



# The Courts and Political Controversy

POLI 104I

# Where are we going?

- ▶ 6/27 - the relationship between law and politics.
- ▶ 6/29 - incorporation (OB2 – 4a)
- ▶ 7/4 - incitement (OB2 – 5a)
- ▶ 7/6 - obscenity (OB2 – 5b (first half))
- ▶ 7/11 - executive power (OB1 – 4a-d)
- ▶ 7/13 - election law (OB1 - 8c)
- ▶ 7/18 – threats & offensive speech (OB2 – 5b (second half))
- ▶ 7/20 - guns (OB2 365-387 + Bruen)
- ▶ **7/25 - privacy (OB2 – 11 + Dobbs)**
- ▶ 7/27 - review

# Reading for 7/27

- ▶ privacy (OB2 – 11)
- ▶ **privacy and personal autonomy**
  - ▶ Lawrence v. Texas
  - ▶ Cruzan by Cruzan v. Director, Missouri Department of Health
  - ▶ Washington v. Glucksberg
  - ▶ Vacco v. Quill

# Constitutional Amendments

- ▶ 1<sup>st</sup>: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
- ▶ 3<sup>rd</sup>: No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.
- ▶ 4<sup>th</sup>: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
- ▶ 5<sup>th</sup>: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;

# Constitutional Amendments

- ▶ 5<sup>th</sup>: [continued] ...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
- ▶ 9<sup>th</sup>: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
- ▶ 14<sup>th</sup>: [1868] Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

# Privacy (personal autonomy)

- ▶ Lawrence v. Texas (2003): decided 6-3; reversed.
- ▶ Background: “Responding to a reported weapons disturbance in a private residence, Houston police entered John Lawrence's apartment and saw him and another adult man, Tyron Garner, engaging in a private, consensual sexual act. Lawrence and Garner were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct. In affirming, the State Court of Appeals held that the statute was not unconstitutional under the Due Process Clause of the Fourteenth Amendment, with *Bowers v. Hardwick*, 478 U.S. 186 (1986), controlling.”

# Privacy (personal autonomy)

- ▶ Kelly v. Johnson (1976): “the Court upheld a regulation limiting the length of policemen’s hair.”
  - ▶ Not a “basic matter of procreation, marriage and family life.”
- ▶ Moore v. City of East Cleveland (1977): city ordinance limiting occupancy of a single dwelling to members of the same immediate family unconstitutional:
  - ▶ “When a city undertakes such intrusive regulation of the family, the usual judicial deference is inappropriate.”
- ▶ Whalen v. Roe (1977): registration requirements for “purchase of certain dangerous drugs” upheld.
- ▶ Bowers v. Hardwick (1986): decided 5-4; upheld a Georgia law “making heterosexual and homosexual sodomy a crime.”

# Privacy (personal autonomy)

- ▶ Lawrence v. Texas (2003): decided 6-3; reversed.
- ▶ Question Presented: “Do the criminal convictions of John Lawrence and Tyron Garner under the Texas "Homosexual Conduct" law, which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples, violate the Fourteenth Amendment guarantee of equal protection of laws? Do their criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment? Should Bowers v. Hardwick, 478 U.S. 186 (1986), be overruled?”



# Privacy (personal autonomy)

- ▶ Lawrence v. Texas (2003): decided 6-3; reversed.
- ▶ Holding: “[T]he Court held that the Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause. After explaining what it deemed the doubtful and overstated premises of Bowers, the Court reasoned that the case turned on whether Lawrence and Garner were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause. “Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government,” wrote Justice Kennedy. “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual,” continued Justice Kennedy. Accordingly, the Court overruled Bowers.”

# Privacy (personal autonomy)

- ▶ *Lawrence v. Texas* (2003): decided 6-3; reversed.
- ▶ Majority (Kennedy): “The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.”
- ▶ “In *Griswold* the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom.”
- ▶ “After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt v. Baird*, 405 U. S. 438 (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons...[and found] that the law impaired the exercise of their personal rights...”

# Privacy (personal autonomy)

- ▶ Lawrence v. Texas (2003): decided 6-3; reversed.
- ▶ Majority (Kennedy): “Both *Eisenstadt* and *Carey*, as well as the holding and rationale in *Roe*, confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick*.”
- ▶ “To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act.”
- ▶ “Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”

# Privacy (personal autonomy)

- ▶ *Lawrence v. Texas* (2003): decided 6-3; reversed.
- ▶ Majority (Kennedy): “[T]he historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.”
- ▶ “[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”
- ▶ “In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.”

# Privacy (personal autonomy)

- ▶ Lawrence v. Texas (2003): decided 6-3; reversed.
- ▶ Majority (Kennedy): “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.”
- ▶ “The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”
- ▶ “The rationale of *Bowers* does not withstand careful analysis...*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”

# Privacy (personal autonomy)

- ▶ Lawrence v. Texas (2003): decided 6-3; reversed.
- ▶ Dissent (Scalia): ““Liberty finds no refuge in a jurisprudence of doubt.” *Planned Parenthood of Southeastern Pa. v. Casey*. That was the Court's sententious response, barely more than a decade ago, to those seeking to overrule *Roe v. Wade*. The Court's response today, to those who have engaged in a 17-year crusade to overrule *Bowers v. Hardwick*, is very different. The need for stability and certainty presents no barrier.”
- ▶ “There, when *stare decisis* meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to *reaffirm* it...Today, however, the widespread opposition to *Bowers*, a decision resolving an issue as “intensely divisive” as the issue in *Roe*, is offered as a reason in favor of *overruling* it. See *ante*, at 15-16. Gone, too, is any “enquiry” (of the sort conducted in *Casey*) into whether the decision sought to be overruled has “proven ‘unworkable,’ ”

# Privacy (personal autonomy)

- ▶ Lawrence v. Texas (2003): decided 6-3; reversed.
- ▶ Dissent (Scalia): “Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an "intensely divisive" decision) *if*: (1) its foundations have been "eroded" by subsequent decisions, *ante*, at 15; (2) it has been subject to "substantial and continuing" criticism, *ibid.*; and (3) it has not induced "individual or societal reliance" that counsels against overturning, *ante*, at 16. The problem is that *Roe* itself--which today's majority surely has no disposition to overrule--satisfies these conditions to at least the same degree as *Bowers*.”
- ▶ “To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey*'s extraordinary deference to precedent for the result-oriented expedient that it is.”

# Privacy (personal autonomy)

- ▶ Lawrence v. Texas (2003): decided 6-3; reversed.
- ▶ Dissent (Scalia): “persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts--or, for that matter, display *any* moral disapprobation of them--than I would *forbid* it to do so.”
- ▶ “What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new “constitutional right” by a Court that is impatient of democratic change. It is indeed true that “later generations can see that laws once thought necessary and proper in fact serve only to oppress,” *ante*, at 18; and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.”



# Privacy (personal autonomy)

- ▶ Cruzan by Cruzan v. Director, Missouri Department of Health (1990): decided 5-4; affirmed.
- ▶ Background: “In 1983, Nancy Beth Cruzan was involved in an automobile accident which left her in a "persistent vegetative state." She was sustained for several weeks by artificial feedings through an implanted gastronomy tube. When Cruzan's parents attempted to terminate the life-support system, state hospital officials refused to do so without court approval. The Missouri Supreme Court ruled in favor of the state's policy over Cruzan's right to refuse treatment.”
- ▶ Question Presented: “[Does] the Due Process Clause of the Fourteenth Amendment permit Cruzan's parents to refuse life-sustaining treatment on their daughter's behalf?”

# Privacy (personal autonomy)

- ▶ Cruzan by Cruzan v. Director, Missouri Department of Health (1990): decided 5-4; affirmed.
- ▶ Holding: “...while individuals enjoy the right to refuse medical treatment under the Due Process Clause, incompetent persons [are] not able to exercise such rights. Absent "clear and convincing" evidence that Cruzan desired treatment to be withdrawn, the Court found the State of Missouri's actions designed to preserve human life to be constitutional. Because there was no guarantee family members would always act in the best interests of incompetent patients, and because erroneous decisions to withdraw treatment were irreversible, the Court upheld the state's heightened evidentiary requirements.”

# Privacy (personal autonomy)

- ▶ Cruzan by Cruzan v. Director, Missouri Department of Health (1990): decided 5-4; affirmed.
- ▶ Majority (Rehnquist): “[F]or purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”
- ▶ “Petitioners go on to assert that an incompetent person should possess the same right in this respect as is possessed by a competent person.”
- ▶ “The difficulty with petitioners' claim is that, in a sense, it begs the question: an incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such a "right" must be exercised for her, if at all, by some sort of surrogate.”

# Privacy (personal autonomy)

- ▶ Cruzan by Cruzan v. Director, Missouri Department of Health (1990): decided 5-4; affirmed.
- ▶ Majority (Rehnquist): “The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements.”
- ▶ “In our view, Missouri has permissibly sought to advance these interests through the adoption of a "clear and convincing" standard of proof to govern such proceedings.”
- ▶ “In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state.”

# Privacy (personal autonomy)

- ▶ Cruzan by Cruzan v. Director, Missouri Department of Health (1990): decided 5-4; affirmed.
- ▶ Dissent (Brennan): “Because I believe that Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State, and because I find that the improperly biased procedural obstacles imposed by the Missouri Supreme Court impermissibly burden that right, I respectfully dissent.”
- ▶ “...if a competent person has a liberty interest to be free of unwanted medical treatment...it must be fundamental.”

# Privacy (personal autonomy)

- ▶ Cruzan by Cruzan v. Director, Missouri Department of Health (1990): decided 5-4; affirmed.
- ▶ Concurrence (Scalia): “The text of the Due Process Clause does not protect individuals against deprivations of liberty simpliciter. It protects them against deprivations of liberty “without due process of law.””
- ▶ “...no “substantive due process” claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against State interference.”
- ▶ “This Court need not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so, it will destroy itself.”

# Privacy (personal autonomy)

- ▶ Washington v. Glucksberg (1997): decided 9-0; reversed.
- ▶ Background: “Dr. Harold Glucksberg -- along with four other physicians, three terminally ill patients who have since died, and a nonprofit organization that counsels individuals contemplating physician assisted-suicide -- brought this suit challenging the state of Washington's ban on physician assisted-suicide. The State of Washington has historically criminalized the promotion of suicide attempts by those who "knowingly cause or aid another person to attempt suicide." Glucksberg alleged that Washington's ban was unconstitutional. Following a District Court ruling favoring Glucksberg and his fellow petitioners, the Ninth Circuit affirmed and the Supreme Court granted Washington certiorari.”
- ▶ Question Presented: “[Does] Washington's ban on physician assisted-suicide violate the Fourteenth Amendment's Due Process Clause by denying competent terminally ill adults the liberty to choose death over life?”

# Privacy (personal autonomy)

- ▶ Washington v. Glucksberg (1997): decided 9-0; reversed.
- ▶ Holding: “Analyzing the guarantees of the Due Process Clause, the Court focused on two primary aspects: the protection of our nation's objective fundamental, historically rooted, rights and liberties; and the cautious definition of what constitutes a due process liberty interest. The Court held that the right to assisted suicide is not a fundamental liberty interest protected by the Due Process Clause since its practice has been, and continues to be, offensive to our national traditions and practices. Moreover, employing a rationality test, the Court held that Washington's ban was rationally related to the state's legitimate interest in protecting medical ethics, shielding disabled and terminally ill people from prejudice which might encourage them to end their lives, and, above all, the preservation of human life.”



# Privacy (personal autonomy)

- ▶ *Vacco v. Quill* (1997): decided 9-0; reversed.
- ▶ Background: “Dr. Timothy E. Quill, along with other physicians and three seriously ill patients who have since died, challenged the constitutionality of the New York State's ban on physician-assisted suicide. New York's ban, while permitting patients to refuse lifesaving treatment on their own, has historically made it a crime for doctors to help patients commit or attempt suicide, even if patients are terminally ill or in great pain. Following a District Court ruling favoring the State of New York, the Second Circuit reversed and the Supreme Court granted New York certiorari.”
- ▶ “[Does] New York's ban on physician-assisted suicide violate the Fourteenth Amendment's Equal Protection Clause by allowing competent terminally ill adults to withdraw their own lifesaving treatment, but denying the same right to patients who could not withdraw their own treatment and could only hope that a physician would do so for them?”

# Privacy (personal autonomy)

- ▶ *Vacco v. Quill* (1997): decided 9-0; reversed.
- ▶ Holding: “Employing a [rational basis] test to examine the guarantees of the Equal Protection Clause, the Court held that New York's ban was rationally related to the state's legitimate interest in protecting medical ethics, preventing euthanasia, shielding the disabled and terminally ill from prejudice which might encourage them to end their lives, and, above all, the preservation of human life. Moreover, while acknowledging the difficulty of its task, the Court distinguished between the refusal of lifesaving treatment and assisted suicide, by noting that the latter involves the criminal elements of causation and intent. No matter how noble a physician's motives may be, he may not deliberately cause, hasten, or aid a patient's death.”