

Essay Exam Question Grading Key
Prof. McDonald

Issue

I1 = Correct issue statement
I2 = Incomplete issue statement
I3 = Incorrect issue statement

Rule

R1 = Correct statement of governing legal principles
R2 = Incomplete statement of same
R3 = Incorrect statement of same

Analysis

A1 = Correct factual analysis
A2 = Incomplete factual analysis
A3 = Incorrect factual analysis

Conclusion

C1 = Correct conclusion
C2 = Incomplete conclusion
C3 = Incorrect conclusion

Other Notations

D = Did not follow directions or instructions provided on front of exam or as part of question.
G = Good point or analysis.
ORG = Need better IRAC organization and analysis (e.g., fully complete each issue before moving on to the next issue; do not “front load” rules—discuss them only where appropriate to each IRAC of a specific issue).
Y = "Yes!" (as in "righto!").

1)

1. Does the State of Surf's abortion law violate J's personal liberty substantive due process rights?

Under the due process clause of the 14th Amendment, no person shall be deprived of life, liberty or property without due process of law. The Supreme Court has read substance into this requirement and has required deprivations of life, liberty or property to be substantively fair under the appropriate test.

In *Roe*, the Court held that the right for a woman to choose whether or not to terminate a pregnancy was a fundamental right. In *Roe*, the Court demarcated a woman's right to choose at viability, and then set up a strict trimester framework. Under *Roe*, a state statute would be subject to strict scrutiny if it attempted to regulate a woman's right to choose in the first two trimesters. However, a state regulation would only be subject to rational basis review if it attempted to regulate a woman's right to choose in the third trimester, because at that point the government's interest in life and the fetus' interests came into enough competition with the mother's rights. However, third trimester regulations still had to have an exception for the life and the health of the mother. Then in *Casey*, the Court "upheld *Roe's* central holding" of the viability framework, but struck down the trimester framework. Thus, the current test, as the Court adopted in *Casey* is an undue burden test for pre-viability regulations (and a rational basis test for post-viability regulations, subject to life and health exceptions). Under the *Casey* undue burden test for pre-viability regulations, an undue burden exists, and therefore a state regulation is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability. Here, *Casey's* undue burden test is appropriate, because we are dealing with a state statute, and the facts state that Jan was seeking her abortion after it had gestated for four months, and it "would not be able to survive outside Jan's womb until it had gestated for 5 1/2 months. Therefore, we are dealing with a state regulation of pre-viability abortion.

Here, the facts state that the woman was (1) required to sign an informed consent document; (2) required to view a 10 minute 3D sonogram of the fetus in her womb at least 24 hours prior to signing the informed consent document; and (3) required to obtain her husband's consent. The informed consent document will not likely place an undue burden on J's right to choose because it only required information about the stages of fetal development and about the process of the abortion itself, as well as information about potential risks to the woman. These are legitimate types of information that a state can desire a woman to have access to in making her decision whether to abort a child. Furthermore, in *Casey*, the court sustained informed consent provisions, making it likely that any informed consent provisions that are not highly burdensome will be sustained. Here, these types of legitimate information do not seem to be "highly burdensome" on J's decision. The second requirement may be a bit more problematic. It requires J to view a 10 minute 3d sonogram of the fetus in her womb at least 24 hours before signing the informed consent. There was no similar provision in *Casey*, so this might be an issue of first impression before the Court. J could argue that this is unduly burdensome as it extends the amount of time that she must wait before having the procedure performed, but the *Casey* Court sustained a waiting period, and here, the period is fairly short--24 hours. The state's justification is that it wanted to make sure that the woman's consent is truly informed. This may be legitimate, because it is providing the woman with more information regarding the procedure, but J could also argue that this could be done in a less traumatic way, such as showing her a sonogram of a fetus at a similar developmental stage. Still, this is a part of the information, the waiting period is not unduly long, and the state is paying for it, so the Court will probably not hold that it places an "undue burden" on J's right to choose. The last part of the regulation is the most problematic, requiring spousal

consent to the abortion. In *Casey*, the Court struck down spousal consent requirements, noting the danger of spousal abuse problems, and noting a further concern that a husband should not have veto power over a woman's right to choose in the marital relationship.

The facts state that the abortion law would be divisible, and based on the facts and relevant law, it appears that the Supreme Court would handle the law as follows: (1) uphold the informed consent provision because it is not unduly burdensome; (2) probably uphold the 3d sonogram requirement because, while burdensome, it probably does not rise to the level of an "undue" burden; and (3) strike down the spousal notification requirement, as it did in *Casey*, because of fears of domestic abuse and the woman's right to choose being stronger than the man's choice.

Thus, the court would probably grant J's injunction with regard to the spousal notification requirement, but deny it in other regards

2. Does BM's requirement that the woman sign a document agreeing to hold a brief ceremony at the clinic violate J's personal liberty substantive due process rights?

Rule - see above

The first main issue here is whether BM can be called a state actor, because under the state actor doctrine, only states or those deemed to be state actors can be held to have violated the Fourteenth Amendment. There are three ways that courts will hold otherwise private actors to be state actors for purposes of finding constitutional violations. First is the public function doctrine, under which a private entity is determined to be a state actor if it provides function that is traditionally and exclusively provided by the government. Here, BM is providing reproductive health services, a function that the government has not traditionally or exclusively performed. Second is the entanglement doctrine, under which a private action is deemed to be a state action if the state affirmatively authorizes, encourages, or facilitates the action. Here, there is nothing to show that the state of Surf authorized, encouraged or facilitated BM's specific decision to require the ceremony as a part of the abortion process. Therefore, we look at the third category, which is where a private entity looks like a government body. In this category, if BM's structure is very similar to the Tennessee state high school athletic association in *Brentwood Academy*. The Court deemed the high school athletic association to be a state actor because 84% of its members were public high schools and the organization received much public support. Here, BM's charter recites that it is a private corporation, but its board of directors and executive officers shall be appointed by the governor for an initial two-year term, and reappointed by the governor every two years thereafter. Thus, the board of directors is 100% appointed by the government (governor), which is even more than the 84% in *Brentwood Academy*. Furthermore, BM receives 80% of its annual funding from appropriations by the Surf Legislature, much like the state high school athletic association in *Brentwood Academy*. Thus, considering that BM's board is entirely chosen by the state (governor) and it receives the vast majority of its funding from the state (80%), it is likely to be deemed a state actor under this "other" category.

Since BM is a state actor, it must comply with the personal liberty substantive due process clause, and its implications on abortion procedures detailed above. Namely, under *Casey*, BM can place no undue burden on J's right to choose. BM implemented a policy requiring women to sign a document agreeing to the holding of a brief ceremony at the clinic, which she could choose to attend or not, before the fetal remains were shipped off for incineration. J would likely argue that this does operate as an undue burden because she wants the procedure over and done with as quickly as possible. However the state will argue that its provision that she can "choose to attend or not" makes it so that there is no burden at all imposed by the requirement. Furthermore, this is just one clinic's way of

handling it. The state could argue that it imposes no undue burden on her decision, it only affects her decision to have the procedure at this particular facility

Most likely, the Court would hold that the agreement to a brief ceremony is not an undue burden on J's right to choose

A²₃ (Thus, the court would probably deny J's request for an injunction against BM's policy.

3. Does BM's requirement that the woman would sign a document agreeing to hold a brief ceremony at the clinic violate the Establishment Clause?

The First Amendment states that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The state actor doctrine is implicated here as well, and the issue is fully discussed in part 2. Because BM is a state actor, it cannot violate the establishment clause. The justices have different views as to whether the establishment clause requires strict government neutrality on the topic of religion or whether it is just that the government cannot compel funding to or attendance at a particular church. Still, the test (selectively) applied favors the former interpretation. Under the Three-Part *Lemon* Test, (1) a statute must have a secular legislative purpose; (2) the statute's principal or primary effect must be one that neither advances nor inhibits religion, and (3) the statute must not foster an excessive entanglement with religion. The modern court essentially ignores the third prong of the test, and it may be more easily applied by stating it as follows: A law can have no governmental purpose or primary effect to advance or inhibit (1) one religious sect vs another or (2) religion vs. nonreligion. Encompassed in the effect portion are two other tests: (1) the endorsement test, which asks would a reasonable observer who is familiar with the background, history, and nature of the parties or rules that the government has adopted view the particular practice as endorsing religion and therefore advancing religion? and (2) the coercion test, which asks whether the law at issue has the effect of coercing participation in a particular religious practice? Here, the governmental purpose is evidenced by the BM written policy, which justifies "it on the grounds of according due respect and dignity for 'potential life,' and providing an appropriate solemnity to the act of disposing of the remains." As in the *Santa Fe Independent Schools* case, the "solemnizing act" and the "message of respect for dignity of the fetal remains" is going to be religious in nature when you look at the nature of the ceremony. It is presided over by a non-denominational chaplain, and the policy was passed by the board of directors, 3/4 of whom consider themselves to be evangelical Christians. Therefore, the policy likely has the purpose of advancing religion. Under the effect portion, it is likely that the requirement would not rise to the level required by the endorsement test, because it is too far removed from the government actors. However, as the test takes into account the "background, history, and nature of the parties," the reasonable observer would know of BM's ties to the state. So, it may have the effect under the endorsement test. Under the coercion test, BM would argue that its provision that the woman can choose whether or not to attend the ceremony makes it such that no one would be coerced to participate. However, in all likelihood, a woman who has just had a fetus removed from her body and killed will feel compelled to go to a ceremony that involves that fetus.

In short, the regulation satisfies the purpose test by looking at the composition of the board and the "solemnizing" the "non-denominational chaplain" and the "message of respect and dignity" the regulation has the purpose of advancing religion over nonreligion.

Therefore BM's requirement does violate the establishment clause

4. Does the state's prohibition against embryonic screening prior to 4 months of gestation

violate J's personal liberty substantive due process rights?

Ruel for personal liberty SDP - see above

The Court considered personal liberty substantive due process in the *Griswold* case where it struck down under strict scrutiny a state law that prohibited giving contraceptive advice to married couples. The Court referenced footnote 4 of *Carolene Products* and found that the right of privacy in the marital relationship was a fundamental right, which was implied by the "penumbras formed from emanations" from the other rights in the bill of rights. The main concurrence found this fundamental right in the Ninth Amendment. Regardless of where it comes from, it was here to stay, and the Court subsequently expanded *Griswold's* protection to be the right to make private decisions without interference from the government. Here, the government restricted the right to engage in embryonic screening to "prevent the use of the procedure for reasons that were considered to be unethical, such as enabling prospective parents to pick and choose the children they would have based on their sex or other desired physical characteristics unrelated to the health of the child. This is the state attempting to get involved in a private ethical decision of the type restricted by *Griswold*, thus the Court will apply strict scrutiny. Under a strict scrutiny analysis, the Court will as (1) has the government asserted a compelling government interest; and (2) is the legislation narrowly tailored to that compelling government interest. Here, the state's interest is merely in ethics, a matter which is more proper to be considered on a personal level, especially with the strong restrictions that the Court has placed on abortion legislation. However, assuming that the interest is compelling, the legislation is certainly both overinclusive and underinclusive. It is overbroad because it would affect persons who would use the embryonic screening to make decisions based on the health of the child. It is underbroad because persons who wish to make decisions based on sex or other desired physical characteristics could still make those decisions (and have an abortion) after four months since, as the facts state here, at least in J's case, her fetus would not have been viable until 5 1/2 months.

A2
A4
G
?

The prohibition against embryonic screening violates the personal liberty substantive due process rights

5. Did the loss of the fertilized egg comprise a procedural due process violation?

Procedural due process - 14 A

state actor doctrine relevant here, too.

- (1) cognizable property interest - reasonable expectation of continued receipt of a government benefit - policy said they would hold it for 2 years, so probably
- 3 (2) cognizable deprivation - negligence is insufficient *daniels*. So no. A2
- 2 (3) due process - notice and meaningful opportunity to be heard, or 3-step *Matthews* test,
- 2 but no cognizable deprivation so irrelevant.

Not a pdp violation because no cognizable deprivation. OS