1. Sign ups

2. Assign

3. Yesterday.


   Then Lochner. Struck down a wage and hour labor eegulation as vs. DP becasue vs. Lib of K. Lookwed at the Ct.'s arguments, and the way the maj paintts the conflict as onebetween laborers and state. Lib of K and police power. 2 dissents. Harlan and OWH one of famous. If the end is regulation of labor, not permissible. If the end is health and safety of bakers and consumers of bread, then either a petaext or faulty becasue if the menas: no proven relation beween reg, of hours and end of health and sfety

   Trying to verbalize the problem.

   What's wrong with Lochner. Alongg wyth Dred Scott, oone of th most widely repudicated of case. But why?

   A. Interventionist? OWH would allow for judicial review of Legislation.
   B. OK to be activist, but wrong issue?
   C. Was iyt that they held wrong personal / political views? [Note how a S. Ct nominee's religious and political beliefs are part of the process of senate confirmation]
   D. View of society wrong in which lib of K made sense?
   E. What wiuld you have federal judges tio do to avoid the default of Lochner?
   F. What after all is the function of judicial review?

   Williams (poor people ought o be an object of Ct. protection) and Epps (working on a neural, broader statement)
Two related issue issues. One of which already touched upon in my quetionnms and Mr. Williams proposal.

A. Are there people whose special circumstances require that Ct. respond more receptively, more posiytively and prtoctively to kgsislation protectuing them?
   i) not wards 493 ½ - at CP What if were?
   ii) Holden v. Hardy 492 3/4 and fn 1
   iii) Muller v. Otregon 500 n. 1 go over 500-501 and FN2

That's one instance in which solicitous judical scrutiny would be called for even by Lochner maj. But danger: demeaning stereotypes.

B. Second related instance not bcaause wards but because of inequality.
   i) Harlan 495 3d sentence. Quaere? How? Tructural
   ii) N. 2 p. 498...
   iii) Esecaially apt in liberty of K. How such a liberty if the parties have radically differ power for bargaining. Only liberty if parties have parity. No fair maakt then.
   iv) Could say n Ct's not resposnsibl to redress natural disparities. What then the argument.
   v) Harlan and casebook note. State not an univolved non-action. Not an umpire s standing back, callijing balls and stri=kes. Participamnt, along with other nbranches of gov: ijin helping create and maintain the system that avors owners vs. laboers. Hioy? property / contract/ tax/ form labor unions, strike and picket. Resessing the inequality that the state helped into create.
What brought an end to the Lochner era was the 1920-2 - 1930's economic collapse of the U.S. and the legal changes necessary to the recovery. FDR. New Deal. Saw in changes in Commerce Clause interpretation that produced such cases as Wickard v. Filburn. More legislation had been struck down on DP grounds that IC grounds. P. 506. Thereafter, Ct. Very deferential to legislation on economic and social issues. Bmoch broader latatusw in what is a legitimate purpose of legislation and a test of only reasonableness in the fit of means to ends.

Carolene Products (1938) 507

1. Shows how far Ct. willing to go in finding a measure to be rational

Congressional committee found that use of filled milk led to undersourishment. Strong sense that it was simply protectiuonsit legislation on behalf of the milk lobby...
NB: 507 1/2 + at 2; then bortom at 3. Presumed rational. deferential to legislation on the mine run Economic/social legislation. Means - rational, presumed. .. Ends: ok if not prohibited by the Constitution.

3. N. 3, p. 509 More deferential subsequently

4. FN 4 Go thru !!! back to

Williamson v. Lee Optical (1955) 509

1. Facts.
Effective lobbying 510 1/4 at *
Means. Not necessary or reaonsable. No reason optontrist an’t fit old lndred to new frames
S Ct? 510 1/2 ++ Might have. Also: if evil, measure may cover only part. Not have tp do all at same rtime
Takings: Come back too as time allows at end. Continue with DP for Now. To mP . 540.

Lochner gave way in 1930's to deferential DP review. But change in 1965 with Griswold, where substantantive DP reviww as reinvigorate.

Employed to strike down legislation limiting some rights. Same in ordinary run of economic legislation - deferentia. But not in areas touch on reprodyction, family, sex and death. CP Fn 4 Rights (Pol Process, D & I minorities

Wre a handful of unique cases protectinmg peosoaal rights through DP. Meyer 545.

Meyer (1923)n545

1. Facts. German teaching
2. How construe what DP liberty protects? lb of K?
3. Who and what protected here. 545 1/3

Pierce (1925) 545

1. Fact: Mandatory publkic schooling. Paarochial and public schools vs.
2. Who and what protected?

Skinner (1942) 545 (14th Amend Equal Protection)

   Similar to mmodern 3strijes and you’re out legislation
   Only is was 3 strikes no balls
2. What right? 545 bottomm
3. What probem? Blue collar crime, not white collar

To Griswopd.
Griswold (1965) 546

Facts:
   What is purpose (549 - infidelity) and what is means 546
2. Who are the Appellants
3. What had they done.

Douglas opinion:
1. What right? Privacy?

2. How / where projected. in Cionst? Const argument. How oenstrct? Always have to
   ground in Const language
   14th DP? 546 bottom !!!
   If not which. 547 penumbras of 6.
   What is a penumbra?

3. Privacy/ police in the bedroom.

8. Whose rt to privacy?
   Who were appellants? Married couple?
   How argue in later cases?

Goldberg 548

1. What right? Marital privacy
2. Where in Cionst. DP 14th / 5th Ninth Whetb 9th? Read.
3. How determine what rights in DP? 548 2/3 Any bwetter thnn Lochner?
4. SOR 549. Compelling

Harlan 549

1. DP 549
2. What control on content. 549 atb ** I e why not Lochner
   And 549 ***
3. Continues from Poe opinion. 549 bottom
   How describe rthe rt? 550 top Compare 551 1/3 (3rd & 4th Amends.)
   How know? Liiberty is ... and 550 1/3 at SOR. 1ST 1/2 ONLY. TO //
   Control on DP = liberty as know from history and traditions. Prob next p infra)

4 Continue same line: 550 1/3 at SOR And requires higher scrutiny by court.
   Carolene Peroducts FN 4. Not presume...
   Which of the three paragraphs? Rt? Politicl process? D&I min?
   Argue all?

White 552

Neat package of argument: 552 1-3

Black and Stewart 2 dissenting opinions each joins te other 553

   Black: Lochner
   Stewart, Silly law, but no Const grunding for it, as witness 6 amneds.

555 N 2.
   Is this Lochner? Only this time guessed right?
   Is this a women’s rts case?
   Poor woen?

556 N4 : Eliasnestate
1. Sign up sheets: 2 abortion cases argued Nov. 8. Each of four read 1 of the 4 briefs. Group responsibility. Case names and numbers. Download from the USSC. Responsibility to assign and how to and where to proceed. Each will need to tell the others about the brief. Questions to be answered. Appoint a convener? Nov. 6: for convening and working out answers to a set of questions. Mweet before and after – after all read. A day or two of classes to present and talk about. 7-8 by groups. Then follow up read te accounts of the orl arguments on Wed.

2. Assignments for next week will be posted. Finish the abortion cases in the casebook. Then next topic? Allow plenty of time for individuals and groups work on the two upcoming cases.


What ended the Lochner era was the 1930’s. Same as turnabout in th IC clause cases. Wickatrd v. Filburn and th modern era. Since 1930’s Sup Ct has been very deferential to cong. Std. of rationality

Caronene Products (1938) 507 illustrative. Test is rationality and rationality of cong act will be presumed. In statutes regulating the economy.

Williamson v. Lee Optical (1955) 509

1. Facts.
Effective lobbying. 510 1/4 at *
What D. Ct do?
Ends? Protecteck consumkers.
Means. Seems like it is not necessary or even reasonableraeosnable. No reason optician can’t fit old lenses to new frames
S Ct? 510 1/2 ++ Might have.
Not only presume rationality, what can imagine would be rational.

* * *

Takings: Come back toi as time allows at end. Continue with DP for Now. To P. 544

* * *

Lochner gave way in 1930’s to deferential DP review. But door to change opened in 1965 with Griswold, where substantiative DP review returned but in a different form.
Still deferential to the ordinary run of economic legislation. But willing to scrutinize more closelyly statutes that involved certain fundamental rights: reproduction, family, sex and death. CP fn. 4, 1st parag?
We are a handful of unique earlier cases protecting personal rights through DP. Meyer
Meyer (1923) 545

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2. How construe what DP liberty protects? Ib of K?
3. Who and what protected here. 545 1/3

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Who were appellants? Married couple?
    How argue in later cases?

Goldberg 548

1. What right? Marital privacy
3. How determine what rights in DP? 548 2/3 *** last parag Any bwetter thnan Lochner?
4. SOR 549: Compelling

Harlan 549 – Epps - two JMHarlan’s this the second. Salways good to read, esp this one and
William Brennan

1. DP 549

2. Whatb control on content: 549 ½ + ** Ie why not Lochner
    And 549 2/3 ***

3. Continues ifrom Poe opinion. 549 bottom
   How describe rthe rt? 550 top Compare 551 1/3 (3rd & 4th Amends.)
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Black: Lochner
    Stewart. Silly law, but no Const ground for striking it down, as witness 6 ammeds.

555 N 2
    Is this Lochner? Only this time guessed right?
    Is thhis a women’s rts case?
    Poor woen?
556 N3s: Eiasnestat (1972)

1. ep

2. Law banning distribution of contraceptives.

3. Unmarried individual

4. Not a married couple as in Griswold

5. Rt. = 556 3/4 at * left

Carey (1977) 556 bottom.

Minors under 16. Struck down. Strict scrutiny
Rt. decisionss in child bearing.
Doubt that availability had anything to do with the purpose of advancing morality.

N. 5 557 – Cloning to produce children/

Roe v Wade (1973) 558

1. Purpose
   Protect helath of the mother
   Potentiality of the life of the fetus

   Criminalize abortion except whwen liofe of mother at staker


   Purpose / end must be a compelling state interest
   Means must be narrowly drawn

4. What here?

Tripartite scheme. 561 1st full paragraph
1st trinmesetr (3 moths +/-) neither suficnetl geat to commnstrate a CSI
2nd mother's health mre at issue...
5. What right? What can attorneys argue is the right protected by the decision? How many ways to formulate the right?

P. 558 #1 and 2
559 #3
560 #4 not any orior description
561 3/4 # 5A and B
562 1/2 #6 part of a right


7. Whatever it is, where in the constitution is it to be found?
   558 bottom

8. How does Sewart describe the right and where from?
   562. 14th?
   Says Griswold 1/3

9. Douglas 562
   What 562 3/4
   Where FN 1
   9th? 14th?

10. Rehaquist dissent 563
    Loxchner 562 bottom

11. Is a fetus a person? 560 top and fn 2?
    End of n. 1 p. 565.

12. Doe 564

13. n4 p. 566 sex equality carolene fn 4

14. Argued DP. Why not EP. Ginsburg thought it should have been.
    Kinds of argument. History
    Other side not so active. Won
Myer, Pierce, Skinner, Griswold, Eisenstat, Roe - Rt. to privacy: teacher to teach, students to learn, parents to determine, doctors to give advice and to perform medical procedures, a person to use birth control devises or chemicals or to have an abortion? How state it How argue it? How ground it in the Constitution? How expand or contract it? What does the right cover: A right to keep the government out of what? Bedrooms, classrooms, doctors offices, hospitals, husband-wife, lover-lover and parent-child relationships, pregnant women - fetus relationships? Decisions males as well as females about their bodies? Same sex relationships? And individual's rt to determine the use of his/her body?

Griswold and the rt of privacy seem to have stuck. We do believe we have a rt of privacy.

Post Roe:

A. Note 2(a) 568 ff. Spousal and parental consent.

1. Planned Parenthood of Mo. v. Danforth (1976) 568 vs. spousal consent (no husband veto), also vs a parent veto, consent.

2. But: Bellotti I & II (1976) (1979) Ok to have parent involvement if not in the form of a blanket veto: if minor aen obtain a court order permitting ehr to have an abortion without talking to her parents about it, i.e. a judicial by pass.

3. Subsequent cases: OK to require parental notice but not parental veto.

4. How does the Ct go about making decisions about whether a given intrusion on privacy violates the liberty protect by the DP clause is. O'C developed a formula Bellotti I p.. 568 3/4 + “unduly burdens.” Whether a statute unduly burdens the pregant woman’s right to decide whether to carry a fetus to term. Att'y’s directing their arguments tom her as a swing vote would then argues that a measure is or is not an undue burden. Casey

B. Note 2(b) - medical abortion practicces 569 ff

1. Akron (1983) 569: vs. requirements that post-trimester abortions be performed in a hospital rather than a clinic, that the Dr give certain information to the patient, that the abortion no be performed with 24 hrs of signing the consent form. Some of these because intruded on th discretion of the physissican 569 2/3.

C. Note 3 bottom 569. Gov funding.

1. Maher 1977 - ok for state to ban use of Medicaid funds for non-therapeutic abortions 1980

2. Harris 1980 p. 570 - ok for fed gov to deny funds for most abortions

3. Rust 1991 - ok to restrict funding for abortion counselling


To Casey 1992 p. 574:

1. Part I, 574 bottom - once again reaffirm “the essential holding of Roe” esp. with Justices O’Connor and Kennedy agreeing.

2. What did the state do? 5 parts:

   a. Prohibit abortions except in “medical emergencies”. Ct of Appeal construed meaning when mother’s life or health significantly threatened

   b. Consent. Dr. Must inform about medical procedure and then must wait or 24 hours.

   c. If married must notify husband.

   d. Except in instances of emergency, pregnant women under 18 must have parental consent, but there was allowed a judicial bypass.

   e. Facility must file reports giving information about the abortion, the physician, etc., not the patient’s name.
To yellow p7 [2A] 14th half

Votes: 5 not to overrule Roe (Blackmun/Stevens) + (O'Connor, K and Souter)
4 to overrule (Rehnquist, White, Scalia, Thomas)
of the 5, 3 remain Stevens, Kennedy and Sotu.
of the 4, 2 remain. Scaklia and Thoma

Now: Breyer, Ginsburg, Roberts and Alito. Quaere

4 = Rehn, White, Scalia, Thomas; 3 = O'Connor, K. Souter; 2 = Bl, Stevens

4. The 5 provisons in the order in which the Ct decided them: Go back too p 574 and
look at the voting array.

a. Medical emergency exception # 4 in order in which statute initially presented, but first in
which Ct decided in opinion. V(A) p. 579 2/3 - upheld (9-0)

b. 24 hr waiting period - informed consent #4. V(B) 579 2/3+ - upheld (2) Bl St. u.
c. Spousal notification #3 V(C) 580 vs 5-4 the three plus the two

d. Parental consent with judicial by-pass #2 V(D) 582 pro 9-0

e. Reporting #5) V(E) pro 8-1 (Bl).

Uphold all but spousal notification.

* * *

5. Where in the constitution is the right rooted and the arguments grounded? 14th 575 top


7. What is the SOR according to the three?

Roe - CS1 / narrowly drawn means 575 bottom

Ma's health - compelling end of 1st trimester; fetus = viability, end of second

Casey - reject trimester scheme 578; instead viability/undue burden. 578 bottom

Part IV - only the three. p. 574
8. If undue burden, – only 3 -- how argue:

Compare spousal notification with 24-hr waiting period. 1\textsuperscript{st} = UB, 2\textsuperscript{nd} not.

Yellow sheets 10 ff


11. Revisit the rt, p. 575. 1 - 3 - top 1/3, bottom, then 2/3.

Mazurek (1997) 588

Not an undue bburden. Whay not:. Limitinf abortions to licesnsed physisicans. Wiythdrew permission for livecnsed physucuans assistants. Only one.

Accessibility because of mileadge and sparse populadon. Fe accessible..


Nebraska. Banned partial birth or dilation and extraction abortionmss.

Maj Breyer, Stevebsnd, O'Connor, Souter Ginsburg: Vs. Const;
1. No evcepcion for womans' health. Undue burden.
2. Also the ban could be coinsytrudef to include othor forms of abortionn thereby leavin physicians in fear of prosecution. Undue burden for the pregnant woman because undue burden for physician?

Stevens and Ginsburg:
1. See Nebraska aas chippng away at Roe. How?
2. read 589 2/3 Rte At NB. Roe


Thomas 590 at * x2
O'Connor: Suggests that a ban on D&X could be constitutional if had a life and health exception.

To Ayotte, supp 34.

So Ayotte Supp 34.

O'C lasst opinion, vcarrying forward hr observation in Stenberg. Just because some constitutional infirmity, does not mean strkine down Statute as a whole.

Here a parental notification requirement that would be uncomnnstttional in only a few of its applications might be curable if a court could sever the uncomnstitutional applications.

Remanded.

Gets us to next week's two cases.2

Reluctant to start us on another section, but .....