6-2001

Lochner Redeemed: Family Privacy after Troxel and Carhart

David D. Meyer

LOCHNER REDEEMED: FAMILY PRIVACY AFTER *TROXEL* AND *CARHART*

David D. Meyer*

At least since its 1992 decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, *the Supreme Court has differentiated its review of abortion laws from its scrutiny of other intrusions on family privacy. Whereas abortion restrictions are reviewed under the middling "undue burden" standard, incursions on other family-related liberties, including marriage, kinship, and child rearing, are said to be subject to the strict scrutiny ordinarily employed in the defense of fundamental rights. This Article contends that the Court's most recent decisions in this context give reason to reconsider both sides of that equation.* Stenberg v. Carhart, *striking down Nebraska's ban on "partial-birth" abortions, suggests that the Court's scrutiny in the abortion context will be more aggressive and rigid than most had supposed. At the same time, its decision in* Troxel v. Granville, *limiting states' authority to order grandparent visitation over the objections of a parent, suggests that there is more fluidity in the Court's review of other family liberties than is conventionally assumed. Together the cases signal a convergence in both sorts of family-privacy controversies toward a common standard of "reasonableness." That standard bears, for many, an uncomfortable association with the much-maligned "natural law-due process formula" of the* Lochner *era, but Professor Meyer argues that it is precisely the right approach in the context of family privacy. Although more rigid doctrinal formulae are sometimes preferred on the ground that they constrain judicial judgment, here they are undesirable precisely because they obscure the value judgments that are inevitably at the core of every family-privacy decision.*

* Associate Professor, University of Illinois College of Law. I thank Dan Farber, Amy Gajda, Kit Kinports, Harry Krause, John Nowak, Marty Redish, and Richard Storrow for their very helpful comments.

INTRODUCTION

At the beginning of the last century, legal and constitutional protection for privacy was only nascent.[1] The home, to be sure, received some special constitutional protection from intrusion under the Fourth Amendment,[2] and the intimacies of family life were widely assumed to occupy a "private sphere" apart from the domain of law and public order.[3] But "family privacy" itself had no place in the constitutional lexicon. Accordingly, when the U.S. Supreme Court employed the Due Process Clause to ensure the "reasonableness" of legislation restricting parental authority in child rearing,[4] it did so only in the same way in which it policed the "reasonableness" of legislation restricting the working hours of laborers or the rates charged by industry.[5]

For much of the last fifty years, however, it has been the Court's task to develop and defend a distinctive constitutional doctrine protecting "intimate relationships, the family, and decisions about whether or not to beget or bear a child."[6] Although the Court has repudiated the interventionism of the *Lochner* era, it has clung to the narrow sliver of its *Lochner*-era precedents relating to parents and children.[7] Sidestepping alternative

1. *See, e.g.*, RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW 22–24 (1999). It was only in 1890 that Louis Brandeis and Samuel Warren published their groundbreaking article urging common law protection for intrusions upon personal privacy. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. *See* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13–15 (1970).

3. *See, e.g.*, Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498–502 (1983); Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1157.

4. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (recognizing a parent's right to send a child to private school); Meyer v. Nebraska, 262 U.S. 390 (1923) (recognizing a parent's right to give a child instruction in a foreign language).

5. *See, e.g.*, Ribnik v. McBride, 277 U.S. 350 (1928) (invalidating rate regulation); Lochner v. New York, 198 U.S. 45 (1905) (invalidating statute fixing a maximum hourly work week).

6. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 857 (1992).

7. Only about a half-dozen years separate the U.S. Supreme Court's rejection of *Lochner* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), from its insistence in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), that "[m]arriage and procreation are fundamental," *id.* at

understandings that might have grounded these cases in the Constitution's regard for contract, speech, or religion, the Court has instead fit them under the new rubric of privacy, carving out a "realm of family life which the state cannot enter."[8] In the ensuing decades, the Court has made great efforts to explain how its aggressive defense of family privacy stands on a different, more principled ground than *Lochner*'s now-discredited activism on behalf of economic liberties.[9]

Central to distinguishing *Lochner* has been the struggle to identify constraints on judicial discretion, both in defining the boundaries of family liberties and in enforcing those liberties against the political process. To this end, the Court has sought to replace the meandering value judgments of the *Lochner* era with the fixed directives of modern fundamental rights analysis. When it finds an incursion upon a discrete privacy right, such as marriage or child rearing, the Court insists it is not free to pass judgment according to its own values, but must channel its review through a prescribed form of scrutiny.[10] In recent years, this analysis has varied depending upon whether the family-privacy claim involves abortion. Traditional family-related liberties, such as the right to marry or to bear and raise a child, are said to be "zealously guarded" through the strict scrutiny traditionally reserved for fundamental constitutional rights.[11] The abortion right, however, at least after *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[12] is qualified

541, and its reaffirmation in *Prince v. Massachusetts*, 321 U.S. 158 (1944), that parents have a right to direct the upbringing of their children.

8. *Prince*, 321 U.S. at 166.

9. *See, e.g.*, *Casey*, 505 U.S. at 861–62 (distinguishing *Roe v. Wade*, 410 U.S. 113 (1973), from *Lochner*); Bowers v. Hardwick, 478 U.S. 186, 194–95 (1986) (rejecting privacy claim and analogizing to *Lochner*); Moore v. City of East Cleveland, 431 U.S. 494, 543 (1977) (White, J., dissenting) (noting that, for Justice Hugo Black, *Pierce* and *Meyer* "as substantive due process cases, were as suspect as *Lochner*"); *see also* Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332–33 (1988) (noting that "the foundationalist project [of constitutional scholars in recent decades] might be summarized as 'justify judicial review, show that *Lochner* is illegitimate, and then apply the theory to *Roe*'"); Gary D. Rowe, Lochner *Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 223 (1999) ("[A]voiding '*Lochner*'s error' remains the central obsession, the (oftentimes articulate) major premise, of contemporary constitutional law."); Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 873 (1987) (noting that "[t]he spectre of *Lochner* has loomed over most important constitutional decisions"); Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 8–10 (1973).

10. *See* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 295–96 (1992) (noting that "the Court has attempted to limit its own freedom to balance in many areas by employing fixed 'tiers' of review").

11. *In re* Custody of Smith, 969 P.2d 21, 28 (Wash. 1998), *aff'd sub nom.* Troxel v. Granville, 530 U.S. 57 (2000).

12. 505 U.S. 833 (1992).

and subject to protection only under the more middling "undue burden" standard.[13]

The close of the Court's 1999 Term, however, gives strong reason to rethink this conventional understanding. On one side, the Court's decision in *Stenberg v. Carhart*,[14] the late-term abortion case, makes the abortion right seem stronger than previously thought; on the other, its decision three weeks earlier in *Troxel v. Granville*,[15] the grandparents-visitation case, makes the more venerable child rearing right of parents appear distinctly more qualified. Together, the cases suggest that the Court is moving toward a roughly similar approach in both sorts of family-privacy cases. More significantly, the cases signal that the polestar of the Court's emerging approach is "reasonableness," the very standard that the Court is supposed to have safely entombed along with *Lochner* itself.

In Part I of this Article, I demonstrate the significance of the *Troxel* and *Carhart* decisions by placing them in the context of the Supreme Court's evolving family-privacy jurisprudence. In particular, I show that most early accounts have fundamentally misread *Troxel* by characterizing it as a resounding victory for parents' rights and have underappreciated the way in which *Carhart* strengthened the right to abortion. *Troxel* is remarkable, not because the Court found the application of Washington's grandparent-visitation statute to be constitutionally flawed—for traditional doctrine readily suggested that result—but because the parent won the case on such narrow and tenuous grounds.[16] Conversely, what is most remarkable about *Carhart* is that the Court struck down Nebraska's ban on so-called "partial-birth" abortions on grounds so robust and uncompromising.[17] The contrasting approaches reveal an important shift in the Court's confidence about its role. The majority's bold strokes in *Carhart* show that, eight years

13. *See id.* at 874 ("Only where state regulation imposes an undue burden on a woman's ability to make this decision [about terminating a pregnancy] does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

14. 530 U.S. 914 (2000) (invalidating a Nebraska ban on partial-birth abortions on the grounds that it imposed an "undue burden" on a pregnant woman's choice among late-term abortion methods and lacked a requisite exception for abortions needed to protect a woman's health).

15. 530 U.S. 57 (2000) (invalidating a court order for grandparent visitation, issued pursuant to a Washington statute that permitted "any person" to petition for visitation, on the ground that the issuing court gave insufficient consideration to the parent's objections to visitation).

16. Whereas the state supreme court had struck down Washington's visitation statute on its face and asserted broadly that non-parent visitation could only be justified if necessary to avert serious harm to a child, the plurality in *Troxel* insisted on limiting its holding to the trial court's application of the statute and refused to address the state court's "harm" rule. *See infra* Part I.A.

17. Besides finding that Nebraska's ban on partial-birth abortions imposed an undue burden on a pregnant woman's choice among abortion methods, the Court in *Carhart* also held that Nebraska was constitutionally required to make an exception from its ban for any women for whom the proscribed method would be the safest possible means. *See infra* Part I.B.

after *Casey*'s whisker-thin affirmation of *Roe v. Wade*,[18] the Court is increasingly sure of its place in protecting a woman's right to choose.[19] Ironically, at precisely the same moment, the Court's appreciation in *Troxel* for the daunting complexity of the American family seems to be leading it to soften its step with regard to the family-related liberties about which it had always expressed the greatest confidence.[20] Side by side, the two decisions draw together what most have regarded as separate strands of doctrine and suggest a future in which all such family-privacy controversies will be resolved by an essentially similar balancing of public and private interests.

Yet, just as *Troxel* and *Carhart* signal this convergence, they point to another, more troubling commonality in the Court's approach: a reluctance to own up to the vexing value judgments that are inescapably at the heart of the Court's emerging constitutional standard. Both cases ultimately required the Court to balance important social values in concluding that the Constitution did not permit the legislative judgments. *Troxel* pitted a parent's child rearing prerogative against the interests of children and of extended family members in sustaining a relationship of potentially great importance; *Carhart* balanced a woman's interest in health against a state's interest in expressing widely shared sentiments about the nature and value of human life. And yet in both cases the Court dodged explaining its choices. Last term's cases thus show a Court solidly committed to its role as arbiter of the nation's family values, but strangely unwilling to confront the hard value judgments that role requires.

In Part II, I consider what lies ahead for the Court. The special difficulty of disputes centered on the family—a difficulty which largely drives the ongoing convergence in the Court's family-privacy jurisprudence—is the possibility that a single controversy may involve a clash of intersecting constitutional interests. The unusual complexity of many family-privacy disputes explains the Court's flight from strict scrutiny, a standard far too rigid and outcome-determinative to account for the constitutional cross currents in this setting, and also points the way toward the Court's core challenge for the future: finding some principled way of mediating among conflicting privacy claimants. The Court's bent toward a *de facto* standard

18. 410 U.S. 113 (1973).

19. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 879 (1992) (affirming the "the central holding" of *Roe v. Wade*).

20. *See Troxel*, 530 U.S. at 65 (O'Connor, J., plurality opinion) (noting that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court"); *id.* at 95 (Kennedy, J., dissenting) (noting that the existence of a fundamental parenting right "is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions").

of *reasonableness* in reviewing incursions on abortion, child rearing, and other family liberties carries all the familiar vulnerabilities of the *Lochner* era, most obviously the danger of indeterminacy. But the very formlessness of the reasonableness standard is also, in this context, its virtue because it permits the Court to comprehend and balance competing values in a way that modern fundamental rights analysis cannot. The re-emergence of reasonableness review in the realm of family privacy, then, is not merely the legacy of *Lochner*, but at least partly its redemption.

I. THE CONVERGING PATHS OF FAMILY PRIVACY

The Constitution's protection for freedom of choice in matters relating to family life has been famously murky.[21] Without any clear grounding in the text of the Constitution, the doctrine has emerged in fits and starts from a series of cases involving, first, child rearing[22] and marriage[23] and, later, cohabitation,[24] contraception,[25] and abortion.[26] Indeed, it was not clear initially that the Court's solicitude in these cases was premised upon the fact that the government was intruding upon *the family*. The very first of the cases, decided at the height of the *Lochner* era and upholding parents' decisions about the schooling of their children,[27] seemed to be as concerned

21. *See* Hill v. NCAA, 865 P.2d 633, 651 (Cal. 1994) (en banc) (lamenting "the murky character of federal constitutional privacy analysis," and calling it a doctrine "without any coherent legal definition or standard"); Anita L. Allen, *Tribe's Judicious Feminism*, 44 STAN. L. REV. 179, 192 (1991) (describing "the 'substantive due process' quagmire of the privacy-as-fundamental-liberty argument"); David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 531 (2000) (noting "broad agreement that the Supreme Court's 'privacy' cases have created a doctrinal 'quagmire'"); Daniel A. Farber, Book Review, 10 CONST. COMMENT. 510, 510 (1993) (reviewing JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION (1992)) (noting that "prominent scholars have tried to escape the swamp by abandoning the concept of privacy altogether").

22. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (recognizing a parent's right to send a child to private school); Meyer v. Nebraska, 262 U.S. 390 (1923) (recognizing a parent's right to give a child instruction in a foreign language).

23. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing a right to marry); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (recognizing a right to avoid sterilization on the ground that "[m]arriage and procreation are fundamental to the very existence and survival of the race").

24. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (recognizing a right of extended family members to live together).

25. *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (recognizing a right to sell or distribute contraceptives); Eisenstadt v. Baird, 405 U.S. 438 (1972) (recognizing a right of individuals, regardless of marital status, to use contraception); Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing a right of married couples to use contraception).

26. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

27. *See supra* note 22 and accompanying text.

with the contractual liberty of teachers as it was with the child rearing liberty of parents.[28] By 1944, however, after *Lochner*'s protection of economic liberties had been discarded, the Court recast the cases as carving out a "private realm of family life which the state cannot enter."[29]

While many particulars of the Court's family-privacy doctrine have remained fuzzy, there has been general agreement about its broadest outlines. The Court has insisted repeatedly that all of these specific family liberties—at least with the arguable exception of abortion—rank as fundamental.[30] According to well-worn doctrine, any governmental restriction of a fundamental right must be subjected to strict constitutional scrutiny, under which the government bears the burden of proving that the restriction is narrowly tailored to achieve a compelling state interest.[31]

---

28. *See* Meyer, *supra* note 21, at 533–34. Certainly, Justice Black took this view:

> *Meyer v. Nebraska* . . . and *Pierce v. Society of Sisters* . . . were both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in *Lochner v. New York* . . . . *Meyer* held unconstitutional, as an "arbitrary" and unreasonable interference with the right of a teacher to carry on his occupation and of parents to hire him, a state law forbidding the teaching of modern foreign languages to young children in the schools. And in *Pierce*, relying principally upon *Meyer*, Mr. Justice McReynolds said that a state law requiring all children attend public schools interfered unconstitutionally with the property rights of private school corporations because it was an "arbitrary, unreasonable and unlawful interference" which threatened "destruction of their business and property."

Griswold, 381 U.S. at 515–16 (Black, J., dissenting) (citations and footnote omitted). For a forceful "revisionist" analysis suggesting that *Meyer* and *Pierce* were premised on protection of a different sort of "property" right, see Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

29. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing a guardian's right to enlist her child in street corner proselytizing).

30. *See* Washington v. Glucksberg, 521 U.S. 702, 726 (1997) (stating that past cases have protected "certain fundamental rights and 'personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education'" (quoting *Casey*, 505 U.S. at 851)); Turner v. Safley, 482 U.S. 78, 95 (1987) (describing the right to marry as fundamental); Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (stating that past cases have recognized "a fundamental individual right to decide whether or not to beget or bear a child"); Lyng v. Castillo, 477 U.S. 635, 638 (1986) (describing the choice of "family living arrangements" as "a fundamental right"); Santosky v. Kramer, 455 U.S. 745, 758–59 (1982) (stating that a parent has a "fundamental liberty interest" in "'the companionship, care, custody, and management of his or her children'" (quoting Lassiter v. Dep't. of Soc. Servs., 452 U.S. 18, 27 (1981))); Zablocki v. Redhail, 434 U.S. 374, 383–84 (1978) (describing the right to marry as fundamental); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973) (stating that a fundamental privacy right "encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing"); Loving v. Virginia, 388 U.S. 12, 12 (1967) (describing the right to marry as fundamental); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental . . . .").

31. *See generally* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.7, at 626 (3d ed. 1999); 3 ROTUNDA & NOWAK, *supra*, § 18.3, at 213 (discussing fundamental rights and standards of review under the Equal Protection and Due Process Clauses).

When that standard applies, it is generally presumed that the state will fail in its burden and the restriction will be struck down.[32] In truth, the Court has often mitigated this doctrinal rigidity. The Court sometimes, for example, has resorted to manipulating the boundaries of family-privacy rights in order to sustain reasonable regulations affecting marriage or child rearing—deciding, say, that parents have a fundamental right to send their children to a parochial school, but not to a racially segregated one.[33] Further, even when the Court has found incursions on a fundamental right of family privacy, it sometimes has obscured the nature of its review.[34] For some, the Court's occasional evasions have been enough to raise doubt over whether the rights of marriage, kinship, and child rearing really qualify as fundamental at all.[35] Yet, the Court itself has never wavered in describing

32. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as "'strict' in theory and fatal in fact"); Sullivan, *supra* note 10, at 296.

33. *See* Runyon v. McCrary, 427 U.S. 160, 178–79 (1976) (holding that state-mandated integration of private schools does not violate the rights of parents desiring segregated education because "while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation"). Similarly, in *Zablocki*, 434 U.S. at 374, Justices Lewis Powell, Jr. and Potter Stewart suggested that the fundamental right of marriage would extend to heterosexual interracial couples, but not to same-sex or underage couples. *See id.* at 392–93 (Stewart, J., concurring); *id.* at 397–99 (Powell, J., concurring). For other examples, see Meyer, *supra* note 21, at 559–62. *See also* EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS 165 (1996) (asserting that in the area of family privacy, "the Supreme Court's substantive due process jurisprudence appears manipulable and result oriented").

34. In both *Zablocki*, 434 U.S. at 374, and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), for example, the Court avoided the familiar language of strict scrutiny, substituting debatable synonyms that left doubt about the rigor of the Court's review. *See* 2 ROTUNDA & NOWAK, *supra* note 31, § 18.28, at 581 (noting that "[t]he majority opinion [in *Zablocki*] left the exact nature of the standard of review employed in this case unclear"); Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949, 952–54 (1992); Meyer, *supra* note 21, at 540–44. Indeed, recurring looseness in the Court's review has led some to conclude that these liberties are protected by a standard lower than strict scrutiny. *See, e.g.*, Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174, 179 (4th Cir. 1996) (discussing the right of child rearing), *cert. denied*, 519 U.S. 1111 (1997); 2 ROTUNDA & NOWAK, *supra* note 31, § 18.28, at 581 (discussing the right to marry); David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 838–39 (1999) [hereinafter Meyer, *Family Ties*] (discussing the right of child-rearing); Meyer, *supra* note 21, at 536–48 (discussing the full range of family-privacy rights); Milton C. Regan, Jr., *Marriage at the Millennium*, 33 FAM. L.Q. 647, 652 (1999) (discussing the right to marry); Lynn D. Wardle, Loving v. Virginia *and the Constitutional Right to Marry, 1790–1990*, 41 HOW. L.J. 289, 324–25 (1998) (same).

35. *See, e.g.*, *Herndon*, 89 F.3d at 179 (concluding that incursions on parental rights are subject only to rational basis scrutiny); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 533 (1st Cir. 1995) ("[T]he *Meyer* and *Pierce* cases were decided well before the current 'right to privacy' jurisprudence was developed, and the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose

these family liberties as fundamental and in maintaining at least the veneer that they are entitled to the same degree of judicial protection accorded all other fundamental rights.

At least since 1992, however, the rule for abortion has been different. Although the Court in earlier cases had described the right to abortion as fundamental,[36] implying that it ranked on the same constitutional plane as the rights of marriage and child rearing, the Court in 1992 cut the abortion right loose from its doctrinal moorings in the broader range of family-privacy rights.[37] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[38] the Court resolved its lingering misgivings about *Roe v. Wade*[39] by reaffirming the existence of a right to abortion while giving it a specially qualified status. The Court acknowledged that the abortion right is rooted in the Constitution's more general regard for "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"[40] but emphasized that "[a]bortion is a unique act"[41] and that *Roe v. Wade* itself could be regarded "as *sui generis*."[42] The right to abortion was set apart from the other family-privacy rights from which it sprang, the Court reasoned, because of the "unique" way in which its exercise was

---

infringement merits heightened scrutiny."), *cert. denied*, 516 U.S. 1159 (1996); Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1231 (1999) (suggesting that the Court has established only "the quasi-fundamental nature of the right" to marry); Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 985 (1988) (contending that the Court's "patchwork of decisions . . . leave[s] many questions unanswered," including "whether parental rights are truly fundamental rights at all"); *cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 n.4 (1993) (Souter, J., concurring in part) (concluding that "the *Pierce* reasonableness test" used in most parental-rights cases is less stringent than strict scrutiny).

36. *See* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 420 n.1 (1983); Carey v. Population Servs. Int'l, 431 U.S. 678, 688–89 (1977); Roe v. Wade, 410 U.S. 113, 152–53 (1973).

37. As Professors Daniel Farber and John Nowak have demonstrated, the Court actually began to compromise its scrutiny in abortion cases well before 1992. *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) ("By 1986, it was quite literally 'black letter' or 'hornbook' law that in pre-viability abortions *Roe* requires strict scrutiny only to determine if the regulation in question is a reasonable health regulation."); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.29, at 810–11 (5th ed. 1995). But the Court made its departure from traditional fundamental rights analysis official in *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992).

38. 505 U.S. 833 (1992).

39. 410 U.S. 113 (1973).

40. *Casey*, 505 U.S. at 851.

41. *Id.* at 852; *accord* Stenberg v. Carhart, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting).

42. *Casey*, 505 U.S. at 857; *cf.* Bellotti v. Baird, 443 U.S. 622, 650 (1979) (Powell, J., plurality opinion) (describing the abortion right as "a constitutional right of unique character").

"fraught with consequences for others," including other family members and "the life or potential life that is aborted,"[43] and because of the peculiar strength of the state's interest in protecting those other interests.[44] These differences led the authors of *Casey*'s pivotal joint opinion to reject the strict scrutiny standard and to adopt in its place the more qualified "undue burden" standard.[45] Henceforth, regulations making it more difficult to obtain an abortion, even before viability of the fetus, need not be justified by "compelling interests" and "narrow tailoring"; rather, such regulations will be upheld so long as they do not have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[46]

In this sense, *Casey* can be seen as having established a major fork in the road of family-privacy doctrine. State incursions on a woman's access to abortion will be diverted onto the low road of undue burden analysis, under which the woman's interest in autonomous decisionmaking will be balanced more flexibly against the state's interest in promoting health and childbirth and, implicitly, against the interests of other family members who might be affected by the woman's choice.[47] State incursions on all other family-related liberties, however, will remain on the high road of traditional strict scrutiny, under which the state's power to interfere with private decisions about marriage, child rearing, and living arrangements will be more sharply curtailed. This remains, by and large, the hornbook account of modern constitutional privacy analysis.[48]

Neither the majority in *Stenberg v. Carhart* nor the plurality in *Troxel v. Granville* purported to abandon this bifurcated approach to family-privacy

43. *Casey*, 505 U.S. at 852.

44. *See id.* at 871.

45. *See id.* at 871 (rejecting strict scrutiny); *id.* at 876–79 (adopting the undue burden standard).

46. *Id.* at 877.

47. In *Casey*, for instance, the Court emphasized that constitutional protection for abortion must account for the interests of all those affected by the decision to terminate a pregnancy, including "the woman who must live with the implications of her decision; . . . the spouse, family, and society which must confront the knowledge that these procedures exist, . . . and, depending on one's beliefs, . . . the life or potential life that is aborted." *Id.* at 852. Later in its opinion, the Court frankly considered the separate interests of a woman's husband and of the parents of a pregnant minor in judging the reasonableness of the state's regulations mandating spousal notification and parental consent. *See id.* at 895–98; *id.* at 899–900 (O'Connor, Kennedy, & Souter, JJ., plurality opinion).

48. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 10.1.1, at 638 & n.2 (1997); *id.* § 10.2, at 644; ALLAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS § 2.5, at 78–100 (2d ed. 2001); NOWAK & ROTUNDA, *supra* note 37, § 11.7, at 403–04; *id.* § 14.28, at 801, 806–08; *id.* § 14.29, at 811–12, 817–23.

controversies. In fact, the plurality in *Troxel* invalidated the visitation order at issue in that case without applying any clearly recognizable standard of constitutional review, and the majority in *Carhart* disclaimed making any innovations in *Casey*'s "undue burden" standard.[49] Yet the reasoning of the prevailing Justices in the two cases—including both the reasons they relied upon and, importantly, those they eschewed—suggests that there is much less distance between the two lines of family-privacy analysis than most have supposed. Indeed, it suggests that abortion may not be "unique," after all, at least in any sense relevant to the Constitution, and that many of the considerations that led the Court to moderate its review of abortion regulations also apply to state interference with other aspects of family privacy.

A. *Troxel v. Granville*

The family quarrel at the center of *Troxel* arose from tragedy. Brad Troxel and Tommie Granville shared a romantic relationship and, though they never married, had two daughters, Isabelle and Natalie.[50] After Brad and Tommie separated in 1991, Brad moved in with his parents, Jenifer and Gary Troxel, and Tommie retained custody of the two girls. The grandparents often saw the girls during visits with their father in the Troxel home. In May 1993, Brad committed suicide. For a time, the elder Troxels continued to see Isabelle and Natalie regularly, as they had before Brad's death. However, that winter, after Tommie informed the Troxels that she wished to cut back on the amount of time the girls spent at their home, the grandparents balked and turned to the Washington Superior Court for Skagit County. The Troxels filed a petition for court-ordered visitation under two state statutes, both of which gave standing to non-parents.[51] The broader of those statutes, section 26.10.160(3) of the Washington Revised Code, provided that "[a]ny person" was entitled to petition a court "at any time" for court-ordered visitation and that a court was to oblige if it found that visitation would "serve the best interests of the child."[52] The superior court, after a trial, found that the girls would indeed "benefit[] from spending

49. *See* Stenberg v. Carhart, 530 U.S. 914 (2000).

50. *See* Troxel v. Granville, 530 U.S. 57, 60 (2000).

51. *See In re* Custody of Smith, 969 P.2d 21, 24 (Wash. 1998), *aff'd sub nom.* Troxel v. Granville, 530 U.S. 57 (2000).

52. WASH. REV. CODE § 26.10.160(3) (West 1998). The statute read: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." *Id.*

quality time" with their grandparents.[53] Accordingly, it ruled that the Troxels were entitled to resume regular visitation with the girls, although not as frequently as they had sought.[54]

After an intermediate appellate court reversed on statutory grounds,[55] the Washington Supreme Court accepted Tommie's argument that the visitation statute was unconstitutional. The court's rationale is important, both because it reflected a conventional understanding of family-privacy doctrine and because a majority of Justices on the United States Supreme Court ultimately embraced so little of it. The state supreme court's analysis hewed closely to the black-letter account of family-privacy doctrine.[56] "[I]t is undisputed," the court began, "that parents have a fundamental right to autonomy in child rearing decisions."[57] That much was clear from a series of Supreme Court decisions reaching back to *Meyer v. Nebraska*[58] and *Pierce v. Society of Sisters*[59] that upheld parents' rights to make educational choices for their children.[60] Because the statute authorized interference with a par-

53. *Troxel*, 530 U.S. at 62 (quoting superior court's written finding of fact).

54. At trial, the Troxels asked the court to permit them to spend two weekends each month with the girls as well as two weeks during the summer. The girls' mother, on the other hand, said she was unwilling to give the Troxels more than one daytime visit with the girls each month. The trial court ultimately split the difference, granting the Troxels one weekend of visitation each month, one week during the summer, and daytime visits on each grandparent's birthday. *See id.* at 61.

55. The court of appeals had avoided Tommie's constitutional challenge by ruling that the Troxels lacked standing under the statute to seek visitation in the first instance. *See In re* Visitation of Troxel, 940 P.2d 698 (Wash. Ct. App. 1997), *aff'd sub nom. In re* Custody of Smith, 969 P.2d 21 (Wash. 1998), *aff'd sub nom. Troxel*, 530 U.S. at 57. Although the statute itself granted standing broadly to "[a]ny person," the court of appeals reasoned that restrictive amendments to another Washington visitation statute should be implied into section 26.10.160(3) as well in order to save it from constitutional infirmity. *See Troxel*, 940 P.2d at 700 (noting that the court's narrowing construction was "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in [child rearing]"); *see also Smith*, 969 P.2d at 26. The state supreme court, however, would have none of it. The statute's "[a]ny person" language was plain and unambiguous, the court ruled, and the judiciary had no business "read[ing] qualifications into the statute which are not there." *Id.*

56. Indeed, the leading constitutional law hornbook, in an edition published as *Troxel* was pending before the Court, predicted that the Supreme Court would follow just the sort of strict scrutiny analysis employed by the state court. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.28, at 866 (6th ed. 2000) ("Perhaps, the Court [in *Troxel*] will rule that a state may, if it so chooses, grant visitation rights to grandparents only if the visitation order is narrowly tailored to a compelling or overriding interest, such as insuring the well being of a child.").

57. *Smith*, 969 P.2d at 27.

58. 262 U.S. 390 (1923) (striking down a law that forbade teaching children in a foreign language).

59. 268 U.S. 510 (1925) (striking down a law forbidding parents from sending their children to private schools).

60. *See Smith*, 969 P.2d at 27.

ent's child rearing decisions concerning visitation, the court reasoned, strict scrutiny was required.[61]

Applying the strict scrutiny test, the court readily acknowledged that states have a compelling interest in protecting children from serious harm.[62] Past cases upholding governmental authority to enforce vaccination or child labor laws over parental objection had established that much.[63] The court conceded, moreover, that court-ordered visitation might be the only way to spare a child from "severe psychological harm" in "circumstances where a child has enjoyed a substantial relationship with a [non-parent]."[64] Yet, section 26.10.169(3) was not tailored to the goal of safeguarding children from such injury because it allowed courts to order visitation without regard to harm, on the lesser showing that visitation would promote a child's "best interest."[65] The state's interest in marginally enhancing the welfare of an already well-off child, the court held, simply cannot qualify as "compelling."[66] Perhaps another statute, one more narrowly tailored to the goal of protecting children from the arbitrary infliction of "severe psychological harm" might be constitutional, but not the intrusive, free-wheeling "best-interests" statute enacted by the Washington legislature.[67]

---

61. *See id.* at 28 ("Where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.").

62. *See id.* at 28–29.

63. *See id.* at 28 (citing Prince v. Massachusetts, 321 U.S. 158 (1944)).

64. *Id.* at 30.

65. *Id.*

66. *See Smith*, 969 P.2d at 30. The *Smith* court reasoned that

> Short of preventing harm to the child, the standard of "best interest of the child" is insufficient to serve as a compelling state interest overriding a parent's fundamental rights. State intervention to better a child's quality of life through third party visitation is not justified where the child's circumstances are otherwise satisfactory.

Id.

The Georgia Supreme Court had earlier reached the same conclusion. *See* Brooks v. Parkerson, 454 S.E.2d 769, 774 (Ga. 1995) (holding Georgia's grandparent-visitation statute unconstitutional "because it . . . does not require a showing of harm before state interference is authorized").

67. Both Justices Sandra Day O'Connor and David Souter described the state supreme court's decision as having identified two distinct constitutional defects in the Washington visitation statute: first, "the failure of the statute to require harm to the child to justify a disputed visitation order," and, second, "the statute's authorization of 'any person' at 'any time' to petition and to receive visitation rights subject only to a free-ranging best-interests-of-the-child standard." Troxel v. Granville, 530 U.S. 57, 75–76 (2000) (Souter, J., concurring); *accord id.* at 61–63 (O'Connor, J., plurality opinion). These concerns, rather than being "two independently sufficient grounds," *id.* at 76 (Souter, J., concurring), are really two sides of the same coin. The reason why the state supreme court thought the statute's allowance for visitation to "any person" on a mere best-interests showing swept "too broadly," *id.* at 63 (O'Connor, J., plurality opinion), was that it permitted a petitioner to obtain visitation without proving that a child would suffer harm from a loss of contact.

When the U.S. Supreme Court affirmed this judgment in June 2000, its decision was widely hailed in news reports and editorials as a broadsided victory for the authority of parents. The editors of *The Washington Times*, echoing other newspapers, crowed that the Court's ruling had established that "Big Brother . . . has no place inside the American family."[68] The chair of the family law section of the New Jersey State Bar Association commented that the decision "really bolsters parents and seems to give them an almost inalienable right to raise their kids without interference."[69]

Had the Court embraced the reasoning of the Washington Supreme Court, these characterizations of the Court's decision would have been warranted. The state supreme court's wooden application of strict scrutiny would decimate the non-parent visitation laws of all fifty states.[70] If court-ordered visitation were possible only when a loss of contact would inflict "severe psychological harm"[71] on the child, it would surely be the rare case in which a court intervened.[72] This seems clear from the way in which some judges, touting the natural resilience of children, have sought to minimize the significance of even the most egregious family ruptures. Consider, for instance, a recent New Jersey case in which a woman sought visitation with twin four-year-old girls who had been born to her former live-in partner during their same-sex relationship. Applying a best-interests standard, a state court granted visitation after finding that the girls would

68. Editorial, *A Victory for Parents*, WASH. TIMES, June 11, 2000, at B2; *see also* Editorial, *Affirming Parents' Rights*, ST. LOUIS POST-DISPATCH, June 6, 2000, at B16; Editorial, *Court Right to Affirm Parental Power*, ATLANTA CONST., June 7, 2000, at A18; Editorial, *Grandparents' Rights? Wrong*, PLAIN DEALER, June 9, 2000, at B8.

69. Evelyn Apgar, *Grandparents' Visits Likely to Be Tougher; Family Lawyers Assess Ruling*, N.J. LAW., July 3, 2000, at 3. Professor Erwin Chemerinsky gave a similar assessment: "I think that the practical effect of this [ruling]," he told National Public Radio's *All Things Considered*,

> will be to undermine the grandparents' right statutes that exist in all fifty states. It's certainly possible to interpret this decision narrowly, it's just invalidating broad statutes like Washington's; however, I think that the clear implication of this is that parents have a fundamental right to control the upbringing of their children and if parents don't want grandparent visitation, the state can't order it over their objections.

All Things Considered: Supreme Court Decision that Grandparents Can't Sue for Visits with Their Grandchildren (NPR radio broadcast, June 5, 2000) (statement of Prof. Erwin Chemerinsky).

70. *See Troxel*, 530 U.S. at 73 n.* (noting that "[a]ll 50 States have statutes that provide for grandparent visitation in some form" and collecting statutes).

71. *See Smith*, 969 P.2d at 30.

72. Indeed, since Georgia amended its grandparent-visitation law to require proof of harm in response to a 1995 constitutional ruling by the state supreme court, there has been no reported case upholding an order of visitation. *See* GA. CODE § 19-7-3(b)(2) (1999), (requiring finding that "the health or welfare of the child would be harmed unless . . . visitation is granted"); Brooks v. Parkerson, 454 S.E.2d 769, 769 (Ga. 1995) (holding unconstitutional a prior version of the statute for omitting the harm element). To the contrary, in the only reported appellate decision on point, the state court of appeals reversed a trial court's finding of prospective "harm" as clearly erroneous. *See* Hunter v. Carter, 485 S.E.2d 827, 829–30 (Ga. Ct. App. 1997).

benefit from continued contact with their longtime caregiver.[73] A dissenting judge, however, would have applied a standard akin to that suggested by the Washington Supreme Court and denied visitation after concluding that "the potential for serious psychological harm is, at best, a speculative possibility."[74] A Virginia court, in the wake of *Troxel*, reached the same conclusion about a young boy separated from the foster parents who, for years, had served as his only family.[75] That judges would doubt the prospects for harm

---

73. *See* V.C. v. M.J.B., 725 A.2d 13, 22–23 (N.J. Super. Ct. App. Div. 1999), *aff'd*, 748 A.2d 539 (N.J. 2000), *cert. denied*, 121 S. Ct. 302 (2000).

74. *Id.* at 23 (Braithwaite, J., concurring in part and dissenting in part). Notwithstanding the "strong loving relationship" that existed between the children and the woman who had shared their home and helped to rear them for more than two years as their "other mother," this judge nevertheless doubted that her disappearance from their lives would be a matter of serious or lasting concern to them:

> [B]oth parties' experts testified that the children will experience some "short-term problems" if their relationship with plaintiff is terminated. As to long-term effects, defendant's expert testified that "they will probably not suffer." He based this opinion on the fact that the children are "well cared for" and that well cared for children are resilient.

Id. In a similar vein was the so-called *Baby Richard* adoption case from Illinois. There, the state supreme court ordered that a four-year-old boy be abruptly transferred from the family who had raised him since he was days old to the biological father he had never met. *See In re* Petition of Kirchner, 649 N.E.2d 324 (Ill. 1995). Thereafter, the boy was permitted no further contact with the caregivers he had thought were his parents, nor with the older boy he regarded as his brother. Yet, notwithstanding the sudden loss of contact between the four-year-old child and the loved ones he regarded as his only family, Justice James Heiple took an optimistic view of the boy's psychological prospects:

> As for the child, . . . it is to be expected that there would be an initial shock, even a longing for a time in the absence of the persons whom he had viewed as parents. This trauma will be overcome, however, as it is every day across this land by children who suddenly find their parents separated by divorce or lost to them through death. . . . It will work itself out in the fullness of time.

In re Petition of Doe, 638 N.E.2d 181, 190 (Ill. 1994) (Heiple, J., concurring); *cf. In re* J.F. 694 N.Y.2d 592, 600 (N.Y. Fam. Ct. 1999) (ordering a change in custody of children and noting that "[a]lthough the children may be upset, angry, and disappointed and may grieve, the Court has faith that in the long run, the children's resiliency, lust for life and underlying goodness and purity will bring them to a place where they can love and be loved by both parents").

75. *See In re* Richardson, No. 1364-A, 2000 WL 869450, at *4 (Va. Cir. Ct. June 23, 2000). In that case, the boy had been placed with the foster parents when he was two months old; his mother, battling drug problems, then dropped out of his life. The boy's father, incarcerated for the first two years of his son's life, began sharing custody with the foster parents when the boy was three years old. One year later, after the father assumed full custody, he sought to cut off contact with the former foster parents and the Virginia Circuit Court agreed that he was constitutionally entitled to do so. Despite expert testimony that the boy's "separation from the [foster parents] is the psychological equivalent to the death of a parent, placing him in significant risk for depression, lowered self-esteem, and guilt in later years," *id.* at *2, the court found that the boy would not "suffer actual harm" from a severance of ties with the foster parents:

> Corey may be at higher risk, even significantly higher risk for depression and related disorders due to the separation from the [foster parents]. However, the support he is receiving in his home and the lack of serious problems to date lend confidence that Corey is in a healthy environment with his father where he will continue to progress.

Id. at *4.

when a four-year-old child loses contact with a longtime parent figure suggests a very narrow scope indeed for non-parent visitation under a constitutional "harm" test.[76]

The U.S. Supreme Court, however, pointedly did not embrace the reasoning of the Washington Supreme Court. In fact, a close reading of *Troxel*'s six separate opinions shows that a majority of the Justices made concerted efforts to distance themselves from it. Only two Justices agreed with the Washington Supreme Court that the visitation statute was facially unconstitutional,[77] and only one, Justice Clarence Thomas, embraced a parents' rights rationale as broad as the state supreme court's.[78] Indeed, of the seven Justices who directly addressed the state court's harm test for overcoming parental prerogative, five expressly withheld approval[79] and two rejected it outright.[80] A majority vote affirming the state court's judgment was pieced together only by adding the four-member plurality led by Justice Sandra Day O'Connor, which was willing to say only that the statute had been unconstitutionally applied to Tommie Granville and then only on the narrowest possible ground. Thus, although Tommie Granville herself could fairly claim vindication by the Court's decision, it was hardly clear, as she

---

76. In fact, research amply supports the intuition that children often suffer grievously from the loss of a relationship with a parent or a de facto parent. *See, e.g.*, Meyer, *Family Ties*, *supra* note 34, at 843 & n.413; Suellyn Scharhecchia, *A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case*, 2 DUKE J. GENDER L. & POL'Y 41, 41–42 & nn.5 & 8 (1995); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2402 n.4 (1995). Nevertheless, the willingness of these judges to discount children's sense of loss fits comfortably within a broader family law tradition. As Barbara Woodhouse has pointed out, courts in many settings have minimized the importance of children's relationships with caregivers in order to vindicate the rights-based claims of biological parents. *See* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1809–10 (1993) (analyzing cases favoring the claims of genetic over "gestational" parents and concluding that, "[a]lthough giving lip service to children's interests, they fail to reflect children's experience of reality"); Woodhouse, *supra* note 28, at 1116–17:

> The Court has shown a disturbing willingness to deny children's reality in order to protect a hollow family integrity. These disputes over acknowledging children's independent voices and independent interests indicate the tenacity of the Aristotelian idea, establishing the impossibility of intrafamily oppression, that parent and child are one, and "there can be no injustice to oneself."

Id. (citation omitted).

77. Those two were Justice Souter, *see* Troxel v. Granville, 530 U.S. 57, 75 (2000) (Souter, J., concurring), and Justice Clarence Thomas, *see id.* at 80 (Thomas, J., concurring).

78. *See id.*

79. *See id.* at 73 (O'Connor, J., plurality opinion); *id.* at 76 (Souter, J., concurring).

80. *See id.* at 84–87 (Stevens, J., dissenting); *id.* at 93–96 (Kennedy, J., dissenting). Justice Antonin Scalia, though he did not mention the harm test directly, could safely be added as a third vote against it, as he concluded more broadly that parents lack a fundamental right to control visitation decisions in the first instance. *See id.* at 91–93 (Scalia, J., dissenting).

had insisted, that the decision was "a victory for every parent in the country."[81]

To the contrary, the uniting theme of five of the six opinions in the case—representing a total of eight Justices—was a determination to tread softly and to avoid any heavy-handed formulations of parents' constitutional rights. That shared commitment to restraint emerges as the most significant feature of the case. Not only did the Court leave the largest constitutional questions for another day, but a majority of the Justices seemed unwilling to embrace even threshold propositions that conventional wisdom had assumed to be settled. In this, crucially, the Justices seemed to be opening the door to a new, more flexible analysis that would permit the Court to balance the competing privacy interests of other family members—in much the same way that relaxed scrutiny in the abortion context permits the courts to take into account potentially conflicting private interests. *Troxel*, then, figures as an important case not for the narrow holding produced by the coalition favoring affirmance,[82] but for the consensus of a different and larger coalition in favor of a new, less rigid approach to family-privacy disputes.

Discerning this latter consensus requires some care in parsing the Justices' opinions. (Because it is hard to follow the players without a scorecard, one is provided in figure 1.) Writing for the plurality, Justice O'Connor readily agreed that parents have a "fundamental right . . . to make decisions concerning the care, custody, and control of their children,"[83] and that courtordered visitation directly burdens that right.[84] Indeed, there was near-universal agreement on this foundational point.[85] Significantly, however, rather than apply strict scrutiny and consider whether the state's interests were compelling and its means narrowly tailored, the plurality simply announced that Washington's "breathtakingly broad"[86] statute had

81. Timothy Egan, *After Seven Years, Couple Is Defeated*, N.Y. TIMES, June 6, 2000, at A22 (statement of Tommie Wynn, formerly Tommie Granville).

82. Under *Marks v. United States*, 430 U.S. 188, 193 (1977), "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (citation omitted). Accordingly, the Court's holding in *Troxel* is the plurality's conclusion that Washington's visitation statute had been unconstitutionally applied given the circumstances of Tommie Granville's family.

83. *Troxel*, 530 U.S. at 66 (O'Connor, J., plurality opinion).

84. *See id.*

85. All except Justice Scalia agreed on this point. *See id.* at 76–77 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring); *id.* at 86 (Stevens, J., dissenting); *id.* at 95–96 (Kennedy, J., dissenting). *But see id.* at 91 (Scalia, J., dissenting) (concluding that court-ordered visitation implicates no fundamental right of parents).

86. *Id.* at 67 (O'Connor, J., plurality opinion).

been unconstitutionally applied to Tommie Granville because the trial judge had given no deference to her assessment of her daughters' interests.[87] "[T]here is a presumption that fit parents act in the best interests of their children," Justice O'Connor wrote, and before the state may impose its own view of a child's welfare, the Constitution requires that the state point to "special factors" that might undermine or rebut that presumption.[88] In this case, the plurality found none. There was no suggestion, moreover, that Tommie Granville was an unfit mother.[89] In the end, it appeared to the plurality that the trial court had overridden Granville's objections to visitation not because of any extraordinary circumstances, but because of "a simple disagreement [with her] . . . concerning her children's best interests."[90]

Having found the superior court's visitation order unconstitutional on this ground, the plurality insisted that it was unnecessary to "define today the precise scope of the parental due process right in the visitation context."[91] Specifically, the plurality refused to say just what "special factors" might overcome the "presumption that fit parents act in the best interests of their children"[92]—that is, whether it is constitutionally necessary to prove that a parent's decision would cause a child serious harm, as the state supreme court supposed, or whether some lesser showing might suffice.[93]

Justice David Souter, concurring in the judgment, provided a fifth vote for affirming the state supreme court's judgment. He saw essentially the same constitutional problem in the visitation scheme as had the plurality. The fundamental right of parents to make child rearing decisions "would be a sham," he wrote, "if it failed to encompass the right to be free of judicially compelled visitation by 'any party' at 'any time' a judge believed he 'could make a "better" decision.'"[94] Like the plurality, Justice Souter insisted that striking down the visitation order on this ground made it unnecessary "to

87. *See id.* at 69–72.

88. *Id.* at 67–70.

89. *See id.* at 68. To prove that a parent is "unfit," it is usually necessary to show serious misconduct by the parent leaving a child without the most basic care. *See generally* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.6, at 903 (2d ed. 1987) (noting that "unfitness signifies active conduct by the parent which seriously and repeatedly harms the child either physically or psychologically"). So minimal a measure of parental quality is the "fitness" standard that parental "unfitness" normally justifies depriving the parent of custody and permanently terminating the parent's relationship with the child. *See id.*; *see also* Santosky v. Kramer, 455 U.S. 745 (1982) (holding that the Constitution permits termination of parental rights upon clear and convincing proof of parental unfitness).

90. *Troxel*, 530 U.S. at 72.

91. *Id.* at 73.

92. *Id.* at 68.

93. *See id.* at 73.

94. *Id.* at 78 (Souter, J., concurring).

decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections."[95]

Figure 1
The Shifting Coalitions in *Troxel*

	Plurality (O'Connor, Rehnquist, Ginsburg & Breyer)	Souter	Stevens	Kennedy	Thomas	Scalia
Court-ordered visitation burdens parent's "fundamental" rights	Yes	Yes	Yes	Yes	Yes	No
Strict scrutiny applies	No*	No*	No*	No*	Yes	No
Constitutional presumption in favor of parental judgment about child's interests	Yes	Yes	Yes	Yes	Yes	No
Presumption is rebuttable by case-specific "special factors"	Yes	?	Yes*	Yes*	No*	NA
Constitution permits visitation only to prevent "harm" to child	?	?	No	No	?	NA
"Best-interests" standard is capable of giving sufficient deference to parents' judgment	?	?	Yes	Yes	No	NA
Washington's statute is facially unconstitutional	?	Yes	No	?	Yes	No
Statute unconstitutional "as applied" to Granville	Yes	Yes*	?	?	Yes*	No

*Impliedly

95. *Id.* at 77. Unlike the plurality, however, Justice Souter concluded that the sweeping breadth of the statute's best-interests standard for non-parent visitation required the invalidation of the statute on its face, not solely in its application to the Granville family. *See id.* at 75–79.

Justice Thomas provided a sixth vote for affirmance, but grounded that result directly in an application of strict scrutiny. Concurring in the judgment, he wrote that he wished to reserve judgment on the correctness of past cases recognizing a fundamental child rearing right.[96] At least for so long as *Meyer* and *Pierce* remain good law, however, he insisted that strict scrutiny required the invalidation of any law that would "second-guess[] a fit parent's decision regarding visitation with third parties."[97] It was "curious[]," he added, that none of the other Justices applied strict scrutiny and that he stood alone in "articulat[ing] the appropriate standard of review."[98]

Justices John Paul Stevens, Antonin Scalia, and Anthony Kennedy dissented, though each for very different reasons. Whereas Scalia's disagreement with the plurality was total, the differences between the plurality, Stevens, and Kennedy were much narrower. Indeed, Justices Stevens and Kennedy agreed with the gist of the plurality's constitutional analysis. They agreed, for instance, that court-ordered visitation burdens the fundamental child rearing right of objecting parents and that the Constitution recognizes a presumption that parents are best suited to assess their children's interests.[99] Yet they disagreed with the plurality that the record established Washington's failure to accord proper weight to Granville's judgment about visitation.

Instead, Justices Stevens and Kennedy analyzed the case from the opposite direction, starting first with the state supreme court's conclusion that the Constitution requires proof that a child would suffer serious harm before a state may grant visitation to a non-parent. The Justices contended that the state court's insistence on proof of harm reflected an excessively "inflexible,"[100] "rigid,"[101] and "categorical"[102] understanding of parents' constitutional rights. The Constitution, they contended, does not tip the scales so heavily in favor of parents' child rearing authority, but instead permits a more even balancing of parental prerogative against the interests of children and grandparents in maintaining a relationship.[103] Having

96. *See id.* at 78–79 (Thomas, J., concurring).
97. *Id.* at 80.
98. *Id.*
99. *See id.* at 86–91 (Stevens, J., dissenting); *id.* at 93–98 (Kennedy, J., dissenting).
100. *Id.* at 86 (Stevens, J., dissenting).
101. *Id.*
102. *Id.* at 96 (Kennedy, J., dissenting).
103. *See id.* at 90 (Stevens, J., dissenting) (contending that the Constitution must "recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation" and that states should be permitted "to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this"); *id.* at 97–102 (Kennedy, J., dissenting) (contending that the Constitution must be understood to take into account the mutual interest in continuing contact

rejected a constitutional harm predicate for visitation, moreover, both Justice Stevens and Kennedy insisted that a "best-interest-of-the-child" standard was potentially capable of giving sufficient protection to a parent's child rearing judgment.[104]

Justice Scalia expressed a more fundamental disagreement, dissenting on the ground that Washington's visitation law burdened no fundamental right. The "right of parents to direct the upbringing of their children," he wrote, is a natural right of the sort alluded to by the Declaration of Independence and by the Ninth Amendment, but it is not a constitutional right enforceable by the judiciary against the states or against the federal government.[105] Justice Scalia left no doubt that he believed *Meyer*, *Pierce*, and subsequent cases had erred by recognizing a substantive due process right of child rearing, and insisted that they should be strictly confined to their facts until properly overruled.[106]

The various opinions in *Troxel* are remarkable, both for the way in which they crisscross standard ideological and jurisprudential lines and for the breadth of constitutional turf they cover. Here, for example, is a plurality

---

between children and non-parents who have played an unusually substantial role in the children's upbringing).

104. *See id.* at 90 (Stevens, J., dissenting); *id.* at 99–102 (Kennedy, J., dissenting). Both would then have remanded the case to give the state courts an additional opportunity to flesh out the precise content of the Washington statute's "best interests" standard and to determine whether that standard had been unconstitutionally applied on the facts of this case. *See id.* at 82–85 (Stevens, J., dissenting); *id.* at 93–96, 100–02 (Kennedy, J., dissenting).

105. *Id.* at 91–92 (Scalia, J., dissenting). Justice Scalia explained

> In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men . . . are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

Id.

106. *See id.* "The sheer diversity of today's opinions," he wrote, "persuades me that the theory of unenumerated parental rights . . . has small claim to *stare decisis* protection. . . . While I would not now overrule th[e] earlier cases [recognizing a fundamental child rearing right] (that has not been urged), neither would I extend the theory upon which they rested to this new context." *Id.* at 92.

comprised of Chief Justice William Rehnquist and Justices O'Connor, Ruth Bader Ginsburg, and Stephen Breyer, allayed against far-flung dissents from Justices Stevens, Scalia, and Kennedy. Here is Justice Scalia invoking the Declaration of Independence and sketching the Ninth Amendment as a sort of constitutional black hole, a gateway into a vacuum of nonlegal, unenforceable "rights."[107] Here, indeed, is a case that makes bookends of Scalia, with the narrowest view of the Constitution's scope, and Thomas, who (after reserving the possibility that he might ultimately agree with Scalia[108]) takes the most expansive view of the constitutional right.[109] Through the rising smoke of this battleground, however, there emerges apparent consensus about a point of tremendous significance: The daunting complexity of family relationships commands special caution and flexibility in formulating any constitutional rules of decision.[110] This point is important because it signals an approach to family-privacy controversies that is quite different from the rigid, heavy-handed scrutiny prescribed by conventional fundamental rights doctrine.[111]

The Justices' determined restraint took at least three forms. First, the refusal by a majority to embrace, or even to address, the state supreme court's harm test for court-ordered visitation demonstrated an unusually strong desire to leave as few footprints as possible on the constitutional terrain.[112]

---

107. *See id.*

108. *See id.* at 80 (Thomas, J., concurring) (noting that because "neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights[,] . . . . I express no view on the merits of this matter").

109. *See id.* Justice Thomas seems to take an even broader view of the fundamental child rearing right than the Washington Supreme Court did. Unlike the state supreme court, which suggested that a state could override a fit parent's decision concerning visitation upon a showing that the child would suffer serious harm, Justice Thomas implied that the Constitution shielded parental decisions from state review so long as parents were deemed minimally "fit." A state, he wrote, "lacks even a legitimate government interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties." *Id.*

110. The plurality, for instance, went out of its way to "agree with Justice Kennedy that . . . the constitutional protections in this area are best 'elaborated with care.'" *See id.* at 73 (O'Connor, J., plurality opinion) (quoting *id.* at 101 (Kennedy, J., dissenting)); *see also id.* at 95–96 (Kennedy, J., dissenting) ("[C]ourts must use considerable restraint . . . as they seek to give further and more precise definition to the right [of parents to rear their children]."). Justice Souter underscored the desirability of avoiding "turning any fresh furrows in the 'treacherous field' of substantive due process." *Id.* at 76 (Souter, J., concurring) (citation omitted). And Justice John Paul Stevens expressed regret that the Court had not simply avoided the case altogether. *See id.* at 80 (Stevens, J., dissenting).

111. *See id.* at 80–81.

112. The plurality and Justice Souter both went out of their way to avoid considering whether avoiding harm to a child is the only constitutionally sufficient justification for court-ordered visitation. *See id.* at 73–74 (O'Connor, J., plurality opinion); *id.* at 76–77 (Souter, J., concurring).

The refusal to answer the second question on which the court granted certiorari leaves legislatures and lower courts with maddeningly little guidance.[113] They are told that they must give deference to a parent's judgment about a child's interests before ordering visitation, but they are told nothing about the strength of the deference that must be given. Perhaps it is so strong that only the avoidance of harm to the child would suffice to overcome it, but perhaps—as at least three Justices insisted[114]—some less compelling interest would do.[115]

Second, the plurality's insistence upon limiting its ruling to an "as-applied" challenge also seems pointed. Both Justice Souter and the plurality, after all, saw in the statute the same constitutional defect: Whereas the Constitution bars a state from overriding a parent's decisions concerning visitation simply because "a judge believed he 'could make a "better" decision,'"[116] Washington's statute directed precisely that result.[117] Yet only Justice Souter was willing to affirm the state supreme court's holding that the statute was unconstitutional on its face. To be sure, the Court's inconsistent directives about the proper boundaries of "facial" and "as-applied"

113. The Court granted certiorari on both of the two questions presented by the petition. The first question asked generally whether the Washington visitation statutes, in permitting non-parents to seek visitation based upon a best-interests-of-the-child standard, "impermissibly interfere[d]" with parents' fundamental rights of child rearing. Petitioner's Brief, *Troxel*, (No. 99-138) at i. The second question asked more particularly whether the Washington Supreme Court had erred in embracing "the flawed premise that a parent's fundamental right to autonomy in child rearing decisions is unassailable and that the state's parens patriae power to act in a child's welfare may not be invoked absent a finding of harm to the child or parental unfitness." *Id.*

114. *See Troxel*, 530 U.S. at 85–86 (Stevens, J., dissenting) (rejecting the harm test as having "no support in this Court's case law"); *id.* at 94–98 (Kennedy, J., dissenting) (rejecting the harm test); *id.* at 91–93 (Scalia, J., dissenting) (concluding that parents have no fundamental right to make decisions concerning visitation).

115. Although it is, of course, a time-honored prudential rule that courts should avoid deciding constitutional questions on unnecessarily broad grounds, *see* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000), the Justices' restraint in *Troxel* seems uncommonly stiff. Certainly, the Court has not felt so constrained in other cases. In *Santosky v. Kramer*, 455 U.S. 745 (1982), for instance, the Court considered the constitutionality of a New York statute under which the petitioners' parental rights had been terminated based upon a preponderance-of-evidence showing their unfitness. In holding this scheme unconstitutional, the Court did not stop at saying that the statute's preponderance standard of proof gave insufficient protection to parental interests, but went on to hold that the constitutionally required standard of proof was, in fact, "clear and convincing evidence." *Id.* at 769.

116. *Troxel*, 530 U.S. at 78 (Souter, J., concurring) (citation omitted); *see also id.* at 69–72 (O'Connor, J., plurality opinion).

117. *See id.* at 67 (noting that, under Washington's statute, "[s]hould [a] judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails"); *see also id.* at 76–78 (Souter, J., concurring).

challenges have stirred up considerable confusion.[118] But it seems plain enough here that the plurality would have been justified in striking down the statute on its face. The constitutional defect it identified in the statute, after all, was essentially one of overbreadth—the statute was said to "sweep[] too broadly"[119] by permitting forced visitation without any showing of "special factors" that might justify casting aside a parent's judgment[120]—and the Supreme Court traditionally has suggested a broader role for facial invalidation in the overbreadth context.[121] The theoretical and practical concerns that have led the Court to favor facial invalidation of overbroad statutes in the First Amendment context also support facial invalidation of overbroad statutes that impinge upon other fundamental constitutional rights, including specifically fundamental privacy rights.[122] Certainly, this often has been the Court's approach in past cases in which it found that a law swept "too broadly" in constraining family-privacy rights.[123] Although the Washington visitation law contains no threat of criminal sanctions that

118. *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 237–38 & n.10 (1994); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1323–25 (2000). *Compare, e.g.*, Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting the denial of certiorari) (suggesting that a statute is facially invalid unless its application would be constitutional "in a large fraction of cases"), *with id.* at 1178–81 (Scalia, J., dissenting from denial of certiorari) (insisting that a statute is facially unconstitutional only if there are no circumstances in which it could be constitutionally applied).

119. *Troxel*, 530 U.S. at 76–77 (Souter, J., concurring); *see also id.* at 73 (O'Connor, J., plurality opinion) ("[W]e rest our decision on the sweeping breadth of § 26.10.160(3) . . . ."); *id.* at 63, 67 (calling the statute "breathtakingly broad").

120. *See id.* at 68.

121. *See, e.g.*, L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 38–40 (1999); United States v. Salerno, 481 U.S. 739, 745 (1987).

122. For a forceful demonstration of this point, see Dorf, *supra* note 118, at 264–71.

123. In *Roe v. Wade*, 410 U.S. 113, 164 (1973), for example, the Court concluded that Texas's abortion law "swe[pt] too broadly" in banning all abortions except those necessary to save the life of the pregnant woman. On that basis, the Court struck down the statute in its entirety, not just as applied to Jane Roe and other women who sought abortions prior to viability. *See id.* at 177 (Rehnquist, J., dissenting) ("The Texas statute is struck down *in toto*, even though the Court apparently concedes that at later periods of pregnancy Texas might impose these selfsame statutory limitations on abortion."); *see also* John Christopher Ford, Note, *The* Casey *Standard for Evaluating Facial Attacks on Abortion Statutes*, 95 MICH. L. REV. 1443, 1450 (1997) (observing that "the Court has used the overbreadth doctrine in [a long line of] abortion cases"). Similarly, in *Stenberg v. Carhart*, 530 U.S. 914 (2000), after finding that Nebraska's ban on "partial-birth abortion" swept too broadly in reaching so-called dilation and evacuation (D & E) abortions, see *infra* notes 170–173 and accompanying text, the Court struck down the law entirely, not just as applied to those seeking D & E abortions. Finally, in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court struck down a municipal ordinance that limited home occupancy to an overly narrow conception of "family." Although the statute plainly could have been constitutionally applied to unrelated individuals sharing a family home, *see* Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974), the Court simply struck down the ordinance.

might chill protected parenting decisions (a customary justification for facial invalidation under analogous overbreadth principles[124]), a majority in *Troxel* was quick to recognize that the expense of defending child rearing decisions under an overbroad statutory scheme can itself effectively bully parents into conceding their parental prerogatives.[125] Given this recognition, the plurality's insistence on preserving the Washington visitation statute, ensuring that many more parents will be forced to defend their prerogative under its "breathtakingly broad" scheme, seems curious.

The plurality's insistence on confining itself to an as-applied challenge also seems startling considering what the Washington Supreme Court had already said about the visitation statute. Although federal courts usually defer facial invalidation of ambiguous statutes in order to give state courts a chance to craft a limiting construction,[126] here the Washington Supreme Court had already refused to give the statute a narrower interpretation on the ground that the statute was unambiguous.[127] As the plurality noted, "[t]he Washington Supreme Court had the opportunity to give § 26.10.160(3) a narrower reading, but it declined to do so."[128] Accordingly, the plurality's decision to preserve the Washington statute, leaving to the Washington Supreme Court questions of statutory construction and severance that it effectively had already answered,[129] appears to be driven by a single-minded commitment to crafting the narrowest holding possible.

---

124. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318–19 (2000) (Rehnquist, J., dissenting); *United Reporting Publ'g Corp.*, 528 U.S. at 38–40; Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 868–70 (1991); Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1040 (1983).

125. The plurality agreed with Justice Anthony Kennedy that "the burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.'" *Troxel*, 530 U.S. at 75 (O'Connor, J., plurality opinion) (quoting *id.* at 101 (Kennedy, J., dissenting)).

126. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975) ("[A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts."); Dorf, *supra* note 118, at 283–87 (discussing federalism concerns when federal courts consider facial challenges to state statutes).

127. *See In re* Custody of Smith, 969 P.2d 21, 26 (Wash. 1998). The court was emphatic that, under state practice, courts may not "read qualifications into a statute which are not there. A 'court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission.'" *Id.* (quoting Auto. Drivers & Demonstrators Union Local 882 v. Dep't of Ret. Sys., 598 P.2d 379 (Wash. 1979)).

128. *Troxel*, 520 U.S. at 67. The *Troxel* plurality concluded that the Constitution requires that states give "a parent's own determination" about visitation "some special weight," *id.* at 69, and simultaneously acknowledged that "Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever." *Id.* at 67.

129. Indeed, under the rule of practice emphasized by the state supreme court, see *supra* note 127 and accompanying text, the court would seem to be disabled from narrowing the statute sufficiently to save it—at least given the state supreme court's view of the constitutional necessity

The third and final demonstration of the Justices' self-conscious restraint was their failure to articulate any recognizable standard of constitutional review.[130] Although this is hardly the first time the Court has obscured the standard of review in a family-privacy case,[131] the omission by seven Justices in three separate opinions of any statement of a governing standard, after expressly having found an incursion upon a fundamental right, seems particularly striking.[132]

Undoubtedly, the restraint pervading the *Troxel* opinions reflects a basic lack of confidence about the Court's constitutional intervention into the family and the dread of a misstep. The Court, of course, long has regarded family law matters as a largely alien realm belonging to the state courts,[133] but in *Troxel* the Justices seemed even more unsure than usual of

---

of proving harm. Applying an identical rule of statutory construction, for example, the Florida Supreme Court recently refused to accept a saving construction of a statute permitting grandparents to compete with parents for custody under a "best-interests" standard. *See* Richardson v. Richardson, 766 So. 2d 1036 (Fla. 2000). The court rebuffed the argument that the statute could be saved from facial invalidity by construing it to require grandparents to offer proof that the child would suffer harm if removed from their custody:

> If this Court were to construe the statute narrowly by inserting a harm to the child element, we would in effect be rewriting the statute and changing it in a manner not intended by the Legislature. . . . [U]nder fundamental principles of separation of powers, this Court is without authority to change the wording of [the statute] by judicially inserting a harm to the child element where the Legislature clearly has not done so.

Id. at 1042–43.

130. The remaining two Justices were Thomas, who expressly urged strict scrutiny, *see Troxel*, 530 U.S. at 80 (Thomas, J., concurring), and Scalia, who impliedly endorsed the rational basis test by concluding that no fundamental right was implicated, *see id.* at 91–93 (Scalia, J., dissenting).

131. *See supra* note 34 and accompanying text.

132. Certainly it was not lost on Justice Thomas, who was left to wonder aloud why none of the other Justices were willing to acknowledge the applicability of strict scrutiny. *See Troxel*, 530 U.S. at 80 (Thomas, J., concurring). Indeed, *Troxel* was so hazy about the governing standard that a Missouri appellate court, considering a constitutional challenge to Missouri's grandparent-visitation statute in the wake of *Troxel*, concluded that no heightened scrutiny of any form was required. *See In re* G.P.C., 28 S.W.2d 357, 365–66 (Mo. Ct. App. 2000) ("With the exception of Justice Thomas, the plurality in *Troxel* scarcely mentions the appropriate standard of review. . . for such cases. . . . *Troxel* does not indicate that the Missouri Supreme Court's use of rational basis review . . . was incorrect."). Although the Missouri court plainly misunderstood *Troxel* in this respect—*Troxel*'s invalidation of the Washington trial court's indisputably rational visitation order is irreconcilable with rational basis review—the Missouri court's confusion illustrates just how oblique *Troxel* is concerning the appropriate standard of review.

133. *See, e.g.*, *Troxel*, 530 U.S. at 91–93 (Scalia, J., dissenting); *id.* at 90 n.10 (Stevens, J., dissenting); Ankenbrandt v. Richards, 504 U.S. 689, 703–04 (1992) (reaffirming a judge-made "domestic relations exception" to the jurisdiction of the federal courts based partly on federal judges' lack of proficiency in family law matters); Santosky v. Kramer, 455 U.S. 745, 771 (1982) (Rehnquist, J., dissenting); Sosna v. Iowa, 419 U.S. 393, 404 (1975) (emphasizing that "domestic relations [are] an area that has long been regarded as a virtually exclusive province of the States"). *See generally* HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL 8–11 (3d ed. 1995).

their footing. The Court took up the case amid fervent warnings that a broad ruling might do considerable damage to children growing up in non-traditional families,[134] and the opinions in *Troxel* suggest that most of the Justices heeded these warnings. The plurality began its analysis, for example, by acknowledging at length the growing diversity of family forms, and Justices Stevens and Kennedy underscored the same point.[135] The Justices thus readily accepted that for more and more children, the emotional bond of greatest importance and substance may be not with a parent, but with a non-parent caregiver such as a grandparent, aunt, or stepparent.

Importantly, this recognition seemed to lead the Justices not only to limit the scope of their decision, but also to moderate the vigor of their review with regard to the issues they did decide. As Justice Stevens put it, "[t]he almost infinite variety of family relationships that pervade our

134. A cascade of briefs by *amici curiae* and newspaper analysts pleaded with the Justices to take notice of the increasing diversity of American families and warned that a rigid endorsement of parental power could produce untoward results in families in which non-parents have assumed a primary role in child rearing. In its *amicus* brief, for example, the University of Pennsylvania's Center for Children's Policy Practice & Research, above all else, "urge[d] the Court to proceed with caution." Brief of Amicus Curiae Center for Children's Policy Practice and Research at 2, *Troxel* (No. 99-138). The center continued:

> In deciding this case, [the Court] should avoid any language that would cast doubt on the authority of the courts to protect and promote the stability of over 3,000,000 children residing with kin and extended family and over 500,000 children in foster care. . . . Recognizing the diversity and individuality of family life, the Court should defer to the expertise of state and local entities currently engaged in generating appropriate standards to apply in individualized adjudications.

Id. at 2–4; *see also* Brief of Lambda Legal Defense and Education Fund and Gay and Lesbian Advocates and Defenders at 3–8, *Troxel* (No. 99-138); Brief of Amicus Curiae National Association of Counsel for Children at 4–8, *Troxel*, (No. 99-138); Linda Greenhouse, *Case on Visitation Rights Hinges on Defining Family*, N.Y. TIMES, Jan. 4, 2000, at A11; Deb Price, *Court Must Tread Carefully in Custody Case*, DETROIT NEWS, Nov. 8, 1999, *available at* http://detnews.com/EDITPAGE/9911/08/price/price.htm (last visited May 1, 2001); Ellen Goodman, *Grandparents' Rights*, BOSTON GLOBE, Jan. 16, 2000, at C7.

135. Echoing themes in several of the *amici* briefs, Justice O'Connor observed that "[t]he demographic changes of the past century make it difficult to speak of an average American family." *Troxel*, 530 U.S. at 63. As a larger share of American children are raised in single-parent homes, she wrote, "persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing." *Id.* at 64. Justice Kennedy wrote that his "principal concern" about the state supreme court's broad parental-rights holding was that it

> seem[ed] to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households. For many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood.

Id. at 98 (Kennedy, J., dissenting) (citation omitted).

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."[136] Indeed, the approaches followed by a majority of the Justices suggested that their failure to mention strict scrutiny was not a curious oversight, but an implicit rejection.

The Justices' seeming acknowledgment of the constitutional relevance of the ongoing changes in family relationships is significant. The Court is not famous for its innovation in the field of family privacy. In past cases, the Court has relied heavily on tradition and legal form in defining the family relationships entitled to constitutional protection.[137] Thus, recognizing substantial emotional relationships between children and non-parents as a counterweight to the authority of parents would constitute an important step in reorienting family privacy toward a model that is more concerned with the function and substance of intimate relationships than with historical notions of family form or allocations of decisional power.[138]

In charting this course, at least six Justices seemed to agree that the constitutional limits on visitation orders must be discerned by balancing, on a case-by-case basis, a parent's reasons for resisting the visits against the particular interests of children and non-parents in maintaining their relationship. The plurality, for instance, reasoned that the Constitution does not give parents a categorical veto over visitation, only a presumption of good judgment, and, importantly, that this presumption can be overcome in individual cases by countervailing "special factors."[139] In explaining why no such factors supported the trial court's intervention in the *Troxel* case, moreover, the plurality said nothing about the absence of a "compelling" public purpose, but pointed instead to a "combination of several factors"

136. *Id.* at 90 (Stevens, J., dissenting).

137. *See* Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1216–17 (1999); Meyer, *Family Ties*, *supra* note 34, at 807–10; Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. (forthcoming 2001); Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1642–50 (1991).

138. *See* Barbara Bennett Woodhouse, *"It All Depends on What You Mean By Home": Toward a Communitarian Theory of the "Non-Traditional" Family*, 1996 UTAH L. REV. 569, 569–72 (advocating such a shift); Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1259–61 (1999) (same).

139. As the plurality emphasized, "[t]he problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests." *Troxel*, 530 U.S. at 69 (O'Connor, J., plurality opinion).

that suggested the reasonableness of Tommie Granville's parental judgment on the facts of this case.[140]

Indeed, it was precisely a wariness of categorical rules that led the plurality to avoid addressing the facial validity of the Washington statute. "Because much state-court adjudication in this context occurs on a case-by-case basis," Justice O'Connor wrote, "we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter."[141] Rather than invalidate statutes across the board, disrupting vast numbers of visiting relationships between children and grandparents, siblings, and others, the plurality wished to ensure that future constitutional lines would be drawn slowly, against the background of actual families.

Justices Stevens and Kennedy also had in mind an approach very different from traditional strict scrutiny. Justice Stevens, for example, observed that

> [c]ases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.[142]

The potential for conflicting interests between the parent and the child, to say nothing of the conflict between the parent and the grandparents, sets this sort of family-privacy case crucially apart from earlier cases in which family members stood unified in their opposition to state meddling.[143] In cases in which the privacy interests of one family member may conflict with those of another, a more open-ended balancing of interests is required:

> 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

---

140. *See id.* at 72 (O'Connor, J., plurality opinion). Among the factors that supported judicial deference to Granville's judgment were that there was no suggestion of her "unfitness," *id.*, and that Granville had not sought to cut off contact entirely with the grandparents, but only to curtail it. *See id.* at 69–72.

141. *Id.* at 73 (footnote omitted).

142. *Id.* at 86 (Stevens, J., dissenting).

143. Justice Stevens specifically differentiated the parent's claim in *Troxel* from that in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925):

> *Pierce* involved a parent's choice whether to send a child to public or private school. While that case is a source of broad language about the scope of parents' due process rights with respect to their children, the constitutional principles and interests involved in the schooling context do not necessarily have parallel implications in this family law visitation context, in which multiple overlapping and competing prerogatives of various plausibly interested parties are at stake.

Troxel, 530 U.S. at 86 n.7 (Stevens, J., dissenting).

> 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.[144]

Justice Stevens suggested, furthermore, that the strength of each family member's privacy interests will vary with the substance of the particular relationship which they seek to protect and that courts, cognizant of "[t]he almost infinite variety of family relationships," should be trusted in each case "to assess . . . the relative importance of the conflicting interests."[145]

Justice Kennedy suggested an essentially similar approach. He, too, emphasized that a parent's exercise of the fundamental right of child rearing carried the potential for causing harm both to children and to non-parent caregivers who have "a strong attachment to the child."[146] The Constitution, he continued, should be understood to allow governmental action directed at avoiding that "risk of harm."[147] Like Justice Stevens, Justice Kennedy suggested that any constitutional limitation on state power to order visitation should boil down to a balancing of the competing interests and that the strength of each claimant's interest should be pegged to the substantiality of their particular emotional relationship.[148] Even Justice Scalia, who argued strenuously against recognition of a fundamental parental right in the first place, agreed with Justices Stevens and Kennedy that if one was to be recognized it would then require a balancing of the competing interests of other family members.[149]

---

144. *Id.* at 88.

145. *Id.* at 90.

146. *Id.* at 99 (Kennedy, J., dissenting).

147. *Id.*

148. "[T]he constitutionality of the application of the best interests standard," Justice Kennedy wrote,

> depends on more specific factors. In short, a fit parent's right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a *de facto* parent may be another. The protection the Constitution requires, then, must be elaborated with care, using the discipline and instruction of the case law system.

Id. at 100–01. Justice Kennedy also quoted *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (quoting Wisconsin v. Yoder, 406 U.S. 205, 231–33 (1972) (internal quotations omitted)), for the proposition that

> [t]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promoting a way of life' through the instruction of children . . . as well as from the fact of blood relationship.

Troxel, 530 U.S. at 98–99 (Kennedy, J., dissenting).

149. Justice Scalia wrote:

> Judicial vindication of "parental rights" . . . 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

Despite the variations in their verbal formulations and in the manner in which they would have resolved the particular controversy in *Troxel*, these Justices importantly shared "the premise that people and their intimate associations are complex and particular, and [that] imposing a rigid template upon them all risks severing bonds our society would do well to preserve."[150] This premise necessarily excludes a conception of the Constitution that would rigidly favor parents in disputes over visitation without regard to the particular strength of the parent's relationship with the child or the child's relationship with the putative visitor. The strict scrutiny test usually used in cases involving fundamental rights simply stacks the deck too heavily in favor of a single individual claimant, entitling that claimant to the same aggressive level of protection in all cases. Although that form of heightened review may work well for most fundamental rights, which ordinarily *do* entail "a bipolar struggle between the [individual] and the State,"[151] it is much too blunt an instrument to be calibrated to "[t]he almost infinite variety of family relationships"[152] at issue and to mediate among competing constitutional interests.[153]

B. *Stenberg v. Carhart*

Three weeks after *Troxel* signaled that conventional wisdom had exaggerated the zeal with which the Court would defend traditional family-privacy rights, the Court's decision in *Stenberg v. Carhart*[154] suggested that conventional wisdom had understated the Court's readiness to police abortion regulations. In striking down Nebraska's ban on so-called "partial-birth" abortions, the Justices showed none of the hesitancy and restraint that permeated their approach in *Troxel*. Whereas a majority in *Troxel* refused even to address the state court's holding that avoidance of harm was the only supportable basis for non-parent visitation laws,[155] here the majority felt no compunction about exploring multiple grounds for invalidating

---

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.

Id. at 92–93 (Scalia, J., dissenting).

150. *Id.* at 90 n.10 (Stevens, J., dissenting).

151. *Id.* at 86.

152. *Id.* at 90.

153. For a fuller explication of this argument, predating the *Troxel* case, see Meyer, *supra* note 21, at 549–54.

154. 530 U.S. 914 (2000).

155. *See Troxel*, 530 U.S. at 73–74 (O'Connor, J., plurality opinion); *id.* at 75–76 (Souter, J., concurring).

Nebraska's law.[156] Whereas the *Troxel* plurality insisted upon leaving Washington's overbroad statute facially intact, remanding so that the state supreme court could consider a narrowing construction it had already implicitly found implausible,[157] the *Carhart* majority did not slow even to a gallop in rejecting a saving construction that had actually been embraced by the state so that Nebraska's law could be wiped off the books.[158]

Nebraska, like some twenty-nine other states in the late 1990s,[159] had enacted a statutory prohibition on "partial-birth abortions" in June 1997.[160] The abortion procedure at which the statute was chiefly directed is one used exclusively in the advanced stages of pregnancy, known in the medical literature as "dilation and extraction" (D & X).[161] Seeking to ban this procedure, Nebraska enacted a statute making it a felony for a doctor to perform an abortion by "deliberately and intentionally delivering into the vagina a living unborn child, or substantial portion thereof, for the purpose of performing a procedure" that the doctor knows will then "kill the unborn child."[162]

Considering a challenge brought by Dr. Leroy Carhart, a doctor who sometimes performed D & X and other abortions in Nebraska, the federal district court and the Eighth Circuit Court of Appeals both found the statute unconstitutional.[163] The Eighth Circuit agreed with the district court that the statutory language was so broad that it encompassed not only D & X abortions, but also a far more common procedure known as "dilation and evacuation" (D & E).[164] Nebraska's statute banned D & E abortions, the

156. *See Carhart*, 530 U.S. at 937–45 (considering whether the statute was unconstitutionally overbroad after having already found it unconstitutional for lacking an exception for preservation of a woman's health).

157. *See Troxel*, 530 U.S. at 61–63 (O'Connor J., plurality opinion); *see also supra* notes 127–129 and accompanying text.

158. *See Carhart*, 530 U.S. at 940–44.

159. *See id.* at 989 (Thomas, J., dissenting).

160. *See* Carhart v. Stenberg, 192 F.3d 1142, 1145 (8th Cir. 1999), *aff'd*, 530 U.S. 914 (2000).

161. *See Carhart*, 530 U.S. at 927; *id.* at 974 (Kennedy, J., dissenting). In this procedure, described frankly by the Court in *Carhart* (and still more graphically by the dissenting Justices), the doctor initiates the abortion by grasping the fetus and removing it, feet first, from the uterus into the birth canal. When all of the fetus except its head is removed from the uterus, the doctor performing a dilation and extraction (D & X) punctures the skull and evacuates its contents in order to decrease its size and enable its removal. *See id.* at 927.

162. NEB. REV. STAT. ANN. § 28-326(9) (Michie Supp. 1999); *see also Carhart*, 530 U.S. at 921–22.

163. *See* Carhart v. Stenberg, 11 F. Supp. 2d 1099 (D. Neb. 1998), *aff'd*, 192 F.3d 1142 (8th Cir. 1999), *aff'd*, 530 U.S. 914 (2000).

164. *See Carhart*, 192 F.3d at 1150. In a D & E, which is the most common method of abortion in the second trimester, the doctor dilates the cervix and removes the fetus using grasping instruments. *See Carhart*, 530 U.S. at 924–25. Whereas the fetus remains intact during a D & X

court of appeals held, because in a D & E a part of the fetus, such as an arm or a leg, is often first pulled outside the cervix before dismemberment occurs and causes fetal demise.[165] As such, the procedure fits within the statutory ban on "deliberately . . . delivering into the vagina" a "substantial portion" of the fetus before causing its demise.[166] Having thus found that Nebraska's statute outlawed the most common method of abortion performed during the second trimester, the Eighth Circuit had no difficulty concluding that the enactment constituted an "undue burden" on a woman's right to elect abortion.[167]

Justice Breyer wrote for a five-member majority in upholding the Eighth Circuit's judgment. Significantly, however, the constitutional defect Justice Breyer first identified in the Nebraska statute is one the Eighth Circuit had not even considered. The Court focused first, not on the statute's overbreadth, but on its failure to include an exemption for women whose health might be endangered by having to forgo a D & X abortion. The Court observed that *Casey* had held that even when states seek to regulate or prohibit abortions after the point of viability they must provide an exception "'where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'"[168]

In response to Nebraska's argument that no exception was necessary because a D & X abortion is simply never necessary to preserve a woman's health, the Court pointed out that the district court had determined that D & X offered medical advantages in some circumstances.[169] Although D & E and other methods were found to provide a "safe" alternative to D & X in all circumstances, the district court nevertheless found that D & X could be an even safer method for some women.[170] Accordingly, the Court held that D & X is sometimes "necessary . . . for the preservation of the . . . health of the

---

procedure, during a D & E procedure the fetus ordinarily is partially dismembered as it is pulled through the opening to the cervix. *See id.* at 925. Also unlike a D & X, the fetal skull is not necessarily collapsed during a D & E procedure to facilitate removal. *See id.*

165. *See Carhart*, 192 F.3d at 1150.

166. *Id.*

167. *See id.* at 1150–51. "An abortion regulation that inhibits the vast majority of second trimester abortions," the court wrote, "would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion." *Id.* at 1151 (quoting Women's Med. Prof. Corp. v. Voinovich, 130 F.3d 187, 201 (6th Cir. 1997)).

168. *Carhart*, 530 U.S. at 921 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 879 (1992)) (alterations omitted). The Nebraska statute made an exception for "partial-birth abortions" necessary to "save the life of the mother," but not to preserve her health. NEB. REV. STAT. ANN. § 28-328(1) (Michie Supp. 1999).

169. *See Carhart*, 530 U.S. at 928–29.

170. *See id.* at 934.

mother," and therefore that Nebraska's omission of a health exception was constitutionally fatal.[171]

The Court, however, was not yet finished with the statute. Having already voided the statute for lack of a health exception, the Court went on to embrace the Eighth Circuit's overbreadth theory as well. The Court acknowledged Nebraska's insistence that the statute applied only to D & X abortions, and not to the more common D & E procedure.[172] The Court noted as well the efforts of the state attorney general to offer a narrowing construction, or indeed several, that would limit the statute's reach to D & X.[173] The Court, however, would have none of it. The lower courts were correct to spurn the attorney general's proposed saving constructions, the Court held, because they would "'twist the words of the law and give them a meaning they cannot reasonably bear.'"[174] Consequently, the statute must be construed broadly to cover D & E, "thereby unduly burdening the right to choose abortion itself."[175]

Justices Stevens and Ginsburg each wrote concurring opinions, emphasizing their view that Nebraska's statute was simply "irrational"[176] in seeking to ban one method of abortion while leaving other, "equally gruesome"[177] methods of late-term abortion untouched. Justice O'Connor also concurred, but wrote separately to make clear that, in her view, "a ban on partial-birth abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional."[178]

Justices Scalia, Kennedy, and Thomas each wrote long and fiery dissents.[179] Justices Kennedy and Thomas each argued that the majority had

171. *Id.* at 938.

172. *See id.* at 939–40.

173. *See id.* at 939–41. The attorney general argued first that the statute was impliedly limited to D & X by its reference to "partial-birth abortion," a term commonly meant to describe D & X. *See id.* at 942. The attorney general next argued that the statute's requirement that the doctor employ a "procedure" to kill the fetus after its partial delivery into the birth canal applied only to the D & X method of deliberately puncturing the fetal skull, not to the dismemberment which occurs incidentally when a fetus is removed from the cervix in a D & E. *See id.* at 943. Finally, the attorney general argued that the removal of an arm or leg from the cervix prior to fetal demise, such as typically occurs during a D & E, could not qualify as the delivery of "a substantial portion" of the fetus, as required by the Nebraska statute for criminal liability. *See id.* at 944.

174. *Id.* at 941 (quoting Carhart v. Stenberg, 192 F.3d 1142, 1150 (8th Cir. 1999)).

175. *Id.* at 930.

176. *Id.* at 947 (Stevens, J., concurring).

177. *Id.* at 951 (Ginsburg, J., concurring).

178. *Id.* at 951 (O'Connor, J., concurring).

179. Chief Justice William Rehnquist also wrote a brief dissenting statement, indicating his agreement with Justice Kennedy's and Justice Thomas' dissents. *See id.* at 952 (Rehnquist, J., dissenting).

grossly misapplied *Casey*'s undue burden test. The statute, they contended, was capable of narrower construction and so should be understood to reach only D & X abortions.[180] As such, they continued, the statute could not be said to constitute an undue burden on a woman's right to elect a previability abortion when it eliminated only one of several concededly safe methods of abortion.[181] Justice Scalia wrote separately, arguing that the result in *Carhart* was not so much a "regrettable misapplication" of *Casey*'s undue burden test as the "logical and entirely predictable consequence" of *Casey*'s having authorized federal judges to decide, on a case-by-case basis, "the pure policy question whether [a given] . . . limitation upon abortion is 'undue.'"[182]

Justice Kennedy, one of the authors of the pivotal joint opinion in *Casey*, took particular umbrage at the majority's holding requiring a health exception. It was, he insisted, "an immense constitutional holding" which shredded *Casey*'s promise to "be more solicitous of state attempts to vindicate interests related to abortion."[183] Justice Thomas, joined by the remaining dissenters, was no less dramatic, warning that the majority's analysis "portends a return to an era [of aggressive scrutiny] I had thought we had at last abandoned."[184]

The dissenters' characterizations were almost certainly over the top. Yet, in important respects, *Carhart* does appear to ratchet up the Court's review of abortion regulations. Most strikingly, the majority seemed to conceive of the requirement for a health exception as a free-standing constitutional obligation, separate and apart from the duty to eliminate undue burdens on a woman's decision to elect a previability abortion. Both the majority and Justice O'Connor, in her concurring opinion, described *Casey* as having recognized two distinct limitations on state regulatory power over abortion: Before viability, the state must not unduly burden a woman's choice and, at *all* times during the pregnancy, state restrictions on access to abortion must make exceptions for preservation of maternal life and health.[185] Moreover, in emphasizing that Nebraska's statute banned what for some women would be the safest method of abortion, the Court did not

180. *See id.* at 972–77 (Kennedy, J., dissenting); *id.* at 989–1003 (Thomas, J., dissenting).
181. *See id.* at 966–68 (Kennedy, J., dissenting); *id.* at 1019–20 (Thomas, J., dissenting).
182. *Id.* at 955 (Scalia, J., dissenting).
183. *Id.* at 979 (Kennedy, J., dissenting).
184. *Id.* at 983 (Thomas, J., dissenting). "Today's decision," he wrote,
> is so obviously irreconcilable with *Casey*'s explication of what its undue-burden standard requires, let alone the Constitution, that it should be seen for what it is, a reinstitution of the pre-*Webster* abortion-on-demand era in which the mere invocation of "abortion rights" trumps any contrary societal interest.

Id. at 982.
185. *See id.* at 930; *id.* at 947–48 (O'Connor, J., concurring).

treat the statute's imposition of medical risk as just one more "burden" on a woman's choice and then consider whether the degree of medical risk made the burden "undue."[186] Rather, both the Court and Justice O'Connor treated the imposition of medical risk as a stand-alone defect before going on to consider whether the statute was *additionally* defective for "plac[ing] an 'undue burden' upon a woman's right to terminate her pregnancy before viability."[187]

In this respect, the Court's analysis strayed from that of then–Chief Judge Richard Posner, whose influential dissent in a parallel Seventh Circuit case had regarded the absence of a health exception as a constitutional defect *because* the resulting imposition of medical risk itself constituted an undue burden.[188] The difference is potentially significant. Although the majority in *Carhart* labeled the health risks created by Nebraska's ban on D & X abortions as "significant" for some women,[189] the majority did not suggest (and certainly did not say) that this quantification was essential to its conclusion that a health exception was constitutionally required.[190] To

186. *See id.* at 1013 (Thomas, J., dissenting) (noting that "[t]he majority assiduously avoids addressing the *actual* standard articulated in *Casey*—whether prohibiting partial birth abortion without a health exception poses a substantial obstacle to obtaining an abortion" (emphasis in original)).

187. *Id.* at 938; *see also id.* at 948 (O'Connor, J., concurring). Justice O'Connor, for example, after agreeing with the majority that the absence of a health exception was constitutionally fatal, wrote that "Nebraska's statute is unconstitutional on the alternative and independent ground that it imposes an undue burden on a woman's right to choose to terminate her pregnancy before viability." *Id.* at 948.

188. *See* Hope Clinic v. Ryan, 195 F.3d 857, 883, 885 (7th Cir. 1999) (en banc) (Posner, C.J., dissenting), *vacated by* 530 U.S. 2738 (2000). Several of the briefs urging the Court to strike Nebraska's law had taken a similar approach, see, e.g., Brief of Amici Curiae Sen. Barbara Boxer and Rep. Nita Lowey and Other Members of Congress, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), as had the Nebraska district court below. *See* Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1122 (D. Neb. 1998).

189. *Carhart*, 530 U.S. at 932; *see also id.* at 934 ("[T]he District Court agreed that alternatives, such as D & E and induced labor, are 'safe' but found that the D & X method was significantly *safer* in certain circumstances.").

190. Nor did the Court demonstrate completely the significance of the risk differential between D & X and alternative methods. The Court cited the district court's finding that, for some women, the D & X method reduced the risk of several complications, some of them serious. *See id.* at 928–29, 932. But because the district court failed to quantify the degree to which D & X reduced these risks, it is unclear from the opinions just how "significant" the overall medical risk would be from a disallowance of D & X. *Cf.*, *e.g.*, Cornfeldt v. Tongen, 262 N.W.2d 684, 701–02 (Minn. 1977) (recognizing that the materiality of medical risk depends upon an assessment both of the gravity *and* the likelihood of a negative outcome). For the district court, it was unnecessary to go further in quantifying the risk because that court understood "[t]he Supreme Court . . . [to] have consistently held that abortion regulations that impose [*any*] medically unnecessary health risks on women are invalid." *Carhart*, 11 F. Supp. 2d at 1122; *see also id.* at 1127 (stating that the medical risk of alternative methods is constitutionally intolerable because it is "larger than necessary").

the contrary, elsewhere in its opinion, the majority seemed to say that *any* state-imposed enhancement of medical risk to a woman electing abortion would be constitutionally intolerable. "[T]his Court has made clear," the majority wrote, "that a State may promote *but not endanger* a woman's health when it regulates the methods of abortion."[191]

As Justice Kennedy pointed out in dissent, the majority's approach appeared to disable states from regulating in any way that would force a woman to assume an avoidable medical risk in choosing abortion—without regard to the substantiality of the particular risk or to the state's reasons for the regulation.[192] Indeed, this was precisely the view taken by the district court and urged upon the Court by Dr. Carhart and several of his supporting *amici*.[193] If this is truly what the majority intended, it constituted a very different limitation on state power from that embodied in the undue burden test. The essence of the undue burden test, after all, is a fluid balancing of the state's interests in regulating against the impact the regulation will have on a woman considering abortion. Although several pre-*Casey* cases had in fact suggested a rigid constitutional rule disallowing any "trade off" at all between a woman's interest in maximal safety and competing state interests,[194] *Casey* itself had taken a more balanced tack. The Court there

191. *Carhart*, 530 U.S. at 931 (emphasis added).

192. *See id.* at 967–68 (Kennedy, J., dissenting). Justice Kennedy wrote:

> The most to be said for the D & X is it may present an unquantified lower risk of complication for a particular patient but that other proven safe procedures remain available even for this patient. Under these circumstances, the Court is wrong to limit its inquiry to the relative physical safety of the two procedures, with the slightest potential difference requiring the invalidation of the law. . . . Where the difference in physical safety is, at best, marginal, the State may take into account the grave moral issues presented by a new abortion method. . . . Unsubstantiated and generalized health differences which are, at best, marginal do not amount to a substantial obstacle to the abortion right.

Id.

193. *See supra* note 188 and accompanying text; *see also* Brief of Amicus Curiae American College of Obstetricians and Gynecologists et al., Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830).

194. In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), the Court held, rather unremarkably, that Missouri could not claim that a ban on the saline amniocentesis method of abortion was justified *as furthering its interest in promoting maternal health* when the record showed that the banned method was actually safer for women than remaining alternatives. *See id.* at 78–79. Three years later, the Court found "[s]erious ethical and constitutional difficulties" with a law that seemed to require a physician, in selecting a method of abortion, to "make a 'trade-off' between the woman's health and additional percentage points of fetal survival." Colautti v. Franklin, 439 U.S. 379, 400 (1979). The Court avoided resolving those difficult questions, however, by striking down the law on grounds of vagueness. *See id.* at 400–01. Finally, in 1986, the Court struck down a law that directed a physician's choice among abortion methods while making an exception only for instances in which the statutorily preferred method "'would present a significantly greater medical risk to the life or health of the pregnant woman.'"

analyzed the constitutional sufficiency of a health exception *within* the framework of the undue burden test and upheld a "medical emergency" exception that applied only when a woman's health would be *seriously* imperiled by compliance with the law.[195] While agreeing that the Constitution would not permit a state to foist "significant health risks" on a woman choosing abortion, the Court upheld Pennsylvania's law on a construction that gave assurance that it "'would not in any way pose a significant threat to the life or health of a woman.'"[196] This assurance that the state's regulations would never "significant[ly]" threaten women's health was enough to satisfy the Court in *Casey* that "the medical emergency definition imposes no undue burden on a woman's abortion right."[197]

Carhart's contrasting avoidance of the undue burden test in evaluating the medical risks created by the Nebraska statute is thus striking. By making a woman's interest in health an absolute trump of the state's interests without any particularized balancing, the majority seemed to embrace a sort of bright-line rigidity more commonly associated with strict scrutiny.[198]

Thus, just as *Troxel* indicated that the standard of review for incursions on traditional family liberties was sliding downward from strict scrutiny,

---

Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 768 (1986) (quoting 18 PA. CONS. STAT. § 3210(b) (1990)). The Court struck down the law on the authority of *Colautti*'s recognition of "the undesirability" of any trade-offs between a woman's health risks and competing state goals. *Id.* at 769 (agreeing with the court of appeals that the statute was unconstitutional because it was "'not susceptible to a construction that does not require the mother to bear an increased medical risk in order to [achieve the state's goal of] sav[ing] her viable fetus'" (quoting Am. Coll. of Obstetricians & Gynecologists v. Thornburgh, 737 F.2d 283, 300 (3d Cir. 1984))).

195. The Pennsylvania Abortion Control Act at issue in *Casey* made an exception from its consent, notification, and waiting-period requirements for cases of "medical emergency." "Medical emergency," in turn, was defined by the statute as a condition in which an immediate abortion was necessary to save the woman's life or to avert a "serious risk of substantial and irreversible impairment of a major bodily function." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 879 (1992) (quoting 18 PA. CONS. STAT. § 3203).

196. *Id.* at 880 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 947 F.2d 682, 701 (1991)).

197. *Id.*

198. Even strict scrutiny, of course, can accurately be described as a balancing test, in that it allows for the possibility that compelling state interests might outweigh the interests of individual claimants. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1200 n.95 (1996) (noting that strict scrutiny is a form of balancing in which a rigorous burden of proof is placed on the government (citing Stephen E. Gottlieb, *Compelling Governmental Interests and Constitutional Discourse*, 55 ALB. L. REV. 549, 551 (1992))). The chief differences between strict scrutiny and lesser forms of scrutiny are that strict scrutiny places a heavier finger on the individual's side of the scale and ordinarily entails a more categorical, less fluid assessment of the competing interests. *See* Sullivan, *supra* note 10, at 295–96. *Carhart*, by placing a heavier finger on the individual's side of the scale and by categorically disallowing governmental measures enhancing maternal health risks, seemed to tip the nature of the Court's balancing somewhat closer to the sort associated with strict scrutiny.

Carhart seemed to signal that the applicable standard in abortion cases was inching up to meet it.

C. Toward a Balancing of Values

Although *Troxel* and *Carhart* signal that the conventional account of family-privacy doctrine is inaccurate, and that the Court is moving toward a middle-ground approach in all such cases, the cases are anything but explicit about what that new ground should look like. In both *Troxel* and *Carhart*, the prevailing Justices insisted that the judgments of invalidity followed inexorably from settled constitutional principles. The omission, in *Carhart*, of an exception for maternal health from the Nebraska abortion statute was said to fly in the face of *Casey*'s unequivocal statement requiring exceptions wherever "necessary."[199] Similarly, in *Troxel*, six Justices regarded the failure of the trial court "to accord the [child rearing] determination of Granville, a fit custodial parent, any material weight" in ordering visitation an obvious affront to the "oldest of the fundamental liberty interests recognized by this Court."[200] Yet, the easy confidence with which the Justices pronounced these judgments masked potentially difficult choices among competing constitutional values. Uncovering these choices, and the Court's reasons for making them, is essential to understanding the Court's emerging balancing test for family-privacy disputes.

1. Child Rearing

In *Troxel*, a majority of the Justices acknowledged, at least indirectly, that disputes over child visitation often involve a tangle of conflicting interests: the interests of parents to control those who will have access to, and thus influence upon, their children,[201] and the mutual interests of children and important non-parent figures in their lives to maintain what may

199. *Carhart*, 530 U.S. at 930 (quoting *Casey*, 505 U.S. at 879); *id.* at 938 ("Requiring such [a health] exception in this case is . . . simply a straightforward application of [*Casey*] . . . .").

200. Troxel v. Granville, 530 U.S. 57, 65–66, 71–72 (2000) (O'Connor, J., plurality opinion); *see also id.* at 75 ("[I]t is apparent that the entry of the visitation order in this case violated the Constitution."); *id.* at 78 (Souter, J., concurring) ("*Meyer*'s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by 'any party' at 'any time' a judge believed he 'could make a "better" decision . . . .'"); *id.* at 80 (Thomas, J., concurring) ("[T]his Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case.").

201. *See, e.g.*, *id.* at 78 (Souter, J., concurring) ("The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character."); *id.* at 65–66 (O'Connor, J., plurality opinion).

be family or family-like relationships of enormous emotional significance.[202] At least six Justices agreed, furthermore, that the constitutional limits on court-ordered visitation must be determined by balancing these competing interests.

The plurality, for instance, found the superior court's visitation order in *Troxel* unconstitutional only after making a detailed inquiry into the circumstances of the affected family and concluding that the parent's interests in autonomy outweighed any countervailing private or public interests. Weighing in favor of the parent were the mother's uncontested "fitness" as a parent and that she had shown measured judgment in not seeking to cut off all contact between her children and their grandparents.[203] Weighing in the other direction, the plurality tacitly acknowledged, was the tragic circumstance that had ruptured the extended family—the suicide of the children's father.[204] This fact alone, however, was insufficient to overcome "the combination of . . . factors" favoring parental autonomy.[205] Justices Stevens and Kennedy, while refraining from making any final judgments about the proper balance as applied to the Granville and Troxel families, appeared to agree with the plurality's basic approach. They too insisted that the constitutionality of any visitation order must turn upon a sensitive inquiry into the various human relationships at stake.[206] They also agreed with the plurality that the Constitution requires that any balancing of the competing

202. *See, e.g.*, *id.* at 63–64; *id.* at 87–91 (Stevens, J., dissenting); *id.* at 97–102 (Kennedy, J., dissenting). Elsewhere I have pointed out the way in which the very term "family-like" may demean nontraditional relationships, see Meyer, *Family Ties*, *supra* note 34, at 807–08, and Meyer, *supra* note 21, at 567–68, nevertheless, I use that term here because, once again, it appears in the *United States Reports*. *See Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

203. *See id.* at 68–72 (O'Connor, J., plurality opinion).

204. *See id.* at 68.

205. *Id.* The plurality wrote:

> The Superior Court's order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters. To be sure, this case involves a visitation petition filed by grandparents soon after the death of their son—the father of Isabelle and Natalie—but the combination of several factors here compels our conclusion that § 26.10.160(3), as applied, exceeded the bounds of the Due Process Clause.

Id.; *id.* at 72 (emphasizing again that it was "the combination of these factors [that] demonstrates that the visitation order in this case was . . . unconstitutional").

206. *See id.* at 87–91 (Stevens, J., dissenting) ("[A] parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae* and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection." (citations omitted)); *id.* at 99–102 (Kennedy, J., dissenting) (suggesting that the constitutionality of a visitation order depends on a balanced assessment of the parent's interests, the child's bond with the putative visitor, and the nature of the putative visitor's pre-existing relationship with the child).

personal interests be done with a heavy finger on the parent's side of the scales.[207]

Although the value judgment implicit in the Court's recognition of a constitutional default rule favoring parental authority over visitation may well seem modest, it appears to differ from the balance the Court has struck with respect to abortion. In a series of cases dating back to *Bellotti v. Baird*[208] in 1979, the Court has held that when a minor seeks an abortion a state may impose a requirement of parental notification or consent *only* if the state provides an adequate "bypass" procedure in appropriate cases.[209] Specifically, if the minor wishes to avoid discussing the matter with her parents, the Constitution requires that she be permitted to obtain an abortion if a court determines that an abortion would be in her "best interests":

> [E]very minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. . . . If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion.[210]

Thus, when the question is whether a minor should be permitted to have an abortion, the Court holds that the Constitution *requires* that a court authorize the abortion based on its own determination of the child's

---

207. Justices Stevens and Kennedy each agreed with the plurality that the Constitution embodies a presumption that parents are best suited to assess their children's interests. *See id.* at 89–90 (Stevens, J., dissenting) ("[O]ur substantive due process case law includes a strong presumption that a parent will act in the best interest of her child."); *id.* at 97–98 (Kennedy, J., dissenting) (recognizing "the law's traditional presumption . . . 'that natural bonds of affection lead parents to act in the best interests of their children'" (citation omitted)). Thus, although Justices Stevens and Kennedy each opined that a statutory "best-interests" standard *could* be constitutional, they made clear that this depends upon the assumption "that trial judges usually give great deference to parents' wishes" in determining a child's "best interests." *Id.* at 89–90 (Stevens, J., dissenting); *see also id.* at 97–102 (Kennedy, J., dissenting).

208. 443 U.S. 622 (1979).

209. *Id.* at 643.

210. *Id.* at 647–48 (Powell, J., plurality opinion); *see also* Lambert v. Wicklund, 520 U.S. 292, 295 (1997) (per curiam); Hodgson v. Minnesota, 497 U.S. 417, 453–54 (1990); Planned Parenthood Ass'n of Kan. City, Mo. v. Ashcroft, 462 U.S. 476, 491 (1983) (Powell, J., plurality opinion); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 439–40 (1983). *But cf.* Janklow v. Planned Parenthood, 517 U.S. 1174, 1177 (1996) (Scalia, J., dissenting from denial of certiorari) (finding it "questionable" whether "'parental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti*-type bypass'" (citation omitted)). *See generally* NOWAK & ROTUNDA, *supra* note 56, § 14.29(3), at 896, 901 (noting that "[b]y 1983, it had become clear that the Powell plurality in *Bellotti II* had become the *de facto* constitutional standard," and that "[i]n the 1990s, the Court continued to uphold parental notification laws, and parental consent laws, if, but only if, such laws offered a pregnant minor female the opportunity for a 'bypass procedure' at which she would present her request to a judge . . . [under a best-interests standard]").

"best interests," even in the face of a contrary determination by her parents[211] or, indeed, even without asking their opinion.[212] Yet, when the question is whether the minor should be permitted to continue to visit with her grandparents or some other non-parent, the Constitution *forbids* a court from authorizing contact based on its own determination of her "best interests," at least without giving considerable deference to her parents' judgment.[213]

The prevailing Justices in *Troxel* did not advert to the abortion cases, but the apparent difference in the Court's tolerance for judicial second-guessing of parents' child rearing assessments in the two contexts suggests some difference in the respective balance of interests. Most likely, it reflects some unspoken judgment that the child's interest in obtaining an abortion is more weighty in the balance than is the child's interest in continuing a relationship with non-parents. If so, that judgment might be based either on a factual assessment of the relative significance to children of the two decisions, or on a judgment that, in contrast to the abortion right, children lack a *constitutional* interest in preserving relationships with non-parents which might serve as a counterweight to the parent's child rearing prerogative.[214] Either way, *Troxel*'s holding that a bare judicial disagreement

---

211. It is noteworthy that the Massachusetts Supreme Judicial Court had construed the statute in *Bellotti* to authorize a court order directly contravening a parent's own assessment of her daughter's "best interests." As construed by the Supreme Judicial Court:

> 1. In deciding whether to grant consent to their daughter's abortion, parents are required by [the statute] to consider exclusively what will serve her best interests.
>
> 2. The provision in [the statute] that judicial consent for an abortion shall be granted, parental objections notwithstanding, "for good cause shown" means that such consent shall be granted if found to be in the minor's best interests.

Bellotti, 443 U.S. at 630 (Powell, J., plurality opinion) (quoting Baird v. Att'y Gen., 360 N.E.2d 288, 292–93 (1977)).

212. *See id.* at 646–48 ("If, all things considered, the court determines that an abortion is in the minor's best interests, she is [constitutionally] entitled to court authorization without any parental involvement."); *Lambert*, 520 U.S. at 301–02 n.* (Stevens, J., concurring).

213. Neither the plurality nor Justice Souter necessarily condemned altogether the use of a "best interests" standard in visitation disputes. They insisted only that courts—*somehow*—give "material weight" to a parent's own assessment of the child's interests in any ultimate determination. This leaves open the possibility, for example, that a statute might give sufficient deference to parents by requiring, say, "clear and convincing" evidence supporting a contrary best-interests assessment or a judicial finding that a child's best interests would be very significantly advanced by visitation.

214. Compare Justice Stevens's statement in his *Troxel* dissent that

> 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 . . . interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.

Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (citations omitted), with *Michael H. v. Gerald D.*, 491 U.S. 110, 130–31 (1989) (Scalia, J., plurality opinion) which rejects

with a parent's "best interests" determination is a constitutionally insufficient basis for a visitation order seems to encompass an unarticulated and potentially important premise.

Troxel, moreover, anticipates that courts will be making many more important value judgments about the nature of family ties in the years to come. In determining whether an order of visitation would be unconstitutionally intrusive, courts are apparently directed to evaluate the *substance* of the various emotional relationships at stake—including those between the parent and child and between the child and the potential visitor[215]—and, it seems, the reasonableness of the parent's resistance to visitation.[216] A majority of the Justices thus implied that some unusual circumstances relating to the child's ties with a potential visitor or to the parent's conduct in seeking to sever contact would be enough to justify overriding the parent's objections.[217] Although the Justices managed to sidestep the task of specifying just what circumstances would suffice,[218] state court judges in *Troxel*'s wake will not have that luxury. They will be required to make

---

the claim that a child conceived during an extramarital affair had a "due process right to maintain filial relationships" with both her biological father and her legal father, her mother's husband. Emily Buss has suggested, for example, that a similar judicial bypass procedure should be provided to children who would take the initiative to assert their own Free Exercise Clause interests in contravention of their parents' wishes. *See* Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53, 74–75 (1999).

215. *See Troxel*, 530 U.S. at 68 (O'Connor, J., plurality opinion) (directing consideration of whether parent has "adequately care[d] for his or her children" and is "fit"); *id.* at 88–91 (Stevens, J., dissenting) (courts should consider the child's interest in preserving "established familial or family-like bonds" with non-parents); *id.* at 97–100 (Kennedy, J., dissenting) (contending that courts should be cognizant of "pre-existing relationships [involving] . . . persons who have a strong attachment to the child" and emphasizing that "a fit parent's right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a *de facto* parent may be another"); *cf. id.* at 93 (Scalia, J., dissenting) (asserting that Court's approach will require it to assess and balance the interests of "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").

216. *See id.* at 71 (O'Connor, J., plurality opinion) (finding it relevant that parent never sought "to cut off visitation entirely," but only to curtail it); *id.* at 89 (Stevens, J., dissenting) (stating that courts may evaluate whether a parent is "in fact motivated by an interest in the welfare of the child").

217. *See id.* at 67–74 (O'Connor, J., plurality opinion); *id.* at 87–91 (Stevens, J., dissenting); *id.* at 97–102 (Kennedy, J., dissenting).

218. *Compare id.* at 73 (O'Connor, J., plurality opinion) (declining to consider "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation"), *and id.* at 77 (Souter, J., concurring) (same), *with id.* at 90 (Stevens, J., dissenting) (suggesting that a child's emotional bonds with a non-parent might justify court-ordered visitation, even without proof that a severance of contact would cause the child harm), *and id.* at 95–99 (Kennedy, J., dissenting) (rejecting a "harm" predicate and suggesting that court-ordered visitation might be justified where a non-parent had been a longtime caregiver to the child).

value judgments that can only be described as excruciating. Should a parent's interest in autonomous child rearing count for more than a child's heartfelt desire to maintain ties with a grandparent with whom the child has lived for several years?[219] Should the parent's interest supersede the mutual interests in an ongoing relationship between a child and a man who for years helped to rear the child in the mistaken belief that he was her father?[220] Does a child's interest in these sorts of relationships predominate only when their extinguishment would inflict "serious psychological harm"?[221] When the child, though not severely scarred, would nonetheless suffer a deep sense of emotional loss? Or is it enough that the evidence shows the child would benefit substantially from maintaining contact?

---

219. The *Troxel* plurality noted, for instance, that "in 1998, approximately 4 million children—or 5.6 percent of all children under age 18—lived in the household of their grandparents," and that "[i]n many cases, grandparents play an important role" in "the everyday tasks of child rearing." *Id.* at 64 (citing U.S. DEP'T OF COMM., BUREAU OF CENSUS, CURRENT POPULATION REPORTS, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE), at *i* (1998)); *see* Ana Beltran, *Grandparents and Other Relatives Raising Children: Supportive Public Policies*, 11 PUB. POL'Y & AGING REP. 1 (Summer 2000) (citing census data showing that "[b]etween 1990 and 1998, the number of [families with children headed by a grandparent] increased by 53 percent," with "over 1.3 million children . . . being raised solely by their grandparents" and "[a]n additional 800,000 children . . . being raised by other relatives with no parent present in the household"); *cf.* Moore v. City of East Cleveland, 431 U.S. 494, 504–05 (1977) (Powell, J., plurality opinion) (observing the important child rearing role often played by grandparents and other members of the extended family); *id.* at 507–09 & 510 n.6 (Brennan, J., concurring) (same). At least when grandparents live with and assume an intensive caregiving role toward their grandchildren, the relationship may be of substantial emotional and developmental importance to children. *See* Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315, 1324, 1328–29 (1994).

220. *Compare* Weinand v. Weinand, 616 N.W.2d 1 (Neb. 2000) (granting visitation under state law, while not considering constitutional question), *with* Van v. Zahorik, 597 N.W.2d 15, 18 (Mich. 1999) (denying visitation under state law, while not considering constitutional question); *see also Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting) ("Cases 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."). The American Law Institute's (ALI) new Principles of the Law of Family Dissolution would permit a man in these circumstances to claim the legal status of "parent by estoppel" and, with it, to share custodial responsibility for the child with the mother. *See* David D. Meyer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution*, 2001 B.Y.U. L. REV. (forthcoming) (considering constitutionality of the ALI's Principles).

221. *In re* Custody of Smith, 969 P.2d 21, 30 (Wash. 1998), *aff'd sub nom.* Troxel v. Granville, 530 U.S. 57 (2000). This was the approach taken by a Virginia court in the first weeks following the *Troxel* decision. *See In re* Richardson, No. 1364-A, 2000 WL 869450 (Va. Cir. Ct. June 23, 2000) (stating that a father is constitutionally entitled to deny visitation with foster parents who had reared a young child alone while the father was in prison; although there was "no doubt that continued visitation . . . would be in [the child's] best interests," the father prevailed because the court found no "actual harm" from severing ties); *see also supra* note 75 and accompanying text (describing the facts of *Richardson* more completely).

Troxel leaves these and other equally painful judgments to other judges, but they are judgments that the Court's constitutional rule inevitably requires.[222]

2. Abortion

The Court's developing abortion jurisprudence rests upon its own mantle of value judgments. *Casey*'s undue burden formula quite expressly, of course, calls for judgments about whether a given abortion regulation is "undue."[223] Although the authors of the joint opinion had defined an undue burden as "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion,"[224] they simultaneously insisted that a state may "express profound respect for the life of the unborn" and undertake to "persuade her to choose childbirth over abortion," so long as the state employs "*reasonable* measures."[225] Thus, the test turns ultimately not on a factual determination of whether the state has affected the exercise of private choice, but on a normative assessment of whether the state's imposition on private choice is reasonable.

Applying the undue burden standard in *Casey*, for example, the plurality found it reasonable for Pennsylvania to "ensure that a woman apprehend the full consequences of her decision" by requiring that a physician highlight certain facts to her, including "the 'probable gestational age' of the fetus" and other matters "relating to the consequences [of abortion] to the fetus."[226] This was not "a substantial obstacle to obtaining an abortion," no matter how many women it might effectively deter from choosing abortion.[227] On the other hand, the Court thought that it clearly crossed the line to require a woman to risk psychological abuse or other forms of illicit coercion by informing her husband of her decision to abort, even though the number of women so affected would concededly be small.[228] States, it thus appears, may seek to change a woman's mind through persuasion, but not through threats.

---

222. For a suggestion about how courts might approach these questions after *Troxel*, see David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 52 RUTGERS L.J. (forthcoming 2001).

223. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 874 (1992) (O'Connor, Kennedy, & Souter, JJ., plurality opinion).

224. *Id.* at 877.

225. *Id.* at 877–78 (emphasis added).

226. *Id.* at 882–83.

227. *Id.* at 883.

228. *See id.* at 893–94.

In *Carhart*, the Court claimed not to rely on the undue burden test in concluding that Nebraska was constitutionally obligated to include an exception for women's health in its ban on partial-birth abortions.[229] The requirement for a health exception, the Court insisted, was a bright-line rule of abortion jurisprudence dating back to *Roe* and the omission of such an exception would be unconstitutional without any need to assess whether the health risks posed by the law qualified as an undue burden on a woman's deliberations.[230] So framed, the issue in *Carhart* seemed to answer itself; the unconstitutionality of Nebraska's omission of a health exception flowed not from any judicial value judgments, but as a matter of course from expert testimony establishing that the banned D & X procedure might indeed offer medical advantages to some women choosing abortion.

Yet the Court's judgments about the necessity of health exemptions are, of course, every bit as value-laden as its judgments under the nominally separate undue burden standard. Notwithstanding *Carhart*'s absolutist characterization of the constitutional requirement, past cases make clear that health exceptions are required only where the Court thinks they *ought* to be, in light of the competing public and private values. In the past the Court has upheld abortion regulations that undeniably had the effect of exposing some women to enhanced medical risk. In *Casey*, for example, the Court upheld the sufficiency of a Pennsylvania law that made no exception for cases in which regulatory compliance would expose a woman to *minor* health risks.[231] More strikingly, *Casey*'s affirmation that states may ban abortion altogether after viability (with requisite exceptions for maternal life and health) refutes the view that women are *always* constitutionally entitled to minimize their medical risk during pregnancy. Having an abortion, after all, will virtually *always* entail less medical risk to a pregnant woman than will childbirth,[232] and thus the health exception would swallow the rule if it were construed to encompass an exemption whenever compliance would increase medical risk to any degree. Accordingly, despite *Carhart*'s broad strokes, the constitutional requirement for a health exception surely depends upon a balancing of the competing private and public interests: The imposition of minor health risks may be constitutionally tolerable in pursuit of the state interest in ensuring informed consent to

229. *See supra* notes 185–187 and accompanying text.

230. *See id.*

231. *See Casey*, 505 U.S. at 879–90; *see supra* notes 195–197 and accompanying text.

232. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 78 (1976) (noting that the saline-amniocentesis method of late term abortion "is safer, with respect to maternal mortality, than . . . continuation of the pregnancy until normal childbirth").

abortion,[233] and the Constitution's toleration of medical risk increases along with the state's interest in fetal life (which after the point of viability can justify the imposition on most women of even the substantial medical risks of childbirth).

Carhart's insistence upon a health exception in Nebraska's law, therefore, must rest upon a similar, unstated judgment about the relative weight of the competing interests. The Court's striking intolerance for maternal health risks undoubtedly reflected a judgment that the state's interest in dictating a choice among late-term abortion methods was relatively weak. Nebraska's ban on the D & X method of abortion, after all, could not be justified by the usual state interests of promoting maternal health or potential life, because the ban proved no hindrance to women seeking to abort through riskier methods.[234] Instead, Nebraska could justify its ban only as a means of expressing popular revulsion at a particular method of abortion that bore, in the state's view, an unsettling similarity to infanticide.[235] Although Justice Breyer's majority opinion offered no direct assessment of the state's interest, Justices Stevens and Ginsburg opined in concurrence that the state's interest was not only weak, but illegitimate.[236] The state's real purpose, they contended, was simply to whittle away at the constitutional right to abortion, one method at a time, and they specifically agreed with then–Chief Judge Posner's view that the state's expressive goals could not possibly justify exposing women to medical risk:[237]

> Imagine a married woman, pregnant, told by her physician that her life depends on her obtaining an abortion. He tells her it would be better from the standpoint of minimizing the risk to her of medical complications from the abortion for her to have a D & X. But, he adds, unfortunately the law prohibits the procedure. It does so not because the procedure kills the fetus, not because it risks worse complications for the woman than alternative procedures would do, not because it is a crueler or more painful or more disgusting method

233. *See Casey*, 505 U.S. at 879–80.

234. *See* Stenberg v. Carhart, 530 U.S. 914, 930–31 (2000) ("The Nebraska law, of course, does not directly further an interest 'in the potentiality of human life' by saving the fetus in question from destruction, as it regulates only a *method* of performing abortion." (citation omitted) (emphasis in original)); *id.* at 930.

235. *See id.* at 930 (noting that Nebraska defended its law on the grounds that it "show[s] concern for the life of the unborn," "prevent[s] cruelty to partially born children," and "preserve[s] the integrity of the medical profession" by erecting a bright line against infanticide (quoting Petitioner's Brief at 48, *Carhart* (No. 99-830))).

236. *See Carhart*, 530 U.S. at 946 (Stevens, J., concurring); *id.* at 952 (Ginsburg, J., concurring).

237. *See id.*

> of terminating a pregnancy, but because the state wishes to make a statement of opposition to constitutional doctrine.[238]

For Posner, as for Stevens and Ginsburg, the balance of interests obviously favored the woman because the state's purpose was itself unconstitutional. For Justice O'Connor, the case could not be decided so briskly because she (along with the four dissenters) viewed the state's expressive goals as legitimate.[239] Yet, though she thought the state entitled to express its view that the D & X method *was* more offensive or more cruel than alternative methods, she evidently did not think the state's expressive interest was strong enough to justify forcing women to assume additional medical risk. Thus, she was willing to permit states to express popular revulsion to D & X by forcing most women to choose a more expensive or less convenient procedure, but not a riskier one.

Ultimately, then, despite *Carhart*'s implication that the undue burden test and the mandate for a health exception constitute independent constitutional requirements, the Court's approach to both questions is really quite similar. Just as the finding of an undue burden represents a normative judgment that the state has engaged in excessive or unfair tactics in seeking to influence a woman's decisionmaking, so too a finding that a health exception is required depends upon a judgment that the state's interests do not justify the risks its regulation would pose to women.[240] Behind the Court's judgment about which expressive tactics are tolerable is necessarily a value judgment about the relative importance of the state's expressive interests and the weightiness of the woman's interest in minimizing the risks of her decision. A case in favor of that judgment could readily be made.[241] Yet, neither Justice Breyer, writing for the majority, nor Justice O'Connor,

---

238. Hope Clinic v. Ryan, 195 F.3d 857, 881 (7th Cir. 1999) (en banc) (Posner, C.J., dissenting).

239. *See Carhart*, 530 U.S. at 951 (O'Connor, J., concurring) ("[A] ban on partial-birth abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view.").

240. *Cf.* Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 111–12 (2000) (criticizing the Court's opinion in *Carhart* by asking, "[W]here, exactly, does the Constitution say that the government may never oblige citizens to incur some very small risk? . . . . Other values, such as minimizing cruelty and barbarism, are also important").

241. Justices Stevens and Ruth Bader Ginsburg made at least a glancing effort in this direction in their concurring opinions in which they assessed the weight of the state's expressive interest in banning the D & X procedure and found it to be nil. *See Carhart*, 530 U.S. at 946 (Stevens, J., concurring); *id.* at 952 (Ginsburg, J., concurring). For a cogent critique of their effort, see Amar, *supra* note 240, at 112–13 which contends that Nebraska's law "sought to protect choice while also expressing society's sense of tragedy," and that "[t]o dismiss this effort to find common ground as 'simply irrational' is politically obtuse and morally insensitive." *Id.*

writing in concurrence, was willing to acknowledge and defend this value judgment directly.

II. THE FUTURE OF FAMILY PRIVACY: OBSCURITY AND CANDOR IN THE COURT'S BALANCING OF VALUES

Troxel and *Carhart* thus show that, notwithstanding conventional understanding, the Court's approach to deciding the full range of family-privacy controversies is essentially consistent. Whether considering a claim that a legislative enactment imposes an "undue burden"[242] on a woman's decisionmaking about abortion or constitutes an "undue interference"[243] with a parent's decisionmaking about child rearing, the Court's judgment rests ultimately on a similar balancing of social values. *Troxel* and *Carhart*, moreover, point toward a central reason for the convergence of privacy doctrine. As *Troxel* illustrates with exceptional clarity, the special difficulty of family-privacy cases, both within and without the context of abortion, is that they often involve a clash of intersecting constitutional interests. Just as the woman's right to choose an abortion may be pitted against the contrary reproductive interests of her husband or, if she is a minor, the child rearing prerogatives of her parents, so too a parent's interest in controlling visitation may be pitted against the contrary wishes of a child and non-parent to continue a family relationship of great significance. The communal context in which claims of family privacy often arise, coupled with a sense that frequently there are unusually powerful public interests at stake,[244] pushes the Court away from the rigidity of strict scrutiny and toward a more fluid balancing of interests. Yet, just as *Troxel* and *Carhart* chart out this course, they highlight the essential challenge it poses: how to mediate, in a reasonably principled and determinate manner, among the "multiple overlapping and competing prerogatives"[245] often at stake in disputes over the family. For now at least, the Court seems unprepared to confront frankly the difficult choices its chosen course inevitably requires.

A. The Common Dilemma: Intersecting Liberties Within the Family

Troxel and *Carhart* point toward an essential similarity of all family-privacy controversies. One individual's assertion of a right of family privacy often affects the constitutional interests of others. The Court was quick to

242. *See id.* at 930.
243. *See* Troxel v. Granville, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting).
244. *See* Meyer, *supra* note 21, at 549–51.
245. *Troxel*, 530 U.S. at 86 n.7 (Stevens, J., dissenting).

confront this dilemma in the context of abortion. From its first recognition of a fundamental right to abortion, the Court squarely acknowledged that the woman's exercise of her right to control the course of her pregnancy might clash with the weighty interests of others. Although *Roe* refused to classify the fetus as a "person" with its own independent and countervailing constitutional rights,[246] the Court nevertheless reasoned that the growing "potentiality of human life" made the woman's privacy "no longer sole" and that "[t]he pregnant woman cannot be isolated in her privacy."[247] In subsequent cases, the Court acknowledged an even broader array of potential conflicts: a woman's election of abortion, for example, might well clash with her husband's interest in becoming a father[248] and, depending on her age, with her parents' interests in controlling important decisions concerning her upbringing.[249]

Yet, having recognized this potential for conflicting interests, the Court in *Roe* went on to insist that it made the woman's privacy interest in abortion "inherently different from marital intimacy, . . . or marriage, or procreation, or education, with which *Eisenstadt* [*v. Baird*[250]] and *Griswold* [*v. Connecticut*[251]] . . . *Loving* [*v. Virginia*[252]] *Skinner* [*v. Oklahoma ex rel. Williamson*[253]] and *Pierce* [*v. Society of Sisters*[254]] and *Meyer* [*v. Nebraska*[255]] were respectively concerned."[256] The Court echoed the same theme in *Casey*, insisting that abortion is "unique" because of the tangle of potentially conflicting interests at stake and so must occupy a unique position in constitutional law.[257]

246. Roe v. Wade, 410 U.S. 113, 156–59 (1973).

247. *Id.* at 156–58.

248. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 895–98 (1992); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69–71 (1976); *id.* at 93 (White, J., concurring in part and dissenting in part); *see also* Tribe, *supra* note 9, at 41.

249. *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 444–47 (1990) (opinion of Stevens, J., announcing judgment of the Court); Belloti v. Baird, 443 U.S. 622, 634, 637–39 (1979) (Powell, J., plurality opinion); *Danforth*, 428 U.S. at 73–75; Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 510–19 (1990).

250. 405 U.S. 438, 438–39 (1972) (discussing the right of unmarried individuals to use contraceptives).

251. 381 U.S. 479, 479 (1965) (discussing the right of married couples to use contraceptives).

252. 388 U.S. 1, 1 (1967) (discussing the right of marriage).

253. 316 U.S. 535, 538 (1942) (discussing the right to avoid sterilization).

254. 268 U.S. 510, 514 (1925) (discussing the right of parents to send their children to private school).

255. 262 U.S. 390, 390–91 (1923) (discussing the right of parents to instruct their children in a foreign language).

256. Roe v. Wade, 410 U.S. 113, 159 (1973).

257. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 852 (1992). The Court wrote that

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform

As the facts of *Troxel* make clear, however, the potential for intersecting private interests is in no sense unique to abortion. In *Troxel*, vindicating Tommie Granville's constitutional right of child rearing carried the potential for extinguishing an established and substantial emotional relationship between her daughters and their paternal grandparents, the only living familial tie they have with their deceased father.[258] In past cases, the Court has acknowledged that the emotional relationships between children and non-parent caregivers may be sufficiently substantial to merit constitutional protection.[259] Although there was no claim in *Troxel* that the grandparents had a constitutional right to visit with the children,[260] several Justices acknowledged the potential for conflicting constitutional interests in the visitation context. Justices Stevens and Kennedy suggested that the interests of a child and non-parent caretaker in continuing a pre-existing relationship of emotional import must be considered in deciding the limits of a parent's child rearing prerogative.[261] Just as the Court in *Roe* concluded

---

> and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.

Id.; *see also id.* (noting that "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law"); Bellotti v. Baird, 443 U.S. 622, 650 (1979) (Powell, J., plurality opinion) (describing the abortion right as "a constitutional right of unique character").

258. Although Granville had sought initially only to limit the grandparents' visitation, by the time she had prevailed in the Supreme Court she stated she was unsure whether she would allow her daughters any contact with their grandparents. *See* Timothy Egan, *After Seven Years, Couple Is Defeated*, N.Y. TIMES, June 6, 2000, at A22.

259. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), for example, the Court held that the Constitution's protection of family privacy precludes enforcement of a municipal ordinance that would force a grandmother to live apart from the grandchildren with whom she had been residing. In *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), the Court assumed, without squarely deciding, that foster parents might have a constitutional liberty interest in maintaining custody of the foster children they have helped to raise, emphasizing that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children." *Id.* at 844.

260. Indeed, the Troxels expressly disavowed such a claim. *See* Petitioner's Brief, *Troxel* (No. 99–138). "Thus," the Troxels noted, "this Court has no occasion to consider, for example, whether it might in some instances be unconstitutional for a state court to enjoin a grandparent from having contact with his or her grandchild." *Id.* at 18 n.38.

261. *See* Troxel v. Granville, 530 U.S. 57, 86–87 (2000) (Stevens, J., dissenting); *id.* at 97–102 (Kennedy, J., dissenting). Justice Stevens further opined that the child's interest "in preserving established familial or family-like bonds" was likely to warrant independent constitutional protection. *Id.* at 87–88. For analyses supporting Justice Stevens' supposition, see, for example, Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 397 (1994); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 626–27, 641 (1980).

that a pregnant woman "cannot be isolated in her privacy,"[262] so a "parent's liberty interest in the care and supervision of her child [cannot be viewed] as an isolated right that may be exercised arbitrarily."[263]

Although the potential for conflicting constitutional claims is no more unique to the broader context of family privacy than it is to the specific context of abortion,[264] the risk of such conflict nevertheless seems endemic to the nature of family privacy. The intimate choices that are protected across the range of family privacy issues, including marriage, procreation, cohabitation, and child rearing, are intrinsically ones of potentially profound interest to more than one individual.[265] As the Court has come increasingly

262. Roe v. Wade, 410 U.S. 113, 159 (1973).

263. *Troxel*, 530 U.S. at 89 (Stevens, J., dissenting). Even Justice Scalia, though favoring a narrower view of the Constitution, saw that the Court's recognition of a fundamental parental right to control visitation would ultimately require recognition of the conflicting interests 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." *Id.* at 93 (Scalia, J., dissenting). The recognition of intersecting interests in *Troxel* is consistent with the Court's tacit acknowledgment of the potential for internal familial conflict in several earlier cases involving the constitutional claims of parents. In *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), for example, the Court recognized that vindicating the constitutional claim of the foster parents to maintain a "family-like" bond with their foster children would conflict squarely with the constitutional rights of the children's "natural parents." *Id.* at 839–40, 846–47. And in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Santosky v. Kramer*, 455 U.S. 745 (1982), the Court upheld the constitutional claims of parents only after assuring itself that the interests of their children were not to the contrary. *See id.* at 760–61 (finding an alignment of interests between child and parent in preservation of their relationship); *Yoder*, 406 U.S. at 230–31; *id.* at 237 (Stewart, J., concurring) ("As the Court points out, there is no suggestion whatever in the record that the religious beliefs of the children here concerned differ in any way from those of their parents."). Indeed, Justice White wrote that *Yoder* would have been "a very different case" if the record suggested a real conflict of interests. *Id.* at 238 (White, J., concurring). For a cogent critique of the Court's assumptions, see Buss, *supra* note 214, at 66–70.

264. Certainly, the Court has encountered other controversies in which the vindication of one claimant's rights seemed to trench upon those of another. The famous tension between the Establishment and Free Exercise Clauses is an obvious example. *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973) ("[T]his Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, and that it may often not be possible to promote the former without offending the latter." (citations omitted)). The "potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press" to cover court proceedings is another. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 547–48 (1976); *see* Press-Enter. Co. v. Superior Court, 478 U.S. 1, 13–14 (1986).

265. *See* Farber, *supra* note 21, at 515 n.15 (noting that the concept of "'privacy as control' fails to work [in settings such as marriage, childbearing, and child rearing, in which] . . . the conduct in question is inherently nonindividualistic"). Indeed, the very term "relational privacy" sometimes used to describe the Constitution's protection for family relationships, *see, e.g.*, Cahn, *supra* note 35, at 1231; Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 388–89 (2000); Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1116 (1998), necessarily implies that the interests of more than a single individual are at stake. *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL

to emphasize that these rights reside with the *individual*, rather than with the family as an entity, the opportunities for conflicting interests have multiplied.[266] Thus, in recent years the Court has found itself confronting not only Tommie Granville's claim that the Constitution entitles her to bar visitation, but also the claims of men that the Constitution entitles them to establish their paternity so that they might seek visitation.[267]

The difficulty this potential for conflict poses for the Court is at least two-fold. First, as *Troxel* itself illustrates,[268] it pushes the Court to abandon the strictures of traditional fundamental rights analysis. Strict scrutiny is simply too confining to permit courts to take account of the interplay of conflicting constitutional interest; its heavy presumption in favor of the individual claimant is incompatible with the possible presence of other

---

LAW 1353 (2d. ed. 1988) ("The Court's apparent intuition that abortion rights are somehow grounded in *relational* concerns is . . . correct—but the relevant relationships are not those between doctors and patients, but those between men and women, and between pregnant women and the fetuses they carry." (footnote omitted)); Farber, *supra* note 21, at 517 ("[I]f moral value really resides in relationships rather than in a single individual's emotion, then the privacy right should protect relationships rather than individuals.").

266. As the Court emphasized in *Eisenstadt v. Baird*, 405 U.S. 438 (1965):

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453. Although the *Eisenstadt* Court had made this point in upholding the right of single persons to use contraceptives, the Court has subsequently quoted the same passage to emphasize that a married woman was free to assert her own privacy interests in abortion against the independent and conflicting procreative interests of her husband. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 896 (1992); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 70 & n.11 (1976). As Barbara Woodhouse has observed, this individualization of family-privacy rights has created a core difficulty: "While we agree that 'family' ought to receive special constitutional protection, problems arise in deciding how to balance the rights of family members. In family cases involving interlocking relationships, it is often difficult to untangle whose rights are being vindicated and whose rights are being burdened." Barbara B. Woodhouse, *Children's Rights*, *in* YOUTH AND JUSTICE (Susan White ed., forthcoming 2001); *see also* Woodhouse, *supra* note 28, at 1110 ("Especially in family law, which deals with collective organisms, liberty is a difficult concept: one individual's liberty can spell another's suppression or defeat."). For more discussion of the way in which the locus of family-privacy rights has shifted from the family as an entity to the individual, see Janet L. Dolgin, *The Family in Transition: From* Griswold *to* Eisenstadt *and Beyond*, 82 GEO. L.J. 1519 (1994); Fineman, *supra* note 137, at 1212–20; Meyer, *supra* note 20, at 580–82; Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537.

267. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989); Lehr v. Robertson, 463 U.S. 248 (1983). Likewise, in the space of just five years, the Court found itself navigating between assertions that the Constitution protects both the interests of a parent whose child has been assigned to foster case, see *Santosky v. Kramer*, 455 U.S. 745 (1982), and a foster parent resisting a state's efforts to reunify a foster child with her parents. *See* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816 (1977).

268. *See supra* notes 136–153 and accompanying text.

claimants with their own weighty interests.[269] The Court's tortured effort in *Roe* to explain its result in terms of strict scrutiny illustrates the point. *Roe*'s trimester framework—allowing increasingly restrictive regulation as a pregnancy progresses[270]—was the product of a frank balancing of the woman's interest in autonomous decisionmaking against the countervailing interests of others, including "that of potential human life."[271] Yet the Court felt obligated to squeeze this outcome within the confines of traditional strict scrutiny. Accordingly, it explained that the state's interest in promoting maternal health "becomes 'compelling'" at "approximately the end of the first trimester" and that its interest in "the potentiality of human life" becomes "compelling" at the point of fetal viability.[272]

This formulation begged for the criticism that dogged it for the next two decades: If the public value of the woman's health is truly "compelling" in the fifth month of pregnancy, it should be no less important in the second (even accepting that the risks posed to it then are fewer), and if the state truly has a "compelling" interest in the "potentiality of human life," as *Roe* found, then "*potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward."[273] The awkwardness of *Roe*'s explanation lay in the fact that its gradational approach was not really a product of strict scrutiny at all but rather of a balance struck among a complex of competing public and private interests affected by the woman's decision.[274] The abortion cases that followed in the 1970s and 1980s only

269. *See* Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CAL. L. REV. 151, 157–58 (1988).

270. Under *Roe*,

> almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake.

Casey, 505 U.S. at 872.

271. Roe v. Wade, 410 U.S. 113, 159 (1973).

272. *Id.* at 163–64.

273. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 461 (1983) (*Akron I*) (O'Connor, J., dissenting) (emphasis in original); *see also* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting) ("The State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests 'exist throughout pregnancy.'" (quoting *Akron I*, 462 U.S. at 461 (O'Connor, J., dissenting))).

274. See Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, 51 LAW & CONTEMP. PROBS. 79, 94–95 (1988); Tribe, *supra* note 9, at 4–5.

confirmed this understanding.[275] Thus, the authors of the joint opinion in *Casey* could fairly describe their abandonment of strict scrutiny and substitution of the undue burden test as merely jettisoning a doctrinal pretense while reaffirming "the essence of *Roe*'s original decision."[276]

The potential for conflicting constitutional values has exerted similar pressure in the Court's cases dealing with other family-related liberties, where, despite their nominal status as fundamental rights, the Court has rarely used the language of strict scrutiny.[277] Although most of the Justices were content in *Troxel* to omit strict scrutiny without explanation, as had been the Court's custom in past cases, Justice Stevens was more direct in explaining that traditional fundamental rights analysis was inappropriate "in this family law visitation context, in which multiple overlapping and competing prerogatives of various plausibly interested parties are at stake."[278]

The second difficulty posed by the potential of family privacy disputes to expose clashing constitutional interests is that, having pushed the Court off of strict scrutiny, it leaves the Court to balance what are likely to be

275. *See* Farber & Nowak, *supra* note 37, at 520 ("Whatever *Roe v. Wade* originally may have meant in Justice Blackmun's mind, it now encompasses a much more flexible approach to abortion. The touchstone of this new approach is reasonableness.").

276. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 869 (1992).

277. *See supra* note 33 and accompanying text. Indeed, it is partly on this basis that a number of scholars have criticized more broadly the very use of "rights" discourse in the context of the family. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 121–30 (1991); MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 135 (1993); EVA R. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY: IDEOLOGY AND ISSUES 6–7, 171–72 (1986); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 295–96 (1988); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 468–71 (1983); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1858 (1985); Schneider, *supra* note 274, at 110–13; Woodhouse, *supra* note 76, at 1809–20.

278. Troxel v. Granville, 530 U.S. 57, 86 n.7 (2000) (Stevens, J., dissenting). Justice Stevens's approach in *Troxel* is consistent with the position he and some other Justices have taken in abortion cases involving parental-notification laws. In *Hodgson v. Minnesota*, 497 U.S. 417, (1990), for example, Justice Stevens wrote: "Three separate but related interests—the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit—are relevant to our consideration of the constitutionality of the 48-hour waiting period and the two-parent notification requirement." *Id.* at 444 (Stevens, J., plurality opinion). The plurality in *Bellotti* had followed a similar approach, emphasizing that a minor's constitutional rights must be balanced against the parents' constitutional interest in child rearing: "The unique role in our society of the family, the institution by which 'we inculcate and pass down many of our most cherished values, moral and cultural,' requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." Bellotti v. Baird, 443 U.S. 622, 634 (1979) (Powell, J., plurality opinion) (citation omitted).

incommensurable values.[279] There is no ready means for deciding, for example, whether parents' interest in the upbringing of their child should predominate over their daughter's interest in making her own decisions about contraception or abortion.[280] Constitutional text is plainly of no real use, given that neither right is grounded in the text, and the Court has made clear that historical notions suggesting a priority are not dispositive.[281] All that is left, then, is for the Court to make some judgment about the respective weight of the competing values—a judgment which has regard for historical and modern majoritarian assessments, but which stands ultimately on its own.[282]

In some of its abortion cases, the Court has confronted this dilemma directly and wrestled openly with the choices posed by the clash of privacy values. In considering abortion laws requiring spousal consent or notification, for example, the Court has acknowledged that both wife *and* husband have their own powerful interests at stake in the decision about whether to continue a pregnancy.[283] And, recognizing that "when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail,"[284] the Court has resolved the conflict by ranking the woman's interest as categorically superior to the man's.[285] "Inasmuch as it is

279. *Cf.* Schneider, *supra* note 274, at 88–89 (expressing skepticism of balancing in the family-privacy context on the ground that "personal rights and state interests are incommensurable"); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

280. *See, e.g.*, *Hodgson*, 497 U.S. at 444; *Bellotti*, 443 U.S. at 633–34.

281. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 765 (1997) (Souter, J., concurring) ("My understanding of unenumerated rights . . . avoids the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level."); *Casey*, 505 U.S. at 848 ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.").

282. *See Glucksberg*, 521 U.S. at 767–68 (Souter, J., concurring); *Casey*, 505 U.S. at 849 ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule.").

283. *See Casey*, 505 U.S. at 895 ("'We recognize that a husband has a 'deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying.'" (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976))); *see also Danforth*, 428 U.S. at 70 (recognizing further "that the decision whether to undergo or to forgo an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious"); *id.* at 93 (White, J., concurring in part and dissenting in part) ("A father's interest in having a child—perhaps his only child—may be unmatched by any other interest in his life.").

284. *Danforth*, 428 U.S. at 71.

285. The Court has ruled, for example, that a statute requiring dual consent to abortion, thereby creating a default rule favoring childbirth in cases of stalemate, is objectionable because it embodies a legislative "determin[ation] that the husband's interest in continuing the pregnancy

the woman who physically bears the child," the Court reasoned, "and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[286] The Court has struck a similarly frank balance when a minor's right to choose abortion has been stacked against her parents' interests in her upbringing.[287]

Whether or not one agrees with the particular value judgments made by the Court in these cases, the Court at least deserves credit for owning up to them and attempting to offer some rationale for its choice. More often, however, as in *Troxel* and *Carhart*, the Court has been less frank about the nature of its constitutional balancing in this context and about its attendant value judgments.

---

of his wife always outweighs any interest on her part in terminating it." *Id.* at 70 n.11. In place of that legislative value judgment, the Court has substituted an opposite one attributed to the Constitution. *See id.* at 71.

286. *Id.* at 71; *accord Casey*, 505 U.S. at 896; *see also* TRIBE, *supra* note 265, at 1340:

> [I]f a woman is forced to bear a child . . . the invasion is incalculably greater. Quite apart from the physical experience of pregnancy itself, an experience which of course has no analogue for the male, there is the attachment the experience creates, partly physiological and partly psychological, between mother and child.

Id. The Court amplified on this judgment in *Casey*, noting that the balance tipped in favor of the woman not only because she had more at stake *physically*, but also more at stake *constitutionally*:

> It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman. *Cf. Cruzan v. Director, Mo. Dept. of Health*, [497 U.S. 261, 281 (1990).]

Casey, 505 U.S. at 896.

287. A statute giving parents a veto power to block their daughter's abortion is unconstitutional because "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty [and, indeed, by implication must be *less* so] than the right of privacy of the competent minor mature enough to have become pregnant." *Danforth*, 428 U.S. at 75; *see also* Bellotti v. Baird, 443 U.S. 622, 643 (1979) (Powell, J., plurality opinion) (stating that a parent's constitutional interest in child rearing is insufficient to justify a statute giving the parent a veto over a minor's abortion in light of "the unique nature and consequences of the abortion decision" for the minor); Catherine Grevers Schmidt, Note, *Where Privacy Fails: Equal Protection and the Abortion Rights of Minors*, 68 N.Y.U. L. REV. 597, 631 (1993) (concluding similarly that a minor's "immediate interest in controlling her reproductive future outweighs a parent's right to exercise complete authority in the household"). In *Hodgson v. Minnesota*, 497 U.S. 417 (1990), the Court used simple mathematics to strike down a law requiring that both parents of a minor be notified of a pending abortion, even if one parent has already given consent. Given the balance previously struck between the minor's privacy interest in choosing abortion and the parent's privacy interest in child rearing, the Court reasoned, "[i]t follows that the combined force of the separate interest of one parent and the minor's privacy interest must outweigh the separate interest of the second parent." *Id.* at 453.

B. The Contours of "Reasonableness"

Dissenting in both *Troxel* and *Carhart*, Justice Scalia attacked what he regarded as the Court's "standardless"[288] choice of values. His first objection was both familiar and substantial: that the Court was without textual authority to impose its own value judgments respecting child rearing or abortion on the majoritarian political process.[289] He went on, however, to lodge a related but more tailored criticism, insisting that the Court's doctrinal process for making these value judgments is guideless and indeterminate.[290] The Court, I think it fair to say, has moved beyond the first point of objection. In *Troxel*, for instance, Justice Scalia stood alone[291] in refusing to recognize an unenumerated constitutional right of parents to rear their children.[292] Justice Scalia's second ground for objection, however, cannot be so easily sloughed off. While the Court has often and forthrightly debated the legitimacy of its substantive due process enterprise, and offered thoughtful justifications for the Court's role in defending

288. Stenberg v. Carhart, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting) (quoting *Casey*, 505 U.S. at 987 (Scalia, J., dissenting)).

289. *See id.* at 2621; Troxel v. Granville, 530 U.S. 57, 91–93 (2000) (Scalia, J., dissenting). *See generally* Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989) (discussing the prevalence of objections based on "majoritarianism").

290. The majority's decision in *Carhart*, he insisted, proved the accuracy of his predictions in *Casey* that the undue burden test was "'as doubtful in its application as it is unprincipled in origin,'" "'hopelessly unworkable in practice,'" and "'ultimately standardless.'" *Troxel*, 530 U.S. at 91–93 (Scalia, J., dissenting) (citations omitted). In *Troxel*, he warned that

> Judicial vindication of "parental rights" under a Constitution that does not even mention them requires . . . not only a judicially crafted definition of parents, but also . . . 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.

Id. at 92–93.

291. Justice Thomas did claim to reserve judgment on this threshold issue, although he then went on to describe parental rights in broader terms than any other Justice. *See id.* at 80 (Thomas, J., concurring). He also reached out to hint that the unenumerated parental right might reside within the Fourteenth Amendment's Privileges and Immunities Clause rather than the Due Process Clause. *See id.* at 80 n.*.

292. It is beyond the scope of this article to attempt to address adequately Justice Scalia's textualist challenge to the very enterprise of giving special constitutional protection to family privacy. A great many others, of course, have undertaken that very substantial project. *See, e.g.*, LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 65–80 (1991); Farber, *supra* note 9, at 1350–55, 1366–67 (concluding that the Court's practice of recognizing unwritten fundamental rights is deeply entrenched in history and modern consensus). Rather, accepting the Court's evident resolve to protect unwritten rights of family privacy, my focus here is on making the particular form of heightened review employed by the Court more intelligible and better suited to the values the doctrine is meant to protect.

unenumerated rights,[293] it has yet to offer reliable guidance about how judges should go about making the value judgments inherent in that enterprise. The Court has made clear only that historical notions of the limits of governmental power are not dispositive, and that the outcome depends upon "reasoned judgment."[294]

The Court cannot begin to answer Justice Scalia's criticism, however, until it is more forthcoming about its role and its value choices. The Court's reluctance to be candid about its value choices seems rooted in a fear of giving credence to Justice Scalia's first criticism that the Court is acting beyond its authority and "legislating from the bench."[295] But the pretense that the Court's family-privacy jurisprudence is somehow value neutral is obviously unsustainable, and the Court's lack of candor means that it is unable to offer any clear account of the reasons that animate its judgments, thus providing fodder for Justice Scalia's second criticism.[296] In this way, the Court's self-defensive masking impulse ultimately backfires, presenting its own corrosive threat to the Court's credibility and prestige. In the realm of family privacy, at least, the retention of the strict scrutiny formula is fundamentally deceptive.[297] The standard does no work and imposes no real constraint upon the process of practical reason that is at the heart of the Court's decisions. Yet, as long as the Court fails to renounce strict scrutiny while plainly applying a lesser standard in case after case, it leaves itself open to charges of confusion or manipulation.[298] Contrary to Justice Scalia's

293. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 755–65 (1997) (Souter, J., concurring); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846–51 (1992); Moore v. City of East Cleveland, 431 U.S. 494, 542–49 (1977) (White, J., dissenting); Poe v. Ullman, 367 U.S. 497, 541–44 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

294. *See Casey*, 505 U.S. at 848–49.

295. Judge Posner has aptly described this as "a judicial defense mechanism—a way of shifting responsibility for unpopular decisions to other people, preferably dead people such as the framers of the Constitution, whose grave provides a convenient place for the buck to stop." RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 309 (2d ed. 1996).

296. Justice Oliver Wendell Holmes recognized the point more than a century ago in his critique of formalism:

> I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious . . . .

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897).

297. *Cf.* Martin H. Redish, *Political Consensus, Constitutional Formulae, and the Rationale for Judicial Review*, 88 MICH. L. REV. 1340, 1363 (1990) ("There can be little doubt that constitutional formulae [such as the strict scrutiny test] 'often create[] a specious sense of certainty' that 'promise[s] clarity or measurement where only judgment is possible.'" (quoting ROBERT NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 139 (1989))).

298. *Cf.* Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring); KEYNES, *supra* note 33, at 172–73 ("The Supreme Court's failure to develop a coherent methodology has

protestations, the value judgments inherent in those cases are not renegade or improper solely because they *are* value judgments[299]—that is the nature of the Court's substantive due process enterprise.[300] Yet the Court's work will continue to be an easy target for the sort of criticism hurled by Justice Scalia until it starts defending its choices more frankly.

In fact, the very formlessness that Justice Scalia finds so offensive in the Court's review is, in this context, ultimately its virtue. By implicitly claiming for itself the authority to decide in each case whether a given regulation of abortion or family life is *reasonable*, the Court has returned to where it began in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.[301] For Justice Scalia and many others, of course, acknowledging this linkage is tantamount to conceding the illegitimacy of the Court's recent cases. After all, as Daniel Farber has observed, "*Lochner* is one of the ogres of constitutional law, mostly used as an epithet to hurl at opposing constitutional theorists."[302] The Court's error in *Lochner*, however, was not in its precise formulation of heightened scrutiny—its search for "reasonableness" rather than "compelling interests" and "narrow tailoring"—but in its decision to employ any form of heightened scrutiny in service of *laissez-faire* economic values. Accepting, however, the propriety of *some* level of heightened scrutiny in defense of family-privacy values, my point is that *Lochner*'s reasonableness standard better serves the values of family privacy than does the rigid form of scrutiny prescribed by conventional fundamental rights

---

imparted a perception of manipulability to its personal liberty and privacy decisions, which undermines the credibility of substantive due process jurisprudence.").

299. *See* Stenberg v. Carhart, 530 U.S. 914, 954–55 (2000) (Scalia, J., dissenting); *Troxel*, 530 U.S. at 91–93 (Scalia, J., dissenting).

300. As Professor Chemerinsky writes:

> After almost a century of Legal Realism, it is strange to need to establish this point, but the Court and many commentators continue to talk as if it were possible for judges to decide cases wholly apart from their personal views . . . . The open-textured phrases in the Constitution . . . force the Court to make value choices in deciding specific cases.

Chemerinsky, *supra* note 289, at 90; *see also* TRIBE & DORF, *supra* note 292, at 65–66.

301. The "reasonableness" standard is precisely the one employed murkily by the Court in those cases and in the rest of its maligned *Lochner*-era jurisprudence. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff . . . ."); Lochner v. New York, 198 U.S. 45, 56 (1905) (describing the essential question of substantive due process as whether a challenged act of government is "a fair, reasonable and appropriate exercise of the police power of the State"); *see also* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 567 n.4 (1993) (Souter, J., concurring in part) (describing *Pierce* as having adopted a "reasonableness test" that is less exacting than strict scrutiny).

302. Farber, *supra* note 9, at 1355; *see also* Gunther, *supra* note 32, at 42 (noting that, because of associations with *Lochner*, "due process carries a repulsive connotation of value-laden intervention for most of the Justices"); Rowe, *supra* note 9, at 223 (noting that the premise of modern constitutional law is that "[t]o Lochner is to sin egregiously").

analysis. Just as the reasonableness test permitted the *Meyer* Court to balance the state's interests fluidly against both the interests of parents in child rearing *and* the interests of teachers in educating, the reasonableness test in *Troxel* permits courts to take account of the varied and potentially conflicting interests of parents, children, and extended family in passing judgment on the state's intrusion. In this sense, although *Lochner* is properly condemned for its excesses across a broad range of economic and social legislation, in the limited field of family privacy its reasonableness standard is largely redeemed.

Notwithstanding an inescapable measure of indeterminacy in any balancing test,[303] it would be possible to make the Court's reasonableness standard considerably more principled and predictable without surrendering the flexibility the Court has wisely retained in this context.[304] Indeed, Justice Souter made an important step toward rehabilitating the *Lochner*-era reasonableness standard three years before *Troxel* and *Carhart*. In his separate opinion in *Washington v. Glucksberg*,[305] he argued for a model of judicial inquiry in substantive due process cases that defined "reasonableness"[306] on a sliding scale. Under this approach, the degree of justification required of a state enactment would depend not solely on a threshold categorization of the

303. Middling standards of review, of course, are inherently more vulnerable to charges of indeterminacy because, by definition, they eschew the outcome-determinative extremes of rational basis or strict scrutiny review. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972–77 (1987); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992).

304. *Cf.* Edward S. Adams & Daniel A. Farber, *Beyond the Formalism Debate: Expert Reasoning, Fuzzy Logic, and Complex Statutes*, 52 VAND. L. REV. 1243, 1313 (1999) ("[F]uzzy logic shows that what lawyers call 'balancing,' and often attack as essentially arbitrary, is in principle reducible to understandable (though non-binary) rules.").

305. 521 U.S. 702 (1997) (upholding ban on assisted suicide).

306. Unlike the Court in most recent cases, Justice Souter readily embraces "reasonableness" as the appropriate polestar of substantive due process review:

> [T]he business of [substantive due process] review is not the identification of extratextual absolutes but scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people. It is a comparison of the relative strengths of opposing claims that informs the judicial task, not a deduction from some first premise. Thus informed, judicial review still has no warrant to substitute one reasonable resolution of the contending positions for another, but authority to supplant the balance already struck between the contenders only when it falls outside the realm of the reasonable.

Id. at 764 (Souter, J., concurring); *accord id.* at 768 ("The weighing or valuing of contending interests in this sphere is only the first step, forming the basis for determining whether the statute in question falls inside or outside the zone of what is reasonable in the way it resolves the conflict between the interests of state and individual.").

private interest affected as fundamental or otherwise.[307] Rather, even when a court discerned a state intrusion on a fundamental liberty interest, the extent of public justification required to sustain it would be further modulated according to the precise strength of the private interests affected and the degree of the state's intrusion.[308] Heightened scrutiny, in this sense, is not a "one-size-fits-all" formula, but a highly nuanced and fact-sensitive accommodation of "clashing principles, each quite possibly worthy in and of itself."[309] And, importantly, the variability of heightened scrutiny under this approach makes it possible for courts to accord greater deference to political enactments, at least in some cases.[310]

Justice Souter's approach is quintessentially pragmatic. Just as Justice Souter disclaims the possibility of resolving the knotty questions of substantive due process by reasoning from "some first premise,"[311] legal pragmatism denies the utility of any foundational theory to produce the right answers to the hardest constitutional questions.[312] Instead, it supposes that resolution of these sorts of questions can come only from a sensitive judgment about the competing values—a judgment which reflects careful regard for the factual context of a decision and a respect for history, but which also recognizes the propriety of occasional judicial innovation.[313]

In important ways, *Troxel*, too, embraced essential propositions of pragmatism by its emphasis on restraint and factual context and by its

307. As under conventional doctrine, though, Justice Souter still considers such categorical distinctions legitimate. *See id.* at 766–67 (Souter, J., concurring) (calling for heightened scrutiny of incursions on fundamental liberty interests).

308. *See id.* at 772 n.12 ("How compelling the interest and how narrow the tailoring must be [in order to satisfy substantive due process review] will depend, of course, not only on the substantiality of the individual's own liberty interest, but also on the extent of the burden placed upon it."). Some Justices in earlier cases, most notably Justice Thurgood Marshall, have advocated a "sliding scale" approach as an alternative to the "tiered" analysis in equal protection cases. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 109–10 (1973) (Marshall, J., dissenting); *see also* Chemerinsky, *supra* note 289, at 73–74.

309. *Glucksberg*, 521 U.S. at 764 (Souter, J., concurring).

310. The reasonableness standard, despite its greater malleability, thus shows more judicial restraint than the strict scrutiny approach prescribed by conventional fundamental rights analysis. *See* POSNER, *supra* note 295, at 318 (defining "judicial restraint" as favoring positions that would increase the power of the political branches of government as compared with the judiciary). And of course if "the lesson of the *Lochner* period . . . [is largely] the need for judicial deference to legislative enactments," Sunstein, *supra* note 9, at 874, this greater potential for judicial deference is an important point in its favor.

311. *Glucksberg*, 521 U.S. at 764 (Souter, J., concurring).

312. *See* Farber, *supra* note 9, at 1338–41; Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 4–9 (1998) [hereinafter Posner, *Against Constitutional Theory*]; Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 2 (1996).

313. *See* Farber, *supra* note 9, at 1341–49; Posner, *Against Constitutional Theory*, *supra* note 312, at 9–12.

apparent willingness to balance historical respect for the parental role against the need for innovation in light of the modern diversification of the family.[314] Where *Troxel* and *Carhart* fell short was in their lack of candor. In both cases, the prevailing Justices implied that their judgments flowed naturally from some first premise, either the ancient prerogative of parents or the inviolable imperative of maternal health. The resulting opaqueness of the value balancing at the core of the two decisions leaves lower courts with only the sketchiest guidance. An October 2000 decision of the Illinois Supreme Court is emblematic of the sort of case law that we can expect as a result.[315] Applying strict scrutiny, which the state supreme court thought was required by *Troxel*'s affirmation of child rearing as a fundamental right, the court held that a trial court had violated the constitutional rights of two divorced parents when it granted visitation rights to the ex-husband's mother over their objection. In explaining why the state's interest in "protecting . . . children whose lives have been disrupted by divorce" could not sustain the visitation order, the court could do no better than to point out that the parents were fit and that "[t]he facts of this case do not warrant the State's interference."[316] The oracular nature of the court's decision is, of course, of a piece with *Troxel* itself. The opinion lacks any persuasive power because it fails to come to grips with the competing individual and community values at stake in the family dispute. By vivid contrast, the dissenting opinion of then–Chief Judge Posner's in the Seventh Circuit's partial-birth abortion case provides a much better model.[317] Judge Posner candidly lays on the table for all to see the tangle of competing values implicated by the legislative act under review and determines that the legislature has overstepped its bounds only after openly assessing their relative weights.[318]

---

314. Dedication to prudence and incremental decisionmaking, *see* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Farber, *supra* note 9, at 1343; Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 177–78, 190 [hereinafter Farber, *Reinventing Brandeis*]; Posner, *Against Constitutional Theory*, *supra* note 312, at 9, appreciation for the importance of factual development, *see* Farber, *Reinventing Brandeis*, *supra*, at 174–76, 190; Daniel A. Farber, *Shocking the Conscience: Pragmatism, Moral Reasoning, and the Judiciary*, 16 CONST. COMMENT. 675, 683–84 (1999) [hereinafter Farber, *Shocking the Conscience*]; Posner, *Against Constitutional Theory*, *supra* note 312, at 3, 11–12, and balanced respect for both history and innovation, *see* Farber, *supra* note 9, at 1337–38; Farber, *Reinventing Brandeis*, *supra*, at 181, 185–86; Farber, *Shocking the Conscience*, *supra*, at 686, are all hallmarks of pragmatism found in *Troxel*. *See* Meyer, *supra* note 222.

315. *See* Lulay v. Lulay, 739 N.E.2d 521 (Ill. 2000).

316. *Id.* at 534.

317. *See* Hope Clinic v. Ryan, 195 F.3d 857, 883, 885 (7th Cir. 1999) (en banc) (Posner, C.J., dissenting), *vacated by* 530 U.S. 1271 (2000).

318. *See supra* note 238 and accompanying text.

Plainly, if the Court's pragmatic approach is to be transformed into something more than "a rudderless journey of ad hoc decisionmaking,"[319] candor must be paired with some additional criteria for decision.[320] The first step, surely, must be to recognize forthrightly all of the separate and competing privacy interests implicated in each case. In this regard, the Court must follow Justice Stevens's lead in *Troxel* by beginning to identify and assess openly the "multiple overlapping and competing prerogatives" at stake in any given family dispute.[321] The Court has done precisely that in some of its abortion cases touching upon the roles of parents or spouses, and there is no reason the Court should not be equally direct in the full range of family-privacy cases.

The Court's next task will be to find some reasonably principled way of accommodating the various interests it has identified. I have suggested elsewhere the outlines of an analytical structure that would make the Court's "reasoned judgment" in this context more transparent and predictable.[322] In past cases, the Court has adjusted its scrutiny of state intervention into the family in light of several variables, including the degree of the state's intrusion upon privacy interests, the degree to which the family is fractured or unified in its resistance to state intervention, and any historical consensus regarding the appropriate balance point.[323] In the context of a dispute over child visitation, for example, this approach suggests consideration of whether the affected family had been splintered by divorce or death, whether the person seeking visitation was a grandparent or a neighbor, and whether the visitation sought was extensive or sporadic. The strength of the "special factors"[324] that must be shown to sustain a visitation order would then increase along with the amount of visitation sought, the extent to which a family was unified in resisting visitation, and the nontraditionality of the relationship fostered by the visitation.[325] Having a more

319. Farber, *Reinventing Brandeis*, *supra* note 314, at 163.

320. *See* Redish, *supra* note 297, at 1365 (contending for *some* use of constitutional formulae on the grounds that "fundamental precepts of democratic theory prescribe that the Court approach its constitutional decisions in a manner qualitatively different from the manner in which a legislature decides issues of social policy"); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1224–25 (1995) (contending that constitutional adjudication must remain "an activity significantly disciplined by facts and forces outside oneself" and not "merely a language for pressing one's preferences").

321. Troxel v. Granville, 530 U.S. 57, 86 n.7 (2000) (Stevens, J., dissenting).

322. *See* Meyer, *supra* note 21, at 579–94.

323. *See id.* at 580–91. I elaborate upon this thesis in Meyer, *supra* note 222.

324. *See Troxel*, 530 U.S. at 68 (O'Connor, J., plurality opinion).

325. *See* Meyer, *supra* note 222, (suggesting how these factors might guide constitutional analysis of visitation disputes after *Troxel*).

consistent regard for factors such as these would not obviate the difficulty of the Court's task, but would at least make the Court's balancing less nebulous and free-floating. The criteria would in no way insulate the need for judicial value judgments, but would help to make the judgments at least more disciplined and transparent.

So long as the Court accepts the basic legitimacy of its family-privacy enterprise, there is no escape from the hard value judgments that the enterprise necessarily requires. Ultimately, the public's willingness to abide the Court's role depends upon the Court explaining and justifying its choices. As Justice Souter has observed, in the field of substantive due process "the acceptability of the results is a function of the good reasons for the selections made."[326] If a majority of the public is not persuaded by the Court's judgment, at least it must be made to respect the integrity of the Court's decisionmaking.[327] Yet, for so long as the Court fails to clarify the nature of its review and grapple openly with the messy choices inherent in its enterprise, its work will remain vulnerable to attack and suspicion.

CONCLUSION

The decisions last Term in *Troxel* and *Carhart* cast important new light on the Court's approach to family-privacy controversies. The Justices' concerted restraint in *Troxel* surprised those who, in keeping with conventional understanding, had expected the Court to apply strict scrutiny in broadly vindicating parental authority. Likewise, the Court's staunch insistence in *Carhart* that state regulation of partial-birth abortion pose no risk at all to women's health surprised those who had expected a more even balancing of state and private interests under the undue burden test. Together, the cases suggest the need for important revision of the conventional understanding of family privacy doctrine. Rather than a bifurcated approach in which incursions on traditional forms of family intimacy are judged strictly while restrictions of abortion are reviewed leniently, *Carhart* and *Troxel* suggest that the Court intends to follow a broadly similar approach to deciding all family-privacy controversies. The essence of this approach is

326. Washington v. Glucksberg, 521 U.S. 702, 770 (1997) (Souter, J., concurring). Indeed, it is the very giving of reasons that legitimates and distinguishes judicial action from other exercises of governmental power. *See, e.g.*, Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807, 809–10 (2000) ("To a remarkable degree, to a degree unknown in any other branch of government, the Court's exercise of power *is* its reasons."); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("[R]easoned response to reasoned argument is an essential aspect of [the judicial] process.").

327. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 865–66 (1992); *see also* Fried, *supra* note 326, at 809.

reasonableness, the very standard with which the Court began its family-privacy enterprise during the *Lochner* era.

Yet for all the light cast by *Troxel* and *Carhart*, the cases also leave much in shadows. Just as the cases confirm the Court's commitment to follow a middle course of review in the context of family privacy, a course that inevitably will require numerous and important value judgments about the family, the Court seems pointedly unwilling to confront its role openly and to defend its choices. Much of what seems to drive the Court's subterfuge is a relentless fear that its interventionism in this field will be viewed as indistinguishable from its activism in the age of *Lochner*. Yet, to sustain its modern family-privacy enterprise, the Court must soon reconcile itself to the realization that, in this one limited area of state regulation, the flexible, value-laden test of reasonableness is precisely the right one.