

A. *Marbury v. Madison* and the authority for judicial review

- a. *Marbury v. Madison* (2): establishes the authority for judicial review of both federal executive and legislative acts, since there is no express authority written into the Constitution.

Facts: M filed suit in the United States Supreme Court seeking a writ of mandamus to compel Secretary of State Madison to deliver his commission papers to federal judge, per statute. Court found that commission to the position was complete as soon as Adams affixed the presidential seal, and unlike a deed, delivery to M was not required. Therefore, withholding commission is the wrong, and M wanted a remedy.

Conclusion: However, Court found it did not have power to issue any remedy.

Held: Even though the Judiciary Act of 1789 purported to grant the Supreme Court the right to issue a writ of mandamus, because that right is not expressly enumerated in the Constitution, the Court's jx. is null and void

Takeaway: This landmark case formed the basis for the exercise of judicial review in the US under Article III of the Constitution.

B. The Tenth Amendment (reserved powers) and how it limits Congress

- a. Generally:

- i. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

- b. One question to ask: "Who does the statute attempt to regulate?"

- i. If STATE, then state sovereignty is implicated then we must determine is acting in its governmental role or as a private actor:

1. If the STATE is acting in a governmental role, the federal government may only prohibit state action, but may not impose affirmative duties on states

- a. *Printz v. US* comes in here!!! (back to the commerce clause)

Facts: Fed Brady Bill requires background checks before the sale/purchase of a gun. Two sheriffs sued to prevent the provision from being enforced.

Issue: May Congress compel a state or local government to even temporarily implement and administer a federal regulatory program?

Reasoning: Court reasoned that while the power to regulate gunsales might sound like it falls within the Commerce Clause (it's a local commercial activity that has an impact on interstate commerce), Congress lacks the power to command a states' executive authorities to do anything.

Conclusion: SCOTUS agreed that the provision was unconstitutional.

Held: per the Tenth Amendment, Congress cannot constitutionally compel state executive branch officials to administer a federal regulatory program any more than it can compel the states themselves to enact, enforce, or administer a federal regulatory program, even if the act is only temporary or administrative and requires limited discretion.

- ii. If PRIVATE PARTY, then the federal government may regulate as long as the statute falls within its constitutional power.

1. See Lopez

- c. Takeaway from *Printz* and the Tenth Amendment
 - i. ***Printz* implies that the 10th Amendment is an independent limitation on the commerce power.**
 - ii. Congress can pass a statute prohibiting the sale of guns to individuals who don't pass a background check.
 - iii. However, in actuality, fed statute does something more than require a test: **it requires that local law enforcement assist.**
 - iv. While the law is a valid execution of commerce power, the statute infringes on state sovereignty... so is unconstitutional.
 - v. Court reads the Tenth Amendment as protect state sovereignty.

C. Another state v. federal controversy: *the right to bear arms*

a. *D.C. v. Heller*

Facts: This case deals with federal enclaves (a parcel of federal property within a state) and the individual's right to possess a firearm for traditionally lawful purposes, such as self-defense within the home. In this case, DC is a federal enclave and it has a ban on handguns, and in addition prohibits them from being in the home unless they are disabled. Heller brings an action claiming that this complete ban violates the 2nd Amendment right to keep and bear arms. Heller is a special police officer authorized to carry a handgun while on duty, and applied for a registration for a handgun he wanted to keep at home. The district denied such a registration.

Issue: Does the District of Columbia's prohibition on the possession of usable handguns in the home violate the 2nd Amendment?

Reasoning: The court recognizes that the right to bear arms is not absolute, that some restrictions may be placed and that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose" meaning there can be some regulations on bearing arms, such as banning felons from owning weapons, the mentally ill, and having registration requirements. However, since this law totally bans handguns in the home, that is not in keeping with the 2nd amendment since it leaves no option open to bear arms.

Held: A complete ban on handgun possession in the home violates the 2nd Amendment, as does its prohibition against rendering any lawful firearm in the home inoperable for the purpose of immediate self-defense.

D. Reproductive Autonomy – Right of Privacy and Due Process

a. Right to purchase and use contraceptives

i. *Griswold v. Connecticut* -- Right to Privacy

Facts: CT statute made giving advice on contraception for purposes of preventing pregnancy a criminal offence. Planned Parenthood official and doctor charged under the statute, but object that it is unconstitutional. Court is concerned about *Lochner*-izing, but reasons that the Bill of Rights radiates penumbras (shadows of shadows), or implicit guarantees that shadow explicit rights and give them substance. Based on 1/3/4/5 Amends, Ct finds such a **penumbral right to privacy**.

Issue: Does the Constitution provide for a privacy right for married couples?

Reasoning: Court is reasons that the Bill of Rights radiates penumbras (shadows of shadows), or implicit guarantees that shadow explicit rights and give them substance. Based on some Amends, Ct finds such a **penumbral right to privacy**. The right to privacy in marriage is not specifically protected in either the Bill of Rights or the Constitution. Nonetheless, it is a right so firmly rooted in tradition that its protection is mandated by various Constitutional Amendments, including the 1st, 9th and 14th Amendments.

Held: The First Amendment has a penumbra where privacy is protected from governmental intrusion, which although not expressly included in the Amendment, is necessary to make the express guarantees meaningful. The association of marriage is a

privacy right older than the Bill of Rights, and the State's effort to control marital activities in this case is unnecessarily broad and therefore impinges on protected Constitutional freedoms. The right to privacy in marital relations is fundamental and older than the bill of rights; it is sacred, and we do not want police in the bedroom looking for signs of contraceptives. Therefore, we apply Strict Scrutiny, and the state law is unconstitutional.

b. Right to an abortion: *Roe* and *Casey*

i. Generally:

1. *Possible Political Positions*

a. Life begins at conception:

i. No possibility of abortion, even w/ rape or incest

b. The state may not interfere with the woman's right to choose

i. Battle is in the middle

c. **Problem** with a woman who is about to go into labor with a healthy unborn child and decides she wants to terminate the pregnancy – need to cut it off somewhere.

2. These cases are ALL about the phrasing

ii. *Roe v. Wade*: **An Expansive Definition—Right to Privacy**

Facts: Roe, a single woman, wanted to get an abortion, but TX law made it illegal unless necessary to save the life of the mother.

Issue: Do the Texas statutes improperly invade a right possessed by the appellant to terminate her pregnancy embodied in the concept of personal liberty contained in the Fourteenth Amendment's Due Process Clause, in the personal marital, familial, and sexual privacy protected by the Bill of Rights or its penumbras, or among the rights reserved to the people by the Ninth Amendment?

Reasoning: Court first went through the history of abortion and found that abortion before "quickening" (16-18th week) was not harshly penalized, if illegal at all. Court also acknowledged that a right of personal privacy, or a guarantee of certain areas or zones of privacy, exists under the Constitution. Ct. reasoned that right of privacy (whether based in 14th or 9th Am.) is broad enough to encompass a woman's decision whether or not to terminate her pregnancy, and that the state would impose detriment on the pregnant woman by denying her choice. [*and now for the most criticized inferential jump...*] Thus, the right to an abortion is fundamental, even if not absolute. Court determined that SS is the correct standard to apply to limitations on the availability of abortions.

Held: the state's interest in potential life (the fetus) only becomes compelling at viability, when the baby is able to survive outside the womb (24-28 weeks). In the first two trimesters, however, the state has NO overriding interest that displaces the woman's right to choose.

Takeaway:

a. **In the first trimester: essentially unregulated**

i. Decision must be left to the woman and the medical judgment of her attending physician.

ii. The state has an interest in maintaining medical standards, thus it can regulate that an abortion can only be performed by a physician, in a certain facility, etc.

b. **In the second trimester:**

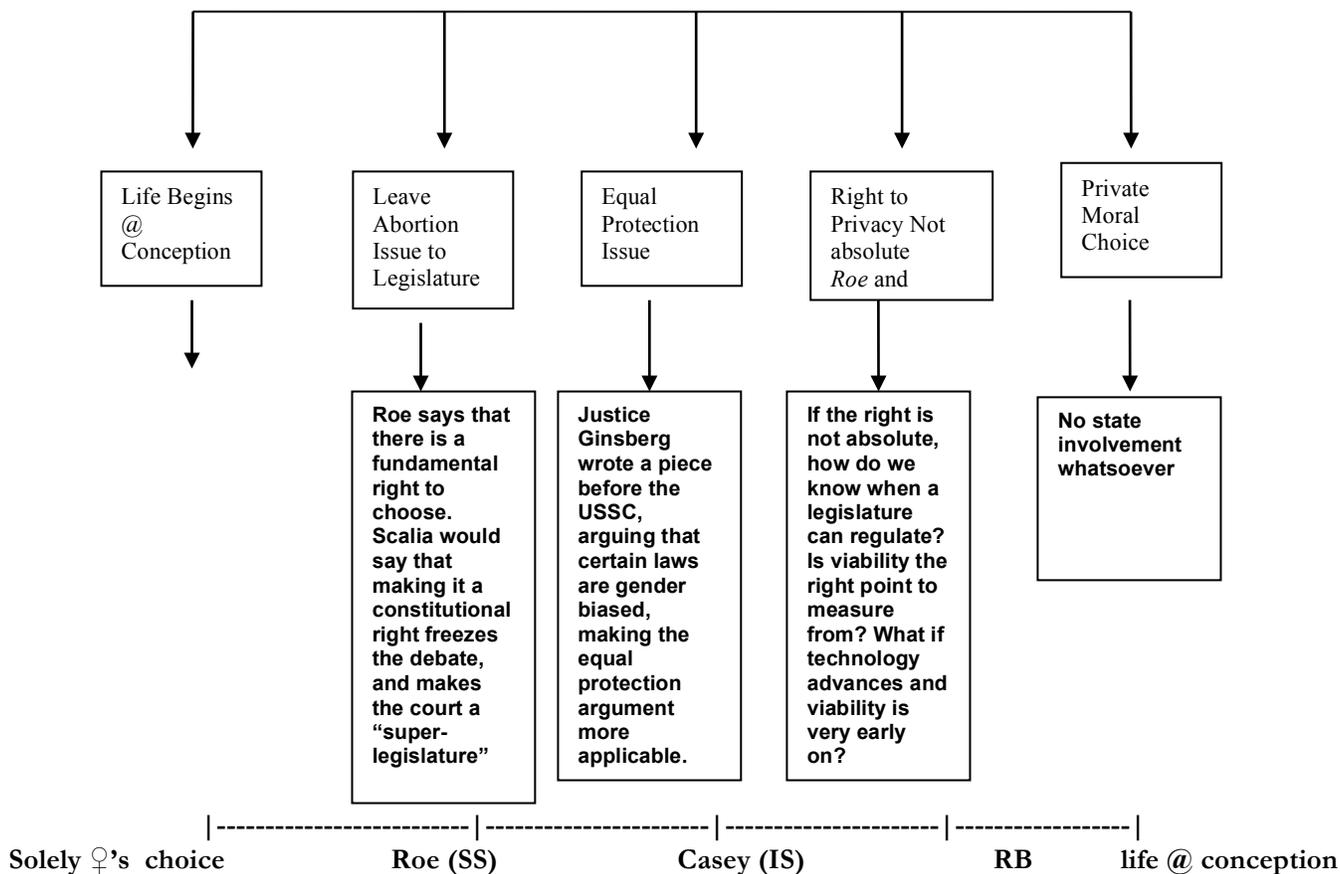
i. The state's interest in maternal health is sufficiently compelling to allow it to regulate abortion procedure in ways that are narrowly tailored and reasonably related to this interest.

c. **In the third trimester:**

i. After viability, the state's **compelling interest in potential life allows it to prohibit abortion**

- ii. However, must include an exception for abortions to save the mother's life or health.
- d. BUT: Pro-life advocates are critical that you can always find a doctor to say that a women's health will be at risk (aka Scalia: "Roe stands for abortion on demand")
 - i. This is where to **Roe** statute gets kicked: The statute sweeps too broadly b/s there is no distinction between trimesters and only an exception for the mother's life (but not her health)

iii. Fight is in the gray area, between *Roe* and *Casey*



iv. *Planned Parenthood v. Casey* – Narrower Definition, Undue Burden, Due Process

Facts: Planned Parenthood facially challenged Pennsylvania's abortion law. The statute required (1) 24 hour waiting period by the woman seeking an abortion (2) parental notification; (3) husband notification, unless he is abusive, not the father or raped her and (4) a public report on all procedures to ensure compliance with the act.

Issue: Does the spousal notification requirement place an undue burden on married women who seek abortions in violation of the United States Constitution?

Reasoning: Here, the Court deviated from, but did not overrule *Roe*, and articulated new test for abortion. Ct reasoned that although it was met w/ some opposition, *Roe* was not unworkable. Privacy is not mentioned in the opinion at all (first departure from *Roe*), but the opinion confirms that the constitutional protection of the woman's decision to terminate her pregnancy **derives from the Due Process Clause**, which promises a realm of personal liberty that the gov't not enter. Opinion states that neither the Bill of Rights nor the specific practices of the States at the time of adoption of the 14th Amendment marks the outer limits of the substantive sphere of Due Process. Thus, the Ct. relies on the rights derived from other cases (constellation of

cases such as Griswold, Eisenstadt, Loving, etc.) The right of a woman to choose is based on the right to personal dignity and autonomy and decisional autonomy.

Held: A state can regulate and place restriction on abortion so long as those regulations **do not impose an undue burden on the woman's ability to make the abortion decision**; when an undue burden results, the regulations are unconstitutional.

Takeaway: This is a **form of intermediate scrutiny**. An undue burden exists, and therefore a provision of law is invalid, if its **purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion** before the fetus attains viability. This is an **unclearly defined test**, much ambiguity—application inconsistent. Change from *Roe* → SC relies on Due Process and not the right to privacy.

E. The 1st Amendment Fighting Words and the Problem of Racist Speech

a. Analysis

i. Text:

1. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”

ii. Conduct that Communicates

1. Conduct that communicates is protected by the 1st amendment, but it **gets intermediate scrutiny**.
 - a. Examples: Marches, picketing, armbands – *Tinker* (black armband), peace signs, photographs
2. **When is conduct expressive or symbolic?**
 - a. *Spence v. Washington*: Guy sewed a peace sign onto a flag to protest the Kent State Massacre, and was arrested. When conduct might operate as a surrogate for speech, test is:
 - i. **Intent to convey a message!!!!**

b. *Texas v. Johnson*: Flag Burning → PROTECTED!

Facts: Protestor at republican convention arrested under TX statute, convicted, and sentenced to jail for 1 yr. for burning the American flag.

Issue: Whether Defendant's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment of the United States Constitution (Constitution)?

Reasoning: Court first applied *Spence* test and found that conduct clearly communicates. Next, finds that O'Brien test is not satisfied – leg. Intent behind the statute is to preserve the flag as notional unity, and therefore aims to suppress anti-American conduct. Also ruled out fighting words – not directed at any specific individual. Court reluctant to get into deciding which symbols warrant special status, as the state argued the flag did.

Held: If law is trying to prevent anti-American message, it is content-based & viewpoint based. So statute subject to SS (“Most exacting scrutiny”), instead of IS under communicative conduct.

Takeaway: It is precisely the strong emotional attachment to the flag that makes its desecration such a uniquely **powerful form of expression**

1. Laws that prohibit flag burning are inherently content-based: the govt. is trying to preserve the flag as a symbol that communicates patriotism, but not of protest or dissent. **Such a content-based restriction of speech only can be justified if SS is met.**
2. No evidence that burning flag undermines its ability to serve as a symbol of national unity. In fact, the more flag burning is met by