



## CHAPTER EIGHT

# *Liberty*

For the past quarter century, debate over constitutional interpretation has often been summed up by reference to a single case: *Roe v. Wade*.<sup>1</sup> When the public thinks about the constitutional implications of presidential elections or Supreme Court vacancies, discussion quickly devolves into a variant of the question “Does this candidate or nominee support or seek to overturn *Roe*?” *Roe* has come to serve as shorthand not just for an individual’s position on whether the Due Process Clauses of the Fifth and Fourteenth Amendment protect a woman’s decision whether to terminate her pregnancy, but also for the broader question of how an individual approaches constitutional interpretation.

For all the focus on *Roe* itself, it is important first to locate *Roe* within the broader constellation of cases extending constitutional protection to individual decision-making on intimate questions of family life, sexuality, and reproduction. These cases, which deal with intimate and private activities, are often grouped under the rubric of the “right to privacy,” a phrase derided by critics because the word “privacy” does not appear in the Constitution.<sup>2</sup> Privacy, however, is simply shorthand for a dimension of individual liberty, and the protection of “liberty” is a principle that not only appears in the Constitution’s text but is central to the document’s overall meaning. As such, the right to privacy reflects a widely shared understanding that certain activities involve private decision-making that ought to be free from government control. As Justice Kennedy said in *Lawrence v. Texas*:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be

a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.<sup>3</sup>

The Constitution protects “liberty of the person both in its spatial and in its more transcendent dimensions.”<sup>4</sup>

The rights affirmed in the cases from *Griswold v. Connecticut*, which struck down a law prohibiting married couples from using contraceptives,<sup>5</sup> to *Lawrence v. Texas*, which invalidated a law criminalizing same-sex sodomy,<sup>6</sup> enjoy widespread support and acceptance. They cannot be reconciled with an arid textualism or an originalism that asks how the Framing generation would have resolved the precise issues. But they are wholly consistent with an approach to constitutional interpretation that reads original commitments and contemporary social contexts together. The evolution of constitutional protection for individual autonomy in certain areas of intimate decision-making reflects precisely the rich form of constitutional interpretation this book envisions. In order to keep faith with the text and principles of the Constitution, judicial decisions have interpreted its guarantee of liberty in light of our society’s evolving traditions and shared understandings of personal identity, privacy, and autonomy.

Perhaps the first case in this line of doctrine is the Supreme Court’s 1942 decision in *Skinner v. Oklahoma*.<sup>7</sup> That case involved an Oklahoma statute that provided for the sterilization of certain “habitual” criminals. Justice Douglas’s opinion for the Court recognized that the state was entitled to make distinctions among offenders without raising questions under the Equal Protection Clause. But the law at issue in *Skinner* was different:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.<sup>8</sup>

Applying heightened scrutiny, the Court concluded that Oklahoma’s law was unconstitutional.

*Skinner* was decided against the backdrop of several competing considerations. On the one hand, the Supreme Court had earlier upheld state sterilization of allegedly unfit individuals in *Buck v. Bell*, the notorious “[t]hree generations of imbeciles is enough” case in which Justice Holmes dismissively referred to the Equal Protection Clause as “the usual last resort of constitutional argument.”<sup>9</sup> And the Court was hesitant to rule out government control over procreation altogether in light of its view of current scientific knowledge on the heritability of criminal traits. But by 1942, it was clear that “evil or reckless hands” in Nazi Germany and elsewhere were using sterilization as a technique to extinguish entire peoples. Just as our war against racism in Germany and Japan informed the Supreme Court’s decisions in the *White Primary Cases*, which overruled earlier cases allowing political parties to exclude black voters, that war also shaped the Court’s understanding of the individual liberty interest at stake in *Skinner*. Notably, in unanimously finding the Oklahoma statute unconstitutional, not a single Justice in *Skinner* asked whether forced sterilization would have been permitted in 1868 when the Fourteenth Amendment was adopted.

Moreover, *Skinner* illustrates an idea that arises repeatedly in the decisional autonomy cases, and that is the mutually supportive interaction between liberty and equality. As Justice Jackson understood, liberty is more secure when government is required to legislate evenhandedly: “The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”<sup>10</sup> Similarly, equality is more secure when government may not deprive any group of a fundamental liberty interest without a compelling justification. In this way, equality and liberty arguments backstop each other, and this point has informed both contemporary understandings and judicial doctrine on decisional autonomy.<sup>11</sup>

The Court’s next major foray in this area came in the Connecticut contraceptive cases. Like many other states, Connecticut adopted criminal prohibitions on the use of contraceptives in the late nineteenth century. But unlike virtually every other state in the nation, Connecticut maintained those statutes in their most sweeping form into the latter half of the twentieth century. Although Connecticut rarely enforced the prohibition against private physicians and their married clients, the law had an important chilling effect: it

deterred the opening of public birth-control clinics that would have provided services to less affluent individuals or to women who were reluctant, for whatever reason, to consult their family doctor. In *Poe v. Ullman*, the Court dismissed a challenge to the Connecticut statute on the ground that the state's apparent failure to enforce the law meant there was no justiciable case or controversy.<sup>12</sup> But Justice Douglas and Justice Harlan dissented, finding in the Due Process Clause's protection of "liberty" a right for married couples to use contraception.

Justice Harlan's dissent in *Poe* is justly recognized as one of the best expositions of the proper method for interpreting the guarantee of liberty in the Fifth and Fourteenth Amendments. Observing that the constitutional text is "not self-explanatory," Justice Harlan explained:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

It is this outlook which has led the Court continually to perceive distinctions in the imperative character of constitutional provisions, since that character must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so

on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. . . .

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no “mechanical yardstick,” no “mechanical answer.” The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take “its place in relation to what went before and further [cut] a channel for what is to come.”<sup>13</sup>

Applying these principles to the issue at hand, Justice Harlan concluded that Connecticut’s decision to enforce its moral judgment through a criminal statute directed at married couples violated due process. He noted that the “aspect of liberty which embraces the concept of the privacy of the home receives explicit Constitutional protection at two places only”—in the Third Amendment, which regulates the quartering of troops, and the Fourth Amendment, which prohibits unreasonable searches and seizures.<sup>14</sup> However, he explained, limiting the right of privacy “to what is explicitly provided in the Constitution” would improperly “divorce[] [the concept] from the rational purposes, historical roots, and subsequent developments of the relevant provisions.”<sup>15</sup> The Connecticut statute, while not involving a physical intrusion into the home, nonetheless intruded “on the life which characteristically has its place in the home.”<sup>16</sup> Indeed, the statute regulated the “private realm of family life,” no aspect of which “is more private or more intimate than a husband and wife’s marital relations.”<sup>17</sup> Thus, Justice Harlan interpreted the constitutional guarantee of “liberty” to encompass not only the spatial but also the decisional aspects of individual privacy. Although the constitutional provisions that secure a right to privacy do not mention its non-physical dimensions, Justice Harlan understood that a constitutional “principle, to be vital, must be capable of wider application than the mischief which gave it birth.”<sup>18</sup>

To be sure, Justice Harlan identified limits on the principle he advanced, some of which we no longer recognize today. For example, he did not question the state’s right to enact laws against fornication, adultery, or homosexual

conduct.<sup>19</sup> But, as Justice Harlan himself acknowledged, each constitutional claim must be considered against the backdrop of our evolving traditions and the principles developed in prior cases; there is “no mechanical answer.”<sup>20</sup>

Four years later, the Court revisited the constitutionality of the Connecticut statute, this time reaching the merits and striking it down.<sup>21</sup> The Court’s 7–2 decision in *Griswold* produced multiple rationales. Justice Douglas’s opinion for the Court did not locate the right of married couples to use contraception within a single constitutional provision. Rather, he pointed to a “zone of privacy created by several fundamental constitutional guarantees” including the First, Third, Fourth, and Fifth amendments, all of which “have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>22</sup> Justice Goldberg, along with Chief Justice Warren and Justice Brennan, joined Justice Douglas’s opinion for the Court but wrote separately to emphasize the Ninth Amendment’s recognition of unenumerated rights. Justice Harlan and Justice White would have decided the case solely under the Due Process Clause on the reasoning that Justice Harlan had set forth in *Poe*.

In light of the fractured reasoning of the Court majority, it is especially telling that *Griswold* has become, in Jack Balkin’s words, part of the “constitutional catechism”<sup>23</sup> widely accepted by the American people. Its privileged place in the constitutional canon is best demonstrated by the defeat of Judge Robert Bork’s Supreme Court nomination in 1987. A major issue in the confirmation hearings was Bork’s analysis of *Griswold*.<sup>24</sup> The Court had drawn a sharp distinction between the Connecticut anti-contraception laws and “the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”<sup>25</sup> But Bork, a self-proclaimed originalist, maintained there was no constitutionally significant difference between “the facts in *Griswold*,” which involved the prosecution of a doctor and clinic director who provided contraceptives to a married couple, and “a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional,” declaring the two cases “identical.”<sup>26</sup> He saw no constitutionally significant difference between the “sexual gratification” that a married couple would obtain from the use of contraception and the “economic gratification” that the utility company and its customers would get from cheaper power.<sup>27</sup> The defeat of Bork’s nomination signaled a strong public understanding that the Constitution protects a broad right to privacy. More fundamentally, it marked the failure of originalism to with-

stand public scrutiny as a methodology for faithfully interpreting the Constitution's text and principles.

Most historical accounts of the development of the right to privacy jump from *Griswold* to the 1972 decision *Eisenstadt v. Baird*,<sup>28</sup> another case concerning access to contraceptives. But between *Griswold* and *Eisenstadt*, the Supreme Court issued yet another canonical opinion, *Loving v. Virginia*,<sup>29</sup> that bears importantly on constitutional protection of individual decision-making. *Loving* struck down Virginia's law against interracial marriage on the ground that it reflected "arbitrary and invidious discrimination . . . designed to maintain White Supremacy" in violation of the Equal Protection Clause.<sup>30</sup> But in the opinion's final two paragraphs, *Loving* marked a turn toward substantive due process. Virginia, the Court said, had "deprive[d] the Lovings of liberty without due process of law" by denying them the "freedom to marry [that] has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>31</sup> Citing *Skinner*, the Court again braided equality and liberty concerns by explaining that "[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."<sup>32</sup>

While *Griswold* and *Loving* were cases about marriage, *Eisenstadt* decoupled the autonomy interest from a traditional institution. There the Court held that the Equal Protection Clause precluded states from denying unmarried individuals the same access to contraception that *Griswold* had provided to married persons. While recognizing that "in *Griswold* the right of privacy in question inhered in the marital relationship," the Court went on to say that

the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>33</sup>

Thus, the Court moved from recognizing the importance of a social institution to recognizing the centrality of intimate decision-making to an individual's identity and self-determination.

Today, our constitutional culture has so internalized the principles of *Griswold* and *Eisenstadt* that it is hard to imagine a legislature enacting, let alone a court upholding, a statute that criminalizes the distribution or use of contraceptives by adults. What accounts for that success? In part, as Justice Harlan suggested, it reflects the Court's wisdom in identifying "the decision whether to bear or beget a child" as one within the scope of liberty protected by the Due Process Clause. Whatever the understanding at the time of the framing or ratification of the Reconstruction Amendments, Americans now recognize that control over the number and timing of children is critical to the ability of men and women to participate fully in the political, economic, and social life of the nation. Any constitutional theory that either rejects that view or endorses it only grudgingly as a matter of stare decisis cannot achieve widespread acceptance or legitimacy.

To be sure, the right to choose abortion has been more controversial than the right to obtain and use contraceptives. But nothing about the Court's interpretive method distinguishes the core right affirmed in *Roe v. Wade* from its doctrinal forerunners. In *Roe*, as in *Meyer v. Nebraska*,<sup>34</sup> *Pierce v. Society of Sisters*,<sup>35</sup> *Skinner*, *Griswold*, and *Eisenstadt*, the Court reasoned from constitutional text, principles, and precedent to the conclusion that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>36</sup>

Despite the controversy surrounding *Roe*, the joint opinion in *Planned Parenthood v. Casey* was correct to note in 1992 that "[a]n entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions."<sup>37</sup> Nearly another entire generation has come of age since *Casey*. Today, no woman of reproductive age in the United States has ever lived under a regime where she did not have the constitutional right to control her fertility. Judges, no less than the people themselves, have lived their lives in a post-*Roe* world. They have family members, friends, neighbors, and colleagues who have assumed *Roe's* concept of liberty.

Over the decades since *Roe*, our society has deepened its understanding of the constitutional underpinnings of the right to reproductive autonomy. Some judges and commentators, most notably Justice Ginsburg, have sought to locate the right not only in the liberty protected by the Due Process Clause



but also in the gender equality component of the Equal Protection Clause.<sup>38</sup> Indeed, the Court decided *Roe* at the beginning of a period of popular mobilization, lawmaking, and constitutional interpretation that transformed the national understanding of gender equality. Still others have sought to reinforce the right by arguing for a revival of the Privileges or Immunities Clause of the Fourteenth Amendment<sup>39</sup> or by relying on First Amendment-based protections for freedom of conscience.<sup>40</sup> The reasons for this evolution are not just, or even primarily, a tactical desire to shore up what might otherwise seem a vulnerable result. Whatever the virtues of these alternative rationales, it is unlikely that anti-abortion forces will be convinced to abandon their opposition by a shift in doctrine. Rather, these additional defenses of reproductive autonomy reflect a richer understanding of the social, political, and economic context in which decisions about childbearing are made. That context, in turn, affects our constitutional understanding.

Social changes also underpin the recent extension of the privacy right to the protection of intimate decision-making by gay people. In *Lawrence v. Texas*, the Court struck down a Texas statute criminalizing private homosexual activity between consenting adults.<sup>41</sup> Justice Kennedy's opinion captures the Court's modern approach to due process:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>42</sup>

*Lawrence* marks a healthy rejection of a late Rehnquist Court dictate that substantive due process analysis should focus on a narrow "description of the asserted fundamental liberty interest."<sup>43</sup> The *Lawrence* Court firmly rejected the view that the liberty interest at issue was "simply the right to engage in certain sexual conduct."<sup>44</sup> That view, the Court explained, "demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."<sup>45</sup> The Court instead described the liberty at issue as gay people's right to "control their destiny,"<sup>46</sup> reaffirming that "[a]t 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.'<sup>747</sup>

By conceiving of liberty in broader terms than the specific conduct at issue, the Court recast the right as involving not only liberty but equality as well. As a practical matter, the effect of the Texas law was not oppressive interference with the intimate lives of gay people, as the law was virtually never enforced. Instead, the real problem with the Texas law was its primary collateral consequence: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."<sup>748</sup> In worrying that criminalization of private homosexual conduct invites public discrimination against homosexual persons, the Court understood that the lives and identities of gay people transcend what they do in their bedrooms to encompass who they are in civil society. Protecting gay people's choices within the intimacy of their homes serves essentially as a safeguard of their dignity in a more public sphere. With this reasoning, the Court again demonstrated that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."<sup>749</sup>

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Among critics of the Court's doctrine in this area, it is often said that constitutional interpretation becomes undisciplined and unguided once the term "liberty" is understood to mean more than what the Bill of Rights expressly provides or more than what the Framers of the Fifth and Fourteenth Amendments intended. And yet, when one considers the Court's liberty decisions in their totality, an unmistakable characteristic that emerges is their incremental quality. Far from opening the floodgates to a torrent of new fundamental rights, the Court's decisions have built carefully and gradually upon a limited and consistent set of core themes, with scrupulous attention to the historic and evolving traditions of our nation. As Justice Harlan said, "[t]hat tradition is a living thing."<sup>750</sup> The freedoms we enjoy today have been forged through the application of his insight that there is "no mechanical formula" for striking the proper balance between the guarantee of liberty and the demands of organized society.<sup>751</sup> The lived experiences, social understandings, and deeply held

values of the American people rightly inform the meaning of constitutionally protected “liberty” and, in so doing, comprise an interpretive approach that enables our courts to faithfully and meaningfully apply the Constitution’s enduring principles from one generation to the next.