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A NEW FORM OF FAMILY PLANNING? THE ENFORCEABILITY OF NO-CHILD PROVISIONS IN PRENUPTIAL AGREEMENTS

Joline F. Sikaitis*

I'm 53 years old and I've been married and divorced twice. I had two children with my first wife . . . . With my second wife, I have one teenage son who is finishing prep school. By and large, they are great kids and I love them very much.

. . . .
I met Julie . . . shortly after my second divorce, about a year and a half ago. We love each other and have decided to get married. Julie . . . has never been married and she is twenty two years younger than I am.

. . . .
The one stipulation I've made before committing to marriage, and I hold firm on, is that Julie had to agree not to start a family. She said she was willing to sign a prenuptial agreement promising that. It may sound selfish but I want to be the most important person in her life. I don't want to share that position with children. I know from experience how demanding of your time they can be.¹

As the legal right to private ordering expands, the ability of couples to structure their private relationships presents issues yet to be resolved.²

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¹ J.D. Candidate, May 2006, The Catholic University of America, Columbus School of Law. The author wishes to thank the dedicated editors and staff of the Catholic University Law Review whose hard work brought this paper to fruition. The author is deeply grateful to Brent for his endless support and friendship and to her mom, without whose inspiration and guidance none of this would be possible.

² See Robert H. Mnookin, Divorce Bargaining: The Limits on Private Ordering, 18 U. MICH. J.L. REFORM 1015, 1017-18 (1985), LEXIS, Individual Law Reviews & Journals, Mijlr File (describing private ordering as "the liberal ideal that individuals have fundamental rights, and should freely choose to make of their lives what they wish"). Some family lawyers advocate pushing the limits of what may be included in a prenuptial agreement, suggesting

[i]n some instances, provisions in an agreement that might not be enforceable when drafted may become legally valid because of future statutory amendments and case law interpretation. It is sometimes useful, therefore, to insert provisions into such agreements which are on the cutting edge of current law. If the law changes, significant gain and protection may thus be realized by the client and
Prenuptial agreements containing no-child provisions test the limits of parties' ability to structure their relationships, and are becoming increasingly prevalent. Although many couples have entered into these agreements, the issue of enforceability has yet to be litigated.

Prenuptial agreements are contracts entered into by parties to a marriage prior to the marriage. Generally, prenuptial agreements

the heirs. Of course, the lawyer should inform the client in writing of possible enforceability problems to limit malpractice exposure.


3. See Jill Brooke, A Promise to Love, Honor and Bear No Children, N.Y. TIMES, Oct. 13, 2002, § 9, at 1 (arguing that no-child provisions, although becoming more prevalent, are speculated by legal experts to be unenforceable). In referring to the increased commonality of no-child provisions in prenuptial agreements, Mitchell Schrage, a New York matrimonial lawyer, stated, "Ten years ago, we had one every other year . . . Now it's four or five. What you often see is the man who's worth $10 million saying that there's no negotiations . . . [and t]hese women are often younger and want to get married, so they acquiesce." Id. Mr. Schrage estimated that as many as twenty percent of the prenuptial contracts he handles "explicitly rule out children . . . the richer you are, the more you want it on paper. The men are usually older and they don't want to raise kids again." Sarah Baxter, Rich Couples Write Babies Out of the Marriage Lines, SUNDAY TIMES (London), Oct. 20, 2002, at 28, LEXIS, Major Newspapers, Times File (quoting Mitchell Schrage).

4. But see Height v. Height, 187 N.Y.S.2d 260, 262 (N.Y. 1959) (asserting that an agreement contemplating the forbearance from having children was void, as public policy dictates that the primary purpose of marriage is to procreate, and the right to regular sexual conduct is implicit in a marriage). Although Height has not been revisited, its precedential value is questionable, as it was decided prior to the shift in judicial opinion regarding prenuptial agreements. Now, New York statutorily addresses prenuptial agreements. An agreement by the parties, made before or during the marriage shall be valid and enforceable in a matrimonial action if such an agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this chapter. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision. N.Y. DOM. REL. § 236(B)(3)(McKinney 1999).

5. FAMILY LAW AND PRACTICE § 59.02 (Arnold H. Rutkin ed., 3d. ed. 2004) (arguing that prenuptial agreements are intended to alter state-imposed formulas set in
provide for the alteration of legal rights to property upon either
dissolution of the marriage or death. Prenuptial agreements have
become more prevalent due to the ascendance of private ordering and
higher rates of divorce and remarriage. These agreements attempt to

statutory guidelines for property distribution in the event of death or divorce). This
Comment will address only prenuptial agreements in the event of divorce. See generally
Kirk Johnson, Gay Divorce: Few Markers in This Realm, N.Y. TIMES, Aug. 12, 1994, at
A20 (noting that prenuptial agreements may also be entered into by gay or lesbian
couples, although these agreements would not technically be termed a prenuptial
agreement).

6. FAMILY LAW AND PRACTICE, supra note 5, § 59.01 (noting that prenuptial
agreements may also be referred to as antenuptial agreements, antenuptial contracts,
premarital agreements, premartial contracts, or prenuptial contracts). For the purposes
of this Comment, they will be referred to as prenuptial agreements.

7. See ARLENE G. DUBIN, PRENUPS FOR LOVERS 15 (2001) ("Statistics are scarce in
the prenuptial area. Anecdotal evidence suggests that 5% to 10% percent of couples and
20% of remarried couples now enter into prenups. By 2020, I predict that more than 50%
of couples will be preceded down the aisle by prenups.") The prefatory note of the
Uniform Premarital Agreement Act (UPAA) offers several explanations for the increased
utility of prenuptial agreements:

The number of marriages between persons previously married and the number
of marriages between persons each of whom is intending to pursue a career is
steadily increasing. For these and other reasons, it is becoming more and more
common for persons contemplating marriage to seek to resolve by agreement
certain issues presented by the forthcoming marriage.

UNIF. PREMARITAL AGREEMENT ACT prefatory note, 9C U.L.A. 36 (2001); see also
DUBIN, supra note 7, at 17 (noting that seventy-five percent of divorced people remarry
within five years and sixty percent of remarriages end in divorce); Catherine Bigelow,
Marriage, American-Style; The Modern Prenup: Who Gets Them and Who Needs Them,
S.F. CHRON., Jan. 19, 2003, at 24, LEXIS, Major Newspapers, Sfchrn File (describing a
Center for Disease Control report, published in May 2001, that found that forty-three
percent of first marriages dissolved within fifteen years, that twenty percent of marriages
dissolved within five years, and approximately thirty-three percent dissolved in ten years);
Advance Report of Final Marriage Statistics, 1988, MONTHLY VITAL STATISTIC REP.
(Natl Ctr. for Health Statistics, Hyattsville, MD) Aug. 26, 1991, at 1, 4 (reporting that four
out of ten marriages involved a party who had previously been married); Melanie
Thernstrom, Untying The Knot, N.Y. TIMES, Aug. 24, 2003, § 6 at 38 (reporting that a
"survey by the American Academy of Matrimonial Lawyers, found that 78% of divorce
attorneys ... say that their caseloads are steady or increasing"); DAVID POPENOE &
BARBARA DAFE WHITEHEAD, THE NAT'L MARRIAGE PROJECT, THE STATE OF OUR
UNIONS: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA (1999),
19, 2004) ("Overall, the chances remain very high—still around 50 percent—that a
marriage started today will end in divorce."). The necessity for premarital agreements in a
time of rising divorce rates has also been echoed in state court decisions. See Brooks v.
Brooks, 733 P.2d 1044, 1050 (Alaska 1987) (finding that "people with previous 'bad luck'
with domestic life may not be willing to risk marriage again without the ability to
1974) (illustrating an extreme example of the usefulness of prenuptial contracts). Prior to
the marriage the husband was married nine times, the wife was married six times, and they
had been married to each other three times. Id.
designate, prior to the dissolution of the marriage, property rights, duties, and responsibilities which, ordinarily, the court would designate upon dissolution of the marriage. As such, the creation of prenuptial agreements invokes the concept of “private ordering.”

In the past twenty years, an ascendant right to private ordering has paralleled Supreme Court decisions bolstering an individual’s right to be left alone. Such decisions suggest that the government should not intrude upon contracts of adults. Parties acceding to a no-child provision in a prenuptial agreement contemplate that a violation of the provision would result in “[e]ither the cessation of spousal support, waiver of some equity interest or . . . the payment of a penalty.” This, in effect, would burden a woman for exercising a fundamental right that she had contracted away in the prenuptial agreement.

The determination of the enforceability of a no-child provision in a prenuptial agreement requires a balancing of rights and public policies. A court must balance the enforcement of a contract supporting the surrender of a fundamental right to procreate and its subsequent penalty

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8. UNIF. PREMARITAL AGREEMENT ACT § 4, 9C U.L.A. 47 (2001). Section 4 of the UPAA stipulates that “[a] premarital agreement becomes effective upon the marriage.” Id. For cohabitants who are not married, the official comment for section 4 suggests that “the parties must look to other law in the jurisdiction.” Id. However, courts are beginning to uphold agreements between unmarried cohabitants as valid providing that they do not offend public policy. Whorton v. Dillingham, 248 Cal. Rptr. 405, 406 (Cal. Ct. App. 1988); Posik v. Layton, 695 So. 2d 405 (Fla. Dist. Ct. App. 1997).

9. See FAMILY LAW AND PRACTICE, supra note 5, § 59.02.


12. The enforceability of a waiver of spousal support in a prenuptial agreement varies from state to state. LAURA W. MORGAN & BRETT R. TURNER, ATTACKING AND DEFENDING PRE-MARITAL AGREEMENTS § 9.042 (2001). Section 3 of the UPAA stipulates that a term agreeing to the “modification or elimination of spousal support” is permissible in premarital contracts. UNIF. PREMARITAL AGREEMENT ACT § 3, 9C U.L.A. 43 (2001). However, if enforcement of the term modifying or eliminating spousal support would cause the party attempting to avoid the term “to be eligible for support under a program of public assistance at the time of separation or marital dissolution,” a court may avoid enforcement of the term. Id. § 6(b), 9C U.L.A. 49 (2001).


15. See discussion infra Part IV.D.
against countervailing public policies supporting procreation, marital stability, and a woman's procreative rights.\textsuperscript{16}

This Comment analyzes the enforceability of no-child provisions in prenuptial agreements within the context of private ordering. It describes the emergence of the right to privacy and the subsequent ascendance of private ordering between adults. Next, this Comment explores how evolving social trends have affected the enforceability of prenuptial agreements and the development of the Uniform Premarital Agreement Act (UPAA). This Comment takes note of the silence of the UPAA and state courts regarding the enforceability of provisions in prenuptial agreements that intend to structure the incidents of the marriage. This Comment also acknowledges the trend in construing prenuptial agreements in a quasi-commercial manner, but suggests that such treatment is inappropriate, given the quasi-public nature of marriage and the concept of marriage as a status, rather than a contract. This Comment argues that no-child provisions may be successfully challenged on both public policy and constitutional grounds. First, the provision would be void as against public policy because the policies against enforcement outweigh the policies in favor of enforcement. Second, the constitutional challenge would argue successfully that enforcement would excessively entangle the judiciary in infringement of a fundamental right. Accordingly, this Comment predicts that no-child provisions will be deemed unenforceable.

\section{Increasing Autonomy: A Balancing of Rights}

\subsection{The Emergence of Private Ordering}

Before the Supreme Court ever established a right to privacy, it was articulated by Louis Brandeis and Samuel Warren in an 1890 law review

\begin{quote}
16. \textit{Cf. Premarital and Marital Contracts, supra} note 2, at 109 ("Even if some of the provisions are not legally enforceable because of technical or other deficiencies or changes in law, judges will frequently find ways to hold parties to agreements by ordering a similar result in a legal proceeding."). If a woman acceding to a no-child provision was promised an equity share for compliance with the no-child provision at the time of divorce, but later breached the term by having children, she would want the no-child provision severed from the contract. \textit{Id.} at 99. When adjudging the enforceability of contracts that are contrary to public policy, such as restrictive covenants and exculpatory or penalty clauses, a court may refuse to enforce the specific term, and still enforce the rest of the agreement. \textit{E. Allan Farnsworth, Contracts} § 5.8 (3d ed. 1999). Such enforcement is "favorable to the party who was bound to the [offensive] clause." \textit{Id.; see, e.g., Pierce v. Hand, Arendall, Bedsole, Greaves & Johnston, 678 So. 2d 765, 767} (Ala. 1996) (finding that although a retired law partner did not comply with an unreasonable restraint on which his deferred compensation was conditioned, he was still entitled to the compensation because the restraint was unreasonable and contrary to public policy).
\end{quote}
article entitled *The Right to Privacy*. Brandeis and Warren advocated that individuals have a privacy interest regarding their "inviolate personality." The decision in *Griswold v. Connecticut* formalized this nascent right to privacy that Brandeis and Warren had advocated three-quarters of a century prior. In assessing a Connecticut statute that made it a crime for any person to use a drug or device that prevented contraception, the Court found a zone of privacy protecting the married couple from governmental intrusion. Though the Constitution does not explicitly reference this zone of privacy, the Court derives authority from the overlapping "emanations" and "penumbras" of other explicitly protected constitutional rights. The Court in *Griswold* asserted that state intrusion into the inviolate zone of marital privacy was "repulsive to the notions of privacy surrounding the marriage."

18. *Id.* at 205. The privacy right addressed by Brandeis and Warren related to privacy in the context of tort relief. *Id.* at 193-94 (noting that the notion that "the individual shall have full protection in person and in property is a principle as old as the common law"). The article suggests that the right to personal privacy extends from a general right to privacy, arguing:

If we are correct in this conclusion, the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds . . . . If, then, the decisions indicate a general right to privacy of thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.

*Id.* at 206.
20. *Id.* at 492. The dissenting opinion cites to the Brandeis and Warren article, noting that the concept of a right of privacy "gained currency" as a result of the Brandeis and Warren article. *Id.* at 510 (Black, J., dissenting).
21. *Id.* at 485-86.
22. *Id.* at 484-86.
23. *Id.* at 486. This emphasis on marital privacy was further emphasized in the concurring opinion, authored by Justice Goldberg, when he wrote, "the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically." *Id.* at 495 (Goldberg, J., concurring). Contra Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1542 (1994) (questioning whether *Griswold*’s emphasis on family metaphors may have been intended to mitigate the heated debate surrounding contraception, Planned Parenthood, and changing social mores). *Griswold* may be narrowly construed as extending this right to privacy only to partners in a marital relationship. See 381 U.S. at 486. Although *Griswold* emphasized a right to privacy, it incontrovertibly stressed privacy in the context of the marital relationship. *Id.* Justice Goldberg’s concurring opinion in *Griswold* cites to Justice Harlan’s dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961):

Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life.
Privacy rights were extended to unmarried individuals in *Eisenstadt v. Baird.* The Court held that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellect and emotional makeup." *Eisenstadt* extended the right to privacy to protect individuals from "government invasion into the personal decision whether or not to have a child." In *Marvin v. Marvin,* the California Supreme Court extended privacy concepts to contracts between unmarried cohabitants. The court stated that as long as the contract was not based on "illicit meretricious consideration," the parties possessed a right to "order their economic affairs as they choose." In finding the contract enforceable, the court expressed its desire to remove judicial barriers that might prevent fulfillment of the expectations of the parties.

And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right... Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.

*Griswold,* 381 U.S. at 495 (citing *Poe,* 367 U.S. at 551-52 (Harlan, J., dissenting)).


25. *Id.* at 453. The decision in *Eisenstadt* definitively expanded the right to privacy to individuals outside of a marital relationship. *Id.* The Court decided *Eisenstadt* on equal protection grounds and expressed discomfort with the Massachusetts law banning the distribution of contraceptives to unmarried individuals. *Id.* at 454. Justice Brennan, in the majority opinion, noted that not allowing the distribution of contraceptives to unmarried individuals, but sanctioning its distribution to married couples, would authorize "dissimilar treatment for married and unmarried persons who are similarly situated." *Id.*

26. *Id.* at 453.


28. *Id.* at 110 (providing that contracts between unmarried cohabitants were enforceable as long as they did not involve contracting for sexual services). The California Supreme Court explained:

The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses. Neither is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a nonmarital relationship when they entered into it. Agreements between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services. Thus the rule asserted by defendant, that a contract fails if it is "involved in" or made "in contemplation" of a nonmarital relationship, cannot be reconciled with the decisions.

*Id.* at 113.

29. *Id.* at 116.

30. *Id.* at 122 (asserting that although societal mores have changed drastically, the decision is not intended to denigrate the importance of marriage).
The progression from *Griswold* to *Marvin* parallels a cultural shift from family to individual. Similar to the shift from status to contract, the shift from family to individual redefined the rights, roles, and expectations of members in a family unit. When status and family were the dominant motifs, family members' interactions were based on their expected or assumed role in that family unit. As the dominant motif shifted towards contract and individualism, interactions could be negotiated or bargained for, as the parties came to be viewed as presumptively equal.

31. Dolgin, *supra* note 23. Divorce laws paralleled this shift. Nicole D. Lindsey, Note, *Marriage and Divorce: Degrees of "I Do," An Analysis of the Ever-Changing Paradigm of Divorce*, 9 J. LAW. & PUB. POL’Y 265, 267 (1998). In California, prior to 1969, fault-based divorce was operative. *Id.* at 267. To obtain a divorce, the petitioner had to prove that the other spouse was at fault. *Id.* Under this model, one party was responsible for the divorce and the other was blameless. *Id.* In 1969, the first no-fault divorce bill was signed into law by California Governor Ronald Reagan. *Id.* No-fault divorce removed the requirement of demonstrating fault. *Id.* at 268. In 1970, the proposal of the Uniform Marriage and Divorce Act was intended as a guide for states to create similar no-fault divorce provisions. *Id.* By 1985, all states had adopted a version of no-fault divorce. *Id.* The move to no-fault divorce was criticized for exacerbating an already high divorce rate. *Id.* Between 1970 and 1990, the divorce rate increased by thirty-four percent. *Id.* at 269.

32. See Dolgin, *supra* note 23, at 1546; see also MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 14–15 (1981) (detailing how the concept of companionate marriage redefined marriage as a “quest for personal happiness” that was “prompted by mutual attraction and interests [and the desire for] close parent-child relationships”).


34. See id.; Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self over the Marital Community*, 81 B.U. L. REV. 59, 67 (2001) (describing the effect of the concept of companionate marriage, Kelly noted, “The concept of marriage as an institution of the state and a determinant of status was being converted to one predominantly governed by individual choices and agreements—the view of marriage as a contract”). In explaining this cultural shift, Dolgin invokes Sir Henry Maine’s theory promulgated in his work *Ancient Law*.

It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. Dolgin *supra* note 23, at 1525 (quoting HENRY J.S. MAINE, ANCIENT LAW 100 (J.M. Dent & Sons 1917) (1861)); JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE 35-37 (1997) (describing how no-fault divorce, judicial acceptance of prenuptial agreements, and challenges to the notion of marriage as reserved for opposite sex partners have redefined the American family). “[M]ore and more the American legal system has come to view adult family members as it views business associates—as autonomous individuals free to negotiate the terms of their relationships and the terms of their relationships’ demise.” *Id.* at 37. Cases decided in the 1970s demonstrate this shift. See *Bellotti v. Baird*, 443 U.S. 622, 647-48 (1979) (undermining parental authority by invalidating a statute requiring a minor to secure parental consent to obtain an abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)
The Court in *Lawrence v. Texas*\(^3^5\) emphasized the liberty of individuals to engage in conduct of their choosing without governmental interference. Justice Kennedy, in the majority opinion, asserted that the derivation of this right originated in the Due Process Clause.\(^3^6\) In striking down a Texas sodomy law targeting homosexuals, the Court asserted that individual decisions between couples regarding their intimate relationships, regardless of whether they relate to procreation, should be free from governmental interference.\(^3^7\)

Although admittedly extending various fundamental rights and liberty interests, the line of privacy cases underscores the ascendance of private

(diminishing the uniqueness of the marital relationship by stating “the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”).

36. *Id.* at 578.
37. *Id.* The decision in *Lawrence* stressed concepts of bodily autonomy and personal liberty:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. *Id.* at 574 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)). However, it remains controversial whether the language of *Lawrence* was meant to extend a privacy right or simply reject the Court’s earlier decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Robert Post contrasts the *Bowers* and *Lawrence* decisions to explore the significance of *Lawrence*:

*Lawrence* is a strikingly innovative opinion. Although it nods in the direction of the traditional approach, noting “in the past half century” an “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex,” *Lawrence* uses these observations more to chip away at *Bowers*’s historical references than to establish the constitutionally protected nature of a liberty interest in private sodomy between consenting adults. Although the Court in *Lawrence* also repeatedly invokes the autonomy approach to substantive due process, announcing at the beginning of its opinion that “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” it makes no focused effort to link the behavior regulated by the Texas statute to a specifically constitutional dimension of autonomy, like the self-definition that was so important to Blackmun’s dissent in *Bowers*. Instead the theme of autonomy floats weightlessly through *Lawrence*, invoked but never endowed with analytic traction.

ordering in modern jurisprudence.\textsuperscript{38} Private ordering relies on the concept that adults should be able to express their wishes, free from governmental intrusion.\textsuperscript{39} It is premised on the construct that individuals are best situated to make decisions about their own future, and the state may not interfere.\textsuperscript{40}

\textit{B. The Outer Boundaries of Private Ordering}

\textit{1. Contracts Contravening Public Policy}

As a general rule, freedom of contract is operative unless a court determines that some other interest outweighs the interest in the individual's autonomy and justified expectations.\textsuperscript{41} Two primary concerns may motivate a court to invalidate an agreement on public policy grounds. First, a court could find that refusing to uphold the contract would "discourage undesirable conduct by the parties or by others."\textsuperscript{42} Second, a court may view judicial enforcement of the contract as "an inappropriate use of the judicial process."\textsuperscript{43}

\begin{itemize}
\item \textsuperscript{39} See Mnookin, \textit{supra} note 2, at 1018.
\item \textsuperscript{40} Id. (quoting J.S. MILL, \textit{ON LIBERTY}, in \textit{ON LIBERTY AND REPRESENTATIVE GOVERNMENT} 68 (R. McCallum ed. 1947)) ("Each spouse . . . is the person most interested in his own well-being . . . with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else." (second omission in original)).
\item \textsuperscript{41} FARNSWORTH, \textit{supra} note 16, § 5.1, at 321. Public policy concerns may limit freedom of contract:
\begin{itemize}
\item The power to contract is not unlimited. While as a general rule there is the utmost freedom of action in this regard, some restrictions are placed upon the right by legislation, by public policy and by the nature of things. Parties cannot make a binding contract in violation of law or of public policy.
\item Sternaman v. Metro. Life Ins. Co., 62 N.E. 763, 764 (N.Y. 1902); Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775) ("The principle of public policy is this: ex dolo malo non oritur actio [no right of action arises from one's own fraud]. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."); see also Samuel Williston, \textit{Freedom of Contract}, 6 CORNELL L.Q. 365, 374 (1921) ("Observation of results has proved that unlimited freedom of contract, like unlimited freedom in other directions, does not necessarily lead to public or individual welfare and that the only ultimate test of proper limitations is that provided by experience.").
\item \textsuperscript{42} See FARNSWORTH, \textit{supra} note 16, § 5.1, at 322.
\item \textsuperscript{43} Id.
\end{itemize}
\end{itemize}
A New Form of Family Planning?

Surrogacy contracts are a prime example of contracts originally found unenforceable for contravening public policy. Traditional surrogacy contracts that involve the exchange of money and do not allow the surrogate the option to reconsider are considered offensive to several pervasive public policies such as: the policy against child bartering; the best interest of the child standard; laws that make the surrender of parental rights revocable; and the public interest in the "natural family." However, in many states surrogacy contracts entered into without the exchange of money and reserving the option of the surrogate mother to change her mind are often enforceable.

2. Excessive Entanglement

Courts have established limits to the enforceability of prenuptial agreements. In a prominent Pennsylvania Superior Court decision, the court found the excessive entanglement exception operative. In Zummo v. Zummo, the Pennsylvania Superior Court refused to enforce a verbal provision of a prenuptial agreement stipulating the religious upbringing of children from the marriage. It posited that enforcement

44. In re Baby M, 537 A.2d 1227, 1234 (N.J. 1998) (defining a surrogacy contract as an agreement between a couple and a woman who agrees to artificial insemination and to carry a child to term. After the birth of the child, the woman is separated from the child and the couple is regarded as both the lawful father and mother.).  
45. Id. ("The payment of money to a surrogate is perhaps criminal, and potentially degrading to women.") The court also found the contractual surrender of parental rights to be invalid. Id. at 1245-46. The New Jersey Supreme Court contends that it has long been the state policy that, when possible, children should remain with their natural parents. Id. at 1246-47.  
46. Id. at 1240-42.  
47. Id. at 1256-60.  
48. Id. at 1264.  
49. Id. at 1245-50.  
51. See infra notes 53-55 and accompanying text.  
53. Id. at 1147; see also In re Marriage of Weiss, 49 Cal. Rptr. 2d 339, 346-47 (Cal. App. 1996) (citing Zummo, 574 A.2d at 1146-48); Sotnick v. Sotnick, 650 So. 2d 157, 160
would involve excessive entanglement and encroachment by the state on a fundamental right of religious freedom protected by the First Amendment.\textsuperscript{44}

The theoretical underpinnings of \textit{Zummo} are derived from the excessive entanglement exception.\textsuperscript{45} Private individuals, entities, or actors may infringe upon one another's constitutionally protected liberties, free from governmental intrusion.\textsuperscript{46} However, "if the government affirmatively authorizes, encourages, or facilitates private conduct that violates the Constitution," then "the government must cease its involvement with the private actor or the private entity must comply with the Constitution."\textsuperscript{47}

C. The UPAA and the Trend Towards Enforceability

Prior to the 1970s, courts deemed prenuptial agreements entered into in anticipation of divorce void as against public policy.\textsuperscript{48} The advent of no-fault divorce and the rising divorce rate prompted courts to

(\textit{Fla. Dist. Ct. App. 1995}) (citing \textit{Zummo} for the proposition that legal authority is generally against agreements pre-determining the religion in which the child will be raised).

54. \textit{Zummo}, 574 A.2d at 1146. The court believed that enforcement of the provision "encroaches upon the fundamental right of individuals to question, to doubt, and to change their religious convictions and to expose their children to their changed beliefs." \textit{Id.} (finding that the source of these rights was found in the Establishment and Free Exercise clauses of the First Amendment). \textit{Id.}


56. \textit{E.g.,} The Civil Rights Cases, 109 U.S. 3, 11, 14, 18-19 (1883). The state-action doctrine implies that the Constitution applies to government action but not private action. CHEMERINSKY, supra note 55. However, both state and federal statutes may limit private infringement of fundamental rights through laws requiring the private actor to comply with the same standards as those set out in the Constitution. \textit{Id.}

57. CHEMERINSKY, supra note 55, § 6.4.4.3; \textit{see Shelley v. Kraemer, 334 U.S. 1, 13-15 (1948)} (exemplifying the entanglement exception). On a writ of certiorari, the Supreme Court applied the entanglement exception proffering, "Action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." \textit{Id.} at 14. \textit{Shelley} involved a restrictive covenant whereby those in the neighborhood agreed that they would not sell their homes to African-American families. \textit{Id.} at 4-5. The lower courts upheld the restrictive covenant on the grounds that the private contract was protected by the state-action doctrine. \textit{Id.} at 6. The Supreme Court rejected this explanation and asserted that the entanglement exception was operative. \textit{Id.} at 19-20.

58. \textit{See, e.g., In re Marriage of Higgason, 516 P.2d 289, 295 (Cal. 1973)} (differentiating between contracts made "in contemplation that the marriage relation will continue until the parties are separated by death" from contracts made in contemplation of divorce); \textit{see also} Katherine B. Silbaugh, \textit{Marriage Contracts and the Family Economy}, 93 NW. U. L. REV. 65, 72-73 (1998).
reconsider their position.\textsuperscript{59} \textit{Posner v. Posner},\textsuperscript{60} the seminal decision finding prenuptial agreements enforceable, took note of these societal and legal shifts and responded accordingly.\textsuperscript{61} Other states soon followed Florida's lead and revised their position on the enforceability of prenuptial agreements.\textsuperscript{62}

The UPAA, proposed in 1987, was devised to standardize laws regarding the enforceability of prenuptial agreements.\textsuperscript{63} To date, twenty-five states and the District of Columbia have adopted the UPAA.\textsuperscript{64} The UPAA provides two grounds for finding prenuptial agreements unenforceable.\textsuperscript{65} First, if parties did not execute the agreement

\begin{footnotesize}

With divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners whose property and familial situation is such as to generate a valid antenuptial agreement settling their property rights upon the death of either, might want to consider and discuss also—and agree upon, if possible—the disposition of their property and the alimony rights of the wife in the event their marriage, despite their best efforts, should fail.

\textit{Id.}

60. 233 So. 2d 384 (Fla. 1970).

61. \textit{Id.} at 384. In rendering prenuptial agreements enforceable, the court referenced changing divorce laws, notably the advent of California's no-fault divorce law:

This court can take judicial notice of the fact that the ratio of marriages to divorces has reached a disturbing rate in many states; and that a new concept of divorce—in which there is no "guilty" party—is being advocated by many groups and has been adopted by the State of California in a recent revision of its divorce laws providing for dissolution of a marriage upon pleading and proof of "irreconcilable differences" between the parties, without assessing the fault for the failure of the marriage against either party.

\textit{Id.}


65. \textit{UNIF. PREMARITAL AGREEMENT ACT} § 6, 9C U.L.A. 48 (2001). The UPAA also stipulates conditions under which a prenuptial agreement may not be enforceable:

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
voluntarily, it could be unenforceable.\textsuperscript{66} Second, if the agreement was unconscionable due to a contracting party's failure to disclose all property or financial obligations, it would not be enforceable.\textsuperscript{67} Though the UPAA encourages a contract-like view of prenuptial agreements, some states that have not adopted the UPAA have gone further, asserting that it is not a court's place to inquire into substantive provisions of a prenuptial agreement.\textsuperscript{68}

\textbf{D. Prenuptial Contracts Regulating the Ongoing Marriage}

The preponderance of prenuptial agreements address the allocation of property and support subsequent to the dissolution of the marriage.\textsuperscript{69} Although the UPAA does not explicitly refer to the regulation of conduct, it permits provisions for "any other matter, including [the parties'] personal rights and obligations, not in violation of public policy

\begin{itemize}
\item (1) that party did not execute the agreement voluntarily; or
\item (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
  \begin{itemize}
  \item (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
  \item (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
  \item (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.
  \end{itemize}
\item (b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.
\item (c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.
\end{itemize}


\textit{Id.} § 6(a)(2), 9C U.L.A. 48-49 (2001). Nondisclosure of property and financial obligations could only be permissible if the adverse party expressly waived their right to disclosure or "could not have had, an adequate knowledge of the property or financial obligations of the other party." \textit{Id.} § 6(a)(2)(i)-(iii).

\textit{E.g.}, White v. White, 617 So. 2d 732, 734 (Fla. Dist. Ct. App. 1993); Howell v. Landry, 386 S.E.2d 610, 615 (N.C. App. 1989) (applying contract principles of construction to prenuptial agreements); Simeone v. Simeone, 581 A.2d 162, 166 (Pa. 1990) (asserting that the reasonableness of the prenuptial contract is not an appropriate subject for judicial review); Gant v. Gant, 329 S.E.2d 106, 114 (W. Va. 1985) (advancing that using the standard of fairness subjects the prenuptial agreement to the type of "wealth redistribution that these agreements are designed to prevent").

or a statute imposing a criminal penalty." The official comment to the UPAA stipulates that an agreement may be made regarding "choice of abode, freedom to pursue career opportunities, and so on." The UPAA seemingly suggests that parties may contract on conduct in an ongoing marriage, permitting that it does not violate public policy.

The Restatement of Contracts provides some guidance on unenforceable provisions. Restatement Section 190 states that provisions of contracts intending to alter the "essential incidents" of marriage shall not be enforced. The Louisiana Supreme Court attempted to differentiate between essential and nonessential incidents of the marriage. The court stated that "with the advent of no-fault divorce and the changes in society that such laws represent, public policy has changed and the traditional rule . . . has given way to the more realistic view that such agreements are valid and enforceable under certain circumstances."

70. UNIF. PREMARRITAL AGREEMENT ACT § 3(a)(8), 9C U.L.A. 48 (2001). The UPAA delineates the following as acceptable content for prenuptial agreements:

(a) Parties to a premarital agreement may contract with respect to:
(1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
(2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
(3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
(4) the modification or elimination of spousal support;
(5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
(6) the ownership rights in and disposition of the death benefit from a life insurance policy;
(7) the choice of law governing the construction of the agreement; and
(8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.
(b) The right of a child to support may not be adversely affected by a premarital agreement.

73. Id. Nonetheless, courts have rarely enforced provisions in a prenuptial agreement that attempt to regulate conduct in the ongoing marriage. Reynolds, supra note 69; see also Lenore J. Weitzman, Legal Regulation of Marriage: Tradition and Change, 62 CAL. L. REV. 1169, 1260 (1974) (suggesting that contracts that alter the existing incidents of marriage will be voided either on the basis of public policy or lack of consideration because a pre-existing duty cannot be valid consideration).
75. Id.
76. Id.
The regulation of conduct, in an attempt to minimize socially inappropriate behavior, appears to be permissible. In *Stadther v. Stadther*, the Alabama Court of Civil Appeals enforced an agreement which provided for additional payments for the wife should the husband drink excessively, cause injury to the wife, or engage in other activities that might lead to divorce. In contrast, courts have deemed less socially beneficial provisions unenforceable. In *Favrot v. Barnes*, the Louisiana Court of Appeals refused to enforce a provision attempting to regulate the frequency of sexual intercourse during the marriage.

II. MARRIAGE IS NOT AN ORDINARY CONTRACT

The depiction of a prenuptial agreement as an ordinary contract is somewhat misplaced. As the mid-nineteenth century decision *Maynard v. Hill* stressed, marriage is not an ordinary contract. It differs from an ordinary contract in several ways because, unlike entry into an ordinary contract, entry into a marriage creates a legally and publicly recognized

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79. *Id.* Courts have also enforced provisions that provide stipulations between the parties for the upbringing of children. *See, e.g.,* Ramon v. Ramon, 34 N.Y.S. 100, 112-13 (N.Y. Fam. Ct. 1942) (holding enforceable a provision that dictated the religion in which the children would be raised).
81. *Id.* at 875 (voiding a prenuptial contract that required the parties to limit sexual intercourse to once a week). The court held that it was not the place of the judiciary to uphold a contract altering intimate marital obligations. *Id.; see also* Koch v. Koch, 232 A.2d 157, 160 (N.J. Super. Ct. App. Div. 1967) (finding a contract requiring the husband’s mother to live with the couple unenforceable, as it conflicted with the couples’ conjugal relations); Mengal v. Mengal, 108 N.Y.S.2d 992, 995-96 (1951) (holding unenforceable as against public policy a provision of a prenuptial agreement that stipulated that the wife’s sons would not live with the couple during the marriage).
82. Ellen H. Moskowitz, *Some Things Don’t Belong in Contracts,* NAT’L L.J., June 8, 1998, at A25 (“[C]ontracts are commercial tools, at odds with the unconditional, binding qualities many individuals value about family relationships.”); Jeffrey Evans Stake et. al., *Opportunities for and Limitations of Private Ordering in Family Law,* 73 IND. L.J. 535, 558-59 (1998) (commenting on private ordering, Michael Grossberg observed that “unlike marital choice, the tilt in divorce had always been toward state regulation and severe limits on private ordering even though over time divorce became more accessible and more frequent”).
83. 125 U.S. 190 (1888).
84. *Id.* at 211 (stating that marriage “is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress”).
status, that confers both legal and economic benefits on the contracting parties. Through the support of both parties, the state maintains an interest in the children of the marriage, and entry into a marital contract must be solemnized by an appointed official. Based on these differences which negotiate the rights and responsibilities of both parties, marriage should not be treated as an ordinary contract. The passage and promulgation of the Defense of Marriage Act supports the premise that, despite an increased acceptance of the concept that not all couples marry to bear children, procreation is a manifest function of the married couple.

86. See, e.g., infra note 212.
88. See, e.g., CAL. FAM. CODE § 400 (Deering 2004); N.Y. DOM. REL. LAW § 11 (McKinney 1999) (providing an enumeration of officials who may solemnize a marriage).
89. North Carolina stipulates the following prerequisites for a valid marriage:

A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, either:

(1)a. In the presence of an ordained minister of any religious denomination, a minister authorized by a church, or a magistrate; and

b. With the consequent declaration by the minister or magistrate that the persons are husband and wife; or

(2) In accordance with any mode of solemnization recognized by any religious denomination, or federally or State recognized Indian Nation or Tribe.

91. See generally H.R. REP. NO. 104-664 (1996). In discussing the appropriateness of the Defense of Marriage Act, the House Committee on the Judiciary cites to a prepared statement by Professor Haley Arkes, a Professor of Jurisprudence and American Institutions at Amherst College:

We are, each of us, born a man or a woman. The committee needs no testimony from an expert witness to decode this point: Our engendered existence, as men and women, offers the most unmistakable, natural signs of the meaning and purpose of sexuality. And that is the function and purpose of begetting. At its core, it is hard to detach marriage from what may be called the “natural teleology of the body”: namely, the inescapable fact that only two people, not three, only a man and a woman, can beget a child.

Id. at 13 (quoting On the Defense of Marriage Act: Hearing on H.R. 3396 Before the House Comm. on the Judiciary, 104th Cong. (1996) (statement of Haley Arkes, Professor of
III. THE RIGHT TO BEAR CHILDREN AS A FUNDAMENTAL RIGHT

A. Foundations of the Right to “Bear or Beget”

A no-child provision of a prenuptial agreement implies the waiver of a fundamental right.92 The Supreme Court has not always recognized procreation as a fundamental right.93 In Buck v. Bell,94 the Supreme Court affirmed the constitutionality of a Virginia law allowing for the involuntary sterilization of the mentally retarded in state institutions.95 Upholding the Virginia law and condoning the sterilization of Carrie Buck, described as “a feeble minded white woman,” the Supreme Court saw no fundamental right to procreation.96

Skinner v. Oklahoma97 laid the foundation for procreation as a fundamental right.98 The Supreme Court declared unconstitutional a statute that mandated sterilization for habitual criminals.99 The Court asserted that this Oklahoma legislation infringed upon the “basic civil rights of man” and pronounced that “[m]arriage and procreation are fundamental to the very existence and survival of the race.”100 Although

Jurisprudence and American Institutions at Amherst College)); see also Linda Greenhouse, Supreme Court Paved Way for Marriage Ruling with Sodomy Law Decision, N.Y. TIMES, Nov. 19, 2003, at A24 (noting that thirty-seven states have “laws or constitutional provisions defining marriage as between a man and a woman”).

92. See Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (designating the right to bear children as one of the “basic civil rights of man”). The concept of a fundamental right to procreate and subsequently define one's family was promulgated in a series of cases originating in post-World War II jurisprudence. Cf. Deborah W. Denno, Sexuality, Rape and Mental Retardation, 1997 U. ILL. L. REV. 315, 336 (1997) (noting that the eugenics movement in the United States declined subsequent to World War II as Nazi atrocities were exposed, particularly those perpetrated against the mentally ill and handicapped).

94. 274 U.S. 200 (1927).
95. Id. at 208.
96. See Stephen Jay Gould, Carrie Buck's Daughter, 2 CONST. COMMENT 331, 336 (1985). By 1935, approximately 20,000 “forced eugenic sterilizations” had been performed by the United States Government. Id. at 332. In 1980, Carrie Buck and her sister, who had also been sterilized, were both alive and found to have normal intelligence. Id. at 335-36.
98. Gould, supra note 96, at 335-36.
100. Id. at 541.
A New Form of Family Planning?

Skinner did not overrule Buck, the decision signaled a shift away from the eugenics movement in the United States.101

The line of cases supporting a fundamental right to privacy also compliments a fundamental right to procreate or to not procreate.102 Griswold, in conferring a privacy right on married couples, granted the right to choose whether to have children by allowing the use of contraceptives.103 Though the controversy in Eisenstadt was resolved on equal protection grounds, the Court employed far more revolutionary concepts and language than in Griswold to describe the extended right of procreative decision-making.104 Writing for the Court, Justice Brennan avowed, "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."105 With this sentence, the Court extended to individuals the right to control reproduction and decide whether to procreate.106

Ostensibly, though Roe v. Wade107 concerns abortion, it also announced a woman's right to make personal decisions regarding procreation.108 Roe was based on earlier cases related to both privacy and procreation.109 In granting a woman's limited right to an abortion, Justice Blackmun's opinion averred a right to privacy and indicated that, regardless of whether its textual authority is found in the Ninth Amendment or the Fourteenth Amendment, the right to privacy "is broad enough to

101. Id. at 539-40 (distinguishing Skinner from Buck on equal protection grounds). The Court reasoned that in Buck, sterilization was mandated for a group that was similarly situated whereas in Skinner, the Oklahoma statute imposed arbitrary distinctions among criminals, thereby violating equal protection. Id.


103. See Griswold v. Connecticut, 381 U.S. 479, 485 (1965). This right is not as explicitly defined in the opinion as the family right to privacy. See Dolgin, supra note 23, at 1542 (suggesting that emphasis on the inviolability of the domestic sphere may have been amplified in order to circumvent an acrimonious moral controversy regarding the availability of contraception).

104. See Eisenstadt v. Baird, 405 U.S. 438, 442-43 (1972); see also Katheryn D. Katz, The Clonal Child: Procreative Liberty and Asexual Reproduction, 8 ALB. L.J. SCI. & TECH. 1, 42 n.207, (1997) (noting that as the Court could not agree on whether a right to contraception existed, they opted to strike down the Massachusetts statute on equal protection grounds).


106. Id.


108. Id. at 153.

109. Id. at 152-53.
encompass a woman’s decision whether or not to terminate her pregnancy.”

Planned Parenthood v. Casey qualified a woman’s right to obtain an abortion. Casey affirmed the Constitution’s protection of an individual’s autonomy regarding personal decisions relating to “marriage, procreation, contraception, family relationships, child rearing, and education.” As a requirement to obtain an abortion, Casey replaced Roe’s trimester framework with the “undue burden” standard. This shift in standards may be viewed as downgrading the abortion right from a fundamental right to a protected liberty interest.

Unlike the right not to procreate, the right to procreate has little support in case law. Cleveland Board of Education v. LaFleur is the only Supreme Court case that explicitly designates pregnancy as a fundamental right. The Supreme Court classified pregnancy as “one of the basic civil rights of man.”

110. Id. at 153. However, this right is not absolute. Id. The majority opinion announced that a trimester framework is appropriate for qualifying a woman’s right to terminate her pregnancy. Id. at 163-64. In the first trimester, the woman has a plenary interest in choosing whether to terminate her pregnancy. Id. In the second trimester, the state can regulate to compel an interest in maternal health and safety. Id. at 163. In the third trimester, the state has a plenary right to protect the fetus and a duty to protect the mother. Id. at 163-64. The trimester framework prescribed in Roe was replaced with the undue burden test introduced in Planned Parenthood v. Casey, 505 U.S. 833, 876-79 (1992).

112. Id. at 872-79.
113. Id. at 851. Casey ostensibly affirms a woman’s reproductive autonomy while simultaneously upholding a law limiting this right. Id. at 882-84. The Court upheld a Pennsylvania law mandating a twenty-four hour waiting period for obtaining an abortion, that the woman be given detailed information about the fetus, and that the physician file a report about the abortion that includes the name of the physician, the woman’s age, the number of prior pregnancies, the number of prior abortions, complications from the abortion, the weight of the fetus, and whether the woman was married. Id. at 882-900.

114. Id. at 877 (“A finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of an unviable fetus.”).
117. Id. at 650. Reproductive freedom may be viewed to include both the right to avoid conception and the right to conceive:

The freedom to avoid conception and childbirth, however, is not the only aspect of reproduction that needs legal protection. Another essential element of procreative freedom is the right to become pregnant and to parent, a right that is still ill-defined and in some respects unprotected by the law. . . . Full procreative freedom would include both the freedom not to reproduce and the freedom to reproduce when, with whom, and by what means one chooses.
B. Who Decides? A Weighing of Rights

Once the right to bear or beget a child is established, the scope of the right evolves.\textsuperscript{15} \textit{Planned Parenthood of Central Missouri v. Danforth}\textsuperscript{20} invokes the proposition that the locus of procreative decision-making rests squarely with the mother.\textsuperscript{121} Finding the Missouri statute regulating abortions unconstitutional, the Supreme Court held that a state could not require the written consent of the spouse as a mandatory condition for obtaining an abortion.\textsuperscript{122} According to \textit{Danforth}, procreative decision-making rests squarely with the woman.

The advent of Assisted Reproductive Technology (ART) presented courts with new challenges regarding rights to procreate and not procreate.\textsuperscript{123} In a line of cases known as the frozen embryo cases,\textsuperscript{124} courts were charged with deciding which right was stronger—the right to

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\textsuperscript{16} \textit{LaFleur}, 414 U.S. at 640 (citing \textit{Skinner v. Oklahoma}, 316 U.S. 535, 541 (1942)) ("[T]he Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this... constitutional liberty.").


\textsuperscript{18} 428 U.S. 52 (1976).

\textsuperscript{19} Id. at 67-75.

\textsuperscript{20} Id. at 67-72. In vesting ultimate decision-making authority with the mother, the Court explained, "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." \textit{Id.} at 71.

\textsuperscript{21} See, e.g., \textit{Davis v. Davis}, 842 S.W.2d 588 (Tenn. 1992).

\textsuperscript{22} Id. \textit{A.Z. v. B.Z.}, 725 N.E.2d 1051 (Mass. 2000), and \textit{Kass v. Kass}, 696 N.E.2d 174 (N.Y. 1998), among others, are known as the frozen embryo cases because they involve the disposition of embryos preserved by cryopreservation. \textit{Cf.} Jennifer Marigliano Dehmel, Comment, \textit{To Have or Not To Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?}, 27 CONN. L. REV. 1377, 1380-82 (1995). Cryopreservation is a multi-step process. \textit{Id.} First, a woman's ovaries are stimulated to produce multiple eggs. \textit{Id.} at 1380. Next, the eggs are removed to a petri dish where the sperm are introduced. \textit{Id.} at 1381. Once the sperm fertilizes the egg, the preembryo develops, and the cell division begins. \textit{Id.} When the preembryo reaches the four or eight cell stage, it is implanted into a woman's uterus. \textit{Id.} Although this process is arduous and painful, many frozen preembryos are created and may be preserved for up to ten years.\textit{Id.} The use of frozen embryos as a means to achieve conception has increased dramatically:

In the United States as of 1990, approximately 23,468 embryos were in frozen storage, and 350 babies had been born from frozen embryos. According to one doctor who has long specialized in the field of assisted fertilization, there are now "millions" of frozen embryos worldwide, an amount which, to his distress, is ever-expanding.

\textit{Id.} at 1382.
procreate or the right not to procreate.¹²⁵ In *Davis v. Davis*,¹²⁶ the divorcing couple had attempted in-vitro fertilization and failed.¹²⁷ Mrs. Davis wished to donate the frozen pre-embryos, which she and her husband had conceived through ART, to an infertile couple.¹²⁸ In opposition, Mr. Davis sought to destroy the frozen pre-embryos.¹²⁹ The Tennessee Supreme Court's analysis in *Davis* provided insight into the judicial balancing of the right to procreate against the right to avoid procreation.¹³⁰ The court found that Mr. Davis's interests in avoiding procreation were greater than Mrs. Davis's interest in donating the embryos.¹³¹ The court noted that Mrs. Davis could achieve parenthood through other means, such as adoption or ART with another donor.¹³² The Tennessee Supreme Court ultimately found that "the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the pre-embryos in question."¹³³ Therefore, *Davis* asserted that the right to avoid procreation trumps the right to procreate when procreation is possible through other means.

IV. JUDICIAL INTERPRETATION OF NO-CHILD PROVISIONS

A prenuptial agreement is both an agreement between two prospective adult spouses and a contract.¹³⁴ As such, general contract requirements

¹²⁵ *Davis*, 842 S.W.2d at 602-03 (noting that, due to the unique nature of the case, it was incumbent on the court to balance the unique interests of the parties).

¹²⁶ 842 S.W.2d 588 (Tenn. 1992).

¹²⁷ *Id.* at 589.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 603-04 ("One way of resolving these disputes is to consider the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by different resolutions.").

¹³¹ *Id.* at 603 (noting that "an interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood"). The court warned that the interests would be more competing if Mrs. Davis' competing interest was to use the frozen pre-embryo attempt to bear a child who she would raise. *Id.* at 604.

¹³² *Id.*

¹³³ *Id.*; see also *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000) (finding unenforceable a contract for the disposition of embryos which would, in effect, force the father to become a parent). The Supreme Court of Massachusetts opined that "[a]s a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement . . . . [C]ourts will not enforce contracts that violate public policy." *Id.* at 1057-58.

apply, as well as the provisions of the UPAA. Section 6 of the UPAA assesses the enforceability of the term in question. Section 3 of the UPAA stipulates that parties may contract on matters "including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." In assessing the enforceability of the agreement, a court will consider the procedural and substantive unconscionability of the agreement and public policies surrounding its enforcement.

A. Procedural Unconscionability

A procedural unconscionability analysis focuses on whether a contracting party had a "meaningful choice" in the bargaining process. If a party agrees to a contract term because either the other party uses unfair bargaining tactics or the acquiescing party lacks understanding of the contract terms, the contract may be found procedurally unconscionable. Since a no-child provision involves an absolute duty to perform, an investigation of coercive conduct is appropriate but will not directly resolve the issue of the enforceability.

1. Timing

A particular concern in assessing procedural unconscionability and the voluntariness of the contract is timing. The longer the time between when the party was presented with the agreement and when the agreement was executed, the greater the likelihood the contract such, should be evaluated under the same criteria as are applicable to other types of contracts.

135. Jennifer Kim, Contesting the Enforceability of a Premarital Agreement, 11 J. CONTEMP. LEGAL ISSUES 133, 134 (1997). Prerequisites to a contract, such as offer, acceptance, and consideration must be present for a prenuptial agreement to be valid. See MORGAN & TURNER, supra note 12, at 375. Although section 6 of the UPAA requires that a prenuptial agreement comply with the statute of frauds, at common law a prenuptial agreement did not have to be in writing. Id. at 376.


137. Id. § 3(a)(8), 9 U.L.A. 43 (2001).

138. See discussion infra Part IV.

139. FARNSWORTH, supra note 16, § 4.28, at 311.

140. Id. § 4.28 (stating that conduct at the time of bargaining that is misleading or coercive may render the contract procedurally unconscionable).

141. A no-child provision generally stipulates that a child will not result from the marriage. E-mail from Mitchell Schrage, Partner, Mitchell Schrage & Associates, PLLC, to Joline F. Sikaitis, supra note 13; see also Ex parte Walters, 580 So. 2d 1352, 1354 (Ala. 1991) (upholding the agreement after one spouse threatened not to marry if the agreement was not signed).

142. PREMARITAL AND MARITAL CONTRACTS, supra note 2, at 10.
execution was voluntary. In the case of a no-child provision, the provision itself would not trigger procedural unconscionability.

2. Lack of an Independent Counsel

Although independent counsel is an important factor to consider in determining whether the parties voluntarily entered into the contract, absent other defenses, it is insufficient to demonstrate a lack of voluntariness. However, if the party asserting procedural unconscionability was unable to meet with an attorney or if the advice was explained in an incomprehensible manner, the court may find the voluntariness element absent.

B. Who Decides What is Fair? Substantive Unconscionability

The UPAA invokes the substantive fairness requirement when determining if the parties entered into the prenuptial agreement on equal terms. It considers an agreement to be substantively unconscionable if the signing party did not receive a full disclosure of assets from the party seeking enforcement, did not sign a waiver of this right to disclosure, or did not have a reason to know about the specifics of the enforcing party's

143. Id. The court, in establishing a gap in time, will generally consider the time at which the parties first considered the prenuptial agreement, rather than the time the parties entered into the agreement. See MORGAN & TURNER, supra note 12, at 397. In cases where the parties had discussed the agreement well in advance of the wedding, the court found the agreement to be voluntary. See Fletcher v. Fletcher, 628 N.E.2d 1343, 1347-48 (Ohio 1994) (finding a prenuptial agreement entered into the day before the marriage valid because all of the other prerequisites were met). In contrast, where the agreement was sprung on the party just prior to the wedding with no advanced indication, courts are more likely to find duress because of procedural unconscionability. E.g., Zimmie v. Zimmie, 464 N.E.2d 142, 146-47 (Ohio 1984) (voiding the prenuptial contract for procedural unconscionability, finding that as the wife saw the prenuptial contract for the first time only one day prior to the wedding, she did not enter into it voluntarily).

144. See Zimmie, 464 N.E.2d at 146.


146. In re Estate of Crawford, 730 P.2d 675, 678-79 (Wash. 1986) (reasoning that the contract lacked the requisite voluntariness because the agreeing party, Mrs. Crawford, as a result of not being able to consult with an attorney, could not understand the contract terms and, therefore, did not enter into the agreement voluntarily); see also Orgler v. Orgler, 568 A.2d 67, 70-71 (N.J. Super. Ct. App. Div. 1989) (reasoning that because the plaintiff's attorney failed to advise her on the concepts of equitable distribution and alimony, the plaintiff could not make a "knowing and intelligent waiver" of rights she waived by signing). But see Simeone v. Simeone, 581 A.2d 162, 165-66 (Pa. 1990) (reiterating that prenuptial agreements, like other contracts, bind the parties to the agreement, regardless of the parties' understanding of the terms).

147. UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2), 9C U.L.A. 49 (2001) (stating the prenuptial contract is not valid if "the agreement was unconscionable when it was executed").
A party seeking to avoid a no-child provision may be able to invoke the doctrine of duress. To be successful, a party must prove that an improper threat was made by the adverse party which left him or her with "no reasonable alternative." Agreements signed under a threat of physical violence, although few in number, will be found invalid. Other threats, perhaps to call off the wedding, may not constitute duress, and contracts signed under such threats will be upheld.

C. Abandonment, Ruled Out by the UPAA

To abandon a prenuptial agreement, a party must, through his or her actions or a subsequent contract, repudiate his or her desire to be bound to the terms of the contract. Logically, abandonment would appear to be an appropriate defense to a no-child provision. In states that have not adopted the UPAA, the challenging party may successfully raise abandonment as a defense. However, in jurisdictions that have

149. See PREMARITAL AND MARITAL CONTRACTS, supra note 2, at 61-62 ("Only when the procedural standards are not met, does the substantive fairness of the agreement become dispositive."). In non-UPAA jurisdictions, substantive fairness examination may be applied either at the time of entry into the agreement or at the time of enforcement of the agreement. See id. at 60. If the test is applied at the time of entry into the agreement, the court will ask—did the parties have freedom of contract? Id. This question is circular, as it will lead the court back to the procedural unconscionability analysis. Id. at 61-62; see also Simeone, 581 A.2d at 166 (stating that "the reasonableness of a prenuptial bargain is not a proper subject for judicial review").
151. See infra notes 152-53 and accompanying text.
152. See, e.g., Casto v. Casto, 508 So. 2d 330, 335 (Fla. 1987) (finding a lack of voluntariness where the husband threatened to blow up the house if the wife did not sign the agreement).
153. See Ex parte Walters, 580 So. 2d 1352, 1354 (Ala. 1991) (finding a prenuptial agreement valid despite the husband’s threat to call off the wedding if the wife did not sign the agreement). But cf. Fletcher v. Fletcher, 628 N.E.2d 1343, 1348 (Ohio 1994) (stating that “[t]he presentation of an agreement a very short time before the wedding ceremony will create a presumption of overreaching or coercion, in contrast to this case, the postponement of the wedding would cause significant hardship, embarrassment, or emotional stress”).
155. See, e.g., Gustafson v. Jensen, 515 So. 2d 1298, 1300-01 (Fla. Dist. Ct. App. 1987). The court may infer abandonment from conduct, if the conduct of the parties is unequivocally inconsistent with the terms of the agreement. E.g., McMullen v. McMullen, 185 So. 2d 191, 193 (Fla. Dist. Ct. App. 1966).
156. See, e.g., Gustafson, 515 So. 2d at 1300-01.
adopted the UPAA, absent a written amendment or revocation, the defense is not available.\textsuperscript{157}

\textit{D. Balancing or Juggling? The No-Child Provision Void as Against Public Policy and the Weighing of Competing Interests}

Section 3 of the UPAA delineates permissible content for a prenuptial contract.\textsuperscript{158} Although section 3 fails to mention no-child provisions, the statute permits couples to contract concerning “any other matter, including personal rights and obligations.”\textsuperscript{159} A public policy defense invokes examination of existing laws, as well as countervailing societal views regarding the specific provision at issue.\textsuperscript{160} A court will find a public policy defense compelling when nonenforcement would discourage undesirable conduct or, conversely, enforcement would constitute an inappropriate use of judicial resources.\textsuperscript{161}

The freedom to contract is a fundamental right.\textsuperscript{162} However, despite the core value of freedom of contract, a court may deny enforcement of a provision if it is contrary to public policy.\textsuperscript{163} To decide whether to void a contract or a contract provision on the basis of public policy, a court often invokes a common law balancing test, weighing factors supporting enforcement against factors opposing it.\textsuperscript{164}

Similarly, a court will evaluate the cumulative weight of public policies supporting enforcement of the no-child provision of the contract.\textsuperscript{165} First, a court considers the “justified expectations of the parties.”\textsuperscript{166} Second, a court considers the losses a party may face after relying on the terms of

\textsuperscript{157} \textit{UNIF. PREMARITAL AGREEMENT ACT} § 5, 9C U.L.A. 48 (2001). The section titled “Amendment, Revocation” provides that “[a]fter marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration.” \textit{Id.; cf. PREMARITAL AND MARITAL CONTRACTS, supra} note 2, at 29 (recommending that a defense of abandonment may be precluded by drafting an anti-waiver provision in a prenuptial agreement).

\textsuperscript{158} \textit{UNIF. PREMARITAL AGREEMENT ACT} § 3, 9C U.L.A. 43 (2001).

\textsuperscript{159} \textit{Id.} § 3(a)(8).

\textsuperscript{160} \textit{E.g.,} Posner v. Posner, 233 So. 2d 381, 384-85 (Fla. 1970) (balancing both pre-existing case law and the increase in divorce rates when enforcing prenuptial agreements made in contemplation of divorce).

\textsuperscript{161} \textit{FARNSWORTH, supra} note 16, § 5.1, at 322.

\textsuperscript{162} \textit{See id.} § 5.1, at 321.

\textsuperscript{163} \textit{See in re Marriage of Winegard}, 278 N.W.2d 505, 507 (Iowa 1979) (finding that a spouse’s attempt to avoid his duty of support through a waiver in a prenuptial agreement void as against public policy).

\textsuperscript{164} \textit{Id.} at 512.

\textsuperscript{165} \textit{See generally FARNSWORTH, supra} note 16, § 5.1, at 323-26.

\textsuperscript{166} \textit{Id.} at 324.
the contract or provision. A court considers the possibility that the party seeking to enforce the contract was unaware of the countervailing public policy.

A court will weigh these factors supporting enforcement against factors opposing enforcement of the contract or provision. In calibrating factors opposing the enforcement of a contract or provision, the court first assesses the weight of the policy furthered by nonenforcement. Next, the court considers if the nonenforcement of the contract would enhance the public policy. Finally, the court reflects on the "seriousness and deliberateness of any misconduct that has occurred" and the nexus between the contract or provision and the conduct at issue.

V. ARGUMENTS FOR ENFORCEMENT OF THE NO-CHILD PROVISION

A. Do Privacy Rights Prevail? An Enforcing Party's Claim that the Balance Weighs in His Favor

In initiating the balancing test to determine the appropriateness of public policy as a defense to the contract, the court weighs the factors in favor of enforcement. The party seeking to enforce the agreement will implicitly rely on ascendance of private ordering and the increased rights of couples to arrange the structure and incidents of their relationships. Attempting to demonstrate the reliance interest that was forfeited with the child's birth and the breach of the no-child provision proves to be a difficult and value-laden assessment, as no conceivable restitution exists for the party who proposed the no-child provision. In weighing the enforcement of the public policy, the court will also consider "a party's excusable ignorance of the contravention of public policy." The party may argue that inclusion of the term is not a contravention of public policy.

167. Id.
168. Id.
169. Id.
170. Id.
171. Id.
172. Id. However, it is not imperative that the conduct at issue offend or contravene public policy. Id. at 324-25.
173. Id.
175. See generally FARNSWORTH, supra note 16, § 12.1, at 758. The court would attempt to return the injured party back to the position he would have been in had the contract not been made. Id.
176. Id. § 5.1, at 324.
policy by relying on a constitutional right to privacy both individually and in the marital relationship.177

B. The Enforcing Party’s Assertion that the Right Not to Procreate Is Stronger

The enforcing party may assert that his right not to procreate is stronger than the challenging spouse’s right to procreate.178 He may attempt to distinguish Danforth by construing it narrowly and may suggest that it stipulates that a woman’s decision is dispositive only when the right to an abortion is at stake.179 The enforcing party may offer the frozen embryo cases, specifically Davis, as proof that if procreation can occur through some other means, the party asserting the right not to procreate should prevail.180 The enforcing party may proffer that a no-child provision written into a prenuptial agreement is not an absolute ban on procreation, as the challenging party may have children at a different time with a different person.181 Therefore, the enforcing party may contend that enforcement of the provision would not infringe on a fundamental right, but rather delay the exercise of that right.182 Whereas the party asserting the right to procreate can exercise that right at a later time, the party asserting the right not to procreate lost the right when the adverse party breached the no-child provision of the contract.183 As such, if the no-child provision can be construed not as an absolute prohibition on the exercise of the right, but rather as a delay in exercise of the right, entanglement might not be triggered, and a court might lack a tangible basis for voiding the contract.184

177. Eisenstadt, 405 U.S. at 454 (expanding this right to privacy to unmarried individuals). See Griswold, 381 U.S. at 484 (conferring a right to privacy on married couples).

178. See Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).


180. See Davis, 842 S.W.2d at 604.

181. E.g., id. In rendering Mr. Davis’ right to avoid procreation dispositive, the court stated that if Mrs. Davis’ right was operative, Mr. Davis “would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it.” Id.; Brooke, supra note 3 (recounting that a woman in New York who had entered into a prenuptial agreement containing a no-child provision with her husband was now separated from him and pregnant via artificial insemination).


183. Cf. Davis, 842 S.W.2d at 604.

184. See discussion supra Part I.B.
VI. PUBLIC INTERESTS IN PROCREATION AND MARRIAGE: FACTORS AGAINST THE ENFORCEMENT OF THE NO-CHILD PROVISION

A. Do Procreative Interests Prevail? The Challenging Party’s Claim that the Balance Weighs in Her Favor

In assessing the weight of factors against public policy as a defense to the no-child provision, a court considers four factors: the gravity of the policy; the likelihood that nonenforcement of the provision will further the policy; the gravity of the misconduct expressed in the provision; and the relationship between misconduct and the contract or provision. The challenging party will contend that explicit, firmly entrenched interests exist in procreation, stable and natural families, and bodily autonomy, and she will proffer that no-child provisions contravene these policies. The attack will argue that enforcement of the contract not only contradicts expressed policy, but also encourages couples to contractually alter the incidents of their relationship and commodify procreative processes.

B. Enforcement Punishes the Exercise of a Fundamental Right

If a no-child provision were enforced, the withdrawal of an equity share, spousal support, or the assessment of a penalty could be construed as punishment for the exercise of a fundamental right. In LaFleur, the Supreme Court expressly declared impermissible the punishing of the exercise of the fundamental right to pregnancy. The dilemma presented in the enforcement of a no-child provision could be analogized to that in Danforth, as both attempt to wrest procreative decision-making power away from a woman—one by law and one by contract.

185. Farnsworth, supra note 16, § 5.1, at 324.
186. See discussion infra Part VI.A-C.
187. See discussion infra Part VI.A-C.
188. See discussion infra Part VII.A.3.
C. Courts Are Loathe to Enforce Prenuptial Agreements that Contract Away a Fundamental Right

Individuals, through their conduct, may encroach upon one another’s protected liberties. However, if a court must enforce the contractual infringement of another’s liberty, it becomes entangled in the infringement, and constitutional protections apply. In deciding whether to enforce a no-child provision, a court is likely to frame the issue similarly to how the Pennsylvania Superior Court framed it in Zummo. Zummo held that when courts are called upon to enforce contracts, the court becomes a state actor. Therefore, while an individual may infringe on another’s constitutionally protected rights and liberties, a court may not. The enforcement of a no-child provision in a prenuptial contract requires the court to infringe on a woman’s fundamental right to procreate.

VII. No-Child Provisions Are Unenforceable

Despite the ascendance of private ordering, no-child provisions are unenforceable. A court will void or sever no-child provisions either because the term and its consequences contravene prevailing public policy (and it wishes to discourage the creation of such terms in the future) or because the provision inappropriately entangles the judiciary in the infringement of a fundamental right. Both interpretations

192. The Civil Rights Cases, 109 U.S. 3, 21 (1883) (holding the Fourteenth Amendment is not applicable to the conduct of a private actor or entity).
193. CHEMERINSKY, supra note 55, § 6.4.1 (noting that if the government “affirmatively authorizes, encourages, or facilitates” the infringement, then either the private actor must comply with the Constitution or the government must cease its involvement). Shelley v. Kraemer, 334 U.S. 1, 19, 20 (1948), very clearly states that, in enforcing the contract, the government becomes involved and the Fourteenth Amendment is triggered.
195. Id.; see Shelley, 334 U.S. at 14.
196. Shelley, 334 U.S. at 14. Even though the fundamental right to procreate may be supported by the greater weight of case law, the right to procreate is, nonetheless, a fundamental right as well. LaFleur, 414 U.S. at 639-40.
197. See discussion infra Part VII.B.
198. See discussion infra Part VII.
199. Id.; see City of Newton v. Rumery, 480 U.S. 386, 392 (1987) (“The relevant policy is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by the enforcement of the agreement.”); see, e.g., Davies v. Grossmont, 930 F.2d 1390, 1396 (9th Cir. 1991) (voiding a contract in which a teacher signed away his right to run for public office in a settlement agreement with his former employer, the Grossmont Union High School District, because there was no public policy critical enough to outweigh the teacher’s right to run for public office). In reaching its conclusion, the Davies court stated, “The question whether the
express the same underlying value—individuals do not have an unlimited ability to structure their private relationships.203

A. Public Policies Opposing Enforcement Outweigh Policies Favoring Enforcement

In states that have adopted the UPAA, the law permits content “not in violation of public policy.”201. A public interest in the rights to privacy and private ordering prevails; however, this right is not unlimited.202. Cumulatively, interests in procreation, marital stability, natural families, and the procreative decision-making of women trump privacy interests.203. By voiding or severing a no-child provision, a court will clarify and promote the public policies at issue and discourage the creation of such provisions in the future.204

1. The State Has an Unequivocal Interest in Procreation

The state has expressed its interest in procreation in justifications for not extending marriage to same-sex couples.205. Explicitly, the law distinguishes opposite-sex marriage from same-sex relationships on the waiver of federal constitutional rights is enforceable is a question of federal law, which we resolve by the application of federal common law.” Id.

200. Some scholars caution against complete freedom of contract in prenuptial agreements:

Premarital agreements should be greeted with skepticism, not embraced with enthusiasm. In addition to strengthening the “freedom of contract” principle and supporting individual autonomy, the law governing the enforcement of premarital agreements should be fashioned to effectuate other public policies: the eradication of gender discrimination and the attainment of economic justice for the economically vulnerable spouse at the end of a marriage. The tension between these policies and the “freedom of contract” principle can be reconciled by the adoption of a regime that enforces a premarital agreement only if the agreement attains economic justice for the economically vulnerable spouse or, failing that, if the bargaining process culminating in execution of the agreement was demonstrably fair.

Gail Frommer Brod, Premarital Agreements and Gender Justice, 6 YALE J.L. & FEMINISM 229, 295 (1994).

202. See discussion infra Part I.
203. See discussion infra Part VII.A.
204. FARNSWORTH, supra note 16, § 5.1, at 324.
205. E.g., Standhardt v. Superior Court, 77 P.3d 451, 463-64 (Ariz. Ct. App. 2003) (holding that despite the Supreme Court’s decision in Lawrence v. Texas, Arizona’s prohibition of same-sex marriage is not unconstitutional because the state has an interest in procreation and child-rearing within the marital relationship). The court of appeals stated, “Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State’s interest in ensuring responsible procreation within committed, long-term relationships.” Id. at 463.
basis of procreation.\textsuperscript{206} The legislative history of the Defense of Marriage Act boldly argues, "the [G]overnment has an interest in marriage simply because it has an interest in children."\textsuperscript{207} In addition, throughout the line of abortion cases, while the Court extended a liberty interest in abortion to women, it consistently averred the state interest in the viability of the fetus.\textsuperscript{208} Enforcement of a no-child provision would expressly contradict public policies favoring procreation offered in justifications that limit marital and abortion rights.\textsuperscript{209}

2. Marital Stability Is an Expressed Public Interest

The state has a clear interest in marital stability.\textsuperscript{210} Federal and state expenditures for the creation of programs encouraging marital stability reflect this interest.\textsuperscript{211} The benefits that flow from marriage confirm its status as a public interest.\textsuperscript{212}

\begin{itemize}
\item \textsuperscript{206} H.R. REP. NO. 104-664, at 13 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2917 (noting "civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing").
\item \textsuperscript{207} Id.
\item \textsuperscript{208} Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).
\item \textsuperscript{209} E.g., Baxter, supra note 3; Brooke, supra note 3 ("One part of the bargain, however, is almost never mentioned: successful men who have raised children with Wife No. 1 often insist that their subsequent, younger spouses must forgo having children. Matrimonial lawyers say the arrangement, though legally dubious, is increasingly being written into prenuptial agreements.").
\item \textsuperscript{210} See H.R. REP. NO. 104-668, at 13.

[It] is simply wise and prudent to reorient our policies to encourage marriage, especially when children are involved. For this reason, the Administration plan commits up to $300 million per year for states to design and implement programs that reduce nonmarital births and increase the percentage of children in married-couple families . . . .

. . . The Administration's proposal will establish a $100 million annual fund to conduct research and demonstration projects, and provide technical assistance primarily focusing on family formation and healthy marriage activities.

Id. at 2, 20. The authors of the press release emphasize an incontrovertible link between an intact marriage and healthy child development. Id. at 2. In finding Massachusetts's law banning gay marriage unconstitutional, the Massachusetts Supreme Judicial Court also stressed the need for strong family units:

[All] children, need and should have the fullest opportunity to grow up in a secure, protected family unit. Similarly, no one disputes that, under the rubric of marriage, the State provides a cornucopia of substantial benefits to married parents and their children. The preferential treatment of civil marriage reflects the Legislature's conclusion that marriage "is the foremost setting for the
In *Davis*, the court distinguished between a prohibition and a delay in the exercise of a right. A no-child provision framed as a delay of the procreative right means that the spouse is free to exercise this right with another partner or by another means. It implicates divorce as an appropriate step toward the exercise of this right. This interpretation of a no-child provision conveys that the exercise of the right to procreate, in which the state has a strong interest, may only be achieved through divorce, a legal action contrary to public interest. Applying the *Davis*

education and socialization of children" precisely because it "encourages parents to remain committed to each other and to their children as they grow." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003) (quoting *Id.* at 996 (Cordy, J., dissenting)).

212. See *Goodridge*, 798 N.E.2d at 955-57. The decision specifically delineates some of the benefits that flow from marriage in the state of Massachusetts.

The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that "hundreds of statutes" are related to marriage and to marital benefits. With no attempt to be comprehensive, we note that some of the statutory benefits conferred by the Legislature on those who enter into civil marriage include, as to property: joint Massachusetts income tax filing; tenancy by the entirety (a form of ownership that provides certain protections against creditors and allows for the automatic descent of property to the surviving spouse without probate); extension of the benefit of the homestead protection (securing up to $300,000 in equity from creditors) to one’s spouse and children; automatic rights to inherit the property of a deceased spouse who does not leave a will; the rights of elective share and of dower . . . ; entitlement to wages owed to a deceased employee; eligibility to continue certain businesses of a deceased spouse; the right to share the medical policy of one’s spouse; thirty-nine week continuation of health coverage for the spouse of a person who is laid off or dies; preferential options under the Commonwealth’s pension system; preferential benefits in the Commonwealth’s medical program, MassHealth; . . . financial protections for spouses of certain Commonwealth employees (fire fighters, police officers, and prosecutors, among others) killed in the performance of duty; the equitable division of marital property on divorce; temporary and permanent alimony rights; the right to separate support on separation of the parties that does not result in divorce; and the right to bring claims for wrongful death and loss of consortium, and for funeral and burial expenses and punitive damages resulting from tort actions.

*Id.* at 955-56 (citations omitted).

213. *Davis v. Davis*, 842 S.W.2d 588, 603-04 (Tenn. 1992). The court reasoned that if the party seeking to procreate could do so at another time, with another party or in another manner, her right to procreate was not prohibited but rather merely delayed. *Id.*

214. See *Brooke*, supra note 3 (describing how a woman who had acceded to a no-child provision of a prenuptial agreement was now separated from her husband and pregnant via artificial insemination).

215. Such regulation demonstrates that the characterization of marriage as a private contract is misplaced:

For all the talk of the increasing "privatization" of family law, we are far from a system in which parties are free to contract for any marital arrangement that they want. Aside from the restrictions on termination provisions in *prenuptial*
framework to enforce a no-child provision results in the promotion of contradictory public policies, given the government's interest in marital stability. Therefore, construction of a no-child provision as a delay in the exercise of a fundamental right is misplaced since it would implicitly contravene an expressed policy promoting marital stability.

3. Nonenforcement of the Contract Discourages the Commodification of Procreative Processes

Disdain for, and the pervasive illegality of, surrogacy contracts reflects courts' concern that the enforcement of reproductive contracts will commodify reproduction and undermine women's autonomy in procreative decision-making. State treatment of surrogacy contracts turns on an important distinction. Surrogacy contracts, in which the surrogate is not paid and may freely rescind her promise to give the child to the contracting parties, remain generally enforceable, whereas, contracts involving the exchange of money and forbidding the woman from changing her mind are generally construed as illegal. No-child provisions parallel the latter type of surrogacy contract. Inherent in a no-child provision of a prenuptial agreement lies irrevocable consent and a fungible exchange of an equity stake, property interest, or spousal support for the forbearance of a procreative right. Enforcement of a

agreements], potential mates cannot bind themselves legally to marriages in which spouses' domestic, financial, and sharing obligations are specified by contract. Polygamous and same-sex marriages are prohibited. These laws are not default rules, but restrictions on freedom of marital contract, and they strikingly distinguish family law from contract law.


217. See id.
218. In re Baby M, 537 A.2d 1227, 1248 (N.J. 1988). Cataloging the reasons why surrogacy contracts offend public policy, the New Jersey Supreme Court stated, "In surrogacy, the highest bidders will presumably become the adoptive parents regardless of suitability, so long as payment of money is permitted." Id.; compare Margery Maguire Shultz, Reproductive Technology and Inten-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. REV. 296, 335 (1990) (delineating the relationship between surrogacy contracts and the commodification of human life), with Radhika Rao, Assisted Reproductive Technology and the Threat to the Traditional Family, 47 HASTINGS L.J. 951, 955-56 (1996) (suggesting that the denial of constitutional rights to surrogate mothers through the denial of their fundamental right to procreate would be deleterious and disempowering).
219. See Baby M, 537 A.2d at 1264.
220. Id.
221. See infra text accompanying notes 140.
222. See E-mail from Mitchell Schrage, Partner, Mitchell Schrage & Associates, PLLC, to Joline F. Sikaitis, supra note 13 (noting that violation of a no-child provision would result in either a cessation of spousal support, the waiver of some equity interest, or the
no-child provision, like enforcement of a surrogacy contract, would promote the notion that a woman's reproductive rights may be bought and sold, thus commodifying the procreative process and offending public policy.\footnote{225}

The enforcement of a no-child provision would ignore case law concerning the locus of procreative decision-making.\footnote{226} The Supreme Court's decision in \textit{Danforth} clearly stipulates that the woman has a greater interest in procreative decisions.\footnote{225} Procreative decision-making is a woman's inalienable right through the first trimester of her pregnancy.\footnote{226} Enforcing a no-child provision denies this inalienability and forces a woman to live with "the consequences of prior decisions that are no longer consistent with the values and preferences of the person she has become."\footnote{227}

\textit{4. Factors in Favor of Contract Enforcement Are Tenuous}

In a no-child provision, the party seeking to enforce the agreement expects that the court will enforce his arrangement attempting to alter the incidents of the marital relationship.\footnote{228} Consequently, this party payment of a penalty). Decisions on surrogacy suggest that it is impossible to revoke parental rights in advance of the birth of a child. \textit{Baby M}, 537 A.2d at 1248 ("In surrogacy, consent occurs so early that no amount of advice would satisfy the potential mother's need, yet the consent is irrevocable.").

\footnote{223} \textit{See} Shultz, \textit{supra} note 218, at 335.

\footnote{224} In a state where the UPAA had been adopted, once a spouse acceded to a no-child provision in a contract, the term could only be avoided if the couple in writing jointly agreed to amend or revoke the term. \textit{Unif. Premarital Agreement Act} § 5, 9C U.L.A. 47 (2001) ("After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration."). In states where prenuptial agreements are construed similarly to commercial contracts, the general test for abandonment may apply:

\begin{quote}
[A] contract may be abandoned by mutual consent and that such consent may be implied from the acts and conduct of the parties. A contract will be treated as abandoned when the acts of one party, inconsistent with its existence, or acquiesced in by another. Where acts and conduct are relied upon to constitute abandonment, however, they must be positive, unequivocal and inconsistent with intent to be further bound by the contract.
\end{quote}

\textit{H.T.C. Corp. v. Olds}, 486 P.2d 463, 466 (Colo. Ct. App. 1971) (citations omitted). As such, absent an express writing, abandonment may be a more viable defense in non-UPAA jurisdictions. \textit{Id.}

\footnote{226} \textit{Id.}; \textit{see also} \textit{Roe v. Wade}, 410 U.S. 113, 163 (1973).
\footnote{228} In asserting his right to structure incidents of personal relationships, the enforcing party would rely on a constitutional right to privacy. \textit{E.g.}, \textit{Lawrence v. Texas}, 539 U.S. 558, 564-65 (2003). This assumption relies on the prominence of private ordering and the
either expects to have no children from the marriage or expects that the birth of the child will absolve him of support or equity transfer obligations.\textsuperscript{229} The enforcing party's reliance on judicial acquiescence to the alteration of the marital relationship is contrary to the courts' reluctance to enforce family promises and the prominence of the best interest of the child standard.\textsuperscript{226} These interests would, in effect, diminish the enforcing parties' privacy interests.\textsuperscript{231} Furthermore, interests in procreation, marital stability, and women's reproductive rights outweigh a limited privacy.

\textbf{B. Enforcement of a No-Child Provision Fails Strict Scrutiny and Excessively Entangles Courts}

Although individuals are free to contract away fundamental rights privately, the concept of excessive entanglement offers that, when a court enforces the contract, it becomes entangled and due process limits apply.\textsuperscript{222} The abridgement of a fundamental right, enforced by a court, triggers a substantive due process analysis that requires a strict scrutiny standard of review.\textsuperscript{223} The end must represent a compelling state interest and the means, enforcement of the contract, must be narrowly tailored to

devolution of a right to privacy within intimate relationships. \textit{Id.}; Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); Marvin v. Marvin, 557 P.2d 106, 116 (Cal. 1976). \textit{Contra In re Baby M}, 537 A.2d 1227, 1254 n.13 (N.J. 1988) ("As a general rule, a person should be accorded the right to make decisions affecting his or her own body, health, and life, unless that choice adversely affects others." (emphasis added)).

\textsuperscript{229} E-mail from Mitchell Schrage, Partner, Mitchell Schrage & Associates, PLLC, to Joline F. Sikaitis, \textit{supra} note 13.

\textsuperscript{230} A no-child provision would be breached by the birth of a child. \textit{See} DOLGIN, \textit{supra} note 34, at 217 (noting the prominence of the "best interest of the child" standard); \textit{see also} Mary Ann Glendon, \textit{Family Law Reform in the 1980's}, 44 L.A. L. REV. 1553, 1567 (1984) ("[S]ubstantial limitations on freedom of contract . . . are appropriate, at least if there are dependent children at the time of divorce."); \textit{cf.} Andrew Kull, \textit{Reconsidering Gratuitous Promises}, 21 J. LEGAL STUD. 39, 52 (1992) (discussing the reluctance of courts to enforce family promises).

\textsuperscript{231} \textit{Cf.} Glendon, \textit{supra} note 230, at 1567.

\textsuperscript{232} Shelley v. Kraemer, 334 U.S. 1, 14-15 (1948); CHEMERINSKY, \textit{supra} note 55, § 6.4.3.

\textsuperscript{233} \textit{See} United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (articulating that a due process analysis is appropriate when government action infringes on a fundamental right); \textit{cf.} Albright v. Oliver, 510 U.S. 266, 272 (1994) ("The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity."); LEE EPSTEIN & THOMAS G. WALKER, \textit{CONSTITUTIONAL LAW FOR A CHANGING AMERICA} 417 (3d. ed. 1998) (commenting on the application of strict constitutional scrutiny when the fundamental right to privacy is abridged).
A no-child provision fails a substantive due process analysis and inappropriately entangles the court in the infringement of a fundamental right.

1. Avoidance of Procreation in the Marital Relationship Is Not a Compelling State Interest

The avoidance of children in the marital relationship is not a clearly expressed public interest. Upholding the pervasive standard of the best interest of the child and the expressed state interest in procreation support policies supporting procreation in the marital relationship. Furthermore, expressed interests implicate a clear policy favoring procreation in the marital relationship.

2. Even if Avoidance of Procreation Were a Compelling Interest, It Is Not Narrowly Tailored

It is important to differentiate between the concept of not wanting children to result from a marriage and the embodiment of that volition in a contract. If the party does not desire to have children, he or she may take other steps to carry out this desire. When less restrictive means

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234. Reno v. Flores, 507 U.S. 292, 302 (1993) (stipulating that fundamental rights may not be abridged by the government “unless the infringement is narrowly tailored to serve a compelling state interest”).

235. See, e.g., Davis v. Davis, 842 S.W.2d 588, 603-05 (Tenn. 1992) (holding that the right to procreate was outweighed by the right to avoid procreation because the child would be born to divorced parents). But see MARK STRASSER, LEGALLY WED 54 (1997) (noting the state does not seek to further its compelling interest in procreation within a marriage by mandating sterility tests or inquiring about future plans for procreation).

236. The Supreme Court has explicitly recognized a state interest in procreation. In Casey, the Court held that the state possesses “legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.” Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

237. See Adams v. Howerton, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), aff’d, 673 F.2d 1036 (9th Cir. 1982) (reasoning that “the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised”).

238. See infra Part I.B; see also Doe v. Doe, 314 N.E.2d 128, 132 (Mass. 1974) (“We would not order either a husband or wife to do what is necessary to conceive a child or to prevent conception, any more than we would order either party to do what is necessary to make the other happy.”).

239. If a couple mutually desires to avoid procreation, they may use contraception. See generally Birth Control, WEBMDHEALTH, at http://my.webmd.com/hw/healthy_women/hw237877.asp (last updated June 1, 2003). If the husband wishes to avoid procreation absolutely, he may opt for a vasectomy. See generally Marvin Ross, Vasectomy: A Permanent Option, WEBMDHEALTH, at http://my.webmd.com/content/article/14/1685_50045.htm (last visited Oct. 11, 2004). If the wife desires to avoid procreation permanently, she may seek a hysterectomy. Hysterectomy, WEBMDHEALTH,
exist to achieve an end, the state action in question is not narrowly tailored and does not satisfy the requirements of strict scrutiny. 240

VIII. CONCLUSION

The increase in both prenuptial agreements and no-child provisions therein suggests that the enforceability of these provisions will soon require judicial resolution. These provisions challenge a court to balance competing rights and contemplate the court's role in private relationships.

The ascendance of private ordering and the increased ability of couples to structure the terms of their relationships support enforcement of the no-child provision. Nonetheless, the right to privacy is not unlimited. When private actors seek judicial intervention in enforcement of a contract, public policy and constitutional concerns become operative. Penalizing a woman for exercising a fundamental right offends prevailing public policies concerning marital stability and a woman's procreative rights. Despite increasing emphasis on the right of individuals to be left alone, a court is loathe to be an actor in subverting public policies, intruding on a couple's private relationship, and altering the incidents of marriage.

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240. See CHEMERINSKY, supra note 55, § 10.1.2.