

Florida Bioethics Network: The State of Abortion Jurisprudence

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History of Abortion Regulations

- At common law, abortion was not illegal if performed before quickening. Infanticide was illegal, and abortionists who inadvertently killed the mother would be condemned.
- Mid-19th century movement by doctors to professionalize obstetrics and gynaecology and to close ranks against “jealous midwives, ignorant doctor-women and busy neighbors” led to criminalization
- At beginning of 20th century, abortion was seen as the last resort of desperate single women, but by mid-century it was viewed as a practice of married women to control family size – this narrative pitted women against their husbands, their fetuses and society

Due Process of Law

- No person shall . . . be deprived of life, *liberty*, or property, without due process of law (5th Amendment) – applies against the federal government
- nor shall any State deprive any person of life, *liberty*, or property, without due process of law (14th Amendment) – applies against the states

What is *Due Process of Law*?

Procedure

Technical requirements –
affirmation by both houses of
legislature and signature by
executive

Fairness concerns

Notice, a hearing, an opportunity to
be heard prior to a deprivation

Substance – certain rights are
more important than others

Enumerated rights (speech, religion,
jury trial, free of searches and
seizures) are so fundamental that
government needs a really good
reason to impair them

Unenumerated rights, such as
natural rights, may also deserve
fundamental status – like privacy,
voting, safe environment

Other normal rights get rational basis treatment

Due Process Structure

Fundamental Rights

Strict Scrutiny – government must have a *compelling* state interest in impairing the right, and must use the least-restrictive means possible.

Government generally cannot deny the right, and any impairment of the right must not unduly burden the right
i.e., government must have a really good reason to restrict the right (strict in theory, fatal in fact)

Non-fundamental Rights

Rational Basis Scrutiny – government need merely have a legitimate reason (not arbitrary or capricious) and the means must be rationally related to the ends

Sometimes so deferential to government that it is a “shocks the conscience” test, or “entirely irrelevant” test
i.e., government can do whatever it wants to impose the will of the majority onto the minority



Lochner Era — 1890-1936

- Very conservative court struck down hundreds of state and federal laws aimed at regulating the market – labor and wage laws, occupational safety laws, public health laws, etc.
- They argued that the due process clause's protection of liberty and property prevented the states and the federal government from interfering with the individual's right to contract for labor, to agree to pay wages that the employee would accept, or to impose costs on employers that they would not willingly undertake (such as minimum wage and safety regulations)
- We refer to this as the era of “substantive economic due process” where the Court elevated economic interests to the status of fundamental rights and struck down laws that interfered with those rights. The creation of *Strict Scrutiny*
- During this era there were a couple of cases holding that intimate family decisions, such as whether to send children to private or public schools, or to teach a child a foreign language (German) were fundamental liberty interests as well and could not be restricted by the state without very good reasons.
- But generally morals legislation was deemed OK under rational basis (anti-abortion, anti-adultery and fornication, anti-gambling, anti-lottery, prohibition laws were all deemed fine)

Demise of Lochnerism

- 1936, with threats of Roosevelt's Court Packing plan, the retirement of 2 ultra-conservative justices, and pressure on the first Justice Roberts to change his view, the Court shifted (the *shift in time that saved nine*) and began to uphold economic legislation, thus demoting property rights from fundamental to non-fundamental rights status.
- 1936-1965 – period of relative deference by the courts to federal and state legislation

Griswold v. Connecticut (1965)

Creation of a Right to Privacy

- Connecticut criminalized the practice of providing contraception to anyone, including to married couples. Decision generated SIX opinions
 1. Douglas, for the Majority – argued that the “penumbras” of the first, fourth, fifth, and sixth amendments protect a zone of **privacy** for the marital bedroom
 2. Goldberg – argued that the ninth amendment protects a zone of **privacy** because rights expressly granted do not deny or disparage other rights retained by the people
 3. Harlan – Liberty prong of the due process clause protects a zone of **privacy**
 4. White – joined the majority because the law was inherently unreasonable
 5. Black – Dissenting – argued there was no mention of the term privacy anywhere in the Constitution
 6. Stewart – Dissenting – agreed with Black and suggested if Connecticut citizens disagreed they should get their legislature to remove it

Roe v. Wade - 1973

- Based the fundamental right of a woman to terminate her pregnancy in the right to privacy protected in *Griswold*, but subject to certain limitations. Elevated laws regulating abortion to strict scrutiny
 1. First trimester – no regulations by the state are permissible (except obvious generalized health and safety regulations) because the risk of an abortion is lower than the risk of carrying a child to term
 2. Second trimester – regulations are permissible, but only to protect the health and life of the mother
 3. Third trimester – post viability the state's interest in potential life permits a state to, if it chooses, regulate or even outlaw abortions, so long as a provision exists to protect maternal life, which must always prevail over fetal life



Since 1965 – Right to Privacy has become very far-reaching

Contraception (Griswald v. Connecticut)
Interracial Marriage (Loving v. Virginia)
Right to Possess Pornography (Stanley v. Georgia)
Abortion (Roe v. Wade)
Intimate Sexual Conduct (Lawrence v. Texas)
Same-sex Marriage (Obergefell v. Hodges)
Right to refuse medical treatment (Cruzan v. Missouri) or
to authorize medical treatment (right to a vasectomy)
Right to determine how to raise one's children

We currently have statutory rights to privacy in things like our cell phones, browser history, medical records, educational records, credit scores, financial information

Planned Parenthood v. Casey - 1992

- Affirms the fundamental right to an abortion, but changes the regulatory framework
 1. Rejects trimester framework of *Roe* and adopts a viability/pre-viability framework
 2. Pre-viability the state may regulate to protect potential fetal life, but may not unduly burden a woman's right to an abortion
 3. Post-viability the state may regulate and even prohibit abortions to protect fetal life, so long as there is an exception for maternal life
 4. Opens the door to more extensive regulation early in the pregnancy (first trimester) and changes the standard from health and safety (*Roe*) to undue burden (*Casey*)

Endless state laws “regulating” abortion

- Until 2007 all abortion laws had been passed at the state level, and they attempted to regulate the procedure through a variety of means
 - Spousal and parental consent requirements
 - 24-hour waiting periods
 - Informed consent requirements (must provide information about alternatives to abortion)
 - Fetal heartbeat bills requiring an ultrasound
 - Fetal burial bills requiring funerals for disposition of fetal remains
 - Partial-Birth Abortion bans (struck down in *Stenberg v. Carhart*)
 - Unborn victims of violence act criminalizing violent attacks against pregnant women
 - Admitting privileges/clinic facility requirements



Questions for the
Court have been

- Are these TRAP laws an undue burden on the constitutional right to an abortion? Or are they merely legitimate regulations?
- Court has gone back and forth, sometimes allowing things like a 24-hour waiting period, but not a spousal consent requirement, or permitting a fetal heartbeat requirement but not admitting privileges, and these have been completely irreconcilable.
- *Dobbs v. Jackson Women's Health Organization* – prohibits abortions after 15 weeks

WWSD (What Will Scotus Do?)

- Nuclear Option – Reverse and reject the Right to Privacy altogether as constitutionally illegitimate (appropriate parallel action to Lochner) and as Justice Thomas has often supported.
- Surgical Drone Strike Option – Remove abortion from the privacy umbrella but leave everything else. On what basis will the court distinguish abortion from, say, a vasectomy in terms of the right to privacy?
- Landmine Option – Uphold the right in theory, but rule that various restrictions are not undue burdens which results in death by a thousand cuts. Put up so many barriers that the right is no longer meaningfully exercisable



The background features two large, overlapping, curved lines. One line is a light blue color and the other is a light green color. They are positioned in the top right and bottom left corners, framing the central text.

Other Safe Harbors?

State Privacy Protections



THE CONSTITUTIONAL RIGHT TO ABORTION IN THE UNITED STATES AND FLORIDA

Caroline Mala Corbin

Professor of Law & Dean's Distinguished Scholar,
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The United States Constitution

THE U.S. CONSTITUTION IS THE
SUPREME LAW OF THE LAND, AND
NO LAW, STATE OR FEDERAL, MAY
VIOLATE IT.

THE U.S. SUPREME COURT HAS THE
FINAL SAY OVER THE
INTERPRETATION OF THE U.S.
CONSTITUTION

FIRST RULE:
NO BANS
BEFORE
VIABILITY

States may not ban
abortion before viability

This was the rule in *Roe v. Wade*, and has been reaffirmed by every subsequent decision

SECOND RULE: NO UNDUE BURDEN BEFORE VIABILITY

The test, announced in *Planned Parenthood v. Casey* (1992), is still the test today for evaluating abortion regulations.

A law imposes an undue burden if it places a substantial obstacle in the path of a woman seeking to end her pregnancy

Before viability

- The govt may not ban abortion
- The govt may not pass regulations that impose an undue burden on women seeking to end their pregnancy

After viability

- The govt may ban abortion as long as the ban does not jeopardize the pregnant women's health or life

SUMMARY OF ABORTION LAW TODAY

DOBBS V. JACKSON WOMEN'S HEALTH ORG.

Mississippi passed a law that banned abortions after 15 weeks, banning abortions before viability (which occurs months later).

The law bans abortion before viability and pre-viability bans violate the Constitution

In fact, both the District Court and the 5th Circuit Court of Appeals held that the Mississippi ban was unconstitutional.

WHAT ARE THE POSSIBLE OUTCOMES FOR DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

Best case scenario:

- The Supreme Court affirms that pre-viability bans violate the Constitution (but will weaken the undue burden test)

Worst case scenario:

- The Supreme Court declares that *Roe v. Wade* was decided incorrectly and holds that the U.S. Constitution does not protect the right to abortion.

Or somewhere in between:

- For example, the Supreme Court states that the Constitution protects the right to abortion but upholds the law.

**IF THE SUPREME
COURT
ELIMINATES
CONSTITUTIONAL
RIGHT TO
ABORTION, THEN
EACH STATE
DECIDES LEVEL
OF PROTECTION**

Many states have passed their own pre-viability bans in anticipation of U.S. Supreme Court overruling Roe v. Wade

While the U.S. Constitution may not longer protect abortion, states may protect the right in their state constitution or by state law.

FLORIDA'S FIFTEEN WEEK BAN

Abortion is
illegal after
fifteen weeks

Goes into
effect July 1,
2022

No
exceptions
for rape

FLORIDA CONSTITUTION

Art. I, sec. 23: “Right of Privacy: Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life.”

FLORIDA SUPREME COURT

The Florida Supreme Court holds that the right to privacy includes the right to end an unwanted pregnancy. “Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy. We can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime” *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989).

Moreover, the Florida Supreme Court applies strict scrutiny to abortion regulations, like the Mandatory Delay Law, which would force women to go to the doctor twice before ending her pregnancy. *Gainesville Women Care, LLC v. State*, 210 So. 3d 1243 (Fla. 2017)

Just as the U.S. Supreme Court has become much more conservative (and hostile to abortion rights), so has the Florida Supreme Court

HARD TURN TO THE RIGHT

**[Extra]
Versions of
the Undue
Burden
Test**

SINGLE QUESTION VERSION (JUNE MEDICAL):

Does the abortion law create a substantial obstacle in the path of women seeking to end their pregnancy?

TWO QUESTION VERSION (HELLERSTEDT):

Does the abortion law create a substantial obstacle in the path of women seeking to end their pregnancy?

Has the government proven that the abortion law accomplishes its stated goal?

Constitutional Jenga with Privacy and Abortion Rights

Professor Ciara Torres-Spelliscy



@ProfCiara



Griswold v. Connecticut (1965)

- Justice Douglas writes that right to privacy can be inferred from several amendments in the Bill of Rights, and this right prevents states from making the use of contraception by married couples illegal.
- Justice Goldberg, joined by Justices Warren and Brennan, concurred. Goldberg located the right to privacy in the Ninth and Fourteenth Amendments.
- Justice Harlan concurred, arguing that the Due Process Clause of the Fourteenth Amendment protects the right to privacy.
- Justice White concurred, arguing that the Fourteenth Amendment was the proper basis for the decision.

Roe v. Wade (1973)

- Inherent in the Due Process Clause of the Fourteenth Amendment along with the Ninth Amendment is a fundamental “right to privacy” that protects a pregnant woman’s choice whether to have an abortion. A state law that broadly prohibits abortion without respect to the stage of pregnancy or other interests violates that right.



Constitutional Jenga

- The Supreme Court builds on past precedents when deciding new cases. Privacy is the basis of many rights today.

Skinner v. OK Marriage is a fundamental right
& procreation is a basic civil right 14th Am EP

Griswold v. CT Privacy from 14th Am DP
& Bill of Rights

Skinner v. OK Marriage is a fundamental right
& procreation is a basic civil right 14th Am EP

Loving v. Virginia – Marriage is fundamental
right (race) 14th DP & EP

Griswold v. CT Privacy from 14th Am DP
& Bill of Rights

Skinner v. OK Marriage is a fundamental right
& procreation is a basic civil right 14th Am EP

Roe v. Wade Privacy from 14th Am DP
& 9th Am

Loving v. Virginia – Marriage is fundamental
right (race) 14th DP & EP

Griswold v. CT Privacy from 14th Am DP
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Skinner v. OK Marriage is a fundamental right
& procreation is a basic civil right 14th Am EP

Planned Parenthood v. Casey 14th Am DP	
Roe v. Wade Privacy from 14 th Am DP & 9 th Am	Loving v. Virginia – Marriage is fundamental right (race) 14 th DP & EP
Griswold v. CT Privacy from 14 th Am DP & Bill of Rights	Skinner v. OK Marriage is a fundamental right & procreation is a basic civil right 14 th Am EP

	Obergefell v. Hodges Marriage is fundamental right (same sex) 14 th DP & EP
Planned Parenthood v. Casey 14th Am DP	US v. Windsor – Marriage is fundamental right (same sex) 5 th DP & EP
Roe v. Wade Privacy from 14 th Am DP & 9 th Am	Loving v. Virginia – Marriage is fundamental right (race) 14 th DP & EP
Griswold v. CT Privacy from 14 th Am DP & Bill of Rights	Skinner v. OK Marriage is a fundamental right & procreation is a basic civil right 14 th Am EP

June Medical v. Russo 14 th Am DP	
Whole Woman's Health v. Hellerstedt 14 th Am DP	Obergefell v. Hodges Marriage is fundamental right (same sex) 5 th DP & EP
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What could happen in
*Dobbs v. Jackson Women's
Health Organization?*

If the Supreme Court in *Dobbs* invalidates *Casey*...

June Medical v. Russo 14 th Am DP	
Whole Woman's Health v. Hellerstedt 14 th Am DP	Obergefell v. Hodges Marriage is fundamental right (same sex) 5 th DP & EP
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Planned Parenthood v. Casey
14th Am DP

But if they go big and invalidate privacy from *Griswold*...

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& Bill of Rights

That would leave us back where we were in the 1940s with *Skinner v. Oklahoma*.

Skinner v. OK Marriage is a fundamental right
& procreation is a basic civil right 14th Am EP



- Thus there is more than just reproductive freedom on the line in *Dobbs v. Jackson Women's Health Organization*

If the majority
goes after privacy,
many more rights
and liberties are
in peril.



And the only real
difference is who is on the
Supreme Court.



Thank you for
listening.

- Professor Ciara Torres-Spelliscy
-  @ProfCiara