By Dennis Goldford, Ph.D.

In American constitutional law the phrase “right to privacy” refers not to questions of information and secrecy, but rather to the idea that government has no authority to interfere with the right of individuals to make their own decisions about intimately personal, fundamental matters like marriage, sexual activity, and child rearing. Though controversial, the right to privacy developed because of, and must be understood in terms of, two important questions in our constitutional system: first, how are individual rights protected against government, and, second, what individual rights are protected against government?

Prior to the adoption of the Fourteenth Amendment in 1868, the rights of Americans were protected (beyond a few provisions of Article I, Section 10, of the Constitution and the mechanisms of separation of powers and federalism) in three principal ways. First, individuals were protected against certain actions of the federal government by the Bill of Rights. Second, individuals were protected against certain actions of their own state governments by a bill of rights or other such provisions in the constitution of their state. Third, individuals traveling to a state other than their own were protected against certain actions of that state government by certain provisions of Article IV of the Constitution. The key point is that, at that time, individuals had no federal protection against actions of their own state governments, because the Supreme Court held in Barron v. City of Baltimore (1833) that the Bill of Rights applied to federal actions only—not to state actions. As the Court stated in Twining v. New Jersey (1908), “the first ten Amendments of the Federal Constitution are restrictive only of national action.”

Due to doubts about the constitutionality of the Civil Rights Act of 1866, which provided for federal protection for the newly freed slaves against the southern state governments, the Fourteenth Amendment was ratified in 1868 and stated, in part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The Supreme Court held in the Slaughter-House Cases that the Privileges or Immunities Clause of the Fourteenth Amendment did not now make the protections of the Bill of Rights applicable against state governments in defense of fundamental individual rights. Nevertheless, many justices believed that the Fourteenth Amendment does in fact establish a basket of fundamental rights grounded in the U.S. Constitution to be protected against state infringement. Increasingly, the Supreme Court came to argue that the idea of liberty
mentioned in the Due Process Clause of the Fourteenth Amendment provides the textual basis for this basket of protected fundamental rights.

If the Due Process Clause answers the question of how fundamental individual rights are protected by the Constitution against state governments, the other question became more problematic: what fundamental individual rights are protected by the Constitution against state governments? In other words, how do we know what rights are contained in that federally guaranteed basket? One answer, suggested in the late nineteenth century and supported most prominently by Justice Hugo Black in the twentieth, is that any and all rights protected against federal infringement by the Bill of Rights are protected against state infringement by the Due Process Clause of the Fourteenth Amendment. However, the Supreme Court as a whole has never accepted this argument. Rejecting it for the Court in *Palko v. Connecticut* (1937), Justice Benjamin Cardozo wrote: “Whatever would be a violation of the original bill of rights (Amendments one to eight) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.” The question remains, therefore: how do we determine what fundamental individual rights are protected by the Constitution against state governments?

Justice Cardozo went on to suggest two criteria for making that determination: a right is contained in that federally guaranteed basket of rights protected against state infringement if it is “implicit in the concept of ordered liberty” or is, citing another case, a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” (*Palko*). This allowed for substantial overlap between the Bill of Rights and the Due Process Clause, for the Court came to see many of the rights protected against federal infringement by the Bill of Rights as protected against state infringement by the Due Process Clause because they satisfied either or both of these two criteria. Still, the Court’s acceptance of these two criteria in many ways simply shifted rather than solved the initial problem. How do we know if a right is one protected by the Due Process Clause? How do we then know when a right is “implicit in the concept of ordered liberty” or is a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”?

The problem here is that, in the absence of specific words in a written text, it appears quite difficult to get people to agree on what rights are part of ordered liberty or even on what rights are fundamental in our political and legal traditions. On the one hand, we do not want to claim more rights than are permissible, because asserting a right means limiting majority rule. On the other hand, if we want to defer to the preferences of a popular
majority we run the risk of allowing that majority to infringe on individual rights that it really should not endanger. This is why the right to privacy is so controversial, for people disagree about whether it exists and, if it does, about what it protects. Thus, in *Griswold v. Connecticut* (1965), Justice William Douglas wrote with regard to marriage: “We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system,” whereas Justice Black wrote: “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.”

To be sure, also writing in *Griswold*, Justice Arthur Goldberg argued, “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” (488). Nevertheless, almost no one either before or after *Griswold* appealed to the Ninth Amendment to justify the protection of an unenumerated—unmentioned—right. Thus, in *Roe v. Wade*, Justice Harry Blackmun stated: “This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” Whether one favors or opposed a right to abortion, it is clear that Justice Blackmun neglected to do the hard work here of dealing with the difficult interpretive questions we have raised. Specifically, why does abortion fall within the right to privacy? (Indeed, appealing to the other criterion, the dissenters in *Roe* argued that a right to abortion is not a principle of justice grounded in American traditions.) Why, as in the case of *Lawrence v. Texas*, do homosexual relations fall within the right to privacy?

We could say, of course, that there is no such thing as a right to privacy in the Constitution, because there is no black-letter textual provision containing those words. If we were to say this, however, we would have to remember that there is no black-letter text that provides for either the presumption of innocence or the power of judicial review, both of which are conventionally considered to be in the Constitution. Additionally, we would have to address what is perhaps the central question about the protection of individual rights in our constitutional system: do we have a right to make our own decisions about certain personal and even intimate matters that we consider absolutely fundamental to our identity and sense of self in the absence of an explicit, black-letter text in the Constitution that protects any such right?
Long ago, in the case of *Calder v. Bull*, Justice Samuel Chase wrote: “I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State.” As you read and think about the following materials on the right to privacy, ask yourself whether you agree or disagree with Justice Chase.

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