How an Uncommonly Silly Law Led to a Host of Very Consequential Supreme Court Decisions

By C. Evan Stewart

In 1879, Connecticut passed a law barring the use of "any drug, medicinal article or instrument for the purpose of preventing conception"; the penalty was "not less than fifty dollars" or between 60 days and one year in prison. And the state legislature also made it a crime to aid or abet such activity.

Connecticut's law was challenged repeatedly in the years thereafter, even reaching the U.S. Supreme Court several times, but without effect. In 1965, the Court decided to address the law head-on, a law one Justice derided as "uncommonly silly." Yet the outcome of that case, *Griswold v. Connecticut*,[1] was far from silly. For the first time the nation's highest court declared that the Constitution implied a fundamental right to privacy, thereby setting in motion the direct doctrinal basis for some of the most consequential social policy rulings of our time – *Roe v. Wade*[2] (abortion), *Lawrence v. Texas*[3] (right of same sex sex), and *Obergefell v. Hodges*[4] (same-sex marriage). All of those decisions, whether acknowledged or not, involved the Court's application of substantive due process.

"Bad" Substantive Due Process

The Supreme Court's track record on substantive due process is far from stellar. It made many terrible decisions before it began experimenting with substantive due process in what many people consider a "good" way in the 1960s. The *worst* decision, in my judgment, was the *invention* of substantive due process in *Dred Scott v. Sandford*,[5] where the Fifth Amendment was held to protect the right to travel with one's "property" (i.e., one's slave). The Court thereafter expanded on that "original sin," via the 14th Amendment, into protecting the right of economic free will in *Lochner v. New York*,[6] which struck down a New York law that sought to regulate the number hours

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a baker could work per week. The Court rejected New York's "arbitrary" and "unreasonable" interference with an individual's "freedom of contract"; *Lochner* was subsequently used to promote "laissez-faire constitutionalism" throughout the first part of the 20th Century, as one by one the Court struck down virtually all of President Roosevelt's "New Deal" legislation. It likely would have continued on that path were it not for FDR's threat to pack the Court in 1937. In response to that constitutional crisis, the Court did an abrupt 180-degree turn.[7]

Many lawyers and political scientists have been very critical of the foregoing substantive due process decisions by the Court; and a good number of those critics have not liked unelected Justices weighing in on obviously political matters, as well as the policy ends promoted by those decisions (e.g., racism, striking down "progressive" legislation, etc.). But what if substantive due process were to be used going the other political way?

"Good" Substantive Due Process

The first time the Court started experimenting with substantive due process in a "good" way came in the 1960s, and involved the "uncommonly silly" Connecticut law that had been challenged over the years – but always unsuccessfully. In 1961, the Supreme Court seemed to put an end to all repeal efforts in *Poe v. Ullman*,[8] when it dismissed a lawsuit directed against the Connecticut law for failure to state a case or controversy. In his dissent, however, Justice John Marshall Harlan II suggested a legal path forward through a broad reading of liberty rights under the 14th Amendment:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints,…and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

That language would become transformative for much of the Supreme Court's 14th Amendment jurisprudence over the next six decades.

A Test Case Is Born

In addition to Harlan's doctrinal approach, Justice William Brennan's concurrence in *Poe* – that a "true controversy" did not exist because no one had been arrested in violation of Connecticut law – provided the law's opponents with a plan. Planned Parenthood decided first to open a clinic in Connecticut and thereafter to "get Estelle Griswold [the Executive Director of Planned Parenthood's Connecticut operation] arrested." On November 1, 1961, the facility opened in New Haven. Several days later, New Haven police detectives began assembling prearranged evidence which demonstrated that Griswold and Leo Buxton, a professor at Yale Medical School and the medical director at the clinic, were giving birth control devices, as well as advice related thereto, to a number of local, married women. On November 10, arrest warrants were issued for both Griswold and Buxton for violating the aiding and abetting provision. The test case had begun.

At the trial stage, the defendants were found guilty and each fined $100. The intermediate appellate court affirmed the verdict (the court declined to pass judgment on the "wisdom or unwisdom" of the law unless it was "plainly violative of some constitutional mandate"). On April 28, 1964, the Connecticut Supreme Court affirmed the lower courts, noting that "every attack now made on the statute . . . has been made and rejected" by each and every court, over many years. Next up: the U.S. Supreme Court.

On to the Supremes

Griswold and Buxton's lawyers invoked 28 U.S.C. § 1257 (where a statute is "repugnant to the Constitution") in their petition to the Court, invoking Amendments One, Four, Nine, and Fourteen as the affected Constitutional provisions. In December of 1964, a unanimous Court agreed to grant certiorari, and briefing took place at the beginning of the next year.

On March 29, 1965, the Court began to hear oral argument, and it was tough sledding for both sets of advocates; each was constantly interrupted by questions, unable to get to many of the points they had intended to raise. At one point, Justice Hugo Black suggested to appellants' counsel that his side was advocating the same kind of (discredited) substantive due process doctrine endorsed by *Lochner* and its progeny; that led to some very heated back and forth. Notwithstanding, appellants' counsel did try to focus on that which had been advanced in the briefs – what Harlan had been getting at in *Poe*: an emerging Constitutional right of privacy, grounded in the First, Third, Fourth, Fifth, and Ninth Amendments. Justice Harlan piped in at that point and asked whether appellants' counsel was planning to say anything more on the First Amendment issue. His reply: "Well, I'm not getting far on any of my arguments . . . ." After laughter throughout the courtroom subsided, he concluded: "I can't guarantee that I'll get back to the First Amendment, no." The argument then moved on to the fact that the Connecticut law did not "conform to current community standards."

Counsel for the State of Connecticut was equally hammered, especially on the fact that Connecticut was the *only* state that prohibited the use of contraception. The

Court adjourned midway through his presentation, and took up argument the following day. The focus the next day was on whether the statute was a proper use of Connecticut's police power and whether the seldom-enforced law was really a "dead letter."

In his rebuttal, appellants' counsel tried to focus on broad public policy issues. But then a series of questions from the Court on the unbriefed subject of abortion took center stage. At one point, Justice Byron White observed: "I take it abortion involves killing a life in being, doesn't it? Isn't that a rather different problem from conception?" Appellants' counsel agreed, but was unable to stop Justice Black from probing farther on this hot-potato issue and its possible application to the case before the Court.

Finally, at 10:45 a.m. on March 30, oral argument concluded. And as with most cases argued before the Court, no one could predict how the nine Justices would resolve the weighty matters briefed and orally vetted.

The Court Decides

On June 7, 1965, Justice William Douglas (who had not asked a single question at oral argument) delivered the opinion of the Court. Justice Arthur Goldberg wrote a concurring opinion, which was joined by Chief Justice Earl Warren and Justice Brennan. Justice Harlan wrote a separate opinion, concurring in the result, as did Justice White. Justices Black and Potter Stewart each wrote dissenting opinions.

Justice Douglas noted at the outset that there was not a problem of standing (which had defeated a prior challenge to the statutes) because Griswold and Buxton had been found guilty of the aiding and abetting provision. That was the easy part.

Moving on to the merits, Douglas, in striking down Connecticut's law, recognized that the result might sound a lot like *Lochner* and its substantive due process progeny. Not so: "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." Instead, the Court was *only* substituting its wisdom for the Connecticut legislature because the legislators had passed a law that "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."

In justifying the Court voiding the law, Douglas first invoked Harlan's dissent in *Poe*; but then he went a step farther, finding that various provisions of the Bill of Rights (the First, Third, Fourth, Fifth, and Ninth Amendments) have privacy guarantees which "have *penumbras*, formed by *emanations* from those guarantees that help give them life and substance" (emphasis added). Douglas then cited a number of prior Supreme Court "penumbra-like" cases which "bear witness that the right of privacy which presses for recognition here is a legitimate one."

Obviously concerned about how wide a door he might be opening by recognizing a Constitutional "right of privacy" for the first time in the country's history, Douglas indicated that this new right would be a *very* limited one:

> 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.

Justice Goldberg's concurrence agreed with the newly discovered Constitutional "right of marital privacy" (even though it "is not mentioned explicitly in the Constitution"). His justification, however, was not based upon "penumbras" or "emanations." With the help of his imaginative law clerk, Stephen Breyer, Goldberg emphasized the importance of the Ninth Amendment ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). Why emphasize the Ninth Amendment? Because "this Court has had little occasion to interpret" that Constitutional provision, so perhaps the jurisprudential vacuum could be used to say that the "forgotten" amendment actually "lends strong support" to this new right of marital privacy. The sole authority for this dubious assertion, however, was a "cf." citation to a prior opinion of the Court interpreting the Hatch Act! As for how to determine "which [other] rights are fundamental" enough to receive Constitutional protection, Goldberg provided a facile solution: "look to the 'traditions and [collective] conscience of our people'."

Perhaps recognizing the foregoing was not on the most solid ground (and anticipating caustic attacks from Black and the usually mild-mannered Stewart), Goldberg spent the rest of his concurrence agreeing and re-agreeing with Harlan's dissent in *Poe*.

Justice Harlan concurred with the result, but rejected the imaginative way the majority got there. Rather than trying to avoid the *Lochner* stigma – by invoking "penumbras" and "emanations," let's call a spade a spade: obviously, this is substantive due process; but now it is being used (as he wrote in *Poe*) not in a bad *Lochner* way, but instead to vindicate one of the "basic values implicit in the concept of ordered liberty." As for those who would worry about opening a Pandora's Box with this approach, don't worry: "Judicial self-restraint" will ensure that the Court does not go crazy in the future. And such self-restraint will be achieved through (i) respecting history, (ii) recognizing the aforementioned "basic values," and (iii) appreciating federalism and the separation of powers.[9]

Justice White, also concurred in the result, but took on an even more direct approach than did Harlan. In essence, he wrote that Connecticut's law was so stupid, it violated due process. In an opinion littered with "cf."

citations, White questioned how a ban on contraception affecting married people could somehow prevent illicit sexual relations. Because of the broad impact of the statute on compelling societal interests (i.e., children), Connecticut was bound to justify the laws; and because the state could not, the law must be voided.

Justice Black's dissent, while less famous than Stewart's, presented a telling critique of the opinions of his judicial brethren who voided Connecticut's law. While initially agreeing that the Connecticut law was dumb, he wrote that that did not rise to a Constitutional violation. As for a Constitutional right of privacy, obviously it exists nowhere in the Founders' document (nor are there any "emanations" therein); indeed, the first time the concept emerged is in an 1890 article in the *Harvard Law Review*! With respect to the embrace of substantive due process, Black wrote that he thought the Court had rid itself of that noxious doctrine when the Court did its pivot in the 1930s and stopped voiding FDR's New Deal legislation. In any event, "[s]uch an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them . . . [the former is] a power which was specifically denied to federal courts by the convention that framed the Constitution." As to White's burden point, Black countered that White got it exactly wrong: laws are *presumed* to be Constitutional. Regarding Goldberg's proposed standard of the "traditions and [collective] conscience of our people," where and/or how does the Court determine them?: "Our Court certainly has no machinery with which to take a Gallup Poll." Finally, as to the notion that the Court must "keep the Constitution in tune with the times," that is precisely what led to all the mischief in *Lochner* and its progeny; if people want to update the Constitution, the Founders provided a precise mechanism to do that (a mechanism which does *not* involve the Court). On this last point, Black ended by quoting the late Judge Learned Hand's disparaging of judges using substantive due process to favor their "personal preferences": "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."

Justice Stewart began his dissent with his famous observation: "this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case." He then warmed to the task at hand, chastising the majority for being afraid to label what they were really doing: reviving substantive due process – at least Harlan and White had the courage to call it what it is. As for Douglas's "emanations" and "penumbras" of marital privacy, they are nowhere to be found in any of the enumerated Amendments. And as for Goldberg's hyping of the Ninth Amendment, that is "to turn somersaults with history": "the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder." Stewart then addressed the comment made at oral argument about non-conformity with "current community standards": "it is not the function of this Court to decide cases on the basis of community standards." If people do not like a law, the correct way to proceed is "to persuade their elected representatives to repeal it. That is the constitutional way to take [a] law off the books."

Pre- and Post-Blowback

Well before the various opinions were made public, it was evident to some Court insiders that what was to come would have great significance. Most importantly, two memoranda written by Warren's clerk, John Hart Ely, foresaw much of what lay ahead. The first was dated February 26, 1965, before oral argument, and it was distributed beyond Warren to a number of the other Justices. In his memorandum, Ely warned that "some of [the arguments] urged by appellants have dangerous implications": "Just as I think the Court should vigorously enforce each clause in the Constitution, I do not think the Court should enforce clauses which are not there. No matter how strong a dislike for a piece of legislation may be, it is dangerous precedent to read into the Constitution guarantees which are not there. Despite Justice Brandeis's lifelong crusade for a right of privacy , . . . the Constitution says nothing about such a right." And as for Justice Harlan's approach in his *Poe* dissent, that would constitute "in my opinion, the most dangerous sort of 'activism.'" Ely concluded his February memorandum by advising Warren that to reverse the lower courts on a right to privacy ground "would, in my opinion, have very dangerous implications."

Later on, when Douglas was circulating drafts of his opinion, a number of other Supreme Court clerks were taken aback by the weakness of the analysis, with a few openly mocking his "penumbras" and "emanations." More ominous was Ely's second memorandum to Warren, written after Douglas's nearly finalized opinion: "This opinion incorporates an approach to the Constitution so dangerous that you should not join it."

It appears that the only person in the Supreme Court's building who actually liked what Douglas had come up with was Justice Tom Clark. On April 28, he penned a note to Douglas: "Bill, Yes I like all of it – it emancipates femininity and protects masculinity–- TC."

After the ruling, the immediate reaction by the media was fairly predictable. The liberal press (e.g., the *New York Times, Washington Post, Life*, *New Republic*) hailed the Court's action to protect "the people" from troglodyte state legislators. The mainstream press (e.g., *Richmond Times-Dispatch*), however, thought the dissents were right: "The fact that members of the court simply *don't like* a law is no basis for throwing it out." (emphasis in original); and a number of publications (e.g., *Waterloo Daily Courier*)

lampooned and/or lambasted Douglas's "penumbras" and emanations."

Perhaps more important were the first wave of law review articles. The annual Supreme Court edition published by the *Harvard Law Review* in 1965 opined that the two approaches endorsed by Douglas and Harlan "differ more in tone than in results to which they lead." What the *Review's* editors found more curious was Goldberg's hyping of the Ninth Amendment, which had *never* been the basis for a single decision by the Court since its adoption in 1791. Later in 1965 came an entire issue of the *Michigan Law Review* devoted to *Griswold*; while most of the legal academics praised the result – a Constitutional right to privacy – many questioned the means to get there. Professor Paul Klapper, for example, found Douglas's opinion: "curious," "puzzling," "confusing," "uncertain," and "ambiguous." Professor Robert Dixon wrote: "The actual result of *Griswold* may be applauded, but was it necessary to play charades with the Constitution?" And a consensus among the various academics seemed to form around the notion that – notwithstanding the various approaches of Douglas, Goldberg, Harlan, and White – they all were, at bottom, "treading a worn and familiar path." And that path subsequently became known as "liberal *Lochner*-ism."

The Future of *Griswold*

While Douglas's new Constitutional right was expressly limited to "marital privacy," it did not stay there for long. As noted above, *Griswold* subsequently became the direct doctrinal basis for *Roe v. Wade*; *Lawrence v. Texas;* and *Obergefell v. Hodges.* Will it be extended even further? That probably depends upon the make-up of the Court.

We have all witnessed bruising nominations to the Supreme Court. First came President Barack Obama's 2016 nomination of Judge Merrick Garland, upon which the Senate never took action. Next up was President Trump's nomination of Judge Neil Gorsuch, who was confirmed (after the "nuclear option" was invoked) by a 55–45 vote in the Senate on April 7, 2017 (he is now the 101st Associate Justice of the Court). If Justices Kennedy and/or Ginsburg are the next retirees from the Court, it is likely that the nomination process for their successors will reach new heights of contentiousness (on both sides of the political aisle). Among other things, the fate of "good" substantive due process will likely hang in the balance of who succeeds these Justices.

Postscripts

- For those who wish to know more about *Griswold*, the first stop should be John Johnson's *Griswold v. Connecticut*: *Birth Control and the Constitutional Right of Privacy* (Kansas Press 2005). The 1965 *Michigan Law Review* referenced *supra* is in Volume 64. A more recent scholarly law review take on *Griswold* is Ryan William's "The Path to Griswold," 89 *Notre Dame Law Review* 2155 (2014). And Jill Lepore has weighed in on *Griswold* (and related subjects) in two recent *New Yorker* articles: "To Have and to Hold" (May 25, 2015); "The History Test" (March 27, 2017).
- Justice Stewart's "uncommonly silly law" phrase was later cited with approval by Justice Clarence Thomas in his dissent in *Lawrence v. Texas.*[10]
- Goldberg's Ninth Amendment opinion in *Griswold* would be his last as a Supreme Court Justice. At President Johnson's importuning, he left the Court to replace Adlai Stevenson as the U.S. Representative to the United Nations. His seat on the Court was filled by Abe Fortas. Goldberg's law clerk, of course, is now Justice Breyer.
- John Hart Ely became one of America's leading legal scholars (ranked as the fourth most cited legal authority – after Richard Posner, Ronald Dworkin, and Oliver Wendell Holmes), and served as Dean of the Stanford Law School. His 1980 book, *Democracy and Distrust: A Theory of Judicial Review* (Harvard Press) is considered one of the most important and influential books about Constitutional law ever written. In 1973, after the Court had decided *Roe v. Wade*, Ely published an article in the *Yale Law Journal* (Volume 82). In it he posited that the two rights discovered by the *Griswold* and *Roe* Courts were made from the same "whole cloth" as *Lochner*. He went on to write that "although *Lochner* and *Roe* are twins to be sure, they are not identical. While I would hesitate to argue that one is more defensible than the other in terms of judicial style, there are differences in that regard that suggest *Roe* may turn out to be the more dangerous precedent." Ely supported the availability of abortions as a matter of public policy, but *Roe* (he wrote) "is not constitutional law and gives almost no sense of an obligation to try to be." ■

1. 381 U.S. 479 (1965).
2. 410 U.S. 113 (1973).
3. 539 U.S. 558 (2003).
4. 576 U.S. ____, 135 S.Ct. 2584 (2015).
5. 60 U.S. 393 (1856).
6. 198 U.S. 45 (1905).
7. *See West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).
8. 367 U.S. 497 (1961).
9. Ironically, Harlan's grandfather, John Marshall Harlan, had espoused exactly the *opposite* approach in his *Lochner* dissent. Underscoring that a basic tenet of our democracy is a restrained judiciary, he wrote: "If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to the end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere."
10. 539 U.S. 558 (2003).

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