

AMERICAN
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CONTEMPORARY FAMILY LAW

Sixth Edition



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AMERICAN CASEBOOK SERIES®

 WEST
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To my parents, Barbara and Saul D. Abrams, who led our family.

D.E.A.

*To my parents, Paul and Elissa Cahn, and to Louisa, Abigail,
and Tony, for always teaching me about family.*

N.R.C.

*In loving memory of my father, Robert C. McClain, who practiced law for
over 50 years, for sparking my interest in law and for our many
conversations about family law—and so much more.*

L.C.M.

*To the three men in my life:
In loving memory of my father, Alexander I. Ross,
a pioneer in paternal custody, and
To my husband Jon and son Daniel, with love and thanks.*

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To Calvin and Florence Matsumura, parents in all the ways that matter.

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*To my mother, Eleanor G. Dixon, and my late father, Ernest L. Dixon
for their love and guidance as parents;*

*To my husband, Charles Wesley Weaver, for his love and
unwavering support; and*

To my daughter, Maya, for teaching me how to be a better parent.

J.D.W.

PREFACE

The profound changes that have transformed family law since the mid-twentieth century are arguably unmatched in any other area of the law. The pace of change appears to be accelerating because questions that have been at the core of this book since it first appeared in 2006—and that may have appeared merely theoretical to some readers at that time—now dominate the agenda in courts, legislatures, and public discussion.

This book captures the rapid evolution of doctrine, introduces students to continually shifting policy debates, and explores issues central to family law practice. Solid grounding in legal analysis and reasoning is indispensable to family law study and practice because court decisions, statutes, and administrative regulations are every lawyer's basic legal tools regardless of specialty. Command of doctrine in fields like family law carries lawyering only so far, however, because much of today's doctrine will be tomorrow's history. By conveying a solid sense of the rapid trajectory of ongoing doctrinal change, this book provides students a foundation for anticipating, understanding, and participating in continuing developments in law school and throughout their careers.

Policy study is particularly central to family law because the legislature's broad discretionary standards compel practitioners and judges to grapple with policy concerns when they apply doctrine to the lives of individuals who summon the law's protection. It is impossible to determine the "best interests" of a child or an "equitable" division of a couple's marital assets, for example, without weighing public policy.

Policy considerations will also help shape future doctrinal evolution in contentious areas that largely went unmentioned in family law courses only a relatively short time ago—areas such as the decline of marriage as an institution and the growing class divide in family structure, marriage by same-sex couples, assisted reproductive technology and different pathways to parenthood, joint custody of children, domestic violence, nonmarital partners' rights and obligations, and indeed the very definition of "family" itself. Because many family law policy issues now sharpen political debate (the so-called "culture wars"), the book encourages students and their teachers to analyze not only what the law is, but also what the law should be. To help inform this analysis, notes in several chapters introduce interdisciplinary and international materials.

Themes and chapter organization. Four themes unify the chapters. The first theme, appearing in virtually every chapter, is that family structures are diverse and that family law addresses this diversity in various ways. Such diversity includes not only various forms of adult-adult

intimate relationships, encompassing marital and nonmarital heterosexual and same-sex relationships, but also various forms of parent-child relationships, arising from multiple pathways to parenthood and changing relationships among the important adults in a child's life.

The second theme is that federal and state constitutional law have become increasingly integrated into familial rights and responsibilities through such issues as the right to marry, parents' rights to control their children's upbringing, First Amendment rights, and other rights based on individual and family privacy, and through reform of marriage, divorce, and parentage laws in light of emerging equal protection doctrine.

Third, the book pays particular attention to the ways various biases—such as express and implicit distinctions based on gender, ethnicity, cultural diversity, sexual orientation, race, and class—have affected family law's development and application.

The fourth theme concerns elements of professional identity, including ethics and the importance of collaboration with other professionals who can serve their clients, including marriage counselors, mental health professionals, child psychologists, and forensic accountants. The book's interdisciplinary materials explore non-legal issues that arise in domestic relations practice to accustom students to general concepts in preparation for career-long collaboration with other professionals, amid the high emotions that often accompany family disputes.

Based on these themes, the book offers a distinct approach to several family law issues. For example, we devote separate sections within some chapters to legal ethics and jurisdiction to highlight common issues encountered by family law practitioners. We also provide stand-alone chapters on alternative dispute resolution and private ordering in marriage and divorce, since both commonly arise in family law. And, although family law casebooks often treat spousal support and property distribution together, we consider them in separate chapters to underscore their distinctive practical and theoretical aspects. Finally, we devote two chapters to child custody arrangements, which produce some of family law's most acrimonious legal disputes; the first custody chapter treats the initial custody decision, and the second explores disputes that frequently continue after the initial custody decision, including legal battles over visitation, custody jurisdiction, and international disputes governed by the Hague Convention.

Recognizing the importance of practical skills training, each chapter includes questions and problems (or short exercises) that invite classroom resolution. These problems place students in the roles envisioned by the Preamble of the Model Rules of Professional Conduct: advisor, advocate, negotiator, and evaluator.

Chapter authorship. The authors divided responsibility for the individual chapters and build on chapters initially authored by Professors Abrams and Ross. Each author takes responsibility for the content of the chapters we authored, though we all benefited from an active collaboration in which authors commented on each other's drafts.

Chapter responsibility is as follows:

Professor Cahn: Chapters 9 (Division of Marital Property at Dissolution) and 10 (Spousal Support).

Professors Cahn and Matsumura: Chapters 4 (Nonmarital Partners), 5 (Establishing Parenthood), and 11 (Child Support).

Professors Cahn and McClain: Chapters 1 (Families and Family Law in Contemporary America) and 13 (Visitation and Post-Dissolution Custody Disputes).

Professor Matsumura: Chapters 3 (Family Roles, Rights, and Obligations), and 14 (Alternative Dispute Resolution).

Professors Matsumura and McClain: Chapter 15 (Private Ordering in Marriage and Divorce).

Professor McClain: Chapters 2 (Entering Marriage) and 8 (Divorce).

Professors McClain and Weaver: Chapter 7 (Intimate Partner Violence and Family Torts).

Professor Weaver: Chapters 6 (Adoption) and 12 (Child Custody)

Because student and faculty readers are truly collaborators in our joint project, we invite your comments and suggestions for improvement or for teaching the material. Your input will benefit the next generation of family law practitioners and the families whose lives they touch.

Gratitude. Writing a book, like teaching in the classroom, is a team effort that thrives on valuable contributions from others. Our team includes many terrific people who deserve to share the credit. We continue to benefit from the contributions of everyone who assisted and supported us in preparing this book's earlier editions. With this, as with previous editions, we have benefited from thoughtful feedback from many faculty across the country who use this casebook.

As always, we have incurred many debts as we prepared the Sixth Edition. Dean Angela Onwuachi-Willig at Boston University School of Law supported Professor McClain's participation in the Sixth edition. Professors Karen Brown (George Washington), Roberta Kwall (DePaul) and Margaret Ryznar (Indiana) helped with analysis of the 2017 tax law changes, and Professor Todd Peterson (George Washington) provided useful feedback on jurisdictional questions. Law students at the University

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We also thank our own families for enriching our appreciation of the meaning of family law and the challenges and rewards of family life, and for supporting our work on this book. Finally, we thank the family law students we have taught throughout our careers. Classroom give-and-take with these thoughtful students has helped refine our own thoughts about the important issues that this book treats. Many of our students enroll in the course because they plan to devote their professional energies to family law after graduation. Others expect to practice family law as part of a broader general practice, to enter government service, or to serve on bar association committees, law revision commissions and similar bodies committed to improving family law in the public interest. To whatever stops and destinations their career paths lead, our students make us proud that we were their teachers.

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Guidance regarding gender, deleted material, and citations:

Virtually all of the cases and studies in this casebook use gendered terms such as “man/men” and “woman/women,” “husband/wife” and “father/mother.” When commenting on, questioning, or explicating these materials, we use those terms to promote accuracy and minimize confusion. We do not mean to discount or erase the realities of those who are transgender or whose identities are not reflected by the rigid gender binary.

We have used one set of three asterisks to indicate that we have omitted one or more words, sentences, or paragraphs from cases and other materials excerpted in the book. Brackets similarly indicate deleted material. In some lead cases we have omitted footnotes and citations to cases without so specifying to eliminate distractions for readers. We have also omitted most footnotes in the excerpted law review articles. Numbered footnotes are from the original materials and retain the original numbering. Footnotes designated “Editors’ Note” and indicated by a letter rather than a number indicate that the casebook authors added the note.

Throughout, we use a modified Bluebook style that enables readers to find the materials on which we rely. When citing statutes, we reference online citations.

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CONTEMPORARY FAMILY LAW

Sixth Edition

CHAPTER 1

FAMILIES AND FAMILY LAW IN CONTEMPORARY AMERICA



Over the past century, family life—and family law—have been transformed. Marriage law has shifted from a hierarchical model of husband and wife with fixed roles to a gender-neutral model in which spouses have reciprocal rights and duties. There are no longer racial or gender restrictions on who may marry. No-fault divorce is available in every state, there are a growing number of pathways to becoming a legal parent, children born outside of marriage have virtually all of the same legal rights as children born within marriage, and all parents are equally eligible for child custody.

Regardless of whether you think these changes are positive or negative developments (or have a split verdict on the changes), it is undeniable that the family is central to many contemporary political and legal debates. The assertion that the family—and, in particular, the marital family—is a basic social institution recurs in political rhetoric and judicial opinions. Family policy dominates the front pages of our newspapers and other media, debates about judicial appointments, politics, and congressional actions. Of course, family law and policy also vitally affect the day-to-day lives of adults and children. Some social commentators warn that the marital, nuclear family is receding and becoming eclipsed by a growing variety of other family forms, while others argue that such family diversity is inevitable and warrants support. Indeed, the law governing family life increasingly seeks to protect different types of families rather than holding out one model of family life as the ideal.

Changes in the patterns and forms of family life have attracted intense, very public, and sometimes acrimonious discussion. Nonetheless, legislation and administrative policy concerning the family have shown a sustained trend toward permitting individuals greater freedom to define the content and terms of their own relationships. The approval of premarital agreements by legislatures and courts provides married couples greater freedom to set the economic terms of their relationship, rather than having such terms supplied by default family law doctrines of marital property and spousal support. Cohabitants can establish some terms of their relationships via contract and, sometimes, through legal registration, and adults can voluntarily acknowledge parenthood.

While these trends point to deregulation in the area of intimate relationships, family law continues to regulate family life in many ways, from defining who is a legal parent to setting the terms for entering and exiting marriage and specifying the rights and responsibilities of family members. While some are increasingly able to set the terms of their own families, others, particularly those who receive public welfare benefits, are subject to monitoring by the state. See Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status Part I*, 16 Stan. L. Rev. 257, 257–58 (1964). Further, legal scholar Dorothy Roberts has described how child welfare laws, aimed at addressing child neglect and abuse, are tantamount to a family regulation or family policing system that disproportionately disrupts “Black and Indigenous families.” Dorothy Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build A Safer World* 36 (2022).

Family law is dynamic, in part because family life and family structure are dynamic. This casebook invites students to consider evolution in family law itself, evaluating continuity as well as transformation in areas such as the laws regulating marriage and nonmarriage and the parent-child relationship. This casebook introduces students to “family law” as a body of law that “creates categories of legal relationships, governs entry and exit from those relationships, and regulates behavior during them.” See Naomi Cahn, Clare Huntington & Elizabeth Scott, *Family Law for the One-Hundred-Year Life*, 132 Yale L.J. 1691, 1697 n. 14 (2023). However, it also encourages students to see that, “[i]n its broad sense, family law includes the ways related areas of law shape and influence family life,” such as immigration and naturalization, taxation, bankruptcy, criminal, tax, corporate, real property, and poverty laws. *Id.*

This Chapter sets the stage for learning about contemporary family law. It begins with a detailed overview of the dramatic changes in family structure that have occurred in the last half-century and the growing class-based differences in patterns of family life.

With this background, the Chapter then examines the relationship between families and the law. To do so, it first introduces various purposes of family law and justifications for state regulation of families. It then focuses on constitutionally-based restrictions on how the state can define the family. It also charts the development of constitutional privacy and liberty in U.S. Supreme Court cases considering governmental regulation of adult decision-making about reproduction and intimate sexual relationships.

The final section of the Chapter provides an overview of family law practice and legal ethics, previewing the intellectually challenging and emotionally complex issues that family lawyers face.

Across the United States, “[m]ore than three million new family law cases are filed every year.” Joanna L. Grossman and Christine P. Leatherberry, *Family Law*, 8 SMU Ann. Tex. Surv. 89, 90 (2022). Family law cases (and traffic violations) are among the most common points of contact between most individuals and the legal system. Your friends, family members, and clients will likely ask you, either formally or informally, about subjects covered in this course. Whether or not you ultimately practice family law, the subject is an important component of a well-rounded legal education (even beyond its value for the bar exam). This course is rich in human challenges and emotions, and its lessons are useful. Since family law overlaps with so many other areas of substantive law, you may use what you learn in this course regardless of what area of legal practice you eventually enter.

PROBLEM 1-1

In studying the relationship between family life and family law, here are some orienting questions to consider. In addition to raising jurisprudential issues that shape the development of family law, these questions provide a framework for thinking about family law practice.

1. **What is a family?** In defining “family,” consider whether there are, or should be, differences between the following:

- (a) a personal or social definition, that is, how people might answer when asked who they consider to be part of their “family;” and
- (b) a legal definition for determining who is eligible for governmental benefits (e.g., tax deductions or credits or housing) based on family status and also who is legally obligated to other persons based on family status (e.g., parental obligations to children).

2. **What should the relationship be between families and the law? Why and how does the law regulate families?** For example:

- (a) Should the government have a role in supporting particular family forms and determining what rights and responsibilities attach to different family structures?
- (b) Should family status be the basis for various legal benefits and obligations? If not, then what, if any, legal consequences should flow from family membership?

3. **How might these issues relate to family law practice?**

You may want to revisit your response to the questions in this Problem at the end of the course.

1. THE AMERICAN FAMILY TODAY

The structure of the family has changed dramatically over the past century as individuals live longer, marry at a later age (if at all), have fewer

children, increasingly separate marriage and parenthood and, over the life course, have children with more than one partner. This Part explores some of these social and demographic changes.

The rapidity of familial change is striking. In 1960, for example, 65% of children in the United States were reared in the same kind of family, consisting of married parents, with a stay-at-home mother and a breadwinning father, and another 18% lived with married parents who both worked. Philip N. Cohen, *Family Diversity, New Normal*, Family Inequality (Nov. 23, 2019). Today, less than one-quarter of children whose parents are married live with a stay-at-home mother. United States Census, *Historical Families Tables* Table SHP-1 (Nov. 2022). Thirty-seven percent of children overall live in a dual earner, married mother-father household. Cohen, *supra*. Indeed, there is no one “typical” or “normal” family today, and individuals are choosing to live in a widening array of alternative situations.

The number of households headed by single mothers has grown significantly: “[c]hildren living with a mother only is the second most common living arrangement, a number that has doubled since 1968.” Paul Hemez and Chanel Washington, *Percentage of Children Living With Two Parents Has Dropped Since 1968*, U.S. Census Bureau (Apr. 12, 2021). About 40% of all births are to unmarried women, and almost 80% of children in one-parent families live with their mother. United States Census, *Historical Families Tables* Table FM-2 (Nov. 2022).

One out of every six children under the age of 18 lives with a half-sibling. Brian Knop, *One in Six Children Live with a Half Sibling Under 18* (2020) (Census Bureau). Increased longevity has also created a growing segment of older adults who may form new household units and whose adult children and young grandchildren may interact with them as both sources and consumers of emotional and financial support. See Cahn, Huntington & Scott, *Family Law, supra*. Further, in 2019, of the 4.0% of children who did not live with a parent, more than half lived with a grandparent. *Census Bureau Releases New Report on Living Arrangements of Children* (Feb. 3, 2022).

Multigenerational family households (composed of either two or more adult generations or grandparents and grandchildren) are also increasing. Since 1971, the U.S. population in such households has quadrupled. In March 2021, 59.7 million people, or 18% of the U.S. population, “lived with multiple generations under one roof.” *The Demographics of Multigenerational Households*, Pew Research Center (March 24, 2022). White Americans were the least likely (13%) among major racial and ethnic groups to live in such households. *Id.* Many households swelled during the COVID-19 pandemic, as persons relocated, particularly as assisted living facilities and college dorms faced challenges because of high rates of

contagion. The majority of those who made such a move during the pandemic intend to remain. Family Matters: Multigenerational Living is On the Rise and Here to Stay (Generations United, 2021).

Moreover, households consisting of single adults living alone or with others not related by marriage, birth, or adoption have grown rapidly over the past decades. Since 1960, the percentage of American households with a single occupant has increased from 13% to 30%, and it is even higher for those over the age of 50. Dana Goldstein and Robert Gebeloff, *As Gen X and Boomers Age, They Confront Living Alone*, N.Y. Times (Nov. 27, 2022). Increasingly, family members (and family ties) are “spread among more than one household;” for example, divorced or nonmarital parents may retain ties to children who live with the other parent and that parent’s new partner. See Katharine Silbaugh, *Distinguishing Households From Families*, 43 Fordham Urban L. J. 1071, 1074 (2016). Household membership also fluctuates over the life cycle, as young adults return home (“boomerang” families) or aging parents move in and out. *Id.*

The median age of first marriage in the United States continues to increase. In 2022, it was 30.1 for men and 28.2 for women. U.S. Census Bureau, *Census Bureau Releases New Estimates on America’s Families and Living Arrangements Tables* (Nov. 17, 2022). Studies find a later average age of first marriage for same-sex couples: 38 for men and 33 for women. David Oliver, *Straight Couples Get Married Earlier than Gay Couples. Here’s a Look at Why*, USA Today (Mar. 17, 2023). By contrast, in 1960, the median age at first marriage was 20.3 for women and 22.8 for men. On the other hand, in 1890, the median age at first marriage was 22.0 for women and 26.1 for men. U.S. Census Bureau, *Table MS-2. Estimated Median Age of First Marriage By Sex, 1890 to the Present* (Nov. 14, 2018).

In 2022, over 20 million Americans, or 8.2% of the population, were in cohabiting relationships, compared with approximately half a million, or under .5%, in 1967. U.S. Census Bureau, *Historical Living Arrangements of Adults Table AD-3* (2022). The number of same-sex couple households has steadily grown, reaching 1.2 million in 2022; nearly 60% were married couples. Remy Tumin, *Same-Sex Couple Households in U.S. Surpass One Million*, N.Y. Times (Dec. 2, 2022) (citing Census Bureau data)

Many cohabiting households include children. Approximately 35% of all unmarried parents are cohabiting. Gretchen Livingston, *The Changing Profile of Unmarried Parents*, Pew Research Center (Apr. 25, 2018). Children today are far more likely than children 50 years ago to live with an unmarried parent.

The likelihood of marrying, having children only within marriage, and remaining married is not evenly distributed across social and economic groups. Over the past several decades, a class divide has appeared in family behavior, which has consequences for children.

Well into the 1960s, those who were moderately educated and those who were more highly educated had comparable rates of marriage and marital happiness. That has changed. College graduates are more likely to be married and to raise their children in a two-parent family and less likely to get divorced. June Carbone and Naomi Cahn, *Marriage Markets: How Inequality is Remaking the American Family 16–19* (2014). Families that are more affluent tend to be headed by stably-partnered parents who enjoy comparatively high levels of relationship stability. Working-class and low-income families face higher levels of family instability and single parenthood.

Educational attainment—closely linked to income and earning potential—increasingly predicts marital stability and happiness. Marital stability correlates with marrying for the first time at a later age and waiting to have children. While the overall divorce rate is declining, that is not true for those with less education. Kim McErlean, *The Growth of Education Differentials in Marital Dissolution in the United States*, 45 Demog. Res. 841 (2021). Yet even for those with college education, the income level of one's family of origin correlates with marriage rates; at some colleges, those from the top 20% of income are almost 40% more likely to marry than those from the bottom 20%. Kevin Carey, *The Ivy League Students Least Likely to Get Married*, N.Y. Times (March 29, 2018).

These marriage trends are nationwide, but they also differ greatly based on demographic and social characteristics, as well as other factors. Yeris Mayol-García et al, *Number, Timing, and Duration of Marriages and Divorce: 2016* (Apr. 2021). For example, residents of urban counties are less likely to be married than residents of suburban and rural counties; race and ethnicity also play some part in this marriage gap. Gretchen Livingston, *Family Life Is Changing in Different Ways Across Urban, Suburban, and Rural Communities in the U.S.*, Pew Research Center (June 19, 2018). While “Black women were the most likely to remain never married through young adulthood and middle age,” the increase in the percentage of women who have not married spans “race and Hispanic origin groups.” Mayol-García, *supra*, at 6. Race discrimination is a factor shaping these marriage trends. See Solangel Maldonado, *Romantic Discrimination and Children*, 92 Chi. Kent L. Rev. 105 (2017).

NOTES AND QUESTIONS

1. *The fertility rate and the fertility gap.* The U.S. fertility rate, which has been declining, has some interesting patterns. Since the 1990s, “the biggest increases in motherhood” have been “in groups of women with higher education.” Claire Cain Miller, *The Fertility Rate Is Down, Yet More Women Are Mothers*, N.Y. Times (Jan. 18, 2018). One study found that 86% of women with professional degrees have had a child by age 44, up from 65% in the 1990s.

Also increasing, across economic and racial groups, is motherhood by women who have never married. *Id.*

2. *Unequal family structures.* If, as some have argued, one primary function of marriage is to provide a stable setting for raising children, how concerned should society be about the existence of class-correlated family structures? Should government play a role in encouraging marriage, at least for couples who have, or plan to have, children? If so, on what basis and by what means? Would it be better to focus on inculcating a norm of “responsible parenthood”? If so, how would you define that norm? How might family law and public policy help families formed by unmarried parents? Such families were once referred to as “fragile families” in an influential, multi-decade sociological study that researches the conditions and capabilities of unmarried parents, their relationship dynamics, child outcomes, and how policies and environmental conditions affect families and children. *See About the Future of Family and Child Wellbeing Study* (2023). Should family law develop a new legal status that focuses on the relationship between unmarried co-parents to respond to the increasing separation of marriage and parenthood? *See, e.g., Merle Weiner, A Parent-Partner Status for Family Law* (2015). We discuss parenthood questions more fully in Chapter 5.

3. *The COVID-19 pandemic and family life.* The COVID-19 pandemic highlighted preexisting social and health inequities affecting families that contributed to people from racial and ethnic minorities being at higher risk of contracting and dying from COVID-19. Among the inequities affecting families and communities of color are discrimination, less access to healthcare, crowded housing and a greater prevalence of multigenerational households (making social distancing more difficult). In addition, a disproportionate number of racial and ethnic minorities were considered “essential workers” in, for example, healthcare facilities, farms, factories, grocery stores, and public transportation. Because many such workers “could not follow the primary advice offered over the course of the pandemic to stay at home,” they were at greater risk of “contracting COVID-19 in the workplace and exposing family members at home.” Jason Jackson & Aziza Ahmed, *The Public/Private Distinction in Public Health: The Case of COVID-19*, 90 *Fordham L. Rev.* 2541, 2543 (2022).

The pandemic also highlighted the comparative advantage of marital households. Emily Bobrow, *The Pandemic Is Putting Marriage Even Further Out of Reach*, *Atlantic* (July 27, 2020). Single-mother households and households with cohabiting parents were most likely to be low income, and such households were the “hardest hit” by the pandemic in terms of job loss. *Id.* As later chapters will discuss, the pandemic also had an impact on access to marriage and divorce and posed challenges for parents sharing custody.

2. THE PURPOSES OF FAMILY LAW

The law affects the family in many different ways. In its narrowest conception, family law includes regulation of the formation and dissolution

of the family as a legal unit (as in the law of marriage, divorce, parentage, and custody) and the rights and responsibilities of family members. Most of the law governing these aspects of family law is state-based.

Indeed, pursuant to the Domestic Relations Exception, federal courts do not exercise diversity jurisdiction over divorce, child custody, or spousal support disputes. *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). On the other hand, as this Chapter explores, federal constitutional law shapes the definition and regulation of the family, and federal courts consider family law issues when there are federal questions.

The law's response to the changes in family structure discussed above will depend on the law's goals with respect to regulating families. In an article that remains influential decades after it appeared, Professor Carl Schneider identified five distinct functions of family law. Carl Schneider, *The Channelling Function in Family Law*, 20 Hofstra L. Rev. 495, 497–98 (1992). The following excerpt describes those functions and provides illustrations of each.

**LINDA C. MCCLAIN,
THE FUNCTIONS OF FAMILY LAW**

(2023).^a

Professor Schneider's list of the functions of family law provides a helpful starting point for considering what different ends family law pursues and how they may sometimes be in tension with each other. This is not a canonical list, by which I mean Schneider's list is not akin to a "doctrine," but it offers a useful guide as we consider the relationship between families and the law and why families are subject to constitutional protection as well as regulation.

A. The "protective function": a basic duty of law is to provide protection for individuals from harm by other individuals. In the context of the family, we think particularly of the state's interest in protecting adult partners and children from abuse and of fostering children's best interests. For example, in determining child custody, state laws require a court to consider abuse by one parent against the other parent or the child; many states have a rebuttable presumption against awarding custody to an abusive parent. Protecting from economic harm (e.g., laws of property distribution upon family dissolution) is another example.

B. The "facilitative function": the law helps people to arrange and live their lives in ways that they choose. Family law does this by allowing people to enter into enforceable contracts and by validating their private choices. A few examples are premarital agreements (before a couple

^a *Editors' Note*: This excerpt is adapted and updated from Linda McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 Card. L. Rev. 2133 (2007). All quotes in this excerpt are from the original article by Professor Schneider.

marries) as well as parenting plans (when parents divorce or separate). Other examples are the various procedures that state family law provides for adults to become legally recognized parents (e.g., by consenting to a partner's use of assisted reproductive technology or by a voluntary acknowledgement of parentage). In recognition of family diversity, some cities have created a domestic partnership status open to two or more adults.

C. The "arbitral function": family law helps people resolve their conflicts. Upon divorce, the courts decide between the parties on disputes involving property, spousal maintenance, child custody and child support. Parenting plans, mentioned above, typically require parents to include provisions on how parents will resolve conflicts that arise. Unmarried parents may also ask a court to determine custody and support.

D. The "expressive function": this function "works by deploying the law's power to impart ideas through words and symbols." This function has two related aspects: "first, to provide a voice in which citizens may speak and, second, to alter the behavior of people the law addresses." We encounter this when we consider the symbolic dimensions of marriage. Schneider has argued, elsewhere, that in listing grounds for a fault-based divorce, divorce law expresses an ideal of proper marital behavior: good spouses are faithful, not cruel, and live together. What message, for example, does the law express about marriage by permitting no-fault divorce?

E. The "channelling function": the law develops and "(more often) supports social institutions which are thought to serve desirable ends." Channelling features centrally in discussion and debate about the social institution of marriage and its purposes; parenthood is Schneider's other example of an important social institution. In the constitutional battle over same-sex marriage, one argument offered in defense of states' one man-one woman definition of marriage was that marriage's primary purpose was to properly "channel" heterosexual reproductive sexual conduct to ensure paternal investment in children and support of the child's mother.

NOTES AND QUESTIONS

1. *Are there more functions?* As Professor McClain notes, this list is not exhaustive. What additional functions might family law serve? Consider, for example, the "private welfare function" of families—the role of families in providing care and material support for their members and the related assumption that families, rather than government, should meet these dependency needs. See, e.g., McClain, *The Channelling Function*, *supra*, at 2175.

2. *Social institutions and socially productive behaviors.* Marriage and parenthood, some observe, are the two "pillars" or anchors of family law.

Silbaugh, *Distinguishing Households from Families*, *supra*, at 1082. What purposes or functions do you think the parent-child relationship serves? What “work” does society expect parents to do with respect to their children and how do you think that shapes legal regulation of parental rights and responsibilities? What other socially desirable institutions or relationships are supported by family law?

3. *The purposes of family law reexamined.* As Professor McClain notes, many of the core functions of family law relate to marriage. Legal challenges by same-sex couples to their exclusion from marriage also spurred legal commentators—and judges—to consider the purpose and continuing importance of marriage. For example, in *Obergefell v. Hodges*, 576 U.S. 644, 659 (2015), which is excerpted in Chapter 2, the majority opinion observed that the institution of marriage “has evolved over time,” and has “not stood in isolation from developments in law and society.” Dissenting Justice Alito argued that the Court should not have resolved a “debate” among “the American people” about two competing views of marriage, which he labeled as the “traditional understanding” that had prevailed “for millennia,” and the newer view, which “focuses almost entirely on the happiness” and “well-being” of “persons who choose to marry.” *Id.* at 736 (Alito, J., dissenting). In the traditional view, marriage was “inextricably linked” to “the one thing that only an opposite sex couple can do: procreate,” while on the newer understanding, same-sex marriage can fulfill the state’s purposes as well as opposite-sex marriage: society benefits “because persons who live in stable, fulfilling and supportive relationships make better citizens.” *Id.* at 738.

Some commentators have challenged the privileged place accorded to marriage in family law and policy. Some urge that the law should recognize a broader range of close personal relationships in addition to marriage—including adult relationships that are not sexual and long-term caretaking relationships—and accord these relationships legal protections resembling those accorded to marital families. *See, e.g.*, Maxine Eichner, *The Supportive State: Families, Government, and America’s Political Ideals* 104–107 (2010). Others suggest that society does not need marriage as a legal category. They argue that family law should focus on the caretaker/dependent relationship, and that the “economic subsidies and privilege” currently attached to marriage should shift to that “core” relationship. Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* 123 (2004).

3. FAMILIES AND CONSTITUTIONAL LAW

This Part explores the basic constitutional foundations for defining a family and protecting rights within the family. Beginning with federal constitutional law might seem surprising in a study of family law, given that (as noted above) federal courts rarely hear traditional family law disputes. Further, state law (including case law, statutes, and state constitutions) is the primary source of the family law that you will study

this semester. However, federal constitutional law has shaped the contours of state regulation of the family and its members in crucial ways, both with respect to Due Process liberty—including both individual and family “privacy”—and Equal Protection. Thus, the remainder of the material in the book takes place against the backdrop of these constitutional contours. The majority, concurring, and dissenting opinions in the Supreme Court’s family privacy decisions in this Part introduce some of the strong disagreements among the justices both about constitutional interpretation and constitutional limits on family regulation. These disagreements have parallels in debates over public policy and have practical significance for client representation.

As Professor Peggy Cooper Davis observes, “the Constitution of the United States does not contain the word ‘family’ ” or make “explicit mention of marriage, parenting, contraception, procreation, or abortion,” yet “people in the United States nonetheless invoke the Constitution when rights of family liberty and autonomy are threatened.” Peggy Cooper Davis, *Neglected Stories: The Constitution and Family Values* 5 (1997). Davis explains that the denial to enslaved persons in the U.S. of the rights to marry, to reproductive autonomy, and to maintain ties to children and extended kin were “motivating stories” that shaped the “constitutional doctrine of family liberty” under the Fourteenth Amendment (one of the Reconstruction Amendments passed after the Civil War).

Accounts of the roots of the right to family protection, including family privacy, often begin with two early 20th century cases, *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925). These decisions, which concerned parents’ rights to make decisions about their children’s education, contained frequently-quoted language concerning parents’ Fourteenth Amendment substantive due process liberty interest in the “care, custody and control” of their children.

Meyer struck down a state statute that barred teaching in the German language to children who had not yet reached the eighth grade. Although the case involved the appeal of a teacher who had been convicted of teaching in the German language, the Court stressed the Fourteenth Amendment liberty interests of parents who wanted their children to study German:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and

generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer, 262 U.S. at 399.

Decided just two years after *Meyer*, *Pierce* overturned an Oregon statute that provided that parents could satisfy the state's compulsory education law only by enrolling their children in public schools. A private military school and a Catholic religious order that operated several parochial schools challenged the statute as a threat to their businesses. As in *Meyer*, no parent or child was a party to the action. The Court nonetheless applied the earlier decision, which, it held, made it "entirely plain" that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." The Court further stated: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, *supra*, 268 U.S. at 534–35.

A third decision, *Prince v. Massachusetts*, 321 U.S. 158 (1944), in which an aunt and her niece challenged the application of Massachusetts' child labor laws to the distribution of religious publications on the street, is frequently cited along with *Meyer* and *Pierce* as recognizing family privacy. Justice Rutledge wrote in *Prince*:

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

Id. at 166. However, the Court held that neither the family, nor parenthood, nor religious exercise were "beyond regulation" and upheld the Massachusetts law as applied to the child's distribution of religious literature. It rejected the aunt's parental liberty claim, as well as the aunt's and the child's separate claims based on religious exercise. The Court emphasized the state's *parens patriae* authority to foster children's healthy development and protect them from harm. The four cases in this Section build on these foundations.

A. DEFINING THE FAMILY

By deciding what groups constitute a family, the law has a significant impact on the benefits of, and restrictions on, different familial structures. As you read the following case and notes, consider what purposes are served by the East Cleveland ordinance. Consider also how the Court views the purposes of families.

MOORE V. CITY OF EAST CLEVELAND

Supreme Court of the United States, 1977.
431 U.S. 494.

MR. JUSTICE POWELL announced the judgment of the Court, and delivered an opinion in which MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN joined.

East Cleveland's housing ordinance, like many throughout the country, limits occupancy of a dwelling unit to members of a single family. § 1351.02.¹ But the ordinance contains an unusual and complicated definitional section that recognizes as a "family" only a few categories of related individuals. § 1341.08.² Because her family, living together in her home, fits none of those categories, appellant stands convicted of a criminal offense. The question in this case is whether the ordinance violates the Due Process Clause of the Fourteenth Amendment.

I

Appellant, Mrs. Inez Moore, lives in her East Cleveland home together with her son, Dale Moore, Sr., and her two grandsons, Dale, Jr., and John Moore, Jr. The two boys are first cousins rather than brothers; we are told that John came to live with his grandmother and with the elder and younger Dale Moores after his mother's death.

In early 1973, Mrs. Moore received a notice of violation from the city, stating that John was an "illegal occupant" and directing her to comply with the ordinance. When she failed to remove him from her home, the city filed a criminal charge. Mrs. Moore moved to dismiss, claiming that the ordinance was constitutionally invalid on its face. Her motion was

¹ All citations by section number refer to the Housing Code of the city of East Cleveland, Ohio. *Family definition*

² Section 1341.08 (1966) provides:

"Family" means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

"(a) Husband or wife of the nominal head of the household.

"(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

"(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

"(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

"(e) A family may consist of one individual."

overruled, and upon conviction she was sentenced to five days in jail and a \$25 fine. * * *

II

The city argues that our decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), requires us to sustain the ordinance attacked here. Belle Terre, like East Cleveland, imposed limits on the types of groups that could occupy a single dwelling unit. Applying the constitutional standard announced in this Court's leading land-use case, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926),⁶ we sustained the Belle Terre ordinance on the ground that it bore a rational relationship to permissible state objectives.

But one overriding factor sets this case apart from *Belle Terre*. The ordinance there affected only unrelated individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together, and in sustaining the ordinance we were careful to note that it promoted "family needs" and "family values." 416 U.S. at 9. East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. This is no mere incidental result of the ordinance. On its face it selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here.

When a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs; the usual judicial deference to the legislature is inappropriate. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974). A host of cases, tracing their lineage to *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923), and *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925), have consistently acknowledged a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). See, e.g., *Roe v. Wade*, 410 U.S. 113, 152–53 (1973); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Poe v. Ullman*, 367 U.S. 497, 542–44, 549–53 (1961) (HARLAN, J. dissenting); cf. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Of course, the family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, this Court must examine

⁶ *Euclid* held that land-use regulations violate the Due Process Clause if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 272 U.S. at 395. Later cases have emphasized that the general welfare is not to be narrowly understood; it embraces a broad range of governmental purposes. But our cases have not departed from the requirement that the government's chosen means must rationally further some legitimate state purpose.

carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

When thus examined, this ordinance cannot survive. The city seeks to justify it as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system. Although these are legitimate goals, the ordinance before us serves them marginally, at best. For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household. We need not labor the point. Section 1341.08 has but a tenuous relation to alleviation of the conditions mentioned by the city.

III

The city would distinguish the cases based on *Meyer* and *Pierce*. It points out that none of them "gives grandmothers any fundamental rights with respect to grandsons," and suggests that any constitutional right to live together as a family extends only to the nuclear family—essentially a couple and their dependent children.

To be sure, these cases did not expressly consider the family relationship presented here. They were immediately concerned with freedom of choice with respect to childbearing, e.g., *LaFleur*, *Roe v. Wade*, *Griswold*, or with the rights of parents to the custody and companionship of their own children, *Stanley v. Illinois*, or with traditional parental authority in matters of child rearing and education. But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.

Understanding those reasons requires careful attention to this Court's function under the Due Process Clause. Mr. Justice HARLAN described it eloquently:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a

rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

. . . [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Poe v. Ullman, [367 U.S.] at 542–43 [(HARLAN, J., dissenting)].

Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. * * * [T]here is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family.

Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful “respect for the teachings of history [and] solid recognition of the basic values that underlie our society.” *Griswold*, 381 U.S. at 501 (HARLAN, J. concurring). Our decisions establish 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. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins,

and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years, millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. Decisions concerning child rearing, which *Yoder*, *Meyer*, *Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household indeed who may take on major responsibility for the rearing of the children. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life. This is apparently what happened here.¹⁶

Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State. *Pierce* struck down an Oregon law requiring all children to attend the State's public schools, holding that the Constitution "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S. at 535. By the same token the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring.

I join the plurality's opinion. I agree that the Constitution is not powerless to prevent East Cleveland from prosecuting as a criminal and jailing a 63-year-old grandmother for refusing to expel from her home her now 10-year-old grandson who has lived with her and been brought up by her since his mother's death when he was less than a year old. I do not question that a municipality may constitutionally zone to alleviate noise and traffic congestion and to prevent overcrowded and unsafe living conditions, in short to enact reasonable land-use restrictions in furtherance of the legitimate objectives East Cleveland claims for its ordinance. But the zoning power is not a license for local communities to enact senseless and

¹⁶ We are told that the mother of John Moore, Jr., died when he was less than one year old. He, like uncounted others who have suffered a similar tragedy, then came to live with the grandmother to provide the infant with a substitute for his mother's care and to establish a more normal home environment.

arbitrary restrictions which cut deeply into private areas of protected family life. East Cleveland may not constitutionally define “family” as essentially confined to parents and the parents’ own children. The plurality’s opinion conclusively demonstrates that classifying family patterns in this eccentric way is not a rational means of achieving the ends East Cleveland claims for its ordinance, and further that the ordinance unconstitutionally abridges the “freedom of personal choice in matters of . . . family life [that] is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” *LaFleur*, 414 U.S. at 639–40. I write only to underscore the cultural myopia of the arbitrary boundary drawn by the East Cleveland ordinance in the light of the tradition of the American home that has been a feature of our society since our beginning as a Nation—the “tradition” in the plurality’s words, “of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children.” The line drawn by this ordinance displays a depressing insensitivity toward the economic and emotional needs of a very large part of our society.

In today’s America, the “nuclear family” is the pattern so often found in much of white suburbia. The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia’s preference in patterns of family living. The “extended family” that provided generations of early Americans with social services and economic and emotional support in times of hardship, and was the beachhead for successive waves of immigrants who populated our cities, remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society. For them compelled pooling of scant resources requires compelled sharing of a household.

The “extended” form is especially familiar among black families. We may suppose that this reflects the truism that black citizens, like generations of white immigrants before them, have been victims of economic and other disadvantages that would worsen if they were compelled to abandon extended, for nuclear, living patterns. Even in husband and wife households, 13% of black families compared with 3% of white families include relatives under 18 years old, in addition to the couple’s own children.⁸ In black households whose head is an elderly woman, as in this case, the contrast is even more striking: 48% of such black households, compared with 10% of counterpart white households, include related minor children not offspring of the head of the household.

I do not wish to be understood as implying that East Cleveland’s enforcement of its ordinance is motivated by a racially discriminatory

⁸ R. Hill, *The Strengths of Black Families* 5 (1972).

purpose: The record of this case would not support that implication. But the prominence of other than nuclear families among ethnic and racial minority groups, including our black citizens, surely demonstrates that the “extended family” pattern remains a vital tenet of our society. It suffices that in prohibiting this pattern of family living as a means of achieving its objectives, appellee city has chosen a device that deeply intrudes into family associational rights that historically have been central, and today remain central, to a large proportion of our population.

Moreover, to sanction the drawing of the family line at the arbitrary boundary chosen by East Cleveland would surely conflict with prior decisions that protected “extended” family relationships. For the “private realm of family life which the state cannot enter,” recognized as protected in *Prince*, 321 U.S. at 166, was the relationship of aunt and niece. * * *

[The concurring opinion of STEVENS, J., and the dissenting opinions of BURGER, C.J., STEWART, J. (joined by REHNQUIST, J.), and WHITE, J., are omitted.]

NOTES AND QUESTIONS

1. *Family definition and the limits of legal regulation.* What family relationship in Mrs. Moore’s household was not considered a “family” for purposes of the East Cleveland housing ordinance? Under what circumstances are grandparent-headed households permissible under the ordinance? Does the ordinance allow an engaged couple to live together? Does it matter if a child lives with them?

2. *Rationales for the ordinance.* The city offered various justifications for the ordinance, none of which the Court found persuasive. Do you agree? What ideas does Justice Powell’s opinion express about family privacy? What role do history and tradition play in the Court’s evaluation of the ordinance? Do you think the Court’s analysis of the family “prioritize[s] formal ties of consanguinity and affinity above other types of affiliations”? Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 Cal. L. Rev. 1207, 1237 (2016).

3. *Determining the scope of Due Process “liberty” concerning the family.* *Moore* introduces two issues that recur in a number of other constitutional law cases involving the family that you will encounter in this and later chapters: (1) what is the scope of “liberty” under the Due Process Clause of the Fourteenth Amendment?; and (2) what standard of review do courts use when government “intrudes” on that liberty? In *Moore*, to answer the first question, Justice Powell draws on Justice Harlan’s approach, as do some subsequent Supreme Court cases that you will read (such as *Obergefell*).

4. *The scope of review.* On the second issue, the level of review, Justice Powell explains why the most deferential review (rational basis scrutiny) is not appropriate. He instead applies “something approximating what we now call intermediate scrutiny,” rather than the most exacting review, “what we now

call strict scrutiny.” James E. Fleming and Linda C. McClain, *Ordered Liberty: Rights, Responsibilities, and Virtues* 249, 257 (2013). Professors Fleming and McClain observe that in *Moore*, and in prior and subsequent cases involving the Supreme Court’s “constitutional family law” concerning regulating intimacy, marriage, and parental rights and responsibilities, the Court “engages in a ‘two-step’”: the first step is “a declaration that something is ‘fundamental’ and ‘private;’” the second is “a clarification that it is neither absolute nor beyond regulation.” *Id.* at 254–57. As you read this book, keep your eye on how the Supreme Court and other courts address these two issues.

5. *The decline and rise of multigenerational family households.* Both the majority and concurring opinions refer to a long tradition of extended families sharing a household. In 1950, 21% of the U.S. population lived in multigenerational family households. By 1980, a few years after *Moore*, the percentage had declined to a low of 11%; as discussed above, by 2021, the percentage had almost doubled. One reason (also noted in *Moore*) is financial: “pooling financial resources” and earners can help families in hard times. *Id.* Another prominent reason (as in *Moore*) is caregiving (including caring for adults and children). D’Vera Cohn et al., *Financial Reasons Top the List of U.S. Adults Live in Multigenerational Homes*, Pew Research Center (Mar. 24, 2022). In the U.S., approximately 7.9 million children live in a household with their grandparents or other relatives, with 2.65 million of those living in “skipped generation” households, without a parent. Megan L. Dolbin-MacNab & Lyn M. O’Connell, *Grandfamilies and the Opioid Epidemic: A Systemic Perspective*, 24 *Clin. Child and Fam. Psychology Rev.* 207 (2021). One reason for such “skipped generation” households is the opioid crisis. *Id.*

6. *The (in)visibility of race in Moore.* What role did race play in *Moore*? Although Justice Powell’s opinion nowhere mentions race, Justice Brennan’s concurring opinion mentions the higher rates of extended families headed by an “elderly woman” (such as Mrs. Moore) among Black families than among White families. Justice Brennan further wrote that “the record . . . would not support” an “implication” that enforcing the ordinance reflected a “racially discriminatory purpose.” Commenting shortly after *Moore* was decided, Professor Robert Burt elaborated: while “at first glance, the East Cleveland ordinance might appear anti-black and constitutionally suspect on that ground,” the City was a “predominantly [African American] community, with an [African American] City Manager and City Commission.” Robert A. Burt, *The Constitution of the Family*, 1979 *Sup. Ct. Rev.* 329, 388–89, 391 (1979) (citing Justice Stewart’s dissent, 431 U.S. at 1955 n. 7). Instead, the case was a “dispute among citizens about the meaning of “family.” *Id.* at 391.

Professor R.A. Lenhardt challenges this perspective in her “rewritten” *Moore* opinion (penned from a Critical Race Theory perspective). “Justice” Lenhardt explains the context in which the City of East Cleveland amended its broader definition of a single-family unit to adopt the narrower definition at issue in *Moore*:

The City of East Cleveland * * * is a municipality in racial transition. * * * Incorporated in 1901, * * * for decades, [it] was a popular destination for middle and upper-income Whites. However, by 1966, * * * the city had seen a precipitous drop in its economic base. * * * Established Whites and new immigrants eager for newer homes and municipalities and amenities began to move to the outer suburbs. And, as poor Blacks newly able to afford homes within the city limits began to take their place, the exodus of white homeowners was accelerated “by [racial] panic, capitalized upon by the activities of blockbusters.” By 1970, East Cleveland’s population, which had only been 2.4 percent black a decade earlier, had become more than forty percent African American. * * *

Mrs. Moore * * * is arguably among those Blacks who benefitted from the demographic changes that made low-income, black homeownership possible in the formerly white and affluent East Cleveland. Unlike other communities, [it] has officially eschewed discriminatory practices utilized by others to maintain the whiteness of their communities. * * * [H]owever, city leaders have worried that East Cleveland runs the risk of becoming a “ghetto” like those prevalent in neighboring Cleveland, and they have initiated efforts to avoid such a risk. * * * The thinking among officials—who now include Blacks as well as Whites—has been that such measures [as the zoning regulation at issue here] can guard against the perceived family instability and pathology issues assumed to attend poor, predominantly black, urban communities.

R.A. Lenhardt, *Moore v. City of East Cleveland*, in *Critical Race Judgments: Rewritten U.S. Court Opinions on Race and the Law* 492, 495–97 (Bennett Capers et al., eds. 2022). Justice Lenhardt would have struck down the ordinance not only on Due Process liberty grounds, but also on Equal Protection grounds because of the ordinance’s discriminatory impact on Black families. How does the context of *Moore* shape your analysis of the invisibility of race in Justice Powell’s majority opinion?

7. *Are roommates family?* The Court mentions *Village of Belle Terre v. Boraas*, in which the Court upheld the constitutionality of a zoning ordinance that prevented more than two unrelated persons from living together in the same household. In 2015, a Pennsylvania court upheld an ordinance that permitted residency of “a group of persons living as a single household unit using housekeeping facilities in common, but not to include more than three persons unrelated by blood, marriage or adoption.” *Schwartz v. Philadelphia Zoning Bd. of Adjustment*, 126 A.3d 1032, 1034 (Pa. Commw. Ct. 2015). Most state courts have upheld similar zoning restrictions.

PROBLEM 1-2

You are a member of a city council considering a proposal to amend the city’s ordinance that limits residential lots exclusively to a single-family

dwelling. The proposal provides that such lots could include more than one dwelling unit (such as duplexes and triplexes) as well as accessory development units. Examples of ADUs include garage or accessory apartments, “granny flats” (providing living space for an older parent), and second units.

The council has learned that, in recent years, some other municipalities and states have considered loosening or getting rid of single-family zoning ordinances, arguing that such ordinances contribute to a lack of affordable housing and racial and socioeconomic exclusion and also inhibit multigenerational family living.

Would you support such an amendment? What factors might shape your decision? What arguments would you expect other council members to make for or against such a change? How does this relate to definitions of the family and family law?

PROBLEM 1-3

Jan and Dan are a married couple with one child. For years, they have been close friends with another couple, Josh and Gina, who have three children, and a third couple, Lila and Lisa, an unmarried couple who do not have children. Earlier this year, this group of 10 intentionally came together as a family when Jan and Dan purchased a 6,000 square foot, seven-bedroom home on two acres of land in an affluent residential neighborhood in the Town of Tranquil. Only Jan and Dan are listed on the mortgage, but the group has pooled money into a household bank account to share the cost of mortgage payments, groceries, and utilities. The group take turns cooking dinner and engage in regular routines, such as a weekly family game night. After a coalition of neighbors complained to the zoning board that, although the group of 10 seem to be “nice people,” they violate the neighborhood’s zoning for single-family homes, the board determined that the arrangement does not meet the ordinance’s definition of family—“those related by blood, marriage, civil union, or legal adoption.”

Jan and Dan come to your law office after receiving a “cease and desist” notice from the board that they must discontinue their current living arrangement or vacate the neighborhood. They ask you to represent them before the Zoning Board of Appeals and, if they lose that appeal, then in a court action. What are your two or three strongest arguments on their behalf? What do you anticipate will be the two or three strongest arguments made on behalf of upholding the zoning board’s ruling?

B. THE RIGHT TO PRIVACY IN MARRIAGE

Meyer, *Pierce*, and *Prince* (discussed above) provided the early framework for the Supreme Court’s reexamination of family liberty and privacy in the 1960s. The issue first returned to the Court in the context of

whether a married couple had a constitutional right to obtain or use contraception, and if so, where the source of that right could be found.

GRISWOLD V. CONNECTICUT

Supreme Court of the United States, 1965.
381 U.S. 479.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven—a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. * * *

The statutes whose constitutionality is involved in this appeal are §§ 53–32 and 54–196 of the General Statutes of Connecticut (1958 rev.). The former provides:

Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

Section 54–196 provides:

Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

The appellants were found guilty as accessories and fined \$100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. * * *

We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship * * * [b]y reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. * * *

* * *

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, 198 U.S. 45 [(1905)], should be our guide. But we decline that invitation. * * * We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.

This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters* [268 U.S. 510 (1925)], the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, [262 U.S. 390 (1923)], the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In *NAACP v. Alabama*, 357 U.S. 449, 462 [(1958)], we protected the “freedom to associate and privacy in one's associations,” noting that freedom of association was a peripheral First Amendment right. * * * In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of “association” that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. * * *

* * *

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe v. Ullman*, 367 U.S. 497, 516–22 [(1961) (DOUGLAS, J., dissenting)]. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630 [(1886)], as protection against all governmental invasions “of the sanctity of a man’s home and the privacies of life.” We recently referred in *Mapp v. Ohio*, 367 U.S. 643, 656 [(1961)], to the Fourth Amendment as creating a “right to privacy, no less important than any other right carefully and particularly reserved to the people.”

We have had many controversies over these penumbral rights of “privacy and repose.” These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a “governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.” *NAACP v. Alabama*, 377 U.S. [288], 307 [(1964)]. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

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

Reversed.

MR. JUSTICE GOLDBERG, whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN join, concurring.

I agree with the Court that Connecticut’s birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. * * * [T]he concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted * * * embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court’s opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the

Court refers to the Ninth Amendment. I add these words to emphasize the relevance of that Amendment to the Court's holding.

* * *

This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights. The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." * * *

* * *

While this Court has had little occasion to interpret the Ninth Amendment,⁶ "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 1 Cranch 137, 174 [(1803)]. * * * The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "[t]he enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

* * * [T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. As any student of this Court's opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States. The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or

⁶ This Amendment has been referred to as "The Forgotten Ninth Amendment," in a book with that title by Bennett B. Patterson (1955). * * * As far as I am aware, until today this Court has referred to the Ninth Amendment only in [three cases]. * * *

disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. * * *

* * *

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the “traditions and [collective] conscience of our people” to determine whether a principle is “so rooted [there] * * * as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U.S. 97, 105 [(1934)]. The inquiry is whether a right involved “is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’ . . .” *Powell v. Alabama*, 287 U.S. 45, 67 [(1932)]. “Liberty” also “gains content from the emanations of . . . specific [constitutional] guarantees” and “from experience with the requirements of a free society.” *Poe v. Ullman*, 367 U.S. 497, 517 [(1961) (Douglas, J., dissenting)].

I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating “from the totality of the constitutional scheme under which we live.” *Id.* at 521. Mr. Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, [478 [(1928)]], comprehensively summarized the principles underlying the Constitution’s guarantees of privacy:

* * * The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy—that of the marital relation and the marital home. * * *

I agree with MR. JUSTICE HARLAN’s statement in his dissenting opinion in *Poe*, 367 U.S. at 551–52:

Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole ‘private realm of family life’

it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. * * *

* * *

Although the Connecticut birth control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any "subordinating [state] interest which is compelling" or that it is "necessary . . . to the accomplishment of a permissible state policy." The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern—the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception. But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. * * * The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication. These statutes demonstrate that means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to "invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. [288,] 307 [(1964)].

* * *

In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States. I agree with the Court that petitioners' convictions must therefore be reversed.

MR. JUSTICE HARLAN, concurring in the judgment.

I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion. * * *

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In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values “implicit in the concept of ordered liberty,” *Palko v. Connecticut*, 302 U.S. 319, 325 [(1937)]. * * * I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

* * *

MR. JUSTICE WHITE, concurring in the judgment.

In my view this Connecticut law as applied to married couples deprives them of “liberty” without due process of law, as that concept is used in the Fourteenth Amendment. I therefore concur in the judgment of the Court reversing these convictions under Connecticut’s aiding and abetting statute.

* * * Surely the right invoked in this case, to be free of regulation of the intimacies of the marriage relationship, “come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.” *Kovacs v. Cooper*, 336 U.S. 77, 95 [(1949)] (FRANKFURTER, J., concurring).

The Connecticut anti-contraceptive statute deals rather substantially with this relationship. * * *

An examination of the justification offered, however, cannot be avoided by saying that the Connecticut anti-use statute invades a protected area of privacy and association or that it demands the marriage relationship. The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under the cases of this Court, require “strict scrutiny” * * *.

[T]he State claims but one justification for its anti-use statute. [T]he statute is said to serve the State’s policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal.

Without taking issue with the premise that the fear of conception operates as a deterrent to such relationships in addition to the criminal proscriptions Connecticut has against such conduct, I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State’s ban on illicit sexual relationships. * * *

* * *

MR. JUSTICE BLACK, with whom MR. JUSTICE STEWART joins, dissenting.

I agree with my Brother STEWART's dissenting opinion. And like him I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is my Brethren of the majority and my Brothers HARLAN, WHITE and GOLDBERG who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe—except their conclusion that the evil qualities they see in the law make it unconstitutional.

Had the doctor defendant here, or even the nondoctor defendant, been convicted for doing nothing more than expressing opinions to persons coming to the clinic that certain contraceptive devices, medicines or practices would do them good and would be desirable, or for telling people how devices could be used, I can think of no reasons at this time why their expressions of views would not be protected by the First and Fourteenth Amendments, which guarantee freedom of speech. * * * The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not.

* * *

* * * I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

* * *

* * * My disagreement with the Court's opinion holding that there is such a violation here is a narrow one, relating to the application of the First Amendment to the facts and circumstances of this particular case. But my disagreement with Brothers HARLAN, WHITE and GOLDBERG is more basic. I think that if properly construed neither the Due Process Clause nor the Ninth Amendment, nor both together, could under any circumstances be a proper basis for invalidating the Connecticut law. * * *

The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it consider to be arbitrary, capricious, unreasonable, or oppressive, or this Court's belief that a particular state law under scrutiny has no "rational or justifying"

purpose, or is offensive to a “sense of fairness and justice.” If these formulas based on “natural justice,” or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body. * * * But perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose. * * *

* * *

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people’s elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old fashioned I must add it is good enough for me. * * *

* * *

MR. JUSTICE STEWART, whom MR. JUSTICE BLACK joins, dissenting.

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual’s moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual’s choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

* * *

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy ‘created by several

fundamental constitutional guarantees'. With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. * * * If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

NOTES AND QUESTIONS

1. *Classic impact litigation.* *Griswold* offers a classic example of well-crafted impact litigation and a stark reminder of the rapidity of social change. By the 1950s, Connecticut was the only state that still imposed an absolute ban on contraceptive devices. Some doctors in private practice apparently ignored the law and offered advice to their married patients, who could obtain birth control in neighboring states. Other doctors followed the law. Single persons and people too poor to afford private medical care had no options. Estelle Griswold, who had just become the executive director of the Planned Parenthood League of Connecticut, enlisted the help of two Yale professors, C. Lee Buxton of the Medical School and Fowler Harper, who taught family law at the Law School. They enlisted well-chosen patients for the initial suit, entitled *Poe v. Ullman*, 367 U.S. 497 (1961). Jane Poe, a 25-year-old housewife, was a patient of Dr. Buxton's. Admitted to the emergency room for complications of pregnancy, she had had a stroke, which left her partially paralyzed, with a damaged kidney and speech impairment. Her pregnancy led to a stillbirth. Dr. Buxton believed she could not survive another pregnancy. Two other married couples were also named plaintiffs. One couple had already lost three children in infancy, all of whom had been born with genetic problems. The other had been advised that blood tests indicated that they would not be able to have a healthy child.

In the initial round of litigation in the Connecticut courts, the plaintiffs sought a declaratory judgment that would allow birth control clinics for married patients, but did not raise the privacy argument.

They lost in the Connecticut courts, and the Supreme Court declined to reach the merits on the ground that no realistic threat of criminal prosecution existed. See *Poe v. Ullman*, 367 U.S. 497 (1961). However, two *Poe* dissenters, Justices Douglas and Harlan, emphasized the married couple's right to privacy. (In *Moore, supra*, Justice Powell quoted from Justice Harlan's dissent.) Regrouping, the plaintiffs decided to open one clinic in New Haven, which led, within ten days, to Dr. Buxton's arrest and closure of the clinic. In this new procedural posture, the defense relied heavily on the thinking of the *Poe*

dissenters, leading to the result in *Griswold*. See Catherine G. Roraback, *Griswold v. Connecticut: A Brief Case History*, 16 Ohio N.U. L. Rev. 395 (1989).

2. *Constitutional grounding for the right to privacy*. Of the six opinions issued in *Griswold* (excerpted above), four supported the right to privacy—or “liberty”—in the marital relationship, and two opposed it. Which constitutional amendments did the supporters rely on to find a constitutional right to privacy or liberty? What constitutional standards and level of scrutiny did they apply? What are the major differences between Justice Douglas’s opinion for the Court and the three concurrences? Do the dissenters disagree with Douglas’s opinion over the text of the Constitution, the role of the Court, or both?

3. *Contours and strength of the right to privacy*. How far does the right to privacy expounded in *Griswold* extend? What questions does *Griswold* leave unanswered? How solid is the jurisprudential basis for the right to privacy set forth in the majority and concurring opinions?

4. *Griswold as a poverty law case*. Legal scholar Cary Franklin argues that, while *Griswold* is known primarily for its role in the line of the Court’s reproductive rights cases, it should also be recognized as an important part of the Warren Court’s poverty cases. While Connecticut’s law did not target any particular group, Franklin explains that it “had special bite for low-income women,” since its “most tangible and direct regulatory effect was to prevent the opening of birth control clinics,” which provided contraception and counseling to women who lacked access to private physicians. Cary Franklin, *Griswold and the Public Dimension of the Right to Privacy*, 124 Yale L.J. Forum (Mar. 2015).

C. THE RIGHT TO INDIVIDUAL AND FAMILY PRIVACY

Griswold focused on privacy and the marital unit. In the next case, the Court considered privacy and the rights of individuals within a relationship, whether married or unmarried. *Eisenstadt* arose out of a lecture at Boston University in 1967 by Bill Baird, a pro-choice activist who was invited by BU students seeking to challenge the Massachusetts law at issue in the next case. See *50 Years Later: Revisiting the Moment in BU History That Helped Shape the Abortion Rights Battle*, BU Today (Aug. 31, 2022).

EISENSTADT V. BAIRD

Supreme Court of the United States, 1972.
405 U.S. 438.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court, under Massachusetts General Laws Ann., c. 272, § 21, first, for exhibiting contraceptive articles in the course of

delivering a lecture on contraception to a group of students at Boston University and, second, for giving a young woman a package of Emko vaginal foam at the close of his address. The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it violated Baird's First Amendment rights, but by a four-to-three vote sustained the conviction for giving away the foam. * * * [T]he Court of Appeals for the First Circuit vacated the dismissal and remanded the action with directions to grant the writ discharging Baird. We affirm.

Massachusetts General Laws Ann., c. 272, § 21, under which Baird was convicted, provides a maximum five-year term of imprisonment for "whoever . . . gives away . . . any drug, medicine, instrument or article whatever for the prevention of conception," except as authorized in § 21A. Under § 21A, "[a] registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. [And a] registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician." As interpreted by the State Supreme Judicial Court, these provisions make it a felony for anyone, other than a registered physician or pharmacist acting in accordance with the terms of § 21A, to dispense any article with the intention that it be used for the prevention of conception. The statutory scheme distinguishes among three distinct classes of distributees—first, married persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; second, single persons may not obtain contraceptives from anyone to prevent pregnancy; and, third, married or single persons may obtain contraceptives from anyone to prevent, not pregnancy, but the spread of disease. This construction of state law is, of course, binding on us.

The legislative purposes that the statute is meant to serve are not altogether clear. In *Commonwealth v. Baird*, the Supreme Judicial Court noted only the State's interest in protecting the health of its citizens: "[T]he prohibition in § 21," the court declared, "is directly related to" the State's goal of "preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences." In a subsequent decision, the court, however, found "a second and more compelling ground for upholding the statute"—namely, to protect morals through "regulating the private sexual lives of single persons." The Court of Appeals, for reasons that will appear, did not consider the promotion of health or the protection of morals through the deterrence of fornication to be the legislative aim. Instead, the court concluded that the statutory goal was to limit contraception in and of itself—a purpose that the court held conflicted "with fundamental human rights" under *Griswold v. Connecticut*, where this Court struck down

Connecticut's prohibition against the use of contraceptives as an unconstitutional infringement of the right of marital privacy.

We agree that the goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims of §§ 21 and 21A. And we hold that the statute, viewed as a prohibition on contraception per se, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.

* * *

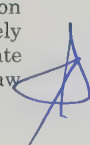
The basic principles governing application of the Equal Protection Clause of the Fourteenth Amendment are familiar. * * *

The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under [the Massachusetts statute].⁷ For the reasons that follow, we conclude that no such ground exists.

First. Section 21 stems from Mass. Stat. 1879, c. 159, § 1, which prohibited without exception, distribution of articles intended to be used as contraceptives. In *Commonwealth v. Allison*, 227 Mass. 57, 62 (1917), the Massachusetts Supreme Judicial Court explained that the law's [plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women.] Although the State clearly abandoned that purpose with the enactment of § 21A, at least insofar as the illicit sexual activities of married persons are concerned, the court reiterated in *Sturgis v. Attorney General*, that the object of the legislation is to discourage premarital sexual intercourse. Conceding that the State could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as "[e]vils . . . of different dimensions and proportions, requiring different remedies," *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 489 (1955), we cannot agree that the deterrence of premarital sex may reasonably be regarded as the purpose of the Massachusetts law.

It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor under Massachusetts General Laws Ann., c. 272, § 18. Aside from the scheme of values that assumption would attribute to the State, it is abundantly clear that the effect of the ban on distribution of contraceptives to unmarried persons has at best a

⁷ Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely *rationaly related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest. But . . . we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard.



marginal relation to the proffered objective. What Mr. Justice Goldberg said in *Griswold*, 381 U.S. at 498 (concurring opinion), concerning the effect of Connecticut's prohibition on the use of contraceptives in discouraging extramarital sexual relations, is equally applicable here. "The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception." * * * Nor, in making contraceptives available to married persons without regard to their intended use, does Massachusetts attempt to deter married persons from engaging in illicit sexual relations with unmarried persons. Even on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is thus so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim.

Moreover, §§ 21 and 21A on their face have a dubious relation to the State's criminal prohibition on fornication. As the Court of Appeals explained, "Fornication is a misdemeanor [in Massachusetts], entailing a thirty dollar fine, or three months in jail. Violation of the present statute is a felony, punishable by five years in prison. We find it hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor." * * * [W]e, like the Court of Appeals, cannot believe that in this instance Massachusetts has chosen to expose the aider and abetter who simply gives away a contraceptive to 20 times the 90-day sentence of the offender himself. * * *

Second. * * * The Supreme Judicial Court in *Commonwealth v. Baird* held that the purpose of the amendment [enacting Section 21A] was to serve the health needs of the community by regulating the distribution of potentially harmful articles. It is plain that Massachusetts had no such purpose in mind before the enactment of § 21A. As the Court of Appeals remarked, "Consistent with the fact that the statute was contained in a chapter dealing with 'Crimes Against Chastity, Morality, Decency and Good Order,' it was cast only in terms of morals. * * * Nor did the Court of Appeals 'believe that the legislature [in enacting § 21A] suddenly reversed its field and developed an interest in health. Rather, it merely made what it thought to be the precise accommodation necessary to escape the *Griswold* ruling."

Again, we must agree with the Court of Appeals. If health were the rationale of § 21A, the statute would be both discriminatory and overbroad. * * *. If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons." * * *

* * *. [Moreover], the statute is redundant in light of the federal and state laws *already* regulating the distribution of harmful drugs. * * *

Third. [May] the Massachusetts statute * * * nevertheless[] be sustained simply as a prohibition on contraception? * * * The Court of Appeals went on to hold:

To say that contraceptives are immoral as such [and forbid them to unmarried persons * * * who must risk * * * an unwanted pregnancy [and other consequence, including a child support obligation] * * * conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state.

We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. [Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.] If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. ¶

On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious. * * *

* * * We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, Massachusetts General Laws Ann., c. 272, §§ 21 and 21A, violate the Equal Protection Clause.^b

* * *

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring.

^b *Editors' Note:* The Massachusetts law struck down by the Court stayed on the books until 2018, when the Massachusetts legislature repealed it in the Negating Archaic Statutes Targeting Young Women Act (known as the "NASTY Women Act"), 2018 Mass. Acts 760, ch. 155 sec. 2, <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter155>.

While I join the opinion of the Court, there is for me a narrower ground for affirming the Court of Appeals. This to me is a simple First Amendment case, that amendment being applicable to the States by reason of the Fourteenth.

Under no stretch of the law as presently stated could Massachusetts require a license for those who desire to lecture on planned parenthood, contraceptives, the rights of women, birth control, or any allied subject, or place a tax on that privilege. * * *

Baird addressed an audience of students and faculty at Boston University on the subject of birth control and overpopulation. His address was approximately one hour in length and consisted of a discussion of various contraceptive devices displayed by means of diagrams on two demonstration boards, as well as a display of contraceptive devices in their original packages. In addition, Baird spoke of the respective merits of various contraceptive devices; overpopulation in the world; crises throughout the world due to overpopulation; the large number of abortions performed on unwed mothers; and quack abortionists and the potential harm to women resulting from abortions performed by quack abortionists. Baird also urged members of the audience to petition the Massachusetts Legislature and to make known their feelings with regard to birth control laws in order to bring about a change in the laws. At the close of the address Baird invited members of the audience to come to the stage and help themselves to the contraceptive articles. We do not know how many accepted Baird's invitation. We only know that Baird personally handed one woman a package of Emko Vaginal Foam. He was then arrested and indicted (1) for exhibiting contraceptive devices and (2) for giving one such device away. The conviction for the first offense was reversed, the Supreme Judicial Court of Massachusetts holding that the display of the articles was essential to a graphic representation of the lecture. But the conviction for the giving away of one article was sustained. * * *

Had Baird not "given away" a sample of one of the devices whose use he advocated, there could be no question about the protection afforded him by the First Amendment. A State may not "contract the spectrum of available knowledge." However noxious Baird's ideas might have been to the authorities, the freedom to learn about them, fully to comprehend their scope and portent, and to weigh them against the tenets of the "conventional wisdom," may not be abridged. Our system of government requires that we have faith in the ability of the individual to decide wisely, if only he is fully apprised of the merits of a controversy.

* * *

It is irrelevant to the application of these principles that Baird went beyond the giving of information about birth control and advocated the use of contraceptive articles. The First Amendment protects the opportunity to

persuade to action whether that action be unwise or immoral, or whether the speech incites to action.

In this case there was not even incitement to action. There is no evidence or finding that Baird intended that the young lady take the foam home with her when he handed it to her or that she would not have examined the article and then returned it to Baird, had he not been placed under arrest immediately upon handing the article over.

First Amendment rights are not limited to verbal expression. The right to petition often involves the right to walk. The right of assembly may mean pushing or jostling. Picketing involves physical activity as well as a display of a sign. A sit-in can be a quiet, dignified protest that has First Amendment protection even though no speech is involved. * * * Putting contraceptives on display is certainly an aid to speech and discussion. Handing an article under discussion to a member of the audience is a technique known to all teachers and is commonly used. * * * [P]assing one article to an audience is merely a projection of the visual aid and should be a permissible adjunct of free speech. * * *

I do not see how we can have a Society of the Dialogue, which the First Amendment envisages, if time-honored teaching techniques are barred to those who give educational lectures.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, concurring in the result.

In *Griswold*, we reversed criminal convictions for advising married persons with respect to the use of contraceptives. As there applied, the Connecticut law, which forbade using contraceptives or giving advice on the subject, unduly invaded a zone of marital privacy protected by the Bill of Rights. The Connecticut law did not regulate the manufacture or sale of such products and we expressly left open any question concerning the permissible scope of such legislation.

Chapter 272, § 21, of the Massachusetts General Laws makes it a criminal offense to distribute, sell, or give away any drug, medicine, or article for the prevention of conception. Section 21A excepts from this prohibition registered physicians who prescribe for and administer such articles to married persons and registered pharmacists who dispense on medical prescription.

Appellee Baird was indicted for giving away Emko Vaginal Foam, a “medicine and article for the prevention of conception. . . .” * * * The gravamen of the offense charged was that Baird had no license and therefore no authority to distribute to anyone. As the Supreme Judicial Court of Massachusetts noted, the constitutional validity of Baird’s conviction rested upon his lack of status as a “distributor and not . . . the marital status of the recipient.” * * *

* * * Had Baird distributed a supply of the so-called “pill,” I would sustain his conviction under this statute. Requiring a prescription to obtain potentially dangerous contraceptive material may place a substantial burden upon the right recognized in *Griswold*, but that burden is justified by a strong state interest. * * *

Baird, however, was found guilty of giving away vaginal foam. * * * Due regard for protecting constitutional rights requires that the record contain evidence that a restriction on distribution of vaginal foam is essential to achieve the statutory purpose, or the relevant facts concerning the product must be such as to fall within the range of judicial notice.

Neither requirement is met here. * * *

That Baird could not be convicted for distributing Emko to a married person disposes of this case. * * *

MR. CHIEF JUSTICE BURGER, dissenting.

The judgment of the Supreme Judicial Court of Massachusetts in sustaining appellee’s conviction for dispensing medicinal material without a license seems eminently correct to me and I would not disturb it. It is undisputed that appellee is not a physician or pharmacist and was prohibited under Massachusetts law from dispensing contraceptives to anyone, regardless of marital status. To my mind the validity of this restriction on dispensing medicinal substances is the only issue before the Court * * *. * * * [E]veryone seems to agree that if Massachusetts has validly required, as a health measure, that all contraceptives be dispensed by a physician or pursuant to a physician’s prescription * * *.

* * *

NOTES AND QUESTIONS

1. *Extending the privacy doctrine: from the marital unit to the individual.* *Eisenstadt* confronted two questions that *Griswold* left unanswered. First, was the right to privacy restricted to the confines of marriage? Second, did the right to sexual privacy attach only to a couple, or also to the individuals who might comprise a couple? As with the debate over whether the nature of marriage should be centered on procreation and child-rearing or on autonomous adult commitment and self-definition, commentators differ on whether or not they see *Eisenstadt*’s shift away from the privacy of the married couple toward the privacy rights of individuals (whether married or unmarried) as a positive development. See Khiara M. Bridges, *Privacy Rights and Public Families*, 34 Harv. J.L. & Gender 113, 142 (2011) (“*Eisenstadt* alters the base of the right to privacy to one that is closer to (individual) decisional autonomy and (individual) bodily integrity”).

2. *Equal protection.* To answer the questions *Griswold* left open, the Court turned to yet another constitutional provision, which it had not

considered in *Griswold*: the Equal Protection Clause. Why, according to the majority opinion, did Massachusetts's law violate the Equal Protection Clause?

3. *The relationship between contraception and abortion.* In *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, 142 S. Ct. 2228, 2242 (2022) (excerpted in Chapter 2), the majority overruled *Roe v. Wade*, 410 U.S. 113 (1973), which drew on both *Griswold* and *Eisenstadt* to hold that the right of privacy included a woman's right to terminate a pregnancy. *Dobbs* also overruled *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which affirmed *Roe* (while modifying its framework) and elaborated on the "liberty" at stake in a person's decision about pregnancy. The *Dobbs* majority asserted that abortion was unique among previously recognized "liberty" rights because it involved the taking of prenatal life (or that of an "unborn child") while also stating that its decision did not have implications for *Griswold*. However, Justice Thomas, in his concurring opinion, urged the Court to reconsider *Griswold* and indicated that it should be overruled as "demonstrably erroneous," 142 S. Ct. at 2301, and the dissent (by Justices Kagan, Breyer, and Sotomayor) warned that other protected liberties (including contraceptive liberty) were at risk. *Id.* at 2319, 2327, 2329–30. What do you think the likely consequence of overruling *Roe* and *Casey* will be for constitutional protection of contraception? When you read the final case in this Section, *Lawrence v. Texas*, 539 U.S. 558 (2003), consider the Court's reliance on *Roe* and *Casey* and think about what impact *Dobbs* might have on the constitutional protection of same-sex sexual activity.

4. *Privacy guarantees in state constitutions.* By comparison to the U.S. constitution, ten state constitutions expressly include a "right to privacy." The South Carolina Supreme Court invoked such a right in South Carolina's constitution to hold that South Carolina's six-week abortion ban was an "unreasonable restriction" on "a woman's right to privacy." *Planned Parenthood South Atlantic et al. v. South Carolina et al.*, 882 S.Ed.2d 770 (S.C. 2023). It observed that *Dobbs* was not relevant or controlling because *Dobbs* criticized *Roe* for resting on an "unmentioned"—versus an explicit—right to privacy. *Id.* at 778.

5. *The legacy of Eisenstadt?* Susan Frelich Appleton argues that *Eisenstadt* promised to: (1) dethrone marriage by moving toward more inclusive notions of relationships that count as family; (2) gesture toward a more liberatory vision of sexual freedom; and (3) promote the understanding that restricting access to contraception had a disproportionate impact on women compared to men. Susan Frelich Appleton, *The Forgotten Family Law of Eisenstadt v. Baird*, 28 Yale J. L. & Feminism 1 (2017). She concludes that these promises remain unfulfilled, pointing to, among other things, marriage's continuing role as the "template" for adult relationships, public policies such as abstinence-only sex education, and the continuing controversy over women's access to and use of contraception, including the numerous challenges to the requirement in the Affordable Care Act that employers' insurance plans cover contraception. *Id.* See, e.g., *Burwell v. Hobby Lobby*, 542 U.S. 692 (2014) (upholding a challenge by three for-profit closely-held corporations to ACA's