Louisiana Law Review

Volume 35 | Number 2
The Work of the Louisiana Appellate Courts for the 1973-1974 Term: A Symposium
Winter 1975

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CONTEMPORARY LEGAL PRAGMATISM AND FUNDAMENTAL FREEDOMS

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The contemporary United States Supreme Court seems to deal more and more in adjudication which has less and less to do with the constitutional text. None would deny, of course, that the Court has engaged in spinning constitutional elaborations and refinements from the beginning. During the years of the Warren Court and, thus far, the Burger era, we have seen the creation of a large number of constitutional guarantees which are only tangentially related to any provisions of the Constitution. The right to privacy,[1] to travel,[2] to beget children,[3] to abort unborn children,[4] and all rights encompassed in the phrase "the necessities of life,"[5] have either been held to be constitutional rights by the Court or nominated for that status by some of the Justices. These rights, often called "penumbral" rights,[6] are more properly described as rights created by judicial fiat. In characteristically Anglo-American fashion their creation has been in response to specific problems and without the benefit of an articulated body of principles, rules, or standards.

Although scholars have devoted considerable energy to the question of "neutral principles,"[7] viewing the Supreme Court's decision-making as a major manifestation of American pragmatism makes understanding of constitutional development more meaningful. The Court's inconsistent treatment of fundamental constitutional rights,

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1. Griswold v. Connecticut, 381 U.S. 479 (1965).

2. Shapiro v. Thompson, 394 U.S. 618 (1969).

3. Eisenstadt v. Baird, 405 U.S. 438 (1972).

4. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

5. Shapiro v. Thompson, 394 U.S. 618 (1969). *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974).

6. Perhaps a plausible, though curious source of the concept of a constitutional penumbra is Justice Holmes' statement in *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926) (dissenting opinion): "But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured."

7. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971); Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571 (1948); Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersection Between Law and Political Science*, 20 STAN. L. REV. 169 (1968); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

especially in the area of the so-called "new equal protection,"[8] is best understood as the results of the Justices' efforts to adjust American law to the political and economic realities as they have perceived them.

THE PRAGMATISM OF MARSHALL AND OTHER GREAT LAWGIVERS

Our ancestors are venerated for their pragmatism. The grand patron of American constitutional jurisprudence, Chief Justice John Marshall, is, quite appropriately, also the patron of constitutional pragmatism. Finding it expedient to give the Constitution a narrow construction in *Marbury v. Madison*,[9] Marshall went on to espouse a broad construction in such classics as *McCulloch v. Maryland*[10] and *Gibbons v. Ogden*.[11] The key to understanding all this is not that a broad construction reflected a sober maturity of views, but that each conflicting approach to the Constitution was suited to the occasion. In *Barron v. Baltimore*,[12] the Marshall Court decided that the states were not bound by the provisions of the Bill of Rights. True, there were sound arguments based on constitutional text and history favoring Marshall's conclusion. However, in other circumstances, Marshall did not hesitate to strain the constitutional text to reach the desired result. For example, in interpreting the contract clause, the early Court held that the Constitution contemplated corporate charters as contracts (even when "inherited" from the British Crown) and that state legislative enactments were tantamount to contracts,[13] despite a constitutional history which clearly indicated that the contract clause reached only laws impairing obligations of contract be-

8. "New equal protection" refers to the post-New Deal use of the equal protection clause of the fourteenth amendment as a constitutional standard for the review of substantive public policies. Used in this sense the equal protection clause plays the same role the due process clause played during the years of so-called "substantive due process." The "new equal protection" differs from the traditional or "old" equal protection in that under the traditional test legislation was upheld if the Justices discerned a "rational basis" for it; the new test is triggered by the legislative use of a "suspect classification" which warrants "strict scrutiny" and which can only be justified by "compelling state interests." For criticism of the "new equal protection," see Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee*, 62 GEO. L.J. 1071, 1093-94 (1974).

9. 5 U.S. (1 Cranch) 137 (1803).

10. 17 U.S. (4 Wheat.) 316 (1819).

11. 22 U.S. (9 Wheat.) 1 (1824).

12. 32 U.S. (7 Pet.) 243 (1833).

13. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

tween private parties. Marshall's goal was to interpret the contract clause so as to protect private property. Although the Justice seemed capable of turning the Constitution on its head in the cause of conservative politics, those politics did not include radical departures from the text on behalf of fundamental human rights. Thus, in *Barron* the private citizen could find no protection from the power of the state in the Bill of Rights.

Following the Civil War, the supposed instrument for protecting the person against the power of the state was the fourteenth amendment. Yet, while property received protection as soon as the nation had recovered from the trauma of the War, developing constitutional protection for the person has been markedly painful and drawn-out. In 1897, the Court held that the essence of the guarantee of the fifth amendment dealing with just compensation for property taken for public use was made applicable to the states through the fourteenth amendment.[14] The Court during the same general period held that numerous guarantees spelled out just as clearly in the Bill of Rights did not apply against the states through the fourteenth amendment. Closer scrutiny reveals that even supposed advances in personal rights found their underpinnings in protection of property rights. For example, in *Meyer v. Nebraska*[15] and *Pierce v. Society of Sisters*,[16] the Court extolled the "natural right" of parents to determine the education of their children free of state interference. However, it can be argued that the Court's real motive was to strike another blow at state power which arguably encroached upon the business of running private schools.

Yet, times were changing, and social realities could not permit the Court to continue to be the economic arbiter. Thus, a new voice of pragmatism arose on the Court. The critique addressed by Justice Holmes (before the advent of the free speech controversy) to his Spencerean brethren of the Court is by now a well-worn tale: do not, urged Holmes, declare laws unconstitutional merely because they are patently unwise or foolish; invalidate only those laws which lack the endorsement of "a reasonable man."[17] When called upon to explain why the right to operate a pharmacy,[18] or serve as an undertaker[19] can

14. Chicago, B. & Q. R.R. Co. v. Chicago, 166 U.S. 226 (1897). *See* Gideon v. Wainwright, 372 U.S. 335, 341-42 (1963).

15. 262 U.S. 390 (1923).

16. 268 U.S. 510 (1925).

17. *See* Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

18. Liggett Co. v. Baldridge, 278 U.S. 105 (1928), *overruled in* North Dakota Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 411 U.S. 947 (1973).

19. Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949).

be suppressed in the community interest, Holmes and his disciples contend that insofar as property rights are concerned, due process is satisfied if the form of law is observed. Courts may not look to the rationale underlying the law; or, if they do look, they must limit their scrutiny to see whether or not there is any basis whatsoever which would appeal to a "reasonable man," that is, any shred of plausibility will do. As the progressivism of Holmes' day was culminated by the New Deal, this pragmatic approach, aided by the infusion of new Justices on the Court, became accepted doctrine.[20]

The triumph of the Holmesian doctrine is reflected in Justice Black's succinct statement of the current approach:

> This Court beginning at least as early as 1934. . .has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. . . . Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.[21]

These developments paralleled the Court's interpretation of the equal protection clause. From the Old Court emerged the version of equal protection teaching that the clause does not impose impossible demands upon the state in the area of economic regulation. The classic statement of this legacy is found in the recent case of *Dandridge v. Williams*,[22] where the Court found that states could limit Aid to Families with Dependent Children (AFDC) funds to a maximum amount per family regardless of size or need. The Court declared:

> In the area of economics and social welfare, a State does not

20. *See, e.g.*, Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356, 364-65 (1973) (upholding state tax with differing rates for corporations and individuals); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (upholding state law requiring only certain businesses to close on Sundays); Williamson v. Lee Optical Inc., 348 U.S. 483, 488-89 (1955) (sustaining regulation of opticians while exempting vendors of ready-to-wear eyeglasses).

21. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949).

22. 397 U.S. 471 (1970). *See also* Jefferson v. Hackney, 406 U.S. 535 (1972); Richardson v. Belcher, 404 U.S. 78 (1971).

> violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. . . 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.'[23]

Thus the Court abandoned its role, on both the equal protection and due process fronts, as the arbiter of state economic regulation.

Almost simultaneously with its renunciation of its economic arbiter role, the Court began in earnest its career as the creator of fundamental personal rights. When the New Deal Court considered the question of whether or not the double jeopardy guarantee applied against the states,[24] Justice Cardozo catalogued certain other constitutional claims which had been upheld against state laws:[25] freedom of speech[26] and press,[27] free exercise of religion,[28] peaceable assembly,[29] and the right of criminal defendants to the benefit of counsel.[30]

> In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.[31]

Cardozo cited other rulings in which the Court had held guarantees of the Bill of Rights not to apply to the states:[32] grand jury indictment,[33] the privilege against self-incrimination,[34] the right to jury

23. 397 U.S. at 485 (citations omitted).

24. Palko v. Connecticut, 302 U.S. 319 (1937).

25. *Id.* at 324, 327.

26. Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937).

27. Near v. Minnesota, 283 U.S. 697 (1937); Grosjean v. American Press Co., 297 U.S. 233 (1936).

28. Hamilton v. Regents, 293 U.S. 245 (1934).

29. Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937).

30. Powell v. Alabama, 287 U.S. 45 (1932).

31. Palko v. Connecticut, 302 U.S. 319, 324-25 (1937). Cardozo also indicated the opposite of a standard amenable to mechanical application: "Right-minded men . . . could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind." *Id.* at 323. *See also* Cardozo's treatment of those immunities "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

32. 302 U.S. at 323, 324.

33. Gaines v. Washington, 277 U.S. 81 (1928); Hurtado v. California, 110 U.S. 516 (1884).

34. Brown v. Mississippi, 297 U.S. 278 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934); Twining v. New Jersey, 211 U.S. 78 (1905).

trial in criminal[35] and civil cases.[36] In addition, the Court had indicated, wrote Cardozo, that neither the fourth[37] nor the fifth[38] amendments applied to the states.

Justice Cardozo's *Palko* criterion of those guarantees "implicit in the concept of ordered liberty" is characteristically American;[39] it settled nothing, clarified nothing, but it offered a gentle hope that the problem of defining fundamental rights was manageable. Moreover, it promised to be guided by circumstances in the future as in the past. The phrase "life of ordered liberty" is no clearer than "life consistent with the American dream." Yet this is the standard whereby fundamental rights have been defined. The story of the post-New Deal acceleration of the process of incorporation is a familiar one and will not be recounted here.[40] In the numerous cases in which the theory has been invoked to incorporate federally protected rights into the fourteenth amendment, Cardozo's test was treated as pure rhetoric: the key question has been whether or not a majority of Justices have found plausible and convincing (one is tempted to say "compelling") reasons of public policy to justify the inclusion or exclusion.

Similar considerations have governed the judicial development of the several tests designed to justify the invalidation of measures considered hostile to the freedom of expression. In 1919, Justice Holmes introduced his unfortunate "clear and present danger" test

35. Maxwell v. Dow, 176 U.S. 581 (1900).

36. Walker v. Sauvinet, 92 U.S. 90 (1875).

37. Weeks v. United States, 232 U.S. 388 (1914).

38. West v. Louisiana, 194 U.S. 258 (1904). Cardozo made no reference to *O'Neil v. Vermont*, 144 U.S. 323 (1892), in which the Court had held the eighth amendment's guarantee against cruel and unusual punishment inapplicable to the states.

39. It is intriguing to compare the Cardozo standard with the more venerable one put forward by Judge Washington in 1823. Referring to the privileges and immunities of citizens of the several states, Washington wrote: "We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature fundamental; which belong of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." Corfield v. Coryell, 6 F. Cas. 546, 551-52 (No. 3,230) (C.C.E.D. Pa. 1823).

40. *See* Annot., 18 L.Ed. 2d 1388 (1967); Lacy, *The Bill of Rights and the Fourteenth Amendment: the Evolution of the Absorption Doctrine*, 23 WASH. & LEE L. REV. 37 (1966).

into the field of freedom of expression.[41] Holmes almost immediately disowned his own progeny[42] (though, to compound the confusion, not outright) and with much assistance from Justice Brandeis proceeded to modify it beyond recognition. The new Holmes-Brandeis clear and present danger test merely placed freedom of expression in the same class with pre-Holmesian property rights and claimed that those laws which encroached on expression should be scrutinized and upheld only when supported by convincing justifications.[43] These efforts, however, like the efforts to set off the freedoms of expression in a special class of "preferred freedoms," dramatize the difficulties of setting up some rights as more "fundamental" than others. Why should the guarantees of the first amendment be the object of greater solicitude than those of the fourth, fifth, sixth, or fourteenth amendments? The theory advanced by Justice Stone in the *Carolene Products* footnote[44]—that regulatory laws aimed at property matters are subject to repeal while laws aimed at suppressing expression would be difficult, if not impossible, to repeal—fails to explain why policies chilling the exercise of fourth amendment or fourteenth amendment rights are not so strictly scrutinized. Although the Holmes-Brandeis doctrine[45] is now accepted as official dogma, the rationale underlying the holding has not become any clearer; indeed, one may argue that a dogmatic formula mechanically applied is no better than ad hoc adjudication resting on no principle whatever.[46]

As they wrestled with the problem of defining fundamental constitutional rights, Cardozo and Holmes did so against the background of a constitutional text. Recent decisions creating rights have gone beyond the text, and this creates even greater problems. The Court must now not only decide whether or not the right merits "incorporation," but whether or not it exists at all.

GRISWOLD V. CONNECTICUT: A PRAGMATIC ADAPTATION OF THE RECENT PAST

A logical point of departure in highlighting the Court's recent career as a creator of constitutional rights[47] is *Griswold v.*

41. Schenck v. United States, 249 U.S. 47 (1919).

42. Abrams v. United States, 250 U.S. 616 (1919).

43. *See particularly* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

44. Carolene Products Co. v. United States, 304 U.S. 144, 152-53 n.4 (1944).

45. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

46. For an interesting treatment of the problem of ad hoc adjudication, see *Rochin v. California*, 342 U.S. 165 (1952); *Breithaupt v. Abram*, 352 U.S. 432 (1957).

47. For a concise chronology, see *Gunther*, *supra* note 8, at 8-12.

Connecticut,[48] where the court struck down a state law against the use of contraceptives by invoking the "freedom to associate," the "right of assembly," and the "right of belief." Justice Douglas was at pains to point out that the Court was not invalidating the law on the basis of the fourteenth amendment's due process clause; to have done so would have been bad form. Rather, the law was being voided on the strength of precedents (*Pierce, Meyer*) and on the strength of post-New Deal style civil liberties cases protective of the individual.

Griswold also marked a high point of the "strict scrutiny—compelling interest" doctrine. In his concurring opinion, Justice White explained the test:

> The nature of the right invaded is pertinent, . . .for statutes regulating sensitive areas of liberty do, under cases of this Court, require 'strict scrutiny,' and 'must be viewed in the light of less drastic means for achieving the same basic purpose.' 'Where there is a significant encroachment upon personal liberty, the State may prevail only by showing a subordinating interest which is compelling.'[49]

But to reach the conclusion that the anti-use statute was subject to its strict scrutiny the Court had to find that a fundamental right had been invaded. In doing so, *Griswold* illustrates still another trait of the current approach toward fundamental freedoms: marked departures from the constitutional text.[50] Caught in the spell of the new jurisprudence, the Justices see constitutional guarantees as undiminishable well-springs of rights. The prophet of the reach of the new approach, and also on other occasions a chief ally, was Justice Black. The Constitution and the Bill of Rights guarantee immunity from unreasonable searches and seizures but the "right to privacy" is not explicitly mentioned. If "privacy" can be found in the interstices of our organic law, where is one to stop? In *Griswold*, Justice Black pointed out the overbreadth of this approach:

> Brothers WHITE and GOLDBERG now apparently would start from this requirement that laws be narrowly drafted so as not to curtail free speech and assembly, and extend it limitlessly to require States to justify any law restricting "liberty" as my Brethren

48. 381 U.S. 479 (1961).

49. *Id.* at 503-04.

50. Justice Brennan, for example, has declared: "The right to vote derives from the right of association that is at the core of the First Amendment, protected from state infringement by the Fourteenth Amendment." Storer v. Brown, 415 U.S. 724, 756 (1974).

> define "liberty." This would mean at the very least, I suppose, that every state criminal statute—since it must inevitably curtail "liberty" to some extent—would be suspect, and would have to be justified to this Court.[51]

Black accurately described the touchstone of the new approach: desirability of having laws "narrowly drafted so as not to curtail" the rights in question, combined with the notion that states will be called upon to justify any restrictive law which impinges upon what a majority of the Court considers "liberty." When the Court later found the right to an abortion to be a fundamental one, Black's *ad horrendum* reference to criminal laws was borne out. As to non-criminal statutes, the Court has made use of the "right to travel" to undermine minimum residence requirements set by the states for welfare recipients,[52] voting,[53] and free, non-emergency medical care for indigents.[54] However, if the Court finds a statute to be less opprobrious, even if it involves a right considered fundamental the Court will strive to save it.

The formula recited by Justice White in the 1974 case of *American Party of Texas v. White*[55] serves well to illustrate the state of the art. The case featured an unsuccessful challenge to Texas' complex of regulations governing nominations of candidates for public offices. Said Justice White:

> [T]he foregoing limitations, whether considered alone or in combination, are constitutionally valid measures, reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways.[56]

Thus, the key question becomes: do a significant number of Justices think that the legislature can do better?

BEYOND GRISWOLD: FUNDAMENTAL FREEDOMS ENLARGED AND CONTRACTED

Since *Griswold*, three major decisions dramatize the Supreme Court's pragmatic treatment of fundamental rights, a treatment

51. 381 U.S. at 517-18.

52. Shapiro v. Thompson, 394 U.S. 618 (1969).

53. Dunn v. Blumstein, 405 U.S. 330 (1972).

54. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974).

55. 415 U.S. 767 (1974).

56. *Id.* at 781. Other electoral system cases are *Williams v. Rhodes*, 393 U.S. 23 (1968), *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) and *Storer v. Brown*, 415 U.S. 724 (1974).

which may indeed be characterized as contradictory and inconsistent. The cases concern travel,[57] equal education,[58] and abortion.[59]

Shapiro

Before *Shapiro v. Thompson*[60] was decided in 1969 the Court had already interpreted the equal protection clause to reach state classifications resting on "suspect" criteria (other than race) and state laws impinging upon "fundamental rights" had to be justified by some "compelling" governmental interest.[61] *Shapiro*, however, marked a new dimension of constitutional activism, for it literally invited wholesale court challenges to any and all public policies. *Shapiro* held that the equal protection clause prohibits states[62] from creating "two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who had resided less than a year, in the jurisdiction."[63] Justice Brennan, in an opinion supported by five colleagues, claimed that the policies were "irrational and unconstitutional"[64] even under the traditional equal protection test, but that the traditional tests did not apply since the cases involved the fundamental right of interstate movement.

Connecticut, Pennsylvania, and the District of Columbia contended that their policy of limiting welfare benefits was not only sanctioned by Congress (indeed, made by Congress, for the District of Columbia) but served to preserve the fiscal integrity of the programs, facilitate planning, provide an objective test of residency, reduce fraud, and give new residents an incentive to make an early entry into the labor force. Fiscal integrity, wrote Justice Brennan, was not a "constitutionally permissible state objective";[65] and the

57. Shapiro v. Thompson, 394 U.S. 618 (1969).

58. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

59. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

60. 394 U.S. 618 (1969).

61. *See* Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Skinner v. Oklahoma, 316 U.S. 535 (1942). For cases since 1969 see *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. McDougall, 413 U.S. 634 (1973); Graham v. Richardson, 453 U.S. 365 (1971). Significant cases involving racial classifications are *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Bolling v. Sharpe*, 347 U.S. 498 (1954).

62. The fifth amendment's due process clause was held to encompass an equal protection element in *Bolling v. Sharpe*, 347 U.S. 498 (1954).

63. 394 U.S. at 627.

64. *Id.* at 638.

65. *Id.* at 633.

other rationales were dismissed under the traditional equal protection standard of classification according to a reasonable basis.[66] The Court did not stop there but went on to hold:

> [T]he traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause.[67]

The only obstacle left remaining in the Court's path was a federal statute specifically authorizing state residence requirements of up to one year. Justice Brennan dealt with it by a deft re-writing of the legislative history and by declaring that even if the constitutional question were presented "the provision, insofar as it permits the one-year waiting-period requirement, would be unconstitutional."[68]

Thus, once created, a fundamental right seemingly cannot be thwarted by policy reasons advanced by the state. A compelling state interest is most often an unreachable goal. In creating fundamental rights, an alarming degree of flexibility and, therefore, power over public policy is left in the hands of the Justices. Since whether or not a claim for legal protection is held to be a constitutional right at all and, if so held, whether or not that right is "fundamental" are open for judicial determination, the Justices literally hold the future of the immediate shape of human rights of Americans in their hands. The Court conceivably could prune away most of the implementing corollaries of our constitutional guarantees merely by redefining them as "non-fundamental." Moreover, the confusion that has abounded as the Court searches for a standard defining fundamental rights has done nothing to allay these fears.

Roe and Doe

The 1973 abortion cases[69] dramatize the ease with which the Justices may fashion fundamental rights. In such a controversial area, it is possible that what looks like progress in the eyes of some will look like retrogression to others. The heart of the Court's opinion in the abortion cases attributes to the pregnant mother the same

66. *Id.* at 638.
67. *Id.*
68. *Id.* at 641.
69. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

"right to privacy" discovered in *Griswold*. Departing even further from the constitutional text, the Court finds that the right to privacy is not only implied by the Constitution but that it can be used to overturn longstanding prohibitions against abortion:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[70]

Declaring the right to an abortion to be fundamental, the Court easily dismissed any state justifications of abortion laws. These laws are somehow said to be suspect because "a woman enjoyed a substantially broader right to terminate a pregnancy" in the late 1790's "than she does in most States today."[71] Finally, the American Medical Association, and the American Bar Association had taken positions sanctioning abortions.[72]

Justice Blackmun cites three reasons underlying the 19th century abortion laws:[73] discouragement of illicit sexual conduct, concern with abortion as a medical procedure, and the state's interest in "prenatal life." The first reason was never taken seriously, says the Court, and advances in medical science have undermined the validity of the second reason; as to the third reason, the Court suggests that the laws were motivated by a desire to protect the life and health of the mother and did not explicitly endorse the theory that life begins at conception.

The right to abortion, however, is not absolute and can be limited in the interest of protecting the mother's health, maintaining medical standards, and preserving prenatal life. Thus, the question is one to be decided by balancing the right to privacy and the "compelling interests" asserted by the state. Although recognizing that the interests in health authorize increasing state interference with the woman's decision as the pregnancy progresses, the interest in preserving prenatal life is undercut by the Court's announcement that "per-

70. Roe v. Wade, 410 U.S. 113, 153 (1973). The Court explained how a woman's right to privacy is infringed by pointing to the medical and psychological harm to the pregnant woman and the problems associated with the unwanted child that could result from a denial of a choice to abort. *Id.*

71. *Id.* at 140.

72. *Id.* at 141-47.

73. *Id.* at 147-51.

son" in the fourteenth amendment "does not include the unborn."[74] Nevertheless, Justice Blackmun attributes to the unborn a potential for human life, and explains that the state may safeguard this entity along with the health of the mother.[75] In other words, the "pregnant woman cannot be isolated in her privacy,"[76] and given the considerations of maternal health "any right of privacy she possesses must be measured accordingly."[77]

In closing, Justice Blackmun draws a distinction between the "health of the mother" factor and the "potentiality of human life" factor. "Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.' "[78] Since "mortality in abortion may be less than mortality in normal childbirth,"[79] the state may regulate abortion with a view toward protecting the health of the mother only after the first three months of pregnancy. Prior to this time the decision to abort is strictly between the woman and her physician. The state's interest in the potentiality of human life cannot be asserted prior to viability, which is defined as that point when "the fetus. . .has the capability of meaningful life outside the mother's womb."[80]

The Court in *Roe* further elaborates and refines the nebulous right of privacy, sorting out conflicting views to arrive at what can only be described as a legislative enactment. Not only does the Court continue to label rights as fundamental and interests as compelling, but enlarges upon its new-found role by specifying at which point a state interest "grows" to be compelling. Although *Roe v. Wade* and *Doe v. Bolton* have been applauded by many as a landmark in our

74. *Id.* at 157. This view is understandably essential to the majority's ruling, but nowhere does the Court explain how a person is to become a person if life is snuffed out before birth. Curiously, after enumerating all the instances in the Constitution in which the word "person" is used, Blackmun concludes: "But in *nearly* all these instances, the use of the word is such that it has application only postnatally." *Id.* (Emphasis supplied.)

75. *Id.* at 162-63.

76. *Id.* at 159.

77. *Id.* But to act to protect the potential person the state must know something of when life begins and on this point Justice Blackmun reports "wide divergence of thinking." *Id.* at 160. A review of this divergence of thought leads him to the following: "In short, the unborn have never been recognized in the law as persons in the whole sense." *Id.* at 162.

78. *Id.* at 162-63.

79. *Id.* at 163.

80. *Id.* The Court points out, however, that the state is not constitutionally compelled to protect either the mother's health after the first trimester or fetal life after viability. *Id.*

evolving law of civil liberties,[81] they do not seem to depart from the Court's pragmatic stance, nor do they affect any basic changes in the prevailing social and economic order.[82]

Rodriguez

The Court which creates rights by judicial fiat has little compunction in limiting the scope of these rights. This principle has been the lesson of cases holding that certain newly-minted rights of criminal defendants have only prospective application (and often with a dizzying variety of degrees of prospectivity).[83] Can the Court, however, de-classify a right from the "fundamental" to the "non-fundamental" class? Yes, indeed, responded the Court in *San Antonio School District v. Rodriguez*,[84] as it found that the right to an equal education was, after all, not fundamental.[85] The problem in *Rodriguez* was this: a child attending one Texas public school was the beneficiary of $356 spent per year on his education; another child residing in another district in Texas received a public education costing $594.[86] The difference in expenditures was a function of the state's legal provision tying the amount spent in each district to the money raised by local ad valorem property taxation. The wealthy district could raise a sizeable sum by taxing at a relatively low rate; the poor district could not match this sum even with higher tax rates, simply because it did not have the wealth to tax. The Court held that the differential treatment at the hands of the state was no violation of the equal protection clause, simply ruling that the right to an equal education was not a fundamental right.

Education is not a right constitutionally provided for, argued

81. *See* Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 BOSTON U. L. REV. 765 (1973); Rubin, *The Abortion Cases: A Study in Law and Social Change*, 5 N. C. CENT. L. J. 215 (1974). *Compare* Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

82. See the discussion of the abortion movement by the American Medical Association and others, *supra* note 72, and accompanying text.

83. See the wide-ranging discussion among the Justices in *Williams v. United States*, 401 U.S. 646 (1971).

84. 411 U.S. 1 (1973).

85. The Court had seemed to place education in the "fundamental right" category in *Brown v. Board of Education*, 347 U.S. 483 (1954); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Green v. County School Bd.*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). However, the school desegregation cases were distinguished because they were decided in "the context of racial discrimination." 411 U.S. at 29.

86. 411 U.S. at 12-13.

Justice Powell for the Court, and neither is there "any basis for saying it is implicitly so protected."[87] Wrote Powell: "As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation."[88] Rodriguez' argument that education was essential to give meaning to his first and fifteenth amendment rights was handled by saying that "the most *effective* speech or the most *informed* electoral choice" though "desirable" were "not values to be implemented by judicial intrusion into otherwise legitimate state activities."[89] One would have thought that the right to an equal education was of equal constitutional stature as the right to receive welfare payments without fulfilling residency requirements. Indeed, Justice Brennan had said in *Shapiro*:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools.[90]

Even if education was not a fundamental right, was not wealth a "suspect" classification requiring the Court to apply the strict scrutiny test? Justice Powell explained that the case was an inappropriate occasion to apply the strict scrutiny test since each of the previous cases in which the test had been applied "involved legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty."[91] The Texas system was different, he claimed, because the thrust of the state's plan was "affirmative and reformatory."[92] Previous cases treating wealth as a suspect classification, declared Powell, involved persons who were "completely unable to pay for some denied benefit" and who "sustained an absolute deprivation" of the benefit involved.[93] Next, the Court declared that "there is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute

87. *Id.* at 35.
88. *Id.*
89. *Id.* at 36.
90. Shapiro v. Thompson, 394 U.S. 618, 633 (1969).
91. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 38 (1973).
92. *Id.* at 39.
93. *Id.* at 19.

impecunity—are concentrated in the poorest districts."[94] The opinion does not deny that there is a correlation between "district property wealth and expenditures,"[95] but it prefaces this concession with an elaborate statement that most districts spending next to the most money on education were inhabited by families with the next to lowest median family incomes, while districts with the lowest expenditures were inhabited by families with the highest median family incomes. The litigation, however, focused on property wealth as a basis for classification and not income wealth; education programs were financed through property taxation and not income taxation; the Court's reliance on income data is thus less than convincing.

In disposing of the suspect classification question, the Court added that the "suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts."[96] According to the standards applied in this case, involving the definition of "classes" and the Court's lack of "expertise" in implementing judgments, the Court has laid an adequate foundation for a retreat from the Warren Court's rulings on racial discrimination in schools and reapportionment of electoral districts.

Having found education to be something less than a fundamental right and wealth generally not to be a suspect criterion, the Court took steps to make sure it was recognized as a genuinely conservative body. The Court exalted those cases limiting the theory of *Shapiro* and stressed the problems involved in judicial resolution of significant issues. It was convenient for the majority opinion to repeat Justice Stewart's view in *Shapiro* (in a concurring opinion) that the Court simply recognizes established rights and does not create new ones.[97] Much of the Powell opinion is devoted to underlining judicial incompetence to deal with the outside world and to extolling the virtues of local government. Instead of viewing the litigation as an attempt to vindicate a constitutionally protected right, the Court seemed to treat it as a mischievous plot to inject the Justices in the day to day operation of the nation's schools.

> A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the tradi-

94. *Id.* at 23.
95. *Id.* at 27.
96. *Id.* at 28.
97. *Id.* at 33, 34.

> tional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes. . . . We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. . . . [A]ppellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures.[98]

A fascinating paragraph in the decision illuminates the Court's true motives in *Rodriguez*:

> Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.[99]

There was no way, in other words, of telling where Rodriguez' demands might lead us. To make good Rodriguez' claim to an equal education would have required the Court to disapprove the marked economic disparities underlying American society. It was not that Rodriguez' claim was less than fundamental, but that it was *too* fundamental. In short, the Court had run up against the historic reality of the sanctity of property interests. It is one thing to enjoin a state official who denies welfare payments to persons who have not survived a year within the state, but quite another to enjoin the perpetuation of the gross inequities prevailing from school district to school district.

CONCLUSION

If *Shapiro*, *Roe-Doe*, and *Rodriguez* were all wrongly decided, how do we explain the seeming inconsistency? *Shapiro* and *Roe-Doe* struck down state legislation while *Rodriguez* upheld state policy. But the Court's handling of these issues has an intelligent, understandable pattern: in *Shapiro* it was anxious to articulate a juridical standard broader than the then-prevalent "reasonable basis" test; striking down the welfare residence requirements was important doctrinally, but it hardly trenched upon the fundamentals of the Ameri-

98. *Id.* at 40.
99. *Id.* at 37.

can status quo. *Roe-Doe* finds the Court cavalierly applying the *Shapiro* approach to strike down state abortion laws—a move which appears quite radical but which, after all, had been sanctioned by the American Bar Association and the American Medical Association. In other words, the Court treated the anti-abortion laws as legal deadwood which was ready to be expunged from the statute books. But to have struck down the system challenged in *Rodriguez* would have touched a raw nerve of our political economy, and the Court typically declined an opportunity to effect basic change.

The discretion of the Court in delineating our fundamental rights is alarming. One can only hope that since the Court engages in the pragmatic creation of rights it will do so in a way consistent with the community interest and the dignity of the individual.