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THE JUDICIAL PROTECTION OF UNENUMERATED CONSTITUTIONAL RIGHTS

By Gene R. Nichol, Jr.

After nearly two centuries, judicial review has become an accepted enterprise in our governmental system. Following the perceived demands of fundamental law, judges— with some frequency—refuse to effectuate legislative and executive acts thought to violate the provisions of our constitutional charter. To some extent, however, a system of limited judicial veto poses tensions with democratic theory. When the federal judiciary negates an action of another branch of government, electorally accountable institutions are overridden by electorally unaccountable judges. If one accepts the premise that important government decisions in a representative democracy are to be made by elected officials, broad judicial authority is disconcerting from the outset.

For the modern American citizen, however, the problem is more than theoretical. Despite the many ways in which some see our government as less than truly representative, Americans cling stubbornly to the belief that they can show their displeasure with the performance of government officials by voting errant ones out of office. But with the federal judiciary, citizens are not even allowed this traditional prerogative. Not only are constitutional decisions made by judges who cannot be removed through the ballot, but also the rulings themselves are particularly irksome to overturn. Amending the Constitution, as the proposed equal rights amendment has shown, is a slow and cumbersome process. The congressional authority to regulate the jurisdiction of the Supreme Court, on the other hand, is problematic and rarely used.

Of course, some constitutional decisions present greater difficulties than others. When a ruling is based upon an unambiguous and widely shared interpretation of the constitutional text, the tension between judicial review and electoral democracy is diminished. A decision, for example, that prohibits governmental classifications directly burdening racial minorities is clearly supported by the history and language of the equal protection clause of the Fourteenth Amendment. And a ruling striking down a federal statute that limits political expression seems mandated by the terms of the First Amendment.
judication. Far more often, courts base their values reflected in the Constitution, applying the Court has on occasion “modernized” the Somewhat more troubling, the Supreme Court has occasionally dictated of the constitutional text, and practices that discriminate against the poor—such as those believed in sexual equality. And practices that aspects of state-sanctioned gender discrimination—such as those restricted the rights of married persons to use contraceptive devices. The opinion found that the regulation impermissibly limited the right of privacy of married persons. Although the Court made some effort to tie the privacy right to the constitutional text, it ultimately concluded that the right to marital privacy was “older than the Bill of Rights—older than our political parties, older than our school system.” 381 U.S. at 466. Accordingly, the right of married couples to choose—free from state interference—to use contraceptive devices is a right of constitutional significance. Two years later, in striking down Virginia’s sterilization statute, the Court ruled in Loving v. Virginia, 388 U.S. 1 (1967) that the privacy right enshrined, at least presumptively, the decision to marry as well.

The Supreme Court and the Privacy Doctrine

The strongest foundation for the modern privacy doctrine is probably the Supreme Court’s decision in Skinner v. Oklahoma, 316 U.S. 535 (1942). There the justices invalidated a statute that authorized the sterilization of persons previously convicted and sentenced to imprisonment two or more times for crimes characterized as “felonies of moral turpitude.” The Oklahoma scheme challenged seemed particularly unfair since the “moral turpitude” standard was used to draw some puzzling lines. Under the system, grand jury was deemed a punishable crime while embezzlement was not. In striking down the statute, the Court noted that the act dealt with “one of the basic civil rights of man ... marriage and procreation are fundamental to the very existence and survival of the race.” Accordingly, procreative interests were given special constitutional status despite their omission from the Bill of Rights.

The Skinner precedent was bolstered by the Warren Court’s mid-1960s decision in Griswold v. Connecticut, 381 U.S. 479 (1965). In Griswold the Court struck down a statute that restricted the rights of married persons to use contraceptive devices. The opinion found that the regulation impermissibly limited the right of privacy of married persons. Although the Court made some effort to tie the privacy right to the constitutional text, it ultimately concluded that the right to marital privacy was “older than the Bill of Rights—older than our political parties, older than our school system.” 381 U.S. at 466. Accordingly, the right of married couples to choose—free from state interference—to use contraceptive devices is a right of constitutional significance. Two years later, in striking down Virginia’s sterilization statute, the Court ruled in Loving v. Virginia, 388 U.S. 1 (1967) that the privacy right enshrined, at least presumptively, the decision to marry as well.
The Supreme Court has recognized that a right of personal privacy, does exist under the Constitution. These decisions make it clear that only personal rights "implicit in the concept of ordered liberty..." are included in this personal guarantee to privacy. They also make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. 410 U.S. at 152.

Four years later the Court ruled, in Moore v. East Cleveland, 431 U.S. 494 (1977), that an East Cleveland zoning ordinance which defined "single-family" so restrictively that a grandmother could not live in the same house with her two grandsons violated the right to privacy. Declaring that "freedom of personal choice in matters of marriage and family life is one of the liberties" protected by the Constitution, the justices determined that the zoning requirement was impermissively intrusive. Finally, the Burger Court has suggested that at least limited constitutional protection for a right to treatment for the involuntarily committed mentally retarded, Youngberg v. Romeo, 457 U.S. 307 (1982), and a right to free association, Roberts v. United States Jaycees, 460 U.S. 609 (1984).

Of course, a plethora of privacy claims have been rejected by the Court. In Doe v. Commission, 425 U.S. 901 (1976), the Court summarily affirmed Virginia's sodomy statute, which makes illegal private, consensual homosexual activity. Kelley v. Johnson, 425 U.S. 238 (1976), held that a policeman does not have a constitutional right to wear his hair any length he chooses. The "right" to observe pornographic materials in an adult theatre was specifically excluded from the Court's view of privacy. And ironically, given the contraceptive decisions, the justices have never ruled that adultery and fornication statutes are impermissible.

Thus, the Supreme Court has struck something of a middle ground in its measurement of personal autonomy. Some privacy rights, primarily those procreative and family-oriented in nature, do exist, despite their omission from the constitutional text. The justices have refused, however, to expand the privacy interest to a general right to be let alone unless harm to another is threatened. Many "vicious crimes"—if indeed there are such things—remain constitutionally permissible. Yet the essential position on the unenumerated rights issue seems both clear and well-settled. Though their scope is neither all-encompassing nor absolute, there are undefined constitutional guarantees.

FUNDAMENTAL FREEDOMS OR JUDICIAL POLICYMAKING?

The shortcomings of nontextual judicial constitutionalizing are substantial. In protecting rights to privacy, the Supreme Court has described interest in marital decisionmaking, procreative choice, and similar areas as "fundamental" liberties. Of course, people disagree strongly over the fundamental aspects of being human. Obviously, the Connecticut legislature that was overturned in the Griswold case did not consider the right to use contraceptives "implicit in the concept of order and liberty." Many regard the abortion decisions as outright denials of the essential aspects of human liberty. And it is hardly a fundamental component of the American tradition to provide access to contraceptives for unmarried minors.

It is reasonable to question—given the controversial nature of "fundamental rights"—why the Court's vision of essential liberties should take precedence over the views of other governmental institutions. If no explicit theory or principle supports the recognition of the various privacy rights, judges may be said to be enforcing their own preferences, not law. Moreover, if fundamental liberties are thought to be constitutionally protected because they are rooted in American tradition, why are the courts better able to ascertain the content of our tradition than our elected officials are?

In short, critics have claimed that the judicial protection of unlisted rights is illegitimate. Judicial review itself, as espoused in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), is heavily premised on the notion of a written constitution. Once the justices move beyond the written dictates of the text, they move beyond their legitimate powers. Policymaking is the bailiwick of the legislators, not the courts.

Critics also point out that the courts have not always honored the wisest policy. In the mid-nineteenth century, the Supreme Court's Dred Scott decision hampered the country's ability to limit the spread of slavery, while President Lincoln honored the ideals of the nation. In the 1930s, the Supreme Court used its vision of the appropriate relationship between the individual and the government to thwart the initiatives of the New Deal. Again, elected officials, rather than the life-tenured members of the federal judiciary, successfully reflected the needs of the citizenry. It is not reasonable to assume, therefore, that judges will be wiser policymakers than their elected counterparts.

UNENUMERATED RIGHTS

Still, fear of judicial usurpation presents only part of the privacy picture. The bulk of the interests protected in the cases seems somehow to belong to us as individuals. Almost intuitively, Americans feel that the intricacies of their sexual experiences, the particulars of their lifestyle choices, and the aspects of their private lives generally are not the business of the government.

The idea that the state should not intrude into the intimate decisions of life is a vague yet persistent notion of our social ethos. It is not surprising, therefore, that as respected a figure as Justice Brandeis would refer to a right "to be let alone" in the "development of emotions..."sensations, and faculties," or that the Supreme Court, even in the 1950s, would declare that "outside areas of plainly harmful conduct, every American is free to shape his own life as he thinks best, do what he pleases, go where he pleases."

Accordingly, some advocates have claimed that many of the interests protected in the
privacy decisions are based firmly in the American tradition and popular consensus. This argument appeared in Griswold itself. Justice Douglas argued there that the marital privacy rights abrogated by the Connecticut statute had been recognized even before the adoption of the Constitution. The American societal ethos, in short, does not countenance government interference in the reproductive decisions of married couples. Others claim that a broad societal consensus supports the guarantee of such liberty interests—even when the legislatures make ill-advised attempts to abrogate them.

Perhaps more successful arguments for constitutional autonomy have sought to tie privacy interests, by analogy and extrapolation, to the express guarantees of the Bill of Rights. Rights to individual autonomy are said to be direct counterparts to the listed protections of freedom of speech and of religion and freedom from self-incrimination, unreasonable search and seizures, and cruel and unusual punishments. Like the rights to privacy, these stated protections are grounded in an inherent respect for the dignity of self-governing individuals. Accordingly, reasonable extrapolation from the first eight and the fourteenth amendments leads to the conclusion that certain intimate choices are meant to be shielded from the intrusion of the state.

None of these claims, it can be argued, clearly carries the day. Tradition, at best, supports cure abortions or contraceptives for minors. No even moderately honest view of American tradition would demand the "liberty" to select sex partners at will. Tradition would demand the "liberty" to secure abortions or contraceptives for minors. Nor is consensus a ready source of constitutional principle. As John Hart Ely has shown, either there is no existing American consensus to guide decisionmaking in modern constitutional disputes or, if there is, the judiciary is particularly ill-suited to discover it.

Securing nontextual rights through analogy to existing ones does at least turn to the text as the source of constitutional protection. Yet analogical analysis can focus its attention in an almost endless variety of directions. While one critic might find privacy rights through the demands of equal citizenship, another could "discover" rigid demands for economic liberty in the constitutional provisions protecting economic expectations, such as the contract clauses or the taking of property clause. Moreover, few of the modern privacy rulings can be based in analogical reasoning unless fairly loose linkage is accepted between explicit and analogous rights. If such loose linkage is acceptable, however, the Court really asks no more than "is that what 'American' stands for?"

So arguments for a strict interpretation of the constitutional charter remain appealing. Unions, that is, one takes seriously the language of the Ninth Amendment. It declares that the "... enumeration of certain rights shall not be construed to deny or disparage others retained by the people." According to James Madison, the principal architect of the Bill of Rights, the Ninth Amendment was designed to lay to rest fears that only those rights named in the document are free from government abrogation.

Madison, in submitting the Bill of Rights for ratification, worried that the listing of various guarantees would lead inescapably to the inference that all other interests not listed were unprotected. Moreover, he worried that the "essential rights could not be obtained with the requisite latitude." His Virginia compatriot, Thomas Jefferson, responded that "Half a loaf is better than no bread. If we cannot secure all of our rights, let us secure what we can."

The Ninth Amendment, therefore, clearly means what it says. Whether or not it can be seen as an independent repository of federal rights, it surely reflects the framers' belief that fundamental liberties exist which are not set forth in the text. Constitutional theorists who insist that only those liberties clearly set forth in the text are subject to judicial enforcement thus have understandable difficulty with the Ninth Amendment. The tight interpretive claim is plagued by self-contradiction. The language of the text is said to control, except when the language calls for the recognition of unlisted rights. Moreover, the strict textualist is forced to embrace the negative implication arising from the adoption of the Bill of Rights, which Madison went to such pains to avoid.

As a result, we have few easy answers. The judicial recognition of nontextual rights poses dangers of overreaching that are both real and substantial. A determination that there are no nontextual liberty guarantees, however, assumes that infringements of core freedoms—which the framers would likely have found reprehensible—must be accepted by modern American citizens. Neither course is free of difficulty.

THE BOWERS DECISION

Rarely have these difficulties proven more apparent than in the Supreme Court's decision this summer in Bowers v. Hardwick, 54 U.S.Law Week 4919 (June 30, 1986). Bowers involved a constitutional challenge, based upon the privacy doctrine described above, to a Georgia sodomy statute. Georgia law makes it a felony to perform or submit to "any sexual act involving the sex organs of one person and the mouth or anus of another." Violation of the provision is made punishable by a jail term of "not less than one nor more than twenty years."

Michael Hardwick was charged with violating the statute in 1982 by committing sodomy with another adult male in the privacy of his residence. A divided panel of the Eleventh Circuit Court of Appeals agreed with Hardwick's claim and invalidated the statute. In an opinion by Justice White, however, the Supreme Court reversed the ruling, declaring that homosexual acts are not protected by the right to privacy. Thus the Georgia law, which conceivably can subject either homosexual or heterosexual couples to twenty years' incarceration for a single private act of sodomy, was upheld.

Justice White's opinion expressly acknowledged the dangers of nontextual judicial review. He recognized that rather than more legal interpretation, the case called for "some judgment about the limits of the Court's role in carrying out its constitutional mandate." Moreover, he argued quite correctly, the "Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cogent roots in the language or design of the Constitution."

Apparantly swayed by such dangers, the majority of the Court ruled that although the "cases are legion" in which unlisted liberties have been recognized, the "right" to homosexual sodomy bears no "resemblance" to the privacy interests sustained in past decisions. Rather, such sexual liberty is outside the scope of traditional American freedoms. In Justice White's words, "until 1961 all fifty states outlawed sodomy, and today, twenty-four states and the District of Columbia continue to provide criminal penalties for sodomy performed in private between consenting adults." Accordingly, Mr. Hardwick's claim for constitutional protection was held to "fall far short" of acceptable pedagogy.

Despite the energetic rhetoric, however, the Bowers decision is a troubling one. Surely Justice White's claim that the interest Hardwick asserted simply failed to "bear any resemblance" to those recognized in prior privacy decisions is disingenuous. Griswold v. Connecticut recognized a right to marital sexual autonomy, and Eisenstadt v. Baird extended the same constitutional shield to single persons. The earlier rulings in Roe v. Wade, recognizing a right to abortion (1973), and Carey v. Population Services, 431 U.S. 678 (1977), striking down a state prohibition on the sale of contraceptives to minors, protected very nontraditional interests in sexual autonomy. And Shalesy v. Georgia, 394 U.S. 357 (1969), in which the Supreme Court ruled it unconstitutional to proscribe the possession of obscene materials by consenting adults in the privacy of their own homes, seemed to offer special judicial solicitude to at least some actions carried out in a private residence. Taken as a group, these decisions or serve to cabin wayward justices. But if that is the case, the Supreme Court determination seems at odds with the rule of law. Even the Georgia legislature has never indicated that it means to apply the sodomy statute only to homosexuals.

Of course, much of the sentiment of the Bowers opinion assumes that the Georgia sodomy statute will not actually be enforced against heterosexuals even though the broad language will support prosecution. But if that is the case, the Supreme Court determination is hardly more reassuring. Read in this manner, Bowers allows the use of a statute of general application—despite its language—to be aimed at only one segment of society. This judicial endorsement of selective enforcement seems at odds with the rule of law. Even the Georgia legislature has never indicated that it means to apply the sodomy statute only to homosexuals.

Most disconcerting, of course, Bowers appears to sanction official discrimination against homosexuals. However the privacy rulings are interpreted, it is clear that heterosexuals have the right to free access to abortions and contraceptives whether they are married or single. It is hardly a major leap to assume that they also enjoy the right to engage in the activities that triggers the need for contraceptives and abortions. Yet such sexual autonomy has now been explicitly denied to homosexuals. It is difficult to square this result with the Fourteenth Amendment's demand for equal protection of the laws.

CONCLUSION

Thus, the judicial recognition of nontexual constitutional interests seems to continue its somewhat serpentine path. The justices apparently remain unwilling to make the existence of all rights dependent on positive legislative enactment. Yet only those unlisted interests enjoying substantial support from the majority of the populace seem to receive meaningful protection. Our present course, therefore, perhaps reflects a broader ambivalence concerning the recognition of an "unwritten constitution."

A free society, as Reinhold Niebuhr observed, requires confidence in the "ability of men to reach tentative and tolerable adjustments between their competing interests and to arrive at some common notions of justice which transcend all partial interests." The judicial recognition of nontexual liberties demands a degree of confidence that such "intolerable adjustments" can be achieved. No theory, however, perfectly explains the Court's actions or serves to cabin wayward justices. But the judicial measurements of the expanse of constitutional liberty may contribute substantially to our stumbling societal steps toward self-improvement. And adjudication may serve to put flesh on a constitutional ethos that is the strongest feature of our national character. If perfect consistency and containment the forfeit of those two values, they may not be worth the price.