

Outline #3

- many family protections are result of fund. rights
 - need compelling state interest that is narrowly tailored in order to regulate
 - any other right has rational basis review

Defining the Family Unit

- strict scrutiny when rights are infringed upon
- family privacy = spatial, decision making (marital), individual, procreative, parental

Griswold

- established fundamental right to privacy
- negative, fundamental right not to procreate
- spatial -> state should not intrude into home
- decision making for body, self, and family
- procreative privacy = part of right of association
- marriage component (sacred in marriage context)
- rule - married couples have right to make procreative decisions, including right not to procreate

Eisenstadt

- EP grounds; married persons not only ones entitled to control repro destiny
- improper for state to motivate control of immoral sex w/ birth as punishment
- we have an individual right not to procreate

Gerber

- married, life sentence, no parole, and wanted to send sperm to wife
- right of individual instead of married couple
- no recognition of positive right to procreate
- rational basis test; related to legit penalogical concerns

Lawrence

- adults have right to engage in consensual, sex activity in privacy of own home, as established by Lawrence
- not necessarily a fundamental right, but privacy of home is sacred
- not a right to engage in homosexual sex, but a right to individual privacy
- "realm of personal liberty in which gov may not enter"
- beyond spatial privacy
- right to decision making

Right to Marry

- need license, procedural formalities; each state has own law
- there are accepted substantive restrictions: ability to pay child support, interracial marriage, incest, degree of relation

Obergefell

- 14th amend. requires states to issue same sex marriage licenses (4 justifications)
 - 1) right to personal choice regarding marriage is inherent in concept of individual autonomy
 - 2) right to marry fundamental; supports 2 person union unlike any other. right to not be alone. fundamental, two person unit.
 - 3) safeguards kids and fams; right to establish a home/raise kids is fundamental to rights of free people
 - 4) nation's traditions make clear marriage is keystone of social order; couple vows to support each other, society pledges to support couple -> symbolic recognition and material benefits to protect and nourish union; marriage as basis for expanding gov. rights, benefits, and responsibilities

- right to marry so fundamental it goes beyond procreative possibilities (i.e. incarceration)

Loving

- people can marry regardless of race of person (intermarriage)

Zablocki

- right to marry fundamental and should not be interfered with by states as punishment for not paying child support

- states can regulate that you can only have one legal spouse (but cant create subs interference without compelling state interest)

Turner

- life imprisonment may restrict right to marry
- otherwise, cant make inmate come up with compelling reason to get married

Zoning Restrictions

- can sometimes cut into heart of fam being able to live together
- usually rational basis review; stand if related to legitimate state interest (i.e. health, safety, public welfare)
- right of association families enjoy

Moreno

- food stamp case
- fams as related persons living under one household
- leg. history shows want to prevent hippies from taking advantage of program
- also fraud in food stamp process
- no legitimate interest to harm a politically unpopular group
- there are noble reasons for wanting people to escape poverty
- related vs. not is not a valid classification
- line drawing? right of association?

Belle Terre

- defined gam as one or more persons related by blood or marriage, living and cooking together OR two persons, no more than, living together and cooking together as single housekeeping unit who are unrelated
- rational basis review -> no fundamental right for 6 college kids to live together
- lacks association nobility of Moreno
- won't starve if don't live together...
- is legitimate state interest in preventing college kids from living together (loud, etc.)

Moore

- prevented family from living together, because not immediate family
- cousins and grandma together
- state argued rational basis to prevent overcrowding and keep middle fam values
- court used strict scrutiny because right of protecting extended fams living together (long tradition of this in US)

- attempt to functionally define family often based on traditional roles
- i.e. IIED -> duration, mutual dependence, common contributions, shared experience
 - same household? emotional reliance? daily relationship? manner related each other in attending to life's mundane requirements?
 - totality of circumstances
- wider net outside of who married traditionally or by blood, but still traditional

Establishing Parent-Child Relationship

- legal parent grants certain fundamental rights
- CARE CUSTODY CONTROL for fit parent -> parental autonomy!

Meyer & Society of Sisters

- parent's right to educate and raise kids as see fit
- state should not unduly interfere with obligations parents assume for selves in upbringing of children

Meyer

- teacher is convicted of teaching German to children who had not yet reached the appropriate age where they are allowed to learn German
 - court focuses on the liberty of the parents to decide what children learn
- children were deemed the property of their father at this time
 - this case is therefore saying that we shouldn't interfere with a father's right to educate his children

Society of Sisters

- statute says that you have to go to public school
- parochial school is challenging the statute because they are going to go out of business if this statute is enforced
- interferes with parents liberty to decide who they are going to school

- “the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations”
- emphasis on parental rights, parental privacy

Prince

- state has parents patriae function -> state can intervene with threat of harm, set up standards for compulsory education, public health reasons, etc.
- wanted kid to hand out flyers re: religious beliefs
- first amend. does not protect parent from state’s ability to require things like education, vaccinations, or child labor
- the parent can become a martyr himself but he can’t choose that for his children
- parent has right to CCC, meaning state can only interfere under strict scrutiny
- if kid in imminent danger, compelling enough to interfere

Yoder

- compulsory education through 16 seen as violation of Amish right to parental autonomy
- religion so intertwined with lifestyle (circumstances of Amish culture)
- cuts too deeply into parental autonomy
- school beyond 14 does not work for this community
- couldn’t follow religious values if kids had to go to high school
- when state passes law that infringes on parents right to CCC, need to examine if passes strict scrutiny review

Troxel

- presumption that fit parent acting in best interest of child
- any person can petition for custody/visitation for kid at any time if in best interest of kid
- broad visitation statute
- unconst for woman who wanted to restrict grandparent visitation
- parents have greater autonomy than grandparents

Establishing Legal Parentage

- important because if not parent, are legal stranger
- legal parentage allows to push others out of child’s life
- gives right to two obligations: custodial rights, custodial obligations (health, support, shelter; removal if not)

Ways to establish legal parentage:

- genetics/birth
 - mother who gives birth usually considered legal parent
 - father who is genetic father of non marital child can be hauled into court for child supp. (does not always establish right to custody -> need bio plus, or sign voluntary acknowledgment at birth)

- Stanley
 - unwed father wanting to protect custodial rights needs biology and something else; significant showing other than just genetic
 - if genetics and significant showing, have due process right to show fitness
 - cant prevent from showing fitness just for state efficiency; right far too valuable for this
- many states have statutes that say genetic parentage enough to require child support
- men can't claim tricked into natural procreation (intercourse = SL)
- no negative procreative privacy after intercourse
- marital presumption
 - all 50 states
 - husband of kids mother presumed to be father
 - 40 states, can be challenged by mother, father, husband, and punitive father (not Michael H.)
 - MI minority of states that only allows husband or wife to challenge, and not punitive father (method in Michael H.)
- Michael H.
 - rule = the state has a legitimate interest in protecting the parental rights of a married couple having a child to the exclusion of the parental rights of a biological father
 - also applies to gays and lesbians
 - some limitations though
- parental estoppel
 - one person provides consistent support, holding self out as parent, might be estopped from denying the parentage
 - could be applied re: assistance in child being conceived, providing emotional support, knowing co-parenting situation and not single parent situation
 - need agreement from all parents, but not written according to ALI
- intent/function
 - child wouldn't exist without fiscal and emotional support of parent
 - social parentage, holding out, showing support
 - some statutes have year limits in lieu of pre birth agreement
 - common now for same sex parents without being married equally
 - birth agreements often in best interest of child
 - argue that better for child to have 2 legal parents to argue for custody
 - idea of equitable parentage -> more social aspect of holding child out instead of intend
 - usually if paid caregiver can't establish
 - what if one gave birth, relationship ends, and bio mom wants to make other a legal stranger
 - non birth mother used to be given inferior status
- Elisa B.
 - marked a shift in this
 - holding self out was critical piece here

- adoption

- creature of statute; no one has fundamental right to adopt; have to prove fitness first
- states vary how termination of parental rights happen
- bio parent must surrender
- sometimes mom proven unfit at birth
- step parent adoption an exception (one continues to be legal parent and one can terminate)
- mother must consent unless proven unfit through TPR
- state and courts fuzzy on father consent (trio of cases about bio +)
- minors may give consent but some require parents to too (MI)
- fathers have less rights and lack of consent may be overridden or may not be required depending on relationship
- revocation of consent: states vary (try to minimize changing of mind)
- agency adoption: private or public -> usually older kids through TPR; home study required
- independent placement -> illegal in some states because worried about baby selling; placed directly with adoptive parent pending final decree
- with open adoptions, some states enforce visitation for bio parent, but most don't (cuts too deeply into parental autonomy) -> normally severs all legal ties
- no requirement for adoptive parents to teach non white kids about ethnical heritage

Assisted Repro Technology

- birth presumption really strong
- only rebutted through valid surrogacy agreement in state that recognizes
- surrogacy can have intent or adoption based test
- two types: gestational (birth mom not genetic mom, basically just holds baby) or traditional (mother is genetic and birth mother, with sample from other man, birth mom provides eggs)
- not all states recognize surrogacy agreements, some allow commercial, unclear what compensation is

Baby M

- traditional surrogacy
- birth/genetic mother wanted to see child given birth to
- agreement that married couple would be legal parents; both surrogate and husband signed termination
- court said contract void as matter of public policy, because mom should have time to consider after surrender
- treated like adoption

Johnson

- intent test controls
- gestational surrogacy genetic v. birth mother
- who intended to be parent when conceived?

- not baby selling if payment for carrying and pregnancy expenses
- positive right to have child in this context
- context of persons state of mind
- beyond legal parentage and looks at intent pre birth

KM v. EG

- KM provides ova to lesbian partner
- - EG is the birth mother so she is the intended mom
- KM's status is then questioned.
- biology – anonymous donors are not parents
 - UPA says donors are not parents (but not random donor)
- intent - initial agreement was to only have EG as the mother
- EG is the only one on the birth certificate
- EG was the only one who changed the will and benefits to include the children
- KM kept it a secret that she was the biological mother of the twins – EG would be the mother
- function -> KM took over the role of mother
 - she was listed as a mother on forms for school.
 - KM's parents were the children's grandparents
- nanny testified that they were both the parents
- court said that the consent form and waiver that KM signed won't work
- can't waive responsibility of a child when a lesbian partner donates an ova to have the kids raised in their home jointly
- the court goes to genetics & biology
- they don't get into whether she is the mother because she openly holds the child out as her own
- cant waive parental right if bio mother with lesbian partner even if other forms of social parentage

- if surrogacy illegal, no legal recourse for couple seeking to enforce K if woman wants to keep kid
- assisted repro tech and establishing parentage based off has created two regimes for poor/rich parents
 - poor parents can only accept child support or not parent solo because of TANF (genetics are very important here!)
 - rich people can have intent govern
 - wealthy have way more rights to decide if can parent
- jrx that does not recognize surrogacy may be more likely to view agreement kingly if protections like those for adoption (i.e. period wanting to decide to keep kid)
- three parents been primarily rejected (i.e. genetic, functional, and sperm donor) -> Louisiana has some statutory allowance
- known sperm donors can occasionally be legal parents if pass a test (i.e. bio +)
- anonymous donor not legal parent
- single mothers based on choice? (based on financial means)

- ivf is a weird area

- man clearly intends to parent when freeze embryo
- different than one night stand
- negative right to procreate been recognized over woman' positive right
- most agreements not enforced if couple splits unless exigent circumstances i.e. cancer

AZ v. BZ

- case with pre-embryos and husband during divorce
- pre-embryos are frozen and the husband doesn't want the pre-embryos given to her during divorce
- don't want to require forced procreation -> but he had intention to parent
- courts don't want to force unwanted fatherhood

State Interference with Relationship: Involuntary Termination

- signs of abuse and neglect, state can interfere with parental autonomy
- partiae role of states in protecting kids
- first complaint -> temp. removal, if not fixed, TPR
- prelim hearing -> court may send kid home with or without services; or may order temporary removal
- if risk of subs/imminent harm, states may proceed directly to removal and follow up hearing
- adjudicatory/dispositional hearing -> court determines plan; have to find neglect/abuse by prep of evidence
- court reviews progress every 6 mos.
- reunification or TPR (TPR needs clear and convincing evidence parent remains unfit, but reunification remains the goal)
- procedures go along with parental autonomy -> fit parent has right to CCC; examples of unfitness in order to justify removal and lack of parental autonomy (being taken away)
- summary proceedings if immediate threat of abuse or harm
 - need to shoe harm, injury, death to be narrowly tailored
 - emergency hearing if really imminent -> need prep of evidence to remove temp, and harm must be subs to remove
- parent can overcome removal via proc process to demonstrated have fixed problem or state made erroneous decision
- state should reasonably attempt to reunify and give parent time to remedy violation
- abuse/neglect defined pretty broadly (case by case)
 - abandoned, deprived of education, forced to live in conditions injurious to well being of kid)
- shouldn't only be based on being impoverished
 - risk of substantial harm because of parents action can justify intervention of state w/ prep of evidence
- middle class bias about clean house... consider cost of taking child out of suboptimal home
- can send kid home with services or remove to foster care
- can be parental defense for assault that is "parental discipline"

- most courts dont require malice
- just analyze amount of force (excessive/reasonable?)
- emotional abuse may constitute removal
 - Shane T.
 - emo abuse manifests into phys for kid
 - phys sickness
 - harsh words
- if mom abused, not used for mom's neglect, unless repeating was father says or being abused as well
 - failing to stop domestic abuse not the same thing!
- state has no affirm duty to protect kid from parents
 - DeShaney
 - child abused multiple times by his father. Caseworker dismisses the case multiple times.
 - finally he is put into a coma and the mother wants to bring an action that the state failed to intervene.
 - not bringing a tort action to get around government immunity
 - state didn't create the danger – the child is not in state custody. That would be a time where the state is liable.
 - state can't control the actions of private actors
 - state did nothing to create a particular kind of relationship
 - but... already made decision and take action? make dad madder?
- can terminate parental rights permanently only if clear and convincing evidence that unfit
 - neglect/abuse not remedied
 - even after reasonable efforts, parent not meeting standard
 - kid in system for 15 months and needs more stable situation
 - big risk of error (lemonade v. yogurt)
 - thats why high standard of evidence
 - Fed. act requires states to engage in reasonable efforts to reunification before TPR
 - need a lot of evidence harm not abated
 - real focus on right for parents CCC, despite fact that kid clearly has right to safety