PRIVACY, AUTONOMY, AND CONSENT

Daniel R. Ortiz*

Privacy is a funny notion—not in the sense of being odd or unusual, but in the sense of being hilarious. The constitutional value itself derives from an oxymoron: substantive due process. It is grounded in “penumbras” and “emanations”—concepts more at home in the world of the Twilight Zone than in the world of constitutional interpretation. And the concept moves the Supreme Court to flights of prose (such as Justice Douglas’s reference to “the sacred precincts of marital bedrooms”1) where the Justices comically stumble over their own metaphors. Such is the comic side of due process. The hilarity is undeniably there, but it should not blind us to the value of the concept of privacy itself.

I do not propose to defend the notion of privacy from those bothered by the comedy which surrounds it. That would be akin to defending the idea of Christmas by arguing the reality of Santa Claus. Nor do I intend to defend privacy by arguing the correctness of Roe v. Wade2 or Griswold v. Connecticut3 or any other individual case. One can believe that the Court wrongly decided any of these cases without abandoning the notion of privacy itself. Privacy does not necessarily imply abortion, just as property does not necessarily imply monopoly and homeless people sleeping on the streets. Similarly, we do not reject the Bible because some wars were fought over it, nor do we reject organized religion because of the Spanish Inquisition. Rather, I plan to explore the central concept of privacy without any of the particular baggage that it now carries from the Court. By looking at the concept in light of our political traditions, I hope to explain why, if the concept did not exist, we would have to invent it.

The term “privacy” itself is a misnomer. The privacy cases do not centrally concern an individual’s right to keep certain information secret, but instead refer to what types of decisions an individual can make without interference from the state. In

* Assistant Professor of Law, University of Virginia Law School.
3. 381 U.S. 479 (1965).
other words, privacy addresses not secrecy, but the scope and limits of individual autonomy. Like the related concept of property, privacy defines a sphere of individual dominion into which others cannot intrude without the individual’s consent or some other sufficient justification. Unlike traditional forms of property, however, it does not represent dominion over things—a physical space over which one possesses at least the power of exclusion—but rather dominion over oneself. It defines a sphere of self-control, a sphere of decisionmaking authority about oneself, from which one can presumptively exclude others.

“Autonomy,” however, is not a magic word. To say that privacy defines a sphere of autonomy does not mean that the individual claiming a privacy right should always win (or even usually win) against the state. The community has broad and valid claims against the individual, claims which we cannot ignore without endangering the community itself. Both the individual and the community are centrally important to us and neither enjoys automatic priority over the other.

The difficulty with privacy lies in determining the reach of its bounds. When must the state leave the individual to himself? Originalists criticize judicially enforced notions of privacy on the ground that there is no “neutral” or principled way to define a boundary between the self and the community. They see only two choices: (1) letting the community itself define these bounds through the political process, subject, of course, to those few restrictions expressed directly in the Constitution, or (2) allowing the courts to define the boundaries for us. Originalists object to the second course for fear that judges will impose their own values on the rest of us. No one, of course, can defend such an imposition. Judges can never legitimately remake the world in their own private images. This is no objection to privacy, however; the problem here is bad judges, not bad concepts. Just as one can hardly condemn the idea of original intent because some opinions apply it poorly, one cannot fairly condemn privacy because some judges wrongly apply their own personal values.

Before arguing the necessity of some constitutional conception of privacy, it is necessary to understand the assumptions underlying “originalism.” The originalist critique is in many ways attractive because it resonates with some of our most fun-
damental political assumptions. Unfortunately, its power proves its downfall, for it makes arguments which ultimately undermine the originalist position itself. As developed by its major proponents, it presents us not with a choice—that between the judges' values and the Framers'—but with an unacceptable dilemma. Upon analysis, both choices prove deeply troubling. Privacy opens up another option in the hope of delivering us from the horns of the originalist dilemma.

The concept of originalism can be traced, along with our most fundamental political beliefs, to our vision of man and certainty. Before the Renaissance and the Enlightenment, we had faith in something I will call "Truth." If we were Platonists, we may have referred to it as "forms"; if we were Jews or Christians, we may have called it "God." Our only problem lay in our inability to discover it. We knew it was there, but we were locked in a cave where we could see only shadows; or we were earthly sorts who, in the words of St. Paul, could see only through a glass darkly. Within this system, we grounded political authority directly in this certain belief in Truth. Once we thought to question, we accepted our rulers' right to exercise power over us because they had divine authority behind them. Kings, in some formulations, were God's regents on earth. They commanded our obedience because He did and He was simply right. No more authority than that was needed. A few characters in the Platonic tradition argued, of course, that philosophers should guide us because they were specially trained to see through the shadows to Truth itself. In any event, most common theories of political legitimacy rested on some notion of authority grounded directly in Truth or on the special capacity of a particular class to ascertain what Truth was.

Since at least Descartes, however, we have doubted such claims of authority. The new science, rationalism and empiricism, led us to wonder whether we could actually discover Truth, while later developments in intellectual history led us to question whether it even existed at all. As John Donne wrote in 1611, "[A] new Philosophy cals all in doubt . . . 'Tis all in pieces, all cohaerence gone . . . Prince, Subject, Father, Sonne, are things forgot." As Descartes and later Kant told us, our only certainty lies in ourselves. The crucial turn for political

theory here was shifting certainty from the world into ourselves, for then we had nowhere to ground political authority except in the individual. Claims that power was exercised by someone with divine authority or by someone possessing special competence at discovering truth could no longer legitimate politics. Rather, the exercise of power against an individual could be legitimated only by that individual's own consent. This shift to consent-based theories of political legitimacy did not mean, of course, that every person had to agree to each use of state authority against him, but only that each person had to consent in some meaningful way to the state itself. In this sense, consent is a value prior to any constitution, for it is the value upon which the legitimacy of the state and the constitution itself rest.

The rise of consent-based theories led to a corresponding shift in the way we conceptualized the state. With one's own consent as the only form of legitimation, the state itself naturally came to be viewed as a compact among the individuals who composed it. The loss of certainty, together with particular changes in economic and social structure, led us inexorably to contractarian political theories from the likes of Hobbes and Locke. Works based on non-consent theories came to appear as curious anachronisms.

Intentionalism—interpreting the Constitution according to the Framers' original intent—springs from contractarian political theory. Intentionalism sees the Constitution as a social contract. In this view, intent is fundamentally important because it illustrates what it is exactly the members of the social compact have accepted. In fact, nothing other than intent can be relevant because anything else would divert attention from the terms of the original consent. To originalists, the text itself remains authoritative, but only because it best reveals to what we have consented. The allure of intentionalism lies in its claim to reveal the unmediated terms of consent.

Viewed from this perspective, privacy is truly pernicious. It represents a judicial imposition of a new social contract to which we have never consented. Such judicial revision of the social contract is no better than violations of it by the legislature or the executive—all three actions violate what we, the people, have agreed to.

About the time of the founding of the Republic, there may
have been little disagreement as to how to interpret the Constitution. The social contract was fresh, many of the parties were still alive, and discerning the terms of consent was comparatively unproblematic. Even then, of course, there were some problems. Some groups, such as women and blacks, were totally excluded from the framing and could thus claim that the document did not reflect their consent. In addition, there were all the usual difficulties of imputing a unified intent to either the Framers or the ratifiers, when many different groups of people had fought over the document’s terms. Finally, there was the unavoidable problem of determining the correct level of generality of intention to apply. Despite these problems, however, there were very good arguments at that time that faithfulness towards original intent was preferable to either alternative: blindly trusting the political process or allowing courts to discover on their own what the people would accept.

The true difficulty with intentionalism arose later when the founding society died and social values changed. Not only did groups from outside the original community join in, but the original community itself changed. Culture never stands still. Two new problems with the original contractarian vision then appeared. First, the further we moved away from the founding, the more difficult it became to understand the framing society’s culture and political values, both of which are often necessary to discern original intent. Gradually, the Court had to engage in a form of cultural archaeology—a very dubious business—in order to discover what the dead believed. Distance thus exacerbated all the original difficulties surrounding intent.

Second, and more importantly, original intent lost its centrality and, indeed, its relevance over time. In a world where political legitimacy rests on consent, any change in values causes the terms of the original consent to lose some degree of legitimating force. At some point, strictly enforcing the specific original terms not only fails to legitimate the state, but, in fact, represents an illegitimate exercise of power. To the extent culture changes, the original intent reflects our consent no more than personal values of judges reflect our consent.

The choice originalism presents then—that between the judges’ own values and the Framers’—is a false one. Although the first alternative is clearly illegitimate, the second is hardly less so. If it is wrong for the judges to impose their own values
because those values are not our own, it is just as wrong for them to impose the Framers' specific values when they too are not our own. Any imposition of values other than our own—whether those of blackrobed contemporary or white-haired ancestor—violates consent. Thus, insofar as the originalist critique of privacy rests on a theory of consent, it proves too much. At bottom, the critique argues against both judge and Framer—the only two choices the originalist sees. In these terms, it is an argument against constitutionalism, not against certain forms of judicial review.

Privacy attempts to offer a way out of this difficulty, although, to be sure, it poses some problems of its own. In defining the boundary between community and self, judges are still not to impose their own values. As Justice Frankfurter wrote, "The judicial judgment in applying the Due Process Clause . . . is not to be based upon the idiosyncracies of a merely personal judgment." Even the fiercest judicial activist would agree that such an approach is clearly illegitimate. Instead, judges are to consult, in the time-worn judicial formula, the "traditions and conscience" of our society in order to discover the people's own values, for these are the only ones that judges can legitimately impose. By engaging in such cultural self-reflection, a court aims to find the contemporary terms of the consent the people have given to be governed. The goal is to legitimate the state and ultimately the Constitution by grounding government in approval of those governed rather than those dead.

Three objections to this view of privacy spring quickly to mind. First, one could ask whether such things as tradition and collective conscience exist in any meaningful sense. In a highly pluralistic society like our own, can these concepts have any real meaning? If they are empty, it may be foolish to expect a court to be capable of imposing any values other than its own. Admitting pluralism, however, does not foreclose consensus. We can agree in differing degrees to different values. The originalists' misstep consists of assuming that we have only two choices: the values of the Framers or those of judges. Viewed this way, they believe, the choice is clear: better to choose James Madison over William Brennan. Privacy, however, opens

up a third possibility: contemporary intersubjectivity, or, in other words, our own messy consensus.

Second, one might ask why, if tradition and conscience exist, courts are better able to discover them than are legislatures. When in doubt, should not the majority be trusted? In short, this response proves too much. If legislatures could be trusted, much of the Constitution, particularly the Bill of Rights, would be superfluous. The mere existence of these provisions evidences some distrust of the political process, perhaps because, as both The Federalist and much recent public choice theory argue, the political process comes with certain pathologies built in.

Third, one might ask why constitutional amendment is not the appropriate way to obtain continuing consent. Since amendment is the process the Constitution itself specifies for change, should it not constitute the only proper way to revise the social contract? Luckily, another symposium panel is set to tackle this issue. It would be presumptuous of me to speak.

The approach here outlined suggests that we would have had to invent some concept of privacy if the Supreme Court had not found one immanent in the open-ended provisions of the constitutional text. Our political theory since at least the seventeenth century necessitates some form of continuing consent to government. Consent represents a value prior to the Constitution, for it alone can legitimate the state. Originalism recognizes the centrality of consent to any theory of constitutional interpretation, but only partially applies this knowledge. It presents a world with only two choices: imposing the values of judges or those of the Framers. The first, it correctly argues, is illegitimate, but the second is as well, for neither the judges nor the Framers are “us.” Privacy seeks to provide us with a third choice. By consulting shared contemporary values, it aims to obtain consent in resolving one of the most contentious and important issues in any classically liberal society: how to define the boundary between the community and the self.