IS TRADITION ACTIVIST?

THE COMMON LAW OF THE FAMILY IN THE LIBERAL CONSTITUTIONALIST WORLD

JAMES R. STONER, JR.*

INTRODUCTION: IMAGINE A PRO-LIFE *ROE*

Suppose during its next term, the U.S. Supreme Court holds that the right to life guaranteed in the Due Process Clauses of the Fifth and Fourteenth Amendments includes a right to birth, overriding any constitutional claim to an abortion right and trumping any statutory guarantee of access to abortion. In other words, suppose the Court declares unconstitutional any state or federal action to protect or support abortion. Leaving the current Court's composition aside for the purposes of this thought experiment, the legal grounds for such a decision may exist.

First, the original intent of the Fourteenth Amendment would arguably support the claim, because many states had enacted statutes forbidding abortion in the early nineteenth century, and no evidence exists that the framers of that amendment intended to overturn such laws.[1] The original intent of the Fifth Amendment is more problematic, because abortion in 1791 was a matter of common law. Although the issue is disputed, scholars have persuasively argued that the common law forbade most abortions and certainly afforded no positive right to abortion.[2] Because early common law

---

* Associate Professor of Political Science, Louisiana State University. Ph.D., Harvard University, 1987; M.A., Harvard University, 1980; A.B., Middlebury College, 1977.

1. Joseph Dellapenna, "The History of Abortion: Technology, Morality, and Law," 40 U. PITT. L. REV. 359 (1979), at 389-390.

2. *See* Joseph Dellapenna, *supra* note 1, at 366-389; JOHN KEOWN, ABORTION, DOCTORS, AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982 3-25 (Charles Webster & Charles Rosenberg eds., 1988).

determined at what stage of a pregnancy abortion would be a crime based on the now-discredited idea of quickening—the notion that a human soul enters the fetal body midway through the pregnancy, at the time the mother begins to feel motion—the Court might now take an even more restrictive view of abortion. After all, modern embryology cannot identify any point between conception and birth when the fetus suddenly comes alive, and modern genetics understands that a fetus is genetically human all along.[3] While this coupling of original intent and scientific advance suggests the reversal of *Roe v. Wade*,[4] a Court hesitant to reverse *Roe* outright but willing to balance conflicting rights might instead reserve the right to reproductive choice as an exception in cases of sexual coercion, where the pregnancy cannot in any sense be attributed to the woman's choice.

Beyond these legal arguments, the Court might find further support in the shift in scholarly opinion over the past decade. Not only have reputable scholars at major universities begun to argue against abortion rights[5], but some abortion rights proponents now acknowledge that abortion ends a human life rather than removing unwanted tissue.[6] Moreover, as abortion rights advocates now increasingly favor an Equal Protection rationale,[7] advocates of a right to birth can also advance an Equal Protection argument. Imagining a minority exists in our modern society that is more "discrete and insular"[8] and lacking in political representation than the unborn is very difficult.

Now almost everyone would agree that if the Court were to recognize a right to birth and essentially overturn *Roe*, it would

---

3. *See* PATRICK LEE, ABORTION AND UNBORN HUMAN LIFE (1996). A discussion of the early discoveries of embryology in relation to abortion law appears in Dellapenna, *supra* note 1, at 402-404.

4.410 U.S. 113 (1973).

5. In addition to the works previously cited, see HADLEY ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE 360-422 (1986) and ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 196-213 (1999).

6. *See, e.g.*, EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT (1996); *see also* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993). As the title of Dworkin's book indicates, the abortion debate is now linked to a debate over euthanasia.

7. *See, e.g.*, MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 108-117 (1996).

8. The language is from the famous footnote four in *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938)

be a sure instance of conservative activism. Establishing a constitutional right to birth would eviscerate years of precedent and numerous statutes, give specific meaning to the text of the Constitution that its various framers did not intend, uproot settled expectations, radically alter current society, and even cause people to question the legitimacy of the Court.[9] To be sure, the concern about legitimacy may not be fatal. Labeling such a decision activist does not mean that it will not have sufficiently numerous or influential defenders to prevent any serious political backlash against the Court as an institution.[10] But the political dynamic of this hypothetical is not the focus of my comment. Rather, I want to use it to make several points about conservative judicial activism more generally. First, I think such a decision, considered by itself, irrespective of the makeup of the Court, would hardly differ from *Roe v. Wade*[11] in its institutional consequences. Any definition of judicial activism that includes a right-to-birth decision would have to include the right-to-abortion cases, and any definition of judicial activism that does not include both types is apt to be partisan rather than analytical. By the time the Court decided *Planned Parenthood v. Casey*[12] in 1992, *Roe* might stake a claim to have become a part of settled law, and even more so today, after a presidential election in which one candidate insisted on defending the decision and the other refused to attack it. In 1973, however, *Roe* was a radical innovation that overturned the law of all fifty states, including some contemporary, more liberal state statutes.[13] The radical reversal outlined here would involve a similar nationwide overturning of current law, but only because abortion rights are mandated by the federal courts. There are some states with statutes on the books, now enjoined by federal judges, that aim to protect a right to life.[14]

---

9. These are the sorts of concerns voiced by the joint opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

10. For a discussion of the exaggerated character of the Court's recently expressed concerns over its perceived legitimacy, see ROBERT NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM (2001).

11. 410 U.S. 113 (1973).

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

13. *See* Lee, *supra* note 3.

14. *See, e.g.*, ABORTION IN THE UNITED STATES: A COMPILATION OF STATE LEGISLATION, 2000 SUPPLEMENT (Roy M. Mersky & Tobe Liebert eds., 2001). For example, Louisiana's abortion statute (LSA-R.S. 14:87) was struck down by the Fifth Circuit Court of Appeals in *Sojourner T v. Edwards*, 974 F. 2d 27 (5th

Second, no one can realistically think that, given the Court's present personnel, any such decision is likely to be made within a generation. Although Justice Kennedy dissented in the partial birth abortion case, *Stenberg v. Carhart*, he did not repudiate the opinion he had joined in *Casey,* but instead argued that the *Stenberg* majority misapplied the *Casey* rule.[15] Even Chief Justice Rehnquist and Justice Scalia, the Court's most outspoken opponents of *Roe*, try the patience of anti-abortion conservatives with their insistence that their only objection to *Roe* is that it overturned and now blocks democratically established anti-abortion legislation without a solid constitutional basis.[16] Justice Thomas alone has signaled that he might adopt the kind of reasoning necessary to make a truly pro-life decision, and even he has not ever done so in the area of abortion. If in what would surely be its paradigmatic cause, conservative activism is so remote, if not implausible, how much should people fear it in any form?[17]

Third, and probably most importantly, the incongruity between the hypothetical reversal of *Roe* and many of the dominant theories of contemporary constitutional law suggests the overall slant of today's constitutional discourse among the legal elite or at least its professoriate. Overall, this discourse is progressive, rationalistic, libertarian, egalitarian, and secularist, although forced to accept conservative electoral strength sufficient to limit liberalization of the federal bench.[18] In the terms of this modern discourse, tradition, which was authoritative under the common law in the absence of an argument to the contrary, now finds itself on the defensive, with the presumption of its validity reversed. For example, that an idea is a traditional "stereotype" is counted as a positive reason against its legitimacy, while the argument in defense of its rationality is not entertained.

Cir. 1995).

15. *See* Stenberg v. Carhart, 530 U.S. 914, 956 (2000).

16. Rehnquist, "The Notion of a Living Constitution," 54 TEX. L. REV. 693, 704-706 (1976).

17. My argument here parallels in a way Robert Nagel's analysis of the Supreme Court's recent federalism jurisprudence and his suggestion of what a truly antifederalist jurisprudence would be. *See* Nagel, *supra* note 10, at 49-67.

18. Ironically, no case demonstrates this better than the decision last year in *Bush v. Gore*, 531 U.S. 98 (2000), where even the Court's most conservative and probably most Republican members had to sign an opinion based on equal protection to achieve an authoritative majority.

Because tradition was authoritative at common law, modern rationalism could present itself as the voice of reason against antiquated prejudice. Because tradition was once itself a reason for judicial decisions, the actual justification for use of a tradition in law often went unvoiced. While conservative activism is not likely to emerge before the development of reasons for traditions, conservatism can never abandon tradition and remain true to itself. Therefore, the question becomes can conservative judges restore tradition that has been abandoned? Can conservative reason meet liberal rationalism in a fair contest? What would be the terms of play? If a fair equivalence of activism versus activism were established, on what principles might we find a middle ground in favor of restraint? This comment will address these issues through a consideration of the basic law of the family, surely the most traditional of institutions and perhaps the chief guardian of tradition itself.

I. THE COMMON LAW AND THE FAMILY

To the chagrin of conservatives—especially conservative textualists—the U.S. Constitution has almost nothing to say about the family. The Preamble mentions "posterity," the President must be "natural born," and treason cannot work "corruption of the blood," but on the whole our fundamental law is silent about the fundamental institution of social life.[19] To understand why the Constitution does not mention family requires a moment's reflection on what the Constitution was meant to be.[20]

The Framers of the federal Constitution intended to provide fundamental law, but they did not mean to be comprehensive with regard to fundamental things. Constitutional law was only a part of the law—concerned with the organization of governmental institutions and the circumscription of their powers—while *federal* constitutional law was concerned only with the organization and limitation of the power of the federal government and some additional limitations on the power of the states. The order of property

19. U.S. CONST., pmbl.; art. II, § 1, cl. 5; art. III, § 3, cl. 2.

20. I discuss these matters at greater length in "The Idiom of Common Law in the Formation of Judicial Power," in THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM 47-68 (Bradford P. Wilson & Ken Masugi, eds., 1998).

and familial relations was largely the business of common law, the unwritten law based in the immemorial law of England and captured in judicial decisions. Carried over by the colonists and recognized in the States, the common law was embedded in the learning of judges and the consensus of the people, the latter especially as expressed by juries, the characteristic institution of common law. At the time of the founding, common law was not yet thought to be judge-made law—that came with Holmes in the late nineteenth and early twentieth centuries—but rather to carry the authority of living tradition.

Common lawyers thought the common law was a rational system, not generated by a political theorist, to be sure, but composed and collected into a reasonably consistent set of rules. Accordingly, the common law embodied basic maxims of justice and contained nothing that ran contrary to the law of nature or of God. The Framers of the Constitution were silent about family, and largely silent about property law, because they knew the common law secured these things in the States. Although the Framers departed from the common law constitutionalism of England in writing a Constitution, common law tradition included a tradition of declaring fundamental principles in writing, as evidenced by Magna Carta, the Petition of Right, and the (English) Bill of Rights. The common law of the family gave legal protection to the traditional Christian pattern of family life. It established the civil law of marriage, allowing one man and one woman of age or with parental permission to marry for life. It included the law of coverture, by which a husband managed the property of his wife within a marriage, establishing his duty to provide for her and their children. Finally, it endorsed the parental duty to maintain and educate the children and the parental right to decide how to accomplish this task.[21]

In the early years of the American republic, the common law changed to conform to the circumstances of republican life and a dynamic, entrepreneurial economy. One can see these changes by comparing the *Commentaries* of the Englishman William Blackstone, written in the 1760s, with those of the American James Kent, first published in the 1830s. Kent notes that marriage law had been modified to include grounds,

21. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 241-261 (W.E. Dean ed., 1836).

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States.[26]

Although this has become one of the most ridiculed passages in American constitutional law, it was a fair and accurate statement of the common law at the time, and merits careful parsing.

Justice Bradley invokes divine and natural law, not as authorities demanding constitutional vindication, but as background principles explaining the common law and thus supporting the presumption that nothing in the Fourteenth Amendment was designed to upset the common law order. His mention of "modifications of civil status" acknowledges the legitimacy of statutory changes to common law, while he further claims that "[t]he humane movements of modern society, which have for their object the multiplication of avenues for women's advancement . . . have my heartiest concurrence."[27] What he insists upon is that changes in common law be made by state legislation, not imposed by judicial decision. Notably, the courts later deemed the states'

---

26. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).
27. *Bradwell*, 83 U.S. at 142 (Bradley, J., concurring).

especially adultery, for judicially granted divorce, rather than requiring a statute of divorce as in England. Married Women's Property Acts, passed first in Mississippi in 1839 and later in all the states, protected wives' separate property from their husbands' debts, gave wives control of that property, and later gave them control of their earnings in the marketplace, thus limiting husbands' control and diminishing coverture.[22] Legislatures established public schools and mandated attendance, especially in New England; the state thus assumed responsibility for education, which had previously been the exclusive province of parents.[23] State statute, rather than judicial decree, enacted these changes. The basic outline of the old common law was maintained, but adjusted to American circumstances. No one seemed to think these changes affected the federal Constitution in any way.

In 1873, however, the Supreme Court heard the case of *Bradwell v. Illinois*, considering whether the Fourteenth Amendment altered the common law of the states by establishing a federal privilege for a woman to practice law.[24] Decided as a companion to the *Slaughter-House Cases*,[25] *Bradwell* held that no such privilege existed and left in place the Illinois decision to exclude women from legal practice. The *Slaughter-House* majority, who had held the Fourteenth Amendment only disallowed race discrimination, could easily dismiss Mrs. Bradwell's claim, because it did not involve race. The other four justices, however, who would have recognized a common law right for the *Slaughter-House* butchers to practice their chosen profession with Constitutional protection, had to explain why Mrs. Bradwell did not similarly win their support. This was the occasion for Justice Bradley's famous statement regarding gender roles in the common law:

---

22. KERMIT HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY. 158-160 (1989).

23. JAMES KENT, COMMENTARIES ON AMERICAN LAW 75-261 (3rd ed. 1836).

24. 83 U.S. 130, 138 (1873).

25. 83 U.S. 36 (1873). In *Slaughter-House*, the majority, led by Justice Samuel Miller, held that the Privileges and Immunities Clause of the Fourteenth Amendment was intended specifically for the protection of African-Americans, not as a device to restructure American federalism and establish new rights to be enforced in federal courts. In dissent, Justices Stephen Field, Joseph Bradley, and Noah Swayne, joined by Chief Justice Salmon Chase, would have given the Amendment a wider reading, allowing federal judicial enforcement of common law rights, in this case a right to practice a lawful profession free of interference by a state-chartered monopoly.

police power adequate to justify protective legislation for women, although when the Constitution was amended to grant women the right to vote, the Supreme Court restricted the police power and eliminated a minimum wage for women.[28]

II. NEW CONSTITUTIONALISM AND THE ECLIPSE OF THE COMMON LAW FAMILY

In the early twentieth century, legal realists reconceived common law as judge-made law, thus stripping it of its traditional authority. After 1937, Constitutional law likewise distanced itself from its original affinity with common law. The story of the "Constitutional Revolution"[29] is familiar to all, but its impact on the law of the family is worth addressing here. On the one hand, the development of a national welfare state removed families' primary responsibility of supplying their own material conditions, in response to a modern economy that had already socialized production and compromised the principle of familial independence. On the other hand, state and federal benefits were typically devised with the traditional family in mind. For instance, the family wage, child labor laws, the labor union, and Aid to Families with Dependent Children all assumed the need for social support to supplement the family and maintain its traditional order.[30] The legal doctrines that insulated new congressional legislation from pre-1937-style judicial oversight were often defended in the new language of legal realism, but the "New Deal" Court's attitude toward the federal commerce power could be justified, at least in part, as a return to the precedents of the Marshall Court.[31] In short, the New Deal had a

28. *Compare* Muller v. Oregon, 208 U.S. 412 (1908), *with* Adkins v. Children's Hosp., 261 U.S. 525 (1923), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

29. This term was apparently coined by Edward S. Corwin to describe the changed attitude of the Supreme Court toward New Deal legislation, which it had sometimes struck down before 1937, and which it generally upheld thereafter. *See* EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. (1941).

30. *Cf.* THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 525-39 (1992).

31. Likewise, in the hands of New Deal judges like Hugo Black, innovative civil liberties decisions were defended in the name of traditional liberties that had been eroded by Progressive policing, and in the opinions of Robert Jackson, for example, the attempt to restore common law rights was a matter of substance as well as form.

conservative, or traditional, as well as a radical dimension, which surely contributed to its success. As the doctrines of the Warren and Burger Courts developed, however, especially in the interpretation of the Fourteenth Amendment's Due Process and Equal Protection Clauses, a new sort of judicial activism emerged. Matters once governed by common law were opened to reform in the name of constitutional principle, with courts deploying the dynamic of judge-made law against common law substance. In Justice Harlan's opinion in *Poe v. Ullman,* and later in the majority opinion in *Griswold v. Connecticut*, the Court invented a "right of contraception," in the name of the married couple but against the traditional and natural purpose of marriage, as part of the liberty guaranteed by the Due Process Clauses of the Constitution.[32] Within seven years, this right, forged in the name of marriage, led to a denial of constitutional recognition of marriage, when in *Eisenstadt v. Baird* Justice Brennan wrote:

> [T]he marital couple is not an independent entity with a mind and a 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 unwanted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[33]

A text that could more precisely reject the community between husband and wife implicit in the common law of marriage than this passage is hard to imagine. Marriage was treated as contingent rather than constitutive, even in relation to an individual's sexual life, and the begetting of children was viewed not as a natural purpose of marital relations but as a personal choice. From this, *Roe v. Wade* and its progeny logically and temporally followed. Accordingly, when the *Planned Parenthood v. Casey* majority decided to strike a provision of the statute that would have required a husband's consent to his wife's abortion, they dismissed the common law

32. Poe v. Ullman, 367 U.S. 497, 523-55 (1961); Griswold v. Connecticut, 381 U.S. 479, 480-86 (1965).

33. 405 U.S. 438, 453 (1972).

as "of course . . . no longer consistent with our understanding of the family, the individual, or the Constitution."[34]

The second judicial assault on the family occurred in the name of Equal Protection and began about the same time as *Eisenstadt*. In several cases that concern differential treatment of the sexes under laws governing the administration of property or the distribution of government benefits, the Court struck down statutes that were based on the traditional common law view of a husband's responsibility as provider for the family on the grounds that they lacked a "rational basis."[35] The shift to the "heightened scrutiny" standard prioritized the abstract individual over the socially embedded man or woman, and suppressed the social practices that prepared boys and girls for lives as husbands and wives in the name of individual rights. For example, in *United States v. Virginia* Justice Ginsburg wrote that the Virginia Military Institute should admit women because they are "capable of all of the *individual* activities required of VMI cadets," dismissing the tradition of chivalry, which by definition is abandoned, or quietly compromised, when the school's "adversative method" is applied to a woman.[36]

Unlike the move toward contraceptive and abortion rights, the move toward sexual equality began in federal legislation with the Equal Pay Act of 1963 and the inclusion of sex among the categories of prohibited discrimination under Title VII of the Civil Rights Act of 1964. Additionally, numerous federal, state, and local laws have influenced relations between the sexes in the past several decades, particularly in divorce.[37] Even so, is it not "activist" to replace the step-by-step development of legislation with sweeping decrees that reorder

34. 505 U.S. 833, 897 (1992).

35. *See* Reed v. Reed, 404 U.S. 71, 76 (1971); the statute struck in Frontiero v. Richardson, 411 U.S. 677 (1973), fits this description, too, though the plurality opinion wanted to invoke "strict scrutiny" in cases of discrimination on the basis of sex. In an influential article, future Justice Ruth Bader Ginsburg concluded, "The breadwinning male/homemaking female division of functions deserves neither special favor nor condemnation by the law. It is a pattern individuals should be free to adopt or reject, without government coercion." Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 42 (1975).

36. United States v. Virginia, 518 U.S. 515, 523-24 (1996) (emphasis added).

37. *See* The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994); Title VII of Civil Rights Act, 42 U.S.C. § 2000(e) (1994). Concerning changes in the law of divorce, see HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988).

what legislative bodies choose to leave in place? And does it not matter when decisions are made, as these have been, on the basis of the Constitution, rather than, for example, through a broad interpretation of the Civil Rights Act[38] because a constitutional decision locks in place social experimentation against any evidence of its consequences? Will a constitutional amendment be needed to restore the family if we discover that strong, compassionate, self-governing citizens cannot be raised without paternal authority and maternal care? Even if the Court's decisions reflect the sentiments of a contemporary political majority, why should minorities be disabled from advocating an alternative way?

III. TOWARDS A CONSTITUTIONAL FAMILY LAW?

The previous section contains a paradox. The Framers wrote the Constitution without mention of the family in part because they did not intend to disturb the family order then in place. This silence, however, has left the family vulnerable to other constitutional developments made in the name of principles not originally understood to threaten the family, but allowed to progress in ways that do. Now, I want to turn to two recent cases that contain hints that the current Court may develop a constitutional law of family rights. In both cases, a traditional view of familial relations seems to prevail, although both involve patterns of relations that today, while hardly atypical, indicate that the family is in deep disarray. Only an alarmist would call either decision activist, but in the past activism by the Court has grown from such small seeds.

First, in *Troxel v. Granville*, the Supreme Court wrote six opinions but nevertheless clearly reaffirmed what Justice O'Connor's plurality opinion called "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[39] She called this right "perhaps the oldest of the fundamental liberty interests recognized by this Court," citing such stalwart cases as *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, *Prince v. Massachusetts*, and *Wisconsin v.*

38. In the matter of sexual harassment, see, e.g., Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) and Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

39. Troxel v. Granville, 530 U.S. 57, 66 (2000).

Yoder.[40] *Troxel* involved an unwed mother's defense against a suit by the parents of her children's late father, a suicide, who were asking the state judge for more extensive visitation rights with their biological grandchildren than the mother freely offered. The trial judge ruled in the grandparents' favor, the state court of appeals reversed, and the Washington Supreme Court affirmed, holding that the state law permitting "any person" to seek visitation rights "any time" whenever "visitation may serve the best interests of the child" violated the federal Constitution by disregarding parental rights and allowing judicial interference on a standard other than "preventing harm to the child."[41] In *Troxel*, the United States Supreme Court plurality was unwilling to require a "preventing harm" standard. They did hold that the trial court judge had incorrectly established a presumption against the mother's right, when the presumption should have been in her favor.[42] Justice Souter concurred on grounds that the decision was overbroad, but he refused to join the plurality opinion because he claimed the state supreme court had ruled the statute facially invalid, while Justice O'Connor based her opinion on the circumstances of the case.[43] Justices Stevens and Kennedy agreed with Justice Souter in his interpretation of the state supreme court decision as a "facial" ruling, but preferred to remand for a more definitive construction of the state statute to insure it would be unconstitutional in all applications.

At first glance, the case hardly seems to implicate "conservative judicial activism," if only because the decision did not follow the usual ideological divide. For example, Chief Justice Rehnquist and Justices Ginsburg and Breyer joined Justice O'Connor's opinion.[44] An interesting exchange between the Court's two most conservative members, however, clearly raised the critical issue for any debate about conservative activism.

---

40. Troxel, 530 U.S. at 65-66; Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 390 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944); Wisconsin v. Yoder, 406 U.S. 205 (1972).

41. *See Troxel,* 530 U.S. at 60.

42. *Id.* at 69.

43. *Id.* at 75 (Souter, J., concurring); *id.* at 60 (O'Connor, J., plurality opinion).

44. *Id.* at 60.

Justice Thomas sided with the majority in favor of affirming the mother's fundamental right but refused to join the plurality opinion because it failed to specify the standard of Due Process review.[45] He believed the test should be "strict scrutiny," because the right is fundamental, although he did explicitly reserve judgment on the questions of whether substantive due process is a misconceived doctrine and whether "the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision."[46] Justice Scalia, in contrast, resoundingly asserted that parental rights are inalienable in the sense proclaimed in the Declaration of Independence and are among those referred to in the Ninth Amendment, but he then denied that they are judicially enforceable.[47] Leaving aside Justice Thomas's caveat, not to mention how *inalienable* rights can have been ceded, it is hard to imagine a clearer or more concise disagreement. Given the heritage of liberal activism in relation to the Fourteenth Amendment—e.g., substantive due process—should conservatives promote the justice who wants strict scrutiny of legislation that confines the rights conservatives favor, or should they hold their applause for the justice who rigorously defers to the legislative will?

The second case, *Tuan Anh Nguyen v. INS*,[48] is a 2001 decision that again involved a somewhat surprising alignment. The Court upheld a statutory provision that differentiated between unwed citizen fathers and mothers in establishing the citizenship status of their children.[49] This time the vote was five to four, and the Court's usual swing justices wrote the majority opinion and dissent. The family circumstances of *Nguyen* were just as disordered as in *Troxel*. An unwed American fathered a son in Vietnam during the war, brought his son home to Texas in 1975, but neglected to file any paperwork with the INS testifying to his paternity before the boy was eighteen as required by law for him to gain automatic citizenship.[50] At twenty-two, the son pled guilty to sexual assault on a child, which not only made him unlikely to gain

45. *Id.* at 80.
46. *Id.* at 80.
47. *Id.* at 91.
48. 533 U.S. 53 (2001).
49. *Id.* at 73.
50. *Id.* at 57-58.

citizenship but also subjected him to deportation if he could not establish his citizenship.[51] The issue in the case was not whether in fairness the young man should gain citizenship and finish his sixteen-year sentence in the United States, nor was the issue whether proof of paternity by DNA tests ought to override INS requirements. Instead, the Court debated whether INS rules discriminate on the basis of sex, because the son of an unwed American mother does gain citizenship by virtue of his birth, without needing to file with the INS as required of the son of an unwed American father.[52]

Justice O'Connor's dissent insisted that Equal Protection standards established in previous cases required a formally sex-blind standard, such as "presence at the birth."[53] She further stated that the majority's purported rationales for the differentiation were too weak to pass "heightened scrutiny."[54] Conversely, Justice Kennedy's majority opinion relied on the observation that a father and mother are not similarly situated in their biological relation to the child: the mother's relation is evident from birth and usually witnessed in the birth process, while the father's relationship is much less certain. By forcing this observation into the structure of an Equal Protection test, Justice Kennedy held that the INS requirements aimed to ensure that a child has "the opportunity for a meaningful relationship" with the biological parent, a purpose not satisfied even though the father actually raised the child.[55]

The sharpest part of the dissent concerned the definition of the word "stereotype" and its meaning in Equal Protection law. Justice O'Connor took issue with Justice Kennedy's definition of stereotype as "a frame of mind resulting from irrational or uncritical analysis."[56] She wrote that it does not matter if the stereotype might reflect a statistically significant characteristic and "thus be in a sense 'rational.'"[57] It was enough, she wrote, if it relies on a "simplistic, outdated assumption" about the differences between the sexes—for example, that unwed "mothers are significantly more likely than fathers . . .to

51. *Id.* at 57.
52. *Id.* at 58.
53. *Id.* at 86.
54. *Id.* at 74.
55. *Id.* at 65.
56. *Id.* at 89.
57. *Id.*

develop caring relationships with their children."[58] Thus, for the sake of attacking traditional opinions about familial relations, the dissenters would allow a male sex offender to gain citizenship, while on the other side for fear of stereotyping, a contorted Equal Protection argument was advanced to permit the United States to deport a son raised in America by an American father. Indeed, the one moment of humane clarity in the two opinions came when the dissent quoted a 1940 presidential committee report to discredit the statute in question, which report in fact merely recommended that the privilege of citizenship be granted to the offspring of an unwed mother and that the mother be promised custody against the claim of the putative father.[59] Of course in our more enlightened age, when children are seen as a burden not a blessing, the justices said the 1940 view was "paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children."[60]

CONCLUSION

Can tradition be established anew and would it be activist to try? Obviously in the matter of the family, no one would think of returning to coverture or the abolition of civil divorce. Short of this, the traditional family remains alive in society. Indeed often enough, if one can speak from experience at the risk of stereotyping, family is the traditional refuge of love and sanity in a mad and heartless world. Despite recent hints at the margins of constitutional law of doctrines friendly to the family, the general leaning of law in the matters of abortion and equal protection remains hostile to legal endorsement of the traditional family and its presuppositions, while doctrines intent upon the demise of traditional patterns of family life seem well-entrenched. In short, the present Court is not at all eager to lead a return to tradition even in the face of familial crisis. If political or moral leadership in that cause should emerge, however, the question of activism is more likely to be whether the Court will block the attempt.

58. *Id.* at 89-90.
59. *Id.* at 91.
60. *Id.*