THE GOOD, THE BAD, AND THE UGLY OF INDIVIDUALISM:

The Intersection of Supreme Court Jurisprudence on Individual Rights and the Family
By Eric Young, Regent Law 2011

Individualism and the rights that stem from that concept are part of the American identity. Individualism is such a fundamental concept that it makes bedfellows out of both sides of political debate and is endorsed by the courts, especially in the liberty interest of the individual within the Fourteenth Amendment.

Individual rights are seen in America as existing pre-textually, as either a transcendental right or one endowed inalienably by our Creator and exists in nature. Ironically, the Supreme Court of the United States has not used nature as a justification for individual rights. The assumption is that individualism and its appended rights must be one of the values that make America great. Individual rights, however, also permit a husband or wife to abandon the family unit without fault, allow a woman without consequence to murder her unborn child, allows homosexuals to not only engage in sodomy, but in many jurisdictions consecrate this conduct in matrimony.

A disconnect obviously exists from the individual rights that lend to the building and the sustaining of a free society and the individual rights that tear society apart and are devoid of moral absolutes. In order to understand this disconnect, this piece will offer a brief exploration of the negative consequences of individualism as evidenced in the Supreme Court’s jurisprudence that has affected the family; this will be followed by an explanation of how the protection of the rights of individuals, which seems positive, went so terribly wrong. Finally, the law of liberty as espoused by the only righteous lawgiver, God, is explored in the only source of absolute truth known to humanity, the Bible, which will reveal what our country and legal system must do to restore the proper understanding of a healthy individualism that builds society and restores the family.

Individualism: The Effect on the Family

It is common knowledge that family values have eroded to the point of a serious crisis in America. The family unit is vital to sustain society; it is undeniable that a healthy marriage fosters happiness in individuals and is the main vehicle to produce responsible individuals for future generations. Yet despite this clarity, the legal system in America has aided in the breakdown of the family; that process has been a subtle devaluing of the family unit. This subtle process is most readily seen in judicial jurisprudence and arguably began in Meyer v. Nebraska1 where the Supreme Court recognized the parental right to rear children and declared that "the individual has certain fundamental rights that must be respected."2 Two years later the Court extended individual rights of parents to include the individual liberties of children in Pierce v. Society of Sisters.3 However, the Court subsequently elevated those liberties of the child greater than the familial right of parents to direct the upbringing of their child in Prince v. Massachusetts.4 In Prince, the parental choice to allow a child to distribute religious leaflets was held to be a criminal act under child labor laws.5 Thus, what started out as the Court strengthening the family in Meyer and Pierce quickly progressed to the Court construing individual rights in Prince to weaken the family by allowing greater state interference in the rearing of children,6 all in the name of liberty.
The process of weakening the family is not only apparent in the context of parental rights, but also in the context of the marriage relationship. Once again the Court began by strengthening the family in declaring unconstitutional a statute making miscegenation a crime in *Loving v. Virginia,* thereby recognizing the fundamental individual right to marriage. Less than ten years later the Court began an assault on the family by declaring an individual right in *Zablocki v. Redhail* to marry another as supreme over an individual’s financial responsibility to his or her children. Individualism has progressed in Supreme Court jurisprudence to include an array of privacy rights that assumes a fundamental individual right to sodomy. Many states now allow homosexual individuals to consecrate their sodomy in marriage even though marriage, from time immemorial, has been understood to be between one man and one woman. What the Court started well in *Loving,* began to weaken the family unit by concluding individual rights supreme to marital responsibility in *Zablocki.* Following *Lawrence v. Texas,* some state legislatures began confidently redefining marriage to allow same sex marriage. Could this be attributed, at least in part, to the Supreme Court’s observation in *Eisenstadt v. Baird* that there is no difference between being married and not being married?

Though the pattern of the Court’s initially strengthening and subsequently weakening the family is clear, the context of procreative rights perhaps provides the greatest example. The Court declared unconstitutional a statute mandating forced sterilization for habitual criminals because the right of the individual to “procreate[ ] ... [is] fundamental.” While individual procreative rights did not strengthen the family per se, in *Griswold v. Connecticut* the Court recognized the traditional notion of marital privacy when it concluded that married couples not only have the right to procreate but the right not to procreate by using contraceptives. Just seven years later, however, the Court weakened the family once again declaring that there is no difference between a married and an unmarried couple when it comes to the individual right of privacy. The Court extended the logic of its holding in *Griswold* (for marrieds) to *Eisenstadt* (for singles) by declaring an individual right to privacy contraception under the Equal Protection Clause of the Fourteenth Amendment, finding that individuals who wish to use contraceptives are similarly situated to married couples who wish to do so.

This same individual privacy right to procreate and not to procreate being firmly rooted in *Eisenstadt* led the Court to declare the individual right of mothers to murder their unborn children in *Roe v. Wade* in the name of privacy. In eight short years, the Court went from protecting martial privacy to allowing parental pre-natal infanticide. There can be no greater example of the disconnect between individual rights that build society and strengthen families and the individual rights that destroy the family and weaken society than the individual privacy right of abortion.

**Individualism: From Good to Bad**

The inevitable question is how can the Court, construing the Constitution, declare fundamental individual rights that strengthen the family and then subsequently declare individual rights injurious to the family? The irony is that the family is fundamental to the existence of our society arguably in a greater degree than individual rights. The answer rests in the absence of a fixed standard to guide in the definition of individual rights. The Supreme Court has used the liberty interest found within the Fourteenth Amendment to be the vehicle that applies the federal Bill of Rights and other individual rights that apparently emanate from the Bill of Rights to the States through the doctrines of substantive due process and selective incorporation. The Court is tasked, on a case by case basis, with determining which individual rights are fundamental or are
such that no state may take them away. To signal when rights are found to be fundamental certain language is employed by the Court, for example, fundamental individual rights are those that are essential to "a scheme of ordered liberty [such that] [t]o abolish them is ... to violate a principle of justice so rooted in the traditions and conscience of our people ... and [an] enlightened system of justice would be impossible without them."16 This standard indicates that individual rights must be found in the traditions of America and in the conscience of its people. The problem is the Court does not always follow its own standard to root individual rights in anything consistent. A constitutional right to homosexual sodomy, for example, is neither found in America’s historical tradition nor is it found morally or consciously permissible to a majority of Americans. Instead the Court looks vaguely at the liberty interest of the Fourteenth Amendment and through substantive due process declares certain individual rights fundamental. Furthermore, once the Court identifies a right, that right can be subsequently defined in such a variety of ways that dilute the right of any fixed meaning.

The right to privacy is an example of how the Court originally strengthened the family and then subsequently weakened it through the application of individualism and expanding the meaning of the term privacy. Privacy is a right that can be seen in the history of our country and the common law tradition we inherited from England, but the Supreme Court defines privacy differently, depending on the context, to arrive at privacy rights that include marital privacy on the one hand and abortion and sodomy on the other. Ironically, the Court did not find the right of marital privacy to be a fundamental right of nature, but strangely held that the right existed in "the Bill of Rights [that] have penumbras, formed by emanations from those guarantees that help give them life and substance."17 Abortion became an easy leap for this style of jurisprudence because the outer bounds of the individual privacy right was not seen as existing in nature nor as an inalienable right endowed by the Creator, but as one that emanated from the shadow cast by an implicit right to privacy held to exist in the First, Fourth, Fifth and Ninth Amendments.18 The procreative rights of the individual emanated to the extent of allowing a mother to murder her child.19 The right to privacy can mean marital privacy or a right to engage in homosexual sodomy or a mother’s right to murder her unborn child; the term privacy has a broad and speculative meaning, which in other words, indicates that privacy has no meaning.

The Court itself recognized the dangers in redefining rights when it said that “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.”20 The Court has also said, “the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground” in defining individual fundamental rights located in the liberty interest of the Fourteenth Amendment.21 Ironically, the Court exercised judicial restraint in Bowers v. Hardwick only to overrule it by declaring a fundamental privacy right to engage in homosexual sodomy in Lawrence v. Texas.22

Another example of the Court’s application of a fundamental right understood through the lens of individualism that had negative unintended consequences is in defining the contours of religious liberty. The Warren Court is credited with a huge expansion of the scope of individual rights in the name of liberty as previously seen in cases like Griswold. In the 1963 case Sherbert v. Verner,23 the Court created the strict scrutiny test for religious liberty that has been said to be the high water mark for the protection of religious freedom.24 The problem created in Sherbert is best explained by Gerard V. Bradley’s article Beguiled [sic]: Free Exercise Exemptions and the Siren Song of Liberalism. The article was written in anticipation of the Court’s decision upon revisiting Employment Div. v. Smith.25 Smith limited the Sherbert strict
scrutiny test to unemployment compensation for statutes that burden an individual’s right to free exercise of religion. The Court in *Smith* held that neutral laws of general applicability that restrict the free exercise of religion are valid.26 Bradley points out that *Smith*’s first visit to the Supreme Court made unlikely bedfellows out of religious and non-religious groups and politically conservative and liberal groups.27 These groups were brought together by the concept of liberal individualism because it was friendly to the individual right to privacy and provided a conduct exemption for religious exercise.28 But the strict scrutiny test in *Sherbert* did not accord with the plain meaning of the free exercise clause, which traditionally would find laws invalid that banned certain acts only because they were religious in character.29 Furthermore, *Sherbert* does not accord to the historical understanding of free exercise of religion, which saw religious liberty as primarily a freedom of worship belonging to churches, and secondarily as belonging to individuals in relation to churches.30 The Warren Court created the test not because of any past historical precedents but rather in the context of the string of individual rights cases of the 1960s.31 Actually, the Court historically rejected religious conduct exemptions to neutral laws as evidenced in *Reynolds v. United States.*32

The negative effect of creating a conduct exemption based on the right of the individual free exercise of religion to otherwise neutral laws in addition to lacking textual support for anything other than the right of an individual to think and believe according to the dictates of his understanding is twofold.33 First, religion is defamed. This problem is based in the fact that historically free exercise had sound limitations that prevented licentiousness and violations of public health and safety in the name of religion.34 Since a state interference with the individual right after *Sherbert* required strict scrutiny, the outer limits of the right seemed to have no end. *Sherbert* left each man’s conscience to serve as a law unto himself in the name of religion. This has become so because the state does not have a test that is employed for sincerity of belief, as once sincerity is alleged it is accepted.35 Bradley stated the problem this way: "the worshiping community has been supplanted ... by the religiously motivated individual" and ""[r]eligious liberty is the trump card of the emancipated self, overruling all state polices."36 This marked a transition from religious freedom to individual freedom of choice regarding religious conduct to the worship of the autonomous self.37 Bradley gives two colorful examples, one where a court heard arguments regarding the Church of the Most High God whose two principles of worship were absolution through sex and the sacrifice of money.38 The second illustrative case was a criminal matter where the defendant came to court in his spiritual attire which consisted of a chicken suit. The problem is evident, the *Sherbert* individual right could not detect any difference between these absurdities and the truly sincere adherent of a religious faith.39 The truth that the Constitution does not provide a conduct exemption may be startling to many religious observers, but it is important to remember that an individual does not need to look to government for approval of his or her religious convictions.

The second negative effect of the creation of the individual right to a conduct exemption in the name of the free exercise of religion is the increase of state interference.40 This is a reappearance of the subtle erosion that occurred in the context of the family when individualism is inserted into the equation. In the context of *Sherbert*, courts had been unwilling to grant conduct exemptions in some of the more questionable religious practices that violate otherwise neutral laws.41 The unwillingness to grant religious conduct exemptions in every case forced the courts to find a state interest compelling where it would not have otherwise been compelling. The result is problematic when a legitimate exercise of religion is substantially burdened and the state interest is one that is already established as compelling, thereby weakening the free exercise
right. This last example of the Court stepping in to strengthen a right using individualism, which in turn weakens the very institution it previously strengthened, reveals that the corruption of individualism is not limited to the context of the family.

The Court has found its source for individual rights in the Fourteenth Amendment, the Bill of Rights, and the emanations from the penumbras of the Bill of Rights. The penumbra of rights is a legal fiction that allows the Court to expand the scope of individual rights to the furthest limits imaginable, in the name of liberty. The damage is compounded when this type of jurisprudence takes rights that are not textually supported or even ones that are, like the free exercise of religion, and redefine the right so that the words of the text or the right itself becomes so diluted that it completely loses any meaning. The effect of establishing individualism and redefining the meaning of rights ends in a process that initially strengthens and subsequently weakens the value of the institution, whether it be in the context of the family or religion. The conclusion drawn from these cases is that a legitimate end can never be accomplished through an illegitimate means without the end itself being corrupted.

The Fixed Standard of the Law of Liberty

Individualism as construed by Supreme Court jurisprudence is rooted in the liberty interest in the Fourteenth Amendment, but it is clear that there is no fixed standard upon which the Court relies. The result is that individualism has been happily and effectively used to erode the foundations of our society, allowing actions which were previously held to be immoral as endorsed in the name of an individual right to liberty.

This observance should be a clarion call to find something more substantial to limit this jurisprudence and encourage a reversal of the damage. The need for the exercise of judicial restraint is obvious, allowing litigants to effect the desired change through petitioning their respective legislatures. America is, after all, a constitutional republic dedicated to democratic principles. The Court has taken many policy issues away from legislatures and out of the hands of the people. It is also obvious that there is a need to root individual rights not found textually in the Constitution in Natural Law. This is attractive, but the same problems currently injurious to the family are also likely under Natural Law. The Court could define Natural Law to serve any purpose it desires, just as it has in finding rights that emanate from but are not textually supported in the Bill of Rights. It is equally unlikely that the Court would look to anything like Natural Law in an age of pluralism, existentialism, and legal realism. The Bible is another source of law neglected by the Court. The Bible offers the solution to the problem of individualism both for the Court and for the individual person. Though not welcomed in such an analysis, integration of Biblical principles shed insight into establishing meaning to the liberty and individual rights that the Court struggles to consistently define.

While the Court may not look to principles of Natural Law or the Bible for help in defining the liberty interest of the Fourteenth Amendment, the Bible does, however, offer clear guidance and sound principles that could correct the lost meaning of liberty and individualism. A brief examination of the Bible will reveal that the connection of morals and law is necessary to restore meaning to individual rights found to exist within the Constitution. The Bible provides infinite guidance to the individual regarding the liberty interest that has been so widely construed by the Court to have lost any tangible meaning.

The Bible discusses the law of liberty in the book of James, which offers solid guidance to restoring meaning to our legal system. James exhorts us to “receive with meekness the
implanted word, which is able to save your souls … [so you can look] into the perfect law, the
law of liberty … and persevere … [then you are] no hearer who forgets but a doer who acts …
[and] will be blessed in … [your] doing.” James places a condition precedent to being able to
look into the law of liberty: receiving with meekness the implanted word. James’ audience is
Jewish converts to Christ who were scattered all over the Roman world. This is instructive
because the Jews were a people rooted in the rule of law. They were dedicated to strict adherence
of the Mosaic Law and James instructs that morals cannot be disconnected from law. The
connection of morals and law is again made by James when he says, “[s]o speak and so act as
those who are to be judged under the law of liberty. For judgment is without mercy to one who
has shown no mercy. Mercy triumphs over judgment.” When there is a moral connection to law
exemplified here in meekness and mercy, then the law is actually one of liberty and freedom.
This was shocking for the Jews who followed the Law of Moses, which was viewed as
extremely burdensome, yet they were being encouraged in liberty in Christ. John Adams spoke
of the connection of morals and law when he observed that “our constitution is made only for a
moral and religious people. It is wholly inadequate to the government of any other.” The
disconnect we have now in our law is this lack of moral absolutes. This would explain the
emergence of no fault divorce, and explains how the Court could construe the Constitution to
have a right of privacy that includes abortion and sodomy. Perhaps the Court in Zablocki could
have understood that the moral requirement of a man to be responsible for his children is actually
superior to his right to obligate himself to a new marriage. Integrating morality into the law
understands that moral consequences and moral absolutes are the path to that liberty,
empowering law with authentic and consistent meaning.

The law when connected with morals produces liberty and freedom according to James,
but the practical application to the individual within the law of liberty was expounded upon by
Paul. In his letter to the Galatian Church Paul says that Christians “have been called to liberty …
[o]nly do not use liberty as an opportunity for the flesh, but through love serve one another.” The
freedom here is not one that is selfishly asserting individualism, which is an opportunity for
the flesh, but the freedom Paul speaks of is liberty and freedom from the bondage of sin and
selfish individualism. This freedom allows a Christian to benefit another without seeking his own
benefit. This sort of liberty would make Mr. Zablocki want to be financially responsible for his
children even if that meant delaying his individual desire to marry again. Perhaps the couple who
is experiencing irreconcilable differences may have the liberty to examine what opportunities
there may be to restore the family in love rather than run towards no fault divorce. When this
liberty to love is rejected then the Christian and non-Christian alike enter into bondage and
slavery to sin, which is so clearly revealed in individualism.

Both non-Christians and Christians need to examine where they stand in relation to the
law of liberty. The non-Christian may be thinking this message is nonsense, but a critical
examination of the reality of the world would certainly lead to despair and hopelessness. Jesus
Christ has brought hope to the hopeless. This confident hope can be experienced because “all
who call upon the name of the Lord will be saved.”

Likewise, Christians must examine themselves to ensure they are not living again under
the bondage of sin. James says the person who chooses bondage when liberty is available is “a
hearer of the word and not a doer, he is like a man who looks intently at his natural face in a
mirror. For he looks at himself and goes away and at once forgets what he was like.” Christians
should look at themselves in the mirror and ask if they are living according to the worldly system
of freedom that enslaves, or are they living free by the Spirit of God, which offers infinite liberty
to love others more than themselves. Neither the courts nor the federal or state governments can restore the family or civil society. Only when individuals turn from selfish freedom to a true freedom will change in our country ever be possible.

1 262 U.S. 390 (1923).
2 Id. at 401.
3 268 U.S. 510 (1925). (The Court struck a state statute requiring compulsory public education because of the traditional American understanding of liberty prevented the state from forcing students to accept instruction only from public schools and the statute conflicted with private schools ability to engage in business).
4 321 U.S. 158 (1944). (The Court refused an exception to state statute that prevented child labor law asserting that the public interest of safety and health of the child was greater than a parental right to exercise religion by requiring a child to pass out Jehovah’s Witness leaflets before the child was of an age to choose for themselves).
6 Id.
7 388 U.S. 1 (1967). The Court recognized that “Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival …. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.” Id. at 12.
8 Zablocki v. Redhail, 434 U.S.374 (1978). (The Court struck a statute that required noncustodial parents attempting to marry to seek a court order prior to receiving a marriage license because the state was concerned with whether child support was maintained so that the child would not become dependent on the state).
10 Kohm, supra note 5, at 33.
12 381 U.S. 479 (1965). (The Court invalidated a state law that prohibited the use of contraceptives based on a right to privacy, namely marital privacy).
13 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). (The Court created the right of unmarried individuals to possess contraceptives on the same basis as married couples, which approved the right of unmarried individuals to engage in non-procreative sexual intercourse).
14 Id.
17 Griswold, 381 U.S. at 484.
18 Id.
19 Roe, 410 U.S. at 152-53.
22 The Supreme Court overruled Bowers, where the Court previously exercised restraint in upholding a state law prohibiting sodomy.
23 374 U.S. 398 (1963). (The Court required strict scrutiny, a compelling state interest was required to substantially burden religious conduct and the state interest must have been achieved through the least restrictive means, to deny unemployment compensation for an individual fired for the exercise of religion).
26 Id. at 878.
28 Id. at 248.
29 Id. 261.
30 Id. at 304. Thus, religious and conservatives like Sherbert because of the expansion on the right of the individual to worship through conduct and non-religious and liberals like Sherbert as an expansion of individualism.
31 Id. at 264.
32 Id. at n.126.
The liberty interest in the Fourteenth Amendment originally probably meant a person could not be imprisoned without the due process of law, but the Court has expanded that liberty interest to lose the original meaning so the proposition is to define liberty as found in Scripture.


James 2:8-12.

Christopher Levenick & Michael Novak, Religion and the Founders: The Nation is out of step with the American people, National Review Online, (March 7, 2005), at http://old.nationalreview.com/comment/novak_levenick200503070743.asp

Galatians 5:13 (New King James Version).

1 Timothy 4:10 (English Standard Version).

Romans 10:13.

James 1:24.