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Note, Unenumerated Rights – Substantive Due Process, the Ninth Amendment and John Stuart Mill

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UNENUMERATED RIGHTS—SUBSTANTIVE DUE PROCESS, THE NINTH AMENDMENT, AND JOHN STUART MILL

*[I]n ultimate reduction the first object of a free people is the preservation of their liberty.**

I. INTRODUCTION

Modern technology and an emerging social ethic have placed unprecedented bounds on the realm of individual liberty. Technology has severely limited the scope of behavior which affects only the actor. At the same time, overpopulation, mass communications, rapid transportation, and self-destructability have rendered men more interdependent than ever before. This interdependency makes purely individual behavior almost non-existent and justifies an ever increasing claim to societal control of individual action for the collective good. As the technological advances of modern America have provided the pragmatic justification for greater governmental control of the individual, the social ethic has provided the philosophic justification. Perhaps in reaction to a Protestant ethic, which many individuals used as justification for the exploitation of society, modern America has adopted a social ethic which places the collective welfare of society above the needs of any individual. The danger today is that the pendulum will swing too far and individual liberty will be sacrificed in the name of the collective welfare.

While a government free to act without limitation for the collective good may be democratic, it has no place in our constitutional scheme. The authors of the Constitution feared a tyranny of the majority. They believed the collective welfare could only be secured by insuring the integrity of the individual. The result was a Constitution which secured certain rights. For the purpose of this comment these right's include all privileges and immunities which vest in the individual. The realm of constitutionally protected liberty is considered to be the aggregate of these individual rights.

The same factors which have resulted in greater governmental control of the individual make it both necessary and difficult for courts to define constitutionally protected rights. The men of frontier America had the ability to withdraw from society. This generation enjoys no such option. Our "Waldens" must be internalized; rather than withdrawing from an infringement of our liberties, we must assert them and demand the government to with-

* Call, *Federalism and the Ninth Amendment*, 64 DICK. L. REV. 121, 131 (1960).

draw. Nevertheless, the consequences of almost every act extend beyond the actor, thereby more readily justifying governmental regulation. Ultimately we must look to the Constitution for a resolution of these competing claims between the individual and the state, and, through judicial interpretation, create a protected realm of individual liberty.

The United States Constitution established a dichotomy of powers and rights. Powers may be either express or implied and when the needs of modern society have required governmental regulation the Supreme Court has been able to find an implied power to act. By adopting the notion of a "living Constitution" and an expansive interpretation of the necessary and proper clause,[1] the Court has kept constitutional powers equal to the needs of the time. On the other hand, while rights in the Constitution may be either enumerated or unenumerated, the Court has been most reluctant to define the latter. This portion of the Constitution has not "lived"—while the Supreme Court has been quick to find implied powers, it has been extremely hesitant to find unenumerated rights. Nonetheless, if individual liberty is going to survive the challenge of modern America, its constitutional status will have to be reexamined in light of contemporary conditions and standards will have to be developed by which the Court can determine which conduct merits constitutional protection.

Rights and powers do not exist independent of each other. They must be viewed on a continuum and courts must assume the difficult role of balancing the competing interests on a case-by-case basis. To accomplish this it is useful to establish a hierarchy of both rights and powers. Express powers cannot be denied or enumerated rights assailed, but where implied powers and unenumerated rights clash, no standards are available by which to resolve the conflict. This comment proposes a constitutional hierarchy of rights. Rights may derive protection by enumeration, through the ninth amendment or through the due process clauses of the fifth and fourteenth amendments.

The Supreme Court has always protected enumerated rights and will, of course, continue to do so, following standards and guidelines it has established. This comment will confine itself to the protection of unenumerated rights. Initially, it will explore the doctrine used in the past to void laws violative of unenumerated rights—substantive due process. Then the ninth amendment will be suggested as a source of protected behavior, with John Stuart Mill's *On Liberty*[2] being offered as a criterion for the determination of ninth amendment rights.

1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
2. J. MILL, ON LIBERTY (Gateway Ed. 1959).

II. SUBSTANTIVE DUE PROCESS

Advocates of substantive due process contend that the due process clause of the fourteenth amendment protects those rights which are "fundamental" to a free society.[3] They argue that individuals should be free "from all substantial arbitrary impositions and purposeless restraints."[4]

Substantive due process, however, is not widely accepted as a valid interpretation of the due process clause today. The lack of workable standards is the reason usually given for its decline. To many, the power to declare a right "fundamental," and, therefore, constitutionally protected, amounts to judicial amendment and is beyond the scope of the Court's authority. However, supporters of substantive due process do not believe excessive judicial discretion is a real danger:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[5]

Appealing as this argument might be, the history of substantive due process supports the reservations of its opponents. A capsule history of the doctrine's application will show that the Supreme Court has not always demonstrated restraint.

In *Meyer v. Nebraska*[6] the United States Supreme Court voided a Nebraska law prohibiting all schools in the state from teaching in a foreign language or from teaching foreign languages to students who had not passed the eighth grade. The appellant successfully maintained that he had a constitutional right to practice his profession which was teaching a foreign language. The Court

3. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting).
4. *Id.* at 543.
5. *Id.* at 542.
6. 262 U.S. 390 (1923).

stated that "[h]is right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [fourteenth] Amendment."[7] The *Meyer* Court summarized other rights which had found fourteenth amendment protection.

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[8]

Two years later the right to "direct the upbringing and education of children"[9] was held to mean that the state could not force attendance at public as opposed to private schools. While few people objected to the results in these cases, dissatisfaction did result from a parallel series of cases. In *Lochner v. New York*,[10] the Supreme Court voided a New York labor law establishing maximum working hours for bakery employees. They placed freedom of contract on a constitutional plain:

> [A] prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week, is, in our judgment, so wholly beside the matter of a proper, reasonable and fair provision, as to run counter to that liberty of person and of free contract provided for in the Federal Constitution.[11]

Three Justices felt that the law was a valid exercise of state police power, and Mr. Justice Holmes felt that the Court had forced its economic views on the nation through the fourteenth amendment: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . [and] a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*."[12]

History vindicated Justice Holmes. Subsequent Supreme Court Justices have recoiled at the prospect of applying the substantive due process doctrine because of the potential for future *Lochners*

7. *Id.* at 400.
8. *Id.* at 399.
9. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).
10. 198 U.S. 45 (1905).
11. *Id.* at 62.
12. *Id.* at 75 (dissenting opinion).

inherent in the doctrine. As a result, other constitutional provisions have been a source for the protection of personal liberties.

A recent case upholding an unenumerated personal liberty illustrates the Court's reluctance to use substantive due process to protect individual liberty. In *Griswold v. Connecticut*[13] the Supreme Court recognized a constitutionally protected right to marital privacy. Though the opinions of five Justices[14] seemed to be consistent with the substantive due process approach to the fourteenth amendment, the ogre of another *Lochner* and the announced belief by several members of the Court in some form of "incorporation"[15] compelled the Court to find a new doctrine. Justice Douglas articulated the new approach: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy."[16] Marital privacy was placed under this constitutional penumbra.

Though a respectable majority of the *Griswold* Court believed that marital privacy was constitutionally protected, no viable doctrine emerged from the case. Justice Stewart pointed out in dissent:

> [T]he Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.[17]

Just as the Justices could not reach a meeting of the minds on why they were doing what they did, legal commentators cannot agree on the significance of the decision. Some feel that it is just one more case in "the main line of development under the substantive rights interpretation of the liberty protected by the due process clause."[18] Others, however, see it as the possible source of a new philosophy by which individual rights will be protected.[19]

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13. 381 U.S. 479 (1965).

14. Justices Harlan, White and Goldberg wrote concurring opinions which appeared to be consistent with the principles of substantive due process. The Chief Justice and Justice Brennan joined in Goldberg's opinion.

15. According to the incorporation doctrine, the fourteenth amendment was meant to incorporate the first eight amendments within itself. *See* Mr. Justice Black's dissenting opinion in Adamson v. California, 332 U.S. 46 (1947).

16. 381 U.S. at 484. This "penumbral" approach satisfies the incorporationist demand that only those rights spelled out in the first eight amendments are protected by the fourteenth amendment while allowing for the protection of "fundamental" rights as emanations of the amendments.

17. *Id.* at 527-28.

18. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 251 (1965).

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

Griswold may arguably be seen as both a continuation of those cases employing the philosophy of substantive due process and a source of a new methodology for protecting individual liberties via the ninth amendment. In the future, the Supreme Court should recognize and protect ninth amendment rights.[20] Moreover, the Court should defend lesser rights via the due process clause of the fourteenth amendment. These "lesser rights" would include any individual interest arbitrarily or capriciously infringed upon by state action.

From a constitutional viewpoint, the relationship between citizens and a state is different than that between citizens and the federal government. The federal government is one of enumerated powers and, within its power grant, it is free to act as it will unless clearly proscribed by another section of the Constitution. If enumeration grants power, omission ought reasonably be construed to deny it. By omitting powers, the government is denied access to certain realms of personal behavior. On the other hand, the state's powers are, from a federal viewpoint, not enumerated. With the exception of the meager prohibitions of Article I, Section 10 of the Constitution, the states are not expressly denied any authority over its citizens. Yet the Constitution does recognize a power vested in the people. The tenth amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people.* [Emphasis added]

The fourteenth amendment increased the scope of federal court review of state laws and this increase has complicated the court's task.[21] When reviewing a federal statute it is sufficient for a court to determine if the power to act was granted by the Constitution and if it was, the law will be upheld unless it infringes on an enumerated right. State powers, however, are not derived from the Federal Constitution. The state's powers are nearly absolute by implication and the express rights of the citizens nil. Therefore, if the same test were applied to state enactments, the power would have to be upheld no matter how blatantly it infringed on individual rights. Thus, federal courts are confronted with a real dilemma: they must either acknowledge that the Federal Constitution does not protect an individual from state action no matter how obnoxious or they must engage in a balancing of implied powers and unenumerated rights. The former course would be to nullify the fourteenth amendment. The latter would constitute a return to substantive due process.

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20. The concept of the ninth amendment rights will be developed in section III of this comment.

21. Prior to the fourteenth amendment, state laws could be challenged in federal courts under the supremacy clause by claiming they conflicted with the Federal Constitution, statutes or treaties.

It might be argued that the balancing of state and citizen powers and rights should be worked out in the political arena of the state but that ignores the historic role of the Supreme Court. The Court created judicial review[22] and it must now live with it. The fact that the fourteenth amendment complicates the task does not vitiate the Court's responsibility. The fact that a prior Court was less self-restrained than it should have been can only be answered by greater restraint in the present Court. As Arthur Sutherland put it, referring to the *Griswold* decision:

> I wish . . . that we might, like Justices Harlan and White, rely simply on the idea that such a statute as that in *Griswold* is inconsistent with the undefinable concept of reasonable liberty, which due process of law has come to connote for us and which we must let our nine Justices apply. For this, we must avow when we are frank with ourselves, is our constitutional system.[23]

Therefore, when a law is challenged as violative of an individual right which is neither expressly protected in the Constitution, nor reserved to the people by the ninth amendment, the principles of substantive due process should apply. A court should only uphold such a law if it is "reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application . . . ."[24]

III. NINTH AMENDMENT

As well as interests protectable under the due process clause, certain unenumerated rights should be recognized under the ninth amendment. These rights are of a higher order and require a showing of extreme necessity to justify governmental invasion. While the amendment's historic application does not support this contention, it does not render it untenable.

The ninth amendment was the creation of James Madison.[25]

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22. Marbury v. Madison, 5 U.S. (1 Cranch) 135 (1803).

23. Sutherland, *Privacy in Connecticut*, 64 MICH. L. REV. 283, 288 (1965). *See also* Kauper, *supra* note 18, at 258; Kutner, *The Neglected Ninth Amendment: The "Other Rights" Retained by the People*, 51 MARQ. L. REV. 121, 132 (1967).

24. Griswold v. Connecticut, 381 U.S. 479, 504 (1965) (White, J., concurring).

25. B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Call, *Federalism and the Ninth Amendment*, 64 DICK. L. REV. 121 (1960); Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627 (1956); Kelley, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966); Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936); Kutner, *The Neglected Ninth Amendment: The "Other Rights" Retained by the People*, 51 MARQ. L. REV. 121 (1967); Redlich, *Are There "Certain Rights . . . Retained by the People?*, 37 N.Y.U.L. REV. 787 (1962); Rogge, *Unenumerated Rights*, 47 CALIF. L. REV. 787 (1959).

It was inserted to allay the fears of some that enumerating rights would have the effect of denying those not listed, while satisfying the demands of others that a declaration of rights be inserted in the Constitution. The Federalists had felt that a declaration of rights was needless:

> James Wilson summarized the Federalist viewpoint: "[I]t would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should not enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence.[26]

Despite Federalist assurances, many of the states remained insistent that a Bill of Rights be adopted.[27]

Madison bowed to the states' demands, and we have a Bill of Rights which includes the ninth amendment:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Several schools of thought have developed over the meaning of the amendment. Traditionally, it has been considered purely a rule of construction articulating the assumption that the federal government has no powers which are not granted by the Constitution.[28] Some members of this school also believe the ninth amendment was inserted to make clear that the government, in amending the Constitution, was enunciating rather than creating rights. Rights, they contend, exist independent of powers and the government has the power neither to create nor to dismiss a right.[29] The common factor to these interpretations is that they afford no ninth amendment protection of rights.

> In summary, whether one reads the history of the ninth as foreclosing the "imperfect enumeration" theory, or as attempting to avoid future definitional problems, the amendment clearly remains a rule of construction with the purpose of obviating the possibility of interpreting the first eight amendments as exclusive. It is not, as its history indicates, either a source or a summary of those unenumerated rights.[30]

A second school also holds the ninth amendment to be a rule of construction, but one which provides protection for unenumerated rights:

> The Ninth Amendment is not a source of these unenumer-

26. Kelley, *supra* note 25, at 817.
27. C. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 42-44 (2d ed. 1954).
28. Call, *supra* note 25, at 129-30.
29. Dunbar, *supra* note 25, at 635, 638.
30. Kelley, *supra* note 25, at 825.

> ated rights but points to other parts of the Constitution, particularly the 'due process' clauses of the Fifth and Fourteenth Amendments as the context within which enumerated rights are to be determined and the means by which they are to be protected.[31]

Under this theory, the ninth amendment provides the constitutional basis for substantive due process. The amendment means that the first eight amendments should be liberally construed so as to protect unenumerated rights. It does not, however, protect any rights itself. Advocates of this approach consider the ninth amendment to be the functional equivalent of the necessary and proper clause, being to rights what that clause has been to powers.[32]

Others consider the ninth amendment to be a source of protection for unenumerated rights:

> [The ninth amendment] must be a positive declaration of existing, though unnamed rights, which may be vindicated under the authority of the Amendment whenever and if ever any governmental authority shall aspire to ungranted power in contravention of "unenumerated rights."[33]

It is considered declaratory of absolute or inherent rights against which any assertion of power must fail.[34] Norman Redlich contends that the tenth amendment supports this view.

> The last four words of the Tenth Amendment must have been added to conform its meaning to the Ninth Amendment and to carry out the intent of both—that as to the federal government there were rights, not enumerated in the Constitution, which were 'retained . . . by the people,' and that because the people possessed such rights there were *powers* which neither the federal government nor the states possessed.[35]

Proponents of this view have also suggested that the ninth amendment is to personal rights what the general welfare clause is for collective or public rights,[36] *viz.*, Congress can act to defend unenumerated rights with the authority for such action derived from the ninth amendment. It has even been contended that the amendment applies to the states as well as the federal government directly[37] (though not through the fourteenth amendment) and to the acts of private individuals.[38]

This comment accepts the third view in its least ambitious form.

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31. Kutner, *supra* note 25, at 135.
32. Dunbar, *supra* note 25, at 635.
33. Kelsey, *supra* note 25, at 323.
34. Kelley, *supra* note 25, at 816.
35. Redlich, *supra* note 25, at 807.
36. B. PATTERSON, *supra* note 25, at 5.
37. *Id.* at 36; Redlich, *supra* note 25, at 808, 809.
38. Kutner, *supra* note 25, at 141.

Certain unenumerated rights exist which should derive their constitutional protection from the ninth amendment. Naturally, any law which violates such a right would be void by authority of the amendment. No position is taken, however, on the more extreme positions that the ninth amendment is itself a grant of governmental power to legislate in favor of unenumerated rights or that it proscribes certain forms of private behavior.

Several considerations support this position. First, the history of the amendment does not demand one interpretation. Every historical survey available centers on the meaning which James Madison intended the amendment to have.[39] While the meaning of the document's author is relevant, it is the intent of the first Congress that is persuasive to the courts. Unfortunately, that intent is obscure. The House enacted this measure with little debate and the Senate's proceedings were secret. Perhaps a more ambitious empirical work than this comment will attempt to determine the depth of the individual Congressmen's belief in natural rights and equate that to the depth of ninth amendment protection. For purposes of this comment, however, it is sufficient to state that the amendment's history does not compel an interpretation which deprives it of substance.

A second reason for advocating a substantive ninth amendment is found in its application by the Supreme Court. While the Court has avoided reading body into the amendment, such an interpretation would have its roots in prior opinions. In *United Public Workers v. Mitchell*[40] the court stated:

> We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views.[41]

The most recent and promising application of the ninth amendment is found in *Griswold v. Connecticut*.[42] While Mr. Justice Goldberg's concurring opinion most directly relied on the ninth amendment, it was in fact used to justify his belief in substantive due process.[43] Mr. Justice Douglas' majority opinion offers more hope for a revival of the amendment. As partial justification for the opinion that marital privacy is constitutionally protected, Justice Douglas merely states that "[t]he Ninth Amendment provides: . . . ."[44] and includes the text. Future Courts might use

39. *See* note 25, *supra*.
40. 330 U.S. 75 (1947).
41. *Id.* at 94.
42. 381 U.S. 479 (1965).
43. Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 207 (1965); Kelley, *supra* note 25, at 829-30.
44. 381 U.S. at 484.

this reminder that there is a ninth amendment as a springboard from which to elaborate on the substance of the amendment.

Rules of statutory interpretation also favor a substantive ninth amendment. As a general rule, a statute should not be read so as to deprive any of its words of meaning. The amendment states that there are "certain [unenumerated] rights . . . retained by the people." While the Constitution explicitly states that these unenumerated rights of the people exist, the traditional interpretation of the amendment has shielded these rights from any constitutional protection. It is possible that this terminology was meant only as a rule of construction limiting governmental powers, but the wording in itself seems to raise certain unenumerated rights to a constitutional plane. An interpretation which denies the existence of constitutionally protected unenumerated rights clearly does violence to those words in the Constitution which state that there are enumerated rights "retained by the people."

A final reason for adopting a substantive approach to the ninth amendment is found in the nature of the times. Modern technology has provided the methods of invading the realm of the individual and modern interdependence has provided the justification for using the technology. It is no longer sufficient for courts to look only at the power being exercised to determine if it is justified. They must also scrutinize any individual interests being infringed:

> Protection of . . . the dignity and integrity of the individual . . . has become increasingly important as modern society has developed. All the forces of a technological age—industrialization, urbanization, and organization—operate to narrow the area of privacy and facilitate intrusions into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society.[45]

In short, the argument for a ninth amendment renaissance[46] is four-fold. The amendment's history does not necessarily preclude a substantive interpretation; such an interpretation is not without precedent; the rules of statutory interpretation favor it; and, modern society requires a more stable foundation for the protection of personal liberties than the past has provided. The foundation for the future should be the ninth amendment.

IV. JOHN STUART MILL—A STANDARD

Over the years, standards have evolved whereby courts are able to ascertain whether or not a statute is violative of the due

45. Emerson, *Nine Justices In Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965). *See also* McKay, *supra* note 19, at 279.

46. The ninth amendment was "born" when it was enacted but rendered lifeless by judicial inaction. This comment suggests a "rebirth" by judicial recognition.

process clause.[47] If, as this comment suggests, there is to be a higher order of rights protected by the ninth amendment, standards will have to be developed to determine which rights are favored. John Stuart Mill provides such a standard in his essay *On Liberty*.[48]

Initially, it should be made clear that Mill's philosophy is not offered as an absolute or exclusive criterion for the determination of ninth amendment rights.[49] It is offered rather as a standard which will raise a presumption that an interest is protected.

It is Mill's lack of originality which renders his work a useful tool in the determination of which rights are protected by the ninth amendment. The Court is not asked to adopt a philosophy more desirable than that of the authors of the Constitution but rather to apply a very clear statement of the philosophy which prompted the ninth amendment. Russell Kirk refers to *On Liberty* as follows:

> Some books form the character of their age; others reflect it; and Mill's *Liberty* is of the latter order. . . . As Mill himself was the last of the distinguished line of British empiricists, so his *Liberty*, with its foreboding remarks on the despotism of the masses, was more an epilogue to middle-class liberalism than a rallying-cry.[50]

While Mr. Justice Black's objection in *Griswold* to the application of standards based on "natural justice"[51] might appeal to an age which does not accept that concept, it does not obviate the fact that the men who authored the Constitution did believe in it.[52] If the Court is going to protect rights which the framers of the Constitution meant to be protected, it must deal with "natural" or "inherent" rights no matter how difficult it might be in the modern milieu.[53] It is particularly this modern inability to treat natural law concepts that makes a work like Mill's valuable. It provides workable criteria for determining which rights were considered protectable by the authors of the Constitution.

Mill's application of his philosophy is of little value today. The fact situation in Mill's time was not the same as the framer's time nor is it the same as the present. Nevertheless, his concepts have retained their vitality:

> [T]here is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also

47. *See* text accompanying notes 3-24 *supra*.
48. J. MILL, *supra* note 2.
49. Also, this comment does not suggest that the amendment was meant to embody Mill's philosophy.
50. Kirk, *Introduction* to J. MILL ON LIBERTY, *supra* note 2, at vii.
51. 381 U.S. at 522 (dissenting opinion).
52. Kelley, *supra* note 25, at 816.
53. Call, *supra* note 25, at 121.

> affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly, and in the first instance; for whatever affects himself, may affect others through himself. . . . This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. . . . Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.[54]

Capsulized, Mill's philosophy is that a person of sound mind and proper age is free to do what he will privately, either individually or in concert with others, short of harming another. It can not be too strongly stated that Mill did not offer this as a simplistic measure of rights and that he was aware that liberty could only be preserved by balancing collective rights with individual rights. There is little behavior which is purely either collective or individual and the preservation of liberty is dependent on the establishment of a wise balance between the competing interests. It is this balancing which the ninth amendment requires.

A court in applying these standards will have to resolve three questions. First, does the challenged regulation only affect the behavior of competent adults? Second, does the law limit the ability of the individual to shape his conscience or plan his life? Third, does the behavior which the law attempts to modify affect others than the actor? If there is an affirmative answer to the first two questions, and a negative to the last, the presumption that the statute is constitutional would fall and the burden would shift to the state to prove that the infringement of the ninth amendment right is justified by a compelling state interest. Thus, a law which infringes upon a right protected by the ninth amendment would undergo the same judicial scrutiny as one violative of a first amendment right.[55] In addition to a showing of

54. J. MILL, *supra* note 2, at 17-18.

55. *See, e.g.*, Board of Educ. v. Barnette, 319 U.S. 624 (1943); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

necessity, the government should be allowed to defeat a ninth amendment claim by showing a long tradition of prohibition or regulation. While the framers of the Constitution generally believed in the concept of liberty later defined by Mill, it cannot be presumed that they meant to void laws which had historic standing in common law nations.

Though Mill has never been adopted as a source of constitutional protection, the frequently heralded right to "privacy" often appears to be a synonym for Mill's "liberty." In *Olmstead v. United States*,[56] Mr. Justice Brandeis, dissenting, declared that:

> [t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[57]

Since *Olmstead* it has often been suggested that privacy stands on a constitutional plane.[58] In *Griswold* the very specific right to marital privacy was raised to that plane. The problem with this constitutional right to privacy is that it merely replaces the nebulous "liberty" with the equally nebulus "privacy." Just as one has no absolute right to "liberty," he has no absolute right to "privacy." Standards must still be developed and whether called privacy or liberty, Brandeis' "right to be let alone" is probably the functional equivalent of Mill's right to act as one will short of harming others.

In addition to the protection of privacy which in application appears to be synonomous with Mill's liberty, the Court has applied the Mill criteria in reverse. In *Public Utilities Commission v. Pollak*,[59] for example, the Supreme Court held individual liberties to be limited when in conflict with the rights of others.[60] They reversed a court of appeals' holding that radio commercial messages on public vehicles invaded the realm of privacy protected for each individual by the due process clause of the fifth amendment, stating: "The liberty of each individual in a public vehicle or public place is subject to reasonable limitations in relation to the rights of others."[61] It is not extreme to argue that those same liber-

56. 277 U.S. 438 (1928).
57. *Id.* at 478.
58. Dixon, *supra* note 43; 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); McKay, *supra* note 19.
59. 343 U.S. 451 (1952).
60. *Id.* at 465.
61. *Id.*

ties would have been protected if the rights of others had not been involved. Some state courts have, in fact, voided laws specifically because they entered the realm of individual liberty as defined by Mill.[62] These facts lead to the conclusion that courts have applied the Mill criteria in the past, but generally have only stated their conclusions. Thus, John Stuart Mill is not alien to judicial decisions. When a court finds a right to "privacy" or "to be let alone," it is simply stating a conclusion. The determination was likely based on a reasoning process similar to that suggested by Mill in *On Liberty*. When a court suggests that an individual right must be limited when in conflict with the rights of others, it is implying the right deserves a higher order of protection when it affects the individual alone. Finally, use of this analysis by state courts means that Mill's philosophy was not unknown to the common law, and the Constitution must be interpreted in light of the common law.[63] In short, John Stuart Mill in *On Liberty* provides a workable standard by which to determine those rights which are preferred under the ninth amendment.

V. CONCLUSION

The major dilemma of the twentieth century "is the growing tension between the assumed necessity for a strong state largely devoted to the achievement of social welfare ends and the equally pressing need to preserve the individual from the gathering forces of big government."[64] In a nation with judicial review the courts must play an active role in drawing the line between these competing forces. The belief that this is a "political" problem which should be left to the legislature is unsound. The courts provide the only forum in which a single individual can be heard. The legislature on the other hand is a forum for the majority. It responds to the collective will of the citizens and is an eminently inappropriate place for an individual to challenge a law enacted for the collective welfare.

To resolve this dilemma courts must not only provide a forum for the assertion of rights but must reevaluate and redefine the constitutional bases of protected rights. That is, they must define the constitutional realm of individual liberty. This comment suggests that unenumerated rights can derive protection from two sources in the Constitution. Either the ninth amendment or the due processs clauses may provide protection from state infringement on an individual course of conduct. While these sources of protection coexist, they are not coequal and a law which infringes

62. Comment, *Limiting the State's Police Power: Judicial Reaction to John Stuart Mill*, 37 U. CHI. L. REV. 605 (1970).

63. South Carolina v. United States, 199 U.S. 437, 450 (1905).

64. McKay, *supra* note 19, at 279.

upon a ninth amendment right should merit greater scrutiny than one which invades a right favored by the due process clause.

Since history has denied the ninth amendment substance, this comment offers one standard for a determination of those rights which it protects. John Stuart Mill's *On Liberty* provides a criterion for determining whether an individual activity is subject to state control. Oversimplified, any activity is protected which affects only the actor as long as the actor is of sound mind and has reached his majority. More explicitly, the state cannot invade the realm of conscience or tastes; nor can it interfere with an individual's right to plan his own life short of interfering with others. Nevertheless, Mill is not offered as an absolute, and establishing that a right satisfies this criterion merely rebuts the presumption that a law infringing on it is constitutional and places the burden of establishing why the statute should not be voided on the state. Several factors, such as extreme governmental necessity or a history of prohibition might satisfy the state's burden. For example, a statute prohibiting adult sexual activity in private would not be presumed to be constitutional. By showing a history of prohibition of certain private sexual activity, however, the government would satisfy its burden and a law prohibiting those activities would be upheld. Such a history would, of course, have to have roots reaching back into the common law at least as far back as the time of the adoption of the Constitution. History is of value only insofar as it rebuts the presumption that the asserted right was meant to be protected by the ninth amendment. If the state cannot show historic justification for the challenged law, it must show that the law is justified by a compelling state interest and that the need cannot be satisfied in a less offensive manner. If the government fails to meet these requirements, the challenged statute must be voided by authority of the ninth amendment.

If an individual challenges a law as violative of his rights and the right infringed does not merit protection under the ninth amendment, the court should apply the traditional substantive due process criteria. The court must look at the statute and determine if it is, in its opinion, reasonably calculated to effectuate a legitimate government concern. Case law will eventually lead to some degree of certainty as to which governmental concerns are legitimate and which laws are well calculated to effectuate these concerns. The specter of *Lochner* should result in greater restraint today but not an absolute refusal to act. To refuse to act for fear of abusing its power would be to deny the Court its proper role in our system.[65]

The *Griswold* fact situation will illustrate the viability of these theories. If the criteria proposed by this comment were applica-

65. Kauper, *supra* note 18, at 258.

ble, the question presented would have been: does the state have the right to deny a married couple the right to plan their family? Surely this right meets the Mill criterion and is protected by the ninth amendment. Two adults are willfully determining their own destiny without affecting others. Thus the Mill test is met and the state could never bar such a right because it is protected by the ninth amendment. The problem in this case is that the state does not deny this right per se, but denies it de facto by refusing to allow married couples the information needed to make a rational decision and the means to carry out their decision. Since the effect of the law is to deny a ninth amendment right, it is not presumed constitutional and unless the state can prove an extreme justification, it must be voided insofar as it applies to married couples.

Supposing that there were no ninth amendment rights involved, the Court should have proceeded as Justices White and Harlan did.[66] It should have looked for a legitimate state concern, which in this case was the control of premarital sexual activity, and then determined if the statute was reasonably calculated to effectuate this goal. Certainly the denial of information to married couples could have no effect on nonmarried persons. The law was, therefore, an unreasonable infringement on the rights of married couples in violation of the due process clause.

There is, of course, danger in the Court's entering new constitutional waters and announcing unenumerated protected rights, but the times leave little room for judicial timidity. At a time when the government needed powers to act, an infant Court under Marshall was ready to find those powers. Today, the individual needs protection from that very government and if the Court does not provide that protection, individual liberty may be eroded. It would be tragic if in interpreting a document steeped in notions of individual liberty the Court could not find a protected realm of liberty. Our heritage demands the preservation of individual liberty.

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66. Griswold v. Connecticut, 381 U.S. 479 (1965) (concurring opinions). The distinctive feature of Mr. Justice White's opinion, apart from the fact that it is a clear articulation of the substantive rights interpretation of due process, is the care with which he examines the Connecticut law in determining whether any rational consideration appropriate to matters of public concern justifies the restriction.