Second Session Readings

I. The run-up to Roe v. Wade

The Fifth and Fourteenth Amendments of the Constitution provide that no person may be "deprived of life, liberty, or property , without due process of law."

In the view of some, this provision merely provides procedural protection to those charged with a violation of law. In this view, the Due Process Clause does not limit the extent to which state or federal law may limit your liberties. Rather, it provides that if you are charged with violating any law (regardless of whether the law restricts your liberties) you cannot be convicted and punished unless you are given an opportunity to contest the charges through fair procedures.

However, in several cases going back over 100 years the Supreme Court has ruled that the Due Process Clause does limit the extent to which the government may enact laws that restrict persons' "liberty" to exercise rights the Court considers to be "fundamental." In legal lingo, that means that the Due Process Clause provides "substantive" as well as "procedural" protection.

A. “Substantive” due process: the right to enter into contracts.

In the late 19th century, the Supreme Court started using the Due Process Clause to protect property rights, including the right of businesses to enter into contract. The leading case was Lochner v. New York (1905), holding invalid a New York law imposing a maximum 60-hour work week in bakeries, and 10-hour work day, on the ground that it violated the “liberty” of employers and workers in bakeries to enter into employment contracts. Lochner has been called “one of the most condemned cases in United States history.”

Under Lochner, the Court invalidated economic regulation which it believed not to have a strong health or welfare justification. That included minimum wage and maximum hour legislation, price regulation, and laws restricting business entry. The Court viewed any legislation motivated by an income redistribution rationale to be constitutionally suspect.

In 1937, under pressure exerted by supporters of New Deal and Depression-era legislation, the Court abandoned Lochner, in a case upholding a state law establishing a minimum wage for women. West Coast Hotel v. Parrish (1937)

B. Substantive due process: "fundamental" personal rights.

The question then was, if "substantive" due process does not protect the "liberty" of persons to enter into contracts, how about other alleged "liberties"?

In the early 20th century, while Lochner's protection of contract rights still prevailed, the view emerged that the Due Process Clause also protected personal rights.

Thus in Meyer v. Nebraska (1923), the Court invalidated a state law prohibiting the teaching of any modern language other than English in any public or private grammar school. (The law resulted anti-German feeling arising from the First World War.) The Court said that the Due Process Clause's protection of "liberty":

> " denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. This liberty may not be interfered with [by] legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. [That] the State may do much to improve the quality of its citizens [is] clear; but *the individual has certain fundamental rights which must be respected*. [Here, no] emergency has arisen which renders knowledge of a child of some language

> other than English so clearly harmful as to justify [its] infringement of the right long freely enjoyed. (emphasis added)."

On the same reasoning, the Court also invalidated a state statute requiring children to attend public rather than private schools. (This statute arose from a backlash against Catholic and Jewish immigrants, and apparently was intended to "Protestantize" the next generation.) The Court concluded that the statute "unreasonably [interfered] with the liberty of parents and guardians to direct the upbringing and education of children under their control." <u>Pierce v. Society of Sisters</u> (1925).

C. Fundamental personal rights extended to the sexual arena.

<u>Griswold v. Connecticut</u> (S. Ct. 1965)

At issue was the constitutional validity of a Connecticut law making it illegal for a doctor to advise a married couple how to prevent conception and to prescribe a contraceptive device.

The Court held the Connecticut law unconstitutional. The Court argued that the law "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."

The Constitution also does not explicitly establish a right to marital privacy. However, the Justices advanced a number of theories to find such a right.

The theory that has survived in subsequent cases (including Roe v. Wade) is that "the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights." Under this theory, it doesn't matter that the Bill of Rights (or any other part of the Constitution) fails to mention sexual privacy (or privacy at all).

D. Griswold dissent – the conservative critique

The dissenters feared the decision would allow the Court to create whatever new "liberties" the Justices felt were socially desirable. Just like the previous discredited Lochner decision had used liberty of contract to strike down progressive economic legislation the Justices disliked, the dissenting Justices argued that the Court would now use newly-constitutionalized concept of personal liberty to strike down conservative social legislation they disliked.

II. Roe v. Wade (1973)

Majority Opinion (Justice Blackmun) (excerpts)

"The Texas statutes that concern us here make it a crime to "procure an abortion," . . . except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." . . . .

. . . .

"The Constitution does not explicitly mention any right of privacy. [But] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy,

does exist under the Constitution. [citing decisions protecting the right to rear one's own children (thus setting aside state laws forbidding private schools and the teaching of certain foreign languages to children) and decisions protecting the right to use contraceptives]. This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. . . . .

. . . .

"The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. . . . .[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation . . . . The privacy right involved, therefore, cannot be said to be absolute. [citing decisions sustaining state laws requiring compulsory vaccination]

. . . .

"Where certain "fundamental rights" are involved, . . . regulation limiting these rights may be justified only by a "compelling state interest," . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

. . . .

"With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established

medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."

"With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."

Dissents

Rehnquist (with White):

Previous cases said that the 14th Amendment's protection of "liberty" only covered rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (such as the right to rear and school your own children). The asserted right to an abortion doesn't fit that description. "Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as appellants would have us believe."

White (with Rehnquist):

"At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless, unwanted for any one or more of a variety of reasons – convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. . . . .The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, . . .the issues should be left with the people and to the political processes the people have devised to govern their affairs."