Possible Golden Opportunities for Anti-Proponents of Same-Sex Marriage and of Roe v. Wade

Recently, a federal trial court judge ruled that same-sex marriage qualifies as a "fundamental right" under the U.S. Constitution's 14th Amendment's due process clause (Herbert v. Kitchen, Judge Robert J. Shelly, 12/20/13). If the U.S. Supreme Court agrees to hear this case, then anti-same-sex marriage proponents and anti-Roe v. Wade proponents each have, respectively, a golden opportunity to put to rest the contention that same-sex marriage is constitutionally guaranteed and to take these two (2) huge bites out of Roe v. Wade: 1) Roe's explicit holding that there is an "implicit" general constitutional right to privacy, and 2), Roe's explicit holding that a physician-procured abortion of a pre-viable human fetus qualifies as a " fundamental right," constitutionally speaking.

Roe v. Wade (January 23, 1973, 410 U.S. 113), with the exceptions of the Court's gun rights cases of McDonald v Chicago (2010) and D. C. v Heller (2008) – both of which employed at least implicitly the traditional or Washington v. Glucksberg (1997) fundamental rights criterion- which is discussed infra), is the Court's "most recent" case recognizing a new "fundamental right". But there is in that Roe recognition this extremely serious constitutional discrepancy: It is extremely unclear if the procured abortion of a nonviable human fetus is a "fundamental right" because it is "implicit" in the "implicit" general right to privacy (see, e.g., San Antonio Independent School District v. Rodriguez (March 21, 1973, 411 U.S. 1 at 17 & 33-34, and 101 (J. Marshall dissenting): the criterion of a "fundamental right" is whether the alleged right "is explicitly or implicitly guaranteed by the Constitution "), or rather is it deemed as a "fundamental right" because it qualifies so " independently " of the so-called right to privacy. (See, e.g., Paul v. Davis (1976), 424 U.S. 693, 713: "our 'right of privacy' cases … deal with substantive aspects of the Fourteenth Amendment. In Roe, the Court pointed out [very explicitly] that the … rights found in the guarantee of … privacy must be limited to those which are " fundamental " as described [traditionally] in Palko v. Connecticut." Here is the Roe holding to which Paul v. Davis is referring (Roe v. Wade, 410 U.S. at 152-53): "only personal rights that can be deemed "fundamental" … are included in the [constitutionally] guarantee[d] right of … privacy."

This means that according to Paul, the Court, in Roe, unwittingly held that the so-called implicit constitutional right to privacy can be "only" superfluous. This is because a fundamental constitutional right can generate or guarantee to itself whatever is necessary to its legitimate exercise. And since the so-called right to privacy is superfluous, constitutionally speaking, it is also necessarily nonexistent. And so says Peter Westen in his On Confusing Ideas: Reply, 91 Yale L.J. 1133, 1153 (1982): "Any concept in law … that is empty … should be banished as an explanatory norm." And that explains fully why the right of privacy has not been employed by the Court since Roe v Wade. Privacy is a protected right, but it is not a " protecting " right. For example, home privacy is constitutionally protected, but the protecting right here is , not a right of privacy, but rather the 4th and 14th Amendments.

The criteria of the existence of an implicit constitutional right are: (1) the right is necessary to effectuate one or more of the explicit guarantees; (2) the right flows from the structure or design of the Constitution, 3), the right is a corollary of one or more of the explicit or implicit guarantees; and (4), the right is fundamental to the stability of the Union. The Court in Faretta v. California (1975), 422 U.S. 806, 819 n. 15, stated: " The inference of [constitutional] rights is not, of course, a mechanical exercise….An implied right must arise independently from the design and history of the constitutional text. "

Common sense dictates that neither constitutional rights nor the design or structure of the constitutional text can generate an implied right that is without effect. It follows that since the constitutional right to privacy does not constitutionally establish, effectuate or better-secure one or more existing constitutional rights, then a right to privacy cannot be said to be "implicit" in the Constitution. (See, Philip A. Rafferty, Roe v. Wade: A Scandal Upon the Court, free online at 7 RJLB No. 7.1 (2006) at paragraphs 42-71.)

Although Roe states explicitly that its "holding … is consistent … with the lenity of the English Common law on [procured abortion rights "] (410 U.S. at 165), the exact opposite is the truth: What Roe held to be a fundamental right (while all the while purporting to be employing the traditional fundamental rights criterion discussed infra), because it was recognized as such at the English Common law (and therefore is established as one of the most sacred of all constitutionally guaranteed rights), was "murder" at the English common law. And the trial court judge ruled so in Queen v. West (1848), Cox's C.C. 500, 503; 2 Car & K 785, and 175 English Rpt. 329), in the course of instructing the jury on the common law crime of the murder of a non-viable human fetus or human being.

> The prisoner is charged with murder and the means stated are that the prisoner caused the premature delivery of the witness Henson, by using some instrument for the purpose of procuring abortion: and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. This, no doubt, is an unusual mode of committing murder …; but I am of the opinion (and I direct you in point of [the common] law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in such a state that it is less capable of living [meaning that the child "became nearer to death or father from life"], and afterwards dies in consequence of its exposure to the to the external world [i.e., because it was aborted alive in a non-viable state], the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder.

In the course of joining in the Court's majority and concurring opinions in Washington v. Glucksberg (1977), 521 U.S. 702, which holds that there is "no" fundamental constitutional right of a person to commit physician-assisted suicide, Justice O'Connor stated (521 U.S. at 736): "'our Nation's history, legal traditions, and practices do not support the existence of such a right.' [Therefore], I join the Court's [majority and concurring] opinions."

There is simply no question that, under the traditional Washington v. Glucksberg criterion of fundamental rights, neither procured abortion nor same-sex marriage can even begin to qualify as "fundamental rights", constitutionally speaking. There is not a person under God's good sun who can document so much as a single period and location in pre-1960 Anglo-American history or culture when and where procured abortion was practiced openly " because it was then and there thought to be legal ". (See generally, Philip A. Rafferty, Roe v. Wade: Unraveling the Fabric of America (2012/13), online at www.parafferty.com: Click the Unraveling link, and then scroll to pages 178-79 (n.30), pp, 51(beginning at last full paragraph) – 54, 199-210, and pp. 70-172.)

Same-sex marriage can no more be considered legitimately as an aspect of the constitutionally guaranteed "fundamental right" to marry than can incestuous, bigamous, polygamous or three or four-way bisexual marriages be considered so. In West Coast Hotel Co. v. Parrish (1936), 300 U. U. 379, 391, the U.S. Supreme Court observed: "Liberty in each of its phases has its history and connotation." Throughout its historical context, the fundamental right to marry has been understood to mean the right of an unmarried, competent adult to marry another, unmarried competent adult who is of the opposite sex, and who is not too closely related by blood. If "opposite gender " is no longer to be considered as "integral" to the marriage equation, then, there can be no good reason under God's good sun why number (which is still two) should be still considered so.

Given the foregoing understanding of the fundamental right to marry, and the criterion of fundamental rights adopted, more or less, by all nine judges in such cases as McDonald/ Heller

(fundamental right to possess a gun in the home) and Washington v. Glucksberg (no fundamental right to commit physician-assisted suicide), then the only way for the Court to conclude that same-sex marriage is now to be included within the constitutional understanding of the fundamental right to marry, would be for the Court to adopt a fundamental rights criterion that has been condemned by every justice who has ever set on the Court, including Justice Thurgood Marshall as expressed in his dissenting opinion in San Antonio Independent School District v. Rodriguez (411 U.S. 1, 102 (1973)): "I certainly do not accept the view that [fundamental rights determination] … need necessarily degenerate into an unprincipled, subjective 'picking-and-choosing' between various interests, or that it must involve this Court in creating [fundamental] constitutional rights." And see also, e.g., Faretta v. California (1975), 422 U.S. 806, 820 n. 16: " Such a result [ie., thrusting counsel upon an accused, against his considered wish] would sever the concept of [the right to counsel of one's choice] from its historic roots."

With the probable exception of Roe v. Wade, and with the certain exception of Rodriguez (which has never been followed wherein the majority adopted the nonsensical "whether the claimed right is explicitly or implicitly constitutionally guaranteed" as the constitutional criterion of fundamental rights), the only fundamental rights criterion ever employed by the Court is this: Whether our Nation's history, legal traditions, and cultural practices support the existence of the (claimed) fundamental right (Justice Sandra Day O'Connor, concurring in Glucksberg, 521 U.S. 702, 736).

Since an across-the-board prohibition of same-sex marriage excludes no persons or groups of persons period, then where is the discrimination? Just because gays are prohibited from marrying their own implies no discrimination directed at them. As observed by the Court in Wisconsin v. Yoder (1971), 406 U.S. 205, 215-216: " The very concept of "ordered liberty" precludes allowing every [or any] person to make his own standards on matters of conduct in which society as a whole has important interests." Certainly the people of a particular state (and all the people of the United States) have a legitimate interest in preventing their governments from becoming something that they are not. Tacking on same-sex marriage to the fundamental right to marry makes marriage into something that it is not. And our Declaration of Independence states very explicitly that whenever a state or government fails to preserve, secure, or facilitate the exercise of an "unalienable" or "fundamental" right, then it becomes the right of the people of that state or government to modify it, and even to abolish it.

Finally here, as observed by the Court in Murphy v. Ramsey, 114 U.S. 15, 45 (1885) (Matthews, J.): "[N]o legislation can be supposed more wholesome and necessary to the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." And then there is this statement by Justice Anthony Kennedy in oral argument in the Court's very recently decided DOMA case: "Throughout American history, states have [acted as the sole authority of] … who is married".