identified, often using abstract labels, how far could such an abstraction be extended? Did protecting the "privacy" of the decisions whether to have a family also include the right to make decisions regarding sexual intimacy? Although many of these issues have been resolved, others remain.

One of the earliest formulations of noneconomic substantive due process was the right to privacy. This right was first proposed by Samuel Warren and Louis Brandeis in an 1890 Harvard Law Review article[538] as a unifying theme to various common law protections of the "right to be left alone," including the developing laws of nuisance, libel, search and seizure, and copyright. According to the authors, "the right to life has come to mean the right to enjoy life,—the right to be let alone . . . . This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature."

The concepts put forth in this article, which appeared to relate as much to private intrusions on persons as to intrusions by government, reappeared years later in a dissenting opinion by Justice Brandeis regarding the Fourth Amendment.[539] Then, in the 1920s, at the heyday of economic substantive due process, the Court ruled in two cases that, although nominally involving the protection of property, foreshadowed the rise of the protection of noneconomic interests. In *Meyer v. Nebraska*,[540] the Court struck down a state law forbidding schools from teaching any modern foreign language to any child who had not successfully finished the eighth grade. Two years later, in *Pierce v. Society of Sisters*,[541] the Court declared it unconstitutional to require public school education of children aged

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[538] Warren and Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193 (1890).

[539] *See* Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting) (arguing against the admissibility in criminal trials of secretly taped telephone conversations). In *Olmstead*, Justice Brandeis wrote: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . 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. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." 277 U.S. at 478.

[540] 262 U.S. 390 (1923). Justices Holmes and Sutherland entered a dissent, applicable to *Meyer*, in Bartels v. Iowa, 262 U.S. 404, 412 (1923).

[541] 268 U.S. 510 (1925).