United States Constitutional Law: Theory, Practice, and Interpretation

Class 8: The Constitution in Action—Abortion

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- Introduction
- Governmental structure
- Individual rights
- Enforcing the Constitution
- Interpreting the Constitution
- The Constitution in action
The United States Constitution in Action

• Introduction
• Racial discrimination
• The right to keep and bear arms
• Abortion
• Same-sex marriage
• A hypothetical municipal ordinance prohibiting dog ownership
Supreme Court Case Presentations

• Background
  • Who were the parties?
  • What happened (what were the facts of underlying the dispute)?
  • How did the case get to the Court (what was the procedural history)?

• Court’s ruling, justices’ votes, and final disposition
  • Who won (which party prevailed) and what did the Court do (affirm or reverse the last lower court)?
  • How did each justice vote (to affirm or to reverse)?
  • What happens next (did the Court remand and, if so, to where and for what)?

• Rationale and reasoning of each opinion (majority, concurrences, dissents)
  • What approach to constitutional interpretation did each opinion take?
  • What role did precedent and \textit{stare decisis} play in each opinion?
Honesty in Constitutional Interpretation

• Ask first: “What do I personally think about this issue as a matter of social policy?”

• Then ask: “What does the Constitution say about the issue?”
  • Is there an individual right regarding that issue in the Constitution?
  • To which governmental institution did the Constitution delegate the power to regulate as to the issue?
    • To the States, the Federal government or both?
    • If to the Federal government, to Congress, the President, or the Judiciary?
Principal Dichotomy

**Originalists**
- Constitution establishes a fixed governmental framework
- Consider intention of framers or original public understanding
- Questions about moral and political soundness of policy are historical
  - Is this overly conservative and tied to the “dead hand of the past”?
  - Is this approach incapable of rational and responsible change?

**Living Constitutionalists**
- Constitution is evolving in response to changing circumstances and improved moral and political beliefs
- Reasoning resembles development of common law
  - Is this threatening to the rule of law and the separation of powers?
  - Is this constitutional amendment under the guise of interpretation?
Abortion
Griswold v. Connecticut (1965)
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- Griswold, director of PPLC, challenged Connecticut Comstock Act of 1873 that prohibited any drug or instrument for the purpose of preventing conception
- Argued her conviction was invalid under Fourteenth Amendment
- SCOTUS reversed her conviction, finding an unenumerated right to privacy found in the “penumbras” and “emanations” of the Fifth and First Amendments
- Concurring justices argued that a right to privacy existed (White; Harlan) in the DP Clause of Fourteenth Amendment and (Goldberg) in the Ninth Amendment as reserved to the people
Roe v. Wade (1973)
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• The “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.”

• Given the fundamental nature of the right to privacy, abortion regulations must be narrowly tailored to address a “compelling state interest.”

• First trimester, no regulation; second trimester, protecting health of mother was compelling; third trimester, interest in “potential life” compelling

• Rehnquist and White dissented: “The drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.”
Planned Parenthood v. Casey (1992)
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- Plurality opinion by Souter, O’Connor, and Kennedy is lead opinion
- Reaffirms Roe finding that the right to abortion is grounded in DP Clause
- Stare decisis applied because Roe led “to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation”
- Adopted a “fetus viability” approach: At viability state could regulate abortion except to preserve life or health of mother.