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I. INTRODUCTION

An obvious function of the Bill of Rights is to provide a mechanism for achieving a balance between the individual and the state; the specific restraints contained therein reflect the boundary between the individual and the federal government as envisioned by the drafters. The balance produced was intended to be organic; that is, to be forever adaptable to the changing needs of government and people. Of the two methods for changing the boundary, amendment and judicial construction, the latter has assumed prime importance because the former has proved to be practically unwieldy. The exact location of the boundary line and the resulting responsiveness of the balance to human needs depend in large part upon the judicial and political philosophies and consequent judicial methodologies current within the Supreme Court.

The overriding constitutional issue of our time has been the controversy between those who view the Bill of Rights as an absolute mandate empowering, the Supreme Court to grant or deny constitutional protection to basic human values depending entirely upon whether they have literal support within the constitutional text, and those who view the Bill of Rights as a general expression of constitutional tenets to be balanced along with other factors such as human needs, legislative needs, and each individual Justice's understanding of basic standards of fairness and justice. The context for this controversy has been the Court's adjudication of the implications of due process "liberty" and the extent to which the first eight amendments should give it procedural and substantive content. The Court has seldom looked beyond the Bill of Rights to nonconstitutional sources from which interests fundamental to due process "liberty" can be derived.[1] On occasion, certain Supreme Court Justices have looked to such sources, and opponents have decried such action as an abuse of judicial restraint.[2]

Since the Constitution is a plan of written but flexible basic rights, interpreted and applied by a judiciary with few limitations upon its powers, it is necessary to avoid conferring carte blanche discretion

1. *See generally* E. CORWIN, LIBERTY AGAINST GOVERNMENT 10-67 (1948); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365 (1929).

2. Reich, *The Living Constitution and the Court's Role*, in HUGO BLACK AND THE SUPREME COURT 133 (S. Strickland ed. 1967).

upon the Court. This Note adopts the premises that we may be arriving at an era when "liberty" will demand constitutional protection of human interests other than those explicitly embodied within the text of the Bill of Rights; that judicial identification of those interests is often the most effective method for granting this protection; and that the function of constitutional due process is to preserve the relevancy of "liberty" to the needs of modern people. This Note will explore the Supreme Court's past attempts to bring content to due process "liberty," and will illustrate the difficulties in granting constitutional status to a nonconstitutional interest by tracing the legal development of one such interest, privacy. Finally, the Note will argue for a judicial methodology through which fundamental nonconstitutional interests might gain constitutional status.

II. DUE PROCESS "LIBERTY" AND FUNDAMENTAL RIGHTS

A. Introduction

Due process adjudication involves the judiciary in a three-step process that leads to eventual reconciliation of the conflicting demands of private and public interests.[3] First, the court must identify conceptually the asserted interest as one which is fundamental to our society. Secondly, the government-imposed regulation or procedure must be found to embody some legitimate public concern and some proper method of protecting that concern. Finally, a factual judgment is required to determine the actual effect that the regulation or procedure has upon individual liberties.[4] This Note is concerned primarily with the first step, the identification of fundamentality; that is, what is inherent in "dueness" of process.

The original significance of due process, as traced from the Magna Carta, was that a person should be accorded the "procedures of law" when being deprived of his life, liberty, or property.[5] Thus, when adopted into our constitutional structure, the concept of due process had only procedural connotations. The notion that due process could be used in limiting legislative power in order to protect substantive

3. The quantum of individual freedom varies with the variety of human demands made upon socicty to make greater affirmative provision for the well-being of the whole. Professor Pound has observed that "men wish to be free but they want much besides." R. POUND, JUSTICE ACCORDING TO LAW 31 (1951).

4. *See generally* Hastie, *Judicial Method in Due Process Inquiry*, in GOVERNMENT UNDER LAW 331 (A. Sutherland ed. 1956).

5. See Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 COLUM. L. REV. 1 (1917).

rights was therefore slow in developing.[6] Not until the *Dred Scott* case in 1857[7] was a substantive interpretation and application of due process conceived by the Supreme Court, and then only in dictum.

B. Procedural Due Process

Since the Bill of Rights contains primarily procedural limitations, the Court has often given procedural content to due process "liberty." During the past 50 years the Court has generally debated the fundamentality of interests specifically recognized by the text of the first eight amendments; however, certain opinions during this period are significant for their enunciations of various judicial methodologies that are still current within the Court.

In a 1937 case, *Palko v. Connecticut*,[8] an appellant argued that the double jeopardy prohibition of the Bill of Rights was essential to due process and therefore applicable to the states through the fourteenth amendment. Mr. Justice Cardozo, speaking for the Court, stated that it was not the presence of Bill of Rights limitations within the specifics of the Constitution that made them equally valid as against the states; rather, those limitations had been found to be "implicit in the concept of ordered liberty."[9] "To abolish them," he continued, would be "to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[10] He conceptualized fundamental rights that are "implicit in the concept of ordered liberty" as those interests which are "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[11] He found that the immunity from double jeopardy was not such a "fundamental principle." Implicit in this standard of "ordered liberty" is the view that an asserted private interest, which has no corollary within the specifics of the first eight amendments, but which fits the test outlined by Mr. Justice Cardozo, might well be deemed "fundamental."

In a 1947 case, *Adamson v. California*,[12] the privilege against self-incrimination was held not to be a fundamental right protected by due process "liberty" against state infringement. This result was not

6. Wynehamer v. People, 13 N.Y. 378 (1856), may have been the first clear judicial expression of a substantive right interpretation of due process.

7. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

8. 302 U.S. 319 (1937).

9. *Id.* at 325.

10. *Id.*

11. *Id.* at 328.

12. 332 U.S. 46 (1947).

surprising in view of an earlier decision, *Twining v. New Jersey*.[13] However, Mr. Justice Frankfurter's concurring opinion and Mr. Justice Black's dissenting opinion joined the basic controversy which is at the heart of this Note: By what method should due process "liberty" be given procedural and substantive content?

In substance, Justice Frankfurter adopted Justice Cardozo's view in *Palko* that due process "liberty" should perform an independent function apart from the Bill of Rights by providing the judiciary with the means to prevent governmental abuses not manifest when the Bill of Rights was drafted. As the objective standard to guide the Court in its applications of this flexible due process, Justice Frankfurter adopted the "ordered liberty" concept, which he took to encompass certain values of decency and fairness to be used as limitations upon judicial discretion.[14]

Justice Black countered with the argument that an "ordered liberty," flexible due process method exceeds the constitutuional powers of the Court.[15] He based this contention on the premise that the Constitution contains a relatively fixed balance between public and private interests and, therefore, the Court is obliged to invalidate legislation only on the strength of the particularized standards enumerated in the Bill of Rights.[16] Justice Black, a libertarian, was seeking wholesale incorporation of all of the Bill of Rights guarantees into due process "liberty," and he feared that a flexible due process method would grant the Court a large measure of discretion to deny the fundamentality of these guarantees.[17] This approach has been termed an "absolutist method"; that is, a preference for a methodology of judging which denies to judges the power to weigh competing values and policies and which adopts the Bill of Rights as the sole standard of fundamentality.[18]

In *Rochin v. California*,[19] all of the participating Justices agreed that the method by which the state had obtained incriminating evidence was a denial of the defendant's right to due process. Justice

13. 211 U.S. 78 (1908) (a state can constitutionally compel a man to testify against himself in spite of the fifth amendment prohibition against such action by the federal government).

14. 332 U.S. at 63 (concurring opinion).

15. 332 U.S. at 90 (dissenting opinion).

16. *Id.*

17. *See* Reich, *supra* note 2. *See also* Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A.L. REV. 467 (1967); *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549 (1962).

18. *See generally* Freund, *supra* note 17.

19. 342 U.S. 165 (1952).

Frankfurter, speaking for the majority, avoided implicating the Bill of Rights, by concluding that "this is conduct that shocks the conscience" and offends a "sense of justice."[20] Justice Black, reiterating his *Adamson* opinion, preferred to rest invalidation of this procedure on self-incrimination values reflected by the fifth amendment.[21] Since *Adamson*, the Court has found most of the major Bill of Rights provisions to be "fundamental" to due process "liberty."[22] Significantly, however, a majority of the Court has not held to Justice Black's view that judicial authority to identify fundamental rights in the first eight amendments negatives judicial authority to derive fundamental due process guarantees from other sources.

C. *Substantive Due Process*

The earliest attempts by the Court to give substantive content to due process "liberty" centered on the protection of commercial and property rights, termed "economic due process."[23] Significantly, the Court had little difficulty in identifying "liberty of contract" as fundamental to "liberty," even though it was not expressly recognized by the Bill of Rights as a limitation upon government.[24] The Court, however, did not find the contract liberty so fundamental as to be

20. *Id.* at 172, 173 (conviction based on the admission into evidence of 2 morphine tablets forcibly retrieved by police tbrough use of a stomach pump from stomach of suspected narcotics-peddler).

21. *See* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (invalidating a state regulation arbitrarily restricting admission to the bar); Wieman v. Updegraff, 344 U.S. 183 (1952) (invalidating a state statute subjecting public employees to arbitrary dismissal). In botb instances the Court relied solely on due process grounds without reference to the standards of the Bill of Rights.

22. *E.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment jury trial); Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment confrontation of witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination privilege); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel in non-capital cases); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusion of evidence obtained by fourth amendment unreasonable search and seizure).

23. The first such case, Allgeyer v. Louisiana, 165 U.S. 578 (1897), struck down state legislation wbich sought to regulate foreign insurance companies doing business within the state. For other cases invalidating economic or social welfare legislation under a substantive due process theory, see Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936); New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); Williams v. Standard Oil Co., 278 U.S. 235 (1929); Ribnik v. McBride, 277 U.S. 350 (1928); Tyson & Brother v. Banton, 273 U.S. 418 (1927); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Adams v. Tanner, 244 U.S. 590 (1917); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905).

24. In identifying the "liberty of contract" as being fundamental, the Court stated: "The liberty mentioned in that amendment (the fourteenth) means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties . . . ." Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

absolute. Rather, it determined that in any given instance regulatory measures might be exercised legitimately, and therefore it adopted a case-by-case, ad hoc method of adjudication. The Court subsequently utilized this methodology to invalidate a number of state and federal economic and social welfare programs.[25]

This approach was challenged in the early 1900's by a group of dissenters led by Mr. Justice Holmes,[26] and the Court eventually discarded due process protection of economic liberties.[27] This demise did not result from any explicit recognition by the Court that social welfare legislation was an inherent *good*; rather, the specific reason given centered on the problem of conceptual identification of the constitutional fundamentality of each asserted economic interest.[28] With no clear constitutional text to provide a "standard of fundamentality," the Court reasoned that decisions as to "debatable issues as respects business, economic, and social affairs"[29] should be left to legislative judgment. Thus, it was a conceived lack of standards for substantive due process adjudication that induced the Court to repudiate economic liberties.

Some years prior to the demise of economic due process, the Court, in several decisions, gave substantive content to due process "liberty" in support of civil, rather than economic, interests. In a 1923 case, *Meyer v. Nebraska*,[30] a state statute forbidding the teaching of foreign languages in public schools was invalidated under the due process clause after the Court found that this exercise of legislative power interfered with the "opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."[31] The Court expansively defined due process "liberty" as:

> [T]he 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 one's 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.[32]

Subsequently, in *Pierce v. Society of Sisters*,[33] a state statute

25. *See generally* cases cited in note 23 *supra*.

26. *See* Lochner v. New York, 198 U.S. 45, 74 (1905) (dissenting opinion).

27. *See generally* Olsen v. Nebraska, 313 U.S. 236 (1941); United States v. Caroline Prods., 304 U.S. 144 (1938); Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937); West Coast Hotel v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934).

28. *See* Olsen v. Nebraska, 313 U.S. 236 (1941).

29. Day-Brite Lighting v. Missouri, 342 U.S. 421, 423, 425 (1952).

30. 262 U.S. 390 (1923).

31. *Id.* at 401.

32. *Id.* at 399.

33. 268 U.S. 510 (1925).

compelling attendance of children at non-religious public schools was set aside for the same reason. Significantly, in neither of these cases did the Court mention that the fundamental interests given substantive due process protection had any necessary relation to the express terms of the Bill of Rights. Thus, the Court identified the fundamentality of the civil rights which were derived from nonconstitutional sources without the aid of any objective standard; however, no subsequent decisions have utilized this approach.

III. A RIGHT OF PRIVACY EMERGES AND EVOLVES

A. Introduction

Although the right of privacy is not mentioned specifically in the Constitution, it has been said that a "right to be let alone is the underlying theme of the Bill of Rights."[34] The development, or perhaps nondevelopment, of a privacy interest into a privacy right is illustrative of the critical role that methodology plays in the judicial recognition of nonconstitutional interests as fundamental to due process "liberty."

B. Historical Origins

1. *Constitutional Law.*—Three basic concepts account for the implicit presence of privacy within the first, third, fourth, fifth, and ninth amendments:[35] individualism, limited government, and the importance of private property as it relates to the exercise of individual liberty.[36] These political assumptions, which combine to maximize the concept of privacy within our political system, were injected into that system to delimit governmental authority in the seizure of persons and property.

In 1765, an English Court invalidated the use of "writs of assistance" to search private homes basing its holding on the law of trespass.[37] Thereafter, for nearly 100 years after the adoption of our Constitution, no American court expressly recognized a right of privacy by decision, although several common law doctrines, among them nuisance and trespass, protected certain aspects of privacy.[38]

34. Griswold, *The Right to be let Alone*, 55 NW. U.L. REV. 216 (1960).

35. T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 367-75 (2d ed. 1871).

36. A. WESTIN, PRIVACY AND FREEDOM 330 (1967).

37. Entick v. Carrington, 2 Wils K.B. 275, 95 Eng. Rep. 807 (C.P. 1765).

38. Other common law protections of privacy interests were: eavesdropping prosecutions; the doctrines of relevance and necessity; protection of trademark; development of legal protection for confidential relationships; protection of postal privacy. *See* A. WESTIN, *supra* note 36, at 333-37.

In an 1886 decision, *Boyd v. United States*,[39] the Supreme Court joined the fourth and fifth amendments to invalidate a provision of the Federal Customs Act, which compelled production of private effects when federal agents seized goods suspected to be contraband. Because the personal effects were not seized physically, their disclosure was not a traditional fourth amendment search and seizure, and consequently judicial invalidation of this provision was a protection of a personal rather than a property right. Mr. Justice Bradley, speaking for the Court, intimated that it was the intrusion upon privacy which the Court was seeking to protect by invoking the fourth and fifth amendments:

> It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . .[40]

Thus, it appeared that the fourth, and possibly the fifth, amendment would become the source for constitutional indentification and protection of privacy interests.

2. *Private Law.*—In 1888, Judge Cooley coined the phrase "the right to be let alone,"[41] but prior to that time no court had based relief expressly on such a right.[42] Most personal interests in privacy were being protected by doctrines in tort and contract law.[43] Several years later, Samuel Warren and Louis Brandeis, concerned over the publication of exposés by mass-circulation newspapers, wrote their now famous seminal essay in which they argued for an independent privacy principle in the common law.[44] After an analysis of the cases, they concluded that the common law did not adequately protect an individual's "inviolate personality" and that a man should be able to seek protection for those interests directly. They argued that without the new privacy right as a rational basis for protection, the excesses of "yellow journalism" would continue to expand, since there was no appropriate legal restraint.[45] The article has since been credited with

39. 116 U.S. 616 (1886).

40. *Id.* at 630.

41. T. COOLEY, TORTS 29 (2d ed. 1888).

42. W. PROSSER, THE LAW OF TORTS § 112, at 829 (3d ed. 1964).

43. *See* note 38 *supra*; A. WESTIN, *supra* note 36, at 344.

44. Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

45. "The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions of his privacy subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury." *Id.* at 196.

inducing recognition of a right of privacy by American courts.[46] In the nearly 80 years since the article was published, a majority of states either judicially or legislatively have adopted invasion of privacy as a tort.[47] Yet during that time and especially during the past decade, there has been considerable controversy over the definition and present status of the tort right. Dean Prosser has suggested that the single concept advocated by Warren and Brandeis has become a conglomeration of four torts;[48] others have argued that the concept should not be fragmented, fearing that once the force of a single concept is allowed to disintegrate, it will again become a derivative interest.[49]

C. *Privacy and The Fourth Amendment*

Although invasion of privacy has been recognized as a tort in most states, the Supreme Court has rejected the concept of a broad constitutional right to privacy within the fourth amendment. In *Olmstead v. United States*,[50] the defendant, who had been convicted on the basis of evidence obtained by a wiretap, relied on the language of the *Boyd* decision as support for the propositions that the fourth amendment protects more than physical invasions of privacy and that there is a broad constitutional right of privacy within the confines of the fourth amendment, which can be asserted regardless of the invasionary method. The majority, speaking through Chief Justice Taft, observed that constitutional interpretations should conserve public as well as private interests. To best accomodate those interests, he upheld the "practical meaning" of the fourth amendment, construing it "in the light of what was deemed an unreasonable search and seizure when it was adopted."[51] Hence, the plain language of the amendment, "search and seizure," was found to exclude trespass upon the spoken word and to include only physical trespass.

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46. Rogers, *A New Era for Privacy*, 43 N.D.L. REV. 253 (1966).

47. W. PROSSER, *supra* note 42, at 831-32.

48. The 4 torts suggested are: (1) intrusion; (2) public disclosure of private acts; (3) false light in the public eye; and (4) appropriation. *Id.* at 832-42.

49. "The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy, or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual." Bloustein, *Privacy as an Aspect of Human Dignity—An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 1003 (1964).

50. 277 U.S. 438 (1928).

51. *Id.* at 465.

Of the four dissenters, Mr. Justice Brandeis's celebrated opinion took issue specifically with the Chief Justice's "plain meaning" interpretive method and with the scope of privacy protection identified by that method. He contended that above all, constitutional interpretation should render specific guarantees adaptable to a changing world: "[A] principle to be vital must be capable of wider application than the mischief which gave it birth."[52] On the issue of constitutional privacy, Justice Brandeis argued that privacy should be recognized as an independent interest defined as "the most comprehensive of rights and the right most valued by civilized men." Consequently, he would have accorded it broad and comprehensive constitutional protection: "[E]very unjustified intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."[53] Justice Brandeis reasoned that the failure of the majority to distinguish between the interest protected and the invasionary method had prevented the identification of privacy as a fundamental fourth amendment right.

Had the Brandeis theory been adopted by the Court, the fourth amendment might have become a guaranty of a broad privacy right. Instead, besides rejecting privacy outright as a fundamental interest, the *Olmstead* majority read a requirement of physical trespass into the fourth amedment. This led to a series of decisions in which the Court relied diligently on the technical trespass rationale to refuse protection against ingenious methods of electronic surveillance.[54]

Finally, in 1967 the Court held that the physical trespass test would no longer be controlling. In *Katz v. United States*,[55] the government had obtained incriminating evidence by attaching an electronic device to the outside of a public telephone booth, which was being used regularly by the defendant. The Court overturned the conviction based upon this evidence, holding that although the electronic eavesdropping equipment did not penetrate the wall of the telephone booth, the eavesdropping violated defendant's privacy, upon which he had justifiably relied while using the booth. In distinguishing between the interest protected and the invasionary method, the Court, speaking

52. *Id.* at 473 (dissenting opinion).

53. *Id.* at 478.

54. *See, e.g.*, Lopez v. United States, 373 U.S. 427 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Silverman v. United States, 365 U.S. 505 (1961); On Lee v. United States, 343 U.S. 747 (1952); Wolf v. Colorado, 338 U.S. 25 (1949); Goldman v. United States, 316 U.S. 129 (1942).

55. 398 U.S. 347 (1967).

through Mr. Justice Stewart, asserted that the "Fourth Amendment protects people, not places."[56] It might have appeared that with this apparent emphasis on the civil liberty, rather than the property right implications of the fourth amendment, the Court was about to recognize a broad privacy right. But in explicit terms it rejected the concept of a general constitutional right to privacy embodied within the fourth amendment that had been envisioned in *Boyd* and in Justice Brandeis's *Olmstead* dissent. Indeed, Justice Stewart agreed that there were certain privacy interests implicit within the specific guarantees of the Bill of Rights, but in dictum stated that "a person's *general* right to privacy . . . is, like the protection of his property and of his very life, left largely to the law of the individual States."[57]

D. Privacy and Due Process "Liberty"

We have seen that the Court has rejected the notion that there is a broad right of privacy within the fourth amendment or any other specific guarantee; however, it has been argued by some judges that certain privacy interests are embodied within due process "liberty" and should be accorded the status of a constitutional right on the basis of their fundamentality as derived from nonconstitutional sources.

Mr. Justice Douglas was the first to assert the substance of this position. In *Public Utilities Commission v. Pollak*,[58] the Court refused to prohibit the transmission of local radio programs through loudspeakers installed on streetcars operating within the District of Columbia. Justice Douglas dissented, contending that "[l]iberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom."[59] Because the passengers were a captive audience and were thereby denied the right to choose not to listen, he reasoned that the transmission of the programs was a denial of a right of privacy. Although he chose fifth amendment due process "liberty" as the embodiment of this privacy right, he was careful to seek out implicit recognition of privacy in the first, third, and fourth amendments, identifying in each of them a grant of environmental control to the individual. Thus, although Justice Douglas would have broadened the scope of the absolutist method, he still retained the Bill of Rights as the sole standard for judging, finding constitutional

56. *Id.* at 351.
57. *Id.* at 350-51.
58. 343 U.S. 451 (1952).
59. *Id.* at 467.

support for the fundamentality of privacy in "emanations" from specific guarantees.

An even more expansive methodology was used by Mr. Justice Harlan in his dissent in *Poe v. Ullman*,[60] wherein he argued the unconstitutionality of a Connecticut contraceptive statute, which was subsequently struck down in *Griswold v. Connecticut*.[61] In *Poe*, only two dissenters, Justices Douglas and Harlan, reached the merits of the case, contending that the statute violated the right of privacy.[62] Adopting essentially the flexible due process method that was implicit in prior Cardozo and Frankfurter opinions,[63] Justice Harlan maintained that such a method could be used not only to identify the fundamentality of Bill of Rights guarantees, but also to identify interests whose fundamentality may be derived from nonconstitutional sources. Justice Harlan relied strictly on the due process clause as embodying this basic privacy interest which emanated from without the Constitution. Although he pointed to constitutional recognition of privacy in the third and fourth amendments, he refused to rely on any of the first eight amendments as a necessary textual foundation for privacy, arguing that "such an analysis forecloses any claim to constitutional protection against this form of deprivation of property."[64]

E. Griswold v. Connecticut

As we have seen, prior to the *Griswold* decision in 1965, a majority of the Supreme Court had limited the scope of the privacy right to the fourth amendment prohibition against unreasonable search and seizure. Justices Douglas and Harlan had been the sole advocates for broadening this scope. Therefore, if privacy was to be the ground for decision in *Griswold*, it fell upon the Court to fashion a new constitutional concept.

Because the Connecticut statute making the use of contraceptives a criminal offense[65] was clearly unsupportable in light of current social

60. 367 U.S. 497 (1961).

61. 381 U.S. 479 (1965).

62. As he had in *Pollak*, Justice Douglas found a right of privacy within "emanations" and "penumbras" of specific Bill of Rights guarantees, 367 U.S. at 509.

63. *See* notes 8 & 12 *supra* and accompanying text.

64. 367 U.S. at 549 (dissenting opinion).

65. "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." CONN. GEN. STAT. REV. § 53-32 (1968).

values, striking it down might have been a simple matter. There were however, many doctrinal solutions available to the Court, and the choice among them presented an ideal opportunity to provide future constitutional underpinnings for privacy and other interests that are not neatly categorized within the Constitution but which are nevertheless fundamental to liberty.[66]

In holding the statute unconstitutional, seven Justices found that marital privacy was a constitutional right fundamental to due process "liberty"[67] and declared that the fundamentality of the privacy interest was not predicated upon any one specific Bill of Rights guarantee. Two different methodologies were used by the majority in arriving at this conclusion. Five Justices declared, as had Justice Douglas in *Pollak* and *Poe*, that the fundamentality of marital privacy "emanates" from the "penumbra" of the Bill of Rights;[68] five Justices held that a privacy interest can be fundamental to due process "liberty," quite apart from any of the Bill of Rights specifics.[69] Thus, at least five Justices reaffirmed the seemingly repudiated judicial power to protect fundamental substantive interests regardless of source. Not since *Meyer* and *Pierce* had a Court majority identified and protected a substantive civil right not expressly contained within the confines of the first eight amendments.

Perhaps the great significance of *Griswold* lies in the Court's vote against a narrow, literal reading of the Constitution, relying instead upon the spirit rather than the specifics of "liberty." Privacy is but one example. The long struggle to grant constitutional recognition to a privacy interest is illustrative of the potential difficulties in identifying the fundamentality of other basic values, which spring from sources apart from the constitutional text. If the Court should refute the clear implications of *Griswold*, privacy and other nonconstitutional interests fundamental to liberty will either go unprotected or remain in large part derivative interests, fettered by the history and precedents which exist within each specific constitutional guarantee. Nevertheless, the methodological implications of *Griswold* are a step toward insuring the relevancy of constitutional liberty to the changing demands of society, thereby preserving the conflict-resolving capacities of constituional law.

66. Among the choices of doctrinal solutions were: the equal protection clause; the due process clause; and the first, third, fourth, fifth, and ninth amendments.

67. These Justices were: Chief Justice Warren and Justices Douglas, Harlan, Goldberg, White, Brennan, and Clark.

68. These Justices were: Chief Justice Warren and Justices Douglas, Goldberg, Brennan, and Clark.

69. These Justices were: Chief Justice Warren and Justices Harlan, White, Goldberg, and Brennan.

IV. FUNDAMENTAL INTERESTS AND OBJECTIVE STANDARDS—METHODOLOGICAL SOLUTIONS

A. The Search for Objectivity

When faced with the assertion of a new and allegedly fundamental interest, such as privacy, a court is caught in a frustrating dilemma—to maintain its authority it must act, yet it must preserve its constitutional powers by exercising them with restraint.[70] Theoretically, at least, a judge has the power to reshape society according to his personal scheme of values and his own beliefs in how interests should be balanced in giving effect to those values. Accordingly, judges seek to apply a standard that is sufficiently objective to limit present as well as future discretion in the adjudication of the asserted interest. This is especially true when interpreting provisions like the due process clauses, which change content depending on the nature of the controversy and the claim asserted, with the result that precedent is often meaningless. The function of a judicial standard, then, is twofold: it must first aid a court in rationally articulating a resolution of the conflict in the instant controversy, and perhaps more importantly, the decision must somehow transcend the specific dispute so as to reflect the resolution that society at large will accept. In this role, a court is a necessary power organ of a larger social process by which the conflicts of society are resolved and its goals articulated.[71]

When an interest is asserted as fundamental to due process "liberty," if a judge is not satisfied that a precise standard exists by which he can identify, formulate, and apply the interest, he might deny outright the very existence of the interest. As we have seen, this has been the result of countless efforts to convince the Supreme Court of the fundamentality of an interest for which there is no express constitutional foundation. In its search for objectivity, the Court generally has limited the choice of standards to the Bill of Rights, thereby limiting basic human rights to those envisioned nearly 200 years ago. There are a number of reasons why concerns for objectivity should not present a threshold bar to consideration of the merits of a claim, so long as it is not plainly frivolous.

First, historical justifications no longer exist to support such

70. There are no absolute limitations in the Constitution, which can have a practical effect upon the Court's power, short of impeachment or amendment. Further, phrases such as "case or controversy," "standing to sue," and "political question" can be easily manipulated.

71. *See* Ribble, *A Look at Policy Making Powers of the United States Supreme Court and the Position of the Individual*, 14 WASH. & LEE L. REV. 167 (1957); Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW. 573 (1958).

limitations upon human rights. Libertarians have long argued that the use of a flexible standard inherent within an "ordered liberty" method would eventually "dilute" the Bill of Rights by denying the fundamentality of those specific guarantees. Most of the major provisions of the Bill of Rights, however, have been incorporated without dilution into due process "liberty."[72] Secondly, it can be argued that total objectivity is unattainable due to the subjective elements present in any methodology adopted for constitutional adjudication.[73] The issues before the Court contain very real political, economic, and social implications, which are both persuasive and essential to a decision if it is to reflect the built-in organic aspects of our constitutional system.[74] Thirdly, the Court's constitutional duty is to resolve conflicts and thereby to preserve the flexibility and receptiveness of law in the face of forces for change. In light of our evolving society, it is wholly unrealistic to claim that an individual's repository of basic constitutional rights is limited to the text of the Bill of Rights. Such a position succeeds only in establishing an irrebuttable presumption of constitutionality for that legislation which is not repugnant to constitutional specifics, in spite of the legitimate human needs that must suffer. Lastly, the basic question should not center on whether personal judgment will be used; the real issue concerns the wisdom with which the Court will exercise its legitimate, if personal, powers. Mr. Justice Cardozo has appropriately commented on judicial wisdom as follows:

> [L]ogic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. . . . One of the most fundamental social interests is that law should be uniform and impartial. There must be nothing in its action that savors of prejudice or even arbitrary whim or fitfulness.[75]

The issue of wisdom necessarily involves the issue of appropriate judicial method.

B. Flexible v. Absolute Methodologies

It has been suggested that the quest for objectivity is in itself futile and that it acts as an effective denial of the independent existence of

72. *See* note 22 *supra* and accompanying text.

73. *See* Braden, *The Search for Objectivity in Constitutional Law*, in JUDICIAL REVIEW AND THE SUPREME COURT 172 (L. Levy ed. 1967).

74. Although it is said that the Supreme Court does not "interpret" facts, in reality facts seldom speak for themselves, existing only as they are contemplated by their recipient. *See* A. N. WHITEHEAD, MODES OF THOUGHT 13 (1938); Cahn, *Fact-Skepticism and Fundamental Law*, 33 N.Y.U.L. REV. 1 (1958).

75. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921).

fundamental nonconstitutional interests. It is submitted that a flexible due process, ordered liberty method can provide whatever objective standards are possible and necessary in constitutional adjudication.

Every constitutional question is replete with competing values, which reflect differing values within society. It has been the basic thesis of this Note that there never has been, and never can be, a self-executing, objective formula for interpreting the Constitution. Changing needs and demands of society will produce new challenges to individual liberties. For example, as fierce domestic controversies continue to build, public pressure will likewise build to restrict constitutional "liberty." The use of physical violence against the people, property, and institutions of the United States in apparent defiance of the law have created recently a climate of fear within the country which could lead many people to choose "order" at the expense of the "liberty" of others, as well as their own. The constitutional issues that come before the Court are, therefore, not so much a clash between right and wrong as a conflict between right and right. The absolutist method often avoids these genuine dilemmas by its effort to fashion "responsible" judicial processes, thereby slighting the emphasis that should also be given the "responsiveness" of the law. A flexible method offers an opportunity to confront the right-right dilemma by seeking the fundamentality of asserted private interests and weighing them against public interests. This method brings all relevant and recalcitrant facts to bear upon the identification process by which an interest's fundamentality is demonstrated.

The extent to which fundamental interests are found to exist will depend upon how such interests are conceived. Since definition really has meaning only in light of the purpose for which the definition is sought, perhaps the best that can be expected is to impart to the Court some sense of the interest's fundamentality to individual liberty in a complex society. This much is essential, for taking privacy as an example, much of the reluctance of the Court to identify the privacy interest can be traced to its failure to perceive the realistic implications of the privacy interest to modern man.[76] The one common element in definitions of privacy is control: privacy enables an individual to control what is known about himself and about his sphere of human activity.[77] Privacy need not find support derivatively from some existent constitutional value; rather, the fact that a person needs a reasonable measure of control over his life space would seem a sufficient self-justification for the interest's fundamentality and independent existence within the constitutional framework.

76. *See* notes 50-55 *supra* and accompanying text.

77. *See generally* Fried, *Privacy*, 77 YALE L.J. 475 (1968).

Continuing with privacy as an illustration, there are many convincing justifications that can be brought to bear on the proposition that aspects of privacy are fundamental to liberty. Among them, perhaps the best documented are studies reflecting the anthropological, sociological, philosophical, psychological, and political implications of privacy.[78] This body of scientifically developed knowledge about privacy would seem relevant and essential to the resolution of the ultimate issue of fundamentality. The nonlegal disciplines can aid the judicial process in directing the law, involving that process in the larger social process of which it is obviously a part.

Such extra-legal data obviously does not provide legal conclusions, but it does disclose information which lends credence to the conclusions of a wholly legal argument.[79] This data reflects the social implications of legal values and consequently provides an objective context to guide the Court in seeking the peculiar fundamentality of an asserted interest. This "forced" involvement in the larger social process is the potential objectivity inherent in "ordered liberty"; Justices are forced to make legal decisions against the fabric of social facts and implications. Labels and patent formulas, characteristic of the absolutist method, are not present under the guise of "objectivity" to exonerate the individual Justices from their responsibility of consciously adjusting the universal to the local, yet retaining sufficient universality to assure social acceptance of the decision and the utility of the accommodation of interests.

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78. The anthropological studies include: R. ARDREY, THE TERRITORIAL IMPERATIVE (1966); E. HALL, THE HIDDEN DIMENSION (1966); Murphy, *Social Distance and the Veil*, 66 AM. ANTHROPOLOGIST 1257-74 (1964). The philosophical studies include: J. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED (C. Everett ed. 1945); J.S. MILL, ESSAY ON LIBERTY (1859); Rawls, *Legal Obligation and the Study of Fair Play*, in LAW AND PHILOSOPHY 3 (S. Hook ed. 1964).

The psychological studies include: E. COFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959); E. HOFFER, THE TRUE BELIEVER (1951); R. LAING, THE DIVIDED SELF (1960); A. MASLOW, MOTIVATION AND PERSONALITY (1954); Journard, *Some Psychological Aspects of Privacy*, 31 LAW & CONTEMP. PROB. 307 (1966).

The sociological studies include: D. KRECH, THE INDIVIDUAL IN SOCIETY (1962); LEWIS, RESOLVING SOCIAL CONFLICT (1943); R. WILLIAMS, AMERICAN SOCIETY: A SOCIOLOGICAL INTERPRETATION (1960); Bates, *Privacy—A Useful Concept?*, 42 SOCIAL FORCES 429 (1964); Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROB. 281 (1966).

The political science studies include: H. ARENDT, THE HUMAN CONDITION (1959); M. BERGER, FREEDOM AND CONTROL IN MODERN SOCIETY (1964); H. ROELOFS, THE TENSION OF CITIZENSHIP: PRIVATE MAN AND PUBLIC DUTY (1957); Berle, *The Protection of Privacy*, 79 POL. SCI. Q. 162 (1964).

79. "Some of the errors of courts have their origin in imperfect knowledge of the economic and social consequences of a decision, or of the economic and social needs to which a decision will respond. In the complexities of modern life there is a constantly increasing need for resort by the judges to some fact-finding agency which will substitute exact knowledge of factual conditions for conjecture and impression." B. CARDOZO, THE GROWTH OF THE LAW 116-17 (1924).