ADVANCE SHEET – December 10, 2021

President's Letter

In this issue, we present several varied texts related to the doctrine of substantive due process, at issue in the Dobbs abortion case from Mississippi argued before the Supreme Court on December 1st.

The first is a letter from Learned Hand to Theodore Roosevelt dated February 27, 1912, in which Hand sets out four highly restrictive tests which should be applied to any invocation of substantive due process. [C. Jordan, *Reason and Imagination: The Selected Correspondence of Learned Hand* (Oxford U.P.2013), pp. 28-29]

The second is the dissenting opinion of Justice Black, joined by Justice Stewart, in *Griswold v. Connecticut*, 381 U.S.479, 507 (1965) urging that the doctrine is limited to the parameters of the Bill of Rights.

The third is the concurring opinion of Justice Goldberg, joined by Chief Justice Warren and Justice Brennan in *Griswold v. Connecticut* , 381 U.S.479, 486 (1965) finding the penumbra of the Ninth Amendment to be incorporated in the doctrine.

The fourth is perhaps the most eloquent invocation of the doctrine, improbably enough from the pen of Mr. Justice Mc Reynolds in the majority opinion in *Meyer v. Nebraska* , 262 U.S. 390 (1923), a case which some commentators suggest could have been decided on First Amendment grounds.

George W. Liebmann

Special Places

Wednesday marked the eightieth anniversary of the attack on Pearl Harbor, a date which has in fact lived in infamy. When one visits Pearl Harbor, at least the two occasions that I have been there, you encounter a reverence rarely seen outside of a place of worship. I have been to other places that you might think would inspire similar feelings only to find the atmosphere quite different. In Dealey Plaza, at the site of President Kennedy's assassination, it seemed everyone was more interested in taking pictures (mostly selfies) than contemplating the significance of where they were. Perhaps one of the most distasteful sights I have ever seen were two large Xs in the street, where the limousine carrying the President was located when he was shot. And yes, when traffic permitted people would jump onto one or the other of the Xs for a photo.

Most people, I hope you are amongst them, have a place in their lives they feel a specialness toward, a place they feel, at some level, a reverence for. As for me, surprise of surprises, it is the Bar Library. The Library is that wonderful combination of beauty and substance. There are times in fact when I wish its appearance was not so elegant.

This past Sunday the parish that I attend, St. Casimir in Canton had two very special visitors. The Pastor, Father Dennis, welcomed them to this most magnificent church making sure they knew that although beautiful, it was the parishioners that truly made it a special place.

I invite all of you to "my special place." If you are not familiar with all that goes toward making the Library what it is, I will be glad, depending upon how much time you have, to bring you up to speed. From its amazing history and people, to what it has to offer in the way of services and collections, collections that run the gamut from current to colonial, it is quite a place. Just do not let the way it looks fool you. Although I have never grown tired of looking at it, it is so much more.

Joe Bennett

Books – The Perfect Present

As part of a literacy campaign, not sure whether it is still out there or not, we were all told, I suppose especially the young, that “Reading is Fundamental.” We have found out that during a pandemic, it is not a bad way to spend time.

Many of the speakers who have appeared as part of the Bar Library Lecture series have done so in promotion of a book they had recently published. The Library obtained numerous copies for sale at the lectures and retained those that were not sold so that those who could not attend might have the chance to purchase them at a later time. Thus was born the Bar Library bookstore. The following are available for purchase. For yourself, for someone who is interested in the law or history, stop by and visit our store. If you already know what you would like, just let us know and we will get it to you – including that favorite modern day favorite – curbside pick-up. Just call 410-727-0280 or e-mail us at jwbennett@barlib.org.

Abraham Lincoln & Treason In The Civil War (Hardcover) (Signed By Author) $35.00
Abraham Lincoln & Treason In The Civil War (Softcover) (Signed By Author) $20.00
American Constitutional History: A Brief Introduction $30.00
Ancient Law $75.00
Art Of Cross-Examination $95.00
Baltimore & The Nineteenth Of April 1861 $15.00
Baltimore Lives $30.00
Blackstone's Commentaries On The Laws Of England $500.00
Brady v. Maryland: A Fiftieth Anniversary Commemoration $20.00
Daggers Drawn: 35 Years Of KAL Cartoons In The Economist $35.00
The Death Penalty As Torture $20.00
Emancipation – The Union Army . . . (Signed By Author) $35.00
Ex Parte Merryman: Two Commemorations $15.00
Failure To Flourish $30.00
The Fall Of The House Of Speyer $35.00
51 Imperfect Solutions $20.00
The Ghosts Of Johns Hopkins (Signed By Author) $20.00
Great American Law Reviews (3 Volume Set) $300.00
Holding Fast To Dreams $25.00
I'm Not Really Guilty $25.00
Lincoln On Law, Leadership, And Life (Signed By Author) $12.50
The Lost Indictment Of Robert E. Lee (Signed By Author) $20.00
Louis D. Brandeis $35.00
Louis D. Brandeis: American Prophet $20.00
The Making Of Africa America $25.00
Mencken: The Days Trilogy $30.00
Mencken's Prejudices Debunked $20.00
Military Law And Precedents $75.00
Odessa: Architecture – Monuments $35.00
The Order Of The Coif $95.00
Our Little Monitor: The Greatest Invention Of The Civil War (Signed By Author) $25.00 Prohibition In Maryland: A Collection Of Documents $15.00
The Promise And The Dream $30.00
Reason And Imagination: The Selected Correspondence of Learned Hand $35.00
The Secret Life Of Lady Liberty $20.00
The Spirit Of The Common Law And Other Writings $150.00
Telemachus $20.00

Sapperstein & Associates, LLC

Real Estate Appraisers • Consultants • Due Diligence and Valuation Specialists

301-654-0214 | appraisal@sapperstein.net | Established 1982

Gary L Sapperstein, MAI, SRPA, MRICS
7920 Norfolk Ave, Ste, 220, Bethesda, MD 20814

Serving all of Maryland, including Baltimore, Washington, D.C. and Northern Virginia

Appraisal Services

- For Lending Purposes
- Real estate portfolios
- Gifting & estate tax planning and reporting purposes
- Corporate realty assets
- Fair annual rental studies
- Valuation of underlying assets for partnership purposes
- Litigation Support
- Date of Death Valuations

1912-2

To Theodore Roosevelt

February 27, 1912 University Club

Dear Colonel Roosevelt:

I have breakfasted and dined today with [George] Rublee,[39] and I am so pleased with his idea that I want to write you of how perfectly I think it answers the situation. I cannot help saying that the appeal to the people from judicial decisions has very seriously troubled me, not because it is "revolutionary," but because it seems to me to meet the evil in the wrong way. I can't see why Rublee's idea does not in much more thoroughgoing fashion than my suggestion go to the very heart of the difficulty.

All the veto power of the courts which can trouble what you want to do, and the rest of us who feel as you do, is bound up in the phrase "due process of law" which we all have in the Bill of Rights. It is by definition of that phrase that practically the whole damage has occurred. Having now an authoritative and unanimous declaration of the Supreme Court after the most amazingly latitudinarian canon,[40] what can be better than to suggest that it be written into the Bill of Rights as a definition. You would not want to take Holmes verbatim; there are other and shorter forms which have been constantly recurring. You may remember my sending you one opinion which was only a specimen. Besides, you need not commit yourself to any given phrase; it is enough that the interpretation should be finally fixed in the B. of R. itself, substantially embodying the best present doctrine of the Supreme Court. I confess if it came to actual reduction in the case of a given state, I

---

38. LH published two articles on the minimum wage in THE NEW REPUBLIC: *The Hope of the Minimum Wage*, November. 20, 1915, at 66, and *The Legal Right to Starve*, May. 2, 1923, at 254 (published anonymously).

39. George Rublee (1858–1957): New York attorney, Federal Trade Commission, 1915–1916; Special Counsel to the Treasure Department, 1917; American Delegate to the Allied Maritime Transport Council, London, 1918–1919.

40. I.e., in the vein of Holmes's opinion in *Noble State Bank v. Haskell*: "We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power." 219 U.S. 104, 110 (1911).

should want it powerfully clear, but that's another matter. The genius of the idea is that it absolutely quiets the hardest-shelled Bourbon.[41] They always have banked on the Sup. Ct., and haven't yet waked up to the fact that that august body has been sadly treacherous of late, consistently, deliberately treacherous.

New York is, of course, a bad place to judge from, and we are apt to get a gloomy outlook, but still, with all allowance, I think that the present form of the recall of judicial decisions is much misunderstood and distrusted. I don't believe that would be your real purpose at all, if it could be once made clear, and I hope you will gradually be able to make Rublee's scheme emerge, and take the place of the other, that is, if you agree. I hope you liked Rublee. I have mentioned him to you but you never met him before, to know him. He has more sagacity and clearness of mind than almost any man I know. He could and would help a good deal in such matters[...]

The following suggestions occur to me as tentative definitions of "due process of law" or, what is the same thing, the "Police Power." None of them is taken verbatim from the reports, but they can be found in substance I think throughout them.

1. "an act of the legislature shall be deemed due process of law if it prescribe what can in any reasonable view be thought to serve the welfare or convenience of the people."
2. "an act of the legislature shall be deemed due process of law if it prescribe what it consonant with morality, or public policy, as understood by a majority of the people."
3. "an act of the legislature shall be deemed due process of law unless it certainly appear to have no possible relation to any public policy."
4. "an act of the legislature shall be deemed due process of law whenever it does not clearly prescribe what is beyond the scope of any reasonable view of the welfare or convenience of the people."

I rather prefer no. 4 or no. 2.
L. Hand

ms with signature, Theodore Roosevelt Papers, Manuscript Division, LC, Reel 131

41. I.e., arch-conservative.

Estelle T. GRISWOLD et al. Appellants,

v.

STATE OF CONNECTICUT.

No. 496.

Argued March 29, 1965.

Decided June 7, 1965.

Mr. Justice BLACK, with whom Mr. Justice STEWART joins, dissenting.

I agree with my Brother STEWART'S dissenting opinion. And like him I do not to any

extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is my Brethren of the majority and my Brothers HARLAN, WHITE and GOLDBERG who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe—except their conclusion that the evil qualities they see in the law make it unconstitutional.

Had the doctor defendant here, or even the nondoctor defendant, been convicted for doing nothing more than expressing opinions to persons coming to the clinic that certain contraceptive devices, medicines or practices would do them good and would be desirable, or for telling people how devices could be used, I can think of no reasons at this time why their expressions of views would not be protected by the First and Fourteenth Amendments, which guarantee freedom of speech. Cf. Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89; NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405. But speech is one thing; conduct and physical activities are quite another. See, e.g., Cox v. State of Louisiana, 379 U.S. 536, 554—555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471; Cox v. State of Louisiana, 379 U.S. 559, 563—564, 85 S.Ct. 476, 480, 13 L.Ed.2d 487; id., 575—584 (concurring opinion); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834; cf. Reynolds v. United States, 98 U.S. 145, 163—164, 25 L.Ed. 244. The two defendants here were active participants in an organization which gave physical examinations to women, advised them what kind of contraceptive devices or medicines would most likely be satisfactory for them, and then supplied the devices themselves, all for a graduated scale of fees, based on the family income. Thus these defendants admittedly engaged with others in a planned course of conduct to help people violate the Connecticut law. Merely because some speech was used in carrying on the conduct—just as in ordinary life some speech accompanies most kinds of conduct—we are not in my view justified in holding that the First Amendment forbids the State to punish their conduct. Strongly as I desire to protect all First Amendment freedoms, I am unable to stretch the Amendment so as to afford protection to the conduct of these defendants in violating the Connecticut law. What would be the constitutional fate of the law if hereafter applied to punish nothing but speech is, as I have said, quite another matter.

The Court talks about a constitutional ‘right of privacy’ as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the ‘privacy’ of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against ‘unreasonable searches and seizures.’ But I think it belittles that Amendment to talk about it as though it protects nothing but ‘privacy.’ To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term ‘right of privacy’ as a comprehensive substitute for the Fourth Amendment's guarantee against ‘unreasonable searches and seizures.’

'Privacy' is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 293, 84 S.Ct. 710, 733, 11 L.Ed.2d 686 (concurring opinion); cases collected in City of El Paso v. Simmons, 379 U.S. 497, 517, n. 1, 85 S.Ct. 577, 588, 13 L.Ed.2d 446 (dissenting opinion); Black, The Bill of Rights, 35 N.Y.U.L.Rev. 865. For these reasons I get nowhere in this case by talk about a constitutional 'right or privacy' as an emanation from one or more constitutional provisions.1 I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

This brings me to the arguments made by my Brothers HARLAN, WHITE and GOLDBERG for invalidating the Connecticut law. Brothers HARLAN2 and WHITE would invalidate it by reliance on the Due Process Clause of the Fourteenth Amendment, but Brother GOLDBERG, while agreeing with Brother HARLAN, relies also on the Ninth Amendment. I have no doubt that the Connecticut law could be applied in such a way as to abridge freedom of speech and press and therefore violate the First and Fourteenth Amendments. My disagreement with the Court's opinion holding that there is such a violation here is a narrow one, relating to the application of the First Amendment to the facts and circumstances of this particular case. But my disagreement with Brothers HARLAN, WHITE and GOLDBERG is more basic. I think that if properly construed neither the Due Process Clause nor the Ninth Amendment, nor both together, could under any circumstances be a proper basis for invalidating the Connecticut law. I discuss the due process and Ninth Amendment arguments together because on analysis they turn out to be the same thing—merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive.

The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it consider to be arbitrary, capricious, unreasonable, or oppressive, or this Court's belief that a particular state law under scrutiny has no 'rational or justifying' purpose, or is offensive to a 'sense of fairness and justice.'3 If these formulas based on 'natural justice,' or others which mean the same thing,4 are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. I readily admit that no legislative body, state or national, should pass laws that can justly be given any *513 of the invidious labels invoked as constitutional excuses to strike down state laws. But perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose. While I completely subscribe to the holding of Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that

legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of 'civilized standards of conduct.'5 Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution.6

Of the cases on which my Brothers WHITE and GOLDBERG rely so heavily, undoubtedly the reasoning of two of them supports their result here—as would that of a number of others which they do not bother to name, e.g., Lochner v. State of New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937; Coppage v. State of Kansas, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441; Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813, and Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785. The two they do cite and quote from, Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, and Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, were both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in Lochner v. New York, supra, one of the cases on which he relied in Meyer, along with such other long-discredited decisions as, e.g., Adams v. Tanner, 244 U.S. 590, 37 S.Ct. 662, 61 L.Ed. 1336, and Adkins v. Children's Hospital, supra. Meyer held unconstitutional, as an 'arbitrary' and unreasonable interference with the right of a teacher to carry on his occupation and of parents to hire him, a state law forbidding the teaching of modern foreign languages to young children in the schools.7 And in Pierce, relying principally on Meyer, Mr. Justice McReynolds said that a state law requiring that all children attend public schools interfered unconstitutionally with the property rights of private school corporations because it was an 'arbitrary, unreasonable, and unlawful interference' which threatened 'destruction of their business and property.' 268 U.S., at 536, 45 S.Ct. at 574. Without expressing an opinion as to whether either of those cases reached a correct result in light of our later decisions applying the First Amendment to the States through the Fourteenth,8 I merely point out that the reasoning stated in Meyer and Pierce was the same natural law due process philosophy which many later opinions repudiated, and which I cannot accept. Brothers WHITE and GOLDBERG also cite other cases, such as NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405; Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231, and Schneider v. State of New Jersey, 308 U.S. 147, 60 S.Ct. 146, which held that States in regulating conduct could not, consistently with the First Amendment as applied to them by the Fourteenth, pass unnecessarily broad laws which might indirectly infringe on First Amendment freedoms.9 See Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 7—8, 84 S.Ct. 1113, 1117, 12 L.Ed.2d 89. 10 Brothers WHITE and GOLDBERG now apparently would start from this requirement that laws be narrowly drafted so as not to curtail free speech and assembly, and extend it limitlessly to require States to justify and law restricting 'liberty' as my Brethren define 'liberty.' This would mean at the very least, I suppose, that every state cri minal statute —since it must inevitably curtail 'liberty' to some extent—would be suspect, and would have to be justified to this Court.11

My Brother GOLDBERG has adopted the recent discovery12 that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates 'fundamental principles of liberty and justice,' or is contrary to the 'traditions and (collective) conscience of our people.' He also states, without proof satisfactory to me, that in making decisions on this basis judges will not consider 'their personal and private notions.' One may ask how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll.13 And the scientific miracles of this

age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the '(collective) conscience of our people.' Moreover, one would certainly have to look far beyond the language of the Ninth Amendment14 to find that the Framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine. The whole history of the adoption of the Constitution and Bill of Rights points the other way, and the very material quoted by my Brother GOLDBERG shows that the Ninth Amendment was intended to protect against the idea that 'by enumerating particular exceptions to the grant of power' to the Federal Government, 'those rights which were not singled out, were intended to be assigned into the hands of the General Government (the United States), and were consequently insecure.'15 That Amendment was passed, not to broaden the powers of this Court or any other department of 'the General Government,' but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the '(collective) conscience of our people' is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court. This fact is perhaps responsible for the peculiar phenomenon that for a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs. Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.

I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.16

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat oldfashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause with an 'arbitrary and capricious' or 'shocking to the conscience' formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, e.g., Lochner v. State of New

York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937. That formula, based on subjective considerations of 'natural justice,' is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703; Olsen v. State of Nebraska ex rel. Western Reference & Bond Assn., 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305, and many other opinions.17 See also Lochner v. New York, 198 U.S. 45, 74, 25 S.Ct. 539, 551 (Holmes, J., dissenting).

In Ferguson v. Skrupa, 372 U.S. 726, 730, 83 S.Ct. 1028, 1031, 10 L.Ed.2d 93, this Court two years ago said in an opinion joined by all the Justices but one18 that

'The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.'

And only six weeks ago, without even bothering to hear argument, this Court overruled Tyson & Brother v. Banton, 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718, which had held state laws regulating ticket brokers to be a denial of due process of law.19 Gold v. DiCarlo, 380 U.S. 520, 85 S.Ct. 1332. I find April's holding hard to square with what my concurring Brethren urge today. They would reinstate the Lochner, Coppage, Adkins, Burns line of cases, cases from which this Court recoiled after the 1930's, and which had been I thought totally discredited until now. Apparently my Brethren have less quarrel with state economic regulations than former Justices of their persuasion had. But any limitation upon their using the natural law due process philosophy to strike down any state law, dealing with any activity whatever, will obviously be only self-imposed.20

In 1798, when this Court was asked to hold another Connecticut law unconstitutional, Justice Iredell said:

'(I)t has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.' Calder v. Bull, 3 Dall. 386, 399, 1 L.Ed. 648 (emphasis in original).

I would adhere to that constitutional philosophy in passing on this Connecticut law today. I am not persuaded to deviate from the view which I stated in 1947 in Adamson v. People of State of California, 332 U.S. 46, 90—-92, 67 S.Ct. 1672, 1696, 91 L.Ed. 1903 (dissenting opinion):

'Since Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60, was decided, the practice has been firmly established for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision thereby affecting policy. But to pass upon the constitutionality of statutes by looking to

the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is another. 'In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other they roam at will in the limitless *526 area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.' Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 599, 601, n. 4, 62 S.Ct. 736, 749, 750, 86 L.Ed. 1037.'21 (Footnotes omitted.)

The late Judge Learned Hand, after emphasizing his view that judges should not use the due process formula suggested in the concurring opinions today or any other formula like it to invalidate legislation offensive to their 'personal preferences,'22 made the statement, with which I fully agree, that:

'For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.'23

So far as I am concerned, Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.

Footnotes

1 The phrase 'right to privacy' appears first to have gained currency from an article written by Messrs. Warren and (later Mr. Justice) Brandeis in 1890 which urged that States should give some form of tort relief to persons whose private affairs were exploited by others. The Right to Privacy, 4 Harv.L.Rev. 193. Largely as a result of this article, some States have passed statutes creating such a cause of action, and in others state courts have done the same thing by exercising their powers as courts of common law. See generally 41 Am.Jur. 926—927. Thus the Supreme Court of Georgia, in granting a cause of action for damages to a man whose picture had been used in a newspaper advertisement without his consent, said that 'A right of privacy in matters purely private is * * * derived from natural law' and that 'The conclusion reached by us seems to be * * * thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law * * *.' Pavesich v. New England Life Ins. Co., 122 Ga. 190, 194, 218, 50 S.E. 68, 70, 80, 69 L.R.A. 101. Observing that 'the right of privacy * * * presses for recognition here,' today this Court, which I did not understand to have power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with 'privacy.'

2 Brother Harlan's views are spelled out at greater length in his dissenting opinion in Poe v. Ullman, 367 U.S. 497, 539—555, 81 S.Ct. 1752, 1774, 1783, 6 L.Ed.2d 989.

3 Indeed, Brother WHITE appears to have gone beyond past pronouncements of the natural law due process theory, which at least said that the Court should exercise this unlimited power to declare acts unconstitutional with 'restraint.' He now says that, instead of being presumed constitutional, see Adkins v. Children's Hospital, 261 U.S. 525, 544, 43 S.Ct. 394, 396, 67 L.Ed. 785, the statute here 'bears a substantial burden of justification when attacked under the Fourteenth Amendment.'

4 A collection of the catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment laws which offend their notions of natural justice would fill many pages. Thus it has been said that this Court can forbid state action which 'shocks the conscience,' Rochin v. People of California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183, sufficiently to 'shock itself into the protective arms of the Constitution,' Irvine v. People of State of California, 347 U.S.

128, 138, 74 S.Ct. 381, 386, 98 L.Ed. 561 (concurring opinion). It has been urged that States may not run counter to the 'decencies of civilized conduct,' Rochin, supra, 342 U.S. at 173, 72 S.Ct. at 210, or 'some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Snyder v. Com. of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674, or to 'those canons of decency and fairness which express the notions of justice of English-speaking peoples,' Malinski v. People of State of New York, 324 U.S. 401, 417, 65 S.Ct. 781, 789, 89 L.Ed. 1029 (concurring opinion), or to 'the community's sense of fair play and decency,' Rochin, supra, 342 U.S. at 173, 72 S.Ct. at 210. It has been said that we must decide whether a state law is 'fair, reasonable and appropriate,' or is rather 'an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into * * * contracts,' Lochner v. State of New York, 198 U.S. 45, 56, 25 S.Ct. 539, 543, 49 L.Ed. 937. States, under this philosophy, cannot act in conflict with 'deeply rooted feelings of the community,' Haley v. State of Ohio, 332 U.S. 596, 604, 68 S.Ct. 302, 306, 92 L.Ed. 224 (separate opinion), or with 'fundamental notions of fairness and justice,' id., 607, 68 S.Ct. 307. See also, e.g. Wolf v. People of State of Colorado, 338 U.S. 25, 27, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 ('rights * * * basic to our free society'); Hebert v. State of Louisiana, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270 ('fundamental principles of liberty and justice'); Adkins v. Children's Hospital, 261 U.S. 525, 561, 43 S.Ct. 394, 402, 67 L.Ed. 785 ('arbitrary restraint of * * * liberties'); Betts v. Brady, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595 ('denial of fundamental fairness, shocking to the universal sense of justice'); Poe v. Ullman, 367 U.S. 497, 539, 81 S.Ct. 1752, (dissenting opinion) ('intolerable and unjustfiable'). Perhaps the clearest, frankest and briefest explanation of how this due process approach works is the statement in another case handed down today that this Court is to invoke the Due Process Clause to strike down state procedures or laws which it can 'not tolerate.' Linkletter v. Walker, 381 U.S. 618, at 631, 85 S.Ct. 1731, at 1739.

5 See Hand, The Bill of Rights (1958) 70: '(J)udges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary they wrap up their veto in a protective veil of adjectives such as 'arbitrary,' 'artificial,' 'normal,' 'reasonable,' 'inherent,' 'fundamental,' or 'essential,' whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision.' See also Rochin v. People of California, 342 U.S. 165, 174, 72 S.Ct. 205, 210 (concurring opinion). But see Linkletter v. Walker, supra, n. 4, 381 U.S. 631, 85 S.Ct., at 1739.

6 This Court held in Marbury v. Madison, 1 Cranch 137, that this Court has power to invalidate laws on the ground that they exceed the constitutional power of Congress or violate some specific prohibition of the Constitution. See also Fletcher v. Peck, 6 Cranch 87, 3 L.Ed. 162. But the Constitutional Convention did on at least two occasions reject proposals which would have given the federal judiciary a part in recommending laws or in vetoing as bad or unwise the legislation passed by the Congress. Edmund Randolph of Virginia proposed that the President

'* * * and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by (original wording illegible) of the members of each branch.' 1 The Records of the Federal Convention of 1787 (Farrand ed.1911) 21.

In support of a plan of this kind James Wilson of Pennsylvania argued that:

'* * * It had been said that the Judges, as expositors of the Laws would have an

opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.' 2 id., at 73.

Nathaniel Gorham of Massachusetts 'did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures.' Ibid.

Elbridge Gerry of Massachusetts likewise opposed the proposal for a council of revision:

'* * * He relied for his part on the Representatives of the people as the guardians of their Rights & interests. It (the proposal) was making the Expositors of the Laws, the Legislators which ought never to be done.' Id., at 75.

And at another point:

'Mr. Gerry doubts whether the Judiciary ought to form a part of it (the proposed council of revision), as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality * * *. It was quite foreign from the nature of ye. office to make them judges of the policy of public measures.' 1 Id., at 97—98.

Madison supported the proposal on the ground that 'a Check (on the legislature) is necessary.' Id., at 108. John Dickinson of Delaware opposed it on the ground that 'the Judges must interpret the Laws they ought not to be legislators.' Ibid. The proposal for a council of revision was defeated.

The following proposal was also advanced:

'To assist the President in conducting the Public affairs there shall be a Council of State composed of the following officers—1. The Chief Justice of the Supreme Court, who shall from time to time recommend such alterations of and additions to the laws of the U.S. as may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union * * *.' 2 id., at 342. This proposal too was rejected.

7 In Meyer, in the very same sentence quoted in part by my Brethren in which he asserted that the Due Process Clause gave an abstract and inviolable right 'to marry, establish a home and bring up children,' Mr. Justice McReynolds asserted also that the Due Process Clause prevented States from interfering with 'the right of the individual to contract.' 262 U.S., at 399, 43 S.Ct., at 626.

8 Compare Poe v. Ullman, 367 U.S., at 543—544, 81 S.Ct. at 1776, 1777, 6 L.Ed.2d 989 (Harlan, J., dissenting).

9 The Court has also said that in view of the Fourteenth Amendment's major purpose of eliminating state-enforced racial discrimination, this Court will scrutinize carefully any law embodying a racial classification to make sure that it does not deny equal protection of the laws. See McLaughlin v. State of Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222.

10 None of the other cases decided in the past 25 years which Brothers WHITE and GOLDBERG cite can justly be read as holding that judges have power to use a natural law due process formula to strike down all state laws which they think are unwise, dangerous, or irrational. Prince v. Com. of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, upheld a state law forbidding minors from selling publications on the streets. Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204, recognized the power of Congress to restrict travel outside the country so long as it accorded persons the procedural safeguards of due process and did not violate any other specific constitutional provision. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796, held simply that a State could not, consistently with due process,

refuse a lawyer a license to practice law on the basis of a finding that he was morally unfit when there was no evidence in the record, 353 U.S., at 246—247, 77 S.Ct. at 760, to support such a finding. Compare Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654, in which the Court relied in part on Schware. See also Konigsberg v. State Bar, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810. And Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, merely recognized what had been the understanding from the beginning of the country, an understanding shared by many of the draftsmen of the Fourteenth Amendment, that the whole Bill of Rights, including the Due Process Clause of the Fifth Amendment, was a guarantee that all persons would receive equal treatment under the law. Compare Chambers v. State of Florida, 309 U.S. 227, 240—241, 60 S.Ct. 472, 478—479, 84 L.Ed. 716. With one exception, the other modern cases relied on by my Brethren were decided either solely under the Equal Protection Clause of the Fourteenth Amendment or under the First Amendment, made applicable to the States by the Fourteenth, some of the latter group involving the right of association which this Court has held to be a part of the rights of speech, press and assembly guaranteed by the First Amendment. As for Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 I am compelled to say that if that decision was written or intended to bring about the abrupt and drastic reversal in the course of constitutional adjudication which is now attributed to it, the change was certainly made in a very quiet and unprovocative manner, without any attempt to justify it.

11 Compare Adkins v. Children's Hospital, 261 U.S. 525, 568, 43 S.Ct. 394, 405 (Holmes, J., dissenting):

'The earlier decisions upon the same words (the Due Process Clause) in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts.'

12 See Patterson, The Forgotten Ninth Amendment (1955). Mr. Patterson urges that the Ninth Amendment be used to protect unspecified 'natural and inalienable rights.' P. 4. The Introduction by Roscoe Pound states that 'there is a marked revival of natural law ideas throughout the world. Interest in the Ninth Amendment is a symptom of that revival.' P. iii.

In Redlich, Are There 'Certain Rights * * * Retained by the People'?, 37 N.Y.U.L.Rev. 787, Professor Redlich, in advocating reliance on the Ninth and Tenth Amendments to invalidate the Connecticut law before us, frankly states:

'But for one who feels that the marriage relationship should be beyond the reach of a state law forbidding the use of contraceptives, the birth control case poses a troublesome and challenging problem of constitutional interpretation. He may find himself saying, 'The law is unconstitutional—but why?' There are two possible paths to travel in finding the answer. One is to revert to a frankly flexible due process concept even on matters that do not involve specific constitutional prohibitions. The other is to attempt to evolve a new constitutional framework within which to meet this and similar problems which are likely to arise.' Id., at 798.

13 Of course one cannot be oblivious to the fact that Mr. Gallup has already published the results of a poll which he says show that 46% of the people in this country believe schools should teach about birth control. Washington Post, May 21, 1965, p. 2, col. 1. I can hardly believe, however, that Brother Goldberg would view 46% of the persons polled as so overwhelming a proportion that this Court may now rely on it to declare that the Connecticut law infringes 'fundamental' rights, and overrule the long-standing view of the people of Connecticut expressed through their elected representatives.

14 U.S.Const. Amend. IX, provides:
'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'
15 1 Annals of Congress 439. See also II Story, Commentaries on the Constitution of the United States (5th ed. 1891): 'This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, e converso, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies.' Id., at 651 (footnote omitted).
16 Justice Holmes in one of his last dissents, written in reply to Mr. Justice McReynolds' opinion for the Court in Baldwin v. State of Missouri, 281 U.S. 586, 50 S.Ct. 436, 439, 74 L.Ed. 1056, solemnly warned against a due process formula apparently approved by my concurring Brethren today. He said:
'I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly and limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words 'due process of law,' if taken in their literal meaning have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still was ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.' 281 U.S., at 595. See 2 Holmes-Pollock Lettes (Howe ed. 1941) 267—268.
17 E.g., in Day-Brite Lighting, Inc. v. State of Missouri, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469, this Court held that 'Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.'
Compare Gardner v. Com. of Massachusetts, 305 U.S. 559, 59 S.Ct. 90, 83 L.Ed. 353, which the Court today apparently overrules, which held that a challenge under the Federal Constitution to a state law forbidding the sale or furnishing of contraceptives did not raise a substantial federal question.
18 Brother HARLAN, who has consistently stated his belief in the power of courts to strike down laws which they consider arbitrary or unreasonable, see e.g., Poe v. Ullman, 367 U.S. 497, 539—555, 81 S.Ct. 1752, 1774, 1783 (dissenting opinion), did not join the Court's opinion in Ferguson v. Skrupa.
19 Justice Holmes, dissenting in Tyson, said:
'I think the proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.' 273 U.S., at 446, 47 S.Ct. at 433.
20 Compare Nicchia v. People of State of New York, 254 U.S. 228, 231, 41 S.Ct. 103, 104, 65 L.Ed. 235, upholding a New York dog-licensing statute on the ground that it did not 'deprive dog owners of liberty without due process of law.' And as I said concurring in Rochin v. People of State of California, 342 U.S. 165, 175, 72 S.Ct. 205, 211, 96 L.Ed. 183, 'I believe that faithful adherence to the specific guarantees in the

Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards' urged by my concurring Brethren today.
21 Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, and similar cases applying specific Bill of Rights provisions to the States do not in my view stand for the proposition that this Court can rely on its own concept of 'ordered liberty' or 'shocking the conscience' or natural law to decide what laws it will permit state legislatures to enact. Gideon in applying to state prosecutions the Sixth Amendment's guarantee of right to counsel followed Palko v. State of Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288, which had held that specific provisions of the Bill of Rights, rather than the Bill of Rights as a whole, would be selectively applied to the States. While expressing my own belief (not shared by MR. JUSTICE STEWART) that all the provisions of the Bill of Rights were made applicable to the States by the Fourteenth Amendment, in my dissent in Adamson v. People of State of California, 332 U.S. 46, 89, 67 S.Ct. 1672, 1695, 91 L.Ed. 1903, I said: 'If the choice must be between the selective process of the Palko decision applying some of the Bill of Rights to the States, or the Twining rule applying none of them, I would choose the Palko selective process.'
Gideon and similar cases merely followed the Palko rule, which in Adamson I agreed to follow if necessary to make Bill of Rights safeguards applicable to the States. See also Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923; Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653.
22 Hand, The Bill of Rights (1958) 70. See note 5, supra. See generally id., at 35—45.
23 Id., at 73. While Judge Hand condemned as unjustified the invalidation of state laws under the natural law due process formula, see id., at 35—45, he also expressed the view that this Court in a number of cases had gone too far in holding legislation to be in violation of specific guarantees of the Bill of Rights. Although I agree with his criticism of use of the due process formula, I do not agree with all the views he expressed about construing the specific guarantees of the Bill of Rights.

Mr. Justice GOLDBERG, whom THE CHIEF JUSTICE and Mr. Justice BRENNAN join, concurring.

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that 'due process' as used in the Fourteenth Amendment includes all of the first eight Amendments (see my concurring opinion in Pointer v. Texas, 380 U.S. 400, 410, 85 S.Ct. 1065, 1071, 13 L.Ed.2d 923, and the dissenting opinion of Mr. Justice Brennan in Cohen v. Hurley, 366 U.S. 117, 154, 81 S.Ct. 954, 974, 6 L.Ed.2d 156), I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution1 is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment, ante, at 1681. I add these words to emphasize the relevance of that Amendment to the Court's holding.
The Court stated many years ago that the Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Snyder v. Com. of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674. In Gitlow v. People of State of New York, 268 U.S. 652, 666, 45 S.Ct.

625, 630, 69 L.Ed. 1138, the Court said:
'For present purposes we may and do assume that freedom of speech and of the press —which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.' (Emphasis added.)
And, in Meyer v. State of Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042, the Court, referring to the Fourteenth Amendment, stated:
'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 (for example,) the right * * * to marry, establish a home and bring up children * * *.'
This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights.2 The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.
The Ninth Amendment reads, 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights3 could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.4
In presenting the proposed Amendment, Madison said:
'It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution (the Ninth Amendment).' I Annals of Congress 439 (Gales and Seaton ed. 1834).
1685 Mr. Justice Story wrote of this argument against a bill of rights and the meaning of the Ninth Amendment:
'In regard to * * * (a) suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis * * *. But a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a bill of rights that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people.' II Story, Commentaries on the Constitution of the United States 626—627 (5th ed. 1891).
He further stated, referring to the Ninth Amendment:
'This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the wellknown maxim, that an affirmation in particular cases implies a negation in all others; and, e converso, that a negation in particular cases implies an affirmation in all others.' Id., at 651.
These statements of Madison and Story make clear that the Framers did not intend that

the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.5

While this Court has had little occasion to interpret the Ninth Amendment,6 '(i)t cannot be presumed that any clause in the constitution is intended to be without effect.' Marbury v. Madison, 1 Cranch 137, 174, 2 L.Ed. 60. In interpreting the Constitution, 'real effect should be given to all the words it uses.' Myers v. United States, 272 U.S. 52, 151, 47 S.Ct. 21, 37, 71 L.Ed. 160. The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deeprooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that '(t)he enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.' (Emphasis added.)

A dissenting opinion suggests that my interpretation of the Ninth Amendment somehow 'broaden(s) the powers of this Court.' Post, at 1701. With all due respect, I believe that it misses the import of what I am saying. I do not take the position of my Brother Black in his dissent in Adamson v. People of State of California, 332 U.S. 46, 68, 67 S.Ct. 1672, 1683, 91 L.Ed. 1903, that the entire Bill of Rights is incorporated in the Fourteenth Amendment, and I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. As any student of this Court's opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693; Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659; Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113; Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900; NAACP v. State of Alabama, 357 U.S. 449, 78 S.Ct. 1163; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792; New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686. The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the authority of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights.

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a State's infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth And Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first

eight amendments. Cf. United Public Workers v. Mitchell, 330 U.S. 75, 94—95, 67 S.Ct. 556, 566, 567, 91 L.Ed. 754.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and (collective) conscience of our people' to determine whether a principle is 'so rooted (there) * * * as to be ranked as fundamental.' Snyder v. Com. of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332. The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' * * *.' Powell v. State of Alabama, 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158. 'Liberty' also 'gains content from the emanations of * * * specific (constitutional) guarantees' and 'from experience with the requirements of a free society.' Poe v. Ullman, 367 U.S. 497, 517, 81 S.Ct. 1752, 1763, 6 L.Ed.2d 989 (dissenting opinion of Mr. Justice Douglas).7

I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.' Id., at 521, 81 S.Ct. at 1765. Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944, comprehensively summarized the principles underlying the Constitution's guarantees of privacy:

'The protection guaranteed by the (Fourth and Fifth) amendments is much broader in scope. The 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.'

The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy—that of the marital relation and the marital home. This Court recognized in Meyer v. Nebraska, supra, that the right 'to marry, establish a home and bring up children' was an essential part of the liberty guaranteed by the Fourteenth Amendment. 262 U.S., at 399, 43 S.Ct. at 626. In Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, the Court held unconstitutional an Oregon Act which forbade parents from sending their children to private schools because such an act 'unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.' 268 U.S., at 534—535, 45 S.Ct. at 573. As this Court said in Prince v. Massachusetts, 321 U.S. 158, at 166, 64 S.Ct. 438, at 442, 88 L.Ed. 645, the Meyer and Pierce decisions 'have respected the private realm of family life which the state cannot enter.'

I agree with Mr. Justice Harlan's statement in his dissenting opinion in Poe v. Ullman, 367 U.S. 497, 551—552, 81 S.Ct. 1752, 1781: 'Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. * * * Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.'

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact

that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

My Brother STEWART, while characterizing the Connecticut birth control law as 'an uncommonly silly law,' post, at 1705, would nevertheless let it stand on the ground that it is not for the courts to "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Post, at 1705. Elsewhere, I have stated that '(w)hile I quite agree with Mr. Justice Brandeis that * * * 'a * * * State may * * * serve as a laboratory; and try novel social and economic experiments,' New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 (dissenting opinion), I do not believe that this includes the power to experiment with the fundamental liberties of citizens * * *.'8 The vice of the dissenters' views is that it would permit such experimentation by the States in the area of the fundamental personal rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government.

The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be 'silly,' no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling,' Bates v. City of Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480. The law must be shown 'necessary, and not merely rationally related to, the accomplishment of a permissible state policy.' McLaughlin v. State of Florida, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222. See Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155.

Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any 'subordinating (state) interest which is compelling' or that it is 'necessary * * * to the accomplishment of a permissible state policy.' The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern—the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried

as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception, see Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582. But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. See Aptheker v. Secretary of State, 378 U.S. 500, 514, 84 S.Ct. 1659, 1667; NAACP v. State of Alabama, 377 U.S. 288, 307—308, 84 S.Ct. 1302, 1313, 1314, 12 L.Ed.2d 325; McLaughlin v. State of Florida, supra, 379 U.S. at 196, 85 S.Ct. at 290. Here, as elsewhere, '(p)recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340. The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication. See Conn.Gen.Stat. ss 53—218, 53—219 et seq. These statutes demonstrate that means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to 'invade the area of protected freedoms.' NAACP v. State of Alabama, supra, 377 U.S. at 307, 84 S.Ct. at 1314. See McLaughlin v. State of Florida, supra, 379 U.S. at 196, 85 S.Ct. at 290.

Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. As my Brother Harlan so well stated in his dissenting opinion in Poe v. Ullman, supra, 367 U.S. at 553, 81 S.Ct. at 1782.

'Adultery, homosexuality and the like are sexual intimacies which the State forbids * * * but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality * * * or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.'

In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States. I agree with the Court that petitioners' convictions must therefore be reversed.

Footnotes

1 My Brother STEWART dissents on the ground that he 'can find no * * * general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.' Post, at 1706. He would require a more explicit guarantee than the one which the Court derives from several constitutional amendments. This Court, however, has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884; Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992; Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204; Carrington v. Rash, 380 U.S. 89, 96, 85 S.Ct. 775, 780, 13 L.Ed.2d 675; Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796; NAACP v. Alabama, 360 U.S. 240, 79 S.Ct. 1001, 3 L.Ed.2d 1205; Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625. To the contrary, this Court, for example, in Bolling v. Sharpe, supra, while recognizing that the Fifth Amendment does not contain the 'explicit safeguard' of an equal protection clause, id., 347 U.S. at 499, 74 S.Ct. at 694, nevertheless derived an equal protection principle

from that Amendment's Due Process Clause. And in Schware v. Board of Bar Examiners, supra, the Court held that the Fourteenth Amendment protects from arbitrary state action the right to pursue an occupation, such as the practice of law.

2 See, e.g., Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979; Gitlow v. New York, supra; Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213; Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782; Robinson v. State of California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653; Pointer v. Texas, supra; Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106.

3 Madison himself had previously pointed out the dangers of inaccuracy resulting from the fact that 'no language is so copious as to supply words and phrases for every complex idea.' The Federalist, No. 37 (Cooke ed. 1961), at 236.

4 Alexander Hamilton was opposed to a bill of rights on the ground that it was unnecessary because the Federal Government was a government of delegated powers and it was not granted the power to intrude upon fundamental personal rights. The Federalist, No. 84 (Cooke ed. 1961), at 578—579. He also argued,

'I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.' Id., at 579. The Ninth Amendment and the Tenth Amendment, which 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,' were apparently also designed in part to meet the above-quoted argument of Hamilton.

5 The Tenth Amendment similarly made clear that the States and the people retained all those powers not expressly delegated to the Federal Government.

6 This Amendment has been referred to as 'The Forgotten Ninth Amendment,' in a book with that title by Bennett B. Patterson (1955). Other commentary on the Ninth Amendment includes Redlich, Are There 'Certain Rights * * * Retained by the People'? 37 N.Y.U.L.Rev. 787 (1962), and Kelsey, The Ninth Amendment of the Federal Constitution, 11 Ind.L.J. 309 (1936). As far as I am aware, until today this Court has referred to the Ninth Amendment only in United Public Workers v. Mitchell, 330 U.S. 75, 94—95, 67 S.Ct. 556, 566—567, 91 L.Ed. 754; Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 143—144, 59 S.Ct. 366, 372, 83 L.Ed. 543; and Ashwander v. TVA, 297 U.S. 288, 330—331, 56 S.Ct. 466, 475, 80 L.Ed. 688. See also Calder v. Bull, 3 Dall. 386, 388, 1 L.Ed. 648; Loan Ass'n v. City of Topeka, 20 Wall. 655, 662—663, 22 L.Ed. 455.

In United Public Workers v. Mitchell, supra, 330 U.S. at 94—95, 67 S.Ct. at 567, the Court stated: 'We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments (is) 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. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. And, if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment.'

7 In light of the tests enunciated in these cases it cannot be said that a judge's responsibility to determine whether a right is basic and fundamental in this sense vests

him with unrestricted personal discretion. In fact, a hesitancy to allow too broad a discretion was a substantial reason leading me to conclude in Pointer v. Texas, supra, 380 U.S. at 413—414, 85 S.Ct. at 1073, that those rights absorbed by the Fourteenth Amendment and applied to the States because they are fundamental apply with equal force and to the same extent against both federal and state governments. In Pointer I said that the contrary view would require 'this Court to make the extremely subjective and excessively discretionary determination as to whether a practice, forbidden the Federal Government by a fundamental constitutional guarantee, is, as viewed in the factual circumstances surrounding each individual case, sufficiently repugnant to the notion of due process as to be forbidden the States.' Id., at 413, 85 S.Ct. at 1073.
8 Pointer v. Texas, supra, 380 U.S. at 413, 85 S.Ct. at 1073. See also the discussion of my Brother Douglas, Poe v. Ullman, supra, 367 U.S. at 517—518, 81 S.Ct. at 1763 (dissenting opinion).

MEYER

v.

STATE OF NEBRASKA.

No. 325.

Argued Feb. 23, 1923.

Decided June 4, 1923.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Plaintiff in error was tried and convicted in the district court for Hamilton county, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of 10 years, who had not attained *397 and successfully passed the eighth grade. The information is based upon 'An act relating to the teaching of foreign languages in the state of Nebraska,' approved April 9, 1919 (Laws 1919, c. 249), which follows:
'Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language.
'Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.
'Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars ($25), nor more than one hundred dollars ($100), or be confined in the county jail for any period not exceeding thirty days for each offense.
'Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval.'
The Supreme Court of the state affirmed the judgment of conviction. 107 Neb. 657, 187 N. W. 100. It declared the offense charged and established was 'the direct and intentional teaching of the German language as a distinct subject to a child who had not

passed the eighth grade,' in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefore. And it held that the statute forbidding this did not conflict with the Fourteenth Amendment, but was a valid exercise of the police power. The following excerpts from the opinion sufficiently indicate the reasons advanced to support the conclusion:

'The salutary purpose of the statute is clear. The Legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state. Pohl v. State, 102 Ohio St. 474, 132 N. E. 20; State v. Bartels, 191 Iowa, 1060, 181 N. W. 508.

'It is suggested that the law is an unwarranted restriction, in that it applies to all citizens of the state and arbitrarily interferes with the rights of citizens who are not of foreign ancestry, and prevents them, without reason, from having their children taught foreign languages in school. That argument is not well taken, for it assumes that every citizen finds himself restrained by the statute. The hours which a child is able to devote to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small. A selection of subjects for its education, therefore, from among the many that might be taught, is obviously necessary. The Legislature no doubt had in mind the practical operation of the law. The law affects few citizens, except those of foreign lineage. Other citizens, in their selection of studies, except perhaps in rare instances, have never deemed it of importance to teach their children foreign languages before such children have reached the eighth grade. In the legislative mind, the salutary effect of the statute no doubt outweighed the restriction upon the citizens generally, which, it appears, was a restriction of no real consequence.'

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment:

'No state * * * shall deprive any person of life, liberty or property without due process of law.'

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. Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; **627 Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; Allegeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133; Twining v. New Jersey

211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97; Chicago, B. & Q. R. R. v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328; Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973; New York Life Ins. Co. v. Dodge, 246 U. S. 357, 38 Sup. Ct. 337, 62 L. Ed. 772, Ann. Cas. 1918E, 593; Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254; Adkins v. Children's Hospital (April 9, 1923), 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785; Wyeth v. Cambridge Board of Health, 200 Mass. 474, 86 N. E. 925, 128 Am. St. Rep. 439, 23 L. R. A. (N. S.) 147. The established doctrine is that this liberty may not be interfered *400 with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. Lawton v. Steele, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 385.

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares:

‘Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.’

Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His 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 amendment.

The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the state has held that ‘the so-called ancient or dead languages' are not ‘within the spirit or the purpose of the act.’ Nebraska District of Evangelical Lutheran Synod, etc., v. McKelvie et al. (Neb.) 187 N. W. 927 (April 19, 1922). Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian, and every other alien speech are within the ban. Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and ‘that the English language should be and become the mother tongue of all children reared in this state.’ It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends

to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide:

'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. * * * The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.'

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.