rights of man'" and a "fundamental freedom." "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," and the classification of marriage rights on a racial basis was "unsupportable." Further development of this line of cases was slowed by the expanded application of the Bill of Rights to the states, which afforded the Court an alternative ground to void state policies.[549]

Despite the Court's increasing willingness to overturn state legislation, the basis and standard of review that the Court would use to review infringements on "fundamental freedoms" were not always clear. In *Poe v. Ullman*,[550] for instance, the Court dismissed as non-justiciable a suit challenging a Connecticut statute banning the use of contraceptives, even by married couples. In dissent, however, Justice Harlan advocated the application of a due process standard of reasonableness—the same lenient standard he would have applied to test economic legislation.[551] Applying a lengthy analysis, Justice Harlan concluded that the statute in question infringed upon a fundamental liberty without the showing of a justification which would support the intrusion. Yet, when the same issue returned to the Court in *Griswold v. Connecticut*,[552] a majority of the Justices rejected reliance on substantive due process[553] and instead decided it on another basis—that the statute was an invasion of privacy, which was a non-textual "penumbral" right protected by a matrix

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[549] Indeed, in Griswold v. Connecticut, 381 U.S. 479, 482 (1965), Justice Douglas reinterpreted *Meyer* and *Pierce* as having been based on the First Amendment. Note also that in Epperson v. Arkansas, 393 U.S. 97, 105 (1968), and Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506–07 (1969), Justice Fortas for the Court approvingly noted the due process basis of *Meyer* and *Pierce* while deciding both cases on First Amendment grounds.

[550] 367 U.S. 497, 522, 539–45 (1961). Justice Douglas, also dissenting, relied on a due process analysis, which began with the texts of the first eight Amendments as the basis of fundamental due process and continued into the "emanations" from this as also protected. Id. at 509.

[551] According to Justice Harlan, due process is limited neither to procedural guarantees nor to the rights enumerated in the first eight Amendments of the Bill of Rights, but is rather "a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions." The liberty protected by the clause "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." 367 U.S. at 542, 543.

[552] 381 U.S. 479 (1965).

[553] "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." Griswold v. Connecticut, 381 U.S. at 482 (opinion of Court by Justice Douglas).