The Invisible Amendment: The Evolution of the Right to Privacy

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Abstract: Citing six landmark Supreme Court cases, this piece argues that the meaning of America's unwritten right to privacy has changed over time. It follows the right to privacy from its original appearance in an 1891 case between private actors to its application, beginning in the 1960s, against government regulation of intimate activities and bodily autonomy. It concludes with the 2022 *Dobbs v. Jackson Women's Health Organization* decision, which may mark the beginning of a new chapter for the right to privacy in American law.

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The extent of the right to privacy, aptly described as the right to be left alone, is the backbone of many social issues at the center of American political debate. Arguments favoring constitutional protection for abortion, access to contraception, and same-sex intercourse all hinge upon a robust right to privacy. Originalists commonly question the basis for such a right, noting that neither the Bill of Rights nor later amendments make any mention of privacy. Nonetheless, citizens' right to privacy has been recognized in judicial circles since the 1800s; in these early years, privacy was broadly defined as a protection against unwanted intrusion by private individuals and media. A pivotal moment occurred in 1965, when the Supreme Court's *Griswold v. Connecticut* decision officially recognized an implied right to privacy scattered across multiple constitutional amendments. Since then, the Court has generally upheld that American citizens possess a right to a considerable degree of privacy from unwarranted government intrusion. As subsequent landmark cases continued to expand the right to privacy's application, the meaning of privacy has seemingly transformed as well. In recent decades, privacy has increasingly pertained to bodily autonomy and intimate relations and has been used by courts to strike down state and federal laws intended to regulate these areas. Although Supreme Court cases dating back to 1891 have upheld that the right to privacy exists in American jurisprudence, it remains unwritten in the Constitution and lacks a single, defined meaning, which has caused its scope to change dramatically over time.

One of the earliest Supreme Court decisions referencing a potential right to privacy occurred in 1891, over six decades before the *Griswold* v. *Connecticut* ruling. In *Union Pacific Railway Co. v. Botsford*, a railroad passenger received permanent brain and spinal cord injuries after a railcar berth broke free and landed upon her head. She sued the railway company for negligence, but the company countered that it was entitled to surgically examine the passenger, without her consent, in order to determine the amount of damage. Writing for the majority, Justice Horace Gray sided with the passenger, insisting that, "no right is held more sacred…than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of the law."[165] Although Gray does not use the term "privacy," he captures the spirit of the word by insisting that the passenger

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[165] Union Pacific Railroad Co. v. Botsford, 141 U.S. (1891): 251.

is entitled to a negative freedom: liberty from unwarranted bodily intrusion. It is worth noting that while this Court decision protected the passenger's privacy from a non-governmental actor, no additional check was made upon state or federal power. Co-authoring a Harvard law review article in 1890, a young Louis Brandeis also advocated for a right to privacy in response to "instantaneous photographs and newspaper enterprise [which] have invaded the sacred precincts of private and domestic life."[166] Brandeis suggests that stronger legal action must be taken against unnecessary prying by actors such as tabloids, but does not hold the government to this standard. It is worth noting that Brandeis makes no mentions of privacy in the bedroom, which would be a defining issue in later landmark cases. Rather, he seems to view privacy strictly in terms of the right to be left alone from private nuisances and intrusions. Nonetheless, both men's writings demonstrate that notions of an individual's right to privacy from other persons existed in judicial circles long before the 1960s, although little attempt was made to define its constitutional basis.

Griswold v. Connecticut (1965) was significant in the development of the right to privacy for two reasons. Firstly, it applied citizens' right to privacy against unwarranted interventions by the federal and state governments, as opposed to just private actors. Secondly, it marked the beginning of an expansion of privacy as a legal concept, from simply blocking unwarranted intrusions to also encompassing the protection of intimate relations between consenting adults. The case arose from legal challenges against a Connecticut law prohibiting the use of contraceptives by married couples. Writing for the majority, Justice William O. Douglas overturned the law, declaring that it violated a "zone of privacy created by several fundamental constitutional guarantees."[167] Although privacy does not appear explicitly in the Constitution, Douglas argues that unwritten rights may be interpreted from written ones. He claims that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[168] According to Douglas, the so-called zone of privacy is one of these implied protections, created by the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments. The opinion states that the First Amendment's right of association is one aspect of privacy, while the Third Amendment's prohibitions against the quartering of soldiers is another

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[166] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy." *Harvard Law Review,* Vol. 4 No. 5. (December 15, 1890).
[167] Griswold v. Connecticut, 381 U.S. (1965): 485.
[168] *Griswold v. Connecticut,* 484.

facet.[169] Douglas continues, asserting that the Fourth Amendment "affirms the right of people to be secure in their persons, houses, papers," while the Fifth Amendment's Self-Incrimination clause "enables the citizen to create a zone of privacy which [the] government may not force him to surrender to his detriment."[170] Combined with the Ninth Amendment, which states that citizens possess rights that are not written in the Constitution, Douglas concludes that there is a strong basis for an implied right to privacy.

In a concurring opinion, Justice Arthur Goldberg agreed, stating that, "though the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection."[171] However, in contrast to Justice Douglas' textual interpretation, Goldberg uses a historical argument to uphold married couples' right to privacy. He asserts that, "the fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so."[172] Citing the Ninth Amendment, he proclaims that, "there are fundamental personal rights...which are protected from abridgment by the Government though not specifically mentioned in the Constitution."[173] From Goldberg's perspective, the Constitution guaranteed married couples a degree of privacy from government interference because the sanctity of a marital pact has deep roots in Western tradition.

By 1972, the Supreme Court's view of privacy had developed a more libertarian view. The *Eisenstadt. v Baird* (1972) decision, penned by Justice William J. Brennan Jr., expanded sexual privacy rights to all citizens by striking down bans on the distribution of contraceptives to unmarried individuals. Brennan writes that, "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."[174] He justifies this interpretation by citing the Equal Protection Clause of the Fourteenth Amendment,

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[169] *Griswold v. Connecticut,* 484.
[170] *Griswold v. Connecticut,* 484.
[171] *Griswold v. Connecticut*, 485.
[172] *Griswold v. Connecticut,* 495-496.
[173] *Griswold v. Connecticut,* 495-496.
[174] Eisenstadt v. Baird, 405 U.S. (1972): 453.

stating that, "If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution would be equally impermissible."[175] For Justice Brennan, the right to privacy and reproductive choice was not merely confined to marriage on the basis of tradition, but was meant to be a broadly applied democratic principle.

In the year following the *Eisenstadt* decision, the Supreme Court settled its most famous privacy case, *Roe v. Wade* (1973). Despite its infamy, the case is hardly the most groundbreaking decision of those mentioned in this analysis in terms of originality or upsetting the status quo. Rather, it builds upon the precedents previously established in the *Griswold* and *Eisenstadt* opinions. For the Supreme Court, *Roe v. Wade* was merely the next step in the process of applying and expanding the scope of reproductive privacy, which had previously been limited to contraceptives. Following the decision, privacy rights would be expanded to include the protection of a woman's right to terminate her pregnancy, striking down numerous state laws banning abortion procedures. In the majority opinion, Justice Harry Blackmun directly refers to precedent set in *Griswold v. Connecticut* and reaffirms that the right to privacy (or a guarantee of a zone of privacy) exists through the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[176] He also notes that previous cases establish that procreation, contraception, family relations, and child rearing education are all subject to a guarantee of personal privacy.[177] Consequently, Blackmun declares, "this right of privacy...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[178]

Where this decision varies from its privacy-related predecessors is in Blackmun's claim that, "the privacy right involved…cannot be said to be absolute."[179] Unlike the majority opinions of *Griswold* and *Eisenstadt*, Justice Blackmun finds that an individual's right to reproductive privacy does not always overrule the concerns of the government. On the issue of abortions, Blackmun maintains that the state has "important interests…in protecting potential life...At some point in the pregnancy, these respective interests become sufficiently compelling to sustain

[175] *Eisenstadt v. Baird*, 453.
[176] Roe v. Wade, 410 U.S. (1973): 727.
[177] *Roe v. Wade,* 726.
[178] *Roe v. Wade,* 727.
[179] *Roe v. Wade,* 727.

regulation of the factors that govern the abortion decision."[180] He attempts to find a balance between state interest and bodily autonomy by creating a trimester system, which holds that, in the early stages of a pregnancy, the mother possesses sole authority on the decision to terminate the pregnancy. However, as the fetus develops and approaches viability, the state's interest in regulating abortion increases and can eclipse the would-be mother's right to privacy.[181] The subject matter of *Roe v. Wade* would make it one of the most controversial rulings in American history; it was ultimately overturned in 2022.

One of the most recent landmark privacy cases, *Lawrence v. Texas* (2003), applied the right to privacy to same-sex relationships, which had been criminalized in some states through anti-sodomy laws. The case arose when two citizens, following their arrest, challenged a Texas statute forbidding two individuals of the same sex from engaging in intimate acts. In the Supreme Court's majority opinion, Justice Anthony Kennedy moved to strike down the Texas law, arguing, "statutes do seek to control a personal relationship...that is within the liberty of persons to choose without being punished as criminals." Reaffirming the implied right to privacy, Kennedy then declares, "the liberty protected by the Constitution allows homosexual persons the right to make this choice."[182] Justice Kennedy's logic posits that the right to privacy must apply to all intimate relationships between consenting adults, rather than solely heterosexual ones. He argues that, "liberty of persons to choose [how to define their relationship]…counsels against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[183] The Supreme Court's decision in *Lawrence v. Texas* marked a further expansion of the implied right to privacy, as well as privacy's association with the protection of bodily autonomy and intimate relationships in the field of law.

The right to privacy has transformed dramatically since it emerged as a legal concept in the 1890s. Initially, constitutional scholars such as Horace Grey and Louis Brandeis viewed privacy as protection against private actors that were unnecessarily intrusive. However, *Griswold v. Connecticut* began a transformation of privacy, applying it to both federal and state governments

[180] *Roe v. Wade,* 727.
[181] *Roe v. Wade,* 732.
[182] *Lawrence v. Texas,* 567.
[183] *Lawrence v. Texas,* 567.

as well as establishing protections for decisions within certain intimate relationships for the first time. In the decades following the decision, the Supreme Court would increase the scope of privacy, expanding it to include contraception for unmarried citizens in *Eisenstadt v. Baird*, the termination of pregnancies in *Roe v. Wade*, and same-sex intercourse in *Lawrence v. Texas*.

The Court's gradual expansion of privacy rights as a protection of bodily autonomy finally came to a halt in 2022, when the outcome of the *Dobbs v. Jackson Women's Health Organization* case reversed the previous decision in *Roe v. Wade.* Writing for the majority, Justice Samuel Alito argued that, "The Constitution makes no reference to abortion, and no such right is implicitly protected by any Constitutional provision…some rights…are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition.'" He concludes that "the right to abortion does not fall within this category."[184] In future decisions, Justice Alito's "history and tradition" basis for evaluating the merit of unwritten rights could further alter scope and meaning of the implied right to privacy. With *Roe v. Wade* overturned, the Supreme Court could choose to revisit other high-profile cases involving privacy and bodily autonomy, potentially reversing other landmark decisions. In particular, relatively modern developments such as the widespread legality of homosexual relationships and the use of contraception could be jeopardized by a standard that insists that implied rights must be rooted in "history and tradition." Alternatively, growing controversy surrounding social media giants and data collection may very well shift the focus of the privacy debate once again. With the Court's composition now dominated by originalist judges, it remains to be seen if implied constitutional protections such as privacy will continue to be recognized at all in future decisions.

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[184] Dobbs v. Jackson Women's Health Organization, 597 U.S. (2022): 2242.

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