Lecture Notes

# Chapter 10: Privacy and Personal Liberty

## Annotated Chapter Outline

1. The Right to Privacy: Foundations
   1. ***Olmstead v. United States (1928)***
      1. This case involved the ability of federal agents to wiretap telephones without warrants.
      2. The Court ruled that neither the Fifth Amendment’s protection against self-incrimination nor the Fourth Amendment’s search and seizure provision protected individuals against wiretaps.
   2. In the early 1900s, the Supreme Court began making use of a doctrine known as substantive due process.
      1. The Court stresses the word liberty in the due process clauses to prevent governments from enacting certain kinds of laws.
      2. Litigants argue that the word *liberty* in the due process clause implies the existence of a right that is not enumerated in the Constitution.
      3. The Court then must determine if the right exists and, if so, whether it is a “fundamental” right.
   3. ***Lochner v. New York (1905)***
      1. The Court reviewed an 1897 New York law that prohibited employees of bakeries from working more than ten hours per day and sixty hours per week.
      2. The owner of a bakery argued that the due process clause’s guarantee of liberty implies the right of employers and employees to enter into contracts specifying the number of hours employees could work.
      3. Five of the nine justices agreed with the bakery owner.
   4. ***Meyer v. Nebraska (1923)***
      1. The justices considered a state law, enacted after World War I, that forbade schools from teaching German and other foreign languages to students below the eighth grade.
      2. They invoked a substantive due process approach to strike down the law, reasoning that the word *liberty* in the Fourteenth Amendment protects more than the right to contract.
   5. ***Poe v. Ullman (1961)***
      1. At issue was the constitutionality of an 1879 Connecticut law prohibiting the use of birth control, even by married couples.
      2. A physician challenged the act on behalf of two women who wanted to use contraceptives for health reasons.
      3. The majority of the Court voted to dismiss the case on procedural grounds.
      4. In his dissent, Harlan sought to demonstrate that the concepts of liberty and privacy were constitutionally bound together, that the word *liberty*, as used in the due process clauses, “embraced” a right to privacy.
   6. ***Griswold v. Connecticut (1965)***
      1. A dramatic change took place when the justices suddenly altered their views.
      2. The majority agreed that the right to privacy existed, even if they disagreed over where it resides in the Constitution.
      3. This case found a right to privacy in the Constitution and deemed that right fundamental.
      4. Governments may place limits on the right to privacy only if those limits survive “strict” constitutional scrutiny.
2. Reproductive Freedom and the Right to Privacy: Abortion
   1. Prior to the decision in Roe, abortion was not as salient a political issue as it is today.
   2. During the 1960s, a growing pro-choice movement sought to persuade states to legalize the procedure fully—that is, allow abortion on demand.
   3. Attorneys and leaders of the pro-choice movement supplemented their legislative lobbying with litigation, challenging restrictive abortion laws on several grounds.
   4. *Roe v. Wade (1973)*
      1. This case was challenge to a Texas law representing the most restrictive abortion laws.
      2. Justice Blackmun’s opinion concludes that the right to privacy “is broad enough to encompass a woman’s decision whether or not to terminate a pregnancy.”
         1. The Court, while not rejecting a Ninth Amendment theory of privacy, preferred to locate the right in the Fourteenth Amendment’s due process clause.
         2. Because the Court held that women have a fundamental right to abortion, it would use a strict scrutiny/a compelling interest test to assess the constitutionality of restrictions on that right.
3. The Aftermath of *Roe*
   1. The public was split over its support for the Court’s ruling, with about 50 percent of Americans supporting it and the rest either opposing it or offering no opinion.
   2. *Roe* may not have changed public opinion on abortion, it had the important effect of mobilizing the movement to oppose it.
   3. Pro-life groups began to lobby legislatures to enact restrictions on the right to an abortion.
   4. The pro-life movement’s short-term goals were to persuade state legislatures to enact restrictions and then convince the Supreme Court to uphold them.
   5. The longer-term objective was the explicit overruling of *Roe* by the Court.
   6. ***Planned Parenthood v. Casey (1992)***
      1. The justices replaced Roe’s trimester framework and compelling interest analysis with an undue burden standard.
      2. *Casey* permitted states to regulate abortion throughout the pregnancy so long as their restrictions did not unduly burden the right to terminate a pregnancy.
4. Overruling *Roe*
   1. ***June Medical Services v. Russo (2020)***
      1. The Court considered a requirement that doctors performing abortions obtain admitting privileges at a hospital within 30 miles of the abortion facility.
      2. The Court struck down the requirement on the ground that the requirement posed a “substantial obstacle” to women seeking an abortion without “significant health-related benefits.”
   2. *Dobbs v. Jackson Women’s Health Organization (2022)*
      1. Alito’s opinion for the Court was crystal clear: “The Constitution does not confer a right to abortion; Roe and Casey are overruled; and the authority to regulate abortion is returned to the people and their elected representatives.”
      2. Alito’s majority opinion tries to distinguish these rights from the abortion right: “… we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”
      3. The dissenters strongly disagree: The majority could write just as long an opinion showing, for example, that until the mid-20th century, “there was no support in American law for a constitutional right to obtain [contraceptives].” So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure.
   3. Private Sexual Activity
      1. ***Bowers v. Hardwick (1986)***
         1. This dispute began in 1982 when an Atlanta police officer arrived at Michael Hardwick’s home to serve him with an arrest warrant for failure to keep a court date.
         2. The officer arrested Hardwick for violating a Georgia law that prohibited the practice of oral or anal sex.
         3. Hardwick and his ACLU attorneys challenged the law, asserting that it violated the fundamental right to privacy as articulated in Griswold and should be subject to strict constitutional scrutiny.
         4. Splitting 5–4, the Court upheld the Georgia law.
         5. The state needed to show only that the law had reasonable relation to a legitimate interest, in this case, that of morality.
      2. *Lawrence v. Texas (2003)*
         1. The majority not only overruled prior precedent but also made the even rarer move of admitting that the Court had made a mistake in *Bowers*.
         2. In overruling *Bowers*, the Court did not necessarily treat the right to same-sex sodomy as a fundamental right.
         3. It did suggest that there was a significant liberty interest at stake—an interest grounded in privacy, dignity, and freedom from stigma.
   4. Same-Sex Marriage
      1. *Goodridge v. Department of Public Health (2003)*
         1. The highest court in Massachusetts held that state laws allowing only heterosexual couples to marry discriminated against gay persons in violation of the state constitution.
         2. In the decade following the Goodridge ruling, countries throughout the world moved to legalize same-sex marriage, as did thirty-seven states and the District of Columbia.
      2. ***Hollingsworth v. Perry (2013)***
         1. A due process and equal protection challenge to an amendment to the California constitution banning same-sex marriage.
         2. Although the Court dismissed the case for lack of standing, the majority’s opinion, by not overturning the lower court’s decision that the ban was unconstitutional, had the effect of allowing same-sex marriage in California.
      3. ***United States v. Windsor (2013)***
         1. The Court struck down a section of the federal Defense of Marriage Act, which defined marriage as a legally recognized relationship between one man and one woman for purposes of the more than one thousand federal laws that address marital or spousal status.
         2. Justice Kennedy held that the due process clause of the Fifth Amendment precludes the federal government from refusing to recognize a same-sex marriage valid under state law.
      4. ***Obergefell v. Hodges (2015)***
         1. Because it provided a definitive answer to the question of whether states can ban same-sex marriage, Obergefell is a landmark decision.
         2. But it—not to mention the strenuous dissents of four of the Court’s five Republican appointees—raises even more questions.
            1. In light of the majority opinion in *Dobbs*, will the Court reconsider *Obergefell*?
            2. What will happen when claims of equality based on sexual orientation collide with claims of religious freedom?
      5. ***Masterpiece Cakeshop v. Colorado Civil Rights Commission (2018)***
         1. The justices ruled quite narrowly, holding only that states must treat neutrally, not with hostility, claims of religious freedom while ensuring the dignity of gays.
   5. The Right to Die
      1. *Cruzan v. Director, Missouri Department of Health (1990)*
         1. By the time the Court took the case, rules that permitted patients and their families to end treatment had garnered public support.
         2. In August 1990, two months after the Court’s decision, the Cruzans petitioned a Missouri court for a new hearing.
         3. Despite protests from pro-life groups, a state court judge ruled on that the Cruzans could have Nancy’s feeding tube removed.
      2. ***Washington v. Glucksberg (1997) and Vacco v. Quill (1997)***
         1. Both involving state laws making it a crime to assist another person to die by suicide.
         2. By 9–0 votes, the justices held that terminally ill patients do not have a fundamental right to the assistance of a physician to hasten death because there is no deeply rooted traditions supporting “suicide.”
         3. As a result, the Court subjected the laws to a rational basis analysis and found that the bans were reasonably related to states’ legitimate interests.
      3. ***Gonzales v. Oregon (2006)***
         1. The Court took up Oregon’s Death with Dignity Act, which permits state-licensed physicians to dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient.
         2. Attorney General John Ashcroft issued a rule asserting that the statute was unlawful, claiming that the Controlled Substances Act (CSA) of 1970, enacted by Congress to regulate the legitimate and illegitimate trafficking of drugs, criminalizes the use of controlled substances to assist suicide.
         3. In a 6–3 decision, the Supreme Court expressed its firm disagreement with the Gonzales/Ashcroft rule.
   6. Drug Testing
      1. ***Chandler v. Miller (1997)***
         1. The Court held that a Georgia law requiring drug screening of all candidates for public office went too far, that it “diminishes personal privacy for a symbol’s sake.”
      2. ***Ferguson v. City of Charleston (2001)***
         1. The Court struck down a state hospital’s policy of conducting drug tests on obstetrical patients and turning the results, if positive, over to law enforcement agents.
      3. *Board of Education of Pottawatomie County v. Earls (2002)*
         1. The Court held that a school policy requiring students to consent to urinalysis testing for drugs in order to participate in any extracurricular activity was insufficiently intrusive to violate the students’ expectation of privacy.
      4. ***Vernonia School Dist. 47J v. Acton (1995)***
         1. A school system required that students wishing to play sports sign a form giving consent to drug testing.
         2. The Court held, 6–3, that the requirement does not violate the Constitution.