near-absolutist rhetoric.

Conflicts between competing individuality interests are not limited to the free speech/privacy area. The self-fulfillment right of a restaurant owner to choose whom he will serve conflicts with the self-fulfillment rights of blacks, whom some restaurateurs would choose not to serve. Douglas uniformly supported the claims of the black customers and argued that the restaurant is either so imbued with public interest or, alternatively, so controlled by state licensing as to involve state action sufficient to trigger an equal protection violation. In a later case, however, Douglas implied that under some circum-

95. 343 U.S. 451, 467 (1952) (Douglas, J., dissenting); see p. 1583 supra.
96. 418 U.S. 298, 305 (1974) (Douglas, J., concurring). Lehman, a candidate for state office, was refused advertising space on vehicles of a city transit company. Both the plurality opinion and the dissent were based on Lehman’s First Amendment claims. Douglas’s separate concurrence, however, ignored the First Amendment issue and decided the case solely on the privacy rights of the passengers.
97. Douglas argued that the right of free speech does not allow the speaker “to force his message upon an audience incapable of declining to receive it.” Id. at 307; see Public Utilities Comm’n v. Pollak, 343 U.S. 451, 468-69 (1952) (Douglas, J., dissenting).
98. In the Loudspeaker Cases, Douglas balanced the speakers’ right to present their unique religious views (non-conformity) against the right of the residents of the surrounding neighborhood to peace and quiet in their homes (dignified treatment). In Pollak, he balanced the passengers’ right to pick and choose different forms of news and entertainment (self-fulfillment and nonconformity) against the streetcar company’s right to promote its business (self-fulfillment).
99. Douglas has suggested that only “government-imposed or government-approved” captive audiences pose constitutional problems. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 72 (1973) (Douglas, J., dissenting) (individuals who were offended by pornographic nature of books, movies, or art not captive audience). According to such a rule, if the speakers in the Loudspeaker Cases had been successful in obtaining a permit from the local government, they would have been susceptible to captive audience arguments in privacy suits brought by residents of the surrounding neighborhoods.
stances members of an all-white club could exclude blacks. In these cases, once again, Douglas implicitly balanced one individual's right to choose against another's right to self-fulfillment. Village of Belle Terre v. Boraas is yet another example of Douglas's implicit balancing of values of individuality. Belle Terre involved a local zoning ordinance that restricted land use to "one family" homes. When a group of university students challenged the ordinance, Douglas, writing for the Court, rejected the students' claim of an associational right to live with whomever they chose and upheld the constitutionality of the ordinance. Although the students presented an argument for self-fulfillment and nonconformity, Douglas appeared to favor the competing self-fulfillment claims of the village's homeowners. This surprising result once again

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102. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), involved a private club with an all-white, exclusionary membership practice. In his dissenting opinion, Douglas recognized the associational rights of the white club members. Id. at 179. He would, however, have found for the black complainants. The state liquor licensing procedure and the absence of alternative, racially mixed taverns injected the private club with sufficient public interest to involve state action. Id. at 182-83; see Glennon, supra note 54, at 1312-13; cf. Bell v. Maryland, 378 U.S. 226, 265-66 (1964) (opinion of Douglas, J.) (large corporate defendant had "no tinge of an individual choice to associate only with one class of customers").


105. The definition of family, for the purposes of the ordinance, was restricted to either blood relatives or a group of not more than two unrelated people living together as a single housekeeping unit. Belle Terre, N.Y., Building Zone Ordinance of the Village of Belle Terre, Art. I, § D-1.35a (June 8, 1970), quoted in Boraas v. Village of Belle Terre, 476 F.2d 806, 809 (2d Cir. 1973), rev'd, 416 U.S. 1 (1974).

106. The students claimed that the ordinance interfered with the right to travel, that it barred people who were uncongenial to the present residents, that social homogeneity was not a legitimate interest of government, that the ordinance trenched on the right to privacy, and "that the ordinance [was] antithetical to the Nation's experience, ideology, and self-perception as an open, egalitarian, and integrated society." 416 U.S. at 7.

107. 416 U.S. at 9 (homeowners' self-fulfillment interest in laying out "zones where family values, youth values, and the blessing of quiet seclusion and clean air make the area a sanctuary for people"). Moreover, some of Douglas's strongest pro-privacy statements extol the virtues of marriage and family. See Doe v. Bolton, 410 U.S. 179, 212 (1973) (Douglas, J., concurring) (privacy described in terms of marriage and family); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Douglas, J.) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.").

108. Cf. United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 543 (1973) (Douglas, J., concurring) (declaring unconstitutional section of Food Stamp Act that had discriminated against households that included unrelated members) ("The right of association, the right to invite the stranger into one's home is too basic in our constitutional regime to deal with roughshod."); Thorpe v. Housing Auth., 386 U.S. 670, 679 (1967) (Douglas, J., concurring) (tenant in public housing project cannot be evicted for exercising right of association). Moreover, Douglas had at least implied that the concept of association extended to the right of unmarried adults to live together.
demonstrates Douglas's failure to delineate clearly his balancing priorities.\textsuperscript{109}

\textbf{B. Justice Douglas's Right to Privacy: Tragedy or Triumph?}

Justice Douglas's opinion for the Court in \textit{Griswold} stands as one of the great substantive victories of his judicial career. In \textit{Griswold} Douglas succeeded in translating his personal philosophy into acceptable legal doctrine. Moreover, the \textit{Griswold} opinion attracted a majority of the Court, albeit a bare majority of five,\textsuperscript{110} and it has subsequently been accepted as valid constitutional precedent for the right of privacy.\textsuperscript{111}

Douglas's victory was, however, an ironic one, for the Justice did not adequately distinguish his privacy theory from the discredited theories of economic substantive due process. Unlike economic interests, privacy is an application of the principle of individuality, and individuality for Douglas permeates the entire Bill of Rights. Thus, in supporting privacy, Douglas believed he was invoking the Constitution itself rather than a personal theory of social welfare.\textsuperscript{112} But the distinction between economic and individuality interests can be a fine one, as critics were quick to point out.\textsuperscript{113}

Moreover, the victory in \textit{Griswold} was not total. Although Douglas believed in an expansive right of privacy derived from the general principle of individuality, the privacy right in \textit{Griswold} was drawn

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\textsuperscript{109} Another possible explanation for this result might lie in Douglas's emphasis on the zoning aspect of the case. He seemed to classify zoning ordinances as economic or social legislation and was willing to defer to the legislative judgment if the law was reasonable and not arbitrary. 416 U.S. at 8. Moreover, he quoted extensively from his own majority opinion in \textit{Berman v. Parker}, 348 U.S. 26 (1954), an earlier case involving zoning regulations in the District of Columbia.

\textsuperscript{110} See note 40 supra.


\textsuperscript{112} See note 40 supra.


Douglas himself failed to realize the distinction, for he classified the \textit{Boraas} case as an economic interest/zoning case and failed to notice the individuality/associational interests of the students. See note 109 supra.
from the penumbras of the Bill of Rights and restricted in scope to the marital relationship. Over Justice Douglas's dissents, the Court subsequently refused to apply Griswold to search and seizure and wiretapping cases.\textsuperscript{114} Since Douglas's retirement, the Court has consistently resisted the expansion of the privacy right.\textsuperscript{115} Attempting to secure constitutional recognition for the right of privacy while avoiding the dangers of substantive due process, Justice Douglas acquiesced in a conception of privacy that was susceptible to constriction by the more conservative Burger Court.\textsuperscript{116} The result has been a limited right of privacy and not the expansive "right to be let alone" envisaged by Justice Douglas.

\textsuperscript{114} See note 51 \textit{supra}.
\textsuperscript{115} See note 45 \textit{supra}.
\textsuperscript{116} The inherent tragedy of Justice Douglas's experience with the privacy right parallels a similar experience of Justice Field, who has been described as "the one figure who serves best as a prototype for Justice Douglas's brand of judicial activism." Karst, \textit{supra} note 11, at 746. Field had pioneered a substantive interpretation of the Fourteenth Amendment only to have his landmark dissents wrenched out of their original context by another generation of jurists and applied to economic, "liberty of contract" issues. McCurdy, \textit{Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897}, 61 J. Am. Hist. 970, 978-80 (1975).