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

Prior to the adoption of the Fourteenth Amendment, individuals had no federal protection against actions of their own state governments.
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 controul; 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.

Dr. Dennis Goldford is Professor of Politics and International Relations at Drake University in Iowa. He teaches in the areas of political theory and constitutional law, and his recent research deals with the originalism debate in contemporary constitutional theory. He has published numerous articles in the areas of political theory and constitutional interpretation, and his recent book is entitled The American Constitution and the Debate Over Originalism (Cambridge, 2005). His current research deals with politics and religion, and with the theory of federalism. Professor Goldford is also a frequent commentator on Iowa and national politics through both local and national media outlets.
Case Background

The Comstock Laws, federal laws passed in 1873, banned the interstate distribution of “obscene, lewd, and/or lascivious” materials. With specific references to birth control devices and information, the regulation effectively outlawed birth control. Twenty four states passed similar laws.

In the early twentieth century, the “second wave” of the American feminist movement was largely behind efforts to repeal these laws. Individuals including Margaret Sanger campaigned for universal access to birth control. Sanger went on to found Planned Parenthood. Later in the twentieth century, challenges to laws banning birth control continued. One such law was a Connecticut statute, largely unchanged since adopted in 1879, that banned the use of “any drug, medicinal article or instrument for the purpose of preventing conception.” The law punished people who offered advice or counseling on birth control as severely as the offenders who actually used it.

In the 1960s, Estelle Griswold, the Executive Director of the Planned Parenthood League of Connecticut, together with a physician colleague from Yale School of Medicine, opened a birth control clinic for married couples in New Haven, Connecticut. The clinic was staffed with doctors and nurses, who provided counseling on birth control to married women only. She was prosecuted, and the case eventually went to the Supreme Court. Griswold argued that marital privacy was a natural right protected by the Ninth Amendment, as well as by the Due Process Clause of the Fourteenth Amendment.
**DOCUMENT A**

*James Otis, Against Writs of Assistance, 1761*

Now one of the most essential branches of English liberty is the freedom of one’s house. A man’s home is his castle, and whilst he is quiet, he is as well guarded as a prince in his castle.

- Restate Otis’s assertion in your own words.
- What does this say about the status of the home in the American legal tradition?

**DOCUMENT B**

*Sections of the Bill of Rights, 1791*

**Amendment I:** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

**Amendment III:** No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

**Amendment IV:** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**Amendment V:** No person …shall be compelled in any criminal case to be a witness against himself....

**Amendment IX:** The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

- Underline the protections (if any) that may be based on a natural right to privacy.
- In which amendment(s) do you find language similar to Otis’s language in Document A?
DOCUMENT C

Section of the Fourteenth Amendment, 1868
No state shall ... deprive any person of life, liberty, or property, without due process of law.

- What is required in order for states to deprive people of their liberty?

DOCUMENT D

Connecticut Statute, 1879 (revised 1958)
Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned....

Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

- What two kinds of crime does this statute define?

DOCUMENT E

Pierce v. Society of Sisters, 1925
[The Act of 1922 [requiring all parents to send their children to public schools] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.

- The Constitution does not list the right of parents to choose schools for their children. Why, then, does the Court refer to this right as “guaranteed by the Constitution”?
“Margaret Sanger Has Her Mouth Covered,” 1929

- What right does this birth control activist claim the government is abridging?

**DOCUMENT G**

_Palko v. Connecticut, 1937_

[The scope of the Due Process Clause only includes rights which] have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states ... [and which are] the very essence of a scheme of ordered liberty.

- Restate this analysis of the Due Process Clause in your own words.
[T]he full scope of the liberty guaranteed by the Due Process Clause [of the Fourteenth Amendment] cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints....

- How does this document define liberty?

“Man Pickets Outside New Haven Planned Parenthood,” 1963

- What is this protestor’s message?
Majority Opinion (7-2), Griswold v. Connecticut, 1965

Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. ...The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The Fourth and Fifth Amendments were described ... as protection against all governmental invasions “of the sanctity of a man’s home and the privacies of life.”

We have had many controversies over these penumbral rights of “privacy and repose.” These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a “governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred....

- How does the Court’s decision compare to your analysis of Document B?
- What does the Court mean by a “zone of privacy”?
- What does the Court mean by “we deal with a privacy older than the Bill of Rights”?

Since 1791 [the Ninth Amendment] 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 deep-rooted 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.

- Why is the Ninth Amendment so significant?


Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual’s moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual’s choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

- Restate the main points of the dissenters’ argument.
DOCUMENT M

“Birth Control Advertising,” 1967

Did the creators of this poster believe that the right to use birth control is a right protected by the Ninth Amendment?

DIRECTIONS

Answer the Key Question in a well-organized essay that incorporates your interpretations of Documents A-M, as well as your own knowledge of history.

KEY QUESTION

Support or refute the Supreme Court’s ruling in Griswold v. Connecticut (1965), that the Constitution protects a right to privacy within marriage that includes the decision to use artificial birth control.
*Eisenstadt v. Baird*, 1972

...If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible, since the constitutionally protected right of privacy inheres in the individual, not the marital couple. ...If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

- How did this ruling expand on the right to privacy defined in *Griswold v. Connecticut*?