

Fundamental Rights Under Privacy in the USA

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Introduction

This essay is an annotated list of U.S. Supreme Court cases involving privacy. The U.S. Supreme Court uses the concept of *privacy* to designate a zone surrounding individuals, the family, and the home, into which the government may not intrude without a compelling interest.

There are only a few fundamental rights that have been recognized by the U.S. Supreme Court under the classification of *privacy*. Each of these fundamental rights is summarized below. Given the large number of cases on, for example, search and seizure, obscenity, gender discrimination, racial discrimination, and affirmative action, it is surprising that there have been so few cases on privacy rights.

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

1. Rearing Children

- ***Meyer v. Nebraska*, 262 U.S. 390 (1923).**

Meyer struck state law that required schools to teach only in English to children who had not passed the eighth grade. In dicta, the Court said:

While this court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes 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. [citations to 14 cases omitted] The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. [citation omitted]

Meyer, 262 U.S. at 399-400.

- ***Pierce v. Society of Sisters*, 268 U.S. 510 (1925).**

The U.S. Supreme Court struck state law that required all children to attend public schools.

- ***Prince v. Massachusetts*, 321 U.S. 158 (1944).**

The U.S. Supreme Court affirmed conviction of guardian, a member of Jehovah's Witnesses, for allowing girl to sell religious magazines, in violation of Massachusetts state statute that prohibited child labor.

The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here, most recently in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178. Previously in *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468, this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. And in *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce v. Society of Sisters*, *supra*. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

Prince, 268 U.S. at 165-166.

Nonetheless, Mrs. Prince lost her case, because the child labor law was held to be a valid exercise of the state's authority.

- ***Stanley v. Illinois*, 405 U.S. 645 (1972).**

Mother of Stanley's children had died and Stanley sought custody of the children. Because Stanley had never married the children's mother (despite living together for 18 years), Illinois statute made the children wards of the state and put them in foster homes. Illinois presumed that Stanley was an unfit parent, without any showing of his individual circumstances, and denied him custody of his children. U.S. Supreme Court held that this statute denied due process.

- ***Wisconsin v. Yoder*, 406 U.S. 205 (1972).**

The U.S. Supreme Court upheld right of Amish to withdraw their children from public school after the eighth grade. *Yoder* struck state law that required twelve years of attendance at school.

- *Troxel v. Granville*, 530 U.S. 57, 65 (U.S. 2000) ("The liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court." The Court cited both *Meyer v. Nebraska* and *Pierce v. Society of Sisters* from 1923 and 1925.).

2. Procreation sterilization

- ***Buck v. Bell*, 274 U.S. 200 (1927).**

In the only reported decision from lower courts on this case, the Virginia Supreme Court explained the alleged facts:

At the time Carrie Buck was committed to the State Colony for Epileptics and Feeble-Minded, she was seventeen years old and the mother of an illegitimate child of defective mentality. She had the mind of a child nine years old, and her mother had theretofore been committed to the same Colony as a feeble-minded person. Carrie Buck, by the laws of heredity, is the probable potential parent of socially inadequate offspring, likewise affected as she is. Unless sterilized by surgical operation, she must be kept in the custodial care of the Colony for thirty years, until she is sterilized by nature, during which time she will be a charge upon the State. If sterilized under the law, she could be given her liberty and secure a good home, under supervision, without injury to society. Her welfare and that of society would be promoted by such sterilization.

Buck v. Bell, 130 S.E. 516, 517-518 (Va. 1925).

The U.S. Supreme Court affirmed the Virginia Supreme Court's holding that the sterilization was permissible. Justice Oliver Wendell Holmes wrote for the U.S. Supreme Court:

There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process at law.

The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds. The judgment finds the facts that have been recited and that Carrie Buck 'is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization,' and thereupon makes the order. In view of the general declarations of the Legislature and the specific findings of the Court obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. Three generations of imbeciles are enough.

Buck, 274 U.S. 200, 207 (1927).

While *Buck* has never been explicitly overturned by the U.S. Supreme Court, there appears to be a consensus amongst legal scholars that *Buck* does not correctly state modern law.¹ However, there are some reasons to believe that *Buck* is still good law.² Justice Marshall wrote in 1973:

Thus, in *Buck v. Bell*, 274 U.S. 200 ... (1927), the Court refused to recognize a substantive constitutional guarantee of the right to procreate. Nevertheless, in *Skinner v. Oklahoma ex rel. Williamson*, supra, 316 U.S., at 541, 62 S.Ct., at 1113, the Court, without impugning the continuing validity of *Buck v. Bell*, held that 'strict scrutiny' of state discrimination affecting procreation 'is essential' for '(m)arriage and procreation are fundamental to the very existence and survival of the race.' Recently, in *Roe v. Wade*, 410 U.S. 113, 152-154 ... (1973), the importance of procreation has indeed been explained on the basis of its intimate relationship with the constitutional right of privacy which we have recognized. Yet the limited stature thereby accorded any 'right' to procreate is evident from the fact that at the same time the Court reaffirmed its initial decision in *Buck v. Bell*. See *Roe v. Wade*, supra, at 154, 93 S.Ct., at 727.

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 100-101 (1973) (Marshall, J., dissenting). Moreover, in a 1978 case involving personal liability of a judge who had ordered an involuntary sterilization of a 15 y old woman,³ the U.S. Supreme Court did not mention *Buck v. Bell*, which suggests that the Court did not regard *Buck* as anathema. These failures to criticize *Buck* may only indicate that the U.S. Supreme Court is reluctant to mention legal issues that are not absolutely necessary to resolve cases, or it may indicate that *Buck* continues to be good law.

More than 25 years after the decision in *Buck v. Bell*, investigations⁴ showed two major problems with this case.

First, the state of Virginia perpetrated a fraud on the courts by alleging that Carrie and her daughter were “feeble-minded” — later investigators found that Carrie had normal intelligence, but Carrie had attended only five years of school, and her daughter had above average intelligence. After Carrie Buck’s father either died or abandoned his family, Carrie’s mother became a

¹ See e.g., *Matter of A. W.*, 637 P.2d 366, 368-369 (Colo. 1981); *Matter of Romero*, 790 P.2d 819, 821 (Colo. 1990); Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law*, Vol. 3, § 18.27, p. 301 (1992) (“... it is doubtful that the Supreme Court would follow *Buck v. Bell* today.”).

² See, e.g., Philip R. Reilly, *The Surgical Solution*, pp. 152-154 (1991). Further, several majority opinions of the U.S. Supreme Court since 1960 cited *Buck v. Bell* without criticizing its result. *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964); *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 369, n. 6 (2001).

³ *Strump v. McFarland*, 435 U.S. 349 (1978).

⁴ J. E. Coogan, “Eugenic Sterilization Holds Jubilee,” 177 *The Catholic World* 44 (April 1953); Robert J. Cynkar, “*Buck v. Bell*: ‘Felt Necessities’ v. Fundamental Values?” 81 *Columbia Law Review* 1418, 1437-1440, 1457 (Nov 1981); Stephen Jay Gould, “Carrie Buck’s Daughter,” 93 *Natural History* 14 (July 1984); J. David Smith and K. Ray Nelson, *The Sterilization of Carrie Buck* (1989).

prostitute as a way of earning a living. To remove a prostitute from the streets, Carrie's mother was committed to the state institution for retarded people. Carrie was adopted by a guardian. After Carrie was raped by the nephew of Carrie's guardian, Carrie had a daughter at age 17 y. Carrie's guardian solved his embarrassing situation by having Carrie committed to the same state institution as Carrie's mother. Carrie's daughter was allegedly diagnosed as retarded when she was six months old, although that so-called diagnosis may have been fabricated by the state institution.

Second, the attorney who "represented" Carrie Buck in these legal proceedings had a conflict of interest, in that he also represented the state institution in other matters. Carrie's attorney called no witnesses on her behalf and wrote feeble briefs in this case.

It is now clear that *Buck v. Bell* was a sham case that was designed to get legal approval of forced sterilizations. Judges can *not* make good decisions when the judges are presented with false facts and the apparently opposing attorneys for the two parties are in collusion.

Aside from these false facts and defective procedure, the opinion of the U.S. Supreme Court has two additional problems.⁵ First, Justice Holmes accepted the declaration of Virginia that sterilization allows criminally insane people to be released from institutions.⁶ But sterilization does *not* alter a person's behavior or mental illness. Were Virginia and the Court confusing sterilization with castration, which might alter the behavior of male rapists? Furthermore, sterilization would *not* make a retarded person more capable of earning a living. Second, Holmes compared involuntary sterilization with compulsory vaccination, but he ignored an important distinction: the vaccination statute at issue in *Jacobson* did not actually compel vaccinations, but only fined unvaccinated people.

During the eugenics era typified by *Buck*, it was easy to lawfully sterilize mentally retarded people in the USA, but difficult to find a surgeon who would sterilize a normal person.⁷ Ironically, after the end of the eugenics movement around the year 1960, it was difficult to lawfully sterilize mentally retarded people in the USA, but easy to find a surgeon who would sterilize a normal person.

⁵ Robert J. Cynkar, "*Buck v. Bell*: 'Felt Necessities' v. Fundamental Values?" 81 Columbia Law Review 1418, 1458-1459 (Nov 1981).

⁶ "... many defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety ..." *Buck*, 274 U.S. at 205-206.

⁷ Sterilizing a normal person was then conventionally considered to be a mutilation.

- ***Skinner v. Oklahoma*, 316 U.S. 535 (1942).**

In a case on sterilization of habitual criminals, the U.S. Supreme Court held that procreation is a fundamental legal right:

But the instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.

Skinner, 316 U.S. at 541.

contraception

The freedom to procreate includes the freedom to *not* procreate. During 1965-77, the U.S. Supreme Court issued three historic opinions on contraception that invalidated repressive state laws that restricted the use or distribution of contraceptives:

1. *Griswold* struck a Connecticut state law that prohibited *use* of contraceptives by anyone. The plaintiffs in *Griswold* were married adults.
2. *Eisenstadt* struck a Massachusetts state law that prohibited distribution of contraceptives to *unmarried* people.
3. *Carey* struck a New York state law that prohibited sales of contraceptives to persons under 16 years of age.

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

Would we allow the police to search the sacred 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.

Griswold, 381 U.S. at 485-486.

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

... whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.

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 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.

Eisenstadt, 405 U.S. at 453.

- ***Carey v. Population Planning International*, 431 U.S. 678 (1977).**

Although "(t)he Constitution does not explicitly mention any right of privacy," the Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." *Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). This right of personal privacy includes "the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977). While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions "relating to marriage; procreation; contraception; family relationships; and child rearing and education. [citations omitted⁸]" *Roe v. Wade*, *supra*, at 152-153, 93 S.Ct., at 726. See also *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640, 94 S.Ct. 791, 796-797, 39 L.Ed.2d 52 (1974).

The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives, *Griswold v. Connecticut*, and most prominently vindicated in recent years in the contexts of contraception and abortion. [citations omitted]

Carey, 431 U.S. at 684-685.

- ***Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).**

The U.S. Supreme Court struck part of the so-called Comstock statute⁹ that prohibited sending unsolicited advertisements for contraceptives through the mail.

terse remarks about the Comstock statute

It is important to recognize that the Comstock Law grouped *five* distinctly different items into *one* law:

1. obscene or lewd publications,
2. contraceptives (i.e., "any article or thing designed or intended for the prevention of conception"),
3. instruments for abortion or abortifacient drugs (i.e., "any article or thing designed or intended for the ... procuring of abortion"),
4. advertisements for either contraceptives or abortions, and
5. *information* about contraceptives or abortion (i.e., "book, pamphlet, ... giving information, directly or indirectly, ... how, ... or by what means, either of the things before mentioned [contraceptives or things that produce abortion] may be obtained or made").

⁸ I have deleted the citations to cases in this long sentence from *Roe v. Wade*, to make the sentence easier to read. The full quotation is reproduced below, at page 10.

⁹ 17 Stat. 599 (1873). See the terse history of the Comstock statute at: *Poe v. Ullman*, 367 U.S. at 520, n. 10 (1961) (Douglas, J., dissenting); *Bolger*, 463 U.S. at 70, n. 19 (1983).

The reason for this strange grouping of five unrelated items is that Anthony Comstock believed that both contraception and abortion were immoral, hence any information about either contraception or abortion was obscene.

The prohibition against mailing obscene material was weakened by cases in the U.S. Court of Appeals. *U.S. v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2dCir. 1934); *Parmelee v. U.S.*, 113 F.2d 729 (App.D.C. 1940). This prohibition against obscene material in the mail was eroded by a series of U.S. Supreme Court cases beginning in the 1960s. For a discussion of the Comstock statute's prohibition against mailing obscene materials, see *Ginsberg v. State of N. Y.*, 390 U.S. 629, 650-659 (1968) (Douglas, J., dissenting).

The prohibition against mailing contraceptives was weakened by a series of cases in the U.S. Courts of Appeals. *Youngs Rubber Corporation v. C.I. Lee & Co.*, 45 F.2d 103, 108-109 (2dCir. 1930); *Davis v. U. S.*, 62 F.2d 473, 474-475 (6thCir. 1933); *U.S. v. One Package*, 86 F.2d 737 (2dCir. 1936). The U.S. Government chose not to appeal *Davis* and *One Package* to the U.S. Supreme Court.

The prohibition against mailing instructions for contraception was weakened in *U.S. v. Dennett*, 39 F.2d 564 (2dCir. 1930) (Holding instructions for contraception “not obscene”). and *Consumers Union of U.S. v. Walker*, 145 F.2d 33 (App.D.C. 1944) (Ordering U.S. Post Office to mail publication with test results of condoms.). See also *U.S. v. One Book Entitled “Contraception,” by Marie C. Stopes*, 51 F.2d 525 (S.D.N.Y. Jul 16, 1931).

The prohibition against mailing advertisements for contraceptives was struck by the U.S. Supreme Court in *Bolger*, 110 years after the Comstock statute was passed.

abortion

- ***U.S. v. Vuitch*, 402 U.S. 62 (1971).**

Vuitch is a now-forgotten case from the District of Columbia, involving a statute that permitted abortions only when “necessary for the preservation of the mother's life or health”. The U.S. Supreme Court interpreted “health” to include *mental health*. Given the anguish of an unwanted pregnancy, *Vuitch* could have made abortions legal in the USA. Twenty-one months after *Vuitch*, the U.S. Supreme Court issued *Roe v. Wade*, and then *Vuitch* was forgotten. Remarkably, the majority opinion in *Vuitch* does not use the word “privacy”, although Justice Douglas mentioned privacy in his separate opinion that dissented in part.

- ***Roe v. Wade*, 410 U.S. 113 (1973).**

Roe v. Wade was a landmark case that made legal abortions during first three months of pregnancy. The Court reviewed the history of the legal right to privacy:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U.S. 1, 8-9, 88 S.Ct. 1868, 1872-1873, 20 L.Ed.2d 889 (1968), *Katz v. United States*, 389 U.S. 347, 350, 88 S.Ct. 507, 510, 19 L.Ed.2d 576 (1967); *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), see *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S., at 484- 485, 85 S.Ct., at 1681-1682; in the Ninth Amendment, *id.*, at 486, 85 S.Ct. at 1682 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541-542, 62 S.Ct. 1110, 1113-1114, 86 L.Ed. 1655 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S., at 453-454, 92 S.Ct., at 1038- 1039; *id.*, at 460, 463-465, 92 S.Ct. at 1042, 1043-1044 (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925), *Meyer v. Nebraska*, *supra*.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Roe v. Wade, 410 U.S. at 152-153.

There have been *many* subsequent U.S. Supreme Court cases on state and federal laws regulating abortion, which are summarized at:

<http://www.plannedparenthood.org/library/ABORTION/majorus.html> .

I believe the following case is especially significant.

- ***Planned Parenthood of Southeastern Penn. v. Carey*, 505 U.S. 833 (1992).**

Carey allowed abortions prior to viability of fetus ex utero. *Carey* has a more liberal holding than *Roe v. Wade*, which only allowed abortions during the first three months of pregnancy.

But not too much freedom ...

- ***Maier v. Roe*, 432 U.S. 464 (1977).**

Maier upheld a state regulation that denied Medicaid payments for nontherapeutic abortions, but allowed Medicaid payments for live births. Justice Brennan wrote an eloquent dissenting opinion.

- ***Harris v. McRae*, 448 U.S. 297 (1980).**

The U.S. Supreme Court upheld the Hyde Amendment that prohibited federal funding of abortions for indigent women, even when the abortion was medically necessary.¹⁰ Justices Brennan and Marshall wrote eloquent dissenting opinions.

- ***Rust v. Sullivan*, 500 U.S. 173 (1991).**

The U.S. Supreme Court upheld law that prohibited physicians in public clinics (i.e., clinics that received federal financial support) from mentioning abortion. This case has not received the critical scrutiny that it deserves: the government intrudes on the physician-patient relationship and puts a gag in the mouth of the physician.

3. Marriage and Family Relationships

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

The Lovings were an interracial couple who were lawfully married in the District of Columbia, then moved to Virginia, which not only did not recognize marriages between people of different races, but also provided criminal penalties for such marriages. The U.S. Supreme Court invalidated the Virginia state law. Three years earlier, a Florida anti-miscegenation statute was invalidated on equal protection grounds, without explicitly mentioning privacy.¹¹

- ***Boddie v. Connecticut*, 401 U.S. 371 (1971).**

The U.S. Supreme Court struck a Connecticut state law that required payment of court costs as a prerequisite for obtaining a divorce, a law that prevented indigent people from obtaining a divorce.

¹⁰ Aside from legal arguments for making a medical procedure available to both wealthy and poor women, there is an economic argument that most people wish to ignore: Note that the legislation allowed funding for live births, which are approximately ten times more expensive than abortions. And if a woman could not afford a \$ 300 abortion, she certainly could not afford the thousands of dollars each year for food, clothing, medical care, school supplies, etc. for her child, so the government would need to pay for both a live birth, then welfare payments for the child during the next 18 years. No wonder the U.S. Congress can not balance the budget! Furthermore, if our society is serious about reducing poverty, we must recognize that too many children are one cause of poverty. If an indigent woman wishes to have an abortion, government should find a way to pay for it. In Representative Hyde's enthusiasm to impose *his* moral choice on indigent women, he trampled on their individual rights, as well as ignored economic realities.

¹¹ *McLaughlin v. Florida*, 379 U.S. 184 (1964).

- ***Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).**

The U.S. Supreme Court struck down mandatory leave for all pregnant teachers in public schools.

This 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 of the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147; *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010; *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510; *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042. See also *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645; *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655. As we noted in *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349, there is a right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

LaFleur, 414 U.S. at 639-640.

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

The Court struck a Wisconsin statute that required a resident of Wisconsin who was supporting minor children not in his custody to have permission of the court before marrying. The goal of this state statute was to prevent men from spending money on their new wife, instead of continuing to pay support to their already existing children.

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

The U.S. Supreme Court refused to find a fundamental right for homosexuals to engage in consensual sexual activities in a home, therefore the state was free to impose criminal penalties.¹² Brennan wrote an eloquent dissent. *Bowers* was decided by a 5 to 4 vote; Justice Powell concurred with the majority. After the decision was rendered, Justice Powell made an unusual public declaration that he had been wrong in *Bowers*. Finally, on 23 Nov 1998, the Georgia Supreme Court, in *Powell v. State*, 510 S.E.2d 18, ruled that this state statute violated Georgia's state constitution.

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

The U.S. Supreme Court held that prison inmates could marry without permission of the prison warden. Recognizes that “the decision to marry is a fundamental right under *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), and *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) ...” and that the prison regulation “is not reasonably related to these penological interests.” *Safley*, at 94, 97.

¹² The American Psychiatric Association declared in their 1973 revision of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III) that homosexuality was *neither* a disease *nor* a pathology. Given that about 5% of people are homosexuals, I believe that homosexuality should be seen as a “normal variant”, *not* as a defect. Federal courts are supposed to be aloof from popular sentiment and bigotry — that is why federal judges have lifetime tenure. However, the U.S. Supreme Court in *Bowers* made the mistake of only protecting majority lifestyles.

- ***Romer v. Evans*, 517 U.S. 620 (1996).**

The voters of Colorado approved an amendment to the state constitution that prohibited all legislative, executive or judicial action at any level of state or local government designed to protect homosexual persons. The U.S. Supreme Court, by a 6 to 3 vote, held that the amendment violated the equal protection clause of the 14th Amendment to the U.S. Constitution.

- ***Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472 (2003).**

The U.S. Supreme Court finally overruled *Bowers* in June 2003. In *Lawrence*, the U.S. Supreme Court held that consenting, adult homosexuals had a right to engage in their private sexual conduct, under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *Lawrence* also contains some remarks that the majority may not impose its morality on everyone via criminal statutes.

Legal issues of status (e.g., marriage and divorce) have traditionally been matters of state law in the USA, and the federal courts refuse jurisdiction of family law cases, as explained in my separate essay.¹³ In *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003), the Massachusetts Supreme Court courageously decided that homosexuals should have the same right to marry as heterosexuals. Because *Goodridge* was based on the Equal Protection clause in the Massachusetts state constitution, and does *not* conflict with the U.S. Constitution, the U.S. Supreme Court will not review *Goodridge*.¹⁴

- ***National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004).**

A citizen sued under the Freedom of Information Act to obtain death-scene photographs of Vincent Foster, Jr., the deputy counsel to President Clinton. The U.S. Supreme Court held that the photographs would *not* be disclosed, because of the privacy rights of Foster's *family*.

¹³ Ronald B. Standler, *Federal Court Jurisdiction in the USA in Family Law Cases*, <http://www.rbs2.com/dfederal.pdf> (May 2004).

¹⁴ *Largess v. Supreme Judicial Court for State of Massachusetts*, 317 F.Supp.2d 77 (D.Mass. 13 May 2004), *aff'd*, 373 F.3d 219 (1st Cir. 29 June 2004), *cert. den.*, --- S.Ct. ---- (29 Nov 2004).

4. Privacy in Home

- ***Boyd v. U.S.*, 116 U.S. 616 (1886).**

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes [sic] of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's judgment. [*Entick v. Carrington and Three Other King's Messengers*, reported at length in 19 How.St.Tr. 1029, 95 Eng.Rep. 807 (K.B. 1765)] Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other.

Boyd, 116 U.S. at 630.

Boyd was overruled on other grounds in *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967). See the review of *Boyd* in *Fisher v. U.S.*, 425 U.S. 391, 407-409 (1976). However, it is still true that the U.S. Supreme Court protects privacy inside homes.

- ***Silverman v. U.S.*, 365 U.S. 505 (1961).**

The U.S. Supreme Court held that use by police of a microphone in a ventilating duct in a house to listen to criminal suspect's speech was an *unreasonable* search that violated the Fourth Amendment.

The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066; *Boyd v. United States*, 116 U.S. 616, 626-630, 6 S.Ct. 524, 530-532, 29 L.Ed. 746. [FN4] This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard.

FN4. William Pitt's eloquent description of this right has been often quoted. The late Judge Jerome Frank made the point in more contemporary language:

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty--worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

United States v. On Lee, 2 Cir., 193 F.2d 306, 315--316 (dissenting opinion)
Silverman, 365 U.S. at 511-512.

- ***Stanley v. Georgia*, 394 U.S. 557 (1969).**

A person may legally possess obscene material inside his/her home, although that person can neither receive nor distribute obscene material. See also *U.S. v. Orito*, 413 U.S. 139, 141-143 (1973).

- ***Rowan v. U.S. Post Office*, 397 U.S. 728 (1970).**

The U.S. Supreme Court upheld federal statute that allowed a person to prohibit sexual advertisements from being sent to him/her through the mail. The U.S. Supreme Court later characterized *Rowan* as holding “the right to avoid unwelcome speech has special force in the privacy of the home”.¹⁵

- ***Mincey v. Arizona*, 437 U.S. 385 (1978).**

... the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

Mincey, 437 U.S. at 393.

- ***Moore v. City of East Cleveland*, 431 U.S. 494 (1977).**

The U.S. Supreme Court struck a local zoning law that required all members of a single-family dwelling to be members of the same family (e.g., grandparents could *not* live with their grandchildren).

- ***F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 748-750 (1978).**

The U.S. Supreme Court upheld Federal Communications Commission sanctions for radio station that broadcast indecent language. The Court explicitly considered that the broadcast could be heard inside homes, where children might be present.

- ***Payton v. New York*, 445 U.S. 573 (1980).**

In a criminal case involving Fourth Amendment, the U.S. Supreme Court said:

But the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and specific constitutional terms: “The right of the people to be secure in their . . . houses . . . shall not be violated.” That language unequivocally establishes the proposition that “[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 683, 5 L.Ed.2d 734. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.

¹⁵ *Hill v. Colorado*, 530 U.S. 703, 717 (2000).

Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton, 445 U.S. at 589-590.

Later in *Payton*, the U.S. Supreme Court spoke of the *sanctity* of the home:

In this case, however, neither history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic. [FN54]

FN54. There can be no doubt that Pitt's address in the House of Commons in March 1763 echoed and re-echoed throughout the Colonies:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter — all his force dares not cross the threshold of the ruined tenement!

Miller v. United States, 357 U.S., at 307, 78 S.Ct., at 1195.

Payton, 445 U.S. at 601.

- ***Frisby v. Schultz*, 487 U.S. 474 (1988).**

The U.S. Supreme Court held that a city may forbid picketing in front of home.

- ***Minnesota v. Olson*, 495 U.S. 91 (1990).**

In case involving warrantless arrest of an overnight guest in an apartment, the U.S. Supreme Court held that the arrest violated the guest's Fourth Amendment rights. *Olson* recognizes that a guest has a reasonable expectation of privacy in the home.

- ***U.S. Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 495-502 (1994).**

Unions sought list of home addresses of government employees. The U.S. Supreme Court held that the addresses were private and would *not* be disclosed by the government.

- ***Kyllo v. U.S.*, 533 U.S. 27 (2001).**

Police used thermal imaging equipment to “look” inside a house, although there was no trespass by police. The U.S. Supreme Court held that this was a search under the Fourth Amendment and “presumptively unreasonable without a warrant.”

5. Right to Refuse Medical Treatment

There is a well-established common-law legal right in the USA that a mentally competent adult patient has the legal right to refuse continuing medical treatment for any reason, even if that refusal will hasten his/her death. See cases and discussion in my separate essay at <http://www.rbs2.com/rrmt.pdf> . This right to refuse medical treatment is nearly absolute for adults, unless they are *either*

1. mentally incompetent (i.e., retarded or insane),
2. incapable of expressing a wish (i.e., in either a coma or a persistent vegetative state) — see my separate essay at <http://www.rbs2.com/rtd.pdf> , or
3. inmates of a prison.

In these exceptions, someone else — typically the next-of-kin, the person named in a health-care proxy, or the state — must make the decision. A state will *sometimes* compel a mother to undergo a medical procedure to prevent her child(ren) from being abandoned.

In 1997, the U.S. Supreme Court possibly recognized the right to refuse medical treatment as a Constitutional right. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S. [261] at 278-279, 110 S.Ct. [2841] at 2851-2852 [(1990)].”). The U.S. Supreme Court did *not* include the right to refuse medical treatment in the list of privacy rights, because the Court was resisting expansion of privacy rights, as explained below, beginning at page 22. However, the common law in many states is that the right to refuse medical treatment does invoke constitutional privacy rights.

children

In the case of children, parents generally can accept or refuse medical treatment for their children. There is a major exception to this rule: parents can *not* refuse medical treatment for their children that would probably save the life of the child. This means that physicians can legally transfuse blood into children whose parents are Jehovah's Witnesses, although the parent is probably able to legally refuse a transfusion in herself or himself. This is a complex and evolving area of law, for which the following citations are only a beginning:

- *People v. Pierson*, 68 N.E. 243 (N.Y. 1903) (Parent, on religious grounds, refused to seek medical attention for two-year old daughter with whooping cough and subsequent pneumonia. Parent convicted of misdemeanor.);

- *Prince v. Massachusetts*, 321 U.S. 158 (1944) (At 166-167: “The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. *People v. Pierson*, 176 N.Y. 201 [(N.Y. 1903)]. At 170: “Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”).
- *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769 (Ill. 1952) (Parents, on religious grounds, refused consent for life-saving blood transfusion of their 8-day old daughter, so court ordered transfusion.), *cert. denied*, 344 U.S. 824 (1952);
- *State v. Perricone*, 181 A.2d 751 (N.J. 1962) (allowing blood transfusion to child whose parents were Jehovah’s Witnesses), *cert. den.*, 371 U.S. 890 (1962);
- *Jehovah’s Witnesses in State of Washington v. King County Hospital Unit No. 1 (Harborview)*, 278 F.Supp. 488 (D.Wash. 1967) (held state could order blood transfusions to children of parents who were Jehovah’s Witnesses), *aff’d without opinion*, 390 U.S. 598 (1968) (per curiam) (citing *Prince v. Massachusetts*, 321 U.S. 158);
- *Custody of a Minor*, 379 N.E.2d 1053 (Mass. 1978) (parental rights terminated when parents refused to continue chemotherapy for leukemia in their infant);
- *People in Interest of D. L. E.*, 645 P.2d 271 (Colo. 1982) (parental rights terminated when parents, on religious grounds, refused to give medicine to their child who suffered from grand mal epileptic seizures);
- *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988) (affirming manslaughter conviction for parent who used "Christian Science" prayer instead of medicine for her 4 y old daughter who was suffering from meningitis).

To be clear, there is a significant difference between (1) a single mother who refuses a life-saving transfusion for herself, despite making an orphan of her child, and (2) a child who needs a life-saving transfusion, but the one parent/guardian refuses to consent. The first invokes the right of an adult to refuse medical treatment for herself, the second wrongfully deprives a child of the chance to live. In the second example, the parent is declining medical treatment for someone else, when that someone was never competent to make a choice, because they are a minor.

U.S. Supreme Court cases

- ***Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (U.S. 1905).**

Often cited as a case affirming *compulsory* vaccination against smallpox, but those of us who have actually read the case know that the Massachusetts statute at issue in this case only fined unvaccinated people \$5. True compulsion would physically force the violator to be vaccinated.

- ***Zucht v. King*, 260 U.S. 174 (1922).**

Validated city ordinance requiring children to be vaccinated against smallpox as a condition of attending public schools. Violation also includes a maximum fine of \$100.

- ***Rochin v. California*, 342 U.S. 165 (1952).**

Law enforcement agents forcibly entered Rochin's bedroom and saw him put two capsules in his mouth. They tried to remove the capsules from his mouth, but failed. Rochin was handcuffed and taken to a hospital. At the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This 'stomach pumping' produced vomiting. In the vomited matter were found two capsules which proved to contain morphine.

Rochin, 342 U.S. at 166

Rochin was convicted in state court. The U.S. Supreme Court reversed the conviction:

... we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Rochin, 342 U.S. at 172

- ***Winston v. Lee*, 470 U.S. 753 (1985).**

Law enforcement agents wanted to have a surgeon remove a bullet from under Lee's collarbone, to show that rifling on the bullet matched a shopkeeper's pistol, thus proving that Lee committed a robbery. Held that the proposed surgery was an *unreasonable* search under the Fourth Amendment.

- ***Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).**

Person has right to refuse medical treatment. Upheld state requirement that family must prove by clear and convincing evidence that incompetent person (Nancy Cruzan was in a persistent vegetative state) would want withdrawal of life-sustaining treatment. See my separate essay, Annotated Legal Cases Involving Right-to-Die in the USA, <http://www.rbs2.com/rtd.pdf> (2005).

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

The U.S. Supreme Court refused to declare a general right for a person to commit suicide. Therefore, the Court upheld a Washington state law that prohibited physician-assisted suicide. See my separate essay, Annotated Legal Cases on Physician-Assisted Suicide in the USA, <http://www.rbs2.com/pas.pdf> (2005).

- ***Vacco v. Quill*, 521 U.S. 793 (1997).**

In New York, as in most States, it is a crime to aid another to commit or attempt suicide, [FN1] but patients may refuse even lifesaving medical treatment. [FN2] The question presented by this case is whether New York's prohibition on assisting suicide therefore violates the Equal Protection Clause of the Fourteenth Amendment. We hold that it does not.

FN1. New York Penal Law § 125.15 (McKinney 1987) ("Manslaughter in the second degree") provides: "A person is guilty of manslaughter in the second degree when ... (3) He intentionally causes or aids another person to commit suicide. Manslaughter in the second degree is a class C felony." Section 120.30 ("Promoting a suicide attempt") states: "A person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide. Promoting a suicide attempt is a class E felony." See generally *Washington v. Glucksberg*, 521 U.S. 702, 708-720, 117 S.Ct. 2258, 2262-2267, 138 L.Ed.2d 772 (1997).

FN2. "It is established under New York law that a competent person may refuse medical treatment, even if the withdrawal of such treatment will result in death." *Quill v. Koppell*, 870 F.Supp. 78, 84 (S.D.N.Y. 1994); see N.Y. Pub. Health Law, §§ 2960-2979 (McKinney 1993 and Supp. 1997) ("Orders Not to Resuscitate") (regulating right of "adult with capacity" to direct issuance of orders not to resuscitate); *id.*, §§ 2980- 2994 ("Health Care Agents and Proxies") (allowing appointment of agents "to make ... health care decisions on the principal's behalf," including decisions to refuse lifesaving treatment).

Quill, 521 U.S. at 796-797.

- ***Sell v. U.S.*, 539 U.S. 166 (2003)**

Sell was indicted for criminal offenses, but declared mentally incompetent to stand trial. The U.S. Supreme Court then announced four conditions for involuntarily giving antipsychotic drugs to a defendant in a criminal case.

6. Reasonable Expectation Test

The landmark case of *Katz v. U.S.*, 389 U.S. 347 (1967) considered a wiretap on a public telephone booth. The principal holding in this case was that the police had violated the defendant's privacy upon which he justifiably relied and the police made an unreasonable seizure under the Fourth Amendment to the U.S. Constitution. In Justice Harlan's concurring opinion in *Katz*, 389 U.S. at 361, a two-part test was proposed:

1. Did the person have an actual expectation of privacy in the communication? and
2. Does society recognize this expectation as reasonable?

The U.S. Supreme Court accepted this two-part test in *Smith v. Maryland*, 442 U.S. 735, 740 (1979) and restated their acceptance again in *California v. Ciraolo*, 476 U.S. 207, 211 (1986). While *Katz* is a search and seizure case in criminal law, the reasonable expectation test has been applied in civil contexts, such as privacy of e-mail, which I discussed in a separate essay.¹⁶

There is a famous sentence in *Katz*: "... the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. Nonetheless, there are some places where people do have a reasonable expectation of privacy, while one does *not* have a reasonable expectation of privacy in a public place. As *Katz* says in the next sentence:

What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.

Katz, 389 U.S. at 351.

A U.S. Supreme Court case in the year 1973 explained:

The protection afforded by *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), is restricted to a place, the home. In contrast, the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved. Cf. *Roe v. Wade*, 410 U.S. 113, 152-154, 93 S.Ct. 705, 726-727, 35 L.Ed.2d 147 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485-486, 85 S.Ct. 1678, 1682-1683, 14 L.Ed.2d 510 (1965). Obviously, there is no necessary or legitimate expectation of privacy which would extend to marital intercourse on a street corner or a theater stage.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66, n. 13 (1973).

¹⁶ Ronald B. Standler, *Privacy of E-Mail in the USA*, <http://www.rbs2.com/email.htm> (May 1998).

7. U.S. Supreme Court Unwilling to Expand Privacy

Sometime after the year 1985, new justices appointed to the U.S. Supreme Court have expressed a general reluctance to further expand an individual's constitutional right of privacy. Respect for *stare decisis* generally prevents these new justices from abolishing previously established privacy rights. However, new justices can slowly erode privacy rights, as shown by abortion cases during the 1980s and 1990s.

In 1986, the U.S. Supreme Court wrote:

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Bowers v. Hardwick, 478 U.S. 186, 194-195 (1986).

The specific issue in *Bowers* was overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003), but the U.S. Supreme Court continues to be reluctant to expand privacy rights.

In 1992, the U.S. Supreme Court wrote:

As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-226, 106 S.Ct. 507, 513-514, 88 L.Ed.2d 523 (1985). The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins v. City of Harker Heights, Texas, 503 U.S. 115, 125 (1992).

Part of this quotation from *Collins* was quoted in a series of U.S. Supreme Court majority opinions:

- *Reno v. Flores*, 507 U.S. 292, 302 (1993);
- *Albright v. Oliver*, 510 U.S. 266, 271-272 (1994) (plurality opinion);
- *Compassion in Dying v. Washington*, 79 F.3d 790, 803 (9th Cir. 1996) (“The Court has also recently expressed a strong reluctance to find new fundamental rights.”), *rev'd sub nom. Washington v. Glucksberg*, 521 U.S. 702, 720 (1997);
- *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998);

- *Chavez v. Martinez*, 538 U.S. 760, 775-776 (2003) (“Many times, however, we have expressed our reluctance to expand the doctrine of substantive due process,”);
- *District Attorney’s Office for 3rd Judicial District v. Osborne*, 557 U.S. 52, 72 (2009).

See also *Seal v. Morgan*, 229 F.3d 567, 574-575 (6thCir. 2000) (“The list of fundamental rights and liberty interests — which includes the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to terminate one's pregnancy, and possibly the right to refuse unwanted lifesaving medical treatment, see *Glucksberg*, 521 U.S. at 720 (citing cases) — however, is short, and the Supreme Court has expressed very little interest in expanding it. See *Glucksberg*, 521 U.S. at 721.”).

“deeply rooted” in history ?

In 1977, Justice Powell — joined by Justices Brennan, Marshall, and Blackmun — wrote a plurality opinion for a U.S. Supreme Court case that noted:

Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.
[footnote omitted]

Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 (1977).

This statement in *Moore* is literally true: the law in the USA has long protected the family from government regulation. However, beginning in 1999, several justices on the U.S. Supreme Court interpreted this *unremarkable* passage in *Moore* to mean that *only* institutions that are “deeply rooted” in U.S. history can qualify for substantive due process protection. For example,

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," [*Moore*, 431 U.S.] at 503, 97 S.Ct., at 1938 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.

Washington v. Glucksberg, 521 U.S. 702, 720-721 (1997).

In a 1999 case involving an unconstitutionally vague gang loitering ordinance, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, wrote a dissenting opinion that was the first to declare that *only* rights that were “deeply rooted” in history qualified for substantive due process protection:

We recently reconfirmed that "[o]ur Nation's history, legal traditions, and practices ... provide the crucial 'guideposts for responsible decisionmaking' ... that direct and restrain our exposition of the Due Process Clause." *Glucksberg*, 521 U.S., at 721, 117 S.Ct. 2258

(quoting *Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion)). **Only**¹⁷ laws that infringe "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' " offend the Due Process Clause. *Glucksberg, supra*, at 720-721, 117 S.Ct. 2258. *City of Chicago v. Morales*, 527 U.S. 41, 102 (1999) (Thomas, J., dissenting).

A majority opinion of the U.S. Supreme Court in a criminal case decided in 2003 adopted the restrictive reading that *only* "deeply rooted" rights are protected:

The Court has held that the Due Process Clause also protects certain "fundamental liberty interest[s]" from deprivation by the government, regardless of the procedures provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). **Only**¹⁸ fundamental rights and liberties which are " 'deeply rooted in this Nation's history and tradition' " and " 'implicit in the concept of ordered liberty' " qualify for such protection. *Ibid.* Many times, however, we have expressed our reluctance to expand the doctrine of substantive due process, see *Lewis, supra*, at 842, 118 S.Ct. 1708; *Glucksberg, supra*, at 720, 117 S.Ct. 2258; *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); in large part "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). See also *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-226, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985). *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (Thomas, J., writing for the majority).

One month after *Chavez v. Martinez*, Justice Scalia in a dissenting opinion, joined by Justice Thomas and Chief Justice Rehnquist, said:

... But *Roe* and *Casey* have been equally "eroded" by *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), which held that *only*¹⁹ fundamental rights which are " 'deeply rooted in this Nation's history and tradition' " qualify for anything other than rational-basis scrutiny under the doctrine of "substantive due process." *Roe* and *Casey*, of course, subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort *was* rooted in this Nation's tradition. *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

This view is repeated later in the same dissenting opinion by Justice Scalia:

Our opinions applying the doctrine known as "substantive due process" hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S., at 721, 117 S.Ct. 2258. We have held repeatedly, in cases the Court today does not overrule, that *only*²⁰ fundamental rights qualify for this so-called "heightened

¹⁷ Emphasis added by Standler.

¹⁸ Emphasis added by Standler.

¹⁹ Emphasis in original by Justice Scalia.

²⁰ Emphasis in original by Justice Scalia.

scrutiny" protection — that is, rights which are " 'deeply rooted in this Nation's history and tradition,' " *ibid.* See *Reno v. Flores*, 507 U.S. 292, 303, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) (fundamental liberty interests must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (internal quotation marks and citations omitted)); *United States v. Salerno*, 481 U.S. 739, 751, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (same). See also *Michael H. v. Gerald D.*, 491 U.S. 110, 122, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) ("[W]e have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' ... but also that it be an interest traditionally protected by our society"); *Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (Fourteenth Amendment protects "those privileges *long recognized at common law* as essential to the orderly pursuit of happiness by free men" (emphasis added)). [FN3] All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.

Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).

Notice that Justices Scalia and Thomas appear to have twisted the meaning of a famous quotation from *Moore* in 1977, so that *one* of several methods of identifying fundamental rights became the *only* method. This new, restrictive interpretation of *Moore* by Justices Scalia and Thomas differs from the meaning intended by the authors of *Moore*. For example, in a 1986 dissent, Justice White, joined by Justice Rehnquist, wrote:

Attempts to articulate the constraints that must operate upon the Court when it employs the Due Process Clause to protect liberties not specifically enumerated in the text of the Constitution have produced varying definitions of "fundamental liberties." One approach has been to limit the class of fundamental liberties to those interests that are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [they] were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937); see *Moore v. East Cleveland*, 431 U.S., at 537, 97 S.Ct., at 1955 (Stewart, J., joined by REHNQUIST, J., dissenting). Another, broader approach is to define fundamental liberties as those that are "deeply rooted in this Nation's history and tradition." *Id.*, at 503, 97 S.Ct. at 1938 (opinion of POWELL, J.); see also *Griswold v. Connecticut*, 381 U.S. 479, 501, 85 S.Ct. 1678, 1690, 14 L.Ed.2d 510 (1965) (Harlan, J., concurring). These distillations of the possible approaches to the identification of unenumerated fundamental rights are not and do not purport to be precise legal tests or "mechanical yardstick[s]," *Poe v. Ullman*, 367 U.S. 497, 544, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). Their utility lies in their effort to identify some source of constitutional value that reflects not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government — "*the balance struck by this country*," *id.*, at 542, 81 S.Ct., at 1776 (emphasis added) — and they seek to achieve this end through locating fundamental rights either in the traditions and consensus of our society as a whole or in the logical implications of a system that recognizes both individual liberty and democratic order.

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 790-791 (1986) (White, J., dissenting).²¹ While Justice White is against *Roe v. Wade* and other decisions giving the right to abortion constitutional protection, his dissent in *Thornburgh* makes it clear that

²¹ *Thornburgh* was overruled by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

rights “deeply rooted” in history is just one possible way of identifying fundamental liberties. And, in a 1990 dissent, Justice Brennan, joined by Justices Marshall and Blackmun, wrote:

Whatever other liberties protected by the Due Process Clause are fundamental, "those liberties that are 'deeply rooted in this Nation's history and tradition' " are among them. *Bowers v. Hardwick*, 478 U.S. 186, 192, 106 S.Ct. 2841, 2844, 92 L.Ed.2d 140 (1986) (quoting *Moore v. East Cleveland, supra*, 431 U.S., at 503, 97 S.Ct., at 1938 (plurality opinion).

Cruzan by Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 304-305 (1990) (Brennan, J., dissenting). This terse statement reminds us that there may be other fundamental liberties protected by substantive due process, in addition to those liberties that are “deeply rooted” in history.

conclusion

Although several states (e.g., New Jersey in *Quinlan*) have raised the legal right to refuse medical treatment to the status of a privacy right, the U.S. Supreme Court refused to recognize such a new constitutional privacy right.²² While the U.S. Courts of Appeal in the Ninth Circuit and also in the Second Circuit (New York) held that terminally ill patients had a constitutional right to physician-assisted suicide, a unanimous U.S. Supreme Court reversed those holdings.²³ Requiring that substantive due process rights be “deeply rooted” in history slams the door shut and prevents judges from creating new legal rights in response to technological (or societal) change.

I have posted a separate essay, <http://www.rbs0.com/judact.pdf> at my personal website, which argues that so-called “judicial activism” in creating new privacy rights is desirable.

This document is at www.rbs2.com/priv2.pdf

My most recent search for court cases on this topic was on 24-25 Dec 2004.
first posted 6 Aug 1998, revised 1 Jul 2012

return to my homepage at <http://www.rbs2.com/>

²² Ronald B. Standler, *Annotated Legal Cases Involving Right-to-Die in the USA*, <http://www.rbs2.com/rtd.pdf> (April 2005); Ronald B. Standler, *Legal Right to Refuse Medical Treatment in the USA*, <http://www.rbs2.com/rrmt.pdf> (30 June 2012).

²³ Ronald B. Standler, *Annotated Legal Cases on Physician-Assisted Suicide in the USA*, <http://www.rbs2.com/pas.pdf> (May 2005).