The Third Session

SUPREME COURT OF THE UNITED STATES

Griswold v. Connecticut

No. 496 Argued: March 29-30, 1965 --- Decided: June 7, 1965

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The statutes whose constitutionality is involved in this appeal... provide[s]: **Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined** not less than fifty dollars or imprisoned not less than sixty days nor more than one year... **The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute, as so applied, violated the Fourteenth Amendment...**

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment.Overtones of **some arguments suggest that Lochner v. New York, should be our guide. But we decline that invitation, as we did in West Coast Hotel Co. v. Parrish,...We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws** that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation…

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice -- whether public or private or parochial -- is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights….

In NAACP v. Alabama, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right....

[I]n other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion….

We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

MR. JUSTICE STEWART, whom MR. JUSTICE BLACK joins, dissenting.

Since 1879, Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law... As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. **But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.**

In the course of its opinion, the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

We are told that the Due Process Clause of the Fourteenth Amendment is not, as such, the "guide" in this case. With that much, I agree. There is no claim that this law, duly enacted by the Connecticut Legislature, is unconstitutionally vague. There is no claim that the appellants were denied

any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws. Compare Lochner v. New York, , with Ferguson v. Skrupa, ….

Syllabus

SUPREME COURT OF THE UNITED STATES

LAWRENCE v. TEXAS

Argued March 26, 2003–Decided June 26, 2003

Responding to a reported weapons disturbance in a private residence, Houston police entered petitioner Lawrence's apartment and saw him and another adult man, petitioner Garner, engaging in a private, consensual sexual act. Petitioners were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct. **In affirming, the State Court of Appeals held, inter alia, that the statute was not unconstitutional under the Due Process Clause of the Fourteenth Amendment.** The court considered Bowers v. Hardwick, 478 U.S. 186, controlling on that point.

Held: The Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause.

(a) Resolution of this case depends on whether petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause. For this inquiry the Court deems it necessary to reconsider its Bowers holding. The Bowers Court's initial substantive statement–"The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy … ," 478 U.S., at 190–discloses the Court's failure to appreciate the extent of the liberty at stake. **To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put**

forward, just as it would demean a married couple were it said that marriage is just about the right to have sexual intercourse. …

41 S. W. 3d 349, reversed and remanded.

Kennedy, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and Thomas, J., joined. Thomas, J., filed a dissenting opinion.

Syllabus

SUPREME COURT OF THE UNITED STATES

Roe v. Wade

Argued: December 13, 1971 --- Decided: January 22, 1973

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life.

Held:

... State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved, violate **the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy.** Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion

except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C.J., and DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined.... WHITE, J., filed a dissenting opinion, in which REHNQUIST, J joined.

New York Review of Books

The Abortion Battlefield

Marcia Angell, JUNE 22, 2017

Women Against Abortion: Inside the Largest Moral Reform Movement of the Twentieth Century by Karissa Haugeberg About Abortion: Terminating Pregnancy in Twenty-First-Century America by Carol Sanger

If anyone thought that Donald Trump's manifold inconsistencies might... offer women some protection from the Mike Pence wing of the Republican Party—they were wrong.

Women have always been subject to male domination, sometimes almost completely. Even in as enlightened a country as the United States, men created the laws under which women lived well into the twentieth century, and they ensured that women had an inferior status.. .Women couldn't vote in the United States until 1920 (fifty years after African-American men), and until 1936 they could lose their citizenship if they married a foreigner....

Not surprisingly, controlling sexuality and reproduction was central to keeping women in their place. For most of the country's history, motherhood was considered women's highest calling. They were expected to submit to their husbands sexually, and marital rape did not become a crime in all states until 1993. Abortion was illegal in most of the country for most of its history...

Everything changed in 1960 when the first birth control pill, Enovid, came on the market.... Despite the fact that a prescription was required, which could be embarrassing and even difficult for single women to get from paternalistic doctors, **within a few years millions of women were "on the pill."....Nevertheless, many pregnancies continued to be unplanned, and still are.**

In 1973 the Supreme Court, in the case of Roe v. Wade, took the next step. It found by a 7–2 majority that women had a constitutional right to end a pregnancy.

The right was close to absolute in the first trimester, could be regulated by the states in the second trimester only to protect the woman's health, and in the third trimester could be further regulated or even banned to protect "potential life," unless the woman's health or life were at stake. Legal abortions rapidly became common...Almost immediately, Roe v. Wade became a moral and political—and sometimes a literal—battlefield, and it remains so...

[The] initial public opposition to abortion, which began even before Roe v. Wade, came from priests and bishops in the Catholic Church, as well as Catholic women, often nuns, whose opposition frequently grew out of their general reverence for life...In addition, antiabortion organizations were formed, such as the **National Right to Life Committee (NRLC),** which had millions of members and chapters in every state by the late 1970s. **Like the Catholic Church, their focus was on protecting the embryo (defined as less than eight weeks' gestation) or fetus—both usually referred to as the "unborn child"—through legal and legislative strategies.**

But beginning in the late 1970s, there was an ideological shift. Instead of emphasizing only the protection of the fetus, the focus changed to include the protection of pregnant women. In essence, they were seen as potential victims of heartless abortionists, as much at risk as their fetuses. A new psychological illness, called the postabortion syndrome, was invented, marked by lifelong guilt and remorse after an abortion...

By the 1980s, the antiabortion movement had undergone another major shift. It became dominated not by Catholics but, over time, by evangelical Protestants, and its methods increasingly included direct confrontations at abortion clinics to block access. **The movement also became increasingly associated with the right wing of the Republican Party...** Many states, particularly Republican strongholds, began to pass legislation that put onerous and often humiliating conditions on women seeking abortions and on the doctors providing them. **In the 1992 case of Planned Parenthood v. Casey.... The Court announced that Roe had undervalued the state's interest in potential unborn life, an interest which Casey now fixed at the moment of conception.** States were now within their rights to persuade pregnant women against abortion from the start....Since then, and particularly since Republicans have gained control of most state governments, states have rushed to pass new laws that treat pregnant women like errant children... **"Between the 2010 midterm elections and 2015, states adopted 231 new restrictions on abortion."**

Alabama's Women's Right to Know Act requires a twenty-four-hour waiting period prior to an abortion...Texas went even further. It added two more requirements to its already daunting restrictions. The first required all abortion providers to have admitting privileges at a local hospital, and the second required all abortion clinics to be

licensed as "ambulatory surgical centers," essentially mini-hospitals. **These requirements would put many abortion clinics out of business, as the legislators well knew—and intended. The case eventually reached the Supreme Court, which held in Whole Women's Health v. Hellerstedt (2016) that these additional requirements put an "undue burden" on the exercise of a constitutional right—** one of the few pieces of good news in recent years for defenders of abortion rights. Still, about half the abortion clinics in Texas have had to close, as have many in other states.

Most telling, Sanger highlights the failure of those who favor the restrictions... to consider the harms of not being able to obtain one. For many women, an unwanted pregnancy can be disastrous—emotionally, financially, or even physically (the mortality rate from childbirth is about ten times that of an abortion)...The latest figures...show a rapid drop in abortions to the lowest level since Roe v. Wade, about half the frequency from the peak in 1980...

The reasons most women gave the researchers for choosing an abortion were concern for someone else, inability to afford raising a child, and the belief that having a baby would interfere with work, school, or the ability to care for dependents. The great majority had incomes of less than 200 percent of the federal poverty level, and nearly 60 percent already had given birth to at least one child. About half were single. In 1977, ...

An important new development is the growing use of medical abortions performed using two drugs, mifepristone (Mifeprex) and misoprostal, given two days apart, that induce a miscarriage. Although mifepristone was approved by the FDA in 2000 for early abortions, the agency attached a number of restrictions to its dispensation, ostensibly for safety reasons... Nevertheless, about 30 percent of abortions are no longer surgical, but medical—that is, performed using these drugs.

A Pew poll in October 2016 showed that 59 percent of Americans think abortion should be legal in all or most cases, while 37 percent think it should be illegal in all or most cases... **It seems to me that much of the argumentation about abortion hinges on the use of loaded words, in particular the word "life." If life is defined as beginning at conception, then it is often assumed that abortion should therefore be illegal...**

The Trump administration has made it clear that it, along with the Republican Congress, will do everything possible to bring an end to abortion... Jeff Sessions, referred to Roe v. Wade as "one of the worst, colossally erroneous Supreme Court decisions of all time." The new Congress is poised to eliminate federal

funding for Planned Parenthood, the largest provider of reproductive health care services in the United States...

Syllabus

Supreme Court of the United States

DISTRICT OF COLUMBIA. v. HELLER

Argued March 18, 2008—Decided June 26, 2008

District of Columbia law bans handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns..., but authorizes the police chief to issue 1-year licenses; and requires residents to keep lawfully owned firearms unloaded and dissembled or bound by a trigger lock or similar device. Respondent Heller, a D. C. special policeman, applied to register a handgun he wished to keep at home, but the District refused. He filed this suit seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on handgun registration, the licensing requirement insofar as it prohibits carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibits the use of functional firearms in the home. The District Court dismissed the suit, but the D. C. Circuit reversed, holding that the Second Amendment protects an individual's right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right.

Held:

1. The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.

(a) **The Amendment's prefatory clause announces a purpose, but does not limit or expand the scope of the second part,** the operative clause. The operative clause's text and history demonstrate that it connotes an individual right to keep and bear arms.

2. **Like most rights, the Second Amendment right is not unlimited.** It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Amendment or state analogues. The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws

imposing conditions and qualifications on the commercial sale of arms. Miller's holding that the sorts of weapons protected are those "in common use at the time" finds support in the historical tradition of prohibiting the carrying of dangerous and unusual weapons. Pp. 54–56....

Justice Scalia's opinion for the Court concluded as follows:

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many amici who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns... But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.
Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct. We affirm the judgment of the Court of Appeals. It is so ordered.

The Oath 111-13

The split in Heller was the familiar 5- 4- with Stevens, Souter, Ginsburg, and Breyer in their customary losing position-but this time the surprise came from the chief justice. Instead of giving the opinion to Kennedy to keep him on board, Roberts asked Scalia to write for the majority...

Scalia turned Heller into a textualist and originalist tour de force. Literally word by word, Scalia deconstructed the meaning of the Second Amendment, using the sources available to the framers of the Constitution. (He cited Blackstone eight times.) He went back to the Glorious Revolution of seventeenth-century England , to uncover the roots of the constitutional right....

Stevens, too, was talking like an originalist. The true measure of Scalia's success in Heller was that he had changed the terms of the debate. In the twentieth century, it was inconceivable that two justices would spend thousands of words excavating from seventeenth- and eighteenth-century sources the purported intentions of the framers. The Supreme Court did not operate that way in those days. Scalia changed that...

At a minimum, the conflict between Scalia and Stevens underlined the difficulty of determining any single meaning of the intentions of the framers, more than two centuries after the fact. By eighteenth-century standards, the men who gathered were a diverse group. They had different ideas about what their work meant, as did the state legislators who ratified their work. On many provisions, they compromised; on others, they left their words intentionally vague. Often, there is no single "original intent" or "original meaning." Moreover, for all that the framers quarreled over the wording of the Constitution, they never indicated that they understood their intentions should bind future generations. All that mattered, they thought, was the Constitution itself...

Heller represented the culmination of a political, legal, and public relations offensive that was many years in the making. Scholars, lawyers, politicians, and activists created a new understanding of the Second Amendment that eventually commanded five votes on the Supreme Court. **Notwithstanding his denials, Scalia had demonstrated precisely how the Constitution is not dead at all-but a vibrant, living thing. In other words, there was less to the originalism revolution than met the eye. Originalism was no more principled or honorable than any other way of interpreting the Constitution. It was, as Heller demonstrated, just another way for justices to achieve their political goals.**

Syllabus

Supreme Court of the United States

OBERGEFELL v. HODGES

Argued April 28, 2015—Decided June 26, 20151

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners... filed suits... claiming that... state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

Held: The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State...

(2) The history of marriage is one of both continuity and change. Changes... have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation's experience with gay and lesbian rights...Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in Bowers v. Hardwick...concluding laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." Lawrence v. Texas....

(b) The Fourteenth Amendment requires a State to license a marriage between two people of the same sex.

(1) The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs... Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, Loving v. Virginia, 388 U. S. 1, invalidated bans on interracial unions, ..

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.

Reversed Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined.

Justice Scalia, with whom Justice Thomas joins, dissenting.

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. **Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.** The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention.

This practice of constitutional revision by an unelected committee of nine, always

accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to....

The Constitution places some constraints on self-rule—constraints adopted by the People themselves when they ratified the Constitution and its Amendments. Forbidden are laws "impairing the Obligation of Contracts,"[3] denying "Full Faith and Credit" to the "public Acts" of other States,[4] prohibiting the free exercise of religion,[5] abridging the freedom of speech,[6] infringing the right to keep and bear arms,[7] authorizing unreasonable searches and seizures,[8] and so forth. Aside from these limitations, those powers "reserved to the States respectively, or to the people"[9] can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove that issue from the political process? Of course not...

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter what it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect.[13] That is so because "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions . . . . "

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same- sex marriages in 2003.[20] They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.[22] Of course the opinion's showy profundities are often profoundly incoherent.