Chapter 16: Finding a Right to Privacy

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Griswold v. Connecticut (1965)

Does the U.S. Constitution protect an individual's right to privacy? Many Americans think it does. Others say it does not. The word "privacy" cannot be found in the U.S. Constitution. Yet the U.S. Supreme Court, by a vote of 7 to 2, based its decision in *Griswold v. Connecticut* (1965) on the presumption of a constitutionally protected right to privacy. The Court's "discovery" of a right to privacy in the U.S. Constitution was lauded by many Americans and derided by many others, including two justices of the Supreme Court, who wrote sharp dissenting opinions against the Court's majority in the *Griswold* case.

Both before and since the *Griswold* decision in 1965, Americans within and outside of the judicial branch of government have argued about whether the Constitution, correctly construed, includes a right to privacy. Today, although most Americans acknowledge a personal right to privacy, there are strong disagreements about what areas of life or instances of behavior are appropriately protected from governmental intrusion by this constitutional right.

So, what is this right to privacy? Where did it come from? And how did it become a contentious constitutional issue before, during, and after the Supreme Court's deliberations in *Griswold v. Connecticut*?

Ever since the founding of the United States, it seems, most Americans have believed in a right to privacy—the right to protection against unwarranted or unlawful government intrusion into certain legally protected areas of private life. The framers of the U.S. Constitution often referred to constitutionally protected personal and private rights. Within several papers of *The Federalist*, the greatest commentary ever written on the meaning and intent of the Constitution, James Madison prominently discusses the public and private rights that a good government should protect. For example, in the tenth paper of *The Federalist*, Madison writes:

> When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.

The very idea of a constitution implies zones of private life that are beyond the reach and regulation of a government limited by law. Indeed, an individual's right to privacy in certain domains of personal life, off-limits to invasive government regulation, is a primary distinction between totalitarian or despotic governments and constitutionally limited and free governments.

Given the long-standing presence of "private rights" (a phrase used often by James Madison, John Adams, and others of the Founding Era) in the political and constitutional traditions of the United States, how did this idea become an object of contention in our time? Louis Brandeis and Samuel Warren, two Massachusetts lawyers who wrote an attention-getting article, "The Right to Privacy," that appeared in the *Harvard Law Review* in 1890, may have laid the ground for this current constitutional controversy. This article stressed the importance of protecting individuals against the violation of their personal dignity and privacy by invasive newspaper and magazine reporters, but it claimed that the "right to be let alone" was also applicable to invasive actions by government.

After becoming an associate justice of the U.S. Supreme Court, Brandeis asserted the right to privacy in a dissent against the Court's 5–4 decision in *Olmstead v. United States* (1928). Brandeis based his dissent on a person's presumptive constitutional right to privacy against federal government agents seeking information about illegal behavior by secretly listening to private telephone conversations. Brandeis wrote, "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . . 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."

Although Brandeis argued that the Constitution as a whole was a guardian of personal privacy, he pointed particularly to the Fourth Amendment protections against "unreasonable searches and seizures" and the Fifth Amendment guarantees against self-incrimination. He extolled these prime examples, among others, of constitutional barriers against "unjustifiable intrusion by the Government upon the privacy of the individual." For more than thirty years after Brandeis's *Olmstead* dissent, the issue of a constitutional right to privacy lay dormant, as the Court avoided formal discussion of it.

Then, in *Poe v. Ullman* (1961), the issue once again came to the forefront. In their dissent, Justices John Marshall Harlan II and William O. Douglas argued for the individual's right to privacy, and against an 1879 Connecticut law banning the use of birth control devices, even by married couples. Harlan pointed to the Fourteenth Amendment's provision that "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law." According to Harlan, the state law at issue unconstitutionally deprived individuals of their liberty, without due process of law, to use birth control devices, which was "an intolerable and unjustifiable invasion of privacy." Thus, Harlan linked the Fourteenth Amendment's guarantee of liberty to an unenumerated (not stated but inferred) substantive right to privacy, which must be protected if there

were to be equal justice through due process of law.

As the Court did not rule against the Connecticut law prohibiting the use of contraceptive devices, because it had not been enforced, this issue did not die. The controversy soon returned to the U.S. Supreme Court. Estelle Griswold, executive director of the Planned Parenthood League of Connecticut (PPLC), and her associate Dr. Charles Lee Buxton were arrested for violating their state's anticontraception law. In 1962, they were tried and found guilty of giving married couples advice on birth control and prescribing contraceptive devices. Both of them were fined one hundred dollars for the crime of providing information about contraceptives. In 1963 and 1964, the appellate division of the Connecticut Circuit Court and the Connecticut Supreme Court of Errors upheld the convictions of Griswold and Buxton as justified by the state's "police power." They appealed to the U.S. Supreme Court, which accepted the case of *Griswold v. Connecticut* in 1965.

Griswold v. Connecticut (1965)

- 381 U.S. 479 (1965)
- Decided: June 7, 1965
- Vote: 7–2
- Opinion of the Court: William O. Douglass
- Concurring opinions: Arthur Goldberg, (Earl Warren and William Brennan), John Marshall Harlan II, and Bryon White
- Dissenting opinions: Hugo Black and Potter Stewart

Counsel for Griswold argued that the PPLC's clients had a constitutional right to privacy that enforcement of the 1879 state law violated. The Court sided with Griswold and struck down the state statute as an unconstitutional violation of the right to privacy. However, the seven justices in favor of the petitioner, who agreed to reverse the decision of the Connecticut courts, disagreed markedly about where in the Constitution a right to privacy could be found, and about how it could be justified.

Justice William O. Douglas, who wrote the opinion of the Court, found a general right to privacy, which he believed can be derived from the First, Third, Fourth, Fifth, and Ninth Amendments. These parts of the Bill of Rights, said Douglas, imply "zones of privacy that are the foundation for a general right to privacy." He further held that the unenumerated right to privacy, emanating from several parts of the U.S. Constitution's Bill of Rights, could be applied to a state government through the Fourteenth Amendment's due process clause.

In justification of the Court's opinion, Justice Douglas referred to Court decisions that had alluded to a privacy right, such as *Meyer v. Nebraska* (1923), *Pierce v. Society of Sisters* (1925), and *DeJonge v. Oregon* (1937). Douglas noted that in *Meyer*, for example, the

Court had applied the property and liberty interests of the Fourteenth Amendment's due process clause to strike down state laws that had prohibited the teaching of foreign languages to elementary and middle school students. In *Pierce* it had similarly struck down a law that had outlawed private schools. And, Douglas pointed out, in *DeJonge* the Court had recognized freedom of association with others in private groups, a right not mentioned explicitly in the Constitution but derived from the First Amendment's guarantee of the right to assembly, which it applied to the state of Oregon through the liberty and due process clauses of the Fourteenth Amendment. Douglas argued that in all three cases — *Meyer*, *Pierce*, and *DeJonge* — the Court had prohibited state governments from infringing upon private rights related either to property, personal choice, or civil association, which were applied against state governments through the liberty and due process clauses of the Fourteenth Amendment.

Justice Arthur Goldberg, who concurred in the Court's decision, argued that the basic source of the individual's right to privacy is the Ninth Amendment, which says, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." According to Goldberg, the idea of liberty in the Fourteenth Amendment protects unenumerated personal rights, which are listed neither in the Bill of Rights nor in any other part of the Constitution. He claimed that the right to privacy in marital relationships was one of those rights not specified in the Constitution that nonetheless was "retained by the people." Goldberg also said, "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 the 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 whatever."

Justices John Marshall Harlan II and Byron White wrote concurring opinions based solely on the due process clause of the Fourteenth Amendment, which essentially endorsed Harlan's dissent in the 1961 case of *Poe v. Ullman*. Harlan, for example, argued that privacy is an unenumerated substantive right at the core of due process. There are two interlocking conceptions of due process: procedural and substantive. Procedural due process is about the fair application of laws to guarantee equal justice for all persons in legal proceedings. Substantive due process refers to unspecified rights, fundamental to the maintenance of liberty and order, that must be guaranteed to all persons in conjunction with fair and equal legal procedures, if equal justice under the law is to prevail. Harlan and White relied on their concept of substantive due process through the Fourteenth Amendment to justify an unenumerated substantive right to privacy, which constitutionally protects an individual's liberty against intrusion from the state government under certain conditions, such as the intimate relations between partners in a marriage.

Justices Hugo Black and Potter Stewart dissented. Both of them disagreed with the 1879 Connecticut law at issue in *Griswold*. Stewart called it "an uncommonly silly law." However, both Stewart and Black argued that enforcement of the 1879 law did not violate anyone's rights under the U.S. Constitution. They insisted there is no right to privacy in the Constitution. Stewart wrote, "With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."

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." In *Griswold*, Justice Black found no "specific constitutional provision" that prohibited the state government's regulation of the private behavior at issue in this case.

Both Black and Stewart criticized the Court's majority for going beyond the Constitution to use their judicial power willfully to achieve a desired social outcome.

Justice Black concluded, "Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention." According to Stewart, this unrestrained use of judicial power would lead to a "great constitutional shift of power to the courts" and away from the legislative and executive branches of government, the branches directly accountable to the people through regular elections.

Support for a right to privacy has grown since the *Griswold* decision. In *Katz v. United States*(1967), the Court overturned the decision in *Olmstead v. United States* (1928). The Court held that the Fourth and Fifth Amendments protect an individual's right to privacy against electronic surveillance and wiretapping by government agents, even in a place open to the public such as a telephone booth on a city street.

In *Eisenstadt v. Baird* (1972), the Court applied the right of privacy in obtaining and using contraceptive devices to individuals in general, rather than limiting it to married couples, as in *Griswold*. Writing for the Court, Justice Brennan said, "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 Court's most controversial applications of the privacy right have been in cases that in one way or another are associated with sexual behavior. For example, in *Roe v. Wade* (1973), the Court ruled that the right to privacy included a woman's right to terminate her pregnancy by choice during the first trimester and during the second and third trimester when necessary to protect the life and health of the woman. This use of an unenumerated

substantive right to privacy has been used by the Court in series of cases since Roe to uphold in general a woman's "right to choose" an abortion while modifying in some respects the Court's 1973 holding about this matter.

Another controversial Supreme Court decision that connected an unenumerated substantive right to privacy with sexual behavior was *Lawrence v. Texas* (2003). In this case, the Court found unconstitutional a state law banning certain kinds of consensual sexual behavior between two people of the same sex, because the statute violated the privacy rights of two adult males to engage in sexual relations in a private residence. In his opinion for the Court, Justice Anthony Kennedy emphasized the liberty and due process clauses of the Fourteenth Amendment, which were applied against the state government of Texas to protect the personal choices of consenting adults in a private homosexual relationship. He thus continued a line of reasoning about personal choice and privacy that can be traced to the Court's rulings in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.

Supreme Court decisions such as *Roe* and *Lawrence* have been criticized not only by those who refute an explicit right to privacy in the Constitution, but also by some who agree with the idea of a general constitutional right to privacy. The pro–privacy rights critics of the *Roe* decision, for example, claim that it wrongfully uses a valid, if unenumerated, constitutional right to justify behavior that should not be constitutionally protected. As a result, some individuals who strongly disagree with a constitutional right to choose an abortion are staunch defenders of a constitutional right to privacy in other instances.

It appears that a constitutional right to privacy is here to stay. It also seems that the exact meaning, justification, and limits of a constitutional right to privacy will continue to be controversial. Every extension of the right to privacy limits the power of government to regulate behavior for the common good, even though citizens in a democracy expect their government to advance community-wide concerns. By contrast, every expansion of government power to regulate the behavior of individuals diminishes the private domain of personal liberty, which Americans have always cherished. How to justly balance and blend these contending factors, so that both are addressed but neither one is sacrificed to the other, is an ongoing question that the Supreme Court asks when considering the correct uses and limitations of the right to privacy.

"The Right to Be Left Alone"

Following oral arguments about the Griswold case, the Court met in conference to discuss the issues in the Court's secluded conference room. Reconstructions of the surviving notes made by Justices William O. Douglas and William J. Brennan in conference on April 2, 1965, provide a glimpse into the proceedings. In conformity with the Court's tradition, the conference started with comments from the chief justice. Chief Justice Warren, in the conference at least, rejected the privacy rights argument that he later accepted in voting for the petitioners in this case. He also demonstrated his antipathy to the substantive due

process argument, shared by some other justices, that Justice Harlan and Justice White later presented in their concurring opinion in this case. The bracketed comments are notes of Justice Douglas that pertain to the comments attributed to Justice Harlan and Justice Brennan.

Warren: I am bothered with this case. The Connecticut legislature may repeal the law . . . I can't say that this affects the First Amendment rights of doctors, and I can't say that the state has not legitimate interest in the field . . . I can't . . . use equal protection, or use a "shocking" due process standard. I can't accept a privacy argument. I might rest on . . . the theory that there is no prohibition on sales and they don't go after doctors as such, but only clinics. I prefer to hold that since the act affects rights of association, it must be carefully and narrowly drawn. Basic rights are involved here— we are dealing with a most confidential association, the most intimate in our life. This act is too loosely drawn—it has to be clear-cut and it isn't. I am inclined to reverse [the decision against Griswold of the Connecticut courts].

Black: I can't reverse on any ground. Only one of two possible grounds are conceivable for me—the doctors' First Amendment rights. The right of association is for me the right of assembly, and the right of a husband and wife to assemble in bed is a new right of assembly to me . . . The [state law at issue] is pretty clear and carefully drawn—it is not ambiguous. So I can't find why it isn't within the state's power to enact. If I can be shown that it is too vague on due process grounds, I can join it . . . I am not at rest on it. I am against the policy of the act.

Douglas: The right of association is more than the right of assembly. It is a right to join with and associate with—the right to send a child to a religious school is on the periphery. *Pierce* is such a case. We have said that the right to travel is in the radiation of the 1st Amendment, and so is the right of association. Nothing is more personal than this relationship, and if on the periphery is still within First Amendment protection. I reverse.

Clark: I reverse. I agree with Bill Douglas. There is a right to marry, to have a home, and to have children.

Black: A state can abolish marriage.

Clark: This is an area where I have the right to be left alone. I prefer that ground for reversal.

Harlan: [Douglas: He restates his position in *Poe v. Ullman*—he relies on due process and reverses.] I would have difficulty if this were not a "use" act and if not applied to married couples.

Brennan: I reverse. [Douglas: He continues the Chief Justice's and Clark's, and Douglas's views.] I would bring the realm of privacy in. I do not reach the act that applies only to

unmarried people.

Stewart: There is nothing in the Bill of Rights that touches this. I can't find anything in the First, Second, Fourth, Fifth, Ninth, or other amendments, so I would have to affirm [the decisions of the Connecticut courts].

White: I reverse.

Goldberg: I reverse. You may regulate this relationship and the state cannot. There is no compelling state reason in that circumstance to justify the statute. I rely on *Meyer v. Nebraska*, *Schware v. Board*, and *Pierce v. Sisters*. These are all related to First Amendment rights—assembly—as we said in *Aptheker*. If we can form a club, he can join his wife and live with her as he likes.