PERSONAL LIBERTY

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 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.

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Case Background

Throughout history, society has passed laws restricting sexual activity. Laws regarding incest, adultery, and prostitution exist in all 50 states today. Historically, state laws dealing with sexual activity included prohibitions on sodomy. These laws were based in English common law. The growing acceptance of homosexual lifestyles in America led to challenges of sodomy laws. Most states forbade gay sex until the 1960s.

_Griswold v. Connecticut_ (1965), _Eisenstadt v. Baird_ (1972), and _Roe v. Wade_ (1973) were cases which sought to define a right to privacy with regard to reproductive choices. Reproductive decisions involve sexual activity between consenting adults, and the Court ruled in 1965 that the Bill of Rights protected a zone of privacy in America’s bedrooms. The challenge, therefore, became how to define the limits of Americans’ rights to privacy with regard to sex.

In 1986, the Supreme Court refused to recognize a “fundamental right of homosexuals to engage in sodomy” in the case of _Bowers v. Hardwick_. The Court declined to extend the protections afforded under _Griswold_ and _Eisenstadt_, and upheld the power of the states to limit sexual activity. The Court was asked to revisit its decision seventeen years later. In _Lawrence v. Texas_, John Lawrence challenged a Texas state law banning certain sexual acts between people of the same sex. He claimed the law violated privacy and due process rights protected by the Constitution.
DOCUMENT A

Commentaries on the Laws of England, Book IV, 1765-1769

IV. WHAT has been here observed ... ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offence, of a still deeper malignity; the infamous crime against nature, committed either with man or beast....

I WILL not ... dwell any longer upon a subject, the very mention of which is a disgrace to human nature. ...Which leads me to add a word concerning its punishment.

THIS the voice of nature and of reason, and the express law of God, determine to be capital. Of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: so that this is an universal, not merely a provincial, precept.

▷ How did English common law view and punish sodomy?

DOCUMENT B

Federalist No. 51, 1788

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure....

In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.

▷ According to this document, what two possible sources of injustice exist?

▷ According to this document, why does the extended nature of the American republic help ensure justice?
Concurring Opinion, Railway Express Agency v. New York, 1949

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

- Restate this assertion in your own words.

Majority Opinion, Griswold v. Connecticut, 1965

The present case ... concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees....

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. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

- What right to privacy was defined in Griswold v. Connecticut?
- What is the “noble purpose” that this privacy promotes?
**DOCUMENT E**

**Majority Opinion, Eisenstadt v. Baird, 1972**

The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. 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 ... the State could not, consistently with the Equal Protection Clause, outlaw distribution [of birth control] to unmarried but not to married persons....

- What is the difference between this decision and the one in the Griswold case (Document D)?

**DOCUMENT F**

**Majority Opinion, Roe v. Wade, 1973**

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, ... the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. This right of privacy... is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.

- How did the decision in Roe build on the decisions in Griswold (Document D) and Eisenstadt (Document E) with respect to the right of privacy?

Question: “Do you think homosexual relations between consenting adults should or should not be legal?”

What trends do you see concerning Americans’ support for legalizing homosexual activity?

Source: Nation Gallup Polls

We think it evident that none of the rights announced in [*Griswold* and *Eisenstadt*] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy. ...Moreover, any claim that these cases [mean] that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.

Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home....

[R]espondent asserts that there must be a rational basis for the law, and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed....

- How does the Court contrast the right to privacy protected in the *Griswold* and *Eisenstadt* cases with the right claimed in *Bowers*?
- What statement does the Court make about morality and the law?
Majority Opinion (6-3), Lawrence v. Texas, 2003

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. ...Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. ...The laws involved in Bowers [Document H] and here... purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. ...It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. ...The liberty protected by the Constitution allows homosexual persons the right to make this choice.

It must be acknowledged, of course, that the Court in Bowers was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code....

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

» Restate the majority opinion in two to three sentences.
Concurring Opinion, Lawrence v. Texas, 2003

I agree with the Court that Texas’ statute banning same-sex sodomy is unconstitutional. ...I base my conclusion on the Fourteenth Amendment’s Equal Protection Clause. ...The statute at issue here makes sodomy a crime only if a person “engages in deviate sexual intercourse with another individual of the same sex.” Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants.

- Why does the concurring Justice believe the Texas law is unconstitutional?

Dissenting Opinion (Antonin Scalia), Lawrence v. Texas, 2003

[The Texas sodomy law] undoubtedly imposes constraints on liberty- so do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to “liberty” under the Due Process Clause, though today’s opinion repeatedly makes that claim... The Fourteenth Amendment expressly allows States to deprive their citizens of liberty so long as “due process of law” is provided....

[T]he Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. [emphasis original]

- What argument does Justice Scalia make about the Due Process Clause in his dissent?
Dissenting Opinion (Clarence Thomas), Lawrence v. Texas, 2003

The law before the Court today “is ... uncommonly silly.” ... If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.

Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to “decide cases ‘agreeably to the Constitution and laws of the United States.’ ” And, just like Justice Stewart [dissenting in Griswold v. Connecticut, 1965], I “can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy.”...

- If Justice Thomas believes the law is “uncommonly silly,” why does he not find it unconstitutional?
DOCUMENT M

“What Are You Doing Here?” 2003

Stu’s Views © Stu All Rights Reserved www.STUS.com

What is the cartoonist’s viewpoint about privacy and the Texas law at issue in Lawrence v. Texas?

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

Analyze how the Court’s definition of privacy evolved from 1965 to 2003.
Jody Thompson (L) and his partner Jesse Adams, of Asbury Park, New Jersey, hold hands at a 2006 rally at The Unitarian Church of Montclair.

- How do some state initiatives to ban or legalize gay marriage apply to the issues in Lawrence v. Texas?

- Some scholars suggest that the majority in Lawrence did not adopt the reasoning used by Justice Sandra O’Connor in her concurrence, because O’Connor’s equal protection argument could have opened the door to constitutional claims to a right to gay marriage. Evaluate this assertion.