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Six Theses on Interpretation Symposium

Cass R. Sunstein

SIX THESES ON INTERPRETATION

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This discussion will come in two parts. First, I will make a somewhat unconventional constitutional argument about how the privacy cases should be understood. Second, I will venture a few observations about the character of this argument and about the nature of legal interpretation.

In essence, my substantive argument is that the Supreme Court's privacy cases should be understood as involving not only privacy, but also, and much more fundamentally, discrimination, usually on the basis of sex. The applicable constitutional provision is the equal protection clause, not the due process clause. I suggest that this claim should be understood as a legal argument; that interpretation is critical rather than conventional, and inevitably so; that the claims of legal indeterminacy depend on crudely positivist notions of interpretation; that analogies to interpretation in theology, literature, and philosophy offer limited help; and that it is time to turn away from questions about the nature of interpretation and toward more in the way of substantive legal argument.

I

The statute at issue in *Griswold v. Connecticut* forbade the use of contraceptives by married couples. The statute was defended as a means of preventing extramarital sex. Its origins suggested that it was intended to ensure that sex would occur only for purposes of procreation.

In the real world, it is principally women rather than men who are responsible for contraception. The consequences of a prohibition on use of contraceptives are visited principally on women. A system that denies use of and access to contraceptives will disadvantage women uniquely, and relative to men, by forcing them to choose between carrying the child to term with the attendant disabilities, or having an abortion with its emotional and physical risks.

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Such a system calls for a powerful defense by the state. In the *Griswold* case, no such defense was forthcoming.

Under current law, of course, the equal protection clause is aimed primarily at impermissible motivations, not primarily at social subordination as such. Anti-contraceptive laws do not classify on the basis of sex; it is therefore necessary to prove discriminatory motive on the part of the state. Under the best reconstruction of current law, a discriminatory motive exists if and only if a state would not have done what it did if the distribution of benefits and burdens among the relevant groups were reversed.[1] If the state's decision would have been the same regardless of which group was helped and which hurt, it would be fair to say that it was neutral with respect to sex (or race). If the state's decision would have been different, it is infected by a discriminatory motive. This analysis of impermissible motivation has the advantage of being a fully plausible approach to the constitutional criterion of equality.

In the context at hand, the question of discriminatory intent becomes: Would a state have imposed restrictions on the right to use contraceptives if the costs of pregnancy were visited on men rather than women? There are two possible answers to this question. The first is, Clearly no. No legislature would punish men in this way for having had sex.

Another response is that the question is itself not susceptible to an answer. Most counterfactuals are based on situations that have some analogue in the real world. But in the counterfactual in question, the problem is that if men could become pregnant, they would not be men. The inability to become pregnant is one of the defining characteristics of being a man. In this view, the question is so speculative and otherworldly that it is not sensible even to pose it.

Undoubtedly this view has a good deal of plausibility to it. But it also suggests reasons to be extremely skeptical about—perhaps to abandon altogether—the inquiry into discriminatory intent. In a large class of cases, the intent inquiry, phrased as an equality question, will suffer from precisely these problems. A plausible substitute for the discriminatory intent test, one also having roots in constitutional law, would ask whether the practice at issue contributed to the social subordination of a disadvantaged group. Under that substitute approach, which I cannot spell out in detail here, *Griswold* was rightly decided as an equality case.

It is time to summarize what has been a quite simple point. The disabilities imposed by laws that restrict access to contracep-

1. I rely in the next few paragraphs on the analysis in Strauss, Discriminating Intent and the Timing of Brown, 55 U. CHI. L. REV. (forthcoming 1989).

tives are visited principally on women. If social subordination is the target of the equal protection clause, such laws are presumptively unconstitutional, and the presumption cannot easily be rebutted. If the equal protection clause is aimed at discriminatory motive, there is good reason to believe that such laws are also unconstitutional. If the discriminatory intent standard is not satisfied, the problem is with the standard itself, and such laws are unconstitutional under the most plausible alternative approach as well.

Arguments of this sort apply not only to *Griswold*, but to *Eisenstadt* and *Carey* as well. *Roe v. Wade* and its successor cases are easier in some ways but harder in others. Antiabortion statutes are of course directed exclusively at women. Thus they amount to de jure discrimination on the basis of sex. It will not do to suggest that the discrimination is merely in terms of effects. The disadvantaged class consists exclusively of women. There is authority in the Supreme Court distinguishing sex discrimination from discrimination against pregnant people, but this distinction is hard to take seriously.

It is sometimes suggested that antiabortion laws do not treat people who are similarly situated differently; hence they are said not to discriminate on the basis of sex. But the Aristotelian criterion ("treat likes alike") is unhelpful when biological differences are at work, or when the claim is that equality requires the differently situated to be treated differently. In cases of biological difference, legal disabilities that make those differences count raise questions of discrimination, at least when the removal of those disabilities would tend in the direction of equality. If women were permitted to control their own reproductive processes, more in the way of equality would result: neither men nor women would be subject to the risk of pregnancy from sex. Antiabortion laws thus represent a legal disability that removes a possible source of equality, or that create a source of inequality. They are therefore a form of sex discrimination, unconstitutional unless this can be defended quite persuasively.

Here too the case can be understood in terms of social subordination or, more conventionally, discriminatory intent. There is no doubt that compulsory childbearing is an element of the social subordination of women, imposing on them a burden nowhere imposed on men; and the burden has significant consequences in the real world. Under an intent test, the simple point is that it is highly doubtful that antiabortion laws would exist if men could become pregnant. If this conclusion is to be resisted, it is because the ques-

tion is itself an implausible one, not susceptible to reasoned answer; and in that case we have reason to reject the test itself.

Even if the case is understood in this way, it is not clear that *Roe* was rightly decided. Perhaps the state could justify the disability placed on women as a means of protecting an extremely important interest: fetal life. But the absence of the imposition of any comparable burden on men, and the real-world consequences of selective abortion regulation, increase the state's difficulties in defending its statute. Selective restrictions of abortion, varying from one state to another, would produce an economically and racially skewed system that would preserve far fewer fetal lives, and impose more disabilities on women, than might be expected.

I might add that the central problem in *Bowers v. Hardwick* was also one of equal protection. Justice Stevens rightly struck this theme in his dissent. Prohibitions on homosexual conduct deny to gay people sexual liberty that the majority allows to itself: it is principally for this reason that anti-sodomy laws are constitutionally problematic.

II

What does it mean to say that the argument just offered is a constitutional argument? In what sense do arguments of this sort represent "law"? Notably missing from the argument is explicit emphasis on some of the conventional sources of constitutional argument—language, history, structure. On the other hand, the argument is not simply moral theory or normative argument in the abstract. The claim that the privacy decisions should be understood as involving sex discrimination is not a claim that the best political theory would understand them as such. The claim is instead that the equal protection clause is best interpreted to treat the cases in these terms. That claim in turn depends on a theory of the meaning of the notion of constitutional equality. That theory attempts to link race and sex discrimination—understanding both practices, for constitutional purposes, as a reflection either of a kind of prejudice or of social subordination. The argument offered above receives some support from cases suggesting that neutrality as between blacks and whites and women and men is a constitutional requirement, at least outside of the setting of affirmative action. It is buttressed as well by cases suggesting that the equal protection clause is designed to combat social subordination.

Considerations of this sort lead me to six basic claims about constitutional interpretation.

1. The asserted dispute between constitutional "perfection-

ism"—embodied perhaps in the idea that the Constitution should be interpreted so as to coalesce with the best political and moral ideals—and "hard law" approaches to constitutional law is based on confusions that might be cleared up by paying attention to actual constitutional argument. It would be a large mistake to suggest that constitutional claims of the sort made here—even if, for example, the intent of the framers, narrowly understood, is put to one side—put everything up for grabs. Whether the argument is to be accepted or rejected will depend on the reasons offered in its behalf. Those reasons—as in *Brown v. Board of Education*—involve the meaning of constitutional equality in light of the decided cases and the appropriate conception of the constitutional text. To ask whether *Brown* is "hard law" or personal preference is to assume a dichotomy that misdescribes the process. The same is true of constitutional argument quite generally.

2. There is little difference between law in the ordinary sense—as understood in the common law and in many cases of statutory construction—and constitutional law as represented in arguments like that offered above. The sources of legal argument are in both cases the same, broadly speaking. The principal difference is that institutional constraints make the Supreme Court quite reluctant to invalidate legislative and executive decisions, and properly so. Moreover, precedent plays a different role in constitutional and common law cases; there are other differences as well. But in terms of interpretive methodology, there is no sharp break.

3. The "indeterminacy" thesis, at least as frequently understood, misconceives the process of constitutional argument (and legal argument generally). I assert that the argument offered above is correct. So to assert is not to deny that the argument depends partly on judgments of value. It is sometimes said, as against interpretive approaches to law, that if something depends on judgments of value, all bets are off. But this idea turns on crudely positivist notions of social science. The argument made above is not in any simple sense a mere assertion of personal preference. If it is wrong, it must be because constitutional argument, properly understood, makes it wrong; and that is a question that must be discussed.

4. There are large differences between legal interpretation on the one hand and religious interpretation, literary criticism, and moral argument on the other. In some respects these analogies may be illuminating. But one cannot think about questions of interpretive practice in the abstract. The appropriate nature of interpretation turns on the purposes for which one is interpreting. Law is coercive; federal judges are unelected; some sources of interpreta-

tion are permissible and others are not; the Supreme Court operates in a highly pluralistic society; the rulings of the Court are authoritative—all of these features distinguish legal interpretation from interpretive practices in literature, theology, and philosophy.

5. Legal interpretation is critical rather than conventional; and this is inevitable. It is often misleading or unhelpful to understand legal interpretation as an appeal to an "interpretive community" or to conventional understandings of what words mean. The interpretive community is usually quite diverse. There is no conventional understanding of whether the equal protection clause is violated by a law banning abortion. The courts must choose among competing plausible understandings. But to repeat: to say this is not to say that judges are at sea, or that there are not right and wrong answers. And it is important to emphasize that correctness and incorrectness will be highly contextual. The privacy cases raise equal protection issues only contingently; they might be analyzed quite differently in a world of gender equality.

6. What is needed for the immediate future is less discussion of whether constitutional interpretation is law, and more attention to how constitutional argument operates in concrete cases. A related point: What is needed is more and better in the way of substantive constitutional argument. The privacy cases, I claim, involve impermissible discrimination. Why should they not be understood in those terms?