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## Paradox of Family Privacy

David D. Meyer

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David D. Meyer

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*For seventy-five years, the Supreme Court's protection of the constitutional rights of family privacy has had two sides. On the outside is a veneer of often absolutist rhetoric exalting the "sanctity of the family" and sketching the boundaries of a "private realm of family life which the state cannot enter." On the inside is an essentially pragmatic approach to deciding actual controversies involving the family.*

*In this Article, Professor Meyer contends that the Court has been right to moderate its scrutiny because the rigidity of traditional fundamental-rights analysis is ill-suited to the task of mediating the complex and intersecting private and communal interests which are often at stake in the family. He argues, however, that the Court has been wrong to resist acknowledging this reality. Besides generating confusion, the Court's refusal to come clean about the qualified nature of family-privacy rights paradoxically has undermined the values of autonomy and intimacy that the rights are said to exalt. The Court's nominal adherence to the traditional strict-scrutiny formula has pushed it to construe the scope of family-privacy rights narrowly at the threshold in order to leave tolerable leeway for state regulation. And the Court's tendency to justify its narrow construction in terms of the desert or legitimacy of particular family relationships or decisions itself has regulatory significance, compounding the extent of the state's intrusion into family life.*

*Professor Meyer concludes by arguing that openly embracing the sort of intermediate review that in fact has characterized much of the Court's work in this context would place family-privacy rights on a less exalted, but ultimately more secure plane. And he points to several criteria embedded in the Court's past cases that would help provide greater determinacy to a constitutional "reasonableness" standard for state action directed at the family.*



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David D. Meyer\*

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## INTRODUCTION

When it comes to the nature of the Constitution's protection for freedom of choice in matters relating to family life, there is wide agreement on perhaps only two points: first, that the subject raises "questions of unsurpassed significance in th[e] Court's interpretation of the Constitution,"<sup>1</sup> and, second, that the Court's halting passes at these questions have left its family privacy doctrine in a state of unsurpassed disarray. The significance of the questions is transparent. A comprehensive account of the subject calls for answers to the most basic and intractable problems of judicial review, answers that might justify the judiciary's role in negating, without textual authority, majoritarian governance in an area that is of particularly profound interest not only to the individual but also to the polity.<sup>2</sup>

Yet answers in this context have been particularly slow in coming. The Supreme Court has eschewed any effort to develop a unified theory that might define the special content of family liberty and justify the extraordinary limitations placed upon state authority in this area. Instead, the Court has been content to let strands of doctrine emerge piecemeal. Rights to abortion, contraception, marriage, kinship, and the custody and rearing of children have, for the most part, sprung up independently of one another, only later converging into a loosely recognized constellation of "family privacy" rights.

Clarity has been impeded, moreover, not only by the Court's failure to adopt any cohesive theory that might tie these rights together, but also by its refusal to adhere consistently to any single standard of constitutional review. At one time or another, the Court has denominated each of the individual rights comprising family privacy as "fundamental," suggesting that any significant governmental intrusions upon them should be subject to the narrowest pos-

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1. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 547 (1989) (Blackmun, J., concurring in part and dissenting in part).

2. The Supreme Court long has acknowledged the significance of the state's interest in the family as the basic unit of socialization and education. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 397, 399 (1978) (Powell, J., concurring) ("The State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people."); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."); *Maynard v. Hill*, 125 U.S. 190, 211 (1888); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) ("[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, . . . than that which seeks to establish it on the basis of the idea of the family, . . . the sure foundation of all that is stable and noble in our civilization . . .") (quoted in *Romer v. Evans*, 517 U.S. 620, 651-52 (1996) (Scaha, J., dissenting)).

sible limits. Yet the Court's actual behavior in specific cases has left a large wake of uncertainty and confusion. In articulating the scope of its review, the Court has seemed consciously to avoid the familiar language of strict scrutiny, opting instead to muddy the waters with ambiguous hedge phrases and arguable synonyms. Even more than in other areas of unenumerated or fundamental rights, therefore, the Court's family privacy cases have left pointedly unclear both what sorts of private conduct are deserving of heightened protection and what form that protection should take.

Importantly, all the while the Court has followed this middling course, it has insisted upon maintaining the veneer that it is protecting fundamental rights in a traditional, doctrinally familiar manner. The result, as the California Supreme Court recently lamented, is a constitutional doctrine "without any coherent legal definition or standard."<sup>3</sup>

In this Article, I argue that there is an important and unfortunate disjunction between what the Court says about family privacy rights and how it actually goes about protecting those rights in real cases. In Part I, I review the Court's family-privacy cases and conclude that, notwithstanding rhetoric consistently exalting the fundamental nature of these rights, the Court in fact has taken a more meandering course. Above all else, the Court has been pragmatic, tacitly adjusting its scrutiny in light of the magnitude of the state's intrusion and the strength of the state's regulatory interests. Only in the context of abortion, however, has the Court now come close to acknowledging openly the more limited nature of its review.

In Part II, I consider the consequences of this disjunction. Specifically, I argue that the Court's illusory adherence to the fundamental-rights framework, while in fact applying a more flexible standard of review, has worked significant perversions in the constitutional doctrine. Shifting conceptions of the locus of family privacy rights—from the family as an entity to particular individuals residing within the family—have coincided with expanded notions of state action to produce a troubling paradox: a constitutional doctrine meant to limit state intrusion into the family has been converted into an invitation for intervention of a particular kind, as courts increasingly have permitted the "fundamental rights" of certain family members to mandate the outcome of intra-family disputes. Having taken too seriously the Supreme Court's fundamental-rights rhetoric, some state and lower federal courts have held that the Constitution

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3. *Hill v. NCAA*, 865 P.2d 633, 651 (Cal. 1994) (en banc).

requires, for example, that a child submit to visitation with an incarcerated or abusive parent<sup>4</sup> or that custody be awarded to an absent biological parent rather than a step-parent or guardian who may have raised a child for years.<sup>5</sup>

Of equal significance, the Court's nominal adherence to an analytical framework requiring strict scrutiny has put pressure on the Court to construe narrowly the scope of family privacy rights at the threshold. Thus, in cases in which a particular governmental regulation seems intuitively to be constitutionally tolerable and yet does not readily seem to satisfy the exacting demands of strict scrutiny, there is a recurring temptation to justify the intuition by concluding that the regulated conduct did not fall within the protected right in the first place. Such reasoning then finds expression in judicial holdings that the regulated family activity or relationship is without privileged constitutional status because it lacks "traditional respect in our society"<sup>6</sup> and thus is not really "deserving of constitutional recognition."<sup>7</sup> This leads to a second irony: a doctrine meant to exalt non-interference in family life itself serves as an engine of state regulation, as the expressive power of constitutional law is wielded by the judiciary to honor and entrench certain personal choices in family matters and to condemn and delegitimize others.

Thus, in Part III, I argue that it would be a wiser course for the Court to come clean about the true nature of family privacy rights—to acknowledge openly that governmental intrusions upon these rights are sustained not only when necessary to the attainment of the most exceptional public goals, but whenever they are judged ultimately to be reasonable. In this regard, I suggest a surprisingly novel linkage between the implicit privacy protections of the Fourteenth Amend-

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4. See, e.g., *In re J.A.*, 962 P.2d 173, 184 (Alaska 1998) (Matthews, C.J., dissenting) (stating that, absent clear and convincing proof of unfitness or misconduct endangering the child, a parent is constitutionally entitled to maintain some contact, even over the objections of the custodial parent); *Hoversten v. Superior Court*, 88 Cal. Rptr. 2d 197, 200-01 (Cal. Ct. App. 1999) (acknowledging the constitutional visitation rights of incarcerated parent); *In re Julie M.*, 81 Cal. Rptr. 2d 354, 358-59 (Cal. Ct. App. 1999) (holding that an abusive parent's constitutional right to visitation precludes giving child a veto right over contact); *In re A.C.*, 643 So. 2d 743, 745 (La. 1994) (holding that clear and convincing proof of sexual abuse is required in order to prohibit visitation rights); *Mullin v. Phelps*, 647 A.2d 714, 724 (Vt. 1994) (same).

5. See, e.g., *S.G. v. C.S.G.*, 726 So. 2d 806, 812 (Fla. Dist. Ct. App. 1999); *In re M.M.L.*, 900 P.2d 813, 819-23 (Kan. 1995); *Grant v. Martin*, 744 So. 2d 817, 820-21 (Miss. App. 1999); *Girard v. Williams*, 966 P.2d 1155, 1162-66 (Mont. 1998). In *Girard*, for example, the court held that a father who was unknown to his two school-age sons was "entitled" to claim custody of them from their longtime guardians upon his release from prison, notwithstanding the "trauma" the boys admittedly would suffer. See *Girard*, 966 P.2d at 1166-67.

6. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 n.3 (1989) (Scalia, J., plurality opinion).

7. *Moore*, 431 U.S. at 504 (Powell, J., plurality opinion).

ment and the explicit privacy protections of the Fourth, and call for a rough harmonization, on a consistent "reasonableness" standard, of the Constitution's protections for family and personal privacy. Such a standard would not, I contend, introduce significant (or ultimately intolerable) indeterminacy into the Constitution's protection of family privacy. Indeed, the Court's doctrine could be made appreciably more predictable by reorienting it around a structured approach to reasonableness, and I begin to identify several of the pillars that tacitly have structured the Court's inquiry in past cases. Although my proposal would require the softening of some judicial rhetoric about the sanctity of family privacy, I conclude that the benefits of a more comprehensible and flexible regime of constitutional limitations would outweigh whatever would be lost in the expressive value of the Court's exaggerated rhetoric.

### I. THE RHETORIC AND REALITY OF FAMILY PRIVACY

Beyond the spirited and deep-going debate over the theoretical justifications for the judiciary's identification and enforcement of unenumerated constitutional rights, there is broad agreement that the Supreme Court's "privacy" cases have created a doctrinal "quagmire."<sup>8</sup> Nowhere is this more true than in that branch of constitutional privacy cases dealing with matters of intimacy and autonomy in family life.<sup>9</sup> More than seventy-five years after the Supreme Court first began to carve out "a 'private realm of family life which the state

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8. See, e.g., Anita L. Allen, *Tribe's Judicious Feminism*, 44 STAN. L. REV. 179, 192 (1991) (book review) (describing "the 'substantive due process' quagmire of the privacy-as-fundamental-liberty argument"); Daniel A. Farber, Book Review, 10 CONST. COMMENTARY 510, 510 (1993) (noting that "prominent scholars have tried to escape the swamp by abandoning the concept of privacy altogether"); see also Hill, 865 P.2d at 650-51.

9. The Court's constitutional privacy cases under the Fourteenth Amendment generally are grouped into two branches, one dealing with autonomy in making "a person's most basic decisions about family and parenthood," *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992), and the other recognizing an "individual interest in avoiding disclosure [by the government] of personal matters," *Whalen v. Ree*, 429 U.S. 589, 599 (1977). A third branch of constitutional privacy doctrine is rooted in the Fourth Amendment's guarantees against unreasonable searches and seizures. See *infra* Part III.A.



cannot enter,'"<sup>10</sup> the boundaries of that constitutional sanctuary remain decidedly unclear.<sup>11</sup>

The confusion stems primarily from two sources: first, the fragmented nature of the Court's family privacy doctrine, and, second, the Court's failure to identify and adhere consistently to a single standard of constitutional review.

### A. *An Amalgam of Rights*

Current constitutional protection for family privacy is comprised of various distinct, though related, strands of rights against the state. It includes the right to marry,<sup>12</sup> to procreate or to avoid procreation,<sup>13</sup> to rear children,<sup>14</sup> and to cohabit with family members.<sup>15</sup> Although the Court occasionally groups these rights together in describing a more all-encompassing right of family privacy,<sup>16</sup> it has never seriously attempted to offer a comprehensive theory which might explain why some intimate conduct or relationships, but not others, are entitled to special constitutional solicitude. Thus, the Court's past willingness to recognize a fundamental right to marry<sup>17</sup> or to expose

10. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 842 (1977) (quoting *Prince*, 321 U.S. at 166). The origins of constitutional rights of family privacy generally are traced to *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), in which the Court recognized a right of parents to direct the education of their children. See *infra* text accompanying notes 20-35.

11. As one district judge summed up the current doctrine, "[w]hile it is beyond dispute that family privacy and association are constitutionally protected rights, the circumstances in which those rights would be violated remain murky." *Franz v. Lytle*, 791 F. Supp. 827, 833 (D. Kan. 1992), *aff'd*, 997 F.2d 784 (10th Cir. 1993); *accord, e.g.*, *McKenna v. Fargo*, 451 F. Supp. 1355, 1379 (D.N.J. 1978) (acknowledging "[t]he confused state of the constitutional doctrine of privacy"), *aff'd*, 601 F.2d 575 (3d Cir. 1979); *Hill*, 865 P.2d at 651 (describing "the murky character of federal constitutional privacy analysis").

12. See *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384-85 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

13. See, e.g., *Casey*, 505 U.S. at 846 (abortion); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (same); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42 (1942) (avoid sterilization).

14. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399.

15. See *Moore v. City of East Cleveland*, 431 U.S. 494, 499-506 (1977).

16. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997); *Casey*, 505 U.S. at 848-49; *Hodgson v. Minnesota*, 497 U.S. 417, 446 (1990) (Stevens, J., plurality opinion); *Moore*, 431 U.S. at 500-01. The Court, however, has not always been so sure. In 1976, the Court frankly admitted it was uncertain whether "[t]he *Meyer-Pierce-Yoder* 'parental' right and the privacy right" emerging from cases such as *Griswold* and *Roe* were theoretically distinct or were merely "verbal variations of a single constitutional right." *Runyon v. McCrary*, 427 U.S. 160, 178 n.15 (1976).

17. See *supra* note 12.

one's children to foreign-language instruction<sup>18</sup> cannot safely be relied upon to predict whether there is similar constitutional protection for, say, an individual's choice to cohabit with a lover or to employ harsh corporal punishment in child-rearing. This is because despite the oft-repeated insistence that its substantive-due-process "holdings . . . are 'not a series of isolated points,' but mark a 'rational continuum'" of heightened protection,<sup>19</sup> the Court has yet to agree on the rationale that explains its rather tattered family-privacy "continuum."

The improvisational nature of the Court's family privacy jurisprudence is reflected clearly in its origins. In *Meyer v. Nebraska*<sup>20</sup> and *Pierce v. Society of Sisters*<sup>21</sup>—now regarded as the foundational family privacy cases—the Court struck down state efforts to regulate primary education, holding that government could not prevent children from learning a foreign language<sup>22</sup> or from attending a private school.<sup>23</sup> In neither case, however, did the Court ground its holding squarely and unambiguously in the Constitution's special regard for the family. Rather, the Court seemed to be moved by a combination of several distinct constitutional concerns. In striking down the ban on foreign-language instruction in *Meyer*, for instance, the Court relied heavily not only upon the right of parents to manage the education of their children, but also upon the right of the petitioner—who was, after all, not a parent but a teacher—to pursue his calling.<sup>24</sup> So, too, in *Pierce* the Court alternated between a concern for "the liberty of parents and guardians to direct the upbringing and education of children" and the "property" and "liberty" interests of private educators to "engage[] in a kind of undertaking not inherently harmful."<sup>25</sup> Accordingly, in describing the "liberty" protected by the Due Process Clause, the Court catalogued the right "to marry, establish a home and bring up children" directly alongside "the right of the individual to contract[] [and] to engage in any of the common occupations of life."<sup>26</sup> At times, the Court seemed to say that the core constitutional problem with the laws in these two cases was their interference with the parent-child

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18. See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

19. *Casey*, 505 U.S. at 858 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

20. *Meyer*, 262 U.S. 390.

21. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

22. See *Meyer*, 262 U.S. at 403.

23. See *Pierce*, 268 U.S. at 534-35.

24. See *Meyer*, 262 U.S. at 400. The Court in *Meyer* thus summed up its opinion with the conclusion that the ban on instruction offended the Constitution by "aboli[shing]" an apparently harmless "occupation." *Id.* at 403.

25. See *Pierce*, 268 U.S. at 534-35.

26. *Meyer*, 262 U.S. at 399.

relationship, the state's attempt in each instance to "standardize . . . children"<sup>27</sup> and to usurp authority over child-rearing that age-old societal consensus had assigned to parents.<sup>28</sup> Elsewhere, however, the Court seemed predominantly offended by the law's intermeddling in the free contractual exchange between parent and educator<sup>29</sup> or by the state's naked attempt to suppress the "acquisition of knowledge,"<sup>30</sup> all quite independent of the happenstance that the cases involved children and their parents.

Indeed, the Court's easy blending of rationales in *Meyer* and *Pierce* gives the cases something like the quality of a prism in modern constitutional law, refracting the light of several different theories of individual rights and creating varying images depending upon the angle at which one views them. Thus, 40 years after deciding *Meyer* and *Pierce*, the Court could look back on them as resting directly upon the First Amendment principle that "the State may not . . . contract the spectrum of available knowledge."<sup>31</sup> Elsewhere, the Court has explained the cases as protecting chiefly the rights of religious or ethnic minorities, implying strongly that the vice of the laws was not their interference with a fundamental right to rear children or receive information, but their discrimination against a suspect class.<sup>32</sup> From still another angle, the cases can be seen as simply of a piece with the Court's *Lochner*-era<sup>33</sup> romance with laissez-faire economics, vindicating the contractual liberty of teachers to pursue their calling<sup>34</sup> or the quasi-property rights of parents in their children.<sup>35</sup>

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27. *Pierce*, 268 U.S. at 535.

28. *See Meyer*, 262 U.S. at 401-02.

29. *See id.* at 400 ("Plaintiff in error taught [the German] language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] Amendment.").

30. *Id.*; *see also id.* at 399 (listing the right "to acquire useful knowledge" as an aspect of constitutionally protected "liberty," alongside the right "to contract" and the right of parents to "bring up children").

31. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *see also* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.7, at 634 n.32 (3d ed. 1999) (noting that *Meyer* and *Pierce* "might be viewed as relating to certain First Amendment rights").

32. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (describing *Meyer* and *Pierce* as having involved "statutes directed at particular religious . . . or national . . . minorities") (citations omitted).

33. *Lochner v. New York*, 198 U.S. 45 (1905).

34. *Griswold*, 381 U.S. at 515-16 & n.7 (Black, J., dissenting).

35. *See generally* Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer* and *Pierce* and the Child as Property, 33 WM. & MARY L. REV. 995, 997 (1992) (arguing that *Meyer* and *Pierce* "were animated . . . by . . . a conservative attachment to the patriarchal family, to a class-stratified society, and to a parent's private property rights in his children and their labor").

In recent years, the Court has settled firmly on the view that *Meyer* and *Pierce* recognized a "fundamental liberty interest of natural parents in the care, custody, and management of their child[ren]."<sup>36</sup> And so today, long after the substantive economic due process theory of the *Lochner* era has dropped away into the recesses of constitutional history, *Meyer* and *Pierce* continue to provide support for a thriving amalgam of substantive due process rights of family privacy and autonomy. Yet the hodge-podge character of the theoretical basis for the Court's original holdings in *Meyer* and *Pierce* reveals just how weak the ground is underneath this structure of rights.

Having launched its family-privacy jurisprudence with only the dimmest view of its theoretical justifications or limits, the Court has been scarcely more successful in subsequent years in rallying any consensus on the matter. For the past 30 years, the Court has seen-sawed between expansive interest-balancing and narrower history-based justifications for the Court's protection of family privacy. When in an expansive mood, the Court has embraced the idea that the underlying theory of the family-privacy cases is the Constitution's special regard for self-governance in matters of exceptional intimacy, recognizing "the interest in independence in making certain kinds of important decisions."<sup>37</sup> The touchstone of privacy protection under this view is the degree to which an individual would resent state intrusion; where the stakes of intervention for the individual are exceptionally high—say, having to incur or continue an unwanted pregnancy—the Constitution demands an exceptional justification from the state.<sup>38</sup>

Just as often, however, the Court has retreated from the broad implications of the intimate-decisions rationale, insisting instead that the boundaries of the Constitution's solicitude for family privacy are marked by historical consensus about the proper limits of governmental power.<sup>39</sup> What makes a family relationship or personal

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36. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

37. *Planned Parenthood v. Casey*, 505 U.S. 833, 859 (1992) (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977)).

38. This was the Court's method of analysis in, for example, *Roe v. Wade*, 410 U.S. 113 (1973). As has often been observed, what justified recognition of the fundamental right for the Court in that case was appreciation of the large "detriment that the State would impose upon the pregnant woman by denying th[e] choice [to terminate her pregnancy]," a detriment potentially encompassing medical risk, physical hardship, psychological harm, and "a distressful life and future." *Id.* at 153. This method also prevailed a year earlier in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), when the Court recognized a fundamental right of unmarried persons to obtain and use contraceptives on the ground that "[i]f 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." *Id.* at 453.

39. As the Court stated in 1997, "[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that

decision worthy of heightened constitutional protection under this view is not the particular stakes for the individual, but whether society traditionally has regarded the particular relationship or choice as off-limits to governmental interference. Thus, in a number of cases where there could be no doubt that there were very large personal stakes for individuals affected by governmental intervention, the Court nevertheless refused to find a fundamental right on the ground that the individual's particular choices concerning intimacy or family life were not historically sanctioned.<sup>40</sup>

The absence of a single, coherent theory justifying the Court's intervention continues to dog the Court across the broad spectrum of its modern family privacy cases, making it difficult to predict when the Court will be willing to recognize a given family relationship or activity as constitutionally privileged.

### *B. Ambivalence and Ambiguity in the Court's Review*

The Court has generated confusion on a second front as well. Even when it is possible to say with confidence that the state has intruded upon a protected family right, it is impossible to know with any certainty how aggressive the Court will be in policing the intrusion.

At one time or another, the Court has identified each of the specific rights comprising family privacy as "fundamental."<sup>41</sup> Traditional due process and equal protection doctrine, of course, provides

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any and all important, intimate, and personal decisions are so protected." *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997). Instead, the *Glucksberg* Court insisted that the "crucial 'guideposts'" for identifying the scope of fundamental rights are "[o]ur Nation's history, legal traditions, and practices." *Id.* at 721 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)); see also *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").

40. For example, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court found no fundamental right implicated although the state action there—laws prohibiting homosexual conduct as sodomy—threatened to deprive the individual of means of intimate sexual expression. See *id.* at 191-95. Likewise, in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the Court found no fundamental right although the stakes of the governmental action included the extinguishment of a biological father's established relationship with his daughter and his complete exclusion from her life. See *id.* at 125-27.

41. See, e.g., *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right . . ."); *Bowers*, 478 U.S. at 190 (noting that the Court's cases recognize "a fundamental individual right to decide whether or not to beget or bear a child"); *Santosky*, 455 U.S. at 753 (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child[ren]"); *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978) (same); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688-89 (1977) (noting that the "right of decision in matters of childbearing" is "constitutionally protected").

that any state action that significantly impinges upon a fundamental right must be subjected to strict scrutiny, requiring the state to prove that its interference with the right is narrowly tailored to achieve a compelling state interest.<sup>42</sup> Yet the Court's family-privacy cases leave considerable doubt about whether strict scrutiny is in fact the governing constitutional test. Both the Court's description of the applicable standard of review and its own conduct of review in particular cases strongly suggest that the Court in fact applies a less stringent form of review.

### 1. Abortion

The governing standard in the abortion cases has been famously shippy. Although the Court first described the right to abortion as "fundamental" in *Roe v. Wade*,<sup>43</sup> consensus on the point was short-lived. Indeed, by 1989, a plurality of the Court thought it unnecessary to explore "the abstract differences between a 'fundamental right' to abortion . . . , a 'limited fundamental constitutional right,' . . . or a liberty interest protected by the Due Process Clause."<sup>44</sup> Whatever the proper classification, the Court by then was largely settled in a mode of constitutional review that bore little resemblance to traditional strict scrutiny. Writing in 1990, two years before the Court reformulated the abortion right in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>45</sup> Professors Daniel Farber and John Nowak surveyed the Court's evolving abortion doctrine and concluded that the Court in the 1980s had abandoned any pretense of strict scrutiny.<sup>46</sup> "Whatever *Roe v. Wade* originally may have meant in Justice Blackmun's mind," they wrote, "it now encompasses a much more flexible approach to abortion. The touchstone of this new approach is reasonableness."<sup>47</sup> In reviewing laws controlling the configu-

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42. See 2 ROTUNDA & NOWAK, *supra* note 31, § 15.7; 3 *id.*, § 18.3 (discussing fundamental rights and standards of review under the Equal Protection Clause).

43. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973). The Court stuck to the same formulation in *Carey*, 431 U.S. at 688-89, and *City of Akron v. Akron Center for Reproductive Health, Inc.*, (Akron I), 462 U.S. 416, 420 n.1 (1983).

44. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 520 (1989) (Rehnquist, C.J., plurality opinion).

45. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

46. Daniel A. Farber & John E. Nowak, *Beyond the Roe Debate: Judicial Experience with the 1980's "Reasonableness" Test*, 76 VA. L. REV. 519, 523 (1990) ("By 1986, it was quite literally 'black letter' or 'hornbook' law that in pre-viability abortions *Roe* requires strict scrutiny only to determine if the regulation in question is a reasonable health regulation.") (citing JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 698 (3d ed. 1986)).

47. *Id.* at 520.

ration or duties of medical personnel relating to abortion,<sup>48</sup> for example, or requiring parental notification or consent when a minor elects abortion,<sup>49</sup> the Court upheld or struck down the particular requirements based upon whether they seemed to be reasonable and measured means of protecting health or promoting responsible decision-making.<sup>50</sup> The Court did not, however, hew to any recognizable form of strict scrutiny.

The Court's 1992 embrace of the "undue burden" standard in *Casey* thus did not represent so much a dramatic overhaul of the right to abortion as the denouement of a long and gradual repudiation of traditional fundamental-rights analysis. *Casey* made it clear that, under the "undue burden" standard, the constitutionality of abortion regulations would turn more frankly on the Court's assessment of their "reasonableness": "States are free," the plurality wrote in crystallizing the constitutional rule, "to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning."<sup>51</sup> And it also made clear that this standard of

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48. See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759-65 (1986) (striking down requirement that physicians inform patients considering abortion of particular medical risks); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 482-86 (1983) (upholding requirement that second physician be present during certain abortions); *Akron I*, 462 U.S. at 442-49 (striking down requirement that physicians orally provide specified medical information to patients considering abortion); *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (per curiam) (upholding requirement that abortion be performed by a licensed physician).

49. See, e.g., *Ohio v. Akron Ctr. for Reprod. Health, Inc.*, 497 U.S. 502, 510-17 (1990) (upholding statutory requirement of notice to one parent with possibility of judicial bypass); *Hodgson v. Minnesota*, 497 U.S. 417, 450-55 (1990) (striking down statutory requirement that both parents of a minor be notified); *H.L. v. Matheson*, 450 U.S. 398, 407-13 (1981) (upholding requirement of parental notification as applied to immature, unemancipated, and dependent minors); *Bellotti v. Baird*, 443 U.S. 622, 644-56 (1979) (striking down statute that required even mature minors to notify their parents and to obtain parental or judicial consent).

50. See Farber & Nowak, *supra* note 46, at 522-24.

51. *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992) (O'Connor, Kennedy, and Souter, J.J., plurality opinion) (emphasis added). The plurality in *Casey* went on to define an "undue burden" as "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. In applying that standard to the particular statutory restrictions at issue in *Casey*, the plurality made clear that the test ultimately turns on an assessment of whether the particular regulation is a "reasonable" accommodation between the individual's interest in autonomous decisionmaking and the state's interests in deliberative decisionmaking or preservation of life or health. See *id.* at 883 (upholding constitutionality of statutory requirement that "the woman be informed of the availability of information relating to fetal development" on the ground that it is "a reasonable measure to ensure an informed choice") (emphasis added); *id.* at 885 (upholding constitutionality of statutory requirement that a licensed physician, as opposed to a qualified assistant, provide certain information to a woman "as a reasonable means to ensure that the woman's consent is informed") (emphasis added); cf. *id.* at 895 (stating that parental notification requirements are valid "based on the quite reasonable assumption that minors will benefit from consultation with their parents") (emphasis added);

review is distinctly more deferential than traditional strict scrutiny.<sup>52</sup> But the ease with which the Court could draw support for its “undue burden” test from its earlier abortion precedents demonstrated the accuracy of Farber and Nowak’s thesis that the Court had abandoned traditional fundamental-rights analysis well before 1992.<sup>53</sup>

## 2. Marriage

In contrast to its ongoing discord in the abortion cases, the Court has not hesitated in recognizing the right to marry as fundamental.<sup>54</sup> As in the abortion cases, however, the Court has demonstrated far less certainty about just what that recognition should mean in any given case. Although the Court’s denomination of the right as fundamental would seem to require strict scrutiny for any

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Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 133-36 (1989) (construing Justice O’Connor’s “undue burden” test, before *Casey*, to turn largely on “the quantity of burden an abortion restriction imposes”); Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2031 (1994).

52. The difference between traditional strict scrutiny and the more deferential “undue burden” test is well exemplified by the *Casey* Court’s analysis of a requirement in the Pennsylvania statute that certain information about the health risks of abortion be provided to women by a licensed physician, as opposed to a qualified assistant. See *Casey*, 505 U.S. at 884-85 (O’Connor, Kennedy, and Souter, J.J., plurality opinion). Such a requirement readily fails traditional strict scrutiny because there is no demonstration of the necessity that the information be provided by a medical doctor. Cf. *Akron I*, 462 U.S. at 448 (rejecting the contention that “the woman’s consent to the abortion will not be informed if a physician delegates the counseling task to another qualified individual”). Applying the “undue burden” test, however, the plurality in *Casey* found no need to consider the necessity of the requirement, and instead emphasized a measure of deference to state policy judgments that is quite alien to strict scrutiny:

Since there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue burden. Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others. See *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). Thus, we uphold the provision as a reasonable means to ensure that the woman’s consent is informed.

*Id.* at 884-85 (emphasis added).

The Court’s reliance on *Williamson*, a case normally cited for its classic statement of the rationality standard of review, in assessing the permissibility of Pennsylvania’s abortion regulation reflects how far from strict scrutiny the Court has strayed.

53. In *Casey*, the plurality was able to collect a handful of earlier cases that had employed “undue burden” language in analyzing the constitutionality of abortion restrictions, see *Casey*, 505 U.S. at 874-75 (O’Connor, Kennedy, and Souter, J.J., plurality opinion), and to point to still other cases that in fact applied some form of “reasonableness” review less than strict scrutiny, see *id.* at 885 (quoting *Akron I*’s analysis of whether “the State’s legitimate concern that the woman’s decision be informed is reasonably served by requiring a 24-hour delay”) (emphasis added).

54. See, e.g., *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).



significant governmental impairment of an individual's freedom to enter into (or, presumably, exit) marriage,<sup>55</sup> the Court's cases dealing with marriage regulation are in fact more equivocal.

Two of the cases most often cited for recognizing the fundamental nature of the right to marriage, *Loving v. Virginia*<sup>56</sup> and *Turner v. Safley*,<sup>57</sup> are of little help because the standard of review in each case was controlled by an independent factor. *Loving* applied strict scrutiny to Virginia's anti-miscegenation law, but it would have done so in any event because the law involved a suspect racial classification.<sup>58</sup> *Turner* applied a more deferential standard of review to a law restricting the ability of prison inmates to marry, but its deference was driven largely by the fact that the regulations applied in a prison setting.<sup>59</sup> Thus, neither case squarely addresses which standard of review should apply to state restrictions on marriage in ordinary circumstances.

The Court confronted that question directly in *Zablocki v. Redhail*,<sup>60</sup> but seemed to hedge its answer. Considering a challenge to a Wisconsin law that required court permission before parents subject to a child-support order could marry, the Court stated that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship" will be presumed constitutional, subject only to minimal rational-basis review.<sup>61</sup> Regulations that do "significantly interfere" with a person's decision to marry, the Court contin-

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55. See 3 ROTUNDA & NOWAK, *supra* note 31, § 18.28, at 575 (concluding that "laws which restrict individual choice regarding marriage or divorce will be subjected to 'strict scrutiny' under the due process or equal protection clauses").

56. *Loving v. Virginia*, 388 U.S. 1 (1967).

57. *Turner v. Safley*, 482 U.S. 78 (1987).

58. See *Loving*, 388 U.S. at 11. The Court noted that the law was also defective because it burdened the fundamental right of marriage, but did not specify whether strict scrutiny would be independently triggered for that reason as well. See *id.* at 11-12; see also *Zablocki*, 434 U.S. at 398 (Powell, J., concurring in judgment) ("*Loving* involved a denial of a 'fundamental freedom' on a wholly unsupportable basis—the use of classifications 'directly subversive of the principle of equality at the heart of the Fourteenth Amendment . . .'. It does not speak to the level of judicial scrutiny of, or governmental justification for, 'supportable' restrictions on the 'fundamental freedom' of individuals to marry or divorce.>").

59. See *Turner*, 482 U.S. at 85. The Court framed the test as whether the restrictions on marriage were "reasonably related to legitimate penological interests." *Id.* at 89. The Court has applied the same deferential standard of review in considering claims that prison regulations abridged other fundamental rights as well. See, e.g., *Thornburgh v. Abbott*, 490 U.S. 401, 414-19 (1989) (upholding regulation authorizing wardens to restrict inmates' receipt of certain types of publications); *O'Lone v. Estato of Shabazz*, 482 U.S. 342, 350-53 (1987) (upholding regulation that impeded inmates' exercise of religion).

60. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

61. *Id.* at 386.

ued, are subject to a level of scrutiny described as "rigorous,"<sup>62</sup> under which the regulation must be "closely tailored" to achieve a "sufficiently important" state interest.<sup>63</sup> By these words, perhaps the Court meant to describe traditional strict scrutiny. But its deviation from the familiar language of prior opinions and substitution of debatable synonyms seemed calculated to leave the question open.<sup>64</sup>

The majority's application of the test to the Wisconsin statute did nothing to resolve the ambiguity. The Court obligingly assumed that the State's goals in enacting the statute—primarily prodding parents to meet their child-support obligations—were "legitimate and substantial,"<sup>65</sup> but held that the statute was an "unnecessarily" clumsy means of advancing those goals.<sup>66</sup> The Court's focus on the under- and over-inclusiveness of the statute (for example, its pointless<sup>67</sup> or "irrational"<sup>68</sup> denial of marriage to truly indigent parents who were incapable of responding to the statute's intended incentives) could be understood as an application of strict scrutiny's "narrow tailoring" test, but is equally consistent with the sort of "fit" analysis used under more middling standards of review.<sup>69</sup>

The separate opinions of Justices Stewart, Powell, and Stevens, each of whom concurred in the judgment, seem only to confirm that the Court was embracing something less than true strict scrutiny for marriage restrictions. Each expressed the view that not all laws "significantly" or "substantially" restricting an individual's freedom to

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62. *Id.*

63. *Id.* at 388.

64. See 3 ROTUNDA & NOWAK, *supra* note 31, § 18.28, at 581 (noting that "[t]he majority opinion [in *Zablocki*] left the exact nature of the standard of review employed in this case unclear," and concluding that the Court's "statements indicate that the Court used a standard of review that approximates one or more of the 'middle level standard[s] of review'"); Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, 51 J. LAW. & CONTEMP. PROBS. 79, 84 (1988) (reaching the same conclusion); Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790-1990*, 41 HOW. L.J. 289, 324-25 (1998) (same).

65. *Zablocki*, 434 U.S. at 388. Again, the Court seemed consciously to avoid consideration of whether this aim was "compelling," the benchmark under traditional strict scrutiny.

66. *Id.*

67. See *id.* at 389 (emphasizing that "with respect to individuals who are unable to meet the statutory requirements, the statute merely prevents the applicant from getting married, without delivering any money at all into the hands of the applicant's prior children").

68. *Id.* at 394 (Stewart, J., concurring in judgment); *id.* at 406 (Stevens, J., concurring in judgment).

69. Compare, e.g., *Craig v. Boren*, 429 U.S. 190, 199-200 (1976) (analyzing whether gender-based classification "closely serves" state's "important" objectives under intermediate scrutiny). Under intermediate scrutiny, the Court requires the government to demonstrate that its means are "substantially related" to the achievement of an "important" state purpose. See generally 3 ROTUNDA & NOWAK, *supra* note 31, § 18.3, at 218-21 (describing intermediate scrutiny).

enter into marriage should be subject to strict scrutiny.<sup>70</sup> Specifically, each supposed that laws barring bigamous, incestuous, or under-age marriages would be sustained without any requirement that the government demonstrate an exceptional justification.<sup>71</sup> For these Justices, what ultimately doomed the Wisconsin statute was not that it "significantly interfere[d]" with the choice to marry, or that it did so without proof that there was no less burdensome way of achieving a compelling public goal, but simply that it restricted access to marriage in an unreasonable way.<sup>72</sup> What made the statute's lack of fit intolerable was its palpable unfairness, its imposition of a draconian and "unprecedented"<sup>73</sup> penalty and its "deliberate discrimination against the poor,"<sup>74</sup> an economic class that already had more than its share of hardships. The statute's defect was ultimately not its imprecision, but its embodiment of a legislative policy judgment that was simply "alien . . . to our shared notions of fairness."<sup>75</sup>

Taken together, the various opinions in *Zablocki* reflect a more flexible and textured review of marriage regulations than ordinarily associated with strict scrutiny. *Zablocki* left intact *Loving's* declaration that marriage is a fundamental right but plainly contemplated that incursions on the right would be policed pragmatically. The level of judicial scrutiny will vary not only with the substantiality of the state's restriction of the freedom to marry, but also with the particular nature of the restriction.<sup>76</sup> Moreover, the sufficiency of the justification offered by the state will turn not only on whether less burdensome alternative means exist, but also on the Court's judgment of whether the chosen means are fair and reasonable in light of all of the competing public and private values.

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70. See *Zablocki*, 434 U.S. at 392-93 (Stewart, J., concurring in judgment); *id.* at 396-97, 399 (Powell, J., concurring in judgment); *id.* at 403-04 (Stevens, J., concurring in judgment).

71. See *id.* at 392 (Stewart, J., concurring in judgment); *id.* at 399 (Powell, J., concurring in judgment); *id.* at 404 (Stevens, J., concurring in judgment).

72. See 3 ROTUNDA & NOWAK, *supra* note 31, § 18.28, at 582 (construing Justice Powell's and Justice Stewart's opinions as ultimately resting on an assessment "that the law was not a reasonable means of furthering important state interests").

73. *Zablocki*, 434 U.S. at 403 (Powell, J., concurring in judgment); *id.* at 404 (Stevens, J., concurring in judgment).

74. *Id.* at 405 (Stevens, J., concurring in judgment); see also *id.* at 394 (Stewart, J., concurring in judgment); *id.* at 402-03 (Powell, J., concurring in judgment).

75. *Id.* at 395 (Stewart, J., concurring in judgment).

76. See *supra* note 71 and accompanying text (supposing lesser scrutiny of traditional restrictions, such as anti-bigamy and -incest laws).

## 3. Kinship

The Court has been equally ambiguous in its cases considering the Constitution's protection for family choices in living arrangements. In *Moore v. City of East Cleveland*, a plurality held that the fundamental right of family privacy encompassed a right of persons related by blood, adoption, or marriage to live together as a family.<sup>77</sup> Three years before, the Court had sustained, under the rational-basis test, a local ordinance from New York that had restricted residence in a zoned area to single "families" composed of legally or biologically related members.<sup>78</sup> In *Moore*, however, a city had attempted to limit residence to "families" defined in narrower terms that would have prevented the petitioner, Inez Moore, from living with both of two grandsons who had different parents.<sup>79</sup> The plurality concluded that the East Cleveland ordinance, unlike the earlier New York ordinance, intruded upon the "private realm of family life," and so was subject to heightened constitutional scrutiny.<sup>80</sup> As in *Zablocki*, however, the plurality described that level of scrutiny in a way that pointedly seemed to avoid the usual language of strict scrutiny. "[W]hen the government intrudes on choices concerning family living arrangements," the plurality stated, "this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."<sup>81</sup> The plurality went no further in describing just how "important" the state's interest must be or the particular efficiency with which the state's means must serve its ends.

Applying the test, the plurality, also as in *Zablocki*, assumed the "legitima[cy]" of the city's interests in reducing residential congestion and the cost of city services,<sup>82</sup> but concluded that the zoning ordinance served those goals only "marginally, at best."<sup>83</sup> That the plurality found only the barest and most "tenuous relation"<sup>84</sup> between the ordinance's definition of "family" and the city's stated goals estab-

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77. *Moore v. City of East Cleveland*, 431 U.S. 494, 498-500 (1977).

78. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-9 (1974).

79. *See Moore*, 431 U.S. at 496-97.

80. *Id.* at 499 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

81. *Id.* As with the Court's description of the standard of review in *Zablocki*, *see supra* notes 61-69 and accompanying text, it is possible to read the plurality as embracing traditional strict scrutiny, *see* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1176, 1178 n.9 (1996) (citing *Moore* as adopting strict scrutiny). Yet, as with *Zablocki*, the plurality's verbal formulation is at least equally consistent with intermediate scrutiny.

82. *Moore*, 431 U.S. at 500. Once again, as in *Zablocki*, the plurality did not address whether these interests also qualified as—or *needed* to qualify as—"compelling."

83. *Id.*

84. *Id.*

lished that the ordinance would have failed any form of heightened scrutiny, and this spared the plurality the need to go farther in fleshing out the precise standard of review.<sup>85</sup> The plurality's pointed ambiguity on the issue, however, is striking and seems to demonstrate the Court's ambivalence about whether to embrace strict scrutiny even in cases where it finds the "fundamental" right of family privacy to be directly and substantially burdened.

#### 4. Child Rearing and Custody

It was in the context of disputes over education and child rearing that the Court first recognized what later came to be known as the constitutional right of family privacy.<sup>86</sup> These early cases described the level of judicial scrutiny in modest terms, requiring only that measures regulating the choices of parents concerning the education and upbringing of children bear a "reasonable relation" to a legitimate state purpose.<sup>87</sup> But those cases also long predated the articulation of the modern standards of heightened scrutiny, and so it is perilous to read too much into the Court's choice of words.<sup>88</sup> It is evident from the reasoning of the cases that the Court was applying something appreciably more aggressive than modern-day rationality review.<sup>89</sup> But the early cases remain enigmatic—and not solely because of the evolving meaning of doctrinal terms.

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85. Justice Stevens concurred in the judgment for reasons similar to those he cited in his separate opinion in *Zablocki*. See *supra* notes 70-74 and accompanying text. He suggested that the heightened burden of justification imposed on the government was rooted not in the ordinance's intrusion into "family life," but rather its interference with the "fundamental" right of a residential property owner "to decide who may reside on his or her property." *Moore*, 431 U.S. at 518-20 (Stevens, J., concurring in judgment). He concluded that the city failed to carry its burden largely because, as in *Zablocki*, he was offended by the "unprecedented" and heavy-handed nature of the city's regulatory strategy. See *id.* at 520-21.

86. See *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

87. *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399-400.

88. See *Herndon v. Chapel Hill-Carrboro Bd. of Educ.*, 89 F.3d 174, 178 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 & n.5 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996).

89. In *Meyer*, for example, the Court did not doubt the legitimacy of the state's goal of "foster[ing] a homogeneous people with American ideals prepared readily to understand current discussions of civic matters," *Meyer*, 262 U.S. at 402, or that the ban on foreign-language instruction rationally furthered that goal. Rather, the Court held that the State's pursuit of that goal, though rational, must be subordinated to the higher value of parental primacy in making basic decisions about a child's education. See *id.* at 402-03. But see Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 988-89 (1988) (reading *Meyer* and *Pierce* as applying "what can be seen through modern eyes as the present rational basis test").

In large part, the Court's parental-rights cases remain profoundly murky regarding the balance they strike between private and communal interests in childrearing because they rest uncomfortably upon two competing and as-yet-unreconciled metaphors: the family as a "private refuge"<sup>90</sup> from a brutal or indifferent community and the state as "protector"<sup>91</sup> of children from a brutal or indifferent family.<sup>92</sup> As Dean Lee Teitelbaum has pointed out, political and social thought in the nineteenth and early twentieth centuries—the milieu from which the early constitutional cases sprang—simultaneously coupled a zealous rhetoric of governmental abstention with a strongly interventionist impulse toward the family.<sup>93</sup> And the Supreme Court of that era reflected the same tension, vacillating freely—often in the very same opinion—between grandiose claims of deference to parental prerogative and confident assertions of state authority to protect child welfare.<sup>94</sup>

Subsequent cases have made it clear that the Court regards some form of heightened scrutiny as appropriate whenever the state intrudes significantly upon a parent's basic decision concerning child rearing. In recent decades, the Court has stated repeatedly that a parent has a "fundamental liberty interest" in "the companionship,

90. Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1157; see also *id.* at 1141 (discussing the traditional idea of "refuge").

91. *Legate v. Legate*, 28 S.W. 281, 282 (Tex. 1894).

92. See Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393, 393 (1996) ("[T]ensions between the public role of parenthood and the privacy of the family, between public support for responsible parenting and public intervention in irresponsible parenting, have figured prominently in American politics for at least three quarters of a century.").

93. See Teitelbaum, *supra* note 90, at 1157 ("Nineteenth century public concern with child-rearing, it seems, was pervasive, however much Americans may have considered the home a private refuge.").

94. The Court's opinion in *Prince v. Massachusetts*, 321 U.S. 158 (1944), upholding the state's authority to prosecute a parent or guardian for enlisting the aid of a child in streetcorner proselytizing, is a classic illustration. The Court launched its analysis with the oft-repeated declaration that

[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that [our] decisions have respected the private realm of family life which the state cannot enter.

*Id.* at 166 (citation omitted). The backsliding, however, commenced with the very next sentence: But the family itself is not beyond regulation in the public interest . . . Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.

*Id.* (footnotes omitted).

care, custody, and management of his or her children.'"<sup>95</sup> And yet the Court in those cases, still torn between the competing metaphors of family as haven and as hell, stops short of embracing strict scrutiny as the governing standard.

The Court has used the familiar language of strict scrutiny—"compelling" interests and "narrow tailoring"—in only a few of its cases dealing with the rights of parents. Moreover, in the most prominent of those cases, *Wisconsin v. Yoder*, the Court strongly implied that strict scrutiny was justified by constitutional interests other than the child-rearing rights of parents.<sup>96</sup> In a much greater number of cases, the Court seems to apply a more free-form "reasonableness" test to government actions that impede a parent's child-rearing authority, implicitly calibrating the level of scrutiny in each case to match the particular degree of intrusion upon the parents' interests.<sup>97</sup> Thus, for example, the Court has upheld government action subjecting children to corporal punishment by teachers against the wishes of parents,<sup>98</sup> dismantling a form of private education desired by parents,<sup>99</sup> prohibiting parents or guardians from enlisting the aid of their children in street-corner proselytizing,<sup>100</sup> and requiring the inoculation of children over the objection of their parents.<sup>101</sup> Although each of these govern-

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95. *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (quoting *Lassitor v. Department of Soc. Servs.*, 452 U.S. 18, 27 (1981)); see also, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990); *Rivera v. Minnich*, 483 U.S. 574, 579 (1987); *H. L. v. Matheson*, 450 U.S. 398, 410 (1981); *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972).

96. See *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972). The parents in *Yoder* objected to Wisconsin's compulsory school-attendance law as interfering with *both* their rights of family privacy *and* their First Amendment right to exercise their religion. See *id.* at 208-09. In explaining why strict scrutiny applied to the Wisconsin law, the Court expressly referred to the law's burden on the claimants' Free Exercise rights. See *id.* at 219. Moreover, the Court pointed out that the result would be otherwise if the parents were motivated by "secular considerations" in objecting to sending their children to school, implying that the law's interference with autonomy in the parents' child-rearing decisions alone would not have been enough to trigger strict scrutiny. See *id.* at 216. The Court subsequently has confirmed this view, insisting that strict scrutiny was justified in *Yoder* only because it presented a unique combination of Free Exercise and substantive due process interests. See *Employment Div. v. Smith*, 494 U.S. 872, 881 & n.1 (1990); see also *Yoder*, 406 U.S. at 233 ("[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment.") (emphasis added).

97. See David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 838-42 (1999).

98. See *Baker v. Owen*, 423 U.S. 907, 907 (1975), *aff'g* 395 F. Supp. 294 (M.D.N.C. 1975); *Ingraham v. Wright*, 430 U.S. 651, 668-71 (1977).

99. See *Runyon v. McCrary*, 427 U.S. 160, 178 (1976).

100. See *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

101. See *Jacobson v. Massachusetts*, 197 U.S. 11, 29-31 (1905).

mental actions readily could be said to have interfered significantly with a parent's "companionship, care, or management" of his or her children, in none of these cases did the Court apply anything resembling strict scrutiny.<sup>102</sup> Indeed, as Dean Teitelbaum has observed, when all is said and done, "[w]hat is most striking about [the Court's] cases . . . is not the strong language they employ in support of values of pluralism and deference to parental authority but the narrowness of the exceptions they recognize to state authority."<sup>103</sup>

Lower courts, aware that the Court's cases leave plenty of room for governmental regulation of parents' decisions concerning education, child care, custody arrangements, and other issues of child-rearing, have turned aside parents' objections to mandatory sex education,<sup>104</sup> juvenile curfews,<sup>105</sup> state supervision of "home-school" curriculum,<sup>106</sup> and community-service obligations for high-school students,<sup>107</sup> to name just a few examples, essentially on the grounds that the State's particular intrusions upon the parent's autonomy in child-rearing were "reasonable." Although a handful of cases have applied strict scrutiny,<sup>108</sup> most expressly have not.

Indeed, the Supreme Court's tendency to reduce parent-state conflicts to a question of "reasonableness" has left a number of lower federal judges scratching their heads and wondering out loud whether there really is a "fundamental right" of parents to the "companionship, care, custody, and management" of their children.<sup>109</sup> Others have

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102. Indeed, despite their apparent meandering, the cases could fairly be read to reveal the following principle: the Court accords heightened constitutional protection to parental authority when it happens to agree with the parents' particular child-rearing decisions. See Robert A. Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 339-40 ("This is the thread that can be traced into a coherent pattern among the votes of the conservative bloc Justices . . . — that a specific, authoritarian style of parenting rather than the status of parent itself warrants constitutional deference.").

103. Teitelbaum, *supra* note 90, at 1157.

104. See *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 532-34 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996); cf. *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580, 584-87 (Mass. 1995) (upholding condom distribution in public schools).

105. See *Hutchins v. District of Columbia*, 188 F.3d 531, 545-46 (D.C. Cir. 1999) (en banc); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 852-53 (4th Cir. 1998).

106. See *Murphy v. Arkansas*, 852 F.2d 1039, 1041, 1044 (8th Cir. 1988); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1064 (6th Cir. 1987).

107. See *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 177-79 (4th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461-62 (2d Cir. 1996).

108. See, e.g., *Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997) (applying strict scrutiny to juvenile curfew ordinance); *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 265 (N.Y. App. Div. 1993) (applying strict scrutiny to state program to distribute condoms at public high schools), *leave to appeal dismissed*, 637 N.E. 2d 279 (N.Y. 1994).

109. The Fourth Circuit, for example, concluded:



sought to synthesize the case law as recognizing that "parents may possess a fundamental right [only] against *undue* . . . interference by the state."<sup>110</sup> But that, of course, is only another way of saying that the heightened protection given to parents' child-rearing decisions is qualified and rests ultimately upon a standard of "reasonableness."

### C. Roots of Ambivalence

The full range of the Court's family-privacy jurisprudence thus reveals a nagging dissonance between the Court's exuberant rhetoric

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From *Meyer* to *Runyon*, the Supreme Court has stated consistently that parents have a liberty interest, protected by the Fourteenth Amendment, in directing their children's schooling. Except when the parents' interest includes a religious element [independently protected by the Free Exercise Clause], the Court has declared with equal consistency that *reasonable* regulation by the state is permissible even if it conflicts with that interest. That is the language of rational basis scrutiny.

*Herndon*, 89 F.3d at 179; see also *Immediato*, 73 F.3d at 461; *Brown*, 68 F.3d at 533 ("[T]he *Meyer* and *Pierce* cases were decided well before the current 'right to privacy' jurisprudence was developed, and the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny."); McCarthy, *supra* note 89, at 985 (contending that the Court's "patchwork of decisions . . . leave many questions unanswered," including "whether parental rights are truly fundamental rights at all").

The depth of the uncertainty is illustrated by the regularity with which courts uphold claims of qualified immunity by government officials sued for violating parents' constitutional rights of child-rearing autonomy. In the view of many courts, "the amorphous nature of [the parents'] liberty interest in familial relationships" excludes the sort of clarity necessary to overcome a claim of qualified immunity. *Frazier v. Bailey*, 957 F.2d 920, 931 (1st Cir. 1992). As one district court explained,

[t]he weight of parents' interest in the care and custody of their child balanced against the state's interest in the protection of the child from harm naturally leaves a court engaged in this type of inquiry in a quandary as to what plaintiffs' clearly established rights may be in a particular situation. It is for this reason that many courts have found that, in the context of child care workers investigating and bringing child abuse proceedings, there are no "clearly established" substantive due process rights held by parents.

*Callahan v. Lancaster-Lebanon Inter. Unit 13*, 880 F. Supp. 319, 329 (E.D. Pa. 1994) (citation omitted); accord *Franz v. Lytle*, 791 F. Supp. 827, 833 (D. Kan. 1992), *aff'd*, 997 F.2d 784 (10th Cir. 1993).

110. *Schleifer*, 159 F.3d at 852 (emphasis added); see *Hutchins v. District of Columbia*, 188 F.3d 531, 551 (D.C. Cir. 1999) (en banc) (Edwards, C.J., concurring in part) ("[T]he case law suggests that if there is a significant and important goal to be achieved that generally enhances the health, safety, or welfare of unemancipated minors, the state may pass legislation to achieve that goal, so long as the legislation does not unduly tread on parents' rights to raise their children."). Indeed, Justice Stewart seemed to take precisely this tack in explaining why the outlawing of racially segregated private schools implicated no fundamental right of parents who desired such education for their children:

The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.

*Runyon v. McCrary*, 427 U.S. 160, 178 (1976) (citations omitted).

about the sanctity of the family and the moderation which it consistently demonstrates when actually called upon to review state intrusions into the family.<sup>111</sup> Such dissonance is by no means unique to the context of family privacy. Commentators and dissenting Justices have pointed out many other instances in which the Court seemed in fact to apply a standard different from the one that was formally said to govern.<sup>112</sup> Some of this fudging may be endemic to the enterprise of substantive due process review and may simply reflect, as Professor Carl Schneider has suggested, the Court's discomfort generally with the uncertain boundaries and implications of its undertaking.<sup>113</sup> And, yet, the Court's reluctance to apply traditional strict scrutiny seems both clearer and more consistent in its fundamental-rights cases relating to the family. In this context, there seem to be additional forces at work driving the Court to compromise the rigor of its review.

Although there may be other influences as well, two background considerations seem largely to account for the Court's tacit acknowledgment that traditional strict scrutiny is ill-suited to the task of mediating between the state and the individual in the context of the family. The first is a sense, often though not always left unstated, that the stakes for the community are higher when it comes to regulating the institution of the family than in many other areas of important personal liberties. When the state restricts the freedom of individuals to migrate across state lines,<sup>114</sup> for instance, or to cast a ballot,<sup>115</sup> the state's possible regulatory interests—ensuring an adequate provision of public services, say, or orderly elections—probably strike most observers as legitimate but not overwhelming. That intuition comfortably supports use of a constitutional standard that sharply limits the state's ability to promote those interests, because it seems unlikely that the community stands much to lose if the government is sometimes unable to carry its burden of exceptional justification. Thus, traditional strict scrutiny of state action burdening the

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111. See Schneider, *supra* note 64, at 86 (noting "doubts about the correspondence between the [scrutiny] test invoked [in the Court's family privacy cases] and the test actually used").

112. See, e.g., Plyler v. Doe, 457 U.S. 202, 244 (1982) (Burger, C.J., dissenting); Zobel v. Williams, 457 U.S. 55, 72-73 & n.2 (1982) (O'Connor, J., concurring in judgment); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 97-98 (1973) (Marshall, J., dissenting); 3 ROTUNDA & NOWAK, *supra* note 31, § 18.3, at 224; Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 299-300 (1992).

113. See Schneider, *supra* note 64, at 86, 88 (suggesting that the Court may undertake "*sub rosa* adjustments of its standards" in some cases because of "the Court's uncertainty about the right to privacy itself and about how far it may take the Court").

114. See, e.g., Saenz v. Roe, 119 S. Ct. 1518, 1525-27 (1999) (discussing fundamental right of travel); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (same).

115. See, e.g., Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (discussing fundamental right to vote); Williams v. Rhodes, 393 U.S. 23, 31 (1968) (same).

fundamental rights of interstate travel or political participation seems to reflect our collective judgment that the community can afford, in these contexts, to subordinate more systematically its interests in regulation to those of the regulated individuals.

The balance seems different, however, in the context of state authority over the family. While few would deny that the stakes of state intervention for the individual are at least as high in this context as in the realm of other fundamental liberties, there is a widely held sense that the stakes of non-intervention for the community may be more significant here. "It is through the family," Justice Powell once observed, "that we inculcate and pass down many of our most cherished values, moral and cultural."<sup>116</sup> That belief, deeply rooted in law and elsewhere,<sup>117</sup> suggests that the community has an enormous, unparalleled stake in the family—society's very ability to replicate its own values and culture in the next generation.<sup>118</sup> It is the continuing force of this belief that gives so much heat to current debates over so-called "family values" issues, such as same-sex marriage, divorce, and single parenthood.<sup>119</sup> And it is partly this grandiose assessment of the stakes for the community that leads the Court tacitly to retreat from a constitutional standard that would narrowly cabin the state's regulatory authority. The intuition that the balance between the

116. *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977).

117. More than a century ago, the Court considered it obvious that "no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, . . . than that which seeks to establish it on the basis of the idea of the family, . . . the sure foundation of all that is stable and noble in our civilization . . ." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). That assessment, and others of similar import, finds continual affirmation in subsequent opinions. See, e.g., *Davis v. Beason*, 133 U.S. 333, 344-45 (1890) (quoting *Murphy*); *Romer v. Evans*, 517 U.S. 620, 651-52 (1996) (Scalia, J., dissenting) (same).

118. For a nuanced account of the "socializing" function of many laws affecting family, see Schneider, *supra* note 64, at 97-118.

119. Professor David Chambers has explained the intensity of the debate over same-sex marriage in these terms:

In our country, as in most societies throughout the world, marriage is the single most significant communal ceremony of belonging. It marks not just a joining of two people, but a joining of families and an occasion for tribal celebration and solidarity. In a law-drenched country such as ours, permission for same-sex couples to marry under the law would signify the acceptance of lesbians and gay men as equal citizens more profoundly than any other nondiscrimination laws that might be adopted. Most proponents of same-sex marriage, within and outside gay and lesbian communities, want marriage first and foremost for this recognition. Most conservative opponents oppose it for the same reason.

David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 450-51 (1996) (footnote omitted); accord Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1876-77 (1997); see also Schneider, *supra* note 64, at 116-17 ("The social and political controversy over the privacy doctrine is in part a battle about modernity and modernization . . . [T]he question the battle raises is what kind of society we are to be.").

individual's interests in autonomy and the community's interests in regulation may be more even in the context of the family than in other areas of fundamental liberty counsels against a lopsided scrutiny in which the state's interests are virtually foreordained to lose.<sup>120</sup>

The second factor driving the Court toward a more flexible standard of constitutional review is one that it has acknowledged in its abortion cases, but which has application to other family-privacy controversies as well. More than with other fundamental rights, an exercise of one of the rights of family privacy may be "fraught with consequences for others,"<sup>121</sup> often posing a clash between conflicting individual rights. Abortion provides only the most obvious illustration. The woman's fundamental right to terminate her pregnancy necessarily, of course, poses a threat to "the life or potential life of the unborn."<sup>122</sup> But it also may present conflicts with the "privacy" interests of other family members—with the procreative desires of the potential father,<sup>123</sup> for instance, or with the child-rearing authority of the parents of a pregnant teenager.<sup>124</sup> In this context, vindication of one fundamental right may well require subordination of another. It is, in significant measure, this gnawing reality that ultimately has led the Court to recognize that traditional fundamental-rights analysis simply does not quite fit. The strictures of the usual search for "compelling interests" and "narrow tailoring" make it impossible for a court to comprehend the full complexity of intersecting public and private interests. Indeed, it is largely on this

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120. Despite Justice O'Connor's recent protestation to the contrary in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (O'Connor, J., plurality opinion), the Court generally has seemed to accept the accuracy of Professor Gerald Gunther's famous description of strict scrutiny as "strict" in theory and fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); see also Sullivan, *supra* note 112, at 296.

121. *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).

122. *Id.* at 870 (O'Connor, Kennedy, Souter, J.J., plurality opinion). Professor Laurence Tribe, for example, criticized the Court's first pass at abortion in *Roe* for failing to demonstrate "a more cautious sensitivity to the mutual helplessness of the mother and the unborn that could have accentuated the need for affirmative legislative action to moderate the clash between the two." Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 342 (1985).

123. See *Casey*, 505 U.S. at 852; see also *id.* at 895 ("recogniz[ing] that a husband has a 'deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying'") (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976)); EVA R. RUBIN, *THE SUPREME COURT AND THE AMERICAN FAMILY: IDEOLOGY AND ISSUES* 57-58 (1986).

124. See *Bellotti v. Baird*, 443 U.S. 622, 644-51 (1979) (upholding constitutional right of competent minor to elect abortion without parental guidance).

basis that some have questioned the usefulness of rights-based discourse in family law at all.<sup>125</sup>

Although the Court has come to acknowledge this potential for conflict in emphasizing the constitutional and moral "unique[ness]" of abortion,<sup>126</sup> similar conflicts occur in other family-privacy contexts. The gravity of the personal stakes in the abortion decision may distinguish it somewhat, but the conflict of rights is occasioned not by anything unique to the particulars of abortion, but rather by the fact that a matter of wide significance is being decided within the context of a family. The decision of one adult about whether to bear a child inescapably touches in a profound way the interests of other members of an existing or potential family system. In the same way, decisions about who is to have custody of a child, how a child is to be raised, whether certain persons shall be permitted to marry or divorce, and so on, are likely to present not a narrow struggle between individual and state, but a more complex blend of conflicting or potentially conflicting interests of basic importance.

Thus, for example, when the Court in *Wisconsin v. Yoder*<sup>127</sup> vindicated the fundamental liberty of Amish parents to refuse to send their children to public high school, it was forced to sidestep the contention that it was subordinating the independent "constitutionally protectible interests"<sup>128</sup> of the children themselves. Although the majority opinion largely painted the case as an uncomplicated struggle between the bureaucratic state and nonconforming Amish families,<sup>129</sup> Justice White in concurrence and Justice Douglas in dissent apprehended a more complex picture. For them, the question of the state's regulatory power over education implicated not only the child-rearing and religious liberty of parents, but also the most basic interest of children in ultimately choosing a life outside the confines of their

125. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 121-30 (1991); MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 135 (1993); RUBIN, *supra* note 123, at 6-7, 171-72; Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 *YALE L.J.* 293, 295-96 (1988); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy - Balancing the Individual and Social Interests*, 81 *MICH. L. REV.* 463, 468-71 (1983); Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 *CAL. L. REV.* 151, 157-58, 164-65 (1988) [hereinafter Schneider, *Rights Discourse*]; Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 *MICH. L. REV.* 1803, 1858 (1985) [hereinafter Schneider, *Moral Discourse*]; Schneider, *supra* note 64, at 110-13.

126. *Casey*, 505 U.S. at 852; *cf. id.* at 857 (suggesting that the abortion right recognized in *Roe v. Wade* could be "classif[ied] . . . as *sui generis*").

127. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

128. *Id.* at 243 (Douglas, J., dissenting in part).

129. See *id.* at 241 (Douglas, J., dissenting in part) (noting that "[t]he Court's analysis assumes that the only interests at stake in this case are those of the Amish parents on the one hand, and those of the State on the other").

parents' religion.<sup>130</sup> Resolving one claim necessarily concluded the other.<sup>131</sup>

Likewise, when the Court in *Santosky v. Kramer*<sup>132</sup> vindicated the fundamental liberty interest of parents in "the companionship, care, custody, and management" of their children by demanding the use of the clear-and-convincing evidence standard in proceedings to terminate parental rights,<sup>133</sup> the Court was required to pass judgment on the independent interest of children in avoiding continued exposure to potentially life-threatening abuse. Although the Court minimized the conflict by willfully presuming that "the child and his parents [will] share a vital interest in preventing erroneous termination of their natural relationship,"<sup>134</sup> its decision to constrain the state's ability to move against abusive or neglectful parents necessarily compromised profoundly important interests of children in cases where the evidence of abuse is accurate though not overwhelming.

So, too, vindication of a parent's constitutional claims to child custody or visitation<sup>135</sup> may require some compromise of the constitutional interests of a competing claimant to custody,<sup>136</sup> of a custodial parent in controlling with whom a child will associate,<sup>137</sup> or of the child herself in maintaining a relationship with a different custodian.<sup>138</sup>

130. See *id.* at 240 (White, J., concurring); see also *id.* at 245 (Douglas, J., dissenting in part). In Justice Douglas' view,

[i]f a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.

*Id.*

131. See, e.g., *id.* at 242 (Douglas, J., dissenting in part) ("If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children.").

132. *Santosky v. Kramer*, 455 U.S. 745 (1982).

133. *Id.* at 758-59 (citation omitted).

134. *Id.* at 760; see also RUBIN, *supra* note 123, at 179 (characterizing the Court's "assumption that the parents' and the child's interests are identical" as a "legal fiction"); Meyer, *supra* note 97, at 835-37 (discussing Court's habit of giving short shrift to claims that children's interests conflict with parents' child-rearing rights).

135. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); see also *supra* notes 4-5.

136. See *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 846-47 (1977) (assuming, but not deciding, that foster parents might have a constitutionally protected interest in maintaining a custody of their foster child).

137. Compare, e.g., *In re J.A.*, 962 P.2d 173, 184 (Alaska 1998) (Matthews, C.J., dissenting) (stating that, absent clear and convincing proof of unfitness or misconduct endangering the child, a parent is constitutionally entitled to maintain some contact, even over the objections of the custodial parent), *In re A.C.*, 643 So. 2d 743, 746-47 (La. 1994) (same), and *Mullin v. Phelps*, 647 A.2d 714, 724 (Vt. 1994) (same), with *Hoff v. Berg*, 595 N.W.2d 285, 291-92 (N.D. 1999) (striking down statute permitting grandparents to seek visitation with children on the ground that it violates "parents' fundamental liberty interest in controlling the persons with whom their

In this way, there is an essential similarity between constitutional claims respecting abortion and those relating to other matters of family life. In each case, recognition that the controversy involves a potential clash of different and competing individual interests pushes the Court toward a more flexible standard of constitutional review.<sup>139</sup> Despite this commonality, however, only in the context of abortion (and there only recently) has the Court come close to acknowledging frankly the more limited nature of its review.

## II. FALLACY AND FALLOUT

Given the unusual complexity of many regulatory controversies affecting the family, the Court surely has been right to moderate its constitutional scrutiny when considering claims of family privacy. It has been quite wrong, however, to maintain the illusion, at least outside the context of abortion, that it is adhering to traditional, undifferentiated fundamental-rights analysis. In this section, I contend that the disjunction between what the Court says about family privacy and how the Court actually goes about the task of policing state regulation of family life is seriously troublesome and ultimately corrosive of the very values the doctrine is meant to exalt.

### A. *The Constitution as Arbiter of Intra-Family Disputes*

Strict scrutiny is typically justified in the context of family privacy as the most secure means of cordoning off the "private realm of family life which the state cannot enter."<sup>140</sup> The choice of a standard that severely constrains the intermeddling impulse of state legislators and bureaucrats is said to be necessary to minimize the role of the

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children may associate"), and *In re Custody of Smith*, 969 P.2d 21 (Wash. 1998) (en banc), cert. granted sub nom. *Troxel v. Granville*, 120 S. Ct. 11 (U.S. Sept. 28, 1999) (No. 99-138).

138. See *In re Guardianship of Zachary H.*, 86 Cal. Rptr. 2d 7, 16-17 (Cal. App. 1999) (holding that a child had a fundamental constitutional liberty interest in remaining in the custody of non-parent caregivers and that interest prevailed over a father's constitutional interest in obtaining custody); Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships With Parent-Like Individuals*, 53 MD. L. REV. 358 (1994); Suellen Scarnecchia, *A Child's Right to Protection From Transfer Trauma in a Contested Adoption Case*, 2 DUKE J. GENDER L. & POL'Y 41, 42, 53 (1995).

139. As Dean Sullivan has observed:

The suspension of categorical reasoning [such as that embodied in strict scrutiny] in favor of . . . an [intermediate-scrutiny or balancing] approach typically comes about from a crisis in analogical reasoning. A set of cases comes along that just can't be steered readily onto the strict scrutiny or the rationality track.

Sullivan, *supra* note 112, at 297.

140. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

government in ordering family affairs. In a substantial number of family-privacy disputes, in which all members of a family are unified in their opposition to state intervention, strict scrutiny achieves precisely that goal. The Court's first family-privacy cases, for instance, were of this character. In *Meyer* and *Pierce*, the conflicts appeared to be between unified families, who desired certain forms of education for their children, and the state, which sought to deny the children that education for its own purposes. Strict scrutiny in such a case does seem calculated to keep government "out" of the family, maximizing the liberty of each family member to decide collectively what sort of education to pursue.

There are many other cases, however, in which the interests of individual family members may be splintered, and in these cases it is an illusion to say that the courts' aggressive protection of "family privacy" keeps government out of the family. Where a family is fractured by internal conflict and one member turns to the government to resolve a dispute—as when a non-custodial parent seeks a court order for visitation—the fact is that the question of constitutional interpretation is often one of deciding which governmental actor will weigh in, the legislatures or agencies through a statutory or administrative solution or the courts through the Constitution. If a court recognizes a constitutional entitlement to contact, for example, and therefore compels the custodial parent to comply with a court-ordered visitation schedule (and perhaps even to say some encouraging things about the visiting parent<sup>141</sup>), the state plainly has interjected itself in a most forceful way into the family. Likewise, when a court, on constitutional grounds, orders that a child be separated from the family who has reared her and placed in the custody of a biological parent whom the child regards as a stranger, it is wholly implausible to say that the Constitution has vindicated the "privacy" or "autonomy" of the family by excluding governmental intermeddling. The reality in these cases is that a substantive rule for resolving a family's internal conflict has been located in the Constitution.

In important ways, the point here is parallel to Professor Cass Sunstein's insight about *Lochner v. New York*,<sup>142</sup> upon which the early

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141. See *Schutz v. Schutz*, 581 So. 2d 1290, 1292-93 (Fla. 1991) (upholding a trial court order compelling the custodial parent "to do everything in her power to create in the minds of [the children] a loving, caring feeling toward [their father] . . . [and] to convince the children that it [was] the mother's desire that they see their father and love their father").

142. *Lochner v. New York*, 198 U.S. 45 (1905).



family-privacy cases were partly founded.<sup>143</sup> *Lochner's* imposition of aggressive limitations on state economic legislation was originally justified as necessary to keep the government out of the marketplace, carving out (to borrow a phrase) a "private realm" of free exchange "which the state cannot enter."<sup>144</sup> Yet, as Professor Sunstein demonstrated, the presupposition that the striking down of wage-and-hours legislation would leave the bargaining between employer and employee untouched by state intermeddling was false. This bargaining remained channeled by an intricate web of common-law rules and by a disparity of economic power that was itself partly a product of the state's regulatory regime.<sup>145</sup> Thus, the *Lochner* Court could assert that its review negated state interference in the parties' exchange only by disregarding as part of the baseline or "natural" state of affairs a large body of powerful and coercive state influences.<sup>146</sup>

Aggressive constitutional review of legislative or administrative action affecting the family sometimes proceeds on a similar set of assumptions. Although the fundamental right of family privacy is premised upon the existence of a "private realm of family life which the state cannot enter," state regulation in fact infuses and undergirds most of our baseline assumptions about what that family life entails. The state holds a monopoly over the formation and dissolution of marriages, defining who may enter into what most still regard as "the most important relation in life"<sup>147</sup> and the terms upon which that relation will cease.<sup>148</sup> Common-law and statutory rules for centuries have helped to reinforce and entrench certain assumptions about the "natural" allocation of authority within the family among parents and

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143. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); see also *supra* notes 33-36 and accompanying text (discussing the interrelationship between *Lochner* and the Court's early family-privacy cases).

144. *Prince*, 321 U.S. at 166.

145. See Sunstein, *supra* note 143, at 874-76.

146. See *id.* at 882 ("We may thus understand *Lochner* as a case that failed because it selected, as the baseline for constitutional analysis, a system that was state-created, hardly neutral, and without prepolitical status").

147. *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring in judgment) (quoting *Maynard v. Hill*, 125 U.S. 190, 205 (1888)). That marriage retains this primacy in the minds of most Americans is borne out by recent polling data. See Norval D. Glenn, *Values, Attitudes, and the State of American Marriage*, in PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA (David Popenoe et al. eds., 1996) ("marriage remains very important to adult Americans—probably as important as it has ever been"); *Institution of Marriage Is Weakening, Study Says*, N.Y. TIMES, July 4, 1999, at 12 (concluding that most young people, though marrying later, continue to regard marriage as ultimately important to happiness).

148. See *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (noting state's "monopolization" over means of divorce).

children and men and women.<sup>149</sup> The law sets out, sometimes in elaborate detail, the respective obligations and entitlements of spouses, parents and children. By zealously embracing gender-based definitions of the appropriate family roles of men and women,<sup>150</sup> as well as ancient notions of parental dominion over children,<sup>151</sup> the law has helped in a crucial way to embed these assumptions deeply, perhaps indelibly, in the fabric of family life.<sup>152</sup> Having thus helped to construct and order the manner in which family members regard and relate to one another, the law cannot then stand back and plausibly claim that it has no hand in how family members resolve their internal disputes.

In this light, when a court affirms the constitutional right of a parent to bar all contact between a child and her grandparents,<sup>153</sup> for example, the court is in no real sense preserving some pre-political autonomy of the family, but is instead enforcing a substantive policy preference (in that case, for parental discretion over grandparent visitation) attributed to the Constitution.<sup>154</sup> The Constitution then becomes not so much a shield against majoritarian state intervention,

149. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 269-70 (1990); Teitelbaum, *supra* note 90, at 1139-44.

150. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (legislative limitations on employment of women justified by "[her] maternal functions"); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) (exclusion of women from legal profession justified because "[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother"). These cases, of course, are hardly ancient artifacts. It was, after all, only about two decades ago that a number of states had statutes on their books assigning unilateral decisionmaking power over family matters to husbands. A North Dakota statute, for example—repealed only in 1979—provided that: "The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto." N.D. CENT. CODE § 14-07-02 (West 1978), *repealed*, 1979 N.D. Sess. Laws, ch. 195, § 1, p. 426.

151. See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1810-11 (1993); Woodhouse, *supra* note 35, at 1041-50.

152. As Professor Marsha Garrison has written, "[f]amily governance . . . represents a perhaps unique blend of tradition-based and state-defined prerogatives. Although the family may well be the most intimate and private of associations, the terms of its governance rest to a substantial extent on public prescription." Marsha Garrison, *Toward a Contractarian Account of Family Governance*, 1998 UTAH L. REV. 241, 242; see also Ann Laquer Estin, *Family Governance in the Age of Divorce*, 1998 UTAH L. REV. 211, 211, 215. Professor Katherine Franke, for example, has argued that the extension of the right of legal marriage, with all of its regulatory incidents, to emancipated slaves ultimately transformed many norms and expectations concerning the construction of intimate relationships among African-Americans. See generally Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999).

153. See, e.g., *In re Custody of Smith*, 969 P.2d 21 (Wash. 1998), *cert. granted sub nom. Troxel v. Granville*, 120 S. Ct. 11 (1999) (No. 99-138).

154. See Teitelbaum, *supra* note 90, at 1178-79 (noting that "talk of family autonomy ignores the influence of the law itself in creating the imbalances of power within the family").

as a rule of decision for anti-majoritarian state resolution of family conflicts.

Judicial use of strict scrutiny, often thought justified in the cause of family autonomy, can then end up making the state's intrusion into the family clumsier and more heavy-handed. Whereas state legislatures might be capable of concocting a compromise solution that would be sensitive to the complex of competing individual family interests at stake, constitutional rules of decision tend to take more absolute and rigid forms.<sup>155</sup> Whereas the degree of intrusion might be relatively modest under the legislature's compromise approach—say, a requirement that parents tolerate occasional visits between child and grandparents, assuming some substantial benefit to the child—it is likely to be starker under a constitutional rule—say, the complete severance of contact between child and grandparents.<sup>156</sup> Thus, by its exaggerated rhetoric about the Constitution's service of "family autonomy" and its insistent adherence to the illusion of traditional fundamental-rights strict scrutiny, the Court ultimately encourages a particular, and often particularly blunt, form of state intervention into the family.

### *B. The Constitution as Stalwart of Family Conformity*

The Court's refusal to embrace overtly a more flexible standard of constitutional review poses still a second paradox for the ideal of family privacy. The awkward rigidity of the strict scrutiny formula sometimes encourages the Court to preserve a field for reasonable government regulation by narrowly construing the scope of family-privacy rights at the threshold. The result is that not only are considerable expanses of family life left without any meaningful constitutional protection, but also that the Court's narrow construction expresses state preferences that themselves serve to regulate family life still further.

#### 1. The Narrow Depth of Fundamental Rights

If a court means to apply strict scrutiny faithfully, there are, of course, only two ways to sustain government regulation affecting the family: either the court must find that the challenged action clears the

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155. See *Schneider*, *supra* note 64, at 110-18; *Tribe*, *supra* note 122, at 342.

156. For example, the Washington Supreme Court suggested that the Constitution would permit a court to overcome a parent's objections to visitation only where a child would suffer "severe psychological harm" from a loss of contact. See *In re Custody of Smith*, 969 P.2d at 30.

extraordinary hurdle of being narrowly tailored to a compelling state interest or it must find that the government action implicates no fundamental privacy right in the first instance. The Court remains deeply reluctant to follow the first of these paths. A quarter-century after Professor Gunther's famous characterization of strict scrutiny as "'strict' in theory and fatal in fact,"<sup>157</sup> the Court's cases continue to reflect the assumption that an initial determination that the challenged action burdens a fundamental right spells its doom.<sup>158</sup> As a result, the real battle in most family-privacy cases occurs at what is nominally the threshold of the constitutional analysis: litigants and judges alike understand that if the government is to win its case, the court must conclude at the outset that the government's actions do not burden any constitutionally privileged aspect of family life.<sup>159</sup>

This understanding undoubtedly has pushed the Court in a number of cases to slice family-privacy rights rather thin. In the context of marriage, for example, the Court has explained broadly that the freedom of the individual to choose a marriage partner is given privileged constitutional protection because it is "essential to the orderly pursuit of happiness."<sup>160</sup> And yet, in almost the next breath, members of the Court have balked at the implications of that holding. It would be intolerable, Justices Powell and Stewart insisted in *Zablocki v. Redhail*, to subject all regulations restricting entry into marriage to strict scrutiny because that would almost certainly condemn a broad swath of traditional restrictions—such as state bans on incestuous, bigamous, or same-sex marriages—that the Justices regarded as eminently reasonable.<sup>161</sup> The solution, then, in order to leave adequate leeway for government regulation, was to define the fundamental right to marry in narrower terms—to recognize, say, a

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157. Gunther, *supra* note 120, at 8.

158. See Schneider, *supra* note 64, at 81; Sullivan, *supra* note 112, at 296 ("The key move in litigation under a two-tier system is steering the case onto the preferred track. The genius of this tracking device is that outcomes can be determined at the threshold without the need for messy balancing.").

159. Thus, in the Supreme Court's most recent family-privacy case, *Troxel v. Granville*, No. 99-138, the petitioners centered their defense of the Washington statute authorizing court-ordered visitation over the objections of a child's parents on the argument that heightened scrutiny was not required. See Petitioner's Brief at 22, *Troxel v. Granville* (No. 99-138) available in, 1999 WL 1079965. Although, acknowledging that some visitation orders might be so intrusive as to burden a parent's fundamental interest in child-rearing, the petitioners contended that most such orders imposed so minimal an interference with the parent-child relationship that no exceptional justification was required of the government. See *id.* at 32-34.

160. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); cf. *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring in judgment) (describing marriage as "'creating the most important relation in life'" (quoting *Maynard v. Hill*, 125 U.S. 190, 205 (1888))).

161. See *Zablocki*, 434 U.S. at 399 (Powell, J., concurring in judgment); *id.* at 392 (Stewart, J., concurring in judgment).

fundamental right to marry someone of a different race but not a fundamental right to marry someone of the same sex.<sup>162</sup>

The Court has taken a similar course in other areas of family privacy. When, two years after *Roe*,<sup>163</sup> the Court wished to uphold the authority of states to ban abortions by non-physicians, it did not do so on the plausible ground that the states' compelling interest in maternal health justified such a limitation of the woman's right to choose.<sup>164</sup> Rather, it held that *Roe* had recognized only "a woman's right to a clinical abortion by medically competent personnel,"<sup>165</sup> and thus "prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution."<sup>166</sup>

Similarly, in reviewing zoning regulations restricting household membership to preferred family forms, the Court has discerned a fundamental right of members of an extended biological family to "live together as a family,"<sup>167</sup> but no such right for persons who do not share a relationship of "blood, adoption, or marriage."<sup>168</sup> Moreover, although the fundamental right of kinship is violated by an ordinance that would force a biologically related family to move to a neighboring suburb in order to remain together,<sup>169</sup> the same right is not implicated

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162. See *id.* at 398-99 (Powell, J., concurring); cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 984 (1992) (Scalia, J., dissenting). This is precisely the conclusion reached by the Hawaii Supreme Court in *Baehr v. Lewin*, 852 P.2d 44, 55-57 (Haw. 1993). But see *Brause v. Bureau of Vital Stats.*, 24 Fam. L. Rep. (BNA) 2015, 2017 (Alaska Super. Ct. Feb. 27, 1998) (concluding that ban on same-sex marriage infringed fundamental constitutional right of privacy).

163. *Roe v. Wade*, 410 U.S. 113 (1973).

164. See *Connecticut v. Menillo*, 423 U.S. 9, 10-11 (1975) (per curiam).

165. *Id.* at 10.

166. *Id.* at 11.

167. *Moore v. City of East Cleveland*, 431 U.S. 494, 500 (1977); see also *Fiallo v. Bell*, 430 U.S. 787, 810 (1977) (Marshall, J., dissenting). More recently, in *Reno v. Flores*, 507 U.S. 292 (1993), the Court applied minimal rationality review to federal Immigration and Naturalization Service rules that permitted illegal alien children to be released to the custody of parents, guardians, or certain other "close relatives," but not to more distant relatives or unrelated caregivers. See *id.* at 322 n.3 (Stevens, J., dissenting) (noting that INS rules would not permit release of a child to the custody of a cousin). The Court found no fundamental right implicated, see *id.* at 302-03, and thus required no special justification by the government for its preference to relegate the children to "government-operated or government-selected child-care institution[s]" rather than unite them with family caregivers who failed to meet the government's test for "close relatives." *Id.* at 302.

168. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 3 (1974). In *Belle Terre*, the Court applied the rational-basis test to uphold a zoning ordinance that banned residential households consisting of persons who were unrelated by "blood, adoption, or marriage." *Id.* at 3, 8-9. The rational-basis test was appropriate, the Court later explained, because such unrelated households do not qualify as families entitled to special constitutional protection. See *id.* at 8-9; see also *Moore*, 431 U.S. at 498-99; see also *supra* Part I.B.3; cf. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732-35 (1995) (considering similar ordinance's compatibility with federal Fair Housing Act).

169. See *Moore*, 431 U.S. at 505-06.

by federal immigration laws that would force the same family to move abroad.<sup>170</sup>

The Court's definition of the fundamental right of parents to make basic decisions about child rearing has been just as erratic. The constitutional right, the Court has held, encompasses a parent's decision to send her child to a private school that teaches foreign languages or the tenets of a religious faith,<sup>171</sup> but not to one that practices racial segregation.<sup>172</sup> Nor apparently does the right include, at least in the view of some Justices, the freedom of parents to exempt their children from corporal punishment doled out in public schools<sup>173</sup> or, conversely, to impose unduly harsh physical punishments themselves.<sup>174</sup> As one lower court explained it, the Court's cases ultimately teach not that the Constitution gives parents a fundamental right to make their own child-rearing decisions, but rather only that it accords a fundamental right to make "*venerab[le]*" child-rearing decisions.<sup>175</sup>

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170. In *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court applied minimal scrutiny to federal immigration laws that denied preferred family status to unwed fathers and their illegitimate children. The Court rejected the contention that the laws, which effectively prevented children living in the United States from being reunited with their only surviving parent, a Jamaican national, *see id.* at 790 n.3, should be subject to heightened scrutiny as an infringement of the fundamental right of families to live together, *see id.* at 794-95; *id.* at 810 (Marshall, J., dissenting).

171. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923);

172. *See Runyon v. McCrary*, 427 U.S. 160, 176-79 (1976).

173. *See Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd mem.*, 423 U.S. 907 (1975).

174. Justice White expressed this view in *Thornburgh v. American College of Obstetricians*: The Court's decisions in *Moore v. East Cleveland*, *Pierce v. Society of Sisters*, and *Meyer v. Nebraska* can be read for the proposition that parents have a fundamental liberty to make decisions with respect to the upbringing of their children. But no one would suggest that this fundamental liberty extends to assaults committed upon children by their parents. It is not the case that parents have a fundamental liberty to engage in such activities and that the State may intrude to prevent them only because it has a compelling interest in the well-being of children; rather, such activities, by their very nature, should be viewed as outside the scope of the fundamental liberty interest. *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 793 n.2 (1986) (White, J., dissenting). But *see* Richard Garner, *Fundamentally Speaking: Application of Ohio's Domestic Violence Laws in Parental Discipline Cases—A Parental Perspective*, 30 U. TOL. L. REV. 1, 16 (1998) (concluding that all "[s]tate laws purporting to regulate parental discipline, directly or by implication," impinge upon parents' fundamental child-rearing rights and must be subjected to strict scrutiny).

175. *See Baker*, 395 F. Supp. at 300 (emphasis added); *see also* Burt, *supra* note 102, at 339-40 ("This is the thread that can be traced into a coherent pattern among the votes of the conservative bloc Justices . . . that a specific, authoritarian style of parenting rather than the status of parent itself warrants constitutional deference.").

The D.C. Circuit recently tried to slice parents' child-rearing rights from another direction. The court held that a juvenile curfew law that kept children home without regard to whether their parents authorized late-night activities implicated no fundamental right of the parents.

We glean from [the Court's parental-rights] cases . . . that insofar as a parent can be thought to have a fundamental right, as against the state, in the upbringing of his or her children, that right is focused on the parents' control of the home and the parents'

By parsing the fundamental rights of family privacy in this way, the Court is able to maintain the veneer of aggressively protecting incursions on fundamental rights while still leaving plenty of room for reasonable state regulation of family activities and decisions. Regulations the Court thinks reasonable and wishes to sustain can be safely steered toward rationality review, away from the shoals of strict scrutiny, by adjusting the scope of the privacy right. The byproduct of the Court's handiwork, however, is a fundamental right whose boundaries are surely as tortuous and bizarre as those of the North Carolina congressional districts the Court so ridiculed in *Shaw v. Reno*.<sup>176</sup>

Admittedly, the Court typically justifies its parsing by reference to history and tradition, rather than to its own assessment of the reasonableness or desirability of the particular state action.<sup>177</sup> Thus, for example, we are sometimes told that the reason why there is a fundamental right for two persons of the opposite sex to marry, but not for three or four persons to do so, is that society deeply venerates the first choice but not the latter.<sup>178</sup> But the Court has been far from consistent about defining the scope of fundamental rights in this way. It is impossible, for instance, to square the Court's discernment of fundamental rights in *Griswold v. Connecticut*,<sup>179</sup> *Eisenstadt v. Baird*,<sup>180</sup> or *Loving v. Virginia*,<sup>181</sup> to name just a few illustrations,<sup>182</sup>

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interest in controlling . . . the formal education of children. It does not extend to a parent's right to unilaterally determine when and if children will be on the streets—certainly at night. That is not among the "intimate family decisions" encompassed by such a right.

Hutchins v. District of Columbia, 188 F.3d 531, 540-41 (D.C. Cir. 1999) (en banc) (citations omitted).

The court's attempt to cabin the constitutional right to decisions affecting specific subject matters—activities inside the home and "formal education"—drew a sharp rebuke from Chief Judge Edwards. See *id.* at 549 (Edwards, C.J., concurring in part) ("[A] parent's stake in the rearing of his or her child surely extends beyond the front door of the family residence and even beyond the school classroom.").

176. See *Shaw v. Reno*, 509 U.S. 630, 634-36 (1993) (describing North Carolina's District 1 as looking like "a 'bug splattered on a windshield,'" and District 12 as "even more unusually shaped") (citation omitted).

177. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 727 & n.19 (1997). See generally Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173 (tracing the historical roots of this approach).

178. See *Planned Parenthood v. Casey*, 505 U.S. 833, 984 (1992) (Scalia, J., dissenting); *Zablocki v. Redhail*, 434 U.S. 374, 398-99 (1978) (Powell, J., concurring in judgment).

179. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding a fundamental right of married couples to use contraceptives).

180. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (finding a fundamental right of unmarried couples to use contraceptives).

181. *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (finding a fundamental right of interracial couples to marry).

with the narrow tradition-bound approach suggested in some of the Court's more recent cases.<sup>183</sup> Although the Court consistently regards traditional societal consensus as relevant to the discernment of fundamental rights, the Court has yet to develop any stable consensus about the level of generality or specificity with which the historical inquiry should be framed<sup>184</sup> or about the extent to which other considerations besides tradition are also relevant.<sup>185</sup> As a result, the Court retains considerable room to maneuver in defining the scope of fundamental rights. And it is not unduly cynical to conclude that the Court has sometimes emphasized the narrower, tradition-based methodology in cases where it was inclined to sustain the particular government regulation, lapsing into more generous formulations in cases where it is more dubious about the government's methods or motives.<sup>186</sup>

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182. See also, e.g., *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (finding a fundamental right of prisoners to marry while incarcerated); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (finding a fundamental right to possess obscene material within the home).

183. See *Casey*, 505 U.S. at 847-48; *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (O'Connor, J., concurring in part) (acknowledging that the narrow "mode of historical analysis [advocated by Justice Scalia's plurality opinion] . . . may be somewhat inconsistent with our past decisions in this area") (citations omitted); *id.* at 137-40 (Brennan, J., dissenting).

184. For instance, in deciding whether the Constitution gives heightened protection to an individual's choice of a polygamous marriage, it is presently unclear whether the Court should define the relevant right as the right to marry or, more specifically, as the right to plural marriage. *Loving's* conclusion that a fundamental right was burdened by Virginia's anti-miscegenation law, see *Loving*, 388 U.S. at 12, at a time when sixteen states still had such prohibitions on their books, see *id.* at 6 n.5, suggests the former approach, see *Casey*, 505 U.S. at 847-48, though recent cases have taken a narrower view, see, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 722-23 (1997) (relevant question is not whether tradition supports an individual's right to control the manner of his death, but whether tradition venerates "a right to commit suicide which itself includes a right to assistance in doing so"); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (relevant question is not whether tradition supports a right of sexual intimacy, but whether it honors a "right [of] homosexuals to engage in sodomy"). The choice obviously will determine whether the Court will find a deeply rooted, traditional consensus supporting the right. See generally LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 73-80 (1991).

185. Thus, although tradition and history are the exclusive determinants for Justice Scalia, and were denominated "crucial 'guideposts'" for the Court in *Glucksberg*, 521 U.S. at 721, they have figured less prominently in other recent cases. In *Casey*, for example, the Court admonished that the "boundaries [of the Court's substantive due process jurisprudence] are not susceptible of expression as a simple rule," *Casey*, 505 U.S. at 849, and ultimately justified recognition of the right to abortion not in traditional consensus but in the profoundly "intimate and personal" nature of the abortion decision, see *id.* at 851. More recently still, in *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999), a plurality insisted that the long historical pedigree of anti-loitering laws did not preclude recognition of a "fundamental right to loiter." See *id.* at 1857 n.20 (Stevens, J., plurality opinion); cf. *id.* at 1881-82 (Thomas, J., dissenting) (complaining that the plurality's analysis was "[i]n derogation of the framework we articulated only two Terms ago in *Glucksberg*").

186. See *Schneider*, *supra* note 64, at 88 n.52 (citing *Maher v. Roe*, 432 U.S. 464 (1977), and *Bowers v. Hardwick*, 478 U.S. 186 (1986), as examples of cases in which the Court narrowly



A large measure of what is driving the Court's occasional manipulation of the boundaries of family privacy is the common supposition that the rigidity of the two-tier analysis traditionally used in fundamental-rights makes the threshold definition outcome-determinative: because it is extremely difficult, if not impossible, to credit state interests in regulation under strict scrutiny, reasonable government regulation can be sustained only by narrowing the scope of what constitutes protectible family privacy.<sup>187</sup> In this way, the adherence to an analytical framework that appears to be more protective of family privacy by demanding the most exceptional justification for government regulation ultimately may be corrosive of family privacy by leading the Court to construe the underlying rights more narrowly. For family relationships and activities excluded by the Court's parsing approach—such as the developed father-daughter relationship in the *Michael H.* case—the results can be disastrous.<sup>188</sup> The costs, moreover, are likely to be felt more widely still in the future as more families take new and non-traditional forms<sup>189</sup> and as the Court's methodology leaves yet more swaths of family life to the minimal protection of

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construed the scope of underlying privacy rights in order to uphold the challenged state action); cf. *Hutchins v. District of Columbia*, 188 F.3d 531, 554-57 (D.C. Cir. 1999) (en banc) (Rogers, J., concurring in part & dissenting in part) (suggesting that the D.C. Circuit has engaged in similar manipulation of the "family privacy" right).

187. Professor Anthony Amsterdam once made a similar observation about the Fourth Amendment:

The fourth amendment . . . is ordinarily treated as a monolith: wherever it restricts police activities at all, it subjects them to the same extensive restrictions that it imposes upon physical entries into dwellings. To label any police activity a "search" or "seizure" within the ambit of the amendment is to impose those restrictions upon it. On the other hand, if it is not labeled a "search" or "seizure," it is subject to no significant restrictions of any kind. . . .

Obviously, this kind of all-or-nothing approach to the amendment puts extraordinary strains upon the process of drawing its outer boundary lines.

Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388 (1974) (footnotes omitted).

188. In *Michael H.*, the Court upheld a California law that prevented a biological father from seeking court-ordered visitation with a daughter conceived during an extramarital affair. *Michael H.*, 491 U.S. at 131. As a result, the father was likely to lose all future contact with the girl, despite the fact that he had once lived with the child and helped to raise her. *See id.* at 143-44, 148 (Brennan, J., dissenting).

189. *See, e.g.*, ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 1-3, 19, 117-18 (Mary Ann Mason et al. eds., 1998) (identifying changing trends in family composition and identification); THE CHANGING FAMILY: FAMILY FORMS AND FAMILY LAW (John Eekelaar et al. eds. 1998); FRANCES K. GOLDSCHIEDER & LINDA J. WAITE, NEW FAMILIES, NO FAMILIES? THE TRANSFORMATION OF THE AMERICAN HOME 16-19, 67-72 (1991); Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417, 418 (1999) (concluding, based on demographic data, that "colabitation has emerged as an important new family form in the United States"); Barbara Bennett Woodhouse, *"It All Depends on What You Mean By Home": Toward a Communitarian Theory of the 'Nontraditional' Family*, 1996 UTAH L. REV. 569.

rationality review. Openly embracing a more flexible standard of review, therefore, could be expected to result in judicial recognition of a broader range of family relationships and decisions entitled to heightened constitutional protection.<sup>190</sup> The historical pedigree of the regulated family activity or entity would remain relevant to determining the extent of constitutional protection,<sup>191</sup> but the Court would be less likely to feel impelled to cut the analysis short at the outset through a miserly definition of the fundamental right.

## 2. The Regulatory Rhetoric of Constitutional Denial

The Court's current approach to protecting family privacy has a Trojan-Horse quality in another way as well. Not only does the Court's nominal allegiance to the strict scrutiny framework lead to a narrowing of what qualifies as family privacy, the Court's differentiation among families in doling out constitutional privilege itself serves as an independent means of regulation.

When the Court rules against a constitutional claimant by finding that the regulated relationship or activity falls outside the protected scope of family privacy, it often buttresses that conclusion with evidence of society's traditional indifference or contempt. In *Michael H.*, for example, Justice Scalia's plurality opinion explained that the claimant had no fundamental right to preserve his relationship with a daughter conceived in an extramarital affair because society did not "respect" their relationship.<sup>192</sup> The suggestion that the child might have her own constitutional interest in maintaining a filial relationship with both her biological father and her mother's husband, each of whom alternately had lived with and helped to rear her, was derisively rejected on the same ground.<sup>193</sup> This was not the sort of "family" worthy of "traditional respect in our society" and thus it lacked "any constitutional significance."<sup>194</sup> Likewise, in *Moore v. City of East Cleveland*, the reason why an extended biological family had a fundamental right to live together, while persons unrelated by "blood, adoption, or marriage" did not, was that society has demonstrated its "respect" for the former family arrangement but not for the latter.<sup>195</sup>

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190. Professor Amsterdam made a similar claim with regard to the Fourth Amendment, though he ultimately rejected an interest-balancing model as too indeterminate. See Amsterdam, *supra* note 187, at 393. For a discussion of the problem of indeterminacy, see *infra* Part III.B.2.

191. See *infra* Part III.B.2.c.

192. See *Michael H.*, 491 U.S. at 122-23 & n.3.

193. See *id.* at 130-31.

194. *Id.* at 123 n.3.

195. *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) (Powell, J., plurality opinion).

When the boundaries of the fundamental right are marked by the limits of society's veneration and respect, exclusion from protection necessarily carries with it the sting of societal condemnation or indifference.

The Court's active winnowing of family groups and decisions according to the criteria of respect and desert is itself a potent form of state regulation of family life. By conferring "constitutional significance"<sup>196</sup> on favored family groups and decisions while denying it to others, the Court powerfully expresses state preferences concerning the construction and conduct of family life. For every paean to the ancient wisdom of the extended family<sup>197</sup> or the simple goodness of the Amish way of life,<sup>198</sup> there is a flipside: the mocking derision of a daughter's relationship with her adulterous father<sup>199</sup> or declaration of the essential artificiality of the bond between a child and her foster parents.<sup>200</sup> There should be no doubting that the expression of these preferences can exercise a real influence on family life.<sup>201</sup> Indeed, the Court itself has acknowledged the particular potency of the "constitutionalization" of social norms.<sup>202</sup> And while it is not surprising

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196. *Michael H.*, 491 U.S. at 123 n.3.

197. *See Moore*, 431 U.S. at 504-05.

198. *See Wisconsin v. Yoder*, 406 U.S. 205, 210-11 (1972).

199. *See Michael H.*, 491 U.S. at 123 n.3, 130-31 (Scalia, J., plurality opinion).

200. *See Smith v. Organization of Foster Families*, 431 U.S. 816, 857, 861-63 (1977) (Stewart, J., concurring in judgment).

201. *See MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 311-12 (1989) (describing how laws "influence the way people think and feel about personal commitments," often unintentionally); REGAN, *supra* note 125, at 86-88; Bartlett, *supra* note 125, at 293-95; Gary B. Melton, *The Significance of Law in the Everyday Lives of Children and Families*, 22 GA. L. REV. 851, 867-77 (1988). Professor Elizabeth Bartholet, for example, has demonstrated how laws relating to adoption sometimes reinforce stigmatizing stereotypes and shape the identities of adoptive families. *See ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 48-50, 164-86 (1993). In an earlier article, I have traced the way in which laws expressing a preference for parents in child custody disputes and subordinating the status of non-parent caregivers affect the development of child-caregiver bonds. *See Meyer, supra* note 97, at 803-12. For other, more general discussions of the expressive significance of law, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996), and Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

202. In *Reitman v. Mulkey*, 387 U.S. 369 (1967), the Court struck down on equal-protection grounds a provision in California's state constitution that guaranteed the right of private property owners not to sell or lease their property as they saw fit. *See id.* at 375-76. Though the provision merely embodied a long-standing rule of the common law, the Court held that the "constitutionalization" of the principle provided crucial (and therefore impermissible) "encourage[ment]" to private discrimination. *See id.* at 376. The "embodi[ment]" of the freedom to discriminate "in the State's basic charter" made a vital difference, both for the influence of private behavior and for the Court. *Id.* at 377.

that the state should have preferences concerning conduct within the family,<sup>203</sup> it is odd that the state should go about imposing these preferences in the course of defining a constitutional guarantee meant to condemn majoritarian "standardiz[ation]" of family life.<sup>204</sup>

The Court's expressive regulation of family seems particularly perverse when it is unintended or comes in cases that nominally vindicate a constitutional claim. Thus, for example, Justice Powell's tribute to the extended biological family in *Moore v. City of East Cleveland* distinguished it from cohabitants who were "unrelated . . . by 'blood, adoption, or marriage'" and who thus would not qualify as families in the sense valued by the Constitution.<sup>205</sup> In doing so, however, the Court provided fodder for later doubting whether a child and her foster parents could be regarded as "family" for constitutional purposes. Although the Court in *Smith v. Organization of Foster Families for Equality and Reform* concluded that it could not "dismiss the foster family as a mere collection of unrelated individuals,"<sup>206</sup> the absence of the biological ties and historical veneration the Court had emphasized in *Moore* provided the crucial ground for subordinating foster families to biological ones in a constitutional hierarchy. Children and their foster parents, the Court concluded, were properly considered a "family-like association[]"<sup>207</sup> and any constitutional privacy interests that "association" might enjoy were "substantially attenuated" when ranked against those of a "natural family."<sup>208</sup>

203. See *supra* text accompanying notes 116-20. Professor Schneider, for example, contends that society, through what he calls the "channelling function in family law," quite properly encourages its members to make certain choices concerning the construction of their family life. See generally Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

204. See *Michael H.*, 491 U.S. at 145 (Brennan, J., dissenting) ("[M]any cases [have] prevent[ed] the States from denying important interests or statuses to those whose situations do not fit the government's narrow view of the family . . . . [W]e have declined to respect a State's notion, as manifested in its allocation of privileges and burdens, of what the family should be.") (citations omitted); *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) ("[T]he Constitution prevents [the state] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (noting that the Constitution "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only"); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 783-84 (1989) (arguing that the right of privacy guards against "a society standardized and normalized, in which lives are too substantially or too rigidly directed").

205. *Moore*, 431 U.S. at 498 (distinguishing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)).

206. *Smith v. Organization of Foster Families*, 431 U.S. 816, 844-45 (1977).

207. *Id.* at 846.

208. *Id.* at 846-47. The Court ultimately insisted that it was unnecessary to decide whether foster families have constitutional rights of family privacy because it concluded that the state had, in any event, provided whatever process was due when it removed foster children from their

This constitutional sorting of true "families" from mere "quasi-famil[ies]"<sup>209</sup> and "family-like association[s]," echoed enthusiastically in the statutory and common-law opinions of lower courts,<sup>210</sup> expresses a public devaluation of non-preferred families.<sup>211</sup> The expression of this hierarchy, which may seem so utterly "natural" to those it favors,<sup>212</sup> may inflict a very substantial injury on those it denigrates.<sup>213</sup> Indeed, to the extent that disfavored families internalize society's valuation, it may distort dynamics within the family, resulting in a diminished quality of bonding or the deterrence of potential caregivers from assuming the responsibilities of "quasi"-parenthood in the first place.<sup>214</sup> Either outcome frustrates rational public policies toward children and is particularly maddening because the expressive harm to these families seems a completely gratuitous byproduct of the Court's constitutional protection of "family privacy."

The regulatory effect of the Court's constitutional adjudication is arguably less troublesome in cases where the Court intends to punish or deter particular family choices. In those instances, such as the

foster parents. *See id.* at 847. The Court's conclusion on the latter point, however, rested on a clear hierarchy of family rights: "Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents." *Id.* at 846-47.

209. *Michael H.*, 491 U.S. at 114 (Scalia, J., plurality opinion).

210. *See, e.g.,* *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1205 (Ill. 1979) (describing unmarried couple who had lived together for 15 years and raised three children as having a "family-like relationship") (emphasis added); *Van v. Zahorik*, 597 N.W.2d 15, 19-20 (Mich. 1999) (holding that a man who lived with, supported, and cared for children since their birth in mutually mistaken belief that he was their biological parent is a "third party" without standing to seek visitation or custody); *In re G.C.*, 735 A.2d 1226, 1229-31 (Pa. 1999) (stating law properly reflects "subordination" of foster families to biological or adoptive families).

211. *See* RUBIN, *supra* note 123, at 155-56. Indeed, Professor Rubin finds in the Supreme Court's cases across a broad range of constitutional claims an embedded "ideology" favoring and reinforcing traditional patterns and constructions of family life. *See id.* at 8-9, 11-20, 143-61, 183-99; *see also* Martha A. Fineman, *Intimacy Outside of the Natural Family*, 23 CONN. L. REV. 955, 962-66 (1991).

212. *See* RUBIN, *supra* note 123, at 190 ("The most likely source of the image of family life depicted in the [Supreme Court's constitutional] opinions is the personal family experience of the Justices themselves, the stable, conservative, middle-class family life of the country during the times of their own childhood."); *see also id.* at 20-21.

213. Professor Glendon has observed, for example, that "the desire of many persons involved in nontraditional living arrangements to win approval or at least legitimacy for these arrangements[]" is a powerful force driving many of the recent controversies over family regulation. GLENDON, *supra* note 125, at 125; *see also* Maya Grosz, *To Have and To Hold: Property and State Regulation of Sexuality and Marriage*, 24 N.Y.U. REV. L. & SOC. CHANGE 235, 245 (1998) ("The definition of the family as heterosexual is central to the de-legitimation of gay and lesbian identity."); cases cited *supra* note 119.

214. *See* Meyer, *supra* note 97, at 810-12 (contending that the law's expressive devaluation of non-parent caregivers affects the dynamics of bonding within such families and may deter potential caregivers from becoming guardians).

Court's revilement of homosexual relations in *Bowers* or Justice Scalia's excoriation of adultery in *Michael H.*, the Court's condemnation is likely to be only part of a larger, deliberate regime of regulation to which the state is firmly committed.<sup>215</sup> The Court's piling-on may add relatively little to the overall degree of the state's intrusion.

Even in those cases, however, the Court's interjection in the name of family privacy may entrench more intrusive forms of state regulation. Thirty-five years ago, Professor Alexander Bickel pointed out that the Court's act of upholding the constitutionality of a controversial measure can lend it new legitimacy, altering the political debate over its merits and sustaining it past the time when it would have been discarded had the Court not intervened.<sup>216</sup> My point here is related, but more refined: not only the act of upholding, but also the manner of the Court's upholding, may affect the future course of state regulation. The morality of homosexual relationships, for example, is now the topic of much debate,<sup>217</sup> and traditional consensus over the propriety of state sanctions directed at homosexuals is breaking down.<sup>218</sup> The political process, left to its own devices, seems clearly to be moving in the direction of less intrusive regulation of gay and lesbian couples and the families they head.<sup>219</sup> The Court's current

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215. See Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1583 (1997) (book review).

216. As Professor Bickel observed:

To declare that a statute is not [constitutionally] intolerable because it is not inconsistent with principle amounts to a significant intervention in the political process, different in degree only from a declaration of unconstitutionality. It is no small matter . . . to "legitimate" a legislative measure. The Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures that may have been tentative in conception or that are on the verge of abandonment in the execution. The Court, regardless of what it intends, can generate consent and may impart permanence.

Alexander M. Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 48 (1961).

217. See generally SAME-SEX MARRIAGE: PRO AND CON (Andrew Sullivan ed., 1997) (setting forth various views from different sides of the debate over same-sex marriage); Ball, *supra* note 119.

218. The Court's conclusion in *Romer v. Evans*, 517 U.S. 620 (1996), that it is not a legitimate end of government to exhibit "animosity" toward homosexuals—coming one decade after *Bowers* sustained anti-sodomy laws based on "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable," *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)—reflects just how rapid that breakdown has been, see *Romer*, 517 U.S. at 634-35.

219. The recent removal of traditional barriers against adoption by lesbians and gay men is one illustration of the trend. See Karla J. Starr, Note, *Adoption by Homosexuals: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497, 1508-13 (1998); Lois R. Shea, *Measure Would Lift Restrictions on Adoption*, BOSTON GLOBE, Jan. 10, 1999, at N.H. Weekly 1, available in 1999 WL 6043347. Decisions in many states limiting the use of a parent's sexual orientation as a ground for denying child custody are another. See, e.g., Carlos A. Ball & Janice Farrell Pea,

method of analyzing family-privacy claims, however, risks throwing the weight of the Constitution behind more heavy-handed regulation. For, under the Court's current approach, a victory for the government is very likely to rest not on a declaration that the state, because of legitimate and important interests, is permitted a certain intrusion upon the valued privacy interests of gay and lesbian families, but rather on a declaration that the subjects of the state's regulation have no specially valued "family" interests in the first instance.<sup>220</sup> The Court's preference for deciding family-privacy claims at the threshold definition of the right, rather than in an outright balancing of state and private interests, inevitably leads to the recognition of a more rigid constitutional hierarchy of families and family choices. The Court's pronouncement of such a hierarchy carries a heightened potential for solidifying intrusive regulation by discounting the very "family" status of certain claimants and legitimizing the "us-them" assumptions that underlie many traditional family proscriptions. The Court rightly has been sensitive to the way in which judicial recognition of a fundamental right can cut short productive debate by placing some controversy off-limits to the political process.<sup>221</sup> Yet the Court largely has ignored the ways in which its method of rejecting fundamental-rights claims can interfere in that same debate, in some cases perhaps giving second life to controversial regulations that otherwise would have withered away.

If the Court were openly to embrace an intermediate-scrutiny approach, however, some of the more pernicious fallout of the Court's current approach could be avoided. By making it possible for the Court to sustain government regulation without having to deny at the threshold that the state's action burdens a private interest of special constitutional value, an intermediate-scrutiny approach would remove much of the current pressure on the Court to construe family privacy rights narrowly. The result would be that the Court could recognize a broader array of families and family activities as fundamentally worthy of respect, placing in each case a burden on the government to justify its intrusion on intimate family arrangements and choices. This would not mean, of course, that this larger array would neces-

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*Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253.

220. See *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) (holding that state ban on same-sex marriages implicates no fundamental rights because same-sex couples are simply "incapab[le] of entering into a marriage as that term is defined"); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (same), *appeal dismissed*, 409 U.S. 810 (1972).

221. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

sarily escape government regulation; it would mean only that each regulation would be sustained frankly on its own merits and not on the basis of a judicial determination that the regulated persons did not count as "family" in any sense "deserving of constitutional recognition."<sup>222</sup>

### III. TOWARD A NEW UNDERSTANDING OF THE CONSTITUTION'S PROTECTION OF FAMILY PRIVACY

I have argued that, despite the Court's occasionally grandiose rhetoric about "the sanctity of the family"<sup>223</sup> and an inviolable "private realm of family life,"<sup>224</sup> the Court actually has demonstrated considerable pragmatism in its mediation between state and individual interests with regard to the family.<sup>225</sup> I also have argued that the Court's reluctance to come clean about the more temperate nature of its review has had a paradoxical impact on the family. The Court's nominal retention of the traditional strict-scrutiny framework for protecting fundamental rights has resulted in a narrowing of the sorts of families and family choices specially protected by the Constitution.<sup>226</sup> And the Court's habit of explaining its line-drawing in terms of veneration and desert has expressed a hierarchy that itself has regulatory significance.<sup>227</sup> In this section, I offer an alternative approach, bottomed on the sort of "reasonable" accommodation of privacy interests expressly contemplated by the Fourth Amendment. By evaluating the "reasonableness" of state incursions under a more flexible standard approximating intermediate scrutiny, the Court could afford to recognize a broader range of family-privacy interests while still leaving adequate room for state regulation.

#### A. *The Fourth Amendment as Prologue*

In seeking to define the balance struck by the Constitution between communal and individual interests in the "private realm of family life,"<sup>228</sup> some reference is plainly appropriate to the "zones of

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222. *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977).

223. *Id.* at 503.

224. *Smith v. Organization of Foster Families*, 431 U.S. 816, 842 (1977); *Moore*, 431 U.S. at 499; *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

225. *See supra* Part I.

226. *See supra* Part II.B.1.

227. *See supra* Part II.B.2.

228. *Prince*, 321 U.S. at 166.



privacy"<sup>229</sup> expressly given protection by the Constitution. The right of family privacy itself, after all, was said to have "emanat[ed]" in part from the Constitution's express protection of personal privacy against governmental invasion and search.<sup>230</sup> Yet the most substantial of those textual privacy protections, the Fourth Amendment's restraint on search and seizure,<sup>231</sup> imposes only a requirement of reasonableness upon government intrusions into personal privacy.<sup>232</sup> By prohibiting only "unreasonable" searches and seizures, the text squarely contemplates a balancing of communal interests in law enforcement and security against personal privacy interests. The amendment's accommodationist approach to privacy protection seems somewhat jarring compared to the absolutist privacy rhetoric of substantive due process. Yet the protection of family privacy ultimately would be enhanced, not compromised, by importing the Fourth Amendment's frank acknowledgment that individual privacy rights are necessarily qualified.

It might seem absurd to hold up the Court's Fourth Amendment jurisprudence as a model for other areas of constitutional privacy law. Most think it is the Fourth Amendment case law that could desperately use some modeling.<sup>233</sup> The Court's search-and-seizure

229. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

230. *See id.*

231. The Court in *Griswold* found evidence of the framers' concern for privacy in "[t]he right of association contained in the penumbra of the First Amendment," the Third Amendment's prohibition against the peacetime quartering of soldiers, the Fourth Amendment's protection against search and seizure, and the Fifth Amendment's Self-Incrimination Clause. *Id.* at 484. Of those, the "penumbra[]" associational right of the First Amendment scarcely qualifies as textual, the Third Amendment has only the most limited application, and the Fifth Amendment's guarantee against self-incrimination seems not so much concerned with keeping information private—since it freely permits the compelled disclosure of information through non-expressive means or from sources other than the defendant—as with the particular manner of disclosure. *See* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1108-17 (1986). That leaves the Fourth Amendment as the most substantial textual protection of personal privacy, a point recognized implicitly in Justice Brandeis' famous dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (locating in the Fourth Amendment "the right to be let alone").

232. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

233. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757-58 (1994) (describing the Court's Fourth Amendment jurisprudence as "an embarrassment[,] . . . a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse"); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 21-22 (1988) (characterizing "search and seizure law as a diseased limb on the body of constitutional theory"). These complaints, moreover, are by no means new. *See, e.g.*, Amsterdam, *supra* note 187, at 349 ("For clarity and consistency, the law

cases have been widely pilloried for careening between seemingly guideless balancing and excessive, almost technocratic formalism.<sup>234</sup> And, as with the family-privacy cases, the rigidity of the Court's formalistic approach sometimes has pushed it to manipulate the boundaries of the Fourth Amendment privacy right in order to leave tolerable leeway for law enforcement.<sup>235</sup> The Court's recent hair-splitting over what constitutes a "reasonable expectation of privacy" illustrates the point.<sup>236</sup>

But for all these jurisprudential shortcomings and qualifications, a distinctive principle of the Fourth Amendment is its embodiment of a more outright balancing approach to privacy protection. Although the Court sometimes has obscured this balancing by adopting rules demarcating certain police practices as "per se unreasonable,"<sup>237</sup> "[t]he core of the Fourth Amendment . . . is neither a warrant nor probable cause, but reasonableness."<sup>238</sup> And, for all its unevenness,

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of the fourth amendment is not the Supreme Court's most successful product."); Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 329 (1973) ("The fourth amendment cases are a mess!"); Wayne A. LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth"*, 1966 U. ILL. L. REV. 255.

234. See, e.g., Wasserstrom & Seidman, *supra* note 233, at 12-20; Ronald F. Wright, Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1127 (1984).

235. Professor Yale Kamisar has made a similar point, contending that the perceived rigidity and high cost of the usual Fourth Amendment remedy, the exclusion of evidence, has pushed the Burger and Rehnquist Courts to "shrink" the scope of the Amendment's application. See Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 499 (1999) ("One reason [the Court may not abandon the exclusionary rule altogether] is that a 'shrunk' Fourth Amendment and a narrower exclusionary rule has made the rule a good deal more livable and defensible."); see also Amsterdam, *supra* note 187, at 388-90; Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 495 (1991); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 271 (1984) ("[T]hese formulas are now little more than readily manipulable cant; a 'justifiable,' 'reasonable,' or . . . 'legitimate,' expectation of privacy is simply one which a majority of the Court wants to accord fourth amendment protection").

236. Compare, e.g., *Minnesota v. Olson*, 495 U.S. 91, 99-101 (1990) (overnight guest has a reasonable expectation of privacy in host's home, thus triggering Fourth Amendment protection), with *Minnesota v. Carter*, 525 U.S. 83, 90-91 (1998) (daytime guest visiting home to conduct a commercial transaction lacks a reasonable expectation of privacy in host's home); For a discussion on the implications of *Olsen* and *Carter*, see *Morton v. United States*, 734 A.2d 178, 182 (D.C. 1999) (attempting to "read the 'tea leaves'" after *Olson* and *Carter* and concluding that a daytime social guest with a longtime relationship with the host would have a reasonable expectation of privacy in host's home).

237. E.g., *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) ("Time and again, this Court has observed that searches and seizures 'conducted 'outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.'") (quoting *Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984), in turn quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

238. Amar, *supra* note 233, at 801; accord Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1445 (1987) ("The fourth amendment

it remains true that the Court is much more likely in the Fourth Amendment context to rest its decisions frankly on a case-by-case assessment of the competing personal and public interests.<sup>239</sup> Indeed, the Court seems to be moving ever more clearly in this direction.<sup>240</sup>

Of course, a sort of interest-balancing applies in strict scrutiny, which asks whether the state's fine-tuned pursuit of a compelling interest outweighs the individual's specially valued interest in privacy, freedom from racial prejudice, or the like.<sup>241</sup> But, in contrast to strict scrutiny, which tips the scales heavily in favor of the individual's interests at the outset, Fourth Amendment balancing is considerably more flexible. Instead of presupposing that the personal privacy interest is in all cases fixed at a very high level, so that any state intrusion must be justified by proof of the most extraordinary public interest, Fourth Amendment balancing permits courts to recognize a less-powerful public interest as sufficient where the particular personal privacy interest is less profound.<sup>242</sup> This approach likewise rejects any

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forbids only unreasonable searches, and 'objective reasonableness' has been the touchstone of fourth amendment jurisprudence from the beginning.").

239. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *Winston v. Lee*, 470 U.S. 753, 764-66 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985); *Michigan v. Long*, 463 U.S. 1032, 1045-52 (1983); *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968); *Wasserstrom & Seidman*, *supra* note 233, at 44-50; *Wright*, *supra* note 234, at 1131, 1134 (noting that "[t]he balancing approach has become a fixture in the civil applications of the Fourth Amendment" and is attaining greater prominence in criminal applications as well).

240. See, e.g., Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1174-76 (1988) (noting several objections to the Court's balancing approach); Scott E. Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?", 94 COLUM. L. REV. 1751, 1766 (1994) ("[T]he Court [now] has made clear that the bottom-line Fourth Amendment test is whether the government intrusion is 'reasonable' based upon a balancing of the government's need to engage in the intrusion against the individual's privacy interests.") (footnote omitted); Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 129 (1989) ("The Court's turn away from the specific commands of the warrant clause and toward a balancing test of general reasonableness is now evident.").

241. See *Dorf*, *supra* note 81, at 1200 n.95 (noting that strict scrutiny is a form of balancing where a rigorous burden of proof is placed on the government); Stephen E. Gottlieb, *Compelling Governmental Interests and Constitutional Discourse*, 55 ALB. L. REV. 549, 551 (1992).

242. The plain-view doctrine's qualification of the warrant requirement is an example. The Court has held that the warrantless seizure of contraband in plain view of police officers is reasonable because "resort to a neutral magistrate under such circumstances would often be impracticable and would do little to promote the objectives of the Fourth Amendment." *Dickerson*, 508 U.S. at 375.

Professor Wasserstrom has identified in the Court's fourth amendment cases two distinct sorts of balancing:

In *Terry* [v. *Ohio*, 392 U.S. 1 (1968)], the Court adopted what might be called a "categorical," as opposed to an ad hoc, balancing test: under *Terry* and its progeny, lesser fourth amendment intrusions—stops and frisks—require a fixed, albeit reduced, quantum of evidence—reasonable suspicion. In *Winston v. Lee*, [470 U.S. 753 (1985),]

fixed "tailoring" requirement, choosing instead to assess the reasonableness of the government's choice of means in light of the gravity of its intrusion.<sup>243</sup> It is this superior flexibility of Fourth Amendment balancing which remains a useful analogue for the Court's approach to family privacy.<sup>244</sup>

### B. A Structured Standard of "Reasonableness"

Although many of the Court's family-privacy decisions seem to be based on the same sort of sliding-scale approach evident in its Fourth Amendment cases, the Court has been more reluctant to conduct its family-privacy balancing out in the open.<sup>245</sup> Bringing that balancing above board, however, would make the Court's family-privacy jurisprudence both more comprehensible and more coherent, without introducing significant new indeterminacy.

#### 1. The Fruits of Candor

Fully and openly embracing an intermediate-scrutiny standard in the context of family privacy would remove much of the pressure that currently distorts the Court's reasoning. Under such a standard,

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however, the Court endorsed an open-ended, "case by case," balancing test for surgical intrusions.

Wasserstrom, *supra* note 240, at 142-43 (footnote omitted).

243. In upholding an investigative stop in *United States v. Sokolow*, 490 U.S. 1, 11 (1989), for example, the Court wrote that "[t]he reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques." *Cf. Florida v. Royer*, 460 U.S. 491, 500 (1983) (opinion of White, J.) ("[T]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.") (emphasis added); *see also* Strossen, *supra* note 240, at 1205-07 (advocating use of a least-intrusive-alternative test but acknowledging that the Court has not done so).

244. I acknowledge, of course, that the Fourth Amendment and substantive due process are often said to be concerned with different sorts of "privacy" interests—the Fourth Amendment with personal interests in secrecy or seclusion and substantive due process with personal interests in autonomy. *See, e.g., Anderson v. Romero*, 72 F.3d 518, 521 (7th Cir. 1995) (Posner, C.J.); Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 178-88, 192-99. The Fourth Amendment remains a useful analogue for due-process protection, however, both because it is quite doubtful that the Constitution assigns less value to the Fourth-Amendment privacy interests, *cf. Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring) (suggesting that freedom from invasive police searches was highly valued by the "fiercely proud men who adopted our Fourth Amendment"), and because, in any event, both sorts of privacy ultimately share a common underlying concern with safeguarding the dignity of the individual against state incursion, *see Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965); *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); Michael J. Meyer, *Introduction*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 1, 1-3 (Michael J. Meyer & William A. Parent eds., 1992); James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 661-66 (1985).

245. *See supra* Part I.

if state action more than incidentally burdened an intimate and significant aspect of family life, the state would bear the burden of demonstrating that the action substantially advanced an important public objective.<sup>246</sup> In contrast to strict scrutiny, an initial determination that the state was intruding upon the constitutionally protected "private realm of family life" would not necessarily signal defeat for the government. The real work of drawing the limits on the state's regulatory power over the family would be shifted from the threshold definition of the right to the subsequent balancing of state and private interests. Here, the essence of the judicial inquiry would be whether the particular benefits to the public of the intrusion, taking into account the cost of any alternatives, exceed the particular burden upon the privacy interests of regulated families.<sup>247</sup>

By making it possible for the Court to recognize an intimate decision or relationship as within the protected zone of family life without having reflexively to strike down its regulation, an intermediate-scrutiny standard would remove much of the current incentive for crabbed constitutional construction of "family." A judgment sustaining a regulation would then be based frankly upon an assessment of its particular merits rather than upon a malign characterization of the regulated family choice as not "deserving of constitutional recognition."<sup>248</sup>

This change would yield three primary benefits. First, it would minimize the extent to which the Court itself engages in expressive regulation of the family.<sup>249</sup> Although the Court's interest-balancing inevitably would express some value judgments about alternative constructions of family life, the new analysis in most cases would avoid the ultimate disparagement of declaring that a particular intimate relationship does not even count as "family" in the eyes of society or the Constitution. Given the profound, even defining significance that family relationships hold for most people, such a declaration is

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246. See 3 ROTUNDA & NOWAK, *supra* note 31, § 18.3, at 218-21 (discussing Court's use of intermediate scrutiny).

247. That this is the core of the inquiry seems evident both from the equal-protection cases in which the Court has expressly applied an intermediate-scrutiny standard, *see, e.g.*, *United States v. Virginia*, 518 U.S. 515, 555-56 (1996); *Craig v. Boren*, 429 U.S. 190, 197 (1976), and from those in which the Court has applied a similar test *sub rosa*, *see, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (denial of public schooling to undocumented alien children violated Equal Protection Clause because state failed to show that exclusion sufficiently served "some substantial state interest").

248. *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977).

249. *See supra* Part II.B.2.

particularly potent, and its avoidance would be a worthy benefit in its own right.<sup>250</sup>

Second, reframing the analysis would likely make the boundaries of the family-privacy right not only more generous, but also more predictable. Lines would still be drawn, of course. At some point of attenuation, all of us would agree that a particular relationship or personal decision subject to regulation bears so little relation to the values underlying the family-privacy right that it warrants no heightened constitutional protection. But our decisions about where to draw that line would not be distorted by an under-the-table judgment about the ultimate desirability of the particular governmental action being challenged. This would leave unresolved the larger, ongoing debate over how to identify and cabin non-textual constitutional rights, but it would remove a key pressure point that tends to corrupt and confuse that debate.

Finally, reorienting the analysis would restore a greater measure of integrity to the Court's family-privacy jurisprudence. The sense that unspoken policy judgments now often drive the Court's proclamations concerning the scope of family privacy rights can only corrode public confidence in the Court's work.<sup>251</sup> In contrast, "[o]pen balancing compels a judge to take full responsibility for his decisions, and promises a particularized, rational account of how he arrives at them."<sup>252</sup> The particular benefit here is not solely the avoidance of cynicism generated by the Court's current approach. Rather, as Professors Louis Michael Seidman and Silas Wasserstrom have observed in the context of the Fourth Amendment, "[b]y candidly addressing the competing interests at stake, the Court encourages dialogue about the weight to be attached to those interests."<sup>253</sup> That dialogue serves both

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250. See *supra* note 213 and accompanying text.

251. As Dean Sullivan has observed, "[c]andor and demystification are independent goods. They have instrumental value too: reasons promote trust in the legitimacy of the enterprise and increase losers' acceptance of defeat." Sullivan, *supra* note 112, at 309. The Court, of course, has not been insensitive to concerns about the public perception of its work in this area. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 867-68 (1992) (expressing concern that appearing to yield to political pressure to overrule *Roe v. Wade* would undermine "confidence in the Judiciary" and the Court's legitimacy).

252. Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825 (1962). Professor Amsterdam made the same point in arguing for a constitutional requirement that police act pursuant to legislative or administrative rules. See Amsterdam, *supra* note 187, at 426 ("[T]hose who make invisible decisions cannot be held accountable for them.").

253. Wasserstrom & Seidman, *supra* note 233, at 46 (footnote omitted).

to keep the courts honest and to expose honest undervaluations of the competing interests to correction.<sup>254</sup>

Some might object that shifting from a categorical approach to a balancing approach would weaken family-privacy rights. This, after all, has been the basis on which many commentators have assailed the Court's move toward a "general reasonableness" test for the Fourth Amendment.<sup>255</sup> In the hands of the current Court, a balancing test might seem a sure tool for shrinking individual rights. For, as Professor John Ely wrote in a slightly different context, "balancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing—or if not that, at least with the relative confidence or paranoia of the age in which they are doing it."<sup>256</sup> And yet, as Dean Kathleen Sullivan has shown cogently, neither balancing nor more categorical approaches systematically favors expansive protection of individual rights.<sup>257</sup> Categorical approaches, as well as balancing, are susceptible to ideological manipulation. And where a categorical approach is being manipulated to constrict the scope of rights, as seems presently to be the case with the Court's protection of family privacy, a move to balancing can enlarge the measure of protection.<sup>258</sup>

Concededly, moving to a balancing approach, and thereby frankly acknowledging the qualified nature of family-privacy rights, risks losing some of the peculiar expressive force that comes from a more absolute characterization of rights.<sup>259</sup> Professor Charles Black, for example, once argued that it would be better not to admit that First Amendment rights sometimes may be overcome, and to do any

254. See generally Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990) (noting that judges should be "candid" about the reasons for the opinions, but not necessarily "introspective"); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987) (discussing the extent to which a judge's duty of candor departs from that of a scholar).

255. See, e.g., Strossen, *supra* note 240, at 1194-1200 (exploring the "costs" of "[i]naccurate identification of competing interests"); Sundby, *supra* note 240, at 1752-54 (introducing the debate over the reasonableness standard); Wasserstrom, *supra* note 240, at 121-30.

256. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975).

257. See Sullivan, *supra* note 112, at 306-09, 317. Indeed, as Professor Wasserstrom has observed in the context of the Fourth Amendment, in some cases the Rehnquist Court already has "utilized a test of general reasonableness to strengthen Fourth Amendment protections when it struck down as *unreasonable* searches or seizures that satisfied the demands of the warrant clause." Wasserstrom, *supra* note 240, at 130.

258. See Sullivan, *supra* note 112, at 307 (listing several examples where balancing can "constrain the government and favor rights"); see also Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319, 319-23 (1992) (agreeing with the arguments made by Dean Sullivan).

259. See Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 175-77 (1985) (using the Constitution's "simple" and "authoritative" style to show how much more powerful it is than if it were substituted by the language used by courts in interpreting it).

unavoidable balancing under the table, lest the admission encourage greater intrusions.<sup>260</sup> Yet an essential predicate to Black's argument was that First Amendment rights are so rarely overcome that the claim of absoluteness could be plausible.<sup>261</sup> In the context of family privacy, in which the courts regularly sustain wide-ranging regulation of family life, that predicate is missing.<sup>262</sup> Thus, any lost expressive value of exaggerated rights rhetoric seems likely to be outweighed by the benefits of a doctrine based on reality, and is offset in any event by the expressive value gained by offering some protection to realms of family life now disregarded under the rigidity of the current, more absolutist approach.

## 2. The Determinants of Reason

The most pressing objection usually offered against interest balancing in constitutional law is its indeterminacy.<sup>263</sup> As Professor Schneider put it, "[s]ince personal rights and state interests are incommensurable, it is hard to see what principle would guide courts if balancing were substituted for two-tier [fundamental-rights] analysis . . . . [And] [s]ince commentators have not proffered a principle, one wonders how much of an improvement it might be."<sup>264</sup> My answer is two-fold.

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260. Black warned that "explicit judicial recognition that the right needs to be balanced on occasion against competing considerations could lead down the slippery slope to its erosion." GLENDON, *supra* note 125, at 42 (citing Charles L. Black, Jr., *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, HARPER'S MAG., Feb. 1961, at 63, 68). Indeed, Black "went so far as to imply that it is better for the courts to perform any necessary balancing in a covert manner by manipulating the definition of speech." *Id.*

261. *See id.* at 191 n.78.

262. Moreover, as Professor Glendon points out, [t]he unexpressed premises of this argument—that Americans cannot be trusted to respect a right that is subject to reasonable limitations, and that they can be deceived by judicial finagling in the service of the illusion of absoluteness—are hard to reconcile with democratic values. It is both paternalistic and elitist to suppose that important rights are safer when judges and scholars pretend they are absolute, than when they stress how very substantial must be the reasons that must be given for limiting them.

*Id.* at 42 (footnote omitted).

263. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972-77 (1987); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-80 (1989); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992).

264. Schneider, *supra* note 64, at 88-89. Professor Amsterdam objected to open-ended interest balancing under the Fourth Amendment for the same reason: "The problem with the graduated model [of Fourth-Amendment reasonableness], of course, is [that] it converts the fourth amendment into one immense Rorschach blot." Amsterdam, *supra* note 187, at 393; *see also id.* at 415 (bristling at "the monstrous abyss of a graduated fourth amendment . . . , splendid in its flexibility, awful in its unintelligibility, unadministrability, unenforcibility and general oozyiness").



First, a shift to interest-balancing would constitute a real improvement even if it yielded no greater determinacy in family-privacy adjudication. The Court's current approach is already markedly indeterminate because its decisions often rest on interest balancing that is conducted under the table and then expressed in some other form in the Court's opinion.<sup>265</sup> Therefore, even if the balancing were no more principled, bringing it above board would have value in itself by exposing the Court's judgments to greater scrutiny.

Second, the Court's interest balancing need not be guideless in any event. Indeed, several determinants of the "reasonableness" judgment already can be teased out of the Court's cases to provide tolerable determinacy. In the past, the Court has placed varying degrees of emphasis upon factors relating to the unified or fragmented structure of the regulated family,<sup>266</sup> the particular degree of governmental intrusion,<sup>267</sup> and historical consensus concerning the value of particular privacy interests.<sup>268</sup> This cannot, of course, constitute a complete catalogue of relevant considerations. And, to date, the Court has taken account of these variables only sporadically, inconsistently, and often indirectly. But, by focusing attention more directly and openly on these and other factors in subsequent cases, the Court will initiate a "dialogue" about the proper balance to be struck.<sup>269</sup> Especially over time, the transparency of this approach is likely to produce a more principled and predictable balancing of interests than the Court now conducts.

*a. Fracture or Unity within the Family.*

The first variable which should guide the Court's "reasonableness" inquiry is one which the Court for the most part has addressed only indirectly. The state's power to intrude upon family life should be more narrowly confined when the state seeks to assert its values upon a family that is unified in its resistance. At the opposite pole, constitutional restraints should be weaker when the family entity is broken open by internal discord and one family member invites governmental intervention to resolve an internal dispute. There is no doubting, of course, that much of traditional family law reflects

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265. See *supra* Parts I.B. & I.C. Professor Schneider himself has acknowledged the Court's tendency to make "*sub rosa* adjustments of its standards" in this context. See Schneider, *supra* note 64, at 88.

266. See *infra* Part III.B.2.a.

267. See *infra* Part III.B.2.b.

268. See *infra* Part III.B.2.c.

269. See *supra* note 253 and accompanying text.

similar assumptions. Never-married or divorced parents are subjected to state investigation and direction on a scale that would be considered unthinkable in the context of married parents in an intact family.<sup>270</sup> There are, to be sure, ample grounds for questioning aspects of this disparity.<sup>271</sup> But there are also solid reasons for considering the intact or fractured nature of the affected family as potentially relevant to the permissible scope of the government's regulatory power.

It bears remembering that the first cases recognizing what later came to be known as the constitutional right of family privacy involved state intrusions upon intact and unified families. In *Meyer v. Nebraska*<sup>272</sup> and *Pierce v. Society of Sisters*,<sup>273</sup> the state sought to prevent parents from providing certain forms of instruction to their children. As far as appeared from the record, parents and children stood united in their opposition to the state's meddling. Moreover, the state's purpose in intervening was not directly to protect the interests of the children, but rather to advance the state's own interests by effectuating the cultural assimilation of immigrant children, thwarting what was perceived to be dangerous balkanization and ensuring that the children "bec[ame] citizens of the most useful type."<sup>274</sup>

The Court's early procreative-liberty cases were of the same character. *Skinner v. Oklahoma*,<sup>275</sup> for example, involved the govern-

270. See, e.g., Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1545-46 (1998); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 27 (1990).

271. Professor Martha Fineman and some other feminist scholars, for example, have contended that the state's greater willingness to intrude upon families that do not conform to the traditional, male-dominated, nuclear model reflects deep-seated sexism. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Fineman, *supra* note 211, at 958-65; Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995); Katharine K. Baker, *Taking Care of Our Daughters*, 18 CARDOZO L. REV. 1495 (1997) (book review). Others have found in the state's greater intrusions into poor or single-parent families evidence of class, ethnic, or racial bias. See, e.g., RUBIN, *supra* note 123, at 146-48; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1440-41 (1991); Jane Rutherford, *Beyond Individual Privacy: A New Theory of Family Rights*, 39 U. FLA. L. REV. 627, 638-39 (1987); cf. *Smith v. Organization of Foster Families*, 431 U.S. 816, 833-35 (1977) (noting that "foster care has been condemned as a class-based intrusion into the family life of the poor").

272. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

273. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

274. *Meyer*, 262 U.S. at 401. For an excellent discussion of the political background of the "Americanization" laws challenged in *Meyer* and *Pierce*, see Woodhouse, *supra* note 35, at 1009-17. Interestingly, similar concerns are surfacing today in Europe, where some civic leaders have advocated the suppression of ethnic regional languages as essential to the preservation of a national democracy. See Marlise Simons, *In New Europe, a Lingual Hodgepodge*, N.Y. TIMES, Oct. 17, 1999, at 4 (quoting Maurice Druon, head of the French Academy, as warning that "[t]eaching regional languages is 'an enterprise that can destroy the unity of the nation'").

275. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

ment's attempt to prevent procreation by a presumably willing couple in order to further its own interest in eugenics, and *Griswold v. Connecticut*<sup>276</sup> involved a state's invasion of "the sacred precincts of marital bedrooms" to deny their choice of contraception. In such settings, it seems appropriate to ratchet up the state's burden of justification because the intrusion on decisional privacy seems more palpable: the family together has made some choice of profound personal importance—concerning whether to have children, say, or how to raise them—and the state has intervened to deny that choice for independent purposes of its own.

But the family-privacy right more recently has found application in other settings that often seem less compelling. During the 1970s, the Supreme Court clearly seemed to shift the locus of the family-privacy right from the family as an entity to individual members within the family.<sup>277</sup> Whereas the Court in previous cases had grounded the constitutional liberty at stake squarely in the family as a whole, now the Court recognized the liberty as residing with the individuals who comprised a family. The procreative liberty that the *Griswold* Court had described as inherent in the marital union was transformed in *Eisenstadt v. Baird* into "the right of the individual, married or single."<sup>278</sup> The mutual rights of parents and children to companionship and nurture set out in *Meyer* and *Pierce* had, by 1979, become the right of an unwed father to block the adoption of his child by the mother's new husband.<sup>279</sup> Specifically, the courts have begun to recognize—though more often implicitly than explicitly—that the state should have somewhat greater regulatory power in cases where the family is broken apart by internal conflict or where there is good reason for suspecting that the family, though intact, is internally divided.

(i) Broken Families. The right of "family privacy" that seemed so intuitive in *Meyer* and *Pierce* as a shield against unwanted public intrusion is now often wielded as a sword by individual family members seeking the state's assistance in resolving an internal family dispute. Non-custodial parents, for example, invoke the Constitution in demanding court-enforced visitation with estranged children<sup>280</sup> or in

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276. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

277. See GLENDON, *supra* note 125, at 56-57, 123; Rutherford, *supra* note 271, at 635-38.

278. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). See generally Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519 (1994).

279. See *Caban v. Mohammed*, 441 U.S. 380 (1979). For a fuller discussion of the evolution of the Supreme Court's cases defining the constitutional rights of unwed fathers, see generally Meyer, *supra* note 97.

280. See *supra* note 4 and accompanying text

seeking to win custody from family members with whom they earlier entrusted their children.<sup>281</sup> With somewhat less success, the Constitution similarly has been invoked by foster parents or children seeking to foil parents' efforts to oust them from a settled custodial placement.<sup>282</sup>

In these cases, the pre-existing fracture within the family justifies allowing the government somewhat wider leeway in its intervention for at least two reasons. First, the privacy interests at stake are surely less powerful where family members are themselves at an impasse over a disputed family decision. It is one thing for the government, as in *Meyer* and *Pierce*, to override a family's exercise of its decisional privacy after family members have themselves settled, by consensus or acquiescence, upon some choice; it is surely something less for the government to step in when family members themselves are deadlocked over how to make the choice. Moreover, when family members are already divided, there is greater potential for conflicting constitutional claims.<sup>283</sup> In that case, no one outcome seems clearly to favor the values of "family privacy" and so the government might reasonably be permitted somewhat greater discretion to choose among the competing privacy claimants.

Second, a key assumption undergirding the Constitution's protection of family privacy—that, left to their own devices, family members generally can be trusted to act in one another's best interests<sup>284</sup>—is more doubtful in the context of divided and embattled families. A common justification for limiting governmental power to override parents' child-rearing decisions, for example, is that parents in most cases are better situated and better motivated to discern and pursue their child's interests than is any governmental agent.<sup>285</sup> When a

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281. See *supra* note 5 and accompanying text.

282. See, e.g., *Smith v. Organization of Foster Families*, 431 U.S. 816, 847 (1977) (declining to resolve whether foster parents have a constitutionally protected liberty interest in maintaining a relationship with their foster children); *In re Guardianship of Zachary H.*, 86 Cal. Rptr. 2d 7, 16-17 (Cal. Ct. App. 1999) (holding that a child had a fundamental constitutional liberty interest in remaining in the custody of non-parent caregivers and that interest prevailed over father's constitutional interest in obtaining custody); *Kingsley v. Kingsley*, 623 So. 2d 780, 790 (Fla. Dist. Ct. App. 1993) (Harris, C.J., concurring in part & dissenting in part) (stating that a child has "no right to change parents simply because the child finds substitutes that he or she likes better").

283. The Court encountered this scenario, for example, in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), where it found that parents and foster parents had conflicting constitutional claims to custody of a child. See *id.* at 846-47.

284. See REGAN, *supra* note 125, at 11.

285. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 601-02 (1979) (asserting that society long has recognized that "natural bonds of affection lead parents to act in the best interests of their children"); Margaret F. Brinig & F.H. Buckley, *Parental Rights and the Ugly Duckling*, 1 J. L. & FAM. STUD. 41, 54-55 (1999); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*,

family is torn apart by divorce or other conflict, however, there is much less reason to be sanguine that family members will look out for each other better than a neutral outsider. As Professor Elizabeth Scott and Dean Robert Scott have observed,

For some non-custodial parents, the creosote bond of parenthood grows more attenuated [after separation], such that being the child's parent becomes less central to personal identity. As the unity of parents' and children's interests dissolves, the risk of conflicts intensifies. Moreover, for many non-custodial parents, the rewards of parenthood diminish after divorce, reducing further the incentive to invest in the relationship with their children.<sup>286</sup>

Courts have recognized this reality in explaining, for example, why it is constitutional for a state to require divorced or never-married parents to pay for a child's college education, while not extending the same requirement to married parents.<sup>287</sup> The same recognition underlies much of the law providing for child-visitation rights by grandparents and other extended family members. The common restriction of court authority over visitation disputes to those occurring in non-intact families in part reflects a judgment that parents in intact families can generally be trusted to grant access to their children in a responsible manner.<sup>288</sup>

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63 U. CHI. L. REV. 937, 940, 951-60 (1996); McCarthy, *supra* note 89, at 1017-19; Schneider, *Rights Discourse*, *supra* note 125, at 159; Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2431-37, 2443-44 (1995).

286. Scott & Scott, *supra* note 285, at 2446-47 (footnotes omitted). Many non-custodial parents, typically fathers, report that conflict or frustration with the constraints of visitation lead them ultimately to withdraw from contact with or support of their children. See *id.* at 2446-47 nn.135-36 (collecting studies).

287. See, e.g., *McFarland v. McFarland*, 885 S.W.2d 897, 900 (Ark. 1994); *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1389-90 (Ill. 1978) ("Unfortunately, it is not the isolated exception that noncustodial divorced parents, because of . . . additional expenses [incident to their divorce] or because of a loss of concern for children who are no longer in their immediate care and custody, or out of animosity directed at the custodial spouse, cannot be relied upon to voluntarily support the children of the earlier marriage to the extent they would have had they not divorced."); *Neudecker v. Neudecker*, 566 N.E.2d 557, 563 (Ind. Ct. App.), *aff'd*, 577 N.E.2d 960 (Ind. 1991); *In re Marriage of Urban*, 293 N.W.2d 198, 201 (Iowa 1980); *LeClair v. LeClair*, 624 A.2d 1350, 1356-57 (N.H. 1993); *Childers v. Childers*, 575 P.2d 201, 207 (Wash. 1978) (en banc); cf. *In re Marriage of Kohring*, 999 S.W.2d 228, 233 (Mo. 1999) (en banc) (upholding rationality of distinction on grounds that "children of an existing marriage derive many benefits that [children] of a dissolved marriage [are] deprived of sharing") (quoting *Leahy v. Leahy*, 858 S.W.2d 221, 230 (Mo. 1993) (en banc)). But see *Curtis v. Kline*, 666 A.2d 265, 270 (Pa. 1995) (sustaining equal protection challenge to statute authorizing post-secondary educational support); *Grapin v. Grapin*, 450 So. 2d 853, 854 (Fla. 1984) (same).

288. See, e.g., *B.R.O. v. G.C.O.*, 646 So. 2d 126, 131 (Ala. Civ. App. 1994) (court may not compel parents in an "intact family" to facilitate grandparent visitation); *Beagle v. Beagle*, 678 So. 2d 1271, 1277 (Fla. 1996) (same); *Hawk v. Hawk*, 855 S.W.2d 573, 582 (Tenn. 1993) (same); *Dotson v. Hylton*, 513 S.E.2d 901, 903 (Va. Ct. App. 1999) (strict scrutiny applies only when the state orders visitation over the objections of a "unified family"; lesser constitutional scrutiny applies when only one parent objects); Laurence C. Nolan, *Honor Thy Father and Thy Mother:*

(ii) Families with Potentially Conflicting Interests. The Court has also recognized, at least tacitly, that even when a family remains intact, a high potential for internal conflicts of interest may justify greater deference to state intervention. The Court has scrutinized most aggressively state action which appears to be directed against families with unified interests.<sup>289</sup> The Court's zeal has dissipated markedly, however, when it has detected a significant potential for conflicting interests within the regulated family. The Court's indignant offense in *Meyer* and *Pierce* to state efforts to "standardize" children, for instance, evaporated in *Prince v. Massachusetts*<sup>290</sup> when the Court considered a guardian's decision to enlist her nine-year-old niece in her religious evangelism. Finding it "wholly inappropriate" to expose a child to the "difficult[ies]" of street-corner proselytizing, the Court plainly believed that the child's interests were in conflict with her guardian's.<sup>291</sup> "Parents may be free to become martyrs themselves," the Court concluded, "[b]ut it does not follow they are free . . . to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."<sup>292</sup>

The Court followed a similar line of reasoning, though it arrived at a different result, in *Wisconsin v. Yoder*.<sup>293</sup> In finding that Wisconsin could not compel Amish parents to send their children to public high school, the Court emphasized that it found no real danger that the interests of the children were at odds with those of their parents.<sup>294</sup> Justice White, moreover, speaking for three Justices in his concurring opinion, made clear that it would be "a very different case" if the evidence suggested a substantial conflict of interests.<sup>295</sup> If the parents had sought to exempt their children from all forms of state-

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*But Court-Ordered Grandparents Visitation in the Intact Family?*, 8 BYU J. PUB. L. 51 (1993); Judith L. Shandling, Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 133-35 (1986) (differentiating between intact and non-intact families).

289. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), for instance, the Court gave no hint that the children might have any interest adverse to their parents in the choice of schooling; so, too, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Loving v. Virginia*, 388 U.S. 1 (1967), and *Stanley v. Illinois*, 405 U.S. 645 (1972), all family members seemed to share a common goal that was being thwarted from without by the state.

290. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

291. *Id.* at 169-70.

292. *Id.* at 170.

293. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

294. See *id.* at 230-31; *id.* at 237 (Stewart, J., concurring) ("As the Court points out, there is no suggestion whatever in the record that the religious beliefs of the children here concerned differ in any way from those of their parents.").

295. *Id.* at 238 (White, J., concurring).

regulated elementary education, for example, the concurring Justices suggested that the balance would have swung in favor of the state.<sup>296</sup>

The Court's detection of significantly conflicting interests within the family is relevant to its constitutional balancing in two ways. First, the conflict may bolster the strength of the state's interest in intervention, such as when the state acts as *parens patriae* to protect the interests of children.<sup>297</sup> At the same time, just as in the case of broken families, the existence of internal conflict may weaken the privacy interests on the other side of the balance. Disputes over grandparent visitation provide an illustration. Although state legislatures and courts generally have placed tighter restrictions on court authority to order grandparent visitation in "intact" families,<sup>298</sup> there is reason for regarding the "family privacy" interest as compromised even when parents are married and united in their desire to cut off grandparents' access to a child. The Court previously has recognized that the emotional bonds between members of an extended family can be profoundly important to the individuals involved.<sup>299</sup> Certainly, if

296. Justice White explained that his constitutional analysis would change if the Amish parents had claimed "that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State." *Id.* In that event, he explained, the parents' interest in controlling their children's education and exercising their religious faith would present a more direct conflict with the children's own interests in "acquir[ing] the basic tools of literacy" and developing the capacity to live independently. *See id.* But, since the parents sought an exemption only from sending their children to high school, Justice White thought the conflict of interests less pressing.

297. *See, e.g., Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 747, 754 (1996) (Breyer, J., plurality opinion) (stating that the protection of children is a compelling interest); *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring) (stating that state has a compelling interest in "the education and training of young people"); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years."); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (state's "interest—safeguarding the physical and psychological well-being of a minor—is a compelling one").

298. *See supra* note 288 and accompanying text.

299. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the plurality spoke glowingly of the tradition of shared child-rearing within the extended family:

Ours is by no means a tradition limited to respect for the bonds uniting the members of a nuclear family . . . . Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family.

*Id.* at 504-05. Later the same Term, in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), the Court again recognized that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association," rather than from its formal legal or biological classification. *Id.* at 844; *see also In re Whitaker*, 522 N.E.2d 563, 567 & n.3 (Ohio 1988) (discussing the profound importance to grandchildren and grandparents of continuing contact); Erica L. Strawman, *Grandparent Visitation: The Best Interests of the Grandparent, Child, and Society*, 30 U. TOL. L. REV. 31, 41-44 (1998) (same).

those bonds were threatened with destruction directly by the state, rather than by the child's parents, their preservation would be a core concern of the Constitution's regard for family privacy.<sup>300</sup> Even without formally classifying the interest of grandparents and grandchildren in preserving their relationship over parental objection as a countervailing fundamental right, that interest hardly seems irrelevant in assessing the strength of the parents' asserted interest in "family privacy."<sup>301</sup> When the state's intervention in the family is intended to mediate between or among what appear to be conflicting interests of individual family members, the state's action is less obviously an affront to the values of "family privacy" and should be regarded with somewhat less suspicion than when the state acts solely in order to assert some interest independent of the family.

*b. The Degree of Governmental Intrusion*

A second and related variable in the Court's protection of family privacy is the degree of the government's intrusion upon family relationships or decisionmaking. The Constitution should be understood to require correspondingly more aggressive judicial scrutiny as the government intrudes more deeply into the protected realm of family life. Smaller intrusions—say, mandatory waiting periods or counseling sessions before marriage, or prohibitions of certain means of parental discipline—should receive a greater measure of deference than larger ones—say, categorical prohibitions on entry into marriage or the outright termination of parental rights.

The Court, to some extent, already acknowledges that the degree of intrusion is relevant to its choice of a standard of review. The Court, for instance, has differentiated its review of "direct" burdens on fundamental rights from that of merely "incidental" burdens.<sup>302</sup> And, as Professor Michael Dorf has pointed out, the Court's differentiation turns as much on the substantiality as the directness of the burden.<sup>303</sup>

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300. See *Moore*, 431 U.S. at 504-06.

301. Some state courts have rejected parents' constitutional challenges to court-ordered visitation by grandparents on essentially this basis. See, e.g., *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992) (upholding a grandparent-visitation statute on the grounds that it "seeks to balance the fundamental rights of the parents, grandparents and the child" and that the state's effort to foster "the development of a loving relationship between family members" justified the limited intrusion upon parents' child-rearing authority), *cert. denied*, 506 U.S. 941 (1992).

302. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 873-74 (1992); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); see also *supra* note 61 and accompanying text.

303. See Dorf, *supra* note 81, at 1221, 1233-37. Indeed, the Court has said as much with regard to marriage regulations. Whereas the Court aggressively has struck down laws or regulations that foreclosed marriage in *Zablocki v. Redhail*, 434 U.S. at 386; *Turner v. Safley*,



In this sense, it is clear at least that the Court varies the strength of its review according to a broad threshold categorization of the character of the government's incursion.

Yet, the Court's family-privacy cases have gone still farther—albeit usually without saying so—in calibrating the strength of review to the substantiality of the government's invasion. Even after deciding at the threshold that a particular burden cannot be categorized as “incidental,” the Court often takes account of the particular extent of the intrusion in assessing the sufficiency of the government's asserted interests. In the context of a parent's “fundamental liberty interest” in “‘the companionship, care, custody, and management of his or her children,’”<sup>304</sup> for example, the Court has distinguished state action that threatened to destroy the parent-child bond from that which threatened merely to deprive a parent of custody or to impinge upon a parent's child-rearing preferences. In a series of cases, the Court has required extra procedural safeguards when the state seeks to terminate parental rights on the ground that “[t]he object of the proceeding is ‘not simply to infringe upon [the parent's] interest,’ . . . ‘but to end it.’”<sup>305</sup>

The Court likewise has recognized significant substantive limitations on the state's power to extinguish the parent-child relationship, while allowing the state considerably more leeway in lesser interventions.<sup>306</sup> And, perhaps most explicitly, the Court's “undue burden” test in the context of abortion requires a direct assessment of

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482 U.S. 78 (1987); and *Loving v. Virginia*, 388 U.S. 1 (1967), it deferred easily to regulations that resulted in a forfeiture of welfare benefits upon marriage, see *Califano v. Jobst*, 434 U.S. 47 (1977). The difference in scrutiny, the Court explained, turned on “[t]he directness and substantiality of the [particular] interference with the freedom to marry.” *Zablocki*, 434 U.S. at 387 n.12.

304. *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

305. *M.L.B. v. S.L.J.*, 519 U.S. 102, 118 (1996) (quoting *Lassiter*, 452 U.S. at 27). In *Santosky*, 455 U.S. at 769, the Court held that the Constitution required the state to prove the statutory grounds for termination of rights by clear-and-convincing evidence; in *Lassiter*, 452 U.S. at 26-27, the Court held that indigent parents, under some circumstances, must be given legal counsel; finally, in *M.L.B.*, 519 U.S. at 118, the Court recognized a right of indigent parents to a waiver of costs usually required for the filing of an appeal.

306. See, e.g., *Santosky*, 455 U.S. at 760 n.10 (“We have little doubt that the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.’”) (quoting *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) in turn quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)); *Caban v. Mohammed*, 441 U.S. 380 (1979) (state may not extinguish established relationship between children and their unwed father by permitting their adoption by another man without proving grounds for terminating parental rights).

the degree of the government's interference with the woman's decisionmaking process.<sup>307</sup> Indeed, as Professor Schneider observed even before *Casey*, "the Court in *Roe v. Wade* seemed to be using just such a sliding scale in its scheme of increasing levels of permissible regulation in each succeeding trimester."<sup>308</sup>

There is an obvious logic to these cases, though it is difficult to square neatly with the traditional strict-scrutiny formula.<sup>309</sup> The strength of the justification demanded of the government should be calibrated to match the extent to which the government seeks to intrude upon constitutional values of family privacy.

*c. Historical Consensus Regarding the Family*

Finally, the Court still could take history and tradition into account in its balancing of the competing state and private interests. The Court is now firmly committed to the idea that historical consensus regarding the propriety of regulation is relevant to an assessment of its constitutionality, but has been inconsistent about exactly how history should be taken into account. Most often, the Court refers to historical consensus in identifying whether regulated conduct falls within the scope of a claimed fundamental right. Yet, in other cases history has taken a back seat to philosophical or other concerns which impelled the Court to extend substantive-due-process protection to choices or conduct that had long been the subject of extensive and often hostile state regulation.<sup>310</sup>

My point is that even after the Court has decided at the threshold that regulated conduct qualifies as the exercise of a fundamental right, the historical pedigree of the regulation may be relevant to the ultimate determination of its constitutionality. The Court itself sometimes has considered historical consensus in its state-interest balancing as well as in its threshold definition of fundamental rights.

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307. See *Casey*, 505 U.S. 874, 877 (distinguishing between regulations which "have the incidental effect of increasing the cost or decreasing the availability" of abortion and those which "plac[e] a substantial obstacle in the path of a woman seeking an abortion").

308. Schneider, *supra* note 64, at 94.

309. See *id.* at 94-95 ("The language of the [strict-scrutiny] test suggests that [its] terms are not relative, that an interest is either compelling or it isn't, that a statute is either necessary to serve an interest or it isn't. Moreover, the Court has never avowedly treated 'compelling' or 'necessary' as relative terms . . .").

310. Abortion and interracial marriage are obvious examples. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 159-60 (1996) (discussing *Loving*); Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 91-92 (1989); see also *supra* notes 177-86 and accompanying text (discussing the Court's inconsistent reliance on history and tradition in identifying non-textual fundamental rights).

In both *Zablocki v. Redhail*<sup>311</sup> and *Moore v. City of East Cleveland*,<sup>312</sup> for instance, the Justices emphasized the novelty of the challenged regulations as a reason for demanding greater justification from the state.<sup>313</sup> That society has managed for two centuries without resorting to a given form of regulation should stoke judicial skepticism that the regulation is needed now.

By the same token, the existence of a long-settled societal consensus that a given regulation is appropriate should counsel caution in invalidating it. As Professor Schneider has argued, much of family law is built upon assumptions concerning human nature that are essentially unprovable, and some greater measure of deference is due when the legislature regulates according to "a theory of human nature [which] has been substantially relied on in the past and . . . has substantial intellectual antecedents."<sup>314</sup> That deference is appropriate partly because regulations that have stood the political test of time are at least somewhat more likely to actually advance community interests. It is also appropriate because an utter disregard of traditional consensus in an area of such profound interest to the community would be perilous for the judiciary.<sup>315</sup>

In no case should the presence or absence of historical precedent be dispositive. The solid historical pedigree of Virginia's anti-miscegenation law,<sup>316</sup> for example, should in no way mandate a conclu-

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311. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

312. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

313. In *Zablocki*, the Court struck down a law that required parents who were subject to a prior child-support order to obtain court permission before marrying. Justice Stewart, concurring in the judgment, balanced the state's interests in enforcing support obligations and ensuring the financial stability of marriages against the incursion on personal privacy interests and concluded that the state's interests fell short primarily because the "legislative judgment [was] so alien to our traditions and so offensive to our shared notions of fairness." *Zablocki*, 434 U.S. at 395. Similarly, in *Moore*, the Justices emphasized the "unusual," *Moore*, 431 U.S. at 496 (Powell, J., plurality opinion), and "eccentric way," *id.* at 507 (Brennan, J., concurring), in which East Cleveland had sought to regulate residential living patterns in explaining why its proffered justifications were insufficient.

314. Schneider, *supra* note 64, at 102.

315. As Justice Harlan observed, "[a] decision of th[e] Court which radically departs from [traditional consensus regarding the appropriate balance between state power and individual liberty] could not long survive, while a decision which builds on what has survived is likely to be sound." *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

316. As Professor Eskridge has written, "[f]ew traditions are as pervasive in American legal history as laws prohibiting different-race marriages." ESKRIDGE, *supra* note 310, at 154; *see also* Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 274-75 (1999). Virginia's anti-miscegenation law dated back to 1691, *see* ESKRIDGE, *supra* note 310, at 154; Grosz, *supra* note 213, at 239, and as many as thirty-seven other states enacted similar bans, *see* ESKRIDGE, *supra* note 310, at 155. At the time the Supreme Court reviewed Virginia's statute in *Loving v. Virginia*, fifteen other states clung to their prohibitions on interracial marriage. *See Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967).

sion that the state interests supporting the measure outweighed the profoundly intrusive burden on individuals like Mildred and Richard Loving. But historical practices and traditional consensus about the propriety of a particular intrusion upon the family may well be relevant in adjusting the specific burden of justification demanded of the government.

### 3. The Determinants Applied

These (and undoubtedly other) factors could work together to direct and structure a judicial inquiry into the reasonableness of a given regulation. In some cases, the factors might point strongly toward a clear answer to the constitutional question. Consider, for example, a law requiring parental consent for minors who wish to marry.<sup>317</sup> The law fairly could be understood as an attempt to mediate between potentially conflicting interests within a family.<sup>318</sup> Rather than the state interjecting itself into a family for independent purposes of its own, the state through such a law would be trying to vindicate one cognizable family-privacy interest—the interests of parents in making decisions directly affecting the welfare of their minor children—against another—that of children to make their own decisions concerning marriage. The second factor, concerning the degree of state intrusion upon privacy interests, similarly would weigh in favor of a moderated standard of judicial review. Here, the law would not deny marriage altogether to minors who could not obtain parental consent; it would require only that they delay marriage until they reach the age of consent or can otherwise persuade their parents to go along. Finally, the long historical pedigree of age restrictions on marriage,<sup>319</sup> and the continuing societal consensus supporting such restrictions, likewise would counsel against their invalidation.<sup>320</sup> Each of these factors, then, would suggest a standard of constitutional review considerably more deferential than traditionally associated with fundamental-rights analysis. A court should sustain the parental-consent requirement, even if it would not survive the

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317. See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 205(a), 9A U.L.A. 168 (1987) (requiring parental or judicial consent to marriage for minors aged 16 or 17 years, and parental *and* judicial consent for minors aged 15 years or younger).

318. See *supra* Part III.B.2.a.ii.

319. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 2.10, at 88-89 (2d ed. 1988); MICHAEL A. GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* (1985); see also, e.g., *Agent v. Willis*, 32 S.E. 322 (N.C. 1899) (applying age restriction on marriage).

320. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 392 (1978) (Stewart, J., concurring in judgment).

strictures of "compelling interest" review, so long as the public benefits of the measure seem to outweigh the relatively limited burden on minors' privacy interests.<sup>321</sup>

In the opposite direction, consider a case like *Loving v. Virginia*.<sup>322</sup> In that case, the state sought through the challenged statute to foist its values on an intact family that was united in its opposition.<sup>323</sup> The degree of the state's intended intrusion on the right to marry was maximal, as the state sought to withhold marriage altogether from interracial couples. And although there was historical precedent for such prohibitions,<sup>324</sup> the tradition was in full-scale retreat<sup>325</sup> and any societal consensus on the matter plainly had collapsed. Thus, the first two factors would call for the most aggressive judicial scrutiny, and the third would not weigh strongly for a moderation of that approach. Thus, the facts of *Loving* would suggest a standard of judicial review quite nearly approaching strict scrutiny.

This is not to say, of course, that these factors will lead in all cases to clear answers. When the various factors point more strongly in opposite directions, some judgment obviously must be made about how to balance them, and no simple formula can provide an answer. The question of same-sex marriage provides an obvious illustration. Here, the first two factors are essentially the same as with the anti-miscegenation law in *Loving*: the state is imposing itself upon an intact family unified in its resistance and the degree of its intrusion is great. The third factor, however, is different. The historical precedent for laws banning same-sex marriage is much stronger than it was for anti-miscegenation legislation. Whereas the latter laws were mostly

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321. The requirement that the government demonstrate the public value of its regulation distinguishes this approach from the now-prevailing tendency to rule for the government by narrowly defining the fundamental right. Cf. *Moe v. Dinkins*, 669 F.2d 67, 68 (2d Cir. 1982) (defining the fundamental right to marry as not including "the right of minors to marry," and therefore applying rational-basis review to age-based, parental-consent requirement); *Hutchins v. District of Columbia*, 188 F.3d 531, 559 (D.C. Cir. 1999) (en banc) (Rogers, J., concurring in part & dissenting in part) (suggesting the same approach in dictum).

322. *Loving v. Virginia*, 388 U.S. 1 (1967).

323. See *supra* Part III.B.2.a. The state did seek to justify its intervention partly on the grounds that it was safeguarding the interests of any children who might be born to the interracial union, see *Loving*, 388 U.S. at 7, and thus arguably was directing itself toward a family with potentially conflicting interests, see *supra* Part III.B.2.a.ii. But the basis of the state's claimed concern was, at least by the 1960s, so transparently trumped up that it would not materially alter the analysis.

324. See discussion *supra* note 316.

325. The number of jurisdictions banning interracial marriage declined from thirty at the end of the Second World War to sixteen at the time the Court decided *Loving* in 1967. See ESKRIDGE, *supra* note 310, at 157, 159.

confined to selected geographic areas,<sup>326</sup> the barrier to same-sex marriage today remains universal. There is also a difference in the degree of societal consensus supporting the regulations. Most data today suggests that a majority of Americans continue to support a ban on same-sex marriage,<sup>327</sup> whereas public support for anti-miscegenation laws was clearly collapsing in the 1960s.<sup>328</sup>

These differences suggest that some moderation of the level of scrutiny is appropriate, but they do not, of course, specify the precise extent of the moderation. Merely identifying the most relevant determinants of the reasonableness inquiry still leaves plenty of play in the joints, and undoubtedly judges would vary in the extent to which they emphasized any one factor. Ultimately, of course, there is no getting around that adjudication of substantive due process claims requires courts to make difficult judgments about the relative weight to be assigned to competing values.<sup>329</sup> A virtue of acknowledging the qualified nature of family-privacy rights, however, is that it at least would help to focus the inquiry upon the crux of the relevant disagreement—in this case, the extent of deference that is owed to tradition in reviewing a highly burdensome and intrusive regulation of family.<sup>330</sup>

More important, this approach would place on the state the burden of offering some real justification beyond bare tradition in order to sustain the regulation. A state wishing to retain its ban on same-sex marriages could not simply point out that the ban was of long standing, shifting to the challengers the burden of proving its utter irrationality. Rather, the state would now be required to come forward with evidence to demonstrate that the ban substantially

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326. The laws were found mostly in the deep South, the West, and Civil War border states. See ESKRIDGE, *supra* note 310, at 157 n.c (listing the thirty states that had such laws at the end of the Second World War).

327. See Robbenolt & Johnson, *supra* note 189, at 419 (noting that “[a] 1998 poll revealed that only 29% of the general public approved of legally sanctioned same-sex marriage”); Ball, *supra* note 119, at 1877 nn.21 & 22.

328. See Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of Loving v. Virginia*, 41 HOW. L.J. 229, 233-34 (1998) (noting that 13 states—nearly half of those which had such laws—repealed their anti-miscegenation laws between 1952 and 1967).

329. See *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) (“The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.”); *id.* at 850 (“No formula could serve as a substitute, in this area, for judgment and restraint.”) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

330. And, even in the hardest cases, it is doubtful that the analysis would be any less determinate than the Court’s current practice of conducting essentially the same balancing under the table.

advanced a public interest of real importance. The imposition of this requirement itself would constitute a major step forward.<sup>331</sup>

And, even if the courts ultimately upheld the prohibition after finding that the state's interests outweighed the intrusion on families, this approach would avoid branding the regulated families as not "families" at all or otherwise as "[un]deserving of constitutional recognition."<sup>332</sup> As Dean Sullivan has observed, affecting the outcomes of cases is not the only consideration in the choice of a doctrinal method: "What a Court says about *why* a law is upheld [also] matters. There is a value to judicial explanations."<sup>333</sup> And the value in this context is nothing less than acknowledgment of the essential dignity of the full range of American families.

### CONCLUSION

For seventy-five years, the Supreme Court's protection of the constitutional rights of family privacy has had two sides. On the outside is a veneer of often absolutist rhetoric exalting the "sanctity of the family"<sup>334</sup> and sketching the boundaries of "a 'private realm of family life which the state cannot enter.'"<sup>335</sup> On the inside is an essentially pragmatic approach to deciding actual controversies involving the family. In cases involving marriage, procreation, family living arrangements, and parenting, the Court has been pointedly reluctant to live up to the implications of its lofty rhetoric, and for good reason. The rigidity of traditional fundamental-rights analysis, with its search for compelling interests and narrow tailoring, is ill-suited to the task

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331. As David A.J. Richards has written:

A constitutional theory and practice, so rooted in skepticism about the abuses of state power, must extend to contemporary generations the same kind of skepticism, that is, the closest scrutiny of alleged grounds of "traditional morality" or "natural differences" of gender or sexual preference so often used to justify what should be under American constitutionalism unjustifiable—the appeal to traditional hierarchies of domination and servility that rest on the unreasoning and unreasonable degradation of the moral powers of free and equal people.

David A. J. Richards, *Constitutional Liberty, Dignity, and Reasonable Justification*, in *THE CONSTITUTION OF RIGHTS*, *supra* note 244, at 73, 99.

332. *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977).

333. Sullivan, *supra* note 112, at 309. Like Professor Nagel, I believe this is true even acknowledging that the public's perception of judicial explanation is likely to be both limited and filtered. See Nagel, *supra* note 259, at 169-77.

334. *Moore*, 431 U.S. at 503; see also *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (noting that the Constitution protects "sacred precincts of marital bedrooms").

335. *Moore*, 431 U.S. at 499 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); *Smith v. Organization of Foster Families*, 431 U.S. 816, 842 (1977).

of mediating the complex and intersecting private and communal interests which are often at stake in the family.

Though the Court has been right to moderate its scrutiny in the family-privacy context, it has been wrong to resist acknowledging this reality. The Court's refusal to come clean about the true character of its role and the qualified nature of family privacy rights paradoxically has undermined the values of autonomy and intimacy that the rights are said to exalt. The Court's nominal adherence to the traditional strict-scrutiny formula has pushed it to construe the scope of family-privacy rights narrowly at the threshold in order to leave tolerable leeway for state regulation. And the Court's tendency to justify its narrow construction in terms of the desert or legitimacy of particular family relationships or decisions itself has regulatory significance, compounding the extent of the state's intrusion into family life.

Openly embracing the intermediate-scrutiny review that in fact has characterized much of the Court's work in this context would place family privacy rights on a less exalted, but ultimately more secure, plane. The Court's cases already provide criteria that would help wring some of the indeterminacy out of a straightforward reasonableness inquiry. And the more flexible standard would permit the Court to comprehend a broader range of family choices and relationships as worthy of constitutional respect, while sustaining state regulation upon a true demonstration that its merits outweigh its costs.



