



## Children Come First

*Divorce law protects parental choice but rarely asks what process is due to the children whose families it restructures.*

By C.D. Cunningham

### FAMILY MATTERS

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Everyone says children come first.

Courts say it. Legislatures say it. Divorce lawyers say it. Parents say it. Spend any time in or around family law or family courts, and you cannot avoid hearing people talk about “the best interests of the child.”

But in practice, children only matter after the adults have already made all the decisions that matter most.

I thought this reality was aptly summed up in a statement by a local candidate for a family court judgeship. The candidate wrote that she would support the rights of mothers and fathers, and parenthetically added, "of course, children come first."

We say children come first, but as in this candidate's statement, the phrase is used like an incantation: If we say it enough, it will absolve us of the fact that we don't truly believe or practice it.

In the current no-fault divorce legal regime, a court can dissolve a child's intact legal family even if there is no damage being done to anyone. The child does not need to be found unsafe. No parent needs to be found unfit. There doesn't need to be abuse, abandonment, adultery, cruelty, addiction, or family dysfunction. A child's family, on which the child depends, can be taken from the child merely because a parent feels like it. And no one else in that child's life can protect the child from the consequences of that choice: not the other parent, nor the current legal system.

That legal structure makes sense when the only interest at stake is adult autonomy. But when minor children are involved, the legal act is not merely an adult exiting a private romantic relationship; it is a state decree that restructures the child's family, home, time, finances, identity, and access to the child's parents.

How can the state strip so much from a citizen, without that citizen having any legal pathway to help fight for him or herself? Doesn't a child have any rights?

## **The Fourteenth Amendment and Family-Integrity Doctrine**

The Due Process Clause of the Fourteenth Amendment is the constitutional principle that a state cannot take something from you (whether that's freedom or a fine) unless there is a process in place for you to try to defend yourself.

But while it's usually thought of in terms of protecting property or courtroom procedure, due process has long been read to protect the substance of fundamental liberty interests, including family relationships.

The Supreme Court of the United States has repeatedly found that parents have a fundamental interest in the care, custody, and control of their children. The state can't

take your children without due process.

But family integrity is not only a parental right. The child is also a person who has the right to family integrity as protected by the Fourteenth Amendment.

In my opinion, that is a constitutional error.

Perhaps the clearest description of this principle appears in a 1982 case. The State of New York had terminated a parent's parental rights to a child. The Supreme Court found that New York acted improperly because it did not recognize "the [child and his parents](#) shared a vital interest" in preventing the destruction of their family.

The American Bar Association recently described the child's constitutional [right to family integrity](#) as a fundamental right rooted primarily in the Fourteenth Amendment, though some courts locate it in the First Amendment's freedom of association.

## Divorce Is State Action

If a child has a constitutional interest in preserving family relationships when the state acts through child welfare law, why should that interest disappear when the state acts through divorce law?

The bottom line is that there is no good reason.

No-fault divorce is not a private act. It is the state intervening in a private relationship to allow one spouse's preferences to affect the entire family unit.

A marriage is not dissolved by private act, but by court order. The state changes the legal status, divides marital property, and allocates how children will be shuttled back and forth between homes.

When a court uses public authority to dismantle the legal structure of a child's intact family, the Fourteenth Amendment should have something to say about the process and the justification required.

This does not mean that the Constitution must forbid divorce in families with children, nor that an individual should be required to stay in a marriage he or she wishes to leave. It does mean that when states choose how they will dissolve marriages where minor children are involved, they should not be able to treat that dissolution as purely an adult entitlement.

## Custody as a Secondary Determination

Modern divorce law claims to protect children through custody and “best interest” determinations. But that application of children’s rights arrives too late.

The child’s family has already been dissolved. The legal system first accepts the adult’s claim that the marriage is over, then it asks how to allocate the child between the separated households. The child’s interest in preserving the intact family is not treated as a constitutional interest at the threshold stage.

At this stage, the courts do not consider what happens when the child no longer has a primary residence, nor do they consider the negative academic or behavioral outcomes.

The child’s interests are considered, but only after the decisive constitutional injury has been allowed.

In my opinion, that is a constitutional error.

Custody law asks: After divorce, where should the children go?

A Fourteenth Amendment family-integrity analysis would ask a prior question: What must the state prove before it allows the dissolution of the child’s intact legal family in the first place?

The child’s interests are considered, but only after the decisive constitutional injury has been allowed.

## Parental Autonomy and Children’s Rights

Children should not get to decide whether their parents stay married. That is obviously true. They do not get to command their parents' emotions. They do not get to force marital affection or fidelity.

Children should not be able to imprison their parents in miserable or dangerous relationships.

That is not what this argument claims or attempts to implement.

Recognizing a child's right to family integrity does not give any control over the parent at all, only the state. It means the state must justify its legal act before dissolving something the child depends on. Constitutional rights often limit what the government may do without giving the rights-holder total control. A criminal defendant's due process rights do not mean he controls the prosecutor.

A child's right to family integrity would not mean the child controls the marriage. Just that when we say children come first, we actually consider them first, not last.

There is an irony in the "children should not decide" objection. In no-fault divorce, the child is also not deciding. But no-fault divorce allows it without requiring both parents to agree. In some cases, one parent is deciding singlehandedly, while the children and the other parent are left helpless.

The parent who wishes to preserve the best arrangement for the child is left with no additional rights or resources to provide the child with ongoing stability. That parent is instead treated as no different from the parent who chose to dissolve the child's family.

## **The Effect of Miserable Marriages on Children**

Another important objection is that children are not helped by forcing parents who hate each other to remain married. Again, recognizing a child's Fourteenth Amendment rights does not require this.

If the family environment is indeed harmful, the law can say so. If the children are being hurt by their current family system, then let that be proven, not assumed.

Not every intact family needs to be preserved. But the state should distinguish between a family that should be dissolved and one in which only one adult wishes to dissolve it based on new preferences. But “no-fault” divorce collapses that distinction at the expense of children.

A child's right to family integrity would not mean the child controls the marriage.

And again, recognizing children's rights does not prevent a parent from exercising a new preference; it only determines how the law treats the parent who does.

No-fault divorce treats grave harm, ordinary unhappiness, boredom, domestic violence, personal reinvention, and adultery the same. That is administratively efficient. But constitutional rights are often inconvenient. The Due Process Clause exists precisely to prevent efficiency from overcoming important individual rights.

The law already knows how to make these kinds of distinctions.

## Why Has Divorce Law Not Integrated This Right?

There are several reasons why this constitutional principle has, to date, not been integrated into divorce law.

First, divorce has historically been framed as a dispute between adults. The only listed parties are the spouses. The pleadings are filed by adults; the adults have the lawyers. Children only enter the case as subjects for custodial findings, not as independent constitutional persons.

Second, the family-integrity doctrine has been developed within the context of child welfare cases, not divorce cases. Courts use the Fourteenth Amendment when the state removes a child from one parent or terminates parental rights. While divorce does functionally remove a child from at least one parent at least some of the time, no-fault divorces have never been held to the same standard.

Third, courts can mistake the “best interests of the child” analysis for the application of the child's constitutional rights. But the “best interests” standard is usually a statutory

standard. It gives judges discretion, but only after the family is already divided.

Fourth, the law treats parental autonomy as asymmetrical. In non-divorce contexts, the state presumes that fit parents will act in their children's best interests. But in no-fault divorce, the state effectively allows one parent to singlehandedly override the family-integrity interests of the child, while the parent acting in the child's interests is effectively sidelined.

Fifth, legislatures and judges fear the alternative. They worry, reasonably, that requiring a higher standard for divorce will revive ugly fault litigation, trap abused spouses, or invite children to be weaponized. Those are real concerns, and they should be addressed. But they are reasons to design better procedures, not reasons to pretend the child has no constitutional interests.

## What the Law Could Require

An approach to divorce law that recognizes children's Fourteenth Amendment rights would not abolish divorce. It would create a separate track for divorces involving minor children.

The law could still permit immediate separation, protective orders, emergency custody orders, and expedited divorce where abuse, violence, abandonment, or serious danger is shown. And it should.

But there are many ways that states could reorganize their divorce laws to structurally protect children's families and encourage parents to choose to stay within their marriage.

I've outlined one option I describe as "[abandonment divorce](#)." In this structure, a parent could always choose to abandon the marriage, respecting that parent's autonomy, if there is no other cause for the divorce, but that choice would be determinative in distributing marital assets and determining child custody, providing the children with the support and stability that they currently lack in the wake of this decision. It would also include a channel for filing for a divorce when it is in fact in the children's best interests.

At a minimum, any solution should require a restructuring of incentives so that parents are legally incentivized to try to preserve a happy marriage. And it should recognize the child's rights before a divorce is granted, not merely after.

## The Core Constitutional Error

The mistake in no-fault divorce is not that it lets people leave marriages they are unhappy in. It's that it provides no legal incentive not to.

It treats a child's family as something that the child has no constitutional interest in preserving.

But whatever divorce laws states create, they should require courts to see the child before they act.

If family integrity is a constitutional right, then divorce law cannot treat children as merely a downstream custody problem. They are more than passengers in their parents' litigation. They are whole persons with distinct rights, whose lives are being reordered by a state power that didn't even think about them first.

Everyone says children come first. Let's create a divorce regime that actually believes it.

About the author



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