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ARTICLES

US CONSTITUTION AND THE NOTION OF FAMILY

The risks of the Supreme Court's judicial activism through family and privacy cases

Sarolta Judit Molnár*
assistant professor (Pázmány Péter Catholic University)

Abstract

This paper examines the family and privacy jurisprudence exercised by the United States Supreme Court. These cases have provoked a substantial amount of attention from the public and politics in the history of the Court. Arguments for the decisions have been widely debated, criticized, and discussed. Arguably, some of these cases have even changed the role of the Court, the culture of the American nation, and the structure of the American society. The paper attempts to investigate these issues in detail and pose a federalist argument shedding light on the dangers of judicial activism regarding the institutions of a democratic state.

Keywords: US Supreme Court, constitutional interpretation, family, privacy

1. Introduction

The turmoil provoked by the question of abortion before the US Supreme Court seems to have been constant in the last 50 years. This paper attempts to research the underlying causes and effects of constitutional interpretation in cases of family and privacy by analyzing the argumentation of such issues and examining historical events, cultural context, and political situation surrounding them. The term family does not appear in the Constitution of the United States; however, several Supreme Court decisions have influenced, and defined fundamental family values. The dilemma is bewildering in the reasons and consequences of the influence constitutional tradition had on an area

* ORCID: https://orcid.org/0000-0002-0708-1574

which is neither a federal matter, nor does it exist as textual element of the Constitution. Therefore, the research looks at the development of these rights and how these cases have affected the function of the Supreme Court. As we look through this development, it leads us to even more fundamental questions about the operation and the state of the democratic establishment of the US. The Court is faced with the difficulty of meeting the needs of a changing society and the boundaries of its judicial power. Inventing or discovering new rights through the interpretation of the Constitution has politicized Supreme Court nominations. The fear is that this erodes the democratic process: the majority of 9 unelected judges decide policy issues via a broad interpretation of the Constitution. This is criticized as judicial activism. The article will demonstrate some of the wrongs this method has led to.

This paper does not discuss how the US legislation or legal system should or should not regulate family and privacy. Nor is this research about what the correct governance of family law would be for American society. Instead, it concerns how the existing body of law can be read and interpreted without running the risk of misusing the democratic process, disrupting the system of checks and balances, or harming the principle of separation of powers; the foundations of the American governmental system. Family seems like a catchment of water for the debated substantive due process[1]– arguably the tool of judicial law finding most frequently employed. This article consists of an analytical discussion of cases and the historical context where family, marriage, kinship, birth, and privacy were at stake. It examines the historical emergence of the concept of privacy, family, and marriage in the argumentation of the Court up until the point where, for example, marriage becomes such a fundamental right that it is defined by the Supreme Court itself. The law of family necessarily composes value judgments reflecting views of the society. Yet judges cannot impose their own values through legal interpretation since they have to remain impartial. The research also considers a critical evaluation of interpretative history in different eras of the Court and the social, political, and legal interaction of its decisions. The broader purpose of this paper is to explore the history and impact of these Supreme Court verdicts and opinions, all related to the idea of the family in US law and politics. This enables us to examine how the influence of the Court has shaped American society and what the underlying values of the United States are.

Firstly, the paper determines basic notions of family, common law, and interpretative theories. These are essential then to, examine, secondly, constitutional tradition and the evolution of rights concerning the focus of the family. Thirdly, historical perspectives are considered and problems that arose in the application of these rights, which allows for the chronological structuring of the emerging constitutional family rights. Finally, this paper suggests that limiting the evolutive interpretation might heal the distorted democratic process and restore political issues to be resolved by democratically elected legislative branches of the government.

[1] Douglas NeJaime: The family's constitution. *Constitutional Commentary* 32, 2. (2017), 413.

2. Basic Notions

2.1. Family

For this paper, we must consider the notion of family as available for courts of law. An important principle of departure must be what the law can grasp from reality, the so-called legal facts.[2] What we mean by family depends very much on the context; it may denote something different in an anthropological, genetic, folkloric, historical, sociological, or psychological context. Even though these might interact with each other, they will never mean the same thing exactly. This is especially visible in recent years, with the notion of family becoming more and more fluid.[3]

Despite the fact that there is no legal definition for the concept of family, the law understands family depending on the subject at hand: narrowly in immigration law, but broadly for succession or rent-controlled tenancy. In the US legal system, family law belongs to state legislation; however, in recent decades, this has gradually altered. One reason lies in congressional legislation, a different one in constitutional interpretation.[4] But could and should constitutional interpretation determine the content of a notion that is under change? This is further complicated by the fact that the Constitution does not contain the word family, much less a definition for it. In addition, certain legal notions in the interpretation theory of constitutional law are fundamental to understanding how 'the family' as a notion has developed through jurisprudence. But what is the role of interpretation in the American legal system?

2.2. Structural background

Although the Bill of Rights and subsequent Amendments to the Constitution affect essential rights, they were articulated well before today's understanding of fundamental rights. Despite being the oldest constitution in force today, the US Constitution has its disadvantages, indisputably. There is no modern fundamental rights charter in the US legal system and amending the Constitution is very difficult, a huge majority and political consensus is needed.[5] This has become even more difficult with the increase

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[2] Legal facts may be classified in a number of ways; these include objective facts of nature such as time or weather conditions for example in case of an accident, state measures such as real estate registry, human circumstances that cannot in principle be influenced by the person like birth or death, age, sex or filiation, and human behavior or conduct for example contracting, breaching a contract etc. Some other instances, circumstances, behaviors and facts cannot be grasped by the law such as friendship or gratitude. Further classification: Arthur L. Corbin: Legal Analysis and Terminology. *The Yale Law Journal* 29, 2. (1919), 163–164. https://doi.org/10.2307/786105

[3] C. Quince Hopkins: The Supreme Court's family law doctrine revisited: insights from social science on family structures and kinship change in the United States. *Cornell Journal of Law and Public Policy* 13, 2. (2004), 435., 438. Even arguing that the Court should adopt a fluid concept of family see at 440.

[4] Brian Bix: *The Oxford Introductions to U.S. Law: Family Law*. OUP USA, 2013. 4.

[5] U.S. Const. art. V. Two third of Congress or two third of State legislatures may propose an amendment that has to be ratified by three fourth of States or call a National Convention within a timeframe given by Congress.

in the number of States and the population. Even more so, it was intended to be difficult originally, so that future generations could not easily modify the most fundamental operative legal text of the country, to preserve its stability.

In order to describe the way constitutional interpretation operates, a landmark of cultural heritage has to be discussed: the common law tradition and its challenges in an era of statutory law.

Common law developed traditionally through decisions of the courts in England when the emerging legislative power of the Parliament was far from being substantial. On the other hand, the monarchy did not operate on the principle of democracy. Therefore, judicial lawmaking was necessary for deciding disputes between the subjects of the king. In the classical common-law system, the judge finds the law through analogies with and distinctions from prior judicial interpretation. This is obviously required if there is no written law. However, whenever there is codified law, the judge's work is to interpret the text, and the two exercises are quite different. The United States of America embraced the governing principle of separation of powers when setting up the operating rules in the Constitution; according to its text, lawmaking lies with the Congress (US Constitution art. I. 1.) on the one hand. These are the enumerated powers of the Congress, the principle of Federalism (US Constitution art. I. 8.). These expressed powers belong to the Congress, which is authorized to enact all "necessary and proper" legislation for the completion of its prerogative expressed in the Constitution. On the other hand, all other areas of legislation are left for State legislation, and this is underlined in the Tenth Amendment. The judiciary has no such mandate (US Constitution art. III.).

Essentially, the US does not have a common-law legal system, but a mixed system, with an overwhelming percentage of codified law. Nonetheless, it seems that American lawyers are not trained in the skills to interpret written law; they are much more prepared for judicial finding of the law.[6] Madison, referencing Montesquieu, in The Federalist No. 47. warns against judicial lawmaking. If the power of judgment were combined with the legislative authority, it would put the life and freedom of the citizens at risk of being arbitrarily controlled since the judge would effectively become the legislator.[7] Hamilton argued that courts are granted "neither Force nor Will" by the Constitution.[8] Criminal law, tax law, environmental law, and administrative law are governed by written law, whereas private law is rather more influenced by common law. In particular, private law belongs to State legislation and jurisdiction for the exception of uniform laws if the State has accepted it (like the Uniform Marriage and Divorce Act 9A ULA). It seems just to say what late Justice Scalia did: "We live in an age of legislation and most

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6 Mary Ann Glendon: Comment. In: Amy Gutmann (ed.): *Matter of Interpretation*. Princeton, Princeton University Press, 2018. 96.

7 James Madison: The Federalist No. 47. at 326. In: Alexander Hamilton – James Madison – John Jay: *The Federalist*. Cambridge, Massachusetts, Belknap Press of Harvard University Press, 1961.

8 Alexander Hamilton: The Federalist No. 78. at 523. Hamilton – Madison – Jay op. cit.

new law is statutory law."[9] Therefore, it is worrying that American courts lack a clear, widely accepted, and consistently implemented framework for interpreting statutes.[10]

2.3. Methods of interpretation[11]

One obvious rule for statutory interpretation is grammatical interpretation, understanding what the text says as normally understood. Whenever the text is unambiguous, this should be easy and clear. Sometimes reading the particular article of a statute does not give a clear meaning. Therefore, logical interpretation is applied, which means that using the rules of formal logics gives a better understanding. Another frequently used tool is systematic interpretation where the context of the particular article, norm, is studied for correlation to other norms. Also, historical interpretation might be helpful whenever the clarity of the norm is not perfect. However, legal norms must be applied as they are applicable at the time of application and not as the legislator intended subjectively. Still, preparatory papers and proposals might shed light on certain ambiguity. Teleological interpretation requires identifying the aim of the norm, which involves valuation. Now all of these methods are fairly standard, although the proportions are disputed. A textualist approach starts with the text of the norm, but not in a literalist way; there is room for other tools of interpretation. After all, words are inherently constrained in their meaning, and the reading that exceeds this finite scope is recreating, not interpreting.[12] Obviously, there are legal gaps, and the text is not always clear-cut; legal interpretation, therefore, involves context but it is absolutely formalistic.[13] The problem, on the one hand, might be that the boundary between creating and interpreting is not always evident. On the other hand, the common-law heritage lawyers might not see that there is a difference when it comes to interpreting codified law whereas finding the law in precedent.

As far as the interpretation of the Constitution is concerned, there is a debate between originalism and dynamism[14]. The debate concerns the question of whether the text of the Constitution should be read narrowly or developed dynamically through the Court's rulings. Dynamism or evolutionism characterizes the concept of the so-called Living Constitution. This means that the Constitution is read flexibly in order to accommodate the needs of a changing society. Whereas, an originalist reading of the

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9 Antonin Scalia: Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws. In: Amy Gutmann (ed.): *Matter of Interpretation*. 47. Princeton, Princeton University Press, 2018. 13. https://doi.org/10.1515/9781400882953-004

10 Albert M. Sacks – Henry Melvin Hart: *The legal process: basic problems in the making and application of law*. Westbury, N.Y., Foundation Press, 1994. 1169.

11 For more detail on methods of interpretation see for example: Winfried Brugger: Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View. *The American Journal of Comparative Law* 42, 2. (1994), 395–421. https://doi.org/10.2307/840752

12 Scalia op. cit. 24.

13 Scalia op. cit. 25. and 37.

14 Scalia op. cit. 38. and William N. Eskridge – Philip P. Frickey: Statutory Interpretation as Practical Reasoning. *Stanford Law Review* 42, 2. (1990), 382. https://doi.org/10.2307/1228963

Constitution gives effect to the meaning of the original text employed to the current situation. The peril of a Living Constitution is that the judge creates the content of the Constitution as what it should say.[15] There is no legal certainty if the most fundamental operational document of the country changes. The promise of the Living Constitution is flexibility. Yet, once the Supreme Court grants or denies a right, there is no room for change. Whereas until policy issues are not dealt with in constitutional jurisprudence, there is room for democratic legislation.[16] On the other hand, an originalist reading requires judgment as to how to apply the original text to modern circumstances, and this might prove difficult and not completely clear-cut either.[17]

The Supreme Court also employs tests when different rights and interests clash. Most basic is the rational basis test evaluating the necessity and proportionality of a given legislation when limiting a constitutional right. Hierarchy has also been developed in constitutional theory; when depending on the class of right that is at hand, a stricter test is adopted: intermediate scrutiny and strict scrutiny.[18] Classification of rights to the different degrees of scrutiny is also developed by the Court itself.

3. Unenumerated rights

One of the most important tools of evolutionary interpretation has been the Due Process Clause. This was originally in the Bill of Rights' Fifth Amendment, and after the Civil War, the Fourteenth Amendment also included this provision. It aimed at ending discrimination based on birth, and equal protection of all citizens of the US. Notwithstanding, non-textual interpretation led to the "separate but equal"[19] doctrine and other discriminatory decisions, the very phenomenon it had been meant to cease.

With the Fourteenth Amendment, the Court has departed from textual interpretation further than with any other. Also, it may be observed that a shift in the role of the Supreme Court has brought about changes in the approach to private matters, such as the understanding of family.[20] Meanwhile, fundamental rights have been discussed worldwide, especially since the 20th century, in the US they were particularly brought

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15 For example: death penalty explicitly contemplated in the U.S. Const. amend. V: "No person shall be (...) deprived of life (...) without due process of law", that is a person may be deprived of life by the due process of law if this is the punishment that is imposed to a capital crime and if they were found guilty in a just judicial process. This is an option for the states, their legislation does not have to impose capital punishment, but if they do, it must be according to the fundamental rules laid out in the Constitution. Despite this, a number of Supreme Court justices have argued that death penalty is unconstitutional; for example: Brennen, J dissenting in Gregg v. Georgie, 428 U.S. 153, 227 (1976).

16 Scalia op. cit. 42.

17 Scalia op. cit. 45.

18 For more on this in the context of privacy see: Emma Freeman: Giving Casey its bite back: the role of rational basis review in undue burden analysis. *Harvard Civil Rights-Civil Liberties Law Review*, 1. (2013).

19 Plessy v. Ferguson, 163 U.S. 537 (1896).

20 This is an issue the Founding Fathers had never intended to be a federal matter.

to the fore by the interpretation of substantive due process after 1905. The due process was especially employed by the Warren Court in the Civil Rights era.

Nonetheless, another tendency is unfolding with dynamic interpretation. Even if the Civil Rights era was a champion of individual rights, with every newly found "right" that the Supreme Court grants or denies, there is no room for social change. Once the Supreme Court decides that there is a right to abortion, or that the fetus is a person,[21] therefore abortion is prohibited by the Constitution, there is no possibility to legislate otherwise despite the fact that abortion is not included in the Constitution. Should constitutional values change, then there is a process deliberately difficult for amending the Constitution. The pressing social change was important enough to amend the Constitution in 1920 in order to give women the right to vote in the Nineteenth Amendment. We cannot see such a process with newly found fundamental rights, possibly because of the high political costs, as we will later see, as it happened with the Equal Rights Amendment.

Firstly, when we look at why the Constitution says nothing about issues concerning family, we find that since the chief purpose of the Constitution was to establish a new country, it mainly deals with the basic structures of government. After all, as the goal was to create a state where people are free to pursue their happiness at their best abilities, individual rights soon emerged as listed in the Bill of Rights, that is, in the first ten amendments to the Constitution. Later, subsequent amendments were added to this enumeration. Nevertheless, the Court has gradually developed the concept of unenumerated rights in its reasoning. It seems unclear what grounds the Supreme Court Justices use for finding a right in the Constitution as implied by the spirit of the law. There are numerous "new" rights in the various argumentations, however the Court is not the legislator.

The roots seem to go back to Lochner.[22] This 1905 landmark case has created an era (post-lochner) where interpretation has changed significantly. The case tackled the issue of a state statute that limited the number of working hours for bakers in New York. As a policy issue, this was for the state to legislate. Yet the Court found that it was a violation of contractual freedom as guaranteed by the Constitution in the Due Process Clause of the Fourteenth Amendment. In principle, the Court declared that "the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation"[23], nevertheless they found the New York law inconsistent with the freedom guaranteed by the Fourteenth Amendment.

The Fourteenth Amendment's wording is "…nor shall any state deprive any person of life, liberty, or property, without due process of law…"[24]. In other words, any right

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21 Even if some states want to legislate laws safeguarding embryos eg. Louisiana there is little room beacuse of Roe see further: Zoltán Navratyil: Az anyatesten kívüli embrió mint „jogi személy"?[Embryo outside the womb as „legal persons"?] In: Csehi Zoltán – Koltay András – Landi Balázs – Pogácsás Anett (ed.): *(L)Ex Cathedra et Praxis ünnepi kötet Lábady Tamás 70. születésnapja alkalmából*. Budapest, Pázmány Press, 2014. 409.

22 Lochner v. New York, 198 U.S. 45 (1905)

23 Lochner v. New York, 198 U.S. 68 (1905)

24 U.S. Const. amend. XIV.

that can be understood as *life, liberty, or property* and if regulated in some way by the government, the Court can proclaim that right to be a fundamental one, therefore annul the government regulation. The problem with this approach is that all legislation concerns life, liberty and property at one point. If employed limitlessly, this theory leads to the Court becoming a super-legislator. But the Court cannot make a policy value judgment what is not involved in the Constitution. This flows from the principle of separation of powers. Justice Holmes argued in his dissent in Lochner that New York legislation was based on a paternalistic economic theory but the decision was written on a laissez-faire economic theory.[25]

> "If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. (…) But the Constitution is not intended to embody a particular economic theory (…) It is made for people of fundamentally differing views."[26]

Therefore, in his opinion, liberty as in the Fourteenth Amendment is distorted when it is used to prevent the legislation of the majority to prevail, except for the situation where it would "infringe fundamental principles as they have been understood by the traditions of our people and our law"[27]. Lochner has been discredited subsequently by West Coast Hotel[28], however the Fourteenth Amendment Due Process Clause has taken on a life of its own. This attitude of the Court has been characterized as judicial activism, unfounded invasion of the policy making area of the branches of government, legislature via a broad or dynamic interpretation of the Constitution.[29] This enabled the due process clause to guarantee certain substantive individual rights against the states.

This judicial activism was very much employed by the Warren Court in the Civil Rights era and this tendency has not stopped since. Some are founded upon the Due Process Clause of the Fourteenth Amendment, at other times on its Equal Protection Clause. Likewise, the Ninth Amendment gained an interpretation that opens the way for unenumerated rights: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".[30] People refers to democratic legislation governed by the will of people through representative democracy.

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25 Lochner 198 U.S. at 75-76 (Holmes, J., dissenting)

26 Lochner 198 U.S. at 75-76 (Holmes, J., dissenting)

27 Lochner 198 U.S. at 75-76 (Holmes, J., dissenting)

28 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)

29 Cass R. Sunstein: Lochner's Legacy. *Columbia Law Review*, 5. (1987) 874.

30 U.S. Const. amend. IX.

The test for unenumerated rights in the Fourteenth Amendment for the Privileges and Immunities Clause had been established as in Corfield v. Coryell[31] as a right "which has, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign," that are "deeply rooted in American history and tradition".[32] For the Due Process Clause of the Fourteenth Amendment, as such a right, it "must be deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty".[33] No such history and tradition can be found about privacy as a right.[34]

4. Right to privacy

The laws invalidated based on the principle of privacy have exhibited a notable inclination to revolve around sexual matters, with significant cases relating to contraception, marriage, and abortion,[35] an area classically regulated by family law. However, the right to privacy has consistently lacked a clear conceptual framework.[36] The right to privacy has been found by the Supreme Court as one of the so-called unenumerated rights in the case of Griswold v. Connecticut[37] and later extended under Roe v. Wade. In Griswold, for example, not a single article or amendment was named, but these rights emerged from the whole of the Bill of Rights. This issue concerned Connecticut's ban on use and distribution of contraceptive tools. The Court struck down the state legislation on the basis that it intruded into marital life infringing a right of privacy that although not found explicitly in the Constitution, could be extracted from "penumbras" of the First, Third, Fourth, Fifth, and Ninth Amendment, creating "zones of privacy".[38] Nonetheless, the majority opinion carefully avoided reference to the Fourteenth Amendment and its Due Process lest it should bring an unpleasant recollection of the repudiated Lochner decision, and in fear that rooting privacy as a right in the substantive due process would give a sort of legislative force to the Court that could be used both by a conservative[39] as well as a liberal majority on the Court.

Since this case concerned the ban on contraceptives for spouses, to a certain extent, the Court dealt with the test established in Corfield v. Coryell, although not referencing it, proclaiming that the right of privacy in a marriage is deeply rooted in history, it

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31 Corfield v. Coryell, 6 Fed. Cas. 546, no. 3,230 C.C.E.D.Pa. (1823)

32 Washington v. Glucksberg, 521 U.S. 702 (1997).

33 Washington v. Glucksberg, 521 U.S. 721 (1997) referencing Snyder v. Massachusetts, 291 U. S. 97, 105 (1934) and Palko v. Connecticut, 302 U. S. 319 (1937).

34 Privacy and the right to private life has emerged in human rights theory in the 20th century and most influentially by the Universal Declaration of Human Rights article 12. adopted by the United Nations General Assembly on 10 December 1948.

35 Jed Rubenfeld: The Right of Privacy. *Harvard Law Review* 102, 4. (1989), 738. https://doi.org/10.2307/1341305

36 Rubenfeld op. cit. 739.

37 Griswold v. Connecticut, 381 U. S. 479 (1965).

38 Griswold v. Connecticut, 381 U. S. 484 (1965).

39 Peter H. Irons: *A people's history of the Supreme Court*. New York, Viking, 1999. 430.

actually precedes the Bill of Rights. Marriage might be deeply rooted in history very well, but contraception, especially as a right, is distinct from marriage as a right. Also, the State had trouble showing a compelling interest in the restriction; still the Court evaded using the rational basis test. Nevertheless, the Court, rather, created a new right from zones scattered across the Bill of Rights. Dissenting opinions in this decision claimed not that privacy was a faulty notion, but that any legislation invades a person's privacy. However, the Constitution only protects specific privacy rights, and contraception is not one of them.[40] Therefore, according to the dissenting Justices, it is not the role of the Constitution to strike down "silly laws"[41] when there is no explicit Constitutional provision as a basis for doing so.

The privacy doctrine was then extended to non-marital relationships in Eisenstadt v. Baird.[42] This involved a contraception ban by Massachusetts. The Court declared that the state legislation was unconstitutional because access to contraception must be the same for married and unmarried individuals according to the Fourteenth Amendment's Equal Protection Clause. This is surprising after Griswold for a number of reasons: different legal relationships are to be regulated differently, and the reason for granting the access for married couples to contraception in Griswold was exactly the special relationship that spouses have and the deep roots the marital relationship has in American history. In Eisenstadt this is overruled when the majority articulates that the constitutional protection has its root not in the marital relationship as such, but in the individual.[43] The Court famously stated, "if the right of privacy means anything, it is the right of the individual (…) whether to bear or beget a child"[44]. Formation of the argument this manner intrigues the question: does privacy mean anything under the Constitution? The Court does not answer, rather takes it for granted, that there is a right to privacy. The paper does not question the need for such a right, but the existence of it is doubtful with no explicit mention and the complicated argument that the so-called zones of privacy seem to be creating this right throughout the Constitution. The use of privacy and the reviving of substantive due process came about with the abortion cases that we shall discuss later in detail. The same line of expansion of the right of privacy came at a temporary halt in Bowers v. Hardwick[45] until it was overruled in Lawrence v. Texas[46]. Deeply personal choices, such as consenting adult's sexual practices were found to be under the protection of privacy from State intrusion, complemented with an equal protection argument.

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40 Griswold v. Connecticut, 381 U. S. Justice Black dissenting 508 (1965).

41 Griswold v. Connecticut, 381 U. S. Justice Stewart dissenting 528 (1965).

42 Eisenstadt v. Baird, 405 U.S. 438 (1972).

43 Eisenstadt v. Baird, 405 U.S. 439 (1972).

44 Eisenstadt v. Baird, 405 U.S. 453 (1972).

45 Bowers v. Hardwick, 478. U.S. 186 (1986).

46 Lawrence v. Texas, 539 U.S. 558 (2003).

4.1. Marriage cases

The institution of marriage had a different career path in the Supreme Court. Marriage obviously predates the history and tradition of the Nation, common law, and law in general. In the 19th century, marriage was regarded as a common law right, which means that it was governed by custom and was subject to state legislation. The importance of marriage as a civil institution appeared in a number of cases.[47] Marriage was mentioned in the Pennoyer case as a matter over which the state has absolute jurisdiction as to decide how to contract a marriage and how to end it. In Reynolds v. US, the subject appeared more as a fundamental right issue. This regarded Mormons challenging anti-bigamy laws as a breach of their First Amendment right of religious liberty. Nonetheless, the Court upheld the plaintiff's conviction of bigamy claiming that the protection of religious freedom is not limitless and does not mean any action confirmed by religious views has to be allowed. Since marriage has a long tradition of monogamy in common law, the claim was rejected.

In the third case (*Maynard),* marriage appeared as a prerequisite for gaining land and the state interest behind the decision was that Oregon wanted to encourage families to settle down. Notwithstanding, after settling down and acquiring title to the land, the husband, divorced his wife from afar while she was still waiting for him in Ohio as he had promised to either return or send for her and his children. The question was whether such restriction is against the constitutional prohibition of impairment of contracts by state legislation. Despite all, it was found that marriage, an institution of society, is the most important relation in life that has both private and social importance. Therefore, it is regulated by the authority, the state, and this power extends to regulating divorce rules even in this manner.

4.2. Change in marriage cases

Be that as it may, already after the appearance of substantive due process,[48] in 1942, the Court struck down the Oklahoma law of sterilization of criminals because marriage and procreation are fundamental to the very existence and survival of the race.[49] Later, contraception bans were abolished on the grounds that they interfered with marital privacy.[50] Both cases concerned the state legislator's policy measures on procreation and privacy. This marked the beginning of an era of judicial activism unprecedented in the previous century; with this tool, the Court can always find a right that might be infringed or restricted by a state law, or federal law, and nullify it because it would violate the due process.

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47 Pennoyer v. Neff, 95 U.S. 714 (1878), Reynolds v. United States, 98 U.S. 145 (1878), Maynard v. Hill, 125 U.S. 190 (1888).

48 Lochner v. New York, 198 U.S. 45 (1905).

49 Skinner v. State of Oklahoma, exrel. Williamson, 316 U.S. 535 (1942).

50 Griswold v. Connecticut, 381 U.S. 479 (1965).

Consequently, the fundamental right of marriage was established over the next couple of verdicts. Mr. and Mrs. Loving were convicted for breaking the interracial marriage ban of Virginia, their residence when traveling to Washington DC. to get married in 1959. Anti-miscegenation laws dated back to colonial times prohibiting whites to marry their slaves "to keep the white race clean". After the Civil War, interracial marriage bans were imposed in some Southern states. The 1967 Loving v. Virginia[51] case was essentially a racial discrimination case, however its strong ties with marriage marked the constitutional status of marriage as well. The Lovings were not only discriminated against but they were denied a basic human good, the opportunity to marry each other because they belonged to different races. The decision nonetheless was not based on the right to privacy, but on the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Much like the Brown v. Board of Education[52] case was, because segregation had been unconstitutional since the passing of the Fourteenth Amendment in 1868 that originally targeted different treatment based on race.[53]

Marriage as a fundamental right was explicitly established in the case of Zablocki v. Redhail[54]. In this case, Redhail was a father but failed to pay child support and the State of Wisconsin took care of his child. Redhail had no wealth to ever pay the debt he owed to the state. The Wisconsin law protected the interest of the state to force parents to take care of their children. Therefore, when he wanted to get married to a woman, he was denied marriage license because of his unpaid child support. Although such a state interest might be justifiable, the means of achieving this goal was to deprive Redhail of the basic right to get married, which interfered with his liberty, and the legitimate aim might have been reached in a different manner. His fundamental liberty to marry was protected by the Due Process Clause of the Fourteenth Amendment, according to the Court.

Furthermore, this reasoning was confirmed in the case of Turner v. Safley[55]which dealt with Missouri state prison regulation that practically forbade inmates to get married for safety reasons. Here, while safety is a legitimate state interest, the almost complete ban on the exercise of the fundamental right of marriage is too burdensome and is not necessary to reach the goal. The Court also specified some purposes of marriage like expression of emotional support, public commitment, personal dedication, expression of faith, status, precondition for benefits etc. While these characteristics may be part of marriage, this does not provide a definition for it.

Most recently, the question of who may be parties to a marriage contract as to the gender of the spouses arose and made marriage the center of constitutional attention in

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51 Loving v. Virginia, 388 U.S. 1 (1967).

52 Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

53 Therefore Plessy v. Ferguson, 163 U.S. 537 (1896) was wrongly decided from the beginning as discrimination on the bases of race was declared expressly unconstitutional in 1868 with the U.S. Const. amend. XIV.

54 Zablocki v. Redhail, 434 U.S. 374 (1978).

55 Turner v. Safley, 482 U.S. 78 (1987).

the United States. Originally, there was a precedent: it is not unconstitutional for a state to regulate marriage as a complementary relationship of man and woman,[56] when in 1972 two college students, both men, applied for a marriage license in Minnesota. The Minnesota Supreme Court declared that state law regulating marriage as heterosexual was constitutional, and the Supreme Court agreed. In the 1970's a huge wave of change in divorce law swept through the country starting from California. No-fault divorce soon became the norm and this has brought substantial change to marriage and family structure in the US society.[57]

In 1993 the Supreme Court of the state of Hawaii, in the case Baehr v. Lewin[58], decided that there is merit in the claim that only heterosexual marriage discriminates against same-sex couples. But, Hawaii reaffirmed traditional marriage in 1998 through legislation. Meanwhile Vermont[59] has decided that legal benefits of marriage should be granted for same-sex partnerships as well. In 2003 the Massachusetts Supreme Court downright decided that same-sex couples have the right to marriage.[60] On a federal level, in 1996 Congress passed a bill, DOMA in defense of the traditional view of marriage for federal purposes.[61] The Act specifically said that "the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife". In spite of the fact the President Obama explicitly made same-sex marriage issue a promise in the presidential campaign, neither was DOMA retrieved by Congress legislation, nor was same-sex legislation passed through Congress.

By 2013, the issue was raised at the federal level when the Supreme Court of the United States had to decide in the case of Windsor[62] whether it was unconstitutional to disregard a same-sex marriage acknowledged by New York state law. DOMA was struck down by the Court because it only acknowledged the marriage of a man and a woman for federal law. In Windsor, the Court decided that marriage in one State has to be acknowledged for Federal purposes; although it declared that this would not mean that same-sex marriage had to be recognized in all States.

However, in 2015 the same issue arose; since Minnesota by then defined marriage as genderless, this precedent did not hold any longer. The Supreme Court went even further in its ruling in Obergefell[63] by stating that not defining marriage as genderless is unconstitutional. By the time of the Obergefell decision, there were states where same-sex marriage was legal, and this particular problem arose from this fragmented state of the legal system. Marriages completely legal in one state would not be recognized

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56 Baker v. Nelson 409 U.S. 810 (1972).

57 James R. Jr. Stoner: Does the law and the constitution of the family have to change? In: Patrick N. Cain – David Ramsey (ed.): *American Constitutionalism, Marriage, and the Family: Obergefell V. Hodges and U.S. V. Windsor in Context* Lanham, Lexington Books, 2016. 208. https://doi.org/10.1080/10457097.2015.1111736

58 Baehr v. Lewin 852 P. 2d 44 (Haw. 1993).

59 Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

60 Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003).

61 DOMA Defense of Marriage Act, Pub. L. No. 104–199, §§ 2–3, 110 Stat. 2419, 2419 (1996).

62 United States v. Windsor, 570 U.S. 744 (2013)

63 Obergefell v. Hodges, 576 U.S. 644 (2015).

in another state. This ruling was based both on the Substantive Due Process and the Equal Protection Clause of the Fourteenth Amendment. This is a very odd rationale of ruling, and it is much debated, since no way could an Amendment in 1868 have meant to protect same-sex marriage. Furthermore, it is still debated today in public opinion and literature.[64]

The constitutional recognition of same-sex marriage has stopped the democratic process of individual States changing their laws in accordance with their citizens' views. Is self-government hurt by the change of law that the decision has brought about? This decision was again built on the unenumerated right in the Fourteenth Amendment. Without an explicit constitutional right, the decision failed to review whether same-sex marriage was rooted in the history or tradition of the United States, yet expanded the definition of marriage.

4.3. Abortion: the ignition point

On this path, not discussing the foundation for privacy anymore, leaving the Corfield v. Coryell test and other tests long behind, the Court has further expanded the meaning of privacy in Roe v. Wade by establishing that it implied the woman's right: whether to continue with her pregnancy or not.[65] Roe has caused an unprecedented turmoil and, arguably, changed the shape of the US legal system and politics. This landmark decision and its subsequent case law with Planned Parenthood v. Casey[66], had also remained controversial for almost 50 years, when in 2022 they were overturned.

Roe changed a situation where abortion was regulated by the States for 185 years in the United States. In its argumentation there was a lengthy report of the history of abortion going back to ancient times, disregarding the fact that there had never been a right to abortion in the history and tradition of the Federation, as it had been rather strictly regulated. Roe also offered the trimester scheme, elaborated by Justice Blackmun, as a guideline for States how to regulate abortion from then on, dividing pregnancy in three stages: in the first stage there would be no restriction for the women and her physician to carry out an abortion, in the second certain restrictions to safeguard women's health could be legislated, and in the final trimester, when the fetus would be viable, the State's compelling interest rose; therefore, abortion could be prohibited lest the woman would be in danger.

This part of the decision was strongly criticized as it resembled drafting legislation, thus outside the Court's scope.[67] The majority opinion rejected the State's argument holding that fetuses were persons under the Constitution. Roe termed the fetus as "potential life". This delimitates the State's compelling interest to protect life

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64 See more eg.: Ryan T. Anderson – Robert P. George – Sherif Girgis: *What is marriage?: man and woman: a defense*. New York, Encounter Books, 2012. 1st American edition.

65 Roe v. Wade, 410 U.S. 153 (1973).

66 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

67 John Hart Ely: The Wages of Crying Wolf: A Comment on Roe v. Wade. *Yale Law Journal* 82, 5. (1973), 926. https://doi.org/10.2307/795536

becoming valid once it is viable, outside the womb. Roe based its precedent on the unenumerated right of privacy, and cited a number of cases where zones of privacy could be discovered. Therefore, an analogy was employed so that privacy was found to be "broad enough to encompass"[68] the right to abortion. By doing so, under the Fourteenth Amendment, Roe essentially revived the substantive due process from 1937, once abandoned with West Coast Hotel from the Lochner era for resulting in freewheeling judicial policymaking. An interesting wrinkle to the story is that Norma McCorvey, the pregnant mother under the pseudonym Jane Roe, gave birth to her child, putting her up for adoption and later becoming a pro-life advocate.

Planned Parenthood promised to end the national controversy that Roe had caused and to settle definitively the abortion issue with its stare decisis;[69] "a standing of the decision", a strong precedent in the American legal system. It discarded the trimester plan and the privacy basis for abortion, but confirmed Roe's "central holding": the State cannot protect fetal life before viability. The basis for the right to abortion was formulated as deriving from the "freedom to make intimate and personal choices that are central to personal dignity and autonomy".[70] Instead of the trimester scheme, it introduced the limit on legislation: any restriction was unconstitutional that would put an "undue burden"[71] on the woman's right to access abortion. The issue of abortion was not settled; both the public remained widely divided on the question and the political debate remained intense. Abortion has continued to be a question raised at Supreme Court nominations.

What harm did Roe cause? What is the peril of judicial activism?

We have left considering the democratic process of amending the Constitution in 1920 when the Nineteenth Amendment guaranteed the right to vote for women. In 1923, a plan called the Equal Rights Amendment was introduced to Congress for further amending the Constitution regarding equality for women. In the late 1960s, the National Organization for Women and others lobbied for this constitutional amendment that would have declared gender discrimination unconstitutional. Finally, it was approved by the House of Representatives in 1971, the Senate in 1972, and it was open for ratification by the States. This process was largely interrupted by the abortion controversy, and the Equal Rights Amendment (ERA) fell short of adoption by only 3 States.[72]

Another long-term impact of these decisions was that abortion, a deeply value-based issue, became a factor in the appointment of Supreme Court Justices. Therefore, the Supreme Court became more politicized than ever before. It also distorted democracy despite almost all Western democracies had the choice to regulate abortion through their people's elected representatives.

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68 Roe v. Wade, 410 U.S. 153 (1973).

69 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 867 (1992).

70 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 851 (1992).

71 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 874 (1992).

72 Irons op. cit. 427.

Even if the majority wished to legislate abortion differently in a given State, there was no room for divergence. The issue has been resolved by Dobbs v. Jackson Women's Health Organization decision in 2022.[73] The Court had to decide whether Mississippi could constitutionally prohibit abortions after 15 weeks of pregnancy. This landmark decision overturned Roe and the stare decisis of Planned Parenthood, and gave the power to regulate abortion back to State legislations. This does not mean that there is no constitutional overview of these rules, but it might be done according to the rational basis test that all other health regulations have to endure. Dobbs lists five reasons for overturning these precedents: the nature of their error; the quality of their reasoning; the workability of the rules; the disruptive effect on other areas of law; and the absence of concrete reliance on case law.

First of all, the decision makes limitations with regard to other decisions from this area of privacy case law by saying abortion is "inherently different"[74] from other issues dealing with private choices, such as contraception, marriage, consensual sex, and children's education. These do not pertain to the crucial moral issue of ending the potential life of another human being, which is "a unique act".[75] The Court's error was to tackle an issue of basic moral and social significance that the Constitution allots to people. Roe claimed to be in accordance with the relative weight of the interests at stake, insights and instances from medical and legal history, the lenity of common law, and the pressing challenges of contemporary times.[76] Nevertheless, as we have seen, it disregarded both the history and tradition of common law as abortion had been a serious crime for centuries. The remaining two factors are aspects considered by the legislator. The reasoning gives no answer to the question why viability is the point when the State's interest is compelling enough. The basis for Roe's central rule is privacy; three probable sources are mentioned and it declares merely a "feeling" that the Fourteenth Amendment Due Process Clause contains such a right.[77] Furthermore, Planned Parenthood introduced the unworkable rule of undue burden.

5. Conclusions

As shown above, the notion of family has undergone major changes through the interpretation of the Court. This is directly caused by changes in the role and tools employed by the Court. However, there might be an indirect cause to these changes since society has changed over the last two hundred years, which is certainly true to some extent. More importantly, the values of society have changed, and public opinion has been shaped midst these value shifts.

We have seen that judicial activism could be used by both the right (for example Plessy or Lochner) and the left (for example Griswold or Roe) of the political spectrum,

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73 Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

74 Roe v. Wade, 410 U.S. 159 (1973).

75 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 852 (1992).

76 Roe v. Wade, 410 U.S. 165 (1973).

77 Roe v. Wade, 410 U.S. 153 (1973).

which can have disruptive effects on the democratic process (eg.: ERA). The debate over abortion has structurally changed Supreme Court nominations especially, and widely politicized the Court itself. Whether this will change now that abortion regulation is given back to the States, is for us to see what the future will bring. If dynamism is followed as a principle, there is a risk of political decisions in the future.

Concerning the original question of this paper, we might wonder if the United States claims to have the oldest constitutional traditions in the world of modern democratic society, then why these changes have never taken place through the democratic process that the system set out. Ultimately, the law is what the competent body claims to be the law, may it be the executive, the legislative, or the judicial. Alternatively, is there a deeper source of law that has to be discovered? If so, what are the questions to pose for the next decades?

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