

The “Right to Privacy” and its Constitutional Evolution: The Ninth and Fourteenth Amendments

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Right to Privacy

Although wrought with controversy, the ratification of the first ten amendments to the United States Constitution would forever shape American jurisprudence. Insisted upon by the Anti-Federalists, the *Bill of Rights* was intended as a protection against encroachments on the rights of the people and states by the national government (Kaminski 2001, 73). To varying degrees, the Supreme Court has indeed utilized the *Bill of Rights* as a means to secure the liberties of the people. More recently however, it has not shown such courtesy to the states. One such instance of judicial injury to the original intent of the Constitution can be found in the Supreme Court's interpretation and expansion of "the right to privacy" as specifically derived from the Ninth Amendment. Where said amendment was drafted by Madison in order to protect the states against a "constructive enlargement of federal power" (Lash 2004, 331), its meaning has been distorted and provisions inappropriately incorporated. It is not beyond reason to assume a "right to privacy" within the penumbra of the Constitution based on the original intent of the Ninth Amendment; however, the right and its derivatives should not have been incorporated into the states through the Fourteenth.

Ninth Amendment

Ratified in 1791, the Ninth Amendment of the United States Constitution reads, "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." According to law Professor Kurt Lash (2004), "the Ninth Amendment is solely concerned with constitutional interpretation. It is neither a grant of power nor a source of rights" (340). Among the *Bill of Rights*, the Ninth and Tenth Amendments are the only provisions that do not include specific, individual rights guarantees with regards to the relationship between the people and federal government. Rather, they are considered "general

statements depicting constitutional structural divisions of power” (Abraham 2005, 84).

Throughout the *Bill of Rights*’ ratification process, the state ratifying conventions demanded there be a constitutional amendment that would protect them from the expansion and abuse of federal constitutional power (Lash 2004, 331). Madison drafted the Ninth Amendment in response to these demands, implying during his 1791 Congressional speech against the National Bank that such an amendment was intended to guard against a federal government that would take latitude in its interpretation of the Constitution (para. 56). The Ninth Amendment must be understood within this context.

To many political activists, the Ninth Amendment has become synonymous with the phrase, “right to privacy,” as invoked in a series of landmark Supreme Court decisions. Until recent decades however, the Supreme Court never utilized the Ninth Amendment in support of this “right.” The 1965 landmark decision in *Griswold vs. Connecticut* (381 U.S. 479) actually “marks the first case in which the ninth amendment has been employed, albeit indirectly, as a substantive check on governmental action” (Constitutional Law 1966, 571). The “right to privacy” as understood in early American jurisprudence, however, is rooted in the 1886 case, *Boyd v. United States* (116 U.S. 616).

In *Boyd*, the court utilized provisions in both the Fourth and Fifth Amendments of the Constitution, claiming that, in certain cases, the two amendments sub-textually protected the privacies of individuals from governmental intrusion (Pratt 2005, 95). According to former Princeton Professor of Politics, William Beaney (1962), the essence of *Boyd* and similar early decisions were claims that the Fourth Amendment’s provision against unreasonable search and seizures and the Fifth Amendment’s privilege against self-incrimination implied a certain level of protection for individual privacy against government intrusions (216). In Justice Douglas’

majority opinion in *Griswold* (381 U.S. 479), he claimed “that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” Before *Griswold*, those penumbras by which the “the right to privacy” was derived were primarily gathered from the First, Fourth, and Fifth Amendments, with occasional state mandated incorporation stemming from the Fourteenth (Levinson 2005, 786).

The Fourteenth Amendment

It does seem odd, however, to draw a relationship between the unenumerated “right to privacy” and provisions from the Fourteenth Amendment. After all, the Fourteenth Amendment was ratified in 1868 as an attempt to settle representation, civil rights, and citizenship disputes following the *Civil War* (Benedict 2001, 289). Even though it effectively overturned the 1857 decision in *Scott v. Sandford* (60 U.S. 393), the Supreme Court originally applied the Fourteenth Amendment narrowly so as to distinguish between federal and state power (289). This amendment “does not embody a new understanding of rights but only supplies a more effective security to rights already possessed by persons and citizens in the United States” (Zuckert 1992, 72). In cases, such as the *Slaughterhouse Cases* (83 U.S. 36), *Civil Rights Cases* (109 U.S. 3), and most famous *Plessy v. Ferguson* (163 U.S. 537), the Supreme Court was not under the impression that the Fourteenth Amendment protected guarantees in the *Bill of Rights* from either state or private action (Benedict 2001, 289). In the early twentieth-century, this started to change.

Beginning in 1908 with *Twining v. New Jersey* (211 U.S. 78), “the Court suggested that some Bill of Rights guarantees might limit the states through the Due Process Clause” of the Fourteenth Amendment (Curtis 2005, 360). This clause states that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States... without due process of law” (U.S. Constitution, art. 14, sec.3). The policy became

known as “selective incorporation,” where certain Constitutional provisions originally intended to restrain the federal government were applied to the states (Abraham 2005, 83). In *Stromberg v. California* (283 U.S. 359), for example, the court concluded that through the Fourteenth, certain First Amendment guarantees of free speech were protected from state encroachment. In the years following, “the Supreme Court incorporated through the Fourteenth Amendment most of the specific protections of rights in Amendments One through Eight” (Abraham 2005, 84). By mid-century, the process of incorporation would be accelerated by the revolutionary *Warren Court*, which not only worked to reinterpret Ninth Amendment provisions, but changed the whole of interpretative history.

Supreme Court Precedent and Historical Interpretations. Alexander Hamilton claimed that the judicial branch of the United States “will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them” (*Federalist* 78). It is unfortunate the opposite has occurred. The enumeration of the “right to privacy” as derived from the Ninth Amendment and incorporated by the Fourteenth is a prime example of Constitutional abuse by the Supreme Court. *Griswold v. Connecticut* (381 U.S. 479) marks the beginning of this phenomenon. Justice Goldberg would state in his concurring opinion that “the right of privacy in the marital relation is fundamental and basic -- a personal right ‘retained by the people’ within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States” (*Griswold v. Connecticut* 381 U.S. 479).

Although it is not unreasonable to assume a certain level of privacy is protected within the Constitution, the Supreme Court went beyond its authority when it chose to enumerate a specific yet unspecified right from the Ninth Amendment. As has already been established, the

Ninth Amendment “*is not a source of rights*” but was intended as a protection against Constitutional abuses stemming from the states’ fear the national government would take interpretative liberties (Lash 2004, 340). In *Griswold*, the court seemingly reversed this distinction. Instead of using the Ninth Amendment to protect the states from federal interpretative liberties, it took this states rights’ amendment and used the Fourteenth to force a “right” onto the states. It was, therefore, inappropriate for the court to establish the “right to privacy” on these grounds and apply provisions of the Fourteenth Amendment to the Ninth. The Supreme Court’s decision in *Griswold* only set the stage for the Ninth Amendment’s most famous abuse.

In 1973, Justice Blackmun and the *Burger Court* handed down their decision in *Roe v. Wade* (410 U.S. 113). In sum, *Roe v. Wade* held that a woman’s “right” to an abortion was protected under the “right to privacy” as enumerated in *Griswold*, and was therefore applicable to the states through the Fourteenth Amendment. This decision effectively overturned laws protecting fetal life in 46 states (*Roe v. Wade* 2010, para.3). Unlike in *Griswold*, the case “was not confined to a claim of abortion within marriage but extended far more generally—indeed, even unqualifiedly—to a woman's right to kill the gestating life” (Van Alstyne 1989, 1679). As future Chief Justice Rehnquist would state in his dissent, “to reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment” (*Roe v. Wade* 410 U.S. 113). To claim a “right to privacy” exists within the penumbra of the Constitution is one thing, but to claim a “right to privacy” protects a “right to abortion” as forced upon the states through a states’ rights amendment is simply preposterous.

In *Roe*, the Supreme Court managed to find an unenumerated right within an unenumerated right and thought it appropriate to force upon the states: “It thereby substituted judicial hubris for judicial deference, substituting its view of the (un)importance of life for the fetus as against the view reported in state law. It ousted any different view than its own, thus doing precisely what it disclaimed was appropriate for any court” (Van Alstyne 1989, 1681). In the years following, this issue would present itself in a number of different fronts. In 1986 the more conservative *Rehnquist Court* struck down an attempt to apply the “right to privacy” to protect sodomy in *Bowers v. Hardwick* (478 U.S. 186). In 2005, however, *Lawrence v. Texas* (539 U.S. 558) would overturn *Bowers* under the same Ninth and Fourteenth Amendment principles as utilized in *Roe*. According to Peter Hoffer (2005), the Fourteenth Amendment’s clause regarding substantive “due process retains its protean ability to adapt constitutional law to changing social mores” (276). Changing social mores—in lieu of Constitutional principles, it would seem—has become the foundation by which Constitutional interpretation has progressed.

Conclusion

In summation, most twentieth-century Supreme Court opinions regarding the “right to privacy” as derived from the Ninth Amendment are inherently flawed. The original intent of both the Ninth and Fourteenth Amendments do not allow for the liberties the Court has taken in their interpretation. The Ninth Amendment, which was intended to protect the states against a latitude of governmental interpretation, has instead become the Supreme Court’s perpetual grab bag of rights in the service of changing social morality. As a states’ rights amendment, provisions from the Ninth Amendment are also logically un-incorporable to the states through the Fourteenth. Decisions, such as *Griswold v. Connecticut*, *Roe v. Wade*, and *Lawrence v. Texas* are prime examples of how the original meaning of these amendments has been ignored. Although it is not

unreasonable to assume a “right to privacy” as provided for by the first eight amendments, recent interpretations of this right have resulted in an incredibly flawed body of case law. It would seem that the Constitution is evolving in such a way that it no longer protects the peoples’ liberty; rather, it answers their demands for the expansion of license based on an ever-changing social order.

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