William & Mary Bill of Rights Journal

Volume 18 | Issue 1 Article 3

The Unbearable Lightness of Marriage in the Abortion Decisions of the Supreme Court: Altered States in Constitutional Law

William W. Van Alstyne
William & Mary Law School

THE UNBEARABLE LIGHTNESS OF MARRIAGE IN THE ABORTION DECISIONS OF THE SUPREME COURT: ALTERED STATES IN CONSTITUTIONAL LAW

William Van Alstyne*

INTRODUCTION

"Marriage" is a term that appears in the most ordinary dictionary,[1] but not in the Constitution or in the Bill of Rights.[2] So, in contrast with the Constitution's treatment of "the freedom of speech," or the "[freedom] of the press,"[3] no provision addresses or establishes "the freedom to marry," or "the right to have a family," or even the right "to have children within marriage." Indeed, for that matter, there are no provisions distinguishing any "rights" for those who do marry from any rights of those who do not.

---

* Lee Professor of Constitutional Law, Marshall-Wythe Law School, College of William & Mary; Perkins Professor of Law (emeritus), Duke University. (This brief essay is offered partly by way of oblique critical comment on a recent article by Jack Balkin, in his reliance on the Equal Protection Clause to account for the Supreme Court's abortion decisions—an account that I think is inadvertently more paradoxical than persuasive, in Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 319–28 (2007).)

[1] *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 801 (William Morris ed., 1st ed. 1970) ("marriage . . . *n.* 1. a. The state of being husband and wife; wedlock. b. The legal union of a man and woman as husband and wife. . . . [Middle English *mariage*, from Old French, from *marier*, to MARRY.]"). But see also a third definition, as given by the same source—marriage defined more loosely as "[a]ny close union" (e.g. a "marriage of minds") or even "a union of inanimate objects (as music and drama in opera)." *Id.*

[2] In contrast, it does appear expressly in some other national constitutions. See, for example, the Constitution (the *"Basic Law"*) of Germany, GRUNDGESETZ [GG] art. 6(1) (F.R.G.) [hereinafter *Basic Law*] ("Marriage and the family shall enjoy the special protection of the state."). *See also* Organization of American States, American Convention on Human Rights, art. 17, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) ("The right of men and women . . . to marry and to raise a family shall be recognized . . . . The States Parties shall take appropriate steps to ensure the equality of rights . . . during marriage . . . ."); International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), art. 23, U.N. GAOR, 21st sess., supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women . . . to marry and to found a family shall be recognized."); Universal Declaration of Human Rights, G.A. Res. 217A, art. 16, U.N. GAOR, 3d Sess., 1st. plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) ("Men and women . . . have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.").

[3] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

And since even the very word "marriage" does not appear in the Constitution, neither is it given any definitional boundaries constraining either Congress or the states.[4]

Even so, over the course of two centuries of judicial review, the Supreme Court has considered the status of marriage in many decisions testing the permissible scope of state and federal laws that deal with marriage.[5] On the whole, moreover, at least until quite recently, these decisions have treated marriage as a special relationship perhaps more vital and more foundational within our constitutional culture than nearly any other.[6] More than a century ago, for example, the Supreme Court described the centrality of marriage in society in the following way: "Upon [the institution of marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal."[7] And so, quite naturally, the institution of marriage, and its regulation, have been recurring subjects of constitutional review.

The principal sources of Supreme Court decisions strongly sheltering rights *within* marriage have been the "due process of law" clauses in the Constitution.[8] The earlier

---

[4] Note that the definition of marriage, *see* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 1, acknowledges a usage of "marriage" as a mere "union of inanimate objects (as music and drama in opera)." May it therefore follow that a legislature might treat marriage as just such a relationship, i.e., as a relationship merely between "*inanimate objects*"? The idea seems startling and even preposterous, so far removed is it from one's natural intuitions on what marriage between two people must surely mean. (Still, in certain respects, as we shall see, it is arguable that the modern treatment of marriage sometimes seems to amount to little more than this . . . .)

[5] *See, e.g.*, cases cited *infra* notes 6, 7, 12, 13, and 19.

[6] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man' fundamental to our very existence and survival.").

[7] Reynolds v. United States, 98 U.S. 145, 165 (1878). The question before the Court in *Reynolds* was whether polygamous marriage (one husband and several wives) must be accepted by law as "marriage" (rather than disallowed as a form of criminal bigamy or criminal cohabitation), for persons claiming protection under the Free Exercise of Religion Clause in the First Amendment. The Court's answer was "no." *See id.* The Court has held that a free exercise claim may nonetheless provide some degree of family exemption from otherwise controlling state statutes (e.g., mandatory enrollment of one's children in some accredited school). *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (permitting withdrawal of Amish children from any further accredited schooling at the eighth grade); *cf.* Employment Div. of Or. Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990) (re-characterizing *Yoder* as also a family-liberty-parental rights due process case).

[8] *See* U.S. CONST. amends. V & XIV. The use of the Due Process Clauses (protecting life, liberty, and property) as a source of substantive limits on state power traces its lineage in legal history to chapter 39 of the Magna Carta, at Runnymede, in 1215: "No free man shall be . . . stripped of his rights or possessions . . . except by the lawful judgement of his equals or by the law of the land." The latter phrase ("the law of the land") was accepted into American practice to mean laws consistent with right and with reason; i.e., not arbitrary in the treatment of personal liberty. *See* Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911); Edward S. Corwin, *The 'Higher Law' Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928).

of these identically-framed clauses appears in the Fifth Amendment of the Bill of Rights,[9] but this clause is binding only on Congress and not on the states.[10] The other, enacted in 1868, appears in the Fourteenth Amendment and expressly does bind the states.[11] Together, these clauses have been understood to limit the national government and the state governments from enacting highly intrusive laws infringing on private liberty within marriage.[12] They have likewise been applied to provide for the equal protection of husbands and wives *within* marriage.[13] For the greater part of

---

[9] U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

[10] Note that, unlike the First Amendment, the Fifth Amendment has no language expressly confining its application only to acts of Congress. *See* U.S. Const. amend. V. Nevertheless, it was widely understood solely to limit the national government, and to leave the state governments to be limited only in such manner, and according to such restrictions, as their own respective state constitutions might provide. The Supreme Court accepted this understanding of the Fifth Amendment. Accordingly, it held the amendment to have no applicability to the states. *See* Barron v. Baltimore, 32 U.S. 243 (1833).

[11] U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."). In the aftermath of the Civil War (1860–1865), in the course of proposing new constitutional limits on the states, Congress was no longer willing to trust the states not to "deprive any person of life, liberty, or property, without due process of law," as was previously the case under the Fifth Amendment. Accordingly, the Thirty-ninth Congress (the Reconstruction Congress of 1866) proposed to extend the Fifth Amendment provision in a new form to make it equally controlling in every state; as the national government was not empowered to deprive any person of life, liberty, or property, without due process of law (but, rather, had at all times since 1791 been forbidden to do so), so too, the states were likewise thereafter to be subject to the same restraint. In brief, with the ratification of the Fourteenth Amendment in 1868, the anomaly of exempting state legislatures from due process standards previously applicable only to Congress came to an end. *See generally* KRIS E. PALMER, CONSTITUTIONAL AMENDMENTS: 1789 TO THE PRESENT 328–35 (2000) (describing the history of the Fourteenth Amendment).

[12] No doubt the single strongest modern example is *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Court held that consensual expressions of sexual intimacy within marriage are generally reserved from state authority by the Due Process Clause. In *Griswold*, moreover, the Court expressly distinguished "*marital* privacy," stressing the special commitment reflected within marriage and describing marriage as a "bilateral loyalty," a relationship traditionally sheltered and protected by the law. *Id.* at 486. For still additional emphases, see *id.* at 486 (Goldberg, J., concurring, joined by Warren, J., and Brennan, J.); *id.* at 495 (Goldberg, J., concurring) (speaking of the "private realm of family life" and of "husband and wife's marital relations" (quoting Poe v. Ullman, 367 U.S. 497, 551–52 (1961))); *id.* at 503 (White, J., concurring) (emphasizing marital privacy). *See also* Michael H. v. Gerald D., 491 U.S.110, 124 (1989) (where the Court again stated that "our traditions have protected the marital family"); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Boddie v. Connecticut, 401 U.S. 371 (1971); Poe v. Ullman, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting); and Meyer v. Nebraska, 262 U.S. 390 (1923).

[13] *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973). These cases all involve disparities in treatment under federal law of spousal benefits received by husbands and by wives

the twentieth century, the pattern of judicial decisions of both kinds—the special protection of marriage and of equality of rights within marriage—tended to be of a common piece. Overall, they strongly sheltered marriage and the mutual interests of married persons in each other and in the new lives joining them through their children, born of that union, conceived within that special union of mutual commitment to one another. A single case decided nearly ninety years ago, affords a suitable example to illustrate the point.[14]

Following World War I, several states enacted laws forbidding any language instruction other than English to be permitted in any school to any child prior to the eighth grade.[15] Ostensibly, these laws were enacted to ensure that the children of first or second generation immigrant families would become fluent in English.[16] Rather than taking care merely to insure adequate instruction in English to serve that end, however, these laws outlawing any non-English language classes, whether in private schools or in public schools, were far more sweeping.[17] That is, they forbade any language instruction in any other language at all until a child was in the eighth grade *regardless* of the degree of English literacy a child might already have or, indeed, be able to demonstrate according to such tests, written or oral, as the state might require. The effect of these laws was particularly harsh on large numbers of immigrant families.[18] They effectively deprived these families (and, indeed, many other families) of any lawful means whatever to enable their own children even to receive any instruction in any school of the language spoken by their parents at home.

The Supreme Court held this restriction to be a violation of the Fourteenth Amendment's Due Process Clause in *Meyer v. Nebraska*.[19] The Court's opinion

---

struck down as inconsistent with the Fifth Amendment Due Process Clause requirements of equality of treatment of spouses within marriage. In cases arising under state laws rather than under federal laws, the Court has tended more often to rely on the Equal Protection Clause—rather than the Due Process Clause—to provide equality of treatment of spouses within marriage. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (one-way alimony rights held invalid as denying equal protection within marriage); *see also* Zablocki v. Redhail, 434 U.S. 374 (1978) (state law conditioning ability to marry on showing that child support obligations have been met held to violate the Equal Protection Clause); Loving v. Virginia, 388 U.S. 1 (1967) (state law restrictions on interracial marriage held void pursuant to the Equal Protection Clause of the Fourteenth Amendment).

[14] Meyer v. Nebraska, 262 U.S. 390 (1923).

[15] *See* Susan G. Lawrence, *Substantive Due Process and Parental Rights: From* Meyer v. Nebraska *to* Troxel v. Granville, 8 J.L. & FAM. STUD. 71, 73–74 (2006).

[16] One says "ostensibly," advisedly (i.e., there was considerable evidence in the background strongly suggesting that these laws were enacted partly from a lingering anti-German animus following World War I). *See id.*

[17] *See Meyer*, 262 U.S. at 397 (quoting the language of the statute at issue); Lawrence, *supra* note 15, at 73–75.

[18] *See Meyer*, 262 U.S. at 397–402.

[19] *See id.* at 399–401; *see also* Farrington v. Tokushige, 273 U.S. 284 (1927) (same case arising under federal statute applicable to the federal territory of Hawaii; same result on Fifth

treated as "fundamental"[20] the "freedom . . . to marry," and the right to "bring up children."[21] Protecting the interests of parents in the education of their own children meant that the state could not forbid them from having their children learn their own language as well as English, at least in schools with teachers willing to provide such instruction.[22] The opinion for the Court pointedly contrasted Plato's visionary Republic in which, as the Court observed: "no parent [was] to know his own child, nor any child his parent," but all were, instead, to be impersonally commingled and, after suitable training, assigned according to some designated social utility and role.[23] While acknowledging that such forms of social organization had been commended by writers of great capacity (e.g., by Plato himself as well as many others), the Court simply observed that their premises—their assumptions respecting a well-ordered state—were "wholly different from those upon which our institutions rest."[24] To be sure, the state laws at issue did not seek literally to enact Plato's vision, literally separating children from their parents soon after birth, but they were cut from the same alienating principles of state power. The restrictive state laws were struck down on due process grounds.[25] The enduring pertinence of *Meyer* and of an impressive number of subsequent decisions,[26] lay in their treatment of family aspirations, of mutually shared interests in children within marriage, and in the protection of the family from being undermined by the state.

I.

In more recent decades, however, there has been a marked shift in respect to marriage, both institutionally, as well as in decisions of the Court. In certain salient respects, what it once was it no longer is.[27] Formerly, the distinctions of marriage as a special estate were indeed such that in some measure society itself *could* be said virtually to be "built upon it," because of how much it mattered. More recently, however, the emphasis has shifted to something far more pale and different in kind: to marriage substantially diminished and in some measure constitutionally thinned or reduced.

In 1972, the Supreme Court itself broke the boundary separating intimacy within marriage from intimacy outside in its startling decision in the case of *Eisenstadt v.*

Amendment due process grounds); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Bartels v. Iowa, 262 U.S. 404 (1923) (same issue, same result).

[20] *See Meyer*, 262 U.S. at 401.

[21] *Id.* at 399.

[22] *Id.* at 400.

[23] *Id.* at 401–02.

[24] *Id.* at 402.

[25] *Id.* at 399.

[26] *See* cases cited *supra* notes 12, 13, & 19.

[27] For a helpful review, *see* Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663 (1976). *See also infra* text accompanying notes 46–58.

Baird.[28] The *Eisenstadt* decision was most significant because the Court decided it on equal protection, rather than on due process, grounds.[29] It held that since the law in question did not forbid retail sale of contraceptive devices for use by married couples, it *therefore* could not forbid such sales to unmarried persons—that is, it was unsustainable insofar as the law drew a distinction between those who were married and those who were not.[30]

In a single stroke, the Court turned inside out the very distinction relied upon in its earlier decisions preceding *Eisenstadt*, most emphatically in *Griswold v. Connecticut*.[31] Whereas in *Griswold* (and in all previous cases sheltering marriage), it was precisely because of the mutual decision to share their lives, their private intimacy, and their commitments respecting children in marriage that provided the constitutional basis for acknowledging a qualified zone of "*marital* privacy," insulated from being put under stress by the state, quite breathtakingly, in *Eisenstadt*, Justice Brennan summarily dismissed all prior emphases on the institution of marriage as distinctive per se.[32] In *Eisenstadt*, the Court's constitutional equal protection ruling was that a state could not make it a criminal offense to market contraceptive devices to single persons *while exempting sales of such devices to married couples*.[33] The syllogism was extreme. It ran in the following absurdist form: A. The State may not forbid married couples from securing professional assistance and access to devices helpful to them to forestall unwanted risks of pregnancy incidental to their shared desire for sexual intimacy within their marriage. B. Since the State does not forbid married couples from the use of such devices, neither may it do so for those who have made no commitment to marriage. "A." is the substantive due process "marital privacy" proposition in *Griswold*. "B." is the equal protection holding of *Eisenstadt*. In *Eisenstadt*, the Court "reasoned" that because of A., *therefore* (also) B. In doing so, it effaced the very basis on which its decision in *Griswold* and every preceding related decision of a like sort had rested, from *Meyer v. Nebraska*[34] to the date of *Eisenstadt* itself.[35] In dicta, *Eisenstadt v. Baird* also provisionally effaced marriage as providing any significant distinction in measuring "unwarranted . . . intrusion[s]" into such closely associated related matters as decisions "whether to bear or beget a

---

[28] *See* 405 U.S. 438 (1972) (holding that the right of access to contraceptive devices of unmarried persons is equal to those within marriage).

[29] *See id.* at 446–55.

[30] *See id.* at 452–55.

[31] 381 U.S. 479 (1965).

[32] *See Eisenstadt*, 405 U.S. at 447.

[33] *See id.* at 448–50.

[34] 262 U.S. 390 (1923).

[35] For clear statements on the utter anomaly of the Court's "analysis" in *Eisenstadt v. Baird*, see H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION (1993), and Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 526–28 (1989).

child."[36] Following *Eisenstadt*, one was left to wonder what this might mean with its quite casual suggestion that there is little that may matter about marriage after all.

It did not take long to find out. And, indeed, one may quickly see the difference this altered view may make in affecting one's own thinking, simply by tracing the aftermath of the way in which, beginning with *Eisenstadt* and carrying into the present time, marriage has been so far marginalized by the Supreme Court to the point that it now holds the view that one who has conceived a child in marriage with his wife has no more standing to claim an interest in the well-being of the child thus conceived than the most casual male acquaintance with whom she may have had an equally casual one night affair (namely, virtually none at all). It requires no great skill to illustrate the point in just the following way.

II.

First, consider the constitutionality of a state statute that does attach a meaningful distinction to "marriage," i.e., a provision merely making clear that *within* marriage, one may have a *compelling* concern in the safe birth of *one's own child*, even as reflected in the following specific protective act:[37]

> Minn. Civ. Code Sec. 241: Absent any plausible medical justification, no physician shall undertake any act to destroy any gestating child willingly conceived within marriage and wanted as the lawful child by either parent willing to provide it with appropriate support.

How might an opinion be framed reviewing this law (as it might be tested against some kind of remarkable claim that the act should be held to offend the Due Process Clause of the Constitution)?[38] One may not be quite certain, of course, but certainly

---

[36] *Eisenstadt*, 405 U.S. at 453.

[37] The statutes and draft opinions presented in this section were created by the author for illustrative purposes.

[38] It presumably would be a due process claim (rather than, say, an equal protection claim) an objecting married woman would seek to assert. For, indeed, with *whom* would an objecting married woman seek to be comparing herself insofar as she put her complaint on "equal" protection (rather than due process) grounds? With an unmarried woman? Indeed, in fact, quite ironically, if there *were* to be some basis for a viable equal protection claim as matters currently stand, *that* claim would more compellingly belong to the bereft father whose "rights" in the well-being of his child conceived within marriage are zero as against those of the mother who may either carry it to term or terminate the gestating child for whatever reason is satisfactory to herself irrespective of her husband's feelings and irrespective of any representations or promises she made when they married and conceived the child by mutual choice. See discussion *infra*, the better to understand this point. For prior Supreme Court cases applying the Equal Protection Clause on behalf of husbands as well as wives within marriage, see cases cited in *supra* note 13.

the following opinion would have been an unexceptional response drawing from the Supreme Court's cases at least as far back as *Meyer v. Nebraska*, and consistent with *Griswold v. Connecticut* itself:

> It is startling to think there may be any substantial constitutional question raised by this statute. We do not think that there is. That marriage, the most personal and sheltered estate known to the law, should come accompanied by no legal recognition of *mutually* protected parenting interests in a child *willingly* conceived *within* that marriage[39] might itself more reasonably be thought to raise the more substantial constitutional question than this modestly protective law. Indeed, it is more likely that the obverse of this law, rather than this law, would present the more substantial constitutional question. For insofar as a state law would presume to license any willing physician to proceed with a procedure calculated to kill and destroy (even) a four-month child in gestation, willingly conceived within marriage, without the least regard for its place in the life and the feelings of its lawful father as well as of its mother, could itself more plausibly raise the more substantial question for this Court. It would be hard to say that so harsh a law would meet the common understanding of due process, or of equal protection as reflected in our various decisions affecting matters such as this. Within marriage a gestating child, willingly conceived within that marriage, surely need not—and perhaps, indeed, may not—be regarded by law as but one person's "separate property," summarily to be disposed of with any willing physician's particularized skill. Not since the terrible days of *Dred Scott v. Sandford*[40] has this Court taken so "detached" a view of what constitutes protected interests in human lives.
>
> It is now more than four decades since Justice Douglas acknowledged for this Court, in *Griswold v. Connecticut*, in speaking of marriage, that marriage is an association that promotes a way of life, a union freely entered into to express a *bilateral* loyalty, neither more nor less, a special estate.[41] Nearly a half-century

---

[39] [Note by the Court.] Which is all that this statute purports to reach. We express no opinion respecting the validity of any law purporting to do anything more. Specifically, this act reaches *no* claim by anyone outside of the marriage. Equally, it makes *no* claim other than in respect to children conceived within marriage "*willingly*," i.e., by mutual will of both parties, husband and wife together, *neither more nor less*.

[40] [Note by the Court.] 60 U.S. 393 (1857) (the "slave decision" by Chief Justice Roger Taney of this Court).

[41] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

earlier, in *Meyer v. Nebraska*, we had noted that "[w]hile this court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment] . . . [w]ithout doubt, it denotes not merely freedom from bodily restraint but also . . . the right . . . to marry, establish a home and bring up children . . . ."[42]

The value of human life in gestation may be subject to much debate and differences of opinion.[43] Yet, we think it is surely not so worthless as always to be rendered discardable at unilateral will. And we find no ground to invalidate a law that merely provides that absent any plausible medical necessity,[44] no physician shall undertake any act to destroy any child in gestation when it is a child willingly conceived within marriage and sufficiently valued by at least one of its parents (even if not, alas, by both) who will cherish and stand ready to provide it all necessary support, *if it is merely allowed to be born.* Indeed, we find it difficult to grasp an argument grounded in the Constitution sufficient to maintain the opposite conclusion—that a law of this merely *minimally* protective sort, enabling one with whom a child was willingly conceived within marriage, to protect the very life of that gestating child from dismemberment and premature death for reasons exclusively satisfactory to the person who may now desire to unburden herself of permitting it merely to be born, is somehow to be regarded as at odds with some clause, or some

---

[42] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[43] [Note by the Court.] We expressly acknowledged as much in *Roe v. Wade*, as we likewise acknowledged that it was not for the judiciary to take upon itself so to resolve the matter as such, i.e., by presuming to dismiss some views as "right" and others "wrong." *See* Roe v. Wade, 410 U.S. 113, 159 (1973) ("We need not resolve the difficult question of when [meaningful] life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, *the judiciary*, at this point in the development of man's knowledge, *is not in a position to speculate as to the answer.*") (emphasis added). Admittedly, and perhaps to some troubling degree inconsistently, having so expressly declared, it is true that in *Roe* itself, a majority of this Court nevertheless *did* presume to hold that no view of the matter would be respected by this Court to justify any law, even one imperative to secure that human life from destruction, if it significantly interfered with (or substantially burdened) a woman's decision that it was, in her *own* view, *not* a life worthy enough of being permitted to live as against *her* "choice" not to permit it to live even until it might be safely delivered (as, say, in the sixth or seventh month at best). *See id.* at 153–67. We need not now try to account for this problem within *Roe* itself, however, in order correctly to decide this case, as we do.

[44] [Note by the Court.] That is, without any special medical risks in continuing to nurture the dependent fetal human life willingly conceived within marriage, to the time when it may be safely delivered to sustain a life outside her womb.

> principle, derived from the Constitution of the United States. We are quite certain there is no such clause or chilling principle in the document called our Constitution, nor, indeed, would we be inclined to invent one, even supposing it were within our discretion to do so—as most assuredly it is not. Whatever else "marriage" may or may not be held to mean, it need not be held to mean so little as to count for nothing beyond whatever some casual third party might presume to assert in respect to the pregnancy of a single person with whom he exchanged no wedding vows.

So might an opinion have been written in declining to upend the Minnesota law. But consider, next, a state legislature enacting the virtual mirror image of this law, say, a statute that might read in the following way:

> Minn. Civ. Code Sec. 48: "Marriage" shall be deemed, in this jurisdiction, to confer no interest whatever that one not married lacks in regard to each woman's reproductive autonomy. Accordingly, no physician providing any abortion service need concern himself with any alleged interest or concern any husband may claim to hold in securing the life of the child, it being the policy of this state that he has none sufficient to count.

How might an opinion from the Supreme Court respond to *this* development? As a mere extrapolation of the dicta in *Eisenstadt* and indeed as in fact declared quite emphatically in subsequent cases by the Court, the following opinion would provide a plausible account:

> It is startling to think that there could be any constitutional question raised by this statute, whether of equal protection or of due process of law. We do not think that there is. To the contrary, this act merely reports in statutory form what our own decisions have already declared to be the controlling law. In our recent decisions, beginning with *Eisenstadt v. Baird*, this Court has held that there is *nothing* sufficient in marriage to permit a state to impose any restriction on the right of any woman—whether or not married and regardless of with whom she conceived a child—to secure the abortion of any fetus *she* does not deem worthwhile to carry to term so long as she acts within the first six months of conceiving that child.[45] This was the essential holding, most

[45] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

> recently, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[46] a case we explained as but a further elaboration of our previous decision in *Roe v. Wade*.[47] In brief, in *Casey*, we have ourselves declared that *not even notice* to her husband of her intention to dispense with the offspring she willingly conceived with him need be provided if, for any reason satisfactory to herself alone, she is not inclined to advise him of her plan.[48]
>
> The statute before us is therefore not remarkable, much less objectionable. Rather, it but states a mere truism. That is, it merely carries particular holdings of ours into suitable provisions of statutory law. In effect, therefore, it but serves to illuminate the real meaning of our own decisions on the *irrelevance* of marriage in this critical regard. Bluntly stated, and so we have held, when it comes to determining whether first- or second-term human life in gestation shall be "terminated," *the interest in the lives of their offspring in gestation stands on no higher footing, constitutionally speaking, for husbands within marriage than the interest of those who eschew marriage and have made no marital commitment at all.* Thus a state statute, such as this one, that advises them that this is so, is merely helpful in clarifying what we have said about the emptiness of "marriage," so far as it affects this particular subject, since 1972.

Which of these sets of strikingly different statutes (and very different opinions) finds the stronger pedigree in the precedents of the Supreme Court? The answer will not long detain us. The plain answer is that prior to *Eisenstadt* (and its downstream abortion-related derivatives), the first opinion would find by far the greater support. Until that date, virtually *every* opinion from the Supreme Court dealing with marriage had treated it as special—as a cornerstone of social organization in the United States, emphasizing its *bilateral* loyalties, its sheltered community, and its protections pursuant to the Constitution and the Bill of Rights.[49] Indeed, the opinion hypothesized for the Court (the imaginary opinion sustaining the first statute) was hardly more than a mere construction of existing Supreme Court views evolved during a century of principal cases touching this field. It is, however, the second opinion—in tone

---

[46] 505 U.S. 833 (1992). Ironically, the *only* provision of the Pennsylvania statute held to be unconstitutional in *Casey*, as imposing an "undue burden" on a woman's right to terminate an unwanted pregnancy, was the provision relating solely to "spousal notification" of her intention to abort their gestating child. *See id.* at 893–95.

[47] 410 U.S. 413 (1973).

[48] *See Casey*, 505 U.S. at 893–95; *see also* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

[49] *See supra* notes 6, 12, & 13 and accompanying text.

as well as in substance—that now more accurately reflects the current constitutional standing (or lack thereof) of marriage in the decisions of the Supreme Court today. Indeed, in light of the Court's most recent principal opinion on this particular subject,[50] the first opinion would not be consistent with its current view at all. It is only an opinion of this second sort that would, with rough accuracy, describe the current state of our constitutional law.

III.

"Marriage" is today easily entered, but then, indeed, it is also almost as easy to exit.[51] So, too, is "marriage" a mere alternative arrangement, one not notably preferable (and, indeed, in some ways less preferable[52]) than some other arrangements available in a number of states where, even as in California, mere "Marvin" agreements (private contracts of cohabitation) are legal alternatives to marriage itself.[53] Not only has marriage been reduced overall in terms of any legal specialness, rather, marriage is itself frankly discouraged by some other features of our modern (or postmodern) law. So, for example, it is commonly supposed that marriage is encouraged in the structure of the federal income tax (i.e., the advantage of filing a joint return),

---

[50] *See Casey*, 505 U.S. 833.

[51] The majority of states have long since switched to "no-fault" divorce, and—in keeping with this switch—decisions to marry may themselves be more lightly made (insofar as they are virtually cancelable at will). *See* Doris Jonas Freed & Henry H. Foster, Jr., *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229, 241 (1981).

[52] A man who marries—and *only* one who does marry (as distinct from the single, unmarried man)—may become liable for the support of such offspring his wife chooses to bear adulterously during the marriage, as well as liable also for the support of such offspring she has with him (and whether he desired them or not). On the other hand, there is no symmetry in this liability, for the wife is not liable for the support of any children she did not bear—certainly not for children the husband conceived adulterously with another. For a brief review of the general topic, see IRA MARK ELLMAN, PAUL M. KURTZ, & KATHARINE T. BARTLETT, FAMILY LAW: CASES, TEXT, PROBLEMS 888–97 (2d ed. 1991).

[53] *See* Marvin v. Marvin, 557 P.2d 106 (Cal. 1976). Such agreements were formerly void on public policy grounds (akin to contracts of prostitution or meretricious criminal cohabitation). But nonmarital cohabitation is currently not merely lawful in most jurisdictions, rather, it is on its way to becoming a protected *civil* right. In California, for example, a private landlord's refusal to rent to unmarried cohabitants is actionable in state court. *See, e.g.*, Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996). Following the Supreme Court's "sodomy decision," in *Lawrence v. Texas*, 539 U.S. 558 (2003), moreover, various state supreme courts have concluded that implicit in the reasoning of the Supreme Court in *Lawrence*, unmarried persons have a substantive due process "*right*" to engage in acts of fornication and of sodomy, as they desire to pursue indiscriminately, or otherwise. *See, e.g.*, Martin v. Ziherl, 607 S.E.2d 367, 371 (Va. 2005). In a sense, the Virginia Supreme Court's decision was also foreshadowed by the Supreme Court's decision in *Carey v. Population Services International*, 431 U.S. 678 (1977), which extended a substantive due process right to buy mail-order nonprescription contraceptive devices to unmarried sixteen-year-olds.

but even this notion is substantially false.[54] For many couples, marriage comes accompanied by a tax *penalty*.[55] Such a couple (a married couple) may pay several thousand dollars *more* each year into the federal treasury than had the couple not married but stayed single, casually cohabiting, and taking care to file separate returns.[56] Marriage may also be discouraged for the same reason for many among the working poor as well, for they, too, may likewise be penalized by the federal tax tables such as they are.[57]

To be sure, in another country, specifically in Germany, the equivalent tax act of the national legislature that discriminated in this fashion (subjecting married couples to higher taxes) was held to be inconsistent with the Constitution's protection of marriage.[58] But there has been no similar successful challenge entertained by our Supreme Court, nor could there likely be such a challenge in light of the manner in which marriage has been diminished in its overall constitutional standing by our Court. In a larger sense, the second opinion modeled in this brief review simply manifests these trends in the marginalizing of marriage, in the social (dis)organization of the United States.

Perhaps all of these developments are nonetheless—on balance—progressive developments, as many evidently believe to be true.[59] Perhaps, that is, they are "good"—that this is truly the way things ought to be where marriage counts very little (nearly nothing actually) when push comes to shove. Yet, surely there may be some reason to think this is not entirely so, or at least that these developments have not come without some costs and, possibly, some real losses as well. As the idea of the centrality of marriage appears to be on the wane, so, too, may the idea of one's family, and of one's responsibilities to that family, become diminished as well. The two are not, after all, entirely easy to distinguish as one tries to think these matters through.[60]

---

[54] *See* Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 1 (2000).

[55] *See id.* at 8.

[56] *See* Tom Herman, *A Special Summary and Forecast of Federal and State Tax Developments*, WALL ST. J., July 28, 1993, at A1 (reporting that even in 1994, it could readily cost a given professional married couple $6,300 each year, as a surtax purely on their marriage).

[57] *See* Editorial, *Review & Outlook: Home Clintonomix*, WALL ST. J., Mar. 26, 1993, at A10 (reporting that under the then current proposed tax bill: "[A] couple earning $12,000 each and planning three kids . . . [will] pay $2,744 in taxes if they get married, but collect refunds totaling $831 if they stay single.").

[58] In Germany, where marriage is expressly protected in the *Basic Law*, *supra* note 2,the Constitutional Court has struck down tax provisions putting those who marry at a tax rate disadvantage of the kind reflected in our own current tax laws. *See, e.g.*, BverfGE, 6, 55 (1957), *translated and reprinted in* WALTER F. MURPHY & JOSEPH TANENHAUS, COMPARATIVE CONSTITUTIONAL LAW 339, 339–42 (1977).

[59] *See, e.g.*, Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

[60] So, for example, in a widely reported article appearing a decade ago in *The Atlantic*, author Barbara Whitehead noted these disquieting facts:

Finally, however, even as acknowledged at the beginning of this brief essay, it is true that the Constitution itself does not expressly address "marriage," "family," or "children" at all.[61] So perhaps it is altogether pointless to presume to relate any of these things to developments in constitutional law, as I have sought to relate them here. Yet, admitting all of this, it is difficult to believe that they are wholly disconnected insofar as the Supreme Court itself has actively participated in this cultural debate, first by specially treating these interests with solicitude and exceptional protection, but more recently with an attitude of quite a different and dismissive sort. Whatever one may think of this development, moreover, and whether one believes that the Supreme Court merely reflects public attitudes in its various constitutional decisions (as many critics think) or sometimes acts in ways that may also influence public attitudes in its various cases interpreting and applying the Constitution (as certainly seems likely), it surely does seem that we do find ourselves in quite an altered state. If even this much is true, then perhaps, however, even now we should also think a little more seriously than the Court itself has seemed to do, or than we have shown sufficient inclination to do, as we slip away now to see ourselves as "through a glass, [but] darkly," rather than as we might want to be seen, "face to face."[62]

> Survey after survey shows that Americans are less inclined than they were a generation ago to value sexual fidelity, lifelong marriage, and parenthood as worthwhile personal goals. [The out-of-wedlock birth rate went from five percent in 1960 to 27 percent in 1990] . . . . Fewer than half of all adult Americans today regard the idea of sacrifice for others as a positive moral virtue. . . . More than half of the increase in child poverty in the 1980s is attributable to changes in family structure . . . . In fact, if family structure in the United States had remained relatively constant since 1960, the rate of child poverty would be a third lower than it is today.

Barbara Dafoe Whitehead, *Dan Quayle Was Right*, THE ATLANTIC, Apr. 1993, at 50, 55, 58 & 77. And from 27 percent in 1990 (up from five percent in 1960), as reported by Barbara Whitehead, the out-of-wedlock birthrate has leaped another 10 percent, to 37 percent overall, by 2005. *See* Joyce A. Martin, et. al., *Births: Final Data Per 2005*, 56 NAT'L VITAL STATS. RPTS. No. 6, Dec. 5, 2007, at tbl. 20. In brief, between 1960 and 2005, less than a half-century, the percentage of out-of-wedlock births increased sevenfold! *See also* Glendon, *supra* note 27.

[61] *See supra* note 2 and accompanying text. Though, to be sure, it does address "equal protection," *see* U.S. CONST. amends. V & XIV, a concept quite left behind in the Court's remarkably degraded treatment of a husband's interest in the life of a gestating child willingly conceived within marriage and posing no undue burden to the woman when she seeks its termination without regard to why . . . . *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887–98 (1992).

[62] *See* 1 *Corinthians* 13:12 (King James) ("For now we see through a glass, darkly; but then face to face . . . .").