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Constitutional Law - Right to Privacy

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CONSTITUTIONAL LAW — RIGHT TO PRIVACY

The Planned Parenthood League of Connecticut operated a birth control clinic where physicians examined married women, gave them advice on means of preventing conception, and prescribed devices for that purpose. The clinic was closed by state authorities, and the executive director and the medical director of the League were convicted of aiding and abetting[1] patients in violating a Connecticut statute proscribing the use of contraceptives[2] by any person. The trial court rejected the defense that application of the birth control statute to prohibit the use of contraceptives by married persons in licit sexual relations violated the due process clause of the fourteenth amendment of the United States Constitution. The Connecticut Court of Errors affirmed the judgment.[3] On appeal, the Supreme Court of the United States reversed. *Held,* a state statute which prohibits the use of contraceptives by *any* person unconstitutionally intrudes upon the right to privacy in marital relations protected by the due process clause of the fourteenth amendment. *Griswold v. Connecticut,* 381 U.S. 479 (1965).

Although no article or amendment of the Constitution expressly guarantees a right to privacy, an early line of cases giving a liberal interpretation to the fourth and fifth amendments recognized such a right. Chief among these cases is *Boyd v. United States,*[4] where the Supreme Court held that a federal statute requiring the defendant to produce his private papers in a quasi-criminal proceeding violated the fourth amendment's prohibition against unreasonable searches and seizures and the fifth amendment's prohibition against forcing a person to testify against himself. Mr. Justice Bradley, delivering the Court's

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administrative regulations established procedure *within the service* for excusing from combatant duty all whose consciences, whether or not religiously impelled, forbade participation. See Stone, *The Conscientious Objector,* 21 COLUM. U.Q. 253 (1953); Exec. Order No. 2823, March 20, 1918; and War Dep't Gen. Order No. 28, June 1, 1918. Perhaps in the final analysis this would be the realistic answer today. Nevertheless, such a solution would run counter to the congressional policy of discretion in the local, civilian boards and might burden the military with an extensive administrative problem.

1. CONN. GEN. STAT. 54:196 (1958): "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."

2. *Id.* 53:32: "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."

3. 151 Conn. 544, 200 A.2d 479 (1964).

4. 116 U.S. 616 (1886).

opinion, looked beyond the wording of these amendments to their underlying principle of protecting "the sanctity of a man's home and the privacies of life."[5]

Later cases protecting the privacy of the individual against novel forms of "unreasonable searches and seizures" relied heavily upon *Boyd* and upon dictum in *Ex parte Jackson*[6] that the fourth amendment protected a sealed letter in the mail against being opened without a warrant.[7] The Supreme Court's position was that use in evidence of a self-incriminating statement or document violated the fifth amendment when the statement or document had been obtained by a violation of the fourth amendment.[8] Despite Justice Bradley's broad language in *Boyd,* these later cases protected the right to privacy only in situations where the government had committed what might be liberally construed as an unreasonable search and seizure.

The passage of prohibition greatly increased the federal government's role in law enforcement. Violators of the ban on liquor invoked the right to privacy secured by the fourth and fifth amendments to hamper its enforcement. In *Olmstead v. United States*[9] the government had obtained evidence of a violation of prohibition by wiretapping. The defendant asserted that admission of such evidence violated the fourth and fifth amendments, but the Supreme Court ruled to the contrary. The Court reasoned that there could not be a violation of the fifth amendment in this situaiton without a violation of the fourth. Thus the question presented was whether wiretapping constituted an unreasonable search and seizure. The Court applied the principle of *Carroll v. United States*[10] that the fourth amendment must be "construed in the light of what was deemed an unreasonable search and seizure when it was adopted" and held that wiretapping was not proscribed by the fourth amendment. Justice Brandeis, adhering to the traditional broad view of the fourth amendment, dissented vigorously from this narrow construction: "[E]very unjustifiable intrusion by the Government

5. *Id.* at 630.
6. 96 U.S. 727, 733 (1878).
7. See Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914).
8. See note 7 *supra.*
9. 277 U.S. 438 (1928).
10. 267 U.S. 132, 149 (1925).

upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."[11]

Although *Olmstead* halted the development of the right to privacy, it did not overrule earlier cases recognizing such a constitutional right. Moreover, the Court continued to invoke the right to privacy. In *Wolf v. Colorado* the Court held that "the security of one's privacy against arbitrary intrusion by the police," "the core of the Fourth Amendment," was "implicit in the concept of ordered liberty."[12] Thus the right was enforceable against the states through the fourteenth amendment. Nevertheless, evidence obtained by violating this right was not held by the Supreme Court to be inadmissible in the state courts, as in federal courts, until *Mapp v. Ohio,* where the Court held that evidence obtained by violating the "Fourth Amendment's right of privacy" was inadmissible in state courts.[13]

In view of the narrow interpretation of the fourth amendment in *Olmstead* either the repudiation of that case or the discovery of a constitutional basis for the right to privacy other than the fourth amendment was necessary before the right could evolve further. In *On Lee v. United States,* Justice Douglas called for a repudiation of *Olmstead* and a return to the practice of liberally construing the fourth amendment.[14] This approach, however, failed to win the adherence of a majority of the Court, and Douglas was left with the alternative of finding some constitutional basis for the right to privacy other than the fourth amendment. But he could not look beyond the first eight amendments and remain an orthodox incorporationist.[15]

The birth control statute involved in the instant case had been previously challenged in *Poe v. Ullman*;[16] however, the case was dismissed on the ground that the challengers lacked stand-

11. Olmstead v. United States, 277 U.S. 438, 478 (1928).

12. 338 U.S. 25, 27 (1949). See also Palko v. Connecticut, 302 U.S. 319, 325 (1937).

13. 367 U.S. 643, 655 (1961). Such evidence had been inadmissible in federal courts since Weeks v. United States, 232 U.S. 383 (1914).

14. 343 U.S. 747, 763 (1952). Previously in Goldman v. United States, 316 U.S. 129 (1941), Justice Douglas had supported *Olmstead.* In *On Lee* he specifically repudiates his prior stand.

15. See Adamson v. California, 332 U.S. 46, 90-92 (1946), where Justice Black, joined by Justice Douglas, dissented, offering the view that the fourteenth amendment incorporates all of the first eight amendments as a substitute for a natural law interpretation of the due process clause. Implicit in this opinion is the view that the due process clause protects only those rights enumerated in the Bill of Rights.

16. 367 U.S. 491 (1961).

ing to sue. In his dissenting opinion in *Poe* Justice Douglas stated that though he believed the due process clause of the fourteenth amendment incorporated all of the first eight amendments, he did not think it was "restricted" or "confined" to them. The right to privacy, he asserted, "emanates from the totality of the constitutional scheme under which we live."[17] Thus, Douglas seemingly rejected the incorporationist view that the fourteenth amendment protects only those liberties guaranteed by the first eight amendments.

The instant case broadens both the right to privacy and the constitutional basis of this right. Seven members of the majority hold that the Connecticut birth control statute violates the due process clause of the fourteenth amendment; however, they arrive at this common conclusion by four different approaches.

Although Justice White voted with the majority he, unlike the other six Justices who voted to overturn the conviction, does not assert that the statute in question violates a constitutional right to privacy. White views the classification of the right invaded as unimportant. He asserts that the Connecticut statute would be valid, despite its intrusion upon marital privacy, "if reasonably necessary for the effectuation of a legitimate and substantial state interest."[18] However, the only alleged end of the statute is to discourage illicit sexual relations. Since a narrower statute could be drawn prohibiting the use of contraceptives in illicit sexual relations only, the Connecticut birth control statute deprives married persons of liberty without due process of law by being broader than necessary to effect its alleged purpose.

Justice Harlan does not speak of a right to privacy in his opinion but merely states that he considers the Connecticut statute unconstitutional for the reasons discussed in his dissenting opinion in *Poe v. Ullman,* where he did assert that the statute violated the right to privacy. In *Poe* Justice Harlan took the position that the right to privacy is part of the liberty protected by the due process clause of the fourteenth amendment. Harlan cites *Wolf v. Colorado* in support of his position that the right to privacy is protected by both the fourth and the fourteenth amendments, but that the fourteenth does not incorporate the fourth. Harlan uses *Boyd v. United States* and

17. *Id.* at 521.
18. Griswold v. Connecticut, 381 U.S. 479, 504 (1965).

other cases liberally interpreting the fourth amendment not as interpretations of an amendment applicable to the states through the fourteenth amendment but as expositions of a right protected by both. Since the rights of privacy protected by these two amendments are not necessarily the same, privacy may be protected by the fourteenth amendment against an instrusion that takes some form other than an unreasonable search and seizure. Although the Connecticut birth control statute is not an intrusion upon the home by a unreasonable search and seizure, it is an intrusion upon life in that home; and is thus an unconstitutional invasion of the right to privacy.[19]

Mr. Justice Douglas, delivering the Court's opinion, develops a theory to explain the origin of those rights which he considers protected by the due process clause of the fourteenth amendment even though not enumerated in the first eight amendments. Douglas asserts that the specific guarantees of the Bill of Rights have "penumbras" formed by "emanations" from them, which create "zones of privacy." For example, the penumbras emanating from the guarantees of the first amendment contain the peripheral rights of choosing a private school for the education of one's children,[20] and of studying a particular foreign language in that school.[21] Freedom of speech and of the press include "the right to distribute, the right to receive, the right to read . . . , and freedom of inquiry, freedom of thought, and freedom to teach."[22] Although freedom of association is not mentioned in the first amendment, the Supreme Court has held that this freedom is a peripheral first amendment right, and, furthermore, that privacy in association is also protected.[23] From the existence of these peripheral rights Justice Douglas infers that "the First Amendment has a penumbra where privacy is protected from governmental intrusion."[24] The third amendment prohibition against quartering troops in any house in peacetime without the consent of the owner likewise creates a penumbra wherein privacy is protected, as do the fourth and fifth amendments. The birth control statute interferes with the marital relationship, which lies within the zone of privacy created by all of these amendments, although the statute does not violate any particular

19. See Poe v. Ullman, 367 U.S. 497, 550 (1961).
20. Pierce v. Society of Sisters, 268 U.S. 510 (1925).
21. Meyer v. Nebraska, 262 U.S. 390 (1923).
22. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).
23. NAACP v. Alabama, 357 U.S. 449, 462 (1958).
24. Griswold v. Connecticut, 381 U.S. 474, 483 (1965).

amendment. Implicit within Douglas' argument is the view that the zone of privacy, as well as the first eight amendments, is incorporated and protected by the fourteenth amendment. To strengthen his position Mr. Justice Douglas quotes the ninth amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." This amendment forms the heart of Mr. Justice Goldberg's opinion.

Prior to the instant case the Supreme Court had not interpreted the ninth amendment,[25] yet it is well established that "it cannot be presumed that any clause in the constitution is intended to be without effect."[26] Justice Goldberg uses the ninth amendment as an aid in understanding the concept of constitutional liberty protected by the fifth and fourteenth amendments. Goldberg refutes the restrictions of the incorporationist theory by interpreting the ninth amendment as indicating that the authors of the Constitution believed that the people retained more rights than those enumerated in the first eight amendments. Although Justice Goldberg accepts the view that the ninth amendment was originally a restriction on federal power only, he also maintains that the ninth may now have some relevance to state action. On the other hand, he does not argue that the ninth amendment is incorporated by the fourteenth, nor that the ninth amendment is an independent source of fundamental rights not spelled out in the Constitution. The ninth amendment, according to Goldberg, is merely an indication that the definition of "liberty," protected by the fifth amendment against federal action and now by the fourteenth against state action, should not be restricted to rights enumerated in the Constitution. However, the source of these unenumerated rights is not the ninth amendment, but " 'the traditions and (collective) conscience of our people'."[27]

It is submitted that Mr. Justice Goldberg's opinion is essentially sound. In their dissenting opinions Justices Black and Stewart voice the orthodox incorporationist objection that the Connecticut statute cannot be held unconstitutional unless it violates a right specifically enumerated in the Constitution.

25. For references in passing to the ninth amendment see United Power Workers v. Mitchell, 330 U.S. 75, 94 (1945); Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 143 (1938); Ashwander v. TVA, 297 U.S. 288, 330 (1935).
26. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).
27. Griswold v. Connecticut, 381 U.S. 479, 493 (1965).

In effect this is saying either that unenumerated rights do not exist, or that they are unenforceable. This seems to advocate exactly what the ninth amendments forbids — construing the enumeration of certain rights in the Constitution to deny or disparage others retained by the people.

Justice Goldberg could have given the ninth amendment a broader interpretation, for it is arguable that the ninth amendment was not originally intended to be solely a limitation on federal power.[28] The ninth amendment refers to an enumeration of rights *in the Constitution,* not just in the first eight amendments. Madison's original draft of the ninth amendment, stated that "the exceptions here or *elsewhere* in the Constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people."[29] The Constitution not only protects rights against the federal government by the first eight amendments, but also rights against state governments in article I, section 10, of the Constitution, which, according to Chief Justice Marshall, "may be deemed a bill of rights for the people of each state."[30] If the ninth amendment refers to the whole Constitution, then it forbids construing any enumeration of rights as an exclusive list, whether these rights be protected against the states or against the federal government. Thus the ninth amendment can be construed as protecting and sanctioning unenumerated rights against both the federal and state governments, independently of the fourteenth amendment.

Had the broader view of the ninth amendment been adopted, the jurisprudence of the fourteenth amendment would have been irrelevant in considering whether any given right was protected by the ninth amendment. Almost any claimed right that the Court had previously determined was not protected by the fourteenth amendment could be advanced again as an unenumerated right protected by the ninth amendment, and the issue decided *de novo.* Justice Goldberg's approach avoids the danger of rendering irrelevant nearly a hundred years of decisions under the fourteenth amendment.

Justice's Douglas' opinion is less forceful than Goldberg's, because Douglas has difficulty reconciling the right to privacy

28. PATTERSON, THE FORGOTTEN NINTH AMENDMENT 2 (1955).
29. *Id.* at 16.
30. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810).

with his incorporationist views. He appears to be attempting a return to the incorporationist fold, from which he departed in *Poe,* by once again restricting his consideration of constitutional issues to the first eight amendments. Douglas notes that each amendment of the Bill of Rights guarantees one or more general rights. In deciding cases the Supreme Court has determined certain specific rights to be included within these guaranteed general rights. For example, the general right, freedom of the press, includes the specific right to distribute. Douglas also notes the specific rights which have been recognized as included within the general rights protected by the first eight amendments. He asserts that these specific rights are but part of a broader general "right to privacy." The specific right to marital privacy is also a part of that general right; hence, he concludes, it is a protected right. This inference, unfortunately, is invalid. The specific right to distribute is protected because general freedom of the press is guaranteed expressly by the Constitution. However, the general "right to privacy" is not similarly guaranteed.

Despite the questionable reasoning in Justice Douglas' opinion, it is significant when joined by Justice Golberg's opinion. Together they indicate that the solution to the incorporationist controversy may be one of synthesis. Even if the incorporationists do eventually persuade the Court to hold that the fourteenth amendment incorporates all of the first eight amendments, it appears very unlikely that the fourteenth amendment will be so restricted as to protect only the rights guaranteed by the first eight amendments.

However it is to Justice White's opinion, the narrowest of the majority's four opinions, that the Court must look if it is to declare void any other state statute against birth control, for the Connecticut statute is unique. It is the only state statute prohibiting the use of contraceptives. Other states have laws making the sale of contraceptives illegal, but it is difficult to see how these laws interfere with the right to privacy. It would consequently appear that if a law forbidding the sale of contraceptives is challenged, the Supreme Court will have to adopt reasoning similar to Justice White's in order to declare it unconstitutional.

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