

CONLAW II OUTLINE

I. Privacy

a. Fundamental Rights

- i. **Subject to strict scrutiny** – The statute must be narrowly tailored and further a compelling government interest
 1. If the Court does NOT find a fundamental right – it applies rational based scrutiny and is deferential to legislature
- ii. Rights include the areas of sex, marriage, child-bearing and child-rearing
- iii. **Procreation (Skinner)**
 1. Choice to have children is a fundamental right that the state cannot take away (Skinner v. Oklahoma, 1942)
 - a. Court invalidated statute that provided for the compulsory sterilization of persons convicted of 3 felonies showing “moral turpitude”
 - b. NOTE: could try to extend the right to have children broader, e.g., adoption, cloning
- iv. **Choice *not* to have children (e.g. right to purchase and use contraception) (Griswold)**
 1. *Griswold* (1965)(7-2)(p.845) struck down statute that forbade the use of contraceptives
 - a. Intent of statute: to discourage sex outside of marriage – belief at time was the purpose of sex was procreation (w/o such intent sex was wrongful)
 - b. Majority (Douglas) – based not on SDP but rather “penumbra” of privacy rights
 - c. **Harlan’s Concurrence** – Recognizes that the due process clause embraces “those rights ‘which are...*fundamental* which belong...to the citizens of all free governments” (849)
 - i. **Lasting observations about SDP rights:**
 1. Limited to “fundamental rights”
 2. Esp. troubling when state uses criminal law
 3. The law seems out of date w/ current beliefs, e.g., not enforced, etc
- v. **Right to control reproduction is an *individual* right**
 1. **Eisenstadt v. Baird** (p.855) – “If the right to privacy means anything, it is the right of the *individual, married or single*, to be free from unwarranted governmental intrusion on matters so fundamentally affecting a person as the decision whether to bear or beget children” (856)
 - a. Significant in recognizing rights of unmarried
- vi. **Right to terminate a pregnancy prior to viability (Roe v. Wade) (7-2) (Blackmun)**

1. Relies on precedent that the “right to privacy” is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” (858)
2. Precise holding displaced
3. Two potential compelling state interests:
 - a. Health of the mother
 - i. In certain circumstances *could* be compelling after first trimester
 - b. Protecting the fetus
 - i. Only during the third trimester
 - ii. Pre-viability – woman’s rights dominate
4. **Dissent (White)**
 - a. Should be left to “the people and the political processes”
 - i. Fears this will end up like *Lochner* – No consistent doctrine
 1. E.g. every minute decision will become a constitutional question
5. **Political theory** – Roe created right to life movement
 - a. State matter prior to *Roe*, might have never gained national importance
 - b. Criticism that *Roe* was too broad (Ginsberg)
 - c. Divisiveness illustrated in lack of regulation of IVF
 - i. E.g. Those believing that life begins at conception take issue w/ the excess embryos resulting from IVF
6. **The right to an abortion does not include the right to receive public funding to have the abortion**
 - a. The state can REFUSE to pay for abortion expenses *even when it* pays for expenses of childbirth if:
 - i. The abortion is non-therapeutic, i.e., not necessary to save mother’s life (**Maher v. Roe**, p.869)
 1. Interpreted *Roe* as the right to be free from “unduly burdensome interferences with her freedom to decide whether to terminate her pregnancy”
 - ii. The abortion is medically necessary, but not life threatening (**Harris v. McRae**, p.872)
 1. Majority (5-4) upheld Hyde Amendment limiting funding on rationale that indigent women are no worse off than they would have been if there had been no funding of any medical procedures

- a. People don't want to use tax dollars to support something they morally oppose
 - b. Reluctant to view wealth/poverty as suspect
2. **Doctrinal point** from *Harris*:
Regardless that some favored Amendment for religious purposes – as long as some purposes were secular