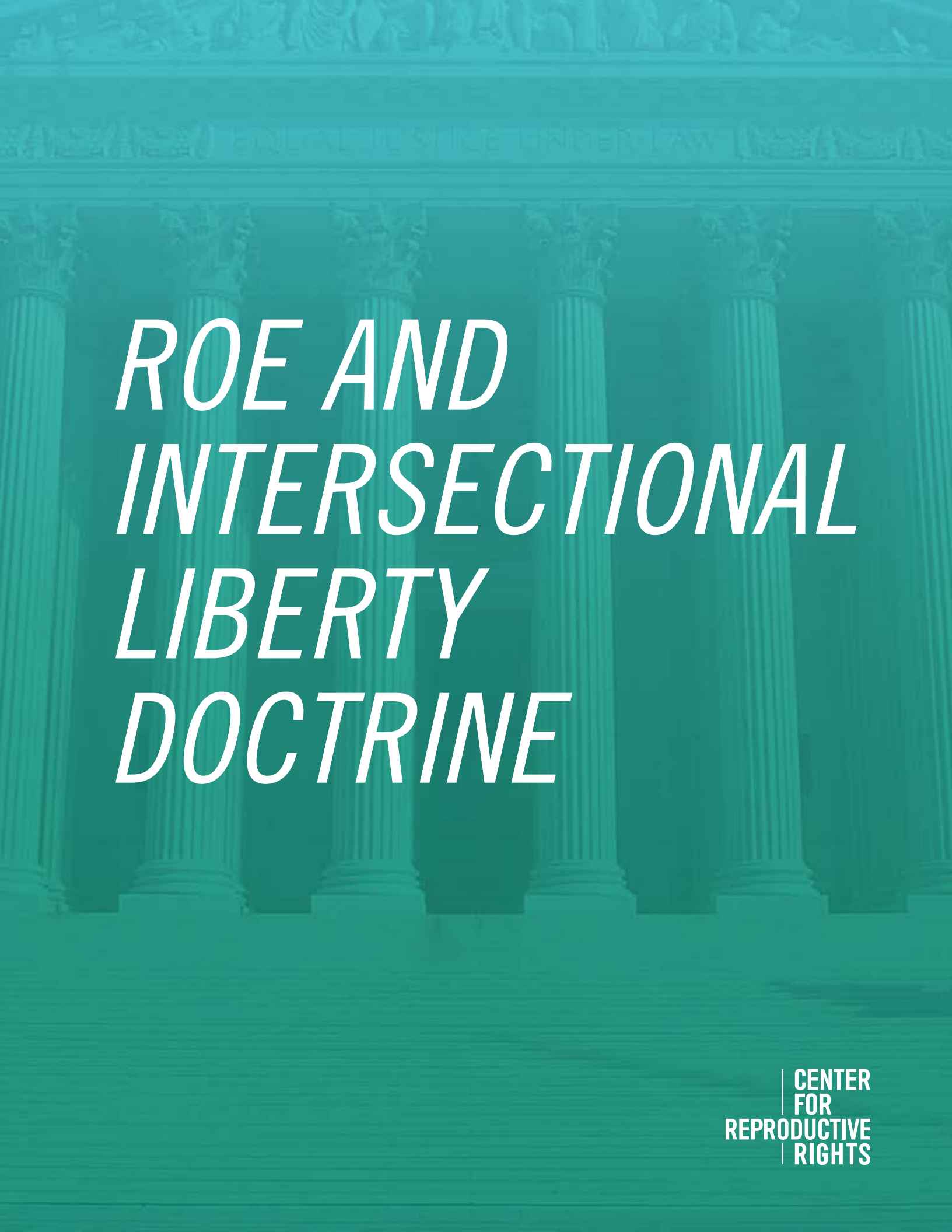

ROE AND INTERSECTIONAL LIBERTY DOCTRINE

CENTER FOR REPRODUCTIVE RIGHTS

About the Center for Reproductive Rights

For over two decades, the lawyers at the Center for Reproductive Rights (the Center) have been the driving force in many of the most significant legal victories ensuring access to reproductive health care across the globe. The Center's game changing litigation and advocacy work, combined with its unparalleled expertise in the use of constitutional, international, and comparative human rights law, have transformed how reproductive rights are understood by courts, governments, and human rights bodies. It has played a key role in securing legal victories in the United States, Latin America, Sub-Saharan Africa, Asia, and Eastern Europe on issues including access to life-saving obstetrics care, contraception, safe abortion services, and comprehensive sexuality information, as well as the prevention of forced sterilization and child marriage. The Center has brought groundbreaking cases before national courts, U.N. Committees, and regional human rights bodies, and it has built the legal capacity of women's rights advocates in over 60 countries. Headquartered in New York City, the Center has offices in Washington D.C., Bogotá, Nairobi, Kathmandu, and Geneva.

In the United States, the Center has won numerous victories in federal and state courts, including the Supreme Court's decision in June 2016 in *Whole Woman's Health v. Hellerstedt*. In that decision, the Court held that Texas had violated the constitutional rights of women by enacting unnecessary health regulations that served no medical purpose, yet shut down clinics and made abortion services harder to obtain for many Texas women. In addition to bringing *Whole Woman's Health* to the Supreme Court, the Center is working with champions in Congress to advance the Women's Health Protection Act, a federal bill that invalidates medically unnecessary restrictions on abortion care, and helps run Act for Women, a national campaign to support the bill. However, with more anti-choice officials coming into power in all levels of government, from the White House to state houses, there are more battles around the corner.

Acknowledgements

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ROE AND INTERSECTIONAL LIBERTY DOCTRINE

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INTRODUCTION

The Supreme Court has repeatedly recognized that any concept of liberty must include the right to make intimate decisions about family, relationships, bodily integrity, and autonomy. Abortion sits within that set of essential rights—without it, liberty cannot exist. Weakening the right to abortion would weaken what liberty means for everyone.

The link between abortion rights and our constitutional right to liberty complicates President Trump's pledge to nominate Supreme Court justices who would overturn *Roe v. Wade* (1973), the landmark decision recognizing a woman's right to safe and legal abortion. Before *Roe*, governments were free to criminally ban or severely restrict abortion access – and most states did. *Roe* determined that the Constitution protects abortion as a fundamental right, making abortion legal in every state and dramatically increasing safe access for women across the country.

Roe was a watershed decision, and became an immediate nemesis for abortion opponents. But its place in constitutional doctrine does not begin, or end, with abortion rights. Instead, *Roe* is one in a line of seminal opinions through which the Supreme Court has developed the liberty doctrine as a source of substantive rights. Those rights encompass abortion, but extend much farther.

Roe brought together earlier cases recognizing a range of rights—from marriage to childrearing—to show how these rights were intertwined with the right to abortion. In doing so, it provided a robust framework for liberty jurisprudence that earlier cases lacked. By upholding *Roe*'s core doctrine against subsequent attempts to overturn it, the Supreme Court strengthened the foundation for related liberty rights it would later recognize, including the right to engage in private sexual conduct and the right to same-sex marriage.

Roe's opponents are wrong to think that the Supreme Court could overturn that decision while leaving other liberty-based rights intact. That's why our debates around the role of the courts and judicial appointments, which are often singularly centered on *Roe,* must also acknowledge that undermining *Roe* would have ripple effects across a broad swath of constitutional law. The consequences would impact people seeking to exercise a range of rights, including the right to marry who we want, to use contraception, or to procreate. Backlash against the courts would come not only from supporters of abortion rights, but also from advocates of LGBTQ rights and others who favor an expansive vision of liberty.

This report discusses rights other than abortion that the Constitution's liberty doctrine protects. It begins by explaining the doctrinal underpinnings of the right to liberty, showing how the Supreme Court strengthened that doctrine in *Roe* and subsequent abortion cases, including *Planned Parenthood v. Casey.* It will explore how the opinions and reasoning in *Roe* and *Casey* helped legitimize and bolster rights that the Court had previously recognized, but in weaker terms, hampered by the absence of a robust liberty framework that the abortion cases provided.

It then examines additional rights the Supreme Court has recognized by building on *Roe* and *Casey*, including some rights that are poised for additional development – but only if liberty doctrine remains strong. It closes by underscoring why abortion cannot be debated in a constitutional vacuum: undermining any of these major abortion decisions would weaken not just the right to abortion, but also a range of other rights that protect our personal lives from improper government intrusion. Courts must defend the right to abortion, or risk eroding constitutional protections for many rights that people of all backgrounds, ideologies, and beliefs have come to rely on in myriad ways.

THE LIBERTY CLAUSE AND SUBSTANTIVE DUE PROCESS

The right of personal liberty has always played a central role in American political thought. It served as a guiding principle for those who initiated the move for American independence from Great Britain, as reflected in the Declaration of Independence, which names "Life, Liberty and the pursuit of Happiness" as "unalienable Rights." After independence, the Bill of Right's framers grouped liberty with life and property when drafting the Fifth Amendment to the U.S. Constitution to protect against interference by the newly formed federal government.[1] Seventy-five years later, the Fourteenth Amendment's drafters included the same trifecta of rights in post-Civil War protections against similar overreach by state governments.[2]

The right to liberty is thus part of the bedrock of the U.S. Constitution. The more difficult question for the courts has been how to determine which specific rights liberty encompasses.

Much of the debate centers on whether courts should have the ability to recognize liberty rights that are not explicitly spelled out in the Constitution's text, and what method they should use to identify any such rights. Conservative legal thinkers and jurists have tended to reject expansive interpretations of liberty, arguing that it is not the proper role of the courts to identify new, constitutionally protected rights. In this view, rights can be legitimate only if they are "deeply rooted in the Nation's history and tradition," [3] and judicial analysis must look backward to identify them, if they exist at all outside of explicit text.

Progressive legal thinkers, in contrast, have tended to favor a broader approach, which recognizes judicial power to interpret liberty to include rights that evolve over time, even if the Constitution's text does not explicitly spell them out. Modeling this progressive approach, *Obergefell v. Hodges* rejected a history-bound method for identifying liberty rights, asserting that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries,"[4] because "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[5]

In sum the Supreme Court has recognized specific rights included within the Constitution's guarantee of liberty, and a handful of its major cases provide guidance on how to identify those rights. The cases that do the most to advance liberty explain how specific rights relate to core liberty values – and for that reason, are at the center of ideological disputes about what liberty really means.

THE CONSTITUTIONAL RIGHT TO ABORTION

Two major abortion cases—*Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992)—have helped define the contours of liberty doctrine by first consolidating and bolstering earlier cases that touched on personal liberty, and also supporting later cases in which the Supreme Court recognized additional liberty rights as contiguous with those that came before.

ROE V. WADE (1973)

The plaintiffs in *Roe v. Wade* challenged a Texas state law that made it a crime to procure or attempt an abortion except for lifesaving purposes. The Court struck down the law as unconstitutional, finding that the right to abortion is protected by the Fourteenth Amendment's guarantee of liberty, which places meaningful limits on state actions that infringe on a person's private life. Framing abortion as a right broadly related to privacy, the Court cited a line of cases that protected a range of rights from marriage to child-rearing and education based on a person's constitutional right to liberty. Building on its earlier reasoning, it decided that liberty was the source of the right to access abortion, an essential and interlinked component of decision-making about private matters.

PLANNED PARENTHOOD V. CASEY (1992)

The Supreme Court deepened its commitment to liberty as the source of abortion rights in *Planned Parenthood v. Casey*, while explicitly extending its analysis of how liberty protects rights other than abortion through the same doctrine. This plurality reaffirmed *Roe*'s holding, writing that the Constitution guards a "realm of personal liberty which the government may not enter." Like *Roe*, *Casey* cited cases about marriage and family decisions, calling them "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [that] are central to the liberty protected by the Fourteenth Amendment." It went further, however, referencing another line of cases dealing with forced medical procedures that protected personal autonomy and bodily integrity as distinct rights that liberty encompasses. Abortion, *Casey* held, is a right situated squarely within the type of liberty that the Constitution guards against government interference.

Roe and *Casey* thus situate abortion within the constitutional right to liberty. And while later cases have affirmed that liberty protects the right to abortion—most recently *Whole Woman's Health v. Hellerstedt* (2016)—*Roe* and *Casey* still stand as the two abortion decisions that focus most closely on defining what liberty means, and how courts should make that determination.

The next sections look at the range of rights that the doctrine of liberty protects, showing how they could unravel if *Roe* and *Casey*'s articulation of liberty were overturned.

RIGHTS STRENGTHENED AFTER *ROE* AND *CASEY*: FAMILY, CHILD-REARING, CONTRACEPTION, AND MARRIAGE

While the Supreme Court recognized rights associated with family relationships, marriage, and contraception before the passage of *Roe* and *Casey*, it had not yet offered a robust account of the liberty doctrine that encompasses them. What these abortion cases succeeded in doing was strengthening the constitutional justification for why this collection of rights is necessarily part of liberty. They did this by explicitly discussing how the Fourteenth Amendment protects a realm of personal decision-making and bodily integrity from government intrusion.

1923 *Meyer v. Nebraska*

1925 *Pierce v. Society of the Sisters*

1973 *Roe v. Wade*

1977 *Moore v. City of East Cleveland*

1992 *Planned Parenthood v. Casey*

FAMILY AND CHILD-REARING

Before *Roe* and *Casey*:

Like other fundamental rights, the rights of family members to maintain relationships with each other, and to decide how to rear children without unwarranted government interference, do not appear explicitly in the Constitution's text. And while the Supreme Court recognized them earlier, *Roe* and *Casey* helped strengthen and explain their constitutional grounding. Starting in the early 20th century, the Supreme Court found that family decisions are protected by the Fourteenth Amendment's liberty clause. *Meyer v. Nebraska* (1923) struck down a Nebraska law that prohibited teaching foreign languages in public schools to students younger than eighth grade, finding that it violated liberty, which includes the right to "establish a home and bring up children."[6] Two years later, in *Pierce v. Society of the Sisters* (1925), the Court found that an Oregon law requiring parents to send their children to public schools "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[7]

After *Roe* and *Casey*:

Roe and *Casey* cited *Meyer* and *Pierce* to show that liberty protects decisions that relate to childrearing from unwarranted government interference, as do other Supreme Court opinions recognizing the right to contraception, private sexual conduct, and marriage (including, extensively, *Obergefell v. Hodges*). Later opinions group *Roe* and *Casey* together with early cases on family rights, stressing that the right to decide whether to bear a child is contiguous with the right to decide how to rear a child.

Cases dealing with parental rights after *Roe* in turn cite the decision as a foundational assertion that liberty protects family life. *Moore v. City of East Cleveland (*1977*)* for example, cited *Roe* in striking down an ordinance that restricted house occupancy to members of a single family, which prohibited a homeowner from living with her son and two grandsons.[8] By 1996, the line of liberty cases protecting family rights was strong enough for Justice Ruth Bader Ginsburg to observe that "although [past cases] yielded divided opinions, the Court was unanimously of the view that 'the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.'"[9]

CONTRACEPTION

Before *Roe* and *Casey*:

The Supreme Court first held that the Constitution protects the right to use contraception in *Griswold v. Connecticut* (1965), eight years before it decided *Roe*. *Griswold*, which resolved a challenge brought by married couples, held that this protection came from a privacy right that lived in many parts of the Constitution, including the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. The Court wrote that "specific guarantees in the Bill of Rights have penumbras, formed from emanations from those guarantees that help give them life and substance," but did not explicitly include reference to liberty as established by the Fourteenth Amendment.[10]

The next Supreme Court case regarding contraception was *Eisenstadt v. Baird* (1972). *Eisenstadt* extended the right to use contraception to single people, using an equal protection analysis based on *Griswold*. *Roe*, decided the following year, cited both of these contraception cases to support its finding that Fourteenth Amendment liberty protects "marital, familial, and sexual privacy."[11] *Roe* positioned the Supreme Court to more explicitly analyze why the Constitution necessarily protects the right to contraception.

After *Roe* and *Casey*:

Roe moved beyond the earlier contraception cases by providing a firmer, clearer grounding for the source of the right to make reproductive choices, and tying it to related liberty rights. *Roe*'s effect was evident in the third, and final, major Supreme Court case dealing with the constitutional right to contraception, *Carey v. Population Services* (1977), which struck down a New York law that prohibited the sale of all birth control to minors under 16 years old, required a licensed pharmacist to sell non-prescription contraceptives to people over 16, and prohibited all advertising and display of birth control. *Carey* cited *Roe* and its analysis of how Fourteenth Amendment liberty protects privacy, which includes a panoply of decisions that individuals must be free to make without unjustified government interference.[12] Its discussion of the right to liberty and its implications was robust, and bolstered by *Roe's* analysis of why rights that fall under its rubric are fundamental.

MARRIAGE

Before *Roe* and *Casey*:

Like the right to abortion, the right to marriage does not appear in the Constitution's text, meaning that protections for marriage must sit within a broader constitutional provision. While the Supreme Court first recognized the constitutional right to marry six years before recognizing the right to abortion, *Roe* and its progeny have played a critical role in cementing and advancing constitutional jurisprudence in this area.

For example, the Supreme Court recognized that the Constitution's liberty clause encompasses the right to marry in *Loving v. Virginia* (1967), which struck down a Virginia state law prohibiting interracial marriage. Explaining why liberty must protect marriage, the Court wrote "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[13] The bulk of the opinion, however, analyzed the equal protection clause and its prohibition on racial discrimination. The short discussion of liberty served to drive home the Court's equal protection holding that the right to marriage cannot be restricted in racially discriminatory ways. The Court's brevity reflected a less-than-solid framework for analyzing liberty rights – something that *Roe* would later provide.

After *Roe* and *Casey*:

Roe, decided six years later, cited *Loving* for its recognition that personal liberty protects zones of private life against government intrusion. *Casey* (1992) similarly cited *Loving*, expressly noting that while marriage is not mentioned in the Bill of Rights, and interracial marriage had been illegal in the 19th century, it is an aspect of liberty that the Constitution rightly protects.[14]

In turn, later cases extending the right to marriage cited *Roe*, *Casey*, and decisions citing those decisions to define liberty. One such case was *Zablocki v. Redhail*, a 1978 Supreme Court opinion finding unconstitutional a Wisconsin state law requiring residents who had child support obligations to obtain court approval before marrying. The Supreme Court observed that "[i]t is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships."[15]

In 2013 and 2015, the Supreme Court drew on its line of liberty decisions to strike down same-sex marriage bans, first federally and then in the states. *Obergefell v. Hodges*—the second of the two watershed opinions—cited cases that protect the panoply of liberty rights, many of which cite or are cited by *Roe* and *Casey*, and emphatically reaffirmed that "[l]ike choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make." When compared to the Court's brief reference to the "orderly pursuit of happiness" in *Loving*, this language shows how far liberty doctrine advanced after *Roe* and *Casey* helped articulate its reach.

LIBERTY RIGHTS: A CASE HISTORY

1923
Meyer v. Nebraska

1925
Pierce v. Society of the Sisters

1942
Skinner v. Oklahoma

1952
Rochin v. California

1965
Griswold v. Connecticut

1967
Loving v. Virgina

1972
Eisenstadt v. Baird

1973
Roe v. Wade

1974
Cleveland Board of Education v. LaFleur

1977
Moore v. City of East Cleveland

Carey v. Population Services

1978
Zablocki v. Redhail

1986
Bowers v. Hardwick
OVERTURNED

1990
Cruzan v. Director of Missouri Department of Health

Washington v. Harper

1992
Planned Parenthood v. Casey

Riggins v. Nevada

1997
Washington v. Glucksburg

2003
Lawrence v. Texas

2013
Windsor v. United States

2015
Obergefell v. Hodges

2018 & on
The Future of Liberty

KEY

LIBERTY RIGHTS THEME

FAMILY & CHILD-REARING | CONTRACEPTION | MARRIAGE | SEXUAL RIGHTS | PROCREATION | BODILY INTEGRITY | MEDICAL DECISION-MAKING

RIGHTS ROOTED IN *ROE* AND *CASEY* WHICH ARE POISED FOR DEVELOPMENT

At least one type of liberty right – the right to engage in private, consensual sexual activity - had not been recognized before *Roe* and *Casey*, and owes its existence to the Court's reasoning in those cases. Additional rights only minimally developed before *Roe and Casey* are poised for development based on liberty doctrine's strong foundations; these include the right to procreate, bodily integrity rights, and the right to medical decision-making.

1973 *Roe v. Wade*

1986 *Bowers v. Hardwick*

1992 *Planned Parenthood v. Casey*

2003 *Lawrence v. Texas*

SEXUAL RIGHTS

Sexual rights are a component of liberty that relies strongly on earlier cases establishing the right to abortion. The Supreme Court recognized the right to engage in private, consensual sexual activity with the partner of one's choice in *Lawrence v. Texas* (2003), a landmark case that struck down a Texas state law criminalizing intimate sexual conduct between same-sex partners. The opinion in *Lawrence* included an extensive discussion of *Casey*, identifying it as one of two cases that compelled the Court to overrule *Bowers v. Hardwick*, an earlier case in which the court had refused to find that liberty protects private same-sex intimacy.[16] *Lawrence* unpacked *Casey's* analysis of "constitutional protection [for] personal decisions relating to marriage, procreation, contraception, family relationships, childrearing, and education," tracing them back to *Roe*, and concluding that the right to liberty articulated in *Casey* necessarily protected same-sex intimate conduct, along with private sexual activity more broadly. *Lawrence* endorsed *Casey*'s general approach to defining liberty rights, quoting its language on the importance of autonomy, dignity, and the freedom to make personal decisions without government interference.

1942 *Skinner v. Oklahoma*

1973 *Roe v. Wade*

1974 *Cleveland Board of Education v. LaFleur*

1992 *Planned Parenthood v. Casey*

PROCREATION

Liberty doesn't just protect the right to prevent pregnancy and childbirth—it also protects the right to have children, or procreate, free from unwarranted government interference. *Skinner v. Oklahoma* (1942) was an early case assessing the constitutionality of a state law that required "habitual criminals" to be sterilized under compulsion of the penal system. The Supreme Court majority wrote that a person who was involuntarily sterilized would be" forever deprived of a basic liberty," but struck down the law on equal protection grounds, since it only applied to a subset of defendants and the state had failed to justify the distinction.[17] Given that any form of forced sterilization should be constitutionally repugnant, a concurring justice would have found that the law violated a person's right to liberty as guaranteed by the Fourteenth Amendment. However, 30 years before *Roe*, a robust liberty doctrine protecting personal decisions like childbearing did not yet exist.

Both *Roe* and *Casey* cited *Skinner* when discussing the contours of personal liberty rights, helping cement the right to procreate within the realm of protected conduct. After *Roe*, in *Cleveland Board of Education v. LaFleur* (1974), the Supreme Court struck down a collection of school policies that required pregnant teachers to take unpaid leave starting up to five months before giving birth, and for three months after giving birth. The Court cited *Roe* for its holding that personal choice in matters of family life is a liberty that the Fourteenth Amendment protects.[18]

While the decision in *LaFleur* sent favorable signals, the Supreme Court has not heard recent cases involving the right to procreate, meaning that *Roe* and *Casey* remain central in establishing that it is protected by liberty, along with the constellation of related rights in which it sits. As new legal disputes arise around assisted reproductive technology (ART)—an emerging field that provides more options for people to become parents with the help of medical technologies—federal and state courts are likely to address the right to procreate more frequently. Any rollback of abortion rights would truncate the right to procreate at a time of heightened relevance.

1952 *Rochin v. California*

1973 *Roe v. Wade*

1992 *Planned Parenthood v. Casey*

BODILY INTEGRITY

Since before *Roe*, liberty has encompassed protections for bodily integrity. In *Rochin* v. *California* (1952), the Supreme Court held that the right to liberty protected a criminal suspect against government action to jam a tube down his throat, inject solution, and force vomiting in order to recover evidence of drug possession. The *Rochin* majority wrote that while the due process clause did not spell out specifics, older cases made clear that it protects "personal immunities" that "are so rooted in the traditions and conscience of our people to be ranked as fundamental," or are "implicit in our concept of ordered liberty."[19] The conduct in this case "shock[ed] the conscience," violating a substantive limit that the government could not overstep.

Although *Rochin* predated *Roe*, the *Roe* decision stopped short of discussing constitutional protections against physical intrusion, instead focusing on private decision-making. *Casey*, citing *Rochin*, laid out more specifically where abortion is located on the spectrum of protected liberty rights. It held that abortion sits at the intersection of cases dealing with personal decisions and those that prohibit the government from interfering with bodily integrity.

Since *Casey*, the Supreme Court has not decided cases that elaborate on the liberty right to bodily integrity. Accordingly, while litigants have raised claims around issues including physical searches and forms of punishment, it is unclear how the right to bodily integrity might constrain government action of those types. *Casey* remains an authoritative case on this aspect of liberty, and any future developments should build on its foundation.

MEDICAL DECISION-MAKING

Two years before *Casey*, the Supreme Court decided a pair of cases recognizing that the right to refuse medical treatment is among the liberty rights that the Fourteenth Amendment protects. *Washington v. Harper* (1990) was a challenge to a Washington state prison policy that allowed prisoners to be treated with anti-psychotic drugs against their consent. While recognizing that liberty protects the right to refuse the administration of medication, the Court upheld the policy given the competing state interest in penal administration.[20] In *Cruzan v. Director of Missouri Department of Health* (1990)—a case involving a request by the parents of a permanently comatose woman to terminate nutrition and hydration, which would lead to her death - the majority recognized more broadly that liberty protects the right to refuse unwanted medical treatment, and assumed that a competent person had the right to refuse even lifesaving treatment.[21] However, it held that a state's interest in protecting life allowed it to prevent family members from refusing treatment on behalf of a comatose patient who had not clearly expressed her wishes.

In the same term that it decided *Casey*, the Supreme Court decided *Riggins v. Nevada* (1992), holding that the liberty right of a pre-trial detainee to refuse medication was violated when administrators forced him to take anti-psychotic drugs before his trial without considering less intrusive alternatives. *Casey* cited all three cases to assert that liberty protects the right to direct or refuse medical treatment, which is inherently linked to the right to access abortion. It recognized, as the common premise, that governmental interests in protecting life cannot override individual liberty claims regarding autonomy in medical decision-making.

Five years later, in *Washington v. Glucksburg* (1997), the Court was faced with the question of whether liberty also protects the right of terminally ill patients to access medical assistance in ending their lives, something the state of Oregon had banned. In a majority opinion that closely analyzed *Casey*, Justice William Rehnquist noted that liberty protects choices rooted in autonomy and dignity, along with rights that relate to personal decision-making. However, Justice Rehnquist wrote that courts must separately and specifically analyze each proposed liberty right, placing heavy weight on history and tradition—neither of which revealed support for medically assisted termination of life. Accordingly, even under *Casey*, liberty could not be read to invalidate the Oregon law.

Several justices wrote separate concurrences, including Justice David Souter who relying partly on *Casey* would have held that liberty included the right of competent, terminally ill patients to end their lives with assistance; however, he believed that the state's countervailing interests justified the existing Oregon law, at least under the circumstances and given the lack of research on how patients would respond. In short, while the Supreme Court has not recognized a liberty right to end one's life with medical assistance, *Roe* and *Casey* provide the doctrinal framework for courts to assess when government policies or actions rise to the level of unnecessary infringement on personal decision-making around issues related to private life, medical and otherwise.

CONCLUSION

This overview only considers Supreme Court cases. Many more cases in the lower federal courts have relied on the liberty doctrine that runs through *Roe* and *Casey*. If *Roe* and *Casey* were to be weakened or overturned, every case that adopted a capacious view of liberty to assert that the Constitution protects private choices and bodily integrity would be correspondingly weakened. Such an outcome would stymie the judicial approach to defining liberty—best expressed in *Obergefell*—that reads the Constitution to protect contemporary norms and practices that evolve, while rejecting the idea that rights can only be defined by looking backwards to a time when they were less inclusive. It is critical for debates about the future of constitutional jurisprudence to address abortion rights in context, instead of as a stand-alone issue on which judicial nominations or elections should turn. Any erosion of our right to liberty would mean losing much more than the right to abortion.


EQUAL JUSTICE UNDER LAW

ENDNOTES

1 "[No person shall….] be **deprived of life, liberty, or property, without due process of law**." U.S. Const. amend V.
2 "No state shall . . . **deprive any person of life, liberty, or property, without due process of law**." U.S. Const. amend XIV sec. 1.
3 *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).
4 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).
5 *Id.* at 2602.
6 *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
7 *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).
8 *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).
9 *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).
10 *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).
11 *Roe v. Wade*, 410 U.S. 113, 129 (1973).
12 *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684 (1977).
13 *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 1824, 18 L. Ed. 2d 1010 (1967).
14 *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 848 (1992).
15 *Zablocki v. Redhail*, 434 U.S. 374, 386, 98 S. Ct. 673, 681, 54 L. Ed. 2d 618 (1978).
16 The other case was *Romer v. Evans*, 517 U.S. 620 (1996), an equal protection case dealing with discrimination against gay people.
17 *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942).
18 *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974).
19 *Rochin v. California*, 342 U.S. 165, 169 (1952).
20 *Washington v. Harper*, 494 U.S. 210, 221–25 (1990).
21 *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 279 (1990).

NOTES

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