2006

In Search of a Conservative Vision of Constitutional Privacy: Two Case Studies from the Rehnquist Court

Mark C. Rahdert

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Constitutional Law Commons

Recommended Citation
Available at: http://digitalcommons.law.villanova.edu/vlr/vol51/iss4/6

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
IN SEARCH OF A CONSERVATIVE VISION OF CONSTITUTIONAL PRIVACY: TWO CASE STUDIES FROM THE REHNQUIST COURT

MARK C. RAHDERT*

I. INTRODUCTION

The Rehnquist Court had difficulty steering a consistent path on the constitutional right of privacy. In part, the conflict resulted from the ever-sharpening divide between the Court’s liberal and conservative Justices, with shifting majorities and outcomes dictated by the votes of “fence-sitting” Justices in the middle. This phenomenon was evident in some leading privacy cases that figured among the Court’s most controversial issues. The conflict was aggravated, however, by conflicting impulses toward privacy among the Justices in the Rehnquist Court’s conservative wing. Especially because of its connections with abortion rights and Roe v. Wade, the conservative Justices distrusted privacy doctrine. But sometimes they were also selectively drawn to it, depending on the particular privacy issue before the Court and the ways in which it might be protected.

To the Rehnquist Court conservatives, the constitutional right of privacy came from dubious origins. Although Due Process protection for privacy interests could be traced to the early twentieth century, its modern formulation came from some of the most progressive and ostensibly judicially activist decisions of the late Warren and early Burger Courts. In particular, it depended on the inductive analysis of Griswold v. Connecticut, which wove particular strands of protection for aspects of privacy in the First, Third, Fourth, Fifth and Ninth Amendments to create a new, unenumerated, independent constitutional protection—a freestanding constitutional right of privacy. Whatever else might be said about Griswold, the analytic structure of the decision departed substantially from the Court’s usual deductive forms of constitutional reasoning. Leading conservative constitutional theorists rallied against Griswold in the 1970s. Following their lead, some of the conservative Justices who set the prevailing intellectual tenor of the Rehnquist Court regarded Griswold’s freewheeling method of constitutional interpretation with suspicion, if not downright hostility.

* Professor of Law, Temple University Beasley School of Law.

2. 381 U.S. 479 (1965).
3. See id. at 484-86.
In the eyes of some Rehnquist Court Justices, the constitutional right of privacy was even more suspect because of the role it played as the foundation for the Burger Court's abortion decisions, most importantly *Roe v. Wade*. No issue more thoroughly defined the left, right and center of the Court during the Rehnquist years than did abortion. Those who opposed the constitutional right of abortion frequently included in their analysis trenchant criticism of its origins in an unenumerated privacy interest that, in their view, had no foundation in the Constitution and no warrant for the status and protection the Court had given to it. *Roe* illustrated to them what was fundamentally wrong with judicial creation of a rudderless and unanchored constitutional privacy doctrine based (in their view) more on judicial assessment of contemporary social values than on the dictates of law.

Yet, while suspect in its formation and extension to abortion, the right of privacy also had conservative attraction. Most significantly, it protected familial interests from undue invasion by the state, a position that resonated positively with the pro-family stance of many social conservatives, and that fit into the more libertarian, small-government facets of conservative political thought. Indeed, constitutional privacy's earliest traces came from pro-family conservative decisions during the substantive due process period of the early twentieth century, in cases like *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. Additionally, by the time privacy issues came before the Rehnquist Court Justices, the doctrine had enjoyed a full generation of acceptance and accumulated precedential weight. To procedurally conservative jurists inclined to value *stare decisis*, this gave adherence to privacy precedent a positive conservative valence and made departure from the right of privacy seem arguably as activist as the process of its creation.

The result was a conservative dilemma—an impulse to limit, even reject claims of constitutional privacy, coupled with an opposite impulse to acquiesce in the doctrine and even selectively extend it in certain limited areas. How could the conservative Justices on the Rehnquist Court do both? Was there some principled way in which they could register their


7. 268 U.S. 510 (1925).

disapproval of the constitutional right of privacy as formulated by Griswold, yet continue their protections of favored privacy interests such as the rights of parents and family? Much of the Rehnquist Court's privacy jurisprudence could be aptly described as a search for a principled response to this dilemma.

Instead of being a dilemma leading to a solution, during the Rehnquist years it was mostly a dilemma leading to a long division. The result was largely a failure to achieve the rule of law over the rule of shifting coalitions—an outcome aggravated by Chief Justice Rehnquist's apparent inability or disinclination to use his leadership position to work towards compromise and consensus. Instead of hammering out a new understanding of the constitutional right of privacy that could serve as the foundation for a consistent line of adjudication, the Court produced a wavering line of decisions brought about by shifting alliances of individual Justices. The Court's decisions sometimes (and in some important ways) limited constitutional protection for privacy, but in other times and ways they preserved and even extended new constitutional guarantees to cover particular privacy interests, all without any unifying theory.

Had this been simply the product of the usual left-right Rehnquist Court divide, the results would be less interesting. But as it happened, the privacy issues the Court faced also frequently split Justices in the Court's conservative wing. Each extension of privacy interests depended on the affirmative votes of one or more conservative Justices, yet typically drew critical fire from the extreme conservative end of the bench. Each restriction or limitation stirred doubts from one or more of the conservative Justices closer to the Court's center. In the end, the Court's decisions produced a privacy doctrine that is rather schizophrenic but far from wholly conservative in its orientation. As it often does on matters of great conflict, the Court wandered to the safer, if theoretically swampy, ground in the center of the juridical spectrum.

Part of the problem, from a theoretical standpoint, was that the Justices linked to the conservative contingent of the Rehnquist Court found different answers to the privacy dilemma, ranging from those (like Justice Scalia) who would sacrifice most if not all of the privacy doctrine, to those (like Justice Kennedy) who were ultimately willing to accept much of it and even extend it to new situations. Somewhere near the middle of this conservative array, and equally near (if not at) the Court's jurisprudential fulcrum on privacy questions, were the Chief Justice himself and Justice O'Connor.

9. Perhaps the best, and arguably one of the most controversial, example is the Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003), striking down a Texas law criminalizing same-sex relations. Justice Kennedy wrote the Court's opinion, and Justice O'Connor concurred in the result, while Chief Justice Rehnquist, Justice Scalia and Justice Thomas vigorously dissented.

Although they occupied similar ground, the Chief Justice and Justice O'Connor arrived there by different routes. A veteran of the early Burger Court battles over privacy's fate, Chief Justice Rehnquist had already set his course on privacy long before his tenure as Chief began.\footnote{11} Consistent with his Burger Court positions, he was prepared to do away with most existing privacy doctrine (especially the Court's decisions on abortion), and was unwilling to extend constitutional protection for any new interests, but was willing to retain some constitutional protection for familial interests. A pivot Justice, compromiser and coalition-joiner by instinct, Justice O'Connor stood resolutely on the fence on privacy questions, as she did on so many of the Court's most divisive issues during her tenure.\footnote{12} Consistent with her general jurisprudential approach, she worked largely within the existing privacy law framework, and she was willing to make modest selective extensions of that framework to accommodate new interests. Except for the abortion cases (notably Planned Parenthood of Southeastern Pennsylvania v. Casey\footnote{13}), Rehnquist and O'Connor frequently voted the same way on privacy matters. But in the process they developed distinctly different doctrinal approaches to the issues that illustrate their two distinct conservative judicial personalities.

The death of the Chief Justice, Justice O'Connor's retirement and their replacements by Chief Justice Roberts and Justice Alito inevitably raise significant questions about the future of constitutional privacy law, just as they do about other highly contested constitutional issues. Will the new Chief Justice and Associate Justice vote in ways that track their predecessors, or will they carve out new positions that change the center of gravity on constitutional privacy? What will the new members of the Court take and keep from the work of their predecessors? What will they reject and discard? What lessons will they learn? Will the probably conservative Roberts Court trim or drop the constitutional law of privacy as an unfortunate and misguided liberal departure from the true Constitutional path? Or will it fashion a new, probably conservative, yet firmly embraced principle of constitutional privacy that will extend into the first half of the twenty-first century? Will it continue to vacillate among shifting coalitions? Or will it work through some compromises to bring about a more consistent doctrine?

For those who endorse the concept of a federal constitutional right of privacy, the answer to these questions ought to be of considerable interest.


\footnote{12. See, e.g., NANCY MAVETY, JUSTICE SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT 25-73 (1996) (exploring Justice O'Connor's judicial record as well as her ability to maneuver alliances on Court); ROBERT W. VAN SICKEL, NOT A PARTICULARLY DIFFERENT VOICE: THE JURISPRUDENCE OF SANDRA DAY O'CONNOR 43-73 (1998) (discussing flexible, but consistent values that have shaped Justice O'Connor's Court decisions).}

\footnote{13. 505 U.S. 833 (1992).}
One token of its significance is the extent to which privacy interests figured in the questioning of Judges Roberts and Alito when they appeared as nominees before the Senate Judiciary Committee. Both faced urgent questions from left and right about their views regarding privacy. The questioning focused most sharply on the bellwether issue of abortion rights, but it extended to other privacy matters as well. Both nominees avoided making any clear commitments. They acknowledged the existence of a constitutional right of privacy as an artifact of precedent, but effectively deflected Senators' attempts to elicit any particulars about their personal views of the doctrine's future. Notably, both cultivated a studied ambiguity on the future of abortion rights, refusing to say little more about Roe than the obvious facts that it was an important precedent that had stood for three decades and survived many challenges. In Judge Alito's case, the ambiguity provoked partisan opposition from many Senate Democrats, producing a closer than usual, albeit ultimately successful, confirmation vote.14

This Article is not about the abortion issue, but about the more general question whether, beyond abortion, the right of privacy will carry much force in the Roberts Court. I believe that it will, but that it will take on a distinctively conservative cast, foreshadowed by some of the leading privacy decisions of the Rehnquist years. To explore this conservative theory of constitutional privacy, I will examine two Rehnquist Court decisions, one by the Chief Justice and one by Justice O'Connor. I will use these decisions as models for an investigation of their differing approaches to the right of privacy, as emblems for the internal conflicts in the Rehnquist Court's privacy jurisprudence, and as potential markers for the development of a conservatively cast doctrine of constitutional privacy in the Roberts Court.

The two cases happen to be ones where Chief Justice Rehnquist and Justice O'Connor found themselves on the same side. One, Washington v. Glucksberg,15 rejects a privacy claim of a right to assisted suicide. The other, Troxel v. Granville,16 protects a claim to parental rights to control child visitation. Both deal with issues that were highly controversial at the time and promise to remain so. Each opinion typifies the judicial stance of its author, while the juxtaposition of the two illustrates both their similarities and their differences in approach in a way that illuminates a possible direction for a conservative twenty-first century vision of privacy.

14. See Hearings on the Nomination of Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States, Before the Senate Committee on the Judiciary, 109th Cong. (2006) [hereinafter Alito Confirmation Hearings]; Hearings on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States, Before the Senate Committee on the Judiciary, 109th Cong. (2005) [hereinafter Roberts Confirmation Hearings].
I will then consider what elements the two approaches share, where they differ and what they portend for the future of privacy law in the Roberts Court. In particular, I will look for elements in the two approaches that might be blended into a new and more coherent conservative doctrine of constitutional privacy. In that connection, I will also comment on the potential significance of the Rehnquist and O'Connor jurisprudence for the Court's second assisted-suicide case, Gonzales v. Oregon, which was the first sample of the Roberts Court's potential direction on constitutional privacy.

II. Washington v. Glucksberg

The issue in this case was whether the Due Process Clause gives terminally ill patients a constitutional right to obtain professional medical assistance in exercising a choice to end their lives. Indirectly, the case presented the Court with an opportunity to take a position on the rights of individuals to determine the circumstances of their own demise—what many have termed a "right to die" or a right to "death with dignity." In our aging, but medically and technologically advanced society, questions concerning the existence of such a right have been gathering for at least a generation. They have divided the medical community, spawned a diverse ethical literature and sometimes produced bitter divisions within families faced with the daunting task of coping with a loved one's terminal suffering. While modern medicine can often postpone the inevitable, there comes a point where it cannot either significantly allay or prevent it, and where the medical measures used to perpetuate life promise only to destroy its quality. This situation poses a sharp ethical dilemma. While some have registered profound religious and moral objections to any deliberate human acts that hasten death, others believe that an individual's control over the timing and terms of one's own demise are not only ethically acceptable but even morally superior to prolonged suffering or helplessness at the hands of an impersonal and reflexive medical life-perpetuating machine. The claim of a right to "assisted suicide" in Glucksberg represented an attempt to establish a constitutional foundation for an individual's right to make for oneself such profound personal choices about the manner of life's end.

In addressing this question in Glucksberg, the Court did not write on an absolutely clean slate. To begin with, state common law (in some jurisdictions buttressed by state constitutional law) had long recognized that an individual's basic right of control over one's body included a right to

18. See Glucksberg, 521 U.S. at 705-06.
make basic decisions about one’s medical treatment, including a right to refuse treatment, even against professional medical insistence that the decision would hasten or precipitate death. More immediately, in *Cruzan v. Missouri Department of Health*,20 the early Rehnquist Court had indirectly, if somewhat awkwardly, given this right a due process constitutional dimension. *Cruzan* had involved an individual in a permanent vegetative state, and the question was whether (and under what circumstances) the state could prevent her family from seeking the withdrawal of treatment (including nutrition and hydration) that would keep her alive but never bring her back to consciousness. In that decision, in an opinion by Chief Justice Rehnquist, the Court had held that the state could demand “clear and convincing” evidence of the patient’s wishes to refuse treatment before allowing the family’s choice. 21 Although the Court had cautiously assumed without deciding the existence of a constitutional due process right to refuse treatment, 22 its implicit conclusion that the state must withdraw its opposition in the presence of clear and convincing evidence of the patient’s wish to refuse further life-sustenance backhandedly acknowledged a fundamental, if qualified, due process interest in refusing further medical intervention. The case has been fairly consistently read that way ever since. 23

Because of *Cruzan*, the question in *Glucksberg* was no longer the broad question whether the Due Process Clause recognized a right to make fundamental choices about ending life-sustaining medical treatment, but the narrower question whether this right extended from the negative choice involved in *Cruzan* (withdrawal of sustenance) to an affirmative choice that would require medical intervention to hasten demise. *Glucksberg* also involved a potential extension from the narrow circumstances of a permanently vegetative patient to the broader (though still limited) class of patients who, though conscious and in command of their own faculties, face imminent and certain death from terminal illness. Such an extension was of great potential social and political consequence because a decision in the patients’ favor would affect a substantially greater number of individuals. It would also mean a constitutional reordering of state law because at that time every state prohibited assisted suicide in one way or another. 24 It would thus place the Court at odds with state law and policy in a way that the decisional rights implicit in *Cruzan* had not. Conservative values of federalism and judicial restraint were clearly implicated. In the briefing and oral argument leading up to the Court’s decision, conservative warning signals against the dangers of an expansive view of the consti-

21. See id. at 280-81.
22. See id. at 279.
23. See *Glucksberg*, 521 U.S. at 720 (noting that *Cruzan* “assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment”).
24. See id. at 710.
tutional right of privacy were clearly going off, particularly in a great deal of the questioning from the bench. 25

In the event, the Court rejected the claim. Perhaps surprisingly, there was virtual unanimity on the result, giving the Rehnquist Court a rare opportunity to issue an opinion on constitutional privacy that was not sharply contested. Chief Justice Rehnquist assigned to himself the task of crafting such an opinion, and he endeavored to use it to lay the foundation for a restricted vision of constitutional privacy. Characteristically, however, Rehnquist did not succeed in getting his Court to speak with one voice. In fact, the decision in Glucksberg generated no fewer than six opinions by individual Justices. Instead of speaking with Marshallian majesty, the Court fractured in its reasoning in a fashion that recalled the pre-Marshall practices of seriatim decision making.

I won’t belabor this article with a play-by-play description of the Chief Justice’s reasoning, but I will attempt to pull from his analysis what I consider to be his principal methodological contributions to a conservative or restrained doctrine of constitutional privacy. In this regard, several features of Glucksberg stand out: a reformulation of constitutional privacy from a freestanding constitutional guarantee to a more limited incident of due process “liberty”; a narrow characterization of previously recognized interests aimed at reducing their precedential value; an energetic separation-of-powers and federalism-based argument extolling the relative virtue of legislative over judicial resolution of contested social questions; an equally energetic critique of the vice of premature judicial intervention; cautious reliance on traditional standards of review (here “mere rationality”) as the medium for judicial restraint; and tolerance, in the interests of federalism, for potential inter-state variation in legal response. I will describe each of these features in succession.

Perhaps the most significant doctrinal element of Rehnquist’s opinion in Glucksberg is his characterization of constitutional rights regarding medical treatment as a species of “liberty” interest. 26 Nowhere in the opinion does he refer to the interest at stake as a right of constitutional “privacy.” This verbal shift is more than mere semantics; it exhibits a deliberate departure from the Burger Court’s precedent. For many years after Griswold, it was customary for the Court to acknowledge that the Constitution protected an individual right of “privacy,” and to ask whether the interest at stake in the case before it came within the scope of that constitutional privacy protection. 27 From Rehnquist’s perspective, however, this was at least part of what got the Court in trouble in cases like Roe, because it enabled the Justices to leapfrog over the hard threshold question

whether the interest itself was one that was deeply rooted in our democracy. Because privacy had already been determined to be so rooted, the Burger Court needed only to determine that the interest itself was linked to privacy to give it constitutional weight. Rehnquist objected to that approach as slipshod bootstrap thinking. Instead, as Glucksberg illustrates, he demanded that each interest guaranteed under Due Process must be independently proven as a facet of constitutional "liberty." This approach reflects the judgment, originally decried by Justice Black in his Griswold dissent, then later embraced by Justice Stewart in his Roe concurrence, that constitutional privacy is actually a species of "substantive due process" thinking.

This was an important shift for Rehnquist and his Court for at least two reasons. First, it brought to bear negative momentum from all the decades of objections to substantive due process that marked the Court's recoil, from the FDR period onward, to the activist invalidation of economic regulation under substantive due process reasoning that had animated much of the Court's work during the first third of the twentieth century. Thanks to the post-FDR decades of judicial development, "liberty interests" claiming the protection of substantive due process now come to the Court with substantial negative momentum—one might even call it a presumption of non-fundamentality—that a law's challenger must overcome. Second, it meant that each claimed "liberty" interest must make its own way: there is no fundamentality by association with other liberty claims. In the Burger days, the Court sometimes worked by analogy from one privacy interest to another. Glucksberg signaled that this form of functionalist and analogical thinking was suspect. Instead, each interest must be considered on its own, independent of any others the Court might have recognized in previous cases. Thus, the analogy from withdrawal of life support to medical assistance in hastening death on which the claim for assisted suicide largely rested would not suffice.

To further restrict the Court's inquiry, Chief Justice Rehnquist also demanded that each interest claiming constitutional status must be de-

---

28. This objection traces to Rehnquist's dissent in Roe, where he characterized a general interest in privacy (outside the Fourth Amendment context of search and seizure) as "no more than that the claim of a person to be free from unwanted state regulation of consensual transactions" which "may be a form of 'liberty' protected by the Fourteenth Amendment" that is "not guaranteed absolutely against deprivation, only against deprivation without due process of law." Roe v. Wade, 410 U.S. 113, 172-73 (1973) (Rehnquist, J., dissenting).


30. See Roe, 410 U.S. at 167-68 (Stewart, J., concurring)

fined with precision, both those the Court had previously recognized and those being claimed in the instant case. In reasoning parallel to Justice White’s discussion of same-sex relations in *Bowers v. Hardwick*, Rehnquist insisted that all “liberty” interests must be carefully defined. This requirement of narrow definition arguably made the topography of constitutional discourse less slippery, because it made distinguishing earlier case law much easier. Following this approach in *Glucksberg*, Rehnquist rejected as semantically inappropriate and overbroad any discussion of a constitutional “right to die.” To the contrary, he characterized the interest assumed in *Cruzan* as a negative right to “refuse medical treatment,” which he sharply distinguished from the claim in *Glucksberg* of an affirmative right to obtain assistance, not for treatment but for “suicide.” *Cruzan*, in other words, was about issues of medicine and health, while *Glucksberg* had nothing to do with either, but was instead about a form of homicide.

With respect to the claimed interest in *Glucksberg*, defined as a right to assisted suicide, the Chief Justice still further confined judicial authority by stressing the important role that legislatures both historically had played and continued to play with respect to defining the legal circumstances of death. Part of this approach was what might be characterized as a “tip-of-the-iceberg” historical analysis (once again reminiscent of the Court’s decision about the legal regulation of sodomy in *Bowers*) which tallied the traditional criminal-law regulation of suicide and assisted suicide by the states and used the results of the tally to suggest that the interest lacked fundamental character. Chief Justice Rehnquist, however, also added to the analysis an assessment of contemporary debate about the rights of the terminally ill to choose the circumstances of their own inevitable death. He stressed the vigor of contemporary national debate on the subject, and the important role to be played by state legislatures as focal points for that debate. He intimated that it would be a negative blow for democracy if the Court were to intervene in an ongoing discussion of social policy, thus preempting the legislatures’ role by prematurely declaring a constitutionally based right to assisted suicide.


34. See *Bowers*, 478 U.S. at 192-94.

35. See *Glucksberg*, 521 U.S. at 710-18.

36. See id. at 716-19.

37. See id. One is struck by an implicit contrast to *Roe v. Wade*. At the time *Roe* was decided, the issue of legalizing abortion was a hot legislative topic in many states. The Supreme Court’s decision in *Roe* effectively cut off such legislative debate by setting a fairly specific set of constitutional rules for the constitutionality of abortion regulation. Chief Justice Rehnquist was a persistent critic of this aspect of *Roe*. See, e.g., *Webster v. Reprod. Health Servs.* 492 U.S. 490, 520-21 (1989) (summarizing analysis for determining constitutionality of abortion regulation established by ruling in *Roe*).
By stressing the value of deliberative democracy in resolving questions about assisted suicide, Rehnquist took up one of the themes that has been used to structure constitutional law since the *United States v. Carolene Products* decision. The rule in *Carolene Products* (in contrast to the various footnote four exceptions) attaches a presumption of legitimacy to the legislative products of representative democracy and warns against judicial encroachment on legislative discretion. Building on this principle, Rehnquist’s *Glucksberg* opinion implies that a more durable solution to the debates about end-of-life issues will evolve if public discussion is allowed to mature into legislative action. By imposing a premature judicial resolution, the Court would artificially cut off that debate. Thus, as with the FDR Court’s reaction against economic substantive due process, here as well the prevailing norm should be judicial restraint in deference to representative democracy. The virtue of judicial inaction on the question of assisted suicide is that it allows legislative deliberation and eventual action to proceed. Chief Justice Rehnquist’s opinion suggests that state legislatures may one day be persuaded of the virtue of allowing assisted suicide, and that courts should let that happen if this occurs. But until the legislatures of the nation have spoken with some sort of clarity, the Court should withhold any judgments of its own on the merits of the assisted suicide question.

In *Glucksberg*, the principal methodological implement for such judicial restraint is the time-honored formula for abstract rationality review: a statute prohibiting assisted suicide should be upheld if, as an abstract matter, it is rationally related to a legitimate government interest. In the instance of assisted suicide, the Court was able, quite easily, to assign a substantial array of abstract legitimate state interests, beginning with the state’s interest in protecting life, and including its traditional role in regulating the medical profession, protecting vulnerable individuals from fraud and undue influence, safeguarding rights of those with disabilities and so forth. What may be most noteworthy about this discussion in *Glucksberg* is that it is not a formality. Rather than a cursory recital of a handful of “conceivable bases,” the Court’s opinion explores in detail the reasons why the state’s asserted interests are significant and might rationally support a legislature’s unwillingness to permit medical intervention to hasten death. In light of the arguments before the Court, this discussion may have been intended to forestall (or co-opt) arguments for a “heightened” rationality-with-some-bite review, such as the one suggested by the Solicitor General, arguing as amicus curiae. But it nonetheless stands in some contrast to other cases involving rationality review of purely economic regula-

---

38. 304 U.S. 144 (1938).
39. *See id.* at 152.
tion, where the Court's recitation of legitimate interests often comes across as almost perfunctory. 42

Finally, Chief Justice Rehnquist's opinion touches throughout on the virtues of federalism. Although the decision does not make any direct allusions, its entire tenor is that states can play a valuable role as federalism's "laboratories" for social experimentation with assisted suicide (and presumably other end-of-life decision making issues as well). 43 Some states may choose (as Oregon has since the Glucksberg decision 44) to allow assisted suicide in limited circumstances, and their experience with it will yield valuable information on its effects, good or ill, for society at large. Over time, other states might join in the experiment, or they might recoil from the experience, depending upon the results it yields. Whatever ensues from this process produces a surer and more tested outcome for society than a premature determination by a Court bent on experimenting with new constitutional rights. Though their decisions may lack the relative permanence of constitutional doctrine, from this point of view the legislatures are ultimately better guardians of civil liberties, and better determinants of the contours of privacy, than are the courts.

Justice O'Connor joined the Chief Justice's majority opinion in Glucksberg, but she also filed one of the several separate opinions in the case, and her concurrence rang a distinctly different chime. O'Connor observed that the case only implicated questions of medical intervention to accomplish death, not treatment for alleviation from pain. She thus clarified that her vote rested partly on the assumption that state laws prohibiting assisted suicide would not impair the ability of medical professionals to provide their terminally ill patients with adequate alleviation from the symptoms of pain their terminal conditions produced. 45 If this were not the case, Justice O'Connor hinted that she might be willing to entertain a limited constitutional interest in receiving affirmative medical intervention in order to relieve severe chronic pain associated with terminal illness, even in circumstances where the intervention substantially hastened death. She did not directly address this question, leaving it for another


43. See Glucksberg, 521 U.S. at 719 (noting that "the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues"); cf. FERC v. Mississippi, 456 U.S. 742, 787-88 (1982) (O'Connor, J., dissenting) (noting that "[c]ourts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas"); New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (opposing constitutional "limitations set by courts upon [state] experimentation in the fields of social and economic science").

44. For a further discussion of Gonzales v. Oregon, 126 S. Ct. 904 (2006), see infra notes 97-104 and accompanying text.

day. Nevertheless, by raising it, she suggested a potential limitation on the scope of state legislative discretion.

From the standpoint of constitutional privacy doctrine, Justice O'Connor's concurrence was significant because it signaled some unwillingness on her part to adhere rigidly to all of the key restrictive precepts in Chief Justice Rehnquist's analysis. For example, she implicitly rejected the affirmative/negative distinction drawn by the majority. Constitutional protection could, in her view, extend beyond a mere right to refuse, to include a right to obtain affirmative medical intervention, at least in the circumstance of severe pain. Further, Justice O'Connor did not undertake to establish an historic state-law or common-law pedigree for the interest in pain relief. She might, of course, demand proof of such a pedigree before recognizing the interest in a future case. But her suggestion that extreme pain might be different seems primarily grounded in an understanding of the prerequisites for maintaining human dignity in the face of impending death. She also opened the constitutional door (albeit in the relatively safe zone of a non-precedential concurrence) to reasoning that is loosely comparable to the "undue burden" analysis in *Casey*. The state could rationally demand that medical professionals treating terminally ill patients must let the illness run its course, but not at the price of the patient's intense and unrelieved pain. To this extent, O'Connor's analysis seems founded on an approach potentially at odds with some of the restrictive precepts in Rehnquist's analysis, and might be closer in structure to the argument the respondent advanced in favor of medical assistance for patient decisions to hasten death.

III. *Troxel v. Granville*

The issue in *Troxel* was the power of state family courts to order visitation with non-parents over the objection of a fit parent. The State of Washington had enacted a statute that was interpreted by the state's Supreme Court as authority for ordering visitation to any petitioner, against the parent's objection, whenever the family court determined that the visitation was in the child's best interest. In the *Troxel* matter, the state family court had ordered the custodial mother, whose parental fitness was not questioned, to permit regular visitation between her two daughters and the children's paternal grandparents after the death (by suicide) of the children's biological father. Before the biological father's death, the grandparents had a significant previous relationship with their grandchildren. Although the children's mother (who later married another man after the biological father's death) did not object to limited visitation with the paternal grandparents, the grandparents sought, and the family court
ordered, significantly more visitation than the mother thought appropriate. The family court judge justified his decision entirely on the determination that, notwithstanding the mother's objections, more extensive grandparent visitation was in the children's "best interests."\[49\]

The Washington Supreme Court overturned the family court's decision by sustaining a federal constitutional attack on the visitation statute. In the Washington Supreme Court's view, the statute was constitutionally defective because it allowed the court simply to substitute its judgment for that of a fit parent, absent any showing that implementation of the parent's choice would work any material harm to the children.\[50\] The case thus presented at least two constitutional issues: 1) whether (and to what degree) the Due Process Clause of the Fourteenth Amendment protected a fit parent's right to determine visitation with her children, and 2) whether the "harm" standard adopted by the Washington Supreme Court correctly defined the scope of that constitutional protection. A subsidiary question, as it turned out, was whether the appropriate mode of constitutional analysis in this case was to address the constitutionality of the statute on its face (as the lower court had done), or as applied to the facts of the Troxel/Granville dispute.

There was no majority outcome in the Supreme Court of the United States. Justice O'Connor's opinion for a plurality agreed with the Washington courts that the statute was unconstitutional but eschewed the breadth of the lower court's reasoning.\[51\] In particular, the plurality elected to consider the narrower problem of the constitutionality of the statute as it had been applied, rather than addressing the full range of potential applications that would be at issue in a facial challenge. Additionally, the plurality rejected the Washington court's "harm" standard on the grounds that it was unnecessary in the circumstances to go that far. Instead, the plurality concluded that the statute's "best interest" standard, as applied by the trial court, failed to give adequate weight to the parent's decision.\[52\]

As in the discussion of Glucksberg above, my focus will be on the most noteworthy structural and methodological features of Justice O'Connor's opinion. I believe the most prominent of those features are these: emphasis on the judicial pedigree of parental due process rights; emphasis on the correspondence of the parent's right with limitations on the competence (and hence the power) of the state to make critical child-rearing decisions; characterization of the Washington statute involved in the case as an "outlier" that pushed the limits of judicial intervention beyond those observed by other jurisdictions; the use of process, particularly presumptions and associated evidentiary standards, to safeguard substance; the use of an in-
termediate (more-than-rational but less-than-strict) and open-ended balance-of-interests form of scrutiny; and reservation of future "wiggle room" by converting the case from a facial to an as-applied challenge. On each of these facets, Troxel's reasoning sets up an interesting contrast with Glucksberg that helps to explain their different outcomes.

In acknowledging the presence of a constitutionally protected due process interest in parental raising of a child, Justice O'Connor carefully noted the interest's long pedigree as "perhaps the oldest" fundamental liberty recognized by the Court, stretching back well past Griswold to some of the Court's earliest due process privacy decisions. She also traced the Court's recognition of this interest through several periods of constitutional history from those early days up to the present. In contrast to the novel constitutional claim in Glucksberg, the claim being asserted in Troxel was already a recognized part of the fabric of the law. In defining the nature of the parent's interest as an interest in "care, custody and control" of children, Justice O'Connor adhered to language that had been used to define that interest in earlier opinions. She also narrowed the scope of the interest by stressing both that it was limited to circumstances of parental fitness and that it was not absolute, but could be overridden by the state in limited circumstances. Throughout her discussion, she stressed the consistency of the Court's handling of parental rights, and what she regarded as the continuity of its decision in the present situation with past precedent. Justice O'Connor thus relied on the procedural conservatism of stare decisis as a warrant for finding and defining the scope of due process in the present circumstance.

While she recognized the need for a state role in the care of children, particularly in light of modern developments contributing to the breakdown of the nuclear family and the development of shifting family relationships, Justice O'Connor also noted that constitutional protection for parental decision making corresponds to a social consensus regarding the limits of state authority. This consensus recognizes the superior competence of fit parents to make the myriad decisions required in the raising of a child. The existence of a constitutional right, in this case, thus corresponds to an important limitation on state authority, and the liberty interest at stake is as much about defining the limits of state intervention in family relationships and recognizing limits on state competence to act as a

53. See id. at 65.
54. See id. at 65-66.
55. See id. Note, however, the relative breadth of this characterization in contrast to Glucksberg. Justice O'Connor could have described the interest in Troxel more narrowly, for example as the interest of parents in restricting visitation by a child's blood relatives, a formulation that would have created a potential distinction from prior cases recognizing parental rights, none of which had dealt with visitation.
56. See id.
57. See id. at 65 ("The child is not the mere creature of the state . . . .") (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)).
substitute parent as it is about protecting the freedom of the individual. The message is that the state must have the power to intervene when traditional family structures break down, but that it is at best only a poor substitute for a fit parent when basic family relationships and structures are intact.

This emphasis on the relationship between constitutional rights and limits on state competence formed an important dimension of Justice O'Connor's constitutional analysis. It led her to require that the statutory machinery authorizing state intervention in familial arrangements must recognize the inherent limitations on state competence (and by the same token the superior competence of the fit parent) by according some level of structural preference for the decisions of a fit parent regarding her child's needs. As with Glucksberg, her opinion did not directly allude to the Carolene Products doctrine, but her analysis fits well within its framework. Because of the fit parent's superiority over the state in deciding what is best for the child, it would be inappropriate to indulge Carolene Products' usual presumption of legislative authority and legitimacy no matter when, why or how the legislature chose to intervene in family matters.

The usual presumptive legitimacy of legislation was further undermined in this instance by the fact that the Washington statute did not adhere in important respects to the typical pattern of state laws regarding custody. In particular, Justice O'Connor emphasized the statute's extraordinary breadth in the authority it granted to family courts to supplant the decisions of fit parents. While noting that all fifty states supply some sort of statutory mechanism for ordering third-party visitation, she contrasted the breadth of the Washington statute with several other state schemes that placed limitations either on who might apply for visitation or on the substantive authority of the court to override fit parents' choices, or both. Justice O'Connor thus implied that the Washington statute was out of line with what other states were doing. She noted that the state courts could have interpreted the statute more narrowly (and she at least implied that the result might have been different had they done so), but in fact they had not, rendering the statute an outlier in the array of state child visitation laws.

This analysis led to what may be the most noteworthy aspect of Justice O'Connor's opinion in Troxel. Rather than attempting to define the limit on state authority in substantive terms, Justice O'Connor turned to a process-oriented analysis. The critical flaw in the Washington scheme, she asserted, was with the process it employed to determine the relative state and parental interests. In particular, the state's system failed to accord the

58. See id. at 69, 72-73.
60. See Troxel, 530 U.S. at 73.
61. See id. at 73-74.
62. See id. at 67, 75.
fit parent’s determination the *presumption* of correctness, or “special
weight” to which it was entitled. 63 This presumption, in turn, placed an
evidentiary burden on those who would challenge a fit parent’s decision to
demonstrate “special factors that might justify the state’s interference” to
override parental choice. 64 Concern for a child’s “best interests” alone is
not enough, because a naked application of that standard would allow the
court simply to substitute its judgment for that of the parents in almost any
situation. It would reverse the roles of parent and state, allowing the state
(through the family court judge) primary authority in any circumstance
where it thought that the state had a “better” idea. Indeed, in this case,
the family court went even further by effectively erecting a presumption
*against* the mother’s choice. 65 Justice O’Connor stressed that the family
court’s handling of the case effectively placed the burden on the mother
to overcome what amounted to a presumption in favor of additional
grandparent visitation. 66

A curious aspect of the plurality opinion in *Troxel* was its failure to
determine with any precision the applicable constitutional standard of re-
view. In fact, there is some evidence that an internal Court dispute over
the standard of review contributed to the Court’s failure to muster a ma-
jority rationale. 67 Perhaps because of that division, Justice O’Connor’s
opinion avoided articulating any clear standard of review. Internal evi-
dence suggests, however, that as a functional matter, O’Connor’s opinion
exercises a review that is a good bit less exacting than formal strict scru-
tiny, but a good bit more exacting than the abstract rationality standard
employed in cases like *Glucksberg*.

We know clearly that O’Connor’s opinion did not adopt strict scru-
tiny, because Justice Thomas’s concurrence in the judgment objected to
the plurality approach in part for precisely that reason. 68 We also know by

63. See id. at 69-70. Interestingly, the plurality drew this presumption require-
ment from an earlier procedural due process decision, *Parham v. J.R.*, 442 U.S.
584, 602 (1979). See also *Troxel*, 530 U.S. at 69 (concluding that “[t]he decisional
framework” employed by trial court “contravened the traditional presumption that
a fit parent will act in the best interest of his or her child”).

64. See *Troxel*, 530 U.S. at 68.

65. See id. at 67.

66. See id. at 69.

67. Justice Thomas concurred in the result, in part on the ground that if pa-
rental rights were to be recognized as entitled to due process protection, regula-
tions interfering with them should be subject to strict scrutiny. He noted that
none of the other *Troxel* opinions recognizing the parental right “articulates the
appropriate standard of review.” Id. at 80 (Thomas, J., concurring).

68. See id. (plurality opinion). Had the plurality applied traditional strict scru-
tiny, its analysis would have proceeded down a different track. The Troxels, as
defenders of the statutory scheme and the trial court’s order under it, would have
been obliged to prove that the statute was narrowly tailored to serve a compelling
governmental interest. Presumably the “best interests of the child” standard would
have satisfied the compelling interest prong of the test, so the determinative ques-
tion would have been whether the statute employed narrowly tailored means to
achieve it. Analysis of this issue would probably have turned on the issue of statu-
inference that rationality was not the standard. Had it been, one could certainly have made a "rational" case for increased visitation on the facts—indeed, the trial judge had done so. The Troxels were not only the children's paternal grandparents; they had also played a significant and evidently loving role in their grandchildren's care and development while the children's biological father was alive, and as a result, they enjoyed a close and significant relationship with their two granddaughters. They were, in short, appealing petitioners whose continued involvement in their grandchildren's life would probably contribute materially to the children's well-being. The trial judge's conclusion that more time with them would be in the granddaughters' best interest was thus a "rational" judgment. Indeed, almost any good-faith judgment following the state's "best interest" standard would have to be equally "rational." But Justice O'Connor demanded more. She did not accept a rational explanation, however plausible it might seem, as sufficient to override the parent's different choice, particularly when, as here, the parent did not object to some grandparent visitation. Instead, Justice O'Connor stressed that, in our "far from perfect" world, what seems beneficial in the abstract may not always be so in practice. More importantly, the family court's reasoning lacked the "special factors" that would be needed to overcome the "presumption" attaching "significant" or "material" weight to the parent's decision.

Justice O'Connor made no attempt to identify what sort of justification might meet her "special factors" test. Rather, she preferred to keep the ends of that test wide open, recognizing that the states needed some maneuvering room to respond to rapid social changes in the structure of the family. Even though this was an "as applied" decision, she emphasized that it was the structure of the state's decision making process that bothered her, not necessarily the fact of its intervention, even in this particular situation. This gave the opinion a rather odd texture, one that feels a great deal like a facial ruling masquerading as an as-applied decision. The constitutional defect was in the way the statute structured the decisional process, a flaw that would presumably exist in every case brought under it. So why should the Court issue only an as-applied result?

The answer, I think, is that as-applied analysis accomplished minimum displacement of state law. As long as a state's conclusion afforded appropriate weight to the parent's choice, no particular outcome would

69. See Troxel, 530 U.S. at 69, 71 (discussing trial court's decision favoring greater grandparent visitation).
70. See id. at 71.
71. See id. at 70.
72. See id. at 69-70, 72.
73. See id. at 73.
be necessarily foreclosed. Moreover, hardly any damage was done to state law itself. Indeed, any state statutory scheme was acceptable to the plurality as long as it incorporated the constitutionally recognized presumption and the associated evidentiary standards that went with it.\textsuperscript{74} This was something that presumably could be done as an interpretive matter by the state judiciary under almost any statutory scheme. In this respect, there is a notable parallelism between \textit{Troxel} and \textit{Cruzan}. In both, the Court used standards of proof as measures for affording a qualified constitutional protection that did not interrupt the administration of state law.\textsuperscript{75}

The decision in \textit{Troxel} sets up a nice contrast with \textit{Glucksberg}. In \textit{Glucksberg}, the claimed constitutional interest was novel and virtually unrecognized in the law, whereas the interest in \textit{Troxel} enjoyed a long judicial pedigree and widespread recognition in the fabric of state family law. In \textit{Glucksberg}, the Court emphasized the superior competence of state legislatures to resolve, in democratic fashion, pressing social questions, while in \textit{Troxel}, the plurality stressed the limits on state competence to intervene in families headed by fit parents. In \textit{Glucksberg}, the law prohibiting assisted suicide was consistent with the national legislative pattern, while in \textit{Troxel}, the law gave family courts vastly broader power than such courts enjoyed in other jurisdictions. In \textit{Glucksberg}, the Court indulged a presumption of governmental legitimacy, while in \textit{Troxel}, the plurality demanded a presumption of superior parental responsibility. In \textit{Glucksberg}, the Court upheld the assisted suicide statute on its face, on a showing of abstract rationality, while in \textit{Troxel}, the Court found the law unconstitutional as applied, because of its failure to require special factors beyond a rational assertion of best interest. In \textit{Glucksberg}, the Court refused to overturn the laws of fifty states, while in \textit{Troxel}, the Court structured its decision to correct a state law aberration in a way that minimized the decision's impact on existing family law.

IV. TOWARD A CONSERVATIVE THEORY OF CONSTITUTIONAL PRIVACY

If constitutional privacy is to have much of a future in the Supreme Court, at least in the foreseeable future, it must do so as a conservative constitutional doctrine. With the confirmations of Chief Justice Roberts and Justice Alito, at least twelve of the last fourteen appointments to the Court, spanning a period of more than thirty-five years, have been of Justices who were as or more conservative than the Justices they replaced.\textsuperscript{76} More importantly, with Justice Alito's confirmation, there is now

\textsuperscript{74} Justice O'Connor contrasted the Washington statute to a variety of other state statutes which she implied would satisfy constitutional requirements. \textit{See id. at 70.}

\textsuperscript{75} \textit{Cf.} \textit{Cruzan v. Missouri Dep't of Health}, 497 U.S. 261, 280-83 (1990) (upholding state's clear and convincing evidentiary standard as constitutionally sufficient for determination of patient's right to refuse medical treatment).

\textsuperscript{76} The fourteen Justices added to the Court (with the Justices they replaced in parentheses) were: Burger (Warren); Blackmun (Fortas); Powell (Black); Rehn-
a solid conservative majority that is likely to hold firm on many civil liberties issues on the Court, including many aspects of the privacy-related issue of abortion. That conservative phalanx, moreover, includes all the Justices on the Court who are under the age of sixty-five. Given the Court's age demographics it is thus likely that the Court will speak with a conservative voice for years, even if the prevailing national political mood becomes more liberal. Thus, if constitutional privacy is to advance in the first third of the twenty-first century, it must do so as a conservative doctrine.

Is that possible?

What a conservative doctrine of constitutional privacy might look like is an open question. Over the last forty years, constitutional privacy has been, primarily, a progressive constitutional doctrine. With the prospect of solid conservative Supreme Court majorities on the horizon, however, the doctrine will have to be reformulated to reflect important conservative values if it is to continue to have any traction.

An appeal to process conservatism alone probably is not the answer, but it may help.\footnote{Process conservatism was part of what saved Roe v. Wade from being totally overruled in Casey. See Planned Parenthood of Se. Pa., 505 U.S. 833, 854-61 (1992) (identifying and applying principles of \textit{stare decisis} as factors supporting partial reaffirmation of \textit{Roe}). That fact cuts both ways, however, in terms of its utility to protect other aspects of constitutional privacy. On the one hand, the \textit{stare decisis} theory advanced in Casey ought to apply as well to important landmark privacy cases, such as \textit{Griswold}. On the other hand, if a conservative coalition forms to limit or overrule \textit{Casey}, the Justices in that coalition may base their decision in part on the claim that \textit{Casey} overvalued the virtue of \textit{stare decisis} in constitutional decision making.} It was rather striking, in this regard, that in Chief Justice Roberts's confirmation hearings he affirmed the existence of a constitutional right of privacy and explained it in terms that corresponded fairly closely with the Court's analysis in \textit{Griswold}. Justice Alito also acknowledged that a constitutional right of privacy is settled law. Although neither nominee gave much detail about the content of constitutional privacy, their willingness to accept its existence as a component of constitutional jurisprudence suggests the possibility that earlier trenchant conservative critiques of \textit{Griswold} as a fundamentally dishonest and shoddy form of constitutional expansionism may no longer figure prominently in conservative constitutional sentiment regarding the right of privacy. Like other constitutional doctrines that were novel in their time but that have achieved wide acceptance, the original theoretical underpinnings of constitutional
privacy law may no longer invite reexamination. The doctrine may have
tained sufficient seniority to occupy a relatively secure constitutional
niche, regardless of how cramped that niche may become.

The more vexing question, however, is whether, and to what degree,
privacy can be made to cohere with substance conservatism on the Su-
preme Court. To that end, I offer a blending of Glucksberg and Troxel as
the beginnings of a model for what substantively conservative constitu-
tional privacy might look like. Weaving the two decisions together pro-
duces six tentative principles for a conservative privacy jurisprudence.

A. Liberty, Not Privacy

The first principle is that, Griswold notwithstanding, there is no free-
standing constitutional right of privacy, at least not in the same sense that
there is a freestanding right to freedom of expression or free exercise of
religion. Rather, constitutionally protected privacy interests either derive
directly from one of the existing enumerated constitutional guarantees
(such as the freedom of association under the First Amendment, protec-
tion from search and seizure under the Fourth Amendment and so forth)
or they represent incidents of constitutionally protected “liberty” under
the Due Process Clauses of the Fifth and Fourteenth Amendments. If the
former, they are better addressed under the rubric of the particular consti-
tutional guarantee from which they arise.78 If the latter, their recognition
is a species of substantive due process. Substantive due process analysis,
moreover, requires that each incident of constitutional privacy must be
defined with care, and each one must rest on its own foundation as a fun-
damental right.

This approach has the advantage, from the conservative perspective,
of tying constitutional privacy more directly to the language and structure
of the Constitution, and of fitting it more directly into longstanding tradi-
tions of constitutional analysis. In particular, it links the inquiry regarding
constitutional privacy to the fundamental rights version of due process
analysis that figured prominently in the Fourteenth Amendment incorpo-
ration debate during the first half of the twentieth century.79 Just as incor-
poration, for most Justices, turned on the question whether a
constitutional principle was “fundamental to ordered liberty,” so the ques-
tion whether a particular liberty interest should be granted constitutional
protection turns on the same inquiry. Justice Harlan relied on this form

78. This would be the case, for example, with the aspects of privacy involved
in freedom of association claims. See, e.g., Boy Scouts of Am. v. Dale, 530 U.S. 640,
647-48, 657-59 (2000) (applying strict scrutiny to claims of expressive association;
decided in same term as Troxel).

(using fundamental rights analysis associated with doctrine of incorporation to
support claims for recognizing constitutional right of privacy).
of analysis in his early arguments for a right of privacy, particularly in his
dissent in Poe v. Ullman, one of Griswold's precursors. 80

In implementing this inquiry, the conservative approach should fol-

low the pattern, exemplified by Chief Justice Rehnquist's opinion in Gluck-

sberg, of defining each constitutionally protected interest narrowly. This

should be particularly true of asserted new interests, though it should also

apply to the Court's appraisal of interests recognized in the past. This

should be done to reduce the analogical sweep of past decisions, thus

preventing the Court from engaging in slippery and undisciplined "boot-

strap" extensions of existing doctrine. With respect to privacy, its effect is

to shift the Court's attention from exploring the broad constitutional "em-

anations" alluded to in Griswold to examining what may be characterized,

for purposes of contrast, as discrete points of light.

B. Judicial and Legislative Pedigrees

Glucksberg and Troxel both attest to the importance of judicial and legi-

slative pedigrees in assessing the fundamental character of an asserted

liberty interest. Indeed, the different receptions the claimed privacy inter-

ests in the two cases received is largely attributable to the relative length or

shortness of their pedigrees. Glucksberg rejected an interest in assisted sui-

cide because there was no evidence of either legislative or judicial recogni-

tion for such an interest; indeed, to the contrary, there was a long and

uniform history of criminal laws prohibiting both suicide and assisted sui-

cide that counseled heavily against recognition. 81 In contrast, Troxel ac-

cepted a claim of constitutional protection for the visitation decisions of fit

parents because the "care, custody and control" of children by their fit

natural parents was among the "oldest" fundamental liberties that had

been recognized by the Court, and was an interest woven into the fabric of

every state's family law. 82

Notably, although history plays an important role in establishing a

right's pedigree, neither decision engaged in a particularly close or search-

ing examination of history, and this too may represent a characteristic of

the conservative approach. If a right is fundamental, it should be visible

from a cursory survey of the promontories of the legal topography. Care-

ful exploration of the subtler contours of either the legislative or the judi-

cial landscape should not be necessary. Thus, for example, in Glucksberg

the Court accorded little significance to the fact that many states have re-

laxed their criminal prohibitions on unassisted suicide in recent years; and

in Troxel the plurality gave little weight to some of the complexities of

third-party visitation statutes discussed at greater length in Justice Ken-

nedy's dissent. 83

80. See id.
83. See id. at 96-101 (Kennedy, J., dissenting).
This emphasis on obvious evidence of a right's pedigree has some troubling aspects. First, it arguably neglects the fact that protections for privacy interests are often visible more from the absence of regulation than from the presence of affirmative guarantees. For example, before judicial recognition of parental rights, the chief evidence of the right of parents to care, custody and control of their children was the absence of state regulatory law dictating how children ought to be raised. Second, it makes the recognition of new interests that emerge from changing social conditions particularly difficult. Change must come first from the legislatures, and in most instances it will take considerable time for a sufficient legislative momentum to develop. From a conservative perspective, however, these potential difficulties are more of an analytic virtue than a vice: unless the Constitution actually gets amended to reflect a new social consensus, the primary engines for responding to social change should be legislatures, not the courts. The courts, from this perspective, assume a following role that is consistent with the Supreme Court confirmation pronouncements of Chief Justice Roberts and Justice Alito that they regard the Supreme Court's role as one limited to interpretation of law.

With regard to judicial recognition, the conservative approach also stresses the importance of cross-jurisdictional and cross-generational recognition of claimed liberty interests. An interest gains in relative importance when it is recognized by more than one court, in more than one context and in more than one generation. In particular, it acquires weight when courts have incorporated some facets of that interest into the common law. This attests to both the generality and the fundamental nature of the interest, and it reduces the prospect that the interest's recognition was the product of aberrational circumstances, temporary political expediency or judicial over-reaching.

Once again, this approach retards the development of rights. It also suggests that at the outset judicial recognition of fundamental interests may be provisional. Rights are not fully secure until they have been tested and reaffirmed over some period of time. How much time must pass is not immediately clear, but the implication from both Glucksberg and Troxel is that it must be enough to ensure that the interest has achieved broad social acceptance that transcends immediate political pressures.

C. Comparative Evaluation of Legislative, Individual and Judicial Competence

The conservative approach to privacy requires an assessment of relative institutional and individual competencies for management of a claimed interest. Of greatest potential significance is the relative role of the legislature vis-à-vis that of the individual. In this regard, it is important

85. See Alito Confirmation Hearings and Roberts Confirmation Hearings, supra note 14.
to view rights of privacy not only as statements about the liberties of the individual, but also as statements about the limited powers of government. Government simply is not competent to make certain kinds of decisions, and if it tries to supplant the individual in making those choices more harm than good is likely to result. Where individual competence is superior, the law must be structured to afford a measure of governmental respect for autonomy of individual decision making.

This "limited government" theme is often overlooked in analysis of constitutional privacy. It resonates with the language and history of the Ninth and Tenth Amendments, both of which were understood to "reserve" some interests to the people, partly as a way of ensuring limitation of centralized government authority. It also resonates with the concept of "ordered liberty" in due process analysis. As in the case of parental interests in care and control of children, the government may to some degree structure and regulate the exercise of individual decision making, and it may take over where individual decision making breaks down, but it may not wholly supplant the autonomy of the individual or attempt to interfere in those circumstances where history, the common law tradition and/or legislative practice recognize individual competence as superior.

In addition to evaluation of the relative roles of the individual and the legislature, constitutional privacy also requires an evaluation of the relative roles of the legislature and the judiciary. In particular, it requires some judicial deference to legislative action in formulating social policy. As in Glucksberg, the legislature is superior at fostering, focusing and resolving social and political debate and at adjusting the law to reflect social change; but as in Troxel, the judiciary is superior at supervising day-to-day decisions and interpersonal interactions. To the extent that the government has a legitimate role in supervising those matters, moreover, judicial competence through case-by-case adjudication is superior to hard-and-fast legislative rules. Thus, in the context of privacy, the judiciary serves two distinct roles. One is to enforce limits on legislative power by safeguarding the autonomy of individual decisions in those contexts where individual competence is superior. The other is to require exercise of legitimate regulatory authority in a fashion that enables judicial fine-tuning of the line between individual autonomy and state authority in circumstances where some measure of autonomy has been constitutionally reserved to the people.

D. Correcting Outliers

One of the most important lessons that Glucksberg and Troxel teach is about the role of state practice in determining constitutional norms. In

each case, the Court drew significant guidance from existing state practice. In *Troxel* the Court was willing, in the presence of a pedigreed privacy claim, to declare unconstitutional a state law that transgressed the limits of intervention set by other states’ practices. In *Glucksberg*, it was unsympathetic to a challenge to a state law that was fully consistent with what other states were doing. In each instance, the nature of state practice and the potential impact of the Court’s decision on state practice were important considerations. The Court was willing to correct an outlier, as in *Troxel*. It was unwilling to wholly reorder state practice, as it would have had to do if it had embraced a right to assisted suicide in *Glucksberg*.

Emerging from this contrast is the view that the role of the judiciary in enforcing the right of privacy is primarily to correct outliers—aberrational invasions of privacy by individual states that depart from accepted norms—rather than to determine major new interests or set significant new directions.87 Once again, from this conservative perspective the Court should largely follow, not lead. It should take empirical soundings regarding the privacy interests society is prepared (through its laws) to recognize, and it should enforce those rights against undue encroachment. It should not, however, generally explore much beyond the path marked by existing patterns of law. Under this view, any claim to privacy must undergo what might be characterized as a “legislative impact analysis.” A key question in any case would be: “How much law will have to be rewritten if we recognize a privacy right here?” If the answer is “a great deal,” there is likely no privacy right. Only if the answer is, more modestly, that “a few outlier statutes may have to be revised,” can the court assume the authority to protect privacy interests being asserted.

E. Flexible Review

Another lesson apparent from the intersection of *Glucksberg* and *Troxel* concerns the role of the standard of review in privacy analysis. As others have observed, the traditional “tiers” of scrutiny followed in the later Warren and the Burger Courts eroded considerably during the Rehnquist years, where they often served more to rationalize outcomes than to structure the Court’s analysis.88 Standards of review, however, continue to have significance as organizing principles, as determinants of legislative power and as directives to be followed by the lower courts. Thus it remains important to assess what standard of review the Supreme Court has applied to a particular constitutional interest. At a minimum, the standard serves as a marker of the interest’s relative significance in the constitutional order.


With respect to constitutionally recognized privacy rights, as the plurality opinion in *Troxel* attests, the Court has shown signs of abandoning the rigid analytic structure of strict scrutiny, which usually attaches to constitutionally protected interests of the highest order, in favor of the relatively looser and more flexible (if less fully protective) intermediate or "rationality plus" standards.\(^\text{89}\) This desire for flexibility, which was a recurrent feature of Justice O'Connor's jurisprudence, may reflect an awareness that, even in the most widely accepted zones of personal autonomy, individual decisions rarely operate in a vacuum. Many can have profound consequences for others as well as implications for society at large that give the state a basis for exercising at least a minimal supervisory role.\(^\text{90}\)

At the same time, on the other end of the standard-of-review spectrum, *Glucksberg* suggests that the Court may also have abandoned the extreme deference of "any conceivable basis" minimum rationality review for "unprotected" privacy interests, in favor of a more detailed and nuanced consideration of legitimate governmental purposes and their means of accomplishment. This may reflect a judgment that privacy interests actually fall on a continuum, so that some "unprotected" interests are sufficiently close to the line of due process protection that they are entitled to some judicial solicitude, even though the Court should defer to reasoned legislative judgments regarding their curtailment.

In both directions, the effect is to give the Court considerable flexibility in its decision making concerning privacy, while at the same time increasing the degree of interaction between the judicial and legislative branches over privacy protections. Rather than the "all or nothing" discipline of rigid tiers of review, the Court is favoring a more flexible approach in which outcomes can be explained by, but are rarely dictated by, the standard of review that the Court has chosen to employ. Instead, each case rises or falls on a more custom-tailored judicial assessment of the propriety of legislative intervention.

From this perspective, the key difference between "protected" and "unprotected" interests may lie, not so much in the formal standard or review employed by the Court, as in the degree of specificity (or generality) with which the standard is applied. Unprotected privacy claims re-


ceive only abstract review; protected privacy claims receive a much more specific and focused inquiry. Thus, in *Glucksberg*, the Court was content with evaluating the abstract rationality of the state's justifications for regulating assisted suicide, without regard to the degree to which those interests might or might not be implicated in individual situations; whereas in *Troxel*, the Court concerned itself much more with the specific ways in which an unqualified "best interests" standard might be used to supplant the legitimate choices of a fit parent.

As a related matter, the *Glucksberg* and *Troxel* decisions also reflect a judicial preference for as-applied rather than facial review in constitutional privacy cases. This preference may well reflect the Court's belief that even where privacy interests are entitled to due process protection, some level of state regulatory authority nonetheless persists, so that the process of drawing the line between state authority and individual autonomy is usually a case-specific exercise. It also probably reflects the Court's reluctance to intrude on legislative judgment any more than is necessary to correct true outliers in state behavior. As in *Troxel*, holding that a statute is unconstitutional only as applied, even when the constitutional defect is structural, leaves a wider swath for legislative discretion than a facial ruling which strikes down an entire statute. 91

Taken together, the use of intermediate and flexible review, the emphasis on specificity and the preference for as-applied review suggest that the Court may be working its way in the privacy context toward what Professor Randy Barnett has termed a "presumption of liberty." 92 Just as laws which do not implicate fundamental interests are entitled to a "presumption of constitutionality" that a challenger must overcome, 93 laws which do implicate fundamental privacy concerns face a "presumption of liberty" that the government must overcome. 94 How the government may overcome that presumption, however, is not as rigidly fixed as the traditional tiers of scrutiny would appear to suggest. The Court must leave open many potential avenues for government justification; nevertheless, it will demand a fairly specific showing by government that its action fits into prevailing social understandings regarding the appropriate boundaries for

91. The Roberts Court's recent handling of *Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2006), that vacated a facial constitutional ruling striking down New Hampshire's statutory scheme for parental notice in cases of abortions for minors, remanding for a narrower ruling enjoining only a limited number of potentially unconstitutional applications, may reflect a similar judgment.


94. See Barnett, *supra* note 92, at 259-60.
protected privacy interests. Where the privacy interest at stake is recognized as fundamental, and where the government's invasion of privacy appears to be an outlier that is inconsistent with prevailing norms, it is unlikely that the presumption of liberty will be overcome.

F. Process Protections and Evidentiary Standards

Treating the privacy interest as erecting a constitutional presumption of protection reinforces the final insight to be derived from an examination of Glucksberg and Troxel—the use of process to safeguard substance. Since Goldberg v. Kelly,95 if not before, it has been customary to treat civil due process as containing two distinct strands, one substantive and the other procedural. The substantive strand prevents government outright from invading a small handful of "fundamental" liberty interests, while the procedural strand protects a distinctly broader array of interests by the more modest expedient of requiring that any "deprivation" of those interests must satisfy certain guarantees of fair process. Troxel96 blends these two approaches by summoning procedural and evidentiary guarantees as aids in protecting the fit parent's substantive interest in care and control of her children.

From a conservative prospect, the use of process to safeguard substance offers several distinct advantages. Initially, it proceeds on the assumption that the state does have an interest in regulation and that at some point that interest may well override the privacy interest of the individual. Further, it facilitates the flexible, intermediate, as-applied approach to constitutional review described above. That approach is essentially a formula for ad hoc judicial balancing of interests, in a context where the tip of the balance is not predetermined, either for the government or for the individual. Indeed, the main practical messages of intermediate or "rationality plus" scrutiny are procedural/evidentiary in nature. As discussed above, the individual is entitled to a rebuttable "presumption" of liberty. Thus the burdens of production and persuasion that typically lie with a law's challenger get shifted to the government. To meet those burdens, moreover, the government must present a justification that is sufficiently specific and grounded in fact to persuade the court. Thus, in contrast to situations of deferential scrutiny, it is the court, not the legislature, that ultimately will decide where to draw the line delimiting government power.

96. To a lesser extent, Glucksberg also contains a procedural component. The procedural aspect of Glucksberg stems from its acknowledgment of the interest in refusing life-perpetuating medical treatment considered in Cruzan, which is protected by a clear-and-convincing evidentiary standard. See Washington v. Glucksberg, 521 U.S. 702, 724-25 (1997). Where clear and convincing evidence of the patient's wishes exists, the right to refuse treatment is established and cannot be overridden by the state, even for rational and legitimate state justifications.
Using procedural mechanisms to safeguard privacy has the further merit of minimizing potential judicial interference with the structure of existing law. Typically, all that is required is grafting onto existing legal structures the necessary presumptions, burdens and standards of proof, which, as noted above, can often be done judicially by interpretation, rather than by amendment of an existing statutory scheme. Additionally, in the context of state law, this approach facilitates federalism. States are given wide latitude in their choice of policies and means in drawing the line between state intervention and privacy, so long as their choices conform to what are likely to be at most a small handful of federal procedural and evidentiary requirements. In this regard, constitutional law supplements or even complements, rather than contradicts, most existing state law and policy.

V. THE ROBERTS COURT’S FIRST TEST: A BRIEF COMMENT ON GONZALES V. OREGON

While I was working on this Article, the Roberts Court decided what might be regarded as its first non-abortion test case on constitutional privacy, Gonzales v. Oregon. In that case, the Court, in an opinion by Justice Kennedy, concluded that the U.S. Attorney General lacked the authority to declare medical assistance in dying, which is permitted under the Oregon Death with Dignity Act, a violation of federal drug laws. The case was decided 6-3, with Chief Justice Roberts joining Justices Scalia and Thomas in dissent.

The Gonzales case cannot be taken as a reliable indicator of future directions of the Roberts Court on privacy for at least two reasons. First, because her successor had not yet been confirmed, Justice O’Connor remained a member of the Court and participated in the decision, joining the majority. We do not know how Justice Alito might have voted had he been on the Court instead, although we do know his vote would not have affected the outcome. Thus, from the point of view of Court personnel, the case represents a sort of transitional step, somewhere in between the Rehnquist Court’s jurisprudence and what is likely to emerge from the Roberts Court. Second, and more importantly, the case was not really about rights to privacy at all, but rather concerned the scope of the Attorney General’s administrative rulemaking authority under federal drug laws. The case thus primarily concerned statutory interpretation and administrative law, rather than the presence or absence of a constitutional right to privacy. The case afforded no opportunity to revisit the Court’s...

100. See id. at 926 (Scalia, J., dissenting).
101. See id. at 916 (rejecting Attorney General’s claim of statutory rulemaking authority).
decision about assisted suicide in Glucksberg. Instead, all the Justices assumed the correctness of that decision as a premise for the analysis.

Nevertheless, I think the decision reached by the Court in Gonzales is consistent with the conservative view of privacy that I have outlined. In particular, it is consistent with principles 2 and 3 of the conservative concept of privacy discussed above. Glucksberg's argument that courts should look first to legislatures for an indication of new directions for constitutional privacy, and its argument that legislatures are superior at focusing and channeling social debate, both imply that legislatures need to be given freedom to act to recognize new privacy interests. This is particularly true of state legislatures, which serve as the laboratories of democracy in our federal system, trying out new legislative ideas in response to changing social circumstances. Unless privacy rights are to remain forever frozen, legislative deference regarding new privacy interests must be a two-way street. Courts should not act too quickly to require recognition of new interests. But they must also defer to legislatures when popular support for a new privacy interest motivates them to give it protection.

One might argue that the decision in Gonzales contravenes principle 4 of the conservative approach, because it allows a statutory outlier to stand, but I do not think this is the case. Statutory outliers that invade already established fundamental privacy interests need to be corrected, but statutory outliers that extend such interests to new circumstances stand on a different constitutional footing. As to such interests there is no constitutional "presumption" either for or against liberty. The only operating presumption, therefore, is the one that requires deference to legislative enactments as the product of a democratically representative process. Just as with laws prohibiting assisted suicide, laws allowing medical assistance for death with dignity should be upheld if there is an abstract rational justification for the state's choice.

This is not to say that Congress is without power to displace the decision of the state of Oregon through the preemptive effect of federal law. To the contrary, Congress could, no doubt, use one or more of its enumerated powers to enact uniform federal procedures governing end-of-life medical decisions, as the majority in Gonzales acknowledged. Under Glucksberg, Congress could, if it chose, prohibit affirmative medical assistance with dying without contravening due process. But for the same

102. See id. at 921-22 (recognizing Oregon law as careful experiment in state medical regulation).
103. See id. at 923 (stating that "there is no question that the Federal Government can set uniform standards in these areas").
104. The closer question would be whether Congress has constitutional authority to prohibit medically assisted suicide under its Article I enumerated powers. See United States v. Lopez, 514 U.S. 549 (1995). Lopez might raise some questions about the scope of Congress's power to do so, but under Gonzales v. Raich, 125 S. Ct. 2195 (2005), which upheld federal law prohibiting possession and use of locally cultivated marijuana for medicinal purposes, Congress's authority over interstate commerce in controlled substances would probably provide a suffi-
reasons as the Court outlined in *Glucksberg*, Congress should, as a matter of policy, take such a step only after careful deliberation, and only with the clarity that the Court found missing in the legislative record of the federal drug laws implicated in *Gonzales*. The Court’s reluctance, in the absence of such clear evidence, to infer statutory authority for federal administrative preemption of state legislation extending rights of privacy thus fits with *Glucksberg*’s view of the important role played by state legislatures in setting new directions for the right of privacy.

VI. CONCLUSION

To scholars and advocates with a progressive orientation, the conservative view of privacy I have developed in this Article probably seems unduly narrow and cramped, with too much emphasis on history and legislative direction, too narrow a focus on legislative outliers, too little room for judicial creativity and leadership and too little emphasis on the functional importance of privacy interests in the lives of ordinary individuals. But the choice going into the twenty-first century may be between a conservative vision of the constitutional right of privacy, and no vision of privacy at all. Given the relative youth and conservatism of President Bush’s two recent appointments to the Court, as well as the other Court demographics discussed at the beginning of this Article, a liberal Court majority generously extending the doctrine of constitutional privacy seems like a fairly unlikely prospect, probably for at least a generation. If the right of privacy is to last through that period, it must do so as a conservative doctrine, framed in terms that speak to important conservative jurisprudential principles. Advocates seeking favorable rulings from the Court must frame their arguments in those terms, and scholars seeking to influence Court developments must, at least, take those terms into account.

Can privacy succeed as a conservative constitutional doctrine? The answer ultimately depends on the votes of the Court’s conservative Justices. It is at least worth noting, however, that the right of privacy found its earliest expression in Court decisions hailing from a largely conservative period, and that the second Justice Harlan, who played an instrumental role in the recognition of the constitutional right of privacy, was regarded as one of the Warren Court’s more conservative Justices. End-of-life medical dilemmas, like those involved in *Cruzan* and *Glucksberg*, and parental

rights issues, like those in *Troxel*, strike conservative and liberal families alike, without regard to their politics. The impulses toward liberty, autonomy and personal responsibility in making life’s fundamental choices are as libertarian as they are liberal. They are, I think, uniquely American. For this reason, the constitutional right of privacy should continue through what is likely to be a conservative period in Supreme Court history.