

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)

The constitution provides guarantees against Government actions, and generally does not apply to individuals. Here *IZ* Biomed (B) is a private entity, so if the const protections are to apply to it, an exception must apply. Is B a state actor? One way for a private entity to be a state actor is if the government manages and establishes the entity. Here the state chartered *G* the creation of B (that alone is not enough to be a state actor), and also appoints all the officers, and directors, and funds 80% of the cost of B. This is similar to Amtrack, which is chartered and funded, and managed, by the gov. Amtrack is a 'state actor', so B is a state actor. the const guarantees apply against B. *C1/A2*

The 14th and 5th amendments provide guarantees that life, liberty, and property will not be deprived w/o Due Process of law. The sup ct has read into that provision that certain substantive rights are to be protected, so that gov cannot infringe on the rights. The guarantees protect against infringements on 'fundamental rights'. One such fundamental right read into the Sub-DP clause is the right of a woman to have an abortion. In Roe, the Ct held that the woman has a liberty interest in getting an abortion, and the state has a *RV* compelling interest in protecting the potential life of the unborn child, and in protecting the life of the mother. The woman's interest is higher than the state's interest, up until the point where the baby is 'viable', or here 5.5 months. At viability, the state can restrict abortions altogether; previability, the state can regulate as long as it does not impose 'undue burden.' Casey. Here, Jane is seeking an abortion after only 4 months, which is previability, so under Casey and Roe she must be able to get an abortion. A regulation that would restrict her from getting an abortion is an 'undue burden.'

Are the restrictions against Jane getting an abortion 'undue burdens'? *3*

1, Is the consent form an undue burden? There was a consent form in Casey that was upheld as not undue, b/c the woman

can simply sign the form and receive the abortion -- it is not very difficult for her to abort, it does not make her unable to get an abortion. Not undue.

2, 24 hour wait: Casey upheld this too, b/c a one day period of waiting is not going to restrict Jane's ability to get an abortion, all she has to do is drive back to the clinic the next day. She has 1.5 months before the baby is viable, so there is no risk of having to wait until the state can fully restrict. Not undue.

A2 3, watching a sonogram: This is not undue, b/c all she has to do is sit and watch for 10 minutes. The video-watching does not unduly burden her ability to get an abortion.

4, Husband consent: this, under Casey, is undue, b/c Jim can refuse to sign, and if Jim refuses to sign then Jane can't get an abortion. She has the right to get an abortion pre-viability, and an impediment that would completely stop her from being able to get one is certainly an undue burden. This is an unconstitutional requirement and should be struck down.

5, holding a brief ceremony: this does not infringe on J's right to an abortion, b/c she does not have to attend, and can easily still get an abortion, obviously, b/c the ceremony occurs only after the abortion. The only burden on her is that she has to sign the paper, which is not an undue burden.

A3 (Regulations that are Not undue burdens are subject to rational basis review; regs that are undue burdens are subject to strict scrutiny.

the ct will look at the ends that the state is trying to protect, and the means by which the state is protecting.

the ends for the regs are: for the woman to know the risks, emotional and physical, of the procedure. These are important state interests.

the means are listed above. Under rational basis they pass, b/c they all do something to advance the ends; but the husband-consent fails b/c it is subject to strict scrutiny, which asks whether there is any less restrictive way to achieve the ends. Here there are less restrictive ways to achieve the end of woman's health and safety--the other means are the other requirements.

-2

Also, this ceremony-requirement can also be attacked on Freedom of Religion grounds. The 10th am prevents the state (recall, B is the state, see above), from 'establishing' religion. The test for what is an establishment of religion was laid out in Lemon, and has been applied by the court with some irregularity, but the test looks for the government's purpose for a government action, and the effect of the action.

Purpose: is the purpose of the gov action is to promote religion (the purpose must be secular), then the act violates the establishment clause. here, the purpose is for 'a message of respect and dignity for the fetal remains', which does not on the surface look like a religious act. However, the Ct will look at the surrounding circumstances, and note that the act is an act of prayer, which is a religious act, and it is done by a clergy person, which indicates that it is done for religious purposes, and the policy was implemented by Evangelical Christians, many of whom are anti-abortionists, so there is a likelihood that they are doing this b/c they believe that abortions are wrong and are trying to convince people that, for religious reasons, they should not get abortions. Because it appears from the circumstances that there was a religious purpose, the gov act fails the Lemon test prong 1.

prong 2: effect. there are 2 ways to test effect:

1, endorsement -- would an informed, reasonable observer familiar with the situation believe that the gov was trying to advance religion? here, b/c they were Xtians, and there was a chaplain, and a 'message' (which could appear to be a prayer--especially b/c it is a 'solemn' ceremony), a reasonable person would believe that the gov was advancing a religious event.

2, coercion -- is the gov coercing Jane into participating in a religious event? NO, b/c she merely has to allow her fetus to attend, she does not have to go.

The gov action should be struck down, and the ct should enjoin

the gov from doing the ceremony.

was law forbidding embryonic screening constitutional? this is a general conduct regulation, and does not appear to infringe on a woman's fundamental right to an abortion, so it could simply have to pass the rational basis test that is applied to laws that don't burden important, fundamental, rights.

ends: enable parents to pick and choose the kids they want, or the characteristics they want. This can be a gov interest b/c the gov may want diversity in children. there is a low bar for what passes RB, and the ct will invent reasons for why the gov passed the law.

means: the gov could reasonably have believed that the reg furthers the state interest.

However, Jane could argue that there is a fundamental right in being able to get embryonic screening. Is it fundamental? The ct will decide this by interpreting the Const. There is no enumerated right to screening, but the ct has read-into the Const various other rights. The ct does this b/c of the 'penumbra', which means that the ct looks at other rights and determined that overall they are meant to protect more than simply the ones listed in the bill of rights, and also b/c the 9th am explicitly states that other, unlisted, rights are also protected from gov regulation. in order to determine if embryonic screening is such a right, the ct uses 5 modes of interpretation:

1, textualism: the text of the const/amendments does not address reproductive rights.

2, structure of const: the const reserves lots of power in the states, and allowing states the rights to regulate things is important in the const; this is a state regulation, so the Ct may want to uphold it on federalism grounds....this is a weak argument.

3, Precedent: there is precedent that resembles the right at issue here: first, the ct has held in *Peirce v society of sisters* that parents have the right to make certain decisions about how to raise their kids; here the right is similar b/c this is the

right to choose what kinds of characteristics the kids have. Also, in Moore, there was the right of family association, which deals with decisions about where kids/families will live, which again indicates that the Ct likes to protect family decisions; Grizwald, too, is the right to 'privacy in decisions in marital relationship,' which indicates again that the Ct likes to protect family decisions. These indicate that a 'high' or even fundamental right might exist in embryonic screening. Similarly, the Roe line of cases protects a woman's autonomy in reproductive decisions. Here it is a similar reproductive decision--not whether Jane wants a kid, but what kind of kid does she want?

4, Originalism: some justices look only at the original intent of the founders; since this screening did not exist back then, there is no way that this was in the contemplation of the states when they ratified the constitution. However, for Kennedy, who has lately been a swing vote, this is only the starting point, and the Ct will also look at:

5, Emerging Social Awareness: is society becoming aware that this is an important right that the gov should not be able to regulate? Here, there seems to be little social awareness; I have never even heard of this test. However, the facts indicate that it was a popular test.

I believe that b/c of precedent, the Ct will find it is a high right, and apply strict scrutiny to laws infringing on the right.

13 Ends: unethical to decide what characteristics the kid has. (this is arguably not a legit end, b/c in Lawrence the Ct held that moral, or ethical, ends cannot on their own be a legit end.)

means: is this the least restrictive way to achieve the end?

Here, no. the gov could make people abort...that is unlikely.

A2 Few tests pass SS..

Did B violate J's procedural DP rights when it lost her other embryo?

1, did Jane have a property or liberty interest in the embryo?

9 Yes, the contract w/ B stated that she had the rights to the embryo for 2 years, and could keep it after the 2 years upon

her request. This was b4 the 2yrs was up, and b/c she had a contract right to the embryo, she had a reasonable expectation that B would keep it. Moreover, it was very important to her (another factor in determining if property interest).

2, Was there a deprivation? Here Stan pulled the plug, and negligently destroyed the embryo. In order for there to be a deprivation, the gov must act with Intent. Negligence is NOT enough to constitute a deprivation. thus no DP violation.

~~A2~~
A2

3, DP? was there DP of law? Here J could claim a full refund of the fees, which is a post-deprivation procedure. post-dep procedures can be enough, so no violation.

A2
C3

Issue: was the embryo a taking? II 3
property: state law