

Widener University Delaware Law School

From the SelectedWorks of Alan E Garfield

September 13, 2016

Implied vs. Fundamental Freedom: A Test

Alan E Garfield



SELECTEDWORKS™

Available at: https://works.bepress.com/alan_garfield/117/

Implied vs. fundamental freedom: A test



ALAN GARFIELD

This is the 11th year that Delaware Law School and The News Journal have teamed up to provide you with a collection of essays to celebrate Constitution Day, September 17, the national observance marking the date in 1787 when the Framers signed the Constitution in Philadelphia. This year's collection is a series of quizzes to test your knowledge of constitutional law. Of course, we realize that most of you are not judges or lawyers so don't feel badly if you get stumped by some or all of the questions. But we do hope you welcome this opportunity to expand your knowledge of constitutional law. After all, lawyers and judges did not "ordain and establish" the Constitution; "We the People" did. If our nation is to continue becoming an ever "more perfect Union," it needs citizens who are educated and engaged, and who are eager to participate in the democratic process with their voices and votes. That's why Justice Louis Brandeis said "the greatest menace to freedom is an inert people" and "public discussion is a political duty."

1. Some of our rights, such as freedom of speech and free exercise of religion, are expressly spelled out in the Constitution. Other rights, such as the right to marry or the right to an abortion, have been implied into the Constitution by the Supreme Court.

It might seem inappropriate for justices to find implied constitutional rights, but keep in mind that the Constitution has some open-ended provisions that invite expansive judicial interpretations. Take for instance the Ninth Amendment, which states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Following is a list of rights that the Supreme Court has implied into the Constitution. Because the justices

have found these rights to be fundamental, the government may not interfere with them without a compelling justification for doing so.

Mixed into the list is one right that the justices have NOT found to be fundamental. That means that the government can interfere with this right without having to show a compelling reason. Which of the following has NOT been found to be a fundamental right?

- The right of same-sex couples to marry
- The right to control the upbringing of one's children
- The right to refuse medical treatment
- The right of terminally ill patients to a physician's assistance with committing suicide

2. Let's consider the specialized rules for the fundamental right to have an abortion.

Which of the following is FALSE about a woman's right to terminate a pregnancy?

- A woman has a right to terminate a pregnancy at any time before the fetus would be viable outside of the mother's womb (usually around 24 weeks)
- Poor women have a right to make the government pay for their abortions
- The government can regulate abortion procedures to ensure that they are safely performed but cannot place substantial obstacles in a woman's path to obtaining an abortion
- The government can enact reasonable measures to ensure that a woman's decision to have an abortion is informed

3. The right to bear arms is explicitly mentioned in the Second Amendment, but there was a longstanding dispute over whether this right meant that an individual had a private right to possess a firearm or only a right to possess a firearm in connection with militia service. This debate arose because of the Second Amendment's ambiguous phrasing, which reads as follows:

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and

bear Arms, shall not be infringed."

It was only in 2008 that the Supreme Court, for the first time, held that the Second Amendment gives individuals a private right to bear arms. So far, the Court has said that the Second Amendment gives individuals which of the following rights?

- To possess a handgun at home
- To carry a concealed weapon
- To purchase a gun at a gun show
- All of the above

ANSWERS

1. The answer is D. The Supreme Court held that terminally-ill patients do not have a fundamental right to physician-assisted suicide, although a number of justices left open the possibility of finding this to be a fundamental right in the future. The Court has found that same-sex couples do have a right to marry, parents have a right to control the upbringing of their children and patients can refuse medical treatment. Keep in mind that the government can override even a fundamental right if it has a sufficiently compelling reason. So, even though people can ordinarily refuse medical treatment, the Court has said that they can be required to be vaccinated to stop the spread of communicable diseases.

2. The answer is B. Poor women do not have a right to make the government pay for their abortions.

3. The correct answer is A. Justice Antonin Scalia who authored the 2008 decision that found a private right to bear arms, expressly noted that "the right secured by the Second Amendment is not unlimited." Specifically, he said that his opinion should not cast doubt "on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

Alan Garfield is a professor at Delaware Law School