A Constitutional Challenge to Michigan’s Ban on Second Parent Adoption by the Unmarried Partner of the Child’s Current Parent

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It appears that the Michigan law providing for second parent adoptions has been interpreted by most judges in the state as being limited to an adoption by a prospective adoptive parent who is married to the child’s current parent. As so interpreted, the statute would prohibit a second parent adoption by the current parent’s heterosexual partner where the couple has chosen not to marry and by the current parent’s same sex partner, since same sex persons cannot marry under Michigan law. In this article, I will discuss a possible constitutional challenge to this ban, and I will do so from the perspective of a lawyer putting together such a challenge.

I have previously discussed at length constitutional challenges to laws and governmental action from the perspective of the lawyer litigating such challenges. The perspective of the litigating lawyer involves framing particular kinds of constitutional challenges in light of existing constitutional doctrine and its capacity for extension. Constitutional cases do not just “happen,” as one might think if one were to look only at the cases that have been decided by the United States Supreme Court as they appear in constitutional law casebooks and are discussed in academic commentary. There are reasons why particular kinds of constitutional cases are brought at particular times, and more importantly, why particular kinds of constitutional challenges are asserted on the basis of particular constitutional provisions rather than on the basis of others.

I. Asserting Constitutional Rights

For the litigating lawyer, the “stuff of constitutional litigation” is the Supreme Court’s precedents and the constitutional doctrine that has been promulgated by the Supreme Court in prior cases. In deciding whether or not to assert a constitutional challenge to a particular law or governmental action, and in deciding on the basis of that challenge, the lawyer must look to the precedents and doctrine. This examination of precedents and doctrine will determine the viability of a particular constitutional challenge and the basis on which that challenge should be made. Any limitation on governmental power designed to protect constitutional rights must be found in the text or internal inferences of the Constitution, and the lawyer must make a decision as to which constitutional provision or provisions the lawyer will rely on in asserting the particular constitutional challenge.

I have illustrated this proposition in the area of the constitutional protection of personal autonomy by tracing the development of the constitutional right to parent and the development of the constitutional right of reproductive freedom. The constitutional right to parent has been referred to by the Supreme Court as “perhaps the oldest of the fundamental liberty interests recognized by the Court.” The constitutional right to parent traces back to two cases from the 1920’s, Meyer v. Nebraska, where the Court invalidated a state law prohibiting the teaching of schoolchildren in any language other than English, and Pierce v. Society of Sisters, where the Court invalidated a state law prohibiting parents from sending their children to private and parochial schools. Such laws seemingly would violate the First Amendment’s guarantees of freedom of speech and association. But at the time these cases were being litigated, the First Amendment had not yet been held to apply to the states, so the lawyers challenging these laws would have to find a different constitutional basis for their challenge. They found this basis in the Fourteenth Amendment’s due
process clause, which the Court had been using for some years to invalidate federal and state economic regulation. It was not much of a step for the Court to hold that just as substantive due process protected economic freedom, it protected personal freedom as well, here the right of parents to control the upbringing and education of their children. Thus was born the constitutional right to parent, which strongly limits the power of the states to terminate or interfere with parental rights, and in its most recent application by the Court in \textit{Troxel v. Granville}, has put a constitutional end to grandparent visitation as we have known it.

The constitutional right of reproductive freedom, reflected most cogently today in the recognition of a woman’s constitutionally protected right to a safe and legal abortion, traces back in a line of growth to the 1942 case of \textit{Skinner v. Oklahoma}. In that case, the Court struck down on equal protection grounds an Oklahoma law providing for the compulsory sterilization of persons who had been convicted of three felonies involving “moral turpitude,” but exempting most “white collar” crimes. It may be assumed that the Court was strongly motivated to invalidate this singularly aberrational law, which was predicated on the scientifically misplaced belief that criminal tendencies were inherited and which was directed against poor persons and racial minorities who were more likely to commit “common crimes.” But the Court needed to come up with a doctrinally acceptable way to do so. At this time, the Court generally was not disposed to sustain equal protection challenges and it was no longer using substantive due process to overturn governmental economic regulation, so Justice Douglas, writing for the Court in \textit{Skinner}, found it necessary to justify a higher standard of scrutiny in this case. He did so by saying that the compulsory sterilization requirement implicated the fundamental rights of marriage and procreation, which he referred to as involving “one of the basic civil rights of man” and “fundamental to the very existence and survival of the race.” As a result of \textit{Skinner}, the right of procreation, along with the right of marriage, was recognized as a fundamental right, and while the Court had not yet specifically articulated a two-tier standard of review for due process and equal protection challenges, \textit{Skinner} clearly stood for the proposition that laws interfering with marriage and procreation were subject to a higher degree of scrutiny than laws dealing with economic and social regulation.

\textit{Skinner} was largely forgotten until \textit{Griswold v. Connecticut} came before the Court in 1965. That case involved a challenge to a nineteenth-century Connecticut law that prohibited the use of contraceptives by all persons, including presumably by married persons. Among the arguments asserted by the lawyers challenging the law was one based on \textit{Skinner}, that the ban on contraceptive use by married persons interfered with their fundamental right to engage in intimate marital relationships without risking pregnancy - in essence that the right to procreate also included the right to avoid procreation. The Court held the ban unconstitutional as violating the married couples’ constitutional “right of privacy.” While the Members of the Court sharply disagreed on the constitutional basis for the “right of privacy,” they all agreed that marriage and what we would now call reproductive freedom were protected by the constitutional “right of privacy,” and they all agreed that Connecticut’s ban on the use of contraceptives by married persons violated the constitutional “right of privacy.”

From the lawyers’ perspective the differing views on the Court as to the constitutional basis for the “right of privacy” following \textit{Griswold} was constitutionally irrelevant. \textit{Griswold} had recognized a constitutional “right of privacy,” and in the wake of \textit{Griswold}, lawyers could and did use this constitutional “right of privacy” to challenge the constitutionality of the anti-abortion laws that existed in virtually all of the states at this time. If it had not been for the Court’s explicit recognition of a constitutional “right of privacy” in \textit{Griswold}, a viable constitutional basis for challenging the anti-abortion laws would not have existed at that time. The argument for the lawyers challenging these
laws would, of course, be based on *Griswold*. They would argue that as regards the reproductive freedom of the pregnant woman, there is no logical difference between using contraception to prevent an unwanted pregnancy from occurring and having a medical abortion to undo an unwanted pregnancy that has occurred. They would further argue that the state did not have a compelling governmental interest in preventing a woman from exercising her fundamental right to reproductive freedom, so the anti-abortion laws were unconstitutional.

The lawyers for the state would respond to this argument within the analytical framework of the compelling governmental interest standard of review. They would argue that fundamental rights are not absolute and that a ban on abortion can be justified under this exacting standard. They would argue that there is a qualitative difference between using contraception to prevent an unwanted pregnancy and terminating an unwanted pregnancy by an abortion, since an abortion destroys potential human life that has come into being and that in the great majority of cases will result in a live birth. Thus, they would argue that the state’s interest in protecting human life from the moment of conception was compelling and that a ban on abortion was the “least drastic means” of advancing that interest. The Court, then, consistent with existing constitutional doctrine, could have upheld the constitutionality of the challenged anti-abortion laws in *Roe*.

But constitutional doctrine can also be extended in the line of growth. In *Roe*, the Court held that a woman’s right of reproductive freedom, now protected by substantive due process, included the right to terminate an unwanted pregnancy by a medical abortion, and that in this context, the state’s interest in protecting potential human life was not compelling until the stage of viability had been reached. I have explained *Roe* as a case where the Court engaged in constitutional balancing, and making a value judgment about the relative constitutional importance of the woman’s interest in reproductive freedom and the state’s interest in protecting potential human life, and it made that value judgment in favor of the woman’s reproductive freedom interest.21

My point here is that lawyers wanting to challenge state anti-abortion laws at the time of *Roe* were able to do so because the Court’s decision in *Griswold* explicitly recognized a constitutional right of privacy and the Court’s precedents in *Griswold* and *Skinner* had held that reproductive freedom was a fundamental right. As discussed above, the constitutional challenge would have failed if the Court had treated abortion differently from contraception and had not made the value judgment that in the context of anti-abortion laws, a woman’s reproductive freedom interest was constitutionally more important than the state’s interest in protecting potential human life. As it turned out, the challenge was successful, and today women have a constitutionally protected right to have a safe and legal abortion.22

**II. Michigan’s Ban On Second Parent Adoptions**

With this experience in mind, we now turn to the perspective of the lawyer seeking to prepare a constitutional challenge to Michigan’s ban on second parent adoptions by the current parent’s unmarried partner. The lawyer must
develop a constitutional theory that will serve as the basis of the challenge. This theory should be the one that is most closely tied to existing doctrine and precedent and so can most readily be extended in the line of growth to support the claim that this ban on second parent adoption is unconstitutional. In so doing it is necessary for the lawyer to identify both the person whose constitutional rights are being violated by the ban and the constitutional provision that protects the rights of that person with respect to the matter in issue.

In my opinion the strongest constitutional theory to support the challenge to this ban, that is, the theory that is most closely tied to existing doctrine and precedent, is that the ban violates the equal protection right of the child who is deprived of a second parent solely because of the unmarried status of the child’s current parent and the prospective adoptive parent. I would refer to this child as the non-marital child - the child who is denied a second parent because of the ban - and focus on the discrimination effected against this child by the ban in comparison to who I would refer to as the marital child - the child whose prospective adoptive parent is married to the child’s current parent.

The discrimination effected against the non-marital child by the ban is illustrated by the comparing the situation of Sam and the situation of Samantha. Sam and Samantha are both in the custody of their divorced mothers, and we will assume that their fathers are dead or would not object to a second parent adoption. Sam’s mother marries her opposite sex partner, who then can and does adopt Sam. Sam now has all the legal protections that come from having two parents, such as the right to support, the right to intestate succession, the right to parental decisionmaking by two parents, and the right to be in the custody of the second parent if Sam’s mother dies or becomes incapacitated. Samantha’s mother has a partner to whom she is not married, either an opposite sex partner, where they choose not to marry, or a same-sex partner, where they cannot marry. Unlike Sam, Samantha cannot have a second parent, with all the resultant legal protections, solely because her mother will not or cannot marry her partner. The constitutional claim would be that the discrimination against Samantha with respect to the ability to have a second parent solely because she is a non-marital child, in comparison with Sam, who is a marital child, deprives Samantha of equal protection.

The doctrine and precedent on which I would rely in support of this theory is the long line of cases beginning with Levy v. Louisiana, holding violative of equal protection virtually all legal discrimination against non-marital (“illegitimate”) children. As the Supreme Court stated in Weber v. Aetna Casualty & Surety Co.:

The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bounds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the head of the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as an unjust - way of deterring the parent.

In Levy and Weber, the Court held unconstitutional the denial to non-marital children of the right to receive worker’s compensation benefits or wrongful death recovery for the death of a parent. The Court has also held it unconstitutional for the state to deny welfare benefits to a family that includes a non-marital child, to deny a non-marital child support from the identified natural father, and to deny a non-marital child the right to inherit from the father. The state must also allow a child born out-of-wedlock a substantial period of time in which to establish paternity against the natural father, so that the child
will be able to claim support from him. This case, and the support and inheritance cases, stand for the proposition that the non-marital child is entitled to the same rights against the natural father that are afforded to the marital child, and it is completely irrelevant that the natural father is not married to the child’s mother.

We now return to Samantha and her equal protection claim. She is a very sympathetic victim of Michigan’s second parent adoption ban, both personally and constitutionally in light of the Levy line of cases. She is being denied a second parent, not because of any “fault” of her own, but because of the conduct of her mother in not marrying her partner or in choosing a partner whom she cannot marry. This makes Samantha’s situation very similar to that of the non-marital child in the Levy line of cases, who suffered all the disabilities traditionally imposed on out-of-wedlock children because of their status as “illegitimate.” While the state may disapprove of Samantha’s mother’s “liaison” with a partner whom she will not or cannot marry, it is “illogical and unjust” to “visit this condemnation” on Samantha by denying her the legal protections that come from having a second parent.

A very important issue in equal protection cases is the articulated standard of review. Certain kinds of classifications, such as those involving race, gender or fundamental rights, are tested under a standard of review requiring heightened scrutiny, but most classifications are tested under the less rigorous rational basis standard of review. Classifications discriminating against non-marital children are now tested under the intermediate level “important and substantial relationship” standard of review: the classification must be substantially related to the advancement of an important governmental interest. It is arguable that this standard of review should also be applied to determine the constitutionality of discrimination against children who are denied the opportunity to have a second parent by adoption because of the non-marital status of their current parent and the prospective adoptive parent. However, the lawyer litigating the constitutional challenge to Michigan’s ban on second parent adoption should proceed on the assumption that the less rigorous rational basis standard will be applicable and should be prepared to demonstrate that the ban is unconstitutional even under this less rigorous standard. There is substantial precedential support for this argument.

When applying the rational basis standard of review, the Court has been disposed to find unconstitutional discriminations that are based on societal prejudice against unpopular groups or persons. Levy and the other earlier cases invalidating discrimination against out-of-wedlock children were decided under an articulated or assumed rational basis standard of review. In fact, in those cases, the Court paid little attention to the standard of review, focusing instead on the unfairness of the discrimination against out-of-wedlock children who had...
no control of the circumstances of their birth. In other cases, applying an articulated rational basis standard of review (sometimes after rejecting claims for heightened scrutiny), the Court has invalidated a city’s denial of a permit for the operation of a group home for the mentally retarded, a state constitutional provision prohibiting the state and political subdivisions from including discrimination on the basis of sexual orientation within the ambit of any anti-discrimination law, a federal law directed against “hippie communes,” that denied food stamps to eligible persons living in households containing more than two unrelated individuals, and a state law denying a free public school education to undocumented alien children. As the Court said in the latter case: “We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests. [Thus] the discrimination contained in [the law] can hardly be considered rational unless it furthers some substantial goal of the State.”

It is difficult to see how the discrimination against Samantha by denying her the benefit of a second parent “furthers some substantial goal of the State,” or for that matter, any legitimate state interest at all. The state cannot rationally argue that it is “harmful” to children to have an unmarried or gay or lesbian adoptive parent, since the state permits “free standing” adoption by such persons. Nor can the state argue that the purpose of the ban is to encourage marriage between the current parent and the prospective adoptive parent, since it prohibits second parent adoptions by gay and lesbian partners, who cannot legally marry the child’s current parent. It seems that the law providing for second parent adoption has been interpreted by most judges in Michigan to bar adoption by the unmarried partner of the child’s current parent either because of a failure of the judges to understand how a second parent adoption operates in these circumstances or because of outright hostility toward allowing unmarried and gay and lesbian persons to adopt their partner’s child. Either way, it can be contended that the ban is objectively unreasonable and so violative of equal protection even under the less rigorous rational basis standard of review.

III. Defining The Parties

Procedurally, I would suggest bringing the case as a plaintiff-defendant class action. The plaintiffs would be children of parents whose partners want to adopt the children, but who are prevented from doing so because the partner is not married to the children’s current parent. They would allege that their parent’s partner has not filed adoption proceedings because the ban would prevent any second parent adoption from being granted. The class would consist of all children who are in this situation. The defendant class would consist of all the Michigan judges who have refused to approve second parent adoptions by the unmarried partner of the current parent. The plaintiffs would seek a declaratory judgment to the effect that it violates the equal protection rights of the children for the state to deny them a second parent by adoption because of the non-marital status of their current parent and the prospective adoptive parent, and a mandatory injunction directing all Michigan judges to issue adoption orders in those cases.

CONCLUSION

Constitutional rights come into being because lawyers, looking to constitutional doctrine and precedent, succeed in persuading courts that the right they are asserting is supported by that doctrine and precedent in the line of growth. In this article, I have explored establishing a constitutional right, based on the equal protection clause, for children to be adopted by the unmarried partner of their current parent.

1 MCL 710.23a(4); MCL 710.51(5).
2 The term, “child’s current parent” refers to the parent having legal custody of the child. Where the spouse or partner of the child’s

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current parent seeks to effect a second parent adoption of the child, it will be assumed that the child's other parent is dead, has agreed to the adoption, or would be subject to termination of parental rights pursuant to 710.51(6).

I have been advised by the Editors of the Journal that the issue came to the surface in the summer of 2002 in the Washtenaw Family Court, where the judges had been granting second parent adoptions to the unmarried partner of the custodial parent for some seven years. The Chief Judge of the Washtenaw Family Court, after meeting with the Chief Justice of the Michigan Supreme Court, issued an order directing that the judges of that Court stop granting such adoptions. A discussion of the authority of the Chief Judge to issue that order and of other questions relating to the power of family court judges to grant such adoptions based on their differing interpretation of the statute or of challenges to such adoptions is beyond the scope of the present article. For purposes of the present article, it will be assumed that the statute will continue to be interpreted by most judges as prohibiting such adoptions and/or that the statute will be authoritatively construed by the Michigan Supreme Court as prohibiting such adoptions.

Like all other areas of law, constitutional law develops in a line of growth. The Supreme Court's decisions in prior cases serve as precedents for the resolution of future cases presenting the same or similar issues. The doctrine that the Court promulgates in these cases and the rationale for its decisions are applicable in future cases, where that doctrine and rationale can be extended or limited. The meaning of a constitutional provision thus develops incrementally over a period of time, and the line of growth of that constitutional provision strongly influences its application in particular cases. See generally Terrance Sandalow, Constitutional Interpretation, 79 MICH. L. REV. 1033, 1054 (1981); See also Robert A. Sedler, The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective, 44 OHIO STATE L.J. 93, 118-20 (1983).


262 U.S. 390; 43 S. Ct. 625; 67 L. Ed. 1042 (1923).

268 U.S. 510; 45 S. Ct. 571; 69 L. Ed. 1070 (1925).

See the discussion of these cases from the perspective of the lawyers litigating them in Sedler, Personal Autonomy, supra, note 4 at 776-779.

See the discussion Id. at 779.

Supra note 6.


316 U.S. 535; 62 S. Ct. 1110; 86 L. Ed. 2d 1655 (1942).

Id. at 541.

See the discussion of Skinner in Sedler, Personal Autonomy, supra note 3 at 780-782.

381 U.S. 479; 85 S. Ct. 1678; 14 L. Ed. 2d 510 (1965).

In Roe v. Wade, the Court simply said that the right of privacy was part of the liberty protected by the Fourteenth Amendment's due process clause. 410 U.S. 113, 153 (1973). In Eisenstadt v. Barid, 405 U.S. 438 (1972), the Court clearly separated the right of procreation from the right of marriage, and held that as a matter of equal protection, unmarried person must have the same right of access to contraception as married persons, because a ban on access to contraception by unmarried persons violated their right to reproductive freedom. Griswold and Eisenstadt are discussed in Sedler, Personal Autonomy, supra, note 4 at 782-787.

I was teaching at the University of Kentucky from 1966 to 1977, and

20 See the discussion of the conflicting arguments in Sedler, Personal Autonomy, supra, note 3 at 787-88.

21 See the discussion of the Court's decision in Roe and the post-Roe cases culminating in Casey in Sedler, Personal Autonomy, supra note 4 at 788-796.

22 The state may regulate abortion so long as the regulation does not impose an "undue burden" on the woman's ability to obtain an abortion, and may refuse to provide funding for abortions. See the discussion and review of cases in Sedler, Personal Autonomy, supra, note 4 at 789-791.

23 391 U.S. 68; 88 S. Ct. 1509; 20 L.Ed. 2d 436 (1968).

24 406 U.S. 164, 175; 92 S. Ct. 1400; 31 L. Ed. 2d 768 (1972).


29 Id.


32 United States Department of Agriculture v. Moreno, 413 U.S. 528; 93 S. Ct. 2821; 37 L. Ed. 2d 782 (1973).


34 Id. at 221.

35 They thus suffer injury in fact to their ability to adopt their partner's child that is directly traceable to the existence of the adoption ban, which injury will be redressed by a favorable decision holding that the ban is unconstitutional. This being so, they have standing to challenge the constitutionality of the ban. See Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464. 471-72; 102 S. Ct. 752; 70 L. Ed. 2d 700 (1982).