

Keeping Faith: Chapter 8 – Liberty

The Right to Privacy as a Dimension of Liberty

- It is important first to locate *Roe v. Wade* within the broader constellation of cases extending constitutional protection to individual decision-making on intimate questions of family life, sexuality, and reproduction. These cases 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. 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.
- The rights affirmed in the privacy cases 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. 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.

Roe v. Wade in Context: Examining the Precedent

- Perhaps the first case in this line of doctrine is the Supreme Court’s 1942 decision in *Skinner v. Oklahoma*, a case involving an Oklahoma statute that provided for the sterilization of certain “habitual” criminals. Applying heightened scrutiny, the Court concluded that Oklahoma’s law was unconstitutional. *Skinner* was decided against the backdrop of several competing considerations, but notably, not a single Justice in *Skinner* asked whether forced sterilization would have been permitted in 1868 when the Fourteenth Amendment was adopted.
- *Skinner* illustrates an idea that arises repeatedly in the decisional autonomy cases, and that is the mutually supportive interaction between liberty and equality. Liberty is more secure when government is required to legislate evenhandedly. 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.
- The Court’s next major foray in this area came in the Connecticut contraceptive cases, which involved criminal statutes prohibiting the use of contraceptives. In *Griswold v. Connecticut*, the Court struck down CT’s statute in a 7-2 decision, which did not locate the right of married couples to use contraception within a single constitutional provision; rather, it 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.” In *Eisenstadt v. Baird*, 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, decoupling the autonomy interest from a traditional institution.
- Nothing about the Court’s interpretive method distinguishes the core right affirmed in *Roe v. Wade* from its doctrinal forerunners. In *Roe*, 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.”

Other Applications: *Loving v. Virginia* and *Lawrence v. Texas*

- Between *Griswold* and *Eisenstadt*, the Supreme Court issued yet another canonical opinion, *Loving v. Virginia*, 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. 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."

- In *Lawrence v. Texas*, the Court struck down a Texas statute criminalizing private homosexual activity between consenting adults. The *Lawrence* Court firmly rejected the view that the liberty interest at issue was "simply the right to engage in certain sexual conduct." The Court instead described the liberty at issue as gay people's right to "control their destiny . . ." 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, one of inviting discrimination against gays and lesbians in both the public and private spheres.