THE CONSTITUTION AND COVENANT MARRIAGE LEGISLATION: RUMORS OF A CONSTITUTIONAL RIGHT TO DIVORCE HAVE BEEN GREATLY EXAGGERATED

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Subject to the inherent ambiguity of legislative motivation, we may safely speculate that when a state enacts a covenant marriage statute, it is seeking to make divorce more rare and to distance the moral culture of that state from the "culture of divorce."[1] This action is premised on a value judgment that marriage is basically good and divorce is basically bad: a value judgment that is simple, intuitive, popular, and far too "traditional" to escape scathing scrutiny by legal academia.[2] This article is an effort to anticipate constitutional attacks on covenant marriage legislation based on modern substantive due process, which focuses on individual moral autonomy, and which includes a "right to marry" couched in terms so individualistic as to imply a correlative right to divorce.[3]

For a period of time beginning in the 1940s and culminating in the 1970s, the Supreme Court seemed to be developing a "right to marry" doctrine that, in fact, protected not marriage but divorce, by striking down family-protective state laws that acted as obstacles to divorce. It

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1 *See, e.g.*, BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND FAMILY (1997) (arguing for a return to a pro-marriage culture, though not advocating fundamental change to no-fault divorce statutes).

2 In an influential article, Kenneth L. Karst argues:

> [O]nce we recognize the duty of government to offer substantial justification for restrictions on the freedom of intimate association, conditions on the termination of marriage come under similar scrutiny. Divorce, like marriage, is a statement about oneself, and about one's future commitments . . . . [N]o-fault divorce seems implied by the freedom of intimate association, unless the state can demonstrate some very strong interest in the fault requirement.

Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 671 (1980); *see, e.g.*, Melissa Lawton, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471 (1998) (covenant marriage laws may impose an "undue burden" on the right to marry, triggering intermediate scrutiny under substantive due process analysis; such laws would probably withstand such scrutiny, but should nonetheless be opposed on policy grounds); Jeanne Louise Carriere, *"It's Déjà Vu All Over Again": the Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701 (1998) (critiquing the Louisiana covenant marriage statute's reliance on counseling).

3 *See infra* note 73 and accompanying text.

has been argued that this incipient "right to divorce" was part of an attempt by the Court to formulate a comprehensive "freedom of intimate association"[4] that nonetheless failed to emerge as a definite constitutional doctrine. I shall argue that the Court has retreated from this approach, leaving more constitutional breathing-room in which states can, if they choose, enact laws to encourage stable marriages.

Numerous Supreme Court opinions have paid dictal tribute to marriage. It has been seen both as an element of a lifestyle proper to an ordinary, upright citizen fulfilling his civic role,[5] and as an aspect of personal self-fulfillment.[6] On closer examination, these two approaches turn out to be symbolic of two contrasting ways of defining the importance of marriage in a republic. Is marriage, after all, valuable because it is one of the cornerstones of a republic based on dispersion of power and requiring a great deal of "obedience to the unenforceable"[7] in order to survive—what we might call a republican (small "r"!) vision of marriage? Or, on the contrary, is it valuable because it promotes the private life-projects of the individuals who choose it—what we might call a self-expressive vision of marriage? Of course it does both—but which of these aspects of marriage has informed the project of constitutionalized family law?

This article will attempt to trace the Supreme Court's varying answers. I aim to show that the republican vision of marriage animated the first body of marital-constitutional theory; that the self-expressivist vision animated the second one; and that the Court has retreated from this latter view, restoring some constitutional space in which states may experiment.

It may be best to clarify at the outset what I mean by the word "republican." I do not mean to revive that trend of the previous decade, whereby "republicanism" was invoked within legal academia as an alternative grounding for an expansive state, against the perceived libertarianism of the Reagan administration.[8] Though I am not a scholar of ancient republics, I do hope to capture by the term "republican" some of

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[4] Karst, *supra* note 2.

[5] *See* Meyer v. Nebraska, 262 U.S. 390 (1923); *see also* Michael H. v. Gerald D., 496 U.S. 110 (1989) (arguing that the husband, as against the adulterous natural father's "right not to conform" as defended by Brennan, had a "right to conform"). Conform to what? Presumably, to traditional and conventional notions of family structure.

[6] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (Blackmun, J., dissenting); Griswold v. Connecticut, 381 U.S. 479 (1965).

[7] Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy - Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 476 (1983).

[8] *See, e.g.*, Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

the self-transcending yet non-statist spirit[9] that was submerged by the rise of the more acquisitive, self-regarding aspects of liberalism.[10]

I. ORIGINS: THE REPUBLICAN RIGHT TO MARRY

The search for the constitutional right to marry usually begins with *Griswold v. Connecticut*,[11] and takes further shape in *Loving v. Virginia*[12] and *Zablocki v. Redhail*.[13] But, even assuming that these cases are definitive with regard to the asserted right,[14] the cases themselves acknowledge a longer pedigree. In *Griswold*,[15] for example, Justice Douglas, building his case for "penumbral" rights, puts at the head of his string-cite the parental rights cases of the 1920s, most notably *Meyer v. Nebraska*[16] and *Pierce v. Society of Sisters*.[17] In *Loving*,[18] Chief Justice Warren, arguing against the notion that a state's power to regulate marriage is unlimited, cites *Meyer*, and *Skinner v. Oklahoma*,[19] despite the fact that the first is about teaching children foreign languages, the second is about an individual's right to procreate, and neither is directly about marriage.

We see here a key transformation of a body of precedent: cases that acknowledged a constitutional right of schoolmasters to pursue their profession, and a correlative right of parents to choose and direct the education of their children, laid a groundwork for the notion that 14th Amendment Due Process protects, against unreasonable state interfer-

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[9] *See* PAUL A. RAHE, REPUBLICS ANCIENT AND MODERN: THE ANCIENT REGIME IN CLASSICAL GREECE 16 (1994) ("Those who speak of the economy being embedded in society take for granted the distinction between government or state and society; and this distinction, prepared if not exclusively introduced by John Locke, belongs to the world of the modern republic and is inapplicable to the ancient city. There was no Greek state . . . . The polis was, as the Greeks often remarked, the men."); *see also* SAINT AUGUSTINE, THE CITY OF GOD, XIX, 24 ("a people is an assemblage of rational beings bound together by a common agreement as to the objects of their love . . . .").

[10] Besides Locke as interpreted by Rahe, *supra* note 9, see Hafen, *supra* note 7. *See generally* JOHN STUART MILL, ON LIBERTY (1859).

[11] 381 U.S. 479 (1965).

[12] 388 U.S. 1 (1967).

[13] 434 U.S. 374 (1978).

[14] For the view that they are not, see Earl Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949 (1992).

[15] *Griswold*, 381 U.S. at 482.

[16] 262 U.S. 390 (1923).

[17] 268 U.S. 510 (1925). Justice Douglas insists that *Meyer* and *Pierce* are First Amendment cases. This piece of legal fiction is most likely motivated by his desire to maintain the precedential force of those cases while still repudiating, or pretending to repudiate, their doctrinal basis—substantive due process.

[18] *Loving*, 388 U.S. at 8.

[19] 316 U.S. 535 (1942).

ence, the fundamental relationships on which the family is built. Let us examine this transformation more closely.

In keeping with the pre-1937 substantive due process doctrine that knew only one level of review—rational basis—yet required all legislation that impinged on "fundamental" rights to pass a fairly searching version of this test,[20] the Court in *Meyer* observed that the term "liberty" in the Fourteenth Amendment includes more than "freedom from bodily restraint"; it also includes "the right of the individual . . . to engage in any of the common occupations of life."[21] The test was whether the legislation—which barred schoolchildren up through 8th grade from being taught foreign languages in school—was rationally related to a legitimate state interest. The Court had no trouble concluding that the government's purpose—cultural cohesion in the citizenry—was a permissible one; indeed, the Court affirmed the legitimacy of a state role in setting the school curriculum. But the outright ban on language instruction at issue here was too broad for the Court to conclude that it was rationally related to the state's legitimate purposes.

In *Meyer*, the state of Nebraska, as appellee, drew its arguments primarily from the play-book of civic republicanism:[22] it sought "to promote civic development" and to spur young Nebraskans to "learn English and acquire American ideals."[23] Significantly, the Court did *not* base its response on the opposite ideology, that of individualism, as one might have expected it to do back in those days when the Court tended to assume that the Fourteenth Amendment had "enact[ed] Mr. Herbert Spencer's Social Statics."[24] To be sure, it framed its holding in terms of "ideas touching the relation between individual and state,"[25] but the individual right recognized by the Court as fundamental was not Mr. Meyer's right to express himself, but rather, his right to exercise a "calling"—that of teacher—that has "always been regarded as useful and

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[20] More recent decisions have seen a revival of this rational basis "with teeth" test. *See* Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (bias against the mentally impaired was not a rational basis for a zoning decision); Nollan v. California Coastal Comm'n., 429 U.S. 1124 (1977) (condition attached to building permit was a taking, requiring compensation, where there was no rational fit between the condition and the harm that the government sought to alleviate); Reed v. Reed, 404 U.S. 71 (1971) (administrative convenience, though a legitimate state purpose, could not justify a broadly-sweeping sex-based presumption). *Reed*, of course, has been superceded by cases holding that a higher standard of review, sometimes called "intermediate scrutiny," applies equal protection challenges to sex-based classifications. *See* Craig v. Boren, 429 U.S. 190 (1976).

[21] *Meyer*, 262 U.S. at 399.

[22] *See supra* note 9 and accompanying text.

[23] *Meyer*, 262 U.S. at 401.

[24] Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

[25] *Meyer*, 262 U.S. at 402.

honorable, essential, indeed, to the *public welfare*."[26] This is, in part, the right to follow one's profession, a right that had been prominent in substantive due process analysis since the *Slaughterhouse* dissents.[27] Mr. Meyer's right to teach German was of a piece with the New Orleans butchers' rights to cut and sell meat,[28] and the New York bakery workers' rights to work as long as they wanted.[29] But it also served "the public welfare," and the Court considered this a factor contributing to the conclusion that it was part of the liberty protected by the Fourteenth Amendment.

The Court's list of substantive due process rights merits our attention:

> Without doubt, [Fourteenth Amendment "liberty"] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[30]

This is virtually a sketch of the ideal republican citizen, especially in the American republic between the Civil War and the Depression. It will strike many today as bourgeois, boring, sexist, and classist. Meanwhile, on the other side of the room, principled critics of judicial activism will ask where the Court gets off making such lists and declaring the lifestyles on them to be constitutionally protected when the text of the Constitution does not protect them in plain terms. It is not my purpose here to make converts from either group of critics: my purpose is achieved if we recognize that the right protected in *Meyer* was not an individual-oriented, self-expressive right, but a community-oriented, bourgeois, right—a right to play a known and respected role in civil society, namely, that of teacher.

Thus, to Nebraska's republican argument—that it must regulate language instruction in the interest of civic unity—the Court makes a republican response: allowing states an unrestricted power to standard-

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[26] *Id.* at 400 (emphasis added).

[27] Slaughterhouse Cases, 83 U.S. (16 Wall) 36, 110 (1873) (Field, J., dissenting) ("right to pursue a lawful occupation in a lawful manner", "lawful pursuits of life"); *see also id.* at 123 (Bradley, J., dissenting) ("adopting a lawful employment"); Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (explaining that "liberty" as used in the Fourteenth Amendment includes the right of the citizen "to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation.").

[28] *See Allgeyer*, 165 U.S. at 589.

[29] *See Lochner*, 198 U.S. 45.

[30] *Meyer*, 262 U.S. at 399.

ize the school curriculum will hurt, not promote, republican values, because it will empower the state at the expense of civil society.

Meyer focuses so narrowly on the rights of the teacher that it is hard to see how, without *Pierce*, it could ever have become part of a canon of parental rights cases. In *Pierce*, which invalidated an Oregon statute that mandated attendance by children at public schools—thus effectively banning private ones—the marital interest comes more clearly into focus. Once again, substantive due process is the analytic mode, education of children was the state interest at stake, and the Court acknowledged the legitimacy of that interest and the power of the state to regulate in pursuance of it. But once again, the state had overreached in the means chosen to pursue that end, because it has asserted a "general power . . . to standardize its children by forcing them to accept instruction from public teachers only."[31] This, the Court held, violates "the fundamental theory of liberty on which all governments in this union rest."[32] The Court does not tell us in depth what this theory is, but it does elaborate on the relevant portion of it in the famous dictum: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[33] Note that here, too, republican themes predominate over individualist or self-expressivist ones. A private right is recognized, but that right is "coupled" with a "high duty." Moreover, that duty itself is defined in terms of further duties: it is a duty to prepare a child for "additional obligations."

At this primordial stage in the history of the *Meyer-Pierce* doctrine, we are still light-years away from the unencumbered selfhood that comes to be celebrated in some of the later cases that claim in some way to be descendants of *Meyer* and *Pierce*.[34] As for a right to marry, this was included in the list of rights in *Meyer*, but its very presence in that list embedded it in a fabric of social life, such that we are prevented from seeing it as a purely self-oriented, expressive right. The central core of the

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[31] *Pierce*, 268 U.S. at 533.

[32] *Id.* at 534.

[33] *Id.* at 535.

[34] *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (father of fetus has no legally cognizable interest in the mother's abortion decision); Eisenstadt v. Baird, 405 U.S.438, 453 (1972) (constitutional right to use contraception cannot be confined to married couples because a marriage is only "an association of two individuals"). The philosophy alluded to here is developed more fully in certain noteworthy dissents. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (conclusive presumption favoring intact legal family over wife's former lover seeking paternal rights violates due process, because ours is a "facilitative, pluralistic" society that protects the individual's "freedom not to conform"); Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (rights of the family are constitutionally protected only because "they form so central a part of an individual's life").

Meyer rights list—"to acquire useful knowledge, to marry, to establish a home and bring up children"—traces the biography of the good, bourgeois citizen.[35] The bohemian self-expresser is a long way away. The right to marry is a right to play a social role hallowed by tradition. As for a right to divorce, the very idea would contradict, rather than instantiate, the *Meyer* right to marry.

II. THE RISE OF THE INDIVIDUALIST RIGHT TO MARRY

Though *Meyer* and *Pierce* relied in substantial part on *Lochner*-era substantive due process, and therefore could easily have been swept away in the judicial revolution of 1937,[36] two cases from the 1940s made plain that *Meyer* and *Pierce* had survived.[37] *Prince v. Massachusetts*[38] declared that the *Meyer-Pierce* doctrine, unlike other doctrines minted during the former era of substantive due process, is "cardinal with us." However, the *Meyer-Pierce* claim in *Prince*, even though bolstered by a claim of free exercise of religion (an aunt with legal custody of her niece sought to have that niece help her sell religious literature, in observance of a religious obligation, but in conflict with Massachusetts's child labor

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[35] Or, as we might say in tort law, the "reasonable man" or the "reasonable person." Interestingly, the French tort law equivalent of "reasonable man" was "bon père de famille" ("good father of a family"). Even today, when the "reasonable person" has replaced the "reasonable man," the French retain the link to family life, using the gender-neutral expression "bon chef de famille" ("good head of a family"). Many thanks to my Canadian-educated torts professor, Michael Krauss of George Mason University School of Law, for calling this to my attention.

[36] *See* West Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937) (noting that "[l]iberty in each of its phases has its history and connotation" and upholding a minimum wage law against a substantive due process challenge, thereby signaling the end of that doctrine as a sword against economic regulation).

[37] It is debatable whether *Meyer* and *Pierce* could be salvaged under the doctrine of Footnote 4 of *United States v. Carolene Products*, 304 U.S. 144, 153 (1938), which speculated on future grounds for strict judicial scrutiny even after economic substantive due process had been rejected. Paragraph one of the footnote refers to textual constitutional rights, whereas neither parental rights nor a right to marry are spelled out in so many words in any constitutional text. (Nor, for that matter, is a right to pursue a profession—the original basis of *Meyer*.) Paragraph two talks about the supposed need for judicial intervention when the mechanics of the democratic process have broken down; it is not easy to connect this paragraph with parental rights or the right to marry, unless one posits that the family is essential to the democratic process because it is an indispensable school of republican virtues. Some social theorists, in fact, have made essentially this argument. *See generally* BRUCE FROHNEN, THE NEW COMMUNITARIANS AND THE CRISIS OF MODERN LIBERALISM 230-35 (1996); GEORGE F. GLIDER, MEN AND MARRIAGE (1992). The third paragraph of the footnote deals with "discrete and insular minorities," which does not describe the family as an institution (despite claims made in the heat of ideological exchange, especially during debates on federal child-care legislation in the early 1990s, that "traditional families" are a dying breed).

[38] 321 U.S. 158 (1944).

laws), lost out to the state's claim of regulatory authority. Thus, *Prince* simultaneously reaffirmed and limited the *Meyer-Pierce* doctrine.

Meanwhile, however, the notion of marriage as a constitutional right was carried forward, albeit without cites to *Meyer* or *Pierce,* in *Skinner v. Oklahoma,*[39] which struck down, on equal protection grounds, an Oklahoma law that allowed for sterilization of three-time offenders, but with seemingly arbitrary exceptions. The lack of justification for the exceptions allowed Justice Douglas, writing for the Court, to use equal protection analysis.[40] But in order to justify heightened scrutiny, he needed to show that a fundamental right was at stake. Without case citations, he announced: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[41] The rest of this passage focuses on the irreversibility of sterilization, so the above is all the analysis we get as to the nature of the marital-procreational right itself. Yet this snippet proved portentous, because it simultaneously made marriage explicitly a constitutional right—and unhooked it from its moorings in social roles and communitarian expectations, viewing it instead solely as a personal right of the individual.

Whether Justice Douglas could have been more clear depends in part on how long Mr. Skinner's sentence was, which we are not told. He was in prison on a second conviction for robbery, sitting atop an earlier conviction for chicken-rustling, thus making the necessary trio for Depression-era Oklahoma's unique variation on the "three strikes and you're out" theme. If he were in for life, the Court could have reached its result by pointing out that sterilization would serve no rational purpose, unless Oklahoma prisons in the 1940s were much more lax than one supposes. On the other hand, if Mr. Skinner could look forward to getting out some day, then the Court could have reached its result by pointing to Mr. Skinner's hoped-for rehabilitation and re-entrance into society: after all, he might someday wish to marry, form a family, and practice all the other virtues of *Meyer* citizenship.

But instead, all we have is a bare announcement that "marriage and procreation" are "basic civil rights." We are not even told if the Court is deliberately reinterpreting *Meyer* and *Pierce* along more individualistic lines—though that is the precedential effect that *Skinner* has had. For

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[39] 316 U.S. 535 (1942).

[40] *See id.* at 539 (comparing crimes which did, and crimes which did not, subject offenders to sterilization). Chief Justice Stone concurred separately, citing procedural, not substantive, due process. That is, he objected to the statute's failure to allow Skinner a hearing on the issue of whether his crime was of such a nature that the tendency to commit it was genetically transmissible. *See id.* at 544.

[41] *Id.* at 541.

instance, *Skinner* is part of a key string-cite in *Griswold v. Connecticut* regarding "penumbral rights of 'privacy and repose.'"[42]

Meyer and *Pierce* also play a role in *Griswold*. Justice Douglas, writing for the Court, implausibly re-labels them as First Amendment cases, and holds that they stand, in the first instance, for the proposition that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."[43] Furthermore, since the right to direct the education of one's children is a "penumbra"[44] of the right to an uncontracted spectrum of knowledge, *Meyer* and *Pierce* stand, in the second instance, for the proposition that the First Amendment has "peripheral rights" without which "the specific rights would be less secure."[45]

Justice Goldberg, in his concurrence, does not join in this re-packaging of *Meyer* and *Pierce*. Instead, he twice cites the rights-list from *Meyer*, both times edited so as to highlight "the right[s] . . . to marry, establish a home and bring up children . . . ."[46] The first time, he cites it for the general proposition that there is precedent for the Court protecting unenumerated rights; the second time (citing *Pierce* and *Prince* as well) it is for the more directly applicable proposition that this tradition of unenumerated rights includes "the marital relation and the marital home."[47]

Justice Douglas's re-packaging of *Meyer* and *Pierce* as First Amendment cases has not stood the test of time, any more than has his rhetoric of "penumbras, formed by emanations."[48] Justice Goldberg's use of *Meyer* and *Pierce* is more faithful to their original meaning, while at the same time illustrating the paradoxes that beset the *Meyer-Pierce* doctrine as it encountered the cultural turmoil of the 1960s. Undoubtedly a family that resists the policeman who seeks to arrest them for failing to send their children to public school is asserting a value similar to the value being asserted by the couple that resists the policeman who

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42 Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

43 *Id.* at 482.

44 *Id.* at 483.

45 *Id.* The Court's willingness to overlook the fact the both *Meyer* and *Pierce* are devoid of any allusion to the First Amendment or to any of its constituent clauses may be explained by the need to avoid the appearance of reviving substantive due process. Given the majority's inclination as to the outcome of the case, Justice Douglas had the unenviable task of explaining a decision striking down a state statute on the basis of constitutional rights that were implied rather than textual, while maintaining plausible deniability when accused (*e.g.*, by Justice Black's dissent) of reviving the *Lochner* approach to judging.

46 *Id.* at 488, 495 (Goldberg, J., concurring) (citing *Meyer*, 262 U.S. at 399) (ellipses in original).

47 *Id.* at 495.

48 *Id.* at 484.

proposes to search their bedroom for contraceptives. Revulsion at either procedure is what has enabled the holding of *Griswold* to find wide acceptance even among those who do not accept its jurisprudential progeny.

But this similarity in the asserted immunity and the values underlying it (whether one calls these values "privacy," "family autonomy," or anything else) should not lead us to overlook the difference in the nature of the right beneath the rhetoric. From the point of view of respectable America at the time of *Meyer* and *Pierce*, sending one's children to a private school and using contraceptives were not fungible things. The former was an alternative mode (alongside using the public schools) of fulfilling a civic obligation to raise one's children to be responsible and socially contributing adults; the latter, had the Court of the 1920s had occasion to take notice of it, would most likely have been seen as a feckless evasion of social responsibility.[49]

The other case on which the Court later relied for a constitutional right to marry was *Loving v. Virginia*.[50] The anti-"miscegenation" statute at issue in *Loving* was a blatant leftover from the Jim Crow era, and the Court had no trouble striking it down as a racial classification unjustified by any compelling state interest. While some commentators who advocate the self-expressivist view of marriage dismiss impatiently the notion that *Loving* is "merely" an opinion about racial discrimination,[51] that is nonetheless what it looks like to anyone who is not actively trying to recruit it for the self-expressivist project.

The opinion by Chief Justice Warren tells us little about what the Court now considers the *Meyer-Pierce* doctrine to mean. *Pierce* goes unmentioned; *Meyer* makes a brief appearance, when the Court underscores Virginia's implicit concession that a state's power to regulate the

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[49] Some guesswork is involved, obviously, in speculating on how the Court in the era of *Meyer* and *Pierce* "would have" viewed contraception. But my guess here is buttressed by the revolutionary consciousness displayed by the activists who orchestrated the *Griswold* litigation. *See generally* DAVID I. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE (1994). Furthermore, moral opposition to contraception was a position held in common by most Protestant churches, as well as by the Catholic Church, well into the 1930s, when views started to shift, in part as a result of the change in the Anglican view announced at the Lambeth Conference of 1933. *See* JANET E. SMITH, *HUMANAE VITAE:* A GENERATION LATER (1992). Interestingly, Tocqueville, comparing the individualist tendencies of democracy with the communitarian tendencies of aristocracy, notes: "Thus not only does democracy make every man forget his ancestors, but it *hides his descendants* and separates his contemporaries from him . . . ." TOCQUEVILLE, DEMOCRACY IN AMERICA 106 (Henry Reeve & Francis Bowen trans., A.A. Knopf 1945) (1837) (emphasis added).

[50] 388 U.S. 1 (1967).

[51] *See, e.g.*, Karst, *supra* note 2, at 667.

marital relation is not unlimited.[52] At the end of the opinion, after the equal protection analysis is finished, the Court adds a brief peroration on marriage: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[53] This formulation touches base on both sides of the republican/individualist dichotomy: the term "personal rights" sounds in individualism; "orderly" strikes a republican note. Either way, *Loving* does not significantly develop the *Meyer-Pierce* doctrine in either an individualist or a republican direction.

The view of *Loving* as announcing a general right to marriage rests on the due-process flourish that the Court adds to its equal protection holding: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law."[54] This analysis is consistent with *Meyer* and *Pierce*: a statute that trenches on a protected freedom must pass what we would today call a "rational basis with teeth" test. The equal protection analysis in *Loving*—sufficient by itself to resolve the case—rests on the presumptive impermissibility of racial classifications, and the consequent need for the "most rigid scrutiny"[55] of such statutes. The due process codicil to the opinion simply affirms that the substantive due process analysis used in *Meyer* and *Pierce* could, were it necessary, supply an alternative ground for striking down Virginia's laws against interracial marriage. The right "to marry" was already an element of the Court's rights-list in *Meyer*; the due process codicil in *Loving* affirms that inclusion, but does not add to it.

III. THE HIGH TIDE OF THE INDIVIDUALIST RIGHT TO MARRY

The doctrinal environment in which laws aiming at supporting marriage might have been suspected of unconstitutionality crested in 1972. That year, in *Eisenstadt v. Baird*,[56] seven years after *Griswold*, the Court contradicted its *Griswold* oratory on marriage and held that the married/unmarried distinction violates the Equal Protection Clause when the right at issue is—not privacy, but contraception. Moreover, Justice Brennan, writing for the Court, declined to hold that contraception is a fundamental right, violation of which triggers strict scrutiny; rather, he applied the rational basis test (said to be flunked here because there is no "rational basis" in discriminating on the basis of an irrational distinc-

52 *See Loving*, 388 U.S. at 7 (citing Skinner v. Oklahoma, 316 U.S. 535 (1942)).

53 *Id.* at 12.

54 *Id.*

55 *Id.* at 11 (citing Korematsu v. United States, 323 U.S. 214, 216 (1944)).

56 405 U.S. 438 (1972).

tion); he thereby implied that the view that marriage is significantly different from other relationships—a view that was supposedly outcome-determinative in *Griswold*—is in fact not even rational. Marriage is not "an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up."[57] Under this view, it is hard to see how marriage is different from a prize fight, an act of prostitution, or any of the space flights in the Gemini program. It was not *Loving*, nor *Griswold* as written, but *Eisenstadt*, and *Griswold* as refracted through *Eisenstadt*, that placed the Court (temporarily, I will argue) behind the view that marriage serves only the private interests of the individuals within it, and does not serve—or, at any rate, does not derive its constitutional status from serving—any social or communitarian ends.

Nonetheless, if the early 1970s marked the high tide of individualism in the Court's approach to marriage, it must be remarked that the tide was not very high. The Court's political choice in favor of individual autonomy in sexual matters was to have, of course, far-reaching consequences in the area of abortion; but in the area of marriage, its impact was limited, as we will see next.

With regard specifically to the legal right to marry, the high tide was marked by *Boddie v. Connecticut*,[58] a decision that struck down, as applied to indigent women, a mandatory filing fee for divorce. This is the closest the Court ever came to holding that divorce is a constitutional right.

Such a holding would not have been implausible, given the reconfiguration of the marriage right that we have so far traced through *Eisenstadt*. If marriage derives its constitutional status from its social functions, as the Court appears to have assumed in *Meyer* and *Pierce*, then deriving a right to divorce from a right to marry would be a risible proposition; in fact, to the extent that divorce harms the very social interests that marriage protects, a judicial activist of the *Meyer-Pierce* era might even have argued that a regime of easy divorce is constitutionally suspect. On the contrary, if marriage serves only the individual ends of the individuals who participate in it, and if individuals change over time, as we see in everyday life that they do, then the right to marry must be indefeasible, easily surviving its own exercise. If unmarried individuals have a right to marry, how can we deny the same right to the married, especially after we have learned from *Eisenstadt* that the distinction between the married and the unmarried fails to pass rational basis review? The logical consequence must be either rights to polygamy and polyan-

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[57] *Id.* at 453.

[58] 401 U.S. 371 (1971).

dry, or, in the alternative (or perhaps as a supplement), a right to divorce.[59]

The significant fact is that the Court did *not* take this step, even in the very case, and at the very moment in constitutional history, when it would have been most plausible to do so. Justice Harlan's opinion for the Court in *Boddie* managed to resolve the case on the basis of procedural due process, focussing on access to the courts and the monopoly of the courts on the legal recognition of marriage and divorce. It makes a passing reference to the fact that "marriage involves interests of basic importance in our society,"[60] with cites to *Loving*, *Skinner*, and *Meyer*, but in the end it holds "only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so."[61] Unlike the *Griswold/Eisenstadt* duo, where announcement of a general right (privacy) actually constitutionalized a more specific right (contraception), *Boddie* really was a decision confined to a general right (access to courts), and was not subsequently held to have constitutionalized a more specific right (divorce).

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[59] This linkage between divorce and a "right to marry" was no doubt best expressed by the following exchange from the original version of Leonard Bernstein's Broadway musical *Candide*, between the innocent hero and his teacher, Dr. Pangloss, philosopher of optimism:

> Candide: Since marriage is divine, of course,
> We cannot understand, sir,
> Why there should be so much divorce –
> Do let us know the answer!
>
> Chorus: Do let us know the answer!
>
> Pangloss: Why marriage, boy,
> Is such a joy,
> So lovely a condition,
> That many ask no better than
> To wed as often as they can,
> In happy repetition!
>
> Chorus: A brilliant exposition!

LEONARD BERNSTEIN & RICHARD WILBUR, CANDIDE (1956).

[60] *Boddie*, 401 U.S. at 376.

[61] *Id.* at 383. Justice Douglas concurred in the result, arguing for an equal protection theory, with poverty as a suspect classification. Douglas's argument against using a due process theory is that due process "has proven very elastic in the hands of judges," citing substantive due process cases from the pre-1937 era. *Id.* at 384. This argument against doctrinal elasticity is a bit of a jaw-dropper in view of the potential breadth of Douglas's own equal protection theory. This concurrence illustrates, if nothing else, the depth of Douglas's commitment to continue fighting the constitutional battles of the 1930s simultaneously with those of the 1970s.

One other case illustrates the individualistic right-to-marry theory at work, or rather, would have done so had the facts been slightly different. In *Zablocki v. Redhail*,[62] the Court considered a Wisconsin statute that barred persons from obtaining marriage licenses if they had financial obligations to other children and could not show that they could continue to meet those obligations after marriage.

Had Roger Redhail been married to the mother of his earlier children, his case would have more sharply highlighted the probable purpose of the Wisconsin statute—protection of the "first family," that is, the family that gets abandoned when one spouse leaves to form a second family.

Much has been written about the economic and psychological wounds that divorce tends to inflict, especially on abandoned wives and children.[63] Many of the academically recommended remedies involved more state involvement in cushioning these effects.[64] Indeed, getting tough on "deadbeat dads" has been a reliable feel-good political issue for several years. The statute at issue in *Zablocki* was simply another approach to the same problem: prevent potential deadbeat dads (or, theoretically, deadbeat moms) from acquiring new "mouths to feed" unless and until he can show that he is adequately feeding the old ones.

A worthy goal, one would think. But the statute had vulnerabilities, and the Court went for them. After all, if protecting a spouse's first family is the goal, would not stepped-up enforcement of payment obligations be better than a conditional prohibition on re-marriage, given that the latter arguably burdens a constitutional right, and furthermore, may not even achieve the state's purpose, since it leaves the spouse free to refrain from a second marriage and *still* refuse to make support payment?

On the other hand, the civics lesson of *Zablocki* was more extensive than its holding. Justice Marshall's opinion quotes from nearly every case in the right-to-marry pantheon, including *Meyer*, which is cited for "the right 'to marry, establish a home and bring up children.'"[65] Yet all this is for the purpose of announcing that the constitutional right to marry stands unimpaired even when the would-be spouse has a precedent legal duty to provide for a given child or set of children. That is to

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[62] 434 U.S. 374 (1978). This case is something of an out-lier, historically speaking, because it came down after the retreat from the "right to divorce" had already begun with *Sosna v. Iowa*, 419 U.S. 393 (1975), in 1975. *See infra* note 72 and accompanying text. The advance and retreat of the "right to divorce" were not perfectly linear.

[63] *See generally* MAGGIE GALLAGHER, THE ABOLITION OF MARRIAGE (1996); DIVORCE REFORM AT THE CROSSROADS (Stephen D. Sugarman et al. eds., 1990); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989).

[64] *See* WALLERSTEIN, *supra* note 63.

[65] *Zablocki*, 434 U.S. at 384 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

say, the right to marry stands unimpaired even when the would-be spouse is already legally obliged to provide certain of the key social goods that society seeks to obtain by protecting marriage as a legal institution.

In the world of *Meyer* and *Pierce*, where providing for the sustenance of children was one of the key civic purposes that marriage served, Mr. Redhail would have no *societal* reason to get married to anyone other than the mother of his children. He might, of course, have strong *personal* reasons for wanting to marry someone else, but the authentic *Meyer-Pierce* doctrine would not require (though it would permit) the state to grant him a marriage license based on personal reasons standing alone—or, rather, standing in tension with the social reasons for marriage (since Redhail's marriage would, more likely than not, detract from his ability to meet his support obligations to his children).[66] The *Meyer-Pierce* project was about bringing personal and social goals into alignment, or at any rate, about providing heightened constitutional protections to personal goals that coincide with social goals. The *Eisenstadt-Boddie-Zablocki* project was about exalting the personal at the expense of the social.[67]

IV. THE FALL OF THE SELF-EXPRESSIVIST RIGHT TO MARRY

Beginning in 1975, the Court's jurisprudence on fundamental rights and personal autonomy became bifurcated: in its abortion jurisprudence, it has adhered to the autonomist line that developed out of *Eisenstadt* and *Roe v. Wade*,[68] culminating in the famous "mystery passage" in *Planned Parenthood v. Casey*;[69] but with regard to all other rights-claims sounding in personal autonomy, it has restored to its jurisprudence a concern for the other-regarding aspects of personal conduct, and a respect for legal tradition as a guide for otherwise-unfettered judicial discretion. In so doing, it has also shown a renewed concern for staying within the limits of its own institutional competence and constitutional

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[66] It is, of course, possible that Redhail's marriage could actually *increase* his ability to meet the support obligations, on the theory that married men on average work harder and earn more than unmarried men. *See generally* GEORGE F. GILDER, MEN AND MARRIAGE (1987).

[67] Justice Scalia isolated this aspect of modern substantive due process in his opinion in *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (criticizing Justice Brennan's dissent for preferring the rights-claim of an adulterous natural father over the conflicting rights-claim of a legal marital unit "on no apparent basis except that the unconventional is to be preferred.").

[68] 410 U.S. 113 (1973).

[69] 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

role—a concern that some critics have seen as missing from *Meyer* and *Pierce*.[70]

For example, in *Sosna v. Iowa*,[71] the Court considered the claim of a former New Yorker who moved to Iowa, sought a divorce from her husband (still in New York) in an Iowa court, and was blocked by Iowa's rule requiring a year of residence in the state before an Iowa court may grant a divorce. Mrs. Sosna led with an argument based on the right to travel, hoping to build on *Shapiro v. Thompson*,[72] which struck down a durational residency requirement for welfare eligibility. Justice Rehnquist's opinion for the Court in *Sosna* put an end to further expansion of the right-to-travel line of cases,[73] but more importantly, it spoke about divorce in a manner that differed notably from *Boddie* and *Zablocki*.

Distinguishing the right-to-travel cases, where the states had invoked "budgetary or recordkeeping considerations"[74] as rationales for their regulations, the Court in *Sosna* noted that more than that is at stake here:

> A decree of divorce is not a matter in which the only interested parties are the State as a sort of "grantor," and a divorce petitioner such as appellant in the role of "grantee." Both spouses are obviously interested in the proceedings, since it will affect their marital status and very likely their property rights. Where [as here] a married couple has minor children, a decree of divorce would usually include provisions for their custody and support. . . . A State such as Iowa may quite reasonably decide that it does not want to become a divorce mill . . . .[75]

Justice Marshall, dissenting on the divorce issue, insisted there is a constitutional "right to obtain a divorce," based on the "right of marital association" recognized in *Loving* and *Boddie*.[76] His reading of *Boddie* is

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[70] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 48-49 (1990).

[71] 419 U.S. 393 (1975).

[72] 394 U.S. 618 (1969).

[73] *See also* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (striking down, on right-to-travel grounds, a durational residency requirement for free treatment of indigents at county hospitals). In *Saenz v. Roe*, 526 U.S. 489 (1999), the Court gave the right to travel a firm constitutional home in the Privileges or Immunities Clause of the Fourteenth Amendment, but did not expand its content.

[74] *Sosna*, 419 U.S. at 406.

[75] *Id.* at 406-07.

[76] *Id.* at 419-20 (Marshall, J., dissenting). Justice White dissented on the issue of Mrs. Sosna's standing. She had gotten a divorce in New York since the filing of this litigation, but in the meantime her case had been certified as a class action. The Court held that the continuing desire of other class members for divorces in Iowa allowed Mrs. Sosna, as their representative, to retain standing. Justice White, for his part, sniffed the presence of an activist lawyer: "The only specific, identifiable individual with an evident continuing interest in presenting the attack upon the residency requirement is appellant's counsel." *Id.* at 412-13. (White, J., dissenting).

that in that case "we recognized that the right to seek dissolution of the marital relationship was closely related to the right to marry, as both involve the voluntary adjustment of the same fundamental human relationship."[77] But the constitutional right to marry, viewed in light of its origins, did not protect the right to adjust fundamental human relationships: it protected the right to enter into, and to carry out the duties of, a relationship defined by social practice as mediated through law—a relationship, moreover, that had a binding promise as one of its elements.

After *Sosna*, cases raising substantive due process claims sounding in personal autonomy—and a right-to-divorce claim would be of this nature—have met with a renewed awareness by the Court of the limits of the legitimacy of substantive due process, and a corresponding willingness to turn to history and tradition as "guideposts for responsible decisionmaking."[78] For instance, in *Moore v. City of East Cleveland*,[79] the rights-claimant prevailed, but only by a plurality, and then only because she convinced the Court that the family relationship at issue (a zoning ordinance that banned anyone other than members of a "family" from occupying a single dwelling, with "family" defined so narrowly as to exclude Mrs. Moore and her grandsons, who were first cousins to each other, not brothers) was sufficiently well-rooted in our nation's history and traditions as to fall within the rule of *Meyer* and *Pierce*.[80]

The next major entry in this scatter-diagram is *Michael H. v. Gerald D.*,[81] a case in which the definition of the rights-claim—or, more precisely, the level of generality at which the rights-claim is defined—determines the outcome. To the dissenters, siding with the rights-claimant, the claim was that of a biological father to paternal rights over his child. What could be more central to the *Meyer-Pierce* tradition than that? Quite a bit, actually, once you consider certain other facts in the case, such as: that the biological father was a former lover of the mother; that the mother desired to be rid of him and to repair her marriage; and that the husband (who was also the named defendant), being fully aware of the foregoing facts, wished both to support his wife in her efforts to repair the marriage, and to claim the child as his own.[82]

For Justice Scalia and those who joined his plurality opinion, the key question was not, do our history and traditions protect fatherhood, but rather, do they protect an adulterous lover who seeks to interfere with a legally intact family? Because legal history and legal tradition

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77 *Id* at 420 (Marshall, J., dissenting).

78 Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

79 431 U.S. 494 (1977).

80 *Id.* at 504-05.

81 491 U.S. 110 (1989).

82 *See id.* at 113-17.

supply an answer to the question at *that* level of specificity (a negative one, obviously), the only reason to choose a more generalized articulation of Michael's claim would be to achieve a different outcome.[83]

The Scalia opinion makes a point of not siding with tradition over novel rights-claims per se, leaving that choice instead to the voters of the state through their elected representatives.[84] For Justice Scalia, the due process clause permits, though it does not require, the state to prefer Gerald's interests over Michael's.

It is left to Justice Brennan, as author of the dissent, to argue that the Constitution takes this choice away from the democratic process and commands an outcome in favor of the novel rights-claim. This is required, he believes, because "We are not an assimilative, homogeneous society, but a facilitative, pluralistic one," in which "liberty must include the freedom not to conform."[85]

Michael H. is significant for the issue of a right to divorce because it shows the Court beginning to look more benignly than it had in the 1970s on the efforts of states to protect the traditional familial institutions of American society. This trend, of course, has not been unbroken. As already noted, the abortion cases remain a collective exception. But the first case after *Planned Parenthood v. Casey* that gave the Court a chance to apply that decision's "mystery passage" to a subject *other than* abortion suggests that the era of continuing expansion of substantive due process rights is at an end.

The case was *Washington v. Glucksberg*,[86] and the right claimed was assisted suicide. Though in *Michael H.*, only Chief Justice Rehnquist was willing to join Justice Scalia in holding that history and tradition are the test of substantive due process claims.[87] In *Glucksberg* an outright ma-

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[83] *See id.* at 127 n.6. Justices O'Connor and Kennedy declined to join this footnote because they believed it "may be somewhat inconsistent" with certain of the Court's broader holdings in the era of modern substantive due process, specifically mentioning *Griswold* and *Eisenstadt*. *Id.* at 132 (O'Connor, J., concurring).

[84] *See id.* at 130.

[85] *Id.* at 141 (Brennan, J., dissenting). Justice Brennan also relied on procedural due process—Michael was denied a hearing at which he might have proved he was Victoria's biological father—but a procedural right to such a hearing is only intelligible if the law of the jurisdiction *cares* who the biological father is. Under the facts of this case, it does not: it cares only that Victoria is *Carole's* biological child, that Gerald and Carole were married at the time Victoria was conceived, that Gerald was neither impotent nor out of the country at that time, and that Carole and Gerald wish to be considered the parents of Victoria. Those four elements concurring, all other facts are irrelevant to the issue of who is Victoria's legal father. This conclusive presumption in favor of the marital unit is subject only to rational basis review unless it can be shown to violate a fundamental right—and the existence *vel non* of such a right is a matter of *substantive* due process.

[86] 521 U.S. 702 (1997).

[87] *See Michael H.*, 491 U.S. at 122-23.

jority signed an opinion that uses basically this methodology. The overwhelming weight of legal authority condemns both suicide and those who assist or promote it; therefore, assisted suicide cannot be a right protected by the Due Process Clause of the Fourteenth Amendment.

Asked by the rights-claimants to hold that the "mystery passage" of *Casey*[88] in effect re-opened the trading floor on new substantive due process rights, the Court replied that this language merely "described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of ordered liberty, that they are protected by the Fourteenth Amendment."[89] That is, the "mystery passage" is authoritatively interpreted as nothing more than a restatement of the Court's substantive due process precedents in the field of personal (rather than economic) rights. The Court's accompanying footnote reaches back from *Moore*, through *Griswold*, all the way to *Meyer* and *Pierce*.[90]

Whether or not this is a convincing explanation of what the "mystery passage" really meant in context, it is a strong signal that claims of personal rights, sounding in substantive due process, but not heretofore accepted by the Court, are unlikely to be recognized in the future. The personal-autonomy-rights factory is closed. There is, therefore, no constitutional right to divorce. Covenant marriage laws are, therefore, not unconstitutional.

V. CONCLUSION

A constitutional right to divorce, should it exist, would be a personal autonomy right, cognizable through the Due Process Clause of the Fourteenth Amendment under principles of substantive due process. For the reasons of doctrinal history that I have shown, we may safely conclude that this right does not exist, and will not in the foreseeable future be found by the Supreme Court to exist.

I have attempted to show that the Supreme Court's jurisprudence of personal rights based on substantive due process originated in notions of family life that Justice Brennan would dismiss as "cramped,"[91] "stagnant, archaic, hidebound,"[92] and "steeped in the prejudices and superstri-

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88 *See supra* note 69.

89 *Glucksberg*, 521 U.S. at 727.

90 *See id.* at 728 n.19. *Eisenstadt* is missing from the string-cite, but this omission is explicable on the ground *Eisenstadt* was framed, at least nominally, in terms of equal protection, though it is rich in indications of how the Court of that era thought about issues that usually sound in substantive due process.

91 *Michael H.*, 491 U.S. at 157 (Brennan, J., dissenting).

92 *Id.* at 141.

tions of a time long past,"[93] and which—he might well have added—were rooted not only in the popular practices and legal institutions of our people, but also in the economic substantive due process that prevailed in the era of *Meyer* and *Pierce*.

When economic substantive due process was rejected, *Meyer* and *Pierce* were salvaged, but were gradually reinterpreted into something very different. Because of that transformation, a right to divorce might have been inferable, and in fact came very close to being declared. The Court, however, drew back from that precipice. There is no solid constitutional obstacle to latter-day attempts by states to prevent more of the agonies of the divorce culture by enacting marriage-protective statutes such as Louisiana's covenant marriage law.

[93] *Id.*