Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform, The

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I. INTRODUCTION

Regarded as fundamental to the integrity of society, the family—and, more specifically, its preservation—has for a very long time been a priority of both courts and legislatures. Hand in hand with this focus on families, however, comes
disagreement about the definition of the family.\textsuperscript{1} Decisions by the Supreme Court are only partially illuminating. In \textit{Trimble v. Gordon}\textsuperscript{2} and \textit{Stanley v. Illinois},\textsuperscript{3} an unwed father and his children are a family; by contrast, in \textit{Michael H. v. Gerald D.},\textsuperscript{4} a married woman, her lover, and their child are not. In \textit{Moore v. City of East Cleveland},\textsuperscript{5} a grandmother and her two sets of grandchildren are a family; in \textit{Village of Belle Terre v. Boraas},\textsuperscript{6} unrelated adults sharing meals and living quarters are not. These cases reveal that marriage and consanguineous relationships are significant elements in the definition of a family.\textsuperscript{7} Other cases suggest that these factors are not determinative. In \textit{Smith v. Organization of Foster Families for Equality and Reform},\textsuperscript{8} the Court asserted that “biological relationships are not [the] exclusive determination of the existence of a family.”\textsuperscript{9} In a similar vein, the Court in \textit{Stanley} remarked that “the law [has not] refused to recognize those family relationships unlegitimized by a marriage ceremony.”\textsuperscript{10} Taken as a whole, these cases imply that without either marriage or a biological relationship, legal recognition of a family is unlikely.\textsuperscript{11} For example, in the absence of a parent-child relationship, marriage is critical for the law to recognize a family.\textsuperscript{12} Marriage alone may not be sufficient for recognition, however.\textsuperscript{13}
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a parent-child relationship to be legally recognized as a family, either biological or legal consanguinity is required. Nonetheless, such consanguinity by itself does not appear to guarantee familial status. Consanguinity’s legal significance in defining who is and who is not a family may depend on whether the existence of a marriage undermines this significance.

The foregoing synthesis of the constitutional law of family recognition is deliberately vague. The lines drawn in the case law purporting to define the family are blurry and incomplete. Nonetheless, recognition as a family matters. As the cases mentioned above make clear, the family is a private realm that the state cannot enter. These cases also underscore the fact that groups of persons not regarded as families have no shield of privacy against governmental interference with their relationships. The impact of this lack of privacy protection can be grave. For instance, where a group of persons does not constitute a family in the eyes of the law, local ordinances can exclude them from living in certain

forbidden. See Eisenstadt v. Baird, 405 U.S. 438, 447 (1972) (finding no rational basis for denying unmarried persons access to contraceptives). Nevertheless, the activity for which the contraceptives are purchased is vulnerable to proscription. See Doe v. Duling, 782 F.2d 1202, 1204 (4th Cir. 1986) (citing prohibition of fornication and cohabitation under Virginia law). Similarly, the mere ability of unmarried persons to live together as a household is vulnerable to proscription. See, e.g., City of Ladue v. Horn, 720 S.W.2d 745, 752 (Mo. Ct. App. 1986) (“There is no doubt that there is a governmental interest in marriage and in preserving the integrity of the biological or legal family. There is no concomitant governmental interest in keeping together a group of unrelated persons, no matter how closely they simulate a family.”).

13. See BARTHOLET, supra note 7, at 169 (“[A] married couple are not really a family until they produce the children who provide the blood link tying them all together.”).


neighborhoods. Where a father cannot marry his child's mother because she is married to someone else, the father has no standing to establish a legal tie to his child. Whereas a father who is married to his child's mother cannot be deprived of custody short of a determination of his unfitness, an unwed father can be denied mere visitation with his child based solely on a finding that it is not in the child's best interests. The decisions asserting these principles indicate that the judiciary limits the definition of family, and, thus, limits the extension of privacy protection to those groups with relational ties that are grounded in marriage and, where there is no marriage, in consanguinity. This emphasis on relationships associated with traditional nuclear family arrangements is anomalous. As individuals in record numbers reformulate the social arrangements in which they choose to live, and social acceptance of alternative families increases, the

22. The term “nuclear family” denotes a marital couple and their dependent children. See Moore v. City of East Cleveland, 431 U.S. 494, 500 (1977). The Author substitutes the term “marital family” when emphasizing the marital component of the nuclear family.
23. See KEN BRYSON & LYNN M. CASPER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1997, at 1 (1998) (reporting a drop in the percentage of married-couple households with children under eighteen years of age from forty percent of all households in 1970 to twenty-five percent of all households in 1997), available at http://www.census.gov/prod/3/98pubs/p20-509.pdf. This report also indicates a rise in the number of families with their own children maintained by one parent, and a rise in the number of single parents who have never been married. Id. Finally, this report states that the majority of single mothers with children under six years of age have never been married, and, generally, that the number of families maintained by people with no spouse is “increasing rapidly.” Id. at 3, 5; see also Helene S. Shapo, Matters of Life and Death: Inheritance Consequences of Reproductive Technologies, 25 HOFSTRA L. REV. 1091, 1101-02 (1997) (describing the traditional family as one that is not heavily represented among families today and attributing changing demographics to increases in divorce, as well as to greater social acceptance of cohabitation and single people raising children alone); D’Vera Cohn, Census Shows Big Increase in Gay Households, WASH. POST, June 20, 2001, at A1 (describing census figures showing “huge increases in the number of same-sex couples sharing households”); Michael A. Fletcher, For Better or Worse, Marriage Hits a Low, WASH. POST, July 2, 1999, at A1 (reporting that “the nation’s marriage rate has dipped by 43 percent in the past four decades, . . . leaving it at its lowest point in recorded history”); Carey Goldberg, Single Dads Wage Revolution, One Bedtime
divide between family privacy jurisprudence and the majority of families grows. As this "gap between legal rules and life" continues to widen, it is critical to consider the extent of the deprivation of privacy protection to nontraditional families and the concomitant disappearance of what historically has been great deference by the state in matters of family life.

This Article re-examines the landmark cases comprising the backbone of the family privacy doctrine and discloses, within the folds of their rhetoric of individual liberty, a policy of privacy promoting nuclear families. The re-examination of the landmark cases in Part II demonstrates that the policy of family privacy is to foster the creation and longevity of traditional, nuclear families. Part II illustrates how this policy has become more clearly articulated over time through the Court's restrictive interpretation of fundamental rights and its recent decision in Troxel v. Granville, the much-awaited ruling on grandparental visitation rights. In Part III, this Article turns to another body of privacy cases, namely, those vindicating the right to individual autonomy, and locates within their treatment of individual sexual and procreative decisions a notable concern for the well-being of nuclear families. This concern, in turn, influences the contours of these individual freedoms. This fresh look at these cases indicates that the quality of privacy vested in individuals depends upon the impact of

Story at a Time, N.Y. TIMES, June 17, 2001, at 1 (reporting that the number of households consisting of single fathers with primary custody of their children has risen fifty percent since 1990); Betsy Hammond, The 2000 Census More Say "I Do" to Cohabitation, PORTLAND OREGONIAN, June 6, 2001, at A01 (reporting that nine percent of all couples declared themselves "unmarried partners"); Jon Jeter, 'Covenant Marriages' Tie the Knot Tightly, WASH. POST, Aug. 15, 1997, at A1 (reporting that "the nation's divorce rate has soared more than 30 percent to the point that nearly half of all marriages now dissolve").

24. Scholars use the term "alternative families" or "nontraditional families" to denote families whose basis is not a marital unit. See, e.g., Ira Mark Ellman et al., FAMILY LAW: CASES, TEXT, PROBLEMS 929 (1998) ("nontraditional families"); D. Kelly Weissberg & Susan Frelitch Appleton, MODERN FAMILY LAW: CASES AND MATERIALS 397 (3d ed. 1998) ("alternative families"). Professor Martha Fineman has coined the term "intimate entities" to refer to "family-like groups that do not conform to the traditional model." Fineman, Our Sacred Institution, supra note 11, at 389 n.8. Societal acceptance of these families has increased in recent years. See Martha Irvine, Traditional Two-parent Families Continue to Decline, Survey Finds Americans Are Also More Accepting of Nontraditional Families, Researchers Say, PORTLAND OREGONIAN, Nov. 24, 1999, at A05.

25. DOLGIN, supra note 15, at 34; cf. Michael H. v. Gerald D., 491 U.S. 110, 157 (1989) (Brennan, J., dissenting) ("When and if the Court awakes to reality, it will find a world very different from the one it expects.").

26. See infra notes 32-170 and accompanying text.

27. See infra notes 171-407 and accompanying text.
individual autonomy on the integrity of nuclear families. If the impact is beneficial, individual autonomy is recognized; if it is detrimental, individual autonomy suffers.

Parts II and III also closely examine the evolution of the standard for announcing fundamental rights (including privacy) under the Constitution to disclose that this standard has become a tool in the perpetuation of bias in favor of traditional, nuclear families. Because, under constitutional law, any expansion of family privacy protection to other than nuclear families must begin with expanding the definition of family at the policy level, Parts IV and V explore whether policy reform will attenuate the nuclear family bias deployed through the Supreme Court’s privacy jurisprudence. To do this, Part IV takes up the law of succession (specifically, intestacy and will construction, construction of bequests containing restraints on marriage, and, finally, the law of undue influence) to disclose, as a historical matter, explicit policies in favor of marital families. This discussion will serve as a backdrop to Part V, which examines reforms—some already established and others merely proposed—aimed, at least in part, at expanding the law’s definition of family. A close evaluation of these reforms (specifically the extension of inheritance rights to nonmarital children, the movement toward openness in adoption, and trends in move-away custody disputes) locates within them the identical policy in favor of nuclear families that lies within constitutional family privacy jurisprudence. This Article concludes that the failure of present-day reforms to effect any meaningful change in family recognition will have a stunting impact far into the future on efforts to expand constitutional privacy protection to encompass newer forms of the family.

II. FAMILY PRIVACY

Justice Louis Brandeis and Samuel Warren’s seminal article advancing the concept of an evolving common law right of privacy was reportedly written in response to the explosion of the mass media in late nineteenth-century America.  

29. See infra notes 465-66 and accompanying text.
30. See infra notes 408-60 and accompanying text.
31. See infra notes 467-664 and accompanying text.
33. See Ken Gormley, One Hundred Years of Privacy, 1992 WIs. L. REV. 1335, 1350.
The article was a rallying cry for a legal response to intrusions on privacy that would vindicate one’s right “to be let alone.”

Privacy, originally construed as the right of an individual to be let alone, has evolved to include a set of principles that protect not only individual privacy but also what has come to be termed family privacy. The body of rights bound within this latter type of privacy includes diverse liberties. Said to have attained judicial recognition originally in the 1920s cases Meyer v. Nebraska and Pierce v. Society of the Holy Names of Jesus & Mary, this body of rights awaited full recognition until the 1960s and 1970s when its existence was discovered to be embedded in the penumbras surrounding the Bill of Rights, in general, and, more specifically, in the Fourteenth Amendment’s extension of the Fifth Amendment’s due process guarantees to the states.

Ever since the announcement of the constitutional right of family privacy, scholars have struggled to locate and describe its source. Some scholars trace family privacy rights to individual liberties or personhood and, thus, see family privacy as an extension of the right to be let alone. Professor Kenneth Gormley, for example, believes that family privacy, which he labels fundamental-decision privacy, is a subset of the right of individual autonomy. Other scholars see

34. Warren & Brandeis, supra note 32, at 193.
37. 262 U.S. 390 (1923).
38. 268 U.S. 510 (1925).
42. See Gormley, supra note 33, at 1396.
43. See Gormley, supra note 33, at 1406, 1420; accord Mary Ann Glendon, The New Family and the New Property 42 (1981); Brandon, supra note 40, at 1197 (“[A]s the Supreme Court has crafted the right to privacy the individualist rationale has prevailed . . . .”); Anne C. Dailey, Constitutional Privacy and the Just Family, 67 Tul. L. Rev. 955, 977 (1993) (“Conventional doctrinal history interprets Eisenstadt and subsequent decisions as confirming that the right of privacy, although historically rooted in family relations, actually protects the individual right of personal liberty.” (citing Laurence H. Tribe, American Constitutional Law §§ 15-20, at 1416-17 (2d ed. 1988) (“Such ‘exercises of familial rights and responsibilities’ as remain prove to be
family privacy rights as distinct from individual liberties. For example, although she recognizes Gormley’s account of family privacy in judicial decisions, Professor Radhika Rao nonetheless has argued that the right of privacy is not the right to be let alone but “the right to come together in close consensual relationships.” She theorizes that the role of privacy ends when conflicts arise between the individuals in such relationships, and the state steps in to determine their relative rights and responsibilities. Professor Janet Dolgin has articulated a hybrid position, arguing that, whereas initially articulated as a right inhering in nuclear families, family privacy has since shifted to inhere in individuals regardless of their membership in a nuclear family. In her scholarship, Dolgin...
explains this evolution as the result of a culture struggling both to preserve traditional understandings of family and to promote respect for individual autonomy. Despite these various views of what privacy is, what it should be, or in whom it vests, it is certain that privacy is a fundamental right protected from governmental interference without a compelling justification. Family privacy, broadly defined, embodies the idea that families, once constituted, have the right to be free from governmental interference.

While the most recent family privacy jurisprudence appears to champion the privacy rights of individuals, a careful analysis of these cases does not fully support the promotion of individual autonomy theory. Instead, family privacy cases show a definite tendency to reach results consistent with a policy not only of promoting the formation of nuclear families but also of promoting harmony within existing nuclear families. What appears in these cases to be the creation of privacy rights to protect individual choice, then, stems not from a concern for individual autonomy in the first instance but rather from a concern that the exercise of individual choice in any given instance may disrupt the harmony of nuclear families. This is not to say that individuals have no privacy rights of their own when posed against the rights of nuclear families but simply that the quality of privacy guaranteed to individuals in this context depends upon the gravity of the impact these individuals' choices have on nuclear families.

To illustrate this point, a mere survey of the landmark cases in the area of family privacy will not suffice. Instead, it is essential to scrutinize the foundation used for most of these decisions—that being the prevailing standard for the articulation of fundamental rights lying within the penumbras of the express guarantees of the Constitution. Underlying this jurisprudence is a selective use of tradition and history more consistent with Dolgin's account of the evolution of family privacy than with Gormley's. Ultimately, however, even Dolgin's account proves insufficient. What lies behind these cases is a rigid notion of the family that relies on the Court's interpretation of history and tradition in order to preserve the benefits of privacy protection for traditional families at all costs.

48. See Dolgin, Emerging Consensus, supra note 47, at 272.
49. See Roe v. Wade, 410 U.S. 113, 152 (1973) (declaring "a right of personal privacy, or a guarantee of certain areas or zones of privacy" to be protected by the Fourteenth Amendment).
A. The Origins of Family Privacy

The right to family privacy, protecting a "private realm of family life which the state cannot enter," owes its genesis to Meyer v. Nebraska and Pierce v. Society of Sisters of the Holy Names of Jesus & Mary. These two cases indirectly vindicated the right of parents to make decisions regarding the upbringing of their children without the intervention of the state. Although Meyer and Pierce served as precedents in support of the privacy right of couples to make decisions about procreation, they are not themselves procreative liberty cases, nor do they explain, with any particularity, the right of parents to make decisions regarding the upbringing of their children. In fact, these cases merely refer to, but do not develop, the principle of parental autonomy. Nonetheless, Meyer and Pierce, when viewed in the light of their progeny, Prince v. Massachusetts, Wisconsin v. Yoder, and Troxel v. Granville, are cases that establish the nuclear family as the locus of family privacy.

In Meyer, a teacher of German challenged a Nebraska statute outlawing the teaching of modern foreign languages to certain children in school. The goal of the statute was to promote the assimilation of children with foreign-born parents into American society. Although the Court found this goal desirable, it declared the means used to advance it—depriving teachers of their right to teach and denying parents their right to engage them to teach their children—violative of substantive due process. The Court emphasized this point by suggesting that failing to safeguard these rights would suppress individualism and to move society closer to a parentless state.

The recognition of the right of parents to make decisions regarding the education of their children without state interference was even more oblique in Pierce. In that case, the State of Oregon passed a law making public education compulsory for children aged eight to sixteen. Private schools complained that

52. 262 U.S. 390 (1923).
53. 268 U.S. 510 (1925).
59. See id. at 401.
60. See id. at 400.
61. See id. at 402.
the statute deprived them of property without due process of law because the effect of the law was the virtual destruction of their livelihood. The Supreme Court agreed, noting that the state's destruction of the plaintiffs' useful and meritorious undertakings constituted an arbitrary and unreasonable exercise of power. The decision appears scarcely to have championed parental rights at all, save for an aside criticizing Oregon's attempt to standardize the education of its children: "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." Along with Meyer, this brief aside in the midst of a property rights case inspired later opinions to announce a general right of parental autonomy in making child-rearing decisions.

In Wisconsin v. Yoder, Amish parents brought First and Fourteenth Amendment challenges to their convictions for violating a law compelling children to attend school until the age of sixteen. This provision conflicted with the Amish belief that formal education should terminate upon completion of the eighth grade so that Amish children would not become subject to worldly influences. The vocational education Amish children received at home after the eighth grade did not qualify for any of the exceptions to the state's compulsory school attendance law because it was not "substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside." In reviewing the matter, the Supreme Court referred to Pierce as support for its pronouncement that parents have autonomy in the religious upbringing and education of their children. The Court invalidated the Wisconsin statute as applied to the Amish on the ground that it infringed the Amish community's religious liberty.

In reaching its conclusion, the Yoder Court went to great pains to describe the Amish as an intact society, existing within the larger American society, made up of fervently religious people working family farms and valiantly resisting the pressure to conform. In the course of its encomium of the Amish idyll, the

63. Id. at 532-33.
64. See id. at 536.
65. Id. at 535.
67. See id. at 210-11.
68. See id. at 207.
69. Id. at 207 n.2.
70. See id. at 213-14.
71. See id. at 235-36.
72. See id. at 229.
73. See id. at 216-17.
74. See id. at 222-23.
Supreme Court distinguished its earlier decision, *Prince v. Massachusetts*. In that case, Sarah Prince, a Jehovah's Witness and the custodian of a nine-year-old child, brought her charge to help her distribute religious literature to people on the street. The police, claiming Prince allowed the child to sell the literature, arrested her for violating Massachusetts's child labor laws. Prince was prosecuted and convicted, but she challenged her conviction on the basis of religious and parental liberties. Despite the fact that the magazines were not offered for sale in the true sense and that the child, in any event, did not sell any, the Supreme Court was not sympathetic to Prince's claim. In fact, the Court appeared somewhat chagrined at having to resolve yet another dispute between the Witnesses and state officials.

With this chagrin as its dominant tone, the Court in *Prince* painted the facts of the case in a much less positive light than it did in *Yoder*. To the Court, *Prince* involved a proselytizing unmarried female guardian exposing her child to unsavory influences on the cold streets of Brockton, in *Yoder*, by contrast, the Court described the parents as respectable members of a prosperous religious community, in which parents protected their children from corrupting influences and taught them meaningful trades. The *Yoder* Court extolled the productive and law-abiding Amish, their high rate of employment, and, despite their "idiosyncratic separateness," their highly self-sufficient community. There was more than a hint of adulation in *Yoder* of the pure motives of the Amish and of their simple, laudable pursuits that in no way interfere with the rights of others. In short, the Court crafted a vision of Amish life as a peaceful refuge from the world outside, which is itself a striking metaphor for the privacy of the ideal family. Such a tone of reverence is utterly missing from *Prince*. Indeed, the Court's dismissive attitude in that case betrayed its disapproval of the Witnesses's failure to be separate from society and to pursue their beliefs in a manner less intrusive upon the privacy of others.

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75. 321 U.S. 158 (1944).
76. Id. at 162.
77. Id. at 160.
78. See id. at 164.
79. See id. at 161 & n.4 ("The story told by the evidence has become familiar.").
80. See id. at 168.
82. See id. at 222.
83. See id. at 222 n.11.
84. Id. at 226.
85. See id. at 225.
86. See id. at 224.
The policy of family privacy

It is a challenge to reconcile the different results in these cases, as both had their origins in accusations by enforcement authorities that parents had directed their children to break the law. In Prince, this was likened to parental abuse and neglect. The Court characterized Prince's actions as forcing her charge into martyrdom \(^{88}\) and as posing a threat to her "health and welfare."\(^{89}\) In Yoder, by contrast, the Court found the parents' actions to be of no harm whatsoever because they were the product of deeply held beliefs.\(^{90}\) One could conclude that the sharp contrast between the two opinions was based on the religion of the parties. A closer reading of the opinions, however, reveals that whatever religious bias they evince is mixed with a marked deference to intact families. Even though Sarah Prince was the child's aunt, in the opinion she is consistently described as a "custodian"\(^{91}\) or "guardian."\(^{92}\) The word "family" is never used to define the relationship between Prince and her niece, despite their consanguineous bond. In Yoder, "family" appears in descriptions of the Amish lifestyle at least four times.\(^{93}\) It is emphasized in particular to demonstrate that Amish children's agrarian employment, in contrast to the Prince child's urban toil, is not exploitative because it takes place on "family farms."\(^{94}\) Given the tenor of these opinions, it is arguable that the Prince's resemblance of something less than the tightly knit families in Yoder accounts, at least in part, for the difference in the outcomes. Later cases in the family privacy area provide substantial support for this position.

B. The Limits of Family Privacy

The constitutional right of privacy owes its existence to the notion that the Constitution guarantees the fundamental rights of all citizens. In safeguarding privacy as a fundamental right, the Court subjects state action that infringes on privacy rights to strict scrutiny, an exacting standard under which the state action "must be necessary to promote a compelling interest."\(^{95}\) Although this standard certainly goes a long way toward protecting privacy rights from interference by state actors, there continues to be disagreement on the Court about the scope of the right of privacy. As an aid in defining the specific contours of this right, the Supreme Court has announced criteria meant to define fundamental rights.

\(^{88}\) See id. at 170.
\(^{89}\) Id. at 171 (internal quotation marks omitted).
\(^{90}\) See Yoder, 406 U.S. at 230.
\(^{91}\) Prince, 321 U.S. at 159.
\(^{92}\) Id. at 167.
\(^{93}\) Yoder, 406 U.S. at 207, 216, 229.
\(^{94}\) Id. at 229.
\(^{95}\) JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.6(a), at 348 (5th ed. 1995).
generally. Fundamental rights have been described variously as those rights that are “implicit in the concept of ordered liberty,”96 are “deeply rooted in this Nation’s history and tradition,”97 and reflect the “‘traditions and (collective) conscience of our people.”98 Early substantive due process cases in the family context used these various criteria to develop an expansive view of fundamental rights—one that was coextensive with the justices’ evolving notions of what constituted a just society.99

In Moore v. City of East Cleveland, the Court sought to continue this tradition. In this case, the Court prevented East Cleveland from exercising its zoning powers to define “family” so as to prohibit a grandmother from living with two sets of her grandchildren.100 In so ruling, the Court asserted that it was “acknowledg[ing] a ‘private realm of family life which the state cannot enter.’”101 Despite its vindication of the privacy rights of a non-nuclear family, however, the decision in Moore actually inhibited recognition of privacy protection for non-nuclear families. Although the Court in Moore went to great pains to articulate that “the institution of the family is deeply rooted in this Nation’s history and tradition,” it failed to define family beyond saying it is more than “the nuclear family.”102 The Court’s purpose in leaving the concept of the family so undefined was to suggest that it should not be subject to enforced standardization.103 It invoked the notion that, because the traditions upon which American society was

97. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (referring to the Constitution’s protection of “the sanctity of the family”).
99. See Thomas B. Stoddard, Bowers v. Hardwick: Precedent by Personal Predilection, 54 U. Chi. L. Rev. 648, 648 (1987) (characterizing the Warren Court as “subscribe[ing] to the concept that the principles of the Constitution should not be frozen in time, but should grow in meaning as the country itself evolves”).

In the years immediately preceding Moore, the Court generally began to curtail the scope of constitutional fundamental rights. See, e.g., Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (determining government employment not to be a fundamental right); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35-37 (1973) (determining education not to be constitutionally guaranteed). This was a development some jurists decried. See, e.g., Murgia, 427 U.S. at 319 (Marshall, J., dissenting) (lamenting the Court’s loss of interest in recognizing fundamental rights).
101. Id. at 499 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
102. Id. at 503, 504.
103. See id. at 507 (Brennan, J., concurring).
found to be living and evolving, the definition of the family is subject to change over time. In the process of expounding this living Constitution, however, the Court made the unfortunate decision not to overrule Village of Belle Terre v. Boraas, a case making it very clear that more than two individuals not related consanguinely or through adoption cannot constitute a family in the absence of marriage. Compounding the lack of precision in the majority's opinion was the concurrence, which, although striving to articulate the liberty at issue with more particularity, made the mistake of associating the non-nuclear family with poverty and disadvantage, suggesting that non-traditional families should be protected only when they are not a matter of choice.

Judicial reaction to Moore circumscribed judicial discretion to announce "new" penumbral rights. The Court limited the scope of already decided privacy cases to their facts, limited fundamental rights generally to those consistent with majoritarian sentiments held at the time that the relevant express constitutional guarantee was enacted, and began framing the issue in fundamental rights cases at an extremely high level of specificity. The new interpretive approach had a striking impact on family privacy cases.

104. See id. at 502 (citing Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting)).
106. See id. at 2 (citing a local zoning ordinance).
107. See Moore, 431 U.S. at 512 (Brennan, J., concurring) (articulating the issue as "the freedom of personal choice of related members of a family to live together").
108. See id. at 507-10 (Brennan, J., concurring).
109. See, e.g., Bowers v. Hardwick, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."); (citing Moore, 431 U.S. at 544 (White, J., dissenting))).

110. See, e.g., City of Mobile v. Bolden, 446 U.S. 55, 114 n.9 (1980) (Marshall, J., dissenting). But see Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 940 (1992) (Blackmun, J., dissenting in part) (objecting to the "laundry list of particular rights, rather than a principled account of how these particular rights are grounded in a more general right of privacy"); Harper v. Va. State Ed. of Elections, 383 U.S. 663, 669 (1966) (noting that the Supreme Court has never "restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights").


112. See David D. Meyer, The Paradox of Family Privacy, 53 Vand. L. Rev. 527, 564 (2000) [hereinafter Meyer, Paradox of Privacy] (opining that the unlikelihood of a statute's surviving strict scrutiny leads the Court to describe the claimed right narrowly). This manner of framing the issue is said to be required by the necessity of describing traditions in the most specific terms possible. See Michael H., 491 U.S. at 127 n.6.
Perhaps no decision more reflects the notion that the Supreme Court’s privacy jurisprudence, at its root, strives to promote and maintain nuclear families than does the Court’s treatment of fundamental rights in *Michael H. v. Gerald D.* In that case, Carole, Gerald D.’s wife, gave birth to Victoria. Victoria, however, was fathered not by Gerald, but rather by Michael H., a neighbor. According to a controlling filiation statute, only Gerald or Carole could rebut the presumption that Victoria was a child of their marriage. Because neither wished to do this, Michael, despite having had an ongoing relationship with Victoria for eleven months during the first three years of her life, had no avenue by which to establish his paternity and obtain court-ordered visitation.

Michael challenged the statute on due process grounds, claiming a right to a relationship with his biological child. The Supreme Court found this claimed right to be grounded neither in history nor in tradition and, thus, not truly fundamental when weighed against the “sanctity... traditionally accorded to... the unitary family.” Mimicking *Bowers v. Hardwick*, the Court restyled Michael’s asserted liberty interest as the “right to legal parentage on the part of an adulterous natural father” and denied the fundamentality of such a right due to “a societal tradition of enacting laws denying [such an] interest.”

Filling the gap left by *Moore*, and echoing *Moore’s* dissent, the *Michael H.* Court

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114. *Id.* at 113.
115. *See id.* at 113-14.
116. *See id.* at 113.
117. *See id.* at 115.
118. *See id.* at 124 n.3.
119. *See id.* at 115-16. Michael also brought an equal protection challenge to the statute. *See id.* at 116. The Court declined to address it because Michael did not raise it in the lower courts. *See id.* at 116-17.
120. *Id.* at 123.
123. *See id.* at 124.
124. *Id.* at 123 n.2, 127 n.6.
125. In his dissent, Justice Stewart said:

The interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to that level. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition.

made it clear that the family was "typified, of course, by the marital family," and concluded that, although the unitary family might include nonmarital families, it most certainly did not include families such as the one to which Michael claimed to belong. In his dissent, Justice Brennan complained at length that the plurality had simply exchanged one malleable concept (liberty) for another (tradition). He then charged the plurality with appealing to tradition but ignoring Supreme Court precedent on family relationships and with forging a "pinched conception of the family" in the process. Finally, he objected to the plurality's excessively narrow statement of the issue as a "novel[] interpretive method," which would have resulted in vastly different decisions in some of the Court's most important substantive due process cases. By focusing relentlessly on marriage as "the critical fact" depriving Michael of standing to assert his parental rights, the plurality, in Brennan's opinion, had turned the Constitution into "a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past." As if responding to this blistering denunciation, California amended its law to allow persons in Michael's position to rebut the presumption of paternity. Although California obviously felt its policy regarding this issue

126. Michael H., 491 U.S. at 123 n.3.
127. See id. Victoria, through her attorney ad litem, petitioned to be named the child of any "psychological or de facto father," and joined Michael in his constitutional challenge of the California statutory scheme. See id. at 114-15. These claims, along with her asserted right to continued visitation with Michael were rejected by the California courts, and Victoria joined in Michael's appeal to the Supreme Court. See id. at 116. The Court determined that Victoria's asserted interests were even "weaker than Michael's" and, as such, rejected her due process challenge. Id. at 130. The Court concluded that multiple fatherhood was not part of "the history or traditions of this country." Id. at 131.
128. See id. at 137 (Brennan, J., dissenting).
129. See id. at 138 (Brennan, J., dissenting).
130. Id. at 145 (Brennan, J., dissenting); cf. Troxel v. Granville, 530 U.S. 57, 91 (2000) (Stevens, J., dissenting). In his dissent, Justice Stevens said:
[T]he instinct against over-regularizing decisions about personal relations is sustained on firmer ground than mere tradition. It flows in equal part from the premise that people and their intimate associations are complex and particular, and imposing a rigid template upon them all risks severing bonds our society would do well to preserve.
Troxel, 530 U.S. at 91.
131. Michael H., 491 U.S. at 140 (Brennan, J., dissenting).
132. Id. at 144 (Brennan, J., dissenting).
133. Id. at 141 (Brennan, J., dissenting).
134. See DOLGIN, supra note 15, at 115 n.58.
135. See CAL. FAM. CODE § 7541(b) (West 1994 & Supp. 2001) ("The notice of
had changed, the policy of privacy expounded in Supreme Court jurisprudence has not. The Michael H. Court’s holding—that a man who fathers a child born to a woman during her marriage to another man has no constitutional right to paternity—remains the law today.

The scope of fundamental rights and the criteria used to define that scope continue to be sources of controversy. Despite the desire of adherents to the new approach to appear to “anchor [their] decisions in timeless concepts, like justice or natural law,” the restrictive approach is simply one of many possible approaches to constitutional interpretation. The Court’s claim that it is bound by this interpretive approach as a way of curbing judicial bias, avoiding results-driven decisionmaking, or even eschewing the role of “super-legislature” is unconvincing on several grounds, not the least of these being that the Court’s current interpretive approach rests on the shaky ground of “limited evidence, social change, and the inherent ambiguity of past beliefs and intentions.”

This, coupled with the fact that the Court is not particularly faithful to this approach strongly suggests that its adherence to it is largely a matter of choice. By motion for blood tests under this section may be filed not later than two years from the child’s date of birth by the husband, or for the purposes of establishing paternity by the presumed father or the child through the child’s guardian ad litem.

136. Michael H., 491 U.S. at 126.
141. See Erwin Chemerinsky, The Vanishing Constitution, 103 HARV. L. REV. 43, 51 (1989) (“[T]he conservative majority of the Rehnquist Court at times adopts and at times rejects originalism, process theory, and tradition as the basis for constitutional interpretation.”). The Warren Court was criticized for making activist rulings based on the personal values of the justices on the bench. See Morton J. Horwitz, The Warren Court and the Pursuit of Justice 112 (1998); Anthony Lewis, Abroad at Home; The Supreme Power, N.Y. TIMES, June 29, 1999, at A19. Likewise, the Rehnquist Court has the predilection to select carefully traditions and practices, or, when faced with a multiplicity of them, to select the one most in line with the results it seeks. See, e.g., City of Chicago v. Morales, 527 U.S. 41, 53 n.20 (1999) (declaring anti-loitering laws unconstitutional where tradition was clearly to ban loitering); see also Stoddard, supra note 99, at 656.
142. See Meyer, Paradox of Privacy, supra note 112, at 563 (“[T]he Court retains considerable room to maneuver in defining the scope of fundamental rights.”). Other high courts with similar concerns regarding judicial activism have rejected this approach as
choosing this approach, the Court has selected a formidable tool with which to forge a legacy for family privacy, leaving little doubt that its aims are to promote and maintain the integrity of nuclear families.

C. The Legacy of Family Privacy

Forty-six years after Prince, the Court vindicated the right of parents to exercise autonomy over the upbringing of their children in Troxel v. Granville, the long-awaited decision evaluating grandparental visitation rights. The dispute arose from Tommie Granville’s decision to limit visits to her children by their paternal grandparents Jenifer and Gary Troxel. Granville and the Troxels’ son Brad had never married, and they parted company soon after the birth of their two daughters. After Brad committed suicide, Granville decreased the Troxels’ visitation with their granddaughters from every weekend to once per month. The Troxels sued to expand their visitation, invoking a statute that allowed any person to petition the court for visitation rights according to the best interests of the child. The Troxels prevailed in the trial court, but Granville, having subsequently remarried and her new husband having formally adopted her daughters, successfully appealed the decision. The Washington Court of Appeals decided that the statute was not intended to allow non-parents to seek visitation in the absence of a pending custody action. The Washington Supreme Court disagreed, viewing this analysis as contrary to the plain language of the statute. Nonetheless, the court affirmed the lower court, ruling that, as a matter of federal constitutional law, the statute infringed on the fundamental right of

unsuited to principled constitutional jurisprudence. See, e.g., Pro-Choice Miss. v. Fordice, 716 So. 2d 645, 651 (Miss. 1998) (declaring it “a mistake to suppose that a constitution is to be interpreted only in the light of things as they existed at the time of its adoption” (quoting Stepp v. Stepp, 32 So. 2d 447, 447 (Miss. 1947))).

144. Id. at 60.
145. See id.
146. See id.
147. See id. at 61 (citing WASH. REV. CODE ANN. § 26.10.160(3) (West 1997)).
148. See id. at 61, 62.
parents to rear their children. The state Supreme Court was of the opinion that the United States Constitution forbids a grant of non-parental visitation contrary to a parent's wishes without a showing of harm or potential harm to the child.

The United States Supreme Court, in a fractured decision, affirmed. Apart from validating the principle that parents have the right to raise their children without governmental interference, the Court did little to define what types of families would qualify for this privacy protection. Invoking Meyer, Pierce, Prince and another case, Parham v. J.R., the Court determined that the Washington statute disregarded the traditional presumption that parents act in the best interests of their children. The Court explained that this presumption precludes a parent from being placed in the position of "disproving that visitation would be in the best interest of her daughters." Instead, the Court required some level of deference to a parent's determination of her child's best interests. The Court declined to define what level of deference would be required and did not explain whether this presumption applied equally to all parents. But the Court strongly implied that such deference would control in the absence of a finding that a parent was unfit. Appearing to consider the changing demographics of the

151. See id. at 30 ("For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all.").

152. See id. at 29 ("It is clear from Supreme Court precedent that some harm threatens the child's welfare before the state may constitutionally interfere with a parent's right to rear his or her child.").

153. See Troxel, 530 U.S. at 75.

154. See id. at 66 ("It cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

155. 442 U.S. 584 (1979). In Parham, children whose parents or guardians committed them to a state mental hospital challenged their admission on due process grounds. See id. at 590. In rejecting the claim that a formalized, fact-finding hearing was needed in such cases, the Supreme Court reasoned that parents, not children, possess the maturity required to make difficult decisions and that "the traditional presumption that the parents act in the best interests of their child should apply." Id. at 602, 604.


157. Id. at 69 (emphasis in original).

158. See id. at 70 (Stevens, J., dissenting) ("[I]f a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." (emphasis added)). Parental unfitness can lead to the removal of a child from the home and the commencement of a termination proceeding. See Homer H. Clark, 2 THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 21.6, at 624, § 21.7, at 631 (2d ed. 1987). In such proceedings, the Supreme Court has mandated that the minimum standard of proof is clear and convincing evidence, citing the need for error-reducing procedures in the interest of avoiding erroneous
American family, the Court was nonetheless careful to characterize grandparents as third parties who, having often assumed responsibilities of a parental nature, should be considered for visitation privileges if child welfare is thereby promoted. Ultimately, though, the Court declined to define “the precise scope of the parental due process right in the visitation context.”

Justice Stevens, misreading the Troxel majority’s opinion to require a showing of “actual or potential ‘harm’ to the child before a court may order visitation continued over a parent’s objections,” objected strenuously to what he characterized as treating “a biological parent’s liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily.” Troxel, 530 U.S. at 70 (Stevens, J., dissenting).

Although appearing to think in an expansive way about the family and calling for greater recognition of children’s liberty interests in preserving intimate relationships, Justice Stevens, in dissent, presented an argument on the scope of parental autonomy that is difficult to distinguish from the majority’s. See id. at 88 (Stevens, J., dissenting) (theorizing that parental rights are not dictated by biology but are dependent on “some embodiment of family”). Recalling Moore, Stevens failed to define the family in any way that would call into question the holdings in Michael H. v. Gerald D., 491 U.S. 110 (1989), and Lehr v. Robertson, 463 U.S. 248 (1983). Moreover, both Stevens and the majority characterized parental rights as deserving special consideration when weighing them against the best interests of the child. See Troxel, 530 U.S. at 89-90 (Stevens, J., dissenting) (asserting that all best interests determinations must begin with the presumption that parents act in their child’s best interests).

Justice Kennedy, dissenting, expressed concern that the majority’s decision swept too broadly in establishing harm to the child as the controlling standard in every visitation proceeding. Id. at 94 (Kennedy, J., dissenting). Commenting that “the conventional nuclear family ought [not] establish the visitation standard for every domestic relations case,” Justice Kennedy pointed out that in many families caregiving roles are assumed by persons other than biological or adoptive parents. Id. at 98-99 (Kennedy, J., dissenting) (citing Moore v. City of East Cleveland, 431 U.S. 494 (1977)). Although he sounded support for nontraditional families, Justice Kennedy’s argument was actually quite narrow. He did not argue that the best interests standard should be the standard used in all third-party visitation cases, but rather that the standard should not be ruled out in all cases. Id. (Kennedy, J., dissenting). His argument could support a double standard for third parties seeking visitation—a higher standard for those seeking visitation with children within traditional, nuclear families, and a lower standard for those seeking visitation with children within nontraditional, alternative or fractured families. Cf. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 122 (1995) [hereinafter FINEMAN, NEUTERED MOTHER] (“[S]ingle mothers are presumed to be abusive.”); Fineman, Family in Society,
Prior to the *Troxel* decision, commentators forecast that the case would have a significant impact on the recognition of nonmarital families if the Troxels' claims were validated.\(^\text{163}\) Although this did not occur, it bears noting that the standing granted by the statute invalidated in *Troxel* was "breathtakingly broad."\(^\text{164}\) It granted standing to virtually any person who wished to petition for visitation. The decision, thus, appears to have little impact on grandparental visitation statutes that restrict standing to grandparents alone or to a relatively narrowly defined set of individuals.\(^\text{165}\) In addition, the decision offers little incentive for states to repeal or rewrite statutes that permit courts to grant visitation in a child's best interests where the child's parent has never been married or where the parents' marriage is somehow "fractured" by death or by divorce.\(^\text{166}\) Why the Court was not more definitive in providing the states direction

*supra* note 16, at 541-42 (remarking that the law treats "unmarried motherhood [as] a proxy for poor organizational skills and individual immorality"). This regime is already established by many grandparental visitation statutes, cited with approval by Justice Kennedy, and is not called into question by the majority opinion in *Troxel*. Under many of these statutes, given that Granville had remarried and provided her daughters a traditional nuclear family, it would have been contrary to both the majority's and Justice Kennedy's reasoning *not* to afford her the highest level of deference possible. See, e.g., *Tex. Fam. Code Ann.* § 153.434 (Vernon 1996 & Supp. 2001) (providing grandparents no standing to seek visitation until the marital unit is "fractured"); *O'Brien v. O'Brien*, 684 _k2d_ 1352, 1354 (N.H. 1996) (providing grandparent standing only where there is an "absence of nuclear family," which may include the parents' unwed status).

163. See, e.g., David Jackson, *Justices Hear Debate on Grandparents' Rights*, DALLAS MORNING NEWS, Jan. 13, 2000, at 1A.


165. See, e.g., *Jackson v. Tangreen*, 18 _P.3d_ 100, 103 (Ariz. Ct. App. 2000) (distinguishing a statute permitting an order of visitation even where the new spouse has adopted the grandchildren as "much more narrowly drawn" than the statute at issue in *Troxel*); *State v. Paillet*, 16 _P.3d_ 962, 971 (Kan. 2001) (declining to declare a grandparental visitation statute unconstitutional on its face because the *Troxel* ruling did not apply to "specific nonparental visitation statutes" (quoting *Troxel*, 530 U.S. at 73)). *But see* *Brice v. Brice*, 754 _A.2d_ 1132, 1136 (Md. Ct. App. 2000) (declaring a grandparental visitation statute unconstitutional on its face because "*Troxel* was not decided on the fact that 'any person' could petition" but, rather, on the fact that the grandparents did petition).

THE POLICY OF FAMILY PRIVACY

concerning the constitutionality of these statutes is not entirely clear, particularly given that the previously discussed precedents do not explicitly elevate the rights of married parents over those of unmarried parents. In fact, the marital status of the parents in Meyer, Pierce, and Yoder, and of the guardian in Prince is never mentioned in those opinions. Hence, it appears that Troxel adds to these cases a new criterion for the exercise of parental autonomy; the decision suggests that the quality of parental autonomy guaranteed in any given case depends on the parents’ marital status.

Although the Troxel Court gave a nod to nontraditional families, it remains an open question whether a nontraditional family, under the current standard for articulating fundamental rights, could be deemed a locus of privacy protection, despite the potential equal protection issues that would be raised by such differential treatment.

Whether Granville’s


167. The problem lies partly in the failure of the Court to articulate the relevant standard of review to be applied in such cases. Professor David Meyer has theorized that the reason the Court was not more explicit in articulating one in Troxel is that it is gradually resurrecting the reasonableness standard of review from Lochner-era family privacy precedents. See David D. Meyer, Lochner Redeemed: Family Privacy After Troxel and Carhart, 48 UCLAL. Rev. 1125, 1183-84 (2001). The Court’s lack of clarity in this regard has resulted in widely varying decisions in the state courts. Compare Jackson v. Tangreen, 18 P.3d 100, 103 (Ariz. Ct. App. 2000) (declaring a statute constitutional under rational basis scrutiny), with Lulay v. Lulay, 739 N.E.2d 521, 534 (Ill. 2000) (declaring a statute unconstitutional, as applied, under strict scrutiny).


169. See supra notes 119-27, infra notes 218-25, and accompanying text.

170. See infra notes 557-61 and accompanying text. State court decisions
parental autonomy would have been granted as much deference had she never married, or had she married Brad Troxel, divorced him, and had never remarried is unknown, and will have to await a future Supreme Court decision.

In the sixty years since the right of family privacy was first spotted on the constitutional law landscape, its contours have seen little change. What has changed is the number of social arrangements, popularly known as families, that do not align with the type of families that the Court has graced with privacy protection. As a result, these unrecognized social arrangements do not qualify for privacy protection. While aware of these changing demographics, the Court, nonetheless, has become adamant in its defense of nuclear families, to the point that it risks treading on equal protection principles raised in other privacy cases that mandate equal treatment of the married and the unmarried. As Part III reveals, however, this understanding of what equal protection means in the context of family privacy may be overstated. Despite the many landmark privacy cases that have been decided since Meyer and Pierce—cases that revolutionized the concept of family privacy by recognizing individual autonomy rights—the law of family privacy remains focused squarely on the defense and promotion of nuclear families.

III. INDIVIDUAL PRIVACY

Although none of the family privacy cases described in Part II dealt with sexual or procreative liberty, they served as precedents for Griswold v. Connecticut\textsuperscript{171} and Eisenstadt v. Baird,\textsuperscript{172} which do. These cases have been described as cases that redefined the source of family privacy as located not in families\textit{ per se} but in individual family members. A re-examination of these cases and their successors, nonetheless, demonstrates that individual privacy rights are influenced by concern for promoting the interests of nuclear families.

considering the scope of unwed parents' parental autonomy suggest that family privacy protection may be deprived in such cases.\textit{ See, e.g.,} O'Brien v. O'Brien, 684 A.2d 1352, 1354 (N.H. 1996) (providing grandparent standing only where there is an “absence of nuclear family,” which may include the parents’ unwed status); Roberts v. Ward, 493 A.2d 478, 481 (N.H. 1985) (“Parental autonomy is grounded in the assumption that natural parents raise their own children in nuclear families, consisting of a married couple and their children.”);\textit{ In re} Custody of Smith, 969 P.2d 21, 38 (Wash. 1998) (Talmadge, J., dissenting) (citing above language from Roberts).

171. 381 U.S. 479 (1965).
A. From Griswold to Hardwick

Beginning in 1879 and continuing until the early 1960s, the use of contraceptives was a criminal offense in Connecticut. In Griswold, physicians, who counseled married persons in the use of contraceptives and who, as a result, were convicted of being accessories to the commission of a crime, challenged the Connecticut statute on constitutional grounds. In striking down the statute, the Supreme Court referred to Meyer and Pierce as examples of cases recognizing zones of privacy emanating from the specific guarantees of the Bill of Rights. The Court emphasized that the facts of the case involved married persons and that marital intimacy should not be interfered with:

Adultery, homosexuality and the like are sexual intimacies which the State forbids... but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality... or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

Reasoning from the premise that nothing is as private as marriage, the Court disapproved of a statute it felt encouraged state authorities to invade marital bedrooms in the search for signs of contraceptive use.

Despite the Court’s valorization of marital privacy, it was not long before it declared that, as a matter of equal protection, where married persons have the

174. See Griswold, 381 U.S. at 480. A prior challenge, Poe v. Ullman, had been dismissed due to the statute’s lack of enforcement. See Poe, 367 U.S. at 508 (“The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication.”).
175. See Griswold, 381 U.S. at 484; see also id. at 495 (Goldberg, J., concurring); id. at 502 (Harlan, J., concurring).
176. See id. at 480.
177. Id. at 498 (Goldberg, J., concurring) (quoting Poe, 367 U.S. at 553 (Harlan, J., dissenting)).
178. See id. at 486; see also id. at 495 (Goldberg, J., concurring) (quoting Poe, 367 U.S. at 552 (Harlan, J., dissenting)).
179. See id. at 485.
right to obtain contraceptives, unmarried persons also must have the right.\textsuperscript{180} This was in the case of \textit{Eisenstadt}, wherein William Baird, a lecturer on contraceptive techniques, challenged his conviction for distributing contraceptive foam at the conclusion of his talk.\textsuperscript{181} Baird asserted the rights of unmarried persons who, under the relevant Massachusetts statute, were forbidden from obtaining contraceptives for the purpose of preventing pregnancy.\textsuperscript{182} The Supreme Court declared the statute unconstitutional because Massachusetts could show no rational relationship between its goal of preventing premarital sex and its denial to the unmarried of access to contraceptives.\textsuperscript{183} So “riddled with exceptions”\textsuperscript{184} was the statute at issue in \textit{Eisenstadt} that, on the one hand, the conclusion drawn by the court appears to have been quite easy to reach. On the other hand, however, the logic of the case is questionable.\textsuperscript{185} Although \textit{Eisenstadt} relied on \textit{Griswold} for its holding, in \textit{Griswold} the right of married persons to use contraceptives was a natural outgrowth of the veil of privacy surrounding the marital bedroom. Nonetheless, the \textit{Eisenstadt} Court reconceived \textit{Griswold} in the following form:

\textit{[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.}\textsuperscript{186}

The odd ring of this characterization is due largely to the fact that the Court in \textit{Griswold} never mentioned the role of procreation in the marital relationship. \textit{Griswold} was, then, of little support to \textit{Eisenstadt}, where no analogous locus of privacy existed. Pointing out that Massachusetts unquestionably had the right to criminalize fornication and adultery,\textsuperscript{187} which is presumably what an unmarried person has in mind when she procures contraceptives, the \textit{Eisenstadt} Court

\begin{itemize}
\item \textsuperscript{180} See \textit{Eisenstadt} v. Baird, 405 U.S. 438, 453 (1972) (“[W]hatsoever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”).
\item \textsuperscript{181} See \textit{id.} at 440.
\item \textsuperscript{182} See \textit{id.} at 442.
\item \textsuperscript{183} See \textit{id.} at 448.
\item \textsuperscript{184} \textit{Id.} at 449.
\item \textsuperscript{185} See \textit{ELLMAN ET AL., supra} note 24, at 1003 (“Most commentators have agreed that the logic of the Equal Protection argument [in \textit{Eisenstadt}] simply does not hold up.”).
\item \textsuperscript{186} \textit{Eisenstadt}, 405 U.S. at 453.
\item \textsuperscript{187} See \textit{id.} (conceding the prerogative of the state to proscribe fornication).
\end{itemize}
emphasized that Massachusetts' interest in deterring premarital sex was not itself illegitimate; rather, the means chosen to advance it were not rationally related to it.\(^{188}\) Thus, although Griswold protects intimate acts between the members of a married couple, Eisenstadt does not protect intimate acts between unmarried persons; instead, it only protects a right to decide whether to have children.\(^{189}\) The opinion avoids contradicting itself only if the point it makes is that where unmarried persons intend to engage in conduct potentially leading to pregnancy—even where the conduct is illegal—they, nonetheless, should be free to obtain contraceptives.

Despite the important role scholars claim Eisenstadt has played in shifting the source of family privacy from the family to the individuals comprising it and, thus, in ushering in an era of sexual autonomy,\(^ {190}\) the right the Eisenstadt Court announced is actually quite narrow. The reasoning of Eisenstadt does not support the proposition that there is a right to engage in sexual relations that do not involve procreative decisions.\(^ {191}\) Although Eisenstadt's equal protection analysis suggests that the unmarried are similarly situated to the married, legislatures are free to criminalize sexual acts between the unmarried, even acts that are potentially

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188. See id. at 448-50.
189. See id.
190. See, e.g., NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 199 (2000); Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187, 225-29 (theorizing that the capability to engage in sexual relations and the ability to control whether to bear or beget a child are ultimately grounded in individual privacy rights); Stoddard, supra note 99, at 653 (describing Eisenstadt as "extend[ing] the privacy right enunciated in Griswold to the unmarried"); Karin E. Wilinski, Note, Involuntary Contraceptive Measures: Controlling Women at the Expense of Human Rights, 10 B.U. Int'l L.J. 351, 355 (1992) (claiming that Griswold and Eisenstadt protect "the right to have sex free of governmental control and to do so with or without contraceptives" (quoting Note, Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex, 104 HARV. L. REV. 1660, 1664 (1991))).
Even the most inherently nonprocreative of all sexual acts, mutual masturbation, conceivably could be criminalized for the unmarried but not the married. None of this means, of course, that the Supreme Court would be unwilling to announce a general right of unmarried persons to engage in sexual relations in a future case, just that, to date, it has gone out of its way not to do so.

The Court heard more on the contraception debate in *Carey v. Population Services, International*. In that case, a company selling contraceptives through the mail challenged a statute outlawing distribution of contraceptives to persons younger than sixteen and requiring a pharmacist to distribute them to persons sixteen or older. A federal district court declared the statute unconstitutional. The Supreme Court, affirming the lower court, invoked *Eisenstadt*’s description of an individual’s decision to cause or to prevent procreation as “among the most private and sensitive.” The appellants challenged *Eisenstadt*’s applicability to the case, noting that it had dealt with equal access to contraceptives by both the married and the unmarried but that the statute at issue made no distinctions.

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192. *See, e.g.*, Doe v. Duling, 782 F.2d 1202, 1204 (4th Cir. 1986) (citing prohibition of cohabitation and fornication under Virginia law); Oliverson v. West Valley City, 875 F. Supp. 1465, 1479 (D. Utah 1995) (holding that the right of privacy does not shield adultery against sanction by the state); City of Sherman v. Henry, 928 S.W.2d 464, 471-72 (Tex. 1996) (same); *see also* Carey v. Population Servs., Int’l, 431 U.S. 678, 718 n.2 (1977) (Rehnquist, J., dissenting) (“While we have not ruled on every conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been ‘definitively’ established.” (citing Doe v. Commonwealth’s Att’y, 425 U.S. 901 (1976))).


194. *See* Carey v. Population Servs., Int’l, 431 U.S. 678, 688 n.5 (1977) (declining to answer whether there is any constitutional right to engage in private, consensual, sexual behavior); Roe v. Wade, 410 U.S. 113, 154 (1973) (“[I]t is not clear to us that the claim asserted by some *amicus* that one has an unlimited right to do with one’s body as one pleases bears a close relationship to the right of privacy previously articulated in the Court’s decision.”).

196. *See id.* at 681.
197. *See id.* at 681-82.
198. *Id.* at 685 (citing Eisenstadt v. Baird, 405 U.S. 438, 452-54 (1972)).
between married and unmarried persons. In response, the Court restyled 
Griswold in order to underscore that the "underlying foundation" of its holding 
was not "sexual freedom" but the right to make childbearing decisions:

Griswold may no longer be read as holding only that a State may not 
prohibit a married couple's use of contraceptives. Read in light of its 
progeny, the teaching of Griswold is that the Constitution protects 
individual decisions in matters of childbearing from unjustified intrusion 
by the State.

By de-emphasizing Griswold's use of marriage in defining the contours of 
privacy, the Court concluded that across-the-board restrictions on contraceptive 
distribution, whether one is married or unmarried, or a minor or an adult, violate 
the Constitution because such restrictions impede decisions in matters of 
childbearing.

Although the rereading of Griswold by Eisenstadt and Carey appeared to 
recognize constitutional protection for childbearing decisions made between 
unmarried persons, it unfortunately came too late to effect this protection. First, 
Griswold never called into question whether individuals have privacy rights 
outside of marriage. Furthermore, Griswold cannot be reread as merely a 
procreative liberty case. It asserts the much broader proposition that married 
couples cannot be prevented from engaging in intimate acts in the bedroom, 
whether those acts are potentially procreative or not. In clumsily trying to remake 
Griswold into a procreative decisions case, Eisenstadt unwittingly exposed the 
law's contemplation of a zone of privacy for unmarried persons that was 
significantly less secure than that of married couples. In his concurrence, Justice 
White remarked that the decision was correct in part because the record failed to 
disclose the marital status of the recipient of the vaginal foam.

In short, Eisenstadt revealed that married persons have the right of sexual privacy but that 
unmarried persons have merely the right of procreative privacy—that is, 
procreative privacy insofar as the acquisition of contraceptives is concerned. The 
concurring justices in Carey exhibited a similar understanding of the different

199. See id. at 686-87.
200. Id. at 687, 688 & n.5, 689.
201. See id. at 694.
202. See id. 687-88. The Court in Hardwick approved of Carey's characterization 
latter three cases [Griswold, Eisenstadt, and Roe] were interpreted as construing the Due 
Process Clause of the Fourteenth Amendment to confer a fundamental individual right to 
decide whether or not to beget or bear a child.").
("No proof was offered as to the marital status of the recipient.").
privacy rights held by married and unmarried persons. Justice Powell implied that married couples have the constitutional right to engage in nonprocreative sex, and Justice Stevens rejected the argument that "a minor has the constitutional right to put contraceptives to their intended use." Even the more recent opinion of Washington v. Glucksberg characterized Griswold as vindicating "marital privacy" and Eisenstadt as protecting decisions regarding contraception. The two are not coterminous, a fact that was to play an important role in delimiting the right of procreative autonomy in the abortion jurisprudence that the Court began developing soon thereafter.

Nine years after Carey, the Supreme Court made a much more definitive statement regarding the privacy expectations of the married versus the unmarried in Bowers v. Hardwick. Michael Hardwick, a gay man living in Atlanta, was arrested when a police officer discovered him in his home engaged in a consensual act that violated Georgia's sodomy statute. Although Hardwick was not prosecuted, he sued, claiming that the statute, which barred both homosexual and heterosexual sodomy, was unconstitutional. This claim was rejected by the federal district court, but the Eleventh Circuit Court of Appeals reversed, concluding that the state impermissibly infringed upon Hardwick's right of privacy by refusing to allow him to engage in private activity that served "the same purpose as the intimacy of marriage." The court then remanded the case to the district court to determine whether the statute could survive strict scrutiny. On appeal, the Supreme Court, hearing only that portion of Hardwick's claim related

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204. See Carey, 431 U.S. at 707-08 (Powell, J., concurring).
205. Id. at 713 (Stevens, J., concurring). Given Justice Stevens's position in Hardwick, it would appear that he had in mind the criminalizing of sexual intimacy between minors. See Bowers v. Hardwick, 478 U.S. at 216 (commenting that Griswold's protection of intimate choices between married persons, "even when not intended to produce offspring," extends to the unmarried).
207. Id. at 720.
210. See Bowers v. Hardwick, 478 U.S. at 188.
211. See id. Joining Hardwick in his lawsuit were John and Mary Doe, a married couple who claimed the exercise of their marital privacy rights was chilled by the existence of the statute. Id. at 188 n.2. The Does' claim was dismissed for lack of standing. Id.
212. See id. at 188; see also Hardwick v. Bowers, 760 F.2d 1202, 1212-13 (11th Cir.), rev'd, 478 U.S. 186 (1986).
214. See id. at 1211.
to consensual homosexual sodomy, rejected the Eleventh Circuit’s analysis and upheld the statute. Attempting to answer the question left open by Eisenstadt and Carey, the Court denied that sexual intimacy conducted in private by consenting adults is always constitutionally insulated from interference by state actors. In assessing Hardwick’s claim, the Court applied the test for evaluating constitutional fundamental rights described above. Anticipating Michael H. v. Gerald D., the Court articulated an exhaustive and narrow list of the fundamental privacy rights recognized under the Constitution—child rearing and education (Meyer and Pierce), family relationships (Prince), procreation (Skinner v. Oklahoma), marriage (Loving v. Virginia), contraception (Griswold and Eisenstadt), and abortion (Roe v. Wade). The Court found no evidence of “the fundamental rights of homosexuals” in any of these precedents. Indeed, the Court went so far as to assert that “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.” Moreover, the Court deemed it ludicrous, given the general proscription of homosexual sodomy at the time of the Fourteenth Amendment’s enactment, that homosexual activity could be characterized as a fundamental right.

Justice Blackmun, dissenting, took the Court to task on several grounds, not the least of which was its insistence on reviewing only that part of the Georgia statute proscribing homosexual sodomy. He remarked that allowing Georgia to defend its statute based solely on its interest in prosecuting homosexuals not only raised serious equal protection questions but also articulated a new understanding of the Griswold, Eisenstadt, and Carey triad. Instead of rereading

216. Id. at 189.
217. See id. at 191 (“[T]he proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.”).
220. 388 U.S. 1 (1967).
221. 410 U.S. 113 (1973).
223. Id. at 189.
224. Id. at 191.
Griswold through the lens of Eisenstadt, as the Carey Court had, Justice Blackmun reread Eisenstadt and Carey through the lens of Griswold. The common link between all three cases was, according to Justice Blackmun, not simply procreative decisionmaking but the freedom to control the nature of one’s intimate associations with others.\textsuperscript{227}

Nonetheless, the Hardwick majority was not ready to expand Griswold to encompass the unmarried as Eisenstadt suggested. By allowing consensual, same-sex sexual activity to be criminalized and refusing to comment on those aspects of the Georgia statute that would have forced it to make a definitive statement regarding the contours of the rights announced in Griswold, Eisenstadt, and Carey, the Hardwick Court left Carey’s rereading of Griswold unchallenged and, thus, left married individuals with greater privacy protection than unmarried individuals.\textsuperscript{228} Supporting its decision with questionable statements about history and “legal homophobia,”\textsuperscript{229} the Hardwick Court generated a firestorm of controversy, leading to extensive documentation in the academic literature of the decision’s many procedural and substantive shortcomings.\textsuperscript{230} The precedential value of Hardwick has been called into question by the Court’s later decision in Romer v. Evans,\textsuperscript{231} and the Georgia Supreme Court has invalidated Georgia’s sodomy statute as a violation of the right of privacy as guaranteed by the Georgia

\textsuperscript{227} See id. at 202 n.2, 206 (Blackmun, J., dissenting); accord id. at 216-18 (Stevens, J., dissenting) (commenting that Griswold’s protection of nonreproductive sexual conduct between married persons extends to the unmarried).

\textsuperscript{228} Professor Marc Spindelman has read Hardwick as lacking a definitive ruling on whether the Constitution protects sexual privacy in a broad sense. See Marc S. Spindelman, Reorienting Bowers v. Hardwick, 79 N.C. L. REV. 359, 416-28 (2001) (focusing specifically on Justice Powell’s concurrence).

\textsuperscript{229} See William W. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet 150, 156-61 (1999) (finding Hardwick “beclouded with white lies, ahistorical generalizations, and contestable value choices masquerading as historical analysis”).


\textsuperscript{231} 517 U.S. 620 (1996). See Eskridge, supra note 229, at 150-52, 210-11 (commenting that the precedential value of Hardwick, although not mentioned in Evans, has been called into question by it).
Constitution. Nonetheless, Hardwick’s promotion of the rights of married couples in the guise of vindicating individual constitutional liberties remains the law today.

B. Abortion and Glucksberg

The Supreme Court’s abortion cases reflect the tension evident in Eisenstadt and Carey—between vindicating individual’s procreative autonomy and safeguarding nuclear family harmony. Although the right to an abortion is essentially a right inhering in a woman who wishes to terminate her pregnancy, the contours of this right shift in response to the capacity of her choice to foster harmony within nuclear families. Thus, what appears to be a right with reference to individual choice alone is dependent on its capacity to further the policy aims of family privacy. This understanding of the right to obtain an abortion is broadly reflected in abortion jurisprudence. That jurisprudence, which began with Roe’s grant to women of full authority over the abortion decision has since shifted to issues relating to the state’s power to limit that authority when the integrity of nuclear families is at stake. While apparently based exclusively on a woman’s right to exercise individual autonomy in abortion matters, the fact that husbands have no right to withhold consent to the abortion or even to receive notification that one is taking place is, in fact, influenced by the Court’s concern that the harmony of married couples not be undermined by disagreements about abortion. Similarly, the existence of readily available judicial approval of abortions for minors in states that require minors to notify their parents or to obtain parental consent before obtaining an abortion has been fashioned to conform with family privacy’s overriding concern of promoting harmony within nuclear families.

1. Roe and Its Progeny

Only ten months after Eisenstadt, the Court decided Roe v. Wade, in which a pregnant woman, a married couple (the Does), and a physician challenged Texas’s anti-abortion statute. In striking down the statute, the Court declared that “the right of privacy . . . encompass[es] a woman’s decision whether or not

233. See Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 846 (1992) (“Roe’s essential holding . . . is a recognition of the right of the woman to choose to have an abortion before viability.”).
to terminate her pregnancy." That same day, the Court decided *Doe v. Bolton*, in which a married woman challenged Georgia's restrictions on abortion. Those restrictions required state residency, hospital accreditation, and approval by two physicians. The Court struck down both Texas's statute and Georgia's regulations, asserting that "the right of personal privacy includes the abortion decision." Establishing what is now the familiar trimester framework for evaluating the constitutionality of restrictions on abortion, the Court made clear that a woman's right to decide to have an abortion is not absolute. The trimester framework forbade regulation of abortion through the first trimester of pregnancy and during the second trimester except "to the extent that the regulation reasonably relates to the preservation and protection of maternal health." Referring to the point after fetal viability, the Court declared it the prerogative of the state to proscribe abortion altogether, except as it was "necessary to preserve the life or health of the mother." This articulation of a woman's right to obtain an abortion within the first trimester of her pregnancy without unjustified state intervention was reaffirmed by the Court's subsequent decision in *Webster v. Reproductive Health Services* but it was qualified in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. After reflecting at length on the necessity for consistency in judicial decisionmaking, the Court in *Casey* reaffirmed *Roe's* "central premise" but rejected *Roe* 's overly restrictive trimester framework in order to allow states to express more "respect for the life of the unborn." *Casey*
noted that fetal viability was subject to circumscription through advances in technology and held that, before that point, the woman’s interest in terminating her pregnancy overrides all interests to the contrary, save for instances in which the state validly can express its respect for the fetus and can guide the woman toward making an informed choice. After the point of viability, according to the Casey Court, “the woman has consented to the State’s intervention.”

The decisions in Doe and Roe have been applauded by some commentators for their recognition of a privacy right vested in each woman to make a procreative decision binding as against all others. This focus on the individual in abortion jurisprudence was reflected in Casey, where the Court described Roe as announcing a “rule...of personal autonomy and bodily integrity,” and reiterated that the right to elect an abortion is located in the woman herself. Both Roe and Doe were certainly cases that extolled this individual right to decide as against the state. The question remained whether a woman’s right to elect an abortion could be overridden by the contrary desires of members of her family.

Among the governmental restrictions on abortion that the Court was asked to review in the years between Roe and Webster (including restrictions on federal

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247. See id. at 860.

248. See id. at 871 (“The woman’s right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. It is a rule of law and a component of liberty we cannot renounce.”).

249. See id. at 877 (“Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.”).

250. Id. at 870.

251. See Brandon, supra note 40, at 1197 (noting the “individualistic rationale” of Roe). It has been urged that this right grew directly out of the marital privacy recognized in Griswold. See David J. Garrow, Abortion Before and After Roe v. Wade: An Historical Perspective, 62 ALB. L. REV. 833, 835 (1999) (“The early origins of Roe grew very directly out of the constitutional precedent of Griswold.”).


253. See id. at 869.

254. Some scholars have noted an ambiguity concerning whether a woman’s physician shares her decisional autonomy in matters of abortion. See, e.g., Brandon, supra note 40, at 1197. Nonetheless, this concept has never been taken too seriously. See, e.g., Washington v. Glucksberg, 521 U.S. 702, 777-79 (1997) (Souter, J., concurring) (suggesting that the physician’s role in the abortion decision is merely to perform the abortion).

funding of abortion, informed consent requirements, and even blanket proscriptions of second-trimester abortions, the ones most relevant to this question were those allowing husbands and parents to override a wife’s or a minor daughter’s decision to obtain an abortion. Disputes over those restrictions arose in the mid-1970s and continue to the present day.

a. Spousal Notification and Consent

Although Roe has been thought to be a vindication of individual privacy rights, it is significant that Roe did not involve a marital family. Norma McCorvey was not married at the time she challenged the Texas abortion statute and it appeared that Sandra Cano’s marriage had been dissolved. Thus, there was no occasion for the Court in either Roe or Doe to explore the right of a husband to participate in the abortion decision.

It would not be long, however, before the Court had to assess the constitutionality of spousal notification and consent regulations. Spousal notification and consent regulations affected only marital families: they required a married woman to notify her husband or to obtain the consent of her husband before she could proceed with an abortion, unless her husband was not the father


257. See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 760 (1986), overruled by Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992); see also Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 444-45 (1983) [hereinafter Akron I]. As to informed consent, the Court decided that a state must not take steps “to influence the woman’s informed choice between abortion or childbirth,” or to place obstacles in the path of a woman’s relationship with her physician. See Akron I, 462 U.S. at 444, 445 (disapproving of the “recitation of a lengthy and inflexible list of information”). Nevertheless, the Court has held that requiring a woman’s informed consent is not unconstitutional. See Thornburgh, 476 U.S. at 760.

258. See Akron I, 462 U.S. at 434.


260. The state of Mary Doe’s marriage is unclear from the opinion. The opinion states both that she and her husband had reconciled and that she objected to bringing a child into a fatherless family. See Doe v. Bolton, 410 U.S. 179, 185, 190 (1973). The Does, who were married, lacked standing. See Roe v. Wade, 410 U.S. 113, 129 (1973).

261. See Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976) (“In Roe and Doe, we specifically reserved decision on the question whether a requirement for consent by the father of the fetus, by the spouse, or by the parents, or a parent, of an unmarried minor, may be constitutionally imposed.” (citation omitted)).
of her child. Such regulations did not require an unmarried woman to obtain the consent of or to notify anyone, even the man suspected of being the father of her child. The lawsuits brought to challenge these regulations highlighted the tension between recognizing married couples’ right to sexual privacy and procreational liberty and granting married women the right to abort.

The issue of whether the woman seeking an abortion had a right to make her decision autonomously—and, thereby, to trump whatever contrary interests her husband might hold—arose in Planned Parenthood of Central Missouri v. Danforth. In that case, a Missouri statute required a husband’s consent to his wife’s abortion. The Court tersely invalidated the statute, emphasizing Roe’s and Doe’s focus on individual rights, and “the obvious fact . . . that when the wife and the husband disagree . . . the view of only one of the two marriage partners can prevail.” Given the pregnancy’s greater physical impact on the wife, the Danforth Court concluded that “the balance weighs in [the wife’s] favor.”

With these considerations as its backdrop, the Court reasoned that the statute was unconstitutional because “the State cannot delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising.” While Danforth involved a statutory consent requirement, Planned Parenthood

262. See, e.g., Casey, 505 U.S. at 972 (Rehnquist, J., dissenting). Rehnquist explained the regulation in Casey as follows:

Section 3209 of the Act contains the spousal notification provision. It requires that, before a physician may perform an abortion on a married woman, the woman must sign a statement indicating that she has notified her husband of her planned abortion. A woman is not required to notify her husband if (1) her husband is not the father, (2) her husband, after diligent effort, cannot be located, (3) the pregnancy is the result of a spousal sexual assault that has been reported to the authorities, or (4) the woman has reason to believe that notifying her husband is likely to result in the infliction of bodily injury upon her by him or by another individual. In addition, a woman is exempted from the notification requirement in the case of a medical emergency.

Id. (Rehnquist, J., dissenting) (citing 18PA. CONS. STAT. Am. § 3209 (West 2000)); see also Danforth, 428 U.S. at 67-68 (“Section 3(3) requires the prior written consent of the spouse of the woman seeking an abortion during the first 12 weeks of pregnancy, unless ‘the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.’” (quoting Mo. REV. STAT. § 188.020(3) (repealed 1979))).


264. See Mo. REV. STAT. § 188.020(3) (repealed 1979).

265. The Danforth dissent complained that the majority dispensed with the consent question virtually summarily. See Danforth, 428 U.S. at 92 (White, J., dissenting in part) (“The Court strikes down this statute in one sentence.”).

266. Id. at 71.

267. Id.

268. Id. at 69 (citation omitted).
of Southeastern Pennsylvania v. Casey dealt with a spousal notification requirement.\textsuperscript{269} The regulation at issue required a married woman to provide her physician with a statement that she had notified her spouse of her impending abortion, unless her case fell within certain exceptions.\textsuperscript{270} The Court, applying an "undue burden" standard, propounded by Justice O'Connor in her dissent in Akron v. Akron Center for Reproductive Health, Inc. ("Akron I"),\textsuperscript{271} found this regulation to be unconstitutional because it likely would "prevent a significant number of women from obtaining an abortion."\textsuperscript{272} Casey generally echoed Danforth in expressing concern that statutes mandating spousal involvement attempt to delegate power the state does not possess.\textsuperscript{273} Casey, however, went farther than Danforth to frame the right as an individual one, asserting that not to decide the case as it did would be to subsume a woman's legal existence within that of her husband—a view of women "no longer consistent with our understanding of the family, the individual, or the Constitution."\textsuperscript{4} The Court went on to say that the state has no right to enact legislation that curtails a woman's right to end her pregnancy, even if that legislation is for the benefit of her husband.\textsuperscript{275}

In addition to considering a married woman's decisional autonomy, Danforth and Casey considered the stability and harmony of the marital relationship. The Casey Court acknowledged that "in well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child."\textsuperscript{276} In this way, the

\begin{itemize}
\item \textsuperscript{269} Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 844 (1992).
\item \textsuperscript{270} Id. at 887. The exceptions included:
\[\text{T}he\ \text{option}\ \text{of}\ \text{providing}\ \text{an}\ \text{alternative}\ \text{signed}\ \text{statement}\ \text{certifying}\ \text{that}\ \text{her}\ \text{husband}\ \text{is}\ \text{not}\ \text{the}\ \text{man}\ \text{who}\ \text{impregnated}\ \text{her};\ \text{that}\ \text{her}\ \text{husband}\ \text{could}\ \text{not}\ \text{be}\ \text{located};\ \text{that}\ \text{the}\ \text{pregnancy}\ \text{is}\ \text{the}\ \text{result}\ \text{of}\ \text{spousal}\ \text{sexual}\ \text{assault}\ \text{which}\ \text{she}\ \text{has}\ \text{reported};\ \text{or}\ \text{that}\ \text{the}\ \text{woman}\ \text{believes}\ \text{that}\ \text{notifying}\ \text{her}\ \text{husband}\ \text{will}\ \text{cause}\ \text{him}\ \text{or}\ \text{someone}\ \text{else}\ \text{to}\ \text{inflict}\ \text{bodily}\ \text{injury}\ \text{upon}\ \text{her.}\]
\item \textsuperscript{271} 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting) (announcing a preference for strict scrutiny review only for "unduly burdensome" abortion restrictions). The standard has been attacked for being as "doubtful in application as it is unprincipled in origin." Casey, 505 U.S. at 985 (Scalia, J., dissenting).
\item \textsuperscript{272} Id. at 893. In effect, the regulation arguably affected less than one percent of women who seek abortions. See id. at 894.
\item \textsuperscript{273} See id. at 897.
\item \textsuperscript{274} Id.
\item \textsuperscript{275} See id. at 896.
\item \textsuperscript{276} Id. at 892-93. Justice Rehnquist, in his dissent, claimed the notification requirement did not constitute an undue burden because "the vast majority of wives seeking abortions notify and consult with their husbands." Id. at 973 n.2 (Rehnquist, J., dissenting).
\end{itemize}
Court suggested that the marriage in *Casey* was not a well-functioning one; otherwise, the wife would have discussed her pregnancy with her husband. Such a discussion—especially when a wife wants an abortion that her husband does not—very likely would place a considerable strain on an already poorly functioning marriage. To compel such a discussion, the Court opined, would compromise privacy in two ways: "The effect of state regulation on a woman’s protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman." This language, borrowed without attribution from Justice Marshall’s dissent in *H.L. v. Matheson*, highlighted the idea that, in trying to compel communication between family members about abortion, the state may compromise the integrity of the family it purports to protect because “self-disclosure can result in less marital satisfaction and... secrecy... actually can foster marital stability.” By allowing a woman to obtain an abortion without notifying her husband, the Court, in effect, can extend the life of the couple’s marriage. Additionally, in insisting that a contrary decision would be repugnant to modern views of the role of women in marriage and would grant husbands too much sovereignty over the lives of their wives, the Court reassured women considering marriage that, in choosing to be married, they would not relinquish rights to personal privacy they would continue to possess if they elected to remain unmarried. While the reasoning in *Danforth* and *Casey* suggested that the Court was only valuing a woman’s right to make an autonomous choice, in a less obvious way, the two cases also endeavored to promote the stability and longevity of the marital unit.

*b. Parental Notification and Consent*

Spousal notification and consent cases wrestle with the tension between the ability of the married couple to make a decision as a unit and the right of a wife to terminate her pregnancy as a matter of individual liberty. Parental notification and consent cases struggle to strike a balance between the right of parents to exercise their parental autonomy and the right of their daughter to individual autonomy. In deciding that a husband must not be given control over his wife’s decision to obtain an abortion, the *Casey* Court made the point that “[a] State may

277. *Id.* at 896 (emphasis added).
278. See *H.L. v. Matheson*, 450 U.S. 398, 448 (1981) (Marshall, J., dissenting) ("Through its notice requirement, the State in fact enters the private realm of the family rather than leaving unaltered the pattern of interactions chosen by the family.").
280. See *Casey*, 505 U.S. at 898.
not give to a man the kind of dominion over his wife that parents exercise over their children. Just as a husband may disagree with his wife's decision to terminate her pregnancy, a minor's parents may disapprove of her similar choice. In any such case, the issue is who should prevail when a daughter wishes to make a procreative decision that her parents, exercising their right to make child-rearing decisions, wish to override. The outcomes of the various decisions on both the spousal and parental notification and consent betray the law's concern for maintaining the stability of nuclear families.

Parental autonomy is basic to the structure of our society because the family is "the institution by which we inculcate and pass down many of our most cherished values, morals and culture." From the parental autonomy cases analyzed in Part II, a clear picture of the marital family as impervious to governmental intervention and of the married couple as the final arbiter of intra-family disputes emerges. But despite the mandates of Meyer and Pierce, and the presumption that "parents act in the best interests of their child," the issue of minors and abortion has tested the limits of parental authority in many Supreme Court cases. The importance of the issue is exemplified by the sheer number of cases the Court has accepted for review in this area of the law. The cases that deal with this question are: Danforth and Bellotti v. Baird ("Bellotti I") (1976); Bellotti v. Baird ("Bellotti II") (1979); Matheson (1981); Akron I and Planned Parenthood Association of Kansas City, Missouri v. Ashcroft ("Ashcroft") (1983); Ohio v. Akron Center for Reproductive Health ("Akron II") and Hodgson v. Minnesota ("Hodgson") (1990); and Casey (1992).

Early cases exploring the right of minors to choose abortion involved parental consent statutes. The Missouri statute in Danforth, for example, required the consent of a parent or someone standing in loco parentis before a minor could obtain an abortion during the first twelve weeks of pregnancy. The state argued

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281. Id.
283. See supra notes 51-94, 143-68, and accompanying text.
290. See Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 72 (1976). Note that if a minor is married, she is emancipated for the purposes of making procreative
that the purpose of the statute was to safeguard both the welfare of minors and parental autonomy.\textsuperscript{291} While expressing respect for parental autonomy, the Court asserted that minors have constitutional rights, a point previously noted in the \textit{Yoder} dissent.\textsuperscript{292} As a result, the Court found the blanket consent requirement in \textit{Danforth} unconstitutional, reasoning that it, like the spousal consent requirement, essentially gave a third-party veto power over even a minor's decision.\textsuperscript{293} In order to justify its decision in light of the state's special concern for the welfare of minors and the integrity of the family,\textsuperscript{294} the Court reasoned that where a minor is mature enough to become pregnant, her parents have no greater interest in parental autonomy than their minor daughter has in her right of privacy.\textsuperscript{295} Further, the Court felt the consent requirement was not the most effective way to "strengthen the family unit" where "the very existence of the pregnancy has already fractured the family structure."\textsuperscript{296}

In \textit{Bellotti II}, both mature and immature minors brought suit to enjoin Massachusetts's two-parent consent requirement. The requirement mandated that every minor, "no matter how mature and capable of informed decisionmaking," obtain her parents' or a judge's consent to her abortion.\textsuperscript{297} Under the statute, even if the judge hearing the matter deemed the minor mature enough to make important decisions, the judge could withhold consent if doing so was in the minor's best decisions. \textit{See id.} at 73 ("It is noted that, in Missouri, a woman under the age of 18 who marries with parental consent does not require parental consent to abort, and yet her contemporary who has chosen not to marry must obtain parental approval."); \textit{see also Bellotti I}, 428 U.S. at 134 ("If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required." (citing \textit{MASS. GEN. LAWS ANN.} ch. 112, § 12P (West 1995))).

\begin{itemize}
  \item \textsuperscript{291} \textit{See Danforth}, 428 U.S. at 72-73 (citing \textit{Meyer}, \textit{Pierce}, \textit{Prince}, and \textit{Yoder}).
  \item \textsuperscript{292} \textit{See id.} at 74; \textit{see also Bellotti II}, 443 U.S. at 633; \textit{Carey v. Population Servs.}, \textit{Int'l}, 431 U.S. 678, 692 (1977). \textit{But see} H.L. v. Matheson, 450 U.S. 398, 436 n.19 (1981) (Marshall, J., dissenting); \textit{Carey}, 431 U.S. at 705 (Powell, J., concurring) ("The principle is well settled that 'a State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is essential to the exercise of various constitutionally protected interests.'" (citing \textit{Ginsberg v. New York}, 390 U.S. 629, 649-50 (1968))).
  \item \textsuperscript{293} \textit{See Danforth}, 428 U.S. at 74.
  \item \textsuperscript{294} \textit{See id.} at 72, 75.
  \item \textsuperscript{295} \textit{See id.} at 75; \textit{cf. Matheson}, 450 U.S. at 448 (Marshall, J., dissenting) ("‘The fact that a minor became pregnant and sought an abortion contrary to the parents' wishes indicates that whatever control the parent once had over the minor has diminished, if not evaporated entirely.'" (quoting \textit{Poe v. Gerstein}, 517 F.2d 787, 793-94 (5th Cir. 1975), \textit{aff'd}, 428 U.S. 901 (1976))).
  \item \textsuperscript{296} \textit{Danforth}, 428 U.S. at 75.
  \item \textsuperscript{297} \textit{Bellotti II}, 443 U.S. at 653 (Stevens, J., concurring).
\end{itemize}
interests; moreover, no judicial consent could be granted unless the minor first had attempted to obtain her parents’ consent.\textsuperscript{298} The Supreme Court agreed with the state court that the statute was unconstitutional due to overbreadth, due process, and equal protection problems.\textsuperscript{299} As in Danforth, the Supreme Court acknowledged the special position of minors in society,\textsuperscript{300} the centrality of parental autonomy to the integrity of society,\textsuperscript{301} and the unique character of the abortion decision.\textsuperscript{302} Balancing these considerations, the Court concluded that a state may not permit a parental veto of a minor’s choice to have an abortion\textsuperscript{303} but may require the consent of one or both parents if the minor is afforded the opportunity to bypass this requirement by demonstrating her maturity or that the abortion would serve her best interests.\textsuperscript{304} By permitting a judge to override a mature minor’s decision and requiring parental consultation in every instance, Massachusetts’s statute did not conform to these parameters.\textsuperscript{305} In striking down the statute, the Court admonished states to legislate with “particular sensitivity” in this delicate area.\textsuperscript{306}

In Akron I,\textsuperscript{307} the Court invalidated yet another statute requiring a minor under the age of fifteen to acquire either the consent of one of her parents or a court order before she could submit to an abortion.\textsuperscript{308} The Court deemed the Ohio statute unconstitutional because it failed to provide a mechanism through which the minor could demonstrate her maturity or show the abortion would be in her best interests.\textsuperscript{309} Finally, in Ashcroft and, later, in Casey, the Court scrutinized Missouri and Pennsylvania statutes requiring the consent of one parent and

\begin{itemize}
  \item \textsuperscript{298}See id. at 630.
  \item \textsuperscript{299}See id. at 633, 645.
  \item \textsuperscript{300}See id. at 635-37.
  \item \textsuperscript{301}See id. at 638 (citing Ginsberg v. New York, 390 U.S. 629, 639 (1968) (holding it constitutionally permissible for a state to forbid the sale of sexually-oriented magazines to minors)).
  \item \textsuperscript{302}See id. at 642.
  \item \textsuperscript{303}See id. at 643 (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976)).
  \item \textsuperscript{304} See Bellotti II, 443 U.S. at 643-44, 647-48. In Lambert v. Wicklund, the Court made clear that a finding of best interests may be based on the fact that it is in the minor’s best interests to obtain the abortion or that it is not in the minor’s best interests to notify her parents. See Lambert v. Wicklund, 520 U.S. 292, 297 (1997), rev’g Wicklund v. Salvagni, 93 F.3d 567 (9th Cir. 1996).
  \item \textsuperscript{305} See Bellotti II, 443 U.S. at 651.
  \item \textsuperscript{306}Id. at 643-44.
  \item \textsuperscript{307}462 U.S. 416 (1983).
  \item \textsuperscript{308}See id. at 439.
  \item \textsuperscript{309}See id. at 440.
\end{itemize}

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containing judicial bypass procedures. In these cases, the Court affirmed the validity of the requirements because they conformed with the Court’s ruling in Bellotti II.

As states began to realize the difficulty of drafting a parental consent statute that would withstand constitutional attack, they began to enact parental notification statutes. Cases scrutinizing the constitutionality of these statutes have followed a similar, albeit different, trajectory to the ones evaluating the validity of parental consent statutes. Ever since these cases first reached the judicial system, courts have struggled to determine whether notification statutes are similar enough to consent statutes that they require a bypass procedure to withstand constitutional scrutiny or whether notification statutes are sufficiently less burdensome on a minor’s procreative decisions that a bypass procedure is unnecessary.

Early challenges to notification provisions resulted in decisions of limited scope. In Bellotti II and Akron I, the notification requirements in the abortion statutes at issue were not in dispute. In Matheson, a minor brought a challenge to a Utah statute that required physicians to notify the minor’s parents before performing an abortion on her. The minor alleged that her desire for an abortion and the willingness of her physician to perform it were the only constitutionally permissible requirements that had to be satisfied prior to her obtaining an abortion. The Utah Supreme Court upheld the statute, reasoning that it promoted “the important role of parents in child-rearing” and that it did not operate as a “veto power over the minor’s decision.” The Supreme Court affirmed, noting that it is often a good idea for a minor to consult her parents on important decisions and, moreover, that the plaintiff had never attempted to

310. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 899 (1992). Casey abandoned Roe’s trimester framework, but it retained Roe’s central holding that “[t]he woman [has a] right to terminate her pregnancy before viability.” Id. at 871.
311. Id. at 899 (“[A] State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure.”); Planned Parenthood Ass’n of Kansas City, Mo. v. Ashcroft, 462 U.S. 476, 494 (1983) (reading the statute to avoid any constitutional infirmity).
313. See id. at 654 (“Neither Danforth nor this case determines the constitutionality of a statute which does no more than require notice to the parents . . . .”).
316. See id. at 403-04.
317. Id. at 405.
318. See id. at 409, 410.
make a showing of maturity. The Court made clear, however, that "[t]his case does not require us to decide in what circumstances a state must provide alternatives to parental notification." Justice Marshall, dissenting in Matheson, questioned the function of notice statutes, and commented that "an adolescent old enough to make the decision to be sexually active . . ., and who is then responsible enough to seek professional assistance for his or her problem, is ipso facto mature enough to consent to his own health care."

Later notification cases dealt more with the question of what circumstances required a state to provide alternatives to parental notification. This issue has become complicated by the disagreement among the Justices over whether notification statutes pose burdens equivalent to those posed by consent statutes. For example, although the majority in Matheson "expressly declined to equate notice requirements with consent requirements," Justice Powell, in a concurring opinion, expressed his view that the same requirements applicable to parental consent statutes should apply to parental notification statutes. In Akron II, the Court upheld Ohio's revised statute requiring notice to one of the minor's parents or a substituted relative, or, in the alternative, a court order of approval. The Court ultimately did not resolve the question of whether judicial bypass mechanisms were required in parental notification statutes because the judicial bypass mechanism in the statute at issue met Bellotti II's criteria for consent statute judicial bypass procedures. The Akron II Court, however, did permit the

319. See id. at 406.
320. Id. at 412 n.22.
321. See id. at 454 (Marshall, J., dissenting) (commenting that Utah's notice statute does not advance asserted state interests).
322. Id. at 453 n.51 (Marshall, J., dissenting) (quoting Hofmann, Consent and Confidentiality and Their Legal and Ethical Implications for Adolescent Medicine, in J. Roswell Gallagher et al., Medical Care of the Adolescent 42, 51 (3d ed. 1976)). But see id. at 408 ("There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion."). Concurring, Justice Stevens opined that there was no constitutional infirmity in requiring parental notification in cases of mature minors. See id. at 425 n.2 (Stevens, J., concurring) ("Almost by definition . . . a woman intellectually and emotionally capable of making important decisions without parental assistance also should be capable of ignoring any parental disapproval.").
323. Id. at 411 n.17.
324. See id. at 420 (Powell, J., concurring); cf. Akron II, 497 U.S. 502, 526 (1990) (Blackmun, J., dissenting) (concluding a notice statute is tantamount to a consent statute).
325. Akron II, 497 U.S. at 507-08.
326. See id. at 510.
state to require the minor to prove her eligibility for a judicial bypass by clear and convincing evidence.\(^\text{327}\)

_Hodgson_ did little to clarify the murky waters surrounding the constitutionality of notification provisions.\(^\text{328}\) In _Hodgson_, to further its interest "in protecting pregnant minors [and] assuring family integrity,"\(^\text{329}\) Minnesota enacted "the most stringent notification statute in the country."\(^\text{330}\) The statute required notification of both parents without a judicial bypass procedure unless a court should enjoin enforcement of the statute.\(^\text{331}\) In reviewing its constitutionality, a remarkably fractured Court made three alternative statements regarding the notification statute. Six justices concluded that a one-parent notification requirement is constitutional with a bypass procedure,\(^\text{332}\) four justices held that a two-parent notification requirement is constitutional with or without a bypass procedure,\(^\text{333}\) and Justice O'Connor decided that a two-parent notification requirement is unconstitutional without a bypass procedure but constitutional with one.\(^\text{334}\) Although uncertain from the opinion, it has been predicted that six justices would agree that a one-parent notification provision is constitutional without a bypass provision.\(^\text{335}\) Nevertheless, the rationales supporting these varying positions were remarkably similar. All focused on limiting governmental interference in internal family operations. The justices who supported a one-parent notification provision with bypass asserted:

\[\text{327. See id. at 516 ("We find the clear and convincing standard used in H.B. 319 acceptable.").}\]


\[\text{330. Id. at 459 (O'Connor, J., concurring in part and concurring in the judgment).}\]

\[\text{331. See id. at 422-23.}\]

\[\text{332. Id. at 480 (Scalia, J., concurring in the judgment in part and dissenting in part).}\]

\[\text{333. See id. at 489 (Kennedy, J., concurring in part and dissenting in part) ("The two-parent notification law enacted by Minnesota is, in my view, valid without the judicial bypass provision . . . .").}\]

\[\text{334. See id. at 461 (O'Connor, J., concurring in part and concurring in the judgment).}\]

In the ideal family setting, of course, notice to either parent would normally constitute notice to both. A statute requiring two-parent notification would not further any state interest in those instances. In many families, however, the parent notified by the child would not notify the other parent. In those cases, the State has no legitimate interest in questioning one parent's judgment that notice to the other parent would not assist the minor or in presuming that the parent who has assumed parental duties is incompetent to make decisions regarding the health and welfare of the child.  

The justices in favor of the two-parent notification provision, even absent the bypass, remarked that parental notice solidifies family ties and that "parents can best fulfill their roles if they have the same information about their own child's medical condition and medical choices as the child's doctor does." Finally, Justice O'Connor's rationale for her position was that "interference with the internal operation of the family ... simply does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure." Other notable comments came from Justice Stevens, who deemed a two-parent notification requirement more burdensome than a one-parent consent requirement, particularly given the almost uniform requirement of only one parent's consent for other activities affecting a minor's health, safety or welfare. Justice Marshall, dissenting in part, analogized notification requirements to consent requirements, characterizing a parent's ability to obstruct a minor's decision after notification similar to the parental veto that could be brought to bear under a consent statute.  

Lower courts have experienced difficulty attempting to apply these muddled precedents to disputes involving parental notification provisions and, thus, have issued conflicting rulings. In Planned Parenthood, Sioux Falls Clinic v. Miller, the district court ruled a notification-of-one-parent provision unconstitutional

337. See id. at 492 (Kennedy, J., concurring in the judgment in part and dissenting in part).
338. Id. at 486 (Kennedy, J., concurring in the judgment in part and dissenting in part).
339. Id. at 461.
340. See id. at 456; cf. id. at 496 (Kennedy, J., concurring in the judgment in part and dissenting in part).
341. See id. at 472 (Marshall, J., dissenting in part).
343. See id. at 1456 n.2, 1458 (citing S.D. CODIFIED LAWS § 34-23A-7 (Michie 1994)).
given the absence of a bypass mechanism. The statute at issue required a physician to inform a minor's parent at least forty-eight hours before the physician performed an abortion on the minor, with exceptions for medical emergencies and abused or neglected minors. On appeal, the Eighth Circuit, invoking *Bellotti II* and *Hodgson*, discussed both consent statutes and notification statutes and concluded that "the Supreme Court has yet to decide whether a mature or 'best interest[s]' minor is unduly burdened when a State requires her physician to notify one of her parents before performing the abortion." Recognizing the clear potential for both notice provisions and consent provisions to burden a minor's choice, the Eighth Circuit held that the Constitution is not abridged when a state compels an immature minor or "non-best-interests" minor to notify her parent or obtain her parents' consent before undergoing an abortion but that the state must provide a "Bellotti-type" bypass for both mature and best-interests minors. Not to do so, according to the court, would compromise the constitutional rights of mature and best-interests minors.

The Fourth Circuit in *Planned Parenthood of Blue Ridge v. Camblos*, reached a contrary decision based on its assessment that notification statutes are fundamentally different from consent statutes. The statute at issue was a one-parent notification statute containing a judicial bypass mechanism. Because the statute provided that a trial court "may"—and not "shall"—grant a mature minor's request for a judicial bypass where she has satisfied her burden of proof, the district court concluded that the statute unconstitutionally vested discretion in judges hearing bypass petitions not to authorize mature minors to obtain abortions without notifying a parent. As such, the district court enjoined enforcement of the statute. On appeal, the Fourth Circuit stayed the district court's
injunction\textsuperscript{356} and, later, after a hearing on the merits, declared the statute constitutional.\textsuperscript{357} In so holding, the Fourth Circuit commented that one-parent notification provisions may not require bypass procedures under Supreme Court precedents\textsuperscript{358} and that this would strike an appropriate balance between a parent’s interest in notification and a mature minor’s right to choose.\textsuperscript{359} The Fourth Circuit ultimately decided that Virginia’s provision was constitutional because it contained exceptions in cases of abusive, neglectful, and absent parents.\textsuperscript{360}

As these cases indicate, it is difficult to reconcile the competing interests of parental autonomy and individual choice in the context of minors who seek abortions. In this area, there appears to be little consensus about the proper balancing of these interests. On the one hand, \textit{Meyer}, \textit{Pierce}, and \textit{Troxel} instruct that the right of family privacy is made up of the right of parental autonomy and, under \textit{Parham}, of the presumption that parents act in their children’s best interests.\textsuperscript{361} On the other hand, \textit{Roe} and its progeny present an image of the family as made up of individuals vested with the liberty to make important decisions autonomously.\textsuperscript{362} These two visions of the family are not inconsistent,\textsuperscript{363} but they present the potential for disharmony, the proper resolution of which continues to be debated in the parental notification and consent cases.

The potential for conflict in the parental notification and consent cases does not explain their outcomes. In virtually all of these cases, a minor’s right to choose to have an abortion invariably outstrips any countervailing interest on the part of her parent to know about or to consent to the procedure. The Bellotti II bypass criteria require this result under consent provisions when a minor can demonstrate sufficient maturity to render her capable of an autonomous decision. The mature minor and her parent are analogous to the pregnant wife and her husband whose consent or notification, if required, would constitute an unconstitutional veto power over the wife’s decision.\textsuperscript{364} The focus on maturity in the bypass proceeding removes parental autonomy from the scope of relevant


\textsuperscript{357} See Camblos, 155 F.3d at 372.

\textsuperscript{358} See id. at 366-67 (citing Lambert v. Wicklund, 520 U.S. 292, 295 (1997); Akron II, 497 U.S. 502, 510 (1990)).

\textsuperscript{359} See id. at 369.

\textsuperscript{360} See id. at 367, 371, 372.

\textsuperscript{361} See supra notes 58-65, 143-68, and accompanying text.

\textsuperscript{362} See supra notes 234-360 and accompanying text.

\textsuperscript{363} See Bellotti II, 443 U.S. 622, 638 (1979) ("The tradition of parental authority is not inconsistent with our tradition of individual liberty.").

\textsuperscript{364} See Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 898 (1992) ("A State may not give to a man the kind of dominion over his wife that parents exercise over their children.").
interests by recognizing that a mature minor by definition can exercise individual autonomy without interference.

The results in cases that use the other *Bellotti II* criterion—best interests—are more difficult to explain. Like a showing of the minor’s maturity, a showing of the minor’s best interests in such proceedings also removes parental autonomy from the calculus, but according to what rationale is unclear. In best-interests cases, the court is certainly not concluding that the minor is *mature* enough to ascertain her own best interests—such a determination would fall under *Bellotti II*’s first criterion. Instead, the determination is that the court itself, as an independent decisionmaker, adequately can ascertain the minor’s best interests. Although apparently consistent with the doctrine of *parens patriae*, such a determination, by itself, does not justify the court’s effacement of parental autonomy. This is because *parens patriae* is not properly invoked “except when necessary for the protection of the child.” The law does not permit the question of a minor’s best interests to be determined by anyone other than the minor’s parent unless the presumption that a parent acts in his child’s best interests has been rebutted or called into question. Thus, behind a court’s decision that an abortion without parental notification or consent is in the minor’s best interests lies the notion that the parent’s judgment about or participation in the abortion decision would *not* be in the child’s best interests. In other words, the court in these cases is making an advance judgment that the parent of a “best interests” minor is unfit to participate.

The procedural due process problems with any such implicit finding are remarkable. As noted above, the Supreme Court in *Troxel* recently declared it

365. To satisfy the best-interests criterion, the minor needs to show that the abortion without notification is in her best interests or that notification of her parent is *not* in her best interests. *See* Lambert v. Wicklund, 520 U.S. 292, 297 (1997) (“[A] judicial bypass procedure requiring a minor to show that *parental notification is not* in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that *abortion without notification is* in her best interests.” (emphasis in original)).

366. *See* Turner v. Melton, 402 P.2d 126, 128 (Kan. 1965) (defining *parens patriae* as a doctrine “recogniz[ing] the right and duty of the state to step in and act for what appears to be the best interests of a child”).


369. *See* Parham v. J.R., 442 U.S. 584, 602-03 (1979) (holding that parents retain a substantial, if not a dominant, role in their children’s upbringing, absent a finding of neglect or abuse).

unconstitutional for the State of Washington to ignore the presumption that parents act in the best interests of their children.\footnote{371} Fully apart from this concern, however, is the fact that whichever criterion is used in a parental consent or notification proceeding, such a proceeding is little more than a "rubber stamp" of the minor's choice.\footnote{372} The rate at which courts determine minors to be mature or abortions to be in their best interests is nothing less than staggering.\footnote{373} Indeed, appellate courts appear quite willing to interpret bypass criteria in such a way that trial judges have virtually no discretion to deny the petitions\footnote{374} and to fashion unusually deferential standards of review whereby appellate courts are constrained to affirm.\footnote{375} Even though notification statutes are aimed at promoting communication within the family, the courts are, nonetheless, sending a very strong message that such communication is not the way "to recognize and promote the primacy of the family."\footnote{376} Instead, in this special context, participation by parents is not "important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding."\footnote{377} The overpowering sentiment in these cases that parents should not become involved in a minor's choice to obtain an abortion supports no other reading.


\footnote{373}{See Hodgson, 497 U.S. at 436 n.21 ("During the period for which statistics have been compiled, 3,573 bypass petitions were filed in Minnesota courts. Six petitions were withdrawn before decision. Nine petitions were denied and 3,558 were granted." (quoting Hodgson, 648 F. Supp. at 765)).}

\footnote{374}{See, e.g., In re Jane Doe 2, 19 S.W.3d 278, 299 (Tex. 2000) (Hecht, J., dissenting) ("It is fast becoming apparent ... that this Court does not intend to allow trial courts much discretion in denying applications under the Parental Notification Act.").}

\footnote{375}{See id. at 289 (Owen, J., concurring) (objecting to the application of the abuse of discretion standard to bypass proceeding review because the "trial court's findings should be reviewed on appeal for legal and factual sufficiency").}

\footnote{376}{Hodgson, 497 U.S. at 501 (Kennedy, J., dissenting in part).}

\footnote{377}{Bellotti II, 443 U.S. 622, 638-39 (1979).}
Although forty-three states have enacted parental notification and consent statutes, more recent developments indicate that courts begin to declare these statutes unconstitutional, nullifying parental autonomy in this context in the same way spousal consent and notification statutes have been eliminated. For example, in invalidating Florida's recently enacted statute as a matter of state constitutional law, the trial court hearing North Florida Women's Health & Counseling Services, Inc. v. Florida applied the same rationale used to nullify spousal notification statutes and found it impermissible, as a matter of individual privacy, to require a minor to consult even one of her parents before seeking an abortion because, in this way, the minor may open herself up to abuse. Using an equal protection rationale, rejected by the Florida trial court, the Supreme Court of New Jersey invalidated that state's parental notification provision because it failed to require, without a compelling justification, pregnant minors to notify their parents when they choose not to obtain an abortion but instead to proceed with their pregnancies. Courts in Alaska, California, and Montana have issued similar rulings.


381. See John Kennedy, Abortion Law Blocked, SUN-SENTINEL (Ft. Lauderdale), May 13, 2000, at 1A (reporting that a notification provision with a judicial bypass was ruled a violation of the state constitution’s guarantee of privacy).


383. See Dan Joling, Associated Press, Abortion Advocates, Foes, Rally at Capitol, Jan. 22, 1999 (reporting on a superior court ruling that a parental consent provision was unconstitutional), available at WL, 1/22/99 Associated Press Newswires.


385. See Associated Press, Abortion Law for Girls Under 18 Struck Down, Feb. 12, 1999 (striking down a parental notification provision as a violation of equal protection guaranteed by the state constitution because "[m]inors who choose to continue their pregnancy are free to do so without any requirement of parental notification"), available at WL, 2/12/99 Associated Press Newswires.

386. See Ctr. for Reprod. L. & Pol'y, Florida Court Recognizes Young Women's
As complicated and convoluted as the decisions in the area of parental notification and consent are, one theme is salient: when it comes to the clash between parental autonomy and a minor's right to choose, the minor's right to choose prevails, regardless of the Court's empty insistence that states constitutionally can encourage dialogue between parents and minors about abortion. Such encouragement is merely precatory, and, in any event, courts almost never find notification in a case involving an immature minor to be in that child's best interests. The minor prevails in these cases not because the immature, non-best-interests minor does not exist but because the policy of family privacy demands it. The trajectory of parental notification and consent jurisprudence, as revealed by the state courts' application of the Bellotti II framework, reveals that the vast majority have determined that, in contrast to Casey's assertion that "minors will benefit from consultation with their parents" but that adult women will not obtain similar benefits from consultation with their husbands, society has little to gain from the potential strife that arises within families when minors inform their parents that they wish to have an abortion. By permitting courts, instead of parents, to assess the best interests of pregnant minors in the volatile context of abortion, and by discouraging compelled discussion of this topic, the courts can promote peace and stability within the family and thereby effectively can foster the ideal of intact nuclear families. Although it is easy for a court to declare this stance compelled by the view of abortion as an individual right, this justification is inapplicable in the context of immature minors. By making the advance assessment that a parent's participation in a minor's abortion decision will not be in her best interests, a court goes a long way toward protecting a certain idealized vision of the nuclear family.

Ever since Eisenstadt and Roe, the Supreme Court, although employing language in its decisions suggesting that the right of privacy is vested in individuals, consistently has taken positions that, in the final analysis, would foster nuclear family harmony. True, the Court has redrawn Roe's trimester system to permit states to express respect and concern for a woman's unborn child, and states certainly will continue to do so, but the Court has stopped short of involving

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388. See id. at 445-46 (Marshall, J., dissenting) (stating there is no dispute that the "State cannot legally or practically require such consultation").

389. See Bellotti II, 443 U.S. 622, 656 n.4 (1979) (Stevens, J., concurring) (noting the irony of this).

family members in the decision. Husbands have no right to be involved in a
decision regarding abortion, and minors freely can obtain the state’s approval for
their abortions, their being strong evidence that the judicial bypass procedure is
little more than an automatic validation of the minor’s decision in the vast majority
of cases. These decisions recognize the right of an individual woman to choose
to have an abortion. Accompanying them, though, is a decided emphasis on
preventing the abortion decision from disturbing the harmony of the nuclear
family.

2. Glucksberg

Attempts to expand the scope of individual privacy beyond the cases
described in Part III.B.1 have been unsuccessful. In Washington v. Glucksberg,391
the Court refused to recognize a fundamental right to die as encompassing both an
individual’s right to refuse life-sustaining medical treatment and his choice to
commit suicide with assistance. As in both Hardwick and Michael H., the Court
deemed the claimed right to be incompatible with this nation’s history, traditions,
and practices.392 In refusing to nullify Washington’s ban on assisted suicide, the
Court defined the scope of the right recognized in Cruzan v. Director, Missouri
Department of Health49 as merely “the right to refuse lifesaving hydration and
nutrition.”394 This made Cruzan consistent with the Court’s careful description493
of the asserted fundamental liberty interest in Glucksberg and its discovery in that
case of an “almost universal tradition that has long rejected the asserted right.”495

392. See id. at 728 (“The history of the law’s treatment of assisted suicide in this
country has been and continues to be one of the rejection of nearly all efforts to permit it.
That being the case, our decisions lead us to conclude that the asserted ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.”).
393. 497 U.S. 261 (1990). In this case, the Supreme Court held that a state may
require clear and convincing evidence of an incompetent’s wishes on the matter before
deferring to a surrogate decisionmaker’s choice to remove life-sustaining treatment from
the incompetent. See id. at 280.
394. Glucksberg, 521 U.S. at 723 (citing Cruzan, 497 U.S. at 279).
395. See id. at 721 (“[W]e have required in substantive due process cases a ‘careful
description’ of the asserted fundamental liberty interest.” (citations omitted)).
396. Id. at 723. The application of this two-tiered analysis brought the Court’s
analysis to a nearly summary conclusion. Five justices wrote concurring opinions.
Justice Stevens noted that the failure of the facial challenge to the assisted suicide ban did
not foreclose future constitutional challenges to the statute as applied. See id. at 739
(Stevens, J., concurring). Justice Breyer remarked that the Court might have defined the
liberty at stake in such a way that it properly would be labeled a fundamental right. See
Beyond its use of a restrictive approach to fundamental rights, *Glucksberg* is significant in the context of individual privacy jurisprudence because it further confirms the unique quality of a woman’s personal autonomy established by the Court’s abortion jurisprudence. Originally, the Ninth Circuit had nullified the assisted suicide statute based on its assessment that the right to die was analogous to the right to choose an abortion. Proponents of the right to die, seizing on expansive language in *Casey* suggesting protection for the right to die based on personal autonomy, cited *Casey* liberally in their submissions to the Court. Although the *Glucksberg* Court cited *Casey* with approval, it disaffirmed any protection for a right to die. In response, scholars have expressed concern that *Glucksberg* might portend the end of constitutional protection for abortion, if

*id.* at 790 (Breyer, J., concurring) (“I would not reject the respondents’ claim without considering a different formulation, for which our legal tradition may provide greater support.”).


398. See *Casey*, 505 U.S. at 851 (“Our precedents have respected the private realm of family life which the state cannot enter. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” (internal quotations and citations omitted)).

399. See, e.g., Brief of Amici Curiae American Civil Liberties Union et al. passim, *Washington v. Glucksberg*, 521 U.S. 702 (1996) (No. 96-110); Brief of Amici Curiae Americans for Death with Dignity & the Death with Dignity Education Center passim, *Glucksberg* (No. 96-110); Brief of Amici Curiae Bioethicists at 13-14, *Glucksberg* (No. 96-110); Brief of Amici Curiae Center for Reproductive Law & Policy passim, *Glucksberg* (No. 96-110); Brief of Amici Curiae Council for Secular Humanism & International Academy of Humanism at 4, 6, 7, 10, 11, 12, 18, *Glucksberg* (No. 96-110); Brief of Amici Curiae Gay Men’s Health Crisis & Lambda Legal Defense & Education Fund, On Behalf of Their Members with Terminal Illnesses, and Five Prominent Americans with Disabilities at 10, 14, *Glucksberg* (No. 96-110); Brief of Amicus Curiae John Doe at 6, 16, 19, *Glucksberg* (No. 96-110); Brief of Amicus Curiae Julian M. Whitaker, M.D. passim, *Glucksberg* (No. 96-110); Brief of Amicus Curiae Surviving Family Members in Support of Physician-Assisted Dying at 6, 9, *Glucksberg* (No. 96-110); Brief for the Coalition of Hospice Professionals at 13, *Glucksberg* (No. 96-110); Brief for the National Women’s Health Network & Northwest Women’s Law Center passim, *Glucksberg* (No. 96-110); Brief for Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson passim, *Glucksberg* (No. 96-110); Brief of 36 Religious Organizations, Leaders and Scholars passim, *Glucksberg* (No. 96-110). There was, not surprisingly, a lack of citations to *Casey* in briefs submitted by opponents of physician-assisted suicide.

400. See, e.g., Susan Frelich Appleton, *Assisted Suicide and Reproductive
for no other reason than that the method of analysis in Glucksberg is inconsistent with the results both of Roe and of Casey.\footnote{401} Glucksberg itself appeared to disavow that any protections guaranteed by Casey had to do with an expansive, general recognition of individual autonomy\footnote{402} and instead described the right recognized therein as simply the right to an abortion.\footnote{403} By placing Casey within its narrow list of protected choices, the Court made certain that the right of privacy was no more than "the mere aggregation of a number of entitlements to engage in specific behavior"\footnote{404} and not the sum and substance of a more abstract understanding of "self-sovereignty."\footnote{405}

Glucksberg, Hardwick, and Michael H. have had a remarkably impoverishing impact on the scope of both individual liberty and family privacy. While Michael H. demonstrates the primacy of the marital family in the Supreme Court's family privacy jurisprudence, Hardwick and Glucksberg, at first blush, appear to have little to do with families. When Hardwick is read along with Eisenstadt,\footnote{406} though, what emerges is the powerful and encompassing legal principle that freedom from governmental interference in sexual activity between consenting adults is enjoyed only by married couples.\footnote{405} Glucksberg also has a role to play in the impoverishment of both family privacy rights and individual privacy rights. By solidifying the Court's reliance on a view of fundamental rights as restricted by historical practices and traditions, Glucksberg places in doubt the possibility that alternative families ever can achieve the level of deference paid to traditional, nuclear families under family privacy doctrine. At the same time, Glucksberg cabins the abortion right enjoyed by women, thereby providing further confirmation that notions of self-sovereignty will not be useful premises in seeking expansion of individual privacy rights in the near future. As fewer and fewer

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\footnote{402} See Glucksberg, 521 U.S. at 703 ("[A]ny of the rights and liberties protected by the Due Process Clause sound in personal autonomy [but that] does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.").

\footnote{403} See id. at 720.


\footnote{405} Glucksberg, 521 U.S. at 724 (citing Respondents' Brief at 12, *Glucksberg* (No. 96-110)).

\footnote{406} See supra note 228 and accompanying text.
families resemble the marital model of *Griswold*, this impoverishment of individual privacy rights promises to have a detrimental impact on the harmony and stability of nontraditional families.

The constitutional rights of family and individual privacy comprise an important portion of this nation's understanding of fundamental liberties. In the abstract, family privacy purports to guarantee freedom from governmental interference in matters of family life. To sketch the contours of this right is to invoke many landmark cases that form the backbone of the Supreme Court's due process jurisprudence—cases with such familiar names as *Griswold, Eisenstadt,* and *Roe*—and to witness the evolution in the vocabulary and understanding of these cases from a relational focus to an individual rights focus. At the same time, to discuss constitutional privacy rights at all is to acknowledge this country's venerable tradition of judicial vindication of fundamentally unassailable rights, rights protected against the vagaries of policies that shift over time.

A closer look at these basic texts reveals that constitutional family privacy law is driven by its own, underlying policy—a policy of vindicating privacy rights most strenuously when the integrity of traditional, nuclear families is at stake. The Court recently has ruled that even where grandparental visitation could be shown to be in the best interests of the grandchildren, there can be no such inquiry into the best interests of the children where the children's parents are married, barring a showing of parental unfitness. In the abortion context, a woman freely may make her decision to obtain an abortion without consulting or notifying either her husband, or, for a minor, in the vast majority of cases, her parents. These cases, while reflecting the breadth of a woman's liberty to choose to have an abortion, illustrate that the Court is influenced by its estimation of the impact of this liberty on the stability of nuclear families.

Finally, cases limiting the extent of privacy protection betray a marked interest in protecting marital families. In spite of the rising numbers of nonmarital families in this country, the Court systematically has developed a method of analyzing fundamental rights claims that essentially forecloses the recognition of novel rights. Because family privacy is, itself, a fundamental right, the Court's analytical stance renders it highly unlikely that nontraditional families will be granted privacy protection at any time in the near future. This is not to say that such recognition will never be forthcoming. Under the Court's current perspective on fundamental rights, privacy protection could be granted to families not grounded in marriage or consanguinity if recognition of such families becomes part of the fabric of this country's traditions and practices. Such a revolution already may be occurring at the policy level.

407. *See supra* notes 153-68 and accompanying text.
IV. FAMILY POLICY IN THE LAW OF SUCCESSION

Marriage between men and women has been extolled throughout history not only as "the foundation of the family," but also as essential to the advancement of civilization, to the propagation of humanity, and to economic prosperity.


409. See Loving v. Virginia, 388 U.S. 1, 12 (1967); COTT, supra note 190, at 17-18, 26, 46, 77, 116-18, 121, 219; Carl E. Schneider, The Channelling Function in Family Law, 20 Hofstra L. Rev. 495, 502 (1992) (quoting JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 156 (1867)).


411. See Bashaw v. State, 9 Tenn. (1 Yer.) 177 (1829); Maddox v. Maddox, 52 Va. (11 Gratt.) 804 (1854) (describing marriage, and its concomitant procreation, as essential to national prosperity); see also COTT, supra note 190, at 81-82, 121, 157, 179; Jane C. Murphy, Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law, 60 U. Pitt. L. Rev. 1111, 1159 (1999) (quoting testimony from 1996 House of Representatives’s Defense of Marriage Act debates describing the “traditional [marital] family as the foundation of prosperity and happiness”); Katherine Shaw Spaht, For the Sake of Children: Recapturing the Meaning of Marriage, 73 Notre Dame L. Rev. 1547, 1551 n.10 (“[T]he link... between a healthy family and a robust economy... is clear and firm.” (quoting Daniel Yankelovich, Foreign Policy After the Election, 71 FOREIGN AFF. 1, 3-4 (1992))).

Not all perspectives on marriage have been quite so sanguine. Marriage also has been described as a tool for the political and economic subjugation of women, an oppression of long duration in which the law has been complicit. See COTT, supra note 190, at 62-67; Nancy D. Polikoff, Why Lesbians and Gay Men Should Read Martha Fineman, 8 Am. U. J. Gender Soc. Pol’y & L. 167, 169-70 (1999) (cataloguing inequities); Dianne Post, Why Marriage Should Be Abolished, 18 Women’s Rts. L. Rev. 283, 289-306 (1997) (associating marriage with slavery and involuntary servitude); Milton C. Regan, Jr., Marriage at the Millennium, 33 Fam. L.Q. 647, 649-50 (1999) (cataloguing inequities).

Professor Martha Fineman has developed an intricate and compelling theory positing that within this rhetoric about the function of marriage lies the privatization of dependency on a grand scale. See Fineman, Our Sacred Institution, supra note 11, at 400. According to this theory, the rhetoric of the importance of marriage to society masks the traditional nuclear family’s true function in serving as a locus for inevitable and derivative dependency. See Martha Albertson Fineman, The Inevitability of Dependency and the Politics of Subsidy, 9 Stan. L. & Pol’y Rev. 89, 92 (1998); Martha L.A. Fineman, Masking Dependency: The Political Role of Family Rhetoric, 81 Va. L. Rev.
In response, the law has favored and continues to favor the institution of marriage. In order to promote marriage, the law provides easy access to marriage by opposite-sex couples, fosters harmony within existing marriages, and, when marriages end in divorce, encourages the parties to remarry.

Despite the law’s emphasis on marriage, its bias in favor of marital families is not always salient. Some areas of the law contain overarching policies suggesting indifference to marriage. For example, in the law of succession, an area of the law governed solely by policy (as opposed to constitutional) concerns, freedom of testation is said to be paramount to all other policies.

With the onslaught of marital breakdown, Fineman urges that marriage is no longer capable of fulfilling this role and advocates its abolition as a legal category. See Fineman, Neutered Mother, supra note 162, at 164, 228; Jeffrey Evans Stake, Michael Grossberg, Martha Fineman, Akhil Reed Amar, Regina Austin, & Thomas S. Ulen, Roundtable: Opportunities for and Limitations of Private Ordering in Family Law, 73 IND. L.J. 535, 542 (1998) (“Marriage is no longer able to serve its historic role as the repository for dependency.”). To replace marriage, Fineman advocates a re-envisioned family focusing on the mother-and-child caretaking relationship as the core unit of family intimacy. See Fineman, Neutered Mother, supra note 162, at 228, 230-32.

2181, 2200, 2205 (1995). With the onslaught of marital breakdown, Fineman urges that marriage is no longer capable of fulfilling this role and advocates its abolition as a legal category. See Fineman, Neutered Mother, supra note 162, at 164, 228; Jeffrey Evans Stake, Michael Grossberg, Martha Fineman, Akhil Reed Amar, Regina Austin, & Thomas S. Ulen, Roundtable: Opportunities for and Limitations of Private Ordering in Family Law, 73 IND. L.J. 535, 542 (1998) (“Marriage is no longer able to serve its historic role as the repository for dependency.”). To replace marriage, Fineman advocates a re-envisioned family focusing on the mother-and-child caretaking relationship as the core unit of family intimacy. See Fineman, Neutered Mother, supra note 162, at 228, 230-32.

412. See Stubbs v. Ortega, 977 S.W.2d 718, 722 (Tex. App. 1998) (“[It is still the public policy of this state to foster and protect marriage and to discourage divorce. . . .”).

413. See, e.g., Turner v. Safley, 482 U.S. 78, 99-100 (1987) (holding a state may not refuse to allow prisoners to marry except for compelling reasons); Zablocki, 434 U.S. at 389-90 (holding a state may not condition permission to marry on compliance with a child support order); Regan, supra note 411, at 652, 655 (describing the present application of a more demanding level of scrutiny to state regulation of marriage than was applied forty years ago).


415. See In re Wagner, 159 A.2d 495, 499 (Pa. 1960) (noting “the policy of looking with favor upon remarriage”). To reconcile the policy favoring remarriage with the policy disfavoring divorce, the law developed the nisi divorce decree, which delays the divorce decree becoming absolute in order to provide both “a cooling-off period to encourage reconciliation” and the prevention of immediate remarriage. Ladd v. Ladd, 640 A.2d 29, 33 (Vt. 1994) (Morse, J., dissenting).

416. Descent and devise are not rights based in the Constitution but are creatures of policy. This is generally accepted, despite the Supreme Court’s landmark decision in Hodel v. Irving, 481 U.S. 704 (1987), a case overturning Congress’s abolition of inheritance rights in fractionated Indian lands. Scholars and jurists agree that the Constitution guarantees neither a right of decedents to bequeath property nor a right of survivors to inherit property either by intestacy or by will. See, e.g., Hall v. Vallandingham, 540 A.2d 1162, 1164 (Md. Ct. App. 1988) (ignoring Hodel); In re Ford, 552 So. 2d 1065, 1067 (Miss. 1989) (“[T]here is no natural law of inheritance. Intestate succession via descent and distribution is purely a function of the positive law of the
At the same time, succession law is no exception to the favoritism of marriage. When the policies in promotion of testatorial discretion and marital families conflict, the courts struggle for answers, but the latter inevitably holds sway, albeit sometimes tacitly. This is especially evident in the law governing intestate succession and the construction of wills. The law of intestate succession embodies legislatures' estimation of how the majority of decedents would choose to dispose of their property were they to die without a will. This law, with few exceptions, establishes a decedent's surviving spouse and descendants as his sole heirs and, in the absence of descendants, establishes his surviving spouse and his ancestral and, perhaps, collateral blood relations as heirs. Implicit in this framework is the idea that the "natural objects of one's bounty" are these members of one's family. Although commentators on intestate succession have argued for reforms.
recognizing that, in nontraditional families, the natural objects of one's bounty often are not related to the testator either through marriage or by blood, these proposals have met with little success. The uniformity of the vast majority of descent and distribution schemes in this country has led many scholars to conclude, in sum, that intestacy laws "promote and encourage the nuclear family."423

Despite the explicit policy of the law of succession to vindicate the freedom of the individual testator, in reality this presumption is shot through with exceptions born of devotion to marital families.424 To prevent application of the law of intestate succession to her estate, an individual need only execute a will.425 In so doing, the law of wills appears to grant a testator complete testamentary freedom, no matter how eccentric or nonsensical her testamentary scheme might appear.426 Nevertheless, avoiding the application of intestacy law is not as easy as it sounds. This is because "the law favors construing a will to dispose of property in the same manner in which the law would have disposed of it had the deceased died intestate."427 Hence, a testator must be very clear in expressing her intention not to leave any part of her estate to the natural objects of her bounty if such an intention is to be honored.428 If she is not, she runs the risk, in the absence

(For centuries succession laws in Anglo-American law have provided for family members.").

422. See Mary L. Fellows et al., Committed Partners and Inheritance: An Empirical Study, 16 LAW & INEQ. 1, 24-29 (1998) (discussing Professor Lawrence Waggoner's proposed legislation); E. Gary Spitko, Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration, 49 CASE W. RES. L. REV. 275, 276 (1999) (commenting that the law prefers gifts to a testator's spouse and blood relations); see also Lawrence Waggoner, Marital Property Rights in Transition, 59 Mo. L. Rev. 21, 78-87 (1994) (proposing legislation).


424. See infra notes 427-60 and accompanying text.

425. See Brooking v. McCutchen, 135 S.W.2d 197, 199 (Tex. App. 1939) ("[A] strong presumption exists that the testator did not intend to die intestate as to any part of his estate, by the execution of the instrument . . . "); Gary, supra note 421, at 1-2.

426. See In re Kirkendall, 642 N.E.2d 548, 552 (Ind. 1994) ("A testator may devise her property with attached terms or subject to conditions, regardless of how capricious or unreasonable the terms or conditions may seem, unless they violate some statute or established principle of law.").

427. Id. at 551; see also Brooking, 135 S.W.2d at 199 ("Courts apply a presumption that absent specific provision to the contrary, the testator intended that his property should pass in accordance with the intestacy laws.").

428. See Kirkendall, 642 N.E.2d at 551 ("[T]he presumption] cannot apply where
of good evidence of her intention, that any ambiguity in the language she uses will be resolved in favor of the natural objects of her bounty, a result potentially consistent with an outright failure of the devise. The result is the passage of property to family members the testator may well have wished not to benefit.

Accompanying the danger that the use of ambiguous language may prevent testators from disinheriting the natural objects of their bounty is the risk that the testator’s testamentary scheme will be undone by charges that it was procured by undue influence. While courts have declared that a testator’s bequest of property to a person who is not a natural object of his bounty raises no presumption of mental incapacity or of undue influence, they often, and without much inquiry, deem a testator’s disposition “unnatural” when it disproportionately benefits “strangers of the blood.” If exceedingly disproportionate, such a disposition will destroy the presumption of testamentary capacity and, in some cases, will give rise to a presumption of undue influence. By contrast, if a disposition is deemed

the testator’s will clearly and unambiguously expresses a contrary intent.

429. See In re Carmody, 300 N.Y.S. 1299, 1306 (Sur. Ct. 1937) (noting the rule that an invalid devise becomes part of the residuary estate unless the residuary devise is itself invalid, in which case the property passes by intestacy); RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 11.3(e)(3) (Tentative Draft No. 1, 1995) (articulating a “constructional preference” for “family members” in cases of ambiguity); 95 C.J.S. Wills § 622 (1957 & Supp. 2001).

430. See In re Miller, 116 P.2d 526, 531 (Wash. 1941) (“Mental incapacity on the part of a testator is not presumed on the theory that it was unnatural and unreasonable to execute a will giving all property to a stranger and cutting off one’s kin.”); 94 C.J.S. Wills § 35 (1956 & Supp. 2001).


434. See In re Lawrence, 132 A. 786, 789 (Pa. 1926) (“Such distribution may, however, become of the utmost importance when considering the question of undue influence to which it is more closely related.... [T]he presumption [does] not extend to relatives of the blood.”); 94 C.J.S. Wills § 242 (1956 & Supp. 2001). Professor Leslie’s research revealed that courts were more likely to impose the presumption of undue influence in unnatural bequest cases when the beneficiary was a non-relative. See Leslie,
natural, it is quite difficult to show it was procured by undue influence\textsuperscript{435} because more evidence is required to show that a natural object exerted undue influence than to show that one who is unrelated to the testator exerted such influence.\textsuperscript{436} Thus, "the influence of a child or spouse in the making of a will ... does not invalidate the will,"\textsuperscript{437} but similar influence by another may invalidate it.\textsuperscript{438} Although the legal rules governing these disputes mandate that careful inquiry be made into a testator's true intentions, too often the presumption that a testator intended to benefit the natural objects of his bounty becomes the rule that the testator should have done so.\textsuperscript{439}

In the case law treating restraints on marriage in wills, courts are presented more squarely with the clash between the freedom of testation and the policy in favor of marriage.\textsuperscript{440} The resulting struggle has left the law in this area a tangle of conflicting rules.\textsuperscript{441} Therefore, it is difficult to generalize, but certain salient


\textsuperscript{436} See In re Kelly's Estate, 46 P.\textsuperscript{2}d 84, 93 (Or. 1935) ("[A]n influence when exercised by a wife might be lawful and legitimate, but . . . if exercised by a woman occupying merely an adulterous relation to the testator, might be undue and illegitimate." (quoting Kessinger v. Kessinger, 37 Ind. 341 (1871))); 94 C.J.S. \textit{Wills} \S 253 (1956 & Supp. 2001).


\textsuperscript{439} See deFuria, supra note 431, at 218 (recognizing an inherent tension between application of the doctrine of undue influence and the principle of freedom of testation); Leslie, supra note 432, at 243 (noting that courts protect testators' family members); Madoff, supra note 435, at 576 ("[T]he undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms.").

\textsuperscript{440} Although the constitutional right to marry has been raised in these cases, it has been held that the court's enforcement of a testamentary restraint on marriage does not prevent a beneficiary from marrying whom he chooses but merely carries out the terms of the bequest. See, e.g., Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 827-28 (Ohio C.P. Ct. 1974).

\textsuperscript{441} See Lewis v. Searles, 452 S.W.2d 153, 155 (Mo. 1970) ("It is obvious that the cases on the subject are both conflicting and confusing.").
themes emerge. Historically, general restraints\(^442\) on marriage in a will were largely forbidden due to the ascendancy of the view that marriage was the proper way of life and had to be encouraged by all means.\(^443\) More recently, the trend in the courts has been to uphold rather than to invalidate restraints on marriage.\(^444\) Still, many of the cases where this occurs do not involve restraints on marriage in the true sense. A condition based on the married or unmarried status of the beneficiary at the time of the testator's death is not considered a restraint on marriage because, given the ambulatory character of wills, such a condition cannot act as an inducement to remain unmarried or to divorce.\(^445\) Freedom of testation is easy to vindicate in such cases because there is no clash between this policy and provisions that reasonably could be construed as permanent restraints on marriage.

True restraints on marriage—that is, provisions that induce a beneficiary's decision to obtain a divorce\(^446\) or not to marry at some point after the testator's death—do limit the freedom of testation. If a restraint on marriage is general, meaning that it bars marriage entirely, it is less likely to be upheld than if a

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\(^442\) A general restraint is one disallowing the beneficiary from marrying anyone. See \textit{Shapira}, 315 N.E.2d at 829.

\(^443\) See \textit{Searles}, 452 S.W.2d at 155 ("There is no doubt that the older cases in Missouri and elsewhere held that a provision in general restraint of marriage was void as against public policy.").

\(^444\) See \textit{Lewis v. Colo. Nat'l Bank}, 652 P.2d 1106, 1108 (Colo. 1982) ("[The policy of the law favoring marriage is without sufficient vigor to overcome the policy in support of effectuating a settlor's intention."); Sherman, \textit{Posthumous Meddling, supra} note 416, at 1317; Annotation, \textit{Conditions, Conditional Limitations, or Contracts in Restraint of Marriage}, 122 A.L.R. 7, 11-12 (1939) ("The preponderance of modern opinion seems to be that the right of a donor to attach such conditions as he pleases to his gift will outweigh the maxim that marriage should be free, except where such conditions are evidently attached through caprice rather than from a desire to carry out a reasonable purpose.").

\(^445\) See \textit{In re Collura}, 415 N.Y.S.2d 380, 381 (Sur. Ct. 1979) ("[S]uch a provision is not contrary to public policy since it refers to a past act."). The ambulatory nature of a will refers to its lack of legal effect until the death of the testator. See \textit{Timberlake v. State-Planters Bank of Commerce & Trusts}, 115 S.E.2d 39, 44 (Va. 1960) ("A will is an ambulatory instrument, not intended or allowed to take effect until the death of the maker. It may be changed during life as often as the mind and purpose of the testator change. While he lives his written will has no life or force, and is not operative or effective for any purpose.").

\(^446\) See \textit{In re Gerbing's Estate}, 337 N.E.2d 29, 32 (Ill. 1975) ("[A] condition annexed to a devise or bequest, the tendency of which is to encourage divorce or bring about a separation of husband and wife is against public policy, and the condition is void."); \textit{Shapira}, 315 N.E.2d at 831 ("Most other authorities agree with \textit{Fineman v. Bank} that as a general proposition, a testamentary gift effective only on condition that the recipient divorce or separate from his or her spouse is against public policy and invalid.").
restraint is merely partial.447 Furthermore, even if only a partial restraint, the restraint must be reasonable in order to be upheld.448 For example, a partial restraint forbidding a beneficiary from marrying a certain person or requiring a beneficiary to marry someone of a certain religion is not void as against public policy because the beneficiary’s choice of a marital partner is not unduly circumscribed.449 A requirement that the beneficiary marry a certain person, although perfectly proper as a condition on a gift inter vivos,450 probably would be invalidated because it unreasonably restricts the choice of a marital partner.451 Restraints on a widow’s or widower’s remarriage, however, are valid452 and are

447. See Hall v. Eaton, 631 N.E.2d 805, 808 (Ill. Ct. App. 1994) ("[A]ttempts to prevent unmarried children from marrying named individuals (partial restraints), or from marrying before a certain age, or from marrying without consent, are valid.").


449. See, e.g., Taylor v. Rapp, 124 S.E.2d 271, 272 (Ga. 1962) ("Prohibiting marriage to a particular person or persons, or before a certain reasonable age, or other prudential provisions looking only to the interest of the person to be benefited [sic], and not in general restraint of marriage, will be allowed and held valid." (quoting GA. CODE ANN. § 53-107 (1933) (current version at GA. CODE ANN. § 19-3-6 (1999))); Shapira, 315 N.E.2d at 827. Note that conditions in a will forbidding a beneficiary from marrying a person of a particular faith or race likewise have been upheld. See, e.g., In re Silverstein, 155 N.Y.S.2d 598, 599 (Sur. Ct. 1956).


451. See Annotation, supra note 444, at 28 (noting that conditioning a testamentary gift on marrying a particular individual has been held reasonable "unless the circumstances are such as unduly restrict a freedom of choice" (citing Maddox v. Maddox, 52 Va. (11 Grat.) 804 (1854))).

452. See, e.g., Wilbur v. Campbell, 192 So. 2d 721, 723 (Ala. 1966) ("There is no controversy that a devise by a husband in total restraint of a second marriage by his wife is valid and will be enforced according to its terms."); Hall v. Eaton, 631 N.E.2d 805, 808 (Ill. Ct. App. 1994) ("Attempts to prevent the remarriage of spouses are valid."). Historically, male testators could condition their wives’ legacies on their remaining unmarried, this being a right related to husbands’ “mournful property right . . . in the viduity of their wives.” Lewis v. Searles, 452 S.W.2d 153, 155-56 (Mo. 1970) (quoting Knost v. Knost, 129 S.W. 665, 667 (Mo. 1910)); see also Hall, 631 N.E.2d at 808. No similar rule permitted female testators to place restraints on the remarriage of their husbands. See Knost, 129 S.W. at 667 ("It is a curiosity in the law that when the boot is on the other foot and a wife makes a grant, which by condition subsequent is to be defeated on the remarriage of her husband, the general doctrine that conditions in restraint of marriage are void as contra bonos mores has been applied with vigor."). But see In re Appleby, 111 N.W. 305, 309 (Minn. 1907) ("His . . . wife possessed the property, the wealth; and no sound reason can be advanced to sustain the view that she was under legal or moral obligation to provide him with an income with which to support in comfort and

http://scholarship.law.missouri.edu/mlr/vol66/iss3/1
not thought of as general restraints. In contrast, a general restraint on marriage is invalid where the beneficiary previously has not been married, unless the intention of the testator is to provide support for the beneficiary until such time as the beneficiary does marry. The mirror image of this rule validates provisions that are written with the motive to provide support in the event a beneficiary divorces her spouse or with the motive to protect the beneficiary from "misappropriation on the part of her husband." Without evidence of the intention to provide support, such conditions would be considered inducements to divorce and, thus, violations of the public policy encouraging marriage. On the other hand, inducements to marry or restraints on divorce in wills are consistent with the policy in favor of marriage and will be upheld because there is no public policy in favor of discouraging marriage or favoring of divorce. These various rules show that the law generally disfavors restraints on marriage but that their prohibition depends upon the extent to which they actually impede marriage.

The foregoing sketch of succession law exposes several overarching principles. The law of intestacy is a statutory default will establishing inheritance rights in marital or consanguineous families for individuals who die without a will. Testators who bequeath property to persons who are not the natural objects of their bounty do so at their peril. Despite the venerable, and supposedly overarching,

luxury a new wife.

453. See 52 AM. JUR. 2d Marriage § 114 (2000 & Supp. 2001). But see Sherman, Posthumous Meddling, supra note 416, at 1317 (classifying restraints on widows' remarriages as "general restraints on second marriages").

454. See Hall, 631 N.E.2d at 808; In re Heller's Estate, 159 N.W.2d 82, 84 (Wis. 1968) ("A condition rendering a gift contingent upon not marrying anyone is void . . . .") (citing RESTATEMENT (FIRST) OF PROPERTY § 424 (1944)); 52 AM. JUR. 2d Marriage § 114 (2000 & Supp. 2001).

455. See In re Stone's Estate, 155 N.Y.S.2d 898, 899 (Sur. Ct. 1956) ("Where, as here, the dominant motive of the testatrix is evidently to provide support for her granddaughter until her marriage, no invalid general restraint of marriage is imposed.").

456. See Hall, 631 N.E.2d at 807 ("[I]f the dominant motive of the testator is to provide support in the event of such separation or divorce, the condition is valid." (citing In re Gerbing, 337 N.E.2d 29, 32-33 (Ill. 1975))).

457. Id. at 808.


460. See In re Clarke, 57 P.2d 5, 10 (Colo. 1936) (noting that the state does not favor divorce but merely permits it under certain circumstances).
policy that testators have complete freedom of testation, basic principles of will
collection and presumptions in the law of undue influence render it easier for
natural objects of a testator’s bounty to overturn his bequests than for unnatural
objects to do so. Furthermore, the law applicable to wills that restrain marriage
permits testatorial absolutism only to the extent that the will does not restrain
marriage. In short, the law of succession is rife with examples of bias in favor of
marital families. This leaves those who consider the natural objects of their bounty
to lie outside the law’s rigid definition of this kind of family with little assurance
that their testamentary goals can be achieved.

Many areas of the law embody a favored status for marriage and the married.
Not wanting to betray this favored status, the law of succession extols
testamentary freedom while systematically dismantling it in cases where the
married state is perceived to be at risk. In this way, succession law closely mirrors
the constitutional law cases discussed in Part III. Just as inheritance law cases
uphold freedom of testation only if it does nothing to undercut marriage, individual
privacy cases defend individual autonomy more vigorously if to do so is consistent
with the promotion of traditional, nuclear families. These illustrations of how an
overarching policy favoring marriage becomes embedded beneath individual
autonomy rhetoric raise the question whether policy reforms aimed at loosening
the grip of this bias, in an effort to recognize today’s nontraditional families,
achieve their goal.

V. POLICY REFORM

Whenever substantive due process and equal protection claims are brought,
as in the family privacy cases discussed in Parts II and III above, courts must
assess “the adequacy of the ‘fit’ between the classification and the policy that the
classification serves.”461 The fit must be tighter in some cases than in others,
depending on whether the legislation infringes on a fundamental right or creates
suspect or quasi-suspect classifications. For example, in Michael H., the Court,
having found no fundamental right for an adulterous natural father to have a
relationship with his child, found an adequate fit between California’s conclusive
presumption of paternity and its policy of “excluding inquiries into the child’s
paternity which would be destructive of family integrity and privacy.”462 In
contrast, the Eisenstadt Court, applying the rational basis test, found no adequate
fit between the proscription on access to contraceptives by the unmarried and

policy “concerns what is right, just, and affects the citizenry of the State collectively.”
462. Michael H., 491 U.S. at 120.
Massachusetts's goal of deterring premarital sex. The Court emphasized the absurdity of a "scheme of values" that would prescribe pregnancy and the birth of an unwanted child as punishment for fornication.

Beyond having to balance asserted public policies against constitutional liberty interests, the Court in these cases is required to interpret the Constitution—an act itself influenced by public policy. By narrowly defining fundamental rights and rejecting claims like those made in Hardwick, Michael H., and Glucksberg, the Court most recently has determined that it is important to define the claimed right with great specificity and to be bound by historical referents. This choice of interpretive position is not only a matter of discretion; its very implementation requires reference to policy in order to function. By turning to historical referents, the Court is required to look beyond the constitutional law context to areas of the law driven by public policy concerns. In Hardwick and Glucksberg, the area in question was the criminal law, and in Michael H., the law was that governing family relationships. In this way, the Court brings the specificity of the statutory enactments and court decisions of the past to bear on how the broad outline of the Constitution is interpreted today.

By electing to be constrained by historical traditions and practices, the Court has decided it should play no role in effecting social reform via its interpretation of the Constitution in fundamental rights cases. In light of this interpretive attitude, it is left to legislative bodies to codify social policy more in keeping with prevailing social norms. In fact, the Court, at times, has encouraged them to do so. Legislatures have responded in various ways. They have, for example, enacted legislation removing barriers to inheritance by nonmarital children. Commentators also have responded by designing proposals to address deficiencies in adoption law wrought by misplaced glorification of nuclear families. In addition, courts themselves have dismantled misguided analytical frameworks in move-away custody disputes in favor of a more general application of the best interests of the child standard. As if responding to shifts in societal values and practices, such reforms would appear to question the primacy of the nuclear family as the standard by which rights are distributed. As such, these reforms are of great

464. Id. at 448.
466. See, e.g., Washington v. Glucksberg, 521 U.S. 702, 737 (1997) (O'Connor, J., concurring) (urging the "democratic process" to experiment with balancing the various interests in right-to-die cases).
historical importance. Nevertheless, upon unpacking these legislative, judicial, and scholarly attempts to reform the law relating to families, what emerges is the same bias toward fostering and protecting nuclear families that was uncovered in the constitutional law in Parts II and III of this Article. What at first appear to be departures from outdated policies that are unreflective of how life is lived today are, in actuality, embodiments of the old policies beneath a new facade.

A. Nonmarital Children and Marital Families

Historically, inheritance by nonmarital children was forbidden because it would legitimate illicit sexual relations. As a result, this type of inheritance was deemed contrary to a decedent's presumed intentions. The law has evolved in the last twenty-five years to recognize that innocent children should not suffer disinheritance as a result of their parents' indiscretions. This reform in the law arose largely due to a mandate from the Supreme Court making clear that classifications based on a child's nonmarital status that do not substantially relate to important legislative goals violate the Equal Protection Clause of the Fourteenth Amendment. Legislatures responded to this mandate by enacting statutory frameworks that align the treatment accorded nonmarital children with that accorded marital children. Despite this sea change in the inheritance rights of nonmarital children, the law continues to favor marital relationships in this

467. See Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) ("The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage.").


469. See Weber, 406 U.S. at 175 ("[I]mposing disabilities on 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. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise.").

470. See Clark v. Jeter, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.").

471. See, e.g., Regan, supra note 411, at 659 (stating that illegitimacy is not a suspect constitutional classification, so that children of unmarried parents enjoy most of the benefits available to those whose parents are married).
context. Only parents unwed at the time of their child’s birth are deprived of the opportunity to inherit from that child unless they recognize or support the child.472

Under the common law, a nonmarital child could inherit from neither her mother nor her father.473 In striving to keep up with “the advancing enlightenment and civilization of the race,”474 most states have passed laws allowing nonmarital children to inherit from their mothers, but, by and large, nonmarital children still face legal obstacles to inheriting from their fathers.475 This disparate treatment was not ameliorated, as some courts claimed,476 by the existence of the father’s power at any time to execute a will naming his nonmarital child a beneficiary.477 Not only was the use of “children” in a will construed so as to exclude illegitimate children,478 but state statutes deprived a nonmarital child of specific bequests from his parents either per se479 or upon challenge by the testator’s surviving spouse and marital children.480 The Supreme Court, in Labine v. Vincent,481 rejected a

472. See infra note 535 (citing statutes denying fathers’ inheritance rights through their nonmarital progeny unless they support or acknowledge them).

473. In re Estate of Karas, 329 N.E.2d 234, 236 (Ill. 1975) (“Under the common law an illegitimate was considered filius nullius.” (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *456)); DUKEMINIER & JOHANSON, supra note 419, at 105.

474. Karas, 329 N.E.2d at 237 (quoting Smith v. Garber, 121 N.E. 173, 175 (Ill. 1918)).

475. See DUKEMINIER & JOHANSON, supra note 419, at 115. In Trimble, the Court described these new laws as attempting to establish a system of intestate inheritance more just to illegitimate children and, at the same time, protecting against spurious claims of paternity. Trimble v. Gordon, 430 U.S. 762, 776 (1976).

476. See, e.g., Karas, 329 N.E.2d at 240.


478. See Brisbin v. Huntington, 103 N.W. 144, 147 (Iowa 1905) (“The decisions are unanimous that, in the absence of statutory provisions modifying the common law with respect to illegitimate children, the words “issue,” “child,” or “children,” found in a will or statute, whether qualified by the word ‘lawful’ or not, are to be construed as only those who are legitimate, and, if others are intended, this must be deduced from the language employed, without resort to extrinsic facts.”).


480. See Gore v. Clarke, 16 S.E. 614, 616 (S.C. 1892) (citing a statute declaring void any bequest of more than one-fourth of a testator’s estate to that testator’s illegitimate child “provided the wife or child alone can raise the question”); Bennett v. Toler, 56 Va. (15 Gratt.) 588 (1860) (“In a great majority of cases the testator is presumed to prefer, as objects of his bounty, legitimate children to bastards.”).

481. 401 U.S. 532 (1971) (holding that a state’s interest in promoting family life rationally supports its disallowance of an intestate share for an unacknowledged
constitutional challenge to these statutes, reasoning that it had no authority to interfere with a state’s intestate succession laws and that these laws were rationally based on the desire of states to encourage family relationships.

After deciding no fewer than nine disputes involving wrongful death and public benefits statutes containing classifications based on illegitimacy, the Supreme Court, in *Trimble v. Gordon*, reviewed an Illinois intestate succession statute that disallowed illegitimate children from inheriting from their biological fathers. The case was an appeal by a nonmarital child from the probate court’s rejection of her petition to be declared an heir of her father’s estate. The Supreme Court of Illinois, ruling orally from the bench immediately after oral argument, affirmed the decision.

While not overruling *Labine*, the *Trimble* Court indirectly disapproved of it, stating that other decisions had made express that no “State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships.” The Court also hinted that *Labine* may have gone too far in approving, based on the state’s asserted interest in the orderly administration of estates, the complete exclusion of nonmarital children from intestine inheritance. Likewise, the Court expressed its view that proof problems in inheritance claims by nonmarital children should not be used to excuse invidious discrimination against them. Finally, the *Trimble* Court deemed the fact that the father could have made a will and the claim that the intestacy statute reflected his “presumed intent” wholly irrelevant to the question at hand.

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482. See id. at 537 (finding no justification in the Constitution for interference with the state’s choice of intestate succession laws).

483. See id. at 536 n.6.


487. See id.

488. See id. at 765.

489. Note, however, that four justices dissented in *Trimble*, deeming *Labine* dispositive. See id. at 777 (Rehnquist, J., dissenting).

490. Id. at 769.

491. See id. at 767 n.12.

492. See id. at 772.

493. Id. at 774-75.
THE POLICY OF FAMILY PRIVACY

As radical as Trimble seemed, it, nonetheless, did not stand for the proposition that, to inherit from their intestate fathers, nonmarital children must have precisely the same rights as marital children. The Court admitted that difficulties in proving paternity “might justify a more demanding standard for illegitimate children claiming under their fathers’ estates than that required either for illegitimate children claiming under their mothers’ estates or for legitimate children generally.”

The Court, thus, left room for a veritable welter of new litigation presenting the question of when the different standard would become too demanding to pass constitutional muster.

Both New York and Texas defended their particularly demanding standards in cases reaching the Supreme Court. New York’s statute provided that nonmarital children could not inherit in intestacy from their fathers unless, during the father’s lifetime, a court issued an order of filiation initiated during the mother’s pregnancy or before the child’s second birthday. This provision was challenged in Lalli v. Lalli by the son of an intestate who openly had acknowledged his paternity. In declaring New York’s statute constitutional, albeit imperfect, the Court noted that its purpose was not to steer people into legitimate relationships but to promote the orderly administration of estates.

The Court commented that, because the unexpected appearance of a nonmarital child claiming a share of an estate could disrupt the stability of orderly administration, New York’s restriction on the ability of nonmarital children to inherit was justified. Also compelling to the Court were the peculiar proof problems that paternity posed. Whereas maternity is a foregone conclusion in most cases, questions of paternity invite fraudulent claims and harassing litigation—especially where fathers and their nonmarital children do not constitute “a formal family unit.” The Court felt that these important concerns were addressed appropriately by New York’s statutory scheme because it required

494. Id. at 770; cf. Reed v. Campbell, 476 U.S. 852, 855 (1986) (holding that “the state[’s] interest in the orderly disposition of decedents’ estates may justify the imposition of special requirements upon an illegitimate child”).


496. See id. at 261 n.2 (citing N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(2) (McKinney 1998)).


498. See id. at 262-63.

499. See id. at 276.

500. See id. at 272-73.

501. See id. at 267 (“[T]he marital status of the parents is irrelevant.”).

502. See id. at 267-68.

503. See id. at 270.

504. See id. at 271.

505. Id. at 269.
the filiation order to be issued during the putative father's lifetime.\textsuperscript{506} This circumscribed the time within which illegitimate children could present their claims and allowed the putative father to defend himself against false claims of paternity.\textsuperscript{507} The \textit{Lalli} Court did not address the constitutionality of the statute's two-year limitation specifically;\textsuperscript{508} a choice Justice Blackmun, in his concurrence, suggested would haunt the Court as legislatures questioned whether their particular statutes were more like the one in \textit{Trimble} or the one in \textit{Lalli}.\textsuperscript{509}

In dissent, four justices argued that the decision was an unjustified retreat from \textit{Trimble} in that it made it likely that nonmarital children would never inherit from their fathers in intestacy.\textsuperscript{510} As if responding to this dissent, later New York cases specifically found the statute's two-year requirement unconstitutional.\textsuperscript{511} Since its amendment in 1981, New York's statutory scheme has allowed, in addition to the court order of filiation,\textsuperscript{512} a nonmarital child to inherit from his natural father if the father: (1) "has signed an instrument acknowledging paternity,"\textsuperscript{513} (2) "paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own,"\textsuperscript{514} or (3) "a blood genetic marker test had been administered to the father which together with other evidence establishes paternity by clear and convincing evidence."\textsuperscript{515} These criteria incorporate some of the suggestions Justice Brennan made in his dissent in \textit{Lalli} and reflect the statutory scheme that many states, including Texas, subsequently have adopted.\textsuperscript{516}

Texas was particularly recalcitrant in preventing nonmarital children from claiming a paternal inheritance and has had a history of other draconian laws disfavoring illegitimate children.\textsuperscript{517} In 1977, the year \textit{Trimble} was decided, Texas

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\item \textsuperscript{506} See id. at 271.
\item \textsuperscript{507} See id. at 271-72.
\item \textsuperscript{508} See id. at 267 n.5.
\item \textsuperscript{509} See id. at 277 (Blackmun, J., concurring).
\item \textsuperscript{510} See id. at 277-78 (Brennan, J., dissenting).
\item \textsuperscript{511} See, e.g., \textit{In re McLeod}, 430 N.Y.S.2d 782, 785 (Sur. Ct. 1980); \textit{In re Harris}, 414 N.Y.S.2d 612, 615 (Sur. Ct. 1979) ("[I]f a literal and stringent application of the two year limitation . . . were accepted, it would require a finding that this portion of the statute is constitutionally offensive to the right of the infant to equal protection of the law."); \textit{In re Angelis}, 410 N.Y.S.2d 521, 524 (Sur. Ct. 1978).
\item \textsuperscript{512} See N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2)(A) (McKinney 1998).
\item \textsuperscript{513} N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2)(B) (McKinney 1998).
\item \textsuperscript{514} N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2)(C) (McKinney 1998).
\item \textsuperscript{515} N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2)(D) (McKinney 1998).
\item \textsuperscript{516} Many of these statutes track the language of the Uniform Parentage Act. See UNIF. PARENTAGE ACT § 201(b)(2)-(3), 9B U.L.A. 25 (Supp. 2001); UNIF. PARENTAGE ACT Prefatory Note, 9B U.L.A. 17-18 (Supp. 2001).
\item \textsuperscript{517} See Gomez v. Perez, 409 U.S. 535 (1973) (striking down as an
still had a statute depriving an illegitimate child of any claim to a paternal inheritance unless her parents had married after her birth.\textsuperscript{518} In 1978, Delynda Reed, born out-of-wedlock, claimed a share of the estate of her father Prince Ricker, who had died four months before \textit{Trimble} was decided.\textsuperscript{519} The Texas courts denied her claim, ruling that \textit{Trimble} did not operate retroactively to encompass claims to estates opened \textit{before} the decision in \textit{Trimble} but distributed \textit{afterwards}.\textsuperscript{520} The Supreme Court reversed, ruling that, although the claim of a nonmarital child to a share in her father’s estate may impose upon the child “special requirements,”\textsuperscript{521} the timing of Reed’s claim had no impact on the state’s interest in the orderly administration of Ricker’s estate.

In response to \textit{Trimble} and later cases, the Texas legislature passed a series of amendments to both the Texas Probate Code and the Texas Family Code. In 1977, the Texas legislature amended the Texas Probate Code to allow a nonmarital child to claim a paternal inheritance only if the parents had married after the child’s birth or the father voluntarily had legitimated the child.\textsuperscript{522} In 1979, the legislature again amended the Texas Probate Code to allow the child to be legitimated by a court order of paternity provided for by the Texas Family Code.\textsuperscript{523} Despite this reform, Texas’s statute of limitations for a nonmarital child’s paternity action required the child to bring the action before her first birthday, a requirement characterized as “less than generous” in \textit{Mills v. Habluetzel},\textsuperscript{524} a Supreme Court case striking it down as a violation of equal protection.\textsuperscript{525} While \textit{Mills} was pending before the Supreme Court, the Texas legislature increased the

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  \item[unconstitutional violation of equal protection] Texas’s rule disallowing illegitimates a right of support from their biological fathers. In \textit{Mills v. Habluetzel}, 456 U.S. 91, 101 (1982), the Supreme Court’s follow-up to \textit{Gomez}, the Court struck down, as a violation of equal protection, a Texas statute of limitations requiring a nonmarital child to bring a suit for support before reaching his first birthday. The Court held that the truncated limitations period afforded nonmarital children no reasonable opportunity to assert their claims and bore no substantial relationship to the state’s interest in frustrating stale or fraudulent claims of paternity. \textit{See id.} at 100-01.
  \item[518.] \textit{See} Reed v. Campbell, 476 U.S. 852, 853 (1986) (citing \textsc{TEX. PROB. CODE ANN.} \textsection{} 42 (Vernon 1980 & Supp. 2001)).
  \item[519.] \textit{See id.}
  \item[520.] \textit{See id.} at 853 n.3 (citing Reed v. Campbell, 682 S.W.2d 697, 700 (Tex. App. 1984). Texas courts apparently had applied \textit{Trimble} to claims pending as of the date of the decision. \textit{See id.} at 856 (citing Winn v. Lackey, 618 S.W.2d 910 (Tex. App. 1981); Lovejoy v. Lillie, 569 S.W.2d 501 (Tex. App. 1978)).
  \item[521.] \textit{Id.} at 855.
  \item[523.] \textit{See id.}
  \item[524.] 456 U.S. 91 (1982).
  \item[525.] \textit{Id.} at 94.
\end{itemize}
limit to age four, and, in 1983, the legislature again increased the time frame to two years after a child becomes an adult.\textsuperscript{526} The Texas Probate Code was amended in 1987 to provide for post-death determinations of paternity in the probate court,\textsuperscript{527} and, finally, in 1989, the legislature again amended the Texas Family Code to make the more liberal statute of limitations passed in 1983 applicable to "children for whom a paternity action was brought but dismissed because a statute of limitations of less than eighteen years was in effect."\textsuperscript{528} The present law reflecting this series of amendments allows nonmarital children to bring a paternity suit within two years of their reaching the age of majority or, "without regard to a paternity determination under the Family Code or voluntary legitimization by the father,"\textsuperscript{529} to establish paternity by clear and convincing evidence in the probate court\textsuperscript{530} either in the course of an existing probate\textsuperscript{531} or by attacking a judgment of heirship within four years.\textsuperscript{532} These statutes of limitations were, like the limitations imposed by the statute in \textit{Lalli}, justified by Texas's interest in "the orderly administration of estates and the validity of property ownership."\textsuperscript{533}

These legislative reforms suggest that the contemporary view that there are no illegitimate children, only illegitimate parents,\textsuperscript{534} has led to abolition of the long-standing bias in favor of nuclear families that perpetuated the stigma of illegitimacy. But instead of completely abolishing this bias, states have elected to shift the stigma of illegitimacy from illegitimate children to their parents and, in this way, have found a new means of promoting nuclear families. Prevented by the Supreme Court on equal protection grounds from disfavoring nonmarital children, several states have passed legislation denying fathers inheritance rights from or

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529. \textit{Id. at 866.}
530. \textit{See TEX. PROB. CODE ANN. § 42(b) (Vernon 1980 & Supp. 2001).}
531. \textit{See In re Chavana, 993 S.W.2d 311, 317 (Tex. App. 1999).}
532. \textit{See Turner, 848 S.W.2d at 878.}
534. \textit{See In re Cherkas, 506 A.2d 1029, 1031 (R.I. 1986) ("The sweep of the various opinions of the Supreme Court of the United States in this area may be summarized by a statement of principle widely accepted in the modern era. Although there may be illegitimate parents, there is, in justice, no such person as an illegitimate child. The very term ‘bastard’ is illustrative of the medieval notion that the sins of the father would be visited upon his hapless offspring. If such a concept was ever accepted, it is time, and past time, that it be wholly discredited and repudiated.").}
\end{flushright}
through their nonmarital progeny unless they supported or acknowledged such children. Determining that fathers who do not treat their nonmarital children as their own have no entitlement to inherit from those children's estates, the Georgia legislature enacted such a statute. The statute disallowed the father of a nonmarital child from inheriting from or through that child if paternity had not been established through presumption or court order, or if the father "failed or refused openly to treat the child as his own or failed or refused to provide support for the child." The statute also expressly recognized the right of a nonmarital child's mother to inherit from the child under any circumstances, and it made no mention of married parents who abandon their children.

The statute was invoked by the plaintiff in Rainey v. Chever. In that case, Robert Lee Chever's twenty-year-old nonmarital child was killed in an automobile accident. Zenobia Hamilton Rainey, the child's mother, moved the court to deny the child's father heirship status even though his paternity had been established. Chever, who apparently never had supported his son or played any role in his son's life, responded by challenging the statute on federal and state equal protection grounds. The trial court agreed with Chever, and the Georgia Supreme Court affirmed, noting that the statutory means chosen to advance the state's interest in encouraging fathers to take responsibility for their nonmarital children were not substantially related to the classification that penalized fathers but not similarly situated mothers.

The Supreme Court denied certiorari over the strenuous dissent of Justice Thomas, who, joined by Chief Justice Rehnquist and Justice Scalia, described a host of social ills attributable to the high incidence of out-of-wedlock births. Claiming that the Georgia Supreme Court had failed to adhere to Supreme Court


540. See id. at 823.
541. See id.
543. See Rainey, 510 S.E.2d at 823.
544. See id. at 824.
545. See Rainey, 119 S. Ct. at 2411 (Thomas, J., dissenting).
Justice Thomas declared that the court should have defined the issue as whether a distinction between fathers who do and fathers who do not support and acknowledge their nonmarital children had a rational basis. Based on this statement of the issue, Justice Thomas concluded that the Georgia Supreme Court improperly had applied heightened scrutiny in its review of the statute's constitutionality.

Although the opinion of the dissenting justices has no legal force, it is remarkable that both it and the Georgia Supreme Court's opinion never fully explored the distinction between classifications stigmatizing nonmarital children and those stigmatizing their parents. This distinction was reflected, if not fully appreciated, in two decisions the Supreme Court made early in its history of invalidating legislation denying entitlements because of illegitimacy.

In Levy v. Louisiana, the Court struck down Louisiana's denial of standing to nonmarital children who wished to sue for the wrongful death of their parent. The Court found no rational relationship between the prohibition and the lower court's assertion that it discouraged "bringing children into the world out of wedlock." In Glona v. American Guarantee & Liability Insurance Co., recognized as the reverse of Levy, the Court struck down a classification disallowing a mother from suing for the wrongful death of her nonmarital child. As in Levy, the Court found the prohibition irrational, remarking: "It would, indeed, be farfetched to assume that women have illegitimate children so they can be compensated in damages for their death." Oddly, many courts discussing

546. See id. at 2412 (Thomas, J., dissenting) (claiming the state court decision to be "inconsistent with this court's prior decisions").
547. See id.; cf. Parham v. Hughes, 441 U.S. 347, 356 n.7 (1979) ("[T]he Georgia statute at issue here excludes only those fathers who have not legitimated their children."); Alvarez v. Dist. Dir. of U.S. Immigration & Naturalization Serv., 539 F.2d 1220, 1224 (9th Cir. 1976) (asserting that strict scrutiny in the alien context is not required when classifications are made within groups of aliens rather than between aliens and citizens).
548. See Rainey, 119 S. Ct. at 2412 (Thomas, J., dissenting).
550. Id. at 68.
551. Id. at 70.
554. Glona, 391 U.S. at 76.
555. Id. at 75; cf. Hughes v. Parham, 243 S.E.2d 867, 871 (Ga. 1978) (Hill, J., dissenting) ("The denial of a claim for a child's wrongful death does not promote the family as an institution for rearing that child in a timely or rational manner regardless of the level of scrutiny employed."). aff'd, 441 U.S. 347, 353 (1979) ("It is thus neither illogical nor unjust for society to express its 'condemnation of irresponsible liaisons..."
Glona have described it as a decision striking down an illegitimacy classification. But because the nonmarital child in the case had died, the classification was not based on illegitimacy but on the plaintiff’s marital status at the time of her child’s birth. Such classifications do not receive the heightened scrutiny that illegitimacy classifications do and might have no difficulty surviving rational basis review, the most limited scope of review. Still, although the rational basis standard is highly deferential, “[i]f the Equal Protection Clause prohibits arbitrary and irrational discrimination even if no suspect class or fundamental right is implicated.” Accordingly, it is conceivable that the Court beyond the bonds of marriage’ by not conferring upon a biological father the statutory right to sue for the wrongful death of his illegitimate child.

556. See, e.g., Alexander v. Whitman, 114 F.3d 1392, 1404 (3d Cir. 1997) (classifying Glona as a case addressing a legislative classification based on “having been born out of wedlock”); Jerry Vogel Music Co. v. Edward B. Marks Music Corp., 425 F.2d 834, 836 (2d Cir. 1969) (“In Levy and Glona the Court had no problem of defeating reasonable expectations that any party had entertained in the past. It held merely that the illegitimacy of the plaintiff or the decedent was not a constitutionally adequate defense to a wrongful death action.”); Peterson v. Norton, 395 F. Supp. 1351, 1355 (D. Conn. 1975) (grouping Glona with other Supreme Court decisions involving “classifications on the basis of legitimacy of birth”); Pouplos v. McMahan, 297 S.E.2d 451, 452 (Ga. 1982) (characterizing Glona as “present[ing] the issue of whether a statutory discrimination against illegitimate children is constitutional”); Burnett v. Camden, 254 N.E.2d 199, 202 (Ind. 1970) (describing the classification in Glona by “the fact that the child was born out of wedlock”).

557. See Parham, 441 U.S. at 356 n.7 (“The invidious discrimination perceived in [Glona] was between married and unmarried mothers.”).

558. See F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) (explaining that rational basis review defers to legislative judgment and demands no evidence or empirical data in support of legislation); Nordlinger v. Hahn, 505 U.S. 1, 15 (1992) (explaining that rational basis review merely requires that a “purpose may conceivably or may reasonably have been the purpose and policy” of the legislature (internal quotation marks omitted)); Williams v. Pryor, 240 F.3d 944, 948 (11th Cir. 2001) (“Only in an exceptional circumstance will a statute not be rationally related to a legitimate government interest and be found unconstitutional under rational basis scrutiny.”); Robert C. Farrell, Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans, 32 Ind. L. Rev. 357, 357 (1999) (characterizing rational basis review as “extremely deferential”). Challenges based on rational basis rarely succeed. See Farrell, supra, at 357 (“In the past twenty-five years, the Court has decided ten such cases, while during the same time period, it has rejected rational basis arguments on one hundred occasions.”).

559. Muller v. Costello, 187 F.3d 298, 309 (2d Cir. 1999) (internal quotation marks omitted); see also City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”).
would disapprove of a statute that establishes marriage as a proxy for the support of marital children and that requires the unmarried to make an independent showing of support for their children.\(^6\) Marriage is, after all, no guarantee that parents will support their children. Even if an unwed father took steps to legitimate his child, his failure to support his child would have to be addressed by invoking the state's enforcement machinery. The same is true of married fathers who fail to support their legitimate children. Denying one set of parents inheritance rights for non-support of their children but not similarly depriving married parents who do not support their children stigmatizes the unmarried and runs counter to a broad reading of *Eisenstadt* and other Supreme Court decisions.\(^5\) By failing to recognize the Georgia statute's marital status discrimination in *Rainey*, the Georgia Supreme Court implied that the Georgia legislature could cure the equal protection flaw in the statute by imposing the same deprivation of inheritance rights on women who bear children out-of-wedlock as was imposed on men. By not granting certiorari in *Rainey*, the United States Supreme Court left several indistinguishable statutes in other states untouched. In so doing, the Court resurrected its former justification for not striking down statutes stigmatizing illegitimate children and thereby perpetuated the law's continued promotion of marital families.

\(^5\) See *Labine v. Vincent*, 401 U.S. 532, 553-54 (1971) (Brennan, J., dissenting) ("It is also important not to obscure the fact that the formality of marriage primarily signifies a relationship between husband and wife, not between parent and child. Analysis of the rationality of any state effort to impose obligations based upon the fact of marriage must, therefore, distinguish between those obligations that run between parties to the marriage and those that run to others."); *Dolgin*, supra note 15, at 99, 117 (suggesting the Court's position in unwed father cases is driven less by the concern that fathers establish relationships with their children than that they establish a connection to the mothers of their children); Linda C. McClain, "Irresponsible" Reproduction, 47 HASTINGS L.J. 339, 342 (1996) ("Although reproduction within marriage serves as the best proxy for responsible reproduction in this discourse, and nonmarital reproduction for irresponsible reproduction, such models prove to be both over- and underinclusive.").

The Supreme Court has declined to analyze such claims. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 116-17 (1989) ("We do not reach Michael's equal protection claim, however, as it was neither raised nor passed upon below."); *Caban v. Mohammed*, 441 U.S. 380, 394 n.16 (1979) (declining to address an equal protection claim founded on differential treatment of married and unmarried fathers). *But see Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (finding compelling distinctions between unmarried and married fathers based on the latter's having "borne full responsibility for the rearing of [their] children during the period of the marriage").

B. Mimicking Nuclear Families in Adoption Policy

In her renowned study of adoption, Professor Elizabeth Bartholet explores how society stigmatizes adoption. She explains how many prospective parents are encouraged to consider adoption only after many years of expensive, grueling, and unsuccessful fertility treatments. She also finds a distressing bias in theoretical and empirical work on adoption springing from the assumption "that adoptive relationships are somewhere on the spectrum between disastrously and modestly inferior to biologic relationships." In addition, Bartholet decries the law's complicity in placing insurmountable barriers between prospective adoptive parents and children who need homes.

As if to temper the stigma associated with adoption, the history of adoption regulation in this country is one of "biologism," a biologic bias holding "that what is 'natural' in the context of the biologic family is what is normal and desirable in the context of adoption." As such, the law does its utmost to fashion adoption

562. See BARTHOLET, supra note 7, at 164-86.
563. See BARTHOLET, supra note 7, at 205-07.
564. BARTHOLET, supra note 7, at 181.
565. See BARTHOLET, supra note 7, at xix, 170.
566. BARTHOLET, supra note 7, at 48 ("Our laws design adoptive families in imitation of biology."); BARTHOLET, supra note 7, at 93, 170 (noting that the law structures adoption in imitation of biology); see also Jackson v. Tangreen, 18 P.3d 100, 105 (Ariz. Ct. App. 2000) (citing ARIZ. REV. STAT. ANN. § 8-117 (West 1999 & Supp. 2000) (defining the relationship between an adoptive child and his adoptive parents as the same as if "the child were born to the adoptive parent in lawful wedlock"); R. Alta Charo, And Baby Makes Three—or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution, 15 Wis. WOMEN'S L.J. 231, 237, 239 (2000); Joan Heifetz Hollinger, Authenticity and Identity in Contemporary Adoptive Families, J. GENDER SPECIFIC MED., Nov. 2000, at 23, 24 ("[T]he asserted-equivalence model of adoption attempt[s] to reinscribe the biogenetic family by creating a legal framework within which the personal and emotional ties of the "natural" family [are] to be replicated."); Radhika Rao, Assisted Reproductive Technology and the Threat to the Traditional Family, 47 HASTINGS L.J. 951, 957 (1996) (remarking that adoptions are carried out by a "system of legal regulations that reconstruct adoption in the image of the biological family"); Marjorie Maguire Shultz, Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. REV. 297, 320 ("[F]acts must be altered and suppressed in order to make [adoption] mirror as closely as possible the standard model of socially legitimated biology.").

Although racial bias in adoption placements is illegal, see 42 U.S.C. § 1996b (Supp. V 1999), Bartholet finds that adoption professionals have contributed to biologism by promoting adoption matches between "biologic look-alikes," thus fashioning a vision of the idealized marital and procreative family. See BARTHOLET, supra note 7, at 111. Professor Jane Maslow Cohen has argued that racial matching policies in the adoption
in imitation of procreation by, above all, promoting secrecy in the process.\textsuperscript{567} As a result, adoption law has been complicit in valorizing the nuclear family.\textsuperscript{568} Despite its ability to mimic the nuclear family model, however, adoption has never shed its badge of inferiority and remains inherently suspect. Unable to achieve the privileged status of procreation,\textsuperscript{569} adoption is systematically discouraged as a way to create a family, and persons who elect to pursue it must accept the attendant loss of privacy and dignity reserved for nuclear families.\textsuperscript{570}

The law seeks to shape the adoptive family according to the nuclear family model. Historically, although the adopted child acquired the status of a lineal descendant,\textsuperscript{571} he did not acquire the status of an heir of the body with regard to context raise the same equal protection concerns that led to the nullification of anti-miscegenation statutes in \textit{Loving v. Virginia}, 388 U.S. 1 (1967), and she has theorized that racial matching is inappropriate in a society where the definition of race has become increasingly ambiguous. See Jane Maslow Cohen, \textit{Race-Based Adoption in a Post-Loving Frame}, 6 B.U. PUB. INT. L.J. 653, 665, 668-69 (1997).

\textsuperscript{567} In most states, adoption records are secret making it difficult for adopted children to discover the identities of their natural parents. See, e.g., TEX. FAM. CODE ANN. §§ 162.006(b), .018, .022 (Vernon 1996) (The identities of the biological parents are kept confidential.). The open records movement has gained some inroads. See ALASKA STAT. § 18.50.500 (Michie 1998); KAN. STAT. ANN. § 65-2433 (1992) (open records laws); see also Shultz, \textit{supra} note 566, at 320 ("All records of the parties and the circumstances are buried in secret files of a 'go between,' never to be revealed to any of the parties.").

\textsuperscript{568} See \textit{Bartholet}, \textit{supra} note 7, at xxv ("Traditional understandings of the meaning of family... help shape the institution of adoption in ways that reinforce the notion that the ideal form of family is the idealized husband-wife nuclear family of the past."); see also KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP 38 (1991) ("[A]doptive relations... pose no fundamental challenge to either procreative interpretations of kinship or the culturally standardized image of a family assembled around a core of parent(s) plus children."). Biologically unrelated adopted siblings are even forbidden from marrying. See TEX. FAM. CODE ANN. § 2.004 (Vernon 1996). \textit{But see} Israel v. Allen, 577 P.2d 762, 764 (Colo. 1978) (ruling that a statute prohibiting marriage of biologically unrelated adopted siblings violates an equal protection guarantee).

\textsuperscript{569} See \textit{Bartholet}, \textit{supra} note 7, at 76 (Whereas "[t]here is an absolute right to produce a child, ... there is no right to enter into a parenting relationship with a child who is not linked by blood—no right to adopt.").

\textsuperscript{570} See \textit{Bartholet}, \textit{supra} note 7, at 33 (referring to the "highly regulated" world of adoption and its corresponding lack of privacy rights); \textit{Bartholet}, \textit{supra} note 7, at 79 ("We would not dream of telling fertile people that they have no right whatsoever to produce a child—that childbirth is a privilege to be allowed or not at the entire discretion of the government."); \textit{Bartholet}, \textit{supra} note 7, at 167 ("Adoptive relationships are not seen as entitled to the same kind of privacy.").

inheritance.\textsuperscript{572} Such a "child's right of inheritance from the adoptive parents [was] strictly construed."\textsuperscript{573} Inheritance of an adopted child from his adoptive parents was thought to be impermissibly "in derogation of succession by heritable blood."\textsuperscript{574} Today, the majority of jurisdictions provide definitions of adopted children that give such children the same rights as biological children.\textsuperscript{575}

Although an adopted child continues to inherit from his natural parents in the absence of a contrary statute,\textsuperscript{576} most states have promulgated legislation severing this right of inheritance\textsuperscript{577} because dual inheritance is contrary to public policy.\textsuperscript{578} Nevertheless, a minority of states allow adopted children to inherit from their natural parents.\textsuperscript{579} These states render the right illusory, however, by permitting judges hearing adoption matters to sever this right in the adoption decree.\textsuperscript{579} This severance of inheritance rights is common,\textsuperscript{580} and, once this occurs, any interest the child has in the estate of his natural parents vanishes. In this way, even in states permitting adopted children to inherit from their biological parents, courts have complete discretion to structure inheritance rights to mimic those of the traditional marital family.\textsuperscript{581}

In the era when adoption secrecy held sway, there appeared to be no need for courts hearing adoptions to sever adopted children’s right to inherit from their biological parents. But even where adopted children have been able to discover

\textsuperscript{572} See id.
\textsuperscript{573} Id.
\textsuperscript{574} Id.
\textsuperscript{575} See, e.g., TEX. FAM. CODE ANN. § 162.017(c) (Vernon 1996).
\textsuperscript{577} See id. For an example of such a statute see, for example, ARIZ. REV. STAT. ANN. § 8-117 (West 1999 & Supp. 2000).
\textsuperscript{578} See Wailes v. Curators of Cent. Coll., 254 S.W.2d 645, 650 (Mo. 1953).
\textsuperscript{579} See, e.g., TEX. FAM. CODE ANN. § 162.017(b) (Vernon 1996); TEX. PROB. CODE § 40 (Vernon 1980 & Supp. 2001).
\textsuperscript{580} See, e.g., TEX. FAM. CODE ANN. § 161.206(b) (Vernon 1996).
\textsuperscript{581} See Shapo, supra note 23, at 1118-19 (revealing that even in states where an adopted child retains the right to inherit from her natural parents "only in one case... did a court open sealed records to reveal the parents’ names" (citing Spillman v. Parker, 332 So. 2d 573, 575-76 (La. Ct. App. 1976))).
\textsuperscript{582} See Donald G. Cohen, Adoption Can Have Unexpected Effects on Inheritance and Overall Estate Plan, 18 EST. PLAN. 8, 10 (1991) (finding in laws severing the rights of adoptees to inherit from their natural parents a public policy favoring adoption as a substitute for a blood relationship); Shapo, supra note 23, at 1098 (commenting that adoption law furthers a policy of integrating adopted children into their adoptive families (citing Jan Ellen Rein, Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts), 37 VAND. L. REV. 711, 717 (1984))).
the identity of their natural parents, inheritance rights have been denied for fear that the exercise of such rights will disrupt the boundaries of established families. This issue arose in *Little v. Smith,* a case illustrating that once family harmony is threatened, the orderly administration of estates becomes the basis for overriding statutory inheritance rights. After her adoptive mother’s death, Katherine Smith, needing information about her genetic history in order to help her ailing son, began a search for her natural parents. A series of fortuitous events led to her obtaining adoption records revealing that her mother was Thelma Little Hart. Through further research, Smith discovered that Hart had come from a wealthy family but had predeceased her mother Lula Little, Smith’s biological grandmother. Little, however, had died and left a will naming Hart as a beneficiary. As Hart’s descendant under the anti-lapse statute, Smith petitioned for a share of Little’s estate, which had been distributed and closed eight years earlier. In addition to her petition for a declaration of heirship, Smith charged the executor of Little’s estate, Hart’s brother and, thus, Smith’s biological uncle, with fraud and breach of fiduciary duty.

In what can be described only as a formalistic and arbitrary decision, the Texas Supreme Court affirmed summary judgment for the defendants. In so doing, the court identified three competing interests in the case—“(1) the right of adoptees to inherit from or through their natural parents, (2) the confidentiality of the identities of birth parents and their families, and (3) the need for finality of probate proceedings”—and determined that confidentiality and finality were the paramount interests, in spite of (or, perhaps, because of) the difficulties adoptees face in obtaining their birth records.

The reasoning of *Little* is puzzling because the case was not one in which an adoptee sought to obtain her birth records. Smith already had obtained her records, and, after discovering her right to inherit from Little’s estate, had asserted those rights within two years. Moreover, Smith not only asserted a right to share

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583. 943 S.W.2d 414 (Tex. 1997).
584. See id. at 415.
585. See id. at 415-16.
586. See id. at 416.
587. See id.
588. See id.
589. See id.
590. See id.
591. Id. at 417.
592. See id. at 418.
593. The statute of limitations for bringing an action for a determination of heirship in Texas is four years from the closing of the estate. See *Smith v. Little,* 903 S.W.2d 780, 787-88 (Tex. App. 1995), *rev’d on other grounds,* 943 S.W.2d 414 (Tex. 1997).
in Little’s estate but also asserted fraud on the part of the executor of the estate,\(^{594}\) fact questions surrounding which inspired the intermediate appellate court to reverse the trial court’s grant of summary judgment on that count.\(^{595}\) The Texas Supreme Court, however, made the curious ruling that “the discovery rule is unavailable in suits to assert a right of inheritance by adoptees.”\(^{596}\) The court based this newly-fashioned principle on the fact that the legislature had erected barriers meant to frustrate adoptees’ discovering the identities of their biological parents.\(^{597}\) This fact was not only wholly irrelevant to Smith’s case, but it fully ignored the legislature’s mandate that birth records be produced if good cause is shown.\(^{598}\) The court leapt to the startling conclusion that legislation protecting confidentiality in adoption advanced a policy so overarching that the discovery rule\(^{599}\) should be unavailable even to adoptees who successfully discover the identities of their natural parents.\(^{600}\) Not surprisingly, given the general tenor of the opinion, the court did not inquire into whether Smith had shown good cause in her petition to obtain her adoption records.

Though not exactly circular, the Little court’s decision is, nonetheless, baffling. The opinion conveys the unsettling impression that it is aligned with the sentiment behind old statutes of limitations, which made it impossible for nonmarital children to assert paternal inheritance rights.\(^{601}\) There is an undeniable emphasis in this case that is reminiscent of Bartholet’s findings that adoptive families suffer a loss of dignity when they fail to live up to the model of the traditional nuclear family. By discovering the identity of her biological mother and pursuing the inheritance promised her under Texas law, Katherine Smith found herself in a class denied recourse to the discovery rule—one of the most basic and significant principles aiding civil litigants. The new rule propounded by the court will help keep the secret of adoption safe and will be a useful tool in the promotion of biologism.

Given recent calls for the reform of adoption policy, it is hoped that cases such as Little soon will be an anachronism. Some proposals, claiming it is time to

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594. *See* Little v. Smith, 943 S.W.2d at 416.
595. *See* Smith v. Little, 903 S.W.2d at 785.
596. Little v. Smith, 943 S.W.2d at 420.
597. *See* id.
599. *See* Trinity River Auth. v. URS Consultants, Inc., 889 S.W.2d 259, 262 (Tex. 1994) (“A cause of action does not accrue until the plaintiff knows of the facts giving rise to the cause of action.”); Burns v. Thomas, 786 S.W.2d 266, 267 (Tex. 1990) (“Under [the discovery] rules, the statute of limitations does not begin to run until claimant discovers . . . facts establishing a cause of action.”).
600. *See* Little v. Smith, 943 S.W.2d at 423.
601. *See supra* notes 524-26 and accompanying text.
value differences between adoptive families and other families, advocate "openness" in adoption. "Openness" refers to open records and open adoption. Advocates of open records urge opening records to adult adoptees. Open adoption refers to contact between the biological parents, the adoptive parents, and the adopted child. Proposals to advance open adoption suggest various arrangements running the gamut from meetings between biological and adoptive parents prior to the child's birth to "the creation of enforceable post-adoption visitation rights for certain individuals, especially the birth parents of the adopted child." It is hoped that, through openness reforms, children's needs will be better addressed, that they will have greater opportunities for forming their


605. See Garrison, supra note 603, at 890-91 (defining open adoption as an arrangement "in which the adoptive child retains some form of contact with her biological family").


607. See Bartholet, supra note 7, at 891.
identities, and that the traditionalist notion that adoptions must mimic the nuclear family, a notion thought to impede adoptive children's bonding with their adoptive parents, will be dismantled.

Although openness sounds desirable in many contexts, it is not clear that it can advance these praiseworthy objectives. First, the values said to promote openness in adoption emphasize the indelibility of blood bonds and the need to forge connections between adopted children and their biological parents in order that each may deal with his loss and experience the presence of the other. Second, they encourage blending of the adoptive and biological families in the name of "family intimacy," language reminiscent of Griswold—to promote an understanding on the part of the child that he has "two sets of parents." Third, "no matter how adequate" adoptive parents are as parents, the focus in this set of values is on what adoptive parents cannot give a child—"genes, ancestors, or birth"—and how they can harm a child by keeping secrets that make him feel something is wrong with him. In sum, the policy of open adoption focuses squarely on finding a role for biological parents in the life of the adopted child.

Whether any of these values promotes the well-being of children is unknown because currently there is a lack of definitive empirical evidence that openness in adoption is in a child's best interests. If these reforms are in the best interests

608. See Cahn & Singer, supra note 604, at 191.
609. See BARTHOLET, supra note 7, at 58 (noting the argument of adoption traditionalists that confidentiality is required for a birth mother to move on with her life and to protect the privacy of the adoptive family); David D. Meyer, Family Ties: Solving the Constitutional Dilemma of the Faultless Father, 41 ARIZ. L. REV. 753, 829 (1999) [hereinafter Meyer, Family Ties] (canvassing modern justifications for the termination of biological parents' rights in adoption cases).
610. See General Values, supra note 602.
611. See General Values, supra note 602.
612. See General Values, supra note 602.
613. See General Values, supra note 602.
614. See General Values, supra note 602.
615. See General Values, supra note 602.
616. See Marianne Berry, Risks and Benefits of Open Adoption, ADOPTION, Spring 1993, at 125, 134 ("Given the present state of knowledge, decision making around open adoption remains a risky business, with substantial need for caution, assessment, and planning."); Hollinger, supra note 566, at 26 (noting that the answers that have led to open adoption policies do not have "research-based answers"); Meyer, Family Ties, supra note 609, at 832 ("None of these studies purports to prove squarely that children either benefit from or are harmed by ongoing contact with non-custodial biological parents."). There is some extant evidence. See, e.g., RUTH G. Mccroy & HAROLD D. GROTEVANT, OPENNESS IN ADOPTION: EXPLORING FAMILY CONNECTIONS 196-97 (1998) (reporting findings that openness in adoption does not lead to confusion on the part of
of children, they should be implemented. As a practical matter, however, publicizing the message that adoptive families are in important ways not nuclear seems ill-suited to elevating the status of these families under a legal regime that prizes and reveres the nuclear family model. 617 Focusing energy on fostering relationships between biological and adoptive families in order to create a new form of blended family instead creates ambiguity in the boundaries between them, and the Supreme Court has insisted that such boundaries be present for the bestowal of privacy protection. While it may seem sensible to shift the gears of adoption policy to strive to avoid the evils resulting from decisions like Little, the new policy of openness in adoption in the name of validating the essential value of biological ties may provide support, albeit unintentionally, for the law’s emphasis on reserving governmental deference for traditional nuclear families. 618 In short, the answer to adoption law’s shortcomings may not lie in outright denigration or rejection of adoption that mimics the marital model. Although perhaps in the best interest of children, these efforts will do little to refine the definition of the family on a constitutional level.

At bottom, nothing about openness addresses the fundamental problem that adoptive families are considered an “inferior family form.” 619 Instead, these proposals widen the gap between traditional nuclear families and nontraditional families. Even Bartholet cautions that, although some aspects of openness help remove the stigma of adoption, 620 “it remains unclear . . . whether the seachange

adopted children or present greater challenges to the parenting role of adoptive parents and even may lead to better resolution of birth mothers’ grief).

617. See BARTHOLET, supra note 7, at 60 (commenting on the movement to open sealed adoption records and stating that “a move to embrace openness might further denigrate rather than affirm adoption”); BARTHOLET, supra note 7, at 176 (noting that literature in support of the openness movement does little more than suggest “that opening the system would at best alleviate the pain and suffering caused by separating children from their birth parents”).

618. See Fineman, Our Sacred Institution, supra note 11, at 394 (“The persistence of the nuclear family as the model of intimate organization reveals the difficulty of change in this area and helps to explain how even potentially radical challenges are absorbed and transformative impulses are tamed.”).

619. BARTHOLET, supra note 7, at 59; see BARTHOLET, supra note 7, at 170 (“The law has reflected and reinforced the degraded status of the adoptive family.”); BARTHOLET, supra note 7, at 181 (commenting that the “working assumption of virtually all theoretical and empirical work is that adoptive relationships are somewhere on the spectrum between disastrously and modestly inferior to biologic relationships”); Fineman, Our Sacred Institution, supra note 11, at 404 (“Intimate entities that do not conform to the form designated as natural in most instances are not considered families at all.”).

620. See Elizabeth Bartholet, Taking Adoption Seriously: Radical Revolution or Modest Revisionism?, 28 CAP. U. L. REV. 77, 84 (1999) (reporting the view of some commentators that changes in adoption law have helped adoption shed its stigma).
is more apparent than real. Upon studying the rhetoric surrounding the openness movement, one finds a great deal of discussion of openness as a cure-all for adoption's ills. The remedy, however, to years of the detrimental effects of misguided adoption policy is not to swing the pendulum to the opposite extreme. Although it is too soon to be overly pessimistic about the direction open adoption will take, openness reforms likely will not be capable of tempering adoption's stigma by elevating adoption to the status of a viable alternative to nuclear families. Until they do, any movement in the direction of openness is likely to result in decreased privacy for adoptive and biological families alike.

C. Relocating the Marital Family

Hand in hand with the divorce revolution of the early 1970s came a rise in custody modification cases involving relocation by the custodial parent. The increasing mobility of society and incidence of women working outside the home contributed to this trend. In the typical case, the parent with physical custody wishes to relocate with the child to another area in order to pursue improved job opportunities or a new marriage. Noncustodial parents frequently claim that the relocation will interfere unduly with their visitation rights or that the relocation is requested expressly for this purpose. As a remedy, the noncustodial parent sometimes requests the court to transfer custody. Custodial parents sometimes respond that not to grant the relocation either would contravene their constitutional right to travel or would be contrary to the best interests of the child.

621. Id. at 85.

622. See Jana Singer, Closing Remarks at the Dave Thomas Center for Adoption Law Symposium at Capital University Law School (May 3-4, 2000) (cautioning against repeating past mistakes by moving to the opposite extreme and proclaiming one type of open adoption as the new “perfect solution”), available at http://adoption.about.com/library/weekly/aa050800r.htm.

623. See BARTHOLET, supra note 7, at xxv (calling for adoption to be understood “as a positive alternative to the blood based family form”); BARTHOLET, supra note 7, at 181.

624. See In re Burgess, 913 P.2d 472, 480 (Cal. 1996) (“Economic necessity and remarriage account for the bulk of relocations.”).


626. See Burgess, 913 P.2d at 481 n.6 (“An obvious exception is a custodial parent’s decision to relocate simply to frustrate the noncustodial parent’s contact with the minor children.”); Cassady v. Signorelli, 56 Cal. Rptr. 2d 545, 548 (Ct. App. 1996).

627. See, e.g., In re Edlund, 78 Cal. Rptr. 2d 671, 674 (Ct. App. 1998); Tropea, 665 N.E.2d at 146.

628. See Seltzer v. Seltzer, 34 Cal. Rptr. 2d 824, 826 (Ct. App. 1994); Carol S. Bruch & Janet M. Bowemaster, The Relocation of Children and Custodial Parents:
Commentators, noting the unpredictability of these cases, have developed proposals to bring more consistency to this area. Courts have responded by establishing analytical frameworks and presumptions to aid in the resolution of these cases. In undertaking these efforts, courts have recognized the difficulty of formulating bright-line rules in an area of law punctuated by hard choices at every turn. Some commentators have concluded that the trend in the courts is to recognize the custodial parents' right to relocate through favorable standards, presumptions, and burdens of proof. Others claim the cases reinforce traditional marital roles by vesting decision-making authority in fathers rather than in mothers. Whatever the disparate motives for and different approaches to granting or refusing these requests, it would appear that all courts inquire, at some point in their analysis, into what is in the best interests of the child. Moreover, what is not difficult to discern is that permission to relocate is easy to obtain when the purpose for the move is marriage or remarriage.


633. See Richards, supra note 629, at 246-50 (synthesizing the various approaches).

634. See, e.g., In re Edlund, 78 Cal. Rptr. 2d 671, 674 (Ct. App. 1998) (regarding permission to move with her daughter from California to Indiana to be with her new husband); In re Biallas, 76 Cal. Rptr. 2d 717 (Ct. App. 1998) (regarding the mother's relocation to Nebraska to be with her new husband); Ireland v. Ireland, 717 A.2d 676, 677 (Conn. 1998) (regarding the new husband's relocation to California); Fridley v. Fridley, 748 N.E.2d 939, 940, 943 (Ind. Ct. App. 2001) (affirming the denial of a father's petition for change of custody where the mother wished to move to Arizona with her boyfriend); In re Thielges, 623 N.W.2d 232, 238 (Iowa Ct. App. 2000) (relocation requested for purposes of a "fresh start" in a new area); Rosenthal v. Maney,
New York attempted to bring consistency to its approach to relocation cases by consolidating two cases in *Tropea v. Tropea.* In *Tropea,* Tammy Tropea, a custodial mother of two, planning to remarry and already pregnant with her fiancé's child, petitioned for a modification of custody in order that she be allowed to move to another part of the state. The trial court denied this request based on its assessment that the move would pose undue disruption or substantial

745 N.E.2d 350, 358-59 (Mass. Ct. App. 2001) (reversing the denial of a petition to relocate where the mother's new husband lived in another state); Romanetto v. Weirich, 48 S.W.3d 642, 646 (Mo. Ct. App. 2001) (regarding the new husband's relocation to Ohio); *In re S.E.P.,* 35 S.W.3d 862, 867, 869 (Mo. Ct. App. 2001) (affirming the grant of a petition to relocate where the mother's new husband took a job in Florida); Weaver v. Kelling, 18 S.W.3d 525, 527 (Mo. Ct. App. 2000) (regarding the new husband's relocation to Texas); Lavalle v. Lavalle, 11 S.W.3d 640, 644 (Mo. Ct. App. 1999) (regarding the new husband's relocation to Maryland); Farnsworth v. Farnsworth, 597 N.W.2d 592, 596, 601 (Neb. 1999) (reversing a denial of permission to relocate where the relocating custodial mother had a boyfriend in a new area); Hayes v. Gallacher, 972 P.2d 1138, 1142 ( Nev. 1999) (granting permission to relocate from Nevada to Japan to join new husband and deeming it "particularly unacceptable" to force a choice between children and husband); Tibor v. Tibor, 598 N.W.2d 480, 482, 483, 488 (N.D. 1999) (reversing an order refusing permission to relocate where the mother's new husband moved to take a new job and the noncustodial parent also had remarried); State ex rel. Melling v. Ness, 592 N.W.2d 565, 568 (N.D. 1999) (regarding an unwed mother's relocation to be with her boyfriend); Hawkinson v. Hawkinson, 591 N.W.2d 144, 145 (N.D. 1999) (granting a relocation request where both parties had remarried); *In re B.E.M.,* 566 N.W.2d 414, 417 (N.D. 1997) (permitting an unwed mother to relocate in order to remarry, stating: "It is axiomatic that a newly-wed couple wants to live together and that the child is benefited [sic] by the satisfaction the custodial parent derives from residing with her spouse."); Zozcule v. Zozcule, 751 A.2d 248, 251 (Pa. Super. 2000) (holding that relocation within same county with a new husband does not trigger more rigorous analysis than best interests); Thomas v. Thomas, 739 A.2d 206, 214 (Pa. Super. 1999) (Ford, J., concurring) ("[W]e consider the children's well-being and best interests inextricably joined to the health and happiness of the custodial parent."); Mealy v. Arnold, 733 A.2d 652, 655, 656 (Pa. Super. 1999) (granting an unwed mother permission to relocate to North Carolina in order to marry, although the child's friends and the extended family of both parents lived in Pennsylvania); *In re Marriage of Flynn,* 972 P.2d 500, 503 (Wash. Ct. App. 1999) ("The order preemptively and impermissibly forces Ms. Manis into the quandary of choosing between her freedom to reside with her present husband at a place of her choice or leaving without her children.").

635. 665 N.E.2d 145 (N.Y. 1996). It should be noted that prior to these cases, New York was considered the most difficult jurisdiction in which to obtain permission to relocate. The requirement was that the parent show exceptional circumstances supporting the decision to relocate. This high standard was based on the policy of protecting the noncustodial parent's rights. See *Weisberg & Appleton,* supra note 24, at 909.

636. *See Tropea,* 665 N.E.2d at 146.
impairment of the father’s right of access to the children and that there was no showing of exceptional circumstances supporting a grant of the motion. This decision was reversed at the appellate level, based on a determination that relocation would be in the children’s best interests. The father appealed.

Meanwhile, in Browner v. Kenward, Jacqueline Browner petitioned to move with her son to live with her parents in a different state 130 miles away. Andrew Kenward, the boy’s father and Jacqueline’s ex-husband, unsuccessfully opposed the petition at both the trial court and appellate levels. Those courts concluded that the move would not interfere with Andrew’s meaningful access to his son and that, in any event, the move was in the boy’s best interests.

Affirming both decisions, the New York Court of Appeals rejected the rigid three-step analytical approach developed by lower courts in favor of a case-by-case determination of the best interests of the child in all relocation cases. The court commented that any rights of the parents, however significant, would be appropriately subordinated to considerations of the child’s well-being. Applying this new approach to Browner, the court expressed its agreement with the lower courts that Kenward had not successfully rebutted the finding that Browner’s relocation was in their son’s best interests. The court’s approach to Tropea was slightly different. In reaching its decision, the court explicitly disapproved of decisions from lower courts that deemed remarriage insufficient justification for a distant move and held, instead, that “the demands of a second marriage” may be in a child’s best interests due to “the value for the children that strengthening and stabilizing the new, postdivorce family unit can have in a particular case.”

In affirming Tropea, the court was, in essence, approving of the new family unit that Tropea offered her sons.

637. See id. at 147.
638. See id.
639. The court consolidated the two separate matters, Tropea v. Tropea and Browner v. Kenward, for its opinion. See id. at 146-49.
640. See id. at 147.
641. See id. at 148.
642. See id.
643. See id. at 150, 151-52.
644. See id.
645. See id.
647. Tropea, 665 N.E.2d at 151.
648. See id. at 152.
The same year *Tropea* was decided, California tidied its “decade’s worth of progressively more contradictory appellate decisions”\(^{649}\) by clarifying, in *In re Burgess*, \(^{650}\) the standards to be employed in resolving relocation cases. In that case, a custodial mother petitioned to relocate with her children forty miles from the town in which her ex-husband, the father of her children, lived.\(^ {651}\) The trial court granted the request, finding it to be in the best interests of the children.\(^ {652}\) The court of appeals, however, reversed, articulating a three-tiered framework similar to the one used by appellate courts in New York prior to *Tropea*.\(^ {653}\) The California Supreme Court disapproved of the framework—in particular the requirement that the relocating parent show that the relocation is “necessary”\(^ {654}\)—and reinstated the trial court’s decision.\(^ {655}\) As a matter of policy, the court observed that the frequency of relocation due to remarriage and career changes in today’s society demands that courts deciding relocation cases focus squarely on what custody arrangements serve the best interests of the children.\(^ {656}\)

Most recently, legislatures and courts have begun abandoning presumptions that favor the relocation of custodial parents.\(^ {657}\) The trend in these cases is, thus, moving away from presumptions and rights-based analyses and toward an emphasis on the best interests of the child. This shift merits comparison with the analytical approach mandated by the Supreme Court in resolving grandparental visitation cases. Recall that, in these cases, married biological parents’ constitutional right to exercise parental autonomy is paramount to any inquiry into the best interests of the child.\(^ {658}\) In many states, though, where a parent’s marriage has been fractured, or where that parent has never been married, grandparents may petition for visitation, and such visitation will be granted if it is in the best interests of the child.\(^ {659}\) Such a petition must meet a higher standard in some states, however, if a parent “relocates” her child into a nuclear family through stepparent adoption, as Tommie Granville Wynn did in *Troxel*.\(^ {660}\) These principles mirror

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651. See id. at 477.
652. See id.
653. See id. at 477-78.
654. Id. at 480, 483 n.10.
655. See id. at 484.
656. See id. at 480, 481-82.
658. See supra notes 153-68 and accompanying text.
659. See supra note 166.
660. See, e.g., Foor v. Foor, 727 N.E.2d 618, 622 (Ohio Ct. App. 1999). But see
those at work in the relocation context. A married couple has full constitutional freedom to relocate at will, and such relocation will be presumed to be in the child's best interests. As in the grandparental visitation context, however, once the marriage is fractured, the custodial parent retains the same freedom to travel only to the extent that it is consistent with the child's best interests. In both contexts, once a marriage dissolves, decisions as to relocation and grandparental visitation are "left to the states as a matter of policy, rather than imposed by a court under the rubric of constitutional principle." The significance of this parallelism lies in its demonstration that in the family context, privacy depends heavily upon the existence of marriage. Where no marriage was ever entered into, or where it has been dissolved, any constitutional dimension of relocation and visitation questions falls away and is replaced by the more flexible, policy-based best-interests analysis, which promotes marital families. It is hardly surprising, then, that courts have rejected a rigid framework for analysis in relocation cases and, instead, have embraced an inherently subjective approach that affords wide latitude to decide relocation cases consistently with the policy of promoting marriage. No matter whether the analytical stance is based on constitutional principles or on policy, the rationale driving these decisions remains the same. Courts freely grant grandparents the right to visit fractured families because to do so has little impact either one way or the other upon marital families; likewise, courts freely grant relocation petitions where neither the custodial parent nor the noncustodial parent has remarried. Because compelling grandparental visitation within intact nuclear families, however, may undermine the stability of such families, courts

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statutes cited at note 168, supra.

661. Some courts, invoking state constitutional provisions, require a showing of deleterious effects on the children before the custodial parent's right to relocate with them may be infringed. See, e.g., Watt v. Watt, 971 P.2d 608, 616-17 (Wyo. 1999) ("The custodial parent's right to move with the children is constitutionally protected, and a court may not order a change in custody based upon that circumstance alone.").

662. See Rao, supra note 44, at 1101.

663. See Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459, 559-61 (1990) (showing how the best interests standard can easily be used to promote ideology).

either do not grant grandparents standing to petition for visitation, or the courts require grandparents to prove the unfitness of the parents. Reflecting concern for marital families in the relocation context, courts grant relocation petitions where the custodial parent wishes to move for some reason related to her remarriage. Although the general approach to these cases—to require a showing that “the proposed relocation is made in good faith and is in the best interests of the child”\(^6\)—might suggest that the remarriage of the custodial parent is just one of many factors militating in favor of relocation, in the rare case where a remarried custodial spouse is denied her request to relocate, the noncustodial spouse invariably has remarried as well.\(^6\) Thus, relocation disputes, little known before the explosion of the divorce rate in this country, reflect policies very similar to those in existence before the divorce revolution. Policy reform in this area, like policy reform in the areas of inheritance by nonmarital children and openness in adoption, continues to align itself with the law’s widespread promotion of marriage and nuclear families.

In the hierarchy of family privacy protection, traditional, nuclear families outflank all other forms of the family; nontraditional and nonmarital families have little expectation of privacy. On the level of policy, marital families, as a historical matter, also have been privileged—a fact made obvious by a study of the role of policy in inheritance law. Public policy need not remain stagnant, however. Lawmakers and courts can, and often do, effect reforms to temper the anachronistic treatment of nontraditional families. One valiant reform effort in recent years has been in the area of the inheritance rights of nonmarital children. But the policy of according nonmarital children equal treatment in the inheritance context has done little to elevate nonmarital families to the status held by marital families. Likewise, in the adoption context, many commentators, reacting to the


\(^{666}\) See, e.g., Hughes v. Gentry, 443 S.E.2d 448, 452 (Va. Ct. App. 1994) (transferring custody to the noncustodial parent where the noncustodial parent had remarried); cf. Lazier v. Gentes, 686 N.Y.S.2d 807, 808, 809 (App. Div. 1999) (remanding approval of relocation of the custodial father where the noncustodial mother was engaged to be married). But see Flannery v. Crowe, 720 So. 2d 308, 308 (Fla. Ct. App. 1998) (rejecting the remarried custodial mother’s relocation petition where the legislature recently had eliminated the presumption in favor of relocation); Franz v. Franz, 737 So. 2d 943, 944, 948 (La. Ct. App. 1999) (refusing relocation where the custodial mother, who was “living in open concubinage with a married man,” married one week before the relocation hearing); Buschardt v. Jones, 998 S.W.2d 791, 798, 802 (Mo. Ct. App. 1999) (reversing permission to relocate in favor of the remarried mother; father was cohabiting with a new romantic interest, and the trial judge exhibited bias “against persons of the opposite sex who choose to cohabitate”).
senselessness of biologism, have made proposals for openness that, while they appear to effect reform of the sort urged by Professor Barthalet, have the effect of widening the gulf between families that enjoy privacy protection and those that do not. Finally, policies behind the resolution of relocation disputes, having mushroomed in recent years in response to the rising divorce rate, the increased mobility of families generally, and employment outside the home, betray a solicitude—in the guise of the best interests of children—for parents who wish to remarry.

Although a study of the underpinnings of other areas of family policy will have to be pursued in another forum, this Article looks at three such areas that are cause for concern. Reform efforts in furtherance of the interests of alternative families, while undeniably valuable as a proposition, appear to go astray at the stage of their implementation. Too often, what appears to dismantle the privileges enjoyed by marital families under the law, and to place alternative families on a par with them, in actuality advances the same policies embodied in the all-too-familiar traditions and practices of the past. To ignore this effect of well-intentioned reform efforts further marginalizes alternative families and renders their goal of enjoying privacy protection similar in scope to that enjoyed by nuclear families more difficult to achieve.

VI. CONCLUSION: MARRYING POLICY AND PRIVACY

As the foregoing discussion makes clear, no study of family privacy is complete absent consideration of the policy underlying it. By examining family privacy through the lens of policy, one sees that recent understandings of privacy demand reexamination and that, in particular, constitutional law scholars’ recognition of a trend in the courts away from conceptualizing family privacy as a set of rights emanating from the marital unit to one grounded in liberty interests retained by individuals is likely not complete. Although the equality language of Eisenstadt and the individual autonomy language of Roe suggest such an account of family privacy, a closer look at the language and context of these decisions, and a consideration of more recent developments in the area of constitutional family privacy jurisprudence, reveals that the right to privacy they recognize is influenced, if not dictated, by a decided concern for promoting and maintaining the integrity of the traditional nuclear family. Such emphasis on the marital unit in family privacy cases is consistent with the Supreme Court’s analytical approach to announcing fundamental privacy rights. The approach focuses exclusively on historical practices and traditions and ignores policies not in force at the time of the enactment of the relevant constitutional provision. As such, constitutional recognition of families not recognized historically will come about only by changes in contemporary policies.

In researching historical practices and traditions, the Supreme Court need not look far to conclude that, as a matter of policy, the law, for a long time, has...
favored marital over nonmarital families. This bias has taken hold and continues its work in the law of succession, where rules governing intestate distribution, will construction, and will contests, although declaring protection of testatorial absolutism, contain the explicit message that the law must protect and sanctify marriage. As the law applicable to intestacy, undue influence, and restraints on marriage demonstrates, the paramount policy behind the law of succession—freedom of testation—must yield to concerns that the will of decedents not undermine marriage among the living.

Changes in the law not governed by privacy principles purport to frustrate historical biases by recognizing changes in the composition of families. Recent movement in the law toward dismantling barriers to inheritance by nonmarital children and toward open adoption, for example, appears to question the primacy of the marital family and suggests that expanded legal recognition of nontraditional families may be in the offing. In reality, though, these reforms advance restrictive policies in favor of nuclear families. Examination of reform efforts in the areas of inheritance by nonmarital children, of adoption, and of move-away custody disputes reveals policies reflective of the Supreme Court’s narrow definition of the family. For this reason, reform efforts in these areas are unlikely to be useful as a premise from which to argue for family privacy protection for alternative families.

Until it is recognized that the vision of the family underlying family privacy jurisprudence has been stunted by reliance on a restrictive and outdated understanding of the family, the flowering of a new jurisprudence recognizing a more expansive view of the family will not take place. If the family’s unique character as a locus of constitutionally-based privacy rights is to be fully recognized, the concept of family requires careful and principled definition explicitly rejecting the notion that privacy belongs only to traditional, nuclear families. Attempts to define the family in this way in Supreme Court precedent and in scholarly literature, however, have been marked by a hesitancy and a nebulosity unworthy of their importance in the context of forging a constitutional family privacy doctrine of integrity. Given the Supreme Court’s current manner of articulating and defending family privacy, continued jurisprudence in this vein will impoverish this area with a growing divide between family life and the rules developed to regulate it. Policy reforms, still heavily influenced by views of the primacy of marriage and of consanguinity, will be helpless to stem the tide unless an informed and principled definition of the family emerges. 667

667. In a forthcoming Article, the Author explains how regulation of assisted reproduction, still in its developing stages, is an appropriate platform from which to launch this redefinition. See Richard F. Storrow, Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage (forthcoming).