COMMENT ON THE RIGHT TO MARITAL PRIVACY: A POSTSCRIPT ON *GRISWOLD V. CONNECTICUT*

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In Griswold v. Connecticut, the United States Supreme Court recognized a due process right to marital privacy. Justice Douglas found that such a right, although not articulated in the first eight amendments, is included within a penumbra of those rights contained in the Bill of Rights. In contrast to the penumbra analysis, Professor Rockwell demonstrates in the following hypothetical United States Supreme Court opinion how the right to marital privacy is guaranteed by the liberty clauses of the fifth and fourteenth amendments. Unlike Justice Goldberg, who also recognized the penumbra approach in his concurring opinion in Griswold, the author fashions a uniform rule of constitutional interpretation freed from the vagueness and uncertainty of the penumbra approach.

STATE OF COLUMBIA V. DOE

ON APPEAL FROM THE SUPREME COURT OF ERRORS OF COLUMBIA

No. 76-916. Argued January 28, 1977—Decided March 17, 1977

THE CHIEF JUSTICE delivered the opinion of the Court.

The facts of this case are not substantially dissimilar from those presented to us in *Griswold v. Connecticut,* 381 U.S. 479 (1965). In that case the statutory provisions which were successfully challenged on constitutional grounds imposed fines or imprisonment or both on anyone who used instrumentalities of any kind for the purpose of preventing conception and similarly on anyone who counseled or assisted a person in such use.

The statute of the State of Columbia presently before us provides that: "Any person under the age of twenty-one who possesses or uses any instrumentality, the purpose of which is to prevent conception, shall be fined not less than $100 or imprisoned not less than sixty days nor more than six months or be subject to both fine and imprisonment." Title 13, section 120 of the Columbia Code

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(1976). There is no provision, as in the Connecticut statute, concerning counseling or assisting, presumably to avoid possible collison with the first amendment. Absent such a provision, the only other difference between the statute under review and the Connecticut statute is the age limit and the proscription of possession as well as use in the Columbia statute.

Appellant Doe, a twenty-year-old married woman, was convicted in the District Court for the First Judicial District of Columbia for possession and use of contraceptive devices in violation of the Columbia statute. The Court distinguished this statute from the Connecticut statute on the grounds that the proscription embodied in the age limitation was a reasonable exercise of the state's police power to protect morals and discourage promiscuity among its citizenry. In reaching that decision the district court relied, in part, on the language in *Griswold* which stated: "The present case . . . 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 [the marital] relationship." 381 U.S. at 485. The Court of Appeals for the First Appellate Division affirmed, and its judgment was in turn affirmed by the Columbia Supreme Court, rejecting appellant's claim that the differences between the Connecticut and Columbia statutes were trivial and without constitutional significance.

We agree with appellant's contention that the differences between the two statutes are inconsequential and therefore the Columbia statute is an unconstitutional invasion of the right of marital privacy.

We live in a society where large numbers of young men and women marry before the age of twenty-one.[1] We hold that to deny to them the right of rational family planning is an invasion of the right of marital privacy affirmed by our decision in *Griswold*.[2]

A substantive right of privacy or more precisely marital privacy, for purposes of the issue presented by this case, we identify

1. Columbia is the only state in the Union which requires permission from the parents of both the man and woman who wish to marry before the age of 21 or, alternatively, a six-month waiting period between the application for a marriage license and marriage itself.

2. Section 120 of the Columbia Code also involves serious questions of validity under the equal protection clause of the fourteenth amendment, but that issue is not now before us.

generally as an immunity from legislative or administrative provisions that proscribe or invade behavior, conditions, or relationships that commonly and by long tradition have been understood as involving privacy, absent a showing of a compelling state interest to do so.

We do not write on a clean slate. But what has been written on our constitutional slate has never been regarded as immutable by a majority of the Justices who have sat on this Court.

Therefore, in the first place, it is important to review which provisions of the Constitution *do not* afford protection to the kind of privacy at issue in this case.

In *Griswold* the opinion of the Court relied on no less than five amendments of the Bill of Rights to sustain the right of privacy which was held to have been violated by the Connecticut statute: the first, third, fourth, fifth, and ninth.[3] But none of these amendments deals with privacy per se. In fact, the word "privacy" appears nowhere in the entire Constitution. Consequently, the opinion found that zones or penumbras emanating from these amendments taken separately and together provide a constitutional home for privacy.

With the perspective of the years that have passed since our decision in *Griswold* and the reflection afforded by the passage of time, we conclude that the grounds of that decision were unduly diffuse and inadequately rooted in the language of the Constitution.[4] Consequently we believe that a reexamination of a constitutional right of privacy protected from substantive legislative or administrative impositions is appropriate.

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3. The rights guaranteed by these amendments, excepting the third and the ninth, have been held to be protected against state action by the due process clause of the fourteenth amendment. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

4. *See, e.g.*, Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 294 (1973) ("Penumbras were not necessary, zones of privacy, an unfortunate invention, . . ."). *See generally* Dixon, *The Griswold Penumbra: Constitutional Charter for An Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965); Emerson, *Nine Justices in Search of A Doctrine*, 64 MICH. L. REV. 219 (1965); Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965); 31 LAW AND CONTEMP. PROB. No. 2 (1966); McKay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259 (1965); *Privacy (Nomus XIII)*, Y.B. AM. SOC'Y FOR POLITICAL & LEGAL PHILOSOPHY (J. Pennock & J. Chapman eds. 1971); Sutherland, *Privacy in Connecticut*, 64 MICH. L. REV. 283 (1965).

In constitutional adjudication penumbras and zones may lack the clarity and focus required to establish basic rights. We believe that the language of the Constitution does yield, nevertheless, a resolution of marital privacy presented both in *Griswold* and in the present case with a clarity and a focus commensurate with the importance of the issue. And we believe that this can be done without invoking varieties of constitutional ambiguities associated with penumbras and zones.

The first amendment provides broad protection for freedom of religion, speech, press and assembly. Since 1958 we have held that the effective exercise of these freedoms also requires freedom of association, *NAACP v. Alabama,* 357 U.S. 449 (1958).[5] Manifestly, associational privacy is a necessary ingredient of many forms of association and we have so held in the cases cited above. But this privacy is a concomitant of association and not an entity independent of the substantive rights of expression protected by the first amendment. We find no zone or penumbra of privacy as such emanating from the first amendment. Zones and penumbras are insufficently determinate to root an identifiable constitutional right where the substance of the rights are specified as they are in the first amendment.

The third amendment states: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." The privacy safeguarded here is a most particularized one and casts no constitutionally recognizable penumbra of any kind.

The fourth amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Of all the provisions of the Constitution this amendment reaches furthest into realms of privacy, particularly with respect to various types of electronic

5. *See, e.g.*, Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); Louisiana ex rel Gremillion v. NAACP, 366 U.S. 293 (1961); Bates v. Little Rock, 361 U.S. 516 (1960).

eavesdropping, data banks and warrantless searches. Our decisions based on fourth amendment issues have been legion due to the almost infinite variety of circumstances involved in the pursuit of suspected lawbreakers and evidence of illegal conduct. These decisions have involved questions of procedures used by law enforcement and inspection personnel which have seminal consequences for privacy, but these procedures are not here at issue.

The privacy characteristics attributable to the fourth amendment were rooted initially in Mr. Justice Brandeis' powerful dissent in *Olmstead v. United States,* 277 U.S. 438 (1928) in which he said:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. . . . [E]very unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 478.[6]

Privacy language appears in many of our fourth amendment decisions since then, particularly in Mr. Justice Frankfurter's majority opinion in *Wolf v. Colorado,* 338 U.S. 25 (1949) where he stated that "The security of one's *privacy* against arbitrary intrusion by the police—*which is at the core of the Fourth Amendment* —is basic to a free society." *Id.* at 27 (emphasis added). In our judgment that particular phraseology does not convey an additional constitutional dimension of privacy to the fourth amendment. Without doing violence to the language or intent of the fourth amendment one could better say that "the security against arbitrary intrusion by the police—which is at the core of the fourth amendment—is basic to a free society."

Thus, the fourth amendment forbids "unreasonable" procedures which our decisions have frequently equated with "arbitrary." The words of that amendment do not sustain a broader construc-

6. In Brandeis' pioneering article co-authored with Samuel D. Warren, Brandeis & Warren, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890), Brandeis identified privacy with "the right to be let alone"—a phrase borrowed from Judge Thomas M. Cooley, T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888).

tion. Indeed, in *Katz v. United States*, 389 U.S. 347 (1967) Mr. Justice Stewart, speaking for seven members of the Court, stated "[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." *Id.* at 350 (footnote omitted).[7] We reaffirm that view. Arbitrary, or more precisely, unreasonable searches, seizures, and arrests are what the fourth amendment proscribes. No less, no more. Concededly this can be equated with a limited form of privacy as Mr. Justice Frankfurter asserted. But again this is not the kind of privacy at issue in the instant case.[8]

The clause of the fifth amendment invoked on behalf of privacy in *Griswold* states: "nor shall [any person] be compelled in any criminal case to be a witness against himself." The privacy protected here, if it can be designated as such, concerns evidence. It proscribes compulsion in giving testimony which may incriminate the one from whom testimony is sought.[9]

The majority opinion in *Griswold* also emphasizes dicta in *Boyd v. United States*, 116 U.S. 616 (1886) where the opinion states that the fourth and fifth amendments protect against all governmental invasions "of the sanctity of a man's home and the privacies of life." *Id.* at 630. But those words were written over ninety years ago and today we live in a far more complex society. A society, for example, where there is a recognized governmental need for the Internal Revenue Service to invade the privacy of the personal economy of most of our population, *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1915); where compulsory vaccination is not an invasion of constitutional rights, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); where compulsory military service has prevailed during most of this century, *Selective Draft Law Cases*, 245 U.S. 366

7. *See also* Kitch, *Katz v. U.S.: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133.

8. The rights protected by the fourth amendment were also stated in privacy language in Mapp v. Ohio, 367 U.S. 643 (1961), to mention one of many other fourth amendment cases. But as in *Wolf*, the privacy involved is only the immunity stipulated by the language of the fourth amendment.

9. *See* Malloy v. Hogan, 378 U.S. 1 (1964).

(1918); where farmers may be restricted in the quantity of crops they may produce for consumption on their own farms, *Wickard v. Filburn,* 317 U.S. 111 (1942); and where zoning laws may tell property owners what they may or may not do with their property, *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).[10]

We find no home in any of these amendments for the kind of constitutional privacy at issue in this case. As Mr. Justice Stewart observed in his dissenting opinion in *Griswold* "[T]here is not involved here any abridgment [of first amendment rights]. . . . No soldier has been quartered in any house. There has been no search, and no seizure. Nobody has been compelled to be a witness against himself." 381 U.S. at 529. We agree with this statement as applied to the facts in the present case.

We come now to the the ninth amendment which states: "The enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people." (emphasis added). Although the circumstances which led to the inclusion of this amendment in the Bill of Rights are by now well known and summarized by Mr. Justice Goldberg's concurring opinion in *Griswold id.* at 488-90, it is appropriate to recapitulate them briefly. In opposition to the inclusion of a bill of rights, Hamilton argued that the enumeration of some rights might preclude protection of others. Madison, in turn, was concerned that the statement of specific rights might be unduly limited. To resolve these problems the ninth amendment was adopted. *See* B.B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955).

Initially the ninth amendment was combined with the tenth amendment which states: "The *powers* not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people.*" (emphasis added). They were ultimately ratified, however, as two separate articles. *See* Kutner, *The Neglected Ninth Amendment: The "Other Rights" Retained by the People,* 51 MARQ. L. REV. 121, 125 (1968).

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10. Mr. Justice Douglas' opinion in *Belle Terre,* on behalf of eight members of the Court, found no privacy rights violated by a village zoning ordinance restricting land use to one-family dwellings, where the definition of *family* was limited to the traditional related family and to groups of not more than two unrelated persons.

The meaning and substance of the ninth amendment remain, even at this late date, unclear. Madison, who was the author of the ninth amendment, was an admirer of John Locke and other later natural law and natural rights philosophers of the Enlightment. Consequently, there has been one presumption that, among others, "certain rights . . . retained by the people" referred to rights emanating from natural law, which was inviolate and above any political system created by mankind.[11]

It may be said that the ninth amendment is, par excellence, the natural law provision of the Constitution. But we do not sit to enforce natural law. We sit to interpret and apply the provisions of the Constitution and the positive law. The ninth amendment—forgotten or neglected as it may have been—is part of the Constitution. But we reject the notion that it embraces a natural law substance independent of other provisions of the Constitution. Were we to open that Pandora's box we would loose seeds of imponderable litigation as numerous as the sands of the Sahara.

Nevertheless, "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 174 (1803).

Because of its inchoate natural law language, this Court has referred to the ninth amendment with great parsimony.[12]

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11. *See* Patterson, *supra* at 19; Kutner, *supra* at 124-25; Pollak, *Thomas I. Emerson, Lawyer and Scholar: IPSE Custodiet Custodes,* 84 YALE L. J. 638, 644-48 (1975); Redlich, *Are There "Certain Rights . . . Retained By the People?",* 37 N.Y.U. L. REV. 787, 810-12 (1962); Note, *The Uncertain Renaissance of the Ninth Amendment,* 33 U. CHI. L. REV. 814, 820-24, 832-33 (1966).

12. *See* United Public Workers v. Mitchell, 330 U.S. 75, 94-95 (1947); Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 143-44 (1939); Ashwander v. TVA, 297 U.S. 288, 330-33 (1936).

Mr. Justice Jackson once observed:

> I could not remember that in my long experience in government litigation I had ever had an argument based on the Ninth Amendment or that I had ever been obliged to meet one based thereon, and I could not recall ever having heard that Amendment mentioned by any Justice of the Court in Conference or by any lawyer in any argument before it. So I turned to the work of my friends Hart and Wechsler, "The Federal Courts and the Federal System," and found that they omitted the Ninth Amendment entirely from their printing of the important excerpts from the Constitution. . . . What are these other rights retained by the people? To what law shall we look for their source and

In the principal case prior to *Griswold, United Public Workers v. Mitchell,* 330 U.S. 75 (1947), the majority opinion states: "These appellants seem clearly to seek advisory opinions upon broad claims of rights protected by the First, Fifth, Ninth and Tenth Amendments. . . ." *Id.* at 89. But the Court refused to do so. The opinion went on to observe:

> We accept appellants' contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved. . . . Thus we have a measure of interference by the Hatch Act . . . with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments.

Id. at 94-95. The opinion then went on to assert that the congressional interest in protecting "a democratic society against the supposed evil of political partisanship by classified employees of the government" *id.* at 96, was essentially reasonable, thus overriding claims of appellants based on ninth amendment and other constitutional grounds. *Mitchell* thus clarifies little about the ninth amendment.

It has also been argued that:

> The last four words of the Tenth Amendment must have been added to conform its meaning to the Ninth Amendment and to carry out the intent of both—that as to the federal government there were rights not enumerated in the Constitution, which were "retained . . . by the people," and that because the people possessed such rights there were *powers* which neither the federal government nor the states possessed.

> definition? . . . [T]he Ninth Amendment rights which are not to be disturbed by the Federal Government are still a mystery to me.

Kutner, *supra* (quoting R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 74-75 (1963)), quoted at p. 127-28 *supra* (footnote omitted).

See also Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662-63 (1874) (early affirmations of natural law imperatives radiating from the Constitution). In 1905 a Georgia court asserted that a right to privacy derived from natural law: "[T]he right to privacy is rooted in the instincts of nature. . . . A right of privacy . . . is therefore derived from natural law." BRECKENRIDGE, *infra* note 14 (quoting Pavesich v. New England Life Ins. Co., 122 Ga. 190, 194, 50 S.E. 68, 69-70 (1905)) quoted at p. 6 *infra.*

Redlich, *supra* note 11, at 807.[13] Consequently, "[T]hey [the ninth and tenth amendments] were intended to apply in a situation where the asserted right appears to the Court as fundamental to a free society but is, nevertheless, not specified in the Bill of Rights." *Id.* at 808 (footnote omitted). This reasoning is not without merit but we are unpersuaded by it. We believe that the language of the Constitution relevant to the issue confronting us provides established guidelines of construction which do not require us to create new ones. We adhere to the admonition of Mr. Justice Brandeis concurring in *Ashwander v. TVA*, 297 U.S. 288 (1936): "The Court will 'not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Id.* at 347 (Brandeis, J., concurring).

If, then, the foregoing constitutional provisions which were relied upon by the majority opinion in *Griswold* to protect marital privacy do not suffice for the reasons we have stated, what provisions do secure this right?

Mr. Justice Goldberg, concurring in *Griswold*, placed considerable reliance on the ninth amendment as a constitutional bastion against invasions of privacy. He emphasized the word "construed" in that amendment, and then continued:

> Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. . . .
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> . . . In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.

381 U.S. at 492-93. Without reference to the ninth amendment, this was essentially the position of Mr. Justice Murphy in his dissent in

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13. The tenth amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people.*" (emphasis added).

Adamson v. California, 332 U.S. 46, 123-25 (1947) (Murphy, J., dissenting).

Insofar as Mr. Justice Goldberg viewed the ninth amendment as stating a rule of construction as applied to the enumeration of various rights stipulated elsewhere in the Constitution, we agree.

Furthermore, we find a functional similarity between the necessary and proper clause of article I, section 8 and the ninth amendment. Probably nothing is more firmly rooted in our interpretation of the sparse language of the Constitution than Mr. Chief Justice Marshall's employment of the necessary and proper clause. He viewed this as a rule of construction applicable to the enumerated powers of Congress which precede that clause in article I, section 8. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 353-59 (1819). The ninth amendment is located at the end of the articles of the Bill of Rights which enumerate restraints on the powers of Congress and how they shall be used. Similarly the necessary and proper clause is located at the end of the enumerated powers of Congress. For this reason, among others, Marshall read this clause as conveying powers reasonably implied, but not specified, in the preceding enumerated powers. We read the ninth amendment as performing the same role with respect to restraints on the powers of Congress enumerated in the preceding provisions of the Bill of Rights and other restraints on the powers of Congress and the states stated elsewhere in the Constitution.

Since *Palko v. Connecticut*, 302 U.S. 319 (1937) we have consistently affirmed that fundamental rights are components of the liberty protected against state encroachment by the due process clause of the fourteenth amendment. *See Benton v. Maryland*, 395 U.S. 784 (1969); *Duncan v. Louisiana*, 391 U.S. 145 (1968) and cases cited therein. It necessarily follows that the rule of construction stipulated in the ninth amendment illuminates our disposition of issues involving intrusions on fundamental rights by all jurisdictions in our federal system. Surely the category of privacy presented by this case is a fundamental right in a political system born and nourished by a quest for liberty. We hold, therefore, that the ninth amendment performs the same function for the personal rights enumerated elsewhere in the Constitution as does the necessary and proper clause for the enumerated powers of Congress. The ninth amendment provides a rule of construction: "The enumeration in the Constitution,

of certain rights, shall not be *construed* to deny or disparage others retained by the people." (emphasis added). It enjoins an expansive interpretation of rights that may be secured by ambiguous words. The word "liberty" as it appears in the due process clauses of the fifth and fourteenth amendments is plainly such a word. We have no doubt that when construed in accordance with the command of the ninth amendment, liberty includes various situations of privacy including marital privacy.

The notion of privacy is obviously beset by enormous semantic, philosophical, and contextual problems. As one might expect, this is reflected by the voluminous scholarly literature of recent years.[14]

We reject any comprehensive concept or definition of privacy. Perhaps the one offered by Brandeis and Warren, *supra* note 6, "The right to be let alone," is the most engaging. But because of its breadth it fails to withstand analysis in an operational or functional context. Only a Robinson Crusoe before the arrival of Friday might in fact fully possess such a condition of dubious attractiveness. We therefore limit our holding to the precise issue of marital privacy which is before us. However, we do not imply that there may not

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14. *See* A. BRECKENRIDGE, THE RIGHT TO PRIVACY (1970); S. HOFSTADER & G. HOROWITZ, THE RIGHT OF PRIVACY (1964); J. ROSENBERG, THE DEATH OF PRIVACY (1969); A. WESTIN, PRIVACY & FREEDOM (1967); Beany, *The Constitutional Right to Privacy in the Supreme Court*, SUP. CT. REV. 1962, 212; Fried, *Privacy*, 77 YALE L. J. 475 (1968); Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 35 (1967); 31 LAW & CONTEMP. PROB. No. 2 (1966); Parker, *A Definition of Privacy*, 27 RUT. L. REV. 275 (1974); *Privacy (Nomus XIII)*, Y. B. AM. SOC'Y FOR POLITICAL & LEGAL PHILOSOPHY (J. Pennock & J. Chapman eds. 1971).

Histroically the notion of privacy, as a legal category, developed in Anglo-American law as an ingredient of tort law, evolving from common law property rights: trespass, nuisance, theft of one kind or another, and the like. *See* W.L. PROSSER, THE LAW OF TORTS § 117 (4th ed. 1971); 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).

Warren and Brandeis, in their article *The Right to Privacy*, *supra* note 6, in effect extrapolated a right to privacy from established common law protections of property. They sought to demonstrate that it was a free standing interest, not simply a corollary of property rights. However, their discussion focused entirely on private, rather than governmental, intrusions on privacy. For a critique of their position see Kalvin, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966).

In what is probably the first reference to privacy by an American court, the New York Court of Appeals in 1902 stated that Blackstone, Kent, Story, and other notable commentators on the law did not mention the right. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442, 73 N.Y.S. 898 (1902). The right seems not to have been affirmed or examined until the Warren and Brandeis article in 1890, *supra* note 6.

be other categories of privacy meriting similar constitutional protection. In *Roe v. Wade,* 410 U.S. 113 (1973) we affirmed that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregency. . . . We, therefore, conclude that the right of personal privacy includes the abortion decision, . . ." *id.* at 153-54.[15] In *Eisenstadt v. Baird,* 405 U.S. 438 (1972) we held that a Massachusetts statute limiting the distribution of contraceptives violated the equal protection clause of the fourteenth amendment but we also stated that if "the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453. In *Georgia v. Stanley,* 394 U.S. 557 (1969) we held that a Georgia statute punishing the possession of obscene materials violated rights "to receive information and ideas" *id.* at 564, protected by the first amendment. But the opinion also stated that such a law would unconstitutionally "reach into the privacy of one's own home. . . . [and tell] a man, . . . what books he may read or what films he may watch." *Id.* at 565.

In addition to this Court's recognition of privacy as a fundamental constitutional right rooted in the due process clause of the fourteenth amendment, there is no doubt that privacy is also recognized as a fundamental right on a world scale. Article 12 of the Universal Declaration of Human Rights states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, . . . Everyone has the right to the protection of the law against such interference . . . ."[16] Article 17 of the International Covenant on Civil and Political Rights contains nearly identical language.[17] Similar language appears in Article 11 of the American Convention on Human Rights promulgated by the Inter-American Commission on Human Rights.[18]

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15. For a discussion of earlier decisions involving privacy see Roe v. Wade, 410 U.S. at 152-54.

16. The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations December 10, 1948 by a vote of 48-0, eight nations abstaining. BASIC DOCUMENTS ON HUMAN RIGHTS 106 (I. Brownlie ed. 1971).

17. The Covenant on Civil and Political Rights was adopted by the General Assembly of the United Nations December 16, 1966 and signed by 38 nations. *Id.* at 211.

18. The Inter-American Commission on Human Rights is an autonomous entity of the Organization of American States. The American Convention on Human Rights was adopted

That fundamental personal rights find constitutional protection in the due process clauses of the fifth and fourteenth amendments is, by now, firmly established by decisions of this Court beginning at least in 1923 with *Meyer v. Nebraska*, 262 U.S. 390 (1923). In *Meyer* we invalidated a Nebraska statute which prohibited the teaching of German to students who had not passed the eighth grade. Expressing the views of seven members of that Court,[19] Mr. Justice McReynolds stated:

> While this Court has not attempted to define with exactness the liberty thus guaranteed [by the due process clause of the fourteenth amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399. Mr. Justice McReynolds concluded in *Meyer* that "No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with a consequent infringement of rights long freely enjoyed." *Id.* at 403. Concededly, Mr. Justice McReynolds did not differentiate between economic or property rights and personal rights—a distinction he never accepted. Nevertheless, in the perspective of over half a century, we regard this as a classic statement of the vague language of this clause of the Constitution.

In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) a unanimous Court sustained a challenge by private and parochial schools to an Oregon statute which required children to attend public schools. The opinion stated that the law infringed "the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35.

November 22, 1969. *Id.* at 399. *See also* S. STROMHOLN, THE RIGHTS OF PRIVACY AND THE RIGHTS OF PERSONALITY (1967) which discusses European counterparts to American law of privacy.

19. Mr. Justice Holmes and Mr. Justice Sutherland dissented.

A year later in *Herbert v. Louisiana,* 272 U.S. 312 (1926) the Court asserted that what the due process clause of the fourteenth amendment requires "is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ." *Id.* at 316. Then in *Palko v. Connecticut,* 302 U.S. 319 (1937) Mr. Justice Cardozo, writing for a majority of eight, explicated the fundamental rights extension of the due process clause of the fourteenth amendment, stating that: "The extension became, indeed, a logical imperative when once it was recognized, . . . that even in the field of substantive rights and duties the legislative judgement, if oppressive and arbitrary, may be overridden by the courts." *Id.* at 327.

Since then the Court, with particular selectivity, has continued to extend the protection of the due process clause to restrictions imposed on a variety of liberties not specified as such in the Constitution. *Wieman v. Updegraff,* 344 U.S. 183 (1952) (invalidating a state statute subjecting employees to arbitrary dismissal); *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957) (invalidating a state statute arbitrarily restricting admission to the bar); *Kent v. Dulles,* 357 U.S. 116 (1958) and *Aptheker v. Secretary of State,* 378 U.S. 500 (1964) (upholding the right to travel as an ingredient of the liberty protected against prohibitions by the federal government under the due process clause of the fifth amendment).

We agree with the persuasive reasoning of Mr. Justice Harlan's dissent[20] in *Poe v. Ullman,* 367 U.S. 497 (1961):

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . .
>
> It is this outlook which has led the Court continuingly to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from

20. The majority dismissed the appeal challenging the Connecticut antibirth control statute, subsequently invalidated by *Griswold,* on justiciability grounds.

> a particular provision's larger context. *And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.*

Id. at 542-43 (Harlan, J., dissenting) (emphasis added).

In the same vein we heed the admonitions of Mr. Justice Frankfurter in *Louisiana ex rel Francis v. Resweber,* 329 U.S. 459 (1947) (Frankfurter, J., concurring):

> But broad as these clauses [of the fourteenth amendment] are, they are not generalities of empty vagueness. . . . The safeguards of "due process of law" . . . summarize the meaning of the struggle for freedom of English-speaking peoples. They run back to Magna Carta but contemplate no less advances in the conceptions of justice and freedom by a progressive society. . . .
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> . . . .
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> . . . The Fourteenth Amendment did not mean to imprison the States into the limited experience of the eighteenth century. It did mean to withdraw from the States the right to act in ways that are offensive to a decent respect for the dignity of man, and heedless of his freedom.
>
> These are very broad terms by which to accomodate freedom and authority. . . . [T]hey may be too large to serve as the basis for adjudication, in that they allow much room for individual notions of policy. That is not our concern. The fact is that the duty of such adjudication on a basis no less narrow has been committed to this Court.
>
> In an impressive body of decisions this Court has decided that the Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards which are not defined by the specifically enumerated guarantees of the Bill of Rights. They neither contain the particularities of the first eight amendments nor are they confined to them.

Id. at 466-68.

In a similar vein, viewing our more recent decisions in the realm of personal rights, a scholar of this Court has observed: "Each of the rights that the Constitution explicitly recognizes is itself no more than a brief epitome of a principled generality that allows, indeed

requires, judicial explication." L. LEVY, AGAINST THE LAW 311 (1974).

In *Griswold* both Mr. Justice Harlan and Mr. Justice White rested their concurrence in the judgment of the Court in that case properly, we believe, on due process grounds. 381 U.S. at 499-502 (Harlan, J., concurring), 502-07 (White, J., concurring).

Mr. Justice Stewart, who dissented in *Griswold,* wrote in his concurring opinion in *Roe v. Wade,* "[T]he *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the 'liberty' that is protected by the Due Process Clause of the Fourteenth Amendment. . . . and I now accept it as such." 410 U.S. at 168. He then quotes, with understandable approval, from the majority opinion which he wrote in *Board of Regents v. Roth,* 408 U.S. 564 (1972): "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." 410 U.S. at 168 (quoting *Roth,* 408 U.S. at 572). Mr. Justice Rehnquist in his dissent in *Roe v. Wade* stated that the word "liberty" in the due process clause of the fourteenth amendment "embraces more than the rights found in the Bill of Rights." 410 U.S. at 172-73. We agree, and we hold that those freedoms include the other rights, of which privacy is one, stipulated in the ninth amendment in its appropriate role of prescribing a broad construction of constitutional rights.

The powers of government under the Constitution are awesome. Inevitably, big society breeds big government. As Mr. Justice Murphy observed for a unanimous Court in *American Power & Light Co. v. SEC,* 329 U.S. 90 (1946): "[T]he federal commerce power is as broad as the economic needs of the nation." 329 U.S. at 104. Conversely, our constitutional system of limited government can also sustain the proposition that the liberty protected by the due process clauses of the fifth and fourteenth amendments is as broad as the needs of our society to protect the fundamental personal rights of the individuals within it, absent a compelling governmental interest to limit them.

In arriving at these conclusions we recall from *McCulloch v. Maryland, supra* the classic exhortation of Mr. Chief Justice Marshall: "[W]e must never forget, that it is *a constitution* we are expounding." *Id.* at 407. "[A] constitution" he declared, "intended

to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." *Id.* at 415. Recently Mr. Justice Brennan stressed the evolving quality of the Constitution in *Furman v. Georgia,* 408 U.S. 238 (1972) (Brennan, J., concurring) by asserting that none would now argue that the fifth amendment prohibition of placing any person in double jeopardy of life or limb "provides perpetual constitutional sanction for such corporal punishments as branding and ear cropping, which were common punishments when the Bill of Rights was adopted." *Id.* at 283 n.28.

Finally, our holding, and the constitutional grounds in which it is rooted, in no way raises the spectre of a resurgence of the due process jurisprudence of which *Lochner v. New York,* 198 U.S. 45 (1905) is perhaps the archetype.[21] Since 1937 in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937), foreshadowed by *Nebbia v. New York,* 291 U.S. 502 (1934), we have consistently ruled that the due process clause of the fourteenth amendment imposes no restraints on the states in the exercise of their police powers in regulating their economic affairs provided the means employed bear a rational relationship to their police powers. In most instances there is a rational and objectively identifiable distinction between personal liberty and what was generally regarded as economic liberty during the approximately fifty-year period preceding *West Coast Hotel.* The wall of separation between our *Lochner* due process decisions and our post-1937 due process decisions concerning economic policies has remained high and impregnable. Mr. Justice Frankfurter expressed the vital distinction thus:

> [I]n considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensible conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.

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21. *See also* Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation,* 15 ARIZ. L. REV. 419 (1973); Tribe, *The Supreme Court 1972 Term, Foreword: Toward a Model of Roles in the Due Process of Life & Law,* 87 HARV. L. REV. 1 (1973). *See generally* C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930).

Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

In 1952 we reaffirmed this distinction:

> Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits, as *Tot v. United States*, 319 U.S. 463, holds. But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided.

Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).[22] Our holdings in *Olson v. Nebraska*, 313 U.S. 236 (1941), *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) and *Ferguson v. Skrupa*, 372 U.S. 726 (1963) amply confirm the consistency of our deference to state legislative discretion in the realm of economic regulation. Mr. Justice Black, expressing the views of eight members of the Court in *Ferguson*, declared:

> There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . .
>
> . . . [That] doctrine . . . has long since been discarded. . . . . Legislative bodies have broad scope to experiment with economic problems, . . . It is now settled that States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, . . ." [*Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. at 536] . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.

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22. At issue in *Day-Brite Lighting* was the validity of a statute permitting an employee to absent himself from his employment for four hours, without loss of pay, in order to vote.

Id. at 729-32 (footnotes omitted).

The ghost of *Lochner* will remain banished not only by the force of these decisions, but more compellingly because of the commanding thrust of the ninth amendment in protecting against invasion by either Congress or the states of personal rights protected by the Bill of Rights and the fourteenth amendment.

To summarize our disposition of this case, we find that the Columbia statute unconstitutionally trespasses upon rights of privacy which are embraced by the liberty protected by the due process clause of the fourteenth amendment. Where personal rights are involved, as distinct from predominantly economic or property rights, a broad construction of that liberty is enjoined by the language of the ninth amendment. Marital privacy and other privacies intrinsically associated with the home involve fundamental rights protected from the intrusive hand of governement in a free society. Fundamental rights have long been recognized by decisions of this Court as protected by the due process clauses of the fifth and fourteenth amendments and they are co-extensive with the other rights to which the ninth amendment refers. Fundamental to a free society, such rights may neither be invaded nor truncated by the police powers of the state, absent a compelling state interest to do so. No such interest has been presented by Columbia to justify the statute at issue.

In some circumstances it may be, as Mr. Justice Stewart urged in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972) that:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account.

Id. at 552. Nevertheless, the problem of the identification of, or the distinction between, personal and economic rights, or of an inseparable or subtle mix of both, although sometimes formidable, is not in all instances beyond rational and principled resolution. The problem is ultimately one of degree and impact. In the present case the degree of invasion on the patently personal right of marital privacy and the invidious impact on one of the most personal and private

of human relations is so egregious that the personal/economic rights dilemma evaporates in the teeth of the facts. It does not take absolute intellectual pitch to distinguish a right as distinctively and exclusively personal as the one before us.

Reversed.

Mme. Justice Thomas, with whom Mr. Justice Martin joins, dissenting.

Despite the considerable verbal efforts of the majority opinion of the Court, the fact remains, as the opinion concedes, that the word "privacy" appears nowhere in the Constitution. Moreover, privacy has singularly protean and subjective connotations. One person's privacy may be another person's prison. We do not sit to amend the Constitution to conform to our personal values or to the values of anyone else. Regardless of the Court's disclaimers to the contrary, it has done exactly that; and in doing that it has taken a long step backward toward exhuming the substantive due process typical of the *Lochner*-like line of decisions which I thought this Court had given a proper interment several decades ago. In attempting to avoid the *Lochner* breed of substantive due process decisions, the majority attempts to distinguish personal rights from economic or personal rights. However, the distinction is tenuous at best. One commentator has observed that:

> [T]he recognition is growing that the distinction between "personal" and "property" rights, much like that between "rights" and "privileges," is analytically weak; that it overlooks the importance of property and contract in protecting the dispossessed no less than the established; that it forgets the political impotence of the isolated jobseeker who has been fenced out of an occupation; and that it could in any event justify no more than a relatively modest difference in degree between the judicial roles in the two areas.

Tribe, *supra* note 21, at 9 (footnotes omitted).[23]

23. *See* Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); Bell v. Burson, 402 U.S. 535, 539 (1971). *See also* McCloskey, *Economic Due Process and The Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 45-50; Reich, *The New Property*, 73 YALE L. J. 733, 771-74 (1964).

The majority opinion appears to be singularly blind to the fact that not every value embraced by personal idiosyncrasies can be squeezed into a category of constitutionally protected liberty. Once again the Court has confused its function with that of a legislature. Moreover, it is scarcely rational, much less good law, to dismiss out of hand the claim that there is a substantial state interest embodied in the provisions of the Columbia statute. From its infancy, the law has consistently reflected an interest in the regularization of the family unit of society. That interest is a legitimate one in any civilized society. It has rarely been successfully challenged or gainsaid. In substantial respects, the family, the marital relationship, and the parent-child relationship are creatures of the law subject to legal controls promulgated by the policy making institutions of the political system—in our case the legislatures. *See, e.g., Labine v. Vincent*, 401 U.S. 532 (1971).

It is one thing to assert, as the majority opinion does, that the holding in this case "in no way raises the spectre of a resurgence of the due process jurisprudence of which *Lochner v. New York*, 198 U.S. 45 (1905) is perhaps the archetype." It is another thing to practice it now that the door has in fact been opened. The dangers of recidivism are substantial, particularly when a potential result is congenial to the recidivist. Almost always the first step into territory which ought to be forbidden is in pursuit of results thought to be desirable. The Court makes much of the notion of fundamental rights or values. But one can well ask, without unduly flogging an old horse, where are a society's values to be found? As Alexander Bickel wrote in THE MORALITY OF CONSENT (1975):

> The rights of man cannot be established by any theoretical definition; they are "in balances between differences of good, in compromises sometimes between good and evil, and sometimes between evil and evil. Political reason is a computing principle: adding, subtracting, multiplying, and dividing, morally and not metaphysically, or mathematically, true moral denominations."

Id. at 23-24. "[T]he highest morality," Bickel concluded, "almost always is the morality of process." *Id.* at 123. That is what the Court has fumbled here—the morality of process. It has simply not accepted the discipline which it should accept. In our system, as Mr. Justice Frankfurter time after time perceived, disputed policies

bred by the political process must be resolved by the political process, which we all concede is slow and prone to error. But that is the only legitimate path. That is "the morality of process."

Grasping for straws to support its mystique of the liberty protected by the due process clause, the opinion quotes Mr. Justice Frankfurter. But probably no Justice who has ever sat on this Court, with the possible exception of Mr. Justice Holmes, was more adamantly opposed to judicial legislation by way of intruding the gloss of personal preferences into the language of the Constitution. *See, e.g., West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

Finally, the dissents of both Mr. Justice Black and Mr. Justice Stewart in *Griswold v. Connecticut,* 381 U.S. 479, 507 (1965) (Black, J., dissenting), 527 (Stewart, J., dissenting) provide, in my judgment, definitive statements as to why there is nothing in the Constitution of the United States to prevent any state from enforcing a statute similar to those enacted by Connecticut and Columbia.