

any claim of excessive punishment in individual circumstances is not before us.

The complaint challenged OSP assignments under the Old Policy, and the unwritten policies that preceded it, and alleged injuries resulting from those systems. Ohio conceded that assignments made under the Old Policy were, to say the least, imprecise. The District Court found constitutional violations had arisen under those earlier versions, and held that the New Policy would produce many of the same constitutional problems. *Austin I*, 189 F.Supp.2d, at 749–754. We now hold that the New Policy as described in this opinion strikes a constitutionally permissible balance between the factors of the *Mathews* framework. If an inmate were to demonstrate that the New Policy did not in practice operate in this fashion, resulting in a cognizable injury, that could be the subject of an appropriate future challenge. On remand, the Court of Appeals, or the District Court, may consider in the first instance what, if any, prospective relief is still a necessary and appropriate remedy for due process violations under Ohio's previous policies. Any such relief must, of course, satisfy the conditions set forth in 18 U.S.C. § 3626(a)(1)(A).

* * *

The Court of Appeals was correct to find the inmates possess a liberty interest in avoiding assignment at OSP. The Court of Appeals was incorrect, however, to sustain the procedural modifications ordered by the District Court. The portion of the Court of Appeals' opinion reversing the District Court's substantive modifications was not the subject of review upon certiorari and is unaltered by our decision.

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

G. NINTH AMENDMENT PRIVACY

1. THE NINTH AMENDMENT

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

2. JUSTICE GOLDBERG'S FIND

GRISWOLD v. CONNECTICUT

381 U.S. 479 (1965), Goldberg, J., concurring.

MR. JUSTICE GOLDBERG, whom the CHIEF JUSTICE and MR. JUSTICE BRENNAN join, concurring.

[Appellants were a Planned Parenthood director and a physician convicted and fined under a Connecticut statute criminalizing birth control. They appealed their convictions asserting that the statute violated the privacy rights of married persons wishing to obtain birth control.]

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. * * * I add these words to emphasize the relevance of that Amendment to the Court's holding. * * *

The Ninth Amendment * * * is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected. * * *

While this Court has had little occasion to interpret the Ninth Amendment, "it cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 1 Cranch 137, 174. In interpreting the Constitution, "real effect should be given to all the words it uses." * * * The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

A dissenting opinion suggests that my interpretation of the Ninth Amendment somehow "broaden[s] the powers of this Court." * * * With all due respect, I believe that it misses the import of what I am saying. I do not take the position of my Brother BLACK in his dissent in *Adamson v. California*, 332 U.S. 46, 68, that the entire Bill of Rights is incorporated in the Fourteenth Amendment, and I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. * * * The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this

broadens the authority of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights.

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a State's infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. * * *

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] * * * as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and which lie at the base of all our civil and political institutions' * * *." *Powell v. Alabama*, 287 U.S. 45, 67. "Liberty" also "gains content from the emanations of * * * specific [constitutional] guarantees" and "from experience with the requirements of a free society." *Poe v. Ullman*, 367 U.S. 497, 517 (dissenting opinion of Mr. Justice Douglas). * * *

Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. As my Brother Harlan so well stated in his dissenting opinion in *Poe v. Ullman*, *supra*, at 553.

"Adultery, homosexuality and the like are sexual intimacies which the State forbids * * * but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality * * * or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."

In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth

Amendment from infringement by the States. I agree with the Court that petitioners' convictions must therefore be reversed. * * *

H. FOURTEENTH AMENDMENT PRIVACY

1. THE FOURTEENTH AMENDMENT

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NOTE: THE MAIN SOURCE

The Fourteenth Amendment's due process and equal protection clauses have emerged as the main sources of privacy protection in constitutional law. The due process clause, with its language of "liberty", has proven especially important. The cases collected in this lengthy section tell the complete story of "the right to privacy," beloved and belittled.

2. PRIVATE LIVES, PRIVATE CHOICES

MEYER v. NEBRASKA

262 U.S. 390 (1923).

MR. JUSTICE McREYNOLDS delivered the opinion of the Court. * * *

[In 1920, while an instructor at the Zion Parochial School, plaintiff began teaching a ten year old boy how to read German. For his effort, he was convicted of violating a statute passed in 1919, "An act relating to the teaching of foreign languages in the State of Nebraska." The statute provided that teaching in any "denominational, parochial or public school" be conducted in the English language, that teaching of foreign languages not commence until after the eighth grade, and that violators "shall be subject to a fine of not less than twenty-five dollars (\$25), nor more than one hundred dollars (\$100) or be confined in the county jail for any period not exceeding thirty days for each offense."]

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.