

The Ninth Amendment in Relation to Abortion and the Consequential Political Action

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ABSTRACT: *Over the last two centuries the fundamental rights of Americans has been protected through the security of the Bill of Rights and a Democratic system of government that allows constituents to defend their rights when necessary. This paper looks at the fundamental rights of the Ninth Amendment. Both the explicit and implicit rights of the amendment are discussed, as well as, how those rights affect people, politics, and legislation today.*

The fundamental rights of Americans have been protected over the last two centuries through the security of the Bill of Rights and the democratic system of government that allows constituents to stand up and fight for their rights when necessary. Although most of the amendments in the Bill of Rights are specific on the federal government's responsibilities, there are a few that leave power in the hands of the people and the Supreme Court. The Ninth Amendment not only has been stretched to encompass privacy, liberty, and a woman's reproductive choices, but it has also become a centerpiece in our contemporary political world. Presidential nominations, rulings of Supreme Court justices and appellate court judges, and pending legislation that affects American society all depend heavily on how the Ninth Amendment is interpreted. This essay explores the intricacies behind the amendment, including legislative interpretations, effects on American society, current events surrounding the issue, and why it matters.

The Ninth Amendment was adopted in 1791 as part of the Bill of Rights proposed by James Madison (National Archives and Records Administration [NARA]). The intent of Bill of Rights was to prevent governmental abuse of powers and to protect citizens. The Ninth Amendment, specifically, states that, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (U.S. Government Printing Office). This definition is one of the most vague statements made in the U.S. Constitution. Through judicial activism and a loose interpretation of the Constitution, Americans have created new meaning from this vague sentence.

Originally, the concepts behind the Ninth Amendment were related to federalism. Those who framed the document understood the words to be a "guardian of the

retained right to local self-government" (Lash, 2008). Today, the majority of Americans see the Amendment as a justification of judicial activism and unspoken rights of individuals. The Ninth Amendment's historical ambiguity is not new. Supreme Court Justice Arthur Goldberg compared the Amendment to "reading a text obscured by an inkblot" (p. 467). This analogy demonstrates how differently the Ninth Amendment can be interpreted. The Ninth Amendment's most significant effect on U.S. society concerns the right to privacy. The implied right in the Ninth Amendment to privacy originates from a Constitutional penumbra (United States Conference of Catholic Bishops [USCCB]). Although the Ninth Amendment remained broad to account for the evolution of society, implicit rights in the amendment can now be protected through legislation, Supreme Court decisions, and the activism of the American People.

The Ninth Amendment's vague wording has granted individuals a legitimate right to privacy that other amendments in the Bill of Rights cannot provide. The Supreme Court, deciding specifically on abortion and birth control cases, stated that there was an expected "recognition of the right of liberty or privacy in matters related to family, marriage, and sex" (*Creighton Law Review*, 2008). The Supreme Court went further by striking down any statutes that may intrude on the right to privacy inferred by the Ninth Amendment. Simply put, the Ninth Amendment's ambiguity and broad language has allowed the Supreme Court and American activists to interpret its meaning to protect rights not specifically mentioned in the Bill of Rights.

The implied right to personal privacy that emanates from the Ninth Amendment has been upheld in many high profile Supreme Court cases including *Griswold v. Connecticut* (1965), *Roe v. Wade* (1973), *Planned Parent-*

hood v. Casey (1992), and most recently, *Stenberg v. Carhart* (2000) (USCCB). The most important inference of the right to privacy in reference to abortion was reaffirmed when the Supreme Court reviewed the 1992 case *Planned Parenthood v. Casey*. The Court connected the right to privacy to the Ninth Amendment concluding that, although privacy is never mentioned in the Constitution, the Court must recognize a “person’s most basic decisions about family and parenthood” (Robertson, 1992).

Whether or not the government should interfere with abortion is the subject of debate. Some activists argue that it was a “mistake that it [abortion] became a political issue at all,” and further, that “even when [abortion] was illegal, it was widespread” (Quindlen, 2005). In the United States, statistics from 1955 show that the number of illegal abortions numbered between 200,000 and 1.2 million (para. 3). The number of dangerous or illegal abortions that occurred when abortion rights were not protected is daunting. This is one of the most striking pieces of data referencing illegal abortion rates. It supports the argument that abortions will happen whether or not there are laws against it. Without government protection of abortion privacy rights, women could be forced to terminate pregnancies using unqualified medical providers, or conditions where infection, excess bleeding, and death are possible. One physician described the tools of non-physician illegal abortions where women used:

Household products and utensils to terminate a woman’s pregnancy such as bicycle spokes, Lysol douches, garden hoses, potassium permanganate corrosive tablets, a slippery elm stick, turpentine by mouth, bleach douche, intrauterine installation of kerosene and vinegar, or a coat hanger. (Creighton Law Review, p.24)

Even though the Ninth Amendment may never have been intended to protect the a person’s overall privacy, it is understood to do so today. There is a strong connection between the fight over abortion and the right to privacy which will be further explored in the U.S. Supreme Court cases: *Griswold*, *Roe*, *Casey*, and *Stenberg*.

The landmark case of *Griswold v. Connecticut* (1965) stated that “the Connecticut statute forbidding use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights” (*Griswold v. Connecticut*, 1965). The seven-to-two majority decided that the Connecticut statute was unconstitutional; Justice William O. Douglas acknowledged that “a zone of privacy created by several fundamental constitutional guarantees” was found

in the Ninth Amendment, among others (Thoreson, 2007). The question argued during the *Griswold* case was whether or not a couple had the right to privacy when consulting a physician on the attainability of birth control. The case was appealed to the Supreme Court in 1965, after *Griswold*, an executive with the Planned Parenthood League of Connecticut, was convicted for violating Connecticut’s birth control law when she distributed information about preventing conception to married couples (*Creighton Law Review*, p.226). The couple argued that the statutes violated their Fourteenth Amendment rights because the patients and physicians were deprived of their liberty without due process (*Griswold v. Connecticut*, 1965).

This decision concerning a couple’s right to privacy set a precedent that established a level by which government can interfere in citizens’ private lives. Many conservative or liberal activists believe that a mistake was made when people’s private lives became subject to legal intervention (Quindlen, para. 3). Still, Justice Goldberg’s concurring opinion “concluded that ‘other rights’ in the Ninth Amendment included Libertarian rights, such as the right to privacy—and that these rights were enforceable against the states” (Lash, p.469). This decision was the first step toward defining a specific sphere of privacy and opened the door for abortion rights under the banner of privacy. It paved the way for cases like *Roe v. Wade*, and was one of the “most influential and controversial precedents in recent history” (Thoreson, p. 2). The *Griswold* case has not only affected how couples obtain birth control, but shaped the rules that placed abortion within the sphere of privacy implicit in the Ninth Amendment.

Roe v. Wade (1973) was the first abortion case that the U.S. Supreme Court decided; one that, set a precedent on the legality of abortion in the United States. Prior to the *Roe v. Wade* decision, justifiable abortions were allowed only in certain states. Georgia’s legislature concluded a legal abortion occurred when “a licensed physician is justified in terminating a pregnancy if there is a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother, or that the child would be born with a defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse” (*Creighton Law Review*, p.224). Prior to *Roe*, issues of abortion were primarily dealt with by state legislatures. The case of *Roe v. Wade* held that:

State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother’s behalf without regard to the stage of her preg-

nancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of a woman's approach to term. (*Roe v. Wade*, 1973)

The decision went further, specifying that the physician's counsel is enough to decide the issue of abortion in the first trimester, but after that, the state may create regulations (*Roe v. Wade*, 1973). The *Roe v. Wade* decisions extended throughout the fifty states and overturned all state statutes on abortion (National Right to Life News, p. 2). In order to reach this decision, the Supreme Court Justices relied on passages from the First, Ninth, and Fourteenth Amendments to create the implied right of personal liberty and personal privacy (USCCB, p.2). Since the *Roe v. Wade* decision in 1973, "American women have had the option to obtain safe and sanitary abortion procedures, not only for elective abortions, but also for terminations that are necessary for the health or life of the woman" (Creighton Law Review, p.225).

As mentioned previously, criminalizing abortion does not stop the practice. The legalization of abortion in 1973 prevented thousands of infections, injuries, and deaths that could have occurred from unsafe abortions. The precedent set in *Roe v. Wade* not only initiated the idea of a woman's right to an abortion within the sphere of privacy, but brought the abortion issue to the forefront of American politics.

The next Supreme Court case that ruled on the issue of abortion was *Planned Parenthood v. Casey* in 1992. Prior to *Planned Parenthood v. Casey*, women had made great steps in securing their right to an abortion. Prior to *Casey*, *Doe v. Bolton* (1990) went further than *Roe* by allowing an abortion to be performed during any of the three trimesters of pregnancy for reasons of maternal health (USCCB, p.2). However, after the *Roe* decision, judicial support for the precedent began to erode. *Casey*, "resuscitated a woman's right to choose abortion from the terminal illness it appeared to have suffered after *Webster v. Reproductive Health Services* (1989)." *Webster* set regulations on the use of state funds, facilities, and employees in performing abortions. The backlash from the *Roe v. Wade* decision was clearly seen in cases such as *Webster* and *Rust v. Sullivan* (1990), which prohibited government funding of abortions. *Casey* abandoned the previous framework of the trimester basis for determin-

ing whether an abortion was illegal in favor of the pre- and post-viability tests of the fetus (USCCB, p.1). Also, the Supreme Court justices reaffirmed the *Roe v. Wade* decision, but replaced "privacy" with "liberty" as the constitutional interest (USCCB, p.2). Specifically, *Planned Parenthood v. Casey* (1992) stated that:

Consideration of the fundamental constitutional question resolved by *Roe v. Wade*, principles of institutional integrity, and the rule of *stare decisis* require that *Roe's* essential holding be retained and reaffirmed as to each of these three parts: (1) a recognition of a woman's right to choose to have an abortion... (2) a confirmation of the State's power to restrict abortions after viability... and (3) the principle that the state has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Casey affirmed the basic principle behind *Roe v. Wade*: a woman has the right to terminate her pregnancy up until the fetus is viable and can still terminate at a later time if necessary to protect her life. *Casey* also held that the government may not put an "undue burden" on the woman with regulatory procedures that may create obstacles (Biskupic, 2006). Although there are many additional precedents that *Casey* added to the abortion argument, the Court reaffirmed all the precedents in *Roe v. Wade*. Even with public opinion changing and anti-*Roe* judges being appointed to the Court, the *Roe* decision was upheld. *Casey* revised the "legal grounding for the 'right' to abortion," but the primary protection remained the same (National Right To Life News, 2). The Ninth Amendment still retained the implied right to privacy, although after *Casey* it was sometimes referred to as the right to liberty.

The most recent case decided on the abortion issue was *Stenberg v. Carhart*. In 2000, the Supreme Court held that Nebraska's ban on partial-birth abortion was unconstitutional due to the absence of an exception for the mother's health, and because the description of the procedure was "vague" (USCCB, p.3). The case states that:

Because the statute seeks to ban one abortion method, the Court discusses several different abortion procedures, as described in the evidence below and the medical literature (b) the Nebraska statute lacks the requisite exception "for the preservation of the... health of the mother." *Casey, supra*, at 879 (plurality opinion). The State may promote but not endanger a woman's health when it regulates the methods of abortion. (*Stenberg v. Carhart*, 2000)

In the majority of the concurring opinion were Justices Stevens, Souter, Ginsburg, Breyer, and the recently retired Sandra Day O’Conner (Biskupic, p.14). O’Conner was the fifth key vote. The number of pro-*Roe* justices has now dwindled to four. The advances of these Supreme Court rulings could not have taken place without the original *Griswold* ruling in 1965. Now the Supreme Court actually maintains the power to make the right to have an abortion a political issue and the right to privacy a right that can be defended with specifics (Thoreson, p.2). The Supreme Court can now rule on an issue that was once only discussed behind closed and locked doors. Abortion has even become an important issue to feminists, thanks to wording that specifies abortion as the right of the woman instead of being a “Bill of Rights for physicians” (Robertson, p.24).

Griswold v. Connecticut, *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Stenberg v. Carhart* have all had a great effect on American society and the rights of women. Not only have they affirmed the privacy rights of individuals, couples, and reproductive rights, but they have also had a dramatic effect on the political scene. The presidential election of 2008 was a prime example of the effects of abortion cases because either candidate would have the opportunity to appoint Supreme Court Justices who could affect the rights of millions of Americans. In the next few years the Supreme Court’s decisions will affect Americans by ruling on “privacy, reproductive, speech, and religious rights, to their occupational and environmental protections” (Lithwick, 2008).

The Supreme Court receives their power from the concept of judicial review originating in the 1803 case of *Marbury v. Madison* (Lithwick, p.2). Also, the Supreme Court is not truly reflective of the American population; most of the judges are “white and/or old;” most are both, including Justice Stevens, 88, Justice Ginsburg, 75, and Justice Souter, 68 (p.2). The newest justices, who changed the Court’s balance, replaced Chief Justice Rehnquist and retiring Justice O’Conner. In their places, Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. joined the Court (Weddington & Kretzer, 2007). A Supreme Court nominee’s position on privacy rights is very important, especially with the “*Roe*-obsessed confirmation process” that all Supreme Court nominees must undergo (Economist, 2005). The Supreme Court’s implied power of judicial review, referred to negatively as judicial activism, has made the Court the final voice about what is or is not constitutional. Supreme Court justices and nominees must be careful about what they say regarding the *Roe* decision and privacy. One news-

paper columnist suggested that the Democratic fight for privacy rights may be better off if *Roe v. Wade* was overturned:

Roe is a pretty flimsy decision. The idea that the constitution protects “the right to privacy” was already something of a stretch when Justice William O. Douglas discovered it in the *Griswold v. Connecticut* case in 1965. Ruling that the state government could not stop married couples from purchasing contraception, Douglas wrote that the right to privacy exists because the “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” It was these penumbras and emanations that were stretched still further in 1973 when the court ruled on *Roe*.

A prime example of the shaping, bending, and balancing of values that must occur during a Supreme Court nomination was seen during the 2005 nomination process of Chief Justice John Roberts. Roberts’ nomination, a “sometimes testy hearing marked by tart exchanges with Democratic Senators,” was characterized by a focus on Roberts’ opinion regarding the right to privacy. Roberts remained vague about his opinion on the right to privacy (Kiley & Biskupic, 2005). The process even turned sloppy when pro-choice organizations supported ads that linked Roberts to abortion clinic-bombers; the ads were later pulled (Gibbs, Bacon, & Novak, 2005). Roberts did acknowledge some concept of privacy existed, reportedly telling a Senator, “it was hard to read the Constitution without getting some impression that the Founders were talking about privacy” (Gibbs, Bacon, & Novak, 2005). Overall, the Supreme Court nomination process is a trap where senators, and the public alike, must decide how a nominee feels about relevant topics and whether they will push for rulings against court precedents. Roberts made it through the confirmation hearings and was confirmed as Chief Justice. Roberts plans to be open on the subject of the right to privacy, unlike the previous Chief Justice Rehnquist, who voted against abortion and privacy rights (Shapiro, p.4). Without the support of justices who use their power of judicial review to keep unspoken rights safe, the Ninth Amendment’s right to privacy may find a challenge in upcoming Supreme Court cases.

The interpretation of the Ninth Amendment is an issue hand that affects every American. Pro-life, pro-choice, or undecided, the interpretation of the Constitution has generally accepted the right to privacy, and therefore, the right to abortion. Three of the biggest concerns include

(1) the recent changes in the composition of the Court, with two new justices and the possibility of others; (2) increasing state efforts to limit the legality and availability of abortions; and (3) two cases which are pending in the Court this term involving congressionally-established limitations on the availability of abortions.

(Weddington & Kretzer, p. 15)

Human Rights Watch has become active in protecting women who are still unable to obtain abortions in emergency situations (HRW, 2006). The Freedom of Choice Act, passed in 2004, was one of the strongest pro-abortion pieces of legislation in recent years. It supports precedents such as *Roe v. Wade* (1973) and *Griswold v. Connecticut* (1965). However, there are still pieces of legislation that are in place to prohibit women's access to abortion. The Hyde Amendment, passed in 1976, prohibits government funding for abortions with exceptions for rape, incest, or danger to the woman's life (ACLU, 2004).

The right to privacy implicit in the Ninth Amendment is alive and well in today's world and has an effect

on every life in America. Because of the broad language of the Ninth Amendment, Americans have seen the protection of rights that they never thought existed. The right to privacy and the right to liberty have been included in the Ninth Amendment's vague language in order to protect those rights not explicitly included in the Bill of Rights. Although the Ninth Amendment rights have held strong in the past forty to fifty years, they may find considerable challenges in the future. The Supreme Court's control over issues like the right to privacy affects every life in the U.S. and is one about which every American should be educated. Control is in the hands of the people to decide which direction the country goes and it is not a topic that should be taken lightly.

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