CHAPTER 9

THE RIGHT TO PRIVACY

Outline

I. Introduction
   A. No mention of a right to privacy in the Constitution
   B. Little doubt of its existence
   C. Framers included provisions to minimize government interference in citizens’ lives

II. Right to Privacy
   A. Personal right to privacy recognized as implicit in liberty protected by the Due Process Clause
      1. Justice Brandies found it in the Fourth and Fifth Amendments in a dissent in 1928
         a. First case to discuss the right to privacy
         b. Justice Douglas found it “emanates” from specific Bill of Rights guarantees
            (1) Guarantees create a zone of privacy
         c. Justice Goldberg found it in the Ninth Amendment
         d. Justice Harlan found it in the Fourteenth Amendment
      3. Right of privacy is integral part of American jurisprudence
         a. Implicitly concerns freedom of the individual to
            (1) Make fundamental choices
            (2) Protect individuals from unwarranted government interference
   B. Application of the right of privacy to fundamental rights
      1. Marriage
      2. Childbearing
      3. Abortion
      4. Birth control
      5. Sex/sexuality
      6. Child rearing
      7. Right to die
   C. Determining fundamental rights
      1. Those that are intimate in nature
   D. States may not place undue burden on fundamental rights
      1. Must be reviewed using strict scrutiny standard
         a. State must have compelling interest
         b. Must demonstrate that objective cannot be achieved by less restrictive means

III. Right to Marry
   A. Marriage is a fundamental right
      1. Strict scrutiny is the standard for analysis
         a. Some regulation is valid
         b. Regulation may not significantly interfere with the decision to marry
            (1) Loving v. Virginia, 388 U.S. 1 (1967)
               (a) Challenge to antimiscegenation law
               (b) Court employed Fourteenth Amendment equal protection analysis
                  i. State required to demonstrate compelling interest
                  ii. Court could find no such interest
            (2) Zablocki v. Redhail, 434 U.S. 374 (1978)
(a) Same analysis to strike statute preventing noncustodial parent from marrying if behind on child support
   i. Less restrictive means available
(b) Rational relationship could be used when
   i. No direct legal obstacle
   ii. Does not significantly discourage marriage

2. Rational relationship
   a. *Califano v. Jobst*
      (1) Challenge to Social Security regulation terminating child's benefit upon marriage as undue burden or deterrent to marriage
      (2) Court disagreed
         (a) Not invalid because someone might be deterred

3. States' ability to regulate marriage without interfering in right to privacy
   a. Age requirements
   b. Blood test requirements

IV. Right to Procreate
A. Importance of procreation
      a. Statute required sterilization of individuals convicted of felonies involving “moral turpitude”
      b. Court found marriage and procreation “fundamental to . . . existence and survival of the race”
      c. Decided on equal protection grounds
      a. Statute prohibiting contraceptives
         (1) Challenged by doctors convicted of distribution
         (2) Deemed unconstitutional intrusion on marital privacy
      b. Court overturned statute
         (1) Penumbra of rights
            (a) Each specific right guarantees more than indicated by the specific words
               i. Protections expanded beyond their plain meanings
               ii. Penumbras create a zone of privacy
            (b) Concerned with invasion of privacy into the marital relationship that was necessary to prosecute
   3. No person can be prevented from contraceptives whether married or single
         (1) Expanded *Griswold*
            (a) Relevant consideration shifted from marital bedroom to intimate relationship
   4. Expansion of privacy rights in procreation and birth control
         (1) Limitation on distribution of contraceptives based on age
         (2) Court struck down provision permitting only pharmacists to distribute contraceptives to adults
         (3) Plurality found state did not demonstrate significant interest in banning contraceptives for minors

V. Abortion
A. *Roe v. Wade*, 410 U.S. 113 (1973)
   1. Court acknowledges uniqueness of abortion situation
      a. Decisions most affected by political, cultural, and historical climate
      b. Question: whether Texas statute prohibiting abortion violates woman’s right to privacy
         (1) Woman’s right may be regulated if state has compelling interest
         (2) Balance of state’s interest in health of mother and fetus against woman’s right to privacy
            (a) Trimester analysis
               i. During first trimester state may not ban or closely regulate abortion
a) No valid or compelling interest
ii. During second trimester state may regulate if reasonably tied to health
or welfare of pregnant woman
   a) Compelling interest in woman’s health
   b) No legal protection for fetus
iii. During third trimester, with viability of fetus, state interest in health
   and welfare of fetus is compelling
   a) State may regulate
   b) Abortion must be permitted when necessary to preserve life and
   health of pregnant woman
iv. Based on medical knowledge and technology at the time

1. Court discards trimester analysis
   a. Change in medical knowledge
   b. Change in Court personnel
   c. Public outcry against Roe
2. Plurality affirmed Roe’s essential holding of woman’s fundamental right to abortion
3. Replaced trimester scheme with “undue burden” standard
   a. Pre-viability regulation must pass this standard
      (1) Undue burden if substantial obstacle is placed in a woman’s path
   b. Specific provisions upheld as passing undue burden standard
      (1) Medical emergency
      (2) 24-hour waiting period
      (3) Parental notification
         (a) Missouri v. Danforth, 428 U.S. 52 (1976)
            i. Struck down absolute veto of daughter’s right to choose by both
               parents
            (b) State may require parental consent
            (c) Must allow for judicial bypass
   c. Provisions struck down
      (1) Requirement for reporting reason for failing to provide spousal notice
      (2) Spousal notification
         (a) Places undue burden on woman’s right
            i. Cites domestic abuse
            ii. Women do not lose right to liberty when married
4. Significant disagreement among members of the Court
5. Importance of Casey
   a. Constitutional protection of woman’s right to abortion continues
      (1) No longer fundamental right requiring strict scrutiny
      (2) Test now is “undue burden”

C. Other questions surrounding abortion
1. Whether federal government can refuse to pay for medically necessary abortions
      (1) Placed no governmental obstacle in path of women seeking abortion
      (2) Encouraged childbirth, which is in the public interest
      (3) No constitutional entitlement to financial resources
      (4) Court relied on previous decisions
2. Whether government must fund nontherapeutic abortions
      (1) Challenged regulation that required doctor’s certificate of medical necessity
         to receive medical benefits for abortions
      (2) Court distinguished from Roe v. Wade
         (a) Not direct interference with protected activity
         (b) No obstacle placed in path of woman’s choice
3. Use of public facilities and publicly employed staff for abortions to save women’s lives
(1) Regulations denying funding are constitutional based on the reasoning in
_Harris v. Maher_
(a) Woman retains a choice under regulations
(b) Government under no obligation to provide resources for abortion

4. Federal funding for family planning
      (1) Regulation prevented physicians at federally funded clinics from counseling
          women about abortion as a means of birth control
      (2) Precluded recommendation and referral
      (3) State has “no affirmative duty” to facilitate abortion
      (4) Government could constitutionally choose to support childbirth without
          “impermissibly” burdening women’s rights

5. Partial-birth abortions
      (1) Question whether total ban on certain procedures violated the Constitution
          because they created a significant health risk, placing a burden on the right to
          choose
      (2) Court held that law must have health exception
          (a) Absence of exception places a woman at an unnecessary risk
      (3) Statute imposed an undue burden on woman’s right to terminate pregnancy

VI. Sex and Sexuality
A. _Griswold_ stops short of extending the zone of privacy to sexual relations in general
   1. There is no constitutionally recognized privacy interest in fornication
   2. No constitutional protection for sexual acts committed by married couples in public
      places

   1. Challenge to Georgia law prohibiting sodomy by consenting homosexuals
   2. Court said it would not “extend a fundamental right to homosexuals to engage in
      acts of consensual sodomy”
      a. Found none of the constitutional rights set forth in the _Griswold_ line of cases bore
         any resemblance to this issue
      b. Rights that are part of the concept of ordered liberty or deeply rooted in United
         States history do not apply
   3. Dissent emphasized Court’s framing of the issue
      a. Argued that question should be addressed as right to be left alone / privacy in
         one’s own home
      b. This would have resulted in the conclusion that homosexuals could engage in
         consensual sodomy in the privacy of their homes

C. _Romer v. Evans_, 517 U.S. 620
   1. Challenge to Colorado constitutional amendment precluding all state action
      designed to protect individuals based on their status as homosexuals
      a. State argued that the amendment denied homosexuals any special rights
      b. Court rejected this argument
         (1) Amendment withdraws only from homosexuals “specific legal protection[s]”
            (a) Amendment allowed for discrimination against homosexuals in the
                private sphere
            (b) Operated to repeal all laws or policies forbidding discrimination by all
                levels of the state government
      c. Court also rejected the state’s argument that the amendment supported citizens’
         freedom of association
         (1) Court found no legitimate purpose or objective advanced by the amendment
         (2) “Amendment . . . classifies homosexuals . . . to make them unequal to
             everyone else”
      d. Dissent
         (1) Discrimination against homosexuals is a cultural debate
         (2) Question should be decided by democratic means

1. Overruled Bowers
2. Consensual sex between same-sex adults cannot be prohibited
   a. Due process requires constitutional protection
   b. Concurrence by J. O’Connor
      (1) Equal protection was proper basis for overturning Bowers

VII. Child Rearing
   A. Government interference in parent’s direction of children’s upbringing is limited
      1. Education
         a. Pierce v. Society of the Sisters of the Holy Name of Jesus and Mary, 268 U.S. 510 (1925)
            (1) State statute making it a misdemeanor for parents to fail to send 8- to 16-year olds to public school
            (2) Private schools challenged statute
               (a) Argued that it interfered in parents’ right to choose school
            (3) Court found states could reasonably regulate schools
               (a) This statute unconstitutional
                  i. Abridged parent’s right to direct education and rearing of children
                  ii. Parents did not have unlimited right to direct upbringing
                     a) Some instances where state has legitimate interest in limiting parental freedom where child welfare at stake
         b. Prince v. Massachusetts, 321 U.S. 158 (1944)
            (1) Custodian of 9-year-old convicted of violating state child labor laws by allowing niece to sell religious magazines on a street corner
            (2) Tension between state interest in child welfare and parent’s authority over child rearing
               (a) State authority not negated by parental and religious rights at issue
         c. State authority over children greater than over adults, particularly in areas of
            (1) Employment
            (2) Public activities
      2. Visitation rights
            (1) Statute allowing “any person” to petition for visiting rights and authorizing courts to grant visitation when in child’s best interest
            (2) Statute found too broad
               (a) Fourteenth Amendment liberty interest in upbringing of children
               (b) Statute violated parents’ fundamental right to make decisions regarding care and custody without government interference

VIII. Right to Die and Commit Suicide
   A. Courts consider right to die free of governmental interference in the context of whether and under what circumstances a family member or guardian of an incapacitated individual can make the decision to end life
      1. In 1970s and 1980s used substituted judgment
         a. Allows relatives to decide, relying on In re Quinlan
            (1) What patient would want
            (2) What is in patient’s best interest
         b. State courts also used right of informed consent, right of privacy, or both
   B. What procedural standard is appropriate for surrogate making decision?
      1. Cruzan v. Director, Missouri Department of Health
         a. Parents of daughter in persistent vegetative state seek to remove life support
         b. Court found that competent person has Fourteenth Amendment liberty interest in refusing medical treatment
         c. Question about right of incompetent patient
            (1) Different because surrogate makes the decision
         d. State required clear and compelling evidence of patient’s wish
            (1) Decide constitutionality of standard
         e. State interest found to be substantial
f. Constitution does not require state to grant decision-making power to anyone but the patient
g. Established two major propositions
   (1) Competent adult has constitutionally protected liberty interest in declining unwanted medical treatment
   (2) Where patient incompetent, state may constitutionally refuse to terminate medical procedures except when clear and convincing evidence that this would be the patient’s wish
h. What evidence satisfies this second prong?
   (1) Living will
   (2) Designation of individual to make decisions in case of incompetency—i.e., health proxy
      (a) Recognized by many states
C. Right to commit suicide
      a. State of Washington’s ban on assisted suicide
      b. Physicians treating terminally ill patients and the patients themselves challenged statute on the basis that it unconstitutionally placed an undue burden on liberty interest
      c. Court first reviewed the history and legal traditions in the debate over assisted suicide
         (1) Found that laws consistently condemned assisted suicide
      d. Distinguished from Cruzan and Casey
         (1) Cruzan had a history of support that was not present in this case
         (2) Casey relied on fundamental liberty interest not present in this case
e. Found legitimate state interest in preserving life
   f. Statute reasonably related to legitimate state interest
IX. Summary
   A. Right to privacy implicit in the Constitution based on
   1. Concept of ordered liberty granted by the Fifth and Fourteenth Amendment Due Process Clauses
   B. Right to be free of government interference in making intimate life choices
   C. Employ balancing test, weighing individual interest in privacy against government interest in regulation
      1. Where fundamental rights involved courts will require strict scrutiny
   D. Since 1960s and 1970s, Court has been reluctant to find issues surrounding privacy to be constitutional rights
      1. Greater willingness to allow government regulation of personal aspects of citizens’ rights

Key Terms and Definitions

expectation of privacy: The belief that you (or your possessions) are in a place, or engaged in an activity, where you have a right to expect privacy.
moral turpitude: Describes any crime, such as larceny, that involves immorality or dishonesty.
privacy: Describes the right to be left alone; the right to privacy is sometimes “balanced” against other rights.
viable child: A child developed enough to live outside the womb.
zone of privacy: A place or activity protected against government intrusion by the constitution.
Review Questions

1. From where does the constitutional right to privacy originate and to what areas has it been applied?

2. Please define “zone of privacy” and explain its use in the analysis of cases regarding a right to privacy.

3. How did Planned Parenthood of Southeastern Pennsylvania v. Casey change the Court’s abortion rights analysis as set forth in Roe v. Wade?

4. How has the Court’s analysis of a homosexual’s right to privacy changed from Bowers to Romer to Lawrence v. Texas?

5. What does a court look to when determining whether life support ought to be terminated for an individual who is in a persistent vegetative state?

Internet Connections

1. To learn more about the state laws on the right to die, see “The Legalities of the Right to Live or Die” at http://public.findlaw.com.


4. For the most recent U.S. Supreme Court decision regarding sexual orientation, see Lawrence v. Texas, Docket Number 02-102, 71 USLW 4574 at http://news.findlaw.com.