

Appendix I – Select Supreme Court Cases

Meyer v. Nebraska (1923)

Meyer v. Nebraska of 1923 involved the constitutionality of a ban enacted by the state legislature of Nebraska on teaching children below eighth grade in any language other than English.¹

In striking down this law, the Court noted that while it had not tried to precisely define which liberties are protected by the due process clause of the Fourteenth Amendment, it had identified some of them, including “not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”² The Court singled out two liberties restricted by this law – the right of some teachers to freely pursue their profession, and the right of parents to select what they believe is the best education for their children.

Pierce v. Society of Sisters (1925)

Two years later, in 1925 the Court was called upon to rule on a case involving school choice. In *Pierce v. Society of Sisters*, the Court determined that a law that would have required all children of the state of Oregon to be educated in a public school was a clear violation of the parents’ right to educate their children as they see fit.³ The law would have made it illegal for parents to send their children to private schools run by the Society of Sisters, a non-profit organization with a long history of providing educational services in the state. The Court found that this law was inconsistent with the 1923 ruling in *Meyer v. Nebraska*.

Skinner v. Oklahoma (1942)

The only ruling that specifically recognizes a right to procreation is *Skinner v. Oklahoma*.⁴ At issue in this case was an Oklahoma statute that required compulsory sterilization of individuals who had committed two or more felonies. In dictum, the Court noted: “We are dealing here with legislation which involves *one of the basic civil rights of man. Marriage and*

¹ See 262 U.S. 390 (1923).

² See 262 U.S. 390, 399 (1923).

³ See 268 U.S. 510 (1925).

⁴ See 316 U.S. 535 (1942).

procreation are fundamental to the very existence and survival of the race.”⁵ Its rhetoric notwithstanding, the Court struck down this statute on equal protection, not on substantive due process grounds. The Court pointed out that under this statute, individuals who had committed grand larceny three times would have been sterilized, whereas repeated embezzlement for the same sum of money would go entirely unpunished. In this sense, the ruling is not centered on reproductive rights per se, though the nature of the punishment is clearly a central consideration in this ruling. Moreover, the ruling only establishes a right to preserve one’s procreative capacity; it does not focus procreation per se.

Griswold v. Connecticut (1965)

Until the early 1960s, the Court had ruled narrowly on the merits of specific privacy-related cases and avoided any generalization that would have suggested the existence of a broad right to privacy. A right to privacy existed, but only for those familial choices identified by the Court as deserving constitutional protection. Obviously, this approach leaves very little room for generalizations to other familial choices. If a right to privacy existed at all, it was a highly fragmented and narrowly circumscribed right. This situation changed dramatically in 1965 when the Court, for the first time, ruled that privacy was indeed a right protected by the Constitution.

Griswold v. Connecticut involved the executive director of Planned Parenthood who, by advising married couples on means of preventing pregnancy, was arrested for violating a Connecticut statute that prohibited both the use of and any assistance in using contraceptives.⁶

The Court found that the case involved the substantive due process clause of the Fourteenth Amendment,⁷ but pointed out that in the past this clause had been invoked in conjunction with business affairs,⁸ whereas the present law “operates directly on an *intimate relation of husband and wife* and their physician’s role in one aspect of that relation.”⁹ Noting that this case touched on “a *relationship* lying within the zone of privacy created by several fundamental constitutional guarantees,”¹⁰ the Court asked rhetorically, “[w]ould we allow the police to search the sacred

⁵ See 316 U.S. 535, 541 (1942), emphasis added.

⁶ See 381 U.S. 479 (1965).

⁷ Ever since *Mugler v. Kansas* (1887) [123 U.S. 623, 660-661], the Court has recognized that due process includes two components – a procedural and a substantive element. Thus, the state cannot deprive citizens of life, liberty, or property without following certain procedures designed to ensure fairness. But the state cannot simply invoke procedural fairness as the basis for imposing arbitrary legislation. To infringe upon these liberties, the state not only must provide a “compelling interest,” but it must also demonstrate a “rational relationship” between state interests and legislative means.

⁸ After *Lochner v. New York* (1905) [198 U.S. 45], substantive due process had come to be seen as synonymous with judicial overreach.

⁹ See 381 U.S. 479, 482 (1965).

¹⁰ See 381 U.S. 479, 485 (1965).

precincts of *marital bedrooms* for telltale signs of the use of contraceptives? The [...] very idea is repulsive to the notions of privacy surrounding the *marriage relationship*.”¹¹

Critical to the Court opinion was the determination that marriage is protected by the “penumbras” of several articles of the Bill of Rights. For example, the right of association is contained in the penumbra of the First Amendment; the penumbra of the Third Amendment protects “against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner”; and the Fourth Amendment explicitly establishes “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment, in its self-incrimination clause, creates a “*zone of privacy* which government may not force him to surrender to his detriment.” The Court also found that the Ninth Amendment – “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” – suggests that a fundamental right to privacy exists even though it is not explicitly mentioned in the Constitution.

Much has been said about this landmark legal opinion. Strict constructionists have criticized this ruling as a classic example of the Court discovering a fundamental right that is nowhere to be found in the Constitution or the Bill of Rights. Others have argued that this opinion did not simply create a new fundamental right, but that it was based on numerous Court precedents. The controversy was exacerbated by the fact that the Court established a right to privacy without elaborating on the nature of the activities protected by this right. Using contraceptives, along with the rights enumerated in this opinion (marriage, raising and educating children, and so on), does enjoy constitutional protection, but since the Court did not specify the outer boundaries of the right to privacy, it is unclear whether and to what extent other activities – activities that would most likely be regarded as private – do deserve constitutional protection. Here, we simply note that this ruling can be read in both narrow and broad ways. Narrowly, it establishes a right for married couples to use contraceptives; more broadly, it identifies marital relationships as a private area that the state can intrude on only by demonstrating a compelling interest.

Eisenstadt v. Baird (1972)

In *Eisenstadt v. Baird*, the Court was called upon to determine the constitutionality of a Massachusetts statute that proscribed the distribution of contraceptives to unmarried individuals.¹² The Court found that the Massachusetts statute violated the equal protection clause of the Fourteenth Amendment. The Court noted that the Fourteenth Amendment does not deny the state the power to treat different classes of citizens differently, but it found that the reasons offered by the state of Massachusetts for discriminating between married and unmarried individuals were wholly unrelated to the purported intentions of this law. The Court observed that if “[...] under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to *unmarried persons* would be equally impermissible. It is true

¹¹ See 381 U.S. 479, 485-486 (1965).

¹² See 405 U.S. 438 (1972).

that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet 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.*¹³

Eisenstadt v. Baird is often mentioned as a Court ruling reaffirming *Griswold* and the right to privacy, but it should be pointed out that the Court struck down the Massachusetts statute specifically on equal protection grounds. One may wonder if the “decision whether to bear or beget a child” also encompasses the right to have a child by whatever technical means. The substantive context of this ruling – the use of contraceptives by unmarried persons – suggests that the Court had mainly the right not to have children in mind. A right to privacy would clearly protect this right, but how far the Court would go in protecting the opposite choice remains a matter of speculation.

Stanley v. Illinois (1972)

Stanley v. Illinois called on the Court to rule on the constitutionality of an Illinois statute that assigned the custody of an unmarried father’s children to the state after the death of the mother, without granting the father an opportunity to demonstrate his fitness as a parent.¹⁴ Noting that the Court has frequently recognized the importance of the family and that the “rights to conceive and to raise one’s children have been deemed essential,”¹⁵ the Court determined that the Illinois statute violated the Fourteenth Amendment’s due process and equal protection clauses. The Court recognized the state interest in protecting the well-being and the health of children, but questioned the means of pursuing these legitimate state interests. Once again, the Court focused on family matters as one area that deserves special constitutional protection, but whether the “rights to conceive and to raise one’s children” should be taken to include a positive procreative right is unclear.

Roe v. Wade (1973)

A milestone in the constitutionality of reproductive choices was the 1973 *Roe v. Wade* ruling.¹⁶ In this case, the Court was called upon to decide the constitutionality of a Texas law that allowed interrupting a pregnancy based solely on previous medical advice. *Roe*, a single pregnant woman whose health was not threatened by her pregnancy, argued that the Texas abortion law was unconstitutionally vague and it infringed upon her right to privacy. The Court

¹³ See 405 U.S. 438, 453 (1972).

¹⁴ See 405 U.S. 645 (1972).

¹⁵ See 405 U.S. 645, 651 (1972).

¹⁶ See 410 U.S. 113 (1973).

acknowledged that a right to privacy is not explicitly mentioned in the Constitution, but it went on to point out that a long line of rulings going as far back as 1891 had established the existence of such a right. These rulings involve “fundamental rights” to personal privacy, a right that “has some extension to activities relating to *marriage*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *procreation*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 -542 (1942); *contraception*, *Eisenstadt v. Baird*, 405 U.S. at 453 -454; *id.*, at 460, 463-465; *family relationships*, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and *child rearing and education*, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), *Meyer v. Nebraska* [...].”¹⁷

Of all the rights recognized in this ruling, none can be interpreted as recognizing a positive right to procreate. *Skinner* does focus, *in dicta*, on procreation, but does so in terms of the *capacity* to procreate, not on the procreative act per se. Once again, the Court enlarged the number of rights protected by the substantive component of the due process clause of the Fourteenth Amendment, but these rights do not include a narrowly defined procreative right.

Cleveland Board of Education v. LaFleur (1974)

The Fourteenth Amendment has been repeatedly invoked in the context of reproductive decisions. In *Cleveland Board of Education v. LaFleur*, the Court found that it is unconstitutional for school boards to mandate that pregnant women take a maternity leave at a specific point in time.¹⁸ Nor is it permissible for a statute to require that the baby has reached a minimum age before a teacher can resume her teaching activity. The Court found that “[t]he age limitation serves no legitimate state interest, and unnecessarily penalizes the female teacher for asserting her right to bear children.”¹⁹

The Court did not deny the legitimate interest of the state to ensure continuity of instruction. It also acknowledged that some pregnant women might be unable to properly carry out their duties. But it found that the regulations under scrutiny created an “irrebuttable presumption of physical incompetency,” and that a mandatory, inflexible cut-off date was too rigid a rule. Noting that the Court “has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause” it struck down the school board provisions as not having a “rational relationship to the valid state interest of preserving continuity of instruction.”²⁰

The relevance of this case lies not only in the fact that it once again recognized the constitutional protection of marriage and family-related choices, but also in an implicit recognition of the (positive) right of a woman to bear a child.²¹

¹⁷ See 410 U.S. 113, 152 (1973).

¹⁸ See 414 U.S. 632 (1974).

¹⁹ See 414 U.S. 632, 650 (1974).

²⁰ See 414 U.S. 632, 632 (1974).

²¹ See 414 U.S. 632, 639 (1974).

Carey v. Population Services International (1977)

In *Carey v. Population Services International*, the Court had to determine whether section 6822(8) of the New York Education Law was constitutional.²² This section made it a crime for any person to sell or distribute contraceptives of any kind to a minor under 16. The Court determined, not without considerable ambivalence, that minors “are protected by the Constitution and possess constitutional rights,”²³ but refrained from enumerating these rights. It further decided that the state indeed does not have the power to impose a blanket prohibition on minors’ access to contraceptives. The Court did not deny that the stated purpose of the law, which was to discourage sexual activity among young people, served a legitimate state interest, but it found that section 6822(8) of the New York Education Law did not serve “compelling state interests.”

The majority opinion provides considerable insight into the constitutional reasoning informing this ruling. It makes clear that the “liberty” protected by the due process clause of the Fourteenth Amendment is a “right to personal privacy, or a guarantee of certain areas or zones of privacy.” The Court went on to acknowledge that “the outer limits of this aspect of privacy have not been marked,” but also made clear that over the years it has recognized a number of specific liberties. These are the same liberties enumerated early in *Roe v. Wade*.

²² See 431 U.S. 678 (1977).

²³ See 431 U.S. 678, 692 (1977).