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Troxel v. Granville: Implications for At Risk Children and the Amicus Curiae Role of University-Based Interdisciplinary Centers for Children

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TROXEL v. GRANVILLE: IMPLICATIONS FOR AT RISK CHILDREN AND THE AMICUS CURIAE ROLE OF UNIVERSITY-BASED INTERDISCIPLINARY CENTERS FOR CHILDREN

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This symposium is devoted to the Supreme Court's first family law case of the new century. In this case, a pair of grieving grandparents, the Troxels, sought to protect their future access to the children of their deceased son. The children's mother, Tommie Granville, objected to the order as an unconstitutional state intervention in her parental autonomy. The *Troxel* case was quickly labeled "the grandparents' rights case" by the media. In fact, the Troxels did not claim a constitutional right to visit with their grandchildren. They relied on a state statute providing that "any person" might seek visitation with a child, upon showing that it was in the child's best interest. Nor were any claims raised by the children, who were not represented by counsel or a guardian ad litem. The record was devoid of any claims to a constitutional right asserted by the children themselves to continued contact with their grandparents. Nevertheless, advocates for children recognized that the case had potentially broad implications for children at risk of foster care placement. If, in deciding *Troxel*, the Court were to issue a sweeping statement about the primacy of biological parents' rights, it might unduly limit the power of states and family courts to protect children's relationships with kin, extended family, and de facto caretakers.

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** Sacha Coupet received her Ph.D. from the University of Michigan in clinical psychology and her J.D. from the University of Pennsylvania. After serving as a law clerk in both appellate and trial courts, she will begin a fellowship at the University of Michigan Law School where she will be representing children in court cases and teaching in the clinical program.

Children do not vote, do not attend fund raising dinners, and are sorely lacking in political clout. Poor children are especially unrepresented in the halls of power. This vacuum has long been partially filled by nongovernmental organizations ("NGOs") such as the Children's Defense Fund and professional organizations such as the American Academy of Pediatrics ("AAP"). Recently, a number of projects have evolved in universities around the country seeking to mobilize the expertise of scholars from a range of disciplines. The goal of these projects is to assist decision-makers addressing children and youth policies to understand the legal, scientific, and sociological contexts of their decisions. Universities provide an ideal setting for collaboration between the professions and researchers offering opportunities to explore policy, practice, and research in areas such as child development, family sociology, medicine and health sciences, and the law. Universities are uniquely situated to perform the public mission of encouraging the dissemination of research. We have coined the term "University-Based Interdisciplinary Children's Centers" or "UBICC" (pronounced "you-bick," plural "you-bix"), to denote a new breed of university-based NGO, the mission of which is to mobilize interdisciplinary resources to educate lawmakers and courts, and to promote policies that meet the complex needs of children.

This essay will explore the potential threat that was posed by *Troxel* to children at risk of foster care placement. It will also highlight the potential role of UBICCs in advocating for children's needs and in influencing the courts and legislatures to take a developmentally-informed, child-centered perspective in evaluating laws and public policies. It will focus on the engagement of one specific UBICC, the Center for Children's Policy Practice and Research at University of Pennsylvania, in *Troxel v. Granville.*

The authors of this essay, Prof. Barbara Bennett Woodhouse, and Dr. Sacha Coupet, were part of an interdisciplinary team effort to author an *amicus* brief which would highlight the implications of the case for children in state care and for children at risk of entering the foster care system.[1] Having clerked at the United States Supreme Court, Woodhouse has seen first hand the value of an *amicus* or "friend of the court" brief in providing the Justices with a broader context and a fuller understanding of the ramifications of a particular decision. Dr. Coupet's special expertise in the study of kinship care within the African-American community made her an especially valuable team member.

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1. The team assembled to work on this case spanned a range of disciplines, from law to social work, to psychology and sociology, to psychiatry. *See infra* p. 862-63.

Because our Constitution confers authority on courts only where there is a specific "case or controversy," constitutional issues are invariably presented in a fact specific context. The Court is never asked to answer some broad theoretical question, such as, "What are the consequences for children of recognizing a parental right to deny contact with extended family?" Instead, it must decide a controversy between two or more adverse parties. Since the parties focus on their own narrow interests, and the facts of their dispute, larger implications of a decision may be left unexplored.

Supreme Court Justices have often served many years on the federal bench before they are elevated to the highest court. After many years of deciding cases, they become experts in certain subject matter areas—including antitrust, tax law, and federal legislation of all kinds. Family law and child welfare law, however, are rarely on the Justices' ordinary menu. Few family law cases actually come before the United States Supreme Court, since family law is an area generally left to the states. Accordingly, the role of the *amicus* brief in a case like *Troxel* is especially important as it can provide background knowledge in an unfamiliar area so that the Justices understand the public policy implications of a particular decision.

The *amicus* brief we submitted on behalf of CCPPR is reprinted at the end of this article. Before drafting the brief, the Co-Directors and team members met as a group to discuss the policy issues and to map out a strategy. Dr. Carol Wilson Spigner, former Assistant Commissioner of the Children's Bureau, drawing on her deep knowledge of the child welfare system and children's needs, provided a key phrase that we used as a compass to guide our strategy. We wanted to urge the Justices to avoid "sharpening the battle of rights" over children. We knew that "at risk" children needed all the caretaking resources they could muster and the key to their welfare was cooperation, not acrimony, between those who loved them.

Dr. Spigner's contribution illustrates how a UBICC law and policy team can mobilize experts in a non-law field to make timely interventions in appellate court cases and legislative reform. When a legislature is drafting or seeking public comment on a piece of proposed legislation, members of UBICC may be asked to participate in an advisory committee or to provide testimony and briefings to legislators. Another context in which law is formed is the appellate case in which higher level courts make pronouncements about the meaning of a specific law (e.g., *Suter v. Artist M.*[2]) or about constitutional doctrine (e.g., *Smith v. Organization of Foster*

2. 500 U.S. 915 (1991).

Families for Equality and Reform[3]); *Moore v. City of East Cleveland*[4]; *Stanley v. Illinois*[5]). In cases raising constitutional or statutory issues of importance to children, a UBICC that has been monitoring upcoming cases is in an excellent position to organize a team to draft an *amicus* brief. Or it may join with others in authoring or signing a brief submitted on behalf of a coalition of child advocacy groups.

One important issue for any UBICC is defining its core constituency and adopting policies about its involvement in litigation. CCPPR, at its formation, identified its constituency as "at risk" children and youth. CCPPR also had consciously chosen not to engage in direct representation of parties bringing impact litigation or class action law suits. While such suits are an important element in law reform and often serve to mobilize public institutions to better serve children and vindicate children's rights, direct participation comes at a price. Advocacy organizations engaging in such work must assume an adversarial role towards the agencies and government entities whom they are suing. The advocacy organization is then limited in its ability to participate collaboratively in systems reform. When developing reforms in response to a successful lawsuit, the defendant cities and states will turn to resources that have been less directly involved in the prosecution of the case. CCPPR opted to avoid such direct conflict, in order to remain available as a collaborator and consultant.

Good laws and policies depend upon accurate social science and an understanding of developmental and medical issues, as well as on a clear understanding of constitutional principles and family law jurisprudence. The composition of a law and policy team depends upon the primary issues in a case. For example, CCPPR submitted an *amicus* brief in *Brian B.*,[6] a case that addressed the question whether adolescents tried and convicted as adults have a constitutional right to education while incarcerated. To research and write the brief, Woodhouse assembled a team that included specialists in juvenile justice, corrections, economics, child development, neurology and education theory. The goal of the brief was to inform the judges of the unique developmental and neurological needs of the adolescent and the economic consequences to these children and society of depriving them of education. Social science data reviewed in our brief made clear that the policy of withholding education was irrational and arbitrary and thus unconstitutional. The *Troxel* case, by contrast, posed the question whether

3. 431 U.S. 816 (1977).
4. 431 U.S. 494 (1977).
5. 405 U.S.645 (1972).
6. 203 F.3d 582 (3d Cir. 2000).

parents' constitutional rights were violated when states intervened to protect children's relationships with family and kin outside the nuclear family circle. Instead of focusing on the educational needs of incarcerated youths, it focused on the emotional needs of dependent children.

The State of Washington had passed a law that gave standing to anyone at any time to seek court-ordered visitation, which was to be granted if the court found that visitation would serve the best interest of the child. Mr. and Mrs. Troxel had sought and won expanded contact with the two young daughters of their deceased son. The girls' mother, Tommie Granville, protested that the court order violated her Fourteenth Amendment liberty to direct the upbringing of her children, as established in a line of cases from the United States Supreme Court beginning with *Meyer v. Nebraska*[7] and *Pierce v. Society of Sisters*.[8] The Washington Supreme Court agreed with Granville, and struck down its own state's law as violative of the Federal Constitution. The United States Supreme Court granted certiorari to consider the case.

Many groups filed *amicus* briefs in the *Troxel* case, including parents' rights groups, grandparents' rights groups, bar and professional groups, women's advocates, and civil liberties groups. Before deciding whether to submit a brief, or join another brief, CCPPR's law staff discussed issues and strategies at length, by telephone and e-mail, with many of these groups. We decided that the needs of the constituency with which we were most deeply concerned—children at risk of placement or already in state care—were not adequately represented by any other potential *amicus*. CCPPR's goal was to insure that the Justices considered the impact of their decision on these children in the "public law" systems, not just on children caught in the "private law" sphere of parent-grandparent conflict or acrimonious divorce. While the CCPPR team agreed with the Washington court's finding that parents are constitutionally entitled to deference in raising their children, we were also highly sensitive to the important role played by extended family, partners and kin in creating a safety net for children at risk of placement in the foster care system. CCPPR sought permission to file an *amicus* brief drawing the Court's attention to these other contexts in which children's relationships with nonparents must be protected from disruption. Permission was granted, with no opposition from either party.

It may seem presumptuous to believe that such a brief would be helpful to nine able jurists deciding a hotly litigated and well briefed cased.

7. 262 U.S. 390 (1923).
8. 268 U.S. 510 (1925).

However, the case of *Stanley v. Illinois* illustrates what can happen when the Court decides a family law case without sufficient perspectives on the broader implications of the case. In *Stanley*, an unmarried biological father who had lived with and raised his children challenged a state law that accorded him no special parental rights when their mother died. The Court, in vindicating Mr. Stanley's claim, made unnecessarily sweeping statements about the rights of biological fathers. Legislatures and lower courts interpreted this dicta as conferring rights on absent and unknown fathers, a principle that threw the law of adoption and child protection into chaos. The Court was forced to backtrack, step by step. It clarified in a line of subsequent cases that, while a father has a unique opportunity to develop a protected relationship, he must seize his opportunity by acknowledging and supporting his child in order to claim constitutional protection of the relationship.[9] The goal of the CCPPR intervention was to minimize the risk of a similar unnecessary and unintended disruption of child welfare and family policy.

The *Troxel* team was lead by an academic (Professor Barbara Bennett Woodhouse) who is admitted to practice in the Supreme Court, and has authored or co-authored a number of briefs to the Court in cases involving children's rights.[10] The team included Dr. Sacha Coupet, then a third year law student, whose doctoral thesis in clinical psychology studied the role of African-American grandmothers in providing care giving for children. A third year law student visiting from Harvard University, Ms. Keren Rabin, researched the nonparent visitation statutes of the fifty states. In addition, the team included a senior Masters of Social Work student, Alyssa Burrell Cowan, and sociologist Professor Richard Gelles, of the University of Pennsylvania School of Social Work. Dr. Gelles is a specialist in family violence and an author of the recently enacted Federal Adoption and Safe Families Act, which stresses the need to involve children's extended family resources and kin in child protection and foster care. Also part of the team was University of Pennsylvania School of Social Work Professor Carol Wilson Spigner. Dr. Spigner, as noted earlier, served in the Children's Bureau in Washington, the federal agency that is charged with child

9. Lehr v. Robertson, 463 U.S. 248 (1983); *see* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1746, 1804 (1993).

10. *See, e.g.*, Petition for Writ of Certiorari, Doe v. Kirchner, 515 U.S. 1152 (1995) (No. 94-1644); Motion of Concerned Academics for Leave to Submit Brief Amici Curiae and Brief Amici Curiae in Support of Stay Application of Petitioner Jessica DeBoer, DeBoer v. DeBoer, 509 U.S. 938 (1993) (No. A-64).

protection at the federal level. Dr. Spigner provided expertise on systemic barriers, funding, and race and class. Another key team member was pediatrician/psychiatrist Dr. Annie Steinberg, of the University of Pennsylvania Medical School who provided the psychiatric and developmental perspectives on the child's need for permanency and stability in attachment relationships and the effects, both psychological and neurological, of disruption of such relationships. Finally, Professor Elisabeth Slusser Kelly, Director of Biddle Law Library at University of Pennsylvania, provided research resources and consultation to the team.

The first step was to provide team members with relevant legal materials, and answer questions about the legal principles. After discussion of the developmental and social issues, the team developed a strategy and a central policy theme. The strategy was to urge the Court not to make sweeping statements about parents' rights in the course of deciding the *Troxel* case, but to decide it on the narrow facts presented. As noted earlier, the facts were quite specific to this case. The grandparents in this case had never been the primary caretakers or coresident with the children, and the mother was not seeking to terminate all contact. The mother was a fit and competent parent and no indications existed of risk to the children. The children were not parties to the case and had expressed no position with respect to visitation. Yet the danger existed that the Court, which does not handle many family law cases, might approach the case as an opportunity to enunciate an abstract hierarchy of constitutional rights between adults, placing the autonomy of the biological parent first, regardless of specific facts, attachment relationships, and the needs of children. The "child-centered" theme that we adopted focused on the critical importance of sound policies in custody and visitation, the need to approach child custody and visitation on a case-by-case basis, and the harm that would result from (using Spigner's key phrase) "sharpening the battle of rights" among adult family members. We decided to focus instead on the benefits of maximizing children's family resources. We also decided to bring a child-centered perspective to the abstract constitutional arguments regarding the preservation of family autonomy. Our strategy was to use stories of real children from our clinical caseload to show the other side of *Troxel*: that excessive deference to the rights of the biological parent might well result in *more* children being raised by the state, rather than growing up in families of their own.

Based on this discussion, the team leader drafted an outline and assigned each team member the responsibility of writing or of providing research for a specific section of the brief, according to his or her area of expertise. The

team leader assembled all the texts, edited them, and harmonized them into a first draft. This draft was then circulated to all members for comment and correction and was discussed at various team meetings. The argument was further refined and additional scientific, sociological, and legal sources were provided.

In the past, the difficulty and expense of producing a printed brief conforming with the precise rules of the Court on size, color of cover, type, and font has been a substantial financial and logistical barrier. Electronic publishing has greatly reduced these barriers. Thanks to a donation supporting printing and filing costs, CCPPR was able to print and file its briefs at a very modest cost. An electronic text of the brief was sent to a professional printing service. The brief was then served on the various parties to the case and filed with the Clerk of the Supreme Court. The authors hope that the Amicus Brief speaks for itself, or rather speaks for a population of children who are often denied a voice.

It is impossible to know what effect, if any, an *amicus* brief has on the Court's deliberations. However, the Court's decision in the *Troxel* case definitely avoids the dangers of oversimplification. As Justice O'Connor remarked from the bench in announcing her plurality opinion, the Court was as divided as the family in this case. The Court delivered no fewer than six separate opinions—a plurality (four votes to affirm based on Justice O'Connor's reasoning), two concurrences in the judgment (voting to affirm, but for different reasons than those given by the plurality), and three dissents (voting to reverse and remand, but disagreeing with each other on the reasoning). By our count, six Justices believe that Tommie Granville's Fourteenth Amendment rights were violated (Rehnquist, O'Connor, Breyer, Ginsburg, Souter, and Thomas), two were unpersuaded, and would reverse and remand the case for further proceedings (Kennedy and Stevens), and one would take the federal courts out of the area completely (Scalia).

The plurality, written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Breyer and Ginsburg, concluded that the Washington statute, "as applied" in this case, violated the mother's constitutional right to decide how to rear her children.[11] By using an "as applied" analysis, O'Connor carefully confined the scope of the discussion. She framed the case so it was unnecessary to decide whether the Washington statute would be unconstitutional in *all* circumstances, or even to decide whether the Washington court was correct in its constitutional analysis.[12] Instead, she

11. Troxel v. Granville, 530 U.S. 57, 65 (2000) (O'Connor, J., plurality opinion).
12. *Id.* at 73.

confined her opinion to critiquing how the Washington law was applied to *this* family.

While she noted that the statute's "any person at any time" approach was "breathtakingly broad," she expressed doubt that this statute or other visitation statutes should be treated as *per se* unconstitutional or unconstitutional on their face (as would be, for example, laws that prohibited racial groups from intermarrying[13]). In subsequent remarks stressing the limited role of the Court in setting family policy, O'Connor explains,

> [w]e refused to hold that such statutes are per se invalid. Rather, the States are free to provide for nonparental visitation as long as they provide appropriate weight to the parent's determination of the child's best interests. In this way, we have given the States the necessary space to create structures that promote the best interests of children.[14]

The O'Connor opinion begins by affirming that parents enjoy a constitutional liberty interest, under case law articulating the substantive due process doctrines of the Fourteenth Amendment, to control the upbringing of their children. A long line of cases, beginning with *Meyer v. Nebraska*[15] and *Pierce v. Society of Sisters*,[16] firmly establishes this principle. In a paragraph that has sometimes been quoted out of context, she summarized the law as follows:

> Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will *normally* be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[17]

Some early interpretations of the opinion seized on this sentence and concluded that grandparent visitation orders may never be entered against the wishes of a fit parent. In context, the opinion clearly does not stand for this proposition, which would cast doubt on a host of state statutes and

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13. *See* Loving v. Virginia, 388 U.S. 1 (1967).

14. Justice Sandra Day O'Connor, The Supreme Court and the Family, Address to "Family Law 2000" Conference of the Philadelphia Bar (Nov. 17, 2000), *in* U. PA. J. CONST. L. (forthcoming).

15. 262 U.S. 390 (1923).

16. 268 U.S. 510 (1925).

17. *Troxel*, 530 U.S. at 68-69 (emphasis added).

family court practices. The plurality went on to explain, that "[t]he problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no material weight at all to Granville's determination of her daughters' best interests."[18] In short, there was no showing of facts or circumstances that took this particular case outside the "norm" of nonintervention, or justified the family judge's questioning of this parent's decisions.

O'Connor examined specific ways in which the state family court failed to justify the need for intervention and failed to give due deference to Tommie Granville's choices.[19] For one, the judge seemed to adopt the view that grandparent visitation was presumptively in every child's best interest.[20] Instead, O'Connor reasoned, parents' choices about inter-generational relationships should be accorded deference by the state, here, in the guise of a judge, and presumed to be in the child's best interest, unless there is a showing to the contrary.[21] Furthermore, the judge ignored the fact that the mother had not foreclosed all contact but merely wanted to limit contact to one day per month, while the grandparents wanted far more.[22] As the opinion implies, the State, as well as the child and the grandparents, may have a weightier interest in avoiding a complete severance of the grandparent-grandchild relationship than in second-guessing a parent's decisions about the time, place and manner of such contacts.[23]

What many media accounts missed in analyzing the plurality opinion is its purposeful narrowing of the issues. O'Connor takes a true common law approach to the task, examining the case before her and leaving other issues to future decisions. Noting that each of the fifty states has a visitation statute, she uses comparisons with these statutes to suggest the myriad of situations that arise when third parties seek visitation and the many ways state legislatures have found of protecting children while respecting the parent's autonomy—i.e., imposing burdens of proof, heightening evidentiary standards, or requiring various elements, such as harm to the child or total foreclosure of contact.[24] Rather than deciding whether a given approach is constitutionally mandated, the plurality opinion leaves all of these statutes

18. *Id.* at 69.
19. *Id.* at 69-73.
20. *Id.* at 69.
21. *Id.* at 69-70.
22. *Id.* at 71.
23. *Id.* at 71-72.
24. *Id.* at 73-74, 73 n.1.

intact to be addressed on a case by case basis.[25] The plurality also refuses to decide whether, as the Washington court believed, harm to the child is a necessary element. O'Connor's approach is consistent with her concern for federalism and stresses that constitutional protections in this area are best "'elaborated with care.'"[26] The opinion also gives deference to the roles of judges, noting that "the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied," and that "much of the adjudication in this context occurs on a case by case basis."[27]

The core of the plurality opinion is quite simple and limited: given that parents enjoy constitutional protection of their child-rearing decisions, the State may not intervene without giving "some special weight" to a fit parent's decision. That is precisely what the Washington court failed to do for Tommie Granville, and no more need or should be said. Questions of how to balance various rights and interests are left for another day. In this sense, the plurality opinion was judicially conservative, as many in the world of child welfare and family law had hoped it would be. When the Court decides to enter an area as unfamiliar as family law, it runs a heightened risk of leaving behind misguided dicta. The plurality approach was also sensitive to the needs of the parties for closure. By declining to remand, it permitted Tommie Granville to get on with her life. Because it analyzed the statute "as applied," it also left room for the gradual development of the law of third party visitation as new cases presenting new facts come before the courts. While some have criticized it for leaving too much unsaid, the CCPPR team would join with those who applaud it for declining to dictate specific standards and parameters, beyond those necessary to decide the specific case. Justices Souter and Thomas provided the fifth and sixth votes for the outcome, but they did not endorse O'Connor's narrow approach.

Advocates for children now must delve into the reasoning behind each justice's opinion in order to read the tea leaves. We must ask what the two concurrences, and the dissents of Kennedy, Stevens and Scalia, tell us about how the Court is likely to approach future cases involving State intervention in parents' privacy to protect children's contacts with third parties such as grandparents, kin and partners or de facto parents? By our analysis, a clear majority of the Justices agrees that a statute granting visitation to "any person at any time" based on a pure best interest standard could lead to

25. *Id.* at 73.
26. *Id.* (quoting the concurrence of Justice Kennedy).
27. *Id.*

unconstitutional interventions.[28] A clear majority also appears to accept that, under certain circumstances, states may be justified in ordering third party visitation against the wishes of a fit parent. The crucial issue that divided the Court actually was more procedural than substantive, and first surfaced at oral argument. The Justices startled the parties by asking what the Court should do when faced with a state court judgment striking down a statute as facially invalid, when the statute is unconstitutional in some but not all possible applications. It was clear, even then, that the Justices were in sharp disagreement over this complex and arcane point of Supreme Court practice and procedure.

Justice Souter, in his concurrence, took the position that the Court simply should have affirmed, and he "would say no more."[29] He disagreed with O'Connor's adoption of an "as applied" analysis, given that the Washington court had found its own state statute invalid on its face.[30] Parting ways with both O'Connor and Souter on this procedural point, Justice Kennedy would have remanded for reconsideration. He believed the Washington court had misinterpreted the Federal Constitution, and erred in holding that "the best interest of the child standard is never [constitutionally] appropriate in third-party visitation cases."[31] Further, he believed that the Washington court should be given another crack at the task of interpreting its statute.[32]

Justice Stevens' dissent, like Justice Kennedy's, argues for a remand based on concerns regarding the Washington court's sweeping language. Of all the opinions, Stevens' is the most explicit in discussing the rights and interests of other members of the family constellation, including those of children. He charges Justice O'Connor with suggesting that "children are so much chattel" when she refers to an "independent third party interest" in them.[33] She counters that, in adopting such terminology, she simply is recognizing that visitation statutes may pose questions of constitutional magnitude, as they implicate constitutionally protected interests of parents.[34] Given O'Connor's narrow approach, addressing only those issues

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28. David Meyer provides an excellent breakdown of the score card of opinions in the case. *See* David M. Meyer, Lochner *Redeemed: Family Privacy After* Troxel *and* Carhart, UCLA L. REV. 1125, 1143 (2001).

29. *Troxel*, 530 U.S. at 75 (Souter, J., concurring).

30. *Id.* at 76.

31. *Id.* at 94 (Kennedy, J., dissenting).

32. *Id.* at 101-02.

33. *Id.* at 89 (Stevens, J., dissenting).

34. *Id.* at 64-65 (O'Connor, J., plurality opinion).

raised in this case, her silence on issues of children's rights or interests in family relationships cannot be interpreted as a rejection of the principle that children have certain protected rights to family relationships.

The only radical voice in this case was that of Justice Scalia. He has fairly consistently rejected the line of substantive due process cases that identified various "unenumerated rights" protected by the Fourteenth Amendment, including those of parents to control their children. In his view, while such rights may be "inalienable" as a matter of political theory, it is the province of the states under the Ninth Amendment to protect them, and the federal courts should abstain from the issue. At least Scalia is consistent, opposing federal court intervention to protect parenting decisions of all kinds, whether in the context of abortion or of visitation.[35]

Finally, Justice Thomas, concurring in the judgment, seemed drawn in two diametrically opposed directions. On the one hand, he seemed sympathetic to Scalia's view that the Court exceeds its power by second-guessing state family law policies.[36] But since the parties did not raise this issue and the Court was relying on its Fourteenth Amendment precedents, Thomas did not engage this thorny issue.[37] However, unlike O'Connor, he would have made explicit that the appropriate standard for examining the constitutionality of the intervention was "strict scrutiny."[38] This standard of review is the highest measure of oversight of state action requiring the state to show a "compelling interest" and to prove that its intervention is narrowly tailored to advance only that interest.

Clearly, it was no accident that the plurality opinion refrains from specifying a particular level of scrutiny and instead speaks of the need to accord "some special weight" or "material weight" to the parent's decisions. The CCPPR team was particularly pleased that the plurality had shown such restraint. We believe that family law cases are too complex for a one-size-fits-all constitutional standard. Strict scrutiny may be appropriate when a lone individual's rights are pitted against the awesome powers of the State. In an area such as family law, where courts are often called upon to mediate competing rights and interests of parents, children, and other family members, the Constitution will surely require a more nuanced balancing than is provided by the strict scrutiny standard.

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35. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

36. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

37. *Id.* at 80 n.1.

38. *Id.* at 80.

What does all this mean for "at risk" children and their advocates? *Troxel* definitely does *not* mean that courts are powerless to protect children's extended family relationships in the face of a fit parent's objections. While parents do have a protected liberty interest that must be accorded appropriate deference, this may be accomplished in a number of ways. For now, experimentation with the proper balance between the interests of the state, those of parents, and those of other family members, is left to the laboratory of state legislatures and state courts, with Supreme Court oversight as an outer limit, to be provided as the case law evolves. Just as *Stanley v. Illinois*[39] opened a continuing discussion about the rights of unwed fathers' rights, *Troxel v. Granville* will be the opening gambit in a series of decisions about children's relationships with extended family. In *Troxel*, however, the Court has avoided the trap it fell into in *Stanley*, where it painted biological fathers' rights so broadly that it threw a whole area of complex law into disarray and was forced to back track step by step. Instead, the Court has started cautiously, indicating that some deference must be shown to parental autonomy, but leaving the precise balance of state and private interests to be elaborated in future cases.

By giving us a complex set of opinions that provides a full and nuanced discussion of the issues but avoids broad pronouncements, the Court has avoided coopting the policy role of the state and local governments and the courts. "It is not the province of the Court to decide as a *policy* matter how best to allocate responsibility for the rearing of children."[40] Instead, the Court in *Troxel* has provided fodder for a productive discussion among judges and academics about how to define the constitutional limits on such policies. Discussion such as this Rutgers symposium will be part of the dialogue that will further inform the Court as it confronts new cases presenting new factual contexts. As state courts and law makers address these complex issues, we hope there will be many more UBICCs, following the model pioneered at CCPPR and other such centers, playing their part in educating policy makers on the impact of their decisions on children at risk of placement or already in the foster care system.

The Court's difficulty in reaching a consensus in the *Troxel* case indicates that the next decades will see much debate over the constitutional analysis of state laws and court practices that attempt to protect children's extended family and other care giving relationships. The modern generation of UBICCs, such as CCPPR and the newly formed Center on Children and

39. 405 U.S. 645 (1972).

40. *See* O'Connor, *supra* note 14, at 4 (emphasis added).

the Law at Levin College of Law in Florida, must work to insure that this debate is child-centered, developmentally-informed, and pluralistic. The voices of all children—not only children of divorce, but also children in foster care, and not only children from affluent nuclear families, but also poor children from disabled, immigrant and minority populations—must be included in these debates. But an *amicus* brief is only as helpful to the decision-maker as the social and psychological science that undergirds it. More research is needed—research that is sensitive to culture, class, and race—before we can fully understand the roles of the extended family in preserving children's developmental potential or weigh the effects of disrupting attachment relationships in the name of parental autonomy. By the same token, more research is needed into the effects on family stability of coercive court interventions, and more exploration is needed of alternatives for resolving intrafamily disputes that are less traumatic and disruptive to family functioning.