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**REGULATING THE FAMILY: THE IMPACT OF PRO-FAMILY POLICYMAKING
ASSESSMENTS ON WOMEN AND NONTRADITIONAL FAMILIES**

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INTRODUCTION

On September 25, 1973, Dr. Margaret Mead testified before a Senate hearing on *American Families: Trends and Pressures*.¹ Along with other prominent witnesses, she urged Congress to support policies that prioritize the well being of *all* families because “as the family goes, so goes the nation.”² Senator Walter Mondale (D-MN) voiced the sentiment of many of the witnesses when he warned that “[t]o envision a single model family or a single way to raise

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¹ Statement of Margaret Mead, *American Families: Trends and Pressures*: Hearing Before Subcomm on Children and Youth of the S. Com. on Labor and Public Welfare, 93d Cong. 133 (1973). The Hearing was before the Senate Subcommittee on Children and Youth chaired by Senator Walter Mondale (D-MN). *See also* Theodora Ooms, *Taking Families Seriously: Family Impact Analysis as an Essential Policy Tool* (1995) available at http://www.familyimpactseminars.org/pf_fis02suppreport.pdf (lasted visited Feb. 9, 2013) (describing the hearing).

² Mead, *supra* note 1, at 133. Dr. Mead clarified that “If you make the family the focus, you think about everybody including the unmarried.” *Id.* at 125.

children would do great damage to the pluralism and diversity that makes our country strong.”³

One of the most forward-looking recommendations to come out of the hearing was the development of a family impact statement that would analyze the impact of federal policies on American families in order to maximize the “options and choices that families need to do their best job.”⁴

Despite the initial enthusiasm, it would be fourteen years before this recommendation was implemented by President Reagan with Executive Order 12,606.⁵ By that time, much had changed in the national political landscape. The original proposal had been aimed at supporting the pluralism and diversity of American families, including dual-wage, single parent, and multigenerational families. According to Executive Order 12,606, however, these labels applied to problems – not families. The Executive Order adopted a “pro-family” perspective that, contrary to Senator Mondale’s warning, envisioned a single model family and a single way to raise children.⁶ It advocated a normative view of the “traditional” family and sought to strengthen “the stability of the family,” “marital commitment,” and “personal responsibility.”⁷ President Clinton rescinded the Executive Order in 1997,⁸ but Congress enacted legislation

³ *American Families: Trends and Pressures: Hearing Before Subcomm. on Children and Youth of the S. Com. on Labor and Public Welfare*, 93d Cong. 4 (1973) (introductory statement of Senator Walter F. Mondale).

⁴ *Id.* Senator Mondale stated that the goal of the hearing was “to identify and seek changes in arbitrary policies that place hardship on families. *Id.*

⁵ Exec. Order No. 12,606, 52 Fed. Reg. 34,188 (Sept. 9, 1987), 3 C.F.R. 1987 Comp., at 241 (1987).

⁶ *Id.* The Executive Order was based on a report written by an inter-agency White House working group led by Gary Bauer. *The Family, Preserving America’s Future: A Report to the President from the White House Working Group on the Family* (Dec. 2, 1986) available at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015028455072;seq=5;view=1up> (last visited Feb. 16, 2013). The Report maps out what it characterizes as a “pro-family policy” that asserts certain “home truths” regarding which types of families are desirable. *Id.* at 3.

⁷ Exec. Order No. 12,606, 52 Fed. Reg. 34,188 (Sept. 9, 1987), 3 C.F.R. 1987 Comp., at 241 (1987).

⁸ Exec. Order No. 13,045, 62 Fed. Reg. 36,965 (Apr. 27, 1997), 3 C.F.R. 1997 Comp. sec. 7-702 (1997). President’s Clinton’s Executive Order was titled: *Protection of Children From Environmental Health Risks and Safety Risks*. *Id.* It made no mention of the prior Executive Order, except to say that it was revoked. *Id.*

requiring “pro-family” impact assessments for all rulemaking in 1998.⁹ The “Family Policy Making Assessment” remains in effect today, mandating a “pro-family” lens for all federal rulemaking.¹⁰

This Article examines the evolution of the family impact statement from a progressive template for inclusive policymaking to a “pro-family” values check designed to promote and protect the “traditional” American family.¹¹ The normative switch that occurred corresponds with the larger cultural shifts of the period that saw the rise of the New Right and the Reagan Revolution.¹² Originally proposed as a way to improve family well-being through better and more targeted federal policy, the family impact statement was recast as a necessary bulwark to protect families from federal regulation.¹³ Although rarely mentioned in the legal literature, the story of the family impact statement illustrates a number of significant changes that occurred in the 1980s with respect to rulemaking, family policy, and general views on the desirability of federal regulation.¹⁴ It illustrates the potential power of the administrative state to impose an

⁹ The requirement was passed as an amendment to the Treasury and General Appropriations Act of 1999. S. Amend. 3362, *Assessments of Federal Regulations and Policies on Families*, 105th Cong. (1998).

¹⁰ Unlike Executive Order 12,606, the statutory imposition of a “family assessment” includes a definition of “family” as “a group of individuals related by blood, marriage, or adoption who live together as a single household.” *Id.* There is a special exception for an individual who is related by blood, marriage, and adoption and lives outside of the household, provided the individual receives over half of his support from the group. *Id.*

¹¹ For a discussion of the myth of a “traditional” American family see STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (2000) (describing the “elusive traditional family”).

¹² See generally, ROLAND EVANS AND RONALD NOVAK, *THE REAGAN REVOLUTION: AN INSIDE LOOK AT THE TRANSFORMATION OF THE U.S. GOVERNMENT* (1981). See also, Timothy B. Tomasi and Jess A. Velona, *All the President’s Men: A Study of Ronald Reagan’s Appointment to the U.S. Court of Appeals*, 87 COLUM. L. REV. 766, 767-70 (1987) (describing the Reagan administration and its “New Right” supporters).

¹³ The Executive Order was based on a 1986 inter-agency report of the family that argued that “the rights of the family are anterior, and superior, to those of the state. *The Family*, *supra* note 6, at 4. The report described an “anti-family agenda” that believed that there was “a governmental solution to every problem that government had caused I the first place.” *Id.* at 1.

¹⁴ A Lexis search for “Executive Order 12,606” in the combined law review database only yields four articles. Howard M. Friedman, *The Oversupply of Regulatory Reform: From Law to Politics in Administrative Rulemaking*, 71 NEB. L. REV. 1169, 1182 (1992) (characterizing family well-being as a “specific, difficult-to-quantify concern”); Sara Goldsmith, *Recent Development: A Critique Of The Immigration And Naturalization Service’s New Rule Governing Transnational Adoptions*, 73 WASH. U. L. Q. 1773, 1783 (1995) (only mentioned in a footnote); Lesley Wexler, *Human Rights Impact Statements: An Immigration Case Study*, 22 GEO. IMMIGR. L.J. 285, 299-301 (2008) (describing some of the “hurdles” experience in assessing “family impact”); Lynn D. Wardle, *The Disintegration Of*

across-the-board ideological lens on all federal policy. It also raises important questions regarding how we measure family well-being and how we define family.

Part I of this article details the emergence of “impact assessments” and their role in policymaking, beginning with the environmental impact statement.¹⁵ Seeking to replicate the success of the environmentalists, family advocates proposed a family impact statement to measure the effect of a proposed policy on family well-being.¹⁶ Part II explains the cultural shifts of the 1980s and the rise of “pro-family” sentiment that blamed government policies and the women’s movement for the demise of the “traditional” American family.¹⁷ Part III shows how this “pro-family” policy was endorsed by the Reagan administration and implemented through Executive Order 12,606 – one of a number of innovative checks that President Reagan imposed on rulemaking.¹⁸ Part IV details the legislative response, and Part V looks at the application of the family impact statement in practice and its potential to silence “the pluralism and diversity” that are hallmarks of the American family. A brief Conclusion places family impact statements in the larger context of regulatory reform and addresses whether the impact statement model is an appropriate vehicle for regulating social issues like the family.

I. “IMPACT ASSESSMENTS” AND PUBLIC POLICY

Beginning in the 1960s, Congress flooded administrative agencies with new statutes to

Families And Children's Right To Their Parents, 10 AVE MARIA L. REV. 1, 50-51 (2011) (arguing that “it would be prudent to revive and improve Executive Order 12,606, or one like it, and to implement an effective family impact review policy”).

¹⁵ See SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM (1984) (assessing whether environmental impact statements have institutionalized “a greater sensitivity to environmental risks in the federal bureaucracy”).

¹⁶ At the 1973 Senate hearing, Senator Mondale said, “I have been impressed with what the environmental impact statement has done.” *American Families: Trends and Pressures: Hearing Before Subcomm. on Children and Youth of the S. Com. on Labor and Public Welfare*, 93d Cong. 124 (1973) (responding to the statement of Dr. Margaret Mead).

¹⁷ See *The Family*, *supra* note 6, at 1 (describing “radical critiques of family life”).

¹⁸ See Friedman, *supra* note 14, at 1181 (asserting the regulatory reform increasingly sought to “assure that regulators will give greater weight to new or changing societal concerns”).

implement addressing health, safety, and environmental problems.¹⁹ Many of these statutes were quite broad and comprehensive in scope, such as the Consumer Product Safety Act of 1972,²⁰ the Occupational Safety and Health Act of 1970,²¹ and the Clean Water Act of 1972.²² As agencies were tasked with producing greater, and sometimes highly technical, regulatory regimes, commentators have noted that a shift occurred in the types of regulation undertaken.²³ Agencies increasingly moved away from formal rulemaking as governed by the Administrative Procedures Act (APA) and toward more informal rulemaking through notice and comment procedures.²⁴

In order to maintain accountability and transparency, Congress enacted a series of procedural controls to both monitor and influence the process of informal rulemaking.²⁵ The courts also weighed in creating additional requirements for rulemaking agencies.²⁶ By the late-1970s, the President had also started taking a more direct, affirmative role in influencing agency rulemaking and administrative policies, signaling an expansion of Presidential power.²⁷ In addition to these procedural checks, Congress and the President both began to introduce safeguards referred to as “impact assessments” that were designed to insure that proposed rulemaking or agency action was consistent with broader public policy goals.²⁸ This section

¹⁹ JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING xviii (2006).

²⁰ The Consumer Product Safety Act of 1972, P. L. 92-573, 86 STAT. 1207, (1972).

²¹ The Occupational Safety and Health Act of 1970, P.L. 91-596, 84 STAT. 1590 (1970)

²² The Clean Water Act of 1972, P.L. 92-505, 86 STAT. 816 (1972).

²³ LUBBERS, *supra* note 19, at xviii.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ LUBBERS, *supra* note 19, at 21-22. *See also* Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989) (discussing increased level of presidential control over agency rulemaking). Early in his first term, President Reagan expanded executive control over rulemaking with Executive Order 12,291. Exec. Order No. 12,291, 46 Fed. Reg. 13193, 3 CFR, 1981 Comp., p. 127 (1981). This Executive Order required federal agencies to take regulatory action only if, “the potential benefits to society for the regulation outweigh the potential costs to society.” *Id.* Agencies were also instructed to submit to the Office of Management and Budget (OMB) a “regulatory impact analysis” of the potential costs and benefits for any proposed rule likely to be economically significant. *Id.*

²⁸ The International Association for Impact Assessment (IAIA) defines an environmental impact assessment as “the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made. International Association of

discusses the emergence of “impact assessments” in the context of family policy and shows how they are designed to impose specific value checks on otherwise value-blind policy.

A. Environmental Risks

The National Environmental Policy Act of 1969 (NEPA)²⁹ introduced the concept of an “impact statement”³⁰ – a process of evaluation designed to predict the effect of proposed federal agency action on a pre-defined set of values or standards.³¹ NEPA required federal agencies to prepare an Environmental Impact Statement (EIS) in advance of certain agency actions “significantly affecting the quality of the environment” in order to assess their potential impact.³² An EIS is required to describe:

- 1) the environmental impacts of the proposed action;
- 2) any adverse environmental impacts that cannot be avoided should the proposal be implemented;
- 3) the reasonable alternatives to the proposed action;
- 4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and
- 5) Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.³³

Designed as a tool to enhance federal decision making, the goal of the EIS is to make sure that federal agency action is based on informed and through analysis that takes environmental concerns into account.³⁴

The first widely publicized application of the new EIS requirements was the successful delay of the Super Sonic Transport (SST), also known as the Concorde.³⁵ In the early 1970s, the

Impact Assessment, *What is Impact Assessment?* (Oct. 2009) available at http://www.iaia.org/publicdocuments/special-publications/What%20is%20IA_web.pdf (last visited Feb. 9, 2013).

²⁹ The National Environmental Policy Act of 1969, P.L. 91-190, § 2, 83 Stat. 852 (codified as 42 U.S.C. 4321, *et seq.*).

³⁰ The statute requires an agency to include a statement on “the environmental impact” as well as alternatives to the proposed course of action. 42 U.S.C. § 4332(C)(i) and (iii) (2013).

³¹ 42 U.S.C. § 4332(C). *See also* LUBBERS, *supra* note 19, at 149.

³² 42 U.S.C. § 4332(C).

³³ *Id.*

³⁴ *See generally* TAYLOR, *supra* note 15.

SST promised to revolutionize air travel.³⁶ Flying at twice the speed of sound, the SST could make a transatlantic flight in the time that it took a normal jet to make the same trip.³⁷ When the British and French owners applied to the Federal Aviation Authority (FAA) in 1975 for permission to operate flights out of Dulles International Airport and Kennedy International Airport in New York, the FAA undertook an exhaustive environmental impact review, which culminated in a four-volume EIS.³⁸ Environmentalists objected to the potential for noise pollution, as well as the plane's impact on the ozone, its lack of fuel efficiency, and its safety risks.³⁹ After a period of public comment, the Secretary of Transportation provisionally approved SST flights from the two airports, but called the decision "difficult and close."⁴⁰

B. Family Well-Being

Family and child advocates and policymakers took note of the success the environmentalists had with the EIS and began to look for similar vehicles for monitoring change within family policy.⁴¹ During the 1973 Senate subcommittee hearings on the family, Senator Mondale remarked, "I have been impressed with what the environmental impact statement has done. The agencies hate it, but it gives citizens the right to go to these agencies and say, before we build that SST we want to know what you think it will do to the environment[.]"⁴² Over three days of hearings, leading sociologists, statisticians, demographers, and psychologists described the changing face of the American family and the new challenges that these different types of

³⁵ Robert B. Donin, *Safety Regulation of the Concorde: Realistic Confinement of the National Environmental Policy Act*, 8 TRANSP. L. J. 47 (1976).

³⁶ Bayard Webster, *Scientists Ask SST Delay Pending Study of Pollution*, NY TIMES, Aug. 2, 1970, at 1 (noting that "the question of environmental pollution has become heated, and has assumed political overtones).

³⁷ Donin, *supra* note 35, at 50.

³⁸ *Id.* at 48. The final decision issued by the Secretary of Transportation was sixty-one pages long. *Id.* at 47.

³⁹ Walter Sullivan, *Experts Fear Great Peril if SST Fumes Cool Earth*, Dec. 21, 1975, NY TIMES, at 32.

⁴⁰ *Id.* at 51 (quoting Secretary of Transportation, William T. Colman, Jr.).

⁴¹ *American Families: Trends and Pressures: Hearing Before Subcomm. on Children and Youth of the S. Com. on Labor and Public Welfare*, 93d Cong. 124 (1973) (Senator Mondale commenting on the Statement of Dr. Margaret Mead).

⁴² *Id.*

families faced.⁴³ The witnesses identified significant socioeconomic barriers to family and childhood success, including poor daycare and low wages as contributing factors to declining family prosperity and health.⁴⁴

As the witnesses charted the diversity of American families, they also acknowledged the danger of trying to develop federal policy based on a single vision of family.⁴⁵ Senator Mondale agreed, saying that to do so would “be beyond the legitimate concerns of Government; and could produce at least as serious of problems as ignoring the impact of the policies on families altogether.”⁴⁶ Unlike the later “pro-family” initiatives of the Reagan administration, the hearings focused on how to conduct a “close examination of families as they exist in their major current forms and [develop] a course of action directed at enhancing their viability.”⁴⁷ Senator Edward M. Kennedy (D-MA) argued that federal policy had for too long wrongly assumed “that all families function in the structured and narrow definition of the two-parent family with a working father, a homemaking mother, and dependent children[.]”⁴⁸

Dr. Zigler, a well-known researcher in the field of child development from Yale University, described a “family impact statement” as a starting point to analyze policies.⁴⁹ Dr. Zigler testified that family policy should “entail the continuous analyses of the impact of other

⁴³ *American Families: Trends and Pressures: Hearing Before Subcomm. on Children and Youth of the S. Com. on Labor and Public Welfare*, 93d Cong. (1973) available at <http://ia700303.us.archive.org/14/items/americanfamilies00unit/americanfamilies00unit.pdf> (last visited Feb. 16, 2013).

⁴⁴ *Id.*, See also Nadine Brozan, *Mondale Family's Man in the Senate*, NY TIMES, Feb. 26, 1974, at 32 (discussing Sen. Mondale’s commitment to improving the lives of American families).

⁴⁵ *American Families: Trends and Pressures: Hearing Before Subcomm. on Children and Youth of the S. Com. on Labor and Public Welfare*, 93d Cong. 4 (1973) (introductory statement of Senator Walter F. Mondale) (referring to diversity and pluralism as a strength).

⁴⁶ *Id.* at 2. Senator Kennedy continued that “America’s families include extended kinships, foster homes and guardianships. Regardless of the family structure, these families function to provide the same guidance and support that all families must offer to socialize our children and to prepare them to cope with the demands of society.” *Id.*, at 3.

⁴⁷ *Id.* at 68.

⁴⁸ *Id.* at 3 (statement of Senator Kennedy).

⁴⁹ *Id.* at 69 (statement of Dr. Edward Zigler).

governmental policies for their effects on family life, so that any cost benefit analysis of these policies would include in its equations the factor of whether the policy in question helps or hurts American families.”⁵⁰

Although Dr. Zigler testified that “the environmental model is a good one,” he also stated that it was important to be “realistic in these matters.”⁵¹ In response to a direct question from Senator Mondale about the efficacy of a “family impact statement,” Dr. Zigler advised caution.⁵² He reasoned that imposing a family impact statement would “not be easy to do, Senator, for the very simple reason that, whereas we can all agree that there should be a lower level of sulfur content, it is very much more difficult to agree upon which values we should select as paradigms for the construction of a viable social policy for American families.”⁵³ Dr. Mead reported that she was also enthusiastic about the possibility of a family impact statement, but clarified that the focus of such a statement should be to address, poverty issues including housing, welfare, and care for elderly family members.⁵⁴

Based on these somewhat cautious recommendations, the Subcommittee Staff Director, A. Sidney Johnson, pursued the idea of a family impact statement to aid policymakers and founded the Family Impact Seminar (FIS) in 1976.⁵⁵ The FIS was created to solve the logistical barriers to creating a family impact statement, including questions regarding the political

⁵⁰ *Id.*

⁵¹ *Id.* Dr. Zigler testified that “there ought to some agency responsible for the kind of analysis that would tell us whether any given aspect of a progress is beneficial or detrimental to the people whose needs it is intended to serve.” *Id.*

⁵² *Id.* Senator Mondale again used the analogy of the environmental impact statement, saying “ No one realized what it mould mean at the time, but it has been so important to the environmental movement[.]” *Id.*

⁵³ *Id.* at 69 (statement of Dr. Edward Zigler). Dr. Zigler obviously did not foresee the many contemporary debates over exactly what level or parts of toxin or contaminant is acceptable.

⁵⁴ *Id.* at 124-25 (statement of Dr. Margaret Mead).

⁵⁵ Ooms, *supra* note 1, at 2 (describing formation of FIS and role of Johnson). The goal of the FIS was “to explore the substantive, political, and administrative feasibility of the proposal to require family impact statements.” *Id.*

viability and the substance of a family impact statement.⁵⁶ The FIS policy created a checklist that measured the impact of programs on “marital, family, and parental commitment” as well as the extent to which policies took “the diversity of families” into account.⁵⁷

FIS advocated on behalf of its checklist, saying that it should be voluntary and limited to certain policy areas.⁵⁸ It was officially adopted at the 1980 White House Conference on the Family, where a majority of the representatives voted in favor.⁵⁹ However, a change in administrations and a changing political climate stalled the implementation of the recommendation.⁶⁰ By the time family policy was readdressed during the Reagan administration the goals had changed considerably.

II. THE EMERGENCE OF THE NEW RIGHT AND “PRO-FAMILY” CONCERNS.

When the 1980 White House Conference on the Family overwhelmingly endorsed the use of family impact statements, there were more women in the U.S. labor force than ever before.⁶¹ A combination of ideological shifts, anti-discrimination protections,⁶² and increased access to

⁵⁶ *Id.*

⁵⁷ The Policy Institute for Family Impact Statements, *Assessing the Impact of Policies and Proposals on Families* (2000) available at http://www.familyimpactseminars.org/fi_checklist_aipf.pdf (last visited Feb 16, 2013). The FIS also recommended the creation of a non-partisan Commission for Families be established at all levels of the government. Ooms, *supra* note 1, at 2.

⁵⁸ *Id.*

⁵⁹ *Id.* at 3. The vote was overwhelmingly in favor, with eighty percent voting to adopt the impact checklist. *Id.*

⁶⁰ The FIS asserts that “‘Family’ became captured by the far political right.” *Id.* at 3.

⁶¹ The percentage of the labor force that was made up by women increased from 29% in 1950 to 43% in 1980.

Linda J. Waite, *U.S. Women at Work*, available at <http://www.rand.org/content/dam/rand/pubs/reports/2008/R2824.pdf> (last visited Feb. 16, 2013).

⁶² See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000). The Act provides that “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex.” The EEOC published interpretive guidelines in 1972 requiring equal treatment of pregnant workers: “Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.” 37 Fed. Reg. 6837 (1972); Title VII was amended by the Pregnancy Discrimination Act of 1978, which explicitly stated that the phrase “because of sex” prohibited employers from discriminating against women because of pregnancy and childbirth, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000)).

abortion and contraception⁶³ had led to greater opportunities for women in the workplace.⁶⁴ The potential for economic independence, coupled with expanding opportunities for advancement, changed the lives of women, as well as the lives of men. The average age at first marriage rose to 23 by 1985, thereby allowing many women to finish college or begin a career before becoming wives and presumably mothers.⁶⁵

Families also began having fewer children, making households more nimble, mobile, and receptive to the two-earner status quo that was supported by a strong economy.⁶⁶ Public opinion polls from the time show that the majority of both women *and* men increasingly supported equality in the workforce and the home.⁶⁷ This re-imagined American family seemed to embody the promise of gender equity that the women's movement of the 1970's had worked so hard to make a reality.⁶⁸ This progress, however, would prove to be far from permanent. The achievements of the women's movement were followed by a decade of reversals that commentators have said were fueled by a weakening economy and policymakers jockeying for political advantage in the midst of the "Reagan Revolution."⁶⁹ This section discusses the reversal of fortune that began in the 1980s and charts the emergence of "pro-family" concerns as

⁶³ See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a law forbidding the use of contraceptives violated married couples' constitutional "right to privacy."); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (recognizing right to privacy as it pertains to access to contraception to all individuals regardless of marital status); *Roe v. Wade* 410 U.S. 113 (1973) (holding that the right to privacy extends to the choice to terminate a pregnancy, finding state laws criminalizing abortion unconstitutional); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (finding a New York state statute criminalizing the provision of contraceptives to persons under 16 of years of age to be unconstitutional).

⁶⁴ See Barbara H. Wooten, *Gender Differences in Occupational Employment*, Monthly Labor Review, Bureau of Labor Statistics (April 1997); Heidi Hartmann, *Who Has Benefited from Affirmative Action in Employment?*, in The Affirmative Action Debate 77, 90 (George E. Curry ed., 1996).

⁶⁵ U.S. Census Bureau, *Estimated Median Age at First Marriage by Sex: 1890 to Present*— 2011 available at: <http://www.census.gov/apsd/techdoc/cps/cps-main.html> (last visited February 16, 2013).

⁶⁶ By the early 1970s the average family had 2.1 children, while the average family by 1989 had .96 children. These rates are a stark decrease from the height of the babyboom in 1957 where the average family had 3.7 children. See James R. Wetzell, *American Families: 75 Years of Change*; Monthly Labor Review; Bureau of Labor Statistics (March 1990).

⁶⁷ SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR ON WOMEN* 74 (1991).

⁶⁸ *Id.*

⁶⁹ *Id.* at 83.

a strong political mobilizing force. It then examines how these pro-family concerns were translated into affirmative federal policy during the Reagan administration.

A. A Reversal of Fortune.

The 1980s saw a radical realignment in attitudes towards gender equity and feminism. Whereas both woman and men had supported various forms of gender equity, now only a majority of women were in favor of traditionally “feminist” issues.⁷⁰ Reversing nearly a decade-long trend, the percentage of men who thought a family should be “traditional” in the sense of having a single male breadwinner with a wife-homemaker actually started to increase beginning in 1986.⁷¹

A weakening economy strained the economic gains that women had made in the 1970s,⁷² as traditional male wages dropped by twenty-two percent from the previous decade.⁷³ Although women certainly suffered from the same shifting economy and shrinking job market, commentators have suggested that dimming opportunities in the workforce may have caused men to re-evaluate the role of women.⁷⁴ Men who had welcomed women as a second-earner only five years earlier may have withdrawn their support when faced with the prospect of either sharing or relinquishing their status as the primary family breadwinner.⁷⁵

If individual men failed to make the connection between diminished opportunities in the workplace and working women, the New Right was happy to make that connection for them. The New Right movement came to prominence with the election of Ronald Reagan to the

⁷⁰ *Id.* at 74-75.

⁷¹ *Id.* at 75. This increase actually rose 4 percentage points from 1986 to 1988.

⁷² KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR* (1990).

⁷³ *Id.* at 18. This 22 percentage point drop in median income occurred between 1976 and 1984.

⁷⁴ FALUDI, *supra* note 67, at page 79.

⁷⁵ See LINDA M. BLUM, *BETWEEN FEMINISM AND LABOR: THE SIGNIFICANCE OF THE COMPARABLE WORTH MOVEMENT* 141-142 (1991) (describing the movement of women towards jobs that were more prone to elimination during an economic downturn, especially when seniority determined job-security— for example, the steel industry in the early 1980s).

Presidency in 1980.⁷⁶ It focused on conservative values and prioritized social issues, such as “traditional” families and traditional gender roles.⁷⁷ According to the logic of the New Right, there was a direct relationship between shrinking opportunities for male workers and the influx of women in the paid labor force that had occurred in the 1970s. Indeed, working women were just one part of what the New Right perceived as a larger cultural shift. The New Right considered the most important successes of the women’s movement – increased job and educational opportunities, economic independence, and the acceptance of family planning and child care — to be at the root of a host of new social and economic problems.⁷⁸

The landslide election of Ronald Reagan in 1980 gave the New Right access to the nation’s largest bully pulpit – the Presidency.⁷⁹ To the extent the New Right considered women in the workforce to be the cause of many of the country’s social and economic ills, it was easy to see why their policy solution might be involve trying to strengthen the “traditional” family and discourage women from entering the workforce. In a national press conference addressing the economy and the dissolving job market in 1982, President Reagan explicitly cited women’s increased role in the labor market as a reason for the scarcity of jobs. Reagan said, “Part of

⁷⁶ See Hugh Davis Graham, *Civil Rights Policy*, in *THE REAGAN PRESIDENCY: PRAGMATIC CONSERVATISM AND ITS LEGACIES* 287 (W. Elliot Brownlee & Hugh Davis Graham eds., 2003)(describing the incorporation of “New Right” rhetoric into Presidential publications and speeches, albeit with a significant delay in the adoption of policies reflective of these values).

⁷⁷ See Ted V. McAllister, *Reagan and the Transformation of American Conservatism*, in *THE REAGAN PRESIDENCY: PRAGMATIC CONSERVATISM AND ITS LEGACIES* 44-47 (W. Elliot Brownlee & Hugh Davis Graham eds., 2003)(describing the movement’s coordination with the increasing number of social conservatives concerned with moral issues including abortion, divorce, and the Equal Rights Amendment).

⁷⁸ FALUDI, *supra* note 67, at page 247. Faludi notes that “The publications list of the Rockford Institute’s Center for the Family in a America, a New Right think tank, read like a rap sheet against independent, single, professional, and of course, feminist, women. Some typical offerings in 1989: ‘Perilous Parallel: Working Wives, Suicidal Husbands,’ ‘Why More Women Working Means Lower Pay for Men,’ ‘The frightening Growth of the Mother-State-Child Family,’ and ‘The Link Between Mother-Dominated Families and Drug Use.’” *Id.*

⁷⁹ It bears mentioning that Senator Mondale who had chaired the Senate subcommittee hearing in 1973 ran unsuccessfully for Vice President on the Democratic ticket in 1980. Hendrik Smith, *Reagan Easily Beats Carter*, *NY TIMES*, NOV. 5, 1980, at 1. Reagan then defeated Mondale again in 1984 when Mondale ran for President on the Democratic ticket. Howell Raines, *Reagan Wins by a Landslide: Sweeping at Least 48 States*, *NY TIMES*, Nov. 7, 1984, at 1.

unemployment is not as much the recession as it is the great increase of people going into the job market, and – ladies, I’m not picking on anyone but because of the increase of women who are working today and two-worker families and so forth.”⁸⁰

Despite the general uptick in outrage against working women, dual-wage earning families were not a new phenomenon. Although World War II and the following decades saw an influx of white middle class women into the workforce, the 1950s ideal family — a single male breadwinner with a wife-homemaker — had in large part always been out of reach for many American working class families.⁸¹ Emboldened by increasing societal and political support, the rhetoric of the New Right actively blamed feminism for the destruction of this mythical “traditional family.”⁸² They gradually shifted the conversation from negative, anti-feminist complaints to focus on support for “pro-family” policies and norms.⁸³ This semantic change was adopted by the Reagan administration and many members of Congress who sought to further “pro-family” policies by advocating for a single type of family to the exclusion of all others.⁸⁴

B. “Pro-Family” Policy and the Reagan Administration.

In his acceptance speech at the Republican National Convention in 1980, Candidate Reagan pledged that he was “ready to build a new consensus with all those across the land who share a community of values embodied in these words: family, work, neighborhood, peace, and

⁸⁰ *Question and Answer Session Following a White House Luncheon for Editors and Broadcasters from the Southeastern States*, Apr. 16, 1982, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=42412&st=picking&st1=> (last visited Feb. 16, 2013). In her memoir, Congresswoman Geraldine Ferraro and unsuccessful Vice Presidential candidate, signed out this comment as evidence that “Reagan failed to understand that most women enter the job market out of necessity.” GERALDINE FERRARO, *FERRARO: MY STORY* 133 (2004).

⁸¹ COONTZ, *supra* note 11, at 11.

⁸² *Id.* at 8 (describing “traditional family”).

⁸³ FALUDI, *supra* note 67, at 75-77

⁸⁴ Gary Bauer vowed to protect the “pro-family” label from abuse and misuse by political schemes aimed at providing services like state-funded day care, school-feeding programs, and national health care for children. *The Family*, *supra* note 6 at 4.

freedom.”⁸⁵ While campaigning for President, Ronald Reagan actively courted the vote of social conservatives and evangelical voters. He spoke at the Religious Roundtable event in Dallas, Texas and promised the 15,000 ministers in attendance that he would base all policymaking in his administration on “traditional values.”⁸⁶ Candidate Reagan assured the crowd, “I ... want you to know that I endorse you and what you are doing.”⁸⁷ In turn, Reagan earned the endorsement of the Moral Majority, and other social conservatives who were organizing around traditional family values.⁸⁸

Reagan’s campaign chairman, Senator Paul Laxalt (R-NV) was one of the authors of far-reaching “pro-family” omnibus legislation, the Family Protection Act (FPA).⁸⁹ Although even its supporters acknowledged that the bill had little likelihood of becoming law, many of Reagan’s conservative supporters saw it as an agenda setter for the “pro-family” movement.⁹⁰ As the title of the bill suggests, the FPA was designed to “protect” the “traditional” family model from the onslaught of changing societal values, specifically feminism.⁹¹ The stated goal of the FPA was to foster the “traditional American family” ideal by dismantling many of the women’s movements accomplishments, including access to family planning services and government

⁸⁵ Leslie Bennetts, *Social Conservative Joins on Social Concerns*, NY TIMES, July 30, 1980, at A1.

⁸⁶ See Public Broadcasting Station, *Study Guide of: Of God and Caesar*, Episode 6 of God in America; <http://www.pbs.org/godinamerica/study-guide/six.html> (last visited February 16, 2013). Reagan asked, “Who will vote to protect the American family and respect its interests in the formulation of public policy?” *Id.*

⁸⁷ *Id.* See also Howell Raines, *Reagan Backs Evangelicals in Their Political Activities*, NY TIMES, Aug. 22, 1980, at 8. The New York Times reported that candidate Reagan applauded frequently during the speech of Rev. James Robinson, who referred to the government as “public enemy No. 1.” *Id.* Rev. Robinson said, “I’m sick and tired hearing about all the radicals and the perverts and the liberals and the leftists and the Communists coming out of the closet.” *Id.* He continued, “It’s time for God’s people to come out of the closet.” *Id.*

⁸⁸ BARRY HANKINS, *AMERICAN EVANGELICALS: A CONTEMPORARY HISTORY OF A MAINSTREAM RELIGIOUS MOVEMENT* 148 (2008).

⁸⁹ JAN E. DIZARD, HOWARD GADLIN, *THE MINIMAL FAMILY 169-170* (1990)(describing the introduction and development of the Family Protection Act).

⁹⁰ See Bennetts, *supra* note 87 (noting that “many [Reagan] supporters see it as an agenda for their effort”).

⁹¹ DIZARD & GADLIN, *supra* note 89 (discussing the Family Protection Act’s effort to “write into law the conventional husband-the-breadwinner and wife-the-homemaker nuclear family” doomed the bill).

programs targeting race and sex based discrimination.⁹² Under the FPA, the federal government was directed to take an active role in the “restoration” of the “traditional American family.”⁹³ It was clear that the authors of the legislation believed that governmental policies had been partly the blame for the demise of the “traditional American family.”⁹⁴

The opening section of the FPA provides that “certain Government policies have directly and benignly undermined and diminished the viability of the American family.”⁹⁵ To remedy this situation, the FPA asserts that, “the policy of the Government of the United States should . . . be directed and limited to the strengthening of the American family and to changing or eliminating any Federal governmental policy which diminishes the strength and prosperity of the American family.”⁹⁶ The FPA sought to strengthen and promote this ideal through a laundry list of restrictions on government funding from abortion and contraception to the information that can be provided to students in textbooks.⁹⁷ Specifically, the FPA prohibited the use of federal funds to purchase educational materials that “do not reflect a balance between the status role of men and women, do not reflect different ways in which women and men live, and do not contribute to the American way of life as it has been historically understood.”⁹⁸ When asked to elaborate, Senator Jepsen clarified that, “We should appreciate the role of women as mother and homemaker.”⁹⁹

⁹² *Family Protection Act of 1981*, S. 1378, 97th Cong., 1st Sess., 127 CONG. REC. S. 12694 (1981).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *The Family Protection Act: Handle with Care*, THE CHRISTIAN SCIENCE MONITOR, July 23, 1981.

“Pro-family” legislators and activists were particularly troubled by the efforts of the federal government over the past several decades to end sex-based discrimination.¹⁰⁰ When Senator Roger Jepsen (R-IA) introduced the FPA in 1980, he specifically targeted the use of federal funds to end sex discrimination through Title IX funded centers that recruited women for employment in traditionally male careers.¹⁰¹ Senator Jepsen concluded that surely, it was not the role of the federal government to “shape the attitudes of the American people.”¹⁰² The supporters of the FPA sought to recharacterize (or perhaps reclaim) the proper role of the government. Anti-discrimination laws had sought to protect individuals from bias and prejudice, but now it was time to protect families from the damaging influence of these laws.¹⁰³

Having run a “pro-family” campaign, which some commentators have characterized as blatantly anti-woman, President Reagan responded to the outcry for “protection” of the “traditional” family with the creation of the Office of Family Policy within the Department of Education.¹⁰⁴ Its mission was to promote “pro-family” values—primarily respect for fathers and reinforcement of stereotypical gender roles within the home and in the marketplace.¹⁰⁵ The Office hosted speeches and educational programming designed to help make sure that these “traditional” attitudes were incorporated into the broader national dialogue on the American family.¹⁰⁶ Reagan appointed Gary Bauer as the Director of the Office.¹⁰⁷ Known for his zeal

¹⁰⁰ Karen Flax, *Women’s Rights and the Proposed Family Protection Act*, 36 U. MIAMI L. REV. 141, 152 (1981) (discussing the textbook and educational requirements of the Family Protection Act and potential psychological impact on children).

¹⁰¹ *Family Protection Act*, *Supra* note 92.

¹⁰² 127 Cong. Rec. at S6327.

¹⁰³ *Id.* When introducing the bill, Senator Jepsen identifies the use of Title IX funding to “cure family-related social maladies” through 15 race desegregation assistance centers and 10 sex-discrimination centers. *Id.* He stated, “The activities of these federally funded centers range from recruiting females or males for employment in jobs not traditionally held by members of their sex to identifying race stereotypes in textbooks and other curricular materials and developing methods of countering their effects upon students. At best, such design is counterproductive to efforts to treat each minority as an individual rather than each individual as a member of a minority.” *Id.*

¹⁰⁴ FALUDI, *supra* note 67, at 275 (describing the Office of Family Policy).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

and commitment to conservative social causes, Bauer later served as President of the conservative Family Research Council and ran for President in the Republican primaries leading up to the 2000 Presidential race.¹⁰⁸

Despite the increasing political outcry from conservative leaders, President Reagan did not empower the Office of the Family beyond its initial mandate within the Department of Education, and it ultimately had a minimal impact on national policy development.¹⁰⁹ In his second term, however, President Reagan refocused interest on family policy development. Gary Bauer was appointed to head the White House Working Group on the Family, an inter-agency taskforce developed to “study how government at all levels could be more supportive of American families.”¹¹⁰ Comprised of twenty-two senior members of the administration, the Working Group had the opportunity to imprint “pro-family” policy in a sustained way through federal action.¹¹¹

In 1986, the Working Group published a fifty-two page report entitled, *The Family: Preserving America’s Future* (the *Family Report*).¹¹² Throughout the pages of the Family Report, Bauer and his taskforce provide a scathing condemnation of the status of the American family and all of the sources of its demise—primarily the “heavy hand of government.”¹¹³ In this way, the *Family Report* echoed some of the complaints voiced in the FPA. The *Family Report* singled out programs such as welfare, childcare, food stamps, and free and reduced school lunch for their impact on the family.¹¹⁴ Bauer also identified the “sexual revolution” and

¹⁰⁷ Bauer was also Deputy Under Secretary for Planning and Budget, Department of Education.

¹⁰⁸ Frank Bruni, *Gary Bauer, No. 4 in Iowa Polls Casts Himself as Heir to Raegan*, NY TIMES, Aug. 17, 1999.

¹⁰⁹ FALUDI, *supra* note 67, at 275.

¹¹⁰ *The Family*, *supra* note 6.

¹¹¹ The Working Group included Clarence Thomas, who was then the Chairman of the Equal Employment Opportunity Commission. *Id.* at 52.

¹¹² *The Family*, *supra* note 6

¹¹³ *Id.* at 2, 6 (“This fabric of family life has been frayed by the abrasive experiments of two liberal decades”).

¹¹⁴ *Id.* at 4.

increasing access to no-fault divorce as key contributors to the destruction of the traditional American family.¹¹⁵ Perhaps most alarming, according to Bauer, was that the anti-family agenda had tried to redraw the very definition of a family by including bonds beyond marriage, blood, and adoption.¹¹⁶ Indeed, at the 1973 Senate hearings on the family discussed in Part I above, Senator Kennedy had urged the government to support families “regardless of the family structure” because “America’s families include extended kinships, foster homes and guardianships.”¹¹⁷ The *Family Report* was openly opposed to celebrating the diversity of the American family and rejected Senator Mondale’s warning that imposing orthodoxy on family policy “would do great damage to the pluralism and diversity that makes our country strong.”¹¹⁸

The *Family Report* provides a clear distinction between “good” families and “bad” outcomes, and what Senator Kennedy described under the heading of family clearly belonged in the latter category. To bring this point home, the *Family Report* explains:

It is time to reaffirm some ‘home truths’ and to restate the obvious. Intact families are good. Families who choose to have children are making a desirable decision. Mothers and fathers who then decide to spend a good deal of time raising those children themselves rather than leaving it to others are demonstrably doing a good thing for those children.¹¹⁹

Throughout the *Family Report*, intact families defined by blood, marriage, and adoption are the only types of families recognized. Families not meeting these requirements are instead viewed as problems and the failure to qualify as an “intact” family is seen as a deficit. The *Family*

¹¹⁵ *Id.* at 3,14.

¹¹⁶ *Id.* at 1 “Only a few years ago, the American households of persons related by blood, marriage or adoption—the traditional definition of the family— seemed to be in peril. . . it was trendy to advocate ‘open marriage,’ ‘creative divorce,’ alternative lifestyles,’ and to consider family life as a cause of “neurotic individualism.””

¹¹⁷ *American Families: Trends and Pressures: Hearing Before Subcomm. on Children and Youth of the S. Com. on Labor and Public Welfare*, 93d Cong. 4 (1973) (introductory statement of Senator Edward M. Kennedy).

¹¹⁸ *American Families: Trends and Pressures: Hearing Before Subcomm. on Children and Youth of the S. Com. on Labor and Public Welfare*, 93d Cong. 4 (1973) (introductory statement of Senator Walter F. Mondale).

¹¹⁹ *The Family*, *supra* note 6, at 3.

Report marshals statistics on non-marital children and “latchkey children”¹²⁰ to illustrate what is wrong with the American family.¹²¹

Although poverty and decreased economic power is a consistent theme throughout the *Family Report*, its proposals do not include any assistance for working families, like job-training programs, subsidized childcare, or increased tax deductions for workers.¹²² A basic premise of the *Family Report* is that government intrusion harms families.¹²³ It reasons that without government intrusion different-sex, two-parent families will remain intact and, in turn, will be economically stronger.¹²⁴ According to the *Family Report*, in order to restore the American family, the federal government must recognize the superiority of the “traditional” family and to support this family model through a systemic federalized implementation of “pro-family” policies.¹²⁵ “Although government cannot mandate cultural change,” the *Family Report* provides, “public officials can, as opinion leaders, influence its direction. . . in short, their conduct must not be value neutral.”¹²⁶ Shortly after the *Family Report* was presented to President Reagan, Gary Bauer was appointed to the post of Chief Domestic Policy Advisor.¹²⁷

IV. IMPOSING A “PRO-FAMILY” LENS ON FEDERAL RULEMAKING

As noted in Part I above, both Congress and the Executive became increasingly interested in exercising control over agency rulemaking, starting in the 1970s. In addition to imposing

¹²⁰ *Id.* at 2.

¹²¹ *Id.* Other family deficits listed include the prevalence on non-marital children and children whose parents are divorced.

¹²² When Margaret Mead had testified before the Senate Committee in 1973, she was adamant that economic barriers had to be addressed to have effective family policy.

¹²³ *The Family*, *supra* note 6, at 4. “Government cannot abolish the family, or intrude upon its functions, without undermining the social foundation of the state itself.”

¹²⁴ *Id.* at 15, stating that “Welfare contributes to the failure to form the family in the first place. It is the creation of family fragments, households headed by a mother dependent upon public charity. In that process, the easy availability of welfare in all of its forms has become a powerful force for destruction of family life through perpetuation of the welfare culture. One can only imagine with horror what would happen to low-income, intact families if the centrifugal force of public assistance were applied to them in the same manner.”

¹²⁵ *Id.*

¹²⁶ *Id.* at 5.

¹²⁷ Leslie Maitland Werner, *Reagan to Name New Domestic Aide*, NY TIMES, Jan. 29, 1987.

procedural safeguards, the legislative and executive branches began to impose various value-based requirements that were designed to ensure that agency actions were consistent with other broadly held federal policies. These requirements were sometimes in the form of “impact assessments” or other balancing tests.¹²⁸ They had the effect of mandating that agency action be viewed through a particular policy lens, whether it be environmental risks,¹²⁹ respect for federalism,¹³⁰ concern for takings issues, or the impact of regulation on small businesses.¹³¹ This section briefly discusses the different types of controls that have been imposed, specifically the “pro-family” lens imposed by Executive Order 12,606 and later reinstated by Congress after the Executive Order was repealed in 1997 by President Clinton.

A. *Presidential Control of the Regulatory Process.*

Within weeks of taking office, President Reagan issued Executive Order 12,291,¹³² which directed federal agencies to take regulatory action only where “the potential benefits to society for the regulation outweigh the potential costs to society.”¹³³ The Executive Order was consistent with the New Right’s belief in small government and general distrust of government regulation.¹³⁴ The Executive Order required agencies to submit to the Office of Management Budget (OMB) a “regulatory impact analysis” of the potential costs and benefits for any proposed rule likely to be economically significant.¹³⁵

¹²⁸ See, e.g., The Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 864 (1980) (codified as amended at 5 U.S.C. §§ 601-612) (mandates consideration of impact of proposed regulations on small businesses and other small entities).

¹²⁹ See the National Environmental Policy Act, 42 U.S.C. §§4321-4347d, requiring the development of the Environmental Impact Statement.

¹³⁰ Exec. Order No. 12,612, 52 FR 41685, 3 CFR, 1987 Comp., p. 252 (October 26, 1987).

¹³¹ *Supra* note 128, the Regulatory Flexibility Act (FRA) followed the “impact statement” model, requiring agencies to take the potential impact of proposed rules on small businesses into account while developing the new regulations.

¹³² Exec. Order No. 12,291, 46 FR 13193, 3 CFR, 1981, (February 17, 1981).

¹³³ *Id.*

¹³⁴ *Id.* One of the stated purposes of the Executive Order is to “insure well-reasoned regulations.” *Id.*

¹³⁵ *Id.*

In addition to Executive Order 12,291, President Reagan issued a number Executive Orders that required agency action to be evaluated in terms of other hot-button conservative issues. For example, Executive Order 12,612 made good his controversial campaign promise to protect states' rights.¹³⁶ Its stated purpose was "to restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies." Executive Order 12,630 addressed the New Right's belief that individual private property rights were being eroded by the actions of the federal government.¹³⁷ It ordered agency action to take into account the "obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment."¹³⁸

To some extent, Executive Orders such as these do not really break any new ground. In many cases, agencies are simply being urged to comply with the demands of the U.S. Constitution. This was not the case with the "pro-family" directive discussed below. There, President Reagan was imposing an affirmative vision of the American family against which all policies and regulations would be measured.

B. Executive Order 12,606 -- The Family¹³⁹

In the safety of a second term and with increasing pressure from conservative political and religious leaders, President Reagan explored the administrative options for adopting a "pro-

¹³⁶ Exec. Order No. 12,612, Oct. 26, 1987, appear at 52 FR 41685, 3 CFR, 1987 Comp., p. 252. In 1980, Ronald Reagan's first campaign stop after winning his party's nomination was outside of Philadelphia, Mississippi, near where three civil rights workers had been murdered in 1964. Bob Herbert, *Righting Reagan's Wrongs?* NY TIMES, Nov. 13, 2007. Reagan was widely criticized for proclaiming in his speech that "I believe in states' rights," which many argue was code for white supremacy. David Greenberg, *Dog-Whistling Dixie*, SLATE, Nov. 20, 2007, at http://www.slate.com/articles/news_and_politics/history_lesson/2007/11/dogwhistling_dixie.htm(last visited Feb. 10, 2013).

¹³⁷ Exec. Order 12,630, 53 FR 8859, 3 CFR, 1988 (March 15, 1988).

¹³⁸ *Id.*

¹³⁹ 52 FR 34188; September 9, 1987

family” perspective on the administrative level.¹⁴⁰ The *Family Report* provided a blueprint for a “pro-family” federal agenda.¹⁴¹ A shift in Presidential power and control over administrative rulemaking provided the Reagan White House with a ready vehicle – a family impact statement imposed by Executive Order.

Although family impact statements had been first proposed in the 1970s, the vision of the Reagan administration was radically different from the recommendations of Dr. Mead or Dr. Zigler.¹⁴² The shared understanding of the need for a nuanced, inclusive approach to policies as a way to support all families that emerged from the 1973 Senate subcommittee hearing had given way to the value-based, normative ideology of “traditional family values.”¹⁴³ The “pro-family” policy that shaped the *Family Report* and the ensuing Executive Order viewed the different types of families discussed by FIS and the witnesses at the hearing—single parent, dual wage-earner, foster families — as problems rather than families. The view was that these diluted and diminished “traditional families.” The *Family Report* asserted that

It is simply not true that what we do is our business only. For in the final analysis, the kind of people we are – The kind of nation we will be for generations hence – is the sum of what millions of Americans do in their otherwise private lives . . . there will be staggering consequences for us all.¹⁴⁴

Rather than seeking to serve all American families, the “pro-family” approach of the 1980s turned to policymaking as a means to promote uniformity and control family formation and norms from the top down. “Pro-family” advocates and policymakers decried the intrusion of the

¹⁴⁰ See generally *The Family*, *supra* note 6.

¹⁴¹ *Id.* At the end of each section, The Family Report sets forth a series of recommendations. *Id.* For example, one of the education recommendations was: “Curricular material should not undermine family values but should reinforce the principles and ideals most parents strive to impart to their children.” *Id.* at 43.

¹⁴² *American Families: Trends and Pressures: Hearing Before Subcomm. on Children and Youth of the S. Com. on Labor and Public Welfare*, 93d Cong. (1973).

¹⁴³ *Id.*

¹⁴⁴ *The Family*, *supra* note 6, at 3.

government into the private life of the family, but ultimately turned to the government to right their perceived wrongs.

Less than a year after the *Family Report* was issued, President Reagan signed Executive Order 12,606, creating an assessment analysis requirement for all federal actions that may impact “the family.”¹⁴⁵ The 1997 Executive Order sought to “ensure that the autonomy and rights of the family are considered in the formulation and implementation of policies by Executive departments and agencies”¹⁴⁶ and it provided the following checklist criteria that were to be used in formulating and implementing all policies and regulations:

- (a) Does this action by government strengthen or erode the stability of the family and, particularly, the marital commitment?
- (b) Does this action strengthen or erode the authority and rights of parents in the education, nurture, and supervision of their children?
- (c) Does this action help the family perform its functions, or does it substitute governmental activity for the function?
- (d) Does this action by government increase or decrease family earnings? Do the proposed benefits of this action justify the impact on the family budget?
- (e) Can this activity be carried out by a lower level of government or by the family itself?
- (f) What message, intended or otherwise, does this program send to the public concerning the status of the family?
- (g) What message does it send to young people concerning the relationship between their behavior, their personal responsibility, and the norms of our society?¹⁴⁷

Agencies and departments were then required to identify and provide an adequate rationale for any proposed regulatory or statutory provision that may pose a significant potential negative

¹⁴⁵ Exec. Order 12606, 3 C.F.R. 554 (1987 compilation).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

impact on family well-being.¹⁴⁸ OMB and the Office of Policy Development were given a series of enforcement and implementation obligations, including the preparation of a report to “advise the President on policy and regulatory actions that may be taken to strengthen the institutions of marriage and family in America.”¹⁴⁹

The Executive Order received relatively little coverage in the national press. A brief article in *The New York Times* described the Executive Order as “a new yardstick for evaluating welfare, housing and education programs.”¹⁵⁰ The article reported Bauer as saying “if we would have had this in place a number of years ago, we could have stopped the unintended consequences of some of these well-meaning efforts to help poor families.”¹⁵¹ *The Los Angeles Times* described the measures as one “of a series of actions Reagan has taken to satisfy conservative critics.”¹⁵² It reported that the action was “even more than conservatives could have hoped for because it includes every Cabinet post and executive agency.”¹⁵³ The article quoted an unnamed Administration official as saying, the conservatives “are going to be ecstatic about [the Executive Order].”¹⁵⁴

A year later, President Reagan issued a series of Presidential Memoranda on a developing a government-wide family policy.¹⁵⁵ The memoranda were designed to implement the

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ AP, *Reagan Asks Study Of How U.S. Policy Affects the Family*, NY TIMES, SEPT. 5, 1987, at 36 (noting that President Reagan signed the order while on vacation).

¹⁵¹ *Id.* When asked for an example of such “unintended consequences, Bauer pointed to “unmarried girls who receive benefits under the Aid to Families with Dependent Children program.” *Id.* He explained that “research showed that a girl who remains at home after having a child out of wedlock is unlikely to have another while girls who set up their own households 'end up having a second and a third out of wedlock.’”

¹⁵² Lee May and James Gerstenzang, *Federal Programs Must Assess Impact on Family*, LOS ANGELES TIMES, Sept. 4, 1987.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Memorandums of Governmentwide Family Policy; September 9, 1988, available at Ronald Reagan Presidential Library, <http://www.reagan.utexas.edu/archives/speeches/1988/090988a.htm>.

recommendations of the report mandated by the Executive Order.¹⁵⁶ The memoranda were addressed to the heads of eight different agencies and Departments.¹⁵⁷ The Presidential Memoranda tasked each named agency with carrying out specific “pro-family” recommendations.¹⁵⁸ For example, the Department of Health and Human Services was directed to, among other things, “[e]nsure that all human sexuality and family planning educational and informational materials developed for teens by Federal agencies and, to the extent permitted by law, grantees focus on promoting and encouraging abstinence.”¹⁵⁹ The Attorney General was required to develop a legislative proposal “requiring that no bill be reported to the Senate or House of Representatives by any Committee of either House unless such bill is accompanied by a Family Impact Statement.”¹⁶⁰ One recommendation that resulted in a lasting public policy change was the direction to the Secretary to study the feasibility of allowing a non-working spouse to make tax-deductible contributions to an IRA account.¹⁶¹

For the agencies covered by the Executive Order, the “pro-family” prescriptions presented yet another set of regulatory hoops for agency attorneys and policymakers to jump through, adding to a growing list of special concerns.¹⁶² Executive Order 12,606 remained in force until the second Clinton administration.¹⁶³ However, there is some question as to whether it was actively enforced after President Reagan left office. In 1992, its chief architect, Gary Bauer, complained that the Bush administration was not sufficiently enforcing the Executive

¹⁵⁶ Ronald Reagan, *Memorandums on Governmentwide Family Policy*, available at <http://www.presidency.ucsb.edu/ws/?pid=36344> (last visited Feb. 10, 2013).

¹⁵⁷ The memoranda were addressed to the Secretary of Agriculture, the Secretary of the Treasury, the Secretary of Health and Human Services, the Secretary of Housing and Urban Development, the Secretary of the Treasury, the Attorney General, the Director of Personnel Management, and the Chairman of the National Drug Policy Board. *Id.*

¹⁵⁸ The Memoranda directed the agencies to submit status reports to Bauer, who by that time was Assistant to the President for Policy Development. *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² The growing list of special concerns includes: federalism, takings, small businesses, environmental impact.

¹⁶³ Exec. Order 13,045, 62 Fed. Reg. 36,965 (1997).

Order.¹⁶⁴ Bauer told *The New York Times* that “[t]he Bush Administration has not been foolish enough to repeal the executive order, but I don’t believe that anybody at the White House or the Office of Management and Budget is enforcing it.”¹⁶⁵

When the Clinton White House was faced with pressure from the Government Accountability Office to ensure adequate enforcement of existing regulations and increased demands for Congressional oversight, it evaluated Executive Order 12,606 alongside two other Reagan-era Executive Orders that were chronically under enforced, Executive Order 12,612 on federalism and Executive Order 12,630 on takings.¹⁶⁶ In 1997, President Clinton revoked and revised Executive Order 12,612 on federalism,¹⁶⁷ but did not touch Executive Order 12,630 on takings and the government role in property rights.¹⁶⁸ He also unceremoniously revoked Executive Order 12,606 as part of an Executive Order addressing children’s health and the environment.¹⁶⁹ Conservative groups used this rescission as an example of President Clinton’s larger failure to protect the structure and well being of the “traditional family.”¹⁷⁰ Following revocation of Executive Order 12,606, Senator Jeff Sessions (R-AL) stated:

The elimination of President Reagan's Executive Order is just the latest in a series of decisions that indicates the Clinton administration’s very different approach to family issues. From the outset of President Clinton's first term, it became clear that his administration intended to pursue policies sharply at odds with traditional American moral principles. White House actions have ranged from the

¹⁶⁴ Robert Pear, *Family Values: Hard to Define, Harder to Afford*, June 7, 1992, NY TIMES.

¹⁶⁵ *Id.*

¹⁶⁶ Material Addressing Clinton Response to Reagan Executive Orders; August 13, 1996, available at the William J. Clinton Presidential Library, Kagan Counsel, Box 024—Folder 005, http://www.clintonlibrary.gov/_previous/KAGAN%20COUNSEL/Counsel%20-%20Box%20024%20-%20Folder%20005.pdf. (last visited February 16, 2013).

¹⁶⁷ Exec. Order 13,132, 3 C.F.R. 206 (2000), reprinted in 3 U.S.C. § 301 (2006).

¹⁶⁸ Exec. Order No 12,630, 53 FR 8859 (1988).

¹⁶⁹ Exec. Order 13,045, 62 FR. 36,965 (1997). The new Executive Order required federal agencies to identify and assess environmental health risks that could disproportionately impact children. *Id.*

¹⁷⁰ Patrick F. Fagan, *How Clinton is Killing A Family-Friendly Federal Policy* (May 29, 1997) available at <http://www.heritage.org/research/reports/1997/05/how-clinton-is-killing-a-family-friendly-federal-policy> (last visited Feb. 16, 2013).

incorporation of homosexuals into the military to the protection of partial birth abortion procedures.¹⁷¹

Removing the normative and exclusionary analysis of Executive Order 12,606 from federal policy development was seen by “pro-family” conservatives as just more of the same the Clinton White House. At least one conservative commentator urged Congress to take action and address “the erosion of the family and its consequences for children.”¹⁷² He argued that the “continuing breakdown of the American family, with staggering levels of out-of-wedlock birth, divorce, child abuse, and abandoned children, threatens the future stability of America’s communities.”¹⁷³

C. Legislative Control and “Pro-Family” Rulemaking.

Although the revocation of Executive Order 12,606 did not garner much mainstream media attention or outrage, there was a considerable outcry among conservatives, and Congress responded quickly.¹⁷⁴ In June of 1997, Senator Spencer Abraham (R-MI) introduced The Family Impact Statement Act of 1997 to reinstate the language of Executive Order 12,606.¹⁷⁵ The Act required agencies to provide a certification to Congress that any proposed actions that may have a significant impact on the family have been evaluated and determined to enhance the family.¹⁷⁶ Senator Abraham characterized the revocation of Executive Order 12,606 as an “unnecessary and uncalled for blow” against American families by President Clinton.¹⁷⁷ Senator Abraham argued that reinstating the Executive Order through legislation was the only way to protect the

¹⁷¹ *Family Impact Statement Act of 1997*, S. 891, 105th Cong., 143 CONG. REC. S.5738 (1997). Senator Jeff Sessions describing support for the Family Impact Statement of 1997, available at: <http://www.gpo.gov/fdsys/pkg/CREC-1997-06-17/pdf/CREC-1997-06-17-pt1-PgS5738.pdf>.

¹⁷² Fagan, *supra* note 170.

¹⁷³ *Id.* Senator Sessions said that the “Clinton approach to family policy” was “inspired by First Lady Hillary Clinton’s notion that ‘it takes a village’ to raise a child.” *Id.* It may seem “to offer benign help, but invariably ends up with government bureaucracies controlling much of family life.” *Id.*

¹⁷⁴ Fagan had proposed a date of September 2, 1997 for Congressional action – one decade after the issuance of the original Executive Order. Fagan, *supra* note 170.

¹⁷⁵ The Family Impact Statement Act of 1997, S. 891 June 12, 1997

¹⁷⁶ *Id.*

¹⁷⁷ Statement of Senator Abraham, 143 CONG. REC. S.5596-5621, S5605 (June 12, 1997), available at: <http://www.gpo.gov/fdsys/pkg/CREC-1997-06-12/pdf/CREC-1997-06-12-senate.pdf>.

American family from government policies and programs.¹⁷⁸ In a seeming direct response to then-First Lady Hilary Clinton’s notion that “it takes a village” to raise a child,¹⁷⁹ Senator Abraham asserted that “more than any Government program, America’s children are protected, nurtured and given the means they need to lead good lives by their families.”¹⁸⁰ In stark contrast to the findings of the 1973 Senate subcommittee hearing that embraced diverse family structure and stressed the importance of community, Senator Abraham concluded that, “[n]o national village can replace the constant care and attention of parents.”¹⁸¹

In July 1998, Senator Abraham reintroduced the reinstatement of the Family Impact Statement Act as an amendment to the Treasury and General Appropriations Act of 1999.¹⁸² Echoing the language of the original Executive Order 12,606, the amendment requires agencies to assess the same seven points outlined in the Executive Order, including whether the proposed action “strengthens or erodes the stability or safety of the family and, particularly, the marital commitment.”¹⁸³ It also requires agencies to determine whether proposed rulemaking “strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children,”¹⁸⁴ and whether it “increases or decreases disposable income or poverty of families and children.”¹⁸⁵ Where a proposed action could potentially impact family “well-being,” the amendment requires agencies to submit a written “Family Assessment

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* Speaking in support of the bill, Senator Sessions said, “many have suggested it is community villages, in other words Government, that raise children. But the real truth is, families raise children. Families are the ones who are there night and day to love, to care for, and to nurture children.” Statement of Senator Sessions, 143 CONG. REC. S5738 (June 17, 1997).

¹⁸¹ *Id.* The Act included little discussion on the floor, despite having 10 co-sponsors, and was referred to committee.

¹⁸² S.AMDT.3362 to S.2312 Treasury and General Government Appropriations Act, 1999, added July 29, 1998.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

Certification” to OMB and Congress providing an “adequate rationale” for implementation of the rule despite its negative impact on families.¹⁸⁶

Senator Paul David Wellstone (D-MN), introduced an accompanying amendment, entitled the Family Well-Being and Children Impact Statement.¹⁸⁷ Senator Wellstone’s amendment would have required any legislative action to include a similar statement on the impact of the bill or resolution not only on family well-being, but specifically with respect to children, including whether the action would increase the number of children who are hungry or homeless.¹⁸⁸ The Wellstone amendment was dropped from the final appropriations language.¹⁸⁹ The Abraham amendment was incorporated into the final omnibus appropriations bill as a general provision and remains in effect today.¹⁹⁰

IV. THE FAMILY IMPACT ASSESSMENT IN PRACTICE

The longevity of the family assessment statement may be surprising, especially given that it reflects “pro-family” values that are exclusionary and seem out of step with today’s increasing awareness of (and appreciation for) diverse family forms.¹⁹¹ It persists as a strong normative statement of what a family should be and perpetuates the myth of a “traditional” American family.¹⁹² As noted above, the “pro-family” directive of Executive Order 12,606 carried considerable weight during the Reagan administration, but it remains unclear whether the family

¹⁸⁶ *Id.*

¹⁸⁷ S.AMDT.3373 to S.2312 Treasury and General Government Appropriations Act, 1999, added July 28, 1998.

¹⁸⁸ *Id.*

¹⁸⁹ *See* Treasury and General Government Appropriations Act, 1999 (P.L. 105-277, 5 U.S.C. § 601).

¹⁹⁰ Section 654 of the Treasury and General Government Appropriations Act, 1999 (P.L. 105-277, 5 U.S.C. § 601 note); Implemented by Memorandum for Heads of Executive Departments, Agencies, and Independent Establishments; available at: <http://www.fws.gov/policy/library/rglew.pdf>.

¹⁹¹ In his 2013 State of the Union speech, President Obama explicitly acknowledged LGBT civil rights in reference to equal access to economic opportunity and equal benefits for the families of LGBT service members. Remarks by the President in the State of the Union Speech, February 12, 2013, available at: <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

¹⁹² COONTZ, *supra* note 11, at 8 (describing “traditional family”).

assessment certification continues to influence policymaking in a meaningful way.¹⁹³ This Section looks at the family impact statements in practice, detailing instances where agencies addressed the different “pro-family” directives. It also examines the general shortcomings of an assessment approach as applied to family policymaking and considers the various ways that the current “pro-family” lens excludes and silences the needs of the many and varied faces of the American family.

A. *The Silencing Effect of the Family Impact Statement*

As noted in Part III, Executive Order 12,606 led to a series of Presidential Memoranda, outlining a number of potential reforms that ranged from spousal IRA deductions to abstinence-only education in public schools.¹⁹⁴ In addition to these Presidential memoranda, numerous regulations of the period include the boilerplate recitation that they comply with the requirements of Executive Order 12,606.¹⁹⁵ There does not appear to be much evidence that the agencies in question applied a rigorous analysis when assessing the potential impact of policy on family well-being. For example, 1988 regulations issued by the Department of Health and Human Services on adoption assistance provided that

¹⁹³ See STEVEN K. WISENSALE, FAMILY LEAVE POLICY: THE POLITICAL ECONOMY OF WORK AND FAMILY IN AMERICA 42 (2001) (“As a policy tool, however, the Family Impact Statement, faded after Reagan’s second term”).

¹⁹⁴ See *supra* notes 157-161 and accompanying text (describing the Presidential memoranda).

¹⁹⁵ For example, a 1994 proposed amendment to the regulations governing the immigrant visa petition process simply provided: “The Commissioner of the Immigration and Naturalization Service certifies that she has assessed this rule in light of the criteria in Executive Order 12606 and has determined that this regulation will have no adverse effect on family well-being.” Immigration Service, Department of Justice, *Requests for Addition Support for Immigrant Visa Petitions*, 59 FR 36729 – 36730, July 19, 1994. A 1995 interim rule issued by the Department of Housing and Urban Development used a slightly longer recitation:

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this interim rule will not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the order. No significant change in existing HUD policies or programs will result from promulgation of this interim rule, as those policies and programs relate to family concerns.

Department of Housing and Urban Development, *Home Equity Conversion Mortgage Insurance Demonstration: Streamlining the Demonstration and Allowing Use of the Direct Endorsement Program*, 60 Fed. Reg. 42754, Aug. 16, 1995.

We believe these proposed regulations will serve to strengthen and preserve family life and send a message of support and encouragement to all families who adopt children with special needs. This proposed regulation should have a significant positive impact in matters related to the family. *Although no precise figures are available*, as many as 20,000 families may receive reimbursement under this program for costs related to adopting special needs children.¹⁹⁶

Even where the proposed agency action disclosed a potentially negative impact on family well-being, it was not clear how the assessment was made or the cost-benefit analysis performed. For example, when the Department of Housing and Urban Development announced its *Fair Housing Accessibility Guidelines*, it reported in the Notice of Proposed Rulemaking that the proposed action might have a negative impact on families.¹⁹⁷ The Notice of Proposed Rulemaking did not attempt to quantify the extent of any potential negative impact, but nonetheless concluded that the potential benefits of the new *Fair Housing Accessibility Guidelines* outweighed any negatives.¹⁹⁸ The Notice of Proposed Rulemaking read:

The General Counsel, as the Designated Official under Executive Order No. 12606, The Family, has determined that this notice will likely have a significant beneficial impact on family formation, maintenance or well-being. Housing designed in accordance with the Guidelines will offer more housing choices for families with members who have disabilities. Housing designed in accordance with the Guidelines also may be beneficial to families that do not have members with disabilities. For example, accessible building entrances, as required by the Act and implemented by the Guidelines, may benefit parents with children in strollers, and also allow residents and visitors the convenience of using luggage or shopping carts easily. Additionally, with the aging of the population, and the increase in incidence of disability that accompanies aging, significant numbers of people will be able to remain in units designed in accordance with the Guidelines as the aging process advances. Compliance with these Guidelines may also increase the costs of developing a multifamily building, and, thus, may increase the cost of renting or purchasing homes. Such costs could negatively affect

¹⁹⁶ Department of Health and Human Services, *ACF Nonrecurring Expenses, Adoption Assistance - Title IV-E*, Program Regulation; Dec. 23, 1988, Pr-99-02 [emphasis added] available at <http://www.acf.hhs.gov/sites/default/files/cb/pr8802.pdf> (last visited Feb. 16, 2013).

¹⁹⁷ Department of Housing and Urban Development, *Fair Housing Accessibility Guidelines*, Mar. 6, 1991, 56 Fed. Reg. 9472, available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/disabilities/fhfhag (last visited Feb. 16, 2013) (noting both positive and negative potential impact on families).

¹⁹⁸ *Id.*

families' ability to obtain housing. However, *the Department believes that the benefits provided to families by housing that is in compliance with the Fair Housing Amendments Act outweigh the possible increased costs of housing.*¹⁹⁹

After the Family Impact Statement was enacted as part of the Treasury and Government Appropriations Act of 1999,²⁰⁰ OMB sent a memorandum to all agency heads, explaining that the law “is not a new provision,” but is “intended to reinstate Executive Order 12,606.”²⁰¹ Agencies were directed to use the same procedures that they had followed when the Executive Order was in effect.²⁰² The only thing that changed was the reference to the controlling law. A 2013 Notice of Proposed Rulemaking from the National Credit Union Administration (NCUA) provides a good example.²⁰³ It simply states: “NCUA has determined that this final rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.”²⁰⁴

The absence of analysis, even when the potential for negative impact is disclosed, is consistent with the nature of the family assessment requirement as adopted in Executive Order 12,606 and the Treasury and Government Appropriations Act of 1999. The family assessment requirement is not quantitatively based. There are no directions or guidelines regarding how to measure family well-being or how to engage in a meaningful cost-benefit analysis.²⁰⁵ Instead, the family assessment requirement is constructed around a strong normative vision of the “traditional” American family that is more aspirational than reality-based. Its prescriptive nature does not consider families as they are, but rather as they should be. As such, it is impossible to

¹⁹⁹ *Id.*

²⁰⁰ Public Law 105–277, 112 Stat. 2681 (1998) 5 U.S.C. 601 note.

²⁰¹ Jacob J. Lew, Director Office of Management and Budget, *Memorandum for Heads of Executive Departments on Assessment of Federal Regulations and Policies on Families*, Jan. 26, 1999, available at <http://www.fws.gov/policy/library/rglew.pdf> (last visited Feb. 16, 2013).

²⁰² *Id.*

²⁰³ NCUA, *Prompt Corrective Action, Requirements for Insurance, and Promulgation of NCUA Rules and Regulations*, 78 Fed. Reg. 4032, Jan. 10. 2013.

²⁰⁴ *Id.* at 4037.

²⁰⁵ *Supra* note 57.

establish a measurable baseline, and policymakers are expected to know a family when they see one.

The subjective value-laden character of the family assessment invites the very type of orthodoxy that the witnesses spoke out against at the 1973 Senate subcommittee hearing. On one hand, many contemporary families will not satisfy the “pro-family” vision of who qualifies as a family. As a result, they will be left out of policy considerations and any impact on their well-being will not be considered. However, there is also the possibility of a more aggressive construction. The *Family Report* neatly divided the world into families and problems.²⁰⁶ According to the “pro-family” perspective, a divorced couple, a single-parent headed household, and a same-sex couple are all problems.²⁰⁷ Not only will the family assessment process refuse to measure their well-being, but there could be instances where policy would actually target the “problem” in order to bolster the status and security of real families everywhere.²⁰⁸ Under this thinking, divorce would be more difficult to obtain, potentially trapping individuals in unhealthy situations.²⁰⁹ The formation of single-parent headed families would be discouraged by restricting their ability to qualify for certain benefits.²¹⁰ Same-sex relationships would also be discouraged and certainly not legally recognized.²¹¹

Given the current political climate, some of these more extreme examples are increasingly less likely and more remote, but the continuing vitality of the family assessment

²⁰⁶ *The Family*, *supra* note 6.

²⁰⁷ *See e.g. Id.* at 13. In discussing the rising divorce rate, the report quotes sociologist Amitai Etzioni citing, “If we continue to dismantle our American family at the accelerating pace we have been doing since 1965, there will not be a single American family left by the year 2008.”

²⁰⁸ *See supra* note 144 and accompanying text.

²⁰⁹ *The Family*, *supra* note 6 at 13-14. The report cites the easing of divorce laws and increased access to no-fault divorce as the cause of increased desertion and impoverishment. The report specifically calls for citizens to “demand the alteration of those laws which have allowed, even encouraged, the dissolution of the family” *Id.*

²¹⁰ *See supra* notes 150-151 and accompanying text.

²¹¹ *The Family* addresses the threats of “alternative lifestyles” and the spread of HIV/AIDS, but does not explicitly mention same-sex marriage. At the time of publication, no state recognized same-sex marriage, although some municipalities and employers had started to extend benefits to “domestic partners.”

requirement can still have a silencing and exclusionary impact.²¹² By favoring policies that focus on the preservation of traditional different-sex, two-parent families, the “pro-family” policymaking assessments strongly discourage rulemaking and policies that would benefit non-traditional families, including multigenerational, single-parent, or LGBT families.²¹³ These excluded families, however, are often the most vulnerable and the most in need of assistance. For example, despite growing incidents of divorce, kinship families, and nonmarital children, the family impact statement specifically requires agencies to be wary of policies that undermine the “marital commitment.”²¹⁴ In practice, this could include policies and programs that provide support for the children of single parents, or even federal resources for victims of marital violence—as both would undoubtedly make leaving a violent marriage or raising a child alone less difficult.

In addition to statements regarding the marital commitment and the autonomy of the family, the use of norm-based language regarding youth is similarly troublesome.²¹⁵ Agencies are required to evaluate whether an “action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.”²¹⁶ This provision should require agencies to ask two vital questions: “Whose norms?” and “What society?” However, without guidance, this vague mandate leaves agencies with little

²¹² Despite increased progress towards greater inclusivity across federal agencies, exclusionary efforts persist, for example, the House Bipartisan Legal Advisory Group continues to defend the Defense of Marriage Act (DOMA).

²¹³ See *supra* note 190, the provision regarding the “Assessment of Federal Regulations and Policies on Families” defines a family as, “(A) a group of individuals related by blood, marriage, adoption, or other legal custody who live together in a single household; B) any individual who is not a member of such group but who is related by blood, marriage, adoption to member of such group, and over half of whose support in a calendar year is received from such group.”

²¹⁴ *Id.*

²¹⁵ *Id.* The “Family Impact Statement” provision requires agencies to assess whether, “the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society” *Id.*

²¹⁶ *Id.*

incentive to ask these questions. When taken in context with Executive Order 12,606 and the *Family Report*, it is also clear that the baseline “norms of society” are “traditional values.”²¹⁷

The norm requirement could be a substantial hindrance, especially in the development of policy aimed at youth. Services and programs for youth must be forward thinking to reflect the changing needs and perspectives of today’s young people. For example, the Administration of Children and Families (ACF) at the Department of Health and Human Services, has recently made great strides in identifying the source of homelessness for youth, specifically youth that identify as LGBT.²¹⁸ Through a research-based approach, ACF has begun the process of designing programs and interventions to better meet the needs of these youth and their families.²¹⁹ The Department of Education (DOE) is also developing cutting-edge policies to protect young people who experience bullying and discrimination in the school setting because of their gender expression.²²⁰ Despite these cutting edge policies, ACF and DOE are legally required to filter their work through the static, normative lens of the family policymaking assessment process.²²¹ It is clear from the legislative history, as well as the *Family Report*, that an affirming, inclusive approach to serving LGBT youth would violate the “pro-family” mandate that agencies must consider “the personal responsibility of youth and norms of society”²²² and actions “that erode the authority and rights of parents.”²²³ Measuring policies such as this against the “pro-family” myth of a “traditional” family means that real, life-saving policies are being evaluated against a narrow and exclusionary vision of the American family. The backward

²¹⁷ *The Family*, *supra* note 6.

²¹⁸ A recent example of this work is the publication of *The Economic Well-Being of LGB Youth Transitioning Out of Foster Care*, available at <http://www.acf.hhs.gov/programs/opre/resource/the-economic-well-being-of-lgb-youth-transitioning-out-of-foster-care> (last visited February 16, 2013).

²¹⁹ *Id.*

²²⁰ *See, e.g.* Dear Colleague’s Letter, U.S. Department of Education, October 26, 2010 (providing guidance for gender-based discrimination due to sex stereotyping and sexual orientation).

²²¹ 5 U.S.C. § 601 note.

²²² *Id.*

²²³ *Id.*

looking assessment imposed by the family impact statement has no place in federal family policymaking.

B. Measuring Family Well-Being

As adopted, the family assessment requirement imposed by Executive Order 12,606 and the impact statement did not provide any direction or guidance regarding how an agency should measure the impact of a proposed action on family well-being. Instead, agencies are instructed to consider seven illustrative points that attempt to evaluate “marital commitment,” “parental authority,” and “personal responsibility,” presumably in order to assess “family well-being.”²²⁴ If an agency determines that a proposed action “may negatively affect family well-being,” it is only required to provide an adequate rationale for implementation of [the] policy or regulation.²²⁵ It is clear from the seven enumerated points of inquiry, the narrow statutory definition of family in the statute, and the history of the *Family Report* that the primary purpose of the family assessment requirement was to protect the “traditional” American family at the expense of other families.

Several states have also adopted family policymaking impact statements or assessments.²²⁶ In 2012, the governor of Indiana campaigned on the “pro-family” promise that he would mandate family impact statements for new regulations.²²⁷ One of his first official acts in office was to issue an Executive Order to ensure that state agencies “do not disregard or disadvantage the formation of intact married families.”²²⁸ He specifically directed agencies to recognize “the economic advantages that intact married families offer children.”²²⁹

²²⁴ Act Oct. 21, 1998, P.L. 105-277, Div A, § 101(h) [Title VI, § 654], 112 Stat. 2681-528.

²²⁵ Act Oct. 21, 1998, P.L. 105-277, Div A, § 101(h) [Title VI, § 654], 112 Stat. 2681-528 (d)(1)(B).

²²⁶ *Id.*

²²⁷ Randy McClain, *Orders Of The Day; Pence Directives Focus On Ethics, Family, Veterans, Cutting Red Tape*, BLUFFTON NEWS-BANNER, Jan. 16, 2013, at 9.

²²⁸ Indiana Exec. Order No. 13-05, Jan. 14, 2013, available at http://www.in.gov/gov/files/EO5_01142013.pdf (last visited Feb. 17, 2013). The Indiana Executive Order requires an agency to explain why a proposed action that may

Other countries have also experimented with family impact statements, but the proposals have largely not been enacted or not enforced.²³⁰ In 2004, John Howard, the Prime Minister of Australia acceded to the demands of a small conservative party, Family First, and agreed to prepare “family impact statements” on all party policies and major government actions.²³¹ The Prime Minister called his decision “a historic moment for Australian families.”²³² He also made it clear that, for purposes of these impact statements, a “family unit is a mum and dad and children.”²³³ Several years later, Prime Minister Howard was roundly criticized when he took the position that family impact statements were “secret” and not discoverable through freedom of information claims.²³⁴ By 2012, the Australian media referred to the promise of family impact statements as “largely forgotten.”²³⁵

In the United States, it is also possible to say that family impact statements have been “largely forgotten” – at least on the federal level. Apart from its signaling value, it is not clear whether the family policymaking assessment has had much of an impact on federal policy since the Reagan administration and even then the impact was thought to be negligible.²³⁶ Perhaps the larger tragedy of the family assessment initiatives is that they were never equipped to actually

negatively affect the family is “necessary,” raising the bar considerable from the federal standard of “an adequate rationale.” *Id.*

²²⁹ *Id.*

²³⁰ For example, the Christian Democrat party in New South Wales has tried unsuccessfully to pass legislation establishing a Family Impact Commission since the 1990s. Luis M. Garcia, *Nile Knows How Far to Tip the Balance of Prayer*, SYDNEY MORNING HERALD, June 27, 1991, at 3 (describing attempt to create a “family impact commission”). Liberal attempts to pass such legislation date to 1988. *Id.*

²³¹ AAP Newsfeed, *Howard Meets with Family First*, Oct. 6, 2004. He noted that they currently prepared “regional impact statements, business impact statements, financial impact statements.” *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ Kelvin Bissett, *Top Secret Clamp on Family Impacts*, DAILY TELEGRAPH (SYDNEY), Oct. 8, 2005, at 8.

²³⁵ *The Politics of Pointless Gesture*, CANBERRA TIMES, Jan. 7, 2012, at A19.

²³⁶ The fact that an exclusionary normative regulatory safeguard remains on the books is arguably insulting to millions of American families who do not conform to the law’s vision of the “traditional” American family. Its narrow definition of family reflects contested values of another time and could conceivably prevent agencies from promoting the well being of all American families. See WISENSALE, *supra* note 193, at 42 (noting influence “faded”).

influence or inform policy making. Not only did they fail to engage all families, they were unable to measure or assess “family well-being” in any meaningful way.

The original quantitative proposals of the 1970s had talked about trying to build more informed and inclusive family policy through data collection and public welfare assessments.²³⁷ Their attempt to capture a macro view of family life was replaced with the normative “pro-family” vision that sought to measure questions of authority, commitment, and responsibility within individual families.²³⁸ Although the current family impact statement mandated by Congress is hopelessly under-inclusive, value-laden, and vague, the question remains whether a more data-driven model of family assessment could inform policymaking and better protect the interests of American families.

Beyond the “pro-family” interest in social engineering, there are two driving forces behind the adoption of a family assessment tool to assist in policy development. They are 1) the renewed push for evidence-based policy outcomes,²³⁹ and 2) the persistent desire to avoid unintended consequences.²⁴⁰ The latter concern was voiced by the witnesses before the 1973 Senate subcommittee hearings,²⁴¹ as well as by “pro-family” activists during the 1980s.²⁴² The obvious remedy for unintended consequences is to insure that policymakers address family well-being when considering any major governmental action, but this recommendation begs the question regarding how best to measure family well-being.

As discussed in Part one, the FIS has been working on the question of how to conduct a

²³⁷ *American Families: Trends and Pressures: Hearing Before Subcomm. on Children and Youth of the S. Com. on Labor and Public Welfare*, 93d Cong. 124 (1973).

²³⁸ *Supra* note 190.

²³⁹ See generally KAREN BOGENSCHNEIDER AND THOMAS CORBETT, EVIDENCE-BASED POLICYMAKING: INSIGHTS FROM RESEARCH ORIENTED POLICYMAKERS AND POLICY-ORIENTED RESEARCHERS (2010).

²⁴⁰ *The Family*, *supra* note 6.

²⁴¹ *American Families: Trends and Pressures: Hearing Before Subcomm. on Children and Youth of the S. Com. on Labor and Public Welfare*, 93d Cong. 124 (1973).

²⁴² *Id.*

family policymaking assessment since 1976.²⁴³ At the outset, it is important to distinguish “impact assessment” from cost-benefit analysis, which is an increasingly popular regulatory tool.²⁴⁴ Regardless of one’s view on the neutrality or usefulness of cost-benefit analysis, the type of impact assessment envisioned by family advocates differs from its more famous cousin in a number of important ways.²⁴⁵ Social impact assessment has been adopted in many developed nations, especially those in Western Europe.²⁴⁶ The definition of social impact assessment used by the International Association for Impact Assessment provides:

Social impact assessment includes the processes of analyzing [sic], monitoring and managing the intended and unintended social consequences, both positive and negative, of planned interventions (policies, programs, plans, projects) and any social change processes invoked by those interventions. Its primary purpose is to bring about a more sustainable and equitable biophysical and human environment.²⁴⁷

The FIS has developed a holistic assessment method for family policymaking that examines outcomes in ways that extend beyond a conventional cost-benefit analysis.²⁴⁸ The result is referred to as a “family lens:”

A family impact analysis provides a systematic way to examine a program or policy from a family perspective in order to illuminate how it benefits families, where it has gaps in family support, and how it might be improved to support family well-being. The family impact lens is meant to provide a balanced,

²⁴³ See, About Us, Family Impact Seminars, at <http://familyimpactseminars.org/index.asp?p=2&page=about>.

²⁴⁴ It is easy to confuse given the importance of cost benefit analysis in environmental law and the fact that the family policymaking assessment was originally based on the environmental model. See David M. Driesen, *Is Cost-Benefit Analysis Neutral?* 77 U. COLO. L. REV. 335 (2006) (exploring cost-benefit analysis and its place in environmental law). See also John D. Graham, *Saving Lives Through Administrative Law And Economics*, 157 U. PA. L. REV. 395 (2008) (former director of Office of Information and Regulatory Affairs).

²⁴⁵ Susan Rose Ackerman, *Putting Cost-Benefit Analysis in Its Place: Rethinking Regulatory Review*, 65 U. MIAMI L. REV. 335, 337 (explaining that impact assessment is “not quite the same thing as cost benefit analysis”).

²⁴⁶ ANDREA RENDA, *IMPACT ASSESSMENT IN THE EU* (2006); Jonathan B. Wiener, *Better Regulation in Europe*, 59 CURRENT LEGAL PROBS. 447 (2006).

²⁴⁷ International Association for Impact Assessment, *Social Impact Assessment: International Principles* (2003), available at http://www.iaia.org/publicdocuments/Pubs_Ref_Material/sp2.pdf (last visited Feb. 17, 2011).

²⁴⁸ In the case of family policy, there is a strong argument to be made that cost-benefit analysis is inappropriate and ill-suited to measure them many intangibles that comprise family well-being. See Ackerman, *supra* 244, at 351 (arguing cost-benefit analysis should not be used for “policies which serve other goals, such as fairness or poverty alleviation, and those that have macroeconomic consequences that are large, multigenerational, and potentially irreversible”)

objective, and educational examination of how a program or policy affects families from a nonpartisan standpoint.²⁴⁹

The family impact analysis can involve empirical research, qualitative review of existing research, and interviews.²⁵⁰ It asks a series of questions organized around the five core principals of family: responsibility, stability, relationships, diversity, and engagement.²⁵¹

Although FIS has declined to establish a set definition of “family,” it recognizes a general structural definition (i.e., blood, marriage, and adoption), as well as a functional definition (i.e., groups of unrelated individuals who function as a family or fulfill family roles).²⁵²

The FIS family impact analysis offers one way to evaluate the effect of policy on family well-being,²⁵³ but it is by no means the only way to ensure that policy is responsive to the needs of families and does not work to their disadvantage.²⁵⁴ The primary innovation of Executive Order 12,606 and the family impact statement legislation was that they required policymakers to consider the well-being of families before taking action. In other words, these measures gave families a seat at the table and required policymakers to take notice. The next step would be to require (or at least encourage) policymakers to engage in meaningful assessments of the impact of proposed actions on families. The exact contours of such an assessment are far beyond the scope of this Article,²⁵⁵ but it is essential to adopt a broad definition of families in order to capture the reality of family life as it is lived and experienced by all Americans. Until then, notices of proposed rulemaking will continue to recite compliance with an outmoded and ineffectual “pro-family” analysis, and the needs of families will continue to go unaddressed.

²⁴⁹ Kristin Abner and Rachel A. Gordon, *Differential Response: A Family Impact Analysis* (2012), available at http://www.familyimpactseminars.org/fia_analyses_drfa.pdf (last visited Feb 17, 2013)

²⁵⁰ *Id.* at 7.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ See *supra* note 247 (discussing whether cost-benefit analysis is appropriate for certain value-based policy assessments).

²⁵⁵ For example, it is also essential to adopt a methodology that is easy to administer.

V. CONCLUSION

The current family impact statement evolved from a progressive template for inclusive policymaking to a “pro-family” regulatory filter designed to promote and protect the “traditional” American family. The capture of this progressive proposal by “pro-family” policymakers was consistent with the shifting ideological sentiments of the 1980s. Despite its potential danger posed to families who do not satisfy the view of the “traditional” family, the real danger may be the fact that the family impact statement was never equipped to engage in any genuine analysis. It was a politically motivated signal to appease the conservative base of Republican electorate. In order for families and family well-being to be taken seriously, there must be a sustained and evidence-based analysis of the impact of policies on “family well-being.” Only then will the needs of families be truly integrated in the regulatory and administrative process.