

# THE CONSTITUTIONAL RIGHTS OF NON-CUSTODIAL PARENTS

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## I. INTRODUCTION

The legal treatment of non-custodial parents has become a lightning rod in modern family law. The topic is obviously important. Every year in this country, about one million children see their parents divorce.<sup>1</sup> In addition, roughly a third of all children are born to parents who are not married.<sup>2</sup> Many of these parents, of course, will never live together, and those who do face a high risk of breaking up before the children are grown.<sup>3</sup> Taken together, the trends suggest that fewer than half of all

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1. See ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 28 (2004).

2. See Brady E. Hamilton et al., *Births: Preliminary Data for 2002*, NAT'L VITAL STAT. REP. (Ctrs. for Disease Control & Prevention, Hyattsville, Md.), June 25, 2003, at 3 (indicating that 33.8% of all U.S. births in 2002 were to unmarried women), available at [http://cdc.gov/nchs/data/nvsr51\\_11.pdf](http://cdc.gov/nchs/data/nvsr51_11.pdf); Robert D. Plotnick, *Seven Decades of Nonmarital Childbearing in the United States*, at 1 (Feb. 2004), available at <http://npc.umich.edu/news/events/others/SevenDecades.pdf>.

3. In the United States, most non-marital births are to women who are not cohabiting with a partner. See Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitation Obligation*, 52 UCLA L. REV. 815, 881-82 (2005) [hereinafter Garrison, *Is Consent Necessary?*]. Unmarried parents who do cohabit are more likely to split up; most cohabiting relationships dissolve within five years. See *id.* at 839 & nn.90-92; Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 408 (2004) (discussing social science evidence showing that cohabiting "relationships . . . last a shorter time than marriage, even if there are children"); Marsha Garrison, *Reviving Marriage: Should We? Could We?*, at 19-22 (Oct. 2005) (unpublished paper available at <http://ssrn.com/abstract=829825>) (discussing evidence of comparative instability and qualification of commitment in cohabiting relationships and noting that "[e]ven the arrival of a child does not appear to alter the feeling that cohabitation is fundamentally different from marriage") [hereinafter Garrison, *Reviving Marriage*]; Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. L. FORUM 225, 244-46 (discussing the greater instability of cohabitating relationships); Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847, 857, 869-70 (2005) (discussing growing incidence of childrearing and the high rate of dissolution among unmarried, cohabiting couples). As David Popenoe notes, the effective shift of childbearing from marriage into generally less stable non-marital relationships means that even as the divorce rate has leveled off, "[t]he estimated combined breakup rate of both married and unmarried unions . . . continues to escalate." DAVID POPENOE, *LIFE WITHOUT FATHER* 20 (1996).

children born today—and perhaps as few as a quarter—will live with both their parents throughout childhood.<sup>4</sup> Defining the custodial rights of divorced or separated parents is therefore likely to be a matter of direct concern for a majority of the nation's children.

The topic is also timely. Non-custodial parents are in the news as never before. Frustrated parents are seen scaling the walls of Buckingham Palace and other monuments, dressed as superheroes.<sup>5</sup> They stare out angry and stone-faced from the front cover of *The New York Times Sunday Magazine*.<sup>6</sup> Their grievances against a family law they see as stacked against them are splashed across billboards and newspaper advertisements.<sup>7</sup> And they are said to be coming soon to a theater near you: Miramax recently bought the movie rights to the life story of the founder of Fathers 4 Justice, the British group responsible for much of the surging media attention.<sup>8</sup>

It is easy to dismiss the antics of some of these activists as loopy or, in some darker cases, just plain depraved. Fathers 4 Justice, for instance, temporarily disbanded in January 2006 after an “extremist splinter group” was accused of plotting to kidnap British Prime Minister Tony Blair's five-year-old son, Leo, to dramatize their feelings of parental powerlessness.<sup>9</sup> But, beyond the stunts and costumes, it is clear that the sense of injury expressed by these activists resonates with a broader

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4. See DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & DAVID D. MEYER, *CONTEMPORARY FAMILY LAW* 634 (2006); NANCY E. DOWD, *REDEFINING FATHERHOOD* 23 (2000) [hereinafter DOWD, *REDEFINING FATHERHOOD*] (noting that “[f]orty percent of all children do not live with their fathers and, more distressing, it is estimated that the rate will rise to 60 percent for children born in the 1990s”). For the moment, most children in the United States reside with both parents, but the numbers are declining. See SCHEPARD, *supra* note 1, at 28.

5. See Patrick E. Tyler, *Buckingham Palace's New Tourist Attraction: Batman*, N.Y. TIMES, Sept. 14, 2004, at A3; *Fathers' Rights Protesters Scale Westminster Abbey*, BIRMINGHAM POST (UK), Apr. 14, 2006, at 7, available at 2006 WLNR 6293956.

6. Susan Dominus, *The Fathers' Crusade*, N.Y. TIMES SUNDAY MAGAZINE, May 8, 2005, at 26.

7. See Mary Zemaitis, *Billboard Campaign Criticizes Champaign County Judge*, DAILY ILLINI, Nov. 2, 2005, at 1. The advertising campaigns of one fathers' rights organization, the American Coalition for Fathers and Children, are catalogued on its website, [http://www.acfc.org/site/PageServer?pagename=Billboards\\_and\\_Ads](http://www.acfc.org/site/PageServer?pagename=Billboards_and_Ads).

8. See John Higginson, *Holy Smoke! The Fathers 4 Justice Film*, EVENING STANDARD, Jan. 20, 2006, available at <http://thisislondon.co.uk/films/articles/21483390?source=Metro> (reporting that “[a]fter two years of fighting between film companies, Disney-owned Miramax has bought the rights to turn the campaign group's story into a blockbuster”).

9. See Stewart Tendler, *Fathers 4 Justice Is Disbanded Over “Plot” To Kidnap Leo Blair*, TIMES ONLINE (Jan. 19, 2006), available at <http://timesonline.co.uk/article/0,,2-1996209,00.html>. The group reemerged dramatically four months later by taking over a BBC television studio during a live broadcast of the national lottery drawing. See Sophie Goodchild, *Fathers 4 Justice Storm BBC's Live Lottery Show*, INDEPENDENT ON SUNDAY (UK), May 21, 2006, at 4, available at 2006 WLNR 8723745.

circle of non-custodial parents.<sup>10</sup> Because non-custodial parents are overwhelmingly men, the clash over custody is often seen as a front in the so-called “gender wars.”<sup>11</sup> Certainly, it is true that the cause of non-custodial parents is championed most visibly by a newly energized Fathers’ Rights movement,<sup>12</sup> and that a distressing share of the internet polemics on the topic crackles with misogynistic invective.<sup>13</sup> The gender implications of the topic are real, but the issue is not solely about the rights of fathers. There are smaller numbers of women, too—both non-custodial mothers and the new partners of non-custodial fathers—who are agitating for greater empowerment of non-custodial parents.<sup>14</sup>

Significantly, the push for non-custodial parents’ rights is doing much more than generating headlines; it has already spurred significant changes to family law in some states and, indeed, around the world. The movement’s influence can be seen in laws affecting custody, visitation, child support, and paternity, not only in the United States but also in Australia, Canada, and Europe.<sup>15</sup> Non-custodial parents have gained new

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10. See Patrick Parkinson, *The Past Caretaking Standard in Comparative Perspective*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 446, 461 (Robin Fretwell Wilson ed., 2006).

11. See generally MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE, AND WHAT WE CAN DO ABOUT IT 2* (1999) [hereinafter MASON, *CUSTODY WARS*]; June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1095 (1999) (noting that “[t]he battle lines” over custody “are well drawn and they are gendered ones”); Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 FAM. L.Q. 27, 34-39 (2002) (discussing the “gender wars over custody” spurred by claims of fathers’ rights).

12. See Dominus, *supra* note 6, at 26; Parkinson, *supra* note 10, at 467; William C. Smith, *Dads Want Their Day: Fathers Charge Legal Bias Toward Moms Hamstrings Them as Full-Time Parents*, 89 A.B.A. J. 38, 39-40 (Feb. 2003).

13. See Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1272 (2005) [hereinafter Dowd, *Fathers and the Supreme Court*] (noting that some strains of fathers’ rights advocacy are “strongly antifeminist, even woman-hating”) (footnotes omitted); Martha Albertson Fineman, *Fatherhood, Feminism and Family Law*, 32 MCGEORGE L. REV. 1031, 1043 (2001) [hereinafter Fineman, *Fatherhood*] (observing that “[a] substantial amount of fathers’ rights discourse characterizes mothers in negative and malicious stereotypes, arguing for monitoring, punishment, containment and control over mothers”).

14. See, e.g., *Julian v. Julian*, No. M1997-00236-COA-R3-CV, 2000 WL 343817, at \*1 (Tenn. Ct. App. Apr. 4, 2000) (asserting constitutional rights of non-custodial mother). Reportedly, a third of the members of Fathers 4 Justice are women. See *Activist: How I Stormed Lottery Show*, PLYMOUTH EVENING HERALD, May 22, 2006, at 9, available at 2006 WLNR 8797790. To dramatize the point, one of the six custody-rights activists who stormed a BBC studio in May 2006 was a woman. *Id.*

15. See Smith, *supra* note 12, at 39 (noting that “[f]athers’ rights advocates have lobbied several states to adopt a legal preference for joint custody, pressed for stricter enforcement of noncustodial fathers’ visitation rights, and pushed for DNA paternity tests in child support proceedings” and that “this loosely organized movement has demonstrated its political clout in state legislatures and family courts nationwide”). Surveying recent development in child custody law in Australia, Canada, Denmark, England, France, Hong Kong, Portugal, and the United States, Helen

rights to enforce visitation, limit their support obligations based on additional time caring for the child, and even to “disestablish” their parental status (and obligations) altogether based on DNA proof of non-paternity later in the child’s life.<sup>16</sup>

Most of the changes so far have come through legislative action, and proponents are presently pushing many new initiatives in state legislatures across the United States.<sup>17</sup> Increasingly, however, non-custodial parents are turning their attention to the courts as well, demanding better or equal treatment as a matter of constitutional right. Michael Newdow, the California father who took his fight against the Pledge of Allegiance at his daughter’s school all the way to the U.S. Supreme Court, may be the best known of these litigants.<sup>18</sup> But, with less fanfare, many other parents have also gone to court claiming a constitutional entitlement to play a larger and co-equal role in the

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Rhoades and Susan Boyd observe that a “common thread” is “the central role played by fathers in triggering the legislative reviews, and the tendency for new policies to embrace a normative shift towards a shared parenting model.” Helen Rhoades & Susan B. Boyd, *Reforming Custody Laws: A Comparative Study*, 18 INT’L J.L. POL’Y & FAM. 119, 119 (2004). Australia enacted new legislation in 2006 strengthening its legal preference for “shared parental responsibility.” See Family Law Amendment (Shared Parental Responsibility) Act 2006, available at <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/1D1968BB157D8090CA257178000B0A56?OpenDocument&VIEWCAT=item&COUNT=999&START=1>. For further discussion of “shared parenting” initiatives in Australia, Canada, and Europe, see Ian Curry-Sumner & Caroline Forder, *The Dutch Family Law Chronicles: Continued Parenting Notwithstanding Divorce*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 261 (Andrew Bainham ed., 2006); Parkinson, *supra* note 10, at 456-70; and Helen Rhoades, *The Rise and Rise of Shared Parenting Laws*, 19 CAN. J. FAM. L. 75 (2002).

16. See, e.g., Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345, 1347-48 (2005) [hereinafter Brinig, *Parental Autonomy*] (discussing Oregon legislation strengthening non-custodial parents’ rights concerning visitation and child support); Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, the Approximation Rule and Shared-Parenting*, 25 N. ILL. L. REV. 347, 358-61 (2005) [hereinafter Melli, *Shared-Parenting*] (discussing reductions of child support based upon shared parenting); Linda Lea M. Viken, *Child Support in South Dakota from Obligor Only to Shared Responsibility, an Overview*, 48 S.D. L. REV. 443, 447-52 (2003) (recounting changes in South Dakota law). For critical analyses of the recent legislative and judicial trend allowing legal fathers to “disestablish” paternity, see generally Melanie B. Jacobs, *When Daddy Doesn’t Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193 (2004); Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246 (2006).

17. Many of the pending legislative initiatives are summarized on the website of the American Coalition for Fathers and Children, <https://secure2.convio.net/acfc/site/SPageServer?pagename=SharedParentingLegislation&JServSessionIdr002=ytmwy06ur1.app6a>.

18. See *Elk Grove Uniform Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). Profiles of Michael Newdow, the medical doctor and law school graduate who argued his own case *pro se* in the Supreme Court, appeared widely in the press. See, e.g., Dominus, *supra* note 6. Recently, Newdow reemerged in the headlines when he filed a lawsuit challenging the constitutionality of the use of “In God We Trust” on U.S. currency. See *Atheist Targets Currency*, GRAND RAPIDS PRESS, Nov. 19, 2005, at A8, available at 2005 WLNR 18779412.

upbringing of their children. In the fall of 2004, for example, coordinated class-action lawsuits were filed in forty-four states challenging the constitutionality of prevailing custody law and asserting a constitutional right to “shared parenting,” or equal time with and authority over their children.<sup>19</sup>

To date, non-custodial parents have met mostly with frustration in their resort to constitutional law.<sup>20</sup> There have been some important successes over the years—most notably, the series of U.S. Supreme Court decisions recognizing the parenting status of some unwed fathers.<sup>21</sup> But, in large measure, recent claimants asserting a right to equal parenting prerogatives have been stymied by a battery of impediments relating to standing, jurisdiction, or the merits.<sup>22</sup> As discussed in greater detail below, the broad view that emerges from this litigation, in varied contexts, is that parents are *not* constitutionally entitled to a co-equal role in raising their children following separation or divorce. The state, in this view, retains considerable discretion to allocate parental authority and access following dissolution, including giving one parent a superior and dominant child-rearing role, without having to prove extraordinary or compelling grounds.

This Article scrutinizes that conclusion. Is it right to think that the Constitution, which is said to zealously protect the rights and authority of parents within the intact family, falls away so sharply following divorce or family break-up? And, if so, why and on what ground? In my view, the Constitution does in fact tolerate unequal roles for parents in the divided family, although not for the reasons most courts have given. The reason the Constitution tolerates unequal roles is not that the parenting interests of non-custodial parents are unprotected or insubstantial, as some courts have reasoned, or that the “best interests” of children is a “compelling” state interest which categorically overcomes the fundamental rights of parents under strict constitutional scrutiny.<sup>23</sup> Rather, it is because constitutional protection of parental

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19. See Kim Kozlowski, *Divorced Michigan. Fathers Sue for Equity in Child Custody: Class-Action Lawsuit Seeks to Make Joint Custody the First Option Judges Consider*, DETROIT NEWS, Oct. 31, 2004, available at [http://www.fathers.ca/fathers\\_sue\\_for\\_equality.htm](http://www.fathers.ca/fathers_sue_for_equality.htm); Sheldon Gordon, *Fathers' Day*, NATIONAL, Dec. 2003 (describing similar legal claims in Canada), available at [http://www.canadiancrc.com/articles/CBA\\_Fathers\\_Day\\_2003.htm](http://www.canadiancrc.com/articles/CBA_Fathers_Day_2003.htm); see generally Maury D. Beaulier, *Establishing a Presumption for Joint Physical Custody*, TRANSITIONS, Mar. 1, 2006, at 1. For a listing and summary of the lawsuits, see the website of the Indiana Civil Rights Council, <http://indianacrc.org/classaction.html>.

20. See *infra* notes 90-137 and accompanying text.

21. See, e.g., *Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972); see also discussion *infra* Part III.A.

22. See discussion *infra* Parts III.B-C.

23. See *infra* notes 95-133 and accompanying text.

rights—of custodial and non-custodial parents alike—is always necessarily qualified by the competing interests of other family members. By this view, the qualification—or, to be frank, the weakness—of non-custodial parents’ rights does not so much reflect the unique disabilities of the non-custodial parent, as it does the relative weakness of “family privacy” rights more generally: Even within the ongoing “intact” family, the Constitution must be understood to leave room for sensitive accommodation by the state of the potentially conflicting interests of various family members. My claim, finally, is that honesty in confronting the dilemma posed by the claims of non-custodial parents should lead courts not to ratchet up dramatically the protection those parents receive, but to acknowledge candidly that the Constitution permits—and even requires—the state to balance the interests of others within the family in drawing the limits of family privacy.

This Article proceeds in three parts. Part I describes the evolution of modern custody law, providing a context for evaluating the present constitutional claims. Part II then surveys how non-custodial parents have fared in pressing their claims in court. Part III, finally, critiques the rationales courts have used to limit constitutional protection for non-custodial parents, and suggests an alternative basis for resolving these claims. It concludes, moreover, by suggesting why it would be preferable to openly concede the indeterminate nature of family-privacy protection, even if doing so would not drastically alter the bottom-line outcome of many family disputes over parenting.

## II. THE EVOLUTION OF CUSTODY LAW: FROM SOLE CUSTODY TO SHARED PARENTING

The law of child custody has undergone a dramatic transformation over the past 150 years—or, more accurately, several transformations.<sup>24</sup> American law began with a powerful presumption for custody with fathers. The entitlement of the father—“the Lord of the fireside,” in Chancellor Kent’s phrase—was nearly absolute and, as historian Michael Grossberg has noted, was “[m]oored in the medieval equation of legal rights with property ownership.”<sup>25</sup> The father was naturally

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24. See MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES xii (1994) [hereinafter MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS].

25. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 235, 240 (1985). Barbara Woodhouse has demonstrated how essentially similar property notions imbued the Supreme Court’s recognition of parental rights under the Constitution. See generally Barbara Bennett Woodhouse, “Who Owns the Child?”:

entitled to the benefit of the child's labor, it was supposed, in exchange for the father's investment in the child's support.<sup>26</sup> This rule favoring fathers gave way only if the father was shown to be wholly "unfit"—that is, if he were shown, in the words of one South Carolina judge, to have "monstrously and cruelly abused" his parental power;<sup>27</sup> otherwise, Blackstone observed, the mother was "entitled to no power, but only to reverence and respect."<sup>28</sup>

This rule was then turned on its head over the course of the nineteenth century. The rule favoring fathers in divorce had always coexisted with one granting mothers custody of children born outside marriage.<sup>29</sup> So-called "illegitimate children" were essentially disregarded by English law as "the child of no one," but by custom lived with their mothers.<sup>30</sup> And in early America this custom took on the force of law, with early custody battles recognizing a parallel entitlement of mothers to retain custody of non-marital children.<sup>31</sup>

Further cracks began to open in the paternal preference in cases of divorce as early as the 1810s and 1820s, with judges expressing new concern for the interests of children and for the unique values of "mother love," particularly for younger children.<sup>32</sup> By the end of the century, it had crumbled entirely, replaced with a mirror-image preference for mothers.<sup>33</sup> Under the Tender Years doctrine, mothers were heavily

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Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992).

26. See GROSSBERG, *supra* note 25, at 235; MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS, *supra* note 24, at 61.

27. In *Prather v. Prather*, 4 S.C. Eq. 33 (1809), the court wrote in an action seeking separate maintenance and custody against an abusive husband:

With respect to the children, I do not feel myself at liberty to take them out of the care and custody of the father. He is the natural guardian, invested by God and the law of the country, with reasonable power over them. Unless therefore his paternal power has been monstrously and cruelly abused, this court would be very cautious of interfering in the exercise of it.

*Id.*

28. See BLACKSTONE'S COMMENTARIES ON THE LAW 196 (Bernard C. Gavit ed., 1941); GROSSBERG, *supra* note 25, at 236.

29. See GROSSBERG, *supra* note 25, at 207-08.

30. See generally *id.* at 197-210; HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 1-8 (1971).

31. See GROSSBERG, *supra* note 25, at 207-11.

32. See Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1052-59 (1979) (describing how the common law's strict paternal entitlement began to give way to discretionary judicial consideration of child welfare in early nineteenth century cases).

33. See MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS, *supra* note 24, at 3-4. As Cynthia Starnes aptly notes, "[w]hat thus began as a rule of absolute paternal preference under Roman law evolved into a rule of absolute maternal preference in U.S. law, at least in cases of children of 'tender' years." Cynthia Starnes, *Swords in the Hands of Babes: Rethinking Custody Interviews After Troxel*, 2003 WIS. L. REV. 115, 120.

presumed to be the proper custodian of young children.<sup>34</sup> Custody went to fathers only if the mothers were altogether “unfit” to parent.<sup>35</sup>

Explicit gender preferences in custody were finally set aside in almost all states during the 1970s. A new intolerance for sex discrimination in equal protection doctrine, along with the entry of more women into the permanent workforce, made a categorical preference for mothers untenable.<sup>36</sup> Custody law was then recentered on a formally gender-neutral inquiry into the “best interest of the child.”<sup>37</sup>

This did not mean, of course, that gender bias no longer infected custody decisions, but it was largely pushed underground. Undoubtedly, some judges continue to favor mother custody generally, and some seem to disfavor men *or* women who buck traditional gender stereotypes.<sup>38</sup> A 2004 study of family court judges in Indiana, for example, found that more half expressed support for the Tender Years doctrine in private interviews and acted consistently with that view in deciding cases.<sup>39</sup> A study in 2005 by political scientists Elaine Martin and Barry Pyle concluded that the best predictor of voting behavior by state supreme court judges in divorce cases generally (not only custody disputes) was gender—with female judges favoring female litigants about 60% of the time and male judges favoring divorcing husbands about 55% of the

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34. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 19.4, at 799-800 (2d ed. 1988).

35. See Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 342 (1982).

36. See generally Fineman, *Fatherhood*, *supra* note 13, at 1038 (2001).

37. See *id.*

38. A task force study of the Virginia courts, for example, concluded that “[d]ecisions in custody matters may reflect gender bias” and that “[m]any participants in the study, particularly men, perceive that courts are biased against men in custody matters, which may be based to a great extent on continued application of the ‘tender years’ presumption.” Gender Bias in the Courts Task Force, *Gender Bias in the Courts of the Commonwealth Final Report*, 7 WM. & MARY J. OF WOMEN & L. 705, 718 (2001). Studies in other states have similarly concluded that gender bias continues to influence custody decisions. See *Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System*, 8 GA. ST. U. L. REV. 539, 657-58 (1992); *Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745, 827 n.47 (reprint 1990). *But cf.* Report of the Florida Supreme Court Gender Bias Study Commission 7 (Mar. 1990) (finding that “[c]ontrary to public perception, men are quite successful in obtaining residential custody of their children when they actually seek it,” but acknowledging that “[n]oncustodial fathers are disadvantaged in the allotment of visitation”), available at [http://floridasupremecourt.org/pub\\_info/documents/bias.pdf](http://floridasupremecourt.org/pub_info/documents/bias.pdf). See also Stephen J. Bahr et al., *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?*, 28 FAM. L.Q. 247, 255 (1994); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers To Parent*, 153 U. PA. L. REV. 921, 967-74 (2005); Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 906-18 (1998).

39. Julie E. Artis, *Judging the Best Interests of the Child: Judges’ Accounts of the Tender Years Doctrine*, 38 LAW & SOC’Y REV. 769, 771 (2004).

time.<sup>40</sup>

Although mothers still usually end up with custody of children—the latest census data shows that mothers lead single-parent households by a 5-to-1 margin—some studies suggest that fathers prevail in closer to half of all contested cases decided by a judge, a fact that in part may reflect selection effects in that small subset of cases.<sup>41</sup>

Throughout these changes—shifting focus from fathers to mothers to children—custody law through the 1970s remained premised on the idea of sole custody.<sup>42</sup> The point was always to designate a single custodial parent who would assume primary responsibility for the child. This parent lived with the child, tended to the daily joys and toils of child-rearing, and had final say in major decisions affecting the child—such as the child's education, religious upbringing, and medical care.<sup>43</sup>

The non-custodial parent, meanwhile, was consigned to a decidedly secondary role. These parents—in most cases fathers—were expected to pay child support and exercise “visitation,” a term many resented bitterly.<sup>44</sup> In a despairing number of cases, they did neither. Whether because of awkwardness over their new role, ongoing conflicts with the custodial parent, or other factors, a great many non-custodial fathers simply recede from their children's lives following divorce—and this is equally true even of fathers who were significantly involved with their children before the divorce.<sup>45</sup> Within a year of the breakup, most

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40. Elaine Martin & Barry Pyle, *State High Courts and Divorce: The Impact of Judicial Gender*, 36 U. TOL. L. REV. 923, 936 (2005).

41. See generally Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes—1920, 1960, 1990, and 1995*, 31 FAM. L.Q. 215 (1997). But cf. Elizabeth Brandt, *Cautionary Tales of Adoption: Addressing the Litigation Crisis at the Moment of Adoption*, 4 WHITTIER J. CHILD & FAM. ADVOC. 187, 215 n.166 (2005) (collecting conflicting data on question). Of course, only a tiny fraction of custody arrangements are resolved by judicial decision following trial. Eleanor Maccoby and Robert Mnookin famously found in their study of California divorces that judge-decided cases represented just 1.5 percent of all divorces involving children. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 137-38 (1992).

42. See Marygold S. Melli et al., *Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin*, 1997 U. ILL. L. REV. 773, 776 [hereinafter Melli et al., *Child Custody*].

43. See, e.g., *Rust v. Rust*, 864 S.W.2d 52, 55 (Tenn. Ct. App. 1993) (holding that “in the absence of specific provisions in the custody decree, the parent receiving custody retains the sole prerogative to make the significant decisions concerning the child's education, residence, religious training, and medical care”).

44. See, e.g., Marilyn Gardner, *Yours, Mine, Then Yours Again*, CHRISTIAN SCI. MONITOR, May 3, 2006, at 13 (quoting one supporter of shared parenting as stating that “[t]he words ‘custody’ and ‘visitation’ belong to prisons and hospitals” and that “[t]his may be useful language for the legal system, but not for families”).

45. See E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED* 118-21 (2002); Cynthia R. Mabry, *Disappearing Acts: Encouraging Fathers To Reappear for their Children*, 7 J.L. & FAM. STUD. 111, 114-18 (2005); Maldonado, *supra* note 38, at

children see their fathers only a few times a year, and contact drops off sharply after that.<sup>46</sup> Looking further out, nearly a quarter of divorced fathers report going at least five years without seeing their children.<sup>47</sup> By any measure, this is a shocking “drop out” rate; to fathers’ rights advocates, however, it reflects being “thrown away.”<sup>48</sup>

This sense of resentment led to the next major development in child custody law: joint custody. After its adoption in California in 1979, joint custody spread rapidly, with varying levels of enthusiasm, throughout the country.<sup>49</sup> Favored by a legal presumption in a large minority of states, it is merely tolerated in others as a permissible option.<sup>50</sup> What exactly is meant by “joint custody” varies significantly. Typically, it implies *joint legal custody*—meaning shared decision-making power over significant questions relating to the child’s upbringing (schools, doctors, and so on). Far less often, it also contemplates *joint physical custody*—an equal or roughly equal division of residential time with the child.<sup>51</sup>

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947.

46. See DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 22 (1995) (contending that “[t]oday, the principal cause of fatherlessness is paternal choice” and that “[s]ince 1960, even as paternal death continued to decline, rates of paternal abandonment skyrocketed”); DOWD, REDEFINING FATHERHOOD, *supra* note 4, at 23 (noting that “[f]orty percent of children in father-absent homes have not seen their fathers at all during the previous year,” and that “[o]nly one in six see his or her father at least once a week”); Frank F. Furstenberg et al., *The Life Course of Children of Divorce: Marital Disruption and Parental Contact*, 48 AM. SOC. REV. 656, 663-64 (1983) (finding that half of non-custodial fathers have virtually no contact with their children two years after divorce); Maldonado, *supra* note 36, at 946-47 (“Studies have found that nearly sixty percent of children whose parents had separated had seen their fathers only several times or less in the previous year, and almost thirty percent had not seen them at all in the previous year.”); Judith A. Seltzer, *Relationships Between Fathers and Children Who Live Apart: The Father’s Role After Separation*, 53 J. MARRIAGE & FAM. 79, 85 (1991).

47. See Maldonado, *supra* note 38, at 947; see also HETHERINGTON & KELLY, *supra* note 45, at 121 (in study of 1400 families of divorce, “a quarter of . . . children saw their fathers once a year or less” six years after divorce).

48. See generally, e.g., ROSS D. PARKE & ARMIN A. BROTT, THROAWAY DADS (1999); Ronald K. Henry, *Child Support at a Crossroads: When the Real World Intrudes Upon Academics and Advocates*, 33 FAM. L.Q. 235, 243-44 (1999); Dennis G. Vatsis, *Throwaway Dads: Making the Case for Fathers: Gender Bias Denies Dads Custody When Parents Divorce*, MICH. B.J., Sept. 2001, at 54.

49. See Carbone, *supra* note 11, at 1110-13; Jay Folberg, *Issues and Trends in the Law of Joint Custody*, in JOINT CUSTODY AND SHARED PARENTING 159, 160 (Jay Folberg ed. 1984).

50. See SCHEPARD, *supra* note 1, at 47; see generally Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: “Same Sex” Marriage Issue Dominates Headlines*, 38 FAM. L.Q. 777, 789-95 (2005).

51. Even within this subset of cases, there can be substantial variation. See Carbone, *supra* note 10, at 1114 (noting that “there is no requirement that shared care be shared equally, and the term can refer to anything from a strictly equal division of responsibility to little more than what used to be called visitation”). A study of Wisconsin cases, for example, showed that custody

A more recent innovation in custody law—similar but distinct from joint custody—is the “approximation rule.”<sup>52</sup> First proposed in a 1992 law review article by Professor Elizabeth Scott,<sup>53</sup> the approximation rule recently has been endorsed by the American Law Institute in its *Principles of the Law of Family Dissolution*<sup>54</sup> and has now been adopted into law in West Virginia.<sup>55</sup> The rule rejects the traditional division of child-rearing roles between a “custodial” and a “non-custodial” parent—and jettisons the freighted concept of “visitation”; instead, it favors an allocation of “custodial responsibility” approximating the division of child-rearing roles the parties had prior to the court’s intervention.<sup>56</sup> An explicit aim of this standard is to move away from the indeterminacy and potential bias of the “best interests” test, while preserving as much as possible of the routines and responsibilities both parents had crafted for themselves before their split.<sup>57</sup>

Initially, joint custody was eagerly embraced by legislators and judges as a way of validating and encouraging the involvement of both parents.<sup>58</sup> Over time, its reception has become more mixed.<sup>59</sup> Some have

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arrangements labeled as shared physical custody ranged from equal divisions of residential time to something closer to a 70/30 split. See Melli et al., *Child Custody*, *supra* note 42, at 799.

52. See generally Melli, *Shared-Parenting*, *supra* note 16. The approximation rule is similar to joint custody in that it favors the substantial ongoing involvement of both parents, but can result in unequal allocations of responsibility in couples that engaged in traditional role division in their marriage. As Andrew Schepard points out:

Although gender-neutral on its face, the approximation presumption was “crafted by women” as an alternative to joint custody, which they perceived as the “handiwork of men.” In most cases, the approximation presumption will allocate more of the child’s time to the mother, as mothers do most of the pre-divorce work of caring for children.

SCHEPARD, *supra* note 1, at 168 (footnote omitted).

53. See generally Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 617-18 (1992).

54. See AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.03 (Tentative Draft No. 3 Part I 1998) [hereinafter ALI PRINCIPLES].

55. See W. VA. CODE § 48-11-106 (2001).

56. See ALI PRINCIPLES, *supra* note 54, § 2.09; see also *id.* at 9 (explaining that while “[t]he traditional ‘custody’ and ‘visitation’ terminology symbolize and help to perpetuate the adversarial, win-lose nature” of traditional custody law, “custodial responsibility” instead “expresses the ordinary expectation that both parents have meaningful responsibilities for their child at divorce”).

57. Thus, Katharine Bartlett, the reporter for the custody principles, has aptly described the ALI’s approach as “family enabling” rather than “family standardizing.” Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 818 (1998); see also Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child’s Best Interests*, 35 WILLAMETTE L. REV. 467, 478-82 (1999); Melli, *Shared-Parenting*, *supra* note 16, at 353-54.

58. See James G. Dwyer, *A Taxonomy of Children’s Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 914-15 (2003). Katharine Bartlett and Carol Stack captured the sentiment, writing that “[u]nlike the ‘neutral’ best interests test or a primary caretaker presumption . . . rules [favoring joint custody] promote the affirmative

criticized joint custody on the ground that it awards fathers rights without corresponding duties,<sup>60</sup> and that it has induced some mothers to cede property or support rights in exchange for sole custody.<sup>61</sup> And some scholars have recently detected a general retreat from joint custody, with more judges limiting it to cases where both parents consent to the idea.<sup>62</sup>

Recently, fathers' rights groups—frustrated over the qualified acceptance of joint custody—have launched efforts in many states (and countries) to favor “shared parenting.” Several states, including Iowa, Maine, and Oregon, have already enacted legislation;<sup>63</sup> and additional bills have been introduced in a great many other states.<sup>64</sup>

Some of these “shared parenting” measures, such as the laws adopted in Iowa and Maine, create a presumption in favor of joint legal and physical custody, but allow sole custody if exceptional circumstances show it would serve a child’s “best interests.”<sup>65</sup> Some

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assumption that both parents should, and will, take important roles in the care and nurturing of their children.” Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN’S L.J. 9, 32-33 (1986).

59. See SANFORD N. KATZ, *FAMILY LAW IN AMERICA* 112 (2003); Carbone, *supra* note 11, at 1115.

60. See Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415-16 (1991); see also Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957, 973-74 n.29 (1999).

61. Studying Oregon divorce cases after the state amended its law to favor shared parenting, Margaret Brinig found that “the strengthening of the joint custody presumption in fact increased joint custody awards” and reduced child support awards. See Brinig, *Parental Autonomy*, *supra* note 16, at 1367-68. She observed: “Although I cannot say for sure whether wives disadvantaged by the new statute were trading money for child custody, it is perhaps significant that wives who are represented do better.” *Id.* at 1368; see also Melli, *Shared-Parenting*, *supra* note 16, at 352-53 (noting that use of joint custody has been criticized “as an attempt to reduce the amount of child support by promising a commitment to share the care for the child which is either short-lived or disregarded completely”).

62. See Dwyer, *supra* note 58, at 911; MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* 150 (2005).

63. See IOWA CODE § 598.41 (2006); ME. REV. STAT. ANN. tit. 19-A, § 1653 (2001); OR. REV. STAT. § 107.179 (2006). These laws are discussed in Brinig, *Parental Autonomy*, *supra* note 16, at 1345-49; similar measures proposed or enacted in Australia, Canada, England, France, and other countries are described in Parkinson, *supra* note 10, at 457-60, and Rhoades & Boyd, *supra* note 15, at 119-31.

64. See, e.g., Lam Vaiphei, *Alabama: Bill Introduced Regarding Joint Custody of Children*, U.S. FED. NEWS, Apr. 27, 2006, available at 2006 WLNR 7082185; Jim Kastama, *Shared Parenting Best for Children*, SEATTLE POST-INTELLIGENCER, May 3, 2006, available at [http://seattlepi.nwsourc.com/opinion/268781\\_kastamachild03.html](http://seattlepi.nwsourc.com/opinion/268781_kastamachild03.html) (op-ed article by state representative promoting shared-parenting legislation in Washington). A shared-parenting bill in New York, see N.Y. State Assembly, Bill No. A00330 (text of bill available at <http://assembly.ny.us/leg/?bn=A00330>), recently died in committee, see Michele Morgan Bolton, *Shared Parenting Proposal Fails in Committee: Assembly Panel’s Chairman Says Law Would Have Shifted Focus From the Best Interest of the Children*, ALBANY TIMES UNION, Apr. 26, 2006, at A3.

65. See IOWA CODE § 598.41 (2006) (“If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the

proposals, however, would go further. An initiative measure in North Dakota would recognize an entitlement to joint physical custody unless either parent were shown to be “unfit.”<sup>66</sup> Another in Michigan would amend the state constitution to create an entitlement to “equal parenting”—meaning “as close to 50 percent” of a child’s residential time “as possible”—unless the arrangement would put the child in “direct and imminent danger.”<sup>67</sup>

The more extreme of these are unlikely to succeed, but support for “shared parenting” is clearly significant, as evidenced by the recent enactments in some states. Taken together with the ALI’s movement toward the “approximation” approach toward allocating custodial responsibility, it is clear that the role of non-custodial parents—indeed, the very *idea* of “non-custodial” parents—is being fundamentally reconsidered.<sup>68</sup>

### III. CONSTITUTIONAL CLAIMS OF NON-CUSTODIAL PARENTS

In addition to pressing their case in the legislatures, fathers—and some non-custodial mothers—are also demanding rights in court. In a substantial flurry of recent litigation, they have tried to bypass the need for lobbying and legislation by asserting a constitutional entitlement to “shared parenting” and a more substantial role in raising their children.

The gist of these claims is straightforward: Going back to the 1920s in cases like *Meyer v. Nebraska*<sup>69</sup> and *Pierce v. Society of Sisters*,<sup>70</sup> the Supreme Court has held that parents have a fundamental constitutional

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awarding of joint physical care is not in the best interest of the child.”); ME. REV. STAT. ANN. tit. 19-A, § 1653 (2001) (“If either or both parents request an award of shared primary residential care and the court does not award shared primary residential care of the child, the court shall state in its decision the reasons why shared primary residential care is not in the best interest of the child.”); see also Stephanie N. Barnes, Comment, *Strengthening the Father-Child Relationship Through a Joint Custody Presumption*, 35 WILLAMETTE L. REV. 601 (1999) (advocating adoption of similar legislation in Oregon).

66. See Lisa Gibson, *North Dakota Secretary of State Approves Child Custody Initiative*, GRAND FORKS HERALD, Mar. 3, 2006; Lisa Gibson, *Child Custody: Whose Best Interest? Committee Opposes New Custody Initiatives*, GRAND FORKS HERALD, June 1, 2006.

67. See Non-custodial Parent and Grandparent Organization, *Proposed Amendment to the State of Michigan Constitution Promoting the Best Interests of the Child to Have Equal Access to Both Parents*, available at <http://angelfire.com/az/ecpa/lawprop2.html>.

68. See, e.g., Melli, *Shared-Parenting*, *supra* note 16, at 349-50, 362 (noting that shared parenting already “may be the fastest growing post-dissolution arrangement in the United States,” and that adoption of the ALI approximation standard “would probably result in an increase in shared parenting . . . .”); Parkinson, *supra* note 10, at 456-61. Parkinson surveys the “new legislative emphasis on shared parenting [in the United States and other Western nations] and the equally profound changes in patterns of parenting after separation . . . .” *Id.* at 461.

69. 262 U.S. 390 (1923).

70. *Pierce v. Soc’y of the Sisters of Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

right to raise their children without state interference.<sup>71</sup> Custody orders, public school policies, or other state action that sharply limit the child-rearing role of either parent, the argument goes, substantially burden that right, triggering strict judicial scrutiny. And, under strict scrutiny, the state must show some “compelling interest”—such as imminent harm to the child—to justify its intervention. Incantation of more amorphous interests, including the “best interests” of children, is insufficient.<sup>72</sup>

The argument is doctrinally plausible, and has been endorsed by some academic commentators.<sup>73</sup> But it has found little success in the courts. Indeed, a survey of court decisions across a range of topics shows considerable reluctance to recognize constitutional rights on the part of non-custodial parents. In part, the poor success rate may reflect, as Nancy Dowd has suggested, entrenched stereotypes that denigrate and discount the parenting interests of fathers.<sup>74</sup> In addition, however, I believe that the courts’ reluctance to credit seriously the constitutional rights of non-custodial parents ultimately says something of broader significance about constitutional rights of family privacy generally,

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71. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (observing that “[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court”). For discussions of the Constitution’s protection of parental rights, see generally Emily Buss, Essay, “*Parental*” Rights, 88 VA. L. REV. 635 (2002) [hereinafter Buss, “*Parental*” Rights]; Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109 (2000); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996); GUGGENHEIM, *supra* note 62, at 17-49; Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975 (1988).

72. See Don Fischer, Parenting as a Protected Constitutional Right, (Mar. 8, 2001), <http://www.gocrc.com/constitution.html>; see generally John C. Duncan, Jr., *The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity*, 83 NEB. L. REV. 1240 (2005) (discussing constitutional protection of parental rights and proposing legislation to mandate strict scrutiny of any state action impairing parental rights).

73. See Donald C. Hubin, *Parental Rights and Due Process*, 1 J. L. & FAM. STUD. 123, 134 (1999); Holly L. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27 (1985); James W. Bozzomo, Note, *Joint Legal Custody: A Parent’s Constitutional Right in a Reorganized Family*, 31 HOFSTRA L. REV. 547 (2002); Ellen Canacakos, Note, *Joint Custody as a Fundamental Right*, 23 ARIZ. L. REV. 785 (1981).

74. See Dowd, *Fathers and the Supreme Court*, *supra* note 13, at 1271; see also Gloria Chan, Comment, *Reconceptualizing Fatherhood: The Stakes Involved in Newdow*, 28 HARV. J.L. & GENDER 467, 468 (2005) (contending that *Newdow* “reflects a failure to acknowledge that fathers may indeed have important emotional connections with their children and reinforces the general sense that nonresident fathers are ‘important for their money but for little else’”); Linda Kelly, *The Alienation of Fathers*, 6 MICH. J. RACE & L. 181, 183 (2000) (contending that “[t]he reduction of a father’s parenting role to a financial obligation as represented by [*Miller v. Albright*, 523 U.S. 420 (1998),] affirms the marginalization of unwed fathers otherwise endorsed by the Court in the immigration context.”). Certainly, as Richard Storrow has pointed out, this would not be the only instance in which stereotypes have shaped the boundaries of the Court’s protection of family privacy. See Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527 (2001).

including the rights of custodial parents and parents in intact or “unitary” families.

### A. Unwed Fathers

The area where the rights of fathers have been most directly recognized is the so-called “unwed father” cases. Before the 1970s, unmarried men had scant legal protection as parents.<sup>75</sup> They were highly unlikely to win custody in a battle with the mother; if she chose to surrender the child for adoption by others, the father had no right to object;<sup>76</sup> and if she died, the state could assume custody of her children as if they were parentless.<sup>77</sup>

The Supreme Court significantly changed the status of unwed fathers, however, in a series of decisions in the 1970s and 1980s. In 1972, in *Stanley v. Illinois*,<sup>78</sup> the Court held that an unmarried father who had lived with his three children and their mother was constitutionally entitled to be recognized as a “parent” in deciding the children’s placement upon her death.<sup>79</sup> At the time, Illinois law did not regard the fathers of “illegitimate children” as legal parents.<sup>80</sup> Consequently, “the children of unwed fathers [became] wards of the State upon the death of the mother.”<sup>81</sup> Peter Stanley, who had lived together with Joan Stanley off and on for eighteen years without marrying, thus lost custody of his three children when she died. The Supreme Court, however, held that the Due Process Clause did not permit Illinois’ categorical disregard of unmarried fathers. At least some unwed fathers, the Court noted, “are wholly suited to have custody of their children,”<sup>82</sup> and Peter Stanley, like “all Illinois parents[,] [was] constitutionally entitled to a hearing on . . . [his] fitness” before his children could be removed from his care.<sup>83</sup> Seven years later, in *Caban v. Mohammed*,<sup>84</sup> the Court held that New York could not permit the adoption of an unmarried father’s

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75. See David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 758 (1999) [hereinafter Meyer, *Family Ties*].

76. See *Caban v. Mohammed*, 441 U.S. 380, 390 n.8 (1979).

77. See *Stanley v. Illinois*, 405 U.S. 645 (1972).

78. See *id.*

79. *Id.* at 658.

80. *Id.* at 649-50. Under then-governing Illinois law, “[p]arents . . . means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child’ . . . but the term does not include unwed fathers.” *Id.* at 650 (quoting Ill. Rev. Stat., c.37, § 701-14 (1972)).

81. *Id.* at 646.

82. *Id.* at 654.

83. *Id.* at 658.

84. 441 U.S. 380 (1979).

children by another man without first obtaining his consent or proving his unfitness, as was required for married parents.<sup>85</sup>

These were important victories in giving constitutional protection to the parenting interests of non-custodial parents. And, yet, the victories were also importantly qualified. First, only some unwed fathers qualified for constitutional protection.<sup>86</sup> In other cases, unwed fathers who had never had custody of their children, and had never “come forward to participate in the rearing” of their children, were deemed to fall outside the scope of the Constitution’s concern.<sup>87</sup> The only fathers who prevailed had at least formerly been custodial parents. Peter Stanley had always lived with his children; and Abdiel Caban had lived with his children for four years before their mother left him and married another man.<sup>88</sup> Indeed, partly for this reason, Katharine Baker contends that “the most important factor in determining whether a genetic father will be entitled to constitutional protection of his parental rights is his relationship with the mother.”<sup>89</sup> Unwed fathers prevail, she notes, where the evidence suggests an implicit agreement with the child’s mother to share parental rights.<sup>90</sup>

And, second, the only constitutional entitlement recognized in these cases was to preserve the status quo of parental status: Stanley got to remain with his children, as before; Caban got to veto the stepfather’s adoption and thereby preserve his status as a non-custodial parent. The unwed father cases do not, however, expressly recognize an entitlement to any particular substantive parenting role.

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85. See *id.* at 394. The Court had previously held that married or divorced fathers are constitutionally entitled to object to the adoption of their children. See *Armstrong v. Manzo*, 380 U.S. 545 (1965).

86. See DOWD, *REDEFINING FATHERHOOD*, *supra* note 4, at 98-105; Dowd, *Fathers and the Supreme Court*, *supra* note 13, at 1297-1307; Meyer, *Family Ties*, *supra* note 75, at 760-66; Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology ‘Plus’ Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 50-70 (2004).

87. *Lehr v. Robertson*, 463 U.S. 248, 267-68 (1983) (quoting *Caban*, 441 U.S. at 392); see also *Quilloin v. Walcott*, 434 U.S. 246, 252-53 (1978).

88. See *Stanley*, 405 U.S. at 650 n.4; *Caban*, 441 U.S. at 382.

89. Katharine K. Baker, *Bargaining or Biology?: The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL’Y 1, 34 (2004); see also Dowd, *Fathers and the Supreme Court*, *supra* note 13, at 1306-07 (stating that “the Court’s cases arguably require that unwed fathers cannot trigger constitutional protection unless they share a household for a considerable period of time with the mother and child, either because the Court is more comfortable with a marital-type relationship between the parents, or requires the opportunity for presumed conduct of parental nurture of the children”).

90. See Baker, *supra* note 89, at 34-35.

### B. Equal Custody

Where litigants have sought to establish more specific custodial prerogatives as a matter of constitutional right, they have made little headway. Most of the recent class-action lawsuits claiming a right to shared parenting have been poorly crafted and have failed on jurisdictional, immunity, or abstention grounds. In federal court, claimants who challenged the constitutionality of their state-court custody orders have foundered on the *Rooker-Feldman* doctrine, which bars “lower federal courts . . . from exercising appellate jurisdiction over final state-court judgments.”<sup>91</sup> Class actions seeking damages from state governments for alleged deprivations of parental rights have failed on grounds of the states’ immunity from suit under the Eleventh Amendment.<sup>92</sup> About the most substantial victory that can be claimed from this round of class actions is dictum in a Sixth Circuit opinion, otherwise affirming dismissal of the lawsuit, allowing that the complaint raised “very interesting constitutional questions.”<sup>93</sup>

Yet, when lawsuits have been properly framed and courts have managed to reach the merits of those questions, non-custodial parents still lose. In *Arnold v. Arnold*,<sup>94</sup> for example, a father appealed a custody order awarding him only 102 days per year with his children, rather than a perfectly equal split of 182.5 days per year. He argued that the state’s discretionary custody “statutes violate due process because they deprive[d] him a fundamental liberty interest in equally participating in the raising of his children.”<sup>95</sup> The Wisconsin Court of Appeals, however—like other courts hearing similar claims—ruled that the Constitution’s protection of parental rights was simply inapplicable in a

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91. *Lance v. Dennis*, 126 S. Ct. 1198, 1201 (2006); see, e.g., *Puletti v. Patel*, No. 05 CV 2293(SJ), 2006 WL 2010809, at \*5 (E.D.N.Y. July 5, 2006) (dismissing shared-parenting action on *Rooker-Feldman* grounds); *Chapman v. Oklahoma*, No. 04-CV-0722-CVE-PJC, 2006 WL 288102, at \*2-3 (N.D. Okla. Feb. 6, 2006) (same); see also *Hoblock v. Albany County Bd. of Elec.*, 422 F.3d 77, 87 (2d Cir. 2005) (stating in dictum that a parent’s constitutional challenge to a state court’s deprivation of parental rights would be barred by *Rooker-Feldman*). The *Rooker-Feldman* doctrine, named for the Supreme Court’s decisions in *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 416 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 462 (1983), is founded on the rationale that only the U.S. Supreme Court has jurisdiction to review the judgments of state courts. See *Lance*, 126 S. Ct. at 1200-01.

92. See, e.g., *Ammann v. Connecticut*, No. 3:04CV1647, 2005 WL 465401, at \*1 & n.2 (D. Conn. Feb. 10, 2005) (dismissing complaint on Eleventh Amendment grounds and collecting citations to dismissals of other, similar actions in other courts); *Puletti*, 2006 WL 2010809, at \*7-8 (holding that claim for damages for denial of custody rights is barred by Eleventh Amendment).

93. See *Galluzzo v. Champaign Cty. Ct. of Comm. Pls.*, 168 F. App’x. 21, 23 (6th Cir. 2006).

94. 679 N.W.2d 296 (Wis. Ct. App. 2004), rev. denied, 679 N.W.2d 547 (Wis. 2004), cert. denied, 543 U.S. 873 (2004).

95. *Id.* at 298.

custody dispute between two “natural parents.”

“[W]hile parents do have a natural right to care and custody of their children,” the *Arnold* court concluded, “this does not mean that parents have a ‘fundamental right’ to ‘equal placement periods’ after divorce.”<sup>96</sup> The reason, *Arnold* and other courts have suggested, is that a mediating role by the state is necessary to resolve what otherwise would be a deadlock of conflicting rights.<sup>97</sup> “Custody and visitation disputes between two fit parents,” a Virginia appellate court explained in 2003, “involve one parent’s fundamental right pitted against the other parent’s fundamental right. The discretion afforded trial courts under the best-interests test . . . reflects a finely balanced judicial response to this parental deadlock.”<sup>98</sup> The idea, apparently, is that a discretionary “best interests” assignment of custody is permissible in these cases because the fundamental rights of the two parents effectively cancel each other out, removing any constitutional impediment to state intervention.<sup>99</sup>

In a recent article, Margaret Brinig takes a different tack, suggesting (in company with some other courts<sup>100</sup>) that the “best interests” test is constitutional in custody cases because it qualifies as a “compelling” state interest.<sup>101</sup> She points out that a long line of Supreme Court decisions emphasize state-court primacy in domestic relations cases and demonstrate a strong inclination to leave state courts with

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96. *Id.* at 299 (footnote omitted); *accord* *Lofthus v. Lofthus*, 678 N.W.2d 393, 397-98 (Wis. Ct. App. 2004); *Lawson v. Reynolds*, No. S-10053, 2002 WL 1486484, at \*9-10 (Alaska July 10, 2002).

97. *Arnold*, 679 N.W.2d at 299 (writing that the father-claimant had “not demonstrated why, following a divorce between parents, the state does not have the right to arbitrate any dispute those parents may have over what happens to their children”).

98. *Griffin v. Griffin*, 581 S.E.2d 899, 902 (Va. Ct. App. 2003).

99. For other cases holding that the offsetting rights of parents displace strict-scrutiny protection of fundamental rights and allows use of a “best interests” standard to resolve custody disputes, see *McDermott v. Dougherty*, 869 A.2d 751, 808-09 (Md. 2005); *Jacobs v. Jacobs*, 507 A.2d 596, 599 (Me. 1986); *In re R.A.*, 891 A.2d 564, 576 (N.H. 2005); *Winfield v. Winfield*, No. 2002-L-010, 2003 WL 22952773, at \*4 (Ohio Ct. App. Dec. 12, 2003); *Julian v. Julian*, No. M1997-00236-COA-R3-CV, 2000 WL 343817, at \*4 (Tenn. Ct. App. Apr. 4, 2000). *Cf.* *Bancroft v. Bancroft*, 578 A.2d 114, 117-18 (Vt. 1990) (rejecting father’s claim that use of “best interests” standard violated his fundamental parental rights and observing that “[s]ince both Robert and Linda are the natural parents of the children, there is no presumption that the best interests of the children are served by granting custody to either one of them”).

100. See *Eichinger v. Eichinger*, 31 Fam. L. Rep. (BNA) 1191 (Ind. Cir. Ct. 2004) (describing court’s holding that “statute’s ‘best interest of child’ standard constitutes compelling state interest that justifies resultant interference with rights of biological parents, and thus does not violate substantive due process”), *aff’d*, 808 N.E.2d 1241 (Ind. Ct. App.), *cert. denied*, 543 U.S. 1150 (2005); *Julian*, 2000 WL 343817, at \*4 (stating that “as important as a parent’s rights and interests are, they are secondary to the rights and interests of their children”).

101. See Brinig, *Parental Autonomy*, *supra* note 16, at 1358.

considerable discretion in deciding custody.<sup>102</sup> And she points to Supreme Court opinions, as in *Palmore v. Sidoti*,<sup>103</sup> recognizing that “[t]he State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years.”<sup>104</sup> “Thus,” Professor Brinig concludes, “as a matter of constitutional law, the best interests of the child, protected by the state, should prevail over the constitutional interests of either of the competing parents.”<sup>105</sup> Indeed, in 1993 the Supreme Court readily assumed that “[t]he best interests of the child,” a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody.<sup>106</sup>

### C. Child-Rearing Authority

Even if the Constitution does not entitle each parent to residential custody of a child, it might at least be thought to ensure each parent a major role in raising the child. Yet, non-custodial parents who have limited themselves to seeking a substantial role in rearing their children *as non-custodial parents* have fared little better. Some judges have recognized, at least in passing, a fundamental right of non-custodial parents to some visitation with their children—so that a court’s complete denial of access would trigger constitutional scrutiny as tantamount to a termination of parental rights.<sup>107</sup> But if non-custodial parents aspire to more than a bare minimum of access to a child—to assert, for instance, their views about how their children should be raised or educated—the courts are notably less receptive.

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102. See *id.* at 1351-55. Professor Brinig notes, for example, the Supreme Court’s articulation of a “domestic relations exception” to federal diversity jurisdiction in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). See Brinig, *Parental Autonomy*, *supra* note 16, at 1351.

103. 466 U.S. 429 (1984).

104. *Id.* at 433; see Brinig, *Parental Autonomy*, *supra* note 16, at 1357-58.

105. Brinig, *Parental Autonomy*, *supra* note 16, at 1358.

106. *Reno v. Flores*, 507 U.S. 292, 303-04 (1993). *Reno v. Flores* did not, however, present a constitutional challenge to the “best interests” standard. To the contrary, the constitutional claim—rejected by the Court—was that a “best interests” inquiry was constitutionally *required* in placing juvenile aliens in government custody.

107. See, e.g., *Bueno v. Todd*, No. W2005-02164-COA-R3-CV, 2006 WL 2106006, at \*5 (Tenn. Ct. App. July 31, 2006) (stating that “courts have recognized that non-custodial parents have a fundamental right to visit their children”); *In re ANO*, 136 P.3d 797, 803 (Wyo. 2006) (stating that “the right to associate with one’s child is a fundamental right”); *Wigginton v. Wigginton*, 692 N.W.2d 108, 114 (N.D. 2005) (Sandstrom, J., concurring); cf. *In re A.G.*, 900 A.2d 677, 682-83 (D.C. 2006) (sustaining custody order that limited non-custodial father to visitation at the “sole discretion” of the child’s guardians and reasoning that “[w]hether appellant has a constitutional right to visit his daughter is irrelevant to this case, because the trial court did not prohibit him from doing so”; the court left open the possibility of reconsidering the constitutional claim if the guardians denied all visitation).

The most prominent example is *Elk Grove Unified School District v. Newdow*,<sup>108</sup> the recent Pledge of Allegiance case. In *Newdow*, a father claimed that the recitation of the Pledge at his daughter's public school violated both the First Amendment and his fundamental rights as a parent to determine her religious upbringing.<sup>109</sup> The Court held that he lacked standing to bring the claims, and it grounded that conclusion in *Newdow*'s limited rights under state law as a non-custodial parent.<sup>110</sup> Although *Newdow* was nominally granted "joint legal custody," the custody decree specified that the girl's mother—with whom she lived—would have final say over her upbringing, making *Newdow* a *de facto* non-custodial parent.<sup>111</sup>

"*Newdow*'s parental status," Justice Stevens wrote, "is defined by California's domestic relations law."<sup>112</sup> The Court accepted that "state law vests in *Newdow* a cognizable right to influence his daughter's religious upbringing" and that "the state cases create a zone of private authority within which each parent, whether custodial or non-custodial, remains free to impart to the child his or her religious perspective."<sup>113</sup> But California law did *not* grant *Newdow*, as a non-custodial parent, "a right to dictate to others what they may and may not say to his child respecting religion."<sup>114</sup> Because state law assigned that authority to the girl's mother as the custodial parent, *Newdow* could not object to state-sponsored religious indoctrination of his daughter on the ground that it violated his own constitutional rights as a parent.

By tying the scope of enforceable parental authority under the Constitution to the generosity of a particular custody order, the Court in *Newdow* seemed not to allow for constitutional parenting rights beyond those provided under state law: If state law declined to confer a particular parenting prerogative, the non-custodial parent would have no basis to object under the Constitution.<sup>115</sup>

The implications of *Newdow* for the constitutional rights of non-custodial parents are uncertain. It was possible, after all, that the Court's

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108. 542 U.S. 1 (2004).

109. *Id.* at 8-10.

110. *Id.* at 16-17.

111. *See id.* at 14 & n.6.

112. *Id.* at 16.

113. *Id.*

114. *Id.* at 17.

115. For a critical analysis of this point, see David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 47, 56-59 (Robin Fretwell Wilson ed., 2006) [hereinafter Meyer, *Partners*]. Cf. Dowd, *Fathers and the Supreme Court*, *supra* note 13, at 1279 (criticizing *Newdow* for "mak[ing] constitutional standing rest on the designation of whether a parent is either the sole, primary, or joint custodial parent").

narrow view of standing was merely a convenient device to avoid the merits of a highly politicized case—that it was, in Justice Owen Roberts’ famous phrase from *Smith v. Allwright*,<sup>116</sup> like “a restricted railroad ticket, good for this day and train only.”<sup>117</sup> As Douglas Laycock has written, “*Newdow* . . . may have been politically impossible to affirm and legally impossible to reverse.”<sup>118</sup> Standing provided a convenient exit.<sup>119</sup>

But some lower courts have taken *Newdow* at its word and cabined the constitutional rights of non-custodial parents more broadly, in contexts far removed from the controversy over the pledge. In *Brittain v. Hansen*,<sup>120</sup> for example, the Ninth Circuit rejected a non-custodial mother’s claim that police violated her fundamental parenting rights by wrongfully interfering with her visitation with her son. The court held, as a matter of first impression in the Circuit, that non-custodial parents retain a “liberty interest in the companionship, care, custody, and management of their children,” but emphasized that their constitutional rights are necessarily circumscribed by underlying custody orders and are “unambiguously lesser in magnitude than that of a parent with full legal custody.”<sup>121</sup> Any broader view of a non-custodial parent’s constitutional parenting rights, the court reasoned, “would fail to give proper effect to the state court’s [custody] judgment.”<sup>122</sup> A non-custodial parent might, consistent with the underlying custody order, retain a constitutional liberty interest in court-ordered visitation, but it is limited: *Brittain* held that an alleged police conspiracy to deprive a parent of a visitation period “did not rise to the level of a constitutional violation.”<sup>123</sup>

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116. 321 U.S. 649 (1944).

117. *Id.* at 669 (Roberts, J., dissenting); see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 25 (2003) (Rehnquist, C.J., concurring in the judgment).

118. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 224 (2004).

119. See *Newdow*, 542 U.S. at 25 (Rehnquist, C.J., concurring) (describing the Court’s standing concerns as “ad hoc improvisations” for avoiding the merits of *Newdow*’s claim); Dowd, *Fathers and the Supreme Court*, *supra* note 13, at 1277 (contending that “[t]he controversial nature of the case suggests the Court was eager to avoid deciding the substantive issue by any means possible”).

120. 451 F.3d 982 (9th Cir. 2006).

121. *Id.* at 992.

122. *Id.*; see also *id.* at 989, 991 (citing *Newdow*).

123. *Id.* at 994; see also *Zakrzewski v. Fox*, 87 F.3d 1011, 1014 (8th Cir. 1996) (concluding that state interference with a non-custodial parent’s visitation rights does not implicate fundamental constitutional parenting rights because the parent’s “liberty interest in the care, custody, and management of his son has been substantially reduced by the terms of the divorce decree and Nebraska law”); *Wise v. Bravo*, 666 F.2d 1328, 1331-33 (10th Cir. 1981) (finding that temporary state interference with non-custodial parent’s visitation with child implicated no federal

*Crowley v. McKinney*,<sup>124</sup> decided by the Seventh Circuit in 2005, provides another example. Daniel Crowley, a non-custodial parent, brought suit against the principal of his son's public elementary school in the Chicago suburbs, contending that the school had violated his constitutional rights as a parent by excluding him from all participation in his children's education.<sup>125</sup> Crowley, who was angry over the school's failure to protect his son from ongoing bullying and assaults, had been a vocal critic of school officials. In time, the school had barred Crowley from visiting campus and denied him access to all information about his son's schooling.<sup>126</sup>

The court, in an opinion by Judge Richard Posner, found no constitutional violation. The court acknowledged, of course, that *Meyer* and *Pierce* recognize a fundamental parental right to "a degree of parental control over children's education."<sup>127</sup> But the court went on to find those cases "remote" from Crowley's claim of injury for two reasons: *First*, they involved "a greater intrusion on parental control,"<sup>128</sup> namely, the complete denial of a private education, rather than mere impediments to a parent's "micromanaging his children's education."<sup>129</sup> And, *second*, "they concern the rights of parents acting together rather than the rights retained by a divorced parent whose ex-spouse has sole custody."<sup>130</sup>

If the custodial parent actively opposed Crowley's asserted interest in his son's schooling, Judge Posner wrote, then he would lack standing under *Newdow*.<sup>131</sup> Even if the mother were indifferent, so as to permit standing, Crowley failed on the merits. Judge Posner allowed that "*Newdow* should not be overread to extinguish the constitutional rights of non-custodial parents."<sup>132</sup> Nevertheless, Crowley's status as a non-custodial parent sufficiently weakened his parental interest to take his

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constitutional right of parent); *Luber v. Ross*, No. 1:03CV0493 (GLS/RFT), 2006 WL 37466, at \*4 & n.9 (N.D.N.Y. Jan. 5, 2006) (rejecting any suggestion that a child abuse investigation, resulting in loss of custody and visitation rights, violated father's constitutional rights, reasoning that "[a]s a non-custodial parent Luber does not have a fundamental liberty interest in his visitation rights under these circumstances"). For a thoughtful examination of parents' constitutional claims to pre-deprivation process when police remove children from parents suspected of abusing them, see Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L.J. 913 (2004).

124. 400 F.3d 965 (7th Cir. 2005).

125. *Id.* at 967-68.

126. *Id.*

127. *Id.* at 968.

128. *Id.*

129. *Id.* at 971.

130. *Id.* at 969.

131. *See id.* at 970.

132. *Id.*

claim outside the scope of fundamental constitutional protection.<sup>133</sup> After noting the practical difficulties that school districts might face if confronted with competing claims of parental authority in a divided family, Judge Posner concluded:

[I]n the divorce decree Mr. Crowley surrendered the only federal constitutional right vis-à-vis the education of one's children that the cases as yet recognize, and that is the right to choose the school and if it is a private school to have a choice among different types of school with different curricula, educational philosophies, and sponsorship (e.g., secular versus sectarian).<sup>134</sup>

Dissenting, Judge Diane Wood objected that “the majority implies that a non-custodial parent’s fundamental rights are not entitled to the same degree of protection as those of a custodial parent,” and that “[n]othing in the Constitution . . . supports such a proposition.”<sup>135</sup> She worried that the court’s inability to “see[] . . . [any] federal constitutional dimension in the deprivations that the school district has imposed upon Daniel Crowley”<sup>136</sup> threatened to spell “disaster for an enormous number of children in this country whose parents have become divorced.”<sup>137</sup>

Most courts, however, do not share Judge Wood’s view. Either through standing, narrowing the boundaries of protected parental liberty, or generous assessments of the state’s “compelling” interest in child welfare, judges find ways to defeat the constitutional claims of non-custodial parents.<sup>138</sup>

#### IV. ANOTHER VIEW: INTRA-FAMILY CONFLICT AND BALANCING

The dominant rationales given by courts for limiting the rights of non-custodial parents strike me as unconvincing. The view that, at least where there is sole custody, constitutional protection for parental authority should be concentrated entirely in the custodial parent seems to proceed from one of two possible sources—one theoretical and one more pragmatic.

The theoretical justifications have to do with competing

133. See *id.* at 970-71.

134. *Id.* at 971. The court added: “So we greatly doubt that a non-custodial divorced parent has a federal constitutional right to participate in his children’s education at the level of detail claimed by the plaintiff.” *Id.*

135. *Id.* at 975 (Wood, J., dissenting in part, concurring in part).

136. *Id.* at 973 (Wood, J., dissenting in part, concurring in part).

137. *Id.* at 974 (Wood, J., dissenting in part, concurring in part).

138. See Ralph D. Mawdsley, *Noncustodial Parents’ Right to Direct the Education of Their Children*, 199 EDUC. L. REP. 545, 558 (2005) (concluding, after *Crowley*, that “the extent to which the liberty clause right to direct a child’s education applies to a noncustodial parent is not clear”).

conceptions of the underlying constitutional right. In one view, privacy protection might be tied to the family as an entity.<sup>139</sup> As Judge Posner noted, *Meyer* and *Pierce*—as well as *Griswold v. Connecticut*,<sup>140</sup> *Loving v. Virginia*,<sup>141</sup> and similar cases vindicating rights of “family privacy”—each proceeded on the assumption that all family members stood together in opposing the state’s intervention.<sup>142</sup> Perhaps the non-custodial parent, as the “odd man out” of the reformulated family unit, simply moves outside the circle of privacy protection.

Yet, a view of “family privacy” limited exclusively to the family entity cannot be squared with much of the Supreme Court’s jurisprudence, particularly since *Eisenstadt v. Baird*<sup>143</sup> recharacterized privacy as “the right of the *individual*, married or single, to be free from unwarranted governmental intrusion”<sup>144</sup> into profoundly personal decisions.<sup>145</sup>

Another possible justification for denying rights to non-custodial parents—similar but distinct from the focus on the family as an entity—might be traced to a view that anchors parental rights in an assessment of their utility to children. Emily Buss and Elizabeth Scott, for instance, each have advanced compelling child-centered conceptions of parental rights that justify strong protection of parental prerogative on the ground that parental autonomy serves child welfare by encouraging greater parental investment in childrearing.<sup>146</sup>

In a somewhat different vein, scholars such as Anne Dailey and Linda McClain have emphasized the role of parental autonomy in fostering the capabilities of children as future democratic participants.<sup>147</sup> As Justice Rehnquist once wrote:

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139. See Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1211-12 (1999) [hereinafter Fineman, *Family Privacy*].

140. 381 U.S. 479 (1965).

141. 388 U.S. 1 (1967).

142. See *Crowley*, 400 F.3d at 968-69.

143. 405 U.S. 438 (1972).

144. *Id.* at 453.

145. See generally Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519 (1994); Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 976-77 (1993) [hereinafter Dailey, *Constitutional Privacy*]; Fineman, *Family Privacy*, *supra* note 139, at 1212-13.

146. See Buss, “Parental” Rights, *supra* note 71, at 636, 647-50; Elizabeth S. Scott, *Parental Autonomy and Children’s Welfare*, 11 WM. & MARY BILL OF RTS. J. 1071, 1072-73 (2003); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2414-18 (1995).

147. See LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 42-43, 66-71 (2006); Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431 (2006); Dailey, *Constitutional Privacy*, *supra* note 145, at 958-60.

Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."<sup>148</sup>

Drawing on these instrumental theories of parents' rights, it might be argued that recognition of fundamental child-rearing rights for non-custodial parents is unwarranted. If extending privacy protection to non-custodial parents would erode the prerogative of custodial parents, that might undermine the child-welfare benefits of parental autonomy.

An initial difficulty with such a contention is that it seems to presuppose that the non-custodial parent's potential investments in childrearing are dispensable—that the enhanced investments of the custodial parent induced through broader autonomy will benefit the child more than is lost through the foregone investments of the excluded parent. After all, if autonomy is instrumental in inducing selfless parental investment, the denial of autonomy to non-custodial parents should be expected to diminish their contributions. At least where parents are cooperative, children in fact appear to benefit developmentally from the substantial involvement of both parents.<sup>149</sup>

More broadly, an exclusively child-centered conception of parental rights may give insufficient acknowledgment to the weighty interests of parents themselves. Other family privacy rights, including the right to marry and form a family, have been justified by an assessment of the individual claimant's profound stakes in a decision and by a social consensus that the right at issue warrants protection against state control.<sup>150</sup> Even if we agree that the stakes for the child are relatively weightier in the parent-child relation, it is impossible to deny that the

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148. *Santosky v. Kramer*, 455 U.S. 745, 790 (1982) (Rehnquist, J., dissenting) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)).

149. See SCHEPARD, *supra* note 1, at 31-35; David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2601 (1995) ("Children of divorce are reported to fare best when they have interactions with both parents, and the parents' relationship is cooperative."); Maldonado, *supra* note 36, at 961 (discussing social science evidence showing that "when parents are able to cooperate in child rearing after a divorce and when fathers are able to maintain an active and supportive role, children will be better off in the long run"); Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 705 (1985) (reviewing empirical evidence showing that "[r]egular contact with both parents not only provides emotional comfort for the child whose parents divorce but also increases the quality of parenting the child receives as a result of it").

150. See *generally* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

parent herself also shares profoundly important stakes in the relationship and that parental rights are grounded at least partly in a social consensus about the just deserts of parents.

In *Santosky v. Kramer*,<sup>151</sup> for instance, the Supreme Court rationalized heightened constitutional protection against termination of parental rights—requiring “clear and convincing evidence” of any alleged parental misconduct—on the ground that it mutually served the important interests of both children and parents.<sup>152</sup> True, *Santosky* presumed that children, too, would benefit from this protection of parental rights.<sup>153</sup> But the Court’s assertion of an identity between the interests of parents and children appeared to be more of an afterthought, intended to bat away a pesky argument for watering down parents’ rights, rather than an expression of the foundational justification for according any protection to parents’ rights.<sup>154</sup> When it came to articulating the “private interests” that warranted heightened procedural safeguards against erroneous intervention, the Court spoke first and most emphatically about the “grave” consequences of termination for parents: “Even when blood relationships are strained,” the Court wrote, “parents retain a vital interest in preventing the irretrievable destruction of their family life.”<sup>155</sup> The interests of children were secondary.<sup>156</sup>

In *Reno v. Flores*,<sup>157</sup> the Court seemed to go even farther in acknowledging that the interests of parents are worthy of legal recognition independent of any derivative benefits to children. The Court observed that the “best interests” standard used in parent-versus-parent custody disputes does not ordinarily apply in conflicts between parents and non-parents because “the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.”<sup>158</sup>

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151. 455 U.S. 745 (1982).

152. *See id.* at 765-69.

153. *See id.* at 760-61, 765.

154. The majority’s assertion was responding in part to the dissent’s suggestion that the constitutional question pitted parents’ rights against countervailing children’s interests. In contrast to the majority, then-Justice Rehnquist described the constitutional choice in these terms:

When, in the context of a permanent neglect termination proceeding, the interests of the child and the State in a stable, nurturing homelife are balanced against the interests of the parents in the rearing of their child, it cannot be said that either set of interests is so clearly paramount as to require that the risk of error be allocated to one side or the other.

*Id.* at 790-91 (Rehnquist, J., dissenting).

155. *Id.* at 753.

156. *See id.* at 759 (“We do not deny that the child and his foster parents are also deeply interested in the outcome of [the court’s factfinding concerning parental fault and fitness]. But at the factfinding stage of the New York proceeding, the focus emphatically is not on them.”).

157. 507 U.S. 292 (1993).

158. *Id.* at 304. Justice Stevens reached the same conclusion in denying a request to stay the

I am inclined to believe, therefore, that the theoretical foundations of parents' rights under the Constitution, at least as the Supreme Court has defined them, are broader than their specific utility to children. Their instrumental value to child welfare—the “presumption that fit parents act in the best interests of their children”<sup>159</sup>—is most certainly part of the underpinning. But the profound significance of the parent-child relationship *to parents*, and society's solicitude for the “grave” injury they would suffer from its attenuation,<sup>160</sup> is independently part of what underlies the limitation on state power.<sup>161</sup> Accordingly, parental rights under the Constitution require a recognition that *all* parents, regardless of their designation in a custody decree, share in these rights.

The second explanation for the courts' reluctance to recognize constitutional protection for non-custodial parents is a pragmatic concern for the consequences. Recognizing fundamental parenting rights for non-custodial parents, it is feared, would open the floodgates to innumerable petty and burdensome claims. This was plainly a concern, for instance, animating Judge Posner's opinion in *Crowley v. McKinney*,<sup>162</sup> in which he emphasized the practical burdens that would be imposed on schools by allowing non-custodial parents to contend with custodial parents in “micromanaging” a child's education.<sup>163</sup> Crediting the asserted claims

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court-ordered transfer of the two-year-old girl known as “Baby Jessica” from her would-be adoptive parents to her biological father. Summarily rejecting the suggestion that the Constitution required consideration of the child's “best interests” in the matter, Justice Stevens emphasized that “[n]either Iowa law, nor Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and education.” *DeBoer v. DeBoer*, 509 U.S. 1301, 1302 (1993).

159. *Troxel v. Granville*, 530 U.S. 57, 68 (2000); *see also Parham v. J.R.*, 442 U.S. 584, 602 (1979).

160. 455 U.S. 745, 759-66 (1982).

161. *See Meyer, Partners, Care Givers*, *supra* note 115, at 60-61. In addition to defending a strong conception of parental autonomy on the ground that it advances the interests of children, Martin Guggenheim observes that constitutional protection also serves important adult interests:

The right to bear and raise children is at the core of an individual's autonomy because it permits him or her the opportunity to choose the kind of life that makes the most sense. . . . Parental rights help construct and support “an aspect of human self-definition and moral choice.” This is because, for so many of us, our understanding of ourselves is based on our intimate relationships with others.

GUGGENHEIM, *supra* note 62, at 32 (quoting PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES*, 168 (1997)). Accordingly, he concludes:

[I]t may be misleading to suggest that the parental rights doctrine was developed for the purpose of serving children's interests. At the very least, it is important to acknowledge that the parental rights doctrine is unjustifiable *solely* in terms of the value it serves to children. The doctrine furthers vital interests of American society and may be defended on grounds outside of child-focused claims.

*Id.* at 47.

162. 400 F.3d 965 (7th Cir. 2005).

163. *See id.* at 969-71.

with strict-scrutiny protection would hamstring government—forcing school officials to jump to every demand of a meddlesome parent and depriving divorce courts of valuable discretion to craft custody arrangements that suit the unique circumstances of each family.

Further compounding the difficulty is the realization that when family members disagree about a given matter, recognizing a robust constitutional entitlement on the part of one family member may necessarily impinge on the rights of others.<sup>164</sup> This was clearly one of the concerns driving Justice Stevens' standing analysis in *Newdow*:

The difficulty . . . is that Newdow's rights, as in many cases touching upon family relations, cannot be viewed in isolation. This case concerns not merely Newdow's interest in inculcating his child with his views on religion, but also the rights of the child's mother . . . . And most important, it implicates the interests of a young child who finds herself at the center of a highly public debate . . . .<sup>165</sup>

In order to avoid such entanglements, then, and to leave room for reasonable state regulations of family conflicts (over school records, custodial responsibility, or so on), courts have struggled to exclude non-custodial claims by constricting the scope of fundamental constitutional protection or by holding that any intrusions are categorically justified by the state's "compelling interest" in child welfare.<sup>166</sup>

I am sympathetic to the latter stratagem, but I do not think it is truly convincing. The "best interests" of the child is simply too broad and amorphous a concept to qualify *categorically* as a compelling state interest.<sup>167</sup> It can potentially mean nothing more than a marginal advantage over closely matched alternatives. What's more, the Supreme Court has already indicated that it does not weight children's "best interests" more heavily than the rights of parents. In *Caban v. Mohammed*,<sup>168</sup> for example, the Court accepted that "the best interests of [illegitimate] children often may require their adoption into new families who will give them the stability of a normal, two-parent home."<sup>169</sup> Yet, in the next breath, it held that this interest could not justify stripping Abdiel Caban of his constitutionally protected parental status.<sup>170</sup>

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164. See Dailey, *Constitutional Privacy*, *supra* note 145, at 986-87; David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 554-58 (2000) [hereinafter Meyer, *Paradox of Family Privacy*].

165. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 15 (2004).

166. See *supra* notes 88-102 and accompanying text.

167. See Garnett, *supra* note 71, at 114.

168. 441 U.S. 380 (1979).

169. *Id.* at 391.

170. See *id.*; Reno v. Flores, 507 U.S. 292, 304 (1993) (acknowledging that child's "best

Likewise, in *Palmore v. Sidoti*,<sup>171</sup> the Court gave lip service to the “children’s interests” being a public concern of “the highest order,” but went on to hold that the trial court’s undisturbed “best interests” finding was insufficient to sustain the order through strict scrutiny.<sup>172</sup> In *Palmore*, the trial court had ordered a change of custody to the father based upon the mother’s impending marriage to a man of a different race; the trial court found that suffering the racial prejudices that would be directed at her mother’s interracial household would not be in the girl’s “best interests.”<sup>173</sup> On review, the Supreme Court did not unsettle that factual finding—indeed it frankly acknowledged that “[i]t would ignore reality to suggest that racial and ethnic prejudices do not exist” and that they might subject the young child to “a variety of pressures and stresses” that might be avoided by a change of custody.<sup>174</sup> Yet, while insisting that “[t]he goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause,”<sup>175</sup> this finding was incapable of satisfying the government’s burden under strict scrutiny of demonstrating a compelling state interest.<sup>176</sup>

Nor do I think it is appropriate to shrink the boundaries of the fundamental parenting right in order to leave desired room for reasonable state regulation or accommodation of the competing interests of other family members. In my view, Judge Posner goes too far in concluding that the Constitution is not interested in a school’s exclusion of a non-custodial parent, just as I think it incorrect to hold that parental

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interests” may be subordinated to interests of parents and others); *DeBoer*, 509 U.S. at 1302 (declaring that a child’s “best interests” cannot justify depriving a fit parent of custody).

171. 466 U.S. 429 (1984).

172. *See id.* at 432-33.

173. *Id.* at 430-31. Of course, as Margaret Brinig properly points out, the “best interests” concern asserted in *Palmore* may have “provide[d] cover for a more sinister agenda,” namely, racist objections to the mother’s choice of a new partner. *See* Margaret F. Brinig, *The Child’s Best Interests: A Neglected Perspective on Interracial Intimacies*, 117 HARV. L. REV. 2129, 2147 (2004). But the point here is that the Supreme Court did not rest its holding on any disputation with the trial court’s factfinding concerning the child’s interests. In fact, Professor Brinig’s own empirical research suggests that children of mixed-race parents may well face some additional challenges, including the greater likelihood that the parents will ultimately divorce. *See id.* at 2165-66 (“Mixed-race relationships seem to cause only mildly negative effects in the children involved, so long as the family remains together. Once divorce or foster care enters the picture, the children of interracial couples, holding other things constant, may be subject to a variety of psychological and behavioral effects.”).

174. *Palmore*, 466 U.S. at 433.

175. *Id.*

176. The Court explained: “The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not.” *Id.* (footnote omitted).

rights generally do “not extend beyond the threshold of the school door,” as the Ninth Circuit wrote last November.<sup>177</sup>

At the same time, Judge Wood, in dissent, almost certainly goes too far when she suggests that the rights of custodial and non-custodial parents are always coextensive.<sup>178</sup> In fact, the two reasons cited by Judge Posner for finding the parent’s interest in schooling unprotected—an assessment of the magnitude of the state’s intrusion and a recognition of the conflicting interests within the family<sup>179</sup>—could fairly support giving a *lesser measure* of protection to those interests.

The truth is that the pragmatic concerns militating against recognizing non-custodial parents’ rights have potential application to virtually all family privacy claims. Even within the intact family, parents’ decisions concerning the education of their children—for instance, the decision of Amish parents to forgo secondary education in favor of training on the farm—may implicate important and potentially conflicting interests of the child, as Justice Douglas emphasized in his dissent in *Wisconsin v. Yoder*.<sup>180</sup> A patient’s decisions about abortion, if she is a minor, qualify the child-rearing authority of her parents.<sup>181</sup> And, in *Troxel v. Granville*<sup>182</sup>—recognizing a parent’s fundamental right to

177. See *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005). On denying rehearing in May 2006, the Ninth Circuit panel retracted its “school door” phrase, but reaffirmed its holding that parents’ rights under the Constitution do not include a right “to direct *how* a public school teaches their child.” *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1190 (9th Cir. 2006) (quotation omitted).

178. See *Crowley v. McKinney*, 400 F.3d 965, 975 (7th Cir. 2005) (Wood, J., dissenting in part) (“[A] noncustodial parent’s interests are no less significant than those of other parents. . . . Even if there were some tension between the rights of the two parents, it does not follow that the Constitution affords lesser protection to a noncustodial parent.”).

179. See *id.* at 968-69.

180. 406 U.S. 205 (1972). Justice Douglas wrote:

While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition.

It is the future of the student, not the future of the parents, that is imperiled by today’s decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today.

*Id.* at 244-45 (Douglas, J., dissenting); see Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST’L L. 53, 53 (1999) (acknowledging potential for conflicting interests between parent and child, but cautioning against active state inquiry into children’s preferences); GUGGENHEIM, *supra* note 62, at 44-46 (discussing potential for conflicting interests in *Yoder*).

181. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 444-48 (1990); Richard F. Storrow & Sandra Martinez, “*Special Weight*” for Best-Interests Minors in the New Era of Parental Autonomy, 2003 WIS. L. REV. 789.

182. 530 U.S. 57 (2000).

limit the visitation of grandparents—Justice Stevens cited concern for the impact that the parent’s control might have on the constitutionally protected interests of children and other family members to preserve important relationships.<sup>183</sup>

Recognition of this potential for conflict within the family, as well as of the special strength of the state’s legitimate interests in the family, has led the Supreme Court repeatedly to qualify the strength of its constitutional review in order to leave room for reasonable accommodation of the competing interests.<sup>184</sup> In *Newdow*, these concerns led Justice Stevens to deny standing to the parent claimant;<sup>185</sup> in *Troxel*, the very same concerns led him to endorse a softer approach to protecting parental rights on the merits.<sup>186</sup> Despite finding a substantial state burden on the fundamental rights of parents, *Troxel* did not employ strict scrutiny, but instead directed trial judges simply to give “special weight” to a parent’s concerns in evaluating the competing claims to visitation.<sup>187</sup>

In protecting the fundamental right to marry in *Zablocki v. Redhail*,<sup>188</sup> the Justices similarly used an ambiguous standard of scrutiny and made clear their intention to leave room for “reasonable” marriage regulations.<sup>189</sup> In the context of abortion, *Planned Parenthood v. Casey*<sup>190</sup> formally substituted the less demanding “undue burden” standard for *Roe v. Wade*’s nominal strict scrutiny.<sup>191</sup> And, *Lawrence v. Texas*,<sup>192</sup> which I think is fairly read to recognize a privacy right to intimate relations by a same-sex couple,<sup>193</sup> famously eschewed strict scrutiny in favor of what Laurence Tribe has described as a “mysterious”

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183. *See id.* at 86, 88-89 (Stevens, J., dissenting).

184. *See Meyer, Paradox of Family Privacy, supra* note 164, at 580-87.

185. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004).

186. *See Troxel*, 530 U.S. at 70, 72-73.

187. *Id.* at 69. For a range of views, generally agreeing in their description of *Troxel*’s manner of scrutiny, but often disagreeing in their normative assessment of that review, see Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279; Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337 (2002); Stephen G. Gilles, *Parental (and Grandparental) Rights After Troxel v. Granville*, 9 SUP. CT. ECON. REV. 69 (2001); David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125 (2001).

188. 434 U.S. 374 (1978).

189. *Id.* at 386; *see also* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.28, at 581 (3d ed. 1999) (noting that “[t]he majority opinion [in *Zablocki*] left the exact nature of the standard of review employed in this case unclear,” and concluding that the Court’s “statements indicate that the Court used a standard of review that approximates one or more of the ‘middle level standard[s] of review’”).

190. 505 U.S. 833 (1992).

191. *See id.* at 878-79.

192. 539 U.S. 558 (2003).

193. *See* David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. L. FORUM 453, 455-85.

standard of scrutiny.<sup>194</sup>

The qualified scrutiny in the context of family privacy is not wholly “mysterious,” however. There are several recurring considerations that help to guide the courts’ review. Two of these are the very factors Judge Posner cited for denying protection altogether: the *magnitude* of the state’s burden on privacy and the degree to which family members are *united* or *fractured* in their response to the state’s intervention.<sup>195</sup> A third consideration in many cases is the *traditionalism*—or turned around, the *novelty*—of the competing public and private interests.<sup>196</sup> Where all affected family members oppose a substantial governmental burden on a traditional family intimacy, constitutional protection of family privacy is at its highest. On the other hand, where the state’s intervention is relatively small or has in fact been invited by some members of a divided family, constitutional protection of family autonomy is necessarily weaker.<sup>197</sup>

It seems to me that this is an adequate framework for recognizing and resolving the constitutional claims of non-custodial parents. It would signal constitutional respect for non-custodial parents without triggering a rigid entitlement to a 182.5-day split of child custody or a general duty of school administrators to tailor each child’s curriculum to the preferences of a parent. Because it demands sensitive regard for family privacy interests—*not* “compelling state interests”—there would be no need to make difficult (and, in my view, unsustainable) categorical claims about the supremacy of children’s interests. But it would require that limitations on the rights of any family members, including non-custodial parents, be justified as reasonable in light of the competing considerations.

I do not wish to overclaim the benefits of this approach. In many ways, what I have suggested comes close to the result of the Wisconsin court in *Arnold v. Arnold*.<sup>198</sup> It would leave courts with discretion to craft child-centered custody arrangements suited to particular families. But it would acknowledge that this discretion operates against a backdrop of a constitutional obligation of sensitivity toward the substantial private interests at stake. The flimsy conjecture and disregard of effective alternatives that is acceptable in sustaining government

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194. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916 (2004).

195. *See Crowley v. McKinney*, 400 F.3d 965, 968-69 (7th Cir. 2005).

196. *See Meyer, Paradox of Family Privacy*, *supra* note 164, at 589-90.

197. For a fuller discussion of the way in which courts consider these three factors in tailoring their scrutiny in family privacy cases, see *id.* at 579-94.

198. 679 N.W.2d 296 (Wis. Ct. App. 2004).

choices under rational-basis review would not be permitted. But neither would the government be required to prove that it effectively had no choice but to burden the constitutional interests of the parent.

In all likelihood, the “soft” form of constitutional protection would stand, for all practical purposes, like an additional “abuse of discretion” check against extreme cases. I would not expect this approach to result in dramatically different outcomes from the ones we have already considered. Schools could continue to place reasonable limitations on parents’ access to the classroom, but they could not altogether exclude a parent from his child’s schooling, as in *Crowley*,<sup>199</sup> without offering a sound reason. Likewise, this approach would recognize a constitutional duty to justify significantly unequal allocations of custodial authority, but would recognize child welfare as a sufficient (even if not necessarily “compelling”) justification.

Although this would not change the mandates in many cases, it would likely change some. And it would express greater respect and a greater expectation for the child-rearing roles of non-custodial parents. In this respect, it might help to shift social norms toward their more sustained involvement in the lives of their children.<sup>200</sup>

There are genuine costs to this approach. Professor Brinig, for example, cautions that “[c]onstitutionalizing child custody, or litigating in terms of individual parents’ rights, is likely to harm children in many ways.”<sup>201</sup> The proliferation of “rights talk” may encourage litigiousness and obscure the parties’ consideration of their own responsibilities and the value of informal accommodation—to the obvious detriment of their children.<sup>202</sup> But the magnitude of the most likely harms—promoting conflict between parents or causing a child to endure an ill-advised joint physical custody arrangement<sup>203</sup>—depends partly upon the degree to

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199. *Crowley*, 400 F.3d at 969.

200. As Katherine Hunt Federle has observed in the context of children’s rights, recognition as a rights-holder in the American legal context can be an important marker of social respect and validation. See Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1524-25 (1994) (“To be a powerful individual in our society is to command respect, in the broadest possible sense, and to be taken seriously—to make claims and to have them heard, and to have independent value and worth as a being.”).

201. Brinig, *Parental Autonomy*, *supra* note 16, at 1369; see also Margaret F. Brinig, Troxel and the Limits of Community, 32 RUTGERS L.J. 733, 761-65 (2001).

202. See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 639-40 (2006) (criticizing a focus on rights in the context of child welfare law and warning that “rights will never be the primary way to produce good results for families because the rights-based model creates, or at least perpetuates, an adversarial process for decisionmaking”); Schepard, *supra* note 149, at 735 (discussing detriment to children from post-divorce conflict and litigation).

203. See Brinig, *Parental Autonomy*, *supra* note 16, at 1369.

which recognizing constitutional rights will strip courts of their ability to safeguard children's interests. Unlike a rigid strict scrutiny approach, the more flexible review I envision—a review I believe the courts *already* engage in—would leave room to avoid such results, just as *Troxel* contemplates that judges will continue to be able to order visitation where necessary to preserve relationships that are unusually important to the child.

Nor do I think recognizing these rights would be unduly burdensome for the courts. The *Rooker-Feldman* doctrine, among other obstacles, would continue to limit lower federal court review, and it is important to see that courts, to a significant degree, are already in the business of resolving these claims. It is only that today they resolve these claims by adjusting the boundaries of constitutional protection rather than reviewing the reasonableness of the challenged state action.

## V. CONCLUSION

In closing, let me be clear that I actually share the wariness of many scholars about the further “constitutionalization” of family law.<sup>204</sup> Its benefits are often modest, and the costs can be significant. But my concern is that, in a very real sense, we are already there. Having already injected rights talk into family law and custody disputes, we have no better alternative than to see the process through. Stopping short—recognizing “family privacy” rights only in custodial parents, or only in traditional families, or only where parents do not disagree about their childrearing preferences—leaves the Constitution as a distorting force in family law, while substantial family interests are left at the mercy either of state actors or of other family members who are accorded constitutional privilege.

Child custody should not be primarily about the rights of parents. My hope is that acknowledging rights in non-custodial parents would help to usher in the ultimate realization that the best the Constitution can ever do in the realm of family privacy is to require sensitivity in balancing the interests of all.

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204. See, e.g., *id.*; GLENDON, *supra* note 202; Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment “Privacy” Law: An Essay on the Constitutionalization of Social Issues*, 51 LAW & CONTEMP. PROBS. 79 (1988).