Mr. Justice Douglas: One Man's Opinions

During his thirty-six years on the Supreme Court, Justice Douglas wrote nearly one thousand opinions, many of which were important in the development of constitutional law as we know it today. Below are reprinted selections from a few of his opinions concerning subjects of major importance to him and his country. Our concern is as much with literature as with law. Accordingly, it is not our purpose to collect his greatest or most significant opinions, but rather to discover in his own words some facets of the "essential Douglas." We honor him for what he has written.

One of Justice Douglas' greatest concerns, both on and off the bench, was protection of our natural environment. Sierra Club v. Morton, *405 U.S. 727 (1971), involved the efforts of a conservation group to halt the development of Mineral King, a California wilderness area. Douglas dissented from the Court's opinion denying standing.*

The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. This suit would therefore be more properly labeled as *Mineral King v. Morton.*

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases. The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk,

bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.

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Mineral King is doubtless like other wonders of the Sierra Nevada such as Tuolumne Meadows and the John Muir Trail. Those who hike it, fish it, hunt it, camp in it, frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be few or many. Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.

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[T]he pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.

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The Forest Service—one of the federal agencies behind the scheme to despoil Mineral King—has been notorious for its alignment with lumber companies, although its mandate from Congress directs it to consider the various aspects of multiple use in its supervision of the national forests.

The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.

Perhaps they will not win. Perhaps the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard?

Those who hike the Appalachian Trail into Sunfish Pond, New Jersey, and camp or sleep there, or run the Allagash in Maine, or climb the Guadalupes in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away. Those who merely are caught up in environmental news or propaganda and flock to defend these waters or areas may be treated differently. That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life which it represents will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.

Ecology reflects the land ethic; and Aldo Leopold wrote in A Sand County Almanac, "The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land."

That, as I see it, is the issue of "standing" in the present case and controversy.

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A major theme of Justice Douglas' tenure on the Court was his intense concern for First Amendment rights. This concern was exemplified by his impassioned dissent in Dennis v. United States, *341 U.S. 494 (1951). In that case the Court upheld the conviction of Communist Party leaders under the Smith Act.*

If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. . . . There is a statute which makes a seditious conspiracy unlawful. Petitioners, however, were not charged with a "conspiracy to overthrow" the Government. They were charged with a conspiracy to form a party and groups and assemblies of people who teach and advocate the overthrow of our Government by force or violence and with a conspiracy to advocate and teach its overthrow by force and violence. It may well be that indoctrination in the techniques of terror to destroy the Government would be indictable under either statute. But the teaching which is condemned here is of a different character.

So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books: Stalin, Foundations of Leninism (1924); Marx and Engels, Manifesto of the Communist Party (1848); Lenin, The State and Revolution (1917); History of the Communist Party of the Soviet Union (B.) (1939).

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The opinion of the Court does not outlaw these texts nor condemn them to the fire, as the Communists do literature offensive to their creed. But if the books themselves are not outlawed, if they can lawfully remain on library shelves, by what reasoning does their use in a classroom become a crime? It would not be a crime under the Act to introduce these books to a class, though that would be teaching what the creed of violent overthrow of the Government is. The Act, as construed, requires the element of intent—that those who teach the creed believe in it. The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on *what is said*, but on the *intent* with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen.

There was a time in England when the concept of constructive treason flourished. Men were punished not for raising a hand against the King but for thinking murderous thoughts about him. The Framers of the Constitution were alive to that abuse and took steps to see that the practice would not flourish here. Treason was defined to require overt acts—the evolution of a plot against the country into an actual project. The present case is not one of treason. But the analogy is close when the illegality is made to turn on intent, not on the nature of the act. We then start probing men's minds for motive and purpose; they become entangled in the law not for what they did but *for what they thought*; they get convicted not for what they said but for the purpose with which they said it.

Intent, of course, often makes the difference in the law. An act otherwise excusable or carrying minor penalties may grow to an abhorrent thing if the evil intent is present. We deal here, however, not with ordinary acts but with speech to which the Constitution has given a special sanction.

The vice of treating speech as the equivalent of overt acts of a treasonable or seditious character is emphasized by a concurring opinion, which by invoking the law of conspiracy makes speech do service for deeds which are dangerous to society. The doctrine of conspiracy has served divers and oppressive purposes and in its broad reach can be

made to do great evil. But never until today has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct. Yet that is precisely what is suggested. I repeat that we deal here with speech alone, not with speech *plus* acts of sabotage or unlawful conduct. Not a single seditious act is charged in the indictment. To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions. That course is to make a radical break with the past and to violate one of the cardinal principles of our constitutional scheme.

Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world.

There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction.

Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its

contents. There must be some immediate injury to society that is likely if speech is allowed. . . .

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The nature of Communism as a force on the world scene would, of course, be relevant to the issue of clear and present danger of petitioners' advocacy within the United States. But the primary consideration is the strength and tactical position of petitioners and their converts in this country. On that there is no evidence in the record. If we are to take judicial notice of the threat of Communists within the nation, it should not be difficult to conclude that *as a political party* they are of little consequence. Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state, which the Communists could carry. Communism in the world scene is no bogeyman; but Communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. It is inconceivable that those who went up and down this country preaching the doctrine of revolution which petitioners espouse would have any success. In days of trouble and confusion, when bread lines were long, when the unemployed walked the streets, when people were starving, the advocates of a shortcut by revolution might have a chance to gain adherents. But today there are no such conditions. The country is not in despair; the people know Soviet Communism; the doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it.

How it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery. Some nations less resilient than the United States, where illiteracy is high and where democratic traditions are only budding, might have to take drastic steps and jail these men for merely speaking their creed. But in America they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful.

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. . . [T]he mere statement of the opposing views indicates how important it is that we know the facts before we act. Neither prejudice nor hate nor senseless fear should be the basis of this solemn act. Free speech—the glory of our system of government—should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent. On this record no one can say that petitioners and their converts are in such a strategic position as to have even the slightest chance of achieving their aims.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." The Constitution provides no exception. This does not mean, however, that the Nation need hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to revolution. Seditious conduct can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself. The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. Its philosophy is that violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force. The First Amendment reflects the philosophy of Jefferson "that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order." The political censor has no place in our public debates. Unless and until extreme and necessitous circumstances are shown, our aim should to be keep speech unfettered and to allow the processes of law to be invoked only when the provacateurs among us move from speech to action.

Vishinsky wrote in 1938 in The Law of the Soviet State, "In our state, naturally, there is and can be no place for freedom of speech, press, and so on for the foes of socialism."

Our concern should be that we accept no such standard for the United States. Our faith should be that our people will never give support to these advocates of revolution, so long as we remain loyal to the purposes for which our Nation was founded.

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A less momentous, but equally problematical, First Amendment issue has been the regulation of obscenity. While the Court has held that obscene material is not protected by the First Amendment, it has had difficulty in determining what is obscene. In Ginsburg v. United States, *383 U.S. 463 (1966), the Court sustained obscenity convictions. This determination was based largely on the finding that advertising for the publications exploited their sexual content and depicted them as erotically arousing. Justice Douglas began his dissenting opinion with an attack on this rationale.*

Today's condemnation of the use of sex symbols to sell literature engrafts another exception on First Amendment rights that is as unwarranted as the judge-made exception concerning obscenity. This new exception condemns an advertising technique as old as history. The advertisements of our best magazines are chock-full of thighs, ankles, calves, bosoms, eyes, and hair, to draw the potential buyer's attention to

lotions, tires, food, liquor, clothing, autos, and even insurance policies. The sexy advertisement neither adds to nor detracts from the quality of the merchandise being offered for sale. And I do not see how it adds to or detracts one whit from the legality of the book being distributed. A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it. I cannot imagine any promotional effort that would make chapters 7 and 8 of the Song of Solomon any the less or any more worthy of First Amendment protection that does their unostentatious inclusion in the average edition of the Bible.

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Justice Douglas did not subscribe to the view that constitutional rights belong only to adults. In Wisconsin v. Yoder, *406 U.S. 205 (1972), the Court addressed the constitutionality of a compulsory school attendance law. The respondents were members of the Amish religion, and on religious grounds had declined to send their children to school beyond the eighth grade. The Court held that the law could not be upheld against the religious beliefs of the Amish parents. Douglas dissented in part.*

I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.

It is argued that the right of the Amish children to religious freedom is not presented by the facts of the case, as the issue before the Court involves only the Amish parents' religious freedom to defy a state criminal statute imposing upon them an affirmative duty to cause their children to attend high school.

First, respondents' motion to dismiss in the trial court expressly asserts, not only the religious liberty of the adults, but also that of the children, as a defense to the prosecutions. It is, of course, beyond question that the parents have standing as defendants in a criminal prosecution to assert the religious interests of their children as a defense. Although the lower courts and a majority of this Court assume an identity of interest between parent and child, it is clear that they have treated the religious interest of the child as a factor in the analysis.

Second, it is essential to reach the question to decide the case, not only because the question was squarely raised in the motion to dismiss,

but also because no analysis of religious-liberty claims can take place in a vacuum. If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views. . . . As the child has no other effective forum, it is in this litigation that his rights should be considered. And, if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections.

Religion is an individual experience. It is not necessary, nor even appropriate, for every Amish child to express his views on the subject in a prosecution of a single adult. Crucial, however, are the views of the child whose parent is the subject of the suit. Frieda Yoder has in fact testified that her own religious views are opposed to high-school education. I therefore join the judgment of the Court as to respondent Jonas Yoder. But Frieda Yoder's views may not be those of Vernon Yutzy or Barbara Miller. I must dissent, therefore, as to respondents Adin Yutzy and Wallace Miller as their motion to dismiss also raised the question of their children's religious liberty.

These children are "persons" within the meaning of the Bill of Rights. We have so held over and over again.

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On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition.

It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.

The views of the two children in question were not canvassed by the Wisconsin courts. The matter should be explicitly reserved so that new hearings can be held on remand of the case.

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In recent years, the Court has repeatedly been called upon to determine whether jury selection schemes are compatible with the Sixth Amendment requirement of an impartial jury, and with the due process and equal protection clauses of the Fourteenth Amendment. Ballard v. United States, *329 U.S. 187 (1946), involved the intentional exclusion of women from the federal grand and petit jury panels in the Southern District of California. While not deciding the case on constitutional grounds, the Court held that this exclusion violated the statutory scheme, which was designed to make the jury a representative cross-section of the community. Justice Douglas wrote the opinion of the Court.*

We conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that we should exercise our power of supervision over the administration of justice in the federal courts to correct an error which permeated this proceeding.

It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.

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[T]he exclusion of women from jury panels may at times be highly prejudicial to the defendants. But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in

disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group or an economic or social class, deprives the jury system of the broad base it was designed by Congress to have in our democratic society. It is a departure from the statutory scheme. As well stated in *United States v. Roemig*, "Such action is operative to destroy the basic democracy and classlessness of jury personnel." . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

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Justice Douglas participated in numerous decisions by the Warren Court requiring desegregation of public facilities. During his tenure on the Burger Court, Douglas' position has remained unaltered. Palmer v. Thompson, *403 U.S. 217 (1971), involved the Jackson, Mississippi city council's decision to close municipal swimming pools, following a court judgment against their segregated operation. The Supreme Court held that closure of the pools was not a denial of equal protection. Justice Douglas dissented.*

Jackson, Mississippi, closed all the swimming pools owned and operated by it, following a judgment of the Court of Appeals, which affirmed the District Court's grant of a declaratory judgment that three Negroes were entitled to the desegregated use of the city's swimming pools. No municipal swimming facilities have been opened to any citizen of either race since that time; and the city apparently does not intend to reopen the pools on an integrated basis.

That program is not, however, permissible if it denies rights created or protected by the Constitution. I think that the plan has that constitutional defect; and that is the burden of this dissent.

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Our cases condemn the creation of state laws and regulations which foster racial discrimination—segregated schools, segregated parks, and the like. The present case, to be sure, is only an analogy. The State enacts no law saying that the races may not swim together. While racially motivated state action is involved, it is of an entirely negative character. Yet it is in the penumbra of the policies of the Thirteenth, Fourteenth, and Fifteenth Amendments and as a matter of constitutional policy should be in the category of those enumerated rights protected by the Ninth Amendment. If not included, those rights become narrow legalistic concepts which turn on the formalism of laws, not on their spirit.

I conclude that though a State may discontinue any of its municipal services—such as schools, parks, pools, athletic fields, and the like—it may not do so for the purpose of perpetuating or installing *apartheid* or because it finds life in a multi-racial community difficult or unpleasant. If that is its reason, then abolition of a designated public service becomes a device for perpetuating a segregated way of life. That a State may not do.

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Another major concern of Justice Douglas has been governmental intrusion upon the privacy of citizens. In Griswold v. Connecticut, *381 U.S. 479 (1965), the Court struck down as unconstitutional two state statutes prohibiting the use of contraceptives. Justice Douglas wrote the opinion of the Court.*

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 riqhts.

. . . [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure . . . .

In *NAACP v. Alabama*, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. In *Schware v. Board of Bar Examiners* we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party" and was not action of a kind proving bad moral character.

Those cases involved more than the "right of assembly"—a right that extends to all irrespective of their race or ideology. The right of "association," like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

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 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 Fourth and Fifth Amendments were described in *Boyd v. United States* as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in *Mapp v. Ohio* to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."

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The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Would we allow the police to search the sacred precincts of marital bedrooms for telltale

signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We 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. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

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The issue of privacy arose in a different context in Wyman v. James, *400 U.S. 309 (1971), in which the constitutionality of subjecting welfare recipients to spot visits and checks as a condition for receiving assistance was contested. The Court held that this procedure did not violate any constitutional rights, and was a reasonable administrative tool. Justice Douglas dissented.*

We are living in a society where one of the most important forms of property is government largesse which some call the "new property." The payrolls of government are but one aspect of that "new property." Defense contracts, highway contracts, and the other multifarious forms of contracts are another part. So are subsidies to air, rail, and other carriers. So are disbursements by government for scientific research. So are TV and radio licenses to use the air space which of course is part of the public domain. Our concern here is not with those subsidies but with grants that directly or indirectly implicate the *home life* of the recipients.

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[A]lmost every beneficiary whether rich or poor, rural or urban, has a "house"—one of the places protected by the Fourth Amendment against "unreasonable searches and seizures." The question in this case is whether receipt of largesse from the government makes the *home* of the beneficiary subject to access by an inspector of the agency of oversight, even though the beneficiary objects to the intrusion and even though the Fourth Amendment's procedure for access to one's *house* or *home* is not followed. The penalty here is not, of course, invasion of the privacy of Barbara James, only her loss of federal or state largesse. That, however, is merely rephrasing the problem. Whatever the semantics, the central question is whether the government by force of its largesse has the power to "buy up" rights guaranteed by the Constitution. But for the assertion of her constitutional right, Barbara James in this case would have received the welfare benefit.

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What we said in [previous] cases is as applicable to Fourth Amendment rights as to those of the First. The Fourth, of course, speaks of "unreasonable" searches and seizures, while the First is written in absolute terms. But the right of privacy which the Fourth protects is perhaps as vivid in our lives as the right of expression sponsored by the First. If the regime under which Barbara James lives were enterprise capitalism as, for example, if she ran a small factory geared into the Pentagon's procurement program, she certainly would have a right to deny inspectors access to her *home* unless they came with a warrant.

. . . [We have] held the Fourth Amendment applicable to administrative searches of both the *home* and a business. The applicable principle . . . is that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." In *See* [*v. City of Seattle*] we added that the "businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." There is not the slightest hint in *See* that the Government could condition a business license on the "consent" of the licensee to the administrative searches we held violated the Fourth Amendment. It is a strange jurisprudence indeed which safeguards the businessman at his place of work from warrantless searches but will not do the same for a mother in her *home*.

Is a search of her home without a warrant made "reasonable" merely because she is dependent on government largesse?

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If the welfare recipient was not Barbara James but a prominent, affluent cotton or wheat farmer receiving benefit payments for not growing crops, would not the approach be different? Welfare in aid of dependent children, like social security and unemployment benefits, has an aura of suspicion. There doubtless are frauds in every sector of public welfare whether the recipient be a Barbara James or someone who is prominent or influential. But constitutional rights—here the privacy of the *home*—are obviously not dependent on the poverty or on the affluence of the beneficiary. It is the precincts of the *home* that the Fourth Amendment protects; and their privacy is as important to the lowly as to the mighty.

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It may be that in some tenements one baby will do service to several women and call each one "mom." It may be that other frauds, less

obvious, will be perpetrated. But if inspectors want to enter the precincts of the home against the wishes of the lady of the house, they must get a warrant. The need for exigent action as in cases of "hot pursuit" is not present, for the lady will not disappear; nor will the baby.

I would place the same restrictions on inspectors entering the *homes* of welfare beneficiaries as are on inspectors entering the *homes* of those on the payroll of government, or the *homes* of those who contract with the government or the *homes* of those who work for those having government contracts. The values of the *home* protected by the Fourth Amendment are not peculiar to capitalism as we have known it; they are equally relevant to the new form of socialism which we are entering. Moreover, as the numbers of functionaries and inspectors multiply, the need for protection of the individual becomes indeed more essential if the values of a free society are to remain.

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The bureaucracy of modern government is not only slow, lumbering, and oppressive; it is omnipresent. It touches everyone's life at numerous points. It pries more and more into private affairs, breaking down the barriers that individuals erect to give them some insulation from the intrigues and harassments of modern life. Isolation is not a constitutional guarantee; but the sanctity of the sanctuary of the *home* is such—as marked and defined by the Fourth Amendment. What we do today is to depreciate it.