2002

Self-Definition in the Constitution of Faith and Family

David D. Meyer

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>

Part of the [Law Commons](#)

Recommended Citation

Meyer, David D., "Self-Definition in the Constitution of Faith and Family" (2002). *Minnesota Law Review*. 1135.
<https://scholarship.law.umn.edu/mlr/1135>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Self-Definition in the Constitution of Faith and Family

David D. Meyer†

The latest numbers trickling out of the U.S. census have provided, for many, a startling “glimpse into the shifting and complicated makeup of American families.”¹ In splashy, front-page coverage, newspapers across the country reported last spring that the nuclear family is receding and being fast overtaken by a variety of more unconventional family forms.² The number of married couples living with their children—the family form long venerated as the social norm³—now constitutes less than a quarter of all households.⁴ In their place, the cen-

† Associate Professor, University of Illinois College of Law. I thank Amy Gajda, Harry Krause, John Nowak, and participants in the International Society of Family Law’s North American Regional Conference, held in Kingston, Ontario, for helpful comments and suggestions.

1. Eric Schmitt, *For First Time, Nuclear Families Drop Below 25% of Households*, N.Y. TIMES, May 15, 2001, at A1.

2. See, e.g., Gaiutra Bahadur, *Creating New Definitions for Family*, AUSTIN AMERICAN-STATESMAN, May 27, 2001, at A1; Robin Fields, “Married With Children” Still Fading as a Model, L.A. TIMES, May 15, 2001, at A1; Schmitt, *supra* note 1; *Unmarried-couple households boom*, MILWAUKEE JOURNAL SENTINEL, May 15, 2001, at A1.

3. Although the precise prevalence of the nuclear form over time has been the subject of debate, see, e.g., Barbara Bennett Woodhouse, “It All Depends on What You Mean by Home”: Toward a Communitarian Theory of the “Nontraditional” Family, 1996 UTAH L. REV. 569, 589-91, there is no doubt that it has figured very prominently for “a very long time,” Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537, 538 (stating also that “[s]ince about 1960, research has clearly demonstrated that the nuclear family is not the late-arising product of the industrial revolution which, it was long supposed, broke up extended family groups”), and that it continues to serve as the dominant normative model of family construction, see, e.g., Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 933 (2000) (asserting that “the normative nuclear family” remains “the only legitimate affiliative structure”).

4. These “nuclear” families constituted 23.5 percent of all households in 2000, down from 25.6 percent in 1990. See Schmitt, *supra* note 1. Although the absolute number of these families grew by almost six percent during the

sus found dramatic growth in alternative family arrangements, particularly in the number of households headed by single mothers.⁵ Even more to the point, the data showed a shift toward what the Census Bureau calls "nonfamily" households.⁶ These households, consisting of single adults living alone or with others who are not related by marriage, birth, or adoption, already comprise nearly a third of all households and are growing at twice the rate of "family" households.⁷ This rise in the number of "nonfamily" households, moreover, does not fully capture the growing frequency of unconventional living arrangements.⁸ Some of the households classified by the Census Bureau as "family households" (because they contain two or more people related by birth, adoption, or marriage) nevertheless contain broader intimate groupings that the Bureau does not recognize as "families"—for instance, unmarried partners living with a child who is related by birth or adoption to only one of the partners.⁹ Thus, even within the ranks of "family households" there is a growing number of what might be called "nonfamily" families."

For many years now, changes in the patterns and forms of family life have been the subject of intense and very public debate.¹⁰ There has been, in various quarters, both hand-

1990s, the number of other households grew substantially faster and so the proportion of "nuclear" households declined. *See id.*

5. *See id.* (reporting that "the number of families headed by women . . . grew nearly five times faster in the 1990's than the number of married couples with children").

6. *See* U.S. DEPT OF COMMERCE, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 CENSUS OF POPULATION AND HOUSING 1 (May 2001) [hereinafter 2000 CENSUS]; *see also id.* at A-2 (defining a "Nonfamily Household" as consisting of "[a] householder living alone or with nonrelatives only," and defining a "nonrelative" as "[a]ny household member who is not related to the householder by birth, marriage, or adoption, including foster children").

7. *See* Schmitt, *supra* note 1.

8. At the same time, the rise in "nonfamily households" is by no means due solely to a higher incidence of unconventional living arrangements. Most "nonfamily households" in the census data consist of single adults living alone, *see* 2000 CENSUS, *supra* note 6, at 1, and the increased prevalence is due partly to a delay in the age of marriage and the fact that people, including many who are divorced or widowed, are simply living longer, *see* Schmitt, *supra* note 1.

9. *See* 2000 CENSUS, *supra* note 6, at A-1 (explaining the Bureau's definitions of "Family" and "Family Household").

10. *See, e.g.,* Martha Minow, *All in the Family & In All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275, 278 (1992-93) [hereinafter Minow, *All in the Family*] (noting then-current headlines and observing that "[h]istorians tell us that Americans have worried about the family for over

wringing and celebration over the realization that individuals are choosing to marry later or to forgo marriage altogether in favor of a widening array of nontraditional alternatives. Indeed, writing last year, Justice Sandra Day O'Connor needed no citation for the observation that "[t]he demographic changes of the past century make it difficult to speak of an average American family."¹¹ Still, the swift pace of change evident in the latest census data¹² surely adds some urgency to the question implicit in the Census Bureau's own awkward terminology—namely, which of these intimate associations is entitled to be regarded as "family."

There is considerable disagreement, of course, about whether certain of the changes reflected in the census data should be embraced or resisted in shaping policy toward the family.¹³ Nevertheless, there appears to be broad consensus that public policy should acknowledge and at least partly accommodate the ongoing diversification of family life. This seems evident in the very general movement toward private ordering in family law—allowing couples more leeway, for instance, in defining for themselves the terms of their cohabiting or marital relationships—and in a wide scale softening of the public penalties for entering into unconventional intimate relationships.¹⁴ A survey of recent legislation and pending law-reform proposals suggests a slowly broadening public conception of family, both in the United States and many other nations.¹⁵

three hundred years").

11. *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality opinion).

12. For instance, "[d]emographers expressed surprise that the number of unmarried couples in the United States nearly doubled in the 1990's, to 5.5 million couples from 3.2 million in 1990." Schmitt, *supra* note 1, at A1.

13. See, e.g., Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191, 191-92 (1993) (recounting the inability of a group of legal experts and social scientists to come to consensus about the extent to which law should accommodate ongoing changes in family form). Professor Levy observed that "[j]ust as the American nuclear family is itself struggling to deal with its relationships with grandparents, stepparents, and even strangers who may have played some kind of parent-like role, conference participants struggled to formulate family law judicial and legislative policies which can accommodate as well as promote stability and change." *Id.* at 192.

14. See *infra* Part I.A.

15. See, e.g., William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961, 961-63, 965-67 (discussing the growing trend toward municipal and state enactments granting legal recognition of "domestic partnerships," both in the United States and abroad, and observing that a common theme of these enactments is recognizing "do-

Yet, at least in the United States, this greater generosity in defining family has not generally been carried over to the context in which the definition carries the most weight—the constitutional law of family privacy. There, in marking out the bounds of “a ‘private realm of family life which the state cannot enter,’”¹⁶ courts have tended to adhere to a much narrower and more traditional conception of what counts as “family.” That conception extends beyond the nuclear family to embrace at least some forms of an extended biological family,¹⁷ but more novel intimate configurations—unmarried partners, for instance, or the bond between a child and a non-parent caregiver—are unlikely to be regarded as “family” entitled to constitutional protection.¹⁸ As a result, government may *elect* to be magnanimous in recognizing nontraditional intimate relationships—to grant individuals more freedom to define for themselves alternative forms of “family”—but it is not likely to be *obligated* to respect the self-defining choices of those who stray from convention. Self-definition of the family, by this understanding, is predominantly a matter of legislative choice, not individual prerogative.

That family should be understood so restrictively under the Constitution, however, is not self-evident. Indeed, the relatively static way in which “family” is defined for constitutional purposes contrasts sharply with the more fluid way in which “religion” is conceived for purposes of protection under the First

mestic partnerships as a different form of ‘family’”); *id.* at 978-79, 989 (discussing the legal recognition of unmarried partnerships proposed by the American Law Institute’s *Principles of the Law of Family Dissolution* and suggesting that “the ALI’s placement of its recognition of domestic partnerships in the *Principles* indicates its understanding of domestic partnerships as a type of ‘functional family’ relationship”). For additional discussion and authority, see *infra* notes 32-55 and accompanying text.

16. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (Powell, J., plurality opinion) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

17. *See id.* at 505-06 (holding that the Constitution protects the choice of an extended biological family, at least in the particular “degree of kinship” presented in that case, to share a home).

18. *See, e.g., id.* at 498 (distinguishing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974)). *Boraas* found no constitutional sense of family implicated by an ordinance which regulated the cohabitation of individuals who were not related by “blood, adoption, or marriage.” *Boraas*, 416 U.S. at 2, 7-8; *see also Michael H. v. Gerald D.*, 491 U.S. 110, 122-24 & n.3 (1988) (Scalia, J., plurality opinion) (finding no constitutional sense of family implicated in the relationship between a man and the daughter he fathered in an extramarital affair); *infra* notes 60-92 and accompanying text.

Amendment.¹⁹ Religious liberty and family privacy both rank as fundamental rights under the Constitution, and both sets of rights are said to value personal autonomy in a "private sphere" of conscience or intimacy.²⁰ Yet, while courts give little deference to individual conceptions of "family" that are not validated by tradition and convention, they show considerable deference to unconventional conceptions of religious faith. In the context of the First Amendment, it is now accepted that religious pluralism demands that religion be understood broadly;²¹ yet, in the context of family privacy, the growing diversity of families has not yet generated a similar consensus.²²

This Article considers whether the difference in the judiciary's approaches to defining family and religion under the U.S. Constitution is justified. Part I contrasts the movement toward wider self-definition and private ordering in non-constitutional family law with the decidedly more static notion of family that prevails in constitutional doctrine. Part II contrasts the ways in which family and religion are defined for purposes of constitutional protection. Part III evaluates possible explanations for the differences in constitutional approach, including family privacy's status as an unenumerated right and distinctions in the values underlying the respective constitutional guarantees, and concludes that none justifies the full scale of divergence.

Finally, Part IV suggests that the difference in definitional approach masks a broader similarity in the Supreme Court's protection of family and religion under the Constitution. In the two contexts, the Court has used different strategies for grappling with a common dilemma—the need to balance respect for individualism in a realm of profound personal importance with the practical exigencies of communal governance. In the context of family privacy, the Court has struck the balance by defining the scope of protection narrowly while promising vigorous protection against popular incursions within that sphere. In the context of the First Amendment, by contrast, the Court has been more generous in defining the scope of protection, but compensates for that generosity by giving less substantive protection to qualifying conduct. This Article suggests another course: By pairing greater deference to self-definition of family

19. See Martha Minow, *The Free Exercise of Families*, 1991 U. ILL. L. REV. 925 [hereinafter Minow, *Free Exercise of Families*].

20. See *infra* note 131.

21. See *infra* Part II.

22. See *infra* Part I.B.

and religion with an abandonment of the pretense of absolutist judicial protection, the Court could take account of the core dilemma while remaining more faithful to the underlying constitutional values.

I. THE STATIC NATURE OF THE CONSTITUTION IN UNDERSTANDING "FAMILY": COMPARISONS WITH FAMILY LAW AND POLICY

In recent years, a gulf has opened between the concept of "family" accepted for many purposes of family law and the notion of "family" given protection under constitutional doctrine. While family law is increasingly deferential to individual conceptions of family life, even when those conceptions are quite unconventional, the constitutional doctrine protecting marriage, childrearing, and other aspects of "family privacy" remains closely tied to traditional assumptions about the meaning of "family."

A. THE MOVE TOWARD PRIVATE ORDERING IN FAMILY LAW AND POLICY

In legislation and administrative policy concerning the family, there has been for some decades a sustained trend toward permitting individuals greater freedom in defining the content and terms of their own relationships.²³ The law of divorce, for instance, has comprehensively shifted decisional power from legislators and judges—who for years intensively regulated precisely which human foibles or failures would permit dissolution of a marriage²⁴—to the marriage partners

23. See, e.g., MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 35-42 (1993) ("Recent years have witnessed considerably greater receptivity to private ordering of family matters. As one observer puts it, the law 'has evolved far toward recognizing the need for private choice and the untenableness of uniform public policy as a strategy for governing the conduct and obligations of intimacy.'") (quoting Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 291 (1982)); Ann Laquer Estin, *Can Families Be Efficient? A Feminist Appraisal*, 4 MICH. J. OF GENDER & L. 1, 25 (1996); Marsha Garrison, *Toward a Contractarian Account of Family Governance*, 1998 UTAH L. REV. 241, 241; Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1444-56; Teitelbaum, *supra* note 3, at 544.

24. See, for example, the debate between the prevailing and dissenting justices in *Palmer v. Palmer*, 281 N.W.2d 263 (S.D. 1979), over whether a wife's conduct—including, among other particulars, blocking her husband's access to the shower "because she thought he did not need one" and "caustically referr[ing] to [one of her husband's female coworkers] as his 'Wacky-

themselves.²⁵ Although the desirability of permitting "unilateral" divorce remains contested,²⁶ it is now widely accepted that if both parties concur that their marriage is not worth repairing, they are entitled to part ways.²⁷ This is also true of the financial terms on which they part. After a long history of resistance, the law now generally allows divorcing spouses to decide for themselves, if they can agree, how to divide their property or whether one will support the other through alimony.²⁸ Simi-

Dacky"—was bad enough to permit divorce. *Id.* at 265 (Henderson, J., dissenting). The majority concluded that it was not.

25. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 31 (2d ed. 1988) (stating that "marriage as a legal institution is being transformed from a clearly defined and legally regulated relationship into an imprecisely defined relationship whose incidents are either uncertain or left largely to the control of the parties to the relationship"); NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 212 (2000); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1944 (2000) (noting that "the legal regulation of marriage has undergone transformative change in the past generation," one theme of which has been that "individuals are far freer to arrange their intimate relationships without state coercion or even legal intervention"); Singer, *supra* note 23, at 1446-48.

26. See, e.g., Ira M. Ellman, *The Place of Fault in Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79. Three states—Mississippi, New York and Tennessee—still condition the availability of no-fault divorce on the consent of both spouses. See HARRY D. KRAUSE ET AL., *FAMILY LAW: CASES, COMMENTS AND QUESTIONS* 546 (4th ed. 1998).

27. See *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535, 559 (1998) (remarks of Michael Grossberg) (describing "[t]he creation and rapid diffusion of no-fault divorce" as "one of the most direct endorsements of private ordering . . . ever attempted in American family law"). As Marsha Garrison has pointed out, the movement toward no-fault divorce is only part of a wider trend in law toward a more egalitarian model of governance within the family:

A range of legal developments dating from the 1960s and 70s reflects . . . a[n] evolution in [family] governance: Constitutional monarchy has begun to give way to a more democratic and egalitarian governance model. The new model does not rely on sex-based roles and obligations or emphasize the inviolability of family ties. Instead, it relies on gender-neutral rules and obligations The new governance model links developments as diverse as abortion reform, no-fault divorce, abandonment of the "tender years" presumption in custody law, a more functional definition of parenthood, and a children's rights movement

Garrison, *supra* note 23, at 246-47 (footnotes omitted); see also Scott, *supra* note 25, at 1944-45 (identifying egalitarianism as a central theme in the recent transformation of marriage law).

28. See REGAN, *supra* note 23, at 148-49; AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 5.01 cmt. b (Proposed Final Draft, Part I) (Feb. 14,

larly, family law increasingly has deferred to its regulatory subjects upon the commencement of marriage as well.²⁹ In recent decades the law has favored wider freedom in the making of antenuptial agreements, for instance, and legislatures have abandoned a number of traditional restrictions on entry into marriage.³⁰ So, too, the recent addition of "covenant marriage" in Louisiana, Arizona, and Arkansas—although intended to increase the durability of the marriage bond by qualifying access to divorce—further private ordering by offering couples a choice of marriage forms.³¹

Beyond marriage, the same trend can be seen at work in the public validation of a broader range of individual choice in intimate life. Adoption laws have been loosened to allow more people, particularly single individuals and same-sex partners, to adopt.³² Indeed, some have regularized cohabitation by im-

1997) [hereinafter ALI PRINCIPLES Proposed Final Draft] (acknowledging that "[t]he trend of recent decades has been to increase the latitude of individuals to provide in either premarital or separation agreements for the financial consequences of their divorce").

29. See KRAUSE ET AL., *supra* note 26, at 188 (observing that "over the past three decades, courts and legislatures have allowed couples much greater—although not yet complete—freedom in negotiating the terms of their marriage"); Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex—Or Not at All?*, 34 FAM. L.Q. 271, 293 (2000) [hereinafter Krause, *Marriage for the New Millennium*]; Milton C. Regan, Jr., *Marriage at the Millennium*, 33 FAM. L.Q. 647, 657 (1999).

30. See, e.g., WALTER WADLINGTON & RAYMOND C. O'BRIEN, *FAMILY LAW IN PERSPECTIVE* 14-20 (2001) (summarizing changes in laws governing entry into marriage); Singer, *supra* note 23, at 1465-70 (describing the curtailment of both substantive and formal requirements on entry into marriage).

31. See MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* 29-30 (2000); F.H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 572-78; Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 495-96 (1998); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1226-27 (1998). Indeed, covenant marriage has been criticized on precisely this ground:

[M]any traditionalists fear that "any step that would explicitly 'redefine marriage'—even in a traditionalist direction—is dangerous, because it opens the door to the idea of further redefining it by an act of will." Letting couples choose their marriage regime is perilous because "once you let in the notion of choice . . . you start 'privatizing marriage,' giving the other side a basis to argue for a dozen other choice-based innovations in family law, from 'trial marriage' to same-sex unions"

James D. Wright et al., *Covenant Marriage: Louisiana Update*, THE RESPONSIVE COMMUNITY, Fall 1998, at 84, 85 (quoting Walter Olson).

32. Concerning adoption by same-sex partners, Jane Schacter has ob-

posing family-like obligations of mutual support even without the explicit agreement of the partners.³³

Even through the fog of controversy swirling around the topic of same-sex marriage, it is possible to discern movement toward a broader public conception of family. Although a clear majority of the American public is unprepared to extend marriage rights to same-sex couples,³⁴ there is widening support for the sort of compromise recently fashioned in Hawaii, Vermont, and several European countries—extending to these couples legal recognition of their intimate partnership, along with many

served,

In the last several years, courts in at least twenty-one states have authorized this sort of adoption, and appellate courts in five states and the District of Columbia have affirmed the second-parent adoption theory. The Uniform Adoption Act . . . has also approved second-parent adoption. . . . [S]econd-parent adoption has "become the unmistakable trend of the law's development in this area."

Schacter, *supra* note 3, at 934 (footnotes omitted); see also PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.14 cmt. f, at 286 (Tentative Draft No. 3, Part I 1998) [hereinafter ALI PRINCIPLES Tentative Draft No. 3] (noting the trend and collecting additional authority). This is not to say, of course, that the trend has been uniform. Within just the past two years, legislation limiting (although not altogether barring) adoptions by homosexuals has been enacted in Mississippi and Utah, rejected in Arkansas, and repealed in New Hampshire. See David Crary, *Gay Adoption Ban in Florida Faces Court Test*, L.A. TIMES, June 17, 2001, at A14. A constitutional attack on Florida's statutory ban on adoption by homosexuals recently failed. See *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

33. Cf. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). *Marvin's* willingness to impose marriage-like obligations on unmarried cohabitants in the absence of their explicit agreement has been criticized on the ground that it risks standardizing those who evidently preferred a nonstandard intimate relationship. See HARRY D. KRAUSE, *FAMILY LAW IN A NUTSHELL* 79 (3d ed. 1995); Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47, 54-61 (1978). Yet *Marvin* itself purported, in the main, to be honoring the self-defining choices of cohabitants by enforcing their own promises or "tacit understandings" of marriage-like obligation. See *Marvin*, 557 P.2d at 122.

34. See Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1877 nn.21-22 (1997) (discussing the popular consensus against same-sex marriage); Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventative and Therapeutic Approach*, 41 ARIZ. L. REV. 417, 419 (1999) (noting that "[a] 1998 poll revealed that only 29% of the general public approved of legally sanctioned same-sex marriage"). The recent enactment in Congress and more than thirty states of legislation intended to block same-sex marriage demonstrates the strength of this consensus. See William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1348-49 (2000).

of the financial benefits of marriage, while withholding the ultimate status of marriage itself.³⁵ And, increasingly, legislation or regulations extending benefits or privileges to "family" members have been construed or amended to encompass not only those who traditionally have occupied that position, but also those who functionally stand in that relation.³⁶ Similar

35. See Katharina Boele-Woelki, *Private International Law Aspects of Registered Partnerships and Other Forms of Non-Marital Cohabitation in Europe*, 60 LA. L. REV. 1053 (2000) (surveying developments in European law); Duncan, *supra* note 15, at 961-75 (noting that a growing number of municipal and state enactments are permitting same-sex couples to claim marriage-like status and benefits as "domestic partners"); Krause, *Marriage for the New Millennium*, *supra* note 29, at 294 ("[I]f—as one might conclude from the evidence—same sex marriage is not in America's immediate future, it seems equally clear that broader legislation on 'domestic partnership,' extending to or specifically directed at, same sex partners will soon become widespread."); Poll: *Americans Support Rights for Gay Partners*, PORTLAND PRESS HERALD, June 1, 2000, at 7A, available at 2000 WL 5083477 (reporting that an Associated Press poll found that while most Americans oppose same-sex marriage, "just as many say gay partners should have some legal rights of a married couple—such as inheritance, Social Security benefits and health insurance"); Recent Legislation, 114 HARV. L. REV. 1421, 1425-26 (2001) (describing Vermont enactment and observing that its relative "political stability may make it a springboard" for similar measures elsewhere); Robert Salladay, *Domestic Partners Bills Get Green Light*, S.F. EXAMINER, Jan. 12, 1999, at A12, available at 1999 WL 6868190 (reporting that a statewide poll in California found that "voters support domestic partnerships but strongly dislike the idea of same-sex marriages"). As recent evidence of this growing consensus, for instance, in New York there is reportedly "broad . . . agreement among lawmakers from across the political spectrum" for legislation that would expand the definition of "family" used in state domestic violence law to include same-sex partners. See Somini Sengupta, *Domestic Violence Law Set to be Renewed*, N.Y. TIMES, June 11, 2001, at B6. The state's Republican governor, George E. Pataki,

is seeking to expand [New York's mandatory-arrest law for domestic violence], which now applies only to married couples and to unmarried couples who have a child together, to all domestic partners, including gay couples. The governor's proposal would amend the definition of "family" and "household" to include people "currently residing together on a continuing basis, or at regular intervals" or those who have lived together in the preceding year.

Id. (also noting that "[s]uch a redefinition has quietly garnered the blessings of Senate Republicans, who have in the past resisted gay rights measures").

36. See, e.g., *Hann v. Housing Auth. of Easton*, 709 F. Supp. 605, 610 (E.D. Pa. 1989) (construing the word "family" as used in federal housing regulations to include an unmarried couple and their children); *Borough of Glassboro v. Vallorosi*, 568 A.2d 888, 894 (N.J. 1990) (*per curiam*) (concluding that a group of college students sharing a residence fell within a zoning ordinance's definition of "family" as comprised of one or more "persons . . . living together as a stable and permanent living unit, being a traditional family unit or the functional equivalency [sic] thereof"); *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53 (N.Y. 1989) (construing the word "family" as used in New York's rent-

developments are unfolding abroad.³⁷ Taken together, they provide powerful support for the conclusion that “[i]ncreasingly, talk about the family seems to regard that group not as a unit, but as an aggregation of individuals who define for themselves the relationship they enter into. . . . The dominant modern rhetorical device is to talk about the family in terms of contract and free will.”³⁸ Perhaps the most comprehensive expression of this trend is found in the American Law Institute’s new *Principles of the Law of Family Dissolution*.³⁹ The Principles, which are not a restatement of existing law but a set of recommendations meant to “give[] greater weight to emerging legal concepts,”⁴⁰ consciously assign a leading role in defining family roles and responsibilities to the individuals occupying those roles. Recognizing that “family dissolution today ordinarily is a negotiated process,”⁴¹ the Principles generally seek to be more facilitative than normative.⁴² Although the Principles inevita-

control law to include a same-sex couple on the grounds that the statute’s “intended protection . . . should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life”); KRAUSE ET AL., *supra* note 26, at 13-18 (discussing these cases and other authorities); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 837, 893 (2000) (noting that “[p]arenthood itself is increasingly seen as a functional status, rather than one derived from biology or legal entitlement”); Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of the Family*, 104 HARV. L. REV. 1640 (1991).

37. See, e.g., Boele-Woelki, *supra* note 35, at 1053 (surveying registered-partnership laws in a number of European countries); Duncan, *supra* note 15, at 961-62; Krause, *Marriage for the New Millennium*, *supra* note 29, at 274, 280 & n.9; Payne, *Family Law in Canada*, reprinted in BEREND HOVIUS, *FAMILY LAW* 12-16 (4th ed. 1996) (discussing changing family forms and legal recognition of families in Canada).

38. Teitelbaum, *supra* note 3, at 544.

39. ALI PRINCIPLES Proposed Final Draft, *supra* note 28.

40. *Id.* at xiii.

41. *Id.*

42. In this, the Principles plainly carry forward the decline in moral discourse about family previously observed by Carl Schneider and others. See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985); Teitelbaum, *supra* note 3, at 540; Lee E. Teitelbaum, *Moral Discourse and Family Law*, 84 MICH. L. REV. 430 (1985); Lynn D. Wardle, *Relationships Between Family and Government*, 31 CAL. W. INT’L L.J. 1, 1-2 (2000). Of course, family law has certainly not abandoned moral discourse; as some have pointed out, in many ways the content and focus of that discourse has simply changed. See generally Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225 (1997); Jane C. Murphy, *Rules, Responsibility, and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111 (1999). But while the emergent public morality may emphasize responsibility to children (who can-

bly embody particular conceptions of what is "equitable" in property distribution or alimony, for instance, the ALI most often strives to justify these conceptions with reference to the presumed expectations of the parties rather than to an external social norm.⁴³

The Principles also bring within the scope of "family dissolution" the ending of relationships between unmarried cohabitants. Chapter six of the Principles provides for the legal recognition of domestic partnerships, between couples of any gender, and imposes obligations of support and the sharing of property in keeping with an estimation of the parties' own expectations.⁴⁴

The theme of accommodating individual preferences with regard to family is carried over to the ALI's treatment of child custody as well. The Principles begin by redefining "parent" in decidedly nontraditional terms to include some longtime care-

not really be understood as having consented to contrary terms of parental responsibility), it has ceded many claims to regulating truly consensual family relationships.

43. This is true even of what are generally seen as the Principles' more radical suggestions. See, e.g., ALI PRINCIPLES Proposed Final Draft, *supra* note 28, § 4.18 cmt. a, at 240 (asserting that the rationale for a provision calling for the sharing of separate property upon dissolution of a long-term marriage is that "[a]fter many years of marriage, spouses typically do not think of their separate-property assets as separate"); see also *id.* § 4.18 Reporter's Notes cmt. a, at 253 (noting that "[d]ata on what spouses actually expect in their marriage are sparse, so this section necessarily rests on assumptions about those expectations"). Moreover, in setting out default rules governing property, alimony, and child custody, for instance, the Principles emphasize that parties remain free to opt out. See *id.*, § 5.01(2) & cmt. b, at 257-58 (emphasizing that "the principles stated in this Chapter [concerning alimony] . . . do not create any limitations on the freedom of individuals to bind themselves to a different arrangement in a premarital or separation agreement").

44. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.03, 6.04, at 14-55 (Tentative Draft No. 4 2000); Margaret Brinig, *Domestic Partnership: Missing the Target?*, 2001 J.L. & FAM. STUD. (forthcoming). While acknowledging that the ALI's principles governing domestic partnership are based on suppositions about the parties' expectations, Professor Brinig criticizes the ALI's suppositions as erroneous. In particular, she contends that while many of the ALI principles treat unmarried cohabitants as if they were married, most unmarried heterosexual couples do not regard themselves as married and do not desire the legal entanglements that come with marriage. See *id.*; see also David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1467 (2001) (contending that the ALI Principles ultimately "reflect a profound distrust for individuals' efforts to set the terms for intimate relationships to meet their own needs").

givers who lack a biological or adoptive tie to a child.⁴⁵ Under traditional family law, the romantic partner of a biological parent who had been encouraged by her partner to assume a parenting role, or the man who cares for a child under a mistaken belief in his own paternity, would often be classified as "legal strangers";⁴⁶ certainly, neither association would be regarded as a "family" under current U.S. census standards.⁴⁷ Under the ALI's approach, by contrast, each caregiver would be entitled to claim the status of "parent" and to a presumptive share of future custodial responsibility.⁴⁸ Moreover, recognizing the diversity of modern families, the ALI Principles allow for the possibility that a child might well have more than two parents at any given time. Indeed, the only limitation imposed on the number of parents is made with reference to practical considerations in dividing the child's time, not with regard to any norm of family construction.⁴⁹

Furthermore, in allocating custodial roles among a child's parents, the ALI Principles place the initial responsibility upon the parents themselves to offer a parenting plan of their own construction.⁵⁰ Failing that, the Principles take as their chief guide the past childrearing practices of the particular family before the court, seeking as much as possible to approximate and carry forward whatever pattern of childcare was established before the family's dissolution.⁵¹ In this way, too, the

45. See ALI PRINCIPLES Tentative Draft No. 3, *supra* note 32, § 2.03, at 37.

46. See, e.g., *Van v. Zahorik*, 597 N.W.2d 15, 16-20 (Mich. 1999) (holding that a man who lived with, supported, and cared for children since their birth in the mutually mistaken belief that he was their biological father is a "third party" without standing to seek visitation or custody); *Petersen v. Rogers*, 445 S.E.2d 901, 906 (N.C. 1994) (holding that parents' fundamental right precludes custody claims by "strangers," including prospective adoptive parents who had been rearing the child for an extended period).

47. See *supra* note 6.

48. For a discussion contrasting the treatment of such caregivers under traditional family law and the ALI Principles, see David D. Meyer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution*, 2001 BYU L. REV. 1075.

49. See ALI PRINCIPLES Tentative Draft No. 3, *supra* note 32, § 2.21(1)(b) & cmt. b, at 376-80.

50. See *id.* § 2.06, at 64.

51. See *id.* § 2.09, at 108; Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 478-82 (1999). The ALI modeled its approximation standard on a proposal made by Elizabeth Scott in a 1992 article in the *California Law Review*.

ALI Principles are more sensitive to family variation and deferential to individual preference than traditional approaches to custody.⁵² Rather than using the custody decision as “an opportunity for restructuring parent-child relationships”⁵³ according to some external family norm—the egalitarianism of joint custody, say, or whatever value judgments might infuse a trial judge’s best-interests determination—the goal of the ALI Principles is to leave families as unaffected as possible by their encounter with the judiciary.⁵⁴ Undergirding this approach to custody, then, is a recognition that families come in many different forms and a judgment that the law’s goal in most instances should be affirming and strengthening families as they exist rather than reforming them according to a fixed ideal.⁵⁵

B. THE TURN TOWARD TRADITION IN CONSTITUTIONAL DOCTRINE

Against this backdrop of burgeoning public acceptance of family diversity, the constitutional law of family privacy stands as a comparative stalwart of tradition. From murky beginnings in the substantive economic due process era of *Lochner v. New York*,⁵⁶ the U.S. Supreme Court has fashioned a loose amalgam

See Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615 (1992).

52. See Scott, *supra* note 51, at 619 (asserting that “an approximation rule [in custody cases] . . . represents the optimal response to the current pluralism in family structure”); *id.* at 633-37 (contending that “[a]lthough contemporary families do not follow any single prescription regarding the allocation of parenting roles, the division of roles that a given couple adopts likely reflects internalized values and preferences”).

53. *Id.* at 630.

54. See Bartlett, *supra* note 51, at 480; Scott, *supra* note 51, at 625-35.

55. See Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 818, 851-52 (1998) (describing the ALI Principles as “family-enabling” rather than “family-standardizing”).

56. 198 U.S. 45 (1905). The earliest of the modern family-privacy cases, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)—both of which struck down legislation restricting parents’ educational choices for their children—appeared to rest at least in part on concern for the freedom of contract between educators and parents. See *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399-400, 403; see also *Troxel v. Granville*, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting) (noting that *Meyer* and *Pierce* are rooted in “an era rich in substantive due process holdings that have since been repudiated”); *Griswold v. Connecticut*, 381 U.S. 479, 515-16 & n.7 (1965) (Black, J., dissenting) (characterizing *Meyer* and *Pierce* as cases vindicating economic liberties); David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 533-34 (2000) [hereinafter Meyer, *Paradox*]. Professor Barbara Woodhouse has argued that *Meyer* and *Pierce* are best understood as

of personal liberties relating to family life. These include the right to marry,⁵⁷ to procreate or to avoid procreation,⁵⁸ to rear children,⁵⁹ and to cohabit with family members.⁶⁰ Together, they are said to create "a 'private realm of family life which the state cannot enter.'"⁶¹ Because these rights are considered fundamental,⁶² government incursions on these personal freedoms are subject to rigorous judicial scrutiny.⁶³

In deciding what sorts of conduct or decisionmaking fall within the protected bounds of family privacy, the Court has

vindicating a sort of parental property right in children. See Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 997 (1992).

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

58. See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (recognizing a right to abortion); *Griswold*, 381 U.S. at 485-86 (recognizing a right to use contraception); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42 (1942) (recognizing a right to avoid sterilization).

59. See *Troxel*, 530 U.S. at 66; *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399.

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

61. *Moore*, 431 U.S. at 499 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 842 (1977) (quoting *Prince*).

62. The Supreme Court has denominated each of these rights to be "fundamental." See, e.g., *Troxel*, 530 U.S. at 66 (O'Connor, J., plurality opinion) ("[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); *id.* at 80 (Thomas, J., concurring in the judgment) (noting the agreement of seven Justices in *Troxel* that "parents have a fundamental constitutional right to rear their children"); *Turner*, 482 U.S. at 95 ("[T]he decision to marry is a fundamental right . . ."); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (acknowledging that past cases recognize "a fundamental individual right to decide whether or not to beget or bear a child"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child[ren]"); *Roe*, 410 U.S. at 152-53 (describing the right to abortion as "fundamental").

63. At least since *Casey*, the Supreme Court has differentiated its review in abortion cases from that applied in other family-privacy cases. Whereas most incursions on family privacy are said to trigger the strict scrutiny typically applied in cases involving fundamental rights, *Casey* rejected the use of strict scrutiny in abortion cases and instead adopted the less exacting "undue burden" test. See *Casey*, 505 U.S. at 877 (opinion of O'Connor, Kennedy, & Souter, JJ.). I have argued elsewhere, however, that despite this nominal differentiation, the Court has in fact followed an essentially similar, pragmatic approach in all of the cases in which it determines that family-privacy rights are burdened. See David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125 (2001) [hereinafter Meyer, *Lochner Redeemed*]; Meyer, *Paradox*, *supra* note 56, at 536-54.

not followed a single course. In some cases, it has classified private choice as deserving of heightened constitutional protection on the ground that the choice carries unusually profound ramifications for the decisionmakers. A woman's decision to terminate her pregnancy, for instance, was deemed protected because the consequences of compelled childbirth and parenthood could be enormous;⁶⁴ similarly, the decision of an interracial couple to marry was brought within the scope of protection on the ground that marriage is "essential to . . . happiness."⁶⁵ In other cases, however, the Court has insisted that what makes an intimate choice or relationship deserving of constitutional protection is not its profound significance to the individual but whether society has long venerated personal autonomy in making that choice. This is particularly true of the Court's more recent cases. In *Washington v. Glucksberg*,⁶⁶ for example, the Court squarely rejected the claim that the Constitution entitled an individual to decide for himself whether to end his life with the assistance of a physician. The personal stakes of this decision, although concededly profound,⁶⁷ were not enough to bring it within the realm of protected privacy; what mattered was whether society had long considered such decisionmaking as beyond the control of government (and the Court found that it had not).⁶⁸ The "crucial 'guideposts'" for identifying the scope of fundamental rights, the Court wrote, are "[o]ur Nation's history, legal traditions, and practices."⁶⁹

The difference between these approaches has major implications for the extent to which the Constitution will protect un-

64. See *Roe*, 410 U.S. at 153; see also *Casey*, 505 U.S. at 852 (noting the "unique" implications of the decision for the woman).

65. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); see also *Bowers*, 478 U.S. at 204-05 (Blackmun, J., dissenting) ("[W]e protect the decision whether to marry precisely because marriage 'is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial social projects.'" (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965))).

66. 521 U.S. 702 (1997).

67. See, e.g., *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 281 (1990) (acknowledging that "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality").

68. The Court explained, "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . ." *Glucksberg*, 521 U.S. at 727.

69. *Id.* at 721 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

conventional family life. A focus on the stakes for the individual might well extend protection to new or socially disfavored constructions of family life, as the Court was willing to do in recognizing a right to marry across racial lines or while incarcerated.⁷⁰ More often, however, the Court has emphasized deeply rooted assumptions about the meaning of family as a basis for denying protection to unconventional claimants. In *Bowers v. Hardwick*,⁷¹ the Court found no constitutional protection for the choice to engage in homosexual conduct because society had not long venerated that choice. Even if it were true, as Justice Blackmun pointed out in dissent, that sexual intimacy is closely bound to the very process of self-definition, thus making the state's imposition enormous,⁷² what mattered to the Court was that society had long and widely condemned this sort of intimacy.⁷³ In *Michael H. v. Gerald D.*,⁷⁴ a plurality concluded that the Constitution did not recognize as family the relationship between a man and the daughter he sired during an affair with the girl's married mother. Although the man had intermittently lived with and helped to rear the child and had established a loving bond with her, their relationship did not enjoy "traditional respect in our society" and so lacked "any constitutional significance."⁷⁵

Even in cases in which the Court has ultimately upheld, or at least reserved judgment on, claims of family privacy, it has closely tied the Constitution's sense of "family" to traditional understandings. In *Moore v. City of East Cleveland*,⁷⁶ the Court found constitutional protection for the choice of a grandmother to share her home with one of her sons and two of her grandchildren (one of whom had no parent residing in the home) on the ground that society had long venerated extended-family households, at least "in this degree of kinship."⁷⁷ In doing so, Justice Powell's plurality opinion distinguished a previous case, which had found no such protection for households

70. See *Turner v. Safley*, 482 U.S. 78, 95 (1987) (recognizing the right of a prison inmate to marry); *Loving*, 388 U.S. at 12 (recognizing the right of an interracial couple to marry).

71. 478 U.S. 186 (1986).

72. See *id.* at 205-06 (Blackmun, J., dissenting).

73. See *id.* at 192-94; see also *id.* at 196-97 (Burger, C.J., concurring) (emphasizing the history of Judeo-Christian condemnation of homosexuality).

74. 491 U.S. 110 (1989).

75. *Id.* at 123 n.3.

76. 431 U.S. 494 (1977).

77. *Id.* at 505-06.

comprised of persons unrelated by blood, adoption, or marriage, on the ground that society has demonstrated its "respect" for extended biological families but not for unrelated cohabitants.⁷⁸ Finally, in *Smith v. Organization of Foster Families for Equality and Reform*,⁷⁹ the Court left open the possibility that the Constitution might accord *some* protection to the relationship between a child and her foster parents, but only after concluding that any such protection would be subordinated in preference to the biological parent-child relationship. The foster family could not be "dismiss[ed] . . . as a mere collection of unrelated individuals," the Court allowed.⁸⁰ And yet, the lack of a long tradition of societal veneration or any biological connection meant that any constitutional status this "family-like association"⁸¹ might enjoy would be "substantially attenuated" when compared to that of the "natural" family.⁸² Justice Stewart, concurring in the judgment, was much less delicate in rejecting the foster parents' plea for preservation of their "family," characterizing the bond between a child and foster parents as essentially artificial.⁸³

The Supreme Court's most recent case along these lines, *Troxel v. Granville*,⁸⁴ involved a mother's claim that the Constitution prohibited the state from ordering, over her objection, visitation between her children and their paternal grandparents. Because the state supreme court had ruled broadly that parents are entitled to bar contact with all non-parents, unless the severance would do the child "severe psychological harm,"⁸⁵ the case raised potentially far-reaching questions about just what sort of "family" is valued by the Constitution.⁸⁶ Would the Constitution, for instance, favor the prerogative of a biological parent even against a former partner who had played an equal

78. *Id.* at 498-500, 504 (distinguishing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)).

79. 431 U.S. 816 (1977).

80. *Id.* at 844-45.

81. *Id.* at 846.

82. *Id.* at 846-47.

83. *See id.* at 857, 861-63 (Stewart, J., concurring in the judgment).

84. 530 U.S. 57 (2000).

85. *See In re Custody of Smith*, 969 P.2d 21, 28-30 (Wash. 1998), *aff'd sub nom.* *Troxel v. Granville*, 530 U.S. 57 (2000).

86. *See, e.g., Linda Greenhouse, Case on Visitation Rights Hinges on Defining Family*, N.Y. TIMES, Jan. 4, 2000, at A14 (previewing the oral argument in *Troxel*).

role in raising the child?⁸⁷ In a highly splintered decision, the Justices carefully avoided most of these questions but were quick to agree that society's longstanding regard for the parent-child relationship at least required substantial deference for the childrearing judgment of the parent.⁸⁸

The occasional inconsistencies in the Court's approach surely leave it some room to maneuver, but it is clear enough that the Court's dominant methodology in the family-privacy context strongly disfavors those who have an unpopular and nontraditional conception of family. The Court's usual insistence, especially in recent cases, that claimants find historical veneration for their conception of family before it will be deemed "deserving of constitutional recognition"⁸⁹ is essentially insurmountable for those who stray far from convention. Thus, for example, although societal consensus appears to be moving toward recognizing that the same-sex couples have a legitimate claim to be regarded as family (even if not on equal terms with traditional families),⁹⁰ a gay or lesbian couple is not likely to be able to claim constitutional protection for their family choices under an approach that emphasizes tradition.⁹¹ No matter how

87. See, e.g., *LaChappelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App.), *cert. denied*, 531 U.S. 1011 (2000) (upholding an order granting co-parenting rights to former partner in same-sex relationship in a case decided shortly before *Troxel* was handed down). For a discussion of how such a case might be decided after *Troxel*, see David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711, 728-31 (2001) [hereinafter Meyer, *Constitutional Pragmatism*].

88. The fact that the constitutional claimant in that case was a biological and legal parent who fell squarely within traditional conceptions of family ultimately permitted the Court to avoid knottier questions of constitutional definition. Justice Sandra Day O'Connor, the author of the plurality opinion in *Troxel*, suggested in public comments after the case was handed down that the Constitution's protection for family life is rooted in tradition and in "common understandings of the family," a formula which might imply little room for deviant conceptions of family life. See Sandra Day O'Connor, *The Supreme Court and the Family*, 3 U. PA. J. CONST. L. 573, 575 (2001) (observing that in its family-privacy cases, "the Court has spoken of our common understandings of the family, our common aspirations, and the need to have a deeper understanding of the values that lie at the heart of our tradition"). At the same time, both in *Troxel* and in her later remarks, Justice O'Connor emphasized the need for constitutional law to be adaptive to "the 'changing realities of the American family.'" *Id.* at 577-78 (quoting *Troxel*, 530 U.S. at 64). *Troxel* itself more acknowledges this dilemma than seeks to resolve it. See Meyer, *Constitutional Pragmatism*, *supra* note 87, at 719-22.

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

90. See *supra* notes 35-36 and accompanying text.

91. See *Planned Parenthood v. Casey*, 505 U.S. 833, 984 (1992) (Scalia, J.,

sincerely or powerfully these individuals might regard one another as "family," no matter what role their intimacy may occupy in their lives, the lack of longstanding social acceptance will likely defeat their claim. And, importantly, the reason for this defeat is likely not to be the demonstration of any exceptional interest by the state but a threshold determination that the subjects of the state's regulation simply do not constitute a "family"—or at least not any family worthy of constitutional "respect."⁹²

II. THE STATIC NATURE OF "FAMILY" IN UNDERSTANDING THE CONSTITUTION: COMPARISONS WITH RELIGION UNDER THE FIRST AMENDMENT

In evaluating the Court's heavily traditionalist approach to defining "family," it is illuminating to contrast the Court's approach to defining "religion" for purposes of the First Amendment's guarantees of religious liberty.⁹³ The Free Exercise and Establishment Clauses, like the more amorphous guarantees of family privacy, confer fundamental individual rights in a zone of profound personal significance. And, just as courts must confront the dilemma of deciding what notions of "family" qualify for constitutional protection, so too the First Amendment inescapably requires courts to define the boundaries of "religion." The Court's understanding of "religion," however, has been strikingly more expansive and fluid than its conception of "fam-

dissenting); *Zablocki v. Redhail*, 434 U.S. 374, 392 (1978) (Stewart, J., concurring in the judgment); *id.* at 398-99 (Powell, J., concurring in the judgment); *Dean v. Dist. of Columbia*, 653 A.2d 307 (D.C. App. 1995) (finding no right, under state constitution's due process guarantee, to same-sex marriage because society has not traditionally recognized such a right); *Baehr v. Lewin*, 852 P.2d 44, 55-57 (Haw. 1993) (same); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1. *But cf.* *Brause v. Bureau of Vital Statistics*, 24 Fam. L. Rep. (BNA) 2015, 2017 (Alaska Super. Ct. Feb. 27, 1998) (concluding that a ban on same-sex marriage infringed the constitutional right of privacy because society has long honored intimate self-definition).

92. *Michael H. v. Gerald D.*, 491 U.S. 110, 122-23 & n.3 (1989) (Scalia, J., plurality opinion); *Moore*, 431 U.S. at 504.

93. Martha Minow first suggested such an analogy a decade ago in a lecture at the University of Illinois College of Law. *See Minow, Free Exercise of Families*, *supra* note 19, at 934-37; *see also* COTT, *supra* note 25, at 212-13. Although Professor Minow allowed that she considered the comparison "a bit . . . wacky," Minow, *Free Exercise of Families*, *supra* note 19 at 935, this Author believes it is ultimately quite compelling and attempts here to offer a somewhat more complete demonstration of its relevance than was possible within the confines of Professor Minow's lecture.

ily."

Originally, the Supreme Court cabined "religion" in much the same way in which it now limits the scope of protected family life. The "religion" valued by the First Amendment, the Court then asserted, was the sort of theistic belief widely recognized and long revered by mainstream America—and nothing more. "The term 'religion,'" the Court wrote in 1890, "has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."⁹⁴ Conceptions of religious life that strayed from this tradition could not claim protection.⁹⁵ Thus, in a succession of cases toward the end of the Nineteenth Century, the Court placed Mormons effectively outside the scope of protected religion, in much the same way the Court today might be expected to place polygamy outside the protected range of family life.⁹⁶ The polygamy then practiced as part of the Mormon faith could claim no respect from traditional American values; to the contrary, the Court asserted, the practice was associated only with cultures considered alien to the American tradition and had "always been odious among the northern and western nations of Europe."⁹⁷ "To call their advocacy [of polygamy] a tenet of religion," the Court summed up

94. *Davis v. Beason*, 133 U.S. 333, 342 (1890); see also *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (declaring that "[w]e are a religious people whose institutions presuppose a Supreme Being"); *United States v. Macintosh*, 283 U.S. 605, 625 (1931) ("We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God."), *overruled in part* by *Girouard v. United States*, 328 U.S. 61 (1946); *id.* at 633-34 (Hughes, C.J., dissenting) (defining religion as resting upon "belief in a relation to God involving duties superior to those arising from any human relation").

95. See 4 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 21.7, at 532 (1992) ("The claims of religious minorities received little serious attention from the Supreme Court through the first part of this century."); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6, at 1179 (2d ed. 1988) ("In order to be considered legitimate, religions had to be viewed as 'civilized' by Western standards.").

96. See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 46 (1890) (upholding the repeal of the Mormon Church charter); *Davis*, 133 U.S. at 342 (upholding an Idaho law barring polygamists from serving as electors); *Reynolds v. United States*, 98 U.S. 145, 168 (1878) (upholding a conviction for bigamy).

97. *Reynolds*, 98 U.S. at 164. The strength of popular revulsion to Mormon polygamy at the time is well described in Mary K. Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854-1887*, 13 *YALE J.L. & FEMINISM* 29 (2001).

bluntly, "is to offend the common sense of mankind," or at least that portion of mankind respected by mainstream American tradition.⁹⁸

The Court's narrow, traditionalist conception of "religion" began to give way, however, midway through the Twentieth Century, following a period of dramatic diversification of American religious life.⁹⁹ The early years of that century brought the first large-scale immigration of non-Christian believers into the United States,¹⁰⁰ and subsequent decades ushered in the rise of numerous non-theistic faiths.¹⁰¹ By 1944, the Court insisted that the First Amendment valued unorthodox faiths as well as conventional religion: "[F]reedom of religious belief," the Court wrote in *United States v. Ballard*, "embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths."¹⁰² By 1961, the Court felt compelled to broaden the Constitution's regard for "religion" beyond theistic faith altogether and to acknowledge the presence of "religions in this country which do not teach what would generally be considered

98. *Davis*, 133 U.S. at 341-42; see also *Late Corp. of the Church of Jesus Christ of Latter-Day Saints*, 136 U.S. at 49-50 (stating that Mormon adherence to polygamy was but a "pretence" by the understanding of "the enlightened sentiment of mankind").

99. See John C. Jeffries, Jr., & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001). Writing in the late 1980s, Laurence Tribe observed that "[i]n colonial times there were dozens of major religious groups; today there are well over 250 recognized, major churches, and this number does not include hundreds of smaller, 'fringe' groups." *TRIBE, supra* note 95, at 1179 (footnotes omitted). By the mid-1990s, it was "estimated that more than eight hundred organized religions have appeared in North America during [the Twentieth] [C]entury." *JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 67 n.52 (1995) (citing J. Gordon Melton, *Another Look at New Religions*, 527 ANNALS AM. ACAD. POL. & SOC. SCI. 97 (May 1993)). Writing in 2001, a leading researcher concluded,

Today, over half of all the 2000-plus primary religious groups operating in the United States were formed after 1960. And lest we think of this as a problem at the fringe, we note that of the six largest religious bodies in the United States, three of them were formed in that time period.

J. Gordon Melton, *Religious Pluralism: Problems and Prospects*, 2001 BYU L. REV. 619, 621 [hereinafter Melton, *Religious Pluralism*].

100. See Melton, *Religious Pluralism, supra* note 99, at 620-21; Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 796 & n.30 (1997).

101. See *TRIBE, supra* note 95, at 1180 (noting a "shift in religious thought from a theocentric, transcendental perspective to forms of religious consciousness that stress the immanence of meaning in the natural order").

102. 322 U.S. 78, 86 (1944).

a belief in the existence of God."¹⁰³

The Court's view of religion expanded still farther in a pair of cases interpreting the scope of "religious belief" that would confer an exemption from combat service during the Vietnam War. In *United States v. Seeger*,¹⁰⁴ the Court held that the exemption could not be limited, as the selective service statute seemed to require, to those who subscribed to a theistic faith.¹⁰⁵ Instead, the Court concluded that "religious belief" must include any "belief that is sincere and meaningful" that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."¹⁰⁶

In subsequent cases, the Court appears to have retreated somewhat from the most expansive implications of *Seeger*'s functional approach to defining religion. In *Wisconsin v. Yoder*,¹⁰⁷ for instance, the Court notably went out of its way to distinguish the theology of the Old Order Amish from purely "philosophical and personal" belief systems, which would not

103. *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (striking down a state requirement that public officials attest to a belief in God). The Court suggested that these "religions" included "Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Id.*

104. 380 U.S. 163 (1965).

105. *See id.* at 187-88. The selective service statute provided a combat exemption to those whose "religious training and belief" were incompatible with participation in the war. The statute then defined "religious training and belief" as turning on "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." Universal Military Training & Serv. Act, Pub. L. No. 80-759, § 6(j), 1948 U.S.C.C.A.N. (62 Stat.) 612, 613.

106. *Seeger*, 380 U.S. at 166; *see also* *Welsh v. United States*, 398 U.S. 333, 341 (1970) (applying *Seeger* formulation); *Seeger*, 380 U.S. at 176, 184. Although *Seeger* and *Welsh* were nominally construing the terms of the selective service statute, the Court strongly suggested that this understanding of "religion" carried over to the First Amendment as well. *See Seeger*, 380 U.S. at 176; *id.* at 188 (Douglas, J., concurring); *see also* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 589 (understanding *Seeger* as "hav[ing] significant constitutional portents, particularly because the Court's straining of the language of the statute . . . was prompted by its desire to '[avoid] imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others'"); Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I, The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1425 (1967); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 760-61 (1984); Robert L. Rabin, *When Is a Religious Belief Religious*: *United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231, 238 (1966).

107. 406 U.S. 205 (1972).

qualify for protection under the Free Exercise Clause.¹⁰⁸ How much of a retreat this constituted is debatable. In *Seeger*, too, the Court had excluded from "religion" beliefs that were "essentially political, sociological, or philosophical views."¹⁰⁹ Still, as Justice Douglas pointed out in dissent in *Yoder*, Henry Thoreau's beliefs would seem to qualify as "religious" under *Seeger*'s functional approach.¹¹⁰ Importantly, however, the Court has given no inkling of returning to a definition that ties constitutional protection to tradition or conventional acceptance.

Instead, the Court has committed itself to a broad understanding of religion, but has avoided drawing the boundaries of First Amendment protection tightly around any single definition of religion. In the view of some, the Court has been precisely right to leave the concept murky and open-ended.¹¹¹ And among the many who have ventured to offer some definition or methodology to fill the void, none would have constitutional status turn on the ability of a sect or belief system to claim wide-scale social acceptance or historical respect. Some, for example, have urged a definition that encompasses each individual's "ultimate concern";¹¹² others have sought to distill the es-

108. The Court wrote,

A way of life, however virtuous and admirable, may not be [counted as "religion"] . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. . . . Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Id. at 215-16.

109. *Seeger*, 380 U.S. at 165.

110. See *Yoder*, 406 U.S. at 247-48 (Douglas, J., dissenting in part); see also *TRIBE*, *supra* note 95, at 1182-83 (finding conflict between the understandings of religion in *Seeger* and *Yoder*); Choper, *supra* note 106, at 590-91 (suggesting that *Yoder*'s "relatively cautious approach" to defining religion appeared to retreat from *Seeger*); Peñalver, *supra* note 100, at 798-99 (same).

111. See, e.g., Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 298 (1987).

112. See M. Elisabeth Bergeron, Note, "New Age" or New Testament?: Toward a More Faithful Interpretation of "Religion", 65 ST. JOHN'S L. REV. 365, 375-78 (1995); Craig A. Mason, Comment, "Secular Humanism" and the Definition of Religion: Extending a Modified "Ultimate Concern" Test to *Mozert v. Hawkins County Public Schools* and *Smith v. Board of School Commissioners*, 63 WASH. L. REV. 445 (1988); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1056 (1978). Similarly, the U.S. Court of Ap-

sence of religion as the presence of "faith"¹¹³ or a belief in "extra-temporal consequences" or, perhaps, in a "transcendent reality";¹¹⁴ still others have argued that no single definition can possibly capture all that is worthy of protection and have urged instead that courts proceed pragmatically to "decide whether something is religious by comparison with the indisputably religious, in light of the particular legal problem involved."¹¹⁵

In all, the range of approaches proposed by scholars or tested in court opinions demonstrates a powerful modern consensus that "religion" must be understood in a way that allows considerable room for individual self-definition. It is widely accepted that the Court was correct to broaden its understanding of religion to account for the exploding diversity of religious life in the Twentieth Century, and that any constitutional test must allow for the emergence of new conceptions of religious belief in the future.¹¹⁶ This is not, of course, to say that defer-

peals for the Second Circuit, borrowing from William James, defined religion as "the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine." *United States v. Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983) (quoting WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 31 (1910)).

113. See generally Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1 (1991-92).

114. See Choper, *supra* note 106, at 597-604; see also Mason, *supra* note 112, at 446 (proposing a focus on belief in a "non-rational, transcendent reality"). Dean Choper ultimately rejects a "transcendental reality" test in favor of an "extratemporal consequences" test. See CHOPER, *supra* note 99, at 74-85; Choper, *supra* note 106, at 604.

115. Greenawalt, *supra* note 106, at 753; see also George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519, 1520 (1983); Peñalver, *supra* note 100, at 795. At least two federal courts of appeals, most prominently led by Judge Arlin Adams on the Third Circuit, have developed such an approach. See *United States v. Meyers*, 95 F.3d 1475, 1483-84 (10th Cir. 1996) (construing the scope of religion protected under the Religious Freedom Restoration Act); *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025, 1034-35 (3d Cir. 1981); *Malnak v. Yogi*, 592 F.2d 197, 207-10 (3d Cir. 1979) (per curiam) (Adams, J., concurring in the result); see also *Church of the Chosen People v. United States*, 548 F. Supp. 1247, 1251 (D. Minn. 1982). A decision of the High Court of Australia has taken a similar approach. See Greenawalt, *supra* note 106, at 775 n.86 (discussing the Justices' opinions in *The Church of the New Faith v. Commissioner for Payroll Tax* (Oct. 27, 1983)).

116. See, e.g., *TRIBE*, *supra* note 95, at 1180-81 ("These changed circumstances [the diversification of religious life] made it all but inevitable that the Supreme Court would modify the narrow understanding of 'religion' that had characterized the early development of the law. The idea of religious liberty—combined with the special place of religion in the constitutional order—demands a definition of 'religion' that goes beyond the closely bounded limits

ence to the individual is total, or that the constitutional concept of "religion" is unbounded. It is clear that the state must be permitted to inquire into the sincerity of religious claims¹¹⁷ and to measure even sincere claims against some external standard of what makes religion distinctive or valuable.¹¹⁸ The salient point is that this inquiry must leave substantial room for unconventional conceptions of religion, at least so long as they bear some resemblance to concepts readily recognized and long valued as religious by conventional understanding.

III. EVALUATING THE DIVERGENCE IN THE COURT'S APPROACHES: CONSTITUTIONAL VALUES AND SOURCES OF MEANING

The Court's approach to defining "religion" suggests the possibility of a very different model for resolving the threshold question of "family" in constitutional privacy analysis. Perhaps the Court's recognition of the propriety of flexibility and deference in giving content to "religion" supports a similar role for self-definition in the concept of "family." Perhaps, borrowing from the definitional approaches that have been proposed in the context of the Religion Clauses, the courts might extend constitutional protection beyond convention to any sincere construction of family relationships that serves the essential function of traditional family or bears a sufficient resemblance to indisputable forms of family.

Any proposal to borrow from First Amendment doctrine, however, must first take account of real differences between the respective constitutional guarantees. The guarantees of re-

of theism, and accounts for the multiplying forms of recognizably legitimate religious exercise."); Choper, *supra* note 106, at 580 (stating that any constitutional definition of religion "should be sufficiently capable of growth to include new, unusual, and nonconformist sects and beliefs as well as traditional ones"); Peñalver, *supra* note 100, at 795-96.

117. See *United States v. Ballard*, 322 U.S. 78 (1944).

118. Cf. *Minow, Free Exercise of Families*, *supra* note 19, at 936, 940-41 (implying that the only limitation on constitutional free-exercise protection is the sincerity of the claimant's belief). As *Yoder* makes explicit, there is ultimately some outer limit to the constitutional concept of religion. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972); see *supra* note 108; see also *Greenawalt*, *supra* note 106, at 755 n.7 ("Although the two are sometimes conflated, the question of sincerity is separable from the question of religiousness. . . . Ordinarily a free exercise claim must be both religious and sincere to qualify for constitutional protection."). As suggested below, that limit most likely corresponds with a generous reading of modern convention about what counts as religion. See *infra* notes 166-70 and accompanying text.

ligious freedom, for one thing, are enumerated in the text of the Constitution whereas rights of family privacy are not. Moreover, the Court's more expansive understanding of "religion" might be supported by underlying theories or values unique to the First Amendment or at least inapplicable in the context of family privacy. Whatever differences there are between the purposes and natures of these constitutional guarantees, however, do not justify the full scale of divergence currently found in the Court's approach.

A. FAMILY PRIVACY AS AN UNENUMERATED RIGHT

For some, the prominent role of history and convention in the Supreme Court's definition of family might be justified on the ground that the rights of family privacy have no clear roots in constitutional text. In contrast to the First Amendment's explicit reference to religion, the word "family" does not appear in the Constitution. Over time, the Court or individual Justices have made occasional efforts to trace one or more of the family-privacy interests to a particular strand of text, including the Ninth Amendment,¹¹⁹ the Privileges and Immunities Clause of the Fourteenth Amendment,¹²⁰ and (most often) the Due Process Clauses.¹²¹ No one, however, has taken these efforts very seriously.¹²²

119. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 491 (1965) (Goldberg, J., concurring) (suggesting the relevance of the Ninth Amendment to finding a fundamental right of married couples to use contraception).

120. See *Troxel v. Granville*, 530 U.S. 57, 80 n.* (2000) (Thomas, J., concurring in the judgment) (suggesting the possibility that the fundamental right of parents to rear their children might be grounded in the Fourteenth Amendment's Privileges and Immunities Clause).

121. See, e.g., *id.* at 66 (O'Connor, J., plurality opinion) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); *id.* at 77 (Souter, J., concurring in the judgment); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). For a discussion of the various possible ways of understanding the source and nature of the constitutional rights recognized in the *Meyer* and *Pierce* cases, see, for example, *Meyer, Paradox*, *supra* note 56, at 533-35.

122. Indeed, the Court itself has sometimes been quite frank in acknowledging its uncertainty about the nature or origins of these rights, even as it has reaffirmed and applied them. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 847-50 (1992) (conceding that the Court's Due Process protection of "the substantive sphere of liberty" is not the product of textual interpretation and ultimately defies any "expression as a simple rule"); *Runyon v. McCrary*, 427 U.S. 160, 178 n.15 (1976) (admitting uncertainty about whether "[t]he *Meyer-Pierce-Yoder* 'parental' right and the privacy right" emerging from cases such as *Griswold* and *Roe* were theoretically distinct or merely "verbal varia-

In a series of prominent cases the Supreme Court has looked to history and tradition as means of validating its enforcement of fundamental rights that cannot be located in constitutional text.¹²³ That society has long and widely viewed a given state action as beyond the appropriate power of government gives some reassurance that unelected judges, striking down the action without textual authorization, have not merely imposed their own will in preference to that of the political majority. Although it is widely accepted that history and tradition are relevant to any determination of the scope of nontextual rights, the precise role that these factors should play is famously contested.¹²⁴ Among other points of contention, there is, as yet, no consensus on the level of generality or specificity with which a practice should be described when turning to historical consensus for evidence of veneration.¹²⁵

tions of a single constitutional right"); *see also, e.g., Troxel*, 530 U.S. at 92 (Scalia, J., dissenting) (finding no basis for "[j]udicial vindication of 'parental rights' under a Constitution that does not even mention them"); *Griswold*, 381 U.S. at 499 (Harlan, J., concurring in the judgment).

123. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (identifying "[o]ur Nation's history, legal traditions, and practices" as the "crucial 'guideposts'" for marking the boundaries of substantive due process) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)); *Bowers v. Hardwick*, 478 U.S. 186, 191-95 (1986); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (asserting that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"); *Griswold*, 381 U.S. at 486-87 (Goldberg, J., concurring). *See generally* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173.

124. There are different views on the subject. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 53-54 n.20 (1999) (opinion of Stevens, J.) (suggesting that a fundamental right might be found notwithstanding a long tradition of government interference with the practice); *Glucksberg*, 521 U.S. at 756-69 (Souter, J., concurring in the judgment) (contending that historical support is relevant, but not essential); *Casey*, 505 U.S. at 980 (Scalia, J., concurring in the judgment in part and dissenting in part) (contending that historical validation is essential).

125. *Cf., e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 & n.6 (1989) (Scalia, J., plurality opinion) (suggesting that the Constitution protects only those practices, which defined at "the most specific level at which a relevant tradition . . . can be identified," would have found protection in longstanding societal consensus); *id.* at 132 (O'Connor, J., concurring in part) (acknowledging that the narrow "mode of historical analysis [advocated in Justice Scalia's plurality opinion] . . . may be somewhat inconsistent with our past decisions in this area"); *id.* at 137-41 (Brennan, J., dissenting). *See generally* LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 73-80 (1991). Recently, in *Glucksberg*, the only guidance a majority of the Court apparently could agree on was that the practice should be "carefully formulat[ed]," whatever that might mean. *Glucksberg*, 521 U.S. at 722; *see also id.* at 721 (requir-

Yet, however these points might be resolved in other contexts, the nontextual status of family privacy does not persuasively support the wide divergence in the Supreme Court's definitional approaches to "family" and "religion." Although "religion" does appear in the text of the First Amendment, there is no plausible claim that the Court's currently expansive understanding of that term is controlled by the text. To the contrary, it is accepted that the Court's current approach to defining the boundaries of religious liberty is largely a product of recent decades.¹²⁶ Given the Court's extension of constitutional protection to embodiments of "religion" that were clearly beyond the contemplation of the First Amendment's framers,¹²⁷ and indeed given the Court's reluctance in case after case to give *any* particular content to the word,¹²⁸ it is problematic to

ing a "careful description" of the right) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

126. See RICHARD E. MORGAN, *THE SUPREME COURT AND RELIGION* 161 (1972) ("It is fair to say of the majority of the Warren Court that in the free-exercise area a diffuse desire to protect unorthodox minorities led it, helter-skelter, into a major doctrinal innovation. The free-exercise clause has now grown far beyond the confines of *Reynolds*." (citing *Reynolds v. United States*, 98 U.S. 145 (1878))); Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1712-13 (2000) [hereinafter Choper, *Religious Freedom*] ("Surprising as it may seem, the last hundred years tell nearly the entire story of the federal judiciary's role in America's experiments with the Religion Clauses. . . . It was not until the 1940s that the Court gradually began to give the concepts of religious freedom and separation of church and state the more vigorous meaning that we generally associate with them today."); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 480-82 (1991); Jeffries & Ryan, *supra* note 99.

127. See, e.g., CHOPER, *supra* note 99, at 5 ("At least in part because our nation has become far more religiously heterogeneous, 'practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to . . . the deeply devout and the nonbelievers alike.'") (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 241 (1963) (Brennan, J., concurring)); Choper, *Religious Freedom*, *supra* note 126, at 1712 ("Even if the Framers' intent were clear and unambiguous—and it was not—they could not have imagined the remarkable religious heterogeneity that is today a commonplace feature of American life, or the demands that its 'free exercise' might place upon the fabric of society.") (footnote omitted); Peñalver, *supra* note 100, at 803 & n.91 (noting that "an exclusive reliance on original intent would mandate the adoption of the Framers' theistic definition of religion" and quoting James Madison's definition of religion as "the duty which we owe to our Creator and the Manner of discharging it") (quoting James Madison, *To the Honorable the General Assembly of the Commonwealth of Virginia. A Memorial and Remonstrance.*, in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 6, 7 (Marvin Meyers ed., 1981)).

128. See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 973 (1997) (noting that "the Supreme Court never has formu-

credit the text with a great deal of legitimating power.¹²⁹

With regard to religion, however, there is now a powerful consensus, both on and off the Supreme Court, that the First Amendment should be construed to protect not only those faiths that the Framers would have recognized as religious, but also modern belief systems that serve the same function or bear a sufficient "family resemblance"¹³⁰ to those traditional faiths. It is enough, by this consensus, that the text provides validation for judicial protection of "religion" at a general level, leaving to the courts of future generations the task of adapting the specific content of that term to keep pace with ongoing changes in contemporary conceptions of religious life. If history and tradition are meant as a substitute for text in performing this validating function, then this consensus might suggest the propriety, in the context of family privacy, of permitting courts similar leeway in expanding the "family" comprehended by the Constitution: Deeply rooted tradition provides validation for judicial protection of "family" at a general level, leaving room for courts to adapt the specific content of that term to the rapidly changing terrain of contemporary family life.

lated a definition of religion"); 4 ROTUNDA & NOWAK, *supra* note 95, § 21.6, at 528-29 ("The Supreme [C]ourt has not attempted to define religion although it has noted that any exemptions that the judiciary created under the free exercise clause would be limited to persons asserting a religious belief."); TRIBE, *supra* note 95, at 1187 (observing that "courts have largely avoided defining 'religion' under the establishment clause"); Choper, *supra* note 106, at 579 (stating that "the Supreme Court has never seriously discussed how this term ['religion'] should be defined for constitutional purposes"); Rebecca Redwood French, *From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law*, 41 ARIZ. L. REV. 49, 50-52 & n.13 (1999) (noting that "[i]n its religion clause jurisprudence, the Court understandably has been reluctant to provide all-inclusive definitions of religion not tailored to the immediate context of the case before it" and that, in fact, "the Court has avoided defining religion") (citations omitted); Smith, *supra* note 111, at 298.

129. Indeed, Steven Smith argues cogently that the Supreme Court's modern religious-liberty jurisprudence departs so far from text and original understanding that it amounts to an effective repeal of the religion clauses. See STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 49-50 (1995). He contends that the religion clauses were purely "jurisdictional," stripping the federal government of any role in addressing thorny questions of religious aid or establishment and leaving them wholly to the political judgment of the states. In his view, then, any effort to derive a substantive principle of religious freedom from the text of the First Amendment is wholly artificial. See *id.* at 45-55.

130. *E.g.*, Greenawalt, *supra* note 106, at 763; Peñalver, *supra* note 100, at 821.

B. LOOKING TO THE VALUES UNDERLYING CONSTITUTIONAL PROTECTION: THE PLACE OF NEUTRALITY, PLURALISM, AND AUTONOMY

Even if family privacy's source outside the text of the Constitution does not require the divergence in the Court's approaches to defining "religion" and "family," it remains to consider whether differences in the purposes of the respective constitutional guarantees might justify the divide.

At a superficial level, at least, there are striking similarities between religion and family in the constitutional scheme. Both are often said to occupy a "private sphere" outside of the public order,¹³¹ and both are widely presumed to play crucial formative roles in the development of the individual and in the transmission of the foundational values upon which society is built.¹³² Indeed, the two "spheres" are often assumed to be overlapping, with families serving as the primary conduits for the transmission of religious faith.¹³³ It is therefore not at all surprising that several of the Supreme Court's most prominent

131. For the conception of religion in a private sphere, see, for example, *TRIBE*, *supra* note 95, at 1226, observing that "[t]he doctrines that prohibit excessive church-state entanglement reflect the Madisonian concern that secular and religious authorities must not interfere with each other's respective spheres of choice and influence," French, *supra* note 128, at 69 & n.107, and Jeffries & Ryan, *supra* note 99. For the conception of family in a private sphere, see, for example, Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498-1502 (1983), and Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1157. Indeed, the family has been directly likened to "a little church" for the way it occupies a self-governed sphere separate from the state. See Teitelbaum, *supra* note 3, at 541 (quoting John Demos, *Images of the American Family, Then and Now*, in *CHANGING IMAGES OF THE FAMILY* 43, 46 (Virginia Tufte & Barbara Myerhoff eds., 1979)).

132. The Supreme Court, for instance, has observed that "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977); see also *Maynard v. Hill*, 125 U.S. 190, 211 (1888); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (asserting that "a free, self-governing commonwealth . . . [must be] establish[ed] . . . on the basis of the idea of the family"); DEREK H. DAVIS, *RELIGION AND THE CONTINENTAL CONGRESS, 1774-1789*, at 186-88, 192-95 (2000) (describing the framers' views about the primacy of religion and family "to the development of both individual virtue and the larger political order"). Social science literature likewise demonstrates that "family relationships . . . play a powerful role in shaping adult prospects" of children. Garrison, *supra* note 23, at 261 & n.109 (citations omitted).

133. See *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (stating that "[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice"); DAVIS, *supra* note 132, at 186-87 (discussing the role of families in the transmission of religious values).

landmarks in this area—starting with *Meyer* and *Pierce*, and continuing on through *Yoder*¹³⁴—have involved intertwined claims of religious freedom and family privacy.¹³⁵

In the First Amendment context, the Supreme Court's expansive approach to defining "religion" is clearly supported by the norms animating the modern understanding of the Religion Clauses. There remains lively debate over whether the central premise of those Clauses should be understood to be state neutrality toward all things religious or an affirmative recognition of the special value of religion.¹³⁶ The clause specially guaranteeing the "free exercise" of religion suggests the latter understanding, although the clause forbidding a state "establishment" of religion might be seen as endorsing the former. In fact, there is a substantial historical claim that the Establishment Clause, limited as it was to the actions of "Congress,"¹³⁷ was originally meant to ensure only the neutrality of the *national* government, leaving individual states free to decide for themselves whether to adopt an official religion within their ju-

134. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding the claim of Amish parents to an exemption from a law mandating secondary schooling); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (involving the prosecution of a guardian for enlisting a child's aid in street corner proselytizing); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that a law mandating universal public education unconstitutionally interfered with the right of parents to choose to educate their children in a Catholic school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (involving the prosecution of a teacher in a Lutheran school for giving religious instruction in German). For a discussion of the way in which *Meyer*, now considered the foundational case of family privacy, was also centrally a case vindicating religious liberty, see JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM* 325-26 (2001). To this list might also be added the Court's cases dealing with laws penalizing polygamy, although they predate the modern development of family-privacy doctrine and therefore involved only claims of religious freedom. See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878).

135. As these cases demonstrate, a recurring point of overlap is the claim of parents to control the religious upbringing of their children. For fuller discussion of the complexities presented by entangled claims of religious and family prerogative, see, for example, JAMES G. DWYER, *RELIGIOUS SCHOOLS VS. CHILDREN'S RIGHTS* (1998), Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53 (1999), and Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996).

136. See, e.g., *DAVIS*, *supra* note 132, at 10-14; Jeffries & Ryan, *supra* note 99.

137. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

risdictions.¹³⁸ Nevertheless, neutrality has emerged as a powerful, and indeed the dominant, concern in the modern understanding of both Clauses.¹³⁹ Although neutrality has several meanings in this context, the core principle claiming universal adherence is that government must not play favorites among competing conceptions of religious life.¹⁴⁰ Even those who

138. See GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 93-95 (1987); DAVIS, *supra* note 132, at 16-17, 26, 224-25; SMITH, *supra* note 129, at 21-22; Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1132-33 (1988); Jeffries & Ryan, *supra* note 99.

139. See, e.g., *Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093, 2104 (2001) ("[W]e have held that 'a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.'" (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (emphasis added by the Court in *Good News Club*)); *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (declaring that "we have consistently turned to the principle of neutrality" in deciding the permissibility of government aid to religious schools); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("[W]e have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) ("[I]t is an established principle that the government must pursue a course of complete neutrality toward religion."); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."); *Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality."); see also SMITH, *supra* note 129, at 77 (describing "neutrality" as "[p]erhaps the most pervasive theme in modern judicial and academic discourse on the subject of religious freedom"); Jeffries & Ryan, *supra* note 99.

140. See, e.g., *Church of the Lukumi Babalu Aye*, 508 U.S. at 547 ("Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices."); *Larson v. Valente*, 456 U.S. 228, 244-45 (1982). Commentators explain various conceptions of neutrality at play in the Supreme Court's interpretation of the Religion Clauses. See, e.g., *Church of the Lukumi Babalu Aye*, 508 U.S. at 560-63 (Souter, J., concurring in part and concurring in the judgment); SMITH, *supra* note 129, at 77-96; TRIBE, *supra* note 95, § 14-7, at 1188-94; Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses?*, 2000 SUP. CT. REV. 325, 334 (finding in the Court's cases a concern for neutrality not only among religions or between religion generally and non-religion, but also "between religion and other bases for inclusion or selection for governmentally provided opportunities"); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997). For the argument that the Court's quest for "neutrality" is ultimately futile because the decision to privilege any particular conception of religious freedom necessarily precludes or disadvantages competing conceptions, see SMITH, *supra* note 129, at 63-97. See also 4 ROTUNDA & NOWAK, *supra* note 95, § 21.6, at 528 ("It is difficult to see how the Supreme Court could define religion in a

would downplay the importance of neutrality *toward* religion readily acknowledge the obligation of neutrality *among* religions.¹⁴¹ As the Court observed in *Larson v. Valente*, this policy unites the First Amendment's twin promises of religious liberty: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. . . . Free exercise . . . can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations."¹⁴²

Implicit in this norm of neutrality is, of course, a high value on religious pluralism. This value is implicit in the original understanding of the Free Exercise Clause, and even more vividly reflected in the expansion of First Amendment doctrine during the last half-century corresponding with the diversification of religious life.¹⁴³

An additional and related value underlying the First Amendment's protection of religious freedom is respect for the autonomy of the individual in a realm thought to "have a unique significance for the believer."¹⁴⁴ The Religion Clauses

manner that would not involve the governmental punishment of beliefs or the granting of a denominational preference.").

141. See SMITH, *supra* note 129, at 124 ("Our history speaks with conflicting voices on the question whether government should 'aid' religion, but it may convincingly support the idea that government should not recognize any particular denomination as the official state church, or that government should not require, or forbid, participation in particular religio[us] movements.").

142. 456 U.S. 228, 244-45 (1982); see also *Bd. of Educ. v. Grumet*, 512 U.S. 687, 703 (1994) (observing that it is "a principle at the heart of the Establishment Clause, that government should not prefer one religion to another"); CHOPER, *supra* note 99, at 13 ("In the main, [the Free Exercise Clause] prevents the state from *impeding* the practices of religious minorities that are either disfavored or unacknowledged by the majority."); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1159 (1991) (noting that the Free Exercise Clause "was specially concerned with the plight of minority religions"); Brian A. Freeman, *Expiating the Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exemptions From Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 29-30 (2001).

143. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1516 (1990) [hereinafter McConnell, *Origins of Free Exercise*] (contending that "[t]he Madisonian perspective points toward pluralism . . . as the organizing principle of church-state relations").

144. Choper, *supra* note 106, at 597; see also CHOPER, *supra* note 99, at 74; J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 337 (1969) (describing respect for the special significance of religious conscience as perhaps the strongest policy underlying the Free Exercise Clause); Peñalver, *supra* note 100, at 807 ("The ability of religions to fulfill a deeply

thus protect "the sanctity of religious conscience"¹⁴⁵ partly because of the profound importance of religious belief to many individuals and the sense that it would be "*particularly* cruel for the government to require the believer to choose between violating those commands and suffering meaningful temporal disabilities."¹⁴⁶

These underlying values provide strong and obvious support for the Supreme Court's expansive view of what constitutes "religion." Parsing the concept narrowly risks favoring some sects and withholding protection from others. That result, of course, would compromise the government's neutrality and undermine the associated value given religious pluralism; it also would expose disfavored believers not only to the consequences of unchecked state regulation, but also to the insult of official categorization of their faith as something less than a genuine religion. Accordingly, the policies supporting religious freedom require that the state allow considerable latitude for individuals to develop and act upon their own sincere conceptions of religious devotion and expression, however "[un]acceptable" or even "[in]comprehensible" these may appear by conventional standards.¹⁴⁷ It is for these reasons that the Supreme Court quite properly "has emphasized the believer's own perspective" in assessing claims of religious belief and the constitutional scope of "religion."¹⁴⁸

The policies giving rise to the Constitution's protection of family privacy are murkier and more contested, but there are ready parallels to the law of religious liberty.¹⁴⁹ Just as the Constitution values autonomy in religious life—marking out a

rooted human longing makes them particularly precious and worthy of protection.").

145. *TRIBE*, *supra* note 95, at 1236.

146. Choper, *supra* note 106, at 597 (emphasis added); *see also id.* at 598 (stating that "intuition and experience affirm that the degree of internal trauma" is greater for one forced to violate religious scruples than for one forced to violate a merely moral scruple); Clark, *supra* note 144, at 337 (asserting that "[t]he violation of a man's religion or conscience often works an exceptional harm to him" and that "the cost to a principled individual of failing to do his moral duty is generally severe, in terms of supernatural sanction or the loss of moral self-respect").

147. *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981).

148. *TRIBE*, *supra* note 95, at 1181 ("[I]n order to realize the goals of religious liberty, 'religion' must be defined broadly enough to recognize the increasing number and diversity of faiths. Furthermore, 'religion' must be defined from the believer's perspective.").

149. *See Minow, Free Exercise of Families*, *supra* note 19, at 936.

"sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control"¹⁵⁰—so the guarantees of family privacy are intended to ensure autonomy in a "private realm of family life which the state cannot enter."¹⁵¹ Although these assertions of the state's absolute exclusion are seriously overstated in both contexts, they illustrate well the common value given to individual autonomy. In the area of family life, as in the realm of religion, the Court often has explained the Constitution's solicitude by pointing to the profound importance of family relationships to the individuals involved and the enormous imposition that state regulation would entail.¹⁵²

There is also support for a policy of neutrality in the Constitution's protection of family privacy, though it is more qualified than in the context of religious liberty. It is most assuredly difficult, as Professor Minow has observed, "to maintain any historical basis for the equivalent of an antiestablishment clause when it comes to families."¹⁵³ Indeed, an obligation of complete neutrality would be impossible to square with "the widely held view that the expression of contemporary beliefs and values is one of family law's most important functions."¹⁵⁴

150. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

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

152. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (emphasizing the profoundly "intimate and personal" nature of the decision whether to terminate a pregnancy); *Turner v. Safley*, 482 U.S. 78, 94-95 (1987) (emphasizing the importance of marriage to individual well-being in recognizing the right to marry while in prison); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) (stating that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association"); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (suggesting that heightened protection of the right to abortion is justified by the gravity of the consequences women might suffer as a result of state-coerced childbearing); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (explaining heightened protection for the decision to marry on grounds that marriage is essential to personal happiness); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42 (1942) (emphasizing the grave imposition on the individual of forced sterilization); see also DANIEL A. FARBER, *THE FIRST AMENDMENT* 246 (1998) (noting that "religion is considered a core example of the kind of personal autonomy which the liberal state is pledged to protect," and that "[f]rom this perspective, the right to be a fundamentalist Christian and the right to gay marriage are similar: both involve central aspects of personal autonomy").

153. Minow, *Free Exercise of Families*, *supra* note 19, at 936.

154. Garrison, *supra* note 36, at 842; see also Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497-98 (1992) [hereinafter Schneider, *Channeling Function*]; Teitelbaum, *supra* note 3, at 547-48;

It does not necessarily follow, however, that "[a]bsent an anti-establishment clause, there is no governmental obligation to strive for neutrality."¹⁵⁵ Indeed, on several occasions, the Supreme Court has insisted that the Constitution's limitations on state regulation of family are meant to prevent majoritarian "standardiz[ation]" of family life. "[T]he Constitution," Justice Powell explained in *Moore v. City of East Cleveland*, "prevents [the state] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."¹⁵⁶ Justice Brennan surely overstated the point when he flatly asserted that the Court regularly had "declined to respect a State's notion, as manifested in its allocation of privileges and burdens, of what the family should be."¹⁵⁷ Yet there is no doubt that constitutional privacy protection is meant to ensure that individuals, at least within certain boundaries, are free to give order and meaning to their own intimate relationships.¹⁵⁸

Yet the boundaries that ultimately cabin private choice have often been defined in family privacy cases in terms of history and convention. The overstatement in Justice Brennan's assertion about the Court's intolerance for public channeling of family life is evidenced by the result of the very case in which he made it.¹⁵⁹ In *Michael H. v. Gerald D.*, a splintered Court upheld a California statute that denied family status to a man and the daughter he sired during an affair with the girl's married mother.¹⁶⁰ In a plurality opinion, Justice Scalia rejected the man's constitutional claim to preserve the emotional rela-

Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U. C. DAVIS L. REV. 991, 1004-07 (1989).

155. Minow, *Free Exercise of Families*, *supra* note 19, at 944.

156. 431 U.S. 494, 506 (1977). Similarly, in *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1928), the Court explained the invalidity of Oregon's law mandating public education on the ground that the Constitution "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." *Id.*

157. *Michael H. v. Gerald D.*, 491 U.S. 110, 145 (1989) (Brennan, J., dissenting). In the same passage, Justice Brennan also insisted that "many cases [have] prevent[ed] the States from denying important interests or statuses to those whose situations do not fit the government's narrow view of the family." *Id.*

158. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989) (arguing that the right of privacy guards against "a society standardized and normalized, in which lives are too substantially or too rigidly directed").

159. For an articulation and defense of this "channeling function," see generally Schneider, *Channeling Function*, *supra* note 154.

160. See 491 U.S. at 121-24.

tionship he had established with the girl on the ground that this was not the sort of family relationship that enjoyed "traditional respect in our society."¹⁶¹ A majority of the Court in *Bowers v. Hardwick* refused to extend constitutional protection to homosexual relations on essentially the same ground.¹⁶² In Justice Powell's plurality opinion in *Moore*, but a few paragraphs before he asserted the Constitution's condemnation of family standardization, he linked constitutional protection for the family closely to traditional conceptions of family life.¹⁶³ In deciding whether the Constitution gave shelter to the family claimants in that case, Justice Powell looked to the validation of history: Inez Moore's family was "deserving of constitutional recognition," he concluded, because society had long venerated the choice of grandparents to live in the precise extended-family configuration chosen by the Moores.¹⁶⁴ Accordingly, in the context of family privacy, norms of neutrality and an appreciation of pluralism often coexist uneasily with a sense that society legitimately may act to advance its own conception of family. There is indeed a durable norm of state neutrality evident in the Court's rejection of excessive standardization, but that norm is quite often enforced only within a range of choices deemed acceptable by deeply rooted societal consensus.¹⁶⁵

Conventional understandings also play some role in defining "religion" under the First Amendment. Indeed, judicial efforts to identify the boundaries of both religious liberty and family privacy ultimately reflect what Martha Minow has identified as a broader and more general "ambivalence over pluralism within American history and constitutional traditions."¹⁶⁶

161. *Id.* at 123 n.3.

162. 478 U.S. 186, 191-94 (1986).

163. See 431 U.S. 494, 503 (1977) (plurality opinion) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").

164. *Id.* at 504; see also *id.* at 505-06 (qualifying the Court's affirmation of constitutional protection for the extended family by noting that protection would be extended at least to families related by the "degree of kinship" present in the Moore family).

165. This statement must be qualified with the phrase "quite often" because on other occasions the Court has extended constitutional protections to family choices or relationships—including interracial marriage, marriage while incarcerated, and abortion—for which there was no historical consensus of acceptance. See *supra* notes 64-75 and accompanying text.

166. Minow, *All in the Family*, *supra* note 10, at 278; see also *id.* at 297-305 (discussing manifestations of this ambivalence in conflicts over religion, child welfare, and educational multiculturalism).

When confronted by a novel claim of religious adherence, many judges and scholars ultimately resort to comparisons between the putative religion and more traditional belief systems that indisputably qualify as religious.¹⁶⁷ Any approach to defining "religion" that recommends such comparisons, or that identifies the "essential elements" of religiosity by drawing from familiar faiths, is inevitably bringing conventional understanding to bear in the process.¹⁶⁸ Yet the effect of this influence—so long as the comparisons or "essential elements" are kept sufficiently general, as they have been in modern practice—is only to ensure some rough correspondence between the new religion and contemporary consensus about what constitutes religion. The question is essentially whether, squinting hard, a court can see sufficiently important similarities between the claimed religion and those things conventionally understood to be religions; it is *not* whether the particular belief system or entity before the court can itself claim age-old veneration or "traditional respect in our society."¹⁶⁹ Thus, proponents can still accurately insist that these approaches to defining religion, even as they take account of conventional understandings, are "sufficiently flexi-

167. See, e.g., *Malnak v. Yogi*, 592 F.2d 197, 207 (3d Cir. 1979) (per curiam) (Adams, J., concurring) ("The modern approach thus looks to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.'"); see also *United States v. Meyers*, 95 F.3d 1475, 1483-84 (10th Cir. 1996) (applying test proposed in Judge Adams' *Malnak* concurrence); *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025, 1032-33 (3d Cir. 1981) (same); Choper, *supra* note 106, at 594 n.89 (noting that "the Judeo-Christian religious tradition is dominant in our culture and, whether rightly or wrongly, all other beliefs seeking recognition as religious tend to be compared to it"); *id.* at 599 (acknowledging that the author's proposed "extratemporal consequences" test for defining religion "probably conforms more than the 'ultimate concerns' approach with the conventional, average-person conception of religion"); Freeman, *supra* note 115, at 1553 (suggesting that putative religions be compared to a "paradigm" of religion derived from elements common to many "traditional Eastern and Western religions"); Greenawalt, *supra* note 106, at 753 ("[C]ourts should decide whether something is religious by comparison with the indisputably religious, in light of the particular legal problem involved."); Peñalver, *supra* note 100, at 820-21 (endorsing a "family resemblance" approach to defining religion, in which, among other criteria, "the ultimate goals pursued by adherents to the belief system in question may be compared with those pursued by members of the many world religions").

168. See, e.g., Choper, *supra* note 106, at 599-600; Peñalver, *supra* note 100, at 812-18; Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1074-75 (1978).

169. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 n.3 (1988) (Scalia, J., plurality opinion).

ble and capable of growth to include newly perceived and unconventional values"¹⁷⁰ within the scope of First Amendment protection.

The similarities between the policies underlying the Constitution's guarantees of religious liberty and family privacy are strong enough to cast serious doubt about the propriety of enforcing a narrow and heavily traditional definition of family. Even though pluralism is not valued as highly in the family-privacy context as in the modern First Amendment cases, respect for personal autonomy and the associated concern for what Jesse Choper has called the "special cruelty" factor¹⁷¹ fully justify at least a heavy skepticism of family "standardization." Recognizing the crucial role of family in the lives of individuals, and the cruelty that would be imposed by public measures that damage or destroy genuine and heartfelt constructions of family life, some wider latitude for self-definition of family seems appropriate to the underlying constitutional values.

Precisely what form that wider latitude should take is surely open to debate. Certainly, experience with the Religion Clauses, as well as with family law generally, suggests several possible approaches, including comparative methodologies and functional or essence-based definitions. And, as in the context of religion, something more than sincere self-definition as "family" must surely be required. A "view of the family only as a collection of individuals who come together in a contractarian arrangement for so long and for such purposes as they choose" will strike most as "deeply unsatisfying."¹⁷² Such a view seems

170. Choper, *supra* note 106, at 599; see also *Larson v. Valente*, 456 U.S. 228, 245-46 (1982) (contending that the Court's approach to the Free Exercise Clause gives protection to "small, new, or unpopular denominations" as well as traditional religions); Peñalver, *supra* note 100, at 821 (contending that the proposed methodology for defining religion by comparisons to many world religions simultaneously "closely adheres to our use of the term 'religion' in everyday language" and "leaves ample room for the methodology to expand in the future as our use of the word 'religion' in everyday language changes").

171. Choper, *supra* note 106, at 599; see *supra* note 146 and accompanying text.

172. Teitelbaum, *supra* note 3, at 545; see also MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* (1999); REGAN, *supra* note 23; Woodhouse, *supra* note 3, at 580-81. As Martha Minow has observed, "The danger of an expansive, functional voluntarist view of family—in which people can pick and choose what kinds of family ties that they want to have—is that people will choose to walk out when it gets tough and to avoid responsibilities when it is no longer fun." Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 283 (1991) [hereinaf-

hollow because it "leaves little room for the sense of commitment experienced by and valued in family life."¹⁷³ Even squinting hard, few would recognize important commonalities between a transitory association of college roommates and established conceptions of family;¹⁷⁴ what is missing from their association is the crucial substance of attachment—love, responsibility, dependency, durability—that characterizes past relationships known to us as "family."¹⁷⁵ Just as with religion, drawing the outer boundary of protection with reference to such a contemporary assessment of the essence or core function of family would take some account of modern convention while leaving room for the emergence and recognition of new individual conceptions of family.¹⁷⁶ For the purposes of this Article, it is enough to point out that any of these approaches would be capable of giving greater latitude than the tradition-oriented approach and thus any would likely constitute an improvement over current doctrine.

IV. LIVING WITH BROAD CONCEPTIONS OF FAMILY AND RELIGION: TOWARD MODERATED, BUT FRANKER, STANDARDS OF CONSTITUTIONAL SCRUTINY

This proposal to broaden the scope of "family" protected by the Constitution has so far reckoned only indirectly with the powerful sense that society has a legitimate role to play in advancing its own preferences concerning the construction of family life. As discussed previously, the Supreme Court has sometimes sought awkwardly to accommodate this conviction along with its stated hostility to family standardization in the course of drawing the boundaries of "family" protected by the Constitution.¹⁷⁷ Broadening the Constitution's definition of family

ter Minow, *Redefining Families*].

173. Teitelbaum, *supra* note 3, at 554.

174. *Cf. Borough of Glassboro v. Vallorosi*, 568 A.2d 888, 894-95 (N.J. 1990) (per curiam) (construing a state statute's definition of family to include ten college sophomores living together).

175. It is on this basis that Barbara Woodhouse has proposed a functional definition of "family" that would differentiate between "kinships of responsibility" and mere "associations of choice." See Woodhouse, *supra* note 3, at 580-83. Similarly, Martha Minow has advocated for a functional definition that would focus upon the *obligations* that are implicit in understandings of family relations. See Minow, *All in the Family*, *supra* note 10, at 305-10; Minow, *Redefining Families*, *supra* note 172, at 277-83.

176. See *supra* notes 167-70 and accompanying text.

177. See *supra* text accompanying notes 153-65.

would honor family pluralism but, in doing so, would leave less room for exerting state preferences. Public consensus about family would continue to exert some constraint on the scope of protection, but its role, and its channeling effect, would be substantially diminished. Yet, as is suggested more fully below, the state's legitimate channeling function in family law could be better accommodated not through definition of family at the threshold of constitutional analysis, but later, in a forthright balancing of the competing state and individual interests. As it stands now, the state is permitted to channel families toward preferred forms on a bare showing that the state's preferences coincide with deeply rooted societal assumptions about the family; tradition becomes, in effect, self-justifying.¹⁷⁸ Under the approach advanced here, however, the state more often would be put to the burden of justifying its preferences through reference to more pressing public interests than the empty perpetuation of tradition.

A. A DEEPER COMMONALITY: CONTAINING THE COSTS OF ACCOMMODATION

So far, this Article has contended that similarities between the policies underlying religious liberty and family privacy, and between the roles of religion and family in the lives of individuals, support greater similarity in the judiciary's approach to defining religion and family. There is yet another similarity between the two constitutional contexts, however, which may partly explain the Supreme Court's reluctance to be more generous in defining family for purposes of the Constitution.

At the core of both the Free Exercise and family-privacy guarantees is a common dilemma: If enormous weight is given to the "fundamental" liberty (in the form, for example, of "fatal-in-fact" strict scrutiny¹⁷⁹), and if individuals are then given

178. A state imposition upon non-conforming family life would still, of course, be subject to rational basis review. Given, however, the minimal demands of that test generally and, in particular, the Court's past willingness to accept the enforcement of traditional moral conventions as a sufficient justification for state action under rationality review, *see, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), a conclusion that the state's regulation comports with traditional notions of family is tantamount to proving its constitutionality.

179. *See Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring) (describing strict scrutiny as almost always "automatically fatal"); *Fulilove v. Klutznick*, 448 U.S. 448, 516 (1980) (Marshall, J., concurring) (using a similar description); Gerald Gunther, *Foreword: In Search of Evolving Doc-*

wide berth to define for themselves whether they are entitled to this high-powered protection (by way of great deference to the individual in defining "religion" or "family"), society might be "courting anarchy."¹⁸⁰ As the Court once acknowledged, "It is readily apparent that virtually every action that the Government takes, no matter how innocuous it might appear, is potentially susceptible to a Free Exercise objection,"¹⁸¹ and the same might well be said in the context of the family. The ability to govern might be continually stymied by the demands for special exemptions by a proliferating number of "religions" claiming, perhaps even sincerely, a faith-based objection to taxes, or military service, or drug laws, and so on,¹⁸² and by the demands of an equally far-flung universe of novel associations to the special favoritism shown "families" under the Constitution. "[T]he very concept of ordered liberty," the Court warned in *Yoder*, a case which itself arose at the intersection of religious and family freedoms, "precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."¹⁸³

trine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as "strict" in theory and fatal in fact").

180. *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990).

181. *Bowen v. Roy*, 476 U.S. 693, 707 n.17 (1986); see *id.* at 712 (holding that the Free Exercise Clause did not exempt religious objectors from a law requiring use of social security numbers by beneficiaries of certain welfare programs).

182. There have been a number of recent claims for exemptions. See, e.g., Jed Michael Silversmith & Jack Achiezer Guggenheim, *Between Heaven and Earth: The Interrelationship Between Intellectual Property Rights and the Religion Clauses of the First Amendment*, 52 ALA. L. REV. 467 (2001) (considering claims for religious exemption from copyright laws); Laura L. Coon, Note, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481 (2001) (considering claims for religious exemption from employment-discrimination laws); Michael K. Ryan, Note, *A Requiem for Religiously Based Property Tax Exemptions*, 89 GEO. L.J. 2139 (2001) (considering claims for religious exemption from taxes).

183. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972); see also *Smith*, 494 U.S. at 888-89; *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 653 (1943) (Frankfurter, J., dissenting) (warning against a construction of the Free Exercise Clause that would permit "each individual . . . [to] set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws"); CHOPER, *supra* note 99, at 62 (observing that "if the courts were unqualifiedly to apply heightened scrutiny to every government regulation that appeared to have the effect of restricting individual religious freedom, the diversity of religious beliefs in the United States—which continues to increase—would make virtually every regulation of con-

Yet, the Supreme Court has responded to this common dilemma in different ways in the two contexts. In the Free Exercise area, the Court has come to be quite generous in allowing individuals to bring their claim of faith within the scope of protected "religion," permitting individuals considerable freedom to define for themselves whether they are acting pursuant to religious belief.¹⁸⁴ Yet the Court has mitigated the implications of that generosity by narrowly containing the substantive protection that status confers. In early cases, the Court cabined the Constitution's substantive protection by means of a "belief-action" distinction, which gave protection to internal thoughts, but not to conduct.¹⁸⁵ In recent years, after the articulation of the "compelling interest" test as applicable to governmental restrictions of religious practices,¹⁸⁶ the Court sometimes seemed

duct' open to challenge") (footnotes omitted); MORGAN, *supra* note 126, at 150-51; NOONAN & GAFFNEY, *supra* note 134, at 329; 4 ROTUNDA & NOWAK, *supra* note 95, at 528 ("If the Court did not narrow the potential group of persons who could claim the exemption, a ruling finding that the government must create a religious exemption from the criminal law would make compliance with the law optional for every person."); TRIBE, *supra* note 95, at 1194 (observing that "[o]ne reason the Court has granted only a few free exercise exemptions may be the fear that, once easy accommodations are granted, neutrality will demand that more difficult accommodations be granted as well"); Choper, *supra* note 106, at 592; McConnell, *Origins of Free Exercise*, *supra* note 143, at 1493 (noting the practical concern that "if the exercise of religion extends to 'everything and anything,' the interference with ordinary operations of government would be so extreme that the free exercise clause would fall of its own weight") (citations omitted); Richard John Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 630-31 (1992). Indeed, fears that constitutionally mandating religious exemptions ultimately would "subvert all civil liberty" date back to the original debates over the Free Exercise Clause. See Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 941 (1992).

184. See *supra* notes 94-116 and accompanying text.

185. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."). For a cogent critique of this distinction, see TRIBE, *supra* note 95, at 1183-84. See also McConnell, *Origins of Free Exercise*, *supra* note 143, at 1488-90 (contending that text and historical understanding support the conclusion that "freedom of religion was almost universally understood . . . to include conduct as well as belief").

186. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests.") (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

to "water down" the scrutiny that it actually applied.¹⁸⁷ And still more recently, in *Employment Division v. Smith*,¹⁸⁸ the Court jettisoned any form of heightened scrutiny altogether for cases in which the state has burdened religious exercise by way of a generally applicable law.¹⁸⁹ By current understanding, then, the Free Exercise Clause gives believers, essentially, only a prohibition against discriminatory state persecution, a guarantee that largely duplicates protection given elsewhere by the equal-protection guarantees of the Fifth and Fourteenth Amendments.¹⁹⁰ With substantive protection amounting to so little, the Court can afford to be generous in doling it out.¹⁹¹

187. See *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990) (stating that many laws would not meet the "compelling interest" test if the test were applied faithfully); see also Choper, *Religious Freedom*, *supra* note 126, at 1724-25 (noting frequent deviation between Court's rhetoric of strict scrutiny and actual practice); Christopher V. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) (describing the Court's standard of review as "strict in theory but feeble in fact"); Robert D. Kamenshine, *Scraping Strict Review in Free Exercise Cases*, 4 CONST. COMMENT. 147, 147-49, 154 (1987) (concluding that the de facto use of a "more lenient . . . middle-tier standard" is just one of "[s]everal potential 'outs' [the Court employed to permit it to] maintain nominal adherence to strict review"); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) (describing the Court's "standard of review [as] . . . strict in theory, but ever-so-gentle in fact"). But see *Church of the Lukumi Babalu Aye*, 508 U.S. at 570 & n.5 (Souter, J., concurring in part and concurring in the judgment) (disputing *Smith's* "implication] that the Court, in considering claims for exemptions from formally neutral, generally applicable laws, has applied a 'water[ed] down' version of strict scrutiny").

188. 494 U.S. 872 (1990).

189. For criticisms of the way in which *Smith* narrowed the scope of substantive protection under the Free Exercise Clause, see Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 670-86 (1991), Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 10-39, and Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1129-53 (1990). For an argument that these criticisms are greatly overstated, see Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117, 118-29.

190. See CHOPER, *supra* note 99, at 41-44, 64-65 (discussing similarities between the equal protection and the free exercise doctrine and concluding that "protections for religious liberty are solidly grounded in the free speech provisions of the First and Fourteenth Amendments and would be readily secured even if there were no Free Exercise Clause"); Choper, *supra* note 106, at 582-83. It is for this reason that Douglas Laycock has written that, "[i]n effect, *Smith* repealed the substantive component of the Free Exercise Clause." Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 855-56 (1992).

191. See CHOPER, *supra* note 99, at 62-63; Choper, *supra* note 106, at 591-92 (stating that "[t]here is an obvious relationship between the legal definition

Few claimants, despite passing the "religion" threshold, actually prevail against the government.¹⁹²

In the family-privacy area, by contrast, the Court's tack has been to stave off the anarchical implications of excessive constitutional solicitude by remaining much more selective about who may claim "family" status. In other words, when it comes to "religion" the Court's tack is to be generous in its definition, but relatively stingy in the substance of protection that follows, whereas when it comes to "family," the Court has tended to be more stingy in its definition, while claiming to be more expansive in the substantive protection accorded family status.

Part of the Court's reluctance to construe family more broadly is explained by its nominal adherence to strict scrutiny as the substantive standard of protection once a significant incursion on family liberty is found. In past cases, the Justices

of religion and the shaping of substantive doctrine under the free exercise clause" and that "it is unlikely that an extremely broad definition of religion will be permitted to coexist with an extremely generous protection of the claims that fall within that definition").

192. See, e.g., 4 ROTUNDA & NOWAK, *supra* note 95, at 519 (noting that "[t]he Supreme Court has invalidated very few government actions on the basis of the free exercise clause"); TRIBE, *supra* note 95, at 1194 (noting that, despite its generosity in defining the scope of protected religion, "[i]n practice, the Court has placed significant hurdles in the way of free exercise claimants"). This was true, moreover, well before *Smith* curtailed the substantive protection offered by the Free Exercise Clause:

As Judge Noonan and others have shown, the actual protection afforded religious exercise by the Supreme Court and federal appellate courts applying pre-*Smith* law is not nearly as great as post-*Smith* rhetoric suggests. One enumeration lists seventeen Supreme Court cases between 1963 and 1990 addressing free exercise claims, of which only four (twenty-three percent) prevailed. Similarly, out of ninety-seven cases in the courts of appeals during the 1980s, free exercise claims prevailed in only twelve (twelve percent). Another article, compiling almost one hundred pre-*Smith* cases from state supreme courts and federal courts of appeals for a period ending in 1989, found that the free exercise claim was sustained in only fourteen of eighty-five cases (sixteen percent). . . .

. . . Of course a twenty-five percent chance of winning, under pre-*Smith* law in practice, is better than no chance of winning under *Smith*. Still, the change occasioned by *Smith* is not a change from the bright daylight of religious freedom to the dark night of religious persecution. If the metaphor is apt, even before *Smith* it was deep twilight.

Tushnet, *supra* note 189, at 121-22 (footnotes omitted); see also 4 ROTUNDA & NOWAK, *supra* note 95, § 21.6, at 526; *id.* § 21.8, at 537 (observing that "even during the era of the balancing test the government won virtually every case which did not involve the punishment of religious beliefs").

have openly worried that an expansive conception of family would—on the assumption that strict scrutiny is “strict’ in theory and fatal in fact”¹⁹³—require the evisceration of a wide swath of traditional regulations of family life, many of which undoubtedly strike the Justices as perfectly sensible.¹⁹⁴ Although the Court has often moderated the rigor of its scrutiny in family-privacy cases, the nominal retention of strict scrutiny nevertheless would force awkward and unwelcome maneuvers on the Court if it were to broaden substantially the constitutional concept of family.¹⁹⁵

All of this produces a quite unsatisfactory state of affairs. In order to avoid the costs of excessive accommodation, a great many claimants are now denied any meaningful protection whatsoever under either set of constitutional guarantees. Unconventional claimants, in particular, are likely to find little or no help (except in the thankfully rare instance in which government persecutes a particular religious sect¹⁹⁶).

B. OPEN BALANCING AS AN ALTERNATIVE

There is, however, an alternative that would not create the anarchy or radical accommodation feared by the Court. The Court might, in both contexts, be generous in defining the protected classes—i.e., allow greater room for “self-definition” of family as well as religion—while abandoning its absolutist pretensions with regard to the substantive protection conferred by these constitutional guarantees.¹⁹⁷ Abandoning pretenses

193. See *supra* note 179.

194. In *Zablocki v. Redhail*, 434 U.S. 374, 392 (1978), for instance, several of the Justices contended that traditional restrictions on entry into marriage—such as laws barring bigamous, incestuous, or under-age marriages—should be sustained without triggering strict scrutiny. See *id.* at 392 (Stewart, J., concurring in the judgment); *id.* at 399 (Powell, J., concurring in the judgment); *id.* at 404 (Stevens, J., concurring in the judgment).

195. See Meyer, *Paradox*, *supra* note 56, at 564.

196. *Church of the Lukumi Babalu Aye* was such a case, striking down (even after *Smith*) an ordinance crafted deliberately to prohibit practice of the Santeria religion. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545-47 (1993).

197. See Choper, *supra* note 106, at 591-92 (noting that “a spacious judicial definition of religion need not necessarily lead to greater protection for religious freedom” and that “[t]he ultimate reach of the free exercise clause can be expanded or limited by the Court at either the definitional or substantive steps of the process”); Greenawalt, *supra* note 106, at 753-54 (contending that “a threshold determination that religion is present [in a free exercise case] should not automatically invoke use of the compelling interest test or similar standards of review”).

about the judicial role once these guarantees are triggered—either by recognizing that strict scrutiny need *not* be “fatal in fact,” as the Court has recently done in the context of affirmative action,¹⁹⁸ or by embracing more forthrightly some form of intermediate scrutiny¹⁹⁹—would permit the Court to be more generous in defining “family” without seriously compromising society’s ability to assert important interests in channeling family life.²⁰⁰

This change would not necessarily result in a significant net gain in the number of successful family-privacy (or free-exercise) claims. Many traditional restraints on family formation or the conduct of family life might continue to be sustained against constitutional attack. The approach advocated here, however, would dramatically alter the manner in which courts evaluate the constitutionality of such intrusions. Courts could no longer rest validation of state action solely upon its historical pedigree or the novelty of the intimate affiliation upon which it intruded. Instead, far more often, courts would be required to allow claimants past the threshold of constitutional protection—recognizing their claim to family status—and proceed to evaluate the strength of the justifications for the regulatory measure. Thus, for example, in the recent constitutional challenge to Florida’s statutory ban on adoptions by homosexuals, it would not be dispositive to point out that the affiliation between a foster parent and the child he wishes to adopt com-

198. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

199. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 570 (Souter, J., concurring in part and concurring in the judgment) (criticizing *Smith* and contending that if the free-exercise exemptions generated by a strict scrutiny approach were thought excessively burdensome for government, “it would argue only for moderating the language of the [compelling-interest] test, not for eliminating constitutional scrutiny altogether”); Kamenshine, *supra* note 187, at 154. Elsewhere, I have argued that the Supreme Court should openly adopt an intermediate-scrutiny approach to family privacy controversies. *See Meyer, Lochner Redeemed*, *supra* note 63, at 1163, 1173; Meyer, *Paradox*, *supra* note 56, at 570-79.

200. A similar approach might usefully be employed in the free exercise area. Instead of abandoning all heightened scrutiny of generally applicable burdens on religion, as the Court did in *Smith* in order to contain the costs of accommodation associated with a generous definition of religion, the Court could simply have adopted some form of intermediate scrutiny. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 570 (Souter, J., concurring in part and concurring in the judgment). Such an approach would avoid locking in the Court to granting excessive exemptions while leaving the possibility of at least some meaningful constitutional protection.

menced on different terms from traditional families.²⁰¹ The court in that case, after all, had concluded that the emotional bonds between the putative family members—children and the adults who had acted for years as their only caregivers—were every bit as substantial as those linking parents and children in traditional, biological families.²⁰² Under any of the more expansive formulations considered here,²⁰³ the court would surely be bound to acknowledge the legitimate claim of their “deeply loving and interdependent relationship”²⁰⁴ upon constitutional recognition. The ultimate judgment of the law’s constitutionality then would rest upon a determination of whether the state’s interests in withholding adoptive status outweigh the resulting incursion on family intimacy.

To be sure, calling on judges to weigh the benefits of state action against the costs to those burdened inevitably entails all the familiar drawbacks of balancing tests. Such an approach is inherently indeterminate and therefore less predictable in operation.²⁰⁵ The indeterminacy is aggravated, moreover, by the

201. In *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1380 (S.D. Fla. 2001), the district court ruled that a gay man who, over the course of a decade, had raised three foster children since their infancy could claim no fundamental right of privacy in family status because he had no reasonable expectation of permanence in the foster-care relationship. “Although the concept of family,” the court explained, “embraces relationships other than the archetypical nuclear family, the Constitution protects only those social units that share an expectation of continuity justified by the presence of certain basic elements traditionally recognized as characteristic of the family.” *Id.* at 1379; cf. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 847 (1977) (leaving open the possibility of according some constitutional protection to foster family relationships, but holding that any such protection would be “substantially attenuated” when ranked against that of “the natural family”).

202. Noting that the plaintiffs had raised and nurtured the children for many years, in one case presiding full-time over the intensive medical care of three children infected since birth with HIV, the district court did

not doubt that the emotional ties between [the children and their caregivers are] quite close—as close as those between biological parents. Nor does the Court doubt that a deeply loving and interdependent relationship between [the children and caregivers] exists. . . . [I]ntimate, highly personal parent-child relationships . . . have [in fact] been forged.

Lofton, 157 F. Supp. 2d at 1379.

203. See *supra* text accompanying notes 172-76.

204. *Lofton*, 157 F. Supp. 2d at 1379.

205. See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972-73 (1987); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-80 (1989); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56-69 (1992). Elsewhere, I have tried to suggest a doctrinal framework for an

fact that in family-privacy and religious-liberty controversies the competing values that must be balanced are often incommensurable.²⁰⁶ And, as a result, it is also open to outright manipulation or distortions caused by the natural tendency of decisionmakers to discount the gravity or verity of unconventional claims of harm.²⁰⁷

Yet, even admitting these quite real and legitimate concerns, the approach advanced here would offer substantial benefits over current doctrine. As an initial matter, having the responsibility ultimately to answer for their intrusions—and to provide an answer that goes beyond simply pointing out the tradition of the intrusion—might lead government actors to think harder about enacting intrusive regulations in the first instance. Even without litigation, then, this might reduce the number, or at least mitigate the heavy-handedness, of state intervention into intimate life. In addition, quite aside from any inhibiting effect on the ultimate scope of regulation, constitutional recognition of a broader array of families would avoid the expressive harms associated with the Court's current doctrinal approach.²⁰⁸ Even if traditional regulations were still affirmed, at least that affirmance would not be accompanied by the insult of having been branded by the courts as "[un]deserving of constitutional recognition" as members of a family.²⁰⁹

Moreover, the very flexibility that makes the intermediate approach susceptible to manipulation and abuse also permits

intermediate-scrutiny analysis in this context that might at least mitigate some of this indeterminacy. See Meyer, *Constitutional Pragmatism*, *supra* note 87, at 725-32; Meyer, *Paradox*, *supra* note 56, at 575-94.

206. See CHOPER, *supra* note 99, at 93-94 (discussing religious liberty); Meyer, *Lochner Redeemed*, *supra* note 63, at 1179-80 (discussing family-privacy); Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, 51 LAW & CONTEMP. PROBS. 79, 88-89 (1988) [hereinafter Schneider, *State-Interest Analysis*] (expressing skepticism of balancing in the family-privacy context on this ground).

207. See, e.g., CHOPER, *supra* note 99, at 93-95; Mark Tushnet, "Of Church and State and the Supreme Court": Kurland Revisited, 1989 SUP. CT. REV. 373, 382-83; cf. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (identifying ways in which majority decisionmakers may unconsciously discount outsider claims of harm in the context of race discrimination).

208. For a discussion of the expressive harms caused by the constitutional denial of family status, see, for example, David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 803-12 (1999), and Meyer, *Paradox*, *supra* note 56, at 565-71.

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

conscientious judges to do a better job of comprehending the full range of conflicting interests that are legitimately at stake in many family-privacy disputes. As many scholars have long noted,²¹⁰ and as Justices have sometimes, though less often, acknowledged,²¹¹ family-privacy disputes are quite often ill-suited to analysis within the conventional framework for individual liberties. That framework understands constitutional conflicts as two-way struggles between the state and private claimants and tends to privilege one over the other (the individual under strict scrutiny and the state under the rational-basis test). Freeing judges from the confines of such blunt preferences creates room for creative and sensitive adjustment of the often-complex web of competing individual and public interests in a family.²¹²

Finally, it bears emphasis that this approach would by no means end the government's ability to express preferences concerning family form and the conduct of family life. It would not require rigid state "neutrality" toward all questions relating to family, nor impose, as a matter of constitutional law, an atomistic ideal of what Milton Regan has aptly called the "*optional family*," one in which the content and meaning of family relationships are consigned wholly or largely to individual preference.²¹³ Although family law itself has undoubtedly moved in that direction,²¹⁴ this movement is not necessarily mandated by a proper understanding of the Constitution. Legislatures would remain free, as they are today under current constitutional doctrine, to make their own choices about the wisdom or dangers of that trend. Yet, under the approach advanced here, once the government has made its choice, it would more often be required to justify its preferences concerning the construction or conduct of family life.

210. See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 121-30 (1991); REGAN, *supra* note 23, at 135; Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 295-96 (1988); Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CAL. L. REV. 151, 157-58, 164-65 (1988).

211. See O'Connor, *supra* note 88, at 576 (acknowledging that "[i]n family cases, the rights of individuals are intertwined, and the family itself has a collective personality. Thus, the due process model may not be the best framework for resolving multi-party conflicts where children, parents, professionals, and the State all have conflicting interests."); see also Meyer, *Lochner Redeemed*, *supra* note 63, at 1173-81 (discussing case law).

212. See Meyer, *Lochner Redeemed*, *supra* note 63, at 1184-85.

213. See REGAN, *supra* note 23, at 46.

214. See *id.* at 35-67; *supra* Part I.A.

Instead of undermining the government's legitimate channeling function in family law,²¹⁵ this judicial review, and the justificatory process it would require, could well enhance and enrich that function. The case of *Michael H. v. Gerald D.*,²¹⁶ to take just one well-known example, suggests how these benefits might be realized. In that case, the Court upheld the constitutionality of a statute that presumed conclusively that any child born to a married woman in an intact marriage was a child of the marriage. In doing so, the Court held that the State of California was not constitutionally required to permit a man other than the woman's husband to offer evidence that he was, in fact, the child's biological father. The claimant in *Michael H.* was prepared not only to offer compelling proof of his biological paternity, but also to show that he had previously lived with the child and her mother and had developed an emotional bond with the child while helping to raise her.²¹⁷ Moreover, it was clear that enforcement of California's rigid statutory bar would almost certainly cause him to be cut off from all further contact with his daughter.²¹⁸

There are perfectly sound reasons for concluding, as Professor Regan has, that "[t]he conclusive paternity presumption . . . may be the best we can do under difficult and painful circumstances."²¹⁹ Although the loss to the putative father of the relationship he had begun to establish with his daughter is undoubtedly very substantial, a contrary decision to strike down the statute and hear the challenger's evidence might well spell the end of other established family relationships, including those between the mother and her husband and perhaps between the husband and the child:

It's reasonable to believe that when at least one person [in a marriage] has had an affair, and when a wife has begotten a child by another man, a couple's desire to reconcile may be particularly fragile and vulnerable to disruption. . . . [A] public recitation of events [by way of a paternity challenge] that the spouses are doing their best to

215. Appreciation of family law's channeling function "reflects a belief that law's purpose is not simply the passive accommodation of private behavior. Rather, law may shape behavior in complex ways through its affirmation or condemnation of various types of conduct." REGAN, *supra* note 23, at 136; see also Schneider, *Channeling Function*, *supra* note 154.

216. 491 U.S. 110 (1989).

217. See *id.* at 113-15.

218. See *id.* at 131; see also *id.* at 143-44, 148 (Brennan, J., dissenting) (observing that as a result of the Court's decision the biological father was very likely to lose all future contact with his daughter).

219. REGAN, *supra* note 23, at 137.

put behind them [may well jeopardize their vulnerable marriage]. . . . The state has a legitimate interest in being concerned about this prospect.²²⁰

Faced with a choice between these competing claims of family, the state might reasonably prefer to cast its authority behind the struggling marriage; the state is not required to be "agnostic between them."²²¹ Professor Regan thus makes a persuasive case that the state's interests in marital stability, in the continuity of established patterns of childrearing, or in the condemnation of adultery collectively or individually might justify the considerable intrusion on the claimant's family aspirations.²²²

And, yet, the most notable thing about the plurality's constitutional analysis in *Michael H.* was that it was not required to reach these justifications. Instead, Justice Scalia short-circuited the entire inquiry with the brisk assertion that the likely biological father had no real "family" interest at stake to begin with. Because the sort of father-daughter relationship being asserted in this case lacked the "traditional respect [of] our society,"²²³ Justice Scalia continued, it could claim no respect, and no protection, from the Constitution. As Martha Minow has pointed out, this basis for decision dodges the real questions posed by the dispute in favor of a quick, conversation-stopping escape:

A legal response that treats [unconventional family] claims as irrelevant and undeserving of attention expresses an act of state power to supplant identities that people develop and assert. Of course, courts might question and evaluate whether those relationships should be recognized and protected, but the refusal even to discuss them is a sheer imposition of judicial power in framing the question so it cannot be discussed.²²⁴

220. *Id.* at 134.

221. *Id.* at 136.

222. *See id.* at 134-37.

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

224. MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW 69 (1997). Professor Minow continued,

What seems strange and indefensible in the Supreme Court's plurality opinion in *Michael H.* . . . is the refusal even to permit debate over [the challenged paternity presumption]. By refusing to consider the possibility that Michael H. has a protected liberty interest in his relationship to the child, the plurality bypassed the inquiry into justifications for a presumption, cutting off his legal claims. Not only does this approach redefine the shape of liberty interests protected by the Court, it also treats the very issue of what cannot be questioned as beyond debate.

By abruptly shutting down the discussion in this way, and resting decision on the bare force of tradition, the Court forfeits an opportunity to add to the channeling effect of family law. A decision that engaged the genuine difficulties of the case, however, by acknowledging the real sense of family created by Michael's caregiving and cohabitation with his young daughter and then assessing his loss against the state's legitimate interests in marriage, childrearing, and morality, could do real work to advance family law's channeling function. By identifying and affirming what is ultimately most valued in family life, a decision founded upon the demonstrable good of marriage, for instance, or upon recognition of the harm caused by adultery, could do much more to guide future behavior than one founded upon the brute assertion of tradition.

To some, no doubt, the judicial role contemplated by this constitutional understanding—articulating and enforcing *what is ultimately most valued in family life*—will seem entirely too adventurous and subjective. This approach, it might be feared, would license judges to oversee and disrupt, according to their own lights, the delicate political process through which family law and policy are continually adjusted to fit shifting conceptions of public need and private interests.²²⁵ Judges, by this understanding, would be required to make judgments about these matters, including contestable assessments of the costs and benefits of particular family regulations, but this is inherent in the very notion of a constitutional doctrine of family privacy.²²⁶ It is a considerable virtue of the approach proposed here that it would bring those judgments out more clearly into the open, while leaving room for public recognition of more families as they actually exist in the here and now.

CONCLUSION

As the recent U.S. census data demonstrate, individuals are already acting upon their own conceptions of family. And, in significant ways, family law has been attempting to keep up. Increasingly, the rigid statutes that once defined family law

Id. (citation omitted).

225. Cf. CHOPER, *supra* note 99, at 93-94 (criticizing the use of an intermediate-scrutiny approach in the context of the Free Exercise Clause on the ground that it would require courts to make "legislature-like judgments" on matters of policy); Schneider, *State-Interest Analysis*, *supra* note 206, at 88-95 (discussing faults of the intermediate scrutiny approach).

226. See Meyer, *Lochner Redeemed*, *supra* note 63, at 1182-90.

are being replaced by measures that understand family roles more fluidly and that are more deferential to individual conceptions of family, even when those understandings are quite unconventional. Constitutional protection for the family, however, has been notably less adaptive, with the Supreme Court typically limiting protection to family forms or relationships that can claim deeply rooted societal "respect."

This Article contends that the Court's experience defining "religion" under the First Amendment provides a model for allowing a wider—though not unbounded—role for self-definition of "family" in constitutional law. The First Amendment model is admittedly far from perfect, not least because the Supreme Court has so limited substantive protection under the Free Exercise Clause. It seems quite plausible, however, that the Court has limited substantive free-exercise protection for precisely the same reason, in part, that the Court has resisted broadening the concept of "family": fear that generous protection combined with a generous definition of the protected class would hamstring society's ability to regulate its subjects, even in quite reasonable ways. Openly embracing a more flexible, intermediate scrutiny standard in both contexts would permit more room for self-definition in areas of enormous importance to the individual, but would also leave room for the retention of many traditional state regulations on a demonstration of their true reasonableness.