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# Lochner for Women: The Ideology of Separate Spheres in Muller v. Oregon

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# CONSTITUTIONAL PRIVACY AND THE JUST FAMILY

ANNE C. DAILEY\*

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## I. INTRODUCTION

Liberal political theory has for the most part ignored the family on the unstated assumption that the family is not an institution relevant to political life.<sup>1</sup> Under liberalism, the domestic

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1. See SUSAN M. OKIN, *JUSTICE, GENDER AND THE FAMILY* 9 (1989); CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY* 3 (1989). A recent exception to this tradition is the work of Michael Walzer. See MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 227-42 (1983). Legal philosophers in the liberal tradition have, by virtue of omission, agreed. See *infra* Part II.

sphere of family life is generally perceived as lying outside the realm of legitimate political discourse. Set apart from the public world of work and politics, the family is understood to offer a private sanctuary of individual freedom safe from intervention by government or other public forces.

Since the early part of this century, the Supreme Court has adopted a view of the family as a private institution wherein individuals may pursue their own conception of "the good life" free from government intervention. This constitutional doctrine of family privacy, which the Court has grounded in the guarantee of "liberty" under the Due Process Clause of the Fourteenth Amendment, is said to preserve a "private realm of family life which the state cannot enter."<sup>2</sup> This most "private" of social institutions has established itself as a central focus of heightened constitutional concern in a line of cases affirming the importance of the family as a fundamental social unit.<sup>3</sup>

Despite this vision of the private family in liberal theory and constitutional law, political discourse on the family is hardly an unknown phenomenon in this country. From laws prohibiting divorce in the early years of the republic to contemporary laws denying homosexuals the right to marry, the state has continually shaped and promoted a particular vision of family life. Far from prohibiting state intervention in a prepolitical social sphere, the ideal of family privacy expresses a particular set of family values by protecting only those social relations that the state deems worth protecting. The boundaries of family privacy are drawn by political choice; and the decision regarding which relationships fall within these disputed boundaries is one that helps to define the content of family life.

The ongoing and increasingly heated debate over family values and family structure is carried out today most vigorously at the level of everyday politics. Issues of family life were at the center of the recent presidential election, and legislation aimed at improving, and even restructuring, family life has gained increasing media attention and popular support. In the debate over family values, conservatives tend to call for laws reinforcing

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

3. This line of cases, beginning with *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), includes *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (plurality opinion), and, most recently, *Bowers v. Hardwick*, 478 U.S. 186 (1986). See *infra* text accompanying notes 40-54, 85-93.

the traditional family, while progressives typically pursue legislation addressing the needs of single parents and working mothers. From across the political spectrum, family life has moved to the forefront of our national political debate. It is time for liberal theory and constitutional law to acknowledge the existence and importance of political discourse on the family and to relinquish the myth of family privacy.

This Article has two broad goals: the first is to draw attention to the central role that the family has played, and continues to play, in shaping the Supreme Court's interpretation of constitutional privacy. This insight carries important consequences because it reveals a deep tension within privacy doctrine between the competing goals of safeguarding individual autonomy and insulating communal familial relations. Individual and family together may claim a right of privacy against unwanted intervention by the state. But when individual and family interests differ—when the family is divided—the personal autonomy of the individual comes into direct conflict with the institutional autonomy of the family unit. Within the framework of constitutional privacy lies a fundamental conflict between the principle of individual sovereignty and the principle of communal self-government.<sup>4</sup>

The Supreme Court has attempted to resolve this conflict in favor of individual rights by adopting a view of children as “incompetent” individuals whose development depends on the proper organic functioning of familial relationships of authority. In the Court's view, parental authority is necessary to prepare children for their “eventual participation in a free society.”<sup>5</sup> The Supreme Court has thus come to define the constitutional right of family privacy in terms of the development of future citizens

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4. Contemporary constitutional scholarship has generally dealt with this conflict by simply ignoring the family's independent constitutional significance, although exceptions to this scholarly oversight do exist. See, e.g., June A. Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. C.R.-C.L. L. REV. 361 (1979); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983). Although Eichbaum and Hafen recognize the doctrinal conflict between individual and family privacy, they draw from this insight very different conclusions from those presented here. In Robert A. Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, although the author does not ignore the family, he contends that “principled legitimacy for parental authority as such in preference to other sources of social power commands no adherents yet among liberal or conservative Justices of this generation.” *Id.* at 351 (footnote omitted). This view is not true today, if it ever was.

5. *Bellotti v. Baird*, 443 U.S. 622, 638-39 (1979).

and the maintenance of a liberal democratic order. Yet in so doing, the Court has opened up the "private" family to political meaning and public control, thereby stripping constitutional protection for the family of its privacy rationale. This Article thus aims first to reveal the political meaning of family life underlying the Supreme Court's commitment to family privacy.

The second goal of this Article is to formulate an alternative constitutional approach grounded in an understanding of the family as a distinctly "public" institution serving distinctly political ends. The Article contends that constitutional protection for the family unit need not—and indeed, should not—proceed from the assumption that the family is an inherently "private" institution. Constitutional protection for the family need not derive solely, or even primarily, from a principle of negative liberty. Rather, constitutional protection of the family ought to reflect an understanding of the family's distinct role as a vital intermediate institution serving the communal ends of political life. The family is deserving of constitutional protection because of its essential role in creating and maintaining our broader political order.<sup>6</sup> In doctrinal terms, the Constitution should be read to prohibit state action that threatens to undermine the family's place in the political structure otherwise established by that document.

The family's structural role in our constitutional scheme of government should be understood as twofold: the family both facilitates and constrains the exercise of state power in a way central to the proper functioning of our political system. The family serves to facilitate existing governmental power by helping to create responsible individuals capable of participating in civil and political life. Whereas the doctrine of individual privacy simply assumes the existence of responsible, self-governing individuals, the approach advocated here recognizes that the virtues of family life—and in particular the loving authority of the parental role—are necessary for the promotion and encouragement of a responsible citizenry. Yet families also play a vital role in maintaining the diverse moral values and traditions that

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6. Cf. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991) ("A close look at the Bill [of Rights] reveals structural ideas tightly interconnected with language of rights; states' rights and majority rights alongside individual and minority rights; and protection of various intermediate associations—church, militia, and jury—designed to create an educated and virtuous electorate."). The main thesis of this Article would add implied protection for the family to Professor Amar's list of intermediate associations expressly mentioned in the Constitution.

comprise the pluralist foundation of our liberal political order, values and traditions that in turn serve to counter the threat that unmediated state power poses to moral diversity. The family's role in nourishing and sustaining diverse moral traditions is what in part distinguishes our liberal democracy from totalitarian political regimes committed to the elimination of the "private" spheres of social life. As the locus of potential political resistance, the family acts as an important institutional check on the power of the state to mold citizens in its own image.

Yet not just any family structure will succeed in sustaining the particular political system established by our Constitution. A liberal democracy requires a corresponding *substantive* vision of family life. Families are called on to promote the development of individuals possessing values, expectations, and aspirations consistent with a liberal democracy. They must carry out their primary obligation of educating children in the civic virtues, initiating them into an understanding of the political principles that will ultimately tie them to the broader social and political community. To this extent, the family's role in initiating children into political life suggests that there must be some constitutional limits to the degree of family diversity a liberal democracy may tolerate.<sup>7</sup> When the Supreme Court extends protection to the family unit, therefore, it is not merely carving out a private sphere devoid of substantive content—a domestic realm of negative liberty. Rather, it is designing specific values and institutional structures that serve specific political ends.

Once we recognize that the structure of our political order requires a corresponding substantive vision of family life, we must determine the outlines of that substantive vision. This Article contends that families can only succeed in the task of raising children committed to political justice if the family itself is an institution committed to fair, noncoercive practices. In constitutional terms, this means that the structure of our government rests on a promise of family justice.<sup>8</sup> The doctrine of fam-

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7. It is unclear, for example, whether the liberal principle of toleration must—or should—extend to the family that raises a child in a manner incompatible with the child's future ability to participate in the broader political or civil community. In extreme cases, of course, the state justifies intolerance of such family values by labelling the behavior "child abuse" and removing the child from the home. The issue of the "incompatible" family tradition and the potential limits to liberalism's toleration of diverse family traditions is discussed later in this Article. See *infra* text accompanying notes 253-56.

8. For a fuller elaboration of the meaning of family justice, including a discussion of

ily justice presented in the final section of this Article constitutes an initial effort to make good on that constitutional promise.

The theory of family justice offers an alternative approach to the family in constitutional law. The linchpin of this theory is the recognition that the government necessarily plays a role in the formation and maintenance of family life. The theory of family justice posits that this role must nevertheless be limited by the government's responsibility to sustain family lives compatible with a liberal democratic order. The normative content of this theory—the idea that political justice requires a corresponding vision of family justice enforceable under the Constitution—is elaborated at the conclusion of this Article.

Part II of this Article sets forth the conventional account of the modern family as a private entity separate from and opposed to the public world of work and politics. This Part outlines the portrait of the private family drawn by many contemporary social historians and political theorists, a portrait that underlies the prevailing view of the development of privacy doctrine in constitutional law. It challenges the recent tendency to explain constitutional privacy in terms of a steady evolution away from a private domestic sphere defined by status relationships toward one defined by the voluntary association of equal individuals. Instead, Part II argues that constitutional protection for the family has remained a dominant focus of the privacy cases, evolving alongside the right of individual autonomy. In this manner, the doctrinal framework of constitutional privacy has extended protection to both the individual and the family unit.

Part III dispels the illusion of harmony between individual and family privacy and draws into question the "privacy" basis for constitutional protection of the family. To illustrate the central conflict within contemporary privacy doctrine between individual freedom and communal authority, this Part discusses the recent Supreme Court decision in *Hodgson v. Minnesota*.<sup>9</sup> *Hodgson* presents the question whether a state may require notification of both parents that their minor child intends to have an abortion. It is a case that pits the individual right of the minor to decide whether to obtain an abortion against the right of her

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the traditional dichotomy between principles of justice and principles of family life, see *infra* notes 219-64 and accompanying text.

9. 497 U.S. 417 (1990). The decision in *Hodgson* upholding parental notification with judicial bypass was recently reaffirmed in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).



parents to help guide her decision. This Part focuses on Justice Stevens's opinion in *Hodgson* in order to show how the claim of individual privacy is inherently at odds with the concept of a loving domestic sphere free from governmental intrusion. It explores Justice Stevens's effort to protect the family unit, particularly the authority of parents, while simultaneously preserving the autonomy of individual family members. His effort is important not because he succeeds—he does not—but because it reveals the political function of family life within our liberal democracy. Although attentive to the political dimension of family life, Stevens nevertheless fails to confront the implications of his own insights for the doctrine of constitutional privacy. His opinion never breaks away from the prevailing view of the family as a sphere of negative liberty, free of political significance.

Part IV presents an alternative model of the family's place under the Constitution. Rejecting the prevailing model of the family as a private association, this alternative approach is rooted in an understanding of the family as an intermediate political institution, one that mediates the direct relationship between the individual and the state. Subpart A sets forth a critique of the traditional understanding of the family as a private entity separate from and opposed to the public sphere of politics and law. This subpart offers an alternative historical account of the family as an inherently and necessarily public institution subject to social and political norms. Subpart B presents the conservative version of this "public" model of the family—a version that appears to animate the Supreme Court's emerging deference to state laws affecting family life. The view of the family as a public institution, however, also possesses the normative material for constructing a progressive vision for the family's role in our political order. Subpart C explores the implications of such a progressive vision for constitutional law and presents an alternative constitutional model of family justice.

Part IV concludes that the structure of government guaranteed by the Constitution puts constraints on the power of government to create and regulate family life—constraints determined not by the family's status as a "private" institution, but by the family's political role in our liberal democratic scheme of government. Illuminating the nature of that political role and the contours of those governmental constraints is the final subject of this essay.

## II. THE CONVENTIONAL PORTRAIT OF CONSTITUTIONAL PRIVACY

Individualism, brought forth within the family, would turn against it.

—Brigitte Berger & Peter L. Berger,  
*The War over the Family*<sup>10</sup>

There exists a widely shared perception that constitutional liberty extends protection to individual privacy.<sup>11</sup> Conventional wisdom holds that privacy doctrine focuses predominantly, if not exclusively, on the protection of individual choice in matters of a highly personal nature. In this prevailing view, the family is constitutionally significant only because it falls within the sphere of interests thought to be essential to individual freedom. The debate surrounding constitutional privacy has been seen, therefore, as a dispute regarding the proper scope of this individual right. The cases framing this debate—*Griswold v. Connecticut*,<sup>12</sup> *Roe v. Wade*,<sup>13</sup> *Moore v. City of East Cleveland*,<sup>14</sup> and most recently, *Bowers v. Hardwick*<sup>15</sup>—are viewed as marking the boundaries of this individual sphere of private choice. From this perspective, *Bowers* served to settle, at least in part, the debate over the scope of individual privacy by holding that constitutional freedom of choice extends no further than the traditional family. In this view, the family is constitutionally significant because it marks the boundaries to the personal realm of individual choice.<sup>16</sup>

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10. BRIGITTE BERGER & PETER L. BERGER, *THE WAR OVER THE FAMILY: CAPTURING THE MIDDLE GROUND* 103 (1983), quoted in Susan Cohen & Mary F. Katzenstein, *The War over the Family Is Not over the Family*, in *FEMINISM, CHILDREN, AND THE NEW FAMILIES* 25, 38 (Sanford M. Dornbusch & Myra H. Strober eds., 1988).

11. That this perception is widespread, even among those committed to a judicial philosophy of self-restraint, seems undeniable in light of the recent questioning of then-Judge Clarence Thomas at his confirmation hearing for appointment to the United States Supreme Court. During that hearing, Judge Thomas expressly confirmed his belief that the Fourteenth Amendment protects a right of privacy. See *Excerpts from Senate's Hearings on the Thomas Nomination*, N.Y. TIMES, Sept. 11, 1991, at A22 ("My view is that there is a right to privacy in the Fourteenth Amendment."). Judge Bork has been the most highly visible contemporary critic of this view, a position that he suggests may very well have cost him a seat on the high Court. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 290-92 (1990).

12. 381 U.S. 479 (1965).

13. 410 U.S. 113 (1973).

14. 431 U.S. 494 (1977).

15. 478 U.S. 186 (1986).

16. *Eisenstadt v. Baird*, 405 U.S. 438 (1972), which extended to unmarried persons the right to use contraceptives, poses some embarrassment for this view of constitutional

This Article challenges the accepted notion that constitutional privacy is concerned primarily with safeguarding individual liberty. The conventional view ignores the fact that the family as an independent object of constitutional concern has played a central, if not predominant, role in the development of privacy doctrine. That role has not been restricted to delimiting the sphere of individual privacy. Rather, since the early part of this century, the family has been accorded independent constitutional protection independent of the liberties enjoyed by its individual members. The tension at the heart of constitutional privacy has been, and continues to be, between the doctrines of individual and family privacy: between, in other words, a liberty of individual sovereignty and one of communal self-government.

This Part surveys the doctrinal history of constitutional privacy in an effort to elaborate why the family has been largely ignored by conventional privacy scholarship. Part of the reason for the family's absence from that scholarship lies in the account of family life set forth in the prevailing social history. Although the family has only recently come to the attention of social historians,<sup>17</sup> a general understanding has emerged regarding the development of the modern family. This understanding teaches that sometime between the sixteenth and nineteenth centuries the family underwent a radical transformation from a public to a private institution.<sup>18</sup> In this view, the family evolved from an institution deeply connected with the social and political com-

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privacy. Although the case did involve the individual's right to decide whether to conceive—a right arguably falling within the realm of decisions relating to traditional family life—the *Eisenstadt* Court nevertheless expressly sanctioned contraceptive use outside the marital relationship, and therefore outside traditional family life. See *infra* notes 73-75 and accompanying text.

17. Phillippe Ariès is generally credited with having established the family as a focus of serious historical inquiry. PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* (Robert Baldick trans., 1962); see Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1138 (noting that "[i]n the twenty-four years since that work appeared, . . . the body of work in this area has grown immensely"). Of course, eighty years earlier, Frederick Engels developed an historical theory of the family. FREDERICK ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* (1972); see ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 74 (1988) ("Engels' own work is an attempt to trace the development of the family and, consequently, of women's work in relation to what he calls, revealingly, the development of 'labor.'").

18. See generally NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835* (1977); CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* (1980); John Demos, *Images of the American Family, Then and Now*, in *CHANGING IMAGES OF THE FAMILY* 43 (Virginia Tufte & Barbara Myerhoff eds., 1979).

munity into one separate from, and even in opposition to, the public sphere of work and politics. This evolution of the family is understood to have occurred along two distinct, but purportedly complementary, trajectories. The first concerns the family's perceived transition from a public to a private institution, or what will be called the "privatization" of the family. The second concerns the family's perceived transition from a hierarchical community to an egalitarian association of individuals, or what will be referred to as the "liberalization" of the family. The prevailing view sees these two transitions as being compatible—two aspects of the broader historical movement from "status" to "contract."<sup>19</sup>

The traditional account of constitutional privacy has been refracted through the lens of this social history. Privacy doctrine is generally understood to have itself evolved from protecting the integrity of the family unit to protecting the autonomy of individuals in personal matters. Yet the effect of this historical lens has been one of distortion rather than clarification. The prevailing account of constitutional privacy views the doctrine as having "moved" in the same direction as the social history. It perceives that constitutional liberty has evolved from a doctrine protecting status and family rights to one protecting contract and individual autonomy. As this Part argues, however, the family as an independent institution has not in fact withered out of constitutional existence, but is very much alive in privacy doctrine. The family as an independent institution continues to serve as a vital and important measure of constitutional liberty.

#### *A. The Privatization of the Family*

The concept of family privacy generally is traced to the rise of the modern family sometime during the nineteenth century. According to traditional social history, the pre-industrial family that existed in the United States prior to the nineteenth century was not viewed as a private entity distinct from the larger society.

Through much of the colonial period, most colonists conceived of the family as part of a hierarchically organized, interdependent society rather than as a separate and distinct sphere of experience. Households were tightly bound to the rest of society by taut strings of reciprocity. Family and community were,

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19. See *infra* notes 55-83 and accompanying text.

a seventeenth-century author asserted, "a lively representation" of each other. . . . A wide array of duties grew out of the public nature and communal obligations of households in an agrarian, mercantilist society. Family responsibilities ranged from economic production and the transmission of estates to craft training and dependent care. Though most fully defined as such in the New England provinces, throughout colonial America the family was seen as a public institution tightly integrated into a well-ordered society: "a little commonwealth" in historian John Demos's succinct phrase.<sup>20</sup>

This "little commonwealth" of family life was public not only in the economic sense, but as the phrase implies, in the full political sense as well. For seventeenth century political theorists, familial and political authority were analogous, if not identical.<sup>21</sup> In probably the best known example in preliberal political thought, Robert Filmer developed his theory of the patriarchal state by appealing to the natural authority of the father as justification for the natural authority of the sovereign.<sup>22</sup>

The traditional history posits that the rise of industrial capitalism in the nineteenth century brought about a profound

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20. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 4-5 (1985) (quoting JOHN DEMOS, *A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY* at x (1970)); see also Ellen Dubois, *The Radicalism of the Woman Suffrage Movement: Notes Toward the Reconstruction of Nineteenth-Century Feminism*, 3 FEMINIST STUD. 63, 64 (1975) ("In seventeenth-century New England, all community functions—production, socialization, civil government, religious life—presumed the family as the basic unit of social organization."); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1516 (1983) (describing how under feudalism, "[t]he hierarchical family was an integral part of hierarchical society"); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1835 n.120 (1985) (noting that "[e]arlier centuries [than the nineteenth] did not perceive clear boundaries between the family and society, and were willing to intervene directly in families and to use families to carry out the policies of the state").

21. See JEAN B. ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* 100-08 (1981); Teitelbaum, *supra* note 17, at 1139.

22. See ROBERT FILMER, *PATRIARCHA AND OTHER POLITICAL WORKS* (Peter Laslett ed., 1949). As Elshtain aptly describes:

In Filmer's world there is no split between, or even a drawing of public-private lines; indeed, there is no private sphere—in the sense of a realm demarcated from politics—nor political sphere—in the sense of a realm diverging from the private—at all. Filmer so thoroughly politicizes the family and familializes the commonwealth that there is no room for individuals, whether male or female, to conceive of themselves as having a number of diverse roles to play.

ELSHTAIN, *supra* note 21, at 103; see also LINDA J. NICHOLSON, *GENDER AND HISTORY: THE LIMITS OF SOCIAL THEORY IN THE AGE OF THE FAMILY* 134 (1986) ("Underlying Filmer's defense of the divine right of kings was an identification of familial and political authority extending back to Adam.").

change in the relationship between the family and the larger society.<sup>23</sup> "[F]amilies began to shed their public, multifunctional forms and stand in an increasingly segregated, private realm of society."<sup>24</sup> As productive work previously performed within the family was removed to the outside workplace, a radical separation of the home and marketplace emerged.<sup>25</sup> In addition, other societal changes are viewed as having contributed to the privatization of the family during the post-Revolutionary period, including the effects of declining family size.<sup>26</sup> In the wake of these material changes, the home came to be viewed in private terms as a distinctly domestic sphere.

In this view of the family, privatization also worked a qualitative change in the nature of family life. Under the mantle of

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23. With the ascendance of liberalism, this change is understood to have occurred within political theory as well. Beginning with Hobbes and Locke, "patriarchalism lost its credibility as a full-blown justification for, and theory of, politics." ELSHTAIN, *supra* note 21, at 125. As will be seen in the subpart that follows, however, patriarchy would not lose credibility as a normative ideal of family life, even within liberal theory, for another three centuries. See *infra* notes 55-83 and accompanying text.

24. GROSSBERG, *supra* note 20, at 6.

25. As one author has observed:

Prior to the opening of the 19th century the vast majority of people in the world lived on farms or in peasant villages. And for almost all of them the family was a cooperative economic unit, with children and mother working along with husband, even though usually there was a division of labor by gender. This was true whether production was for subsistence or for sale. Even those relatively few families which lived and worked in towns acted as cooperative enterprises in their shops, inns, and other businesses. Home and work were close together, and wife and husband participated in both. . . . This situation would change dramatically with the spread of the industrial factory system in both Europe and America after the 18th century.

DEGLER, *supra* note 18, at 5; see also NICHOLSON, *supra* note 22, at 106-07. For a socialist perspective on this radical separation, see ELI ZARETSKY, CAPITALISM, THE FAMILY, AND PERSONAL LIFE 17 (rev. expanded ed. 1986) ("[T]he ideology of the family as an 'independent' or 'private' institution is the counterpart to the idea of the economy as a separate realm, one that capitalism over centuries wrested free of feudal restrictions, customary law, and state and clerical intervention.").

26. Michael Grossberg has identified "[a] series of interconnected changes [that] marked the crucial transition of the family from a public to a private institution." GROSSBERG, *supra* note 20, at 6. He observes:

The economic moorings of the household shifted from production toward consumption. Generational influences on family formation declined. New fertility patterns resulted in declining family size. A new domestic egalitarianism emerged to challenge patriarchy. Other alterations included companionate marital practices and contractual notions of spousal relations, an elevation of childhood and motherhood to favored status within the home, an emphasis on domestic intimacy as a counterweight to marketplace competition, and a more clearly defined use of private property as the major source of domestic autonomy.

*Id.*

privateness, the family has increasingly come to be seen as a private "haven" in a "heartless" public world of politics and financial interest.<sup>27</sup> "The family as refuge, in which the wife assumed a special role in preserving moral values, managing the home, and rearing the children was an essential condition of survival in industrial society: no man could endure an unrelieved competitive existence."<sup>28</sup> In contrast to the selfish individualism and amorality of the political and economic spheres, the family was thought to operate according to the private virtues of love, altruism and dependence.<sup>29</sup> Moreover, these private virtues traditionally were the exclusive domain of women. The "public-domestic distinction" arose as a deeply gendered ideological construct associating the amorality of the public sphere with men and the morality of the private sphere with women. The gender implications of the public-domestic distinction are most forcefully displayed by the "cult of domesticity," which came to define women's role in the late nineteenth century,<sup>30</sup> and by the rise of the ideology of separate spheres in law.<sup>31</sup> According to most commentators, the boundaries of the private sphere settled

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27. See CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* (1979); Eichbaum, *supra* note 4, at 368 (noting that "the implicit foundation of a familial privacy right is the dominant cultural myth of the family as 'haven in a heartless world'").

28. Teitelbaum, *supra* note 17, at 1137. *But see id.* (criticizing "the crudeness of the baldest forms of these instrumental theories" that link "[c]hanges in the family . . . directly to changes in economic arrangements or demands").

29. See NICHOLSON, *supra* note 22, at 43-44; Olsen, *supra* note 20, at 1505 ("The morality of altruism has been supposed to animate the family to the same extent that the morality of individualism has been supposed to pervade the marketplace.").

30. Martha Minow, "Forming Underneath Everything That Grows:" *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 836.

Although there is some disagreement about when the cult of domesticity developed and gained dominance, . . . scholars contrast a colonial era in which women held an important status and participated in the economic and public life of the community with later periods when women's family roles excluded them from participation in the broader community.

*Id.* Historians are beginning to explore the class bias underlying the cult of domesticity by examining its relevance to women outside the urban, middle-class environment. *See id.* at 866-77; *see also* ANN DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* 56 (1977); NICHOLSON, *supra* note 22, at 44-45.

31. *See, e.g.,* *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872); *see also* PATEMAN, *supra* note 1, at 123 ("As capitalism and its specific form of sexual as well as class division of labour developed, . . . wives were pushed into a few, low-status areas of employment or kept out of economic life altogether, relegated to their 'natural', dependent, place in the private, familial sphere."); Olsen, *supra* note 20, at 1499 ("In the early nineteenth century, as men's work was largely removed to the factory while women's work remained primarily in the home, there came to be a sharp dichotomy between 'the home' and 'the [workaday] world.'") (alteration in original) (footnote omitted)).

neatly, if restrictively, around a vision of the loving, maternal home.<sup>32</sup>

The traditional history of this transition to the private family is mirrored in the rise of the constitutional doctrine of family privacy. Although the family finds no express protection in the Constitution, the Supreme Court has established a strong tradition of constitutional protection for "the sanctity of the family" under the Due Process Clause of the Fourteenth Amendment.<sup>33</sup> The Court has interpreted the constitutional guarantee of "liberty" in that clause as recognizing a "private realm of family life which the state cannot enter."<sup>34</sup> This constitutional connection between liberty and privacy derives from one of the central tenets in liberal political theory: the distinction between the public and private spheres of human life.<sup>35</sup> Liberal theory conceives of

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32. For discussion of the way in which this conventional history of the family fails to reflect the social reality of nineteenth century family life, see Minow, *supra* note 30, at 851-64. Professor Minow points out the racial and class implications of the conventional ideology. See *id.* at 860-77.

33. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); see also Martha Minow, *We, the Family: Constitutional Rights and American Families*, J. AM. HIST. 959, 962 (1987) (describing how Supreme Court decisions "have tended to take as a given the narrative of continuous constitutional protection for the private sphere of the family"); W. Cole Durham, Jr., Comment, *The Relationship of Constitution and Tradition*, 53 S. CAL. L. REV. 645, 652 (1980) (noting that "[a]lthough the United States Constitution does not expressly provide protection to the family as an institution, there is a long line of constitutional cases that appear to have precisely that effect").

In addition to *Moore*, other cases falling within this tradition of family privacy under the Due Process Clause include *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977); *Cleveland Board of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Related cases arising under the First Amendment and the Equal Protection Clause include *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

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

35. As the political theory that dominates our constitutional discourse, contemporary liberalism serves to orient our inquiry into the history of the family. Liberalism may be crudely but accurately defined as a theory committed to the ideal of individual freedom and to the principle of individual rights securing that freedom. John Stuart Mill described liberalism as committed to "one very simple principle":

That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. . . . The only part of the conduct of anyone for which he is amenable to



the world as divided between the public sphere of state regulation and the private sphere of individual freedom.<sup>36</sup> Under liberalism, the state's limited function "is to guarantee to all individuals an equal opportunity for moral development and self-fulfillment."<sup>37</sup> Although the state may act to safeguard the principles of individual autonomy and freedom, it must nevertheless "refrain from intervention in the 'private' lives of individuals and from imposing moral values that would threaten individual autonomy."<sup>38</sup> The most sacred public right—the

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society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

JOHN S. MILL, ON LIBERTY (1859), reprinted in PREFACES TO LIBERTY: SELECTED WRITINGS OF JOHN STUART MILL 236, 250-51 (Bernard Wishy ed., 1984).

There is a growing body of literature devoted to demonstrating the importance of classical republican ideology for constitutional law and theory. See, e.g., Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). The theory of family justice offered in Part IV of this Article might be understood to exhibit a healthy republican skepticism toward the traditional liberal conception of the private, prepolitical family. As discussed in that Part, however, family justice remains committed to pluralistic family forms and family traditions and, to that extent at least, parts company with republican commitment to the common good. For a discussion of the divide between feminism and civic republicanism over the issue of social diversity, see Anne C. Dailey, *Feminism's Return to Liberalism*, 102 YALE L.J. 1265 (1993).

36. See JAGGAR, *supra* note 17, at 34 ("In the context of liberalism, those aspects of life that may legitimately be regulated by the state constitute the public realm; the private realm is those aspects of life where the state has no legitimate authority to intervene."); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) ("Although one can find the origins of the idea of a distinctively private realm in the natural-rights liberalism of Locke and his successors, only in the nineteenth century was the public/private distinction brought to the center of the stage in American legal and political theory."). The distinction between public and private has also been understood as part of liberalism's approach to "seeing the world as a series of complex dualities." Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1075 (1980).

37. JAGGAR, *supra* note 17, at 35.

38. *Id.* See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (noting that "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government"); see also ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 32 (1988) ("The use of 'privacy' in connection with governmental interference with sexual, reproductive, and familial free choice seems to derive from the concept of 'the private' utilized in the public/private distinction . . .").

The public-private distinction underlies the doctrine in many constitutional areas. See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 (1989) (Rehnquist, C.J.) ("The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."); *id.* at 203-04 (Brennan, J., dissenting) (agreeing that "the Due Process Clause as construed by our prior cases [may create] no general right to basic governmental services," although noting that "[n]o one . . . has asked the Court to proclaim that, as a general matter, the Constitution safeguards positive as well as negative liberties"); see also Susan Bandes, *The*

right that government was instituted to safeguard—is the right to keep government out of one's affairs.<sup>39</sup>

The Supreme Court first gave express constitutional recognition to the right of privacy in the 1965 decision in *Griswold v. Connecticut*,<sup>40</sup> a case challenging a state law that prohibited the use of contraceptives by married couples. In striking down the law, Justice Douglas described the nature of this fundamental freedom:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>41</sup>

The decision in *Griswold* thus established constitutional protection for the privacy of the traditional marital unit. Under *Griswold*, constitutional liberty meant protection for family relationships.

Although the Supreme Court did not expressly articulate this right of family privacy until the decision in *Griswold*, it now locates the origin of the doctrine of family privacy in two decisions from the 1920s, *Meyer v. Nebraska*<sup>42</sup> and *Pierce v. Society of Sisters*.<sup>43</sup> Although these two cases were originally decided on the basis of the fundamental right of contract, the Court has since identified them as the precursors to the modern right of privacy.<sup>44</sup> In *Meyer*, the Court invalidated a state statute that prohibited the teaching of subjects in any language other than

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*Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (discussing public-private distinction underlying state-action doctrine).

39. Laurence Tribe has described "the animating paradox of the right of privacy" as "revered by those who live within civil society as a means of repudiating the claims that civil society would make of them." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-1, at 1302 (2d ed. 1988).

40. 381 U.S. 479 (1965).

41. *Id.* at 486.

42. 262 U.S. 390 (1923).

43. 268 U.S. 510 (1925).

44. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986). The Court first identified this tradition of family privacy in 1944 in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (describing *Pierce* and *Meyer* as decisions that "have respected the private realm of family life which the state cannot enter").

English.<sup>45</sup> Because the appellant was an instructor, the "liberty interest" relied on by the Court to invalidate the law was the instructor's right "to teach and the right of the parents to engage him . . . to instruct their children."<sup>46</sup> However, the Court suggested that more was at stake in *Meyer* than simply the economic liberties of instructor and parent. Although the Court clarified that parents have the right to enter into this educational contract, this was a right they possessed *as parents*. The Court implied that their right to contract derived from "the power of parents to control the education of their own."<sup>47</sup>

Relying on *Meyer*, the Court in *Pierce* struck down an Oregon statute requiring public school education on the ground that the law "unreasonably interferes with the liberty of parents to direct the upbringing and education of children under their control."<sup>48</sup> The Court further elaborated:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>49</sup>

Because the parents were not parties to the suit, however, the Court went on to base its decision on the state's unreasonable interference with the business and property interests of the private schools bringing the suit.<sup>50</sup>

The connection between economic and domestic rights in both *Meyers* and *Pierce* is significant. Both cases were decided at a time when the Supreme Court recognized the right of contract as a fundamental aspect of individual liberty. During the reign of *Lochner v. New York*,<sup>51</sup> the right of contract was viewed as the quintessential "private" right and the market was seen as the paradigmatic "private" ordering mechanism within soci-

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45. *Meyer*, 262 U.S. at 400. The law also prohibited the teaching of all foreign languages prior to the eighth grade. The Nebraska Supreme Court had construed this provision to allow the teaching of the "so-called ancient or dead languages." *Id.* at 400-01.

46. *Id.* at 400.

47. *Id.* at 401.

48. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

49. *Id.* at 535.

50. *See id.* at 535-36.

51. 198 U.S. 45 (1905).

ety.<sup>52</sup> With the recognition of parental rights in *Meyer* and *Pierce*, the Court brought the domestic sphere within the protective scope of the Constitution, thereby establishing limits to the power of the state to regulate within this sphere. The domestic sphere, like the economic marketplace, was "privatized" in the sense that it, too, became a realm of negative liberty whose members had a claim to freedom from state intervention. Soon thereafter, with the demise of economic due process, the economic marketplace "went public," leaving the family alone to define the constitutional sphere of privacy.<sup>53</sup> In this manner, the public-private distinction evolved during this period from a distinction between politics and the marketplace to a distinction between politics and the marketplace on the one hand and the family on the other. With the emergence of the private family, the public-domestic distinction was established in constitutional law.<sup>54</sup>

### B. *The Liberalization of the Family*

As indicated, the traditional social history of the family does not conclude with the family's transition from a public to a private institution. The history goes on to trace a subsequent movement toward increasing individualism and equality within the family.<sup>55</sup> The rise of individualism within the domestic sphere is often associated with the broader progression described by Sir Henry Maine as "a movement from *Status to Contract*."<sup>56</sup>

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52. See generally Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

53. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). The family is perhaps the only constitutionally protected intermediate institution not expressly recognized by the Constitution. Those institutions expressly identified include the church, the militia, and the jury. See Amar, *supra* note 6, at 1132.

54. Although the "public-domestic" distinction emerged early in this century with the development of the doctrine of family privacy, only recently did feminist theorists uncover this "hidden" distinction in political and constitutional theory. See, e.g., OKIN, *supra* note 1; PATEMAN, *supra* note 1; Olsen, *supra* note 20.

55. Frances Olsen has termed this movement "the liberalization of the family." Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 840 n.10 (1985) (defining "liberalization of the family" to include the "shift from the concept of a private family into which the state should not intervene to the concept of individual privacy regarding intimate relationships").

56. HENRY S. MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 165 (Beacon Paperback ed. 1970) (1861). Maine described progressive societies as "distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take

Martha Minow describes this movement from a medieval world of legal status toward a liberal ideal of individual autonomy:

Legal and political transformations, beginning with the Renaissance and continuing into the present, rested on an emerging idea of the individual who has distinct and self-interested desires and who needs freedom of action and protection from the interference of others. Law and politics increasingly addressed the relationship between the individual and the state, replacing attention to feudal obligations. Renaissance political theorists began to define the task of government as protecting the rights and freedoms of each individual. Centralized governments began to overshadow local lords in power and significance, and eventually national laws became the instrument for effecting sovereign power and preserving individual rights. Extensive trading and marketplace exchanges developed as merchants traveled to buy and sell goods. Contract became the central framework for legal and political relations. Reciprocal—and nonhierarchical—obligations, freely chosen by self-defining beings, became the preferred pattern underlying economic transactions and political action.<sup>57</sup>

Emerging from this account of the history of the family is the conclusion that over the last 150 years the family finally shed the vestiges of its feudal past by moving from an integrated, hierarchical community to an association of equal individuals.<sup>58</sup> This perceived liberalization of the family derives from a perception that the private domestic sphere retained the patriarchal structure that characterized the status hierarchies of feudal life. Under the patriarchal family, men and women were assigned to specific family roles. They were integrated into an hierarchical, unitary organization with men at the top and children at the bottom.

Many historians argue that a new conception of the family as an association of individuals emerged during this century largely as a result of the movements for social equality—particularly those movements seeking greater rights for women.<sup>59</sup> In

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account." *Id.* at 163; see also MARY A. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 41-42 (1981); Minow, *supra* note 30, at 834.

57. MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 123-24 (1990) (describing the prevailing view).

58. See Minow, *supra* note 30, at 833.

59. See Elizabeth B. Clark, *Self-Ownership and the Political Theory of Elizabeth Cady Stanton*, 21 CONN. L. REV. 905, 906 (1989) ("[F]eminism's contribution to liberalism was to reinforce and greatly expand the individual's zone of privacy—to widen the definition of rights beyond the rights of the individual in his civil status to include the rights of the

the view of these historians, the transition toward individualism and equality within the family began with the movement toward greater rights for women in the mid-nineteenth century.<sup>60</sup> They recognize that the private family was not a "haven" for women who were confined within its patriarchal walls.<sup>61</sup>

In the early modern period in the West, where the household was the basic social unit and a male headed that household as a consequence of older patriarchal kinship principles, the male represented the household politically. Political participation was not based on the principle of "one man, one vote," but rather on the principle of "one household, one vote."<sup>62</sup>

The women's movement is understood ultimately to have liberated women from their traditional family roles and to have transformed the private sphere from a patriarchal community to an egalitarian association of individuals.<sup>63</sup> Under pressure from the women's movement, "[t]he patriarch was to be stripped of his power in the home, and adult individuals were to return to full autonomy, thereby perfectly fulfilling the promise of the American Revolution and bringing personal liberty back to the

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individual in her private capacity."); Minow, *supra* note 33, at 971 (noting that "[t]he Court's deployment of rights rhetoric . . . may well have sources in the rhetoric used by and on behalf of women and children in nineteenth- and twentieth-century feminism, Progressivism, and the complex reform movements of the 1960s").

60. This movement gained public recognition in the United States with the celebrated 1848 women's rights convention in Seneca Falls. See generally Alice S. Rossi, *Introduction to Part 2 of THE FEMINIST PAPERS: FROM ADAMS TO DE BEAUVOIR* 241 (Alice S. Rossi ed., 1973) [hereinafter *THE FEMINIST PAPERS*]. Thereafter, the movement saw the adoptions of the Married Woman's Property Acts in the various states, beginning with Mississippi in 1939. See Minow, *supra* note 30, at 830.

61. Not simply deprived of "a room of her own," the nineteenth century wife often suffered physical abuse sanctioned under the doctrine of family privacy. See MINOW, *supra* note 57, at 272.

62. NICHOLSON, *supra* note 22, at 4; see 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*442 ("By marriage, the husband and wife are one person in law; that is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . ."); see also *United States v. Yazell*, 382 U.S. 341, 361 (1966) (Black, J., dissenting) (noting that Blackstone's theory meant that, while the husband and wife are one person in law, "the one is the husband").

63. As Martha Minow states:

[T]he traditional view of the legal history of family relationships described a movement from an era of patriarchal power reinforced by the state, consigning women and children to a private sphere removed from political and economic power, to an era of individual autonomy where each individual could claim and enforce legal rights before the state. According to the traditional story, family law expressed the last remnants of status hierarchies maintained in a feudal order, but its last 150 years marked progress toward the liberal commitment to individual rights.

Minow, *supra* note 30, at 833-34.

most immediate level.”<sup>64</sup>

Among other consequences, the rise of individualism meant that marriage would no longer carry with it the prescribed hierarchical status of husband and wife, but instead would constitute a voluntary association of equal individuals. Although the family still would be considered a private institution, it no longer would operate under the ideology of separate spheres.<sup>65</sup> By this account, the individualist family is no longer an integrated, hierarchical community, but instead a voluntary, consensual association in which individuals of either gender are free to pursue their own conceptions of the good life.<sup>66</sup> Thus, the modern family is not only private but also egalitarian.<sup>67</sup>

The movement toward individual rights within the family during this century may be seen as part of a more general liberal progression toward the elimination of intermediate institutions in political life. The idea of individual privacy derives from liberalism’s “conception of individual self-interest as the only legitimate animating force in society.”<sup>68</sup> From this liberal belief in “the intrinsic and ultimate value of the human individual”<sup>69</sup>

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64. Clark, *supra* note 59, at 907.

65. Beginning with the 1971 decision in *Reed v. Reed*, 404 U.S. 71 (1971), the Supreme Court’s approach to gender under the Equal Protection Clause documents the formal decline of the separate spheres ideology. *See also* *Craig v. Boren*, 429 U.S. 190 (1976). The Court’s reliance on asserted “real” gender differences in recent years, however, arguably reinforces a modern version of the separate spheres ideology. *See, e.g.*, *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (upholding gender-based statutory rape law—which effectively prohibited underage women but not underage men from engaging in sexual relations—on the ground that women can become pregnant).

66. *See, e.g.*, Fran Olsen, *The Politics of Family Law*, 2 J.L. & INEQUALITY 1, 6 (1984) (describing the view of the “liberal” family as “a voluntary collection of individuals held together by bonds of sentiment in an egalitarian structure,” which “constitutes a private realm, clearly divorced from the ‘public sphere’”); Olsen, *supra* note 20, at 1517 (describing “[t]he liberalization of the family [as] marked by shifts toward equal juridical rights and the withdrawal of the state”).

67. By focusing its attention on the gender relations between husbands and wives, the traditional view of the private, egalitarian family obscures the issue of the hierarchy between parent and child. This “hidden” hierarchy is the focus of further discussion below. *See infra* Part III.

68. Morton J. Horwitz, *Republicanism and Liberalism, in* AMERICAN CONSTITUTIONAL THOUGHT 57, 66 (1987). “Liberalism is grounded in a conception of individual self-government. Its institutions are designed primarily to secure individual autonomy: the freedom of each to choose and pursue his own ends, limited only by the principle that others must be free to do likewise.” Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 761 (1989).

69. JAGGAR, *supra* note 17, at 33; *see also* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 172 (1977) (noting that right-based theories “place the individual at the center”).

comes the view that "the concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'"<sup>70</sup> Political rights under liberalism are not distributed on the basis of social or economic standing, and intermediate institutions do not exercise any formal political power. "The evolution of liberalism thus can be understood as an undermining of the vitality of all groups that had held an intermediate position between what we now think of as the sphere of the individual and that of the state."<sup>71</sup> Individual privacy can be understood, therefore, as having eliminated the family as an institution that mediates the relationship between the state and the individual. In political terms, the liberal individual stands alone.

This saga of increasing individualism within the family, like the parallel story of privatization, finds support in the doctrinal history of constitutional privacy. While this view recognizes that *Griswold* and the early privacy cases involved claims asserting a right of family autonomy against state intervention,<sup>72</sup> it considers the 1971 decision in *Eisenstadt v. Baird*<sup>73</sup> as the moment when the Supreme Court shifted ground and clarified—for the moment at least—that the constitutional right of privacy belongs to the individual rather than the family unit. In an oft-quoted passage from that decision, Justice Brennan interpreted *Griswold* as standing for the principle of individual rather than family privacy:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be

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70. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring) (quoting Charles Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288, 288 (1977)).

In his partial dissent in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), Marshall describes the right of individual privacy: "'Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy.'" *Hodgson*, 497 U.S. at 463 (Marshall, J., concurring in part and dissenting in part) (quoting *American College*, 476 U.S. at 772).

71. *Frug*, *supra* note 36, at 1088.

72. *See supra* text accompanying notes 40-44.

73. 405 U.S. 438 (1972) (striking down a law prohibiting the distribution of contraceptives to unmarried persons on equal protection grounds).



free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>74</sup>

Conventional doctrinal history interprets *Eisenstadt* and subsequent decisions as confirming that the right of privacy, although historically rooted in family relations, actually protects the *individual* right of personal liberty.<sup>75</sup> In constitutional as well as political terms, therefore, the individual would stand alone.

The high-water mark of this shift to an individualist conception of the right of constitutional privacy is, of course, the decision in *Roe v. Wade*,<sup>76</sup> in which the Supreme Court held that a woman's right to decide whether to terminate her pregnancy is "founded in the Fourteenth Amendment's concept of personal liberty." *Roe* said nothing about the autonomy of the family unit; rather, the case concerned the individual woman's right to reproductive choice. Three years later, however, in *Planned Parenthood v. Danforth*,<sup>77</sup> the Court affirmed the individual's constitutional liberation from familial ties implicit in *Roe*. In *Danforth*, the Supreme Court struck down an abortion law requiring both spousal and parental consent. With regard to the spousal consent provision, the Court acknowledged the legitimacy of the asserted state goal "of fostering mutuality and trust

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74. *Id.* at 453.

75. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (noting that "[o]ur cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government" (citing *Griswold*; *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977))).

Laurence Tribe notes that:

[T]he stereotypical 'family unit' that is so much a part of our constitutional rhetoric is becoming decreasingly central to our constitutional reality. Such 'exercises of familial rights and responsibilities' as remain prove to be *individual* powers to resist governmental determination of who shall be born, with whom one shall live, and what values shall be transmitted.

TRIBE, *supra* note 39, § 15-20, at 1416-17 (footnotes omitted); see also GLENDON, *supra* note 56, at 42 (describing the "'emergence of the self-determining, separate individual from the network of family and group ties'" in American constitutional law) (quoting Carlton Allen, *Introduction to MAINE*, *supra* note 56, at xxvi); Jane Rutherford, *Beyond Individual Privacy: A New Theory of Family Rights*, 39 U. FLA. L. REV. 627, 636 (1987) (describing how "[t]he new constitutional right of privacy quickly became not a family right, but an individual right"); *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1164 (1980) ("Since *Roe v. Wade*, the Court . . . has made clear that these rights [of privacy] belong to individuals rather than family units and has held that some exist regardless of whether their exercise is in a traditional family context.") (footnote omitted).

76. 410 U.S. 113, 153 (1973).

77. 428 U.S. 52 (1976).

in a marriage, and of strengthening the marital relationship and the marriage institution.”<sup>78</sup> Although the Court expressed appreciation for “the importance of the marital relationship in our society,”<sup>79</sup> it ultimately refused to elevate the paradigm of family privacy and marital harmony over the right of the individual woman to choose. Values derived solely from the privatization of the family would have justified spousal consent in the interest of preserving the integrity of the institution; nevertheless, the Court found that the ideal of family unity must give way to the right of a woman to choose the course of her pregnancy. “The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail.”<sup>80</sup>

With regard to the issue of parental consent, the Court in *Danforth* similarly considered the state’s asserted interests in safeguarding the family unit and preserving parental authority,<sup>81</sup> but ultimately concluded that such goals were ill-served “where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure.”<sup>82</sup> Peering through the lens of individual privacy, the constitutional eye sees only a fractured association of rights-bearing individuals.

The doctrine of individual privacy does not perceive any direct connection between the private sphere and family life. Although decisions relating to family life are undoubtedly central to a person’s identity, they do not define its limits.

While it is true that [the privacy cases] may be characterized by their connection to protection of the family, the Court’s conclusion that they extend no further than this boundary ignores the warning . . . against “clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment’s Due Pro-

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78. *Id.* at 71.

79. *Id.* at 69.

80. *Id.* at 71. The Court concluded that “[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.” *Id.* A majority of the Supreme Court recently reaffirmed *Danforth* in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), which struck down a spousal notification provision. Chief Justice Rehnquist argued in dissent that the provision furthers the state’s legitimate interest in promoting “the importance of the marital relationship.” *Id.* at 2871 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting *Danforth*, 428 U.S. at 69).

81. *Danforth*, 428 U.S. at 75.

82. *Id.*

cess Clause.” We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life.<sup>83</sup>

Under the doctrine of individual privacy, the family does not mediate the political or constitutional relationship between the individual and the state. The family as an institution is irrelevant to defining the proper scope of the private sphere. The doctrine of individual privacy eliminates the family from constitutional discourse altogether; it renders the family politically and constitutionally invisible.

### C. *The Conflict Between Privatization and Liberalization*

The traditional story of the liberalization of family life confronts a formidable dilemma: it must account for the fact that the family as a communal unit has been very much visible in the two decades since *Eisenstadt* was decided, and indeed arguably becomes more visible with the passing of each Supreme Court term.<sup>84</sup>

The interpreters of constitutional liberty have never withdrawn protection for the “sanctity” of family life. In *Moore v. City of East Cleveland*, for example, the Court struck down a municipal housing ordinance that a plurality of the Court viewed as “slicing deeply into the family itself.”<sup>85</sup> Similarly, in *Roberts v. United States Jaycees*, the Court discussed the constitutional protection afforded to “personal affiliations” that “attend the creation and sustenance of a family.”<sup>86</sup> In case after case involving constitutional privacy, the Court has emphasized that the family unit and familial relationships define the core of this fundamental interest.<sup>87</sup> As illustrated by the recent decision

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83. *Bowers v. Hardwick*, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting) (citation omitted); see also Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U. L. REV. 765, 772 (1973) (arguing that “[a]t the core of this [private] sphere is the right of the individual to make for himself . . . the fundamental decisions that shape family life”).

84. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The Court has frequently emphasized the importance of the family.”).

85. 431 U.S. 494, 498 (1977).

86. 468 U.S. 609, 619 (1984).

87. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1978) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.”); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 845 (1977) (“[T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights,

in *Michael H. v. Gerald D.*,<sup>88</sup> the Justices appear to agree that constitutional liberty protects the family unit from unjustified state intrusion. In that case, Justice Scalia, speaking for a plurality of the Court, and Brennan, arguing in dissent, agreed that prior cases reflect what Scalia referred to as "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."<sup>89</sup>

The family unit thus clearly continues to play a central role within the broader doctrinal framework of constitutional liberty. But what exactly is this role? We might view the family as serving an instrumental function in defining the reach of individual privacy. In this view, the Constitution extends protection to family relationships because such protection "safeguards the ability independently to define one's identity that is central to any concept of liberty."<sup>90</sup> The family, in other words, provides a useful boundary to confine the otherwise potentially limitless scope of individual liberty. In *Bowers v. Hardwick*,<sup>91</sup> for example, the Court held that the Constitution does not "reach so far" as to protect individual privacy independent of family relations.<sup>92</sup> As Justice Blackmun lamented in dissent, the Court in *Bowers* definitively rejected the notion that the Constitution protects those interests which generally "form so central a part of an individual's life," and instead defined the "boundary" lines of constitutional privacy "by their connection to protection of the family."<sup>93</sup>

*Bowers* elevated the interests of the traditional family unit over those of the autonomous individual standing outside the family realm. In so doing, it necessarily deepened the conflict arising when the will of an individual within the family opposes the will of the family community itself. The family can be an instrument of individual liberty only when the interests of the

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as they have been understood in 'this Nation's history and tradition.'") (footnote omitted) (quoting *Moore*, 431 U.S. at 503)).

88. 491 U.S. 110 (1989).

89. *Id.* at 123. Justice Brennan agreed, noting that if "the plurality meant only to describe the kinds of relationships that develop when parents and children live together (formally or informally) as a family, then the plurality's vision of these cases would be correct." *Id.* at 143 (Brennan, J., dissenting). Justices Scalia and Brennan disagreed, however, over the proper definition of the family for constitutional purposes.

90. *Roberts*, 468 U.S. at 619.

91. 478 U.S. 186 (1986).

92. *Id.* at 191.

93. *Id.* at 204.

individual and the family unit are in harmony. Where families are divided—as, for example, where individuals are opposed to the will of the family community—the family no longer can be seen as serving the individual's needs. The conflict between family and individual privacy becomes manifest the moment individuals within the family disagree over fundamental issues of personal life and they seek, or the state requires, public adjudication of their internal disagreement. Viewed from this perspective, *Bowers* is significant not for the questions it answers about the reach of individual privacy, but for those it raises regarding the role of the family as an independent unit in constitutional law.

The instrumental view of the family is ultimately unsatisfying. Family privacy, far from being instrumental to or even compatible with individual privacy, is deeply antithetical to it. The Supreme Court's express protection for the family as a communal unit simply does not accord with a comprehensive vision of individual autonomy. The rhetoric of family privacy does not conform to an individualistic model. The doctrine of family privacy conceives of individual liberty in the context of communal relations and a shared life. In sharp contrast, the doctrine of individual privacy protects the sovereignty of the individual apart from communal relations, and recognizes value in collective institutions only to the extent that they further individual liberty. Individual privacy perceives family life to exist as a product of individual rather than community will and to serve individual rather than community interests. Although constitutional privacy may present itself as a seamless doctrinal web, the subdoctrines of individual and family privacy are in conflict over the question whether the fundamental sphere of liberty stops with the institutional community or extends to the individual family member.

Individual autonomy and communal family life are compatible only so long as family life remains harmonious. When family consensus breaks down, and family members either voluntarily seek or are legally required to seek public resolution of their differences, constitutional protection for the family unit becomes problematic. It is to this conflict within the "private" family that this Article now shall turn.

## III. CONFLICT WITHIN THE "PRIVATE" FAMILY

Our political system is superimposed on and presupposes a social system of family units, not just of isolated individuals. No assumption more deeply underlies our society than the assumption that it is the individual who decides whether to raise a family, with whom to raise a family, and, in broad measure, what values and beliefs to inculcate in the children who will later exercise the rights and responsibilities of citizens and heads of families.

—Philip Heymann & Douglas Barzelay, *The Forest and the Trees*<sup>94</sup>

In *Hodgson v. Minnesota*,<sup>95</sup> the Supreme Court addressed the question posed at the end of Part I: how do we reconcile the doctrines of individual and family privacy when the challenge to familial authority comes from within the family unit itself? This Part argues that the doctrine of constitutional liberty can never transcend the conflict between individual and family privacy as long as we continue to conceive of the family as a private institution serving private ends. As the decision in *Hodgson* makes clear, the principle of individual sovereignty demands a family open to public scrutiny; constitutional liberty demands a family of political significance. As will be seen, Justice Stevens's majority opinion in *Hodgson* illuminates the political dimensions of family life even as it strains unsuccessfully to maintain a workable version of family privacy.

In *Hodgson*, the plaintiffs challenged a Minnesota statute that required a physician to notify both parents prior to performing an abortion on a minor woman. The statute was enacted in 1981 as an amendment to the Minors' Consent to Health Services Act.<sup>96</sup> Prior to this amendment, the Act authorized any minor to give consent without any parental involvement for the treatment of "pregnancy and conditions associated therewith," including abortion services.<sup>97</sup> The amended statute defined "parent" as "both parents of the pregnant woman if they are both living, [or] one parent of the pregnant woman if only

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94. Heymann & Barzelay, *supra* note 83, at 772.

95. 497 U.S. 417 (1990).

96. *Id.* at 423 (citing MINN. STAT. ANN. § 144.343 (West 1989 & Supp. 1992)). The statute specified that notice be made by the physician or her agent in person or by certified mail at least 48 hours before the procedure was to be performed. *Id.* at 423 n.4.

97. *Id.* at 423 & n.1. The statute also authorized the minor to consent to services related to "venereal disease, alcohol and other drug abuse." *Id.*

one is living or if the second one cannot be located through reasonably diligent effort.”<sup>98</sup> Exceptions to the notification requirement were allowed when the abortion was necessary to save the woman’s life, when both parents had consented in writing, or when the woman had been the victim of parental abuse or neglect.<sup>99</sup> Finally, the statute provided that in the event that the parental notification provision was ever enjoined, the same notification provision with judicial bypass would go into effect.<sup>100</sup>

Although the case spawned a confusing array of opinions by a fractured Supreme Court, the ultimate holding of the case is relatively straightforward. A majority of the Court voted to strike down the two-parent notification statute standing alone,<sup>101</sup> while a different majority voted to uphold the same notification requirement when joined with a provision for judicial bypass. Justice Stevens authored the majority opinion striking down the notification provision standing alone,<sup>102</sup> and it is his opinion that will be the initial focus of discussion.

#### A. *Authority Within the Private Family*

In *Hodgson*, Justice Stevens holds that the two-parent notification statute constitutes an illegitimate state intrusion into the private sphere of family life.<sup>103</sup> His conclusion draws on the conventional portrait of family privacy in constitutional law: “[T]he family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is

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98. *Id.* at 425-26 & n.6.

99. In the case of abuse or neglect, the statute provided that the proper authorities were to be notified.

100. *Id.* at 427 & n.9. This procedure allowed a minor to avoid notifying her parents if she could convince a judge that she was “mature and capable of giving informed consent to the proposed abortion,” or that an abortion without parental notification would be in her best interest. *Id.*

101. *Id.* at 450-55 (Stevens, J.). Justice Marshall, joined by Justices Brennan and Blackmun, concluded that parental notification in any form, whether to one or two parents and with or without judicial bypass, violates the minor’s constitutional right of decisional privacy. *See id.* at 461-79 (Marshall, J., concurring in part and dissenting in part).

102. Justice Stevens also authored a dissent from the Court’s judgment upholding notification joined with judicial bypass. *See id.* at 455-58 (Stevens, J., dissenting in part).

103. Although Justice Stevens concludes that the state does have legitimate interests in protecting the welfare of the pregnant minor and the rights of the parents to raise their daughter, he strikes down the two-parent notification provision on the ground that those interests are sufficiently protected by a requirement that only one parent be notified. *See id.* at 452 (“The second parent may well have an interest in the minor’s abortion decision, making full communication among all members of a family desirable in some cases, but such communication may not be decreed by the State.”).

protected by the Constitution against undue state interference."<sup>104</sup> Cases invoking the constitutional doctrine of family privacy have invariably quoted, as does Stevens, from the 1944 decision of *Prince v. Massachusetts*,<sup>105</sup> in which the Supreme Court stated that the Constitution protects "a private realm of family life which the state cannot enter."<sup>106</sup> As discussed earlier,<sup>107</sup> this doctrine of family privacy is related to individual privacy, in that both forms of privacy appeal to the liberal conception of a private sphere of negative liberty. Whereas individual privacy concerns the right of individuals to make decisions regarding themselves, family privacy concerns the right of the domestic community to make decisions regarding its own welfare. The doctrine of family privacy protects a communal right of self-governance.<sup>108</sup>

The concept of a self-governing institution immediately poses a profound problem for liberalism's commitment to individual sovereignty. Communal rights are compatible with liberal theory only to the extent that individuals within the relevant community agree.<sup>109</sup> When families are divided, the rhetoric of communal rights may serve to mask conflict and coercion behind an ideal of ideal family harmony and love.<sup>110</sup> Although in *Hodgson* Justice Stevens recognizes the reality of intrafamily

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104. *Id.* at 446.

105. *See, e.g., Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

106. *See Hodgson*, 497 U.S. at 447 (quoting *Prince*, 321 U.S. at 166).

107. *See supra* text accompanying notes 33-39.

108. As one commentator has observed:

The claim of moral entitlement to be free from third-party, and especially governmental, interference in the discharge of familial obligations is commonly advanced as a claim of a right to family privacy. A moral right of family privacy is deemed to be a right of family members to be free from uninvited, unwarranted interference with the rearing, education, discipline, health, and custody decisions, made by family members (usually adults) on behalf of members of the same family (usually infants, children, teenagers, the elderly, or the infirm).

ALLEN, *supra* note 38, at 115-16.

109. In cases where the Supreme Court has recognized a right of family privacy, the family has exhibited a more or less undivided front against intervention by the state. *See, e.g., Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (recognizing right of extended family to determine for itself who will reside within the home).

Anita Allen raises but does not resolve the problem of intrafamily conflict: "If a moral right of family privacy is ascribed a family unit, who is entitled to exercise that right? Who is the spokesperson for the family's interest? What if family members disagree about the desirability of governmental intervention?" ALLEN, *supra* note 38, at 117.

110. *But cf. Staughton Lynd, Communal Rights*, 62 TEX. L. REV. 1417, 1417-18 (1984) (advocating protection for communal rights in labor and free-speech areas).



conflict and spends much of his opinion trying to dismantle the myth of the happy American home, he fails to recognize that the divided family cannot at the same time be both private and a sphere of individual sovereignty. Stevens remains confident that he can mediate intrafamily conflict while preserving the dual constitutional principles of family privacy and individual autonomy; he seeks to accomplish this through the concept of parental rights.

As Stevens explains, the doctrine of family privacy incorporates the concept of parental authority:

While the State has a legitimate interest in the creation and dissolution of the marriage contract, the family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference. The family may assign one parent to guide the children's education and the other to look after their health. "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." We have long held that there exists a "private realm of family life which the state cannot enter."<sup>111</sup>

For Stevens, family privacy is a right associated with traditional parental prerogatives. The communal right of family privacy is defined in terms of parental authority over children. Stevens observes that "[a] natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference."<sup>112</sup> Family privacy boils down to the right of parents to exclude the state from intervening in decisions regarding their children.<sup>113</sup>

The concept of parental rights is at odds with the conventional doctrine of family privacy in a straightforward way: if the family is truly a private or self-governing institution, then rights

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111. *Hodgson v. Minnesota*, 497 U.S. 417, 446-47 (1990) (footnotes and citations omitted) (quoting *Parham v. J.R.*, 442 U.S. 584, 603 (1979); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). It is, of course, not at all self-evident why the state has a legitimate interest in the formation and dissolution of the marriage contract.

112. *Id.* at 447.

113. See ALLEN, *supra* note 38, at 112 (noting that "family privacy signifies the freedom of parents to exercise their authority and judgment in accordance with their own values to promote the interests and well-being of themselves and their children"); Teitelbaum, *supra* note 17, at 1175 (observing that each of the "family autonomy" cases in constitutional law "allocates power to one family member or reserves it to the state. None creates decisional rights in an entity.").

that allocate authority within the community subvert that privacy. Defined in terms of parental authority, the doctrine of family privacy does not protect a sphere of individual freedom where all family members are free to pursue their own conception of the good family life. Instead, the sphere of family life is carefully defined by the traditional hierarchical structure of parent-child relations.<sup>114</sup>

Parents have an interest in controlling the education and upbringing of their children but that interest is "a counterpart of the responsibilities they have assumed." . . . [T]he demonstration of commitment to the child through the assumption of personal, financial, or custodial responsibility may give the natural parent a stake in the relationship with the child arising to the level of a liberty interest.<sup>115</sup>

Parental rights are not simply a modified version of the individual right of privacy. Indeed, parental rights are not concerned with individual sovereignty at all, but instead pertain to the right of one individual to control another.

The problem may be stated in simple terms: any allotment of liberty to the parents necessarily diminishes the liberty of the child; conversely, any enhancement of a child's liberty curtails that of the parents. Unlike the right of individual privacy—

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114. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court derived the structure of this private sphere (and the corresponding limits of state power) from natural law and "the natural duty of the parent to give his children education suitable to their station in life." *Id.* at 400. In this way, the Court read the Constitution to protect the natural order of the domestic sphere, which, although it guarantees those relationships a certain measure of freedom from state control, nevertheless includes the "natural" authority of parents over children:

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

*Id.* at 401-02 (omission in original).

115. *Hodgson*, 497 U.S. at 445-46 (citations omitted) (quoting *Lehr v. Robertson*, 463 U.S. 248, 257 (1983)).

which entitles the individual to rights against the state and over herself—parental rights entitle parents to rights against the state, but over another person.<sup>116</sup> By vesting parents with authority over their children, liberalism must find a way to resolve the apparent violation of its competing principle of individual sovereignty. Parental authority, in the form of family privacy, confronts the will of the individual child. Before turning to a discussion of Stevens's attempt to resolve this conflict, his portrait of the minor's individual privacy interest must first be considered.

Stevens holds that the minor possesses a liberty interest in the decision whether to terminate her pregnancy, a holding that falls directly in line with the tradition of individual privacy established in *Eisenstadt* and *Roe*. The minor's right of individual privacy comports with the liberal conception of human beings as rational individuals whose happiness or freedom depends on their capacity for self-determination.<sup>117</sup> Because the individual right of privacy protects decisions regarding fundamentally personal matters, it has been termed an interest in "decisional privacy."<sup>118</sup> Constitutional protection does not attach to the individual's affirmative right to *obtain* an abortion, but instead is concerned with her right to *decide* whether or not to abort.<sup>119</sup> It is a right protecting decisional freedom.

Although Stevens holds that minors possess the individual right of decisional privacy, he concludes that they nevertheless do not have full authority to exercise it. In his view, their "immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."<sup>120</sup> He justi-

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116. Stevens clarifies that this authority is not absolute but is limited by the child's best interests. As he notes, "the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child." *Id.* at 454.

117. See, e.g., JAGGAR, *supra* note 17, at 28 ("Liberal political theory is grounded on the conception of human beings as essentially rational agents."); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 29 (1985) ("Locke suggests that this capacity for rational self-determination is the distinctive feature of human nature and also the essential element of moral responsibility.").

118. See ALLEN, *supra* note 38, at 97.

119. See *Maier v. Roe*, 432 U.S. 464, 473-74 (1977) (noting that "*Roe* did not declare an unqualified 'constitutional right to an abortion,' . . . [but rather] protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy").

120. *Hodgson*, 497 U.S. at 444. The Court in *Bellotti v. Baird* similarly observed: [T]he Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition

fies this limitation on the exercise of the minor's right of individual privacy on the ground that children suffer from an impaired ability to reason.<sup>121</sup> The commitment to decisional freedom that underlies the doctrine of individual privacy is built on a vision of human beings as capable of rational choice. By adopting a model of "impaired capacity" or "incompetency," Stevens is able to reconcile this intrusion on the minor's right of privacy with solidly liberal principles.<sup>122</sup> Because liberalism presumes the rationality of individuals, lesser rights may be accorded where the particular individual does not have the capacity for full rational thought. From the liberal perspective, therefore, interference with privacy rights on incompetency grounds is not really viewed as intervention at all. State regulation of the minor's privacy right does not reflect a substantive goal or value choice, but rather a "neutral" attempt to protect the child from her own immature decision-making abilities. As Stevens argues, the parental notification provision is designed to insure "that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate,"<sup>123</sup> and "rests entirely on the best interests of the child."<sup>124</sup> Thus is he able to construe the parental notification provision as facilitating individual liberty by helping the

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that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.

*Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (Powell, J.).

121. Because Stevens identifies minors as liberal individuals possessing full constitutional rights, he must struggle to explain why they do not possess the independent authority to exercise their rights. His recognition of the minor's impaired capacity necessarily conflicts with his earlier conclusion that the woman's status as a minor does not deprive her of access to the individual right of decisional privacy. Compare *Hodgson*, 497 U.S. at 444 with *id.* at 434. According to his earlier reasoning, the Due Process Clause "protects the woman's right to make such decisions independently and privately," even as a minor. *Id.* at 434. "[T]he fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority." *Id.* (quoting *Bellotti*, 443 U.S. at 642).

The distinction that Stevens implicitly draws between the possession and the exercise of the right of individual privacy is not entirely consistent, and suggests that he is unsure whether pregnant minors should be treated as responsible decision makers. Part of the problem lies in the fact that he would like to uphold one-parent notification while striking down two-parent notification. To do so, he needs to recognize a privacy interest that is strong enough to allow him to strike down two-parent notification, while not so strong as to prohibit one-parent notification.

122. Martha Minow argues that the category of incompetent individuals under liberalism reflects older notions of status derived from medieval law. See MINOW, *supra* note 57, at 124-28.

123. *Hodgson*, 497 U.S. at 450.

124. *Id.* at 454.

minor to make her own decision in a mature and informed manner.

Two-parent notification fails to pass constitutional scrutiny for Stevens not because it intrudes on the minor's individual right to privacy, but because in his view it violates the privacy of the family unit by requiring communication between the spouses. For Stevens, the infirmity lies not in notification itself, but in the requirement that both parents be notified. Stevens strikes down the statute not because parents have no legitimate role to play in facilitating the exercise of their children's constitutional rights, but because one parent's involvement is enough to satisfy this state interest. One-parent notification "supports the authority of a parent" to supervise the minor's decision.<sup>125</sup>

Stevens's affirmance of parental rights goes beyond mere constitutional tolerance. As Stevens suggests, not only is the state constitutionally permitted to recognize parental authority, it is constitutionally required to do so. He observes that had the state bypassed the parents altogether and required judicial review of the minor's decision, such a scheme would have violated the parents' *independent* right to raise their children free from governmental interference. "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.'" <sup>126</sup> Indeed, all of the Justices in *Hodgson* recognize, to some degree at least, parents' independent constitutional right to control the upbringing of their children.<sup>127</sup> Although the Justices in *Hodgson* diverge in their opinions on the permissibility of two-parent notification, they all recognize that a minor's right of individual privacy is limited by the competing right of parental authority. In other words, individual autonomy within the family is directly limited by the constitutional protection accorded to communal relationships of authority. Let us now ask why.

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125. *Id.* at 450. Stevens concludes that while one-parent notification furthers the minor's interest in making her decision and the parents' interest in raising their children, two-parent notification infringes on the family's right of privacy by enforcing communication between the spouses. *Id.* at 451.

126. *Id.* at 446-47 (quoting *Parham v. J.R.*, 442 U.S. 584, 603 (1979)).

127. See *id.* at 447 (Stevens, J.); *id.* at 471 (Marshall, J., concurring in part and dissenting in part); *id.* at 482 (Kennedy, J., concurring in part and dissenting in part).

*B. The Political Dimensions of Family Life*

As established in the preceding discussion, constitutional protection for family privacy enforces the authority of parents at the expense of the child's competing right of individual privacy. Stevens resolves this dilemma in the conventional manner by justifying parental authority in terms of the child's emerging individuality. In so doing, he quotes from Justice White's decision in *Stanley v. Illinois*:<sup>128</sup>

"The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights.' 'It 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.'"<sup>129</sup>

This conception of parental authority is based on an understanding of the family as providing the conditions necessary for the individual's growth into independent adulthood—conditions that the state "can neither supply nor hinder." Family privacy protects the rights of parents to claim authority over their children in order that those children may grow into responsible liberal individuals capable of carrying out the "obligations" of political life.

In this view, the family operates as an institution that trains children to become responsible individuals with the skills necessary for participation in social and political life.<sup>130</sup> As Stevens explains in *Hodgson*:

"Properly understood . . . the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participa-

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128. 405 U.S. 645 (1972).

129. *Hodgson*, 497 U.S. at 447 (alteration and omission in original) (citations omitted) (quoting *Stanley*, 405 U.S. at 651 (quoting *Meyer and Prince*)).

130. See Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. REV. 605, 657 ("Because of its preparatory role, maintenance of the family tradition is in fact a prerequisite to the existence of a rational and productive individual tradition."); Heymann & Barzelay, *supra* note 83, at 773 ("The immensely important power of deciding about matters of early socialization has been allocated to the family, not to the government.").

tion in a free society meaningful and rewarding."<sup>131</sup>

From Stevens's perspective, parental rights are not fundamentally concerned with the "liberty" of parents at all, but rather with preserving the future liberty of children.<sup>132</sup> Family privacy protects a realm of parental authority that is not in itself a sphere of negative liberty, but that is a means for the development of responsible citizens. The doctrine of family privacy thus serves a political function in furthering the constitutional liberty of developing individuals and in sustaining the liberal democratic state itself.<sup>133</sup>

Justice Stevens's approach preserves the principle of individual autonomy by conceiving of parental authority as facilitating the development of individuals capable of autonomous action and thought. Yet what this approach gains in terms of individual autonomy, it loses in terms of privacy. The view of the family as an institution worthy of constitutional protection for its role in maintaining our political and social order is at

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131. *Hodgson*, 497 U.S. at 444-45 n.31 (omission in original) (quoting *Bellotti v. Baird*, 443 U.S. 622, 638-39 (1979) (Powell, J.)). In *Bellotti*, Justice Powell elaborated more fully on the relationship between parental authority and individual liberty:

[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. . . . "[T]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." . . . This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.

We have believed in this country that this process, in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice. Thus, "[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*."

Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children.

*Bellotti*, 443 U.S. at 637-38 (Powell, J.) (third alteration in original) (citations omitted) (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), and *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

132. See Hafen, *supra* note 130, at 657 ("Family life . . . has served to nurture children's readiness for responsible participation in the individual tradition.").

133. See Hafen, *supra* note 4, at 477 ("[T]he family in a democratic society not only provides emotional companionship, but is also a principal source of moral and civic duty.").

odds with the traditional understanding of family privacy. The loving authority of family life is constitutionally protected not because it reflects a realm of negative liberty free from governmental intervention, but because it carries profound political significance as the source of future citizens.<sup>134</sup>

Parental authority is not, of course, without limits. Yet those limits are themselves set by reference to the public ends of family life. Parental authority is exceeded when it threatens to impair the child's development into a responsible civic individual. The settled boundaries of parental authority inject a strong normative vision of the "good citizen" into family life. Parental authority must be exercised in a manner that preserves the child's ability to choose her own values and way of life. It must be exercised in the service of creating citizens equipped to participate in a liberal democracy. The "tyranny" of parental authority is thus understood to be a profoundly political power.<sup>135</sup>

In his dissenting opinion in *Wisconsin v. Yoder*,<sup>136</sup> cited most often for the principle that children have a right of individual autonomy within the family, Justice Douglas draws a clear portrait of the normative content of parental authority. In his seemingly lonely defiance of parental authority, Douglas dissents on the ground that Amish children had the right to attend public school against the wishes of their parents:

On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. . . .

It is the future of the student, not the future of the parents that is imperiled by today's decision. If a parent keeps his child

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134. See *infra* notes 232-56 and accompanying text.

135. As Duncan Kennedy has stated:

[P]olitical philosophy refers constantly to the ideals of the family, and philosophers of the family refer constantly to political ideals. The interpretation of the two realms of discourse is so thorough that we might better speak of a single political/familial rhetoric. . . .

. . . [T]he blurring of institutional lines between the state and the family is more obvious than blurring along the market/family or market/state boundaries. It has been common forever to speak of the public functions of the family in producing and socializing "the next generation."

Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1356 (1982).

136. 406 U.S. 205 (1972).



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. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard . . . .<sup>137</sup>

Even Douglas, however, does not directly challenge the concept of parental authority. Rather, he believes that the limits of parental authority were surpassed here when the Amish parents withdrew their children from community education. Douglas is particularly sensitive to the part that institutionalized education plays in training children for their roles as adult citizens. In his view, by depriving their children of this necessary training for political life, the Amish parents had exceeded the bounds of their lawful authority. Parental authority is justified, in his view, to the extent that it facilitates the proper growth of the liberal individual. To Douglas, part of that proper growth includes participation in the "amazing world of diversity" that is civil life in the liberal state.<sup>138</sup>

Although the concept of parental authority lends meaning to the doctrine of family privacy, it is not the same meaning associated with the traditional view of the private family. The conflict between children and parents is mediated by defining family privacy in terms of parental authority. As we have seen, however, parental authority identifies the family as an institution that is, in part at least, an instrument of the liberal state. The concept of parental authority preserves liberalism's commitment to individual autonomy by conceiving of the family as facilitating the development of responsible individuals. The family is worthy of constitutional protection because it is an institutional source of liberal individuals. The doctrinal end is not the preservation of "privacy." The enforcement of parental rights thus reveals the deeply political character of the family in a liberal democracy.<sup>139</sup>

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137. *Id.* at 244-46 (Douglas, J., dissenting in part) (footnote omitted).

138. *See id.* at 245 (Douglas, J., dissenting in part).

139. Stevens recognizes that parental rights may themselves conflict, as they do in *Hodgson*. If both parents have the "independent right" to control the upbringing of their

In his opinion in *Hodgson*, Justice Stevens attempts to explain and justify the Supreme Court's continuing constitutional protection for the family using the traditional privacy rationale. He argues that protection of the family unit as an intermediate social institution is vital to the proper functioning of a liberal democracy. Stevens then attempts to protect the family on the ground that it is a *private* institution, however, and in this regard his reasoning fails. Viewed, again in part, as an institutional arm of the liberal state, the family can no longer be understood as an inherently private entity. Stevens's ultimately unsuccessful effort to ground constitutional protection for the family in the concept of privacy nevertheless points the way to an alternative constitutional standard, premised on a view of the family as a public institution serving important political ends. This alternative vision of the public family is the subject of Part IV.

#### IV. THE CONSTITUTIONAL PROMISE OF FAMILY JUSTICE

The alternative theory of the family developed in this Part challenges the traditional view of the private domestic sphere that underlies the contemporary doctrine of constitutional privacy. This alternative view exists as a competing, subversive strand within both family history and constitutional case law. It argues that the modern family has never constituted a purely private institution, but has always been subject to state regulation and public control. This challenge to the received wisdom concerning the private nature of family life focuses on the extensive state involvement in the formation and structure of the family as well as on the family's political role in both facilitating and constraining governmental power.

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children, and if this parental right includes the right to be informed of their daughter's intention to terminate her pregnancy, then certainly both parents have the right to be so informed. But, Stevens concludes, informing both parents intrudes on the right of family privacy:

The second parent may well have an interest in the minor's abortion decision, making full communication among all members of a family desirable in some cases, but such communication may not be decreed by the State. The State has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together. . . . [A] state interest in standardizing its children and adults, making the "private realm of family life" conform to some state-designed ideal, is not a legitimate state interest at all.

*Hodgson v. Minnesota*, 497 U.S. 417, 452 (1990). Stevens thus uses the concept of family privacy to uphold parental authority over children, then adopts that same concept to deny that very authority to a second parent.

This Part sets forth the general thesis of this alternative or "public family" approach and seeks to use its insights to construct a new constitutional understanding of the family. Although the public family model views the family as an inherently public institution, it does not, as some members of the current Supreme Court now seem to believe, expose the family to any form of reasonable state regulation. The institution of the family stands at the constitutional crossroads of individual liberty and political order; the family provides the conditions necessary for the development of both the human and social elements underlying our liberal democracy. As the foundation for both individual liberty and structural security, the family requires heightened constitutional attention. That attention should take the form of a standard of family justice.

Subpart A sets forth the general public theory of the family. By elaborating a general theory, I do not mean to suggest that there exists a coherent body of work with which scholars either do or would self-consciously identify. Instead, the theory outlined in subpart A is constructed from bits and pieces of independent work that shares a common orientation toward the public significance of the family. An understanding of the family as a public institution does not accord with a single scholarly approach or even a single political orientation, but accommodates a broad range of theoretical and political agendas. For our purposes, it is sufficient to distinguish between two general public approaches to the role of the family in constitutional law: conservative and progressive public family theories. These two approaches and their significance for constitutional law are explored in subparts B and C.

Subpart B examines the conservative approach as illustrated in the opinion of Justice Kennedy in *Hodgson v. Minnesota*.<sup>140</sup> This approach begins with the basic insight that family

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140. 497 U.S. 417 (1990). In *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), Justice Kennedy joined a narrow majority of the Court in reaffirming *Roe v. Wade*'s "essential holding," defined in part as "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." *Id.* at 2804. Although *Casey* did not directly involve the issue of family privacy, it is arguable that the joint opinion suggests that Kennedy has retreated somewhat from the extreme deference he advocated in his opinion in *Hodgson*. Nevertheless, even if Kennedy has indicated some movement away from that conservative public family position, the four dissenting Justices in *Casey* remain firmly committed to it. See *id.* at 2855-73 (Rehnquist, C.J., concurring in part and dissenting in part); *id.* at 2873-85 (Scalia, J., concurring in part and dissenting in part). Thus, while the analysis presented here may no longer reflect the precise views of

life has a public nature, but uses that insight as a basis for deferring to the state's reasonable regulation of the family. Once having declined to imply a "fundamental" right of family privacy, Kennedy treats the question of constitutional review as being decided. Because Kennedy views the family as having long been the subject of public control, he concludes that family life lies outside the realm of heightened constitutional protection. Deprived of fundamental status, the family, in his view, is subject to reasonable state regulation.

The conservative approach is wrong, however, to conclude that viewing the family as a public institution necessarily ends the constitutional inquiry. To the contrary, this view of the public family simply changes the constitutional focus. Instead of focusing exclusively on the family's relation to the concept of privacy, our attention should be turned to the role that the family plays in maintaining our liberal democratic order. It may be, as the conservative approach maintains, that the Constitution offers no heightened protection for the family unit pursuant to a notion of privacy rooted in the concept of negative liberty.<sup>141</sup> Accepting that premise, however, does not preclude constitutional review of laws touching on family life to the extent that those laws affect the family's more fundamental role in maintaining the structure of government envisioned by the Constitution.<sup>142</sup>

Drawing on the family's role in maintaining our governmental structure, subpart C presents a progressive approach supported by the work of a variety of legal and political scholars, most notably theorists in the feminist tradition. This progressive approach views the family, broadly defined,<sup>143</sup> as playing a central and foundational role in preserving the social conditions necessary for sustaining our liberal democracy. In this view, parental authority in particular is necessary for the development of responsible individuals who have been raised with a sense of belonging to distinct and diverse moral traditions. Although families facilitate the exercise of state power by raising children to be responsible citizens, they also serve to constrain state

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Justice Kennedy, those views may nevertheless now be shared by a near majority of the Court.

141. This is not necessarily to suggest that the Constitution does not extend protection to a principle of individual autonomy that is independent of the family unit.

142. See *infra* notes 232-56 and accompanying text.

143. See *infra* text accompanying notes 250-51.

power by nurturing potential resistance to governmental views.<sup>144</sup> Families perform the vital function of creating citizens committed to autonomous social traditions situated within a broader common political life.

The progressive view recognizes that the family's role in maintaining the human and social conditions necessary for our political order is of central constitutional concern. In this view, the Constitution can and should be read to require that state laws affecting family life be carefully reviewed to determine whether they threaten to undermine the family's essential role in maintaining the liberal democratic structure on which our constitutional order rests. Subpart C argues that this heightened review should reflect a substantive vision of family life—a doctrine of family justice. This subpart further explores what constitutional doctrine of family justice would mean and considers how such a doctrine might have been applied in *Hodgson*.

#### A. *The Family as a Public Institution*

As described in Part I, traditional social history traces the family's transformation from a pre-industrial extension of the public community to a modern private entity set apart from the public world of work and politics.<sup>145</sup> That history also traces a more recent movement from a family life of hierarchical authority to an association of equal individuals.<sup>146</sup> Central to this theory is the liberal distinction between the realm of legitimate public regulation and the realm of individual freedom, a distinction understood to mean the public world of work and politics and the private world of family life. We have called this conventional version of the separation between public and private spheres of social life the public-domestic distinction.<sup>147</sup>

This subpart challenges the generally accepted notion of the private domestic sphere, and argues that, rather than having undergone a transformation from public to private, the modern family has experienced an increasing degree of public control. Social and legal historians sharing this view assert that beneath the ideology of family privacy lies a social and legal reality of family regulation. These theorists ask why it is that, despite a

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144. For a discussion of the limits on the authority of families to resist governmental views, see *infra* text accompanying notes 257-61.

145. See *supra* notes 20-54 and accompanying text.

146. See *supra* notes 55-83 and accompanying text.

147. See *supra* text accompanying notes 29-31.

rhetoric of family privacy, "public involvement in the family seems to have grown substantially during the nineteenth and twentieth centuries."<sup>148</sup> Their inquiry, although tentative and incomplete, is nevertheless rigorous enough to challenge two primary assumptions of the conventional theory: first, that the state is prohibited from interfering in family life; and second, that the private sphere is confined to domestic affairs of no political or civil significance. We shall briefly explore the challenge to both of these assumptions.

Lee Teitelbaum has observed that "[t]he obvious analogue in law to social discourse regarding the separation of public and private spheres would be a diminution in direct regulation of the private realm: that is, of the conduct of family members."<sup>149</sup> Family law scholars in the traditional mode endorse this "obvious analogue" by alluding to the increasing individualism of family life as an illustration of the family's private nature.<sup>150</sup> Teitelbaum challenges this connection between the rise of individual autonomy and family privacy, arguing that individualism has in fact brought greater state intervention into family life. By examining the law of domestic relations in the post-Civil War era, he documents the way in which

both public opinion and official action increasingly sought to regulate directly various aspects of the formation and conduct of domestic relations. Informal marriages were increasingly disapproved and bureaucratic supervision installed; mental and physical requirements for marriage came to be specified. Minimal age requirements for marriage increased significantly. During the same period, activities within the family were regulated by laws making abortion at any stage criminal and by prohibiting the distribution of information concerning contraception. The revision of custody laws and the recognition of adoption also did little to preserve a separate sphere or refuge. Removing sole custodial authority from fathers may well have destroyed a traditional element of patriarchy, but it also converted a private (if patriarchal) system for decisionmaking into a question of sound public policy. It became the business of courts to determine the best interests of children, which in turn

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148. Teitelbaum, *supra* note 17, at 1137.

149. Lee E. Teitelbaum, *The Legal History of the Family*, 85 MICH. L. REV. 1052, 1062 (1987) (reviewing MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985)).

150. See, e.g., GROSSBERG, *supra* note 20 (describing the liberalization of family life in terms of the development of the "republican" family).

meant that public agencies would decide what conduct and circumstances were desirable in child-rearing and what were not.

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... One might add to these instances of public involvement in the constitution and supervision of families the advent of compulsory education and the juvenile court . . . .<sup>151</sup>

Teitelbaum contends that even the heart of this private sphere—the marital relationship itself—is subject to public control. He observes that, until recent years, entrance into and exit from this civil status were subject to increasing restrictions based on conventional morality.<sup>152</sup> Even today, those wishing to marry are not entirely free to design their own contract, but must accept the terms conferred on them by the state.<sup>153</sup>

The traditional theory acknowledges that the state plays a limited role in the formation and dissolution of family life, but argues that state regulation of this sort does not constitute intervention into the private sphere. Instead, the state is understood to be “defining” the boundaries between public and private life.<sup>154</sup> Under the prevailing view, the boundaries of family life are defined by reference to the preexisting, natural sphere of private life.<sup>155</sup> In contrast, some scholars challenge the view that

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151. Teitelbaum, *supra* note 149, at 1062-63; see also LASCH, *supra* note 27; Teitelbaum, *supra* note 17, at 1147-63.

152. See Teitelbaum, *supra* note 17, at 1159.

153. Although parties do not create their own marriage contracts, in some states they may alter, within limits, the nature of their marital status by way of a premarital contract. Such contractual altering of spousal obligations does not extend to parental duties.

154. As Judith Stiehm observes:

In this country, intrafamily relationships are a private rather than a governmental concern. The state does establish a legal basis for the family's existence, but this defining function is exercised principally when families are either being founded, as in marriage or adoption, or dissolved, as in divorce or death. Even then the state's role is minimal unless property is involved.

Judith H. Stiehm, *Government and the Family: Justice and Acceptance*, in CHANGING IMAGES OF THE FAMILY 361, 362 (Virginia Tufte & Barbara Myerhoff eds., 1979).

155. As Frances Olsen notes:

The idea that the state can intervene or not intervene in the family, and particularly that the state practices a policy of nonintervention when it bolsters family hierarchy, would seem to depend upon the belief that a natural family exists separate from legal regulations, and that the hierarchy the state enforces is a natural hierarchy, created by God or by nature, not by law.

Olsen, *supra* note 55, at 846.

In *Moore v. City of E. Cleveland*, 431 U.S. 494, 498 (1977), the Supreme Court expressed this conventional understanding of the natural family when it struck down what it perceived to be the state's attempt to “slic[e] deeply into the family itself” by limiting the definition of family too narrowly. See also *Smith v. Organization of Foster Families for*

laws governing marriage and divorce merely outline the natural sphere. "Rather than marking a boundary limiting state intervention in the family, laws governing the family define the kinds of families the state approves."<sup>156</sup> From this point of view, state laws setting qualifications for marriage and obligations on divorce<sup>157</sup> act as direct, substantive regulations of family life.

The public family approach has also illuminated the racial and class dimensions of family regulation. To begin with, the prevailing history of the family ignores the institution of slavery, a regime that defined the black family out of legal existence.

[T]he history of the black family under slavery [cannot] be ruled outside the bounds of the history of family law. The law governed these families—and yet the law did not determine the patterns of family life among slaves. Including the slave experience in the history of family law exposes state involvement in internal family affairs. The law denied legal protection to the affectionate bonds among blacks and enforced the power of white men to dominate their wives, to sleep with slave women, and to sire their children.<sup>158</sup>

In challenging the traditional view, one historian points out that, even after the Civil War, the freed family "exhibited a preference for work patterns typical of a 'traditional' rural society in which religious, regional, and kinship loyalties are the dominant values . . . . Indeed, very soon after emancipation emerged black households—set within larger networks of kin and community—that closely conformed to the 'premodern' family model."<sup>159</sup> Finally, some social historians have traced the manner in which public welfare laws have policed family life generally by subjecting those families that "deviate" from the traditional norm to strict public control.<sup>160</sup>

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Equality & Reform, 431 U.S. 816, 845 (1977) (noting that "the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights") (footnote omitted).

156. MINOW, *supra* note 57, at 276; see also Olsen, *supra* note 55, at 842 ("The state defines the family and sets roles within the family; it is meaningless to talk about intervention or nonintervention, because the state constantly defines and redefines the family and adjusts and readjusts family roles.").

157. Most states require at a minimum that individuals qualify in terms of gender, age, health, mental competency, and marital status. See, e.g., OR. REV. STAT. § 106.041 (1991). All states have laws regulating property distribution and alimony and child support obligations on divorce. See, e.g., MINN. STAT. ANN. § 518.17 (West 1993).

158. Minow, *supra* note 30, at 863.

159. JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* 68 (1985).

160. See MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WEL-*



The public family theory does not limit its critical inquiry to direct state regulation of the family; it also identifies the myriad ways in which the state has indirectly regulated the most intimate aspects of family life. Martha Minow, applying the insights of the legal realist movement, describes the way in which the law indirectly aids in the construct of family relationships:

Within a sphere cordoned off as "private," removed from state intervention, family members remain individuals who have or who lack rights to appeal to the state. Within the "private" realm of the family, the law has always articulated rules about relationships, and rules about when individuals may object to the government about those relationships; historically, legal theories excluded family relations, along with rules governing those with decreased competence, from the reach of legal rights. The law thus helped to shield from view the governmental refusal to see some kinds of power or abuse as warranting public restraint. It would be false to say that family relations were unregulated: they *were* regulated by the government's grant of financial, physical, and social privileges to the male head of household and refusal to hear any objections of other family members.<sup>161</sup>

One example of the law's historical role in setting the terms of family relationships is the marital exemption to rape statutes.<sup>162</sup> Justified on the conventional ground of family privacy, the marital rape exemption serves to reinforce oppressive and discriminatory family roles.<sup>163</sup> "[T]he marital rape exemption clearly is rooted in an intention to deprive the married woman of the protection of the state and to subject her to the will, sovereignty, and unchecked violence of her spouse."<sup>164</sup> Marital rape is but one illustration of the way in which the law, in areas as diverse as criminal law, estate law, taxation, insurance law, labor law, contract law, tort law, and property law, indirectly, but pro-

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FARE POLICY FROM COLONIAL TIMES TO THE PRESENT (1988); J. DONZELOT, *THE POLICING OF FAMILIES* (1979).

161. MINOW, *supra* note 57, at 279 (footnote omitted).

162. See Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990); Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255 (1987).

163. Although the marital rape exemption has been eliminated in a few states, the majority continue to provide lesser penalties for spousal rape. See West, *supra* note 166, at 46. Many states have extended this more lenient treatment to cohabitant and acquaintance rape. See Note, *supra* note 162, at 1260.

164. West, *supra* note 162, at 65.

foundly, affects the structure of family life.<sup>165</sup>

The public nature of family life is evidenced not simply by the degree of state intervention into family affairs, but also by the public role played by women within the domestic sphere. Although historians generally agree that the nineteenth-century family underwent a transformation from a socially integrated to a socially segregated sphere, they dispute the meaning of the "cult of domesticity" that came to define family life at that time.<sup>166</sup> Whereas scholars have traditionally viewed this domesticity in privacy terms, family and women's historians have explored the political significance of the women's sphere of domesticity and the place of this newly domesticated mother in political life. Some scholars have examined the role of the "republican mother," whose primary responsibility was to "mold[ ] the nation's young into virtuous republicans and competent burghers."<sup>167</sup> As Professor Kerber describes:

The Republican Mother's life was dedicated to the service of civic virtue: she educated her sons for it, she condemned and corrected her husband's lapses from it. If, according to [one] commonly accepted claim, the stability of the nation rested on the persistence of virtue among its citizens, then the creation of virtuous citizens was dependent on the presence of wives and mothers who were well informed, "properly methodical," and free of "invidious and rancorous passions." It was perhaps more than mere coincidence that *virtù* was derived from the Latin word for *man*, with its connotations of virility. Political action seemed somehow inherently masculine. Virtue in a woman seemed to require another theatre for its display. To that end the theorists created a mother who had a political purpose and argued that her domestic behavior had a direct polit-

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165. One commentator has noted:

[T]he involvement of the law in family life reaches into widely diverse areas of law, well beyond what is usually labeled as juvenile and family law. For example, labor law is apt to have consequences in terms of family roles, such as who may serve as a breadwinner, the amount of time available for family life, and even the safety of the home. . . . [S]uch disparate areas of law as estate law, insurance law, taxation, and land use policy may do more to structure families than family law per se.

Gary B. Melton, *Parents, Children and the Courts: The Significance of Law in the Everyday Lives of Children and Families*, 22 GA. L. REV. 851, 862-63 (1988) (footnotes omitted); see also Stiehm, *supra* note 154, at 362-63.

166. See COTT, *supra* note 18, at 1.

167. GROSSBERG, *supra* note 20, at 8.

ical function in the Republic.<sup>168</sup>

Historians such as Kerber emphasize the directly political role these women played in their domestic capacity as the guardians of future citizens.

The ideology of the republican mother has led some social and legal historians to explore the ways in which women's "domestic" work has not been limited to matters of purely private concern.<sup>169</sup> Although operating under an ideology of separate spheres, women historically have drawn on their perceived expertise in matters of morality to enter the public sphere. Martha Minow describes the significance of the "vast numbers" of women who engaged in philanthropic and social reform during the nineteenth and twentieth centuries:

An examination of the work of women in benevolent, religious, social, and political organizations provides a challenge to both parts of the traditional story of family legal history: it suggests that women were never confined to a domestic sphere as narrow or dependent as the ideology implied; and, it also demonstrates that at least some women tried to usher in a new social order characterized not by autonomous individualism but by collective and connective social relations. Critical to both the women who invented these activities and the men who witnessed them, was the rhetorical power of women's traditional domestic roles in justifying the extension of nurturing and caretaking functions—and their presumed purity and virtue—to a public audience.<sup>170</sup>

In their role as spiritual caretakers for the polity, women brought the affective values of the domestic sphere into public life. Under the mantle of the "cult of domesticity," they infused public life with the values of the so-called private family; and under the mantle of republican ideology, they infused family life with a public spirit.

The public family theory should be understood to operate on a normative as well as a descriptive level. Contemporary liberalism conceives of the private domestic sphere as the realm where individuals are free to maximize their own welfare. Some theorists have challenged this liberal image of human nature on

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168. LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 229 (1986).

169. Working class women have always, of course, directly contradicted the notion that women are destined for the private life of marriage and children. See Minow, *supra* note 30, at 852-57.

170. *Id.* at 877-78.

the ground that it fails to offer either a descriptively accurate or a normatively desirable account of family life. In their view, the liberal conception of abstract individualism, under which individuals interact as independent, autonomous, rational equals, has no connection to family life, where individuals are, above all, dependent, related, and unequal. The ontology of liberal individualism, the source of liberal rights, simply does not apply to family life.<sup>171</sup> In families we are, before all else, related; and in this view, those relations are affected with the public interest.

The view of the family as an institution of public significance has its own, admittedly subordinate, history in Supreme Court decisions. In contrast to the traditional understanding of family privacy, which locates its origins in the 1923 decision in *Meyer v. Nebraska*,<sup>172</sup> the doctrinal origins of the public family approach extend even earlier to the 1879 decision in *Reynolds v. United States*.<sup>173</sup> In *Reynolds*, the Supreme Court upheld a law prohibiting polygamy on the ground that the state had the lawful power to regulate marriage. The Court described the state's interest in regulating marriage in terms of the interrelationship between familial and political order:

Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. . . . [P]olygamy leads to the patriarchal principle, . . . which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. . . . [T]here cannot be a doubt that . . . it is within the legitimate scope of the power of every civil govern-

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171. Robin West takes this point even further by arguing that it does not apply to women at all. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14 (1988) ("The potential for material connection with the other defines women's subjective, phenomenological and existential state, just as surely as the inevitability of material separation from the other defines men's existential state.").

172. 262 U.S. 390 (1923); see *supra* text accompanying notes 42-47. *Meyer* can also be read to support the public family view to the extent that implicit in *Meyer's* conception of parental authority over children's education is the political aim of preparing responsible citizens.

173. 98 U.S. 145 (1879). For a discussion of *Reynolds*, see Minow, *supra* note 33, at 967-70; Teitelbaum, *supra* note 17, at 1160.

ment to determine whether polygamy or monogamy shall be the law of social life under its dominion.<sup>174</sup>

Because "polygamy leads to the patriarchal principle," the state has a legitimate interest in regulating family life; the family itself is intimately connected to the structure of political life. The Court reiterated this view nine years later, in *Maynard v. Hill*, when it noted that "[m]arriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."<sup>175</sup> In *Maynard*, the Court rejected the view of marriage as a private, contractual arrangement:

The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.<sup>176</sup>

Central to both *Reynolds* and *Maynard* is the belief that the family plays a crucial role in the structure of our social and political order, and that state regulation of family life is necessary to preserve that order.

Although overshadowed by the traditional conception of family privacy, the Supreme Court has never wholly abandoned its approval of state regulation of family life. Justice Harlan gave voice to this competing tradition of family regulation in his 1961 dissent from *Poe v. Ullman*:<sup>177</sup>

[The] inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express

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174. *Reynolds*, 98 U.S. at 165-66.

175. 125 U.S. 190, 205 (1888).

176. *Id.* at 211.

177. 367 U.S. 497 (1961).

the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.<sup>178</sup>

In sharp contrast to the traditional view, Harlan articulates a conception of the state's role in legislating the morality of family life. Although Harlan does not, as earlier cases did, justify the state's interest by appealing to the interconnection between state and family order, he does establish a firm basis of judicial deference to justify upholding such state regulations. Because those laws are "so deeply pressed into the substance of our social life," he argues, any attempt to uproot them would destroy the social order.

A recognition of the state's legitimate role in regulating private morality has emerged in Supreme Court decisions with increasing frequency in recent years. In contrast to the Court's traditional commitment to family privacy, this emerging view focuses instead on the tradition of state regulation of family life and morals, and exhibits a strong deference to family tradition. Illustrative of the Supreme Court's growing deference to family tradition are the two recent decisions in *Bowers v. Hardwick*<sup>179</sup> and *Michael H. v. Gerald D.*,<sup>180</sup> both of which reveal the Court's increasing reliance on community tradition as the touchstone of constitutional rights.

Upholding a prohibition on homosexual sodomy, the Supreme Court in *Bowers* examined the history of homosexual sodomy at common law and in state statutes, finding that

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178. *Id.* at 545-46 (Harlan, J., dissenting). Ironically, Harlan's dissent in *Ullman* is best known for its articulation of the principle of marital privacy, which became the holding of the Court four years later in *Griswold v. Connecticut*, 381 U.S. 479 (1965). See *supra* text accompanying notes 40-41. In *Ullman*, Harlan concluded that a ban against contraceptive use by married couples violated the fundamental right of marital privacy. Ultimately, he makes clear that his concept of family privacy is defined by social and political tradition:

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

*Ullman*, 367 U.S. at 553 (Harlan, J., dissenting).

179. 478 U.S. 186 (1986).

180. 491 U.S. 110 (1989).

"[p]roscriptions against that conduct have ancient roots,"<sup>181</sup> and concluding that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."<sup>182</sup> The Court rejected the conventional commitment to family privacy by reasoning that "it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road."<sup>183</sup> The Court concluded by explaining that its reluctance was based on the view that the morality of family life is a legitimate object of state concern. Law "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."<sup>184</sup>

Similarly, in *Michael H.*, a plurality of the Court upheld an irrebuttable presumption of paternity that effectively precluded a biological father from pursuing an already established relationship with his daughter. The plurality held that, because the mother was married to another man, the state was free to decide to protect the marital unit at the expense of the natural father's relationship with his daughter.<sup>185</sup> Justice Scalia, writing for a plurality, held that the Due Process Clause only covers those interests "traditionally protected by our society," those "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"<sup>186</sup> Tradition in this view, of course, is the tradition of community morality. "The family unit accorded traditional respect in our society . . . is typified, of course, by the

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181. *Bowers*, 478 U.S. at 192.

182. *Id.* at 194 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

183. *Id.* at 195-96.

184. *Id.* at 196. In contrast, Justice Blackmun in his dissent viewed the case as involving the negative "'right to be let alone.'" *Id.* at 199 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Blackmun rejected the use of tradition as a source for constitutional rights. *See id.* at 210 (Blackmun, J., dissenting) ("I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny.").

185. *See Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (Scalia, J., plurality opinion).

186. *Id.* at 122 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.)).

marital family, but also includes the household of unmarried parents and their children.”<sup>187</sup> After reviewing the history of paternity at common law and in state statutes, Scalia concluded that there is no tradition awarding parental rights to a biological father and a mother married to another man.<sup>188</sup> Justice Scalia’s holding clarifies that, under the conservative view, family privacy, if it exists at all, exists only at the will of the state.<sup>189</sup> Under the interpretation of constitutional liberty articulated in both *Bowers* and *Michael H.*, family privacy is no longer a pre-political right against state power, but a right conferred by state power. In contrast to the natural law leanings of the traditional approach, the public family model rests on a firm positivist foundation. Although the family under the conservative approach is a public institution to the extent that it is shaped by community values, it is not governed by principles derived from a textual or moral authority transcending majoritarian politics.

By identifying the family as an institution of public significance, the Supreme Court appears to remove it from the private sphere of negative liberty protected by the Due Process Clause of the Constitution. In so doing, the Court absolves itself of responsibility for the lives of individuals within the domestic sphere. As we shall see in the following subpart, the conservative approach views that responsibility as lying with the political branch of state government.

### *B. Family Tradition*

In helping to fashion an emerging constitutional deference to family tradition, Justice Kennedy distinguishes his approach

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187. *Id.* at 124 n.3.

188. *Id.* at 125-26.

189. Justice Scalia states:

We do not accept Justice Brennan’s criticism that this result “squashes” the liberty that consists of “the freedom not to conform.” It seems to us that reflects the erroneous view that there is only one side to this controversy—that one disposition can expand a “liberty” of sorts without contracting an equivalent “liberty” on the other side. Such a happy choice is rarely available. Here, to *provide* protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa. If [the natural father] has a “freedom not to conform” (whatever that means), [the marital father] must equivalently have a “freedom to conform.” One of them will pay a price for asserting that “freedom”—[the natural father] by being unable to act as father of the child he has adulterously begotten, or [the marital father] by being unable to preserve the integrity of the traditional family unit he and [the child] have established. Our disposition does not choose between these two “freedoms,” but leaves that to the people of California.

*Id.* at 130 (citations omitted).



in *Hodgson v. Minnesota*<sup>190</sup> from the conventional doctrine of family privacy in two important ways. First, he adopts the alternative view of the family as an institution of public significance and, therefore, subject to legitimate public regulation. Second, based on this insight, he withdraws constitutional jurisdiction over the family in deference to the state prerogative to legislate morality in this public domestic sphere.

Although Justice Kennedy's opinion in *Hodgson* does not specifically articulate the public vision of the family, it adopts an approach consistent with the view that the family is an institution of public significance.<sup>191</sup> For Kennedy, family life is a moral realm shaped by "[t]he history and culture of Western civilization."<sup>192</sup> In contrast to Justice Stevens's charter of negative liberties, Kennedy's Constitution embraces the state's enforcement of traditional family norms and values. For Kennedy, parental notification is a legitimate governmental end precisely because the community has a special role to play in shaping the morals and values surrounding the domestic sphere. The right "to be let alone"—a right associated with the private sphere of negative liberty—is not a part of this traditional family life.

Kennedy directly attacks Stevens for rejecting the state's interest in regulating family life. As discussed earlier,<sup>193</sup> for Stevens, the state has no legitimate role to play in legislating family values because the family constitutes the realm of private liberty. In his view, the constitutional right of individual autonomy protects the individual's freedom from the oppressive conformity of community life. In contrast, Kennedy maintains that state involvement in family life is a legitimate governmental end:

The State identifies two interests served by the law. The first is the State's interest in the welfare of pregnant minors.

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190. 497 U.S. 417 (1990).

191. Justice Kennedy's opinion was joined by Chief Justice Rehnquist and Justices White and Scalia. See *id.* at 480 (Kennedy, J., concurring in part and dissenting in part). Although he dissented from the majority's holding that two-parent notification standing alone is unconstitutional, Kennedy voted with a different majority of the Court in upholding two-parent notification where judicial bypass is provided. Compare *id.* at 489 with *id.* at 497. Justice O'Connor, who had joined Stevens in concluding that two-parent notification standing alone is unconstitutional, provided the swing vote on the issue of parental notification with judicial bypass. Compare *id.* at 459-60 with *id.* at 461 (O'Connor, J., concurring in part).

192. *Id.* at 484 (Kennedy, J., concurring in part and dissenting in part) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)).

193. See *supra* text accompanying notes 103-08.

The second is the State's interest in acknowledging and promoting the role of parents in the care and upbringing of their children. Justice Stevens, writing for two Members of the Court, acknowledges the legitimacy of the first interest, but decides that the second interest is somehow illegitimate, at least as to whichever parent a minor chooses not to notify. I cannot agree that the Constitution prevents a State from keeping both parents informed of the medical condition or medical treatment of their child under the terms and conditions of this statute.<sup>194</sup>

For Kennedy, family life is not about freedom from the community but about roles defined by community tradition.

The different approaches taken by Stevens and Kennedy entail very different constitutional standards for reviewing state laws affecting family life. Stevens would review such laws on the ground that the constitutional guarantee of family privacy prevents the government from intervening in family life absent compelling reasons. Kennedy's view does not impose any significant constraints on government action. Laws affecting the family will be struck down only if they transgress the traditional protections accorded family life. Although Kennedy's approach offers some minimal critical basis on which to evaluate governmental action, the standard in fact only requires that government adhere to "tradition."<sup>195</sup>

Kennedy explores the contours of this community tradition in his consideration of the state interests underlying the parental notification statute.<sup>196</sup> With regard to the state's interest in the welfare of the child, for example, Kennedy does not adopt the individualistic "incompetency" model articulated by Stevens. As we have seen,<sup>197</sup> Stevens justifies limited state involvement in

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194. *Hodgson*, 497 U.S. at 482 (Kennedy, J., concurring in part and dissenting in part).

195. See *Michael H. v. Gerald D.*, 491 U.S. 110, 123 n.2 (1990) (Scalia, J.) (noting that the "purpose [of the tradition standard] is to prevent future generations from lightly casting aside important traditional values").

196. From the outset, Kennedy adopts a rhetorical style that is at odds with the liberal language of individual rights. In contrast to Stevens's focus on the minor's liberty interest, Kennedy does not identify the pregnant minor's interest nor does he articulate the appropriate level of scrutiny to be applied in this case. He upholds the notification provision, however, on the ground that it constitutes a "reasonable measure," see *Hodgson*, 497 U.S. at 501 (Kennedy, J., concurring in part and dissenting in part), which suggests that he believes that the liberty interest is insufficient to raise the minimal level of scrutiny. Having devalued the pregnant minor's constitutional interest, Kennedy focuses his argument on the identification of legitimate state interests.

197. See *supra* text accompanying notes 120-24.

the family on the ground that pregnant minors are full rights-bearing individuals whose immaturity impairs their ability to exercise those rights in a rational way. In contrast, Kennedy views children as occupying a special status under the law. He does not portray children as the free and autonomous members of the liberal universe. Instead, children possess "qualitative differences" from adult individuals:

The law does not give to children many rights given to adults, and provides, in general, that children can exercise the rights they do have only through and with parental consent. Legislatures historically have acted on the basis of the qualitative differences in maturity between children and adults, and not without reason. Age is a rough but fair approximation of maturity and judgment, and a State has an interest in seeing that a child, when confronted with serious decisions such as whether or not to abort a pregnancy, has the assistance of her parents in making the choice.<sup>198</sup>

Although Kennedy does not abandon the rhetoric of rights, he views those rights through the prism of family relations. Whereas Stevens emphasizes the pregnant minor's right to individual privacy, Kennedy emphasizes her dependence and the "grave decision" she must make. Whereas Stevens views the pregnant minor as a young adult, Kennedy clearly views her as a child defined primarily by her dependent status within the family. In Kennedy's opinion, she is not the abstract individual of liberal thought; instead, she is "'a girl of tender years, under emotional stress, . . . ill-equipped to make [the decision whether to bear a child] without mature advice and emotional support.'" <sup>199</sup>

For Kennedy, family tradition establishes a set of hierarchical relationships built around an image of loving authority and dependence. The individuals inhabiting the domestic sphere are not abstract, independent or equal, but are intimately connected in relationships defined by age and gender. Under this approach, family life remains governed by a community tradition reflecting the domestic virtues of love, altruism and dependency. In this realm where individuals are presumed to act out

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198. *Hodgson*, 497 U.S. at 482 (Kennedy, J., concurring in part and dissenting in part) (citations omitted).

199. *Id.* at 480 (Kennedy, J., concurring in part and dissenting in part) (quoting *Belotti v. Baird*, 443 U.S. 622, 640-41 (1979) (plurality opinion) (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., concurring))).

of love, children exist as dependent individuals needing the "mature advice and emotional support"<sup>200</sup> only parents can provide.

The rhetoric of family tradition that permeates Kennedy's opinion is most forceful in his consideration of the state's interest in promoting parental rights. Kennedy begins that discussion by describing the rights accorded parents under the common law. He notes that, although the common law historically gave fathers the right to the custody and control of their children, "the common law of most States has abandoned the idea that parental rights are vested solely in fathers, with mothers being viewed merely as agents of their husbands; it is now the case that each parent has parental rights and parental responsibilities."<sup>201</sup> Kennedy validates this common-law tradition by appealing to a more substantial one: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."<sup>202</sup> Thus, the combined traditions of the common law, Western civilization and American society express a common recognition "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."<sup>203</sup> The tradition of parental rights he describes here is a tradition derived from the community's social and legal norms.

The tradition of parental rights invoked by Kennedy is clearly antithetical to the conception of family privacy set forth by Stevens. Kennedy appeals to "the history and culture of Western civilization" to support his view that the domestic sphere of family relationships is not a private arena insulated from state scrutiny, but a sphere defined and limited by commu-

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200. *See id.*

201. *Id.* at 483 (Kennedy, J., concurring in part and dissenting in part) (citation omitted). It is fitting that Kennedy chooses to rely on a common-law tradition favoring the authority of fathers in support of a two-parent notification statute. Because pregnant minors under a one-parent rule overwhelmingly choose to notify their mothers, the practical effect of the two-parent requirement is to enforce the authority of fathers within the family.

202. *Id.* at 484 (Kennedy, J., concurring in part and dissenting in part) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)).

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

nity values and traditions. Kennedy concludes that "[a] State pursues a legitimate end under the Constitution when it attempts to foster and preserve the parent-child relation by giving all parents the opportunity to participate in the care and nurture of their children."<sup>204</sup> In his view, the *Hodgson* majority improperly rejects the state's interest in strengthening family relationships. Kennedy attacks Stevens for describing as "constitutional[ly] irrelevant[t]"<sup>205</sup> what Kennedy views as the state's legitimate interest "in acknowledging and promoting the role of parents in the care and upbringing of their children,"<sup>206</sup> and in "promot[ing] the primacy of the family tie."<sup>207</sup> The tradition that Kennedy espouses is a tradition of state involvement in the domestic sphere.

For Kennedy, the *Hodgson* case implicates the community's right to legislate in the sphere of family relations. Whereas Stevens views the parental notification statute as facilitating the minor's individual right of privacy, Kennedy explicitly understands the provision as a regulation of substantive ends, a direct endorsement of family values by the state. In response to Stevens's conclusion that the state has no legitimate interest in promoting family relations, Kennedy retorts that "[t]his conclusion, which no doubt will come as a surprise to most parents, is incompatible with our constitutional tradition and any acceptable notion of judicial review of legislative enactments."<sup>208</sup>

For Kennedy, the Court fulfills its legitimate role when it defers to the community tradition surrounding family life. Although he holds that "parents have a liberty interest, protected by the Constitution, in having a reasonable opportunity to develop close relations with their children,"<sup>209</sup> the liberty interest he identifies retains only the slightest vestiges of the modern liberal conception of negative liberty espoused by Stevens. Kennedy makes no promises that parents will be "let alone" to raise their children. Instead, his view would limit parental rights to the "opportunity to develop close relations with their children."<sup>210</sup> The community is free to legislate the parental role so

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204. *Id.*

205. *See id.* at 501 (Kennedy, J., concurring in part and dissenting in part).

206. *Id.* at 482 (Kennedy, J., concurring in part and dissenting in part).

207. *Id.* at 501 (Kennedy, J., concurring in part and dissenting in part).

208. *Id.* at 481 (Kennedy, J., concurring in part and dissenting in part).

209. *Id.* at 484 (Kennedy, J., concurring in part and dissenting in part).

210. *Id.*

long as it accords parents the traditional opportunity to develop a relationship with a biological child.

In Kennedy's view the state is thus constitutionally required to provide biological parents with the opportunity to develop a relationship with their offspring, but it is not prohibited from doing more. The Constitution is not a ceiling on the state's legitimate authority to regulate family life, but its foundation:

[T]he fact that the Constitution does not protect the parent-child relationship in all circumstances does not mean that the State cannot attempt to foster parental participation where the Constitution does not demand that it do so. A State may seek to protect and facilitate the parent-child bond on the assumption that parents will act in their child's best interests.<sup>211</sup>

Kennedy does not view the state's "facilitation" of the parental role as depriving the parents of any constitutional interest because they are not thereby deprived of the opportunity to develop a relationship with their children. The fact that state facilitation of the parental role naturally involves the enforcement of family values does not pose a constitutional problem for Kennedy. "[I]t is at least permissible for a State to legislate on the premise that parents, as a general rule, are interested in their children's welfare and will act in accord with it."<sup>212</sup>

Kennedy is sensitive to the charge that state regulation of family values raises the specter of governmental tyranny by forcing families "to conform to the State's archetype of the ideal family."<sup>213</sup> He responds by arguing that parental notification does not require conformity to the community's vision of the good family life, because "[h]ow the family responds to such notice is, for the most part, beyond the State's control."<sup>214</sup> All that the state has done, in Kennedy's view, is "make the communication [between parent and child] possible by at least informing parents of their daughter's intentions."<sup>215</sup> In other words, he views notification as simply providing the procedural means for communication, and not coerced communication itself:

Minnesota has done no more than act upon the common-sense proposition that, in assisting their daughter in deciding

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211. *Id.*

212. *Id.* at 485 (Kennedy, J., concurring in part and dissenting in part).

213. *Id.* (quoting *id.* at 471 (Marshall, J., concurring in part and dissenting in part)).

214. *Id.*

215. *Id.* at 486 (Kennedy, J., concurring in part and dissenting in part).

whether to have an abortion, parents can best fulfill their roles if they have the same information about their own child's medical condition and medical choices as the child's doctor does; and that to deny parents this knowledge is to risk, or perpetuate, estrangement or alienation from the child when she is in the greatest need of parental guidance and support. The Court does the State, and our constitutional tradition, sad disservice by impugning the legitimacy of these elemental objectives.<sup>216</sup>

In Kennedy's view, parental notification is legislation compelling the means of good family life, not its ends. To the extent that parental notification gives individuals the tools with which to be good parents, it is freedom-inducing rather than freedom-restricting.

Kennedy relies on the means-ends distinction in an effort to avoid the specter of state compulsion; he does not, however, intend to repudiate the notion that it is appropriate for the state to proceed on the assumption "that parents will act in their child's best interests."<sup>217</sup> As we have seen, Kennedy adheres to a vision of the state's proper role in promoting the good family life, but he asserts that legislation of family values does mean compelled conformity to those values. By retaining a healthy liberal respect for individual freedom, Kennedy suggests that legislation of family values should reflect gentle persuasion, not hard coercion.

Kennedy's aversion to moral coercion highlights what is at stake behind his commitment to community tradition. The tradition to which he appeals is a tradition respecting individual liberty. Like Stevens, Kennedy is committed to a conception of individual sovereignty and autonomy in family life. Where Kennedy parts from his conventional colleagues, however, is in accepting the state's affirmative role in maintaining individual freedom in the domestic sphere. In Kennedy's view, although the Constitution does not require the state to protect affirmative liberties by providing parents with the means for effective enjoyment of their parental rights, the Constitution also does not prohibit states from doing so. For Kennedy, "our constitutional tradition" tolerates but does not require affirmative rights within the family. Kennedy concludes that the parental notification statute, and the "constitutional tradition" that supports it, is not oppressive of individual liberty because it does not require fami-

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216. *Id.*

217. *Id.* at 484 (Kennedy, J., concurring in part and dissenting in part).

lies to conform to the state's image of the good family.<sup>218</sup> The means-ends distinction ultimately is important as a way for Kennedy to show that the state is simply facilitating rather than compromising the affirmative right to parental authority when it legislates a normative ideal of family life.

Kennedy's conservative approach ultimately fails as a theory of constitutional liberty because it perceives the family as subject to legislative, but not constitutional, oversight. He presumes that, because the family is subject to governmental and social legislation, it is not within the realm of negative liberty protected under the Due Process Clause. Whatever claim the family might make for constitutional protection must be premised on a state legal tradition clearly extending such protection. Although Kennedy's approach arguably leaves some constitutional basis from which to challenge current state laws that deviate from such tradition, it is still a profoundly deferential approach that simply requires states to provide plausible reasons for changing their legislative minds. Kennedy's deferential approach provides no critical basis from which to evaluate the results of majoritarian decision making.

Kennedy's mistake follows from his assumption that the constitutional issue begins and ends with the determination that family life does not transcend majoritarian politics. The following subpart argues that, given the family's fundamental role in our political scheme, the Constitution's structural provisions should be read to guarantee that state laws will promote a family life consistent with that political order. The republican mother of the Revolutionary era, raising her virtuous sons to participate in the civic pursuit of the common good, has become the liberal parent of the twentieth century, raising his or her sons and daughters to be responsible individuals capable of contributing to the political life of the community. The modern parent carries the political responsibility of instilling a commitment to justice in her developing children.

### C. *Family Justice*

The constitutional dilemma posed here is disarmingly simple. At the same time that family privacy preserves a loving ref-

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218. Kennedy bases this conclusion on the argument that "[h]ow the family unit responds to such notice is, for the most part, beyond the State's control." *Id.* at 485 (Kennedy, J., concurring in part and dissenting in part). However, he ignores the extent to which communication of the daughter's intentions is itself a coercive practice.



uge of individual freedom, it also shields domestic abuse and inequality from public redress. It was in recognition of this oppressive aspect of family privacy that the constitutional principle of individual autonomy pierced the domestic sphere. Yet as we have seen,<sup>219</sup> the right of individual privacy threatens to destroy the private bonds of family life by elevating individual rights above communal needs. Thus, it would seem that constitutional law must settle for either a private family or autonomous individuals, but not both. What the Supreme Court has settled for instead, in the form of judicial deference, is neither. The Court's emerging conservative approach declines to protect any form of privacy in deference to state traditions.

By examining the recent work of feminist historians and theorists, this section explores the possibility of preserving individual autonomy without sacrificing the distinct virtues of family life. Until recently, the modern feminist movement has focused on the way in which family privacy has traditionally reinforced the oppression of women and children in the domestic sphere.<sup>220</sup> Sharing this insight into family life, these feminists fall into two general categories: liberal feminists who have sought to reform family life in an effort to improve conditions for women in the traditional domestic sphere, and radical feminists who have sought to eliminate the domestic sphere altogether. For both liberal and radical feminists, the solution to the problems of domestic life is to eradicate either the inequality or the subordination of women. In either case, the strategy focuses on doing away with what is pernicious in family life, including, if need be, the private family itself.

This Article offers an alternative understanding of both the domestic disease and the constitutional cure. Drawing on the affirmative aspects of family life, the theory offered here seeks not to eradicate, but to rehabilitate: it asks not what is wrong with family life, but how the family may measure up to what is right. This theory proceeds from the understanding that the constitutional doctrine of family privacy went wrong not because it recognized the family as a sphere governed by the pri-

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219. See *supra* text accompanying notes 76-80 (discussing *Roe*).

220. See MINOW, *supra* note 57, at 271-72; ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 182-200 (1987) ("[I]t is precisely family values that contemporary politicians so much affirm that permit, encourage, and serve to maintain domestic violence.").

vate virtue of loving authority, but because it failed to recognize the family as a sphere of justice as well. After reviewing the limitations of the liberal and radical viewpoints within feminism, this subpart outlines the constitutional implications of the alternative theory of family justice proposed here.

### 1. Public and Private in Feminist Thought

The concept of family privacy derives from the fundamental liberal distinction between the public sphere of government regulation and the private sphere of individual liberty.<sup>221</sup> As a central ideological determinant of women's status in social and political life, the public-private distinction has in recent years become a primary focus of feminist inquiry. As one feminist scholar has noted, "[t]he dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is about."<sup>222</sup> At its most basic level, feminism challenges the notion that the status of women within the domestic sphere is irrelevant to our political life. Rejecting the "separate but equal" theory of women's domestic role, feminism politicizes the private sphere in order to extend the principles of justice and equality to family life. The salient and divisive question for feminists is how to realize these political principles in a manner that is consistent with feminist values. The differing answers that feminists give to that question tell a story all their own. Let us briefly recount it.

The liberal movement for women's equality, which first coined the phrase "the personal is political" in the early 1960s, finds its roots in the nineteenth century women's suffrage movement.<sup>223</sup> That movement, spawned by the 1848 Woman's Rights Convention in Seneca Falls, New York, sought equality for women by demanding equal social and political rights.<sup>224</sup> The movement also focused on extending individual rights to the domestic sphere. "[Early] feminism's contribution to liberalism was to reinforce and greatly expand the individual's zone of pri-

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221. See *supra* text accompanying notes 33-38.

222. PATEMAN, *supra* note 1, at 118.

223. See generally 1-2 HISTORY OF WOMAN SUFFRAGE (Elizabeth C. Stanton et al. eds., Rochester, N.Y., Fowler & Wells 1881-1882), reprinted in THE FEMINIST PAPERS, *supra* note 60, at 413.

224. See, e.g., 1 *id.* at 70-74, reprinted in THE FEMINIST PAPERS, *supra* note 60, at 415-21 ("Declaration of Sentiments").

vacy—to widen the definition of rights beyond the rights of the individual in his civil status to include the rights of the individual in her private capacity.”<sup>225</sup> The twentieth-century women’s rights movement adopted this earlier rights-oriented agenda as part of an effort to reform the liberal regime. Modern liberal feminism is committed to preserving a sphere of private activity that is free from governmental control. Aware, however, of the threat that family life poses to individual autonomy, this strand of feminism seeks to extend the liberal principle of individual self-government to the domestic sphere. Liberal feminists wish to retain the categories of public and private, but render them gender-neutral.

In the constitutional arena, the doctrine of individual privacy reflects the success of the liberal feminist agenda. As we have seen,<sup>226</sup> individual privacy views the family as an institution that has shielded private abuse from the public view. The doctrine of individual privacy posits the individual—whether male or female—as the limit of legitimate governmental regulation.<sup>227</sup> But, as we have also seen, the doctrine of individual privacy protects individual freedom at the cost of severing the traditional familial bonds of loving authority.<sup>228</sup> Under the doctrine of individual privacy, the state has a basis from which it may penetrate the intimate family unit. Although liberal feminism preserves the value of individual autonomy, a condition previously denied to women, it nevertheless sacrifices the domestic virtues of altruism, love and dependence. The public-private distinction is retained, but the virtues of family life are lost.

A more radical strand of feminism challenges the notion that any sphere of social life, whether individual or familial, is free from political significance. For radical feminists, the core arena of liberal feminism’s individual privacy—the arena of sexuality—is the source of women’s social and political oppression.<sup>229</sup> Their view rejects the public-private distinction altogether; instead, “every area of life is the sphere of ‘sexual

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225. Clark, *supra* note 59, at 906.

226. See *supra* text accompanying notes 59-64, 161-65.

227. See *supra* text accompanying notes 75-83.

228. See *supra* text accompanying notes 81-82 (discussing *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)).

229. See JAGGAR, *supra* note 17, at 85 (describing how radical feminism expresses the “profound insight . . . that distinctions of gender, based on sex, structure virtually every aspect of our lives and indeed are so all-pervasive that ordinarily they go quite unrecognized”).

politics.'"<sup>230</sup> For radical feminists, women's equality demands public attention to the most intimate aspects of women's lives. It requires an affirmative commitment to recognizing and eliminating women's subordination in every area of life, including that of personal relations. For radical feminists, the concept of privacy is itself a dangerous tool of gender oppression, shielding private abuse from social view.

Against a background of liberal and radical feminism, this Article offers an alternative, progressive reconception of the relationship between the family and the state. Like the radical feminist view, this progressive approach locates the source of women's domestic oppression in the traditional concept of privacy. Progressive feminism rejects the conventional liberal understanding of the public-private distinction and in particular the view of the private domestic sphere as a realm of negative liberty. Instead, the progressive approach conceives of the domestic sphere as a realm constructed by public values and governed by public principles. Yet unlike the radical view, the progressive approach does not seek to eliminate family life, but rather to redeem it.

Ultimately, any progressive approach in support of the family must defend itself against the charge that the family is an inherently conservative institution resistant to social change. Proponents of this charge might ask why a progressive approach should endorse an institution long associated with oppressive social roles. One answer is pragmatic: the family is so deeply embedded in our social and legal fabric that its reform seems a more likely strategy to succeed than its elimination. A related answer resonates on both a personal and normative level: the family, however historically oppressive, is also the source of much human pleasure and happiness.<sup>231</sup> Most of us value our families, whatever their unique problems. While the closed

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230. *Id.* at 101. See generally KATE MILLETT, *SEXUAL POLITICS* (1970).

231. Many people share a similar response to the argument that gender equality requires doing away with gender difference. In her review of Susan Okin's book, *Justice, Gender and the Family*, OKIN, *supra* note 1, Martha Nussbaum comments:

[T]he sense of being male or female is so strong in most of us that a richer psychological and historical inquiry into the nature of human desire would be needed in order to make the case for the kind of [genderless] society Okin seems to want. . . . I sympathize intellectually with Okin's views, but I can't see myself in the world she projects; and I find myself wishing that she were not so fond of making simple and unambiguous statements about matters that are deeply ambiguous and mysterious.

Martha Nussbaum, *Justice for Women!*, N.Y. REV. BOOKS, Oct. 8, 1992, at 43, 46.

doors of the home have shielded abuse, isolation and exploitation, they have at the same time nurtured love and commitment. It is the goal of progressive theory to redeem the family by building upon its particular and compelling virtues.

Progressive feminism is not about freedom from government control, but is rather an affirmative vision of personal and family life. From its perspective, constructing is a public—and ultimately, constitutional—responsibility.

## 2. A Progressive Approach to the Public Family

The progressive approach set forth in this Article accords with the understanding of the family as an institution of fundamental political significance. Although sharing a vision of the public family, the progressive approach rejects the Supreme Court's reasoning that, because family life is a matter of public interest, the Court must defer to the political process. Instead, this Article suggests that the Court should evaluate laws affecting family life in light of the family's foundational role in our political order.

The Constitution establishes a governmental structure defined by the general principles of federalism, separation of powers, and legislative representation. Specific textual provisions establish a federal government of divided powers<sup>232</sup> within a federal system of dual sovereignties.<sup>233</sup> The Constitution's provisions require congressional elections at the federal level,<sup>234</sup> and a republican form of government at the state level.<sup>235</sup> Democratic self-government lies at the heart of the Constitution's structural guarantees.<sup>236</sup> The Constitution thus assumes the existence of a citizenry that is willing and able to participate in a representative democracy, and it is the Supreme Court's role to review state laws to ensure their consistency with these structural guarantees.

For a liberal democracy to succeed, however, it is not enough that individuals merely have the competence to cast a vote. Rather, as Jean Elshtain observes, "democracy requires

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232. See U.S. CONST. arts. I-III.

233. See U.S. CONST. art. VI, amend. X.

234. See U.S. CONST. art. I.

235. See U.S. CONST. art. IV.

236. See Amar, *supra* note 6, at 1132 ("Conventional wisdom acknowledges that the original Constitution proposed by the Philadelphia convention focused primarily on issues of organizational structure and democratic self-governance . . .").

self-governing and self-regulating citizens rather than obedient subjects."<sup>237</sup> In the United States, the process of becoming a self-governing individual capable of meaningful political participation takes place initially and primarily within the family.<sup>238</sup> As the Supreme Court has repeatedly reaffirmed, "the child is not the mere creature of the State."<sup>239</sup> Our liberal democracy rejects the conformity resulting from direct state indoctrination; instead it requires intermediate institutions to initiate individuals into the political life of the state.<sup>240</sup>

The family's role in nurturing the development of responsible civic individuals is not its only constitutional function. The family also serves the vital and unique function of instilling in children "the sense of belonging and having roots in a distinct tradition."<sup>241</sup> These diverse "ways of life" promoted by differing family traditions in turn nourish our liberal political system. They exist, of course, in tension with the authority of the state, balancing the state's power with their potential threat of subversive resistance.<sup>242</sup> As one commentator has described it, the family is the "sphere of private non-conformity."<sup>243</sup>

The preservation of social diversity is a function which the

237. JEAN B. ELSHTAIN, *The Family and Civic Life*, in *POWER TRIPS AND OTHER JOURNEYS: ESSAYS IN FEMINISM AS CIVIC DISCOURSE* 45, 49 (1990).

238. Heymann & Barzelay, *supra* note 83, at 773 ("In democratic theory as well as in practice, it is in the family that children are expected to learn the values and beliefs that democratic institutions later draw on to determine group directions.").

239. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

240. *Cf.* MAX HORKHEIMER, *CRITICAL THEORY* (1972). Horkheimer notes that:

The family, as one of the most important formative agencies, sees to it that the kind of human character emerges which social life requires, and gives this human being in great measure the indispensable adaptability for a specific authority-oriented conduct on which the existence of the bourgeois order largely depends.

*Id.* at 98. Thus, it is clear that public education cannot be the sole or even primary method for initiating children into a liberal democracy. It is possible, of course, to imagine an ideal universal system of private education or communal living that would obviate the need for family life, but this is not the world in which we live.

241. John H. Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 821 (1978).

242. *Cf.* Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1721 (1988) ("Intermediate organizations not only facilitate individual self-definition and expression, but also keep the state from replicating itself by nurturing deviance, diversity, and dissent.") Although I agree with Professor Sullivan's point that intermediate groups such as the family are "too homogeneous, too partial, too differentiated" to be themselves the focus of republican values, *see id.*, that is not to say that certain intermediate institutions may nevertheless foster the "civic, virtuous, [and] deliberative" aspects of the broader political enterprise. *Cf. id.*

243. HERBERT MARCUSE, *EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FRAUD* 97 (1956).

state cannot assume without undermining the foundation of democratic liberty.

The intense loyalties, obligations, and moral imperatives nurtured in families may clash with the requirements of public authority, for example, when young men refuse to serve in an unjust war because this runs counter to the religious beliefs instilled in their families. This, too, is vital for democracy. Democracy emerged as a form of revolt. Keeping alive a potential locus for revolt, for particularity, for difference, sustains democracy in the long run. It is no coincidence that all twentieth-century totalitarian orders labored to destroy the family as a locus of identity and meaning apart from the state. Totalitarian politics strives to consume all of life, to allow for a single *public* identity, to destroy private life, to require that individuals identify only with the state rather than with specific others—family, friends, comrades.<sup>244</sup>

The family is subject to constitutional protection, therefore, not because it is an arena of negative liberty, as conventional wisdom would have it, but because it serves both to deploy and to constrain the political power of the state.<sup>245</sup> The family is a central element of our constitutional structure of government. In the progressive view, the Constitution values and protects family life because it contributes to the preservation of our political order.

Yet not just any family life will do. It would not be a sufficient guarantee of democratic self-government to protect the family in any form whatsoever.<sup>246</sup> To this extent, the value of family diversity is not unlimited. The lessons learned in the domestic community—the tradition or way of life into which the

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244. ELSHTAIN, *supra* note 237, at 55; *cf.* Hafen, *supra* note 4, at 480 (“Monolithic control of the value transmission system is a ‘hallmark of totalitarianism’; thus, ‘for obvious reasons, the state nursery is the paradigm for a totalitarian society.’”) (quoting P. BERGER & R. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 44 (1977); D. MURPHEY, *BURKEAN CONSERVATISM AND CLASSICAL LIBERALISM* 270 (1979)). Contrary to the progressive view presented in this Article, Professor Hafen concludes that “[i]mpermanent relationships that perform some intimate or associational ‘functions’ cannot claim the same position as marriage and kinship in ensuring a political structure that limits government, stabilizes social patterns, and protects pluralistic liberty through the power of its own relational permanency.” *Id.* at 482.

245. *Cf.* HORKHEIMER, *supra* note 240, at 114 (noting that “the family not only educates for authority in bourgeois society; it also cultivates the dream of a better condition for mankind”).

246. As the Supreme Court warned in *Reynolds v. United States*, 98 U.S. 145, 166 (1879), “polygamy leads to the patriarchal principle.” While the specific premise, that polygamy itself threatens the political order, may be contested, the Court’s more general implication regarding the connection between the substance of family life and political order is sound.

individual is born—will be brought by the individual into the larger political community. Children raised in the shadow of domestic tyranny will be ill-equipped to assume the obligations of political liberty. Those raised under the influence of domestic patriarchy will find it difficult to accept the equality of political life. To sustain a healthy democratic order, the family must itself reflect values consistent with those of the political structure. We must, in other words, hold the family up to a standard of justice. Loving authority as a principle of family life is not, in itself, enough.<sup>247</sup>

Two important points remain to be emphasized. First, a theory of family justice does not simply transfer the concept of political justice onto domestic life. Indeed, what is just for the family may actually constitute injustice within the political sphere.<sup>248</sup> For example, while it is certainly “just” for parents to exhibit arbitrary preferences for their own children as against others; arbitrary preferential treatment in the civil or political realm is considered discriminatory and unfair. Similarly, children may develop better under an authoritarian rather than democratic form of family life where bedtime is not established by majoritarian vote. Family justice is not political justice writ small, but rather a vision of the particular role that the family and parental authority play in a liberal democracy.

Although the principle of family justice does not call for the wholesale application of political justice to the domestic realm, it is nevertheless a concept of *justice*. At its threshold, therefore, a principle of family justice rejects the traditional view that justice is incompatible with the familial virtues of love, altruism and mercy.<sup>249</sup> As Susan Okin argues, “[j]ustice is needed as the primary, meaning most fundamental, moral virtue *even* in social

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247. See OKIN, *supra* note 1, at 99-100:

Unless the households in which children are first nurtured, and see their first examples of human interaction, are based on equality and reciprocity rather than on dependence and domination—and the latter is too often the case—how can whatever love they receive from their parents make up for the injustice they see before them in the relationship between these same parents?

*Id.*

248. See Hafen, *supra* note 130, at 654 (arguing that “the family that operates as a true democracy is less likely to provide the security, the role-modeling, the leadership, the socializing, the growth, or many of the other interests preserved by a basic policy decision that parental authority is worthy of some state support.”).

249. See, e.g., MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 30-35 (1982); Karl N. Llewellyn, *Behind the Law of Divorce*, 32 COLUM. L. REV. 1281, 1293-94 (1932). For a more thorough critique of this view, see OKIN, *supra* note 1, at 26-33.



groupings in which aims are largely common and affection frequently prevails.”<sup>250</sup> Relations based on love and affection do not necessarily preclude, but indeed may be understood to supplement, the principles of justice. Family justice need not require equality and evenhandedness in ideal family situations in which family members agree on the common ends of family life. Where family consensus breaks down, however, or where family relations are otherwise less than ideal, it should provide a basis on which individual family members may lay claim to certain rights within the family. Indeed, it may even be that the virtues of family life—love, altruism and dependence—will not flourish in the absence of an underlying communal commitment to just family relations. The affective virtues may begin to weaken the moment individual family members perceive that they are being treated unfairly.

Second, the doctrine of family justice must confront the question of how to define the family. Beyond marriage, what forms of relationship fall within the definition? A homosexual couple, a grandfather and grandchild, a single mother and child, an adult and unrelated child, and a brother and sister, may lay claim to the status of family, and a proper doctrine of family justice must consider the merits of all such claims. All of the enumerated situations potentially satisfy a broad understanding of the family as defined by enduring, close-knit, affective relationships. Family justice calls for the broadest definition of family consistent with the goal of sustaining diverse moral traditions by means of close human connection. Family justice need not require that family relationships conform to a traditional social structure; the fact that two people are not married or do not live together would not in itself exclude them from the definition of family. Family justice would not, however, define family to include transitory or superficial relationships, such as those characteristic of rooming houses, or relationships formed for a specific purpose, such as religious groups or business organizations. A substance of enduring, meaningful human connection rather than traditional form must define the sphere of protected relations.

In doctrinal terms, family justice would mean that laws directly or indirectly affecting family life, including laws that define what a family is, should be subject to heightened review.

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250. OKIN, *supra* note 1, at 29.

Those family regulations that will be sustained will be those that do not hinder a child's eventual participation in the broader political community, nor interfere with community traditions consistent with our broader political ideals.<sup>251</sup> The sphere of protected relations would include, for example, parental authority exercised in a manner consistent with the child's developing sense of autonomy. The progressive approach recognizes that constitutional liberty depends on an ideal that promotes the development of individuals who possess diverse community values, but who share a broader conception of political justice. As one scholar has noted, "Democratic principles give parents a great deal of room to exercise discretion in structuring their families and educating their children."<sup>252</sup>

Ultimately, however, the value of political conformity must place limits on the degree of family diversity that a liberal democracy can tolerate.<sup>253</sup> Those limits must, of course, be determined according to the particular circumstances; there can be no hard and fast rules governing the limits of family authority, as each case will turn on the degree to which the particular family life frustrates the broader political goals.

*Wisconsin v. Yoder*<sup>254</sup> is among the Supreme Court's most notorious cases examining the limits of family freedom. In that case, although the Court upheld the Amish parents' right to withdraw their children from participation in the political and civil life of the broader society, it was nevertheless careful to emphasize that the Amish community raised their children in conformity with traditional American values.<sup>255</sup> Had the sub-

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251. Cf. *id.* at 127 ("Challenging the [public-private] dichotomy does not necessarily mean denying the usefulness of a concept of privacy or the value of privacy itself in human life."); Frank Michelman, *[Private] Personal But Not Split: Radin Versus Rorty*, 63 S. CAL. L. REV. 1783, 1785 (1990) (discussing "the political discourse—I stress political—of personal rights of privacy and association").

252. AMY GUTMANN, *DEMOCRATIC EDUCATION* 12 (1987).

253. See *id.* at 30 ("Because children are members of both families and states, the educational authority of parents and of politics has to be partial to be justified.").

254. 406 U.S. 205 (1972).

255. See *id.* at 225-26. The Court in *Yoder* notes that

the Amish are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade . . . [T]he Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the 'sturdy yeoman' who would form the basis of what he considered as the ideal of a democratic society.

*Id.* at 225; see also *id.* at 234 (concluding that withdrawal of Amish children from the last one or two years of compulsory schooling would not "result in an inability to be self-supporting or to discharge the duties or responsibilities of citizenship").

stance of Amish life been less appealing and less compatible with the ideals underlying the American political system, *Yoder* might have been decided differently.<sup>256</sup>

Family justice is not a determinative legal concept or doctrine. It cannot be reduced to a simple formula with great predictive power. We may feel fairly certain that a principle of family justice would uphold a parent's exclusive right to control the religious upbringing of a young child, but we may feel less sure regarding the education of an older child who rejects the parent's beliefs. We may also be clear that the principle of gender equality inherent in any doctrine of family justice forbids laws requiring spousal notification of a wife's intended abortion. Because state conduct with respect to the family must further the individual's ability to assume his or her civic responsibilities, family justice requires a strong vision of the individual's place in the broader political community.

Ultimately, a theory of family justice calls for articulation of the demands of citizenship and of the kind of political society in which we want to live. The state must walk a middle way between imposing a traditional authoritarian structure on family life and promoting a strict individualism at odds with the domestic community. To that end, laws touching on the family must promote equality among adults, a measure of autonomy for older children, and fair treatment of all family members.

In light of these general principles, the progressive constitutional goal is to fashion a substantive doctrine of family justice. As a beginning effort, let us examine the way in which the Court might have applied a progressive doctrine of family justice in *Hodgson*.

### 3. Family Justice in *Hodgson v. Minnesota*

In evaluating the two-parent notification statute in *Hodgson*,<sup>257</sup> a hypothetical Justice taking a progressive approach would have found guidance in portions of the opinions of Justices Stevens and Kennedy. From Kennedy, she would have taken the principle that the state has a legitimate interest in

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256. It is even possible to perceive the Amish "way of life" as consistent with the central liberal principle of tolerance. By withdrawing from the broader political community rather than challenging it, the Amish were in some ways signalling their willingness to tolerate opposing views.

257. 497 U.S. 417 (1990).

"recogniz[ing] and promot[ing] the primacy of the family tie."<sup>258</sup> In other words, the domestic sphere neither is nor should be a sphere free from governmental regulation; rather, the state properly defines many central aspects of family life. The progressive approach acknowledges the state's involvement in the creation and maintenance of families, and therefore rejects formal constitutional barriers to state involvement in family life.

Several aspects of the parental notification statute would raise grave concerns for our hypothetical Justice. First, she would have to agree with Stevens that the ideal of the intact nuclear family works a profoundly harmful effect on individuals living with the reality of family discord. Our hypothetical Justice would focus on the "sizable and impressive collection of empirical data documenting the effects of parental notification statutes and of delaying an abortion."<sup>259</sup> Stevens devotes the bulk of his opinion to summarizing the empirical findings regarding parental notification, detailing the actual effect of such notification on both intact and non-intact families. He exhibits careful sensitivity to the experience of parents and children in violent and dysfunctional families, demonstrating an insightful recognition of families that are "different," that fail to conform to the prevailing ideal of family life. Family justice prevents the hypothetical Justice from concluding, as Justice Kennedy did, that "[h]ow the family unit responds to [parental] notice is, for the most part, beyond the State's control."<sup>260</sup> The doctrine of family justice focuses on the family's response because it is at the moment of response that authority is exercised and the lesson is learned.

Second, unlike most other decisions faced by a minor, the decision whether to carry a pregnancy to term is one of fundamental and longlasting importance to the young woman.<sup>261</sup> That the decision is independently protected under the Due Process Clause testifies to its importance. Moreover, motherhood is not a temporary "disability" lifted on reaching majority, but a condition lasting an entire lifetime. If a pregnant minor carries a child to term against her wishes, the state has effectively coerced

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258. *Id.* at 501 (Kennedy, J., concurring in part and dissenting in part).

259. *Id.* at 464 (Marshall, J., concurring in part and dissenting in part).

260. *Id.* at 485 (Kennedy, J., concurring in part and dissenting in part).

261. In this regard, the decision whether to terminate a pregnancy cannot be equated with less momentous decisions arguably within full parental control, such as the hour of bedtime.

her into a position of dependency. Unlike the *voluntary* dependency that may characterize some ideal loving relations, this *coerced* dependency—physical, psychological and financial—destroys the individual's ability to be self-governing in any meaningful sense.<sup>262</sup> Young, unmarried mothers in particular face formidable obstacles to completing their education or to entering the workforce. The obstacles faced by all parents become amplified when the parent is a minor: affordable daycare, flexible work hours, public transportation, and sufficient wages and benefits. Under these conditions, such mothers are ill-equipped for the task of raising their children to become responsible, independent citizens. To the contrary, it is entirely possible that an unwanted teenage pregnancy will begin a generational cycle of financial dependency and political disengagement.

Proponents of the parental notification statute might argue that the statute is necessary to ensure that a minor girl does not make the wrong decision and be forced to live with the consequences of a regretted abortion. Yet their argument ignores the fact that in such circumstances, an individual must live with the moral consequences of her *own* decision. In contrast, an individual who is coerced into carrying her pregnancy to term under the statute<sup>263</sup> must live with the moral consequences of a decision *imposed on* her. In a society committed to self-government, it would be fundamentally unjust for the state and parents acting together to override the pregnant minor's wishes with respect to a decision of such important dimensions.

The parental notification statute teaches the pregnant minor a powerful lesson regarding the consequences of her own sexuality. She learns that the state may effectively deprive her of the

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262. To this extent, the involuntary dependency of the pregnant minor is similar to that of the mother who exclusively works at home against her wishes. A woman might involuntarily remain at home because her husband disapproves of mothers working outside the home; because she cannot find adequate daycare; because her job lacks sufficient flexibility; or because her husband does not carry his share of the household responsibilities. In constitutional terms, the theory of family justice would require heightened scrutiny for laws that inhibit a mother's opportunity to enter the workforce. In broader moral terms, the theory would require fathers to participate equally in childrearing where women choose to work outside the home, and require employers to provide those fathers with the flexibility needed for such arrangements.

263. Under the statute, a pregnant minor would be coerced into carrying her pregnancy to term if she chooses not to tell her parents, or where she notifies them in compliance with the statute and they exert financial or other pressures on her that inhibit her ability to terminate the pregnancy.

right to terminate her pregnancy without also providing her the means to raise her child or support her new family. The state denies her this right in the name of protecting family life without first establishing whether a family life of any meaning actually exists for her. Indeed, a minor's reluctance to inform her parents voluntarily is powerful evidence that the ideal family image underlying the notification statute is nonexistent. In view of the importance of the decision at stake, the expressed wishes of the pregnant minor, and the threat of a coerced dependency compromising the minor's ability to participate in the full civil and political life of the community, our hypothetical Justice would hold that the parental notification statute violates the Constitution.

The progressive approach would prevent states from legislating "family values" without taking responsibility for their social effects. This approach rejects Kennedy's conclusion that "[h]ow the family unit responds to [parental] notice is, for the most part, beyond the State's control."<sup>264</sup> In the progressive view, the response of the family unit is not merely a state responsibility, but a constitutional concern as well. Applying a standard of family justice, our Justice will ensure that public aspirations for family life do not unjustly burden the lives of those who are unable to conform to such ideals. This is, in some respects, a pragmatic task. A doctrine of family justice requires that all individuals—whether nonconforming, different or simply pregnant—share in the normative political life of the community.

## V. CONCLUSION

The progressive view of the family in constitutional law developed in this Article has both critical and normative power. In its critical mode, it focuses on revealing the political significance of family life inherent in the traditional doctrine of constitutional privacy. This critique of constitutional privacy takes a doctrinal form by describing the way in which the doctrine of individual autonomy politicizes the sphere of family relations. The critique also takes an historical form by illuminating the way in which the family has always been subject to public control and regulation. In its normative mode, the progressive

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264. *Hodgson*, 497 U.S. at 485 (Kennedy, J., concurring in part and dissenting in part).

approach uses these critical insights to articulate a constitutional vision that recognizes the role of the family in maintaining the political structure of our liberal democracy. The family must be understood as both facilitating and constraining the exercise of state power vis-à-vis the individual. Ultimately, it is an approach that demands that we aspire only to those family ideals that comport with the individual's development into a responsible, self-directing participant in civil and political life. It understands that this development requires that families be given the room to nurture their own—potentially subversive—moral traditions. More affirmatively, it understands that political justice derives in no small measure from the lived justice of family life.

To the extent that the Supreme Court's emerging deference to community tradition recognizes the state's role in shaping public aspirations for family life, it has moved constitutional law in a worthwhile direction. Yet the Court has failed to rise to the challenge of its own insight into the political nature of family life. The progressive doctrine of family justice offered here rejects the view that our constitutional tradition requires deference to the state's moral decisions concerning family life. To the contrary, the Constitution should be understood to establish a principle of family justice. The bonds of domestic relations cannot support a liberal democracy unless those relations are also inherently just. Determining precisely what it means for family relations to be just is the constitutional challenge that awaits us.

