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JUSTICE WHITE AND THE RIGHT OF PRIVACY: A MODEL OF REALISM AND RESTRAINT

David D. Meyer

Justice Byron White’s views on the constitutional right of privacy figure prominently in almost all assessments of his tenure on the Supreme Court. To some degree, this only makes sense. The legitimacy of the Court’s intervention to protect unenumerated privacy rights is, after all, often regarded as the central question of modern constitutional law. Yet, for Justice White’s critics, his views on the question have often taken on singular importance, casting a long, dark shadow over the numerous and diverse other contributions he made to the Court’s jurisprudence during thirty-one years of service. To these observers, he is remembered first and foremost for his unyielding rejection of Roe v. Wade, and for his majority opinion in Bowers v. Hardwick, which found no fundamental constitutional right of sexual privacy for homosexuals. His opinions in those cases are regularly featured as exhibits A and B in popular accounts that portray Justice White as having betrayed the liberal ideals of the Kennedy era: Justice White as the increasingly conservative curmudgeon on matters of individual liberty, wielding traditional morality or his own crusty predilections to repel the claims of modern society. Indeed, his writing in

+ Professor of Law, University of Illinois; law clerk to Justice White, 1992 Term. I am grateful to Jim Dwyer, John Goldberg, and the participants in this symposium, as well as participants in faculty colloquia at William and Mary’s Marshall-Wythe School of Law and the University of St. Thomas School of Law, for comments on an earlier draft of this paper.


4. See Charles Fried, A Tribute to Justice Byron R. White, 107 HARV. L. REV. 1, 20, 26 (1993) (suggesting that Roe and Bowers are “the opinions for which Justice White may well most be remembered” and that they “earned him many enemies”); Andrew Koppelman, The Right to Privacy?, 2002 U. CHI. LEGAL F. 105, 116 (suggesting that Bowers “cast a pall on Byron White’s entire judicial career”).

5. See Jeffrey Rosen, The Next Justice, THE NEW REPUBLIC, Apr. 12, 1993, at 21, 24 (noting “the irony that White, a Kennedy Democrat, voted in 72 percent of the cases last term with Rehnquist, a Goldwater Republican,” and concluding that “White was a follower from the start” who drifted steadily to the ideological right); DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE 444-45 (1998) (noting popular accounts of White as having disappointed Kennedy ideals); Pierce O’Donnell, Common Sense and the Constitution:
Roe and Bowers is said to have precluded President Clinton from saying much nice about Justice White upon White’s retirement from the Court in 1993.6

Less often noted is another line of privacy cases in which Justice White’s views were equally distinctive—those dealing with the rights of unwed fathers. Beginning with Stanley v. Illinois7 in 1972, and continuing through at least a half-dozen other cases over the following two decades, Justice White established himself as the most sympathetic member of the Court, or at least the most vocally sympathetic, to the family yearnings of single men.8 This record, of course, does not fit neatly with the account of White as exemplar of conservative constitutionalism. But it provides fodder for another recurring critique of Justice White as the impossible “enigma,”9 the rootless wanderer of constitutional law whose travels simply defied principled explanation.10 If traditional morality provided a sufficient justification for laws penalizing homosexual intimacy, but not for laws penalizing extramarital relations, the explanation must then lie in Justice White’s own moral sensibilities, which his own opinions strenuously excluded as a legitimate source of constitutional law.11

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Justice White and the Egalitarian Ideal, 58 U. COLO. L. REV. 433, 436 (1987); Fried, supra note 4, at 20; Koppelman, supra note 4, at 114-16.

6. See Hutchison, supra note 5, at 437.

7. 405 U.S. 645, 658 (1972) (holding that an unwed father could not be deprived of custody of his children without a hearing to determine his fitness as a parent).

8. See infra Part I.B.


10. See Hutchison, supra note 5, at 380 (suggesting that White was “fixed . . . in the popular mind as a justice of unpredictable and indeterminate philosophy,” conveying “the impression of someone mired in detail and careening from one intellectual pew to another”); id. at 440 (quoting a New York Times editorial describing Justice White, upon his retirement from the Court, as “an enigmatic judge whose philosophy has defied tracing even by legal scholars”); Fried, supra note 4, at 20-22 & n.8 (asserting that White’s positions in cases could be “clearly, even provocatively, inconsistent” with one another and that “[m]any of Justice White’s detractors emphasize his many apparent inconsistencies”); John C.P. Goldberg, Judging Reputation: Realism and Common Law in Justice White’s Defamation Jurisprudence, 74 U. COLO. L. REV. 1473 (2003) (noting the recurring criticism of Justice White as “unprincipled”); Rosen, supra note 5, at 25 (contending that White’s “pragmatism led him to relish his inconsistencies”); Michael Herz, Justice Byron White and the Argument that the Greater Includes the Lesser, 1994 BYU L. REV. 227, 232 n.23 (“It is striking to what extent the standard perception is that White was quite inconsistent . . . .”); Lee & Wilkins, supra note 9, at 295, 299, 302 (noting recurring criticism of White’s decisions as lacking “consistency”).

11. See Koppelman, supra note 4, at 114-15 (asserting that Bowers rested on a “judgment [that] is, of course, the very kind of ‘imposition of the Justices’ own choice of values’ that Justice White sought to avoid”); Rosen, supra note 5, at 25 (describing Justice White’s opinion in Bowers as both “dishonest[]” and “his most personal”).
I wish to discredit both of these accounts. Justice White’s respect for the democratic process—the stated basis for his views in Roe, Bowers, and similar cases—was neither cover for his own moral preferences, nor the product of a late-career ideological conversion. And his willingness to invalidate certain laws affecting family life, even some nontraditional conceptions of family life, did not belie his commitment to democratic choice. In fact, Justice White’s approach in these cases might well serve as a model for how courts should resolve family-privacy disputes in the future. I say this not because I agree with Justice White’s judgment in each of these cases, nor because I think it impossible to quibble with some of his opinions. What I find praiseworthy in Justice White’s privacy jurisprudence, however, is the methodology by which he reached his judgments. It is a methodology that combines profound and principled respect for the limits of judicial power with a simultaneous, and equally principled, acceptance of the propriety of judicial innovation in exceptional cases. Justice White’s basic approach to deciding which cases warranted that innovation—pragmatic, cautious, attuned to factual nuance, and wary of broad theoretical strokes and bright-line rules—strikes me as entirely appropriate in the context of family privacy. It is an approach, moreover, that is both increasingly reflected in and validated by the Court’s privacy jurisprudence in the decade since Justice White left the bench.

I. DEMOCRACY AND THE BOUNDARIES OF PRIVACY

It is certainly fair to describe Justice White as a privacy skeptic. He was notably more reluctant than many of his colleagues to embrace an expansive conception of unenumerated rights under the Constitution. In rejecting special constitutional protection for certain liberties, such as abortion, homosexual intimacy, or extended-family living arrangements, Justice White took care to insist that the outcome was driven not by his personal preferences on the topic, but rather by a proper understanding of the modest role assigned to judges in our constitutional democracy.

A. The Place of Judges and the Primacy of Democratic Choice

Justice White’s most famous opinions in the field of privacy each rejected, in strenuous terms, the claims for constitutional protection. In Roe v. Wade,12 Planned Parenthood of Central Missouri v. Danforth,13 and Thornburgh v. American College of Obstetricians & Gynecologists,14 he wrote stinging dissents from decisions protecting the right to abortion.

Dissenting again in *Moore v. City of East Cleveland*, Justice White insisted that substantive due process did not protect a grandmother’s wishes to live in an extended-family household encompassing two sets of grandchildren. And in *Bowers v. Hardwick*, he led a majority of the Court in repudiating the suggestion that constitutional privacy demands respect for the sexual relationship between two men. In each case, however, he was careful to attribute the rejection to respect for the democratic process, rather than to his own denigration of the claimants’ interests.

In the abortion cases, for example, Justice White claimed to find offensive not the decision to permit women to elect abortion, but rather that the judiciary, rather than the democratic process, settled the issue. Dissenting from *Roe v. Wade*, he wrote:

> The upshot [of the Court’s decision] is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. . . . The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court’s judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States.

White emphasized the same point thirteen years later in his dissent in *Thornburgh*. “[D]ecisions that find in the Constitution principles or values that cannot fairly be read into that document,” he warned, “usurp the people’s authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation.” The value choice allowing access to abortion could not fairly be read into the Constitution, he reasoned, because there is “nothing in the language or history of the Constitution” expressing that choice, nor any historical or even contemporary societal consensus placing the issue beyond the province of government. “[I]t is ultimately the will of the people that is the source of whatever values are incorporated in the Constitution,” he insisted. If a value choice cannot be traced back to the people in some way—either through

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17. *See Doe*, 410 U.S. at 222 (White, J., dissenting).
18. *Id.*
22. *Id.* at 796 n.5 (White, J., dissenting).
constitutional text, the “ordered liberty” contemplated by the Constitution's design, or “this Nation's history and tradition”—then “the Court engages not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences.”

Justice White pointed to precisely the same concerns in explaining why, in Moore, he found no fundamental right for an extended, multi-generational family to live together in contravention of a local zoning law that took a narrower view of “family.” A Cleveland suburb had enacted an ordinance that restricted its residential neighborhoods to “single family” households. The ordinance then defined “family” in a way that excluded the family of Inez Moore, a grandmother living with one of her adult sons and with the grandchildren born to two of her children. A majority of the Court concluded that the ordinance was unconstitutional: in the view of Justice Powell’s four-person plurality, because it violated Mrs. Moore’s fundamental privacy right to decide upon her own “family living arrangements”; and, in the view of Justice Stevens, because it violated the fundamental right “of an owner to decide who may reside on his or her property.”

Justice White, however, found no fundamental right implicated by the zoning law. As in the abortion cases, he disclaimed any conclusion about the wisdom of the zoning law from a policy standpoint, but insisted that the policy choice was one left to municipal politics. While acknowledging that past cases had “extend[ed] substantial protection to various phases of family life,” Justice White concluded that Mrs. Moore’s particular “interest in residing with more than one set of [her] grandchildren” did not warrant similar protection. His conclusion was not based on an assessment of whether the nation’s history and traditions supported Mrs. Moore’s asserted interest—for he considered the plurality’s focus on the nation’s “deeply rooted traditions” too amorphous and manipulable to justify the identification of non-textual privacy rights. Instead, he suggested that Mrs. Moore’s interest in configuring her household as she wished was simply too insubstantial to

23. Id. at 790-91 (White, J., dissenting) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion)).
24. Id. at 794 (White, J., dissenting).
26. Id. at 495-97.
27. Id. at 499 (plurality opinion of Powell, J.).
28. Id. at 520 (Stevens, J., concurring in judgment).
29. See id. at 550-51 (White, J., dissenting) (stating that “[h]ad it been our task to legislate, we might have approached the problem in a different matter than did the drafters of this ordinance,” but concluding that the matter was nevertheless left to rational legislative discretion).
30. See id. at 549 (White, J., dissenting).
31. See id. at 549 (White, J., dissenting).
override the presumption in favor of democratic choice as evidenced through the enacted ordinance.\textsuperscript{32}

Justice White synthesized these views in his opinion for the Court in \textit{Bowers}. Again, he began his analysis by disclaiming any personal judgment on the merits of sodomy laws:

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds.\textsuperscript{33}

Instead, the sole issue, Justice White insisted, was whether the Constitution had already removed this question from the field of permissible democratic debate.\textsuperscript{34} Considering the “ancient roots” and modern persistence of laws proscribing homosexual conduct, Justice White concluded, “to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”\textsuperscript{35}

Finding validation of a claimed right in “the concept of ordered liberty” or in “history and tradition” was essential in order to ensure that judges were not overstepping their bounds: “The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”\textsuperscript{36} If people come to believe that the Court’s constitutional command, overturning their own democratic choices, rests on nothing more than the Justices’ personal will, the judiciary invites defiance. For White, this had been the lesson of the \textit{Lochner}\textsuperscript{37} era, in which the Supreme Court enforced the Justices’ own notions of “reasonable” lawmaking under the guise of substantive due process, invalidating wide swaths of employment and economic regulations now considered routine and ultimately provoking a humbling “face-off between the Executive and the Court in the 1930’s.”\textsuperscript{38} By locating unwritten rights in “deeply rooted” societal consensus or in the implications of the “ordered liberty” created by the constitutional design, the Court might “assure itself and the public that announcing rights not readily identifiable in the Constitution’s text involves much more than the imposition of the

\begin{itemize}
  \item \textsuperscript{32} \textit{See id.} at 549-51 (White, J., dissenting).
  \item \textsuperscript{33} \textit{Bowers v. Hardwick}, 478 U.S. 186, 190 (1986).
  \item \textsuperscript{34} \textit{See id.}
  \item \textsuperscript{35} \textit{Id.} at 192-94.
  \item \textsuperscript{36} \textit{Id.} at 194.
  \item \textsuperscript{37} \textit{Lochner v. New York}, 198 U.S. 45 (1905).
  \item \textsuperscript{38} \textit{Bowers}, 478 U.S. at 194-95.
\end{itemize}
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Justices’ own choice of values on the States and the Federal Government.”

In the absence of such popular validation, however, “the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.” This rationale, adopted by a majority in Bowers, had been the basis for Justice White’s dissents in Roe, Thornburgh, and Moore, often expressed in nearly identical language.

That Bowers was of a piece with White’s dissents in Moore and the abortion cases has not slowed critics who have suggested that Bowers’ obeisance to democracy was merely a feint and that the Justice’s views in each case were in truth dictated by his own moral scruples. Yet, for Justice White, respect for the primacy of democratic governance was not a prop conveniently employed in privacy cases and otherwise set aside. As many others have observed, judicial deference to democratic rule constitutes a central theme of Justice White’s jurisprudence throughout the whole of his tenure on the Court.

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39. Id. at 191-92.
40. Id. at 195.
41. See, e.g., Moore v. City of E. Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting) (warning that “[t]he Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution”); Doe v. Bolton, 410 U.S. 179, 222 (1973) (“find[ing] no constitutional warrant for imposing [the Justices’ own] . . . order of priorities on the people and legislatures of the States”). In his dissent in Thornburgh v. Am. Coll. Of Obstetricians & Gynecologists, Justice White wrote:

When the Court . . . defines as “fundamental” liberties that are nowhere mentioned in the Constitution (or that are present only in the so-called “penumbras” of specifically enumerated rights), it must, of necessity, act with more caution, lest it open itself to the accusation that, in the name of identifying constitutional principles to which the people have consented in framing their Constitution, the Court has done nothing more than impose its own controversial choices of value upon the people. . . . The utility [of locating unwritten rights in “deeply rooted” societal consensus or in the design of “ordered liberty”] lies in the effort to identify some source of constitutional value that reflects not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government . . . .


42. See, e.g., Thornburgh, 476 U.S. at 778 n.6 (Stevens, J., concurring) (suggesting that language employed in Justice White’s dissenting opinion “reveals that his opinion may be influenced as much by his own value preferences as by his view about the proper allocation of decisionmaking responsibilities between the individual and the State”); Rosen, supra note 5, at 25 (labeling Justice White’s opinion in Bowers “dishonest[]” and “personal” to the Justice).

43. See, e.g., William E. Nelson, Deference and the Limits to Deference in the Constitutional Jurisprudence of Justice Byron R. White, 58 U. COLO. L. REV. 347, 347 (1987) (“Nothing emerges more clearly from Justice Byron R. White’s twenty-five years on the bench than his persistent deference to the policy judgments made by the legislative and executive branches of government.”); William H. Rehnquist, Tribute to Justice Byron R. White, 55 STAN. L. REV. 1, 1 (2002); Kate Stith, Byron R. White, Last of the New Deal Liberals, 103 YALE L.J. 19, 21-22 (1993); Lee & Wilkins, supra note 9, at 297; Starr, supra note 9, at 38.
permitting incursions upon the freedom of the press under the First Amendment, emphasizing "reasonableness" as the touchstone of police powers under the Fourth Amendment, and ultimately sustaining capital punishment under the Eighth Amendment. Indeed, as Professors Hutchinson, Stith, and others have pointed out, the same theme defined Justice White's first major opinion on the Court. Dissenting from the Court's holding that the Eighth Amendment prohibited a state from criminalizing the "status" of being a drug addict, White chided the majority for imposing its own values through the guise of the Eighth Amendment and for failing to defer to democratically elected policymakers:

I deem this application of "cruel and unusual punishment" so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.

The "theme of deference" was evident in Justice White's non-constitutional opinions, as well. At his brief Senate confirmation hearing, Justice White had insisted that "the major instrument for changing the laws in this country is the Congress of the United States," and his subsequent approach to interpreting federal enactments, as well as his opinions on separation of powers and federalism issues, confirmed that belief:

In Justice White's rendition, Congress is the preeminent national policymaking body. Its capacity to govern must be protected from executive overreaching, judicial usurpation, and the

Indeed, colleagues had observed White's commitment to legislative primacy even before he reached the Court. See Nicholas deB. Katzenbach, Byron White, 55 STAN. L. REV. 13, 15 (2002) (noting that, as Deputy Attorney General, "Byron had a more conservative view of the Constitution than many of the activists" and that he struggled "to get the right balance between a creative use of Executive power and the constitutionally dominant role of Congress").


45. See Hutchinson, supra note 5, at 338, 340; Stith, supra note 43, at 21 n.8.


47. Nelson, supra note 43, at 347.

encroachments of state governments. Short of the clearest constitutional restrictions, congressional will should control the behavior of the executive branch, administrative agencies, and the courts.\textsuperscript{49}

As compatriots and commentators have widely observed, the tenets of Justice White’s judicial philosophy accorded closely with the legal realism that prevailed in the formative years of White’s legal education.\textsuperscript{50} In White’s law school days, suspicion of judicial activism was rooted in recent experience with the abuses of the \textit{Lochner} era, in which a conservative Court had stymied the progressive ambitions of the Roosevelt administration through an expansive conception of substantive due process.\textsuperscript{51} There is every reason to believe that Justice White’s professed respect for the primacy of the democratic political process was entirely genuine and was, just as he stated, the central explanation for his views narrowly construing the Court’s power to identify and enforce unenumerated privacy rights under the Constitution.\textsuperscript{52}

\textbf{B. Tradition and Innovation in the Protection of “Liberty”}

Notwithstanding his sincere commitment to a modest judicial role in democratic politics, Justice White signed his name to a significant number of opinions limiting State power to interfere with family life. He agreed with the majority in \textit{Griswold v. Connecticut},\textsuperscript{53} that the Constitution did not permit Connecticut to outlaw the use of contraceptives by married couples, and later went along, even if somewhat grudgingly, with an extension of the same right to unmarried persons.\textsuperscript{54} He joined majority opinions recognizing a fundamental right to marry in \textit{Loving v. Virginia},\textsuperscript{55} \textit{Zablocki v. Redhail},\textsuperscript{56}

\begin{itemize}
  \item 51. See HUTCHINSON, \textit{supra} note 5, at 147-57 (describing the intellectual currents of legal realism at Yale during White’s student days); Oberdorfer, \textit{supra} note 50, at 5; Starr, \textit{supra} note 9, at 38. \textit{See generally} LAURA KALMAN, \textit{LEGAL REALISM AT YALE 1927-1960} (1986).
  \item 52. Indeed, there is at least fragmentary evidence refuting the supposition that Justice White’s views in the privacy cases were driven by his personal moral views. According to Dennis Hutchinson, “he told several law clerks late in his career that if he had been a legislator he would ‘have been pro-choice.’” HUTCHINSON, \textit{supra} note 5, at 368.
  \item 53. 381 U.S. 479, 502 (1965) (White, J., concurring in the judgment).
  \item 55. 388 U.S. 1 (1967).
  \item 56. 434 U.S. 374 (1978).
\end{itemize}
and *Turner v. Safley.* And, finally, he was outspoken in asserting the constitutional rights of unwed fathers to establish and maintain relationships with their children. Justice White may have been a privacy skeptic, but he clearly was not a privacy opponent. Indeed, it is not too much to observe, as Dennis Hutchinson has, that “[t]he sanctity of the family structure, as he conceived it, was central to Byron White as a judge.” A brief review of his position in a range of cases for which he is less often remembered confirms that he was quite willing to wield constitutional notions of privacy, sometimes even in defense of unconventional family relationships.

In *Griswold,* Justice White declined to join Justice Douglas’ majority opinion, with its expansive forays into penumbras of the Bill of Rights and its open-ended declaration of an implied fundamental “right of privacy.” Characteristically, he preferred to hew closer to the facts of the case, concluding, more narrowly, that Connecticut’s stated interest in an across-the-board ban on contraceptive use — deterring sexual relations outside of marriage — could not justify the statute’s ban on contraceptive use *within* marriage. Importantly, however, Justice White accepted the premise of substantive due process generally, and agreed specifically that “the intimacies of the marriage relationship” were entitled to heightened judicial protection:

Surely the right invoked in this case, to be free of regulation of the intimacies of the marriage relationship, “come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.”

... [S]tatutes regulating sensitive areas of liberty do, under the cases of this Court, require “strict scrutiny”...
Similarly, in *Loving, Zablocki, and Safley*, Justice White readily accepted the existence of a fundamental constitutional right to marry, one that was entitled to aggressive judicial protection through the guise of substantive due process.

In *Eisenstadt v. Baird* and *Carey v. Population Services International*, Justice White again voted with the majority. As in *Griswold*, however, he wrote separately to advance a narrower basis for the Court's judgment. The majority in *Eisenstadt* readily extended the privacy right recognized in *Griswold* to unmarried couples, on the rationale that "[i]f 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." Justice White concurred in the judgment invalidating a Massachusetts ban on the distribution of contraceptives, but on a rationale that required no enlargement of *Griswold*: because the record failed to establish the marital status of those involved in the transaction at issue, the criminal conviction might be invalidated on the strength of *Griswold* alone.

Five years later, when the Court returned to a similar issue in *Carey*, White was ready to go along, though with some qualifications. He concurred in most of the majority opinion striking down a New York statute regulating the distribution of contraceptives and banning the distribution altogether to minors under the age of sixteen. He specifically joined the portion of Justice Brennan's majority opinion that recognized "the underlying premise" of *Eisenstadt* and *Griswold* to be "that the Constitution protects 'the right of the individual . . . to be free from unwarranted governmental intrusion into . . . the decision whether to bear and beget a child,'" and stated that, "[g]iven *Eisenstadt* and given the decision of the Court in the abortion case, *Roe v. Wade*," he agreed that New York's law was invalid.

The reason Justice White qualified his approval of the Court's rationale in *Eisenstadt* and *Carey* is evident. On several occasions, Justice White made clear that he assumed the constitutional validity of laws regulating sexual conduct outside of marriage. In his opinion for the Court in

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68. *See id.* at 464-65 (White, J., concurring in the judgment).
70. *Id.* at 687.
71. *Id.* at 702 (White, J., concurring in part).
McLaughlin v. Florida, striking down a law criminalizing interracial cohabitation on equal-protection grounds, he signaled approval of other, race-neutral portions of Florida’s law, which punished premarital and extramarital sexual relations. The latter provisions, he wrote, furthered “a valid state interest” favoring marriage. Again, in his separate opinion in Griswold, Justice White conceded that “the State’s policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, [was] . . . a permissible and legitimate legislative goal.” In finally assenting, in Carey, to Eisenstadt’s recognition of a constitutional right for unmarried individuals to use contraception, he stipulated his understanding that the Court’s holding did not “declare[ ] unconstitutional any state law forbidding extramarital sexual relations.” Indeed, White added that the suggestion that minors might be constitutionally entitled to use contraceptives “notwithstanding the combined objection of both parents and the State” was, quite simply, “frivolous.”

Despite the decidedly qualified nature of his support for the Court’s extension of privacy rights to unmarried persons, White nevertheless found himself on the receiving end of the very sort of criticism he was more accustomed to hurling at the Court: Chief Justice Burger accused Justice White’s separate opinion in Eisenstadt of “seriously invad[ing] the constitutional prerogatives of the States and regrettably hark[ing] back to the heyday of substantive due process.”

Although Justice White was reluctant to find special constitutional protection for sexual activity outside of marriage, he felt no such compunction about conferring protection upon the parent-child relationships that might result from that activity. In Stanley v. Illinois, he wrote for the Court, invalidating an Illinois statute that automatically deprived unwed fathers of the custody of their children upon the death of the children’s mother. Under the Illinois law, unwed fathers were not recognized as legal parents and, therefore, the death of the children’s mother—their only legal parent—rendered the children wards of the State. The Court held that this law, which it characterized as effecting a conclusive

73. Id. at 196.
74. 381 U.S. at 505 (White, J., concurring in the judgment).
75. Carey, 431 U.S. at 702 (White, J., concurring in part).
76. Id. at 702-03 (White, J., concurring in part) (quoting the concurring opinion of Justice Stevens, 431 U.S. at 713).
78. 405 U.S. 645 (1972).
79. Id. at 649.
80. Id. at 646.
presumption that all unwed fathers are unfit parents, denied both due process and equal protection:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection . . . .

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

On the basis of this precedent, recognizing the fundamental right of parents to rear their children, Stanley held that Illinois could not preclude unwed fathers from establishing their fitness to have custody of their children.

Justice White pressed the same theme in a series of subsequent cases. He joined the Court's opinions in Quilloin v. Walcott and Caban v. Mohammed, which recognized similar limitations on the use of adoption laws to strip unwed fathers of parental status, at least when the father, as in Stanley, had taken an active role in raising his children. And he dissented strongly from later decisions, in Lehr v. Robertson and Michael H. v. Gerald D., which upheld statutory devices that denied parental status to certain unwed fathers.

Lehr involved a New York statute that made an unwed biological father's right to be notified when a third party sought to adopt his child dependent upon whether he had registered as a "putative father" with a state agency.
Jonathan Lehr had not registered his claim to parenthood, and so the law allowed the adoption of his daughter without any finding concerning his fitness and, indeed, without even giving him notice of the proceeding. The Court upheld the constitutionality of the registry requirement, distinguishing Stanley and Caban on the ground that the existence of an unwed father’s “substantive due process right to maintain his . . . parental relationship” depended upon whether he had “demonstrate[d] a full commitment to the responsibilities of parenthood by ‘com[ing] forward to participate in the rearing of his child.’” Lehr failed this test, the Court ruled, because he had “never supported and rarely seen [his daughter] in the two years since her birth” and had shirked even the minimal duty of “mailing a postcard to the putative father registry” to indicate his parental interest. Accordingly, the Constitution permitted the state to disregard Lehr as a parent in the adoption proceeding.

Justice White disagreed. In his view, an unwed father’s liberty interest in parenthood was established solely by his genetic tie to the child, quite apart from whether he had developed an emotional relationship with the child. “The ‘biological connection,’” he wrote, “is itself a relationship that creates a protected interest.” After all, “the usual understanding of ‘family’ implies biological relationships, and most decisions treating the relation between parent and child have stressed this element.” Moreover, even accepting the majority’s conception of unwed fathers’ rights as contingent upon their responsible conduct, Justice White criticized the majority’s implication that Lehr had demonstrated only minimal interest in his daughter. Pointing to Lehr’s allegations that the mother had thwarted his repeated attempts to support and interact with his daughter, Justice White concluded: “This case requires us to assume that Lehr’s allegations are true—that but for the actions of the child’s mother there would have been the kind of significant relationship that the majority concedes is entitled to the full panoply of procedural due process protections.”

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89. Id. at 250.
90. Id. at 260 (quoting Caban, 441 U.S. at 397).
91. Id. at 261 (citations omitted).
92. Id. at 249-50.
93. Id. at 264.
95. Id. (White, J., dissenting) (quoting Smith v. Org. of Foster Families, 431 U.S. 816, 843 (1977)).
96. Id. at 271 (White, J., dissenting).
Justice White was similarly sympathetic to the claims of another unwed father in *Michael H. v. Gerald D.* In that case, the Court upheld the constitutionality of a California law that prevented a man from establishing his paternity of a child conceived in an extramarital affair with a married woman. The father had lived off and on with the mother after the birth of their daughter, Victoria, and had held her out as his child. After the mother reconciled with her husband and announced her intention to cut off contact between Victoria and the father, he found that his effort to establish legal ties was precluded by a conclusive statutory presumption recognizing the mother's husband as the child's father. He challenged the constitutionality of the law, contending that the state lacked a compelling justification for depriving him of his fundamental right to a relationship with his daughter.

Justice Scalia's plurality opinion rejected the notion that Michael H. had a fundamental liberty interest in the relationship with his daughter and did so largely on the basis of history. To be ranked as "fundamental," an "asserted liberty interest [must] be rooted in history and tradition"—*i.e.*, the particular family interest must have been "traditionally protected by our society" against state interference. From this point of view, Michael H.'s claim bordered on the preposterous:

> [T]he legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society .... We think it impossible to find that it has.

Indeed, not only had society not "accorded traditional respect" to the ties arising from such extramarital affairs, it actively condemned them. Accordingly, neither Michael nor Victoria had any constitutional privacy interest at stake and it was therefore "a question of legislative policy and not constitutional law" whether to permit their relationship to continue.

Again, Justice White dissented. In his view, the Constitution's protection of the family relationship asserted by Michael H. turned not solely on its historical claim to veneration, but on its substantiality in the here and now.

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98. *Id.* at 118-30.
99. *Id.* at 113-14.
100. *Id.* at 116. The presumption could be rebutted only by the mother or her husband, but not by others outside the marriage. See *id.* at 117-18 (quoting *Cal. Evid. Code* § 621 (West Supp. 1989)).
101. *Id.* at 119-21.
102. *Id.* at 122-23 (Scalia, J., plurality opinion).
103. *Id.* at 124.
104. See *id*.
105. *Id.* at 129-31.
Under Lehr and Caban, "‘[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by ‘com[ing] forward to participate in the rearing of his child,’ his interest in personal contact with his child acquires substantial protection under the Due Process Clause.'"106 In this case, Michael H. had lived with and supported his daughter to the extent that her mother would permit; he had developed an "‘emotional relationship’ with Victoria, "‘who grew up calling him ’Daddy.’"107 It was true enough that their contact had been intermittent, "‘but in light of Carole’s vicissitudes, what more could Michael have done?’"108 For Justice White, the constitutional test in Lehr and Michael H. could not rest solely on abstractions or the happenstance of history; it had to be responsive to the real-world dilemmas of the individuals affected by the Court’s judgments. Having done everything he reasonably could to "‘grasp[] th[e] opportunity’" for responsible parenthood, Michael H. was constitutionally entitled to "‘enjoy the blessings of the parent-child relationship.’"109

II. CONSISTENCY AND CONSENSUS IN THE SEARCH FOR “FAMILY”

Even to some friendly analysts, the pattern of Justice White’s opinions in the family-privacy cases suggests "an inconsistency in White’s jurisprudence: the stickler for law, with little patience for social engineering, could vote and speak like a legislator in areas touching the family.”110 The criticism is certainly plausible; how could the Justice who had condemned the judicial imposition of value judgments in Moore and the abortion cases mandate democratic obeisance to marriage and contraception? How could the Justice who had been so sensitive to the human dilemmas facing unwed fathers, overlooking traditional moral objections to vindicate their parental aspirations, find traditional morality to be a sufficient basis for laws effectively criminalizing homosexuality?

My view is that Justice White’s opinions do not ultimately suggest an inconsistency. To the contrary, his views in these cases can be understood as the products of a single methodology, faithfully applied. Further, I believe that this methodology, born of Justice White’s foundational commitments to restraint and realism in constitutional adjudication, could well serve as a model for the Court’s approach to family-privacy cases in the future.

Before turning to a more full consideration of this methodology, I should first acknowledge and set aside two alternative rationales by which Justice

106. Id. at 160 (White, J., dissenting) (quoting Lehr v. Robinson, 463 U.S. 248, 261 (1983) and Caban v. Mohammed, 441 U.S. 380, 392 (1979)).
107. Id. at 159 (White, J., dissenting).
108. Id. at 160 (White, J., dissenting).
110. Hutchinson, supra note 5, at 371.
White's privacy opinions might be harmonized. First, it may be argued that there is no conflict between White's seemingly more expansive approach to privacy in the contraception and unwed father cases and his narrower approach in Moore and the abortion cases on the ground that the former cases did not actually entail any extension of substantive "privacy" rights. It is true, for example, that the Court's judgments in these cases, or White's dissents, were often grounded in equal protection (as in Eisenstadt, Zablocki, and Caban) or procedural due process (as in Stanley, Lehr, and Michael H.), rather than in the substantive due process protection of privacy. Nevertheless, the distinction does not seem persuasive because the vindication of the constitutional claim in each case required the recognition of specially protected liberty interests relating to family privacy. White's view in each case resulted in not merely a mandate of equal treatment or fair process, but the imposition of a new substantive limitation on state power to invade the asserted liberty. Indeed, the Court collectively, or Justice White individually, often acknowledged as much in subsequent cases.

Eisenstadt, for example, held that equal protection required that unmarried persons enjoy the same access to contraception as married persons.\textsuperscript{111} Given Griswold's prior recognition that married couples have a substantive privacy right to use contraception together, this amounted to recognition that unmarried persons also have a substantive privacy right to contraception. Later, both the Court and Justice White readily acknowledged that "the underlying premise" of Eisenstadt was a recognition that "the Constitution protects 'the right of the individual... to be free from unwarranted governmental intrusion... the decision whether to bear or beget a child.'"\textsuperscript{112} Similarly, Zablocki subjected a law restricting access to marriage to heightened scrutiny under the Equal Protection Clause, but did so on the ground that the law drew classifications with respect to the exercise of the fundamental privacy right to marry—a substantive due process right Justice White had already directly acknowledged in Loving v. Virginia.

Stanley v. Illinois, and White's dissents in Lehr and Michael H., were couched in the language of procedural due process. Yet, in each, the

\textsuperscript{111} See Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (stating that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike").

\textsuperscript{112} Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977) (majority opinion of Brennan & White, JJ.) (quoting Eisenstadt, 405 U.S. at 453); see also Moore v. City of E. Cleveland, 431 U.S. 494, 543 (1977) (White, J., dissenting) (listing Eisenstadt among the Court's decisions recognizing a substantive due process right of privacy). As the Court recently acknowledged in Lawrence v. Texas, Eisenstadt "was decided under the Equal Protection Clause, but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights." 123 S. Ct. 2472, 2477 (2003) (citing Eisenstadt, 405 U.S. at 454).
entitlement to process rested on the invalidation of a substantive rule of law. In *Stanley*, the State of Illinois had decided as a matter of state policy to deny parental status to unwed biological fathers. The Court's judgment held that this policy was impermissible given the Constitution's solicitude for the rights of parents. The Court's holding that Peter Stanley was entitled to a hearing before he could be deprived of custody necessarily carried with it a mandate that Illinois cede a substantive legal entitlement as well—namely, that unwed fathers be entitled to state recognition as parents and to custody of their children upon proof of their "fitness"; otherwise, the evidentiary hearing would have no legal consequence. As Justice White later acknowledged, *Stanley* did more than dictate a measure of process; it "recognized the biological father's right to a legal relationship with his illegitimate child."

For Justice White, the claims of the men in *Lehr* and *Michael H.* rested upon precisely the same principle. Although in those cases, New York and California sought to exclude certain men from the realm of parenthood—in *Lehr*, those whose ties with a child were so attenuated that they had not even gone to the trouble of mailing a postcard to the state's putative father registry, and, in *Michael H.*, those who sought to press their interest in parenthood upon an intact marital family—Justice White considered these policy judgments constitutionally intolerable. In his view, if these men had done all they reasonably could to assume responsibility for the child, the state was constitutionally required to give them not only a chance to prove their good conduct, but ultimately the very "'blessings of the parent-child relationship.'" Accordingly, Justice White's views in these cases cannot be reconciled with his privacy skepticism in *Moore* and *Roe* on the tidy ground that these cases involved merely equal protection or procedural due process. It remains that, notwithstanding his skepticism in *Moore* and *Roe*, he accepted the premise of heightened substantive protection for privacy and was willing to extend privacy protection beyond the confines of the traditional marital family.

Alternatively, it might be argued that Justice White's views in the various privacy cases can be harmonized by resort to a broader notion of family tradition. Perhaps his willingness to find privileged privacy interests, even

114.  Id. at 649-51.
115.  See id. at 649.
116.  Michael H. v. Gerald D., 491 U.S. 110, 158 (1989) (White, J., dissenting) (emphasis added); accord id. at 120-21 (Scalia, J., plurality opinion) (contending that the Court's holding in *Stanley* rested on substantive, rather than procedural, due process).
117.  See id. at 157 (White, J., dissenting); Lehr v. Robertson, 463 U.S. 248, 273-75 (1983) (White, J., dissenting).
in the seemingly more novel contexts of non-marital or extra-marital childbearing, was consistently grounded in an assessment of the nation's "deeply rooted" social traditions, but simply defined at a broader level of generality than favored by some.\textsuperscript{119} For instance, judicial recognition of the fundamental parental rights of unwed fathers might be justified by society's longstanding veneration of "parenthood" even though it would be quite untenable to claim that society had historically respected the ties between children and their unwed fathers specifically.\textsuperscript{120}

This theory of Justice White's rationale appears implausible for at least two reasons. First, although he ultimately came to accept the nation's "deeply rooted" traditions as a basis for recognizing fundamental constitutional rights,\textsuperscript{121} White was initially suspicious of this rationale for substantive due process. In \textit{Moore}, for example, he expressly shunned this approach on the ground that it opened the door to hidden judicial manipulation.\textsuperscript{122} Second, Justice White's record in other cases, including \textit{Bowers}\textsuperscript{23} and \textit{Moore},\textsuperscript{124} seems squarely at odds with an abstract, highly

\textsuperscript{119.} See \textit{id.} at 127-28 n.6 (Scalia, J., plurality opinion) (urging the framing of claimed liberty interests in specific terms when searching for evidence that society has traditionally regarded the liberty as fundamental); LAURENCE H. TRIBE & MICHAEL C. DORF, ON \textit{READING THE CONSTITUTION} 73-80 (1991) (discussing the significance of the choice of generality or specificity in framing a claimed right).

\textsuperscript{120.} \textit{Cf. Michael H.}, 491 U.S. at 127-28 n.6 (Scalia, J., plurality opinion) (acknowledging, but rejecting this suggestion). For evidence demonstrating that the claim of historical respect for unwed fatherhood would be plainly unsupportable, see David D. Meyer, \textit{Family Ties: Solving the Constitutional Dilemma of the Faultless Father}, 41 ARIZ. L. REV. 753, 758-59 & n.10 (1999). Justice Scalia attempted a similar maneuver to rationalize the Court's holdings in \textit{Stanley, Caban,} and \textit{Lehr} with respect for societal tradition, attributing the results in those cases to "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family," by which he meant an intact nuclear (even if non-marital) family. \textit{Michael H.}, 491 U.S. at 123 (Scalia, J., plurality opinion). Whatever the persuasiveness of this effort, \textit{cf. id.} at 143-45 (Brennan, J., dissenting), it cannot clearly explain Justice White's understanding of those cases, given that he thought these cases required extension to the facts of \textit{Michael H.} as well. \textit{See id.} at 160 (White, J., dissenting).


\textsuperscript{122.} \textit{See Moore v. City of E. Cleveland}, 431 U.S. 491, 549-50 (1977) (White, J., dissenting) ("For me, this [approach] suggests a far too expansive charter for this Court...[in relation to] substantive due process review. What the deeply rooted traditions of the country are is arguable.").

\textsuperscript{123.} \textit{Compare Bowers}, 478 U.S. at 190 (White, J., majority opinion) ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy..."), \textit{with id.} at 199, 205 (Blackmun, J., dissenting) (contending that the issue is whether there is a fundamental right of "sexual intimacy" generally, not "homosexual sodomy" specifically).

\textsuperscript{124.} \textit{See Moore}, 431 U.S. at 549-50 (White, J., dissenting) (framing the claimed right in terms of Mrs. Moore's "interest in residing with more than one set of grandchildren" and concluding that, "because of the nature of that particular interest," substantive due process
general approach to rights-framing. Accordingly, White's privacy views cannot be harmonized on this rationale.

Instead, if Justice White's privacy views are to be defended as principled and consistent, it must be with reference to some other theory. The theory that ultimately explains Justice White's voting posits that substantive due process protection in this context is bottomed not on history or tradition, nor solely on a judicial assessment of the substantiality of the private interest at stake, but rather on a determination of whether the asserted interest corresponds with accepted notions of what makes family specially valuable. This entails a normative judgment, but that alone does not render it inconsistent with Justice White's opposition to the Court's judgments in Moore and the abortion cases. It would be a mistake to read White's opinions in those cases for the proposition that normative judgment is impermissible in constitutional adjudication. To the contrary, Justice White made clear that he thought normative judgment both inevitable and, more to the point, appropriate in constitutional interpretation to the extent that the judgment was tempered by genuine judicial humility and self-restraint and accorded roughly with modern social consensus.

Justice White's methodology in these cases can be traced to at least three foundations of his judicial philosophy: realism, restraint, and pragmatism. As already noted, Justice White received his legal education in an environment steeped in legal realism.

A central "reality" accepted by that movement was that judges' interpretation of law is inevitably influenced to some degree by their experiences, world views, and biases. On this point, ample evidence exists to show that White agreed. As Professor Stith observed, "White always understood that judges make law." To him, it would have been fanciful to pretend that the meaning of the law, and

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125. For additional examples, see Thornburgh, 476 U.S. at 792 n.2 (White, J., dissenting) (suggesting that abusive parental discipline of children could not be considered included within the scope of a parent's fundamental right of childrearing); see generally Reno v. Flores, 507 U.S. 292 (1993) (Scalia, J., joined by White, J.) (finding no fundamental right for a child in state detention to reside with extended-family members in lieu of institutional care).
126. See infra notes 104-07 and accompanying text.
127. See supra note 50 and accompanying text.
130. Id.; accord Herz, supra note 10, at 232 ("In short, [White] consistently went along with an image of the judiciary that is a good deal closer to the model of a legislature—representative policymakers who decide matters prospectively and without regard for prior decisions—that the 'official version' would have it. This version is, of course, that of the realists.")
particularly the Constitution, is determinate and reliably ascertainable by faithful consultation of text or history.\textsuperscript{131} Crucially, White did not merely accept the realist notion that judicial behavior is influenced by experience and perspective, but also that, in appropriate measure, it \textit{should} be.\textsuperscript{132} As White explained in his \textit{Thornburgh} dissent: “The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.”\textsuperscript{133} The scope of permissible normative judgment was not simply confined to giving specific content to vague textual phrases, such as deciding which searches or seizures were “unreasonable”\textsuperscript{134} or which punishments were “cruel and unusual.”\textsuperscript{135} It extended as well, to the recognition of limitations on state authority that lack any direct textual hook. Thus, White accepted the concept of substantive due process and, inescapably, that the concept would have normative content.\textsuperscript{136}

At the same time, Justice White was clearly influenced by the realists' sensitivity to the potential for abuse of judicial power. The legal realism movement, after all, had been “ignited” by \textit{Lochner} and fueled by repulsion to the way in which the Supreme Court had obstructed democratic innovation during the New Deal.\textsuperscript{137} This perspective combined a powerful wariness of judicial adventurism with a profound faith in the capacity of democratic institutions. And, as others have persuasively demonstrated, this perspective is readily apparent across the full range of White’s

\textsuperscript{131} See \textit{Thornburgh v. Am. Coll. of Obstetricians & Gynecologists}, 476 U.S. 747, 789 (1986) (White, J., dissenting) (rejecting “the simplistic view that constitutional interpretation can possibly be limited to the ‘plain meaning’ of the Constitution’s text or to the subjective intention of the Framers”); see also id. at 796 n.5 (White, J., dissenting) (reiterating his “recognition that constitutional analysis requires more than mere textual analysis or a search for the specific intent of the Framers”).

\textsuperscript{132} See \textit{Ides}, supra note 50, at 426-27 (suggesting that “White’s approach to separation of powers conforms with the legal realist tenet that law ought to reflect the reality of changing social conditions”).

\textsuperscript{133} 476 U.S. at 789 (White, J., dissenting).

\textsuperscript{134} See U.S. CONST. amend. IV.

\textsuperscript{135} See U.S. CONST. amend. VIII.

\textsuperscript{136} See, e.g., \textit{Thornburgh}, 476 U.S. at 789-90 (White, J., dissenting); see also \textit{Moore v. City of E. Cleveland}, 431 U.S. 494, 547-49 (1977) (White, J., dissenting); Lance Liebman, \textit{A Tribute to Justice Byron R. White}, 107 HARV. L. REV. 1, 15-16 (1993) (stating that White was “clear about the availability—in limited circumstances to be sure—of substantive due process”).

\textsuperscript{137} HUTCHINSON, supra note 5, at 152-53; see also \textit{Oberdorfer}, supra note 50, at 5 (stating that Justice White was a critical observer of the Supreme Court during the New Deal years); Starr, supra note 9, at 38 (opining that “perhaps we are returning to the underlying ideals of Justice White’s world, the New Deal—government can and should solve the problems of the people”).
jurisprudence. It was this assessment of the competing competencies of courts and majoritarian organs of government that led Justice White to emphasize the danger of judicial overreaching, and the consequent need for judicial restraint, as "[a] recurring theme of his opinions."

White's pragmatism forms a third and final foundation of White's privacy methodology. Scholars and colleagues have universally described White's approach to legal questions as either functional or pragmatic. The following account, though written to describe pragmatism in constitutional law generally, may as well be describing Justice White's interpretive approach in particular:

[Pragmatism] is perhaps chiefly defined ... by its skepticism of the ability of grand theory or foundational principles to solve the hard questions of constitutional law .... Pragmatists are often inclined to recognize the usefulness or partial validity of many theories—to admit, for instance, the relevance of original intent or of embedded historical values—but to deny that any one of these theories adequately accounts for the complexity and difficulty of many constitutional questions. Instead, ever wary of bright lines, pragmatism calls on judges to draw on all available sources of wisdom, both theoretical and empirical, to arrive at a practical judgment that fits the facts of each case. For Justice White, the elegance of a legal theory was always an insufficient basis for validating a claim or doctrine; instead, legal rules were ultimately tested by how they worked on the ground, in the complications of the real world. Abstractions were never so persuasive as facts. As Allan Ides put

138. See Liebman, supra note 136, at 17 ("Justice White was a democrat, committed to a healthy political process and ready to allow that process to work."); Nelson, supra note 43, at 348 (explaining that White's decisions "reflect the legal realist notion that definitive legal rules—and hence definitive legal rights—do not exist, that all results are a product of policy choices made by various branches of government, and that, to the greatest extent possible, policy choices ought to be made by legislative or executive officials chosen by and responsible to the majority of the electorate"); Stith, supra note 43, at 21 ("White's confidence in the good faith and capabilities of democratic institutions—Congress, especially, but also the President, state legislatures, and juries—exceeded that of other Justices on the 'left' or the 'right.'"); Starr, supra note 9, at 38 (suggesting that "Justice White may well have been the last true believer in government").


140. See, e.g., Herz, supra note 10, at 227 ("agreeing with the usual portrait of White as a pragmatic functionalist"); Ides, supra note 50, at 422, 428, 432, 437-38; Lewis F. Powell, Jr., A Tribute to Justice Byron R. White, 107 HARV. L. REV. 1, 2 (1993); Stith, supra note 43, at 19, 31.


142. See Hutchinson, supra note 5, at 339-40 (noting that White "believed that police behavior should be understood by practical considerations and not by dogmatic
it, “the foundation of Justice White’s jurisprudence was realism rooted in the belief that law should reflect a pragmatic appraisal of the circumstances to which the law is to be applied.”

A natural result of this approach is a preference for cautious incrementalism in judicial interpretation. An affinity for grand theory or abstraction may lead to sweeping pronouncements of legal principle; close attention to the facts, however, tends to cabin the implications of a decision. Time and again, Justice White avoided broad, theoretical bases for decision when a narrow, fact-specific rationale would suffice.

These three commitments in Justice White’s jurisprudence—realism, restraint, and pragmatism—help to explain the pattern of his decisions in the context of family privacy. Restraint dominated in Moore and the abortion cases; but his realistic acceptance of the role of normative judgment permitted White to go along with the Court’s privacy judgments relating to marriage and contraception and to push the Court even farther with respect to unmarried fathers. What led White to emphasize restraint in one case or realism in the next was not his own predilections concerning policy. Indeed, it is quite plausible that White might have sided with the claimants in Roe, Moore, and Bowers had the controversies come before him as a legislator. Whatever his own moral attitude toward abortion or homosexuality, Justice White might well have favored decriminalization of both as a policy matter, though he did not believe that policy choice was constitutionally required.

Nor were White’s judgments controlled by fealty to tradition. Though it is sometimes said that White’s privacy decisions hewed closely to traditional notions of family, his position in the unwed-father cases and, perhaps, in Eisenstadt and Carey seems to refute the claim.

143. Ides, supra note 50, at 456
144. See Hutchinson, supra note 5, at 339; Bell, supra note 139, at 1395-96; Liebman, supra note 136, at 19.
146. Cf. Hutchinson, supra note 5, at 371 (suggesting that White “could vote and speak like a legislator in areas touching the family”).
149. See Hutchinson, supra note 5, at 368 (noting that White reportedly confided to some law clerks that he would have voted “pro-choice” on the question of abortion as a legislator).
What seems to have driven Justice White's decision in these cases was practical judgment about whether the private interest at stake shared in the core values that define and distinguish family life as a specially privileged "private realm . . . which the state cannot enter." This latter determination did not turn solely on whether the specific family relationship or decision at issue enjoyed longstanding historical veneration, as Justice Scalia would have it. Nor was it sufficient for "fundamental" privacy protection, under White's approach, to adjudge that the private interest at stake was profoundly important to the affected individual, the usual focus for Justices Blackmun and Brennan. In typical pragmatic fashion, the contours of tradition and the substantiality of the private interest were both relevant to the ultimate judgment for Justice White. These factors, however, must be paired with a normative validation of the claimed interest as within popular understanding of the social good of family. When the Court finds a private interest in making certain family decisions to be "fundamental," White explained, "it is not only because those decisions are 'serious' and 'important' to the individual, but also because some value of privacy or individual autonomy that is somehow implicit in the scheme of ordered liberties established by the Constitution supports a judgment that such decisions are none of government's business." So validated, aggressive judicial protection could be considered legitimate by Justice White because the value choice advanced by intervention could then be attributed to the people rather than to judges.

Understood in this light, Justice White's positions in the privacy cases take on considerable order and consistency, suggesting ultimately a distinctive understanding of the sort of family valued by the Constitution. The cases finding special Due Process protection for marriage are the most easily explained. The marital union protected in Griswold, Loving,

154. See e.g., id. at 142-46 (Brennan & Blackmun, JJ., dissenting); Roe v. Wade, 410 U.S. 113, 153 (1973) (Blackmun, J.).
156. As White explained in Thornburgh, this attribution was essential to the legitimacy of judicial intervention: "[I]t is ultimately the will of the people that is the source of whatever values are incorporated in the Constitution . . . . Institutional adjudication is a search for values . . . . that are implicit (and explicit) in the structure of rights and institutions that the people have themselves created." 476 U.S. at 796 n.5 (White, J., dissenting).
Justice White and the Right of Privacy

Zablocki\(^{159}\) and Turner\(^{160}\) plainly shares in the essential values that define a family. Indeed, given the longstanding common understanding of marriage as the very "foundation of the family,"\(^{161}\) the Court had every assurance that its intervention in defense of marital intimacy vindicated core values implicit in the social institution of family.

The unwed father cases presented a closer question for many of Justice White's colleagues. Unmarried fathers had long and widely been excluded from legal definitions of family, making it untenable to ground constitutional protection in a traditional consensus that government had no business regulating the relationships between these men and their children. Yet Justice White displayed no hesitation in extending constitutional protection. Instinctively and pragmatically, he appeared to see the essential connection between the yearnings of these men for a caregiving relationship with their children and the indisputably precious bonds between parents and children in the marital family. In Peter Stanley\(^{162}\) and Abdiel Caban,\(^{163}\) it was possible to see emotional commitment and a loving assumption of responsibility that bore an essential similarity with that which distinguished and privileged the parent-child relationship in more conventional settings; in Jonathan Lehr\(^{164}\) and Michael H.,\(^{165}\) White saw men who plausibly claimed to have done everything reasonably possible to manifest the same commitment.\(^{166}\) Although different in form, the emotional substance of these relationships, therefore, could be seen to draw on the core social values of family. And, as White appeared to accept elsewhere, the personal and social value of family "stems [largely] from the emotional attachments that derive from the intimacy of daily association."\(^{167}\)

Justice White's grudging acceptance of a privacy interest in contraception among unmarried couples might be understood on a similar rationale. Sexual

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166. See Parham v. Hughes, 441 U.S. 347, 366-68 (1979) (White, J., dissenting) (objecting to a categorical exclusion of unwed fathers who failed to legitimate their children from recovery in wrongful-death actions on the ground that some such fathers have emotional relationships that are as close and substantial as other, legally recognized parent-child relationships, and taking note of the growing prevalence of non-marital families).
167. Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844 (1977) (Brennan, J., joined by White, J.) ("[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children.") (citation omitted).
relations outside of marriage could hardly claim historical veneration, yet *Eisenstadt* and *Carey* did at least involve claims for intimate human connection. Of course, the choice to use a contraceptive in a liaison free of marital obligation is not necessarily inherently affirming of socially cognizable family values. But it is possible to see the sexual intimacy of an unmarried couple as bearing some essential similarity to the marital intimacy long and universally valued as a central element of family life. The claims in *Eisenstadt* and *Carey* were thus claims to facilitate intimate human connection—a connection that, at least under the right circumstances, might express values of love and commitment that were recognizable, even if unconventional. It may be unwise to read too much into his ambivalent assent in these cases because for Justice White, these were clearly a close call. But his willingness to strike down broad barriers to non-marital contraceptive use, while pointedly not opening the door to aggressive judicial scrutiny of all state regulation of consensual sexual conduct, suggests that privacy protection might extend only to acts of non-marital intimacy deemed to share in the core values of familial commitment.

This theory might help to explain Justice White’s rejection of the privacy claim in *Bowers*. Of course, as the Court’s recent decision in *Lawrence v. Texas* demonstrates, it is entirely possible to see core similarities between the sexual intimacy experienced by gays and lesbians and that experienced by heterosexuals, including the non-marital heterosexual intimacy facilitated by *Eisenstadt* and *Carey*. To be sure, Michael Hardwick did assert a claim to intimate human association, not isolation or individuation. Yet it seems likely that, for Justice White (as apparently for Justice Powell), the same-sex liaison at issue was so far outside his ken of family experience that he could not imagine the substantial commonalities. This is suggested by his confident assertion in *Bowers*:

> [It is] evident that none of the rights announced [in the Court’s previous family-privacy cases] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . . No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . .

At least in the realm of non-marital heterosexual unions, the Justices had ready models available that suggested the essential “resemblance” to more conventional marital intimacy: the Caban family, for instance, or the Stanleys—families that had built lives together and formed enduring commitments that society could recognize as basically good and honorable,

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170. *Id.* at 190-91.
even if sub-optimal. Even if society were prepared to disfavor or discourage these arrangements, it was not hard to see that they shared with conventional families certain core qualities and values. For some of the Justices at the time of *Bowers,* however, these commonalities were much more obscure in the case of same-sex relationships. Certainly, public models of stable, committed, durable same-sex families were much less available at the time the Justices acted. And it surely did not help the cause that the particular facts of *Hardwick* involved a transitory encounter that completely lacked the “emotional attachments . . . derive[d] from the intimacy of daily association,” traits that defined a socially valuable family in some previous cases.\(^171\)

The same considerations help to explain Justice White’s staunch rejection of heightened constitutional protection for abortion. By the approach suggested here, a woman’s liberty interest in abortion could be seen as not just lacking core values of family, but as antithetical to them. The claimants White favored in cases involving marriage, childrearing, and even contraception could be understood to be asserting an interest in intimate, durable association connoting family. In the abortion cases, however, White perceived the claim to be one for disassociation, individuation, and the avoidance of durable human connection. For Justice White, abortion was a quest for escape from family ties, “typically involv[ing] the destruction of another entity: the fetus,” and this made the abortion decision “different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.”\(^172\) Despite superficial commonalities between the abortion decision and “the decisions protected in *Griswold, Eisenstadt,* and *Carey,*” as each “concern[ed] childbearing (or, more generally, family life),” for Justice White, the cases were crucially distinguished by the “value[s]” underlying the two sorts of claims.\(^173\) In the case of abortion, “the continuing and deep division of the people themselves over the question” precluded a conclusion that the value choice to permit abortion was constitutionally controlled.\(^174\)

Finally, *Moore* might seem somewhat harder to square with this rationale for privacy rights. After all, Inez Moore asserted a claim to intimate human
connection that obviously involved the sort of commitments and mutual obligation that lies at the core of any desirable notion of family.\footnote{175} She sought to help raise her grandchildren in an arrangement that, as Justice Powell’s plurality opinion pointed out, society had long recognized as valuable and even noble.\footnote{176} It appears, however, that Justice White’s reluctance to strike down the zoning ordinance had more to do with a practical assessment of the burden imposed on the Moore family than with any doubts about whether their bonds really qualified as family protected by the Constitution. In \textit{Thornburgh}, White suggested that determining whether a liberty interest is “fundamental” turned in this context \textit{both} on its substantiality to the persons affected and on a judgment that the “value[s]” expressed by the interest are discernable within the constitutional scheme.\footnote{177} In \textit{Moore}, White simply concluded that the burden imposed by the zoning law on the Moore family was not very substantial.\footnote{178} First, he emphasized that the ordinance did not purport to separate Mrs. Moore from \textit{all} of her grandchildren, only some\footnote{179} — and only then after leaving open numerous alternative household configurations.\footnote{180} Second, Justice White noted that Mrs. Moore could escape even that burden by moving her family a mile or two in any direction, since the ordinance applies “only in East Cleveland, an area with a radius of three miles and a population of 40,000. The ordinance thus denies appellant the opportunity to live with all her grandchildren [only] in this particular suburb; she is free to do so in other parts of the Cleveland metropolitan area.”\footnote{181} It appears that, for Justice White, Mrs. Moore’s interests failed to trigger heightened privacy protection not because her caregiving relationship with her grandsons lacked the values of durable commitment that distinguish family, but rather because the state’s burden on Mrs. Moore’s family interests was simply too small to justify overcoming the powerful presumption in favor of democratic judgment.

\section*{III. Privacy and the Virtues of Pragmatism}

So far, I have suggested only that Justice White’s decisions relating to the constitutional right of privacy were neither reactionary nor unprincipled, as many critics have contended. More than that, however, there is much in White’s methodology that is affirmatively worthy of praise and emulation. Its

\begin{footnotes}
\item[176] See id. at 504-05 (Powell, J., plurality opinion).
\item[177] See \textit{Thornburgh}, 476 U.S. at 792 n.2, 796 n.5 (White, J., dissenting).
\item[178] See \textit{Moore}, 431 U.S. at 549 (White, J., dissenting).
\item[179] See id. at 549 (White, J., dissenting) (doubting the substantiality of private interest in “living” with all, rather than some, of one’s grandchildren”).
\item[180] See id. at 550 (White, J., dissenting).
\item[181] Id.
\end{footnotes}
elements—restraint grounded in sincere respect for the primacy of democratic choice, realism about the necessity for normative judicial judgment in delineating the limits of democratic authority, and a pragmatic commitment to cautious, fact-focused, case-by-case adjudication—provide the best means for avoiding the pitfalls of both judicial and democratic excess. For those who desire an honest and responsibly progressive approach to constitutional protection in this area, Justice White’s methodology may not merely be defensible, but indeed be the best thing going.

A. Legitimacy and Transparency in the Search for Constitutional Values

At the broadest level, White’s approach to constitutional privacy recognizes—as society itself always has—that family is specially valuable and worthy of heightened public respect. In tying judicial intervention under the guise of substantive due process to the social good of family, White also recognized that not all private assertions or conceptions of family are equally deserving of public deference. The private interest in a casual sexual encounter, in walking away from a marriage, or in abusing a child need not be regarded neutrally nor as equivalent to the desire to marry, to procreate, or to nurture a child.

This sense of nuance about the range of interests relating to family or intimate association is surely desirable from almost any perspective in defining the boundaries of family privacy. There is wide consensus today—as there always has been—that the content of family life should not be left entirely to the self-defining choices of individuals. A “view of the family only as a collection of individuals who come together in a contractarian arrangement for so long and for such purposes as they choose,” Lee Teitelbaum once observed, is “deeply unsatisfying” because it “leaves little room for the sense of commitment experienced by and valued in family life.” Indeed, as Martha Minow has pointed out, “[t]he danger of an expansive, functional voluntarist view of family—in which people can pick and choose what kinds of family ties that they want to have—is that people will choose to walk out when it gets tough and to avoid responsibilities when it is no longer fun.” As a result, “[t]he government will not and cannot be neutral about family duties.” Family is distinctively valuable

not merely as a location where individuals happen to realize particularly strong self-regarding impulses, but for the uniquely powerful social benefits generated by certain, sometimes selfless forms of intimate association. Accordingly, identifying what society truly values about family—love, durability, commitment, the fulfillment of dependence—may be a means of determining which relationships should qualify for heightened constitutional protection.

Crucially, for Justice White, what distinguished these varied interests—the aspiration to parenthood from the casual sexual encounter, for example—and the legitimacy of their claim to constitutional protection, was not the vicissitudes of historical practice, but some modern judgment about the constituent values of family. In rejecting protection for abortion or homosexual intimacy, for example, it was not enough to point out that society traditionally had not regarded these choices as beyond the purview of government. Instead, it was necessary to establish that no present social consensus so regarded these choices. In Bowers v. Hardwick, for example, Justice White observed that about half the states continued to criminalize sodomy, and in Thornburgh he emphasized “the continuing and deep division of the people themselves over the question of abortion” as precluding special constitutional protection. “[T]hat many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy,” White wrote, “strengthens my own conviction that the values animating the Constitution do not compel recognition of the abortion liberty as fundamental.”

The focus on modern consensus, of course, leaves room to expand constitutional protection as social attitudes relating to family evolve. Justice White agreed, for example, in Loving v. Virginia that the

187. See, e.g., Minow, All in the Family, supra note 185, at 305-10, 331 (suggesting that family be defined by focusing upon the obligations implicit in family relations, under which the state might be “generous” in permitting individuals to claim family status but “strict” in enforcing the duties assigned to that status by public norms); Barbara Bennett Woodhouse, “It All Depends on What You Mean by Home”: Toward a Communitarian Theory of the “Nontraditional” Family, 1996 UTAH L. REV. 569, 580-83 (proposing a functional definition of family that would differentiate between “kinships of responsibility” and mere “associations of choice”).
188. This, by contrast, had seemed sufficient to Chief Justice Burger in Bowers. See 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring) (emphasizing the history of legal prohibitions against homosexual conduct in Roman and English law).
189. See id. at 193-94.
191. Id. at 793-94.
Constitution's regard for family privacy did not permit the people of Virginia to outlaw interracial marriage. Although it was surely impossible to say that society had historically agreed that the private choice of an interracial couple to marry was beyond the legitimate purview of government—at one time, a majority of states proscribed such marriages—it was obvious that such a consensus was emerging at the time the Court acted. Most states had abandoned their anti-miscegenation laws through legislative or judicial action in the 1950s and early 1960s, so that when the Court decided Loving only a relative handful of jurisdictions clung to their statutory bans. Under this approach, the judiciary is permitted to broaden constitutional protection in step with changing social consensus about family, but it may not get out in front of popular judgment. Courts may be allowed to deliver the coup de grace to a traditional measure of family regulation that was already facing overwhelming political pressure, as in Loving, but would not lead the way if social judgment remained essentially unsettled, as in Bowers.

A virtue of this approach is that it permits constitutional acknowledgment of the changing reality of family life. A rigid focus on historical understandings of family and the limits of governmental power, for example, or an approach that limits constitutional protection to certain bright-line categories like marriage or parenthood carries dual risks. First, these approaches can ossify family law and preclude innovative democratic responses to changing social conditions. Innovative responses to the diversification of non-parent childrearing practices, for example, may be stymied by a jurisprudence that fixes constitutional entitlement in a traditional conception of parental privilege. Indeed, state courts following such approaches have blocked a variety of efforts to protect the emotional bonds that may develop between children and their non-parent caregivers in non-traditional families.

193. Id. at 12.
196. See David D. Meyer, What Constitutional Law Can Learn from the ALI Principles of Family Dissolution, 2001 BYU L. REV. 1075, 1085-88 (asserting that many state courts would likely invalidate some of the more innovative non-parent custody provisions proposed by the American Law Institute); Meyer, supra note 120, at 782-92 (reviewing state court decisions imposing narrow constitutional limits on legislative or judicial power to protect a child's emotional bonds with non-parent caregivers in the face of objection by a legal parent, even one with tenuous emotional ties to the child).
At the same time, historical or categorical approaches to constitutional protection risk validating democratic intrusions on non-traditional relationships that, by current understandings, share the core values that distinguish and privilege family life; this includes, of course, Mildred and Richard Loving. Interestingly, it now might extend to John Lawrence and Tyron Garner, the protagonists of *Lawrence v. Texas*. An approach to fundamental-rights analysis tied exclusively to historical consensus, or that assigns rights on the basis of some traditional categorization (such as *parenthood* or *marriage*), obviously cannot easily accommodate emerging social values. One of the striking aspects of Justice White’s approach, by contrast, is that the methodology that produced *Bowers* in 1986 remains perfectly consistent with *Lawrence*’s overruling of *Bowers* in 2003. In the seventeen years since *Bowers* was decided, there has been a significant and obvious shift in public attitudes toward gays and lesbians. While there is not yet public consensus that intimate same-sex relationships should be treated as *equivalent* to intimate heterosexual relationships—a decided majority still opposes permitting same-sex couples to marry, for example—there may now be a strong social consensus that government has no business criminalizing private, consensual sexual intimacy between gays and lesbians. Indeed, as a result of recent legislative repeals and state constitutional decisions, the number of states with criminal sodomy laws dwindled from twenty-four in 1986 to thirteen in 2003—slightly fewer than the number of states that clung to their anti-miscegenation laws at the time of *Loving*. This data, to the extent it demonstrated a modern social consensus that criminal regulation of same-sex intimacy was *illegitimate*, would plainly have been relevant to Justice White in reassessing *Bowers*. Even if he had not considered that data persuasive of a sufficient consensus in 2003, Justice White might well have been willing to do so by 2010 or 2015, assuming that social attitudes continue to evolve on their current trajectory. In this way, Justice White’s methodology permits temperate innovations—

197. 123 S. Ct. 2472, 2475-76 (2003) (overruling *Bowers* and holding that a statute criminalizing intimate sexual conduct between persons of the same sex was unconstitutional).

198. The emerging consensus suggested by polling data and other evidence is that, while gays and lesbians should not be permitted to marry, the law should otherwise recognize the legitimacy of their longterm, committed relationships. *See, e.g.*, Meyer, *Self-Definition*, supra note 182, at 799-800. That same attitude is reflected, of course, in the legal efforts of Vermont, Hawaii, and California to extend most legal benefits of marriage—but not marriage itself—to stable same-sex unions. *See id.; Gay Couples in California Are Granted Wide Rights*, N.Y. TIMES, Sept. 21, 2003, at A10.

199. *See Lawrence*, 123 S. Ct. at 2481.


both constitutional and legislative—in response to changing social developments in family life, without unleashing judges to impose truly ground-breaking values on the democratic process under the guise of constitutional law.

Of course, this approach depends heavily upon subjective judgment. One person’s “temperate innovation” can be another’s starry-eyed “social engineering.” For White, the line of demarcation rested on an assessment that society had accepted that the asserted private interest or relationship shared in the core values denoting family. However, he also was quick to admit that this value judgment—identifying the core values that distinguish family and the extent to which they are implicit in regulated conduct—would be made by judges, and that judges inevitably would be influenced by their own perspectives and values. Realistically, no alternative existed. For Justice White, with no true external constraint available in text, history, or elsewhere, the only workable answer was to encourage judges to exercise self-restraint. He sought to inculcate this norm of restraint by declaring as illegitimate direct reliance on judges’ personal value preferences, by encouraging a sense of genuine judicial humility, and by embracing prudential devices that would generally minimize the scope and impact of judicial intervention.

Justice White’s devotion to pragmatic adjudication—especially to cautious incrementalism in developing constitutional doctrine—reflected his genuine respect for the primacy of democratic judgment. Justice White’s penchant for narrow judgments focusing upon record facts tended to produce slow, tentative extensions of constitutional doctrine rather than broad, dramatic pronouncements. In Eisenstadt v. Baird, for example, where Justice Brennan was ready to declare the right of all persons, married or single, to autonomy in matters relating to contraception and sexuality, Justice White believed that a quirk in the record—the prosecution had failed to establish that the petitioners were not married—permitted a decision based on a straightforward application of Griswold’s protection of marital privacy.

White’s preference for modest holdings was, of course, calculated to minimize judicial imposition upon democratic choice. This is not merely a good in itself, but reflects understanding of the substantial risk of error in this context and sensitivity to the costs of judicial miscalculation. Eisenstadt illustrates that danger. Justice Brennan’s broad and emphatic declaration of

202. See supra notes 102-05 and accompanying text.
constitutional privacy as a “right of the individual”\(^{204}\) effected a substantial recasting of *Griswold v. Connecticut*.\(^{205}\) *Griswold* described the privacy valued by the Constitution as inhering in the *marital relationship*.\(^{206}\) Similarly, earlier cases—*Meyer v. Nebraska*,\(^{207}\) *Pierce v. Society of Sisters*,\(^{208}\) *Skinner v. Oklahoma*,\(^{209}\) and *Prince v. Massachusetts*\(^{210}\)—seemed to protect family associations against external meddling by the state. In emphatically—and unnecessarily—relocating the constitutional interest in the individual rather than the family union, however, *Eisenstadt* opened the door to a host of doctrinal and moral complexities. Most significantly, it created the possibility that the Constitution might be invoked not merely collectively as a shield against the state, but as a sword by an individual to resolve an intra-family dispute. Today, for instance, constitutional privilege is routinely inveighed by one family member against others in disputes over child custody or visitation, sometimes requiring courts to weigh competing claims of individual privacy rights.\(^{211}\) This does not merely add new layers of complexity to judicial decisionmaking, but it also introduces substantial questions about the meaning of family, the durability of family ties, and even the future vitality of the privacy interest itself.\(^{212}\) These are questions that eventually the Court would be required to confront, but the breadth of *Eisenstadt's* reasoning and rhetoric seemed to blur past them without appreciating the implications. Partly as a result, the right of family privacy is now sometimes employed to compel state action to *extinguish* family ties in order to vindicate individual claims to autonomy and self-determination, as in the contested adoption cases involving Baby Jessica and Baby Richard.\(^{213}\) White's inclination toward smaller steps in developing constitutional doctrine might have permitted the

\(^{204}\) 405 U.S. at 453 (emphasis in original) (“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.”).

\(^{205}\) 381 U.S. 479 (1965); see also Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1522, 1543-46 (1994).

\(^{206}\) 381 U.S. at 485-86.

\(^{207}\) 262 U.S. 390, 399 (1923).

\(^{208}\) 268 U.S. 510, 534-35 (1925).

\(^{209}\) 316 U.S. 535, 541 (1942).

\(^{210}\) 321 U.S. 158, 164-67 (1944).


\(^{212}\) See Dolgin, *supra* note 205, at 1564-70 (suggesting that *Eisenstadt's* individualist reconception of the privacy right might facilitate the erosion of family relationships and even the eventual growth of totalitarianism as the family loses its capacity to mediate between individuals and state power).

\(^{213}\) See *In re Petition of Kirchner*, 649 N.E.2d 324 (Ill. 1995) (Baby Richard); *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992) (Baby Jessica); see also Meyer, *Family Ties*, *supra* note 120, at 766-69.
Court to confront these questions in a more deliberate fashion, and perhaps with less untoward results.

A final virtue of Justice White's privacy methodology is its comparative honesty about the role of normative judgment in constitutional decisionmaking. In this, too, White drew directly from the realist tradition. He saw—and acknowledged—that doctrinal commands that judges focus on text or history scarcely eliminate room for value judgments in constitutional interpretation. Text, of course, can provide no real constraint in the privacy context. And, like Justice Black, White recognized that history is incapable of neutrally and objectively cabining constitutional protection. "What the deeply rooted traditions of the country are is arguable," he noted, and "which of them deserve the protection of the Due Process Clause is even more debatable." For White, determining whether a claimed private interest is "deserving" of constitutional protection plainly required a value judgment—i.e., a conclusion that the interest corresponds sufficiently with "some value of privacy or individual autonomy" attributable to the Constitution. In White's view, popular and judicial understanding of these values might change over time. Equality, for example, quite appropriately came to mean something different at the time of Brown v. Board of Education than it did when the Fourteenth Amendment was ratified in 1868. Similarly, common understandings of family have evolved over time. Justice White found crucial the concept that the people themselves had chosen through the Constitution to curtail democratic incursions on equality or family, allowing the specific meaning of "equality" or "family" to change over time. Judges were free to keep pace with changing social understandings and, in doing so, could draw their legitimacy from vindicating "the will of the people." This was, White frankly acknowledged, "a search for values," not an expert reading of history or text.

214. See Duxbury, supra note 128, at 71 ("'Realism' describes accurately what was possibly the single unifying ambition of so-called realists: namely, the commitment to candor, to telling it – whatever 'it' happened to be – as it is.").
215. See Griswold v. Connecticut, 381 U.S. 479, 518-19 (1965) (Black, J., dissenting) (mocking the majority's notion that judges can disregard "their personal and private notions" in determining whether the "traditions [and collective] conscience of our people" support recognition of a non-textual fundamental right; "the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the [collective] conscience of our people") (quoting id. at 493 (Goldberg, J., concurring)).
219. Thornburgh, 476 U.S. at 796 n.5.
220. Id.
221. Id.
Nor was White unaware that judges, in conducting this search, would unavoidably be affected by their own perspectives, experiences, and values. The only reasonable expectation, then, was that judges be alert to their own biases and do the best they could to make an honest appraisal of social consensus respecting the values of family. Obviously, no guarantee exists in such a formula that judges will not overstep their authority, and that undoubtedly leaves many theorists deeply unsatisfied. Pragmatists such as Justice White, however, are more inclined to accept such imperfections as the best that can be had in the real world. Indeed, there is surely much to admire in the frank acknowledgment that constitutional adjudication in this area rests ultimately on value judgments made by judges, with all the dangers and pitfalls that task presents.

Although Justice White’s methodology deserves credit for admitting the role of normative judgment, his opinions in individual cases were sometimes properly faulted for not being more transparent. White’s devotion to brevity in opinions was famous and quite consistent with his commitment to finding narrow bases for decision in constitutional cases—both reflected an overall desire to say as little as possible in the course of constitutional adjudication. Yet, while his restraint in drawing new constitutional lines was generally admirable, White’s sparse explanations of the Court’s reasoning in opinions too often led to confusion and suspicion among readers, obscuring, rather than illuminating, the basis of the Court’s judgments.

Still, notwithstanding the flaws of his opinion-writing in specific cases, Justice White’s methodology in privacy cases was refreshingly honest about the place of value judgments in deciding constitutional cases. Even greater frankness by the Court, in acknowledging forthrightly the specific value judgments which animate its privacy decisions, would prove beneficial not only to public understanding of the Court’s work, but also in spurring public debate over the specific values in question. That debate might help generate—or disprove—social consensus about family relevant to future decisions and might also prod the democratic process to be more responsive to new facts and understandings.

B. The Court’s Emerging Acceptance of the Pragmatic Approach

In the decade since Justice White’s retirement, evidence shows that the Court may be moving closer to his pragmatic model for privacy adjudication. Ironically, the first evidence may be found in the joint opinion of Justices

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222. See Hutchinson, supra note 5, at 418-19 (describing White’s self-imposed twelve-page limit for most majority opinions); id. at 374 (describing White’s majority opinions as typically “adopt[ing] a faceless, restless style that resolved the case and drew as little attention to themselves as possible”).

223. See Liebman, supra note 136, at 19.
O’Connor, Kennedy, and Souter in *Planned Parenthood v. Casey,*224 decided only a year before Justice White left the Court. Although White vehemently disagreed with *Casey’s* result—the reaffirmation of *Roe v. Wade*225—the methodology employed by the authors of the joint opinion bore some important similarities to that used by Justice White. First, the joint authors squarely rejected text or enactment-era traditions as the sole determinants of the fundamental liberty protected by substantive due process.226 Indeed, the plurality rejected the notion that any single formula could neatly describe the Court’s role in identifying fundamental rights, and adopted Justice Harlan’s view, articulated in his dissent in *Poe v. Ullman,*227 that “[n]o formula could serve as a substitute, in this area, for judgment and restraint.”228 The joint authors, like Justice Harlan, required “‘reasoned judgment,’” which would have regard for text, history and tradition, but that ultimately rested on an appraisal of the fundamental values of the nation.229 Second, the joint authors embraced a standard for evaluating government incursions on the abortion right—the “undue burden” test—which was calculated to permit a flexible balancing of the competing private and public interests.230

Five years later, Justice Souter elaborated upon this approach in explaining his understanding of substantive due process in *Washington v. Glucksberg.*231 In *Glucksberg,* Souter stated that substantive due process review “calls for a court to assess the relative ‘weights’ or dignities of the contending interests” in an effort to identify “the values [which] ... truly deserv[ed] constitutional stature.”232 Also adopting Justice Harlan’s formulation from *Poe,* Justice Souter wrote that these values were not to be drawn simply from the “‘personal and private notions’” of judges, but were “those exemplified by ‘the traditions from which [the Nation] developed,’ or revealed by contrast with ‘the traditions from which it broke.’”233 This did not mean that history fixed the values protected by substantive due process; to the contrary, the tradition guiding the Court was “‘a living thing’”234 that was continually shaped and remade by contemporary public debates. For instance, in concluding that the Constitution did not afford heightened

225. See id. at 869 ("We conclude that ... Roe was based on a constitutional analysis which we cannot now repudiate.").
226. Id. at 847-48.
228. Id. at 542 (Harlan, J., dissenting).
229. See Casey, 505 U.S. at 849; Poe, 367 U.S. at 542 (Harlan, J., dissenting).
232. Id. at 767 (Souter, J., concurring).
233. Id. (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).
234. Id. at 765 (quoting Poe, 367 U.S. at 542 (Harlan, J., dissenting)).
protection to the respondents' interest in physician-assisted suicide, Justice Souter did not consider it determinate that society had not historically afforded such a liberty; rather, what was ultimately controlling was that society was still actively wrestling with the implicit value choices and experimenting with public responses.  

Next, in weighing the justification for public intrusions on these constitutional values, Justice Souter insisted that courts should proceed flexibly and cautiously. Courts have no warrant, he wrote, to overturn democratic policy choices that are within "the zone of what is reasonable." Like White, Souter believed that deference to reasonably debatable policy judgments is crucial to ensure proper respect for the primacy of democratic choice. Accordingly, though Justice Souter accepted "the so-called 'compelling interest test'" as the governing standard in cases of fundamental rights, he did not have in mind Professor Gunther's rigid conception of strict scrutiny as "'strict' in theory and fatal in fact," but rather a decidedly more nuanced and flexible standard of review, which would adjust its justificatory demands according to the particular strength of the private interest at stake and the extent of the government's intrusion. In the end, Justice Souter did not rule out the possibility that physician-assisted suicide might be entitled to heightened constitutional protection, but concluded that "[t]he Court should... stay its hand to allow reasonable legislative consideration" to continue. This approach, both to identifying the values specially protected by the Constitution and defining the permissible intrusions upon those values, reflects an essentially pragmatic understanding of privacy adjudication.

Perhaps the clearest affirmation of Justice White's pragmatic approach, however, can be seen in Troxel v. Granville. In Troxel, the Court overturned a trial court's order permitting grandparents to visit with their granddaughters over the objection of their mother. The case seemed an

235. See id. at 773-74.
236. See id. at 785-89.
238. Id. at 768.
239. Id. at 772 n.12.
241. Glucksberg, 521 U.S. at 772 n.12 (Souter, J., concurring) ("How compelling the interest and how narrow the tailoring must be will depend, of course, not only on the substantiality of the individual's own liberty interest, but also on the extent of the burden placed upon it.").
242. Id. at 789.
244. Id. at 62.
easy one from many conventional perspectives. The trial court had acted pursuant to a Washington state statute that authorized courts to grant visitation to “any person” at “any time” upon a finding that visitation would serve a child’s best interests. The mother’s liberty interest in rearing her children enjoyed deep historical validation, and the expansive statute seemed poorly drawn to survive strict scrutiny.

Tellingly, however, the Court did not strike the statute. Eight of the Justices agreed that the trial court’s visitation order burdened Tommie Granville’s fundamental right as a parent to rear her children, and yet only one—Justice Thomas—went on to subject the statute to strict scrutiny. Most of the others seemed intent to proceed cautiously. The plurality opinion authored by Justice O’Connor was willing only to hold that the Washington statute had been unconstitutionally applied on the facts of the Granville family’s case. Justices Stevens and Kennedy, each writing separately, were unwilling to go even that far, instead insisting that the Court should remand for further fact-finding. All sensed the danger of broad constitutional pronouncements—particularly ones grounded in traditional notions of family privilege—for a society in which “[t]he demographic changes of the past century make it difficult [even] to speak of an average American family.” As Justice Kennedy explained, the danger of a broad constitutional rule giving parents the power to cut off contacts with “third parties” is that such a rule:

[P]roceed[s] from the assumption that the parent or parents who resist visitation have always been the child’s primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child . . . As we all know, this is simply not the structure or prevailing condition in many households. For many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood.

This awareness of the changing reality of family life seemed to push all but Justice Thomas (and Justice Scalia, who believed that no fundamental right was implicated in the first instance) to employ a more modest, flexible

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245. Id. at 61.
246. See id. at 74-75.
247. See id. at 80 (Thomas, J., concurring).
248. Id.
250. Id. at 84-85, 94 (Kennedy, J., dissenting).
251. Id. at 63 (O’Connor, J., plurality opinion).
252. Id. at 98 (Kennedy, J., dissenting).
standard of review. The plurality, for instance, would say only that the Constitution required trial judges to give “special weight” to a parent’s own assessment of her child’s best interests before reaching a contrary decision, and that the trial court’s failure to do so in this case invalidated its order. Left expressly undecided was whether a more stringent showing of harm to the child might also be necessary and whether the statute might be facially unconstitutional.

The Justices’ evident determination in Troxel to decide the case on the narrowest possible grounds, leaving room for democratic experimentation in response to complex social issues and carving out flexibility for future courts in mediating conflicts between family members over children, closely resembles Justice White’s instincts for cautious, fact-focused, pragmatic review. The Justices’ concern that constitutional doctrine develop in small steps, both to avoid unwarranted interference with democratic choice and to ensure sensitivity to changing social realities and attitudes, likewise corresponds with White’s own twin commitments to judicial restraint and realism about the inevitable need for modern judgments about the prevailing values of family.

Finally, and paradoxically, even Lawrence v. Texas provides significant validation for White’s privacy methodology. That claim may appear far-fetched given that Lawrence chastises Justice White by name for his flawed historiography in Bowers and concludes sharply that “Bowers was not correct when it was decided, and it is not correct today.” Yet, it is possible to see the outcomes in Bowers and Lawrence as the products of different facts, rather than different constitutional methodologies. In Bowers, White found no fundamental right because he could see no “resemblance” between the sexual intimacy shared by a same-sex couple and the relationships and undertakings previously deemed to share in the core values of family, and because there was no social consensus suggesting such a commonality. In Lawrence, the Court found constitutional protection for same-sex intimacy at least partly because the Justices in 2003 saw the “resemblance” to family intimacy that had eluded White. “When sexuality finds overt expression in intimate conduct with another person,” the Court observed, “the conduct can

254. Troxel, 530 U.S. at 69-70 (O’Connor, J., plurality opinion).
255. See supra notes 142-44 and accompanying text.
257. Id. at 2480.
258. See id. at 2484.
259. See Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986); see also supra notes 169-71 and accompanying text.
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be but one element in a personal bond that is more enduring.\textsuperscript{200} Lawrence's readiness to draw analogies to marriage reinforced the linkage between sexuality and enduring personal bonds: "To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."\textsuperscript{201} In Lawrence, then, as in Griswold, constitutional protection was ultimately founded not upon a sex act, but upon the existence of a durable "personal relationship."\textsuperscript{202} There was, moreover, an "emerging recognition" by society that this relationship is legitimate and beyond the coercive power of the state.\textsuperscript{203} Of course, this conclusion was founded partly on developments occurring since 1986, such as the repeal or invalidation on state constitutional grounds of nearly half the sodomy laws upon which White had relied in Bowers.\textsuperscript{204} None of this is to say that White would have joined the Court's opinion in Lawrence. Certainly, he would have had serious qualms about the breadth of Justice Kennedy's opinion and its description of the historical record concerning legal proscriptions against homosexual conduct.\textsuperscript{205} Yet, the core methodological commonalities of Bowers and Lawrence are surely greater than Justice Kennedy appreciates. Both White and Kennedy considered it important to determine whether the private interest at stake shared in the essential values that privileged family intimacy and both looked to modern social consensus on the question as an important source of validation for this judgment. Although they came to different conclusions because of different understandings of the facts, both asked the same questions. In that sense, Lawrence provides essential affirmation of White's privacy methodology, even as it discards the result that methodology produced in Bowers.

IV. CONCLUSION

In Justice White's view, the legitimacy of judicial intervention in defense of unwritten privacy rights depended upon the honest attribution of the value choices inherent in privacy protection to the people, rather than to judges. Yet Justice White was under no delusions that this approach somehow eliminated the need for normative judgment by judges in the course of

\textsuperscript{200} Lawrence, 123 S. Ct. at 2478.
\textsuperscript{201} Id.
\textsuperscript{202} See id.
\textsuperscript{203} See id. at 2480-81; see also id. at 2480 (asserting that the "laws and traditions in the past half-century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex").
\textsuperscript{204} See id. at 2481.
\textsuperscript{205} See id. at 2478-82.
defining the boundaries of privacy protection. To the contrary, judges would still be called upon to decide whether the privacy interests asserted in a given case shared in the essential qualities and values that distinguished and privileged family life by common understanding. As a realist, Justice White understood that judges would inevitably be influenced by their own experiences and world views in making this estimation. Yet, Justice White's point was that they were obligated to do the best they could to relate constitutional intervention to what they took to be the values of the people.

At its core, this was both the great difficulty of Justice White's approach and its great virtue. By eschewing a singular focus on the purported objectivity of text or history, Justice White's approach promised no guarantee that the Court's judgments would not be influenced by the biases and values of the judges themselves. Yet, by insisting that value choices may not be attributed directly to judges, Justice White's approach would not permit judgments based simply on a frank judicial balancing of the private and public interests. His approach required some middle course that, from the vantage point of some, might seem impossibly messy or even inherently contradictory. By its nature, however, pragmatism is prepared to tolerate the tensions between tradition and innovation, between restraint and intervention, and to recognize that the tension is not soluble by any neat theoretical fix.

Instead, Justice White's pragmatic approach conceded the inevitability of normative judgment—identifying the values constituting the indispensable core of the social institution of family—and denied the existence of any magic bullet, in the form of text, history, or theory, that might vanquish the genuine evil of judicial overreaching. His approach leaves open to debate what are the core family values that society believes should be protected against government incursion. In Justice White's view, those core values seemed to require some positive aspiration to association, to durable intimacy, and to mutual obligation and the fulfillment of dependency. And, yet, Justice White the realist would have readily acknowledged the possibility of other points of view. More importantly, Justice White acknowledged that the legitimate participants in this debate included not only the Constitution's Framers, or the current occupants of the Supreme Court bench, but also the millions of other actors who comprise American democracy. Justice White's methodology did not purport to fix the answers, but it directed judges toward the right questions. And that is probably the most that can be hoped for in this extremely difficult area.