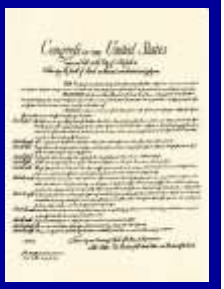
American Government and Politics Today

Chapter 4
Civil Liberties

Where Does the Right to Privacy Come From?

- Does the word "privacy" appear in the Constitution?
- Some argue that the right to privacy emanates from various specific provisions of the Bill of Rights:
- 1st Amendment: freedom of association
- 3rd Amendment: prohibition against quartering soldiers
- 4th Amendment: prohibition against unlawful search and seizure
- 5th Amendment: guarantees against self-incrimination
- 9th Amendment: unenumerated rights
- 14th Amendment: liberty and due process guarantee



Olmstead v. United States (1928)
Justice Louis Brandeis, Dissenting

Dissenting from a 5-4 decision upholding government wiretaps, Justice Brandeis wrote: "The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. 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. To protect, that right, every unjustifiable intrusion by the government upon the **privacy** of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth."

The Warren Court

- Top row (L-R): Byron White, William Brennan, Abe Fortas, Arthur Goldberg.
- Bottom row (L-R): Tom Clark, Hugo Black, Earl Warren, William O. Douglas, John Marshall Harlan II

Griswold v. Connecticut (1965)

- At issue was an 1879 Connecticut law prohibiting the aiding, abetting, counseling or use of birth control, even by married couples.
- The Director of Planned Parenthood, Estelle Griswold who was also a physician, opened a clinic to purposely challenge the law. She was arrested, tried, and convicted of violating the law.

Griswold v. Connecticut (1965)
Justice William O. Douglas for the 7-2 Majority

- Douglas began by listing individual rights that were recognized by courts but that were not specifically listed in the Constitution.
- "The foregoing cases suggest that 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 present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."
- "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."

Griswold v. Connecticut (1965)
The Other Justices Weigh In

- Justice Arthur Goldberg, Chief Justice Earl Warren, and Justice William Brennan concurred and explained that the concept of liberty includes the marital right of privacy. They also cited the **9th Amendment**, which they argued showed that the framers believed there were additional fundamental rights existing alongside those specifically listed in the Bill of Rights.
- Justice John Marshall Harlan II concurred and explained that the 14th Amendment's due process clause was the proper grounding for the issue. Justice White also wrote a separate concurring opinion also relying on the due process clause of the 14th Amendment.
- Justices Hugo Black and Potter Stewart dissented and charged the majority of inventing a general right to privacy that encompasses whatever they choose to say it includes.
- In his separate dissent, Justice Stewart noted that "this is an uncommonly silly law" but one which is not prohibited by the Constitution.
- *Griswold* articulated a right to privacy, but how broad was this right? Certainly it protected "notions of privacy surrounding the marriage relationship" but what else? The next case helped answer that question.


Arthur Goldberg


Hugo Black

Privacy Rights

- There is no *explicit* Constitutional right to privacy, but rather the right to privacy is an interpretation by the Supreme Court.
- From the First, Third, Fourth, Fifth, and Ninth Amendments.
- The right was established in 1965 in *Griswold v. Connecticut*.

Roe v. Wade (1973)

- An 1857 Texas law (revised in 1879) made it a crime to attempt to "procure an abortion" except for the purpose of saving the life of the mother. Similar statutes were in place in a majority of states.
- Norma McCorvey (top left), 21, claimed to have been raped and became pregnant. Her doctor refused to perform the abortion citing the Texas law.
- Her attorneys—including Sarah Weddington (bottom left)—argued that abortion was a fundamental right under the *Griswold* privacy doctrine
- Texas countered that it had a compelling interest in protecting human life.

Justice Harry Blackmun Delivered the Opinion of the Court

- The Court struck down the statute by a vote of 7-2.
- Blackmun began by noting that anti-abortion laws were a relatively recent phenomenon. They were enacted in the latter half of the 19th century and reached their apex in the late 1950s. There has been a slight trend toward liberalization since.
- The "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."
- "A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment."
- Blackmun explained that the fetus was not a person under the meaning of the 14th Amendment. "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."
- "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."

Justice Harry Blackmun Delivered the Opinion of the Court

- Blackmun balanced the competing interests by drawing on the medical literature about the stages of pregnancy—The Trimester Framework:

I. "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."

II. "For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health."

III. "For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

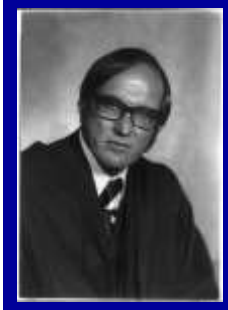
Justice Byron White Dissenting

- Filing his dissent "with all due respect," White found "nothing in the language or history of the Constitution to support the Court's judgments."
- "The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review."

Justice Byron White Dissenting

- White was particularly concerned that the Court, through the second trimester of a pregnancy, "values the convenience of the pregnant woman more that the continued existence and development of the life or potential life that she carries."
- "The common claim before us is that for any [reason]…, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical adviser willing to undertake the procedure…. Whether or not I might agree with that marshaling of values, I can in no event join the Court's opinion because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heartedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing women and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs."

Justice William H. Rehnquist Dissenting



- "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. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today."
- From this historical record, Rehnquist concluded that, "There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted." Therefore, "the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter."

Aftermath

The New York Times

LATE CITY EDITION

LYNDON JOHNSON, 36TH PRESIDENT, IS DEAD; WAS ARCHITECT OF 'GREAT SOCIETY' PROGRAM

High Court Rules Abortions Legal the First 3 Months

State Bans Ruled Out Until Last 10 Weeks

One unforeseen outcome of the case was the anti-abortion movement that exploded in the wake of the decision. In this Jan. 22, 1975 photo "Face to Face on Abortion" the caption read: "Bill Baird, left with arm raised, and his pro-abortion demonstrators parade with a cross outside the State House in Boston Wednesday as an anti-abortion group protests across the street. Wednesday was the second anniversary of the U.S. Supreme court decision liberalizing abortion laws. The opposing groups did not clash."

Conclusion: Controversy

- The "right to privacy" has a controversial history in the U.S. Supreme Court with both liberal and conservative justices debating its meaning.
- While privacy implies the freedom or "liberty" to act without government prohibition, the question of which liberties are protected is an open one.
- Abortion has remained constitutionally protected despite numerous legal challenges over the years.
- Is there a right to physician-assisted suicide? Medical marijuana? So far, the Supreme Court has said "no" but these issues remain controversial.

Privacy Rights and Abortion

- *Roe v. Wade*. In *Roe v. Wade* (1973) the court held that governments could not totally prohibit abortions because this violates a woman's right to privacy. Government action was limited depending on the stage of the pregnancy.
- The controversy continues

Cruzan v. Director, Missouri Dept. of Health

Facts: Nancy Cruzan was involved in a car accident. She was thrown from her car and landed face down in a water-filled ditch. She was found by paramedics with no vitals signs, but was successfully resuscitated. She was in a coma and after two weeks, she was diagnosed as being in a persistent vegetative state. The doctors inserted a feeding tube for her long term care. After four years, her condition did not improve. Nancy's parents decided it was time to withdraw the feeding tube. Hospital staff refused, because it would result in Nancy's death.

Cruzan v. Director, Missouri Dept. of Health

- Missouri State Court: Authorized the removal of the feeding tube based on evidence that showed Nancy would not have wanted to live in this condition.
- Missouri Supreme Court: Overturned the lower court's decision. The evidence presented was not "clear and convincing" of Nancy's wishes regarding the withdrawal of the feeding tube.

Cruzan v. Director, Missouri Dept. of Health

- 1990 U.S. Supreme Court
  - Recognized that competent individuals have a constitutional right to refuse medical treatment.
  - States, however, have an interest in preserving human life, so with incompetent persons, must look to State Law.
  - Missouri Law required a showing by "clear and convincing" evidence that Nancy would have wanted removal of life-sustaining treatment. Parents did not have it. Upheld the decision of the Supreme Ct.

PROBLEMS

- No guaranty that your wishes will be met.
- Court may get involved if disputes arise.
- Could result in someone you do not know or do not like making decisions on your behalf.

Privacy Rights and The Right to Die

- *Cruzan v. Director, Missouri Department of Health* (1997): a patient's life support could be withdrawn at the request of a family member if there was "clear and convincing evidence" that the patient did not want the treatment. This has led to the popularity of "living wills."
  - What If There Is No Living Will? For married persons, the spouse is the relative with authority in this matter.

Privacy Rights and The Right to Die (cont.)

- Physician-Assisted Suicide. The Constitution does not include a right to commit suicide. This decision has left states much leeway to legislate on this issue. Since that decision in 1997, only the state of Oregon has legalized physician-assisted suicide.

The Right to Die

- Supreme Court rulings in *Washington v. Glucksberg* and *Vacco v. Quill* that U.S. Constitution does not protect a right to assisted suicide
  - States allowed to make own laws
- Silence in Terry Schiavo case let stand lower court's ruling
- Other industrial democracies have decriminalized right to die

27

Privacy Rights vs. Security Issues

- Privacy rights have taken on particular importance since September 11, 2001. For example, legislation has been proposed that would allow for "roving" wiretaps, which would allow a person (and his or her communications) to be searched, rather than merely a place. Such rules may violate the Fourth Amendment.
- The USA Patriot Act
  - Civil liberties concerns

Rights of the Accused

- Fourth Amendment
  - No unreasonable or unwarranted search or seizure.
  - No arrest except on probable cause.
- Fifth Amendment
  - No coerced confessions.
  - No compulsory self-incrimination.

Rights of the Accused (cont.)

- Sixth Amendment
  - Legal counsel.
  - Informed of charges.
  - Speedy and public jury trial.
  - Impartial jury by one's peers.
- Eighth Amendment
  - Reasonable bail.
  - No cruel or unusual punishment.

The Bill of Rights and the Accused

- *Miranda v. Arizona:* requires the police to inform suspects of their rights (*Miranda v. Arizona* 1966).
- Exceptions to the *Miranda* Rule. These include a "public safety" exception, a rule that illegal confessions need not bar a conviction if other evidence is strong, and that suspects must claim their rights unequivocally.

The Bill of Rights and the Accused (cont.)

- Video Recording of Interrogations. In the future, such a procedure might satisfy Fifth Amendment requirements.
- The Exclusionary Rule. This prohibits the admission of illegally seized evidence (*Mapp v. Ohio* 1961).

The Death Penalty

- Is the death penalty cruel and unusual punishment or is it a useful method for dealing with the worst criminals?

The Death Penalty Today

- 37 states allow the death penalty.
- Time Limits for Death Row Appeals.
- The 1996 Anti-Terrorism and Effective Death Penalty Act limits appeals from death row.
- Recently, DNA testing has led to the freeing of about a hundred death row inmates who were wrongly convicted, throwing doubt on the death penalty.

Questions for Critical Thinking

- What do you think is the historical basis for civil liberties? Are people as concerned today about the protection of their civil liberties as were the founders?
- Do you think the libel laws restrict a free press? Should the press be allowed to publish anything it wants about a person? Should the press have to prove that everything published is absolutely true?

Questions for Critical Thinking

- Why are the rights of the accused so important? Is there any way to strike a balance between the rights of victims and the rights of the accused?