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# From Family to Individual and Back Again

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# From Family to Individual and Back Again<sup>†</sup>

MARGARET F. BRINIG\*

*Loving v. Virginia*<sup>1</sup> has been thought of in many ways: as an important step toward full equality for African-Americans,<sup>2</sup> as, more generally, a statement about the suspect classification of race,<sup>3</sup> as a declaration about the fundamental nature of marriage,<sup>4</sup> and as a critical addition to the construction of the right to privacy<sup>5</sup> (as well as, of course, exemplified in the validation of the Lovings' own marriage).<sup>6</sup>

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† With apologies to Bilbo Baggins of J.R.R. TOLKIEN, *THE HOBBIT OR THERE AND BACK AGAIN* (1982).

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1. 388 U.S. 1 (1967).

2. See RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY AND ADOPTION* (2003). The whole idea of Professor Kennedy is that allowing marriage and adoption rights are the final legal step toward full equality.

3. *Loving*, 388 U.S. at 12. See also *McLaughlin v. Florida*, 379 U.S. 184 (1964), (striking down a Florida criminal statute which proscribed and punished habitual cohabitation only if one of an unmarried couple was white and the other black); cf. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (making the point that *Loving* was about race and should not be read to extend marriage to same-sex couples); *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006) ("This is not the kind of sham equality that the Supreme Court confronted in *Loving*; the statute there, prohibiting black and white people from marrying each other, was in substance anti-black legislation."); *Anderson v. King*, 138 P.3d 983, 989 (Wash. 2006) ("In *Loving* the Court determined that the purpose of the antimiscegenation statute was racial discrimination, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race. The [*Loving*] Court also said that the Lovings [sic] fundamental freedom of choice to marry may not be restricted by invidious racial discriminations.").

4. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."); *Loving*, 388 U.S. at 12 ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 957 (Mass. 2003) ("It is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a 'civil right.'").

5. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992); *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 447 & n.7 (1972).

6. Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of Loving v. Virginia*, 41 *How. L.J.* 229 (1998).

In my contribution to the first *Loving* symposium,<sup>7</sup> I wrote about the increasing tendency of the Supreme Court, following the 1967 decision, to treat the rights of intimacy as belonging to the individual adults involved.<sup>8</sup> I concluded that the Court increasingly “vindicate[d] the choices and inclination of adults,” viewing marriage as depending upon continuing emotional fulfillment and neglecting the “permanence, commitment, and unconditional nurturing of marriage and parenthood.”<sup>9</sup>

Recently, however, I have been wondering whether the Court might not have reached the end of this trajectory and returned to celebrating the intimate relationships as opposed to the rights, particularly reinforcing relationships between parent and child. Many of my musings, though reached independently, echo those expressed in Carl Schneider’s *Religion and Child Custody*,<sup>10</sup> and my worries about them in Mary Ann Glendon’s *Rights Talk*.<sup>11</sup> Nonetheless, I do realize that the two emphases may be operating simultaneously,<sup>12</sup> and when the

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7. Margaret F. Brinig, *The Supreme Court's Impact on Marriage 1967-90*, 41 How. L.J. 271 (1998).

8. *Id.* at 272.

9. *Id.* at 287.

10. Carl Schneider, *Religion and Child Custody*, 25 U. MICH. J.L. REFORM 879 (1992).

11. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14 (1991) (“Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground.”); see MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 42 (2005) (The children’s rights movement allowed children’s interests to be considered apart from their parents’ rights and interests and perhaps as opposed to them. Children are not and ought not be, fully autonomous human beings. Yet the emphasis on rights has resulted in dividing children from their parents, while “[t]he immutable truth of childrearing is that someone has to be in charge”); Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights."* 1976 BYU L. REV. 605 (1976) (suggesting in the context of a search and seizure case that advancing the child’s fourth amendment rights curtailed the parent’s ability to discipline the child or maintain a crime free home).

12. See Merry Jean Chan, *The Authorial Parent: An Intellectual Property Model of Parental Rights*, 78 N.Y.U. L. REV. 1186, 1218-1219 (2003) (parents possess the equivalent of the rights of authors in their interest in passing along both genetic and cultural attributes in children); David D. Meyer, *The Constitutionality of Best Interests Parentage*, 14 WM. & MARY BILL RTS. J. 857, 874 (2005) (discussing that “best interest” statutes are constitutional because both parents and children possess rights); Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1072 (2003) (parents need authority to best raise children). At least some of the cases may also be seen as describing the terrain of modern fathers’ rights jurisprudence. See, e.g., Gloria Chan, *Reconceptualizing Fatherhood: The Stakes Involved in Newdow*, 28 HARV. J.L. & GENDER 467, 472 (2005) (discussing standing in terms of father’s rights); Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1277, 1304 (2005) (discussing *Newdow* and *Michael H.*); Adrien Katherine Wing & Laura Weselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 3 J. GENDER RACE & JUST. 257, 258 (1999) (arguing that “there is a critical need to value the mothering work of those who are not biological mothers and therefore not traditionally

interests of parent and child collide, a majority of the Court has recently concluded that the child's interests may prevail.<sup>13</sup>

If I am right that *Loving* begins a cycle of sorts, a profitable way of thinking about the case might then be (to paraphrase the book of *Genesis*<sup>14</sup>) that *Loving* begat *Michael H.*,<sup>15</sup> *Michael H.* begat *Troxel*,<sup>16</sup> and so forth. Furthermore, in the same way that *Meyer*<sup>17</sup> and *Pierce*<sup>18</sup> seem rather strange ancestors to *Roe v. Wade*,<sup>19</sup> *Loving* (also cited in *Roe*),<sup>20</sup> clearly a case about marriage, seems a strange predecessor for cases dealing with children's interests when they diverge from their parents' interests. Nevertheless, because the constitutional right of privacy expanded in *Loving*<sup>21</sup> is closely connected with the prudential family law notion of autonomy,<sup>22</sup> the connection between such cases makes sense.

With these musings in mind, I would like to consider five recent Supreme Court cases involving relationships,<sup>23</sup> and in particular, the

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supported in the role. . . . [I]f we do not expand the definition to include non-traditional mothers — men, lesbians, poor women, and women of color — we deny ourselves the chance to benefit from the mothering they can provide our children.”)

13. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 2 (2004) (Stevens, J., with Kennedy, Souter, Ginsburg, and Breyer, J.J., joining). See *infra* note 67 and accompanying text.

14. See generally *Genesis* 25:19 (King James) (using “begat” to describe family lineage).

15. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

16. *Troxel v. Granville*, 530 U.S. 57 (2000).

17. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state may not forbid a teacher from teaching modern languages).

18. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (state may not require that students attend public, as opposed to parochial or private, schools).

19. 410 U.S. 113, 152-53 (1973) (stating that a state may not forbid elective abortion of mature woman during the first trimester) (citing *Meyer* and *Pierce* in the chain of cases establishing a right to privacy).

20. *Id.* at 152.

21. There are literally hundreds of journal articles concerning privacy. One recent comparative piece that mentions many others in a helpful way is James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151 (2004) (arguing that the difference between continental European and American sensibilities grows out of a difference between privacy as an aspect of dignity (the European) and privacy as an aspect of liberty (the American)).

22. See, e.g., *Kilgrow v. Kilgrow*, 107 So. 2d 885, 888 (Ala. 1958) (involving a dispute between married parents over child's parochial or public school education in which court decides that “[i]t seems to us, if we should hold that equity has jurisdiction in this case such holding will open wide the gates for settlement in equity of all sorts and varieties of intimate family disputes concerning the upbringing of children”). See generally *Schneider*, *supra* note 10 (arguing that families, rather than courts, are much better to handle the myriad of disputes that may occur).

23. These are disparate cases, involving third party involvement with nuclear families, the establishment clause, private adult sexual conduct, and denial of standing to a noncustodial father in a challenge to the words “under God” in the Pledge of Allegiance. Nancy Dowd carries out a similar analysis in her recent papers on the treatment of fathers. Dowd, *supra* note 12, at 1330 (arguing that instead of focusing on biology and then nurture in deciding what rights should be accorded to fathers, it would be preferable to focus on the nurturing conduct).

growing acceptance of Justice Stevens's position that children's interests, and especially their relationships with their parents, ought to be considered. I begin with *Michael H. v. Gerald D.*,<sup>24</sup> a post-*Loving* case about parenting where a marriage relationship was deemed highly important, but the child's interests were considered only as a subset of her parents' interests. This is the case with which my original *Loving* piece ended.<sup>25</sup>

In this case, Gerald D., "a top executive in a French oil company," married Carole D., "an international model," in 1976. In 1978, Carole became involved in an adulterous affair with a neighbor, Michael H., and she had a child, Victoria D., in 1981. Gerald was listed as the child's father on the birth certificate and always held Victoria out to the world as his daughter. However, a blood test soon revealed a 98.07% probability that Michael was Victoria's father. During the next three years, Victoria stayed with Carole, but Carole moved among the households of Gerald, Michael, and yet another man, Scott K. It is hard to tell just how much contact Michael had with Victoria during this period, but it appears that Michael spent three months with Carole and Victoria in St. Thomas, Virgin Islands and stayed with Carole and Victoria whenever he was in Los Angeles. In addition, it also appears that Victoria called Michael "Daddy,"<sup>26</sup> Michael contributed to Victoria's support, and Michael was eager to continue his relationship with her.<sup>27</sup>

So eager was Michael that he filed a filiation action to establish his paternity and win visitation rights.<sup>28</sup> In June 1984, however, Carole reconciled with Gerald and joined him in New York, where they lived with Victoria and two other children born into the marriage. During this time, Michael's suit encountered a California statute providing that the child of a wife cohabiting with a husband who is not impotent or sterile was conclusively presumed to be a child of the marriage. Oddly, this conclusive presumption could be rebutted, but only if the husband or wife made a motion for paternity tests within

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24. 491 U.S. 110 (1989); see Dowd, *supra* note 12, at 1304, 1306 (discussing *Michael H.* and noting that "most tellingly, in two cases (*Michael H.* and *Quilloin*) the Court ignored the wishes of the child to maintain a relationship with the biological father" and arguing that the Court's cases reflect a definition of fatherhood that operates along axes of marriage, biology, legitimization, and nurture); Meyer, *supra* note 12, at 873.

25. Brinig, *supra* note 7 at 286 & n.97 (mentioning that "the Court neglects the way that children diminish adult autonomy in marriage" and citing other commentary).

26. *Michael H.*, 491 U.S. at 144.

27. *Id.* at 113-14.

28. *Id.* at 114.

two years of the child's birth.<sup>29</sup> In its ruling, the Supreme Court upheld the constitutionality of this presumption against Michael's Fourteenth Amendment challenge.<sup>30</sup> The Court held that presumptions of paternity rest upon "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."<sup>31</sup> In doing so, the Court quotes *Moore v. East Cleveland*,<sup>32</sup> noting how deeply the family is rooted in the nation's "history and tradition."<sup>33</sup>

In addition, the Court considered Victoria's interest, but found it weaker than Michael's:

We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here because, even assuming that such a right exists, Victoria's claim must fail. Victoria's due process challenge is, if anything, weaker than Michael's.<sup>34</sup>

Why would it be weaker? Presumably because her interests were, at least in theory, protected by the idea that the parents would be looking out for her best interests, according to *Parham v. J.R.*,<sup>35</sup> and by the California presumption, which relieved the Court from having to decide who her father was if neither spouse asked.<sup>36</sup> As the Court noted, however, Victoria was not trying to assert her rights here, so there was no existing conflict between parent and child.

Another case, *Board of Education of Kiryas Joel Village School District v. Grumet*,<sup>37</sup> does not seem to consider the children's indepen-

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29. CAL. EVID. CODE § 621(a) (West 1989).

30. *Michael H.*, 491 U.S. at 123 (citing *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983)).

31. *Id.*

32. *Moore v. East Cleveland*, 431 U.S. 494 (involving an extended family threatened by an exclusionary single family zoning ordinance); see also *Brinig*, *supra* note 7, at 281-82.

33. *Moore*, 431 U.S. at 503.

34. *Michael H.*, 491 U.S. at 130.

35. 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."). The case involved a challenge to a Georgia statute permitting parents to "voluntarily" commit their children to inpatient mental institutions. The Court upheld the statute, finding that the procedures in question, including an independent fact finding by the admitting physician, satisfied the child's interests in freedom from unnecessary institutionalization.

36. That is, if the Court was not being asked to make the determination, there would be no need for litigation, which would exacerbate family conflict.

37. 512 U.S. 687 (1994). See generally Avigaell N. Cymrot, *Reading, Writing, and Radicalism: The Limits on Government Control Over Private Schooling in an Age of Terrorism*, 37 ST. MARY'S L.J. 607 (2006) (arguing that the government should not restrict free exchange in Is-

dent interests at all.<sup>38</sup> In this case, suit was brought by taxpayers and others who sought to invalidate special New York legislation creating a school district for a religious enclave of strict Jewish practitioners.<sup>39</sup> Justice Souter, for the Court, declared that the special legislation violated the Establishment Clause because of its “purposeful . . . fusion of governmental and religious functions.”<sup>40</sup> Justice Stevens, in his concurring opinion, focused on the statute’s effect on children. At this time, Justice Stevens was still writing for a minority of the Court.<sup>41</sup> He maintained in his concurrence:

The isolation of these children, while it may protect them from ‘panic, fear and trauma,’ also unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents’ religious faith. By creating a school district that is specifically intended to shield children from contact with others who have ‘different ways,’ the State provided official support to cement the attachment of young adherents to a particular faith.<sup>42</sup>

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lamic private schools, but might restrict Saudi Arabia, say, from funding them. Also, through selective conditional funding, the government can exert greater control over private schools). As Cymrot notes, Michael McConnell, now a judge on the 10th Circuit, has written, “[t]he moral-cultural role of primary and secondary schools today closely resembles that of churches at the time of the founding” since “it is the schools to which society looks as the principal instruments for inculcation of public virtue—for solutions to problems such as drug use, racism, poor self-esteem, imprudent sexual conduct, and the like.” *Id.* at 659 (quoting Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123, 134 (1991)).

38. Indeed, the commentary focuses upon secularization and the separation of church and state. See, e.g., Thomas C. Berg, *Slouching Towards Secularism: A Comment on Kiryas Joel School District v. Grumet*, 44 EMORY L.J. 433 (1995); Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1 (1996); Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104 (1996).

39. While the Satmar Jewish schools originally began as private sectarian education only, which would not have been problematic after *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925), they sought the right to run an independent district in order to allow disabled students to have the benefits of special educational services unavailable in the private schools.

40. *Grumet*, 512 U.S. at 702.

41. *Id.* at 711 (Stevens, J., concurring, with Blackmun and Ginsburg, JJ., joining).

42. *Id.* My point is that Stevens’s opinion looks at the effect the separate school district might have on the ability of children to meaningfully participate in wider American society. See also Schneider, *supra* note 10, at 893 (“living as separately from the world as John Edward Quiner was expected to do might well, as the trial court noted, limit his chances of prospering in the world, and could actively reduce his happiness.”). To this extent Schneider agrees with Justice Douglas’ dissenting opinion in *Wisconsin v. Yoder*, 406 U.S. 205, 241, 245-46 (1972) (Douglas, J., dissenting in part).

I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court’s conclusion that the matter is within the dispensation of parents alone. The Court’s analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court’s claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children. . . .

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Carl Schneider discusses this problem of isolation at some length in *Religion and Child Custody*.<sup>43</sup> He recognizes the difficulty of courts, as opposed to parents, making this sort of decision without running afoul of the Establishment Clause, and therefore argues for a hands-off approach unless, in a custody case, the child's best interests are directly threatened.<sup>44</sup>

Justice Stevens's concern for children's relationship rights as distinct from their parents'<sup>45</sup> emerges yet more clearly in *Troxel v. Glanville*,<sup>46</sup> where the Court upheld a fit parent's constitutional right

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It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.

*Id.* For a more recent case, decided in favor of the mother with extreme religious views, see *Quiner v. Quiner*, 59 Cal. Rptr. 503, 516 (Cal. Ct. App. 1967); see also Schneider, *supra* note 10, at 886 (arguing that the doctrine promotes pluralism).

43. Schneider, *supra* note 10.

44. *Id.* at 904 ("More important, I have tried to suggest a number of reasons we might doubt that judicial attempts to mediate those conflicts will be successful and might suspect that they will be harmful.").

45. Both *Yoder* and *Kiryas Joel* involved children of separatist religious sects, and were not custody and visitation cases. See *Yoder*, 406 U.S. at 205; *Grumet*, 512 U.S. at 711.

46. 530 U.S. 57 (2000). See generally Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 40 (2004) (arguing for recognition of children's rights only in those contexts in which children self-initiate); Chan, *The Authorial Parent*, *supra* note 12, at 1189, 1213 (2003).

To stimulate childbearing and childrearing that achieves these results, parental rights — the duration and scope of which may be malleable — to direct the upbringing of a child are recognized in those who do the work of producing new citizens . . . [while] [t]hese parental rights are recognized as an incentive for the work of parenting, which society values and wishes to encourage in a certain measure.

*Id.*; John C. Duncan, Jr., *The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity*, 83 NEB. L. REV. 1240, 1290-98 (2005) (proposing a Family Integrity Act); John Dewitt Gregory, *The Detritus of Troxel*, 40 FAM. L.Q. 133, 133-35, 144 (2006) (discussing state court statutes and cases and arguing that the case has wrought no large scale changes); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 141-42 (2006) (noting that the Court in *Troxel* itself did not subject the visitation law to strict scrutiny, suggesting accommodation in the future); Michelle Ognibene, *A Constitutional Analysis of Grandparents' Custody Rights*, 72 U. CHI. L. REV. 1473, 1480 (2005) (arguing that grandparents should have constitutional preference over unrelated third parties, and should be able to intervene in adoptions once parents are out of the picture.); Cynthia Starnes, *Swords in the Hands of Babes: Re-thinking Custody Interviews after Troxel*, 2003 WIS. L. REV. 115, 117-18 (2003) (arguing that the push for in camera child preference interviews may become stronger post-*Troxel*, but that it poses process risks for children); Carol Weisbrod, *Painter v. Bannister: Still*, 2006 UTAH L. REV. 135, 144-45 (2006) (generally discussing the case in her piece celebrating the work of Lee E. Teitelbaum).



to determine whether, and under what conditions, visitation by third parties (in this case grandparents) was appropriate. Broadly speaking, the case reaffirms the right of fit parents “to direct the education and upbringing of one’s children.”<sup>47</sup> Justice Stevens, in his dissent,<sup>48</sup> stressed that the broad parental rights articulated by the majority might not always concur with what was best for their children:<sup>49</sup>

[W]e have never held that the parent’s liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm. The presumption that parental decisions generally serve the best interests of their children is sound, and clearly in the normal case the parent’s interest is paramount. But even a fit parent is capable of treating a child like a mere possession. Cases 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.<sup>50</sup>

Justice Stevens’s point is so central to this piece that I set it out at some length:

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47. *Troxel*, 530 U.S. at 66. (“In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”). Scott, *supra* note 12, at 1072, makes the point that as parents obtain more rights vis á vis the state and non-parents, they will better serve their children’s interests.

48. *Troxel*, 530 U.S. at 80-91 (Stevens, J., dissenting with Scalia, and Kennedy, J.J.).

49. *Id.*

50. *Id.* at 86. One question raised by cases since *Troxel* is whether, for example, divorcing parents who are litigating custody do have their children’s best interests at heart. See, e.g., In re Marriage of Howard, 661 N.W.2d 183, 188 (Iowa 2003) (invalidating a third party visitation statute and holding that the state could not allow interference with parents’ decision not to permit grandparent visitation merely because they were divorcing).

We intimated in *Santi* that divorce was a circumstance that can cause a breakdown of the decision-making of parents. However, this was not to suggest that divorce alone establishes a compelling interest of the state to warrant intrusion into a parent’s decision to deny or limit visitation. We only indicated that divorce, more than the reasonableness of a particular decision to deny visitation, generates the type of concerns that can justify state interference.

*Id.* at 189. Once the court determines that there must be a threshold of unfitness before visitation can be granted over parental objection, it goes on to hold,

[i]t is parental fitness that gives rise to the presumption, not mere marital status. Divorce does not diminish the parent’s fundamental interest in parenting and does not make them less capable parents. Thus, the divorce requirement under section 598.35(1) does not eliminate the need for the parents to be granted the presumption of fitness.

*Id.* at 192. As Ralph D. Mawdsley, *Noncustodial Parents’ Right to Direct the Education of Their Children*, 199 W. EDUC. L. REP. 545, 565 (2005) states, “Such competing demands made on school administrators suggest that they may become (as in *Newdow*) parties to litigation that is, in reality, a continuation of the domestic dispute that led to the divorce to the first place” (citing *Wright v. Wright*, 1999 WL 674306 (Mass. 1999)).

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel. The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.<sup>51</sup>

Justice Stevens's opinion in *Troxel* nevertheless begs the question of how the child's relationship interests mesh with their strong interests in being part of a family sufficiently powerful (as against the state and third parties) to be a place where parents can do their jobs and children flourish.<sup>52</sup> I have made this argument before.<sup>53</sup> And of course Justice Stevens's position was taken in dissent. The majority extended privacy doctrines to protect the decisions of the parent.<sup>54</sup>

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51. *Troxel*, 530 U.S. at 88-89 (mentioning *Michael H.*).

52. For an intriguing suggestion that the family may become more powerful by doing some advance planning, see Linda C. McClain, *Family Constitutions and the (New) Constitution of the Family*, 75 *FORDHAM L. REV.* 833, 841-42 (2006), suggesting both family constitutions and mission statements to replace a "family-hostile" society. McClain suggests that drafting one of these documents creates a "we" or "interdependent will or social will" for the family since families do carry a vital role in "the formative project . . . [of] social reproduction." *Id.* at 845, 869-880.

53. See Margaret F. Brinig, *Troxel and the Limits of Community*, 32 *RUTGERS L.J.* 733 (2001).

54. For a careful discussion of *Troxel*, see, e.g., Meyer, *supra* note 46, at 141 (maintaining that the fact that the Court did not use compelling state interest/strict scrutiny analysis suggests that it might be relaxing the constitutional doctrine protecting their rights); see also *id.* at 142 ("The Justices' obvious desire to leave flexibility in future cases so that the traditional prerogatives of parents might be accommodated with the weighty interests in non-traditional, parent-like relationships suggests that parental rights are not as robust and clearly defined as some state court decisions assume."). For a critique of child custody interviews that might increasingly be sought after the decision, see Starnes, *supra* note 46, at 117-18.

*Troxel's* reaffirmation of the significance and breadth of parental rights strengthens parents' claim that procedural due process entitles them to access their children's in-camera statements. While such parental access reduces information risks, it greatly increases already-high process risks for children, and counsels careful attention to the context and consequences of preference interviews.

*Id.*; Gregory, *supra* note 46, at 133-35, 144 (discussing *Troxel* generally, and concluding that "*Troxel* has induced no startling or radical changes with respect to third-party visitation, and particularly grandparent visitation.").

A fourth case, *Lawrence v. Texas*,<sup>55</sup> invalidated laws against consensual same-sex sodomy.<sup>56</sup> This case could be considered a victory for strengthening privacy rights because of the Court's reliance upon search and seizure cases and police interference with intimate conduct.<sup>57</sup> Although the Court cautions that it is not considering a statute recognizing the status of same-sex relationships,<sup>58</sup> *Lawrence* can also be considered in a broader sense: as involving the degree of a couple's relationship itself. Justice Kennedy, writing for the Court, distinguishes between "mere sex" and "relationship" in these words:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.<sup>59</sup>

Therefore, as *Eisenstadt*<sup>60</sup> brought privacy to the individual regarding contraception,<sup>61</sup> *Lawrence* returns privacy not just to the gay man involved, but to his relationship with another.<sup>62</sup>

Finally, we turn to the case that I believe may come full circle, that is, back to a consideration of children's interests as distinct from their parents', in consideration of relationship rights. *Elk Grove Unified School District v. Newdow*<sup>63</sup> may be best remembered as the case where the Court refused to consider whether "under God" could re-

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55. 539 U.S. 558 (2003).

56. The statute invalidated was the former TEX. PENAL CODE ANN. § 21.06(a) (2003).

57. *Lawrence*, 539 U.S. at 581-82.

58. *Id.* at 578.

59. *Id.* at 567.

60. 405 U.S. 438 (1972).

61. *Id.* at 453 ("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.").

62. *Lawrence*, 539 U.S. at 578 (The Court noted that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

63. 542 U.S. 961 (2004). For general commentary on the case, see Mawdsley, *supra* note 50, at 545-50 (discussing cases like *Newdow* and *Crowley v. McKinney*, 400 F.3d 965, 968-69 (7th Cir. 2005) (holding that the school could refuse to permit non-custodial father on school premises during school days as well as withhold some correspondence concerning the children)); Meyer, *supra* note 12 at 868; Emily Buss, *Parental Rights*, 88 VA. L. REV. 635, 636 (2002).

main part of the Pledge of Allegiance.<sup>64</sup> In this case, the Court found that Michael Newdow, who had joint physical custody of his daughter but not the power to make ultimate decisions when he disagreed with her mother,<sup>65</sup> lacked standing as a parent to make his claims because a California Court had awarded the power to make final decisions (or a veto power) to his ex-partner, Sarah Banning.<sup>66</sup> Authored by Justice Stevens for the Court, the opinion stated:

This case concerns not merely Newdow's interest in inculcating his child with his views on religion, but also the rights of the child's mother as a parent generally and under the Superior Court orders specifically. And most important, it implicates the interests of a young child who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution.

The interests of the affected persons in this case are in many respects antagonistic. Of course, legal disharmony in family relations is not uncommon, and in many instances that disharmony poses no bar to federal-court adjudication of proper federal questions. What makes this case different is that Newdow's standing derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend. In marked contrast to our

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[T]he Constitution should be read to afford strong protection to parents' exercise of child-rearing authority but considerably weaker protection to any individual's claim to parental identity. This means that a state has broad authority to identify nontraditional caregivers as parents, and, if it does so, it must afford their child-rearing decisions the same strong protection afforded more traditional parental figures.

*Id.*; see also the pre-*Newdow* but prescient writing of Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537, 551 ([The family,], especially the nuclear family, "will determine at least the child's original religious definition. . . . [P]arental conduct and attitudes have much to do with the strength of the child's attachment to a religious organization.").

64. Some do, however, see it as a family law case. See, e.g., Chan, *supra* note 12, at 471 ("The *Newdow* opinion perpetuated the social identity of noncustodial fathers as only minimally involved in their children's lives. This stereotype in turn affects how noncustodial fathers' claims will be viewed by others, and courts in particular."); Meyer, *supra* note 12, at 870; Meyer, *supra* note 46, at 143 ("As with the blurring of the family law's traditional boundary markers of parenthood, the Court's desire to balance these opposing values in constitutional doctrine has led it [to] abandon the relatively bright lines of strict scrutiny for softer and less certain standards of intermediate scrutiny.").

65. For a discussion of the retreat from joint physical custody, see James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 911 (2003). Dwyer notes that joint custody became popular in the first place because "legislators were responding to political pressure from fathers' rights groups, which sprang up in many places in reaction to a perception that courts were biased against men in custody decision making. So some of the focus, at least, was on fairness between the adults. In addition, many judges initially were receptive to the trend in favor of joint custody because it seemed to make their jobs easier." *Id.* at 915.

66. *Newdow*, 542 U.S. at 17-18.

case law on *jus tertii* . . . the interests of this parent and this child are not parallel and, indeed, are potentially in conflict.<sup>67</sup>

As such, sometimes parents' and children's rights do conflict. This may even be true in the typical interracial marriage case ever since *Loving*, to the extent that interracial marriages are more likely to dissolve than to remain intact, and divorce is particularly hard on biracial children.<sup>68</sup> The rights of the Lovings and their children clearly did not conflict, since the family could not live together legitimately in Virginia without the Court's decision. A parent-child conflict will be particularly acute in cases where divorcing parents hold strong — and potentially opposing — religious beliefs, as was the case in *Newdow*.<sup>69</sup> In fact, I have found in a study of Iowa divorces, that there was a statistically significant relationship between parents who decided religion was important enough to mention in their separation agreements,<sup>70</sup> and those who divorced on fault grounds and who continued disputing after the divorce decree.<sup>71</sup>

Fights about visitation often center on religion itself or disciplinary views strongly colored by religious views. For example, in *Baker v. Baker*,<sup>72</sup> the mother was Baptist and the father was a Jehovah's Wit-

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67. *Id.* at 15 (citations omitted). See also Dwyer, *supra* note 65, at 846; Meyer, *supra* note 12, at 874 ("The social consensus that undergirds parental rights is based partly on the assumption that they work to the benefit of children, but partly also on a sense of justice and desert for adults."); Meyer argues that the complexities led the *Troxel* and *Lawrence* Courts to apply a lesser standard than strict scrutiny. Meyer, *supra* note 12, at 877. David D. Myers, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1465-66 (2006). (parents are not constitutionally entitled to co-equal role in raising their children following divorce partly because "the Constitution must be understood to leave room for sensitive accommodation by the state of the potentially conflicting interests of various family members.) Meyer quotes from a Virginia court's observation that "[c]ustody and visitation disputes between two fit parents involve one parent's fundamental right pitted against the other parent's fundamental right. The discretion afforded trial courts under the best-interests test. . . reflects a finely balanced judicial response to this parental deadlock." *Id.* at 1479 (quoting *Griffin v. Griffin*, 581 S.E.2d 899, 902 (Va. Ct. App. 2003)). See generally Scott, *supra* note 12, at 1083.

68. See Margaret F. Brinig, *The Child's Best Interests: A Neglected Perspective on Interracial Intimacies*, 117 HARV. L. REV. 2129, 2150-58 (2004).

69. See Schneider, *supra* note 10, at 888-89 ("[T]he now hostile relations of the parents make us doubt some of the reasons we ordinarily have for not intervening in an intact family."). See also, *Newdow*, 542 U.S. at 15.

70. Margaret F. Brinig, *Unhappy Contracts: The Case of Divorce Settlements*, 1 REV. L. & ECON. 241, 252, 255-56 (2005) (mention of religious education of children in the parents' settlement agreement predicts the presence of a mention of fault grounds in their divorce action in Iowa, a state where fault is legally irrelevant).

71. *Id.* at 259 (mention of children's religious education in the parents' settlement agreement significantly related to number of post-divorce litigation).

72. No. 03A01-9704-GS-00115, 1997 WL 731939, \*1 (Tenn. Ct. App. Nov. 25, 1997); see also *Felton v. Felton*, 418 N.E.2d 606, 607-08 (Mass. 1981); *Lundeen v. Struminger*, 165 S.E.2d 285 (Va. 1969); *Quiner v. Quiner*, 59 Cal. Rptr. 503 (Cal. Ct. App. 1967) (transfer of child from mother, a strict believer in the isolationist Exclusive Brethren sect, to father, who was much less

ness. The court originally awarded the mother custody. Both parents were taking the children to their respective religious services and training and attempting to undermine the religion of the other. At trial, the mother petitioned for, and won, affirmation of her exclusive right to determine the children's religious upbringing, based on the physical and psychological effects the conflict was having on the children. In another visitation case, *Brown v. Szakal*,<sup>73</sup> the court refused to order the non-Jewish father to observe the Sabbath and keep kosher when he visited his seven- and nine-year-old daughters. The court found that "absent a showing of emotional or physical harm to the children, courts . . . will not impose upon the non-custodial parent the burden of policing the religious instructions of the custodial parent."<sup>74</sup> A third party visitation case that involved a conflict over discipline (with a belt) is *Newman v. Phillips*,<sup>75</sup> where relationships with the grandparents were fairly close and cordial until the attempted discipline.<sup>76</sup>

I am not one to suggest that the Supreme Court ought to be more involved with family law than it has been since the substantive due process days of *Meyer*<sup>77</sup> and *Pierce*.<sup>78</sup> I am also not one to "abandon children to their 'rights'"<sup>79</sup> or otherwise suggest that children should fend for themselves without their parents' help. For me, a childhood without the nurturing environment of loving parents (or at least one parent) is dismal. However, I am encouraged that the Court seems to recognize that in families with children, the children's interests do need to be considered, and will not always mirror their parents'.<sup>80</sup>

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strict). For a case refusing to enforce the parent's agreement to raise the child as a Catholic, see *Lynch v. Uhlenhopp*, 78 N.W.2d 491 (Iowa 1956).

73. 514 A.2d 81 (N.J. Super. Ct. Ch. Div. 1986). See also *Grayman v. Hession*, 84 A.D.2d 111, 112 (N.Y. App. Div. 1982) (requirement that Gentile custodial mother send the child to Hebrew school because she had "either consented to or acquiesced in the religious training the child has undergone since birth," and had recently moved to Long Island, seriously hindering the fathers "ability to continue his frequent visitations and religious training of his son."); *Mester v. Mester*, 58 Misc. 2d 790 (N.Y. Misc. 1969) (father could not change the visitation or custody simply to raise the child in the Jewish tradition).

74. *Brown*, 514 A.2d at 84.

75. No. 03A01-9602-CV-00056, 1996 WL 480856, at \*1 (Tenn. Ct. App. 1996).

76. Religion and "life style" differences were also central to the dispute between the father and maternal grandparents in the famous custody case of *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966).

77. 262 U.S. 390 (1923).

78. 268 U.S. 510 (1925).

79. Hafen, *supra* note 11, at 607.

80. Compare *Schneider*, *supra* note 10, at 906 ("Both the child's parents claim a right to make decisions for their child. And the children arguably have some kind of a right to assert their own preferences. Yet, while our vocabulary of rights has ample ways of resolving conflicts

Thus, my own read of *Loving* is an aspirational one. I view it as pointing to relationships to which we should all aspire — good marriages and good parenting — goals the Lovings sought and achieved for their own family, which included children.<sup>81</sup> While I would not return to families hidden under a “veil of privacy”<sup>82</sup> where parents — especially fathers — maintained nearly magisterial control over their children (and wives),<sup>83</sup> I do think families need space in which to thrive.<sup>84</sup> Furthermore, I also believe that parents, especially during a divorce, too often think of themselves rather than their children.<sup>85</sup> As Jennifer Nedelsky said:

If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships — with parents, teachers, friends, loved ones — that provide the support and guidance necessary for the as our tradition teaches, the antithesis of autonomy, but a literal precondition of autonomy, and interdependence a constant component of autonomy.<sup>86</sup>

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between an individual right-holder and the state, it has no way of resolving such conflicts between rights holders.”), with *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) (see *supra* text accompanying notes 64-70.).

81. Pratt, *supra* note 6, at 230.

82. *State v. Rhodes*, 61 N.C. 453, 459 (1868) (“We will not inflict upon development and experience of autonomy. . . . We see that relatedness is not, society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.”); see Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1540-49 (1992).

83. This is the fear of some opponents of *Newdow*. See, e.g., Gloria Chan, *supra* note 12, and some promoters of same-sex marriage, Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle The Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535 (1993).

84. See Brinig, *supra* note 53.

85. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995) (arguing that parents are granted autonomy to encourage them to perform their duties faithfully and putting their children’s interests first); see also Schneider, *supra* note 10, at 899 (“[W]e accord parents rights because we assume they are the best decision-makers for their own children. But people in and after a divorce are often wrapped up in a battle with each other, and they may only too easily lose sight of their children’s interests.”).

86. Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEM. 7, 12 (1989).