THE RIGHT OF PRIVACY: A BLACK VIEW OF *GRISWOLD v. CONNECTICUT*

*By Morgan D.S. Prickett**

I. Introduction

Who will deny the value of privacy? In this age of data banks, governmental surveillance, and increasing sophistication in eavesdropping techniques, the word itself evokes images of hearth and home. The value of this ethereal thing called privacy is seemingly self-obvious and beyond dispute.

It may therefore come as a surprise to discover that the "right" of privacy has been accorded constitutional protection only since 1965. In that year the United States Supreme Court decided the case of *Griswold v. Connecticut*.[1] By a seven to two vote, the Court declared that a statute forbidding the use of contraceptive devices was unconstitutional as an unconscionable intrusion into the privacy of the marital relationship.

Mr. Justice Black dissented. The Court's senior member felt that the Court's announcement of a constitutional right of privacy was unwarranted because no specific constitutional provision guaranteed such a right. The major emphasis of Justice Black's opinion was its accusation that "privacy" was an inchoate concept of uncertain dimensions which a majority of the Court had adopted in order to transcribe their personal ideas of normative social and political philosophy into constitutional dogma. Justice Black felt that the Court's action ignored well-established canons of judicial decision-making and threatened to upset the balance of the constitutional system specified by the Framers of the Constitution. Justice Black feared that the *Griswold* decision was the harbinger of a return to substantive due process, a concept alien to the judicial function and one which the Court had previously repudiated after disastrous experience.[2]

Griswold was immediately recognized as a case of unusual importance. A prominent law school held a symposium on its meaning and ramifications.[3] A commentator in the American Bar Association Jour-

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1. 381 U.S. 479 (1965).

2. *Id.* at 520-22 (dissenting opinion of Black, J.).

3. *Symposium on the Griswold Case and the Right of Privacy*, 64 MICH. L. REV. 197 (1965).

nal called it the year's "most important decision."[4] Amid the near-universal approval of the demise of what the victorious attorney labelled a "hopelessly insupportable piece of state legislation,"[5] Justice Black's dissent received reactions ranging from the puzzled[6] to the outraged.[7]

Eight years later the Court handed down the abortion cases[8] and founded its decisions squarely upon the *Griswold* right of privacy. By this time, Justice Black was no longer a member of the Court, but the objections stated in his *Griswold* dissent have become the focus for the growing unease among the public and legal profession concerning the Court's decisions in the privacy area. The Court's actions have been increasingly perceived not as impersonal applications of constitutional principles, but rather as result-oriented assertions of essentially legislative power.[9] Senator Jesse Helms of North Carolina defended his proposed constitutional amendment banning abortion as "a stand against what has become the shame of our nation—the widespread practice of abortion *thrust upon us by the Federal Judiciary*."[10] The fact that the opposition to the Court's decisions has increased in both size and effectiveness[11] demonstrates a current topicality which justifies a reexamination of Justice Black's initial criticisms of the privacy doctrine.

Justice Black did not deny that the use of substantive due process might produce otherwise desirable results in certain instances.[12] This

4. Keeffe, *Practicing Lawyers' Guide to the Current Law Magazines*, 51 A.B.A.J. 885 (1965).

5. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965).

6. More in sorrow than in anger, the response of the *New Republic* was typical: "Mr. Justice Black, the Court's great literalist, at whose bidding the words of the Bill of Rights and of the Fourteenth Amendment have in the past meant many an admirable thing . . . was unable to see how due process laws or any others, could be read to protect [against this] intolerable intrusion into the privacy of the conjugal bed." NEW REPUBLIC, June 19, 1965, at 7.

7. Professor Glendon Schubert characterized Mr. Justice Black as a "rigid, crotchety, dogmatic old man," and attributed his failure to join the majority to cultural obsolescence and/or psychophysiological senescence. G. SCHUBERT, THE CONSTITUTIONAL POLITY 127 (1970).

8. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

9. *E.g.*, NEWSWEEK, Dec. 10, 1979, at 140; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 922, 926 (1973).

10. 122 CONG. REC. 6456 (1976) (emphasis added). *See also* the remarks of the subsequent debate. *Id.* at 11,554-78.

11. The public reaction to the abortion decisions has now reached the dimension of a mass political movement. *See generally Constitutional Convention on Abortion Ban*, 36 CONGRESSIONAL QUARTERLY WEEKLY REPORT, July 1, 1978, at 1677-79. The subject of the Court's actions in the privacy area has not escaped critical examination by legal commentators, especially as it implicates the larger issues of constitutional doctrine and judicial competence. *See, e.g.*, L. LUSKY, BY WHAT RIGHT? (1975) [hereinafter cited as LUSKY]; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

12. 381 U.S. at 515-16. Mr. Justice Black cited Pierce v. Society of Sisters, 268 U.S. 510

primary justification for substantive due process is advanced by its defenders, who argue that its fluidity permits the Court to strike down laws which are not prohibited by the terms of specific constitutional provisions, yet which deserve condemnation because they are oppressive, arbitrary or otherwise repugnant to the "spirit" of the Constitution.[13] But Justice Black insisted that while the contents of substantive due process are uncertain, the dangers that attend its exercise are unchanging. He was convinced that the dangers so far outweighed the immediate benefits that the Court should eschew substantive due process because it was constitutionally forbidden, and because it was too perilous and unpredictable a tool for the Court to employ.[14]

This note will examine the *Griswold* decision at some length paying particular attention to Justice Black's dissent. The note will then discuss the broader jurisprudential background underlying Justice Black's criticisms. It will then assess the validity of these criticisms in light of the evolution of the privacy concept over the last fifteen years. The note will conclude with an examination of the Court's response to these objections and the implications of the continued use of the privacy doctrine as measured against Justice Black's jurisprudence.

II. The *Griswold* Case

Estelle Griswold had been convicted as an accessory to the violation of a Connecticut statute which read

> Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.[15]

She appealed to the United States Supreme Court. Ms. Griswold contended that the law infringed upon a right of privacy which was implicit in the totality of the Constitution but which had never been recognized by a decision of the Court.[16]

Seven members of the Supreme Court voted to reverse the convic-

(1925) and Meyer v. Nebraska, 262 U.S. 390 (1923) as two examples of presumably sound results produced by objectionable reasoning.

13. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 542-45 (1961) (Harlan, J., dissenting); Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 202 (1965); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

14. 381 U.S. at 521-22.

15. CONN. GEN. STAT. ANN. § 53-32 (West). Griswold's conviction had been affirmed by the appellate division of the circuit court and the Connecticut Supreme Court of Errors. State v. Griswold, 151 Conn. 544, 200 A.2d 479 (1964).

16. The gravamen of Griswold's theory on appeal was that the law as applied violated the Third, Fourth, Fifth, Ninth and Fourteenth Amendments. For a discussion of the strategy involved, *see* Pollak, *T.I. Emerson, Lawyer and Scholar: Ipse Custodiet Custodes*, 84 YALE L.J. 638, 643-48 (1975) [hereinafter cited as Pollak].

tion and declare the law unconstitutional. Justice Douglas' opinion for the majority[17] acknowledged that Griswold had standing to maintain the suit while asserting the rights of others.[18] Turning to the merits of the constitutional issue, the Court confronted Griswold's contention that the law was invalid because it violated the liberty interest secured by the due process clause of the Fourteenth Amendment.[19] However, Justice Douglas, suspicious of the overtones of substantive due process implicit in this argument, "decline[d] the invitation" to base the decision on this ground.[20]

Instead, Justice Douglas began his analysis by describing how, in previous cases, the Court had recognized and enforced certain rights not expressly enumerated in the Constitution. For example, in *NAACP v. Alabama*, the Court had declared that the "freedom to associate and privacy in one's associations" are implicit in the First Amendment.[21] The Court had reasoned that privacy was needed to prevent retaliation against those who joined unpopular organizations to better exercise their rights of free speech and assembly.[22] As with the right to dis-

17. The Douglas opinion was joined by Chief Justice Warren and Justices Clark, Brennan and Goldberg. Justice Goldberg wrote a concurring opinion for himself and Chief Justice Warren and Justice Brennan. Justices Harlan and White also delivered concurring opinions. Justices Black and Stewart each dissented in an opinion joined by the other.

18. Griswold was executive director of the Planned Parenthood League of Connecticut. Because her arrest and conviction were based upon her actions as a counselor to married couples, *i.e.*, assisting others to exercise their rights, the Court held that she had standing to challenge the law on behalf of those with whom she had enjoyed a professional relationship of trust. 381 U.S. at 481.

Griswold was the third challenge of the law to reach the Supreme Court. The issue of standing had been determinative of the earlier suits, neither of which had reached a decision on the merits as to the statute's constitutionality. In Tileston v. Ullman, 318 U.S. 44 (1943), the Court held that a plaintiff who sought to represent others in seeking a declaratory judgment of the law's constitutionality lacked the requisite standing to sue. In Poe v. Ullman, 367 U.S. 497 (1961), the Court ruled that because of the desultory and erratic enforcement of the law, a plaintiff seeking a declaratory judgment had not presented a justiciable controversy when he was not threatened with fine or imprisonment for violating the law.

19. Pollak, *supra* note 16, at 648.

20. 381 U.S. at 481-82. At a later point in his opinion, Justice Douglas did refer to an earlier opinion where he had accepted the view that the Connecticut statute infringed a privacy interest which was a part of the "liberty" protected by the due process clause. *Id.* at 484 (citing Poe v. Ullman, 367 U.S. 497, 516-22 (1961) (Harlan, J., dissenting)). It is the opinion of at least one commentator that Justice Douglas' emphasis upon the specific provisions of the Bill of Rights tacitly assumed that any right arising under the first eight amendments was made enforceable against the states through the due process clause. Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 19 VILL. L. REV. 833, 837 (1974). To the extent that he implied that the due process clause played no role in his decision, Justice Douglas was too emphatic. It is more likely that he was declining the invitation only to the extent such a holding suggested that the law could be struck down solely with reference to the due process clause, thereby ignoring the specific provisions of the Bill of Rights.

21. NAACP v. Alabama, 357 U.S. 449, 462 (1958).

22. *Id.* at 460, 462.

tribute and receive opinions,[23] the right of association was recognized as an implicit component of the First Amendment, which had been construed to encompass these peripheral rights in the belief that without them "the specific rights would be less secure."[24]

Justice Douglas conceptualized peripheral rights as enabling rights. Although unenumerated in the Constitution, they are recognized and enforced to facilitate the free exercise of rights which are specifically guaranteed. When Justice Douglas defended the recognition of peripheral rights because their "existence is necessary in making the express guarantees fully meaningful,"[25] the clear implication was that the intrinsic value of these rights was subordinate to their utility as a means to an end.

Justice Douglas concluded from these cases that privacy was one such peripheral right. He stated that "emanations" from certain specific constitutional provisions created "zones of privacy" which are constituent elements of the rights guaranteed by the specific provisions.[26] These privacy rights exist *in* the interstices—what Justice Douglas termed the "penumbras"—surrounding the express rights.[27] Yet peripheral rights, such as association, do not constitute privacy's only source of constitutional protection. The Douglas opinion also examined several specific rights and discerned that these provisions also protected privacy.

One of these provisions was the Fourth Amendment. In a 1949 decision, the Court had emphasized that privacy was at "the core" of that amendment.[28] Only four years before *Griswold*, the Court had again spoken of "the right of privacy embodied in the Fourth Amend-

23. 381 U.S. at 482, *citing* Martin v. Struthers, 319 U.S. 141, 143 (1943). *See also* Lovell v. Griffin, 303 U.S. 444 (1938).

24. 381 U.S. at 483.

25. *Id.*

26. *Id.* at 484.

27. Thus, Justice Douglas spoke of the "right of association contained *in* the penumbra of the First Amendment." 381 U.S. at 484 (emphasis added).

Penumbra is defined in *Webster's New Collegiate Dictionary* (2d ed. 1949), at 623, as "the space of partial illumination, as in an eclipse between the umbra, or the perfect shadow, on all sides, and the full light[:] The shaded region around the dark central portion." For a trenchant criticism of the phrase and its connotations, see R. BERGER, GOVERNMENT BY JUDICIARY, 294 n.47 (1977) [hereinafter cited as BERGER].

The idea that penumbral areas of constitutional provisions could be the source of constitutional rights and governmental power was not a novel concept. The core idea seems to have originated during the heyday of the Court's use of substantive due process. *See, e.g.*, Schlesinger v. Wisconsin, 270 U.S. 230, 241-42 (1926) (Holmes, J., dissenting); Springer v. Philippine Islands, 277 U.S. 189, 209-10 (1928) (Holmes and Brandeis, JJ., dissenting); Olmstead v. United States, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting); Arrow-Hart & Hegeman Electric Co. v. FTC, 291 U.S. 587, 607 (1934) (Stone, J., dissenting).

28. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

ment."[29] Justice Douglas found that privacy was also protected by the self-incrimination clause of the Fifth Amendment. That provision "enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment."[30] Together, the Fourth and Fifth Amendments secure " 'the sanctity of a man's home and the privacies of life' "[31] from governmental intrusion.

29. Mapp v. Ohio, 367 U.S. 643, 660 (1961). The Court had so prominently discussed privacy in Fourth Amendment cases that one commentator observed that at the time of *Griswold*, privacy had become virtually synonomous with the right to be free from unreasonable searches and seizures. Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 19 VILL. L. REV. 833 (1974).

30. 381 U.S. at 484. The period immediately preceding *Griswold* witnessed a reevaluation of underlying rationale of the self-incrimination clause and its applicability to the states. The traditional construction of the privilege was that it secured every individual's right to be free from "all manifestations of compulsion, whether arising from torture or from moral cause." Bram v. United States, 168 U.S. 532, 547-48 (1897). But this was the scope of the federal right; until 1964, it had no application to the several states. *See, e.g.*, Cohen v. Hurley, 366 U.S. 117 (1961); Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908). Even when state officers employed torture or severe psychological duress to procure confessions, the Court eschewed reliance upon the self-incrimination clause. Convictions so obtained were reversed for their repugnancy to the concept of due process, not because the defendant was compelled to incriminate himself. *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

The Court reconsidered this position in 1964, one year before *Griswold* was decided. In Malloy v. Hogan, 378 U.S. 1 (1964), the Court abandoned the view that the self-incrimination clause was not applicable per se to the states. The Court was now of the opinion that the Fourteenth Amendment secured the privilege from state invasion to the same extent that it restrained the federal government. Henceforth, all units of government must respect "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Id.* at 8.

Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), decided on the same day as *Malloy*, went beyond the abstract issue of the applicability of the privilege to the states and examined the substantive policies represented in the self-incrimination clause. The Court found that the privilege reflects "many of our fundamental values and most noble aspirations." *Id.* at 55. Presaging *Griswold*'s talk of "zones," the *Murphy* Court ascertained that one of the purposes of the privilege was to preserve "the right of each individual 'to a private enclave where he may lead a private life.' " *Id.* (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)). This statement was of striking relevance to the *Griswold* decision. Yet *Murphy*'s "private enclave" went unmentioned in *Griswold*. Nevertheless, this omission does not detract from the fact that *Malloy, Murphy* and *Griswold*, all decided within the space of 53 weeks, provide strong support for the proposition that the Court was increasingly prone to conceive of the Fifth Amendment as an independent source of constitutional protection for privacy. Like the privacy interest protected by the Fourth Amendment, the privacy interest of the Fifth Amendment was not found in the literal test of the Constitution. Rather it was a judicial gloss drawn from the purposes and presuppositions of a constitutional provision.

31. 381 U.S. at 484, (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). *Boyd* was the first discussion of the conjunctive effect of the Fourth and Fifth Amendments. Cases dealing with both amendments were thereafter a regular feature in constitutional litigation. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Olmstead v. United States, 277 U.S. 438

In addition, provisions which had not given rise to extended judicial examination reinforced Justice Douglas' belief that there was a privacy interest put beyond the reach of the State by the Constitution. This interest could be found in the Constitution's solicitude for privacy implicit in the Third and Ninth Amendments.[32]

A third and final constitutional source of protection for privacy provided the foundation for the *Griswold* opinion. Although he did not expound this idea at any length, Justice Douglas found that a general intention to foster privacy is implicit in the purpose of the Bill of Rights. He had earlier said that privacy is a value which inheres in the concept of a free society.[33] Consistent with the belief that the Constitution presupposes a citizenry with the integrity and independence of character which is promoted by the existence of a sphere of privacy immune from governmental intrusion,[34] Justice Douglas deemed privacy a predicate for the development and exercise of numerous constitutional freedoms. To achieve this end, Justice Douglas reasoned that a zone of privacy for the individual is necessarily implied in the design of the Constitution. This privacy is not within the literal terms of the first eight amendments, yet it is of a piece with them, for both have a common objective—to promote and sustain the maximum scope of unfettered personal liberty free from arbitrary governmental restraints. This component source of privacy exists in a non-localized and inchoate state, yet it is within the contemplation of the fundamental law of the land: "It emanates from the totality of the constitutional scheme under which we live."[35]

These sources of constitutional protection for privacy—peripheral rights within the penumbras of specific provisions, the specific provisions with their expressly enumerated rights, and the unarticulated intention of the Constitution—were aggregated by Justice Douglas to

(1928); Weeks v. United States, 232 U.S. 383 (1914). The two continue to be asserted in tandem. *See, e.g.*, Andresen v. Maryland, 427 U.S. 463 (1976).

32. 381 U.S. at 484. In his dissent in *Poe v. Ullman*, Justice Douglas had compared the Connecticut statute with the Third Amendment and asked the question, "Can there be any doubt that a Bill of Rights that in time of peace bars soldiers from being quartered in a home 'without the consent of the Owner' should also bar the police from investigating the intimacies of the marital relationship?" Justice Douglas' answer was that "The idea of allowing the State that leeway is congenial only to a totalitarian regime." 367 U.S. 497, 522 (1961) (footnote omitted) (Douglas, J., dissenting).

33. Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting) (". . . the privacy that is implicit in a free society . . . . [and which] emanates from the totality of the constitutional scheme . . .").

34. "The strength of our system is in the dignity, the resourcefulness, and the independence of our people." PUC v. Pollak, 343 U.S. 451, 469 (1953) (Douglas, J., dissenting). *Accord*, Poe v. Ullman, 367 U.S. 497, 514 (1961) (Douglas, J., dissenting). *See also* note 244 *infra*.

35. Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting).

create and preserve a sphere of personal autonomy for the individual. Their collective impact persuaded the Court that the right of privacy urged by Griswold was deserving of constitutional recognition.[36] Justice Douglas perceived that these diverse and discrete sources all contained the common denominator of a concern for privacy. He used this insight to discern a single composite "zone of privacy" that manifested itself as a distinct constitutional right.[37]

Having established legitimacy of the right of privacy, Justice Douglas found that the marital relationship was within the penumbral zone of privacy and thus immune from arbitrary state interference.[38] There being a fundamental personal right of constitutional dimension, it followed that the state law could be sustained only if it acheived its aim by means which minimized restrictions on the right.[39] In this respect Connecticut's statute was deficient, for it operated with "maximum destructive impact" on the marital relationship and consequently on the right of privacy.[40]

A prominent feature of the majority opinion was its notable reluctance to embrace any rationale suggesting substantive due process. This aversion was a departure from Justice Douglas' previous opinions in the privacy area, which had evinced an unambiguous willingness to accept the doctrine.[41] But if Justice Douglas displayed second thoughts about the wisdom of this position, five of his brothers—an outright majority of the Court—had no such hesitation. With varying degrees of candor and enthusiasm, the concurring Justices made explicit their exercise of substantive due process.

Justice Goldberg wrote a concurring opinion for himself, Chief Justice Warren and Justice Brennan, which expanded upon one aspect of the majority opinion. Justice Douglas had simply recited the text of the Ninth Amendment on his way to establishing the various sources of the right to privacy.[42] Justice Goldberg went beyond this cursory treat-

36. 381 U.S. at 485.

37. *Id.*

38. *Id.*

39. Justice Douglas quoted the familiar principle 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.' " *Id.* (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)).

40. The potential for harm was implicit in the enforcement of the law: "If it can make this law, it can enforce it. And proof of its violation necessarily involves an inquiry into the relations between man and wife." Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting). Justice Douglas was a bit more graphic in *Griswold*: "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. . . ." 381 U.S. at 485-86.

41. Poe v. Ullman, 367 U.S. 497, 509 (1961) (Douglas, J., dissenting); PUC v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

42. 381 U.S. at 484. The Ninth Amendment reads: "The enumeration in the Constitu-

ment and delivered the first full dress discussion of the Ninth Amendment in the Court's history. According to Justice Goldberg, while the Ninth Amendment is not "an independent source of rights," nor is it applied by the Fourteenth Amendment against the several States,[43] it is "relevant in showing the existence of other fundamental rights"[44] not specifically enumerated in the first eight amendments,[45] but nonetheless included in the liberty interests protected against state infringement by the due process clause.[46]

Justice Goldberg, like Justice Douglas, thought it appropriate for courts to seek out the unarticulated premises behind the Constitution. Justice Goldberg would look to the "entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees" to discover those fundamental personal rights implied by the Ninth Amendment.[47] Justice Goldberg felt that these fundamental rights could be identified if judges consulted the "traditions and collective conscience of our people," and the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[48] Any right discerned by this process is not rooted in the Ninth Amendment, nor does the amendment have an intrinsic enforcement capacity. Rather, the Ninth Amendment is an aid to the identification of fundamental rights; the rights themselves are secured from state infringement by the Fourteenth Amendment.[49]

Once this innovative methodological foundation had been articulated, Justice Goldberg had no difficulty in identifying marital privacy as one of these fundamental personal rights. Because it was "retained by the people" as contemplated by the Ninth Amendment, Connecticut's attempted encroachment upon it was impermissible.[50]

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tion, of certain rights, shall not be construed to deny or disparage others retained by the people."

43. *Id.* at 492 (Goldberg, J., concurring).

44. *Id.* at 493. Justice Harlan would later characterize the role of the Ninth Amendment as ". . . largely confirmatory of rights created elsewhere in the Constitution. . . ." Flast v. Cohen, 392 U.S. 83, 129 n.18 (1968) (Harlan, J., dissenting).

45. 381 U.S. at 492.

46. *Id.* at 486, 493.

47. *Id.* at 495.

48. *Id.* at 493.

49. Justice Goldberg may have been accurate in maintaining that the Ninth Amendment is not itself enforceable against the states through the due process clause. The sources he cited by James Madison, the author of the Ninth Amendment, are consistent with the conclusion that the amendment was meant to restrain the federal government. 381 U.S. at 489-90. This interpretation could support the Framers' belief that fundamental rights did exist but that the states were left with plenary authority in matters affecting such rights. Standing by itself, the Ninth Amendment is harmonious with the opinion of Alexander Hamilton—which was quoted by Justice Goldberg—that the Federal Government was one of delegated powers. *Id.* at 489 n.4.

50. The use of the Ninth Amendment provoked much of the commentary that followed

Justice Harlan concurred with the result reached by the Court, but he declined to subscribe to either the Douglas or Goldberg approach. In an earlier case he had stated that the " 'private realm of family life which the state cannot enter' " is a most fundamental aspect of the liberty secured by the due process clause.[51] Connecticut, through its statute, sought to intrude upon the most intimate details of the marital relationship with the full panoply of its police powers. Justice Harlan believed that rather than strain to fit the right of privacy into the existing framework of the Bill of Rights, the Court should examine a challenged law for its compatibility with the due process clause. The appropriate judicial inquiry should seek to vindicate and preserve "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 a rational continuum which, broadly speaking, includes a freedom from all substantial impositions and purposeless restraints. . . ."[52] A law would be declared invalid if it encroached upon those basic values " 'implicit in the concept of ordered liberty.' "[53] While specific provisions of the Bill of Rights could be factors in this examination as points of reference, they could not limit the independent authority of the due process clause.[54] Justice Harlan

Griswold. See, e.g., Beaney, *The Griswold Case and the Expanding Right to Privacy*, 1966 WIS. L. REV. 979; Franklin, *The Ninth Amendment as Civil Law Method and its Implications for Republican Form of Government*, 48 TULANE L. REV. 487 (1966); Paust, *Human Rights and the Ninth Amendment*, 60 CORNELL L.J. 231 (1975); Van Loan, *Natural Rights and the Ninth Amendment*, 48 B.U.L. REV. 1 (1968); Note, *Ninth Amendment Vindication of Unenumerated Fundamental Rights*, 42 TEMP. L.Q. 46 (1968); Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966); Comment, 54 KY. L. REV. 794 (1966). For the pre-*Griswold* works on the Ninth Amendment, see Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627 (1956); Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936); B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Redlich, *Are There 'Certain Rights . . . Retained by the People'?*, 37 N.Y.U. L. REV. 787 (1962).

Most commentators found the use of the Ninth Amendment unconvincing. *See, e.g.*, BERGER, *supra* note 27, at 389-90; Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 19 VILL. L. REV. 833, 837 (1974); Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 227 (1965) ("there remains grave doubt that the Ninth Amendment has a significant future"); Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten*, 64 MICH. L. REV. 235, 254 (1965) ("the Ninth Amendment adds a nice ornament . . . but that is all."). However, this skepticism was not entirely in response to *Griswold*. Ten years before, Justice Robert Jackson admitted that "the Ninth Amendment rights which are not to be disturbed by the federal government are still a mystery to me." R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 74-75 (1955).

51. Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

52. *Id.* at 542, 543.

53. 381 U.S. at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

54. *Id.*

voted to strike down the Connecticut statute because the concept of due process condemned any law "so grossly offensive" to the privacy of the marital relationship.[55]

Justice White, like Justice Harlan, proceeded on the premise that the appropriate standard of judicial review was set by the due process clause. Justice White concurred on the ground that Connecticut had failed to justify its intrusion into the basic personal right of marital privacy by demonstrating that the law promoted a compelling state interest.[56]

Griswold was not so much a break with the past as it was the culmination of a process which had been evolving in the Supreme Court over the previous seventy-five years. Concern with privacy had figured in the Court's treatment of cases arising under the First, Fourth, and Fifth Amendments and, more recently, the due process clause of the Fourteenth Amendment. As matters stood at the time *Griswold* was decided, the issue of privacy was neither novel nor unfathomable. However, because judicial protection of privacy was made to depend upon the reach of the specific provision most relevant within the context of the particular case and the claimed privacy interest, the scope of judicial action was limited.

First and foremost was the importance of privacy to the Fourth Amendment. The earliest and most influential opinion dealing with that provision had devoted considerable attention to the protection afforded privacy by the Constitution's ban on unreasonable searches and seizures.[57] Although the Court's dedication to privacy may have subsequently wavered in fact,[58] the Court never denied its primacy in theory. Even when the Court was unsympathetic to the specific claim advanced, the right of privacy never failed to evoke the most glowing of tributes.[59]

In 1949, the Court began the process of converting the right to be secure from unreasonable searches and seizures into the functional equivalent of a limited right of privacy.[60] Privacy was declared to be at the "core" of the Fourth Amendment, which was itself absorbed into the due process clause of the Fourteenth Amendment and thus made applicable as against the several States.[61] The Court did not, however,

55. Poe v. Ullman, 367 U.S. 497, 549 (1961) (Harlan, J., dissenting).

56. 381 U.S. at 502-04 (White, J., concurring).

57. Boyd v. United States, 116 U.S. 616 (1886).

58. *See, e.g.*, Harris v. United States, 331 U.S. 145 (1947); Olmstead v. United States, 277 U.S. 438 (1928); Carroll v. United States, 267 U.S. 132 (1925).

59. *See, e.g.*, Frank v. Maryland, 359 U.S. 360, 362-66 (1959). *See also* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 57 (1966).

60. Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 19 VILL. L. REV. 833 (1974).

61. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

require that the states adopt the federal sanction of excluding evidence seized in violation of the Fourth Amendment. It preferred to interpret the need for a healthy federalism as requiring leeway for the states to develop their own methods for securing privacy. But after a dozen years of disappointed hopes that the protection of this privacy interest could be entrusted to the states, the Court in *Mapp v. Ohio*[62] held that the constitutional status of privacy demanded that all units of government comply with the federal example.

The privacy protected by the Fifth Amendment, after an ambiguous start,[63] had fallen into an extended period of neglect.[64] Commentators' insistent clamoring for the Court to extend greater protection to the privilege against self-incrimination[65] dovetailed with the Warren Court's rapid absorption of specific provisions of the Bill of Rights into the due process clause.[66] The result was an interest in privacy against official interrogation being raised to a level of prominence roughly comparable to that of the Fourth Amendment. The Court's decisions in *Malloy v. Hogan*[67] and *Murphy v. New York Waterfront Commission*[68] guaranteed every person who claimed the right against self-incrimination "a private enclave where he may lead a private life" free from governmental intrusion.[69]

The Court had also dealt extensively with privacy issues within the context of the First Amendment. In the process, it recognized that the protected exercise of free speech and assembly rights was often dependent upon a certain measure of anonymity. For example, the right to freely exercise one's religion may require privacy to prevent public ridicule.[70] Similarly, political groups whose beliefs are disharmonious with the existing orthodoxy might require privacy for their members in the lawful pursuit of their right to associate in order to promote the exercise of their rights of free speech.[71] At the same time, the Court

62. 367 U.S. 643 (1961).

63. The Court's decision in *Boyd* linked the Fourth Amendment's protection against unreasonable searches and seizures to the ban on self-incrimination contained in the Fifth Amendment. 116 U.S. at 633. This aspect of the decision was generally rejected by commentators. *See* 8 WIGMORE, EVIDENCE § 2264 (3d ed. 1940); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT, 57-60 (1964).

64. *E.g.*, Cohen v. Hurley, 366 U.S. 117 (1961); Twining v. New Jersey, 211 U.S. 78 (1908).

65. *E.g.*, Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212; Dykstra, *The Right Most Valued by Civilized Man*, 6 UTAH L. REV. 305 (1959); Griswold, *The Right to Be Let Alone*, 55 NW. U.L. REV. 216 (1960).

66. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Robinson v. California, 370 U.S. 660 (1962) (freedom from cruel and unusual punishment).

67. 378 U.S. 1 (1964).

68. 378 U.S. 52 (1964).

69. *Id.* at 55.

70. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

71. NAACP v. Alabama, 357 U.S. 449 (1958). *But cf.* New York *ex rel.* Bryant v. Zim-

recognized a considerable degree of state power to protect the privacy of the public. Thus privacy had both positive and negative aspects for the government and for individuals. The state must respect the privacy interests attending the exercise of certain rights, yet it could also protect the privacy of its residents from some of the more intrusive effects which the exercise of these rights might entail.[72]

Privacy is a component of each of these amendments, not because it is mentioned in their respective texts, but rather because the Court, confronted with recurring fact situations, had recognized the need for privacy to make their actual operation effective. Cases such as *Rochin v. California*[73] and *Poe v. Ullman*[74] illuminated many inadequacies of the conventional analytical framework, which tended to limit privacy by a rigid categorization dependent upon the relation between a claimed interest and a specific constitutional provision. Increasingly, abuses of privacy were found in the interstices of specific prohibitions. Opinions on[75] and off[76] the Court indicated dissatisfaction with a judicial paradigm that was not according privacy sufficient protection and which was denying an important principle the legal status commensurate with its perceived merits and importance. Accordingly, privacy began to be located in the concept of due process, whose vague contours freed the Court from the shortcomings of a literal construction of the constitutional text.[77]

The period immediately before *Griswold* had sensitized the Court to the value of privacy and to the perils of entrusting its protection to the states. The early 1960's saw the pace of privacy-related problems accelerate: after *NAACP* in 1958, *Mapp, Poe, Malloy* and *Murphy*

merman, 278 U.S. 63 (1928) (constitutionality of law requiring oathbound unincorporated association to file membership roster with state upheld when applied to group known to engage in acts of violence).

72. *Compare* Saia v. New York, 334 U.S. 558 (1948) *with* Kovacs v. Cooper, 336 U.S. 77 (1949) *and* Murdock v. Pennsylvania, 319 U.S. 105 (1943) *with* Breard v. Alexandria, 341 U.S. 622 (1951).

73. 342 U.S. 165 (1952). *Rochin*, the celebrated "stomach pump" case, offered the Court an option to analyze the issue of coercive methods whereby police obtained evidence as (1) a question of search and seizure, (2) a question of self-incrimination, or (3) one of both search and self-incrimination. The majority, speaking through Justice Frankfurter, chose instead to resolve the question purely on the basis of the due process clause.

74. 367 U.S. 497 (1961).

75. Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting); PUC v. Pollak, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting). *See also* Gibson v. Florida Legislative Investigations Comm., 372 U.S. 539 (1963), where Justice Douglas spoke of "the need for a pervasive right of privacy against governmental intrusion [which] has been recognized though not always given the recognition it deserves." *Id.* at 569 (Douglas, J., concurring) (footnote omitted).

76. *See, e.g.*, Nutting, The Fifth Amendment and Privacy, U. PITT. L. REV. 533 (1957).

77. Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting); PUC v. Pollak, 343 U.S. 451, 468 (1953) (Douglas, J., dissenting).

were all decided within a period of three years. The difficulties of accommodating novel privacy claims into the existing constitutional framework and the growing tendency of some members of the Court to resolve problems by referring to the due process clause persuaded the Court of "the need for a pervasive right of privacy against Governmental intrusion."[78] This need was fulfilled in *Griswold*.

The almost overnight acceptance of the due process clause as the primary method whereby privacy might be secured was reflected in the opinions of the *Griswold* majority. In addition to differing degrees of reliance upon the Fourteenth Amendment, Justices Douglas, Goldberg and Harlan found authority for the Court to impose implied limitations on state and federal power in the underlying constitutional purpose reflected in more than one specific provision. Examination of the "totality of the constitutional scheme" identified a comprehensive privacy interest which was derivative yet dynamic and flexible. This focus on a general constitutional purpose, rather than on the limited ambit of any particular specific provision, produced a composite constitutional right of privacy which did not have a concrete nexus with the literal text of any specific constitutional prohibition. In this manner, the *Griswold* right of privacy was a generalized privilege whose nebulous contours might be violated by state action which did not infringe upon one or more of its constituent components.

III. Mr. Justice Black: *Griswold* and Beyond

The primary dissent in *Griswold* came from Mr. Justice Black.[79] His wide-ranging and spirited opinion thoroughly dissected the other opinions of the Court; first the majority opinion of Justice Douglas and then the opinions of Justices Goldberg, Harlan and White, which he treated as a unit. Although prompted by the Court's novel treatment of privacy, his opinion reflected concerns that had engaged his attention for almost forty years. In a sense, his *Griswold* opinion was the apotheosis of Justice Black's constitutional philosophy.

A. The Douglas Opinion

Although the major emphasis of his opinion was focused upon his perceived revival of substantive due process in the concurrences, Justice Black began by listing those points in Justice Douglas' majority

78. Gibson v. Florida Legislative Investigations Comm., 372 U.S. 539, 569 (1963) (Douglas, J., concurring).

79. Mr. Justice Stewart was the only other dissenter. He concurred in Justice Black's opinion and had his senior colleague join his opinion. 381 U.S. at 527. His opinion is most noteworthy for its commonsense observation that the Court was declaring a right which could be violated despite the fact that none of its constitutional components were offended by the action of Connecticut.

opinion with which he disagreed. Initially, Justice Black considered Justice Douglas' references to the First Amendment to be inapposite. That amendment protects speech; it does not sanction a concerted course of conduct made illegal under state law. Although some speech was involved, the dominant characteristic of the condemned behavior was conduct. Accordingly, Ms. Griswold could not defend her actions and overturn her conviction by reference to the First Amendment.[80] Similarly inapplicable was the Fourth Amendment, which forbids unreasonable searches and seizures. Justice Black refused to countenance what he perceived to be Justice Douglas' rewriting of that amendment to substitute "privacy" for "unreasonable searches and seizures."[81]

Justice Black was also disturbed by Justice Douglas' attempt to recast language in order to shift the issue. Rather than engage in the manipulation of terminology, Justice Black relied on more traditional methods. For him, the determinative factors in constitutional interpretation were the language used by the Constitution and the history behind the words.[82] Justice Black felt that judges should "stick to the simple language"[83] of the Constitution and recognize that the Framers had chosen their words very carefully in order to address specific evils.[84]

The reason for this concern was basic. Justice Black believed that the complete enjoyment of guaranteed liberties may be diluted, and the constitutional protection afforded such rights may be diffused, if judges make the Constitution's plain language uncertain of meaning or appli-

80. 381 U.S. at 407-08 (Black, J., dissenting). *See also* Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949).

81. *Id.* at 509. Justice Black thought "privacy" an unfortunate term of uncertain dimensions. " 'Privacy' is a broad, abstract and ambiguous concept. . . ." *Id.* He would later characterize it as a "nebulous subject." Katz v. United States, 389 U.S. 347, 365 (1967) (Black, J., dissenting). He continued to object to what he considered the substitution of "privacy" in place of constitutional language: Time Inc. v. Hill, 385 U.S. 374, 398-99 (1967) (Black, J., concurring) ("privacy" substituted for plain language and intent of First Amendment); Berger v. New York, 388 U.S. 41, 77 (1967) (Black, J., dissenting) (by substituting "privacy" for unreasonable searches and seizures, the Court was playing "sleight-of-hand tricks" with the Constitution's language).

Justice Black did not discuss the Third or the Fifth Amendments, the other specific provisions cited by the Douglas opinion. He did, however, concur in Justice Stewart's dissent, which stressed the irrelevancy of these provisions to a decision of the case. 381 U.S. at 529 (Stewart, J., dissenting).

82. H. BLACK, A CONSTITUTIONAL FAITH, 8 (1968) [hereinafter cited as BLACK].

83. 381 U.S. at 509.

84. "The prohibitions of the Constitution were written to prohibit *certain specific things*. . . ." Time, Inc. v. Hill, 385 U.S. 374, 399 (1967) (Black, J., concurring) (emphasis added). *Accord*, Coolidge v. New Hampshire, 403 U.S. 443, 500 (1971) (Black, J., dissenting); Katz v. United States, 389 U.S. 347, 366-67 (1967) (Black, J., dissenting). *See also* Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960); Cahn, *Justice Black and First Amendment 'Absolutes': A Public Interview*, 37 N.Y.U. L. REV. 553, 554 (1962).

cation.[85] He also felt that any substitution of the Constitution's "simple language" with words deemed more contemporary by judges convinced of their obligation to "keep the Constitution in tune with the times" threatens the safety of constitutional rights.[86]

Whatever the abstract value of privacy, Justice Black felt that government has a right to infringe upon it unless restrained from doing so by a specific provision of the Constitution.[87] He conceded that privacy is a concept not totally alien to the Constitution. He believed, however, that the Constitution's protection of privacy is of more modest dimensions than did the Court: "There are guarantees in certain specific provisions which are designed *in part* to protect privacy *at certain times and places* with regard to *certain activities*."[88] But there is no general constitutional right of privacy.[89]

Because he was unable to find a constitutional provision safeguarding privacy, Justice Black refused to be distracted by Justice Douglas' innovative nomenclature and novel methodology: "I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions."[90] For Justice Black, the "simple language" of the Constitution would not stretch so far.

B. The Concurrences

The primary focus of Justice Black's dissent was directed to the concurring opinions of Justices Goldberg, Harlan and White. Justice Black attacked these opinions, which together reflected the views of a clear majority of the Court, as an application of substantive due process and the natural law method of adjudication.[91]

85. 381 U.S. at 509. Justice Black feared for the security of rights left to "the ingenuity of language-stretching judges." Katz v. United States, 389 U.S. 347, 366 (1967) (Black, J., dissenting). *See also* Rochin v. California, 342 U.S. 165, 177 (1952) (Black, J., concurring).

86. 381 U.S. at 522.

87. *Id.* at 510.

88. *Id.* at 508 (emphasis added).

89. *Id.*

90. *Id.* at 509-10. Three years later, Justice Black would say that the *Griswold* majority had "found some penumbras and emanations from various parts of the Bill of Rights to make a right of privacy. I don't know about penumbras and emanations." New York Times, Mar. 22, 1968, at 41.

91. Although the terms "substantive due process" and "natural law" were used interchangeably by Justice Black, they are not synonyms. Substantive due process is the formula used by the Court to impose implied limits on the power of government. By itself, the phrase describes merely a mode of judicial operation; it conveys no inkling of the values it may be used to implement. Substantive due process is the value-free method for applying the policies natural law claims to find within the vague contours of the due process clause. Although this distinction was not articulated by Justice Black, it is not inconsistent with his use of the terms. One observer of Justice Black's jurisprudential philosophy has given a useful summary of what natural law is and how it is used by the courts: "According to

By interjecting these principles into the due process clause, the Court is able to give that provision a substantive content that Justice Black felt goes beyond its proper meaning.[92] He believed that the phrase "due process," as used by the Framers, has specific and limited connotations.[93] Due process did not license the Court to reserve to it-

exponents of the natural law approach, there exists a set of immutable moral principles which should govern human relationships. For man-made regulations to be true law and thus subject to obedience, they must conform to these principles. Under this view the judge's task should ideally be one of 'deductive reasoning to general moral principles in order to discover what is just in a given situation.' " Yarbrough, *Mr. Justice Black and Legal Positivism*, 57 VA. L. REV. 375, 377 (1971). For the accuracy of this statement, compare it with the Court's statement in Lochner v. New York, 198 U.S. 45, 56 (1905), a case Justice Black found particularly obnoxious: "In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty. . . ?" The proposition was stated in its baldest form by Justice McReynolds: "But plainly, I think, this Court must have regard to the wisdom of the enactment." Nebbia v. New York, 291 U.S. 502, 556 (1934) (McReynolds, J., dissenting). On natural law and substantive due process, see generally E. CORWIN, LIBERTY AGAINST GOVERNMENT (1948); C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930); Corwin, *The 'Higher Law' Background of American Constitutional Law* (pts. 1-2) 42 HARV. L. REV. 149, 365 (1928-1929); Grant, *The Natural Law Background of Due Process*, 31 COL. L. REV. 56 (1931).

92. Justice Black did not contend that the due process clause was totally devoid of substantive content, but rather that such content was strictly defined. One of his clerks put it this way: "There were two facets of Justice Black's theory of due process. . . . Facet No. 1 was that due process encompassed all the specific prohibitions of the Bill of Rights and the Constitution. . . . The Second Facet, equally important, was that due process did not encompass anything else." H. BALL, THE VISION AND THE DREAM OF JUSTICE HUGO L. BLACK 80 (1975). For evidence that this was not strictly correct, see note 93, *infra*.

93. As a general proposition, Justice Black said the only "correct meaning" of due process is that which requires government to proceed according to the "law of the land—that is, according to written constitutional and statutory provisions as interpreted by court decisions." This conception of due process derives from the Magna Carta and means that "our governments are governments of law and constitutionality bound to act only according to law." *In re* Winship, 397 U.S. 358, 382 (1970) (Black, J., dissenting).

After surveying the Court opinions written or assented to by Justice Black, Professor Roger Haigh listed the following elements of purely procedural due process accepted by Justice Black:

1) The right not to be tried under vague or indefinite statutes.
2) The right to a public trial.
3) The right to have reasonable notice of the charges levied.
4) The right to cross-examine witnesses.
5) The right to call witnesses in one's own behalf.
6) The right to be represented by counsel.
7) The right to a fair trial by an impartial court.
8) The right to be tried by an unbiased judge.
9) The right not to be tried by a judge who has an interest in the outcome.
10) The right not to be convicted in the absence of evidence establishing guilt.
11) The right to be free from convictions obtained through perjured testimony.
12) The right not to be tried by a jury convinced of guilt before trial begins.

R. Haigh, Mr. Justice Hugo L. Black, Due Process of Law and the Judicial Role 39 (unpub-

self the power to strike down laws which it finds arbitrary, unreasonable or which conflict with the Court's ideas of what are "civilized standards of conduct."[94] Justice Black believed that judicial use of substantive due process was unwarranted for two reasons. His first and dominant objection was that, as a matter of constitutional doctrine, it distorted the judicial function envisaged by the Constitution. The second criticism was that, as a matter of discretion, substantive due process lured courts into areas where they were not competent to act.

1. Doctrinal Objections

Justice Black fully accepted the legitimacy of judicial review, if it was confined to instances where statutes cannot be reconciled with the specific provisions of the Constitution.[95] He felt that the correct construction of the Constitution compelled courts to recognize that legislatures possess complete power to act in all areas except those expressly withheld by the Constitution.[96] Unlike his concurring brethren, Justice Black believed that neither the Ninth Amendment,[97] nor the Fourteenth, alone or together,[98] could be utilized as a limitless grant of

lished Ph.D. dissertation, Department of Political Science, Fordham University, 1971). The major points of this work are summarized in Haigh, *Defining Due Process of Law: The Case of Mr. Justice Hugo L. Black*, 17 S. DAK. L. REV. 1, 18-25 (1972).

94. 381 U.S. at 511, 520.

95. *Id.* at 513, 520.

96. *Id.* at 513, 527. In support of this position, Justice Black quoted Justice Holmes' dissent in Tyson & Bro. v. Banton, 273 U.S. 418, 446 (1927): "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution. . . ."

97. 381 U.S. at 523 n.19. Justice Black's view of the Ninth Amendment was that it was passed not so much to guarantee rights unenumerated in the Constitution, but rather "to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication." 381 U.S. at 520. *Accord*, BERGER, *supra* note 27, at 390; Moore, *Ninth Amendment: Its Origins and Meaning*, 7 NEW ENGLAND L. REV. 215, 284 (1972). Justice Black believed that the Bill of Rights was "in response to a clamor of the people that some of the original Constitution's grants of federal power were too broad and needed to be restricted. The last place therefore to look for more expansive grants of federal power is in that Bill of Rights." BLACK, *supra* note 82, at 31.

The fact that the Ninth Amendment, passed as it was to protect against federal invasion of the power of the several States to enact laws they consider appropriate to the regulation of local matters, had never before been used to strike down such laws strongly supports Justice Stewart's belief that "[t]he Ninth Amendment, like its companion the Tenth . . . 'states but a truism that all is retained which has not been surrendered.'" 381 U.S. at 529 (Stewart, J., dissenting) (footnote omitted).

Prior to *Griswold*, at least two renowned scholars had discerned the potential of the Ninth Amendment as a method for the use of natural law: R. POUND, in the *Introduction* to B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT at iii (1955); Corwin, *The 'Higher Law' Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152-53 (1928).

98. 381 U.S. at 511.

power for judges to impose their notions of sound public policy under the guise of protecting "fundamental rights."

The issue of legislative authority was central to Justice Black. He believed that substantive due process posed several dangers to the otherwise plenary power of the people's elected representatives. It furnished an opportunity for the judiciary to (1) narrow the scope of legislative power, and (2) usurp the law-making function. The first result occurs when the Court designates areas where no branch of government, including the Court, may operate. It is the assertion of a negative power: when courts declare that legislative power cannot reach certain objects, they do not necessarily expand their own power. In the second situation, courts assume an active role that is not shared with the legislative or the executive branches. Justice Black felt that when courts reserve to themselves the power to weigh the reasonableness of laws and to create new rights out of whole cloth—which is the essence of substantive due process[99]—they usurp the legislative function. Judges assume this active role, according to Justice Black, when they do not "stick to the simple language" but instead utilize considerations not contained within the Constitution as authority to evaluate the wisdom of laws and not merely their constitutionality.[100] Justice Black believed that any appraisal of the desirability of laws transfers legislative power to the Judiciary.[101] He cited the records of the Constitutional Convention to demonstrate that the Framers had explicitly denied the courts this power.[102]

This reduction of the legitimate scope of legislative power, and its

99. "If judges have, however, by their own fiat today *created a right* of privacy . . . then tomorrow and the next day and the next, *judges can create more rights*. . . ." Time, Inc. v. Hill, 385 U.S. 374, 400 (1967) (Black, J., concurring) (emphasis added). For a notorious example of a "right" created by judges, see Lochner v. New York, 198 U.S. 45 (1905) and Allgeyer v. Louisiana, 165 U.S. 578 (1897), wherein the Court declared the existence of a "right to contract" largely immune from governmental interference.

100. Quoting from an earlier opinion of his, Justice Black said that for courts " 'to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of "natural law" deemed to be above and undefined by the Constitution is another. "In the [first] instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people." ' " 381 U.S. at 525-26 (quoting Adamson v. California, 332 U.S. 46, 91-92 (1947) (Black, J., dissenting) (citation omitted)).

101. 381 U.S. at 513. The inviolability of the legislature's retaining exclusive possession of the law-making power was a subject upon which Justice Black, a former United States Senator, had definite if not dogmatic views. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 20 (1965) (Black, J., dissenting); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); BLACK, *supra* note 82, at 25-26.

102. 381 U.S. at 513 & n.6.

concomitant expansion of judicial power, as brought about by substantive due process,[103] would, in Justice Black's opinion, upset a myriad of policy decisions made by the Constitution. It would have a disastrous impact on the separation of powers and it would also threaten traditional concepts of federalism.[104] The *Griswold* precedent of innovative judicial action would make the Court a "day-to-day constitutional convention,"[105] thus effectively nullifying Article V.[106] Lastly, should such power be vested in five members of the Supreme Court, Justice Black felt it would make our form of government dependent upon the wills of men and not upon the impersonal dictates of law.[107]

Justice Black argued from the Court's recent history that the abnegation of the power to bring about such a dramatic redistribution of governmental responsibilities had been accepted as the proper posture for the Judiciary. Substantive due process had been repudiated by the Court after it had been faced with a backlash from the other political branches primarily in the form of the Court-packing plan of 1937.[108] Since that time, the Court had consistently reiterated that it was not a super-legislature or a revisory body which sits to " 'weigh the wisdom of legislation to decide whether the policy it expresses offends the public welfare.' "[109] As recently as two years before *Griswold*, Justice Black had written the majority opinion in *Ferguson v. Skrupa*[110] in

103. *Id.* at 521.

104. *Id.*

105. *Id.* at 520.

106. *Griswold* was not the first time Justice Black had accused the Court of bypassing Article V: Bell v. Maryland, 378 U.S. 226, 341-42 (1964) (Black, J., dissenting); nor would it be the last: Boddie v. Connecticut, 401 U.S. 371, 394 (1971) (Black, J., dissenting); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 676 (1966) (Black, J., dissenting). *Accord*, BLACK, *supra* note 82, at 11. *Cf.* Allen v. Virginia Bd. of Elections, 393 U.S. 544, 595 (1968) (Black, J., dissenting).

107. The rule of law was, for Justice Black, more than a bromide; it was an abiding concern. Boddie v. Connecticut, 401 U.S. 371, 393 (1971) (Black, J., dissenting); A. BICKEL, THE MORALITY OF CONSENT 8 (1975); Howard, *Mr. Justice Black: The Negro Protest Movement and the Rule of Law*, 53 VA. L. REV. 1030 (1967).

Justice Stewart raised the paradoxical possibility that the Court, by creating and enforcing "fundamental rights" in the face of a contrary legislative decision, might itself be denying the people their unenumerated Ninth Amendment right to self-government. 381 U.S. at 531 (Stewart, J., dissenting). Justice Black was later to adopt and repeat this charge in *In re* Winship, 397 U.S. 358, 384 (1970) (Black, J., dissenting). He had earlier suggested that the judicial use of substantive due process deprived states of their Tenth Amendment reserved powers. International Shoe Co. v. Washington, 326 U.S. 310, 324 (1945) (Black, J., concurring).

108. 381 U.S. at 524.

109. *Id.* at 523 n.17 (quoting Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952)). The accusation that a majority of the Court while using substantive due process was acting as a "superlegislature" was first leveled by Justice Brandeis. Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting).

110. 372 U.S. 726 (1963).

which the Court declared its intention to return to "the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislatures."[111] Justice Black felt that these doctrinal objections were being ignored by the Court in *Griswold*.

2. Discretionary Concerns

Justice Black also believed that other reasons existed which should have persuaded the Court, as a matter of prudence, to reject the use of substantive due process. Foremost was the problem of "fundamental rights." Justice Black was convinced that all the concurring opinions assumed that fundamental rights were self-evident without confronting the core issue—that substantive due process must ultimately rest upon whatever subjective considerations motivate a majority of the Court at a given point in time with respect to a given issue.[112] The concept of fundamental rights only underscored this element of subjectivity: the "siren-like appeal" of the "soft phrases used to claim that power for judges"[113] cannot conceal the fact that when constitutional interpretation is divorced from the text of that document, it must by necessity be founded upon the personal beliefs of judges. The protestations of his concurring colleagues notwithstanding, Justice Black believed these idealistic phrases were mere "high-sounding rhetoric devoid of any substantive guidance"[114] which were employed only when judges were enforcing their personal predilections.[115] He scoffed at the idea that judges would not consider their personal convictions in their search for

111. *Id.* at 730.

112. 381 U.S. at 522.

113. BLACK, *supra* note 82, at 21. In his *Griswold* dissent, Justice Black enumerated some of the "catchwords and catchphrases" the Court had employed in prior cases. 381 U.S. at 511 n.4. As one of the extremely rare examples of unintended humor in his opinions, Justice Black would later say of these idealisms: "All of these different general and indefinable words or phrases are the fruit of the same, what I consider to be poisonous, tree, namely, the doctrine that this Court has power to make its own ideas of fairness, decency, and so forth, enforceable as though they were constitutional precepts." Foster v. California, 394 U.S. 440, 449-50 (1969) (Black, J., dissenting). He also called them nothing but "mush." Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 562 (1962).

114. BLACK, *supra* note 82, at 30.

115. 381 U.S. at 513. Justice Black claimed that he was supported on this point by the late Judge Learned Hand, who said: ". . . [J]udges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary they wrap their veto in a protective veil of adjectives such as 'arbitrary,' 'artificial,' 'normal,' 'reasonable,' 'inherent,' '*fundamental*,' or 'essential,' whose office usually, though quite innocently, is to disguise what they are doing and impute it to a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision." *Id.* at n.5 (quoting L. HAND, THE BILL OF RIGHTS 70 (1958) (emphasis added)).

those privileges "so rooted in the traditions and collective conscience of our people as to be ranked as fundamental."[116] As he caustically noted, the Court cannot take a Gallup poll nor does it have a "gadget" to determine what constitutes such a privilege.[117] Judicial divination of the community's opinion therefore requires the interposition of the judges' personal beliefs. The result is that once they release themselves from the constitutional text which both limits and licenses judicial action, substantive due process "not only does not require judges to follow the Constitution as written, but actually encourages judges to hold laws unconstitutional on the basis of their own conceptions of fairness and justice."[118]

Implicit in Justice Black's position was his belief that the Court's prior experience with substantive due process in the economic field provided no guarantee that judges could be trusted with such unbounded power.[119] The Court had reached the near-disastrous impasse of 1937 because it persisted in substituting its opinion of proper public policy for that of the legislatures in the face of increasing public and professional hostility to the Judiciary's stance. The Court's historical failure to gauge the public mood amply demonstrated the inability of the Judiciary to function as a "thermometer of community feeling."[120]

This inability to consistently and accurately mirror contemporary opinion is a deficiency inherent in the activity of courts. It sometimes can be advantageous, as when the courts defend the Bill of Rights against transient majoritarian sentiment. But the point made by Justice Black was that this institutional failing is an abiding characteristic of the judicial function. More than a change of subject matter is required before this "mysterious and uncertain concept" is divested of its latent perils.[121] The dangers of substantive due process cannot be defended on the basis of libertarian results deemed less objectionable to contemporary mores.[122]

Justice Black felt that if legislatures are deprived of the full measure of their constitutional power to enact laws pursuant to their own notions of public welfare, the nation's fundamental ability to govern itself would be endangered. This was not, however, Justice Black's sole

116. 381 U.S. at 519. The phrase was first enunciated by Justice Cardozo in Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), and later adopted by Justice Goldberg, 381 U.S. at 487 (Goldberg, J., concurring).

117. 381 U.S. at 519. *See also* Rochin v. California, 342 U.S. 165, 176 (1952) (Black, J., concurring).

118. Foster v. California, 394 U.S. 440, 450 (1969) (Black, J., dissenting). *Accord*, Time, Inc. v. Hill, 385 U.S. 374, 399 (1967) (Black, J., concurring).

119. BLACK, *supra* note 82, at 11, 24-28.

120. BERGER, *supra* note 27, at 325.

121. 381 U.S. at 522.

122. *Id.*

fear of substantive due process. He also believed that substantive due process posed a threat to the continued effectiveness of the Judiciary. Both of these concerns were encompassed within his characterization of substantive due process as "bad for the courts and worse for the country."[123] This conviction, that the continued utility if not the very existence of judicial review could be jeopardized by the exercise of an imperial judicial authority admitting of no external restraints, came from Justice Black's personal experience. For the eleven-year period prior to his appointment to the Supreme Court in 1937, Hugo Black was a member of the United States Senate.[124] From this perspective he had seen the Court of the "Nine Old Men" use substantive due process to deprive Congress and state legislatures of much of their authority to alleviate the desperate economic distress wrought by the Great Depression. The country's inability to govern within the judicially-imposed confines of substantive due process had inspired President Roosevelt to propose a drastic reorganization of the Judiciary. Senator Black had been one of the most fervent supporters of the controversial "Court-packing" plan.[125] From this perspective, Justice Black warned the Court of the consequences of impinging upon legislative power—when an aroused citizenry moves to halt a Judiciary bent upon the aggrandizement of its power, there can be no guarantee that any vestige of judicial review will survive.

Justice Black knew that in one form or another, the temptation to act on the basis of engaged emotions rather than the constitutional text would always confront judges. He had lived through an era when the nation's power to protect its existence was endangered by the inability of judges to resist this Mephistophelean compulsion. It was for this reason, along with a desire to prevent an unseemly repetition of the judicial crisis of 1937, that Justice Black advocated a prophylactic rule of complete judicial abstention from substantive due process.

Justice Black was convinced that a revival of substantive due process contravened the commands of the Constitution and the Court's past

123. *Id.* at 521.

124. The best treatment of Justice Black's pre-Court career in general and his Senate experience in particular is V. HAMILTON, HUGO BLACK: THE ALABAMA YEARS (1972). Less exhaustive works are G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 127-73 (1977); J. FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS 50-94 (1949); Frank, *The New Court and the New Deal*, in HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM 39 (S. Strickland ed. 1967).

125. H. BALL, THE VISION AND THE DREAM OF JUSTICE HUGO L. BLACK 21 (1975); Frank, *The New Court and the New Deal* in HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM 45 (S. Strickland ed. 1967); V. HAMILTON, HUGO BLACK: THE ALABAMA YEARS 263 (1972). Thorough treatments of the "Court-packing" battle are J. ALSOP & T. CATLEDGE, THE 168 DAYS (1938), which has the advantage of being contemporaneous; L. BAKER, BACK TO BACK (1967); W. Leuchtenberg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

experience. He felt that the five concurring Justices had ignored these compelling reasons why substantive due process should be avoided. Justice Black could not accept their sanguine assurances that substantive due process could be judiciously and sparingly applied and that it would represent only the impersonal attitudes of society and not the personal beliefs of the judges as to what constituted sound public policy.

B. Additional Considerations

Not all of Justice Black's objections to substantive due process were contained within his *Griswold* dissent. Resonating within his stated arguments are implied considerations of a more general nature which constitute the lodestar of his constitutional philosophy and the dominant motif of his career. These considerations went to the core of the juridical ethic controlling the governance of a democratic system.

A central feature of Justice Black's condemnation of natural law and substantive due process was his belief that it spoiled the symmetry of the constitutional scheme. It was incongruous to consider the due process clause, which is the usual outlet for natural law,* as "a blank check to alter the meaning of the Constitution as written"[126] because this would, in Justice Black's opinion, thwart the intent of the Framers in making the Constitution a written document.[127] By committing the fundamental law of the land to writing the Framers provided an objective standard against which the propriety of all laws and official conduct could be measured.[128] Justice Black believed that the men who framed the Constitution recognized that abuse is an inherent temptation of those entrusted with power and that no one could be expected to exercise unlimited power benevolently. He felt that "the Constitution was designed to prevent putting too much controllable power in the hands of one or more public officials."[129] The Judiciary was not exempt from despotic tendencies, as the Framers recognized, for they "wrote into our Constitution their unending fear of granting too much

* But not the only one. *See* Colgate v. Harvey, 296 U.S. 404 (1935), *overruled,* Madden v. Kentucky, 309 U.S. 83 (1940) (privileges and immunities clause); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 675-77 (1966) (Black, J., dissenting) (equal protection clause). *See also* Karst, *Invidious Discrimination: Justice Douglas and the Return of the Natural-Law-Due-Process Formula*, 16 U.C.L.A. L. REV. 716 (1969).

126. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 675 (1966) (Black, J., dissenting). *Accord*, Williams v. North Carolina, 325 U.S. 226, 274 (1945) (Black, J., dissenting).

127. "Had the drafters of the Due Process Clause meant to leave judges . . . ambulatory power to declare laws unconstitutional, the chief value of a written constitution, . . . designed to guarantee protection against governmental abuses, including those of judges, must have written standards that mean something definite and have an explicit content." Goldberg v. Kelly, 397 U.S. 254, 276-77 (1970) (Black, J., dissenting).

128. *Id. See also* Turner v. United States, 396 U.S. 398, 426 (1969) (Black, J., dissenting).

129. BLACK, *supra* note 82, at 23-24.

power to judges."[130]

Justice Black felt that substantive due process and natural law are incongruities because they defeat this policy.[131] The absence of objective content to these doctrines permits judges to decide cases, not according to the clear provisions of the Constitution, but rather in conformity with their own notions of what is best for society.[132] Divorced from the Constitution, the inherently undemocratic nature of the Judiciary is revealed when it nullifies laws without reference to the basic charter of the nation. Arrogation of power by the Judiciary is not possible when the source of that authority specifies where and to what extent power is granted. It is this ultimate check that guarantees a government of laws and not a government of men.[133]

The extent and the ends to which power is granted are the benchmarks of Justice Black's jurisprudence. Implicit in his opinions discussing the correct scope of due process are a principle and a corollary which harmonize with his dissent in *Griswold*. The principle is that the Fourteenth Amendment, by incorporating the Bill of Rights, specifies the values the Court is required to protect against state infringement. The corollary is that the Amendment also places absolute limits on these values.[134]

Justice Black first articulated the role he thought the Fourteenth Amendment was designed to fulfill in 1947. In his celebrated opinion in *Adamson v. California*[135] he advanced what has come to be called the "Incorporation" theory.[136] The essence of incorporation was easily stated:

> My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the objects that the provisions of the Amendment's first section, separately and as a whole, were intended to accomplish and make the Bill of Rights applicable to the states. . . . I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the peo-

130. *Id.* at 10. *See also* note 127 *supra.*

131. Adamson v. California, 332 U.S. 46, 75 (1947) (Black, J., dissenting).

132. *See* note 100 *supra.*

133. BLACK, *supra* note 82, at 10-11. *See also* the sources set out in note 107 *supra.*

134. Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A. L. REV. 467, 469 (1967).

135. 332 U.S. 46 (1947).

136. For purposes of this note, Professor Robert Cushman's definition of incorporation will be used. He defines it to mean "the application against the states, through due process, of a 'right' exactly as the Bill of Rights applies 'right' against the federal government." Cushman, *Incorporation: Due Process and the Bill of Rights*, 51 CORNELL L.Q. 467, 472 (1966) [hereinafter cited as Cushman].

ple of the nation the complete protection of the Bill of Rights.[137]

The incorporation standard was formulated as an alternative to the "ordered liberty" concept of due process. Focusing on the fundamental fairness of a proceeding, the "ordered liberty" formula treated due process as a generalized guarantee of decency and fair play and emphasized the importance of the factual setting.[138] The Court had said that this concept of due process forbade state conduct which was shocking to the judicial conscience.[139] Being possessed of a conscience which was easily shocked,[140] however, Justice Black was appalled at the inconsistent and idiosyncratic results the Court was prepared to accept under this standard.[141] He thought it transformed the Constitution's guarantee of certain and equal justice under law into an uncertain and potentially unequal "justice" according to the unpredictable whims of a given panel of judges.[142]

The aim of Justice Black's *Adamson* opinion was to discredit the "ordered liberty" standard and the opportunities it presented for the Court to introduce subjective theories of natural law. He specifically objected to the implicit assumption that the Court "can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree."[143] Justice Black believed that the Court was absolutely without power to determine what constituted due process because that decision had been made by the Framers of the Fourteenth Amendment.[144] "Due process" and "fair trial" were appealing but imprecise terms. Justice Black felt that the very imprecision of the phrase

137. 332 U.S. at 71-72, 89 (Black, J., dissenting).

138. *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121 (1959); Rochin v. California, 342 U.S. 165 (1952); Betts v. Brady, 316 U.S. 455 (1943); Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908); *and* the concurring opinions of Justice Frankfurter in Haley v. Ohio, 332 U.S. 596 (1947); Adamson v. California, 332 U.S. 46 (1947); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); Malinski v. New York, 324 U.S. 401 (1945). The best discussion of the influences and aspects of the "ordered liberty" formula is B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98-141 (1921).

139. *E.g.*, Rochin v. California, 342 U.S. 165, 172 (1952).

140. Cahn, *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 563 (1962).

141. This response was not confined to Justice Black. Even the member of the Court most wedded to the fundamental fairness concept, Justice Felix Frankfurter, could be dismayed by its applications. *See* his dissenting opinion in Irvine v. California, 347 U.S. 128, 142-49 (1954). Professor Cushman said that "the move toward incorporation was, in part, at least, a revolt against obvious and enduring injustice." Cushman, *supra* note 136, at 498.

142. Cushman, *supra* note 136, at 492. For confirmation of this thesis, *compare* Rochin v. California, 342 U.S. 165 (1952) *with* Irvine v. California, 347 U.S. 128 (1954). Justice Black said that the fundamental fairness test "willfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics." Boddie v. Connecticut, 401 U.S. 371, 393 (1971) (Black, J., dissenting).

143. Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting).

144. *Id. See also* the sources set out at note 158 *infra*.

"due process" should be sufficient to persuade the court to avoid elevating this term of art into a constitutional doctrine:

> The pragmatic government-fearing authors of our Constitution and Bill of Rights did not, and I think wisely did not, use such vague, indefinite, and elastic language. Instead, they provided . . . clear, emphatic guarantees. . . . The explicit commands of the Constitution provide a full description of the kind of 'fair trial' the Constitution guarantees, and in my judgment that document leaves no room for judges either to add or subtract from those commands.[145]

This factor of certainty, however, is both the greatest strength and the most obvious weakness of incorporation. The benefits of predictability are offset by the disadvantages of restricted application. Yet this appearance of inflexibility is only partially accurate. Indeed, one objection to the incorporation theory was that it promoted a warped and an unduly narrow construction of the due process clause's potential for the evolutionary expansion that some judges thought was the primary worth of that provision.[146] Justice Black disagreed:

> I cannot consider the Bill of Rights to be an outworn 18th Century 'strait jacket'. . . . Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart these purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights.[147]

Justice Black firmly believed that the Constitution had made all the fundamental policy decisions regarding the allocation of power within the three branches of government. The function of the Judiciary within this constitutional framework is to apply and effectuate the values specified by the Framers when it adjudicates cases and controversies. Judicial action is proper only when it promotes the values of the Constitution. In all instances where laws do not run afoul of the values of the Constitution, the judicial impulse to act must yield to a pair of

145. Coleman v. Alabama, 399 U.S. 1, 12-13 (1970) (Black, J., concurring).

146. *See, e.g.*, Adamson v. California, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

147. *Id.* at 89 (Black, J., dissenting).

countervailing values of equal weight[148]—the right of the people to govern themselves[149] and the right of the States to legislate according to their own ideas of fairness, wisdom, and desirability in all areas save those denied by the Constitution.[150] Justice Black specifically commented on this point: "The liberty of government by the people, in my opinion, should never be denied by this Court except where the decision of the people as stated in laws passed by their chosen representatives, conflicts with the express or necessarily implied commands of our Constitution."[151]

Although Justice Black believed that the Judiciary lacked the power to alter or replace existing constitutional values, he did not think that every instance of creative judicial action should be rejected. When dealing with constitutional restrictions on governmental power, Justice Black thought that, if a constitutional principle was clear, the Judiciary was obligated to modernize its application in order to preserve its vitality.[152] For example, Justice Black repeatedly voted to uphold the confidentiality of membership files of protected associations in order to prevent the curtailment of freedom of speech and assembly.[153] This position of enunciating new constructions and applications of a specific provision while respecting the Constitution's values permitted a certain degree of flexibility provided it was strictly confined to vindicating the goals of the Constitution.[154] A former clerk to Justice Black summarized this position in the following formula: "The safeguard comes into play whenever the danger it was designed to prevent is present."[155]

148. *In re* Winship, 397 U.S. 358, 385 (1970) (Black, J., dissenting).

149. *Id.* at 384. *See also* note 166 *infra.*

150. 381 U.S. at 513.

151. *In re* Winship, 397 U.S. 358, 385 (1970) (Black, J., dissenting).

152. BLACK, *supra* note 82, at 14-20; Reich, *The Living Constitution and the Court's Role*, in HUGO BLACK AND THE SUPREME COURT, 138-42 (S. Strickland ed. 1967).

153. Bates v. City of Little Rock, 361 U.S. 516, 528 (1960) (Black, J., concurring); NAACP v. Alabama, 357 U.S. 449 (1958); *Cf.* Talley v. California, 362 U.S. 60 (1962) (city ordinance forbidding distribution of unsigned handbills struck down on First Amendment grounds in an opinion by Justice Black).

154. "[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall." Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (emphasis in original).

155. Reich, *The Living Constitution and the Court's Role*, in HUGO BLACK AND THE SUPREME COURT 140 (S. Strickland ed. 1967). This article, read in conjunction with his earlier work, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963), constitutes the most penetrating analysis of Justice Black's jurisprudence.

It should be noted that Professor Reich, a former clerk to Justice Black, used language in these articles which would appear to attribute a more expansive operation to Justice

The crucial idea was that this growth factor is distinguishable from natural law and substantive due process because it is directed by and restricted to the values of the Framers embodied in the Bill of Rights.[156]

The corollary of this concept, one often overlooked, is that because these values are of constitutional origin, they are not subject to a judicial process of addition or substitution.[157] For Justice Black, the Bill of Rights was not a mere enumeration of suggestions as to what due process might incorporate. He considered it the conclusive agenda of legitimate judicial activity. The substantive content of the first eight amendments was not simply an illustration of due process; they were exhaustive.[158]

It was not until *Griswold* that Justice Black's corollary, the idea that the Constitution was designed to address only a finite number of "ancient evils," became apparent.[159] Subsequent cases made it clear that Justice Black was prepared to tolerate many practices of which he disapproved because they were known to the Framers and yet not banned by the Constitution as written.[160] The upshot of this interpretation was that the Constitution, by itself, could not (and if Justice Black

Black's adaptations of constitutional provisions than does this note. Reich's 1967 article is largely a recapitulation of his 1963 effort, yet it makes no mention of Justice Black's *Griswold* dissent. While 1967 was perhaps too soon to appreciate the divergence in attitudes revealed by *Griswold* and the increasing frequency with which his mentor would be at odds with the rest of the Court, Reich admitted in 1977 that his interpretation "goes beyond Justice Black's own views, and instead suggests what might be learned from his opinions." Reich, *Foreword: Mr. Justice Black as One Who Saw the Future*, 9 SW. U.L. REV. 845 (1977).

It bears emphasizing that Justice Black's antipathy to natural law was limited to his abiding belief that it was an element that should not, but invariably would, work its way into the judicial calculus brought to bear in due process cases. No evidence exists that he disagreed with much of the substance attributed to natural law and he occasionally would make an inadvertent use of language that suggested that he too confused normative attitudes with the substance of constitutional provisions. *See, e.g.*, his concurring opinion in Konigsberg v. State Bar, 366 U.S. 36, 67 (1961) where he referred to the "inalienable right to speak." Justice Black was not opposed to natural law per se, only its use by the judiciary. Decker, *Justice Hugo L. Black: The Balancer of Absolutes*, 59 CAL. L. REV. 1335, 1351-52 (1971).

156. *See, e.g.*, Justice Black's construction of the Commerce Clause for an example of how this factor of adaptation worked in practice. BLACK, *supra* note 82, at 9.

157. 381 U.S. at 509. *See also* North Carolina v. Pearce, 395 U.S. 711, 741 (1969) (Black, J., dissenting); Berger v. New York, 388 U.S. 41, 77 (1967) (Black, J., dissenting); Time, Inc. v. Hill, 385 U.S. 374, 398-99 (1967) (Black, J., concurring).

158. Williams v. Florida, 399 U.S. 78, 114 (1970); *In re* Winship, 397 U.S. 358, 377 (1970); Foster v. California, 394 U.S. 440, 449 (1969) (Black, J., dissenting).

159. *See* note 84 *supra*.

160. *E.g.*, McGautha v. California, 402 U.S. 183, 226 (1971) (Black, J., concurring) (capital punishment not cruel and unusual within meaning of the Eighth Amendment because contemplated by Framers); Katz v. United States, 389 U.S. 347, 366 (1967) (Black, J., dissenting) (wiretapping not forbidden by Fourth Amendment because Justice Black equated it with common law nuisance known to, but not banned by, Framers); Berger v. New York,

had his way, in the Court's hands it would not) provide a cure for every problem which might come before the Court. Consider his statement in *Berger v. New York*, a Fourth Amendment case decided two years after *Griswold*:

> [A] constitution like ours is not designed to be a full code of laws . . . . And if constitutional provisions require new rules and sanctions to make them as fully effective as might be desired, my belief is that that calls for action, not by us, but by Congress or state legislatures, vested with powers to choose between conflicting values.[161]

Justice Black's construction clearly holds that the Constitution cannot provide remedies for every problem which a dynamic society is bound to produce. Justice Black was aware that this conceptualization contained an element of internal tension between some of the Constitution's more general and idealized statements and the specific relief it could provide for problems not within reach of its plain language. Yet Justice Black felt that this inherent tension should not necessarily be viewed as a weakness: it was consciously fostered by the Framers in order to diffuse power among the three branches.[162] The doctrine of the separation of powers was intended to preclude the accumulation of unrestrained power in any single branch of government. Justice Black was not prepared to have the Court systematically frustrate this policy by holding itself out as the national problem-solver so as to accommodate an increasingly common belief "that the Supreme Court will reach a faster and more desirable resolution of our problems than the legislative or executive branches."[163] The ease with which judges could succumb to these blandishments only heightened the dangers. Justice Black insisted that if the Judiciary stood fast, disappointed litigants

388 U.S. 41, 71-72 (1967) (Black, J., dissenting); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 677 (1966) (Black, J., dissenting) (poll taxes).

161. Berger v. New York, 388 U.S. 41, 88 (1967) (Black, J., dissenting). *Accord*, Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235, 261 (1970) (Black, J., dissenting); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 397 (1970). Chief Justice Marshall held a similar view: "The Constitution . . . was not intended to furnish the corrective for every abuse of power which may be committed by the State governments." Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 563 (1830). *See also* notes 223-24 and accompanying text *infra*.

It is true that in his dissenting opinion in Colegrove v. Green, 328 U.S. 549, 574 (1946), Justice Black had said that "where a federally protected right has been invaded the federal courts will provide the remedy to rectify the wrong done." This remark, however, was made in the context of malapportioned legislatures, a situation that called for unusual judicial action because the normal democratic processes were not functioning. Yarbrough, *Mr. Justice Black and Legal Positivism*, 57 VA. L. REV. 375, 405 n.147 (1971). This was not the case in Connecticut. *See* 381 U.S. at 531 n.8 (Stewart, J., dissenting). And of course this position assumes the very point Justice Black denied in his *Griswold* dissent—that a legal wrong had been suffered.

162. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

163. BLACK, *supra* note 82, at 11.

would be compelled to resort to the other branches of government. In this manner, the very gap between expectations and actuality would spur the people to seek remedies from the organs intended by the Constitution to produce them, namely, Congress and the state legislatures.

It is likely that Justice Black accepted the idea that the Constitution might only declare a goal without specifying how it might be secured. In such a case, the situation might arise where the Court could discern a new constitutional policy, privacy for instance, without having a way to make the "right" viable. Unlike some other justices, Justice Black was able to confront and accept the apparent anomaly of a violated right which had no judicial remedy. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[164] he refused to sanction the judicial creation of a common law action against federal officers for Fourth Amendment violations because it conflicted with the doctrine of sovereign immunity. The Framers had insisted on this policy and its existence was therefore sufficient to prevent contravening judicial actions. In addition, the mere existence of congressional power to determine the rules by which the government could be sued was sufficient to convince Justice Black that this power could not be exercised concurrently by the Judiciary.[165]

Justice Black believed that the subjective nature of substantive due process demeans the democratic urge—the paramount value of the Constitution[166]—and discourages the people from utilizing those organs of government which best accommodate the changing needs of the people. Set against this value, Justice Black was unmoved by the Court's declarations that it was merely advancing the Framers' intent when it struck down "arbitrary" or "unreasonable" laws which did not infringe upon any specific constitutional provision.[167] He thought that

164. 403 U.S. 388 (1971).

165. This interpretation might explain Justice Black's inability to develop and apply a consistent rationale for the exclusionary rule. Although in 1961 he called it a constitutional commandment, Mapp v. Ohio, 367 U.S. 643, 662 (1961) (Black, J., concurring), he earlier treated it as a mere rule developed by the Court pursuant to its rulemaking power over the federal courts, Wolf v. Colorado, 338 U.S. 25, 39 (1949) (Black, J., concurring), a position he subsequently readopted. Berger v. New York, 388 U.S. 41, 76 (1967) (Black, J., dissenting). For an excellent discussion of Justice Black's contradictory views about the rule, see Landynski, *In Search of Justice Black's Fourth Amendment*, 45 FORDHAM L. REV. 453 (1976).

166. Justice Black made this point explicit speaking for the court in one of the landmark malapportionment decisions: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which . . . we must live. Other rights, even the most basic, are illusory if [it] is undermined." Wesberry v. Sanders, 376 U.S. 1, 17 (1964). *See also* note 167 *infra*.

167. "It can be . . . argued that when this Court strikes down a legislative act because it offends the idea of 'fundamental fairness,' it furthers the basic thrust of our Bill of Rights by protecting individual freedom. But that argument ignores the effect of such decisions on perhaps the most fundamental individual liberty of our people—the right of each man to

substantive due process produced ad hoc decisions which were dependent upon specific factual situations. Justice Black was firmly convinced that this process operated more like the policy selection done by legislatures and that it had no resemblance to the interpretation and application of the law that should characterize the judicial function.[168]

Legislation comes before the Court with the respect intrinsic in the electoral authority of its creators. Justice Black felt that no similar legitimacy sustains the acts of judges who are appointed for life. At best, the law-making efforts of judges are suspect because of their institutional limitations.[169] At worst, as it appeared to Justice Black, they are flatly forbidden by the Constitution.[170] As Paul Freund has observed, the Justice believed that law, especially constitutional law, was and should be the "clean instrument of popular will, not . . . the patina of judges' gloss."[171]

C. Summary

The Court in *Griswold* was seeking to extend the frontiers of personal liberty by preserving a sphere of privacy for the individual. The Court felt that this was a value desirable in and of itself. Hence there was no requirement that privacy promote a specific constitutional provision. Justice Black was not unsympathetic to this motivation;[172] however, he could not join the majority. His fundamental disagreement with the Court's action was his insistence that desirability alone cannot mandate or legitimize a judicially-created "right" of constitutional stature. A judicial belief that important and meritorious concepts were not receiving appropriate recognition by the elected lawmakers was insufficient, in Justice Black's view, to overcome two obstacles: the values of

participate in the self-government of his society." *In re* Winship, 397 U.S. 358, 384-85 (1970) (Black, J., dissenting).

168. *See* note 100 *supra*.

169. 381 U.S. at 519. The institutional deficiencies of the Judiciary were a concern to Justice Black throughout his tenure. "Legislatures, under our system, determine the necessity for regulatory laws, considering both the evil and the benefits that may result. Unless prohibited by constitutional limitations, their decisions as to policy are final. In weighing conflicting arguments on the wisdom of legislation they are not confined within the narrow boundaries of a particular controversy between litigants. Their inquiries are not subject to the strict rules of evidence which have been found essential in proceedings before courts. Legislators may personally survey the field and obtain data and a broad perspective which the necessary limitations of court litigation make impossible." Polk Co. v. Glover, 305 U.S. 5, 15 (1938) (Black, J., dissenting). *See also* sources cited in note 280 *infra*.

170. *Id.* at 513.

171. Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A. L. REV. 467, 473 (1967).

172. "[T]he law is every bit as offensive to me as it is [to] my Brethren. . . . There is no single one of the graphic and eloquent strictures and criticisms fired at . . . this Connecticut law . . . to which I cannot subscribe." 381 U.S. at 507.

the Constitution are fixed as of the time and understanding of the Framers;[173] and the general rule that legislatures have plenary power to govern society within the restrictions of specific provisions of the Constitution.[174] This fixity of content provides a predictability which is the surest safeguard of the people's liberties.[175] Furthermore, it is a predictability which does not require rigidity from any branch of government save the Judiciary. Justice Black believed that the only flexibility required of the Judiciary was its sensitivity for protecting those values set forth in the Constitution.[176] In all other areas, innovation must be left to the elected lawmakers. The creation of new values and, to a lesser extent, some measure of their enforcement,[177] are given over to the people and their chosen representatives to decide. Should the people, as the ultimate source of authority, wish to accord privacy an increased amount of protection, their recourse is to the legislatures and the amendment process of Article V.

Substantive due process is an open invitation for judges to usurp the lawmaking function.[178] This usurpation becomes apparent when the courts declare new values and elevate them to the status of implied constitutional "rights." The judicial creation of this type of right threatens to provoke a political backlash by an aroused citizenry that could endanger expressly enumerated rights and the existence of judicial review. It also deprives government of the right and the power to legislate in all areas except those prohibited by the Constitution. This power to define and create rights is nothing less than judges granting themselves the lawmaking power to "roam at will in the limitless area of their own beliefs."[179] Justice Black was under no illusion as to the expansive nature of this power: when judges are no longer bound by the plain language of the Constitution, the "limitation upon their using

173. "[I]t is language and history that are the crucial factors which influence me in interpreting the Constitution—not reasonability or desirability as determined by the justices of the Supreme Court." BLACK, *supra* note 82, at 8. "It is only through sensitive attention to the specific words, the context in which they are used, and the history surrounding the adoption of those provisions that the true meaning of the Constitution can be discerned." Williams v. Florida, 399 U.S. 78, 113 (1970). In his *Adamson* dissent, Justice Black quoted Justice Samuel Miller to support his belief that this was the correct rule of constitutional interpretation. Said Justice Miller: "It is never to be forgotten that, in the construction of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." *Ex parte* Bain, 121 U.S. 1, 12 (1887), *cited at* 332 U.S. at 72.

174. *In re* Winship, 397 U.S. 358, 385 (1970) (Black, J., dissenting).

175. Boddie v. Connecticut, 401 U.S. 371, 393-94 (1971) (Black, J., dissenting); Rochin v. California, 342 U.S. 165, 177 (1952) (Black, J., concurring). *See* notes 84-85 and accompanying text *supra*.

176. *See* note 152 and accompanying text *supra*.

177. *See* notes 161 & 165 and accompanying text *supra*.

178. *See* text accompanying note 118 *supra*.

179. Adamson v. California, 332 U.S. 46, 91 (1947) (Black, J., dissenting).

the natural law due process philosophy to strike down any state law dealing with any activity whatever, will obviously be only self-imposed."[180]

The core of Mr. Justice Black's constitutional jurisprudence—the belief that the office he held imposed constraints on his personal desires—was set forth in *Griswold*: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some constitutional provision."[181] He felt that the *Griswold* majority, as reflected in the common element of the concurrences, could not conceal the mephitic resurrection of substantive due process despite their sentimental and lyrical beatitudes about the worth of privacy.

IV. Post-*Griswold* Privacy Developments

Prior to his retirement, Justice Black was involved in only one other case involving a privacy argument similar to that of Estelle Griswold.[182] His objections to the right of privacy remain valid however, and their impact on the Court can only be evaluated in light of subsequent developments in the privacy area.

Justice Black called privacy "a broad, abstract and ambiguous

180. 381 U.S. at 524.

181. *Id.* at 510. Two years later, Justice Black made the same point in a somewhat different form: "[I]t may be that those who wrote the Constitution would have done better to provide the federal courts with the power to substitute their choice of constitutional values for the choice made by the Constitution itself. Even were I able to agree that this is true, however, I still could not accept it consistently with my oath to support the Constitution. That oath means to me that I should support the Constitution as written, not as revised by the Supreme Court from time to time." BLACK, *supra* note 82, at 42.

Justice Black was not a preceptor who lacked either the courage or the consistency to be an exemplar: remaining unconvinced of privacy's constitutional status, he abjured its use even when it might have bolstered his position. An apt illustration was his dissent in Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 327 (1968) (Black, J., dissenting). Disputing the majority's ruling that the First Amendment prohibited the owner of a shopping center from preventing the peaceful picketing of his property incidental to a labor dispute because the property was generally open to the public, Justice Black scrupulously avoided reference to the privacy interests of the owner, despite the obvious oblique support it would have given to his position. *Id.* at 327-33. The Supreme Court adopted this position one year after Justice Black's death and largely repudiated the *Logan Valley* decision in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). *See also* Central Hardware Co. v. NLRB, 407 U.S. 539 (1972).

182. Stanley v. Georgia, 394 U.S. 557 (1969). In light of the subsequent decision in the abortion cases, it is interesting to note that Justice Black had a decisive role in one case that must be treated as a near miss. In United States v. Vuitch, 402 U.S. 62 (1971), Justice Black wrote the opinion in a five to four division that upheld the District of Columbia's abortion statute against a charge of vagueness. In concluding his opinion, he was at some pains to avoid the contention that the law was void for its intrusion upon the *Griswold*-like privacy interests. *Id.* at 72-73.

concept."[183] He felt that such a nebulous and ill-defined entity, when conjoined with the underlying dynamic of substantive due process, created a license for judicial action which could "easily be interpreted as a constitutional ban against many things."[184] Time has vindicated this fear. This section will demonstrate that privacy has become a judicial term of art and that *Griswold*, as its fountainhead, has been cited as authority for results which often appear to have minimal connection with the common understanding of the concept of privacy.

Despite the *Griswold* majority's repeated references to privacy within the context of the marital relationship, Justice Black recognized that the Court was, in reality, announcing a right of privacy which belonged to individuals.[185] Later cases verify the accuracy of this interpretation. The Court's opinion in *Eisenstadt v. Baird* made it quite explicit that the right to privacy was not dependent on status: "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. . . . [Yet, i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion. . . ."[186]

In 1921, Judge Cardozo of the New York Court of Appeals noted the "tendency of a principle to expand itself to the limit of its logic."[187] The expansive logic of *Griswold* reached its zenith in *Roe v. Wade*.[188] The subject under review in *Roe* was a Texas statute which made it a crime to procure or attempt to procure an abortion for any purpose other than to save the life of the mother. By a seven to two vote, the Court held the law unconstitutional. The core of this holding was the premise that the right of personal privacy enunciated in *Griswold* "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[189]

Roe is remarkable from several perspectives. First, it intimated that the right of privacy is a comprehensive guarantee of liberty incorporating many aspects of a right to make certain important decisions

183. 381 U.S. at 509.

184. *Id.*

185. 381 U.S. at 508.

186. 405 U.S. 438, 453 (1972) (emphasis in original). In Stanley v. Georgia, 394 U.S. 557 (1969), the Court upheld the right to possess allegedly obscene material within the confines of a private residence. The Court saw its decision as simply acknowledging the First Amendment's protection for an *individual's* "right to satisfy his intellectual and emotional needs in the privacy of his own home." *Id.* at 565.

187. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921). *See also* the similar statements of Justice Holmes in Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) and Paddell v. City of New York, 211 U.S. 446, 448, 450 (1909).

188. 410 U.S. 113 (1973). *Roe* should be read in conjunction with its companion case, Doe v. Bolton, 410 U.S. 179 (1973).

189. 410 U.S. 113, 153.

affecting the quality of life each person may select or pursue.[190] Privacy was now something more than Justice Brandeis' "right to be let alone."[191] It was evolving into a constitutional term of art describing a constellation of amenities, privileges, and immunities deemed integral aspects of a sphere of private autonomy that was beyond arbitrary state interference.[192] Second, *Roe* was the first qualitative example of a Supreme Court decision founded directly upon the right of privacy. As such it was the first genuine extension of the substantive aspects of privacy in the eight years following *Griswold*.[193] Other cases in the interim had cited *Griswold* but had not been controlled by it.[194] Third, in addition to confirming Justice Black's belief that a right of privacy might lead to some unexpected results,[195] *Roe* also confirmed Justice Black's prophecy that the right would ultimately be recognized as originating in the due process clause. Until 1973, the source of the right to privacy remained uncertain. Only two opinions cited *Griswold* in contexts where the privacy interests of specific amendments were inad-

190. The Court in *Roe* interpreted a number of cases decided under the Fourteenth Amendment as illustrations of this decisional aspect of the right of privacy. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to seek contraception); Loving v. Virginia, 388 U.S. 1 (1967) (right to select a marriage partner); Prince v. Massachusetts, 321 U.S. 158 (1944) (right to control family relationships); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right not to have the state arbitrarily or discriminatorily impair procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925), Meyer v. Nebraska, 262 U.S. 390 (1923) (right to direct the education and rearing of children). *See also* Whalen v. Roe, 429 U.S. 589, 598-600 & n.26. (1977).

191. The phrase was first used by Thomas Cooley, COOLEY ON TORTS 29 (2d ed. 1888). It was later adopted by Brandeis and Warren in their famous article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), and subsequently figured prominently in Justice Brandeis' celebrated dissent in Olmstead v. United States, 277 U.S. 438, 478 (1927).

192. For a detailed exposition of what the most privacy-oriented member of the Court considered to be the full breadth and diversity of matters encompassed by the term, see Doe v. Bolton, 410 U.S. 179, 209 (1973) (Douglas, J., concurring); and Note, *Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 YALE L.J. 1579 (1978).

193. Stanley v. Georgia, 394 U.S. 557 (1969), is excluded from this category because it was predominantly a free speech case. The fact that Justice Black was able to join the majority in *Stanley* indicates that he agreed with Justice Marshall's opinion that "[i]f the *First Amendment* means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Id.* at 565 (emphasis added). Had he felt that the issue of free speech was not sufficient to reach this result, it is unlikely that he would have accepted without protest the opinion's references to *Griswold*.

Eisenstadt v. Baird, 405 U.S. 438 (1972), is also excluded because it only marginally extended the same aspect of the privacy right—access to contraceptives—dealt with in *Griswold*. Eisenstadt is also explainable purely as an equal protection issue.

194. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972).

195. The *reductio ad absurdem* he held out was the possibility that the Court's logic meant that privacy could be used to permit the Court to judge the fairness of any criminal law, on the rationale that every such law involves some curtailment of "liberty." 381 U.S. at 518.

equate for resolution of the case, and neither clarified the issue: one had largely used the Douglas opinion,[196] while the other found the right within the nebulous realms of the Ninth Amendment.[197] *Roe*, although not free from ambiguity, indicated the Court's distinct preference for the due process clause:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, *as we feel it is*, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[198]

The fourth notable feature of *Roe* is the similarity of the dissents in that case to Justice Black's *Griswold* opinion. The dissenting opinions of Justices White and Rehnquist adopted the substantive objections as well as the language of Justice Black.[199] While Justice Black attacked the *Griswold* majority's failure to adhere to the meaning of the Constitution as written,[200] Justice Rehnquist stated that the subject of the *Roe* decision was "not 'private' in the ordinary use of that word."[201] The "unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments"[202] feared by Justice Black in 1965 had jumped the narrow factual setting of *Griswold* and sanctioned the Court eight years later to undertake what Justice White termed an extravagant exercise of "raw judicial power."[203]

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196. Eisenstadt v. Baird, 405 U.S. 438, 445-46 (1972).

197. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

198. 410 U.S. at 153 (emphasis added). *Accord*, Whalen v. Roe, 429 U.S. 589, 598 n.23 (1977). *See also* Paul v. Davis, 424 U.S. 693, 712-13 (1976), where the Court divided the constitutional interests of privacy into those " 'zones of privacy' . . . created by more specific constitutional provisions," and spoke of the remainder as those which "deal generally with substantive aspects of the Fourteenth Amendment."

199. *Compare* Justice Black: "I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of 'civilized standards of conduct.' Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not the power to interpret them." 381 U.S. at 513 (footnote omitted) *with* Justice White: "I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. . . . This issue, . . . should be left with the people and to the political processes the people have devised to govern their affairs." Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting) *and* Justice Rehnquist: "[T]he Court's opinion . . . is far more appropriate to a legislative judgment than to a judicial one. . . . The decision here . . . partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." Roe v. Wade, 410 U.S. 113, 173-74 (1973) (Rehnquist, J., dissenting).

200. 381 U.S. at 509.

201. 410 U.S. at 172 (Rehnquist, J., dissenting).

202. 381 U.S. at 521.

203. Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting). *See* note 118 *supra*.

The decision in *Roe* was founded upon the due process clause of the Fourteenth Amendment. This recognition by the Court that its action had no basis in any explicit language of the Constitution tacitly conceded Justice Black's central thesis—that privacy was a judicially created right. The abortion cases were acknowledged to be substantive due process by Justices Douglas and Stewart, the two members of the Court most qualified to confirm posthumously Justice Black's opinion as to the true nature and source of the right to privacy. Justice Douglas' concurring opinion, contrary to his position in *Griswold*,[204] made no attempt to rely upon the penumbra theory's tenuous moorings to the Bill of Rights. Instead, the author of *Griswold* returned to his earlier view that privacy was a component of "liberty" within the meaning of the due process clause.[205]

Justice Stewart also conceded that the *Roe* decision was motivated by substantive due process.[206] Yet Justice Stewart, the sole remaining *Griswold* dissenter and the one person who would be most expected to protest at the expansion of the privacy concept, also joined the majority in *Roe*. His concurring opinion was a surprising recantation of his opposition to substantive due process.[207]

If any ambiguity remained after *Roe*, the Court's decision in *Moore v. City of East Cleveland*[208] dispelled all doubts as to the nature and source of privacy. In *Moore*, the Court struck down as violative of due process a municipal zoning ordinance which limited the residents of a home to certain members of a single family. The constitutional infirmity arose because the law's definition of "family" created classifications that made it a criminal offense for Mrs. Moore to live with two grandsons if they were cousins but not if they were brothers. The Court felt that the city's aim of preventing overcrowding could not be promoted by "slicing into the family itself."[209] Although the city could limit the number of unrelated individuals living within a single dwelling,[210] it could not make criminal the living arrangements of related persons whether undertaken by choice or by necessity. The decision is important to the present analysis not so much for its precise holding but for what the Court said about the nature and the source of privacy

204. Griswold v. Connecticut, 381 U.S. 479, 481-82 (1965).

205. Doe v. Bolton, 410 U.S. 179, 211, 216, 220 (1973) (Douglas, J., concurring). *See also* Poe v. Ullman, 367 U.S. 497, 515 (1961) (Douglas, J., dissenting); PUC v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

206. Roe v. Wade, 410 U.S. 113, 167-71 (1973) (Stewart, J., concurring).

207. Justice Stewart has subsequently shown himself to be the member of the Court who may be the most discriminating in its use. *Compare* Moore v. City of East Cleveland, 431 U.S. 494, 536-41 (1977) (Stewart, J., dissenting), *with* Zablocki v. Redhail, 434 U.S. 374, 391-96 (1978) (Stewart, J., concurring).

208. 431 U.S. 494 (1977).

209. *Id.* at 498.

210. Belle Terre v. Boraas, 416 U.S. 1 (1974).

as a constitutional right. After a dozen years of grappling with *Griswold* and its progeny, the plurality opinion represents an explicit and complete vindication of Justice Black's belief that privacy was based upon substantive due process. The opinion also acknowledged that his fears were well founded:

> Substantive due process has at times been a treacherous field for this Court. *There are risks* when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, *there is reason for concern* lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. . . .[211]

Even more remarkable for its candor was the soul-searching dissent of Justice White. Although he was unwilling to renounce completely the substantive due process utilized in *Griswold*, he discussed the objections of Justice Black with the air of one who seeks counsel from the past in order to resolve the problems of the present. Like his brethren of the majority, Justice White was under no illusions as to the perils that the doctrine of substantive due process posed to the courts and the democratic system:

> The Judiciary, including this court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers . . . the Court should be extremely reluctant to breathe *still further* substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably preempts for itself *another* part of the governance of the country without express constitutional authority.[212]

Chief Justice Burger along with Justices Stewart and Rehnquist also filed separate dissents. The Chief Justice did not discuss the difficult constitutional question of privacy, although he had previously indicated an awareness of the nature and the magnitude of the underlying problem.[213] Justice Stewart believed that no constitutionally protected interest was involved and that the Court's decision was

211. 431 U.S. 494, 502 (1977) (footnote omitted) (emphasis added).

212. *Id.* at 544 (White, J., dissenting) (emphasis added).

213. In an earlier case, the Chief Justice had recognized that the *Griswold* privacy concept presented the dangerous opportunity for judges to pass "into the uncircumscribed area of personal predilections," the upshot of which would find the Court attempting to "seriously invade the constitutional prerogatives of the states and regrettably hark back to the

prompted more by the potential for inequitable application than by the ordinance's incompatibility with the Constitution.[214] Justice Rehnquist, who has been the Court's most consistent opponent of the privacy concept,[215] concurred in Justice Stewart's dissent.

Moore is a notable substantive due process case primarily because a majority of the Court, despite acknowledging that Justice Black's objections were supported by past experience and by the Constitution's plain language, still refused to abandon its use. While acknowledging that the history of the Court's maladroit use of substantive due process "counsels caution and restraint," the plurality opinion went on to say that that history "does not counsel abandonment."[216]

Although *Moore* exhibits the present Court's unwillingness to accept Justice Black's absolute rule of judicial abstention as constitutionally mandated, recent cases indicate that it may be backing away from substantive due process for another reason. As a matter of discretionary action, the Court has evinced a disinclination to bring itself into direct conflict with the political branches over some components of the privacy concept. Justice Black would not have admitted such a distinction could exist because his devotion to the separation of powers created a starkly defined constitutional system of Manichean simplicity: a court either had complete power or it had no power.[217] Nevertheless, the implicit conclusion of the recent case of *Maher v. Roe*[218] and its companion cases[219] is that the Court has begun to curb judicial enforcement of the expansive logic of the *Griswold-Roe* right of privacy.

The facts of these recent abortion cases were quite similar: all involved women contending that the states were required to pay for their nontherapeutic abortions. *Maher* held that a state which participates in the Medicaid program is not required by Title XIX of the Social Secur-

days of substantive due process." Eisenstadt v. Baird, 405 U.S. 438, 472, 467 (1972) (Burger, C.J., dissenting).

214. 431 U.S. at 537-38 (Stewart, J., dissenting).

215. Carey v. Population Services International, 431 U.S. 678, 717 (1977) (Rehnquist, J., dissenting); Kelley v. Johnson, 425 U.S. 238 (1976); Paul v. Davis, 424 U.S. 693 (1976); Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting). *See also* Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693 (1976).

Justice Rehnquist has on at least one occasion used the privacy arguments of past majorities to needle his brethren with charges of inconsistently applying the concept. Nixon v. Administrator of General Services, 433 U.S. 425, 545 (1977) (Rehnquist, J., dissenting). It is remarkable that when he does urge that a privacy argument be sustained, he does so without approving of the doctrine or retreating from his long-standing opposition.

216. 431 U.S. at 502 (plurality opinion).

217. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960). For Justice Black's views on the doctrine of the separation of powers, see note 101 and accompanying text *supra*.

218. 432 U.S. 464 (1977).

219. Poelker v. Doe, 432 U.S. 519 (1977); Beal v. Doe, 432 U.S. 438 (1977).

ity Act[220] to use state or federal funds to furnish a woman the opportunity to secure an abortion. Clarifying the decision in *Roe*, the six-member majority said that "*Roe* did not declare an unqualified 'constitutional right to an abortion,' " but only that the privacy right merely "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."[221] This result comprehends several important doctrinal components.

The first and most important feature of *Maher* was its return to the belief that the predominant responsibility for the resolution of controversies regarding social policy is entrusted to the legislative and executive branches. The Court declined to establish itself as the policy maker of first or even last resort. The topic of abortion is fraught with conflicting opinions from such diverse fields as medicine, theology, sociology, philosophy and, ultimately, penology. In such a situation, the policy of judicial nonintervention expressed in *Ferguson v. Skrupa*[222] is clearly the preferred course:

> [W]hen an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'[223]

The vanguard of public affairs is an inappropriate focus of judicial activism, and one not specified by the fundamental law: "the Constitution does not require a *judicially* imposed resolution of [such] difficult issues."[224]

Griswold, together with *Roe*, established privacy as a fundamental right which could be abridged only by a compelling state interest.[225] Yet *Maher* stands for the proposition that a policy decision produced in the political arena, even if it affects the exercise of a fundamental right, will be sustained if it is rationally related to a constitutionally permissible purpose and, collaterally, involves a governmental power with a "textually demonstrable commitment . . . to a coordinate political de-

220. 42 U.S.C. §§ 1396 *et seq.* (1970).

221. 432 U.S. at 473-74.

222. *See* text accompanying note 110 *supra*.

223. 432 U.S. at 479-80 (quoting Missouri, Kansas & Texas Ry. v. May, 194 U.S. 267, 270 (1904)). *Compare* this passage *with* the remarks of Justice White in *Doe v. Bolton*: "In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ . . . I can find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. . . . This issue . . . should be left with the people and to the political processes the people have devised to govern their affairs." 410 U.S. at 222 (White, J., dissenting).

224. 432 U.S. at 480 (emphasis added). *Accord*, Lindsey v. Normet, 405 U.S. 56, 74 (1972). *See also* note 161 and accompanying text *supra*.

225. Roe v. Wade, 410 U.S. 113, 155 (1973).

partment."[226] Within the context of *Maher*, this collateral consideration was the legislature's authority to determine policy priorities in conjunction with its spending power. The Court's deference to legislative control over the allocation of fiscal resources has, in effect, almost elevated the States' authority over expenditures to the status of a compelling interest.[227]

In *Maher*, the Court reiterated that *Roe* held that a woman's privacy right to an abortion was not absolute in every circumstance.[228] The right to *decide* whether to have an abortion in the first three months of pregnancy was absolute and the state could not erect an absolute obstacle to the free exercise of that right.[229] But the mere fact that this right was declared to be a constituent part of the fundamental right of personal privacy "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion,"[230] that is, for the state to make bringing the pregnancy to term "a more attractive alternative . . . [and one] consonant with legislative policy."[231] Consequently the state can use its broad discretionary power over expenditures[232] to encourage a "preferred course of conduct."[233]

Prior to *Maher*, the Court had recently acknowledged that the states' police power is, in essence, the power to legislate morality. Legislation is an appropriate outlet for the " 'right of the Nation and the States to maintain a decent society.' "[234] It is legitimate for legislatures to attempt to set " 'the tone of the society, the mode . . . the style and quality of life, now and in the future.' "[235] If such legislative efforts "reflect unprovable assumptions about what is good for the people,"[236] this empirical uncertainty alone does not justify a stricter standard of

226. Baker v. Carr, 369 U.S. 186, 217 (1962).

227. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 51 (1973). Legislative decisions which do not facially prohibit or create insurmountable barriers to the exercise of fundamental rights have, when linked to the state's wide latitude in "choosing among competing demands for limited public funds," Maher v. Roe, 432 U.S. 464, 479 (1977), been evaluated by the less exacting rational relation test. *Compare* Shapiro v. Thompson, 394 U.S. 618 (1969) *with* Dandridge v. Williams, 397 U.S. 471 (1970) (right to travel) *and* Zablocki v. Redhail, 434 U.S. 374 (1978) *with* Califano v. Jobst, 434 U.S. 47 (1977) (right to marry).

228. 432 U.S. at 473; Roe v. Wade, 410 U.S. 113, 153-54 (1973).

229. Carey v. Population Servs., 431 U.S. 678, 688 (1977); Planned Parenthood v. Danforth, 428 U.S. 52, 69-75 (1976). *Cf.* Bellotti v. Baird, 428 U.S. 132, 147 (1976).

230. 432 U.S. at 474.

231. *Id.* at 475.

232. *See* note 227 *supra.*

233. 432 U.S. at 477.

234. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59-60 (1973) (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

235. *Id.* at 59, (quoting Bickel in 22 THE PUBLIC INTEREST 25-26 (1971). *Cf.* Belle Terre v. Boraas, 416 U.S. 1, 9 (1974)).

236. 413 U.S. 49, 62, 69.

judicial scrutiny; the usual presumption of constitutionality is operative and the legislation will be upheld if rationally related to a permissible object of governmental attention.[237]

Maher did not renounce the fundamental right of privacy as an abstract principle. However, the presumption of constitutionality and its linkage to the deference traditionally accorded legislative choices in the allocation of public funds did remove much of the efficacy of *Roe*.[238] When the Court refused to impose an affirmative obligation on the political branches to subsidize the judicially created right, it was returning to a large measure of the status quo before *Roe*. By failing to insist that public funding operate to secure the right to an abortion, the Court left it to legislatures to ponder the desirability of a society where abortions are viable options only for those with the financial ability to pay for them.

It should be noted that *Maher* contained three similarities to Justice Black's position. The first is the focus of the Court's inquiry. The *Maher* opinion's undeviating attention to the issue of the state's power to spend according to its own notions of wisdom is reminiscent of Justice Black's insistence that judicial review be limited to the sole question of power. Like Justice Black, the majority in *Maher*, despite the anguished cries of the dissenters,[239] focused solely on whether the state had the power, and did not concern itself with the effects of the exercise of that power.

The second affinity is closely akin to the first. *Maher* was a tacit reclassification of the right of privacy: it no longer constituted a fundamental right of equal dignity with expressly enumerated rights in all contexts. Instead, the Court demonstrated that if the judicial inquiry was limited to the issue of power, privacy was now one of the many social and economic matters to which the compelling state interest test was inapplicable, at least so long as the mere exercise of the right is not prohibited. The scope of judicial review was thus detached from a subjective evaluation of the worth of a claimed right. *Maher* reaffirmed the theory of judicial review expressed in *San Antonio Independent School District v. Rodriguez*.[240] The Court there said that the "undisputed importance" of a claimed privilege cannot figure in determining

237. 432 U.S. at 478-79.

238. Maher v. Roe, 432 U.S. 464, 483-85 (1977) (Brennan, J., dissenting); Beal v. Doe, 432 U.S. 438, 455 (1977) (Marshall, J., dissenting); *id.* at 462-63 (Blackmun, J., dissenting).

239. The tenor of Justice Blackmun's dissent is representative: "For the individual woman concerned, indigent and financially helpless, as the Court's opinions in the three cases concede her to be, the result is punitive and tragic. Implicit in the Court's holdings is the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of: 'Let them eat cake.'" Beal v. Doe, 432 U.S. 438, 462 (1977) (Blackmun, J., dissenting).

240. 411 U.S. 1 (1973).

the level of judicial review given a challenged law.[241] This factor "will not alone cause this Court to depart from the usual standard for reviewing social and economic legislation."[242] Whatever the abstract value of privacy, the Court hesitated to insist that it be respected when the normal judicial posture of deference clashed with the plenary legislative power over appropriations.

The Court's deference points to the third similarity. *Maher* appears to illustrate the possibility mentioned in the previous section: the Court might declare the existence of a fundamental right but the Constitution might deny the Court the power and the means to establish a remedy to vindicate the right.[243]

V. A Black Future for Privacy

It was noted in the introduction that the "right of privacy" is a profoundly emotive phrase.[244] Its simple words exert an enormous attraction because they embody a precious concept which is viewed as being increasingly imperiled. But the phrase is also a dangerous one, for it "implies a value judgment that any invasion of that 'right' is somehow wrong and should be resisted."[245]

The power of this phrase on the emotions may do much to explain *Griswold*. By 1965, the Court was more inclined to view privacy as a constitutional entity.[246] At the same time, the Court accepted the fact that continued inaction in defense of a constitutional right by the political branches might compel the Judiciary to act in an instance where it might otherwise stay its hand.[247] *Griswold* synthesized these two concerns and created a value the Court believed was receiving insufficient

241. *Id.* at 33-35.

242. *Id.* at 35; Maher v. Roe, 432 U.S. 464, 470 (1977). *Cf.* Kelley v. Johnson, 425 U.S. 238, 247 (1976): "[T]he question is not . . . whether the State can 'establish' a 'genuine public need' for the specific regulation. It is whether [a challenge] can demonstrate that there is no rational connection." (footnote omitted).

243. *See* text accompanying note 165 *supra.*

244. The concept of privacy has a special appeal because it is often equated with the existence of a civilized society and personal freedom. *See, e.g.*, W. DOUGLAS, THE RIGHTS OF THE PEOPLE 90 (1958) ("Much of this liberty of which we boast comes down to the right of privacy."); Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965) ("In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society."). *See also* A. WESTIN, PRIVACY AND FREEDOM 23-51 (1967).

245. McKay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259, 271-72 (1965). For a discussion of the destabilizing effects of such emotive phrases on judges, see L. JAFFE, THE ENGLISH AND AMERICAN JUDGES AS LAWMAKERS 101 (1969).

246. *See, e.g.*, Murphy v. New York Waterfront Comm'n, 378 U.S. 52 (1964); Mapp v. Ohio, 367 U.S. 643 (1961). *Cf.* Poe v. Ullman, 367 U.S. 497 (1961).

247. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962), and especially the concurring opinion of Justice Clark at 251-52.

recognition from the political branches. Bluntly put, personal conviction became constitutional compulsion: the Court created a right it wanted to find.[248]

The proponents of substantive due process argue that it serves a useful purpose by furnishing the Court with a method whereby it may strike down the infrequent examples of patently oppressive laws which are not prohibited by the reach of specific constitutional provisions.[249] If due process is viewed as an evolutionary and idealistic concept with a potency independent of the provisions of the Bill of Rights, *Griswold* and other privacy cases such as *Moore* assume a coherent and identifiable pattern; without the authority of the Bill of Rights, the more obvious examples of substantive due process may be characterized by the common denominator of the judiciary's "sense of outrage produced by official pressure on an individual."[250]

One defender of substantive due process, Professor Thomas Grey, poses the question, "Do we have an unwritten Constitution?"[251] The answer is of course we do. But Professor Grey uses the word in the English sense, to connote that body of implicit restrictions comprised of custom and habit which, although unwritten, nevertheless operates as a genuine restraint upon the State. Although numerous scholars consider the informal restraints of societal norms absorbed into the Constitution,[252] this sort of constitution with a small "c" was rejected by the Framers and it has no legally cognizable force.[253] Its great danger is that it denigrates the responsibility and responsiveness of modern legislators.

If the *Griswold* decision was premised upon the Court's belief that privacy would not find adequate protection at the hands of the State, time has proven the assumption erroneous. The Court's belief that only the Judiciary, sheltered from the vicissitudes of the political arena by life tenure, could or would protect privacy simply does not comport with reality: the federal government and the several states have shown themselves fully capable of responding to the people's demand that their privacy be safeguarded. The announcement of a general constitu-

248. C. PRITCHETT, THE AMERICAN CONSTITUTION 686 (2d ed. 1968). As one commentator has phrased it, the *Griswold* opinion was "longer on yearning than on substantive content." Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965).

249. *See, e.g.*, the concurring opinions of Justice Frankfurter in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 468 (1947) and Adamson v. California, 332 U.S. 46, 66 (1947).

250. Sutherland, *Privacy in Connecticut*, 64 MICH. L. REV. 283, 287 (1965).

251. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

252. *E.g.*, E. CORWIN, COURT OVER CONSTITUTION 86 (1957); H. HORWILL, THE USAGES OF THE AMERICAN CONSTITUTION 9 (1925); Munzer & Nickel, *Does the Constitution Mean What it Always Meant?*, 77 COLUM. L. REV. 1029 (1977).

253. BLACK, *supra* note 82, at 3-7. *See also* notes 127-28 and accompanying text *supra*.

tional right of privacy has not insulated Congress or prevented it from responding to the wishes of the public by enacting numerous statutes securing privacy in a variety of contexts.[254] The Privacy Protection Study Commission was established by Congress in 1974 and its report on the formulation of a national privacy policy was recently submitted to the President.[255] In a supplementary vein, *Griswold* has not inhibited the states from more than equaling this legislative output.[256] Nor has it stopped state courts from developing a robust body of common law remedies to protect an individual's privacy from intrusion by another.[257] Subsequent to its decision in *Griswold*, the Supreme Court followed this example by recognizing a cause of action for privacy violations by federal officers.[258] The conclusion to be drawn from these official measures is that the emotive power of the right of privacy operates no less convincingly upon the people, and therefore upon their elected representatives, than it does upon the Supreme Court. Since "[m]odern man's vision of privacy will not fade away,"[259] the normal judicial posture of deference should have been followed in *Griswold*.

Immediately after the case was decided, one commentator forecast that, "depending upon where the philosophy of *Griswold* leads, either the case will gain a respected place in constitutional jurisprudence as the progenitor of a new source of protection for 'fundamental personal rights,' or it will be cast aside as a judicial experiment that proved un-

254. *See, e.g.*, The Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (1974); the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974); The Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1128 (1970).

255. PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY (1977).

256. The most obvious indication of the importance accorded privacy is the number of states that have included a guarantee of privacy in their respective constitutions: ALAS. CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; HAWAII CONST. art. I, § 1; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

An exhaustive collection of constitutional provisions, statutes and cases was compiled in the Report of the Privacy Protection Study Commission, PERSONAL PRIVACY IN AN INFORMATION SOCIETY, Appendix I, part II (1977). A representative sampling of these laws, illustrating the breadth and profusion of state privacy efforts, can be found in COMPILATION OF STATE AND FEDERAL PRIVACY LAWS (R. Smith ed. 1976). Periodic updates are summarized in THE PRIVACY JOURNAL, a monthly publication sponsored in part by the American Civil Liberties Union.

257. *See generally* W. PROSSER, LAW OF TORTS 802-18 (4th ed. 1971).

258. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). The Court has, however, declined to hold that 42 U.S.C. § 1983 creates a federal common law tort remedy for defamation unless such an action is recognized by state law. Paul v. Davis, 424 U.S. 693 (1976), *rehearing denied*, 425 U.S. 985 (1976).

259. Gillmor, *Black and the Problem of Privacy* in JUSTICE HUGO BLACK AND THE FIRST AMENDMENT 91 (E. Dennis, D. Gillmor, & D. Grey eds. 1978).

workable."[260] It is time to cast *Griswold* aside for the reasons specified by Justice Black.

The stated rationale of *Griswold* is not persuasive. Apart from the *ex cathedra* pronouncement that the right of privacy was "legitimate," the Court advanced no convincing reason why it was authorized to act in the face of a presumptively legitimate and constitutional decision by the legislature as to what Connecticut perceived to be sound public policy. Nor was the Court's action "rendered self-evident by intoning the term 'fundamental.' "[261]

The genealogy is clear: *Griswold* begat *Roe* and *Roe* in turn begat the "right to life" movement.[262] The Court, confronted by the unrelenting and increasingly successful political pressure generated by *Roe*'s incursion into the legislative domain,[263] has subsequently called a halt to the onrush of the logic underlying the privacy principle.[264] The abortion funding cases indicate that the Court is unwilling to insist that the political branches accept its designation of fundamental rights as conclusive. The Court's opinions in these cases are suffused with the awareness that " 'the Constitution does not provide *judicial* remedies for every social and economic ill,' "[265] and that recourse to properly functioning political machinery is a viable and even preferable alternative to judicial action.[266]

260. McKay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259, 271 (1965).

261. L. LUSKY, *supra* note 11, at 17.

262. *See* note 11 *supra*. The dissenters in Beal v. Doe, 432 U.S. 438 (1977), took note of these opponents when they spoke of "extraordinary pressure from well financed and carefully orchestrated lobbying campaigns" and "elected leaders cower[ing] before public pressure," *id.* at 462 (Marshall, J., dissenting), and the "demonstrated wrath and noise of the abortion opponents." *Id.* at 463 (Blackmun, J., dissenting).

263. Since 1976, Congress has, after lengthy and acrimonious debate, attached the so-called Hyde Amendment to the annual appropriation bill for the Department of Health, Education and Welfare. The amendment has allowed payment of federal funds for abortions in increasingly narrow circumstances. *Compare* Act of September 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976) *with* Department of Health, Education and Welfare Appropriation Act, Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1977). Numerous lower court decisions have declared the Hyde Amendment unconstitutional. The Supreme Court has recently decided the issue and come to a contrary conclusion. Continuing the course it began with *Maher* and *Beal*, the five-man majority decided that the restrictions of the Hyde Amendment did not violate concepts of equal protection contained in either the Fifth or the Fourteenth Amendments. Harris v. McRae, 48 U.S.L.W. 4941 (June 1980); Williams v. Zbaraz, 48 U.S.L.W. 4957 (June 1980).

264. *See* text accompanying notes 218-243 *supra*.

265. Maher v. Roe, 432 U.S. 464, 479 (1977) (quoting Lindsey v. Normet, 405 U.S. 56, 74 (1972) (emphasis added)). *See also* note 161 and accompanying text *supra*.

266. "Although the Mayor's personal position on abortion is irrelevant to our decision, we note that he is an elected official responsible to the people of St. Louis. His policy of denying city funds for abortions such as that desired by Doe is subject to public debate and approval or disapproval at the polls. We merely hold, for the reasons stated in *Maher*, that

The Court in *Moore v. City of East Cleveland* admitted that the right of privacy is grounded in substantive due process.[267] The next logical step for the Court is to adopt a less imperialistic conception of the judicial function. It would be well-advised to heed Justice Frankfurter's stricture that "[i]n a democratic society like ours, relief must come through an aroused public conscience that sears the conscience of the people's representatives."[268] Because the people are aroused and because the people's representatives have shown that relief *can* come from the democratic process, no reason exists for not leaving the resolution of privacy-related issues to the political branches.[269]

In addition to the abortion controversy, the reasoning of *Griswold* is capable of producing further results which society might find intolerable. Although an obvious response to this problem is that constitutional rights are not and should not be dependent upon popular approval, this answer does not resolve the internal contradiction that political considerations impose on *Griswold*'s operation. The Court set out to protect only those aspects of privacy which are fundamental. Overlooking the fact that the "right" was itself the creation of political action by the Court, a right of privacy "broad enough to encompass a woman's decision whether or not to terminate her pregnancy"[270] would also appear broad enough to encompass the "right" to practice homosexuality, at least in private. Yet the Court has declined to make this seemingly logical extension of privacy.[271]

These gaps in the coherent conceptualization and application of the privacy principle only emphasize the importance of the role of judicial discretion in the area of fundamental rights. Without the concrete guidance of specific constitutional provisions, the Court is thrown back to its own estimations of which judicially designated fundamental rights will comport with current public attitudes. Decisions of this nature cannot be made in a vacuum: the Court is constantly taking the risk that it may turn a blind corner only to find the flow of public opinion moving in the opposite direction. Conversely, where public opinion is known to be hostile, as in the case of homosexuality, legal logic may yield to political reality.[272] Thus conceived, the field of funda-

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the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth as St. Louis has done." Poelker v. Doe, 432 U.S. 519, 521 (1977) (footnote omitted). *Accord*, Maher v. Roe, 432 U.S. 464, 479-80 (1977).

267. *See* notes 208-16 and accompanying text *supra*.

268. Baker v. Carr, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

269. This is qualified, of course, by withholding from legislative interference those privacy interests which are linked to specific provisions of the Bill of Rights.

270. Roe v. Wade, 410 U.S. 113, 153 (1973).

271. Doe v. Commonwealth Att'y, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) (constitutionality of Virginia's criminal statutes prohibiting sodomy and oral copulation upheld as applied to private consensual conduct).

272. The Court is obviously constrained by the fact that its decisions command accept-

mental rights has no boundaries except those that are self-imposed by the Court when its political judgment persuades it to halt the expanding logic of the privacy principle.[273] This haphazard process is proper and even commendable when practiced by the political branches, but it is an unseemly approach for the courts to adopt.[274]

Justice Black appreciated the emotive force of the phrase "right to privacy" and its impact upon judges. He also saw that its attractions were rooted, not in the constitutional, but in the transcendental.[275] It was because he recognized the evocative appeal of the words that he objected so strenuously to their use by the Court in preference to the language selected by the Framers of the Constitution. That instrument's language contains policy decisions establishing values which are not subject to judicial modification:

> Courts have neither the right nor the power to review . . . original decision[s] of the Framers and to attempt to make a different evaluation of the importance of the rights granted in the Constitution. When conflicting values exist in the field of individual liberties protected by the Constitution, that document settles the conflict, and its policy should not be changed without constitutional amendment by the people in the manner provided by the people.[276]

The Court and the American polity have been ill-served by the

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ance only to the extent it accords with society's beliefs or if opposition to the Court's actions can be overcome by loyalty to the legitimacy of the Judiciary's role in our government. *See generally* THE IMPACT OF SUPREME COURT DECISIONS (T. Becker ed. 1973); R. JOHNSON, THE DYNAMICS OF COMPLIANCE (1967); S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES (1970).

273. *Compare* the majority opinion in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) *with* the dissenting opinion of Justice Marshall. *Id.* at 100.

274. The hazards are increased once the Court goes beyond the mere enunciation of a right or principle which may be supported by society and, under the compulsion of the necessity of securing the right, feels obliged to deal with the incidents of the right, which may not be acceptable. For example, the public may support the idea of integration or privacy but balk at busing or abortion. Yet this is inevitable unless the Court makes the distinction between right and remedy. *See* text accompanying note 161 *supra.*

The unease increases when the Court's concern with the details attending the exercise of a right seem to find it wielding a line-item veto. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (striking down a state law specifying surgical procedures to induce abortions).

275. " 'A right of privacy in matters purely private is . . . derived from natural law.' " Griswold v. Connecticut, 381 U.S. 479, 510 n.1 (1965) (Black, J., dissenting) (quoting Pavesich v. New England Life Ins. Co., 122 Ga. 190, 194, 50 S.E. 68, 70 (1905)). The Supreme Court of Georgia went on to describe privacy as a concept "which may be said to arise out of those laws sometimes characterized as '*immutable*,' 'because they are natural, and so just at all times, and in all places, that no authority can either change or abolish them.' It is one of those rights referred to by some law writers as '*absolute*'. . . ." *Id.* (citations omitted) (emphasis in original).

276. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 879 (1960). *Accord*, Baldwin v. New York, 399 U.S. 66, 75 (1970) (Black, J., concurring).

creation of a general constitutional right of privacy. Resurrected out of a fear that the other political branches would fail to protect the right (a fear that was subsequently disproven), the doctrine lured the Court into invalidating a score of state laws under the holding in *Roe*. The resulting political imbroglio typifies the Court's recurring tendency to suffer from "self-inflicted wounds."[277]

The conclusion that the Court has overreached itself will stand regardless of whether the *Griswold* doctrine is measured against either Justice Black's concept of the judicial function, or the "ordered liberty" standard outlined in *Palko v. Connecticut*.[278] Judged by the former, the controversy roiling around the Court as a result of the privacy-abortion cases is the inevitable consequence of the Court's usurpation of powers constitutionally entrusted to the political branches. Measured by the latter, the Court is presently under attack because it has consistently misjudged its theoretical ability to mirror contemporary opinion and also misinterpreted the public temper on the incidents accompanying the privacy right in particular situations.[279] This accentuates the validity of Justice Black's belief that judges are not equipped, either institutionally[280] or personally,[281] to act as the diviners of society's prevailing attitudes. In either case, the Court has needlessly disparaged the political process and the democratic ethic.[282]

277. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 50 (1928).

278. 302 U.S. 319 (1937).

279. *See* note 274 *supra*.

280. The Court's lack of facilities to gather information was one of the reasons Justice Black felt the Judiciary should avoid using substantive due process to second-guess legislative decisions. *See* note 169 *supra*. *Accord*, BLACK, *supra* note 82, at 30; Harper v. Virginia Bd. of Elections, 383 U.S. 666, 678 (1966) (Black, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 519 (1965) (Black, J., dissenting); McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 184 (1940) (Black, J., dissenting); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 452 (1939) (Black, J., dissenting). *See also* R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 291 (1941).

281. Justice Black felt that all the talk about judges applying the "collective conscience" of society through the due process clause was disingenuous and "only a euphemism for an 'individual's' judgment. Judges are as human as anyone and as likely as others to see the world thru [sic] their own eyes and find the 'collective conscience' remarkably similar to their own." Goldberg v. Kelly, 397 U.S. 254, 271 n.6 (1970) (Black, J., dissenting). *Accord*, BLACK, *supra* note 82 at 12-14.

282. "And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. The judiciary, to-day, in dealing with the acts of their coordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it. For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility." THAYER, HOLMES, & FRANKFURTER, JOHN MARSHALL 87-88 (Phoenix ed. 1967).

The public's reaction to the Court's abortion actions reaffirms the earlier opinion of one of Justice Black's former colleagues. Time, Justice Robert Jackson remarked, "has proved that [the Court's] judgment was wrong on most of the outstanding issues upon which it has chosen to challenge the popular branches."[283] The privacy doctrine has not proved an exception to this statement.[284]

VI. Conclusion

The cardinal tenet of Mr. Justice Black's constitutional jurisprudence was his belief that the Constitution was framed with the goal of preventing any one department of government from collecting, retaining or exercising uncontrolled power.[285] The paradox of a nondemocratic Judiciary acting within a system professing to attach a paramount value to rule by democratic methods disturbed Justice Black no less than many of his contemporaries.[286] Although he fully accepted the propriety of judicial review[287] when it upheld the primacy of a constitutional policy decision, he restricted the exercise of this power to the finite number of values verifiable by direct reference to the constitutional text.[288]

The thesis of Justice Black's dialectic was a scheme of governmental powers and purposes which allowed for a hierarchy of permissible judicial activity. These mandates descended in force and legitimacy from the absolutes of the First Amendment, the situational bans against excessive bail and unreasonable searches and seizures, to the

283. R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY, at x (1941).

284. Renunciation of the *Griswold* substantive due process concept would not require the Court to vest in government the constitutionally unfettered authority to intrude into an individual's privacy. It would, however, require the Court to confine privacy to those instances where it may be recognized as a value whose scope does not exceed the reach of a specific constitutional provision. The demise of *Griswold* would not affect those privacy interests which inhere in the First, Fourth, and Fifth Amendments.

285. BLACK, *supra* note 82 at 3-22.

286. On the effect of this phenomenon on the profession in general, see Sutherland, *Privacy in Connecticut*, 64 MICH. L. REV. 283 (1965).

Justice John Harlan, whose conceptualization of due process was the polar opposite of Justice Black's, said of his colleague: "No Justice, whether coming from the political arena or otherwise, has worn his judicial robes with a keener sense of the limitations that go with them than has Mr. Justice Black." Harlan, *Mr. Justice Black—Remarks of a Colleague*, 81 HARV. L. REV. 1, 2 (1967).

287. 381 U.S. at 513, 521. This was not precisely the same view he held upon his accession to the Court: "When I first came to the Court, I had grave doubts about judicial review. Grave doubts. But I am now convinced that if we are to have the form of free government and free society which the Constitution intends, the Court must function as it has." Remarks made by Justice Black, *quoted in* Frank, *The New Court and the New Deal* in HUGO BLACK AND THE SUPREME COURT 63 (S. Strickland ed. 1967).

288. Reich, *The Living Constitution and the Court's Role* in HUGO BLACK AND THE SUPREME COURT 142 (S. Strickland ed. 1967).

complete absence of judicial power to review social and economic legislation which does not present a facial conflict with a specific constitutional provision. This last category will always provide the broadest and most seductive outlet for improper judicial action because the Constitution does not specifically show that judicial action is forbidden. Released from explicit contextual constitutional guidance, and confronted with laws which will often involve the attempted resolution of debatable issues, contemporary judicial activity may all too easily illegitimately interfere with the democratic process. Legislation in this residual sector should come before the Court with a presumption of constitutionality, bolstered by the electoral authority of its makers. When laws touch upon topics unforeseen and unforeseeable by the Framers, Justice Black adamantly believed that "elected legislature[s] . . . must have the last word on a wide range of problems in any system that hopes to be democratic."[289]

Legislative acts or omissions in these nebulous realms, however "arbitrary," "unwise" or "unreasonable," must be allowed. Justice Black refused to exercise a judicial oversight for laws on the cutting edge of current controversy, serene in the belief that the process which produces misguided legislation carries with it its own self-correcting mechanisms and that the people are fully capable of protecting their own interests.[290] A democratic system that indulges the people's right to experiment with social regulation presumes that the tension between expectation and reality produced by such laws will furnish the impetus for correction. This scheme must be accepted by the Judiciary unless legislative power and Article V are to be considered mere gestures. The flaws in democratic government must be tolerated by courts. Society will not be served by disparaging the democratic process, the people's most basic right and the Constitution's most fundamental and pervasive value.[291]

Whatever the benefits of privacy as an abstract principle, it was created at the expense of a greater value. Since the people have subsequently disproved the predicate of the *Griswold* decision—the inability or unwillingness of the political branches to protect privacy—it becomes obvious in hindsight that the Court needlessly sacrificed the principle of judicial self-restraint while utilizing a doctrine with a proven potential for harming the judiciary and the country. Given

289. Rostow, *Mr. Justice Black: Some Introductory Remarks*, 65 YALE L.J. 451, 452 (1956). The Justice said that states should be allowed the maximum latitude possible "in areas where they have a general constitutional competence to act." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 674 (1966) (Black, J., dissenting).

290. Ball, *Hugo L. Black: A Twentieth Century Jeffersonian*, 9 SW. U.L. REV. 1049, 1053 (1977); 404 U.S. vii (remarks of Burger, C.J. announcing death of Mr. Justice Black). *See also* BLACK, *supra* note 82, at 11.

291. *See* notes 166-67 *supra*.

such a balance sheet, Justice Black felt that the benefits are not worth the danger of abuse and that no policy arguments or professed adherence to the intent of the Constitution could be pleaded in its favor.[292]

Bereft of demonstrable ties to the Constitution, *Griswold* is a throwback to the Constitution's distrust of vesting any branch of government with unbridled power lest it become unprincipled tyranny. Substantive due process is thus a standing invitation to the establishment of a kritarchy, for it "lies about like a loaded weapon for the hand of any authority that can bring forward a plausible claim of an urgent need."[293] To continue the metaphor, the Court might well remember that such an instrument, when defective, has a distressing tendency to endanger all around it, the wielder as well as the intended target.

292. Justice Black would later speak with greater particularity to the issues and dangers involved when democratic right is set against judicial will. In 1967, he joined Justice Harlan's dissent in Reitman v. Mulkey, 387 U.S. 369 (1967), where the Court struck down a state constitutional provision passed by a direct vote of the people which, in effect, legalized private discrimination in the sale of privately owned real property. Justice Harlan said that in areas implicating "delicate and troublesome problems . . . fraught . . . with human sensibilities and frailties" the Court should not contrive "new and ill-defined constitutional concept[s]" lest it arrogate to itself "powers and responsibilities left elsewhere by the Constitution." *Id.* at 395-96 (Harlan, Black, Clark and Stewart, JJ., dissenting). These words apply with equal force to *Griswold.*

293. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).