The "Mysteries of Human Life": Dealing with an Ambiguous Right to Privacy

Brian Reed
THE “MYSTERIES OF HUMAN LIFE”\textsuperscript{1}: DEALING WITH AN AMBIGUOUS RIGHT TO PRIVACY

Brian Reed\textsuperscript{2}

I. Introduction

In 1919, the American philosopher Zechariah Chafee told the story of a peculiar case brought before a judge. The defendant was a man accused of hitting another man in the nose. Pleading his case to the judge, the defendant asked whether he had the right to swing his arms in a free country. The judge responded with this statement: “Your right to swing your arms ends just where the other man’s nose begins.”\textsuperscript{3}

Nearly one hundred years have passed since this story was told, yet the importance of individual rights and their limitations has only increased. Indeed, the metaphorical line separating where one man’s right applies and where it does not has become increasingly more complicated to distinguish.\textsuperscript{4} Nevertheless, the point of the story is clear: there are limits to individual rights.

This is particularly true in the context of the right to privacy. Laws and regulations initially seen as appropriate, even expedient, are later seen as blatant violations of privacy. Laws protecting social norms face this challenge. As social norms develop and evolve,

\begin{itemize}
  \item \textsuperscript{1} Planned Parenthood v. Casey 505 U.S. 833, 851 (1992).
  \item \textsuperscript{2} Brian is a junior studying political science and economics at Brigham Young University. He plans to attend law school in the fall of 2013. Afterwards, Brian plans to work in corporate law, and perhaps also in business consulting. Thank you to Gerrit Winkel, Andrew Christensen, Ashley Gengler, Kyle Patterson, and James Tringham, who each provided exceptional guidance and assistance as this paper was being written. It would not have made the progress it has without their help.
  \item \textsuperscript{3} Zechariah Chafee, Jr., Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 957 (1919).
  \item \textsuperscript{4} See United States v. Jones, 131 U.S. 945 (2011).
\end{itemize}
the laws protecting established norms frequently restrict developing ones (such is the case with gay marriage, abortion, and even physician assisted suicide). Further, while many judicial opinions acknowledge that privacy is a legitimate individual right, privacy is not explicitly mentioned in the Constitution. In addition, an appeal to judicial opinions does not settle the definition of privacy; among legal philosophers and scholars, the conceptual definition of privacy is also vague and contested. In short, although interpretation of the Constitution reasonably allows for a right to privacy, there is no consensus on the correct interpretation, and certainly no consensus on an explicit definition.

Despite the lack of consensus, the effect of the right to privacy cannot be understated. Some of the most significant Supreme Court cases of the last century have been decided in the name of the right to privacy. While judges support the existence of the right to privacy with various interpretations of constitutional amendments, academics attempt to further define the right to privacy by enumerating what it allows and where it applies. Considering the perpetual evolution of privacy issues along with the unsettled definition of the right to privacy, the important question becomes: How will we know when the right to privacy should not be expanded?

Rather than contribute to the already sizable literature on whether the right to privacy exists or what the right to privacy allows, my

5. See John Locke, Second Treatise of Government 95 (1690) available at EBSCOhost (“By property I must be understood here, as in other places, to mean that property which men have in their persons as well as goods.”); see also John Stuart Mill, On Liberty (David Spitz, ed. 2007); Ruth Gavison, Privacy and the Limits of Law, 89 Yale L.J. 421 (1980); Jeffrey L. Johnson, Constitutional Privacy, 13 Law and Philosophy 161; Johnathan O’Neill, Shaping Modern Constitutional Theory: Bickel and Bork Confront the Warren Court, Review of Politics 325, 325-351 (2003).


argument highlights the limits of the right to privacy, or what privacy should not allow. I acknowledge that privacy is a legitimate right reasonably implied in the Constitution and established in numerous Supreme Court cases. Yet less attention is given to limitations of this right. In my argument, I will show that the right to privacy should be maximized, but I will also show that expansion beyond privacy’s proper “point of maximization” will decrease individual rights, even (ironically) the right to privacy itself. Given the abstract, conflicting definitions of the right to privacy, my argument identifies limitations in previous court rulings (and the reasons behind these limitations) that should be generalized and applied to future cases concerning the right to privacy. These limitations will serve to solidify the definition of the right to privacy in the future.

The Evolution of Privacy in the Constitution:

As illustrated in what follows, interpretations of the Fourteenth Amendment have shaped the right to privacy for more than a century. The Due Process Clause, contained in Section 1 of the Fourteenth Amendment, was originally intended to prevent the violation of individual rights without proper legal actions in the context of outlawing slavery. The purpose of the Due Process Clause was quickly expanded (and rightly so) to prohibit and prevent any form of violation of individual rights without proper legal action. While the changes introduced with this new legislation were needed and appropriate, its vague wording has also provided justification for a dramatic expansion of individual rights, perhaps even beyond the amendment’s original intent. This section explores the evolution of the application of the Fourteenth Amendment and, specifically, how it relates to the right to privacy.

II. The Lochner Era

The earliest instance in which the Fourteenth Amendment was used to justify the right to privacy occurred in 1905 in *Lochner*
v. New York. The case involved a baker who contracted with an employee to work more than the maximum number of hours allowed under New York law. Although intended to protect individuals from harm caused by exposure to unsafe and hazardous work environments, the law was challenged because it restricted an individual’s privacy to buy and sell labor (in this context labor was considered an individual’s possession). In the majority opinion, the U.S. Supreme Court struck down the New York law saying,

The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment.

Lochner’s appeal to the Due Process Clause established a precedent that was repeatedly cited in cases throughout the early twentieth century, invalidating numerous economic and labor regulations. Soon after Lochner, in Adair v. United States, the Due Process Clause was applied to uphold a “yellow-dog contract” (prohibiting employees from forming a union). Interestingly, while the Due Process Clause was used in Lochner to strike down state legislation limiting the “right to contract,” the same clause was used in Adair to protect legislation preserving the right to contract.

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.

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10 See id. at 54.
11 See id. at 53.
So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee.\textsuperscript{13}

Although the context of \textit{Adair} is different from \textit{Lochner}, it represents yet another protection of an individual’s privacy, specifically the right to contract. According to \textit{Adair}, just as employees had the privacy to sell their labor for however many hours as they saw fit—regardless of how unwise such action may be—employers had the privacy to determine the conditions under which they will purchase an employee. Though the actions of employer and employee may be unwise, it was deemed unconstitutional for the government to interfere.\textsuperscript{14}

As an epilogue to \textit{Adair}, the Supreme Court again protected employers’ privacy to create yellow-dog contracts in \textit{Coppage v. Kansas}. The majority opinion, by Justice Pitney, stated:

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune. . . . It is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of [the freedom of contract and the right of private property] . . . the Fourteenth Amendment, in declaring that a State shall not “deprive any person of life, liberty or property without due process of law,” gives to each of these an equal sanction; it recognizes “liberty” and “property” as co-existent human rights, and debars the States from any unwarranted interference with either.\textsuperscript{15}

\textsuperscript{13} \textit{Id.} at 174-175.
\textsuperscript{14} \textit{See} \textit{Adair} v. United States, 208 U.S. 161, 175 (1908).
\textsuperscript{15} \textit{Coppage} v. \textit{Kansas}. 236 US 1, 17 (1915).
At this time, the Supreme Court appeared to reach a consensus that the right to privacy did in fact include the right to contract and that this right found its place in the Due Process Clause of the Fourteenth Amendment. This clause, however, was not the only support for court rulings against economic regulation during the Lochner era. For example, the Supreme Court referred to the Tenth Amendment in *Hammer v. Dagenhart* and *Carter v. Coal Company* in order to invalidate federal regulation of the economy. Still, the precedent for protecting economic privacy was largely a product of interpretation of the Fourteenth Amendment described above, which defined privacy—in the context of the right to contract—as fundamentally inherent in the Due Process Clause.

III. Post-Lochner Era

In the late 1930s, the Supreme Court shifted dramatically from its Fourteenth Amendment, Due Process Clause foundation for the right to privacy. Under the Lochner era interpretation of privacy, the federal government was prohibited from intervening in intrastate economic activity (see *Hammer v. Dagenhart*). However, faced with the crisis of the Great Depression, the Supreme Court chose to nullify its previous interpretation of the Due Process Clause to enable the passage of New Deal legislation. For instance, yellow-dog contracts—previously protected by the Supreme Court—were outlawed in 1932 by the Norris-LaGuardia Act. As the attention of U.S.

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17 See *Hammer v. Dagenhart*, 247 U.S. 251, 273-274 (1918) (The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture. The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution).

legislation and Court rulings shifted toward economic recovery, the controversy over the definition of privacy faded into the background.

After the Depression, privacy again took center stage in numerous laws and court rulings. While the context of the privacy debate was limited to economic privacies during the Lochner era, the debate now focuses on social privacy. Without question, privacy in the social and economic context is an important element of liberty. Clearly, the right to privacy should be recognized in many situations, yet the Supreme Court’s decision to allow New Deal legislation (in effect, disregarding the privacy definition found in the Due Process Clause) made it difficult to determine where to draw support for a right to privacy in the Constitution.¹⁹ Even today, the controversy over the answer to this question is apparent in a number of Supreme Court decisions involving social privacy. While most recognize privacy, there is significant disagreement regarding the basis for the existence of privacy as a right established in the Constitution.

_Griswold v Connecticut_ is perhaps the most significant Supreme Court decision expanding the right to privacy in the social context. _Griswold_ questioned whether the right to marital privacy was legitimate and, if so, was compromised by a Connecticut law prohibiting the use of birth control. Established in 1879, this law had been challenged repeatedly, but had been upheld until _Griswold_ in 1965. At this time, the law was invalidated because according to the Court it did violate the right to marital privacy. In this sense, _Griswold_ was revolutionary because it was the first unequivocal recognition of privacy as a right inherent in the Constitution since the Lochner era, thus bringing privacy back to the foreground of attention.

Although _Griswold v. Connecticut_ established the legitimacy of social privacy, it added to the ambiguity of the Constitutional definition of privacy. Despite the Court’s 7-2 decision, there were multiple arguments about the source of privacy in the Constitution. While most Justices agreed that privacy in marriage—and privacy in general—is a right protected by the Constitution, they differed on the definition of privacy. In one of the most controversial definitions,

Justice Douglas explained privacy’s existence in the Constitution as follows:

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 right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Though Douglas’ opinion certainly clarified the issue of marital privacy, his discussion of “emanations” and “penumbras” made it difficult to know where privacy does not apply. Adding to the ambiguous definition of privacy, several other Justices provided concurring opinions explaining their own definition of privacy. For instance, Justice Goldberg refers to a marital privacy right “not confined to the terms of the Bill of Rights,” but “supported both by numerous decisions of this Court, referred to in the Court’s opinion, and by the language and history of the Ninth Amendment.”

In addition to the opinions of Goldberg and Douglas, Justice Harlan wrote a third concurring opinion but argued that privacy was inherent in the Due Process Clause, reverting back to the Loch-
ner era definition of privacy. Harlan claimed that “the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values “implicit in the concept of ordered liberty.”

Indeed, dissent among Supreme Court Justices is clear from *Griswold* alone. Douglas claims that privacy comes from “emanations” and “penumbras” throughout the Constitution. Meanwhile, Goldberg points to the Ninth Amendment and the Liberty Clause as the source of privacy. Finally, Harlan disregards the Court’s previous decision to invalidate the relationship between privacy and the Due Process Clause, claiming due process as sufficient support for the existence of privacy. Since *Griswold*, the debate over the source of privacy in the Constitution has continued in other cases.


> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.

Again, O’Connor’s opinion resolves any doubt regarding the defense of privacy in the right to abortion, but it does not clarify where privacy should be limited. Recent debate surrounding the new health care legislation suggests that issues relevant to privacy will continue to evolve. As the government attempts to enforce a law demanding that citizens buy health insurance, Supreme Court review of this leg-

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22 Id. at 500.

islation will be heavily influenced by the definition of privacy they choose to support. According to the Lochner era Court rulings and definition of the right to privacy, it is likely that such a provision would be classified as economic regulation and deemed unconstitutional. However, if the Supreme Court chooses to emphasize the socially concerned emanations and penumbras of the right to privacy, the outcome of its review could be significantly different.

Review of the recent health care legislation provides just one example of the critical importance of a clearly defined right to privacy. Without a unified conclusion regarding the source of the right to privacy in the Constitution, the Supreme Court risks arbitrary expansion of the right to privacy beyond its proper point of maximization, even to the extent that privacy expansion may violate other rights that are explicitly included in the Constitution. In an attempt to clarify the limits of the right to privacy and establish the point of maximization, I will identify a few instances in which the Supreme Court has limited the right to privacy in specific circumstances. I will then discuss how these context-specific limitations could be used as general limitations for future privacy cases and legislation.

III. Limitations of Privacy

While there is plenty of discussion on whether privacy legally exists and whether the right to privacy should apply to specific new “zones of privacy,” there is significantly less discussion of the proper limitations of privacy. This may be because privacy is so difficult to define, and specific limitations require a fixed, clear definition. On the other hand, the disparity may exist because scholars are more concerned with violations of individual privacy than they are with instances of too much privacy (not many people will complain about having too many privacy rights). An argument in favor of establishing limits on privacy could even be misinterpreted as a threat, aiming to take rights away from individuals. Nonetheless, limiting privacy with the intent of maximizing it will yield the greatest amount of utility. Though not often considered, it is possible for privacy—when there is too much of it—to have a negative effect on society, as will

be shown in the following examples. In mathematics, identifying the point of maximization on a bell curve is simple: find the highest point on the curve or the point immediately before the values of the graph begin to decrease. Alas, this concept is much more abstract in the law. Therefore, it is important to study indicators of maximization, or instances when expanding the right to privacy to a new zone would compromise other constitutional rights. Recognizing these indicators will help, in turn, to recognize when the right to privacy has approached its point of maximization. The decisions in *Washington v. Glucksberg*, *Kelley v. Johnson*, and *Olmstead v. U.S.* can help us better identify indicators of maximization when considered under a new light.

IV. The Equal Protection Limit

The emergence of physician assisted suicide illustrates the expanding boundaries of privacy. Though physician assisted suicide is illegal in most states, the simple fact that the right to physician assisted suicide is considered shows that privacy is, indeed, an evolving issue. In 1997, Dr. Harold Glucksberg petitioned the U.S. Supreme Court to overturn the Washington law prohibiting physician assisted suicide.25 While the Washington law banned physician assisted suicide, it did allow a doctor to withhold life-sustaining treatment from a patient if the patient so desired. According to Glucksberg, if a mentally competent, terminally ill patient could elect to refuse life-sustaining treatment, then a patient should not be prohibited from direct physician assisted suicide if the patient so desires. In short, Glucksberg claimed that a patient’s right to die with dignity and in peace should be considered a constitutional right to privacy. Banning qualified patients from making this choice placed an “undue burden”26 on the Liberty Clause of the Fourteenth Amendment.

Prior to the Supreme Court hearing, however, the Washington law was overturned, then re-established upon a subsequent appeal.

26 See id. at 702.
The case eventually reached the Ninth Circuit Court of Appeals. At this point, the Circuit Court declared

After “[w]eighing and then balancing” this interest [the right to physician assisted suicide] against Washington’s various interests, the court held that the State’s assisted-suicide ban was unconstitutional “as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians.”

Once again, the Washington law was overturned. Indeed, the ambivalence surrounding Washington’s law on physician assisted suicide reflects the difficulty found in establishing a proper limit on the right to privacy.

Despite Glucksberg’s appeal, the U.S. Supreme Court limited the right to privacy in large part to avoid a conflict with the Equal Protection Clause, which states that “no state shall...deny to any person within its jurisdiction the equal protection of the laws.” After surveying the legal history regarding suicide, the Court claimed that in hundreds of years the law has never facilitated any form of taking life. Further defending the Court’s position, Justice Rehnquist argued that there is a legitimate state interest to protect the sanctity of life, referring to the severe punishments in place for those guilty of homicide. However, for the purposes of this discussion, the most important reason for his decision was to preserve the rights of those who would be disproportionately disadvantaged by the legalization of the right to privacy: “The State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes.” Rehnquist cited the decision in Cruzan v. Missouri along with research done by the New York Task Force (a group created to investigate the potential consequences of physician assisted suicide in New York in the context

27 Id. at 709.
28 U.S. CONST.amend. XIV, § 1.
of *Vacco v. Quil*.\(^{30}\) From these sources, Rehnquist drew the conclusion that the legalization of physician assisted suicide would create a legitimate, systematic bias against discrete and insular minorities, specifically the poor and disabled. \(^{31}\)

Later arguments have strengthened Rehnquist’s equal protection rationale. According to Siegel, legalization of physician assisted suicide would place a significant disadvantage on the disabled (1998). Theoretically, physician assisted suicide would create a legal environment where it would be easier for the disabled to receive assisted suicide than it would be for the non-disabled. Courts and physicians would be tempted to see the disabilities as medical conditions which lower the quality of life. *Bouvia v. Superior Court, McKay v. Bergstedt,* and *Georgia v. McAfee* provide examples of instances in which the courts demonstrated unequal leniency in granting permission for assisted suicide to disabled plaintiffs.\(^{32}\) While the initial ruling in the Ninth Circuit Court of Appeals called the supposed threat against the disabled “ludicrous on its face,” the U.S. Supreme Court recognized the claim as a legitimate possibility. Based on the persuasive influence of doctors over patients in terminal conditions, the Court held that even subtle differences between the treatments of disabled patients versus non-disabled patients would likely influence the decision to choose physician assisted suicide, increasing the probability of suicide for those who are disabled (from the case description *Washington v. Glucksberg*).\(^{33}\)

In addition to disadvantages imposed on the disabled, legalized physician assisted suicide would impose undue pressure on the lower

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31 See *id.* at 725.
economic class.\textsuperscript{34} In an effort to lower the costs of palliative care which would be charged to family members after they die, or simply because the patient cannot afford the treatment costs that they would receive from choosing alternative treatment, poorer citizens would have greater economic incentives to choose assisted suicide than middle or upper class citizens. Their economic position may even bias the counsel given by physicians, making the physicians themselves more likely to suggest assisted suicide as a possible course of action to lower class patients than middle or upper-class patients. The disproportionate disadvantage placed on those in lower classes and the disabled violates the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{35}

Recognizing that expanding the right to privacy would, in reality, decrease the rights of the poor and disabled helps establish an important indicator of maximization. With other issues, it may be easier to recognize when a new application of a constitutional right goes too far. With privacy, however, this is more difficult. The Supreme Court’s decision to weight the rights of the poor and disabled more heavily than the privacy of those desiring physician assisted suicide can be generalized, making it easier to decide whether privacy should be expanded. Thus, any expansion of privacy which compromises the Equal Protection Clause should be considered an indicator of maximization. In these situations legislators and justices must be especially mindful of the possibility that privacy may be close to its point of maximization. Ironically, the Equal Protection Clause of the Fourteenth Amendment has been used more often as justification for

\textsuperscript{34} See Larry J. Pittman, Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups, 28 Seton Hall L. Rev. 776, 785 (1998); see also New York State Department of Health, When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context (1994).

\textsuperscript{35} See Ronald A. Lindsay, Should we Impose Quotas? Evaluating the “Disparate Impact” Argument Against Legalization of Assisted Suicide, 30 J.L. Med. & Ethics 6, 7-8 (2002) (In this article, Lindsay actually argues against disparate impact. I cite him here only because he also provides a helpful and concise review of the literature in favor of disparate impact).
expansion of individual rights. However, in this context, it provides justification against such an expansion. In this way, the Fourteenth Amendment actually solidifies the right to privacy by providing a limitation of privacy, rather than obscuring it as it has in other interpretations.  

V. The State Interest Limit

In 1976, Kelley brought a case all the way to the U.S. Supreme Court because he wanted to grow out his hair. The circumstances may seem like a non-issue, except that Kelley was a member of the Suffolk County Police Force in New York and as such was subject to a strict grooming standard, regulating both hair length and style. Kelley argued that the grooming standards were “not based upon the generally accepted standard of grooming in the community.”

Thus, the regulation violated his individual privacy to determine his own appearance; this right was, according to Kelley, included in the Fourteenth Amendment. When the case was first tried, the District Court of the Eastern District of New York dismissed the case; however, upon appeal the Court of Appeals of the Second Circuit reversed the dismissal and invalidated the grooming standard. “The Court of Appeals went on to decide that ‘choice of personal appearance is an ingredient of an individual’s personal liberty’ and is protected by the Fourteenth Amendment.”

Despite the case’s appeal to the right to privacy (alluded to in the Fourteenth Amendment), the U.S. Supreme Court limited the right to privacy in the interest of preserving the efficacy and cohesion of the police force. The Court agreed that this interest outweighed and overruled Kelley’s interest to preserve individual privacy. Again, Rehnquist offered the majority opinion, explaining that an ordinary citizen claiming violation of privacy may be justified in this context, but because Kelley represented the Suffolk County Police Depart-

36 See U.S. Const. amend. XIV, § 1.
37 Id. at 241.
38 See id. at 238.
ment, he was not to be treated as an ordinary citizen. Acknowledging the danger of treating government employees as some form of lower-class citizen, Rehnquist defends his claim further:

More recently, we have sustained comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment. CSC v. Letter Carriers, 413 U.S. 548 (1973); Broadrick v. Oklahoma, 413 U.S. 601 (1973). If such state regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment.\(^1\)

Prior to the Supreme Court’s decision on this issue, the Second Circuit Court had dismissed the claim that grooming standards were significantly related to the preservation of some “genuine public need.”\(^1\) In response, Rehnquist held that the question at issue was instead whether there was a reasonable, rational connection between grooming standards and the protection of person and property. That policemen would be more easily recognizable to members of the public and would develop esprit de corps among the policemen themselves was seen as sufficient rationale for upholding the grooming standard.

It should be clear that the Supreme Court was not advocating for the removal of privacy; indeed, this would threaten even basic liberties explicit in the Constitution, such as freedom of speech and freedom of religion. Rather, the Supreme Court effectively elevated the privacy of possessions for the general public above the privacy of personal appearance for the individual. This ruling (along with the ruling in Washington v. Glucksberg) shows that privacy can only be expanded so far before it inevitably begins to compromise other

\(^{10}\) Id. at 245
\(^{11}\) Id. at 242
necessary, significant individual rights. In the context of Kelley v. Johnson, the Supreme Court provides precedent for the limitation of privacy when a proposed expansion would distort or decrease the efficacy of government institutions designed to protect the person and property of individuals. In this context, privacy (in the form of grooming standards) must be limited for privacy’s sake (the person and property of individuals). Here again we find an indicator of maximization when positive growth in one “zone of privacy” leads to negative growth in another.

Courts considering further proposals to expand or make explicit the right to privacy in the Constitution should consider a general state interest limitation—in addition to the equal protection limit discussed previously—before giving approval for expansion. Despite the legitimate value of privacy in maintaining a free society, Kelley v. Johnson suggests that too much individual privacy can be detrimental. Widespread recognition of this limitation will further solidify the definition of privacy in the future so that privacy is not expanded beyond the point where other privacies are compromised as a result.

VI. The National Security Limit

Though similar to the state interest limitation presented in the previous section, the national security limitation deserves consideration given the high level of controversy surrounding the issue. Of all the limitations presented, this limitation provides the most delicate delineation between appropriate and inappropriate expansions of the right to privacy. Support for the establishment of a national security limit can first be found in Olmstead v. U.S. (1928). In the case Olmstead, the leader of an organization involved in the illegal sale and distribution of alcohol during Prohibition, complained that evidence used in his conviction was illegally obtained. More specifically, four probation officers wire-tapped Olmstead’s telephone and recorded conversations between Olmstead and his partners that contained descriptions of their illegal business plans. When Olmstead was arrested and brought to trial, the evidence gathered from the

42 See id. at 247.
wire-tapping was used against him. After his conviction, Olmstead appealed his case on the grounds that his individual right to privacy, as granted him in the Fourth and Fifth Amendments, had been compromised; admitting the illegitimacy of the evidence would consequently exonerate Olmstead.

Initially, the Circuit Court of Appeals for the Ninth Circuit ruled to invalidate the evidence saying that it did violate the privacy given to Olmstead in the Fourth and Fifth Amendments (which protect against unreasonable search and seizure, as well as forced testimony against oneself). The Court argued, “It is of the very nature of the telephone service that it shall be private…The wire tapper destroys this privacy. He invades the person of the citizen, and his house, secretly and without warrant. Having regard to the substance of things, he would not do this more truly if he secreted himself in the home of the citizen.”

The Supreme Court reversed the decision, choosing instead to limit Olmstead’s right to privacy by allowing the evidence to be used in court. Regarding the supposed violation of the Fourth Amendment, the Supreme Court decided that evidence obtained unethically did not compel an individual to testify against himself in court. Further, regarding the supposed violation of the Fourth Amendment, the Supreme Court argued that the ability to invalidate evidence unethically obtained did not belong to the Supreme Court (though the Court did acknowledge the possibility of this outcome in the future, but only in the form of new legislation from Congress44). Because there was no existing law prohibiting such evidence from consideration—and because no physical “search and seizure” had been conducted—the Court ruled that it did not have the authority to deny the evidence from consideration in the trial.

Based only on the Supreme Court’s ruling in *Olmstead*—especially referencing the Court’s allowance for legislation banning illegally obtained evidence—it is difficult to identify limitations of privacy. Thus, further investigation of subsequent court rulings and

43 Olmstead v. United States, 277 US 438, 454 (1928).
44 See *id.* at 465.
legislation is necessary. *Olmstead*, however, is significant because it presents the first balancing of national security and individual privacy.

*Olmstead* was partially overturned in *Katz v. U.S.* (1967). Katz, convicted of selling gambling information across state lines (a federal offence), claimed that evidence gained from wiretapped phone conversations was impermissible in Court because the process by which it was gained violated his right to privacy, inherent in the Fourth Amendment. Though the circumstances of the case are nearly identical to that of *Olmstead*, the Supreme Court ruled in favor of Katz, claiming that the interpretation of privacy had evolved since *Olmstead*.

Although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any “technical trespass under... local property law”.

Here again, we find evidence that the definition of the right to privacy continues to evolve and expand over time. I should be clear that I do not offer a claim regarding the appropriateness of this expansion; instead, I offer the claim that constitutional privacy continues to expand, and that it is possible for privacy to expand beyond the point that it continues to benefit society. With this in mind, it is important to mention the Supreme Court’s statement that the actions of the federal agents responsible for the wiretapping would likely have been justified had they first gained the proper consent from a third-party judge. Their actions were illegal primarily because the agents did not first acquire a search warrant. In essence, the Supreme Court did recognize that wiretapping was appropriate in certain situations, even when the suspect is unaware of the invasion of their privacy.

The issues of wiretapping, national security, and individual privacy again came to the foreground when the Patriot Act was instituted in 2001. A response to the September 11th terrorist attacks, the
Act significantly reduced legal restraints on federal law enforcement. Most important in this context was the sanctioning of roving wiretaps (wiretaps not restricted to any single communication device, but able to transfer to any device used by the suspect in question). While certain elements of the Patriot Act have been brought into question, the wiretapping clause was renewed by President Obama as of 2011. Until now, there have been no further court cases involving the issue.

There is no question that there should be strict and detailed restrictions on the appropriate circumstances for wiretapping. However, the principle illustrated in the legal history of wiretapping again suggests that it is possible for privacy to overstep its appropriate bounds. In the event that privacy were expanded to the point that wiretapping was totally marginalized, national security would be reduced by a significant extent. Seen in this light, increasing individual privacy would risk the preservation of privacy because an individual’s right to be left alone would be legitimately endangered. Recognizing that threats to national security on a grand scale are unlikely to be a daily occurrence, it should still be a significant consideration. The decision to establish a national security limit on the right to privacy in the future should be taken seriously.

VII. Conclusion

It may be intuitive to assume that all individual rights are independent; thus it is possible for everyone to maintain an unlimited level of one’s own liberty without affecting the liberty of those around him. This assumption, however, is faulty. While personal liberty (or privacy) should be maximized, there is a point at which privacy begins to decrease in its utility to society, and even becomes destructive. As the constitutional support for the right to privacy continues to be molded over time, it is especially crucial to limit the expansion of privacy at its point of maximization so that privacy does not expand beyond its appropriate “zones.”


46 Id. at 500.
be to distinguish these zones of privacy, where they begin and where they end.

Analysis of the limits placed on the right to privacy in the past strongly suggests that the point of maximization for privacy occurs when privacy begins to compromise other rights explicitly guaranteed in the Constitution. Given the nature of individual privacy, it is possible, even likely, that continued expansion of privacy rights for individuals in specific zones can in other zones decrease the protection of privacy. This point is clear in *Washington v. Glucksberg*, where the right of a terminally-ill, mentally competent individual to commit suicide is limited in order to preserve equal protection under the law lower-class or disabled citizens. The point is reiterated in *Kelley v. Johnson* and *Olmstead v. U.S.*, where an expansion of privacy comes at the expense of a legitimate state interest or at the expense of a nation’s ability to protect its citizens, the right to privacy has expanded beyond the point at which it continues to benefit society.

When taken to the extremes, privacy can be a double-edged sword. On one edge, privacy can be regulated so heavily that individuals have very little privacy, if any at all. Given that the major focus of public attention centers on the expansion of privacy, it is necessary to increase awareness regarding the other edge of the sword: the trend towards absolute privacy also decreases individual rights, even the right to privacy itself. Privacy is a legitimate right; indeed it is crucial for a free society. However, the unrestrained expansion of individual privacy may be just as damaging to individual privacy (as well as other constitutional rights) as is unrestrained privacy. Thus, future decisions to expand privacy should not be granted until the limitations of privacy are fully considered.