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## **GONZALES V. CARHART AND THE HAZARDS OF MUDDLED SCRUTINY**

*David D. Meyer\**

The Supreme Court's decision in *Gonzales v. Carhart*,<sup>1</sup> upholding the federal Partial-Birth Abortion Ban Act of 2003, has incited both passion and puzzlement. The passions are readily understandable. The case was, after all, the new Roberts Court's first pass at what is commonly taken to be "the most divisive issue in America."<sup>2</sup> And the Court's five-to-four decision only magnified the drama by producing several additional "firsts." *The Washington Post*, for example, observed that, "[f]or the first time since the court established a woman's right to an abortion in 1973, the justices said the Constitution permits a nationwide prohibition on a specific abortion method."<sup>3</sup> Justice Ginsburg, in a blistering dissent which she read aloud from the bench, emphasized that "for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health."<sup>4</sup>

Advocates on both sides of the abortion question saw the decision as a turning point.<sup>5</sup> Opponents of abortion hailed the

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\*Professor of Law, University of Illinois College of Law. I am grateful to Mike Cahill, Marsha Garrison, Nan Hunter, Karen Porter, and the other participants at Brooklyn Law School's March 2008 symposium, *The "Partial-Birth Abortion" Ban: Health Care in the Shadow of Criminal Liability*, as well as to the editors of the *Journal of Law and Policy*.

<sup>1</sup> 127 S. Ct. 1610 (2007).

<sup>2</sup> JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 74 (Penguin Group 2007).

<sup>3</sup> Mark Sherman, *Justices Uphold Abortion Procedure Ban*, WASH. POST, Apr. 19, 2007.

<sup>4</sup> *Carhart*, 127 S. Ct. at 1641 (Ginsburg, J., dissenting).

<sup>5</sup> See Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of*

decision as “the most monumental win on the abortion issue that we have ever had.”<sup>6</sup> Many supporters of abortion rights saw the decision as equally momentous. The Court’s willingness to uphold the federal ban on “partial birth” abortions, having effectively wiped thirty similar state laws off the books just seven years earlier in *Stenberg v. Carhart*,<sup>7</sup> was certainly striking. Leroy Carhart, the Nebraska physician who had now twice given his name to Supreme Court landmarks, warned that the decision appeared to “open[] the door to an all-out assault” on *Roe*.<sup>8</sup> The four dissenters agreed, lamenting that “[t]he Court’s hostility to the [abortion] right . . . is not concealed.”<sup>9</sup>

The initial assessments may have exaggerated *Carhart*’s immediate impact on abortion; because the method of abortion proscribed by the federal Act was exceedingly rare to begin with, the practical consequences for doctors and patients have been limited.<sup>10</sup> Yet, quite apart from *Carhart*’s implications for *Roe*, the decision has provoked puzzlement over what it might mean for the future of constitutional privacy and substantive due process more generally. *Carhart* was not only the Roberts Court’s first abortion case, after all, but also its first significant encounter with unenumerated rights under substantive due process—including what John Roberts, before his nomination, had called “the so-called ‘right to privacy.’”<sup>11</sup> As much as the Court’s about-face

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*Constitutional Common Law*, 31 HARV. J.L. & PUB. POL’Y 519, 567 (2007) (observing that “[m]ost commentators agreed that *Gonzales* took a large step in the direction of eventually overturning *Roe*”).

<sup>6</sup> Sherman, *supra* note 3 (quoting Jay Sekulow, chief counsel of American Center for Law and Justice).

<sup>7</sup> 530 U.S. 914 (2003) (striking down Nebraska statute banning “partial birth abortion[s]”); *see id.* at 977, 979 (Kennedy, J., dissenting) (noting that the Court’s judgment effectively invalidated similar laws in thirty states).

<sup>8</sup> Sherman, *supra* note 3 (quoting Dr. Leroy Carhart).

<sup>9</sup> *Carhart*, 127 S. Ct. at 1650 (Ginsburg, J., dissenting).

<sup>10</sup> David J. Garrow, *Significant Risks: Gonzales v. Carhart and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 45 (concluding that “*Gonzales v. Carhart* has changed the law, politics, and medicine of abortion far less than most early observers hastily thought”); *see also* Pushaw, *supra* note 5, at 567–72 (emphasizing narrowness of *Carhart*’s holding).

<sup>11</sup> Adam Liptak, *Privacy Views: Roberts Argued Hard for Others*, N.Y.

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from *Stenberg*, some observers focused on the jarring difference in tone and outcome from the Court's 2003 decision in *Lawrence v. Texas*.<sup>12</sup>

*Lawrence* had seemed to signal a newly expansive approach to substantive due process in the course of striking down a criminal prohibition against same-sex intimacy. Justice Kennedy's rhetoric for the Court had soared in denouncing the government's encroachment on the "personal dignity and autonomy" of gays and lesbians.<sup>13</sup> Four years later in *Carhart*, human dignity again featured in Justice Kennedy's analysis but this time as a justification for state intervention limiting personal choice. "The Act," Kennedy wrote for the Court in sustaining the federal law, "expresses respect for the dignity of human life."<sup>14</sup> The dignity interests of women confronted with an unwanted pregnancy went largely unacknowledged; instead, as family law scholars Joanna Grossman and Linda McClain observed, "[a]bortions seem[ed] only, in the eyes of the Supreme Court, to involve the 'abortion doctor,' 'the fetus,' and 'the cervix.'"<sup>15</sup>

The juxtaposition of Kennedy's opinions in *Lawrence* and *Carhart* left some Court-watchers scratching their heads. Linda Greenhouse, the *New York Times*' veteran Supreme Court reporter, found it "hard to reconcile [Kennedy's] capacious understanding of the human condition in [*Lawrence*] . . . with the patronizing and counter-factual attitude toward women that suffuses his majority opinion in *Gonzales v. Carhart*."<sup>16</sup> Rich Lowry, editor of the *National Review*, was even more blunt. He accused Kennedy, the

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TIMES, Aug. 8, 2005, at A1.

<sup>12</sup> 539 U.S. 558 (2003).

<sup>13</sup> *Id.* at 574 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>14</sup> *Carhart*, 127 S. Ct. at 1633.

<sup>15</sup> Joanna Grossman & Linda McClain, *Gonzales v. Carhart: How the Supreme Court's Validation of the Federal Partial-Birth Abortion Ban Act Affects Women's Constitutional Liberty and Equality*, FINDLAW, May 7, 2007, [http://writ.news.findlaw.com/commentary/20070507\\_mcclain.html](http://writ.news.findlaw.com/commentary/20070507_mcclain.html) (last visited July 31, 2008).

<sup>16</sup> *Talk to the Newsroom: Supreme Court Reporter*, <http://www.nytimes.com/2008/07/business/media/14askthetimes.html>.

new pivot man on the Roberts Court, of “making it up as he goes along.”<sup>17</sup>

Still others have seen in *Carhart* not meandering, but a deliberate and fateful jurisprudential turn. Professor Steven Calabresi reads *Carhart* to mark a pointed retreat from *Lawrence*. “Justice Kennedy’s narrow, restrained approach to substantive due process in *Gonzales v. Carhart*, the blockbuster partial birth abortion case decided this past term,” he writes, “shows that he and four other Justices have recommitted themselves to the narrow, restrained approach of *Glucksberg* in substantive due process cases.”<sup>18</sup> After *Carhart*, Calabresi concludes, “*Lawrence* is void for vagueness.”<sup>19</sup>

This Article considers *Carhart*’s implications for future constitutional protection of unenumerated rights under the Constitution. There is no doubting that Kennedy’s opinion in *Carhart* sounds a very different theme from his work in *Lawrence*. In fact, as I explain more fully below, in some ways it might well be fair to describe *Carhart* as a sort of “Anti-*Lawrence*.” Yet, for all the differences in tone and focus, it appears that *Carhart* ultimately does not so much reject *Lawrence* as highlight an implicit weakness in its approach to protecting privacy rights. *Carhart*, after all, ultimately upholds the ban on “partial-birth abortions” not by denying that abortion is a constitutional right, but by finding the state’s imposition on that right to be reasonable. *Lawrence* had left the door open to just such limitations when it carefully carved out the question of marriage and other state laws conferring “formal recognition” on same-sex families.<sup>20</sup> In this sense, *Carhart* may provide a road map for further restrictions of constitutional liberties relating to family and intimate association

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<sup>17</sup> Rich Lowry, *America’s Worst Justice*, NAT’L REVIEW ONLINE, July 1, 2008, <http://article.nationalreview.com/?q=NDZhYmJkOWU1OWNiNTRINDVmYTVhMGViYzUxYzcyY2M=>.

<sup>18</sup> Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1518 (2008) (referring to *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

<sup>19</sup> *Id.*

<sup>20</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *id.* at 585 (O’Connor, J., concurring in the judgment).

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that might be found to be consistent with *Lawrence*. Instead of centering the fight on a threshold characterization of the liberty interest at stake as fundamental, *Carhart* shifts the weight of analysis to an outright balancing of state and private interests, ultimately guided by crucial facts supplied by the legislature. By this account, *Lawrence* and *Carhart* together suggest that future battles over the scope of constitutional protection for individual and family privacy will focus less on the boundaries of history and tradition, as Professor Calabresi supposes, and more on disputed questions of contemporary fact.

Part I of this Article sets the stage for *Carhart* by describing earlier developments in the Supreme Court's approaches to abortion and other family privacy rights. In 1992, the Court had differentiated abortion from other fundamental rights and assigned it a more qualified form of protection under the "undue burden" test. Yet subsequent decisions in 2000—including one that emerged from the Court's first meeting with Dr. Carhart—seemed to bring both lines of doctrine back toward common ground. Part II contends that *Lawrence v. Texas* appeared to confirm the new approach, defining the boundaries of substantive due process loosely in order to extend privacy protection more broadly, while providing the protected interests with a muddled form of intermediate scrutiny.

In Part III, I turn to the Court's opinion in *Gonzales v. Carhart*, acknowledging the ways in which *Carhart* might accurately be described as *Lawrence*'s "polar opposite."<sup>21</sup> Indeed, the contrasts between the decisions are strong enough that it is tempting to conclude that one of them must be an outlier. Yet, in Part IV, I suggest that both ultimately share a common inclination to resolve substantive due process disputes based on a relatively fluid balancing of competing private and public interests, while avoiding more categorical doctrinal solutions. In addition, *Carhart*'s readiness to defer to legislative fact-finding in striking that balance suggests that the focus of future court battles over same-sex marriage, adoption, and similar controversies is likely to be less on the bounds of "deeply rooted" tradition and history and more on

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<sup>21</sup> Calabresi, *supra* note 18, at 1521.

contemporary empirical claims about child welfare and family policy.

#### I. THE EMERGENCE OF MUDDLED SCRUTINY IN ABORTION AND FAMILY PRIVACY

By conventional understanding, fundamental rights under the Constitution are given maximum protection by the courts through the framework of strict scrutiny. This means that any substantial government burden on such a right is presumed to be unconstitutional, salvageable only if the state can prove that the burden is narrowly tailored to achieve a compelling public interest. The right of marital privacy recognized in *Griswold v. Connecticut* had been described as fundamental in this sense,<sup>22</sup> as had the right to abortion in *Roe v. Wade*.<sup>23</sup> And so strict scrutiny was commonly said to govern restrictions on abortion as well as on marriage, contraception, childrearing, and the other family-related privacy rights recognized by the Supreme Court.<sup>24</sup>

In reality, close observation revealed that the Court's review often strayed from this formal description. By the late 1980s, for example, it was clear that the Court had relaxed its scrutiny of abortion regulations. Rather than rigidly insisting upon "compelling interests" and "narrow tailoring," the Court essentially passed upon the "reasonableness" of individual regulations from case to case.<sup>25</sup> Something similar could be seen in the Court's cases dealing with other family-related liberties. Even when the Court squarely found burdens on fundamental rights to marry or to share a home with one's extended family, for example, the Justices sometimes muddied the waters in describing their scrutiny of the proffered state interests.<sup>26</sup> Nevertheless, constitutional protection

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<sup>22</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>23</sup> 410 U.S. 113, 155 (1973).

<sup>24</sup> See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.3 689 (7th ed. 2000).

<sup>25</sup> See Daniel A. Farber & John E. Nowak, *Beyond the Roe Debate: Judicial Experience with the 1980's "Reasonableness" Test*, 76 VA. L. REV. 519, 523 (1990).

<sup>26</sup> See NOWAK & ROTUNDA, *supra* note 24, at 689–90 (describing the

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for abortion and for other family privacy rights was treated alike and at least nominally described as maximal.

In 1992, however, this “Black Letter” law was substantially rewritten. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court narrowly turned back a frontal attack on the right to abortion, and to the surprise of many reaffirmed *Roe*’s “central holding.”<sup>27</sup> In doing so, however, the authors of *Casey*’s joint opinion, at least two of whom had long expressed skepticism about *Roe*’s validity,<sup>28</sup> resolved their misgivings by giving the abortion right a specially qualified status. A woman’s profoundly personal interest in making decisions concerning her pregnancy, *Casey* acknowledged, is of the same character as other fundamental “personal decisions relating to marriage, procreation,

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Justices’ descriptions of scrutiny of the proffered state interests); *see also* David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 537–48 (2000) (surveying case law and concluding that “the Court’s family-privacy cases leave considerable doubt about whether strict scrutiny is in fact the governing constitutional test”); Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment “Privacy” Law: An Essay on the Constitutionalization of Social Issues*, 51 L. & CONTEMP. PROBS. 79, 84 (1988) (observing that in its constitutional privacy cases “the Court often seems to be using standards somewhere between the classic rational-basis and compelling-state-interest standards”).

<sup>27</sup> 505 U.S. 833, 879 (1992); *see also* *Talk to the Newsroom*, *supra* note 16 (*New York Times* reporter Linda Greenhouse recently called *Casey* “[t]he most surprising decision” during her nearly thirty years covering the Supreme Court.).

<sup>28</sup> In 1989, for example, Justice Kennedy joined Chief Justice Rehnquist’s opinion in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), describing *Roe* in these unflattering terms:

[T]he rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does. The key elements of the *Roe* framework--trimesters and viability--are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle.

*Id.* at 518. Justice O’Connor, too, repeatedly observed that “*Roe*’s trimester framework . . . [is] problematic.” *Id.* at 529 (O’Connor, J., concurring in the judgment) (noting that “[t]he State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist ‘throughout pregnancy’”); *see also* *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 828 (1986) (O’Connor, J., dissenting in part).



contraception, family relationships, child rearing, and education”—decisions the Court has held belong to a “private realm of family life which the state cannot enter.”<sup>29</sup> And, yet, “[a]bortion is a unique act,” *Casey* explained.<sup>30</sup> Its exercise is “fraught with consequences for others,” including family members, the would-be father, and “the life or potential life that is aborted.”<sup>31</sup>

The need to balance these weighty interests was said to warrant more leeway for state regulation in the context of abortion, and therefore a new and softer standard of review. Accordingly, *Casey* jettisoned *Roe*’s strict-scrutiny test, with its “rigid trimester framework,” in favor of the more flexible “undue burden” standard.<sup>32</sup> Under the new test, government may regulate access to abortion before viability, so long as “its purpose or effect is [not] to place a substantial obstacle in the path of a woman seeking an abortion.”<sup>33</sup> After viability, government may go so far as prohibiting abortion altogether, “except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”<sup>34</sup>

Of course, some doubted that *Casey*’s ratcheting down of the strict scrutiny standard normally used to protect fundamental rights was driven strictly by the “uniqueness” of abortion. It was also eminently plausible to understand the “undue burden” standard as a practical compromise of the Court’s ongoing doubts about whether abortion truly qualified as a fundamental constitutional right.<sup>35</sup> The Court might reconcile itself to a debatable extension of privacy’s boundaries by watering down the strength of protection afforded.<sup>36</sup> In any event, for whatever reason, *Casey* unmistakably

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<sup>29</sup> See *Casey*, 505 U.S. at 851–53 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

<sup>30</sup> *Id.* at 852.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 878–79.

<sup>33</sup> *Id.* at 878.

<sup>34</sup> *Id.* at 879 (quoting *Roe v. Wade*, 410 U.S. 113, 164–65 (1973)).

<sup>35</sup> See, e.g., RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION 65 (2001); Chris Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 MICH. L. REV. 1980, 1981–85 (2002).

<sup>36</sup> Cf. *Schneider*, *supra* note 26, at 87 (noting that “one obvious solution to

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drove a wedge in privacy doctrine, separating constitutional protection of abortion from the nominally full-strength protection accorded other fundamental family-related rights.<sup>37</sup>

Eight years after *Casey*, however, there was ground for reconsidering abortion's constitutional "uniqueness." In 2000, the Supreme Court decided two cases just three weeks apart that suggested a closer affinity between abortion and other family privacy rights. One was *Stenberg v. Carhart*,<sup>38</sup> the first "partial birth abortion" case. The other was *Troxel v. Granville*,<sup>39</sup> dealing with the fundamental child-rearing rights of parents. On one hand, *Stenberg* was notable for the strength of the protection it gave to the abortion right, suggesting that *Casey*'s undue-burden framework was not as weak as some had supposed. On the other hand, *Troxel* suggested that constitutional protection for parental rights is not so strong as commonly believed.

*Stenberg* presented a challenge to a Nebraska law that prohibited "partial birth abortion." The Nebraska statute defined the proscribed act as "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure [intended to] . . . kill the unborn child . . . ."<sup>40</sup> The Act made an exception for such abortions when "necessary to save the life of the mother," but not for those necessary to preserve a woman's health.<sup>41</sup>

A five-member majority struck down the Nebraska statute on two independent grounds. First, the statute's definition of "partial birth abortion" was found to be so broad that it could encompass

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the problem of a too-expansive privacy doctrine is to allow the state interests in . . . regulation[] to override the privacy right").

<sup>37</sup> See Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After Casey and Carhart*, 31 *FORDHAM URB. L.J.* 675, 681 (2004) (stating that *Casey* "altered the very nature of the abortion right, demoting it from a fundamental right to something more enigmatic and certainly more fragile").

<sup>38</sup> 530 U.S. 914 (2000). In this Article, to avoid confusion I refer to *Stenberg v. Carhart* as "*Stenberg*," and *Gonzales v. Carhart* as "*Carhart*."

<sup>39</sup> 530 U.S. 57 (2000).

<sup>40</sup> *Stenberg*, 530 U.S. at 921–22 (quoting NEB. REV. STAT. ANN. §§ 28-328(1), 28-326(9) (Supp. 1999)).

<sup>41</sup> *Id.* at 921 (quoting NEB. REV. STAT. ANN. § 28-328(1) (2007)).

not only “dilation and extraction” (D&X) abortions—the method that was said to be the target of the law—but also “dilation and evacuation” (D&E) abortions, a far more commonly used method. Since the law effectively foreclosed the most common method of second-trimester abortion, it constituted an “undue burden” on a woman’s right to choose abortion.<sup>42</sup>

Second, the statute’s failure to make an exception for abortions necessary to safeguard a woman’s health was held also sufficient to overturn it.<sup>43</sup> Nebraska defended the law on the ground that a woman’s safety would never require access to the proscribed method of abortion, but the Court was unpersuaded.<sup>44</sup> Justice Breyer’s majority opinion acknowledged that it was uncertain whether loss of the D&X method would actually endanger women, but held that the medical uncertainty favored leaving women with more options. “[T]he division of medical opinion about the matter at most means uncertainty,” Breyer wrote, “a factor that signals the presence of risk, not its absence.”<sup>45</sup>

*Stenberg’s* invalidation of Nebraska’s law was, to many commentators, surprisingly strong.<sup>46</sup> The Court did not move cautiously, deciding the case on the narrowest possible ground and stopping there. Instead, having found the law unconstitutional on one ground, the Court proceeded to explore and resolve a second potential defect.<sup>47</sup> Moreover, the Court analyzed the lack of a health exception outside the framework of *Casey’s* “undue burden” test. A health exception was required, the Court held, because the record made it plausible to believe that for some women the prohibited D&X method would be the safest choice.<sup>48</sup> This was a shift from *Casey* itself, which, as Caitlin Borgmann has noted,

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<sup>42</sup> *See id.* at 938–45.

<sup>43</sup> *Id.* at 937–38.

<sup>44</sup> *Id.* at 937.

<sup>45</sup> *Id.*

<sup>46</sup> *See* Akhil Reed Amar, *The Supreme Court, 1999 Term – Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 110–13 (2000); David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1155–63 (2001); Pushaw, *supra* note 5, at 556–59.

<sup>47</sup> *Stenberg*, 530 U.S. at 938.

<sup>48</sup> *Id.* at 936–37.

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seemed to “subsume the medical emergency exception within the undue burden test rather than treating it as a separate, categorical requirement” and which “did not foreclose the possibility that the Court would tolerate some unspecified level of risk to a woman’s health.”<sup>49</sup> In *Stenberg*, the Court felt no need to quantify the precise magnitude of the medical risk posed by alternative procedures or to weigh that risk against the strength of the state’s interests in proscribing the method.<sup>50</sup> Instead, the Court’s opinion could be read to suggest that imposition of *any* health risk on women by the state was *per se* unconstitutional.

It was this aspect of the Court’s holding that most provoked Justice Kennedy in dissent. Requiring a health exception without determining whether the medical risks were significant enough to constitute an “undue burden,” he argued, utterly ignored the bargain struck in *Casey* by elevating the woman’s interests categorically above those of the state and others.<sup>51</sup> The whole point of *Casey*, Kennedy insisted, was that abortion regulations would be evaluated by a more fluid balancing of the private and state interests at stake; by strictly privileging the woman’s health interests without any balancing, *Stenberg* had failed “to accord any weight to Nebraska’s interest in prohibiting partial birth abortion.”<sup>52</sup> “This is an immense constitutional holding,” Kennedy fumed, and betrayed *Casey*’s promise to be “more solicitous of state attempts to vindicate interests related to abortion.”<sup>53</sup> Justice Thomas, joined by the remaining dissenters, agreed that the Court’s analysis “portends a return to an era [of aggressive scrutiny] I had thought we had at last abandoned.”<sup>54</sup>

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<sup>49</sup> Borgmann, *supra* note 37, at 696, 700.

<sup>50</sup> Compare *Stenberg*, 530 U.S. 914, with *Hope Clinic v. Ryan*, 195 F.3d 857, 885 (7th Cir. 1999) (en banc) (Posner, C.J., dissenting) (concluding that the lack of a health exception in Wisconsin’s and Illinois’s “partial birth abortion” law were unconstitutional because they posed an “undue burden” to women seeking late-term abortions), *vacated*, 530 U.S. 1271 (2000).

<sup>51</sup> *Stenberg*, 530 U.S. at 957 (Kennedy, J., dissenting).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 978–79 (Kennedy, J., dissenting).

<sup>54</sup> *Id.* at 983 (Thomas, J., dissenting).

The rhetoric of the *Stenberg* dissents may have been excessive, but there was little doubt that the majority in *Stenberg* had indeed secured and bolstered constitutional protection for abortion. “The lesson from *Stenberg v. Carhart*,” wrote Professor George Annas shortly after the decision was handed down, “is that the right to choose to have an abortion is in no danger from the Court.”<sup>55</sup> The “undue burden” test was not strict scrutiny, but it wasn’t a push-over either; in fact, when it came to the health of women, it did not even apply.<sup>56</sup>

The Court’s decision in *Stenberg* came just a few weeks after its decision in *Troxel v. Granville*. Whereas *Stenberg* involved the most contentious ground of constitutional privacy, *Troxel* involved “perhaps the oldest of the fundamental liberty interests recognized by this Court,” and certainly the least controversial: the “interest of parents in the care, custody, and control of their children.”<sup>57</sup> In *Troxel*, the Court ruled in favor of the parent, holding that court-ordered visitation for grandparents over a mother’s objection violated her fundamental rights as a parent. But it did so on surprisingly narrow grounds and without applying strict scrutiny.

*Troxel* arose from a trial court’s decision to order regular visitation for the paternal grandparents of two girls whose father had committed suicide.<sup>58</sup> The trial court judge acted under a Washington statute that authorized courts to order visitation for “any person” at “any time” a judge thought it beneficial to a child.<sup>59</sup> The Washington Supreme Court held the statute to be facially unconstitutional under strict scrutiny, reasoning that the state could not impose on a parent’s judgment concerning visitation unless necessary to advance a compelling state interest.<sup>60</sup>

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<sup>55</sup> George J. Annas, *The Shadowlands: The Regulation of Human Reproduction in the United States*, in CROSS-CURRENTS: FAMILY LAW AND POLICY IN THE US AND ENGLAND 143, 150 (Sanford N. Katz, John Eekelaar & Mavis Maclean eds., 2000).

<sup>56</sup> See *Stenberg*, 530 U.S. at 930–38.

<sup>57</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (O’Connor, J., plurality opinion).

<sup>58</sup> *Id.* at 60–61.

<sup>59</sup> *Id.* at 60 (quoting WASH. REV. CODE § 26.10.160(3) (1999)).

<sup>60</sup> See *In re Custody of Smith*, 969 P.2d 21, 27–31 (Wash. 1998), *aff’d sub*

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While safeguarding a child from serious harm could qualify as a compelling interest, the state court held, merely advancing a child's "best interests" could not.<sup>61</sup> The U.S. Supreme Court granted certiorari to resolve a split in the state courts over the constitutionality of grandparent visitation laws, and taking up the question in the context of Washington's notably free-wheeling statute suggested the possibility of a relatively easy resolution.

But the case turned out to be anything but easy. In the end, the Court splintered six ways. There was broad agreement among the Justices that court-ordered visitation substantially burdened the mother's fundamental child-rearing right, but much less consensus about what to do about it. Justice O'Connor's plurality opinion readily agreed that Washington's statute was "breathhtakingly broad," and yet was unwilling to follow the Washington Supreme Court in holding it facially invalid.<sup>62</sup> Instead, the plurality was prepared to say only that the statute had been unconstitutionally applied on the facts of the case. Moreover, in explaining that result, the plurality did not use the usual language of "compelling interests" and "narrow tailoring," but held only that the Constitution required the state to give "special weight" to a parent's concerns before overriding her judgments about visitation.<sup>63</sup> The separate opinions of Justices Souter, Stevens, and Kennedy, variously concurring and dissenting in the result, applied similarly opaque standards.<sup>64</sup> Indeed, only Justice Thomas, writing separately and joined by no other Justice, was left to wonder plaintively why strict scrutiny was nowhere to be found in the other opinions.<sup>65</sup>

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*nom. Troxel*, 530 U.S. 57.

<sup>61</sup> *Smith*, 969 P.2d at 30.

<sup>62</sup> *Troxel*, 530 U.S. at 67 (O'Connor, J., plurality opinion).

<sup>63</sup> *See id.* at 69–70.

<sup>64</sup> *See id.* at 75–77 (Souter, J., concurring); *id.* at 85–91 (Stevens, J., dissenting); *id.* at 94–101 (Kennedy, J., dissenting).

<sup>65</sup> *Id.* at 80 (Thomas, J., concurring) ("The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a [fundamental parenting] right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights.").

Yet, the answer was clear enough. Both the plurality and Justices Stevens and Kennedy in dissent cautioned that rigid enforcement of parental prerogative carried the risk of extinguishing other family relationships of enormous significance. This was especially true in light of the growing diversity of modern family life.<sup>66</sup> “[P]ersons outside the nuclear family,” the plurality noted, “are called upon with increasing frequency to assist in the everyday tasks of child rearing.”<sup>67</sup> Justice Kennedy worried that “[c]ases are sure to arise – perhaps a substantial number of cases – in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto.”<sup>68</sup> Justice Stevens likewise emphasized that children sometimes establish “family-like bonds” with non-parents.<sup>69</sup>

The Court in *Troxel* was not ready to describe these other family interests as full-blown fundamental rights, though Justices Stevens and Scalia each hinted at that possibility.<sup>70</sup> But it did not need to. It was plain enough that a majority on the Court favored a softer, more flexible constitutional standard that would leave room for reasonable accommodation of the competing family interests.

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<sup>66</sup> *Id.* at 63 (plurality opinion) (observing that “[t]he demographic changes of the past century make it difficult to speak of an average American family”).

<sup>67</sup> *Id.* at 64.

<sup>68</sup> *Id.* at 98 (Kennedy, J., dissenting).

<sup>69</sup> *Id.* at 88 (Stevens, J., dissenting).

<sup>70</sup> *See id.* (“While this Court has not yet had occasion to elucidate the nature of a child’s liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.”); *id.* at 92–93 (Scalia, J., dissenting) (“Judicial vindication of ‘parental rights’ under a Constitution that does not even mention them requires (as Justice Kennedy’s opinion rightly points out) not only a judicially crafted definition of parents, but also – unless, as no one believes, the parental rights are to be absolute – judicially approved assessments of ‘harm to the child’ and judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents.”).

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As Justice Stevens put it, in a statement that captured the main concern emphasized as well by both the plurality and Justice Kennedy, “[t]he almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent’s liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily.”<sup>71</sup> The evident solution was to sidestep the rigid presumption of individual entitlement underlying strict scrutiny and substitute a softer standard that would allow a more fluid balancing of the competing interests.

Professor Carl Schneider, writing a dozen years before *Troxel*, had foreseen that “one solution to the uncertain dimensions of the [privacy] rights of nonstandard rights-bearers would be to acknowledge a state interest . . . in protecting the right-bearers (as with minors)” sufficient to override the privacy rights of traditional rights-bearers (such as parents).<sup>72</sup> At the time, he considered that approach to be effectively “barred by the virtually outcome-determinative nature of the question whether a fundamental right is at stake” under conventional strict-scrutiny analysis.<sup>73</sup> Yet, by departing from strict scrutiny it was possible to expand the boundaries of constitutional protection without tying the hands of government in addressing the inevitable clashes of private interests that would follow.<sup>74</sup>

It seemed then, after *Stenberg* and *Troxel*, that constitutional doctrine protecting abortion and other family privacy rights was again converging on a common approach.<sup>75</sup> In both contexts, the hard edges of conventional doctrinal categories (*e.g.*, “fundamental rights”) had been deliberately blurred, and the (nominally) bright-line directives of tiered scrutiny had been replaced by muddled, fact-intensive inquiries that sought to balance more flexibly the competing interests from case-to-case.

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<sup>71</sup> *Id.* at 90 (Stevens, J., dissenting).

<sup>72</sup> Schneider, *supra* note 26, at 87.

<sup>73</sup> *Id.*

<sup>74</sup> See Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992).

<sup>75</sup> See Meyer, *Lochner Redeemed*, *supra* note 46, at 1163.



II. *LAWRENCE V. TEXAS* AND THE “MANIFOLD POSSIBILITIES” OF LIBERTY

The Supreme Court’s next major constitutional privacy case, *Lawrence v. Texas*,<sup>76</sup> followed precisely the tack suggested by *Troxel*, extending the boundaries of substantive due process protection while compensating for that generosity by clouding and qualifying the strength of the protection afforded. *Lawrence* drew on the line of constitutional privacy cases, from *Griswold* through *Casey*, to protect the sexual intimacy of gays and lesbians, striking down a Texas sodomy law that applied only to same-sex partners.<sup>77</sup> Yet it famously did so without explicitly describing their liberty interest as “fundamental” and without applying the strict scrutiny normally associated with fundamental rights.<sup>78</sup> Justice Kennedy’s opinion for the Court compounded the uncertainty by borrowing from the language of rational-basis review, concluding, for example, that Texas’ sodomy law “further[ed] no legitimate interest which can justify its intrusion into the personal and private life of the individual.”<sup>79</sup>

But it was obvious that some stronger form of scrutiny was at work in *Lawrence*. First, although the Court did not label the claimants’ interest a “fundamental right” or a “privacy right,” Kennedy labored throughout his majority opinion to connect their interest with those protected in past fundamental privacy decisions. “[T]he most pertinent beginning point,” the Court explained in launching its analysis, “is our decision in *Griswold v. Connecticut*,” which first announced the constitutional right of privacy.<sup>80</sup> From there, Kennedy traced succeeding privacy cases to show that constitutional protection had pushed beyond narrow boundaries of marriage and the traditional family.<sup>81</sup> Finally, *Lawrence* quoted *Casey*’s statement of the basis for the

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<sup>76</sup> 539 U.S. 558 (2003).

<sup>77</sup> *See id.* at 564–75.

<sup>78</sup> *See, e.g.*, Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

<sup>79</sup> *Lawrence*, 539 U.S. at 578.

<sup>80</sup> *Id.* at 564 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

<sup>81</sup> *See id.* at 565–66.

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Constitution's heightened protection of "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"—a statement savaged by Justice Scalia as *Casey's* "famed sweet-mystery-of-life passage"<sup>82</sup>—and concluded that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."<sup>83</sup> This was, in fact, arguably the most crucial point of departure between *Lawrence* and *Bowers v. Hardwick*,<sup>84</sup> which in 1986 had upheld a Georgia sodomy law under rational-basis review. In *Bowers*, the Court could find "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other"<sup>85</sup>; in *Lawrence*, by contrast, the Court saw that same-sex intimacy shares in the same essential qualities that define conventional family relationships.<sup>86</sup>

Second, Kennedy pointedly wrangled with the privacy analysis used by the Court in *Bowers*. In finding no privacy right implicated by Georgia's sodomy law, *Bowers* had characterized the privacy interest at stake narrowly as one of "homosexual sodomy."<sup>87</sup> It then denied heightened protection for that interest by limiting the scope of constitutional privacy to liberties that could be said to be "deeply rooted in this Nation's history and tradition."<sup>88</sup> *Lawrence* criticized *Bowers* on both points.

*Bowers'* narrow description of the private interest, Kennedy wrote in *Lawrence*, "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake."<sup>89</sup> The *Bowers* Court should have looked beyond the "particular sex act" to see that the Texas sodomy law implicated intimate associational interests

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<sup>82</sup> *Id.* at 588 (Scalia, J., dissenting).

<sup>83</sup> *Id.* at 574 (majority opinion).

<sup>84</sup> 478 U.S. 186 (1986).

<sup>85</sup> *Id.* at 191.

<sup>86</sup> See David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEGAL F. 453, 454–55 (2004).

<sup>87</sup> *Bowers*, 478 U.S. at 190–91.

<sup>88</sup> *Id.* at 191–92 (citing *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

<sup>89</sup> *Lawrence*, 539 U.S. at 567.

essentially like those protected within conventional families.<sup>90</sup> “To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim,” Kennedy wrote, “just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”<sup>91</sup> Having taken *Bowers* to task over its exceedingly narrow framing of the claimed fundamental right, the *Lawrence* opinion went on to criticize *Bowers*’ focus on “deeply rooted” social consensus as the test for validating the claimed right. Kennedy’s opinion chided *Bowers* for its description of the historical record before then declaring that, in any event, “our laws and traditions in the past half century are of most relevance.”<sup>92</sup> More recent developments, *Lawrence* contended, showed “an emerging awareness” that the state has no business telling consenting adults how to run their sex lives.<sup>93</sup> For *Lawrence*, this modern consensus amply validated the substantiality of the claimed liberty interest.

Given the weight of the private interests at stake, it was not enough for the state simply to invoke “respect for the traditional family” or popular morality.<sup>94</sup> “The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”<sup>95</sup> *Lawrence* answered no. Justice Kennedy closed the Court’s opinion with a ringing affirmation of the importance of flexibility in interpreting the protection afforded by substantive due process:

Had those who drew and ratified the Due Process Clause of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 571–72.

<sup>93</sup> *Id.* at 572.

<sup>94</sup> *Id.* at 571.

<sup>95</sup> *Id.*

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Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>96</sup>

To many, *Lawrence* signaled an important shift in the Court's approach to substantive due process.<sup>97</sup> As Professor Nan Hunter observed, by "extending meaningful constitutional protection to liberty interests without denominating them as fundamental rights," *Lawrence* was able to sidestep the usual "containment devices" on the Court's role, including the insistence that non-textual rights be "deeply rooted" in history and tradition.<sup>98</sup> In substitution, *Lawrence* offered the prospect of broader, though more indeterminate, constitutional protection by "combining the inquiry into whether the government's justification was reasonable with consideration of the nature and the weight of the individual interests asserted."<sup>99</sup>

It was precisely this implication that sent Justice Scalia into such urgent damage-control in dissent. *Lawrence*, he insisted, did not redefine substantive due process or recognize a fundamental right; it was simply an aberration, a run-away rational-basis case that would ultimately, he hoped, be confined to its facts.<sup>100</sup> By casting *Lawrence* in this way, Scalia hoped to limit future use of the decision as precedent for recognizing other fundamental rights. To have recognized *Lawrence* as premised upon constitutional privacy would have meant acknowledging the double-barreled damage it did to the doctrinal containment devices Scalia and like-

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<sup>96</sup> *Id.* at 578–79.

<sup>97</sup> See Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1187–88 (2004); Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21 (2003); Matthew Coles, *Lawrence v. Texas and the Refinement of Substantive Due Process*, 16 STAN. L. & POL'Y REV. 23, 26 (2005); Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 64 (2006); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1104 (2004); Tribe, *supra* note 78, at 1899–1900.

<sup>98</sup> Hunter, *supra* note 97, at 1104, 1119.

<sup>99</sup> *Id.* at 1122.

<sup>100</sup> See *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

minded privacy skeptics had labored hard to construct in past cases. Of course, designating *Lawrence* as a rational-basis case meant that its implications were potentially even broader.<sup>101</sup> But Scalia was likely prepared to gamble that its robust brand of scrutiny would quickly prove unsustainable if applied generally to rank-and-file liberty interests.

For the most part, Justice Scalia's gamble appears to be paying off. In the years since *Lawrence* was decided, most lower federal and state courts have concluded that "[d]espite its use of seemingly sweeping language, the holding in *Lawrence* is actually quite narrow."<sup>102</sup> Decisions have emphasized limiting principles suggested in *Lawrence*'s majority opinion—distinguishing claims of association involving commercial exchange, public settings, or minors, for instance—to blunt its application.<sup>103</sup> In particular, most courts have not read *Lawrence* as displacing the narrower approach to substantive due process suggested in *Washington v. Glucksberg*.<sup>104</sup> As a panel of the D.C. Circuit observed in 2006, most federal circuits "have either treated the *Glucksberg* analysis as controlling after *Lawrence*, or viewed *Lawrence* as not, properly speaking, a substantive due process decision."<sup>105</sup> A number of

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<sup>101</sup> Randy Barnett, for example, reads *Lawrence* as extending its more substantive form of scrutiny to all government restrictions of individual liberty, disregarding distinctions between "fundamental" and "non-fundamental" liberties. See Barnett, *supra* note 97, at 35–36.

<sup>102</sup> State v. Holm, 137 P.3d 726, 742 (Utah 2006).

<sup>103</sup> See, e.g., United States v. Palfrey, 499 F. Supp. 2d 34, 41 (D.D.C. 2007) (distinguishing *Lawrence* in case involving prostitution); State v. Senters, 699 N.W.2d 810, 815–16 (Neb. 2005) (distinguishing *Lawrence* in case involving conduct with a 17-year-old minor); State v. Lowe, 861 N.E.2d 512, 516–17 (Ohio Ct. App. 2007) (distinguishing *Lawrence* in case involving conduct between consenting adult family members); Singson v. Commonwealth, 621 S.E.2d 682 (Va. Ct. App. 2005) (distinguishing *Lawrence* in case involving public conduct).

<sup>104</sup> See, e.g., Seegmiller v. LaVerkin City, 528 F.3d 762, 771 (10th Cir. 2008); Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1235–37 (11th Cir. 2004), cert. denied, 543 U.S. 1152 (2005); Andersen v. King County, 138 P.3d 963, 999–1000 (Wash. 2006); see also Calabresi, *supra* note 18, at 1527–28; Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409 (2006).

<sup>105</sup> Abigail Alliance for Better Access to Developmental Drugs v. Von

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lower courts have cited Justice Scalia's dissent to justify their conclusion that *Lawrence* is, at the end of the day, a quirky rational-basis case that can be safely set aside and ignored.<sup>106</sup>

That outcome is attractive for judges who are hostile to *Lawrence*'s direction or wary of departing from older precedent without more explicit marching orders from the Supreme Court. But it cannot easily be squared with *Lawrence* itself. A faithful reading of Justice Kennedy's majority opinion makes clear that *Lawrence* strayed well beyond rational basis review. After all, if *Lawrence* agreed with *Bowers* that no fundamental right was presented, and disagreed only about the availability of a rational basis for the state's policy, there would have been no reason for the extended refutation of *Bowers*' approach to framing and validating fundamental rights. Similarly, the only way to make sense of the *Lawrence* Court's strenuous effort to align its own holding with those of earlier Courts in *Griswold*, *Eisenstadt*, and *Casey* is to understand *Lawrence* as recognizing a liberty interest of similar quality.

Scalia himself anticipated that *Lawrence*, if applied faithfully, offered a model for scrutinizing tradition and morality in family law more broadly.<sup>107</sup> And, while *Lawrence* has not radically reshaped family law on a broad scale, some courts have notably drawn on the decision to subject traditional family law measures to

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Eschenbach, 445 F.3d 470, 476 n.8 (D.C. Cir. 2006) (citations omitted), *vacated on reh'g en banc*, 495 F.3d 695 (D.C. Cir. 2007) (en banc). The *Abigail Alliance* panel also asserted flatly that "[n]o court has regarded *Lawrence* as cabining *Glucksberg*." *Id.* There is, however, some authority using *Lawrence* to cabin *Glucksberg*. See, e.g., *McKithen v. Brown*, 565 F. Supp. 2d 440, 488 (E.D.N.Y. July 21, 2008) (concluding that *Lawrence* appears to modify *Glucksberg*'s approach by focusing attention on more recent historical support for a claimed fundamental right).

<sup>106</sup> See, e.g., *Muth v. Frank*, 412 F.3d 808, 818 (7th Cir. 2005), *cert. denied*, 546 U.S. 988 (2005); *Lofton v. Sec'y of Dep't of Children & Fam. Servs.*, 358 F.3d 804, 815–16 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005); *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 394–95 (D. Mass. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1306 (M.D. Fla. 2005); *State v. Fischer*, \_\_\_ P.3d \_\_\_, 2008 WL 2971520 (Ariz. Ct. App. Aug. 5, 2008).

<sup>107</sup> See *Lawrence v. Texas*, 539 U.S. 558, 604–05 (2003) (Scalia, J., dissenting).

more searching review. A few judges, for example, have relied on *Lawrence* to find constitutional defects with traditional laws regulating polygamy and incest.<sup>108</sup> More famously, the Supreme Courts of California, Connecticut, and Massachusetts each cited *Lawrence* in finding a right to same-sex marriage under the constitutions of those states.<sup>109</sup> Indeed, the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health* seemed to find inspiration not only in *Lawrence*'s bottom-line but also in its tactic of strategic avoidance. There was no need to decide whether gays and lesbians have a "fundamental right" to marry, the Massachusetts court insisted, because the state could not justify its law even under rational-basis review.<sup>110</sup> While *Goodridge* held that the state's policy of withholding marriage

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<sup>108</sup> See *State v. John M.*, 894 A.2d 376 (Conn. Ct. App. 2006) (relying on *Lawrence* to hold incest law unconstitutional), *review granted*, 899 A.2d 622 (Conn. 2006); *State v. Holm*, 137 P.3d 726, 776–78 (Utah 2006) (Durham, C.J., dissenting in part) (arguing that *Lawrence* forbids criminalizing practice of plural "celestial" marriage as bigamy). *But see, e.g.*, *Bronson v. Swensen*, 394 F. Supp. 2d 1329 (D. Utah 2005) (upholding constitutionality of bar on polygamy as applied to consenting adults), *vacated on other grounds*, 500 F.3d 1099 (10th Cir. 2007); *People v. Scott*, 68 Cal. Rptr. 3d 592, 595 (Cal. Ct. App. 2007) (upholding incest law as applied to consenting adults); *State v. Lowe*, 861 N.E.2d 512 (Ohio Ct. App. 2007) (same); *Holm*, 137 P.3d at 741–49 (upholding bigamy law against challenge after *Lawrence*). For critical examination of the modern rationales for polygamy and incest laws after *Lawrence*, see Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155 (2005) (polygamy); Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Experience*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004) (same); Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Law Discourse and the Incest Taboo*, 99 NW. L. REV. 1543 (2005) (incest); Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337 (2004) (same).

<sup>109</sup> *In re Marriage Cases*, 183 P.3d 384, 451 (Cal. 2008) (citing *Lawrence*'s understanding of the "expansive and protective provisions of our constitutions" in construing the California constitution to protect same-sex marriage); *Kerrigan v. Commissioner of Pub. Health*, 957 A.2d 407, 467 (Conn. 2008) (concluding that "*Lawrence* represents a sea change in United States Supreme Court jurisprudence concerning the rights of gay persons"); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 953 (Mass. 2003).

<sup>110</sup> *Goodridge*, 798 N.E.2d at 961.

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from same-sex couples was irrational, it was plain that the court's form of rational-basis review had more than the usual bite.<sup>111</sup> *Goodridge*, like *Lawrence*, weaved together considerations of both equal protection and substantive liberty to find that gays and lesbians have a constitutional right to marry, while nominally sidestepping the need to specify the exact metes and bounds of "fundamental" privacy rights.<sup>112</sup> Thus, although most courts have not been eager to embrace *Lawrence*'s broader implications, a small but significant number have shown how the decision can be used to rethink family law from the ground up.

III. *GONZALES V. CARHART*: THE ANTI-LAWRENCE?

In 2007, the Supreme Court handed down *Gonzales v. Carhart*,<sup>113</sup> seeming to mark another turn in substantive due process. Three years after *Stenberg* had struck Nebraska's law against "partial birth abortion," Congress enacted the Partial-Birth Abortion Act of 2003. Twice before, President Clinton had vetoed similar measures.<sup>114</sup> Now, with a new Administration in the White

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<sup>111</sup> Professor Lawrence Friedman has observed that *Goodridge*'s application of a more aggressive form of rational-basis review was consistent with past decisions of the Massachusetts court applying the guarantees of the state constitution. "In fact," Friedman writes, "the Massachusetts Supreme Judicial Court has long applied at least two kinds of rational basis scrutiny to government action: ordinary, deferential rational basis scrutiny in the mine run of cases, and an enhanced rational basis scrutiny when the government action in question implicates or restricts certain important personal interests." Lawrence Friedman, *Ordinary and Enhanced Rational Basis Review in the Massachusetts Supreme Judicial Court: A Preliminary Investigation*, 69 ALB. L. REV. 415, 416 (2006).

<sup>112</sup> In emphasizing the propriety of blending together equality and liberty concerns in scrutinizing traditional marriage laws, *Goodridge* drew directly upon *Lawrence*. See *Goodridge*, 798 N.E.2d at 953 (asserting that "[i]n matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts frequently overlap, as they do here" (citing *Lawrence*, 539 U.S. at 575)).

<sup>113</sup> 127 S. Ct. 1610 (2007).

<sup>114</sup> GEORGE ANNAS, *AMERICAN BIOETHICS: CROSSING HUMAN RIGHTS AND HEALTH LAW BOUNDARIES* 123–26 (2005); Garrow, *supra* note 10, at 3–5 (reviewing legislative history of congressional enactments).



House and with opponents of abortion rights energized by the fight in *Stenberg*, Congress was ready to try again.<sup>115</sup> The Act so closely paralleled the Nebraska law invalidated in *Stenberg* that it amounted to an open declaration of defiance to the Court, or at least an invitation to reconsider its decision.<sup>116</sup> In a signing ceremony surrounded by nine congressional supporters of the legislation (all middle-aged or elderly white men, as George Annas points out<sup>117</sup>), President Bush exhibited the same fighting spirit. Opponents of abortion would be undeterred by court rulings, he made clear, and would ultimately prevail on “the facts.”<sup>118</sup> “The facts about partial birth abortion are troubling and tragic,” Bush declared to applause, “and no lawyer’s brief can make them seem otherwise.”<sup>119</sup>

The language of the new federal Act was somewhat more specific than the Nebraska statute in describing the proscribed procedure. Whereas the Nebraska law had prohibited physicians from delivering “a substantial portion” of a fetus into the vagina before effecting fetal demise, the new federal law went farther in specifying what sort of partial delivery would expose a doctor to liability. The Act, like the Nebraska law, contained no exception for a woman’s health, though the legislative record made findings that “the prohibited procedure is never medically necessary.”<sup>120</sup> In addition to the relatively modest drafting differences between the

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<sup>115</sup> See RICHARD A. GLENN, *THE RIGHT TO PRIVACY: RIGHTS AND LIBERTIES UNDER THE LAW* 112 (2003) (noting that “[a]lthough *Stenberg* appeared to be a victory for abortion-rights advocates, it certainly energized antiabortion activists, who were encouraged by the closeness of the vote and the public’s perception of partial-birth abortion as a particularly gruesome procedure”).

<sup>116</sup> See *Carhart*, 127 S. Ct. at 1643 n.4 (Ginsburg, J., dissenting) (noting that “[t]he Act’s sponsors left no doubt that their intention was to nullify our ruling in *Stenberg*”).

<sup>117</sup> ANNAS, *AMERICAN BIOETHICS*, *supra* note 114, at 133.

<sup>118</sup> Press Release, White House, President Bush Signs Partial Birth Abortion Ban Act of 2003 (Nov. 5, 2003) (transcript of signing ceremony), available at <http://www.whitehouse.gov/news/releases/2003/11/20031105-1.html> (last visited July 28, 2008).

<sup>119</sup> *Id.*

<sup>120</sup> *Carhart*, 127 S. Ct. at 1638.

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Nebraska and federal statutes, there was, of course, another important intervening development: the membership of the Supreme Court had changed. Since *Stenberg*, Chief Justice Rehnquist had died and Justice O'Connor had retired, replaced by Chief Justice Roberts and Justice Alito.

In *Gonzales v. Carhart*, with the new make-up of the Court, Justice Kennedy now wrote for a five-member majority in upholding the federal Act. Not surprisingly, given the close similarity between the federal statute and the earlier Nebraska law, the litigation was largely a reprise of the constitutional challenge in *Stenberg*, but now both issues that had proved fatal to the Nebraska law were resolved in favor of the federal statute. *Carhart* did not overrule *Stenberg*, but claimed to distinguish it on the facts. The federal law avoided *Stenberg*'s overbreadth concern by adding an overt-act requirement and by specifying "anatomical landmarks to which the fetus must be partially delivered" to incur criminal liability.<sup>121</sup> In sustaining the federal law's omission of a health exception, Kennedy's majority opinion adopted the position he had argued for in his *Stenberg* dissent. First, the need for a health exception was analyzed *through*, not apart from, the undue-burden test.<sup>122</sup> Second, and relatedly, Kennedy made clear that the decisive question was not—as it appeared to be for the majority in *Stenberg*—whether the prohibited D&X procedure was, for some women, the *safest* option.<sup>123</sup> Instead, under *Carhart*, the decisive question was whether any health risks imposed on women by the Act were sufficiently "significant" to outweigh the state's interests in prohibiting the D&X method.<sup>124</sup> Legislatures are entitled to

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<sup>121</sup> *Id.* at 1630.

<sup>122</sup> *See id.* at 1635.

<sup>123</sup> *Compare, e.g., id.* (emphasizing evidence that remaining methods offer a "safe" alternative to the proscribed method), *with Stenberg*, 530 U.S. at 937 (emphasizing evidence that the proscribed method is, for some women, a "safer" method).

<sup>124</sup> *See Carhart*, 127 S. Ct. at 1635–38. At oral argument, Priscilla Smith and Eve Gartner, counsel for respondents challenging the constitutionality of the federal Act, had each conceded that proof that D&X offered merely "marginal" safety advantages for women would not be enough to invalidate the Act; but they both insisted that D&X, in fact, offered some women significant safety benefits. *See Garrow, supra* note 10, at 17–18 (reviewing colloquies at oral

strike their own “balance of risks,” Kennedy suggested, so long as they leave available to women abortion options that are recognized to be “safe,” even if not necessarily the safest.<sup>125</sup> “[I]f some procedures have different risks than others,” Kennedy wrote, “it does not follow that the State is altogether barred from imposing reasonable regulations.”<sup>126</sup>

In passing on the reasonableness of Congress’ decision to eliminate the D&X option, *Carhart* balanced the apparent magnitude of the risks to women against the strength of the state’s regulatory interests. On both questions, Justice Kennedy’s opinion presented itself as heavily driven by the facts. In assessing the risks to women, the Court deferred to congressional fact-finding suggesting that forgoing the D&X option presented no significant health risks. Kennedy hastened to add that the Court “retain[ed] an independent duty to review factual findings where constitutional rights are at stake,” but insisted that “a deferential standard” was appropriate.<sup>127</sup> True, some of Congress’ findings were “factually incorrect,” but the record did not refute its ultimate judgment that women would continue to have adequately “safe” abortion options even after the prohibition of D&X.<sup>128</sup> And, significantly, the Court held that Congress was entitled to legislate based upon its own rational judgments in the face of medical uncertainty about the relevant risks.<sup>129</sup>

Similarly, in assessing the strengths of the state’s interests in prohibiting the D&X method, *Carhart* focused on what it presented as the facts. In the majority opinion, Kennedy focused first on the facts of the medical procedure itself, insisting that simply describing “the prohibited abortion procedure demonstrates

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argument).

<sup>125</sup> See *Carhart*, 127 S. Ct. at 1638. The *Carhart* majority added that a woman could still challenge the application of the Act to her on the ground that it endangered her health, but insisted that “[i]n an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.” *Id.* at 1638–39.

<sup>126</sup> *Id.* at 1638.

<sup>127</sup> *Id.* at 1637.

<sup>128</sup> *Id.* at 1637–38.

<sup>129</sup> See *id.* at 1638.

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the rationale for the congressional enactment.”<sup>130</sup> The Act, Kennedy wrote, advanced several “legitimate” state interests, including expressing “respect for the dignity of human life,” safeguarding public respect for the medical profession, addressing “ethical and moral concerns” relating to the “disturbing similarity” between D&X abortions and infanticide, and protecting women from future regret and distress over having chosen the procedure.<sup>131</sup> The factual record on these points was generally thin, but the Court plainly found the underlying assumptions to be reasonable. For example, the Court wrote that “[w]hile we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude that some women come to regret their choice to abort the infant life they once created and sustained.”<sup>132</sup> It was “self-evident” that a woman who later regrets an abortion would have her grief compounded by knowing that she had undergone the D&X procedure.<sup>133</sup> It was “reasonable for Congress to think,” the Court wrote, that public respect for the medical profession might be eroded more sharply by tolerance of D&X than D&E abortions.<sup>134</sup>

In assessing both the medical risks for women and the strength of the state’s interests, *Carhart* deferred to legislative factual determinations that the Court considered reasonable, even when record evidence to support those judgments was thin, unavailable, or effectively in equipoise. The Court underscored the deferential nature of its review by infusing its opinion with the language of rational-basis review. “[W]e must determine whether the Act furthers the legitimate interest of the Government,” the opinion stated at one point; “[w]here it has a rational basis to act, and it does not impose an undue burden,” the opinion later stated, “the State may use its regulatory power . . . , all in furtherance of its legitimate interests . . . .”<sup>135</sup>

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<sup>130</sup> *Id.* at 1632.

<sup>131</sup> *Id.* at 1633–34.

<sup>132</sup> *Id.* at 1634 (citing an *amicus curiae* brief quoting the testimony of some women who expressed regret over past abortions).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1635.

<sup>135</sup> *Id.* at 1626, 1633; *see also id.* at 1638 (“Considerations of marginal

*Carhart* seemed to pull back so hard from the Court's earlier decisions in *Stenberg* and *Lawrence* that observers from diverse perspectives were left to wonder whether the Roberts Court had taken a dramatic turn not only on abortion rights but on substantive due process more broadly. Indeed, in many respects, *Carhart* seemed to depart so clearly from the approach suggested in *Lawrence* that it might be seen as a sort of Anti-*Lawrence*:

- *Lawrence* had suggested the need for special sensitivity in reviewing the use of criminal sanctions to control intimate personal decisions.<sup>136</sup> The *Lawrence* Court, for example, had queried whether the state could enforce majoritarian sensibilities about sexuality and family life “through the operation of the criminal law,”<sup>137</sup> and expressed special concern with the stigma, disabilities, and “collateral consequences” associated with criminal sanctions.<sup>138</sup> In *Carhart*, by contrast, the Court had no apparent qualms in upholding a federal criminal statute that threatened to send physicians to prison for up to two years.<sup>139</sup>
- *Lawrence* had centered constitutional protection on vital relational interests, pointedly tying individual decisions about sex to the construction of family life and the development of enduring “personal bond[s].”<sup>140</sup> *Carhart*,

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safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends.”).

<sup>136</sup> See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 70–71 (2003) (suggesting that *Lawrence* might be read to specially “forbid[] the state from using the heavy artillery of the criminal law”).

<sup>137</sup> *Lawrence v. Texas*, 539 U.S. 558, 571 (2003); see also *id.* at 567 (“The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”).

<sup>138</sup> *Id.* at 575–76 (underscoring concern with “the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition”).

<sup>139</sup> See 18 U.S.C. § 1531(a) (2007).

<sup>140</sup> *Lawrence*, 539 U.S. at 567; see Meyer, *supra* note 86, at 18; see also Robert C. Post, *The Supreme Court, 2002 Term – Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 97 (2003)

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by contrast, completed the shift of the locus for protection of abortion from the doctor-patient relation (where it began in *Roe*) to the individual privacy interest of the pregnant woman alone, stripping away any vestiges of constitutional protection for the doctor's independent professional judgment and discretion.<sup>141</sup>

• *Lawrence* had drawn powerfully on equality principles to heighten its due process scrutiny of Texas' sodomy law, recognizing that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects."<sup>142</sup> Indeed, its entwining of "substantive due process and equal protection doctrine into a holistic analysis of the cultural weight of the individual rights involved" had struck many observers as *Lawrence*'s most salient feature, even if, as Kenneth Karst has shown, the phenomenon was not unprecedented.<sup>143</sup> By contrast, *Carhart* pointedly ignored the equality implications of its understanding of women's substantive liberties; indeed, Kennedy's balancing of interests was focused, as Professor Calabresi noted, on "the state's interest in fetal life with no further attention to—or discussion whatsoever of—a woman's liberty interest in procuring abortion."<sup>144</sup> Instead,

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(noting that *Lawrence*'s "legal and rhetorical energy seems directed . . . at a concern for the dignity of enduring intimate relationships and a refusal to permit 'stigma' to be imposed because of those relationships").

<sup>141</sup> For an insightful account of the role of the doctor-patient relationship in *Roe*'s protection of abortion, see Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 BROOK. L. REV. 147 (2006); see also Peter M. Ladwein, Note, *Discerning the Meaning of Gonzales v. Carhart: The End of the Physician Veto and the Resulting Change in Abortion Jurisprudence*, 83 NOTRE DAME L. REV. 1847 (2008).

<sup>142</sup> *Lawrence*, 539 U.S. at 575.

<sup>143</sup> Hunter, *Living with Lawrence*, *supra* note 97, at 1103; see also Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99 (2007); Post, *supra* note 140, at 97.

<sup>144</sup> Calabresi, *supra* note 18, at 1520.

it was left to Justice Ginsburg in dissent to emphasize that the case was not solely about “some generalized notion of privacy,” but also women’s “equal citizenship.”<sup>145</sup>

• *Lawrence* had refused to accept traditional understandings of family as a basis for laws against sodomy. Kennedy’s opinion in *Lawrence* had acknowledged that “many persons” favored sodomy laws as a means of advancing “profound and deep convictions” relating to “respect for the traditional family.”<sup>146</sup> While expressing respect for these convictions, *Lawrence* held that they could not justify criminalization of contrary choices.<sup>147</sup> *Carhart*, by contrast, relied directly on traditional assumptions about maternal instinct as a basis for abortion regulation. “Respect for human life,” Kennedy wrote in *Carhart*, “finds an ultimate expression in the bond of love the mother has for her child.”<sup>148</sup> The state, *Carhart* held, was entitled to act to protect women from the profound “grief” and “sorrow” that would naturally be visited upon those who consented to D&X abortions in defiance of that instinctive bond.<sup>149</sup> Whereas *Lawrence* demanded public respect for the dignity of those who defied conventional expectations concerning

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<sup>145</sup> *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) (“[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”).

<sup>146</sup> *Lawrence*, 539 U.S. at 571.

<sup>147</sup> *See id.*

<sup>148</sup> *Carhart*, 127 S. Ct. at 1634; see Helen M. Alvaré, *Gonzales v. Carhart: Bringing Abortion Law Back into the Family Law Fold*, 69 MONT. L. REV. 409, 410–11 (2008) (observing that *Carhart* “appeared to adopt presumptions about parents and unborn children that family law typically applies to relationships between parents and their born children,” and that “*Gonzales*, like many family law cases, apparently relied on these presumptions in deference to their claimed self-evident nature and in response to the assertions of the involved adults”).

<sup>149</sup> *Carhart*, 127 S. Ct. at 1634. For an account of the growing emphasis on “woman-protective” rationales for restrictive abortion regulations, see Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007).

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gender roles and family organization, *Carhart* invoked those very expectations to justify public control of defiant choices.

• Finally, *Lawrence* held that government may not rest on popular morality to cabin protected family or intimate relationships, and instead must offer some demonstrable social harm—some “injury to a person or abuse of an institution the law protects.”<sup>150</sup> *Carhart*, by contrast, readily upheld Congress’ power to proscribe a method of abortion based on popular “ethical and moral concerns” likening the D&X procedure to infanticide.<sup>151</sup> True, *Carhart* went on to find additional social harms supporting the legislation—erosion of public respect for the medical profession and emotional distress suffered by regretful women—but these were so thinly supported that it is hard to believe a like-minded Court could not have identified similar harms to sustain Texas’ sodomy law.<sup>152</sup>

IV. CHOOSING SIDES: *LAWRENCE* OR *CARHART*—OR BOTH?

The striking contrast between *Lawrence* and *Carhart* raises an obvious and basic question: Does *Carhart* signal a general retreat from *Lawrence*’s expansive conception of personal liberty? Or, alternatively, is *Carhart*’s seemingly greater tolerance for state intervention on personal autonomy limited to abortion? The seeming schism between the decisions arguably appears to require designating one of them an outlier. That both opinions were written by the same author just four years apart makes the puzzle all the more intriguing.

In a recent essay in the *Michigan Law Review*, Professor Calabresi takes the former view. He reads *Carhart* as signaling Justice Kennedy’s return to the fold of substantive due process

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<sup>150</sup> See *Lawrence*, 539 U.S. at 567, 571.

<sup>151</sup> *Carhart*, 127 S. Ct. at 1633.

<sup>152</sup> See Calabresi, *supra* note 18, at 1521 (“Clearly, the [*Carhart*] Court takes a different view from the *Casey* and *Lawrence* Courts when it comes to government enforcement of morals legislation.”).



skeptics after his brief and regrettable adventurism in *Lawrence*.<sup>153</sup> *Carhart* is “a pro-judicial restraint, anti-substantive due process decision,” Calabresi writes, and “suggests a greatly reduced role for the Court in inventing new constitutional rights that is dramatically opposed to the expansive language of *Casey* and *Lawrence*.”<sup>154</sup> Kennedy’s failure in *Carhart* to acknowledge *Lawrence*, his slighting of women’s liberty interests relating to abortion, and his preference for as-applied over facial challenges, Calabresi argues, each point to a retreat from *Lawrence*.<sup>155</sup> After five years of uncertainty stirred by *Lawrence*’s bold rhetorical strokes, *Carhart* makes clear that *Lawrence* has not displaced *Glucksberg* as the standard-bearer for modern substantive due process analysis, and that *Lawrence* in fact can be safely relegated to the wings, an outlier that has no application beyond its facts.<sup>156</sup> “Kennedy’s opinion in *Gonzales* seems not to regard courts as the arbiters of our liberty,” Calabresi writes, “but as the modest adjudicators of very concrete cases and controversies in situations where the Court absolutely must rule because the facts force it to do so.”<sup>157</sup>

Justice Ginsburg, by contrast, takes the second view suggested above, seeing the decision in *Carhart* as driven chiefly by hostility to abortion rights. In closing her dissent, Ginsburg contended that the majority’s decision “cannot be understood as anything other than an effort to chip away” at the right recognized in *Roe* and *Casey*.<sup>158</sup> Other observers expressed a similar view, fearful—or hopeful—that another shoe is yet to drop.<sup>159</sup> Certainly, for those

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<sup>153</sup> See *id.* at 1520–21.

<sup>154</sup> *Id.* at 1520.

<sup>155</sup> See *id.* at 1520–21.

<sup>156</sup> See *id.* at 1518–21, 1541.

<sup>157</sup> *Id.* at 1521.

<sup>158</sup> *Gonzales v. Carhart*, 127 S. Ct. 1610, 1653 (2007) (Ginsburg, J., dissenting).

<sup>159</sup> See 2007 NARAL PRO-CHOICE AM. FOUND., *ROE V. WADE AND THE RIGHT TO CHOOSE* 3–4 (2007), available at <http://www.naral.org/assets/files/Courts-SCOTUS-Roe.pdf> (stating that *Carhart* “has paved the way for further setbacks to reproductive freedom and personal privacy” and that “*Roe* is in peril”); NAT’L WOMEN’S LAW CENTER, *GONZALES V. CARHART: THE SUPREME*

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who welcomed *Lawrence*'s willingness to protect intimacy and family liberty outside the lines of "deeply rooted" social convention, it might be tempting to take a page from Justice Scalia's playbook in *Lawrence* and try to contain the damage by casting *Carhart* as a rogue decision properly confined to its facts—once again effectively cleaving substantive due process protection for abortion from due process protection for other fundamental family liberties.<sup>160</sup>

I think it would be a mistake to suppose that *Carhart* does not have broader implications for substantive due process and other family privacy rights. But I do not agree that it amounts to an implicit disavowal of *Lawrence* and a ratification of *Glucksberg*'s narrower, history-oriented conception of fundamental rights. In fact, rather than seeing Justice Kennedy's opinions in *Lawrence* and *Carhart* as essentially at odds, requiring a choice between them, I see them as fundamentally sharing a common premise.

It seems implausible that Justice Kennedy intends *Carhart* to usher in a reversal of *Roe* or his own handiwork in *Casey*. Indeed, setting aside its provocative rhetoric, a close reading of Kennedy's opinion confirms that it actually upheld the Act "only in the narrowest and most carefully circumscribed manner."<sup>161</sup> *Carhart* sustained the Act against facial constitutional attack, but left open the possibility of future as-applied challenges in which "the nature of the medical risk can be better quantified and balanced."<sup>162</sup> What Kennedy ultimately wants, then, is to have it both ways—to have his right and eat it too, in effect—by way of a compromise in

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COURT TURNS ITS BACK ON WOMEN'S HEALTH AND ON THREE DECADES OF CONSTITUTIONAL LAW 5–6 (2007), available at <http://www.nwlc.org/pdf/GonzalesvCarhart2.pdf>. Cf. Carole Joffe, *The Abortion Procedure Ban: Bush's Gift to His Base*, DISSENT MAG., Fall 2007, available at <http://www.dissentmagazine.org/article/?article=941> ("Legal observers on all sides of the abortion issue agree that [*Carhart*] may usher in a massive new round of attempted restrictions on abortion.").

<sup>160</sup> Cf. *supra* Part I (recounting bifurcation of family privacy doctrine between abortion and other family-related liberties in *Planned Parenthood v. Casey* and later implicit convergence of the doctrinal standards).

<sup>161</sup> Garrow, *supra* note 10, at 47; accord Pushaw, *supra* note 5, at 526, 567–68.

<sup>162</sup> *Carhart*, 127 S. Ct. at 1638–39.

which the right is retained but subject to “reasonable” state limitation. Indeed, this was the emphatic central claim of both Kennedy’s majority opinion in *Carhart* and his earlier dissent in *Stenberg*—that *Casey*’s compromise requires a more even weighing of state and private interests in evaluating the permissibility of abortion regulations from case to case.<sup>163</sup> “*Casey*, in short, struck a balance,” Kennedy underscored in *Carhart*. “The balance was central to its holding.”<sup>164</sup> As Kennedy saw it, *Carhart* in no way “refuse[d] to take *Casey* . . . seriously,” as Ginsburg alleged in dissent.<sup>165</sup> Instead, in his view, it was *Stenberg* that had refused to take *Casey* seriously; *Carhart* merely restored the balance.<sup>166</sup>

A similar sort of balancing was also central to Justice Kennedy’s approach to parental rights in *Troxel*. In *Troxel*, Kennedy emphasized the importance of construing parents’ child-rearing rights flexibly in order to leave room for preserving potentially significant family relationships between children and non-parent caregivers.<sup>167</sup> He rejected the Washington Supreme Court’s construction of parents’ rights, under which parents would be constitutionally entitled to block visitation in all cases except where doing so would inflict “harm” on a child, as dangerously “categorical”; instead, he argued that the Constitution should be read to leave courts with leeway to balance the competing interests case-by-case through the flexible “best interests of the child” standard.<sup>168</sup> In a fundamental sense, *Carhart* can be seen as quite consistent with Kennedy’s instincts in *Troxel* and *Lawrence*; in each case, Kennedy sought to avoid rigid, categorical understandings of constitutional rights that might limit the ability

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<sup>163</sup> See *id.* at 1626–27; *Stenberg*, 530 U.S. at 956–57 (Kennedy, J., dissenting).

<sup>164</sup> *Carhart*, 127 S. Ct. at 1627.

<sup>165</sup> *Id.* at 1641 (Ginsburg, J., dissenting).

<sup>166</sup> See Garrow, *supra* note 10, at 22–27, 45–47 (suggesting that Kennedy’s approach in *Carhart* appears to be consistent with his own understanding of *Casey*).

<sup>167</sup> *Troxel v. Granville*, 530 U.S. 57, 98–99 (2000) (Kennedy, J., dissenting).

<sup>168</sup> *Id.* at 96–99.

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of judges to decide from case to case how best to balance the competing private and public interests.

Calabresi argues that Kennedy's position in *Troxel* supports Calabresi's thesis that Kennedy is, at heart, a "restraintist" when it comes to substantive due process.<sup>169</sup> Calabresi understands Kennedy to have relied on *Glucksberg's* concern with "history and tradition" in rejecting a broad construction of parental rights, in part out of a "hesitat[ion] to constitutionalize this area of family law."<sup>170</sup> Yet, this misreads the nature of Kennedy's restraint in *Troxel*. Kennedy readily accepted that unwanted visitation orders burden parents' fundamental childrearing rights and trigger constitutional scrutiny; in this sense, he was clearly no skeptic of substantive due process protection for parents.<sup>171</sup> Kennedy's point was that parents' rights should not be construed "categorical[ly]," in a manner that would reflexively override children's countervailing interests in maintaining important relationships with others. For Kennedy, the scope of parents' constitutional rights respecting visitation should not be reduced to a bright-line rule; instead, it should be "elaborated with care" from case to case, with sensitive regard for the particular circumstances of each family.<sup>172</sup> This is a restrained approach to the scope of *parental* rights, in that it pointedly rejects bright-line constitutional entitlements, but it is not a restrained approach to *substantive due process*. Indeed, by encouraging courts to define the boundaries of substantive due process by balancing the competing relational interests from case to case, Kennedy's approach seems highly likely to propel the further "constitutionalization" of family law.<sup>173</sup>

*Lawrence* can be read in much the same way. After all, for all its eloquence, the constitutional protection it gives is emphatically qualified. The Court bars criminal penalties on private, consensual, adult intimacy, but is careful to set aside whether the intimate bonds of gays and lesbians are entitled to formal recognition. The

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<sup>169</sup> See Calabresi, *supra* note 18, at 1522, 1528–31.

<sup>170</sup> *Id.* at 1529–30.

<sup>171</sup> See *Troxel*, 530 U.S. at 95 (Kennedy, J., dissenting).

<sup>172</sup> See *id.* at 101.

<sup>173</sup> See David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. \_\_\_ (forthcoming 2008).

Court suggests that altogether different constitutional standards would apply to “public conduct” or to intimacy involving minors.<sup>174</sup> Justice O’Connor, focusing on equal protection in her opinion concurring in the judgment, suggested a similar line. She agreed that mere “[m]oral disapproval of a group” is not a legitimate reason for state discrimination, and so invalidated Texas’ sodomy law, but she was keen to emphasize that this did not mean that “other laws distinguishing between heterosexuals and homosexuals would similarly fail.”<sup>175</sup> Specifically, she argued that “other [legitimate] reasons” support limiting marriage to opposite-sex couples.<sup>176</sup>

Justice Scalia castigated both Kennedy and O’Connor for presuming a power to distinguish between morality-based sodomy laws and morality-based marriage laws. There is no way in “principle and logic,” Scalia wrote, to defend the distinctions *Lawrence* supposes.<sup>177</sup> “One of the benefits of leaving regulation of this matter to the people rather than to the courts,” he observed, “is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly.”<sup>178</sup> While “[t]he Court today pretends that it possesses a similar freedom of action,” he concluded, such judgments are quintessentially political and cannot be explained as a matter of constitutional principle.<sup>179</sup> The Supreme Courts of California, Connecticut, and Massachusetts evidently agree, having cited *Lawrence* in finding state constitutional protection for same-sex marriage.

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<sup>174</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). For a contrary view concerning “public conduct,” see Carlos A. Ball, *Privacy, Property, and Public Sex* (unpublished draft paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1091526](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091526).

<sup>175</sup> *Lawrence*, 539 U.S. at 583, 585 (O’Connor, J., concurring in the judgment).

<sup>176</sup> *Id.* at 585.

<sup>177</sup> *Id.* at 604–05 (Scalia, J., dissenting).

<sup>178</sup> *Id.* at 604.

<sup>179</sup> *Id.*

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Yet I suspect that Justice Kennedy may find in *Carhart* a model for taking up the challenge. *Carhart*, like *Lawrence* and *Troxel*, reached an outcome that aligns closely with popular sensibilities. As Professor Robert Pushaw observes, “[w]hatever the deficiencies of Justice Kennedy’s *legal* analysis, his *political* instincts seem sound . . . . [H]e has roughly articulated the mainstream American view: allow women to choose abortion in the early period of pregnancy, but recognize the government’s interest in expressing its citizens’ moral condemnation of partial-birth abortion.”<sup>180</sup> Kennedy’s majority opinion justified this result not by manipulating the definitional boundaries of the constitutional right, but by accepting “facts” demonstrating the reasonableness of Congress’ incursion on the right.

*Carhart* upheld the federal Act based on a battery of factual claims. The public interests advanced by the law included—alongside moral objections to the method of abortion—concern for protecting public respect for the medical profession and protecting women from distress and regret over their choices. The absence of a health exception was explained away on the basis of Congress’ findings minimizing (indeed, denying) any health advantages of the banned method. The problem, of course, was that each of these empirical assumptions was unproven at best. Conjecture about the loss of public respect for doctors was deemed “reasonable.” The absence of any “reliable data” proving the incidence of post-abortion regret and distress was of no consequence, because the harm to women was “self-evident.” Congress was entitled to assume that its action did not expose women to significant health risks because the matter was “uncertain.” The Court claimed to exercise an “independent constitutional duty” to review legislative findings trenching on constitutional rights, but this seemed to amount only to ensuring that the factual claims were within the realm of reasonable disagreement. So long as the evidence did not squarely preclude the legislature’s assumption, it was free to regulate.

This tolerance of regulation on the basis of uncertain factual conjecture provides a route to justifying the line-drawing on family

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<sup>180</sup> Pushaw, *supra* note 5, at 569–70 (emphasis in original).

liberties hinted at in *Lawrence*. Factual claims concerning the welfare of children raised by gay and lesbian couples have already taken center stage in defenses of state laws banning same-sex marriage.<sup>181</sup> Ever since Hawaii was forced to justify its ban on same-sex marriage in *Baehr v. Lewin*<sup>182</sup> more than a decade ago, states have downplayed moral objections to homosexuality and focused on empirical claims that traditional, dual-sex marriage provides the optimal setting for procreation and the raising of children.<sup>183</sup> A number of judges hearing these cases have viewed “the state of the scientific evidence as unsettled on the critical question,”<sup>184</sup> and have concluded, as the New York Court of Appeals did in 2006, that “[i]n the absence of conclusive scientific evidence, the Legislature [can] rationally proceed on the common-sense premise that children will do best with a mother and father in the home.”<sup>185</sup>

Of course, if the rational basis test properly governs, such deference is unobjectionable. Yet *Carhart*, with its deference to legislative factfinding in the context of medical uncertainty, might seem to validate this approach even if a form of intermediate scrutiny were thought to apply. If so, a path is cleared for states to place “reasonable” limitations on family liberties under *Lawrence*—for instance, decriminalizing adult intimacy while denying public recognition in marriage—all on the basis of factual claims that, while unproven, strike the court as reasonable.

This points out an inherent danger of the approach taken in *Lawrence* (and *Goodridge*), broadening constitutional protection

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<sup>181</sup> See Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 *FORD. L. REV.* 2733, 2735 (2008).

<sup>182</sup> 852 P.2d 44, 57 (Haw. 1993).

<sup>183</sup> See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (examining state’s justifications for banning same-sex marriage on remand from Hawaii Supreme Court); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003); *Lewis v. Harris*, 875 A.2d 259, 269 (N.J. App. Div. 2005), *rev’d in part*, 908 A.2d 196 (N.J. 2006); *Andersen v. King County*, 138 P.3d 963, 1006 (Wash. 2006); William C. Duncan, *The State Interests in Marriage*, 2 *AVE MARIA L. REV.* 153 (2004).

<sup>184</sup> *Goodridge*, 798 N.E.2d at 980 (Sosman, J., dissenting).

<sup>185</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006).

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without squarely defining the nature of the private interest at stake as “fundamental” and without specifying the nature and strength of the constitutional scrutiny it triggers. Under traditional doctrine, deference to plausible legislative conjecture was the heart of rational-basis review; under heightened scrutiny, government was generally required to prove its claims of necessity. The murkiness of the “new” substantive due process provides cover for expanding protection, but also for importing uncharacteristically deferential standards like the one adopted in *Carhart*.

## CONCLUSION

Professor Pushaw has argued that “[t]he abortion cases illuminate the perils of the modern Court’s idiosyncratic, politicized, common law style of constitutional decision making.”<sup>186</sup> Ironically, this is an assessment with which observers from different perspectives may well agree. For Pushaw and other skeptics of the constitutional abortion right, the see-sawing in the partial-birth abortion cases highlights the need to extract the Court from the business of supervising legislative judgment in the field altogether. For many supporters of abortion rights, the see-sawing demonstrates the perilous fragility of constitutional protection under the softer “undue burden” framework and the need to contain judicial discretion by more heavily privileging the liberty interest of pregnant women. What both camps desire is a jurisprudence in which the boundaries of permissible state regulation of abortion are drawn with brighter lines at the outset, and in which outcomes are less dependent upon the vicissitudes of ad hoc balancing (and thus the ideological inclinations of the particular Justices sitting at the time of argument).

But approaches that make the initial characterization of constitutional rights outcome-determinative have their costs as well. In the broader context of family privacy rights, I have defended the Court’s de facto use of a form of intermediate constitutional scrutiny on pragmatic grounds.<sup>187</sup> Rigid application

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<sup>186</sup> Pushaw, *supra* note 5, at 591.

<sup>187</sup> See Meyer, *Lochner Redeemed*, *supra* note 46, at 1173–89; *see also*



of conventional fundamental-rights analysis is often poorly suited to capture the complex interplay of individual interests at stake in controversies over the family. The use of full-bodied strict scrutiny to protect family privacy rights assumes a unity of family interests opposing the state's intervention, when in fact family members may be divided over their associational ambitions. Too often, the felt need to squeeze complicated family conflicts into standard doctrinal categories has led courts to deny any heightened constitutional protection for non-standard rights-holders, such as children, informal caregivers, or same-sex partners.<sup>188</sup> Against this background, the loosening up of traditional constitutional analysis in *Troxel* and *Lawrence* has for the most part struck me as a welcome development. By substituting a less heavy-handed form of scrutiny, the Court has been able to recognize and more sensitively accommodate a broader range of family interests in our increasingly diverse society.

*Carhart* is a reminder that the indeterminacy of this approach can leave some privacy interests vulnerable to state regulation. *Lawrence* was not a one-sided victory for a broader liberty of family life; the flip side of that generosity was the danger that newly recognized family rights might be more easily overcome by claims of state necessity. The new danger underscored by *Carhart* is that states might not actually be put to persuasive proof of their claims, but might be allowed to rest on plausible conjecture in the absence of conclusive counterproof. If so, *Lawrence* and *Carhart* may be chiefly significant for shifting the fight over substantive due process to a new ground, one increasingly centered on the "reasonableness" of the state's factual assumptions.

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David. D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711 (2001).

<sup>188</sup> For a recent example, see, e.g., *Lofton v. Sec'y of Dep't of Child. & Fam. Servs.*, 358 F.3d 804, 811–15 (11th Cir. 2004) (finding no fundamental right of family privacy for children and longtime foster caregivers to preserve their relationship against state interference), *cert. denied*, 543 U.S. 1981 (2005); see also Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297 (2005).