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Redefining the Family: Undermining the Family

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Redefining the family has become all the rage in the legal academy. Courts and legislators, for the most part, have respected and adhered to the traditional or conventional understanding of what constitutes a family and of why families receive recognition and protection under both state law and federal constitutional law. On the contrary, legal academic commentators, and family law teachers and scholars in particular, have become more and more vocal in their assertions that prevailing legal doctrine arbitrarily excludes from the legally recognized definition of family all manner of suitors who seek recognition. For example, with growing frequency, one finds in the current crop of law school casebooks—for which future generations of practitioners and scholars in the field arguably are a captive audience—advocacy that calls for acceptance and legal recognition of new family forms.[1] Similar arguments in support of new and expansive definitions of "family" appear in law review literature,[2] which is the coin of the realm in legal academic circles.

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[1] For examples of casebooks containing such advocacy, see Ira Mark Ellman, Paul M. Kurtz, and Elizabeth S. Scott, *Family Law: Cases, Text, Problems* 3 (LEXIS 3d ed 1998) (discussing critically the definition of family); Walter Wadlington and Raymond C. O'Brien, *Domestic Relations: Cases and Materials* 1 (Foundation 5th ed 2002) (beginning first chapter with changing concepts of marriage and family); Carl F. Schneider and Margaret F. Brinig, *An Invitation to Family Law: Principles, Process, and Perspectives* 181-83 (West 2d ed 2000) (discussing definitional problems relating to family).

[2] See, for example, Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change: A Proposal for Individual Contracts and Contracts in Lieu of Marriage*, 62 Cal L Rev 1169, 1170 (1974) (arguing that new societal and individual needs may offset the state's interest in preserving the traditional family); James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution*, 2001 BYU L Rev 923, 936 (arguing that we are in a transitional phase from sanctioning only biologically based families to legally recognizing functional families).

I shall argue in this Article that the proposed definitions of family fly in the face of long-standing precedents, particularly decisions of the Supreme Court, which protect the autonomy of the traditional family. In Part I, I describe the way that editors of current law school casebooks and authors of treatises advocate recognition of new and radical definition of family. In Part II, I discuss decisions of the United States Supreme Court that, for more than seventy-five years, have recognized and protected the autonomy and privacy of the traditional family. In Part III, I argue that academic commentators frequently ignore the basic principles reflected in these decisions.

I. CURRENT LITERATURE

A sampling of family law casebooks in current use shows which way and how strongly this particular wind is blowing. In one such volume, for example, the editor, a law school professor, presents fairly early in the materials a chapter titled "Formation of a 'Family' Relationship," followed by the topic heading, "Alternative Definitions of 'Family.'"[3] He introduces this subject with two quotations. The first is from a law review article published in 1988, whose author observes: "In the end, the family is defined by the heart, not the law."[4] The second introductory quotation is from the opinion in a case that the Supreme Court of Minnesota decided in 1967, which contains the following observation: "[T]he meaning [of 'family'] necessarily depends on the field of law in which the word is used, the purpose intended to be accomplished by its use, and the facts and circumstances of each case."[5]

Another widely-adopted family law casebook, this one produced by a coterie of law professors, each teaching at a different prestigious academic institution, also looks critically at the definition of "family."[6] In the introduction to this casebook, the editors address, among other things, a functional definition of family in a number of legal contexts, and provide an evaluation of formal versus legal definitions of family.[7] In a similar vein, the

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[3] David Westfall, *Family Law* 166 (West 1994).

[4] Id at 166 n 1, quoting Jennifer Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 Ariz L Rev 207, 242 (1988).

[5] Westfall, *Family Law* at 166 n 2 (cited in note 3), quoting *LeRoux v Edmundson*, 148 NW2d 812, 814 (Minn 1967).

[6] Ellman, Kurtz, and Scott, *Family Law* at 3 (cited in note 1).

[7] Id at 37-40. See also Judith Areen, *Family Law: Cases and Materials* 133-34, 931-59 (Foundation 4th ed 1999) (containing a section entitled "What is a 'Family'?").

editors of yet another family law casebook introduce the study of family law with a consideration of "Changing Concepts of Marriage and Family," and begin with the increasingly familiar refrain, "Function Versus Form in 'Family' Relationships."[8]

This voguish approach to the teaching of family law is handily and aptly summarized in the observations and the series of questions posed in a casebook edited by Professors Carl E. Schneider and Margaret F. Brinig.[9] Under the rubric "Defining the Family,"[10] which they have identified as one of the "Themes of Family Law,"[11] Schneider and Brinig tell their student readers:

> When we speak of our families, we think we know what we mean. We are probably right. But even in our own culture, "family" has many meanings, and other cultures have many others. The meaning of "family" matters in family law because the law attaches consequences to membership in families. Yet the law too lacks a clear definition of "family."[12]

Then, after observing definitional problems or questions relating to marriage and to parent and child relationships,[13] Schneider and Brinig observe that the answers to such questions depend on "a set of intractable prior questions,"[14] which they then set out as follows:

> Is a family defined by blood relations only? If so, what about husbands and wives? Is a family defined by its functions? If otherwise unrelated people live together and if their relations serve the functions of a family, are they a family? What are the functions of a family? Does something in "human nature" tell us how to define family? In other words, is there something universal in the nature of the family that helps define it, or is "family" a social construct? What purposes does the social construct serve? To

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[8] See Wadlington and O'Brien, *Domestic Relations* at 1 (cited in note 1). See also Harry D. Krause, et al, *Family Law: Cases, Comments and Questions* 1 (West 5th ed 2003) (presenting as Chapter 1 "American Family Law: Definitions, Policy and Trends").

[9] Schneider and Brinig, *An Invitation to Family Law* (cited in note 1).

[10] Id at 181.

[11] Id at 162.

[12] Id at 181.

[13] Schneider and Brinig, *An Invitation to Family Law* at 181 (cited in note 1).

[14] Id.

> what extent can the social construct be deliberately manipulated? Need there be a single definition of "family"? Who decides what a family is? The putative family members themselves? The social group (e.g., a church) of which the individuals are members? Society as represented by the government? Finally, what is society's interest in defining "family"?[15]

One would have to look far and wide to find a more comprehensive set of inquiries relating to and questioning how the family should be defined. To some extent, the questions that Schneider and Brinig pose appear to be rhetorical. Also, one may presume, in light of the context in which the questions appear, that they are intended to inspire students to think about what they have already learned in a family law course and to stimulate them to integrate such thinking into what lies ahead in the course. But what is far more important, in my view, is that the questions are entirely consistent with what I take to be the profound hostility of much of the law school professoriate toward those traditional and conventional family forms that the law has immemorially recognized and protected.

Law student treatises, like the casebooks to which I have alluded, are the products of professorial labors, and frequently reflect a similar concern with redefining families. This is hardly surprising because these treatises, for the most part, appear to be written with a view toward explaining, supplementing, and demystifying what appears in the casebooks. One work of this genre, for example, acknowledges this current trend in its opening chapter, titled "An Introduction to Family Law."[16] The book first poses the question "What is a Family?" and immediately afterward makes a fairly detailed comparison, rich with references both secular and theological, between "The Traditional Family" and "The Nontraditional Family."[17] The writers of another family law treatise assert that "[t]he very definition of 'family' and the boundaries of 'family law' have become blurred."[18]

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[15] Id at 181-82.

[16] John DeWitt Gregory, Peter N. Swisher, and Sheryl L. Wolf, *Understanding Family Law* 1 (Matthew Bender 2d ed 2001).

[17] Id at 7-14.

[18] Harry D. Krause and David D. Meyer, *Family Law in a Nutshell* v (West 4th ed 2003).

In addition to casebook editors and treatise writers, professorial contributions of legal scholarship in law reviews have contributed frequently and at length to efforts to redefine the family. One prominent commentator, for example, has stated bluntly:

> [Our] society has undergone profound transformations in the past century, and the long-standing legal structure of marriage may now be anachronistic. The state's interest in preserving the traditional family may not be important enough to offset new societal and individual needs which require more flexibility and choice in family forms.[19]

Another academic observer concludes, seemingly with approval, that "[h]owever sinuous the path of the law, its direction seems relatively clear: we are in a transitional stage along the continuum from sanctioning only biologically based families to legally recognizing functional families."[20]

It would seem to me that legal academics, whose work presumably intends to influence future generations of American lawyers and perhaps, on occasion, judges, legislators, and the larger community, might take far more balanced views than those that they often present, when advocating for a redefinition of the family. I am very much aware, of course, that it may well be naïve to think that the questions raised and the proposals offered by scholars from the legal academy necessarily have much to do with the problems of the real outside world, considering the rarified and ethereal precincts that many of us inhabit.

My impression and recollection is that to many of us, in living memory and certainly at the time when we began to teach Family Law, it was clear what ordinary speakers meant when they spoke of "the family." After all, most of us probably grew up in one.[21]

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[19] Weitzman, 62 Cal L Rev at 1170 (cited in note 2).

[20] DiFonzo, 2001 BYU L Rev at 936 (cited in note 2).

[21] That a common and clear understanding of "family" once existed is suggested by references throughout academy to a "traditional family" made by those attempting to amend or replace that understanding. See, for example, Dorothy E. Roberts, *The Genetic Tie*, 62 U Chi L Rev 209, 214 (1995) (arguing that the importance of genetic tie in American law and culture between parents and offspring is more significant to the definition of family in white American than in the Black community); Martha M. Ertman, *Contractual Purgatory for Sexual Marginorites: Not Heaven, but Not Hell Either*, 73 Denver U L Rev 1107, 1167 (1996) (describing a narrow definition of family as a "heterosexual dyad with biological offspring"); Martha A. Fineman, *Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* 8 (Routledge 1995) (describing the heterosexual dyad as the core of the historic family). Compare *Moore v East Cleveland*, 431 US 494, 498-499 (1977)

II. SUPREME COURT PRECEDENT ADHERING TO TRADITIONAL DEFINITIONS OF FAMILY

What is more, and what is worrisome, is that current attempts to transmute the legal definition of family ignore the fact that there is some law out there.[22] Such proposals for redefinition reflect a seeming lack of respect by many legal academicians for sound, long-standing, and deep-rooted constitutional doctrine that has established and continues to this day to promote protection of family autonomy and parental authority and, let it not be forgotten, the important and enduring American societal values reflected in that protection. From the first quarter to the final decade of the last century, recognition of family autonomy has been a *leitmotif* in United States Supreme Court decisions that address a variety of issues.[23] The Supreme Court's protection of family autonomy has time and again protected the *traditional* family in cases about the rights of natural parents and guardians to the care, custody, and control of their children.

My concern about professorial enthusiasm for making the definition of family virtually all-inclusive accordingly rests, as I have argued in other contexts,[24] upon the principles reflected in these still valid and still binding holdings of the United States Supreme Court from the last century. The observations of the Court in 1923, in *Meyer v Nebraska*,[25] are as true today as they

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(noting that family relationships established by "blood, adoption, or marriage" deserve special protection and holding that a housing regulation "slic[ed] deeply into the family itself" by criminalizing a grandmother's choice to live with her grandson); id at 500 (defining the "nuclear family" as "essentially a couple and their dependent children"); *Baker v Nelson*, 191 NW2d 185, 186 (Minn 1971) ("The institution of marriage as union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.").

[22] See, for example, notes 25-42 and accompanying text.

[23] See, for example, *Meyer v Nebraska*, 262 US 390 (1923) (invalidating a law barring parents from teaching a child in a foreign language); *Pierce v Society of Sisters*, 268 US 510 (1925) (striking down a statute requiring parents to send their children to public school); *Stanley v Illinois*, 405 US 645 (1972) (requiring a hearing on the fitness of a biological father before his children can be taken from him after the death of the children's natural mother); *Wisconsin v Yoder*, 406 US 205 (1972) (allowing Amish parents to disenroll their children from school in spite of a compulsory attendance law).

[24] See, for example, John DeWitt Gregory, *Family Privacy and the Custody and Visitation Rights of Adult Outsiders*, 36 Fam L Q 163, 166-67 (2002); John DeWitt Gregory, *Interdependency Theory–Old Sausage in a New Casing: A Response to Professor Czapanskiy*, 39 Santa Clara L Rev 1037, 1050-51 (1999); John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 Wash & Lee L Rev 351, 382-84 (1998); John DeWitt Gregory, *Juvenile Court Jurisdiction Over Noncriminal Misbehavior: The Argument Against Abolition*, 39 Ohio St L J 242, 263-64 (1978).

[25] 262 US 390 (1923).

were at the time when Mr. Justice McReynolds wrote them. What is more, the application of the principles of that case and its progeny has served parents, families, children, and American society well, for successive generations. At the heart of the decision in *Meyer* is the Court's assertion of the right "to marry, establish a home and bring up children" as a "liberty" guaranteed by the Fourteenth Amendment.[26] I do not suggest that adults should be prohibited from forging their relationships with each other as they choose. This does not mean, however, that each and every concatenation of relationships that they may forge is entitled to the protection of the state through its law. Simply stated, nothing in the current and long-standing constitutional doctrine expressed in the decisions of the Supreme Court that I have discussed suggests anything to the contrary. If, for example, the law extends rights to grandparents and other legal strangers with respect to children, it will necessarily diminish the constitutionally protected and fundamental rights of the parents of those children to their care, custody, and control, which the Court, time and time again, has deemed fundamental.

The Court strongly and unequivocally reaffirmed this principle a scant two years later in *Pierce v Society of Sisters*[27] in the course of enjoining enforcement of the Oregon Compulsory Education Act, which required parents to send their children to public schools.[28] The Court observed:

> Under the doctrine of *Meyer v Nebraska*, we think it is entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[29]

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[26] Id at 399.

[27] 268 US 510 (1925).

[28] Id at 530.

[29] Id at 534-35 (citations omitted).

The Court concluded unanimously that enforcement of the Act in question should be enjoined.[30]

Some twenty years later, in *Prince v Massachusetts*,[31] a Jehovah's Witness contested before the Court her conviction for violation of the Massachusetts child labor law by furnishing religious magazines to a child, with knowledge that the child would sell them unlawfully on the street.[32] While the Court declined to strike down the statute on constitutional grounds, in the course of its decision it resoundingly endorsed *Meyer* and *Pierce,* and explicitly recognized that "these decisions have respected the private realm of family life which the state cannot enter."[33]

Recalling *Meyer, Pierce,* and *Prince,* is not to engage in romantic historical reflection. More than a quarter century after the last of those decisions, the Court in *Wisconsin v Yoder*[34] reaffirmed their principles of family autonomy and parental authority in the clearest imaginable language. The Court in *Yoder* found in *Pierce* "perhaps the most significant statements of the Court in this area,"[35] and said about *Yoder* itself:

> [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[36]

Simply stated, the Court has never veered from its firm endorsement of the principles of family autonomy and parental authority.[37] The remarks of one commentator accurately character-

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[30] Id at 536.

[31] 321 US 158 (1944).

[32] Id at 159-60.

[33] Id at 166-67.

[34] 406 US 205.

[35] Id at 232.

[36] Id.

[37] See, for example, *Santosky v Kramer*, 455 US 745, 753-54 (1982) (stating that natural parent is entitled to due process at state-initiated parental rights termination proceeding); *Smith v Organization of Foster Families*, 431 US 816, 847-48 (1977) (outlining procedures required under due process to remove foster children from foster homes); *Cleveland Board of Education v LaFleur*, 414 US 632, 639-40 (1974) (holding that mandatory termination provisions for pregnant public school teachers violate due process by

ize the Court's protection of these principles, observing that the Supreme Court "has consistently held that matters touching on natural parent-child relationships and involving the custody and control of one's children are fundamental liberty and privacy interests protected by the Fourteenth Amendment. As such, they are entitled to the greatest constitutional protection."[38]

While the Court in its decisions developed, affirmed, and strengthened family autonomy and parental authority principles during most of the last century, it endorsed these principles yet again at the very beginning of the current century in *Troxel v Granville*,[39] decided in 2000. I am very much aware of the fact that the decision in *Troxel* has been analyzed to a fault; that it has inspired a virtual freshet of law review articles, notes, and comments that is yet to recede; that the Court's decision carried a mere plurality; and that enough confusion was sowed by the opinion of the Court, together with the concurrences and dissents, to provide grist for the mills of law review contributors well into the foreseeable future.[40] Nevertheless, it is appropriate to take notice of the fact that the Court in *Troxel* left family autonomy principles, and their attendant values, undisturbed. Whatever else the ramifications of the decision may be, the Court remains steadfast in its adherence to the principle of family autonomy and the values that underlie and support that princi-

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infringing on the decision to have a child); *Stanley*, 405 US at 657-58 (holding that state statute that allows without a hearing removal of children from custody of unwed father upon death of mother violates due process rights of father); *Skinner v Oklahoma*, 316 US 535, 541 (1942) (holding that state statute providing for sterilization of criminals violates prisoners' basic liberties).

[38] Marian L. Faupel, *The "Baby Jessica Case" and the Claimed Conflict Between Children's and Parents' Rights*, 40 Wayne L Rev 285, 289 (1994). See also Ellen B. Wells, *Unanswered Questions: Standing and Party Status of Children in Custody and Visitation Proceedings*, 13 J Am Acad Matrimonial Law 95 (1995). This writer states:

> The traditional view of our society is that the care, control, and custody of children resides first in their parents; in fact "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." This parental interest in family relationships has been defined as a liberty interest entitled to due process protection.

Id at 109 (citations omitted).

[39] 530 US 57 (2000).

[40] See, for example, Harry D. Krause and David D. Meyer, *What Family for the 21st Century?*, 50 Am J Comp L 101, 119 (Supp 2002) (describing the Justices in Troxel as having affirmed the importance of the parent's traditional authority while leaving room for competing interests); Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v Granville, 2000 S Ct Rev 279, 283 (2000) (arguing that all four opinions in *Troxel* qualified parental rights).

ple. In finding Washington State's grandparent visitation statute unconstitutional, the Court rehearsed the truisms of the past, stating:

> The 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 the Court. More than 75 years ago, in *Meyer v. Nebraska*, we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters*, we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." . . . We returned to the subject in *Prince v. Massachusetts*, and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[41]

The Court followed this passage with a catalogue of other decisions standing for the same principles and concluded: "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[42]

III. PROBLEMS WITH THE CURRENT ACADEMIC TREND

While I think it should be apparent, let me make it abundantly clear why I have devoted so much time and space to the pronouncements of the Court relating to the interests of parents in their children. Judging by the facts in all of these cases, there

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[41] *Troxel*, 530 US at 65-66 (citations omitted).

[42] Id at 66.

can be no doubt that the Court had in mind natural parents or legal guardians and, by extension, adoptive parents of children, who enjoy all the protections and bear all of the responsibilities of natural parents.

Simply stated, these cases, and the grand and enduring principles they reflect, are surely relevant to one of the subjects addressed by *The University of Chicago Legal Forum* Symposium, namely, "the public and private ordering of family relationships and the definition of the family."

"Family" is the umbrella under which the current generation of "new child savers"[43] would place de facto parents, functional parents, parents by estoppel, and the like.[44] I suggest that these arguably radical inventions and contrivances, together with the recently revitalized children's rights movement,[45] threaten both the constitutional liberty interests of parents and children and

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[43] See Robert J. Levy, *The Rights of Parents,* 1976 BYU L Rev 693. Professor Levy observes:

> My concern is perpetuation of the family as the most important relationship in our society—as the unit which provides, and should continue to provide, the basic emotional and socializing experiences for our children. Those functions can be served effectively, I believe, only if the family is considered to be and is treated as an autonomous unit, and if families are protected from untoward governmental interference with their operations. Yet, the current "children's rights" campaign, by increasing government intrusion into family decisionmaking, has at least the potential to upset the traditional social compact that undergirds these family-centered values. To eliminate the threat, we must strive to maintain a stance of "family privacy"—a policy that families may not be supervised by judicial or other agents of the state. I choose to call that stance "Respect for Family Autonomy;" the people I call the "new child savers" claim that I am simply an old-fashioned supporter of "parental rights."

Id at 693.

[44] See American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (Matthew Bender 2002) (employing these terms in guidelines for protecting the welfare of children and the optimal role for the law); Elizabeth Scott, *Parental Autonomy and Children's Welfare,* 11 Wm & Mary Bill Rts J 1071, 1096 (2002) (describing parents' childrearing roles using terms including "de facto parents" and "parents by estoppel"). Consider Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles,* 35 Willamette L Rev 769 (1999); Note, *Developments in the Law-The Constitution and the Family,* 93 Harv L Rev 1159 (1980) (arguing that a Supreme Court case supports a "functional" definition of family).

[45] See, for example, Emily Buss, *Allocating Developmental Control Among Parent, Child and the State,* 2004 U Chi Legal F 27 (arguing for childrens' rights); Elizabeth S. Scott and Robert E. Scott, *Parents as Fiduciaries,* 81 Va L Rev 2401, 2401 (1995) (arguing some contemporary scholars have proposed shifting the traditional legal focus from parents' rights to a "child-centered perspective"); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights,* 14 Cardozo L Rev 1747, 1748-49 (1993) (positing that much has been made of the threat to family values posed by children's rights, but arguing that parents' rights, as currently understood, are undermining the values necessary for children's welfare).

the values that support them, including the presumption that fit parents in autonomous families are competent to rear, educate, and guide their children.

To put it otherwise, it is at the very least questionable whether family autonomy principles and their important underlying values and presumptions can be preserved if more and more legal strangers are admitted into the family tent. With respect to private ordering, I should think that the state ought not interfere with private ordering that results in what are described as family-like associations into which competent adults freely enter, at least so long as the arrangements do not endanger children who are affected.

Public ordering, on the other hand, is an entirely different matter. I do not believe that those who urge that the family should be redefined more inclusively as a matter of law have made a compelling case. I have not heard a persuasive argument as to why the state should sanction and approve such private arrangements, purportedly family-like, through the force of law. As one commentator observes in response to the argument that in light of societal lifestyle changes reflected in the increase in nontraditional families, the state may not have an interest in preserving the anachronistic legal structure of marriage, "[I]t seems unlikely that the majority of state legislatures will abolish these 'anachronistic' marriage requirements in the foreseeable future."[46]

It is just as unlikely, if not more so, that legislatures in a majority of states will see fit to change statutory law to reflect proposals that would redefine families by radical new formulations of who is a parent and the rights of newly-defined parents to affect or control other people's children. What is less unlikely is that courts, claiming to act in the interest of children, will be tempted to exercise their supposed inherent equitable jurisdiction to expand the structure of the family in ways that legislatures never intended or, indeed, never so much as contemplated. One can hope that judges will resist this temptation and recognize that constitutionally protected principles of family autonomy and parental privacy must trump the hopes of the progressive professoriate that the law will define the family in the manner they propose.

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[46] Gregory, Swisher, and Wolf, *Understanding Family Law* at 13 (cited in note 16).