



School of Law

# **CONSTITUTIONAL ABORTION AND CULTURE**

**Helen M. Alvaré,  
George Mason University School of Law**

***Christian Bioethics*, Vol. 19, No. 2,  
pp. 133-149, August 2013**

**George Mason University Law and  
Economics Research Paper Series**

**13-44**

## Constitutional Abortion and Culture

HELEN M. ALVARÉ\*

*George Mason University, Arlington, Virginia, USA*

\*Address correspondence to: Helen M. Alvaré, JD, School of Law, George Mason University, Arlington, VA, USA. E-mail: [halvare@gmu.edu](mailto:halvare@gmu.edu).

*The US Supreme Court's abortion decisions over the past forty years have helped to shape cultural beliefs and practices concerning heterosexual relationships, marriage, and parenting. This is true both in the practical and in the legal senses. Practically speaking, definitively separating sex from childbearing, as only abortion can do (given how often contraception fails), inevitably changes the meaning of sex, and therefore of heterosexual relationships. Legally speaking, the Court's influence was mediated significantly by its decision to locate the right of abortion in an area of constitutional law—substantive due process—which claims to contain only those rights that are indispensable to our national understanding of freedom, both at the level of the individual and respecting our overarching democratic order. In particular, over the course of forty years of abortion opinions, the Court's reflections on a claimed link between abortion and freedom have led it to conclusions broadly reflected in modern American beliefs and practices insofar as sex, marriage, and parenting are concerned. These include, inter alia, a suspicion of motherhood on the grounds of its risks and harms, the dispensable roles and violent characters of men, the great importance of adults' wishes, and the importance of sexual expression for individual identity, divorced from consequences for partners or children.*

**Keywords:** *abortion, culture, due process, Fourteenth Amendment, liberty, parenting, Planned Parenthood of Southeastern Pennsylvania v. Casey, privacy, relationships, Roe v. Wade, sex, US Constitution*

*Roe v. Wade* implies that the people have already resolved the [abortion] debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never—not in 1787, 1791, 1868, or at any time since—done any such thing.

*Thornburgh v. American College of Obstetricians and Gynecologists*,  
476 U.S. 747, 796–97 (1986) (White, J., dissenting)

[M]en's actions are derived from the opinions they have of the good or evil which from those actions redound unto themselves.

Thomas Hobbes, *Leviathan*, Ch. 42 (1651)

## I. INTRODUCTION

There are many ways of approaching the question of the relationship between the legalization of abortion and our current cultural practices concerning heterosexual relationships, sex, marriage, and parenting. A strictly economic approach, for example, might ask about legal abortion's effects on incentives, risk/benefit calculations, and "prices" in the relationship "marketplace" (Akerlof, Katz, and Yellen, 1996). A communications approach would ask how the legalization of abortion has impacted related media and entertainment industry messages. This paper takes a legal approach, considering how—by its conclusion that the "values and principles" suffusing our Constitution necessarily imply a right to abortion—the US Supreme Court helped to shape our current heterosexual relationship, marriage, and parenting practices.

A few words on these new practices are in order. Data issued by the Census Bureau and by the Department of Health and Human Services, among others, indicate that, compared with the recent past, Americans marry somewhat less often, marry at older ages, bear few children, have a continuing high abortion rate, bear a higher percentage of children outside of marriage, cohabit and engage in premarital sex more, and increasingly believe that sexual expression of many kinds is a type of "right," or at least an important form of self-expression that third parties—private or governmental—ought to tolerate or even respect and reward (Akerlof, Katz, and Yellen, 1996; Elliott and Simmons, 2011; Guttmacher Institute, 2011; Regnerus and Uecker, 2011; Wildsmith, Steward-Streng, and Manlove, 2011; US Census Bureau, 2011, 2012).

This paper proposes to show how the Supreme Court's claims about the "values and principles" woven into our Constitution in connection with abortion correlate with the ideas supporting these trends and practices in sex, heterosexual relationships, marriage, and parenting. (Hereafter, for purposes of length, this group of practices will be titled simply "relationships and parenting.") In order to do this, it will be necessary first to familiarize the reader with the legal category that permitted our Supreme Court not only to identify abortion as an essential element of liberty but also to discourse further about the nature of American "liberty" generally in connection with relationships and parenting. This is the category of "substantive due process." When the US Supreme Court announces a constitutional right founded on "substantive due process"—as it did with abortion—it has concluded that, while the right is not explicitly contained in the text of the Constitution or the Bill of Rights,

judges have concluded that it exists based on the “traditions and consensus of our society as a whole, or in . . . logical implications of a system that recognizes both individual liberty and democratic order.”<sup>1</sup> Part II of this essay will take up just enough material on substantive due process—a massive topic—to enable the reader to understand how it is that the Supreme Court’s locating abortion within this category of rights led to its lengthy disquisitions on the essential constitutional contents of liberty where relationships and parenting are concerned.

It should be noted here that an important reason why Supreme Court abortion cases discoursed at such length on other topics—for example, sexual freedom, the good of parenting, marriage, the place of women in society—is the practical relationship between abortion and these matters. Sometimes, states’ abortion laws assumed a position on one or more of these matters, and the Supreme Court responded in kind. At other times, the Court, *sua sponte*, understood these additional matters to be implicated by its framing of the abortion right and it addressed them. In either case, the outcome is a collection of Supreme Court abortion opinions with a great deal to say about many topics that naturally “nest” with abortion.

Almost needless to say, the Court’s abortion opinions are widely disseminated and discussed in both popular and scholarly venues. They are, practically speaking, dispositive regarding the availability of abortion. Further, because many of them opined at length on the panoply of matters naturally “nesting” with abortion, they likely helped to shape cultural practices in these areas. It should also be noted that the Court did not express itself “lightly” on such matters but rather in urgent and authoritative tones. This will become apparent in the excerpts of opinions reprinted and discussed below. It is difficult to see how it could have been otherwise; if the right to seek a legal abortion *must* constitutionally trump the right to life of a developing human being, then the abortion right must be very weighty indeed. Putting this together with my prior observations about the meaning of “substantive due process” rights, and the practical links between abortion and the liberty to engage in procreative activity/sex divorced from a willingness to parent, I conclude that the Supreme Court’s abortion opinions very likely have contributed to current cultural mindsets and practices regarding relationships and parenting. These exhibit strongly the acceptance of the notion that sexual activity, partner commitment, and parenting are quite separate matters. I also hold that the Court consciously intended by its words to suggest that “good” would “redound unto” Americans—particularly women—were abortion freely allowed by law. Surely, some of the fruits of its work are visible in today’s relationship and parenting practices, practices that the Court explicitly led women and men to believe would constitute a “good” for themselves.

This essay will proceed as follows: Part II will treat substantive due process in the manner described *supra*. Part III will revisit the two Supreme Court

decisions, respectively, announcing and affirming an abortion right—*Roe v. Wade*<sup>2</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>3</sup>—insofar as these discussed the nature of American freedom in connection with relationships and parenting. Part IV reflects on additional points about these matters raised by Supreme Court abortion opinions between and after *Roe* and *Casey*. In Parts III and IV, I will regularly suggest how current relationship and parenting practices correlate with the descriptions of the contents of “freedom” proposed in one or more Supreme Court abortion opinions.

Before proceeding further, a few preliminary words about the relationship between this essay and religion. First, nothing in this paper requires an understanding or acceptance of a particular religious tradition. Anyone willing to think about the logical implications of our Constitution’s arbiters assigning abortion a place among essential American freedoms can understand the points I advance here. Still, it is probably the case that those more accepting of a nondualist view of the human person and human sexuality, and willing to grant a particular respect to what is scientifically understood to be human life, possibly on natural-law grounds, will be more persuaded by my piece. To the extent, therefore, that this paper harmonizes with a particular moral theological tradition, it would be my own Roman Catholic tradition.

Second, while this essay’s analysis is primarily legal, its conclusion will suggest the ways in which the Supreme Court’s notions of “freedom” respecting relationships and parenting conflict with Roman Catholic principles and aspirations.

## II. SUBSTANTIVE DUE PROCESS: WHAT IS IT?

In the crucial constitutional paragraphs of *Roe v. Wade*, the US Supreme Court concluded that a right of abortion is a particular kind of “substantive due process” right, a “privacy” right. The majority wrote,

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, . . . (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment . . . in the Fourth and Fifth Amendments . . . in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, . . . in the Ninth Amendment, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment . . . . These decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education . . . .

This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action [i.e., substantive

due process], as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy . . . .<sup>4</sup>

Section 1 of the Fourteenth Amendment to the US Constitution, the source of the due process guarantee, reads in relevant part: "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." Scholars have various opinions regarding the origins of the notion that the due process clause protects not just procedural rights but also substantive liberties. In 1992, in its discussion of substantive due process, the *Casey* Court wrote,

Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since *Mugler v. Kansas*, . . . (1887), the Clause has been understood to contain a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them.' . . . 'Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.' . . . '[T]he guaranties of due process, though having their roots in the Magna Carta's *per legem terrae* and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation' . . . .<sup>5</sup>

According to constitutional law scholars, John Nowak and Ronald Rotunda, the original idea that there were "rights . . . in every society whether they arose from a social compact or from divine right," and that consequently, "a higher or natural law limited the restrictions on liberty that a temporal government could impose on an individual," came from seventeenth- and eighteenth-century political and philosophical writings. These implied that judges possess an "inherent right to review the substance of legislation that either the Congress or state legislatures had enacted" (Nowak and Rotunda, 2004, 432). In a well-known passage in *Calder v. Bull*,<sup>6</sup> Justice Chase wrote famously that a state's authority might be limited by the "great first principles of the social compact" whether or not these were explicit in the Constitution.<sup>7</sup>

Substantive due process was used to protect "freedom of contract" and vested property rights. In its (in)famous opinion in *Lochner v. New York*,<sup>8</sup> the Court struck down a state law limiting working hours as an interference with liberty of contract, protected by the Fourteenth Amendment. *Lochner* fell into disfavor (Nowak and Rotunda, 2004, 444–48). By 1965, when *Griswold v. Connecticut*—one of the most important precedents for *Roe*—was handed down, the Court remained reluctant to rely on substantive due process. *Griswold* held rather that "penumbras and emanations" from existing amendments in the bill of rights indicated the existence of a right of privacy that included the right to access contraception.<sup>9</sup> Later, however, *Griswold* came to be understood as a substantive due process case; *Roe*, as

evidenced above, specifically relied on it as such. By 1985, in a statement endorsed unanimously by the Justices of the Supreme Court, substantive due process was described as follows: “we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments.”<sup>10</sup>

The modern inquiry by which an interest is assessed to determine whether it qualifies as a substantive due process right indicates why a positive conclusion carries so much potential cultural significance. Justice White in his dissent in the abortion case *Thornburgh v. Planned Parenthood* (the high-water mark of antipathy toward state abortion regulation) describes this inquiry as follows:

One approach has been to limit the class of fundamental liberties to those interests that are “implicit in the concept of ordered liberty” such that “neither liberty nor justice would exist if [they] were sacrificed.” . . . Another, broader approach is to define fundamental liberties as those that are “deeply rooted in this Nation’s history and tradition.”<sup>11</sup>

White added that neither of these “distillations of the possible approaches to the identification of unenumerated fundamental rights” are or even “purport to be . . . precise legal tests or ‘mechanical yardstick[s].’” Rather, they seek to “identify some source of constitutional value that reflects not the philosophical predilections of individual judges but basic choices made by the people themselves in constituting their system of government—the balance struck by this country—and they seek to achieve this end through locating fundamental rights either in the traditions and consensus of our society as a whole or in the logical implications of a system that recognizes both individual liberty and democratic order.” White adds that it is “debatable” whether either of these approaches can prevent “judges from roaming at large in the constitutional field.”<sup>12</sup>

The *Roe* Court relied on the categories of “personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ in order to find abortion a substantive due process right.”<sup>13</sup> The *Casey* Court’s plurality opinion (an opinion joined by fewer than a majority of the court but containing the *holding* joined by a majority) continued, “substantive due process adjudication . . . 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.’” It is a “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.”<sup>14</sup>

*Roe* and *Casey* located the abortion right within a particular aspect of substantive due process called the “right of privacy.” A little about the origins of the privacy right will help further to explain what the Supreme Court was conveying about abortion and the related matters of relationships and parenting, when it held abortion to fall within this subset.

Some claim that the unenumerated “right of privacy” had its origins in an 1890 *Harvard Law Review* article by the same name authored by Warren and Brandeis (1890). It was further supported by Justice Brandeis’ famous dissent in *Olmstead v. US*<sup>15</sup> wherein he spoke of the “right to be alone” as the “most comprehensive of rights and the right most valued by civilized man.”<sup>16</sup> Several constitutional cases thereafter—as noted in *Roe* and *Casey*—then upheld parents’ rights to make decisions regarding their children.<sup>17</sup>

The first extended discussion of the right of privacy, however, appeared in Justice Harlan’s dissent in *Poe v. Ullman*<sup>18</sup> (concerning married couple’s right to use birth control), the opinion that became the basis of the majority opinion in *Griswold v. Connecticut*, which in turn proved to be an essential building block for *Roe v. Wade*. *Griswold*,<sup>19</sup> as described above, found a right of privacy in the “penumbras” and “emanations” of textual constitutional amendments implying the significance of privacy (e.g., rights of association, against quartering soldiers in peacetime without consent, and unreasonable searches and seizures).<sup>20</sup> The Court said that the contents of these penumbras and emanations are determined by “what is necessary to make the express guarantees fully meaningful”<sup>21</sup> or by identifying those additional rights without which “the specific rights would be less secure.”<sup>22</sup> As already noted above, while the *Griswold* Court did not rely on due process to strike down Connecticut’s ban on the use of contraceptives by married persons, the case was later interpreted as a due process decision. The majority reasoned that the ban implicated privacy because it “operates directly on an intimate relation of husband and wife,”<sup>23</sup> and involves a private place, the marital bedroom.<sup>24</sup>

A later Supreme Court birth control decision, *Eisenstadt v. Baird*<sup>25</sup> extended the right of privacy “inher[ing] in the marital relationship”<sup>26</sup> to single persons, saying,

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible . . . . [T]he 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>27</sup>

Then came *Roe*, locating the right of abortion squarely within the scope of the Fourteenth Amendment substantive due process privacy right. Nineteen years later, the *Casey* decision described the constitutional privacy “tradition” as protecting “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>28</sup>

Substantive due process jurisprudence regularly attracts criticism on the grounds either that it gives judges and their subjective opinions too much



power—and commensurately reduces the power of the elected branches of government—or that it proceeds with too much attention to the claims of individuals without sufficient attention to others affected by so-called “private” actions. It has been particularly harshly criticized in the abortion context by Justice White, on two grounds: first that abortion is *sui generis*, because it involves the destruction of a human “entity,” and is therefore “different in kind from the other [decisions] that the Court has protected under the rubric of personal or family privacy and autonomy . . . .”<sup>29</sup> Second, White has criticized it because “many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy,” indicating that “the values animating the Constitution do not compel recognition of the abortion liberty as fundamental.”<sup>30</sup>

Yet substantive due process is very much alive in the realm of relationships and parenting. It is the law we have now, and will have for the foreseeable future. Almost certainly, it will continue powerfully to affect the culture. Part III of this essay will now explore what *Roe* and *Casey*’s substantive due process discussions instructed about what American freedom implies or requires in connection with relationships and parenting.

### III. ROE AND CASEY

At issue in *Roe v. Wade* was the constitutionality of a Texas abortion statute banning abortion save when the mother’s life was at stake. The Supreme Court struck down the statute as a violation of a newly limned constitutional right of abortion, an aspect of the substantive due process “right of privacy.” In the crucial paragraphs, as reprinted *supra*, the *Roe* Court concluded that a “woman’s decision whether or not to terminate her pregnancy” is a “personal right that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty.’”<sup>31</sup>

Surprisingly, the Court did not address at length the reasons why abortion need be an essential aspect of ordered liberty. To the extent it did, it moved in two steps. In step one, the Court associated abortion with a grouping of previously recognized substantive due process rights to make decisions concerning the family. These included decisions about marriage, preserving the ability to procreate (as against a criminal sterilization penalty), deciding how to educate one’s children, and deciding to use birth control.<sup>32</sup>

In step two, the Court listed the harms it believed women would suffer without abortion. In other words, it listed problems the Court believed that a woman’s constitutional liberty entitled her to avoid, via abortion:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm *medically* diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a *distressful life and future*. *Psychological* harm may be imminent. *Mental and physical health* may be taxed by *child care*. There is also

the distress, for all concerned, associated with the *unwanted child*, and there is the problem of bringing a child into a *family already unable, psychologically and otherwise, to care for it*. In other cases, as in this one, the additional difficulties and continuing *stigma of unwed motherhood* may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.<sup>33</sup>

In sum, *Roe* instructed that the right to avoid distress of any kind or amount, in connection with pregnancy or parenting, whether as a consequence of one's internal reflections or the reactions of others, has constitutional weight. Interestingly, the Court seemed to lay more stress on the woman's mental and emotional satisfaction than on her bodily health.

By contrast with this focus on myriad aspects of a woman's health, the next part of the Court's opinion—considering the state's interest in unborn life—is silent about the well-being of this form of life. The opinion at this point rather considers varying religious and philosophical views about when life begins. The Court also noted “embryological data that . . . indicate[s] that conception is a ‘process’ over time, rather than an event,” and the development of new medical techniques that involve handling the embryo as if it did not merit the same respect due to born life. Finally, it also looked at various US laws that refused to recognize or protect human life before birth.<sup>34</sup>

Immediately, one can see the correlation between this part of the *Roe* opinion and today's relationship culture, which features a lower birth rate, later childbirth, and a still-high abortion rate. *Roe* strikes a tone unfavorable to motherhood. It suggests that there are many ways in which childbearing might impede (or worse) women's flourishing. It also suggests the relative unimportance of unborn life. This tone continues in the next important case in which the Supreme Court affirmed the link between abortion and women's freedom, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>35</sup>

The *Casey* Court adjudicated the constitutionality of several Pennsylvania abortion regulations and also responded to the request of the US Solicitor General (as *amicus curiae*) to overturn *Roe*.<sup>36</sup> The Court upheld abortion as a substantive due process right, albeit it demoted abortion from its prior status as a “fundamental right” to a “liberty” interest. Defining substantive due process rights, the Court wrote that they encompassed “a realm of personal liberty which the government may not enter,”<sup>37</sup> and a “rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints.”<sup>38</sup> Like *Roe*, *Casey* concluded that abortion was a substantive due process right in two steps. First, abortion was deemed a member of the group of due process rights to make “*personal* decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>39</sup> Its second step was even more individualistic and adult focused than *Roe*'s. *Roe* affirmed a woman's right to avoid suffering in connection with pregnancy and parenting; *Casey* declared a right to choose abortion as

a way of exercising autonomy and self-definition, and even of understanding and *creating* the meaning of life. The Court wrote,

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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>40</sup>

The Court gestured toward the meaning of abortion outside the mind of the mother, acknowledging that “it is more than a philosophic exercise. . . . It is an act fraught with consequences for others,” including “depending on one's beliefs, for the life or potential life that is aborted.”<sup>41</sup> This possibility, however, led nowhere. In follow-up reflections, the Court—mirroring *Roe's* linking of women's freedom and abortion—wrote rather,

[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society . . . .<sup>42</sup> [C]onsequently, this ‘deep, personal character’ of the abortion decision compels its protection as a constitutional liberty, whether or not it destroys human life.<sup>43</sup>

Finally, in the portion of its decision addressing whether *Roe* should be overruled, the *Casey* Court could not have been more explicit in framing legal abortion as a shaper of culture in connection with decisions about sex, and women's plans and social roles. Equating abortion with women's “ability to control their reproductive lives,” it wrote, “for two decades of economic and social developments, people have *organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail*. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives . . . .”<sup>44</sup> It referred to “*people . . . [bawling] ordered their thinking and living around [Roe]*.”<sup>45</sup> Later, continuing the theme of the link between abortion and women's freedom, it wrote, “An 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>46</sup>

Like *Roe*, but to a more dramatic degree, *Casey* tied abortion rights to women's prospects. It placed mothering in a negative light. And it explicitly indicated a role for the Court in shaping modern mores on "intimate relationships" by delineating and providing a "liberty" to women not to parent the children they conceived.

Post-*Roe*, and both pre- and post-*Casey*, the Supreme Court had the opportunity to adjudicate the constitutionality of many states' abortion laws. These cases contain commentary about abortion and related matters, which is relevant to today's cultural practices regarding relationships and parenting. Part IV takes up these cases, their messages, and how these correlate with current relationship practices.

#### IV. ADDITIONAL OBSERVATIONS ON THE SCOPE OF "LIBERTY" IN CONNECTION WITH RELATIONSHIPS AND PARENTING

Because *Roe* adjudged abortion a *federal* constitutional right, after 1973, abortion clinics regularly challenged state abortion laws in federal courts. Many cases found their way to the US Supreme Court, leading to thirty-nine years of opinions exploring further aspects of the abortion liberty. In the course of these opinions—whether because of the contents of the particular state law at issue (e.g., spousal consent and parental involvement), or because of the Court's own reasoning processes—there appears a great deal of reflection about the meaning of freedom in connection with relationships and parenting. In what follows, I consider the leading themes taken up in these opinions and their correlation with the way relationships and parenting are lived today.

##### Minors and Sex

In several cases, the Supreme Court has required states to leave minors free of parental supervision regarding abortion if the minor chooses to seek instead the involvement of a judge.<sup>47</sup> With this small exception (the "judicial bypass"), the Court has applied to minors nearly equally strong constitutional rights language respecting abortion. In so doing, the Court has implied a robust freedom for minors in the sexual arena. Striking down a parental involvement law in *Bellotti v. Baird*,<sup>48</sup> for example, the Court said, "Moreover, the potentially severe detriment facing a pregnant woman . . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor."<sup>49</sup>

Today, assisted by the contents of a great deal of government-funded sex education, "rights-based" thinking about teenage sex—free from parental involvement—is pervasive. For example, the leading US recipient of federal and state funding for adolescent sex education and services, the Planned

Parenthood Federation of America,<sup>50</sup> advises teens directly on its popular website that when considering “when I’m ready” for sex, teens should consult most particularly their personal values and goals, desires, taste for risk, desire for self-expression, knowledge of “safe sex,” and personal motivations. It further advises them to consider *whether* they value any “messages . . . from your family” or “religious, moral or spiritual views” on sex (Planned Parenthood Federation of America, 2013). Early (teenage) adoption of the notion that nonmarital sex is a nearly completely private decision, and divorced from procreation, is naturally associated with later practices concerning relationships and parenting.

### Men, Fatherhood, and Marriage: Danger, Conflict, and Individualism

Two Supreme Court decisions addressed state laws requiring husband’s involvement (via notification or consent) before a wife’s abortion. These provoked the Court to write about men’s character and about fatherhood and the nature of the spousal relationship. Respecting the spousal notification provision at issue in *Planned Parenthood of Missouri v. Danforth*,<sup>51</sup> for example, the Court began by emphasizing the independence of each spouse. It quoted the iconic language of *Eisenstadt* on this point<sup>52</sup> about the marital couple as “an association of two individuals each with a separate intellectual and emotional makeup,” versus an “independent entity with a mind and heart of its own.”<sup>53</sup>

When it comes to abortion, therefore, the Court insisted that one of the pair has to yield, the man:<sup>54</sup> “Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.”<sup>55</sup>

The *Danforth* Court ignored the possibility of an organic relationship, preexisting the state, between (even a married) father and child, opining, “we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right.”<sup>56</sup> In other words, women have an intrinsically recognizable relationship with their children; men—genetic fathers—do not.

The *Casey* Court added that to recognize a man’s interest or authority (concerning life or death) respecting an unborn child is to countenance a “view of marriage . . . repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry.”<sup>57</sup>

*Casey* also characterized husbands, and therefore marriage, as violent. Despite the fact that the spousal consent law there at issue contained exceptions for pregnancies resulting from reported spousal sexual assault, and for situations in which the “woman believes that notifying her husband will cause him or someone else to *inflict bodily injury* upon her,”<sup>58</sup> the

Court concluded that such a large number of men were likely to employ other types of violence (e.g., psychological, verbal, and financial), without any prior evidence of it in the marriage, that the spousal consent requirement would deter too many women from seeking abortion. The statute was therefore deemed “unduly burdensome” and struck down as a violation of women’s liberty.<sup>59</sup> It should be noted that in its discussion of spousal violence, the Court regularly relied on statistics that conflated unmarried and married men’s behavior (“Intimate Partner Violence”);<sup>60</sup> the Court failed to mention that married men are much less likely to abuse their spouses (Bachman, 1994; tables 2 and 3).

Reflecting on this theme, it is curious that abortion jurisprudence should so sharply separate men’s interests from their children’s at precisely the same time in history that men are encouraged to understand themselves as equally responsible parents. In the abortion context, however, women’s rights reign supreme and men are the object of suspicion. It is easy to see a correlation between this theme and the trend against “shotgun marriage” (marriage because the woman is pregnant) in the past several decades (Akerlof and Yellen, 1996). Consequently, increasing numbers of children are born outside of marriage (Martin et al., 2010). Single-parent households are disproportionately headed by women, and unmarried, nonresident fathering predicts strongly for low levels of father involvement (Carlson, 2006). There is a further apparent correlation between the Court’s messages about men and marriage, and reduced marriage rates, later marriage, continuing high divorce rates, and the strenuous objections lodged against state-funded marriage promotion efforts by those who persistently associate marriage with domestic violence (National Organization for Women Legal Defense and Education Fund, 2005).<sup>61</sup>

### Adults Matter More Than Children

Two abortion cases struck down requirements that abortion doctors alter abortion procedures in favor of saving postviability children. In *Colautti v. Franklin*,<sup>62</sup> the Court said that there could be no “trade-off” between the woman’s health and additional likelihood of fetal survival.<sup>63</sup> The Court reasoned similarly in *Thornburgh* saying that because the language of the statute “is not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus,” it was “facially invalid.”<sup>64</sup> It should also be said that abortion cases’ general lack of attention to the situation of, or consequences of abortion for, unborn human life, compared with the attention lavished on the subject of women’s interests, reveals a preference for adults’ interests over children’s.

This vaulting of adults’ interests over children’s correlates with adults’ tendencies today to make decisions about relationships and parenting from an adult point of view. Laws and practices in the areas of divorce, nonmarital

sex, cohabitation, and even the new reproductive technologies are not at all, or not sufficiently, attentive to outcomes for children. A review of primary legislative and judicial sources in these areas reveals a strong tendency to treat adults' interests at length, and consider children, if at all, briefly or with the "aid" of questionable empirical literature (Alvaré, 2005, 101).

### Sexual Expression Rules

As reprinted above, the "mystery of life" passage from the *Casey* decision regards all decisions about "intimate" matters—sex, pregnancy, and parenting—from a purely individualistic and self-serving perspective. There is no mention in this definition of liberty that nearly all "intimate" decisions involve a sexual partner, and perhaps a spouse or a child. The *Casey* passage was later quoted and relied upon in the Supreme Court's decision granting constitutional rights status to homosexual sodomy. In *Lawrence v. Texas*,<sup>65</sup> after the Court suggested that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring"<sup>66</sup> (an unproved assumption intended to facilitate sodomy taking its place alongside preexisting substantive due process rights about "family"), the Court concluded that the decision to engage in a particular form of sexual expression was covered by the substantive due process right of privacy.

Such a viewpoint easily comports with the decision, so frequently made today, to engage in a wide variety of sexual expression, with or without marriage, and without consideration of the social effects of sex. It also has a way of elevating the importance of sexual expression generally, due to its linking this behavior with constructing the very meaning of life and of the "universe." This viewpoint is a perfect fit with the arguments to normalize or even institutionalize nonmarital births, cohabitation, and same-sex unions.

## V. CONCLUSION

Substantive due process litigation concerning abortion has acted as a forum for Supreme Court discourse not only about the link between abortion and freedom but also about "what freedom looks like" in connection with heterosexual relationships and parenting. It is difficult or impossible to gauge empirically how much the Court's abortion opinions have influenced cultural beliefs and practices in these areas. It is indisputable, however, that the ways of "freedom" in relationships and parenting, as described by the Court, bear a close relationship to the beliefs and practices exhibited today by increasing numbers of American men and women.

These beliefs and practices are increasingly alien to Roman Catholic principles not only concerning respect for life but also the goods of marriage, the meanings of sexual intercourse and created sexual identity, and the duties

owed to children. In short, they contradict a wide swath of Catholic teaching about what constitutes “freedom” in the realms of sex, marriage, and parenting. Consequently, it has become necessary, in order for a Catholic academic (or even a parent or teacher) to speak to emerging adults of any religion or none—or to speak to the wider community—to begin by defying current definitions of many fundamental concepts, before broaching specific issues. Freedom has to be redefined in a way that links freedom with truth, with nature, and with the good of the community, particularly the most dependent and vulnerable. The “person” has to be described with reference to the body and to the mind. Only then can Catholic teachings about respect for all human life, sexual norms, and marriage even begin to make sense in the midst of the current and dominant legal and cultural discourse. The task is daunting but ultimately rewarding. As noted above, extant notions of freedom in the context of sex, marriage, and relationships do not appear to serve women, men, or children terribly well. There is still room for authoritative and reasoned teaching that speaks to people’s lived experience.

## NOTES

1. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 US 747, 791 (1986) (White and Rehnquist, JJ., dissenting).
2. 410 US 113 (1973).
3. 505 US 833 (1992).
4. *Roe v. Wade* 410 US at 153.
5. *Planned Parenthood v. Casey*, 505 US at 846–47.
6. 3 US (3 Dall.) 386 (1798).
7. *Id.* at 388.
8. 198 US 45 (1905).
9. 381 US at 484.
10. *Regents of the University of Michigan v. Ewing*, 474 US 214, 225–26 (1985).
11. *Thornburgh*, 476 US at 790–91 (White and Rehnquist, JJ., dissenting) (citations omitted).
12. *Id.* at 791.
13. *Roe*, 410 US at 153.
14. 505 US at 849–50, quoting *Poe v. Ullman*, 367 US, at 542, 81 S.Ct., at 1776 (opinion dissenting from dismissal on jurisdictional grounds).
15. 277 US 438, 478 (1928).
16. *Olmstead v. US*, 277 US 438, 478 (1928).
17. See, for example, *Meyer v. Nebraska* (1923) (parents’ rights to educate their children in a foreign language) and *Pierce v. Society of Sisters* (1925) (parents’ rights to send their children to a religious school).
18. 367 US 497 (1961) (Harlan, J., dissenting).
19. 381 US 479 (1965).
20. *Id.* at 482–85.
21. *Id.* at 483.
22. *Id.* at 482–83.
23. *Id.* at 482.
24. *Id.* at 485–86.
25. 405 US 438 (1972).
26. *Id.* at 453.



27. *Id.*, citing *Stanley v. Georgia*, 394 US 557 (1969), *Skinner v. Oklahoma ex rel. Williamson*, 316 US 535 (1942), *Jacobson v. Massachusetts*, 197 US 11 (1905).
28. 505 US at 851.
29. *Thornburgh*, 476 US at 792 (White and Rehnquist, JJ., dissenting).
30. *Id.* at 793–94 (White and Rehnquist, JJ., dissenting).
31. 410 US at 153 (1973).
32. *Id.* at 152–53.
33. *Id.* at 153 (emphasis added).
34. 410 US 161–62.
35. 505 US 833 (1992).
36. *Id.* at 844.
37. *Id.* at 848.
38. *Id.* at 848, quoting *Poe v. Ullman*, *supra*, 367 US, at 543 (Harlan, J., dissenting) opinion dissenting from dismissal on jurisdictional grounds).
39. *Id.* at 851.
40. *Id.* at 851.
41. *Id.* at 852.
42. *Id.* at 852–53.
43. *Id.* at 853.
44. *Id.* at 856 (emphasis added).
45. *Id.* at 856 (emphasis added).
46. *Id.* at 860.
47. *Bellotti v. Baird*, 443 US 622 (1979).
48. *Id.*
49. *Id.* at 642.
50. *Planned Parenthood Federation of America* (2011) reports receiving \$487.4 million in tax dollars over a twelve-month period and performing 329, 455 abortions during fiscal year 2009–2010.
51. 428 US 52 (1976).
52. *Eisenstadt*, 405 US at 453.
53. *Danforth*, 428 US at 70.
54. *Id.* at 72.
55. *Id.* at 71.
56. *Id.* at 70.
57. 505 US at 838.
58. *Id.* at 887.
59. *Id.* at 893 (emphasis added).
60. *Id.* 891–94.
61. “Finally, because of the prevalence of intimate violence among women receiving public assistance, promotion of marriage will jeopardize the safety and lives of women and their children.”
62. 439 US 379 (1979).
63. *Id.* at 400.
64. 476 US 769.
65. 539 US 558 (2003).
66. *Id.* at 568.

## REFERENCES

- Akerlof, G. A., M. L. Katz, and J. L. Yellen. 1996. An analysis of out-of-wedlock childbearing. *Quarterly Journal of Economics* 111:277–317.
- Akerlof, G. A. and J. L. Yellen. 1996. New mothers, not married: Technology shock, the demise of shot-gun marriage and the increase in out-of-wedlock births. Brookings Institute. <http://www.brookings.edu/research/articles/1996/09/fall-childrenfamilies-akerlof> (accessed July 17, 2013).

- Alvaré, H. M. 2005. The turn toward the self in marriage: Same-sex marriage and its predecessors in family law. *Stanford Law and Policy Review* 16:135–96.
- Bachman, R. 1994. *Violence Against Women: A National Crime Victimization Survey Report*. Washington, DC: US Department of Justice.
- Carlson, M. J. 2006. Family structure, father involvement, and adolescent outcomes. *Journal of Marriage and Family* 68:137–54.
- Elliott, D. B. and T. Simmons. 2011. Marital events of Americans. US Census Bureau. <http://www.census.gov/prod/2011pubs/acs-13.pdf> (accessed July 17, 2013).
- Guttmacher Institute. 2011. Facts on induced abortion in the United States. Guttmacher Institute. [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.html](http://www.guttmacher.org/pubs/fb_induced_abortion.html) (accessed July 17, 2013).
- Martin, J. A., B. E. Hamilton, P. D. Sutton, S. J. Ventura, T. J. Mathews, and M. J. K. Osterman. 2010. Births: Final data for 2008. *National Vital Statistics Report* 59:1–72.
- National Organization for Women Legal Defense and Education Fund. 2005. Why NOW legal defense opposes federal marriage promotion in TANF reauthorization. Legal Momentum: The Women’s Legal Defense and Education Fund.
- Nowak, J. E. and R. D. Rotunda. 2004. *Constitutional Law*; 7th ed. St. Paul, MN: Thompson West.
- Planned Parenthood Federation of America. 2011. Annual report 2009–2010. Planned Parenthood Federation of America. [http://issuu.com/actionfund/docs/ppfa\\_financials\\_2010\\_122711\\_web\\_vf?e=1994783/2039600](http://issuu.com/actionfund/docs/ppfa_financials_2010_122711_web_vf?e=1994783/2039600) (accessed July 17, 2013).
- . 2013. Info for teens, “Am I ready for sex?” Planned Parenthood Federation of America. <http://www.plannedparenthood.org/info-for-teens/sex-masturbation/am-ready-sex-33826.htm> (accessed July 17, 2013).
- Regnerus, M. and J. Uecker. 2011. *Premarital Sex in America: How Young Americans Meet, Mate, and Think About Marrying*. New York: Oxford University Press.
- US Census Bureau. 2011. America’s families and living arrangements: 2011. Table A2: Family status and household relationship of people 15 and over, by marital status, age and sex: 2011. US Census Bureau. <http://www.census.gov/population/socdemo/hh-fam/cps2011/tabA2-all.xls> (accessed July 17, 2013).
- . 2012. Statistical abstract of the United States. Table 78: Live births, deaths, marriages and divorces: 1968–2008. US Census Bureau. <http://www.census.gov/compendia/statab/2012/tables/12s0078.pdf> (accessed July 17, 2013).
- Warren, L. and S. Brandeis. 1890. The right to privacy. *Harvard Law Review* 4:193–220.
- Wildsmith, E., N. R. Steward-Streng, and J. Manlove. 2011. *Childbearing Outside of Marriage: Estimates and Trends in the United States*. Washington, DC: Child Trends.