
The Constitution - Dworkin

Judicial Review \implies **Examining the “constitutionality” of law and uphold/strike laws on such a basis**

- Established in Marbury v. Madison
 - While the court didn’t apply Judicial Review for the case, Judge Marshall asserted the power of Judicial Review as real
- Could it be a power grab by Marshall?
 - The Constitution in Art. VI and Art. III do define some scope of judicial power
 - The conception of the Court is to interpret and apply the law, so Judicial Review does adhere to the role the judiciary branch plays
 - At this point, no argument can be really made against it due to the vast history backing it

Constitutions are special

- Our constitution establishes 3 main things
 - Protection of individual rights
 - Constitutionally limited democracy (which protects against...)
 - **Tyranny of the Majority**
 - * Prevent simple majorities from revoking the rights of legislative minorities
 - * Ex. Nazi march in a Jewish community cannot be made illegal
- The constitution is special in this way as it puts limitations on legislative majorities to protect individuals and legislative minorities
- All of this a promise from the government to individuals/citizens
- *Side Note:* Liberal Democracy \implies A tradition of government that is structured by the governed body and generally protects individuals. A.K.A. a democracy where everyone agrees to a government structure.
- The constitution turns democracy into a constitutionally limited democracy

How would Hercules interpret the Constitution?

- Hercules will *reject* Historicism
 - Understanding the constitution through the explicit and concrete intentions of the framers, something inherently conversational

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- Hercules will *reject* passivism
 - Understanding the constitution via the views of a democratic majority
 - * The constitution's most important feature is a protect from the tyranny of a majority, so such as view violates/subverts the constitution
 - The interpretation force of "popular morality" varies based on the demands of justice in cases
 - Commercial/private cases may weigh in popular opinion (Ex. McLaughlin)
 - Constitutional cases will tend to ignore popular/majority opinion (Ex. Brown)
 - Rejection of Historicism and Passivism does **not** make Hercules/judges judicial activists
 - Judges will still see themselves as interpreting the constitution, just in differing and potentially controversial ways
 - The question to ask is if a judge's *strategy of interpretation* is defensible
 - Hercules ask not whether to interpret or apply constitutional grantees, but how to do so

"Due Process" in the Constitution

- "Due process of law" has **no** plain meaning
 - Even attempts to use the intentions/history backing the amendments does not further an interpretation of the due process clause
- A potential interpretation: Procedural Due Process
 - Deprivation of life, liberty, or property must be done so via democratic means/legislation
 - Almost no constraints on the substance of what the laws say, just focuses on the procedure
 - The constraint is **Rational Basis Review**
 - * Legislation must reasonably pursue a legitimate state interest
 - P.D.P. is rejected in *Lockner v. New York* and is replaced by **Substantive Due Process**
 - * S.D.P. puts stronger constraints on the substance or what a statute can actually do
 - * Originated from economic conservatives on the Court that believed economic liberties deserved higher protections (Economic Substantive Due Process)
 - Ex. Liberty of contract in *Lockner v. New York* \implies Cannot put restrictions on contracts as it is "unfair"
 - * From *Lockner*, if the state limits a *fundamental right*, it must be for a compelling state interest and in the least restrictive manner possible (*strict scrutiny*)
 - * Non-fundamental rights only have to pass rational basis review
- An important note on terminology

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- Interests
 - * **Compelling Interest** \implies An interest that is important towards the health, safety, or well-being of your citizens
 - * **Legitimate Interest** \implies A credible want by the state
 - Manner
 - * **Least Restrictive Manner** \implies The method must be as minimal in scope and effect to accomplish the state's interest
 - * **Reasonable** \implies The method is not self-defeating or bat-shit insane

What are “fundamental” liberties?

- Economic Substantive Due Process said that economic liberties were fundamental, something considered as an embarrassment and failure of the judicial system
- Courts then said *civil rights* are the correct pool of rights to determine what is fundamental
 - Complicated by selected incorporation: not all rights enumerated in the Bill of Rights are fundamental, and some rights that aren't enumerated are still considered fundamental (Ex. Privacy)
 - Selective incorporation demands a rationale to function, eg. the fundamental liberties must make guarantees meaningful

Griswold v. Connecticut

- Connecticut outlawed the use of contraceptives
- Griswold claimed that the statute violates the due process clause of the 14th Amendment
- The Court agreed and established a new precedent
 - The “right to privacy” as a fundamental right
 - Through a constructive interpretation lens, a right to privacy is the best way to understand many constitutional guarantees
- What makes the right to privacy fundamental?
 - In Goldberg concurrence, he agrees with the decision but questions the reasoning that privacy is a fundamental right automatically since it is derived from other fundamental rights
 - Harlan concurs but does not see the due process clause as something reliant on other constitutional statutes, but is rather self standing

Determining Fundamental Rights

As an initial pass, there are two approaches to answering this question.

1. Approach #1: Reasoned Judgement

- What rights would any citizen right now need to have?

2. Approach #2: Historical Tradition

- From *Washington v. Glucksberg*
- Fundamental rights are rights that are deeply rooted in this nation's history and tradition (Originalism ahead!)
- Highly restrictive on what can be done pertaining to fundamental rights

How is *Griswold* Decided?

- Assuming privacy is a fundamental right, does the law pass strict scrutiny?
 - Is the reasoning for the statute a compelling state interest? The state claims that it was trying to prevent extra marital sex
 - Trick question: the court doesn't say so! Assume it is a compelling state interest. It still fails to be narrowly tailored
 - * The statute specifically outlawed the *use* of contraceptives rather than the sale, something that does way more violence to people's rights
 - * The statute also applied to even married couples, hence capturing too large a group then their reasoning outlines
 - Since it fails to be narrowly tailored, the law fails even if the state interest was compelling or not

Roe v. Wade

- Texas outlawed all abortions in all cases except life saving operations. Roe is affected by this and sues.
- Roe argues the law violates the due process clause. The Court agrees
- The Court applies strict scrutiny
 - Texas claims they want to preserve all life, of which they believe starts at conception
 - The Majority claims that Texas cannot legislate on this presupposition that life starts at conception

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- * The Court establishes that burdensome legislation should have a “secularly or publicly acceptable rationale”. The reasoning being that if this was not a requirement, the anti-establishment clause of the 1st Amendment would be violated
 - The Majority doesn’t reject Texas having *legitimate* state interests in restricting abortion
 - * Texas wants to protect pregnant women
 - * Texas wants to protect the potentiality of life
 - Each of these, the Majority offers, grows in substantially further into pregnancy, where they eventually become *compelling* interests

Trimester Framework

1. First Trimester

- The decision is up to the judgement of the attending physician, but otherwise abortion cannot be regulated by the state.

2. Second Trimester \implies State has a compelling interest in the health of pregnant women

- The state can regulate to protect maternal health (but not viability)

3. Third Trimester \implies Viability becomes possible

- The Court draws the line at which the interest in protecting the potentiality of life at the point which the fetus becomes viable which at the time was the third trimester

Planned Parenthood v. Casey (1992)

- Came from states that were imposing maximal restrictions on abortion that were still technically in compliance with Roe
 - Spousal notification
 - 24 hour waiting period
 - Other requirements

Majority

- The Court did not overrule Roe, but replaced or overruled parts of it and its rationale
 - Removed the trimester framework
 - Overruled the use of strict scrutiny

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- The Majority affirms what they say are the 3 “core parts” of Roe
 1. Before viability, the state cannot impose **undue interference**
 2. When viable, the state can regulated, but only if they include exceptions for safety and health
 3. The state’s interest in protecting fetuses from the onset of pregnancy is a legitimate state interest
 - Why was Roe not overturned?
 - **Reliance** \implies People had structured their economic and social life around the continual application of Roe. Overruling Roe in its entirety would cause sudden and serious inequity
 - What about new evidence?
 - * While the trimester framework was not factually sound, viability still importantly marked the point of regulation
 - * If a fetus is viable, then the state does have a legitimate interest in preserved a potential life and/or “object of state protection”

Dissent

- The Dissent strongly disagreed with the majority citing 2 related reasons
 - The termination of a pregnancy is **not** a fundamental right as it is not deeply entrenched in American history or tradition
 - The constitution makes no explicit mention of abortion, and therefore abortion should not be construed as a constitutional Guarantee