17.245 The Supreme Court, Civil Liberties, and Civil Rights
Fall 2006

17.245, The Supreme Court, Civil Liberties, and Civil Rights (Fall 2006)

Discussion 18: Fundamental Rights (I)

There are two levels of privacy rights:

- Constitutional: the right established by the word "liberty" in the 14th Amendment, and the privacy rights construed to flow from the 4th, 5th, and 9th amendments.
- Extra-constitutional: a general right to be free from intrusion by the government and other citizens

The set of cases beginning in the 1960s and extending to today deals with the constitutional right to privacy. Whether such a constitutional right exists is still hotly debated because of the lack of an explicit textual reference. Why this is contested so much has something to do with the *Lochner* decision. The *Lochner* Court read the Constitution to give rise to a right to "freedom of contract" that could not be infringed by a state law regarding the number of hours a baker could work. The Court later decided that so long as a state is acting reasonably, there is no inherent right to free contract. Some justices have invoked the rhetoric and rationale of the *Lochner* decision in inferring a constitutional right to privacy, while others have rejected such a notion.

When *Griswold* came before the Court, some thought that if the Court were to strike down the Connecticut law prohibiting distribution of contraceptives, then it would effectively be reviving the logic of the *Lochner* approach, which has since been rejected.

The question then became: how can the Court prevent a state from prohibiting certain activities that the state may regard or define as immoral, such as the use of contraceptives? The answer involved the Court's interpretation of the term liberty in the due process clause to give rise to a constitutional right to privacy.

Discussion of Griswold v. Connecticut, 1965

Background:
The state of Connecticut had enacted a statute making it a crime for any person to use any drug or article to prevent contraception.

The Issue of Standing
Griswold, the Executive Director of Planned Parenthood, sued to assert the rights of married couples to use contraceptives. Griswold had standing through his conviction for dispensing contraceptives, a conviction that he argued should be overturned because he was just dispensing medical products that his patients had a constitutional right to possess and use.

Griswold arguably made a more sympathetic plaintiff than would a couple trying to assert its rights to use contraceptives.

Generally, where standing is concerned, if an individual has a sufficiently close relationship with someone who clearly has standing, such that restricting the rights of one person affects the other's liberty, then the Court will find that standing exists for the related party to assert a claim.

Merits

Douglas, in the majority opinion, rejects *Lochner*'s approach to the 14th Amendment, but instead construes a right to privacy through various provisions of the Bill of Rights. He invokes constitutional provisions and past interpretations of them that have resulted in a right to privacy under a regime of "ordered liberty":

"In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325 ." (Douglas, majority opinion in Griswold v. Connecticut)

The logic behind the "ordered liberty" view is that in order to protect against a tyrannical state, the constitutional protections afforded by the first 8 amendments to the Constitution must be made to apply to the states.

Douglas then goes through the amendments, mentioning each one that confers or reflects some aspect of a right to privacy:

1) The 1st Amendment a right to freely associate (meaning the government can't discriminate against you because of your associations)
2) The 3rd Amendment protection against quartering of troops reflects the notion that your home is your territory and that the government may not impose arbitrarily on that domain.
3) The 4th Amendment confers a right to be free of governmental intrusion in the form of unreasonable searches and seizures.
4) 5th Amendment establishes the right not to incriminate yourself, which functionally confers upon you a right to the privacy of your thoughts.
5) The 9th Amendment provides that rights specifically stated in the 1st through 8th Amendments do not preclude the existence of other rights.

Douglas then describes these "zones" of privacy (penumbra and emanations) that justify the existence of a constitutional right to privacy.

Justice Black's dissenting opinion highlights the controversy among the justices regarding the elevation of privacy rights to the level of constitutionally protected fundamental rights.

"The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth [381 U.S. 479, 509] Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home." (Black, dissent in Griswold v. Connecticut)

The response to Black's argument is that the Court must address the *Lochner* problem in a way that does not allow for the evisceration of all rights. Taken to an extreme, the reversal of *Lochner* would lead to the disappearance of rights the Founders intended to protect, but did not explicitly and textually define in the Constitution.

Discussion of Eisenstadt v. Baird, 1972

A man who gave out contraceptives after a lecture on birth control was convicted of distributing contraceptive devices to unmarried people without a practicing physician's license. Massachusetts law prohibits physicians and pharmacists from giving away contraceptives except to married couples.

The statutory scheme is further described by the Court:

"As interpreted by the State Supreme Judicial [405 U.S. 438, 442] Court, these provisions make it a felony for anyone, other than a registered physician or pharmacist acting in accordance with the terms of 21A, to dispense any article with the intention that it be used for the prevention of conception. The statutory scheme distinguishes among three distinct classes of distributees - first, married persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; second, single persons may not obtain contraceptives from anyone to prevent pregnancy; and, third, married or single persons may obtain contraceptives from anyone to prevent, not pregnancy, but the spread of disease." (Justice Brennan, majority opinion in Eisenstadt v. Baird)

Where a law divides people into classes, the equal protection is often implicated. In this case there are distinctions between married and unmarried individuals and distinctions between individuals based on their *reasons* for using contraceptives.

The Court rules that the interests of the state (described in terms of public health and public morality) do not justify such classifications:

- The Court rejects the state's claim that the classification is justified by and related to the health implications of contraceptives.
- The Court also rejects the state's claim that the law is justified by a state interest confining sex to the marital relationship.
    - The statute does not prohibit people who are married from using contraceptives for sex outside of their marital relationship; therefore, the law is not narrowly tailored to achieve its objective.

Although basing its ruling on equal protection principles, the Court invokes the constitutional right to privacy:

"If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (Brennan, majority opinion in Eisenstadt v. Baird)

Essentially, the Court says that *Griswold* may or may not apply to the circumstances before it. If it does, then single people absolutely have a right to contraception. If not, the equal protection clause is sufficient to decide the case; the state may not prohibit one class of people from the use contraception while permitting it to another class. Justice Brennan does state, however, that if Court had to reach the issue, it would probably find that *Griswold* does apply to these circumstances and may not be distinguished in terms of the existence of a marital relationship or lack thereof.