BYU Law Review

Volume 2001 | Issue 3 Article 4

9-1-2001

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In assessing the interplay of a statutory scheme and the Constitution, the usual question is whether the drafters of the code have taken sufficient account of the constitutional terrain. This is certainly a fair question when it comes to the American Law Institute's ("ALI") *Principles of the Law of Family Dissolution* ("*Principles*") because the *Principles* include significant innovations in the public regulation of intimate relationships, an area in which that terrain often has proved treacherous.[1] The question seems especially salient in connection with chapter 2's custody provisions in the wake of the Supreme Court's recent disapproval of Washington's third-party visitation law in *Troxel v. Granville*.[2] But certain innovations in the ALI *Principles* seem to warrant turning the question around to ask whether the judges who craft the evolving constitutional doctrines protecting family autonomy have taken sufficient account of the ALI.

Plainly, one of the central insights of the ALI *Principles* is their appreciation of the enormous complexity and diversity of families and the ways in which they order their relationships. This is perhaps most obvious in chapter 2's redefinition of "parent" to include not

* This article was presented at the Symposium on the ALI *Principles of the Law of Family Dissolution*, held at Brigham Young University's J. Reuben Clark Law School on February 1, 2001. I am grateful to the other participants in this symposium who offered many helpful and insightful comments on an earlier draft of this article, and to Lynn Wardle for inviting me.

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1. The *Principles*, set out in separate chapters addressing custody, child support, property division, and support for spouses and domestic partners, do not purport to be a restatement of family law, but rather a statement of recommended principles. *See Foreword* to PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS, xiii (Proposed Final Draft, Part I, Feb. 14, 1997).

2. 530 U.S. 57 (2000). Although the Court struck down only the application of the law in that case, the Justices also expressed more general disapproval of Washington's "breathtakingly broad" visitation statute. *Id.* at 67 (O'Connor, J., plurality opinion). For a more complete analysis of that case, see David D. Meyer, *Lochner Redeemed: Family Privacy After* Troxel *and* Carhart, 48 UCLA L. REV. 1125 (2001).

only biological and adoptive parents, but also those who have played the caregiving role of a parent.[3] Also eye-grabbing is chapter 2's matter-of-fact contemplation that a child may have more than two (and perhaps even more than three or four[4]) parents at a time and that circumstances might justify granting primary custodial responsibility to a nontraditional "parent," even over the objections of a fit biological or adoptive parent.[5] The drafters' sensitivity to diversity and nuance extends beyond family form and also includes the dynamics of family interaction, as well. The *Principles*' abandonment of the traditional bifurcation of "custody" and "visitation" in favor of the unified term "custodial responsibility," consisting in most cases of whatever caregiving or parenting role each adult performed before the court's intervention,[6] reflects the drafters' recognition that the roles of individual parents cannot be pigeonholed into a few discrete categories, but in fact exist across a vast and fuzzy spectrum.[7]

In this aspect, the *Principles*' drafters generally have served America's families, and especially its children, well.[8] The *Principles*

3. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.03(1)(a)–(c) (Tentative Draft No. 4, Apr. 10, 2000) [hereinafter PRINCIPLES (Tentative Draft No. 4)].

4. *Id.* § 2.21 cmt. b (suggesting scenario in which a child might have four parents—two legal and two de facto—simultaneously).

5. *Id.* §§ 2.09, 2.21(1)(a)(i)–(ii).

6. *Id.* § 2.09; *see generally* Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 478–82 (1999).

7. The drafters explained the change in chapter 1:

> The traditional "custody" and "visitation" terminology symbolize and help to perpetuate the adversarial, win-lose nature of the process for determining arrangements for children after a family breakdown. . . . Once planning for the child at divorce is viewed as a more dynamic and complex process, these terms are inadequate. Chapter 2 uses "custodial responsibility" to encompass all forms of custody and visitation. This shift in terminology expresses the ordinary expectation that both parents have meaningful responsibilities for their child at divorce; the only question is what those responsibilities will be. Likewise, the term "decision-making responsibility" reframes the traditional concept of "legal custody" to better connote a division of authority to be exercised on behalf of the child, rather than a status won by one parent at the expense of the other. The changes in terminology are superficial, but they may help to reconstruct the nature of disputes over children from who will possess and control children to what adjustments in family roles will be most appropriate for the child.

PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS ch. 1, at 9 (Tentative Draft No. 3, Part I, Mar. 20, 1998) [hereinafter PRINCIPLES (Tentative Draft No. 3, Part I)]; *see also id.* § 2.03 cmt. e.

8. Notwithstanding significant differences in emphasis among competing theories of

do not seek to "deconstruct" the theoretical "American family" so much as to "reconstruct"[9] the *judicial process* so that it will do less damage to real, living families who find themselves splintered by internal discord.[10] No family is threatened with destruction by a legal regime that seeks to understand how families actually live in the here and now and to honor children's need for stability and continuity at a time of upheaval and vulnerability. Rather than steer families toward some preferred model of child rearing, chapter 2's overriding goal is to ensure that parenting practices the parties saw fit to establish for their children before a family rupture are preserved thereafter to the extent possible. In this sense, as Dean Katharine Bartlett has rightly observed, the *Principles* are not "family[]standardizing" but "family enabling."[11]

Yet the success of the ALI's approach depends crucially on the readiness of constitutional doctrine to assimilate the ALI's own insight. Several of the most important innovations in chapter 2 would be difficult to square with a constitutional doctrine that conceives of family liberties in rigid, all-or-nothing terms. If legal parents, for example, really do have a fundamental right to the "care, custody, and control" of their children, as the Supreme Court has insisted as recently as last year,[12] and if this is really to mean that any meaningful state intervention trammeling a parent's choices must survive strict scrutiny, as many have understood the Court's position, then several of the ALI's directives are in doubt. The ALI *Principles* fare much

child development, "[n]ear consensus does exist . . . for the principle that a child's healthy growth depends in large part upon the continuity of his personal relationships." Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 902 (1984); *accord* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 630–32 (1992) ("[c]hild development experts emphasize the harmful impact of the disruption associated with divorce, and the link between continuity of the parent-child relationship and healthy child development.").

9. PRINCIPLES (Tentative Draft No. 3, Part I), *supra* note 7, at 9.

10. By its own terms, chapter 2's provisions on custody and child rearing apply only if the parents are separated or if there has been some disruption in the "child's residence with a de facto parent." *See* PRINCIPLES (Tentative Draft No. 3, Part I), *supra* note 7, § 2.01. This is important because it substantially limits the opportunities under chapter 2 for uninvited incursions upon what is often characterized as the "intact family." *See infra* Part II.A.

11. Katharine T. Bartlett, *Saving the Family From the Reformers*, 31 U.C. DAVIS L. REV. 809, 819 (1998).

12. *See* Troxel v. Granville, 530 U.S. 57, 66 (2000) (O'Connor, J., plurality opinion); *see also, e.g.*, Santosky v. Kramer, 455 U.S. 745, 758–59 (1982) (quoting Lassiter v. Dep't. of Soc. Servs., 452 U.S. 18, 27 (1981)).

better, however, if the Constitution's regard for family privacy is understood in more nuanced terms as offering a range of protection that depends upon the particular family relationship at stake and the quality and depth of the state's intrusion—in other words, if the Constitution's appreciation for the diversity and complexity of family life is as finely tuned as the ALI's.

I. THE CONSTITUTION AS QUICKSAND

Under one view, the constitutional terrain might appear to hold quicksand for the sort of innovations proposed by the ALI. The Supreme Court, after all, has observed "that a natural parent's 'desire for and right to the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right."[13] In an otherwise deeply splintered decision last spring, one of the few propositions upon which the Justices could readily agree in *Troxel* was that the constitutional right of parents "to make decisions concerning the care, custody, and control of their children" is "fundamental."[14] Under well-worn due process and equal protection doctrine, that ranking implies "the most rigid scrutiny"[15] of unwanted state incursions and a narrow field for legislative experimentation.[16]

Two recurring themes of the family privacy doctrine, in particular, would seem to pose real danger for the sort of innovation championed by the ALI *Principles*. The first is the dominant *traditionalism* of the doctrine and the second is its oft-purported *absolutism*.

13. *Santosky*, 455 U.S. at 758–59 (quoting *Lassiter*, 452 U.S. at 27).

14. *Troxel*, 530 U.S. at 66 (O'Connor, J., plurality opinion); *accord id.* at 76–77 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring); *id.* at 86 (Stevens, J., dissenting); *id.* at 95–96 (Kennedy, J., dissenting). Only Justice Scalia had doubts about the fundamentality of parents' child-rearing rights under the Constitution. *See id.* at 91 (Scalia, J., dissenting) (concluding that court-ordered visitation implicates no fundamental right of parents).

15. Loving v. Virginia, 388 U.S. 1, 11 (1967).

16. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 10.2, at 644 (1997) (stating that "certain aspects of family autonomy [including parental child-rearing] are fundamental rights and that governmental interference will be allowed only if strict scrutiny is met"); ALLAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS § 2.5, at 72–85 (1998) (assuming strict scrutiny applies); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.28, at 866 (6th ed. 2000) (anticipating that Court would apply strict scrutiny in *Troxel*).

A. Traditionalism

The traditionalism is surely most apparent in the way in which courts define the "family" entitled to constitutional protection. The Supreme Court often has sought validation for its enforcement of substantive due process in deeply rooted societal consensus about the outer limits of governmental power. In the specific context of family privacy rights, this has meant rooting the protection of emotional relationships in traditional conceptions of what counts as "family." The bond between a grandson and his grandmother, for example, was said to warrant special constitutional protection against state encroachment in *Moore v. City of East Cleveland*[17] because society had long venerated the choice of extended lineal families to live together, at least "in this degree of kinship."[18] By contrast, society's traditional disinclination to regard unrelated cohabitants as "family" permitted a city to ban such households without triggering any heightened constitutional protection.[19] Embedded societal norms permit a man and a woman to claim "family" status in their decision to marry but preclude other combinations.[20] No matter how strong the emotional bonds between unmarried cohabitants (or between other unconventional intimates, such as a biological father and the daughter he conceived during an extramarital affair[21]), such individuals simply fall outside the traditional idea of "family"; therefore, no special justification is required by the Constitution for measures intruding upon their relations.

Moreover, even when the constitutional claimants unquestionably qualify as "family" under traditional norms, the Court has looked to traditional consensus in evaluating the permissibility of particular regulatory schemes. The Court has been especially wary of legislative initiatives that seem novel or experimental. For example, in striking

17. 431 U.S. 494 (1977).

18. *Id.* at 505–06 (Powell, J., plurality opinion).

19. *See* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 3, 8–9 (1974).

20. *See* Planned Parenthood v. Casey, 505 U.S. 833, 984 (1992) (Scalia, J., dissenting); Zablocki v. Redhail, 434 U.S. 374, 398–99 (1978) (Powell, J., concurring); Dean v. Dist. of Columbia, 653 A.2d 307, 332–33 (D.C. 1995); Baehr v. Lewin, 852 P.2d 44, 55–56 (Haw. 1993) (interpreting parallel privacy guarantee of state constitution); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 32–33; *but see* Brause v. Bureau of Vital Statistics, 1998 WL 88743, at *4–5 (Alaska Super. Ct. Feb. 27, 1998) (interpreting parallel privacy guarantee of state constitution).

21. *See* Michael H. v. Gerald D., 491 U.S. 110, 123 & n.3 (1989).

down a state's efforts to restrict remarriage by delinquent child-support obligors in *Zablocki v. Redhail*,[22] several Justices made clear that the "unprecedented" nature of the experiment heightened the state's constitutional burden.[23] "The Due Process Clause requires a [greater] showing of justification," Justice Powell explained, "'when the government intrudes on choices concerning family living arrangements' in a manner which is contrary to deeply rooted traditions."[24]

Of course, the Court has not always hewed so closely to tradition in marking the constitutional boundaries of family. In its more generous moments, the Court has upheld the fundamental right to marry among some couples whose relationships plainly could not claim deep historical veneration, including interracial couples in the 1960s[25] and inmate couples in the 1980s.[26] More to the point for chapter 2 of the ALI *Principles*, the Court left the door open in *Smith v. Organization of Foster Families for Equality and Reform*[27] to the possibility that a substantial emotional relationship between a child and a nontraditional caregiver might warrant constitutional protection under principles of family privacy.[28] Yet, in doing so, the

22. 434 U.S. 374 (1978).

23. *Id.* at 402–03 (Powell, J., concurring); *id.* at 404 (Stevens, J., concurring); *see also id.* at 395 (Stewart, J., concurring) ("A legislative judgment so alien to our traditions . . . offends the Due Process Clause of the Fourteenth Amendment.").

24. *Id.* at 399 (Powell, J., concurring) (citation omitted).

25. Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (finding a fundamental right for interracial couples to marry).

26. Turner v. Safley, 482 U.S. 78 (1987) (finding a fundamental right for inmates to marry while incarcerated); *see also Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part) (acknowledging that the "mode of historical analysis . . . may be somewhat inconsistent with our past decisions in this area," including *Loving* and *Turner*); *id.* at 137–40 (Brennan, J., dissenting).

27. 431 U.S. 816 (1977).

28. Although in some cases the Court has conceived of family status in categorical terms—compare, for example, Moore v. City of East Cleveland, 431 U.S. 494 (1977), with Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974)—in which the line of constitutional protection for family kinship was drawn at individuals related by "blood, adoption, or marriage"—in other cases, the Court has meandered toward a somewhat more functional understanding of family. In its cases dealing with unwed fathers, for example, the Court has made constitutional status as a parent depend not upon paternity alone, but also upon whether he has "act[ed] as a father" toward his child. Lehr v. Robertson, 463 U.S. 248, 261–62 (1983). The Court also acknowledged in *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 844–45 (1977), that "a deeply loving and interdependent relationship between an adult and a child in his or her care [—and one that *might* warrant constitutional protection—] may exist even in the absence of blood relationship.".

Court left no doubt that the claim of any such unconventional "family-like association"[29] must give way in conflict with that of the traditional, "natural family."[30] Although the Court allowed that it could not "dismiss the foster family as a mere collection of unrelated individuals,"[31] the foster family nevertheless lacked the historical veneration deemed crucial in *Moore*; any constitutional interests the foster family might claim would be "substantially attenuated" compared to those of a "natural family." The recognition of such a constitutional hierarchy, grounded directly in historical notions of a "natural" family, poses obvious difficulty for a project that would redefine basic family roles and reassign traditional prerogatives.[32]

B. Absolutism

A second current in family privacy jurisprudence, also troublesome for the ALI *Principles*, is a tendency to conceive of the relevant constitutional restraints in absolute terms. The Supreme Court has encouraged this tendency by regularly employing grandiose rhetoric in describing the Constitution's regard for family liberties, asserting, for example, that the document carves out "a 'private realm of family life which the state cannot enter.'"[33] It is, of course, quite impossible to reconcile this rhetoric with a succession of cases upholding a wide

29. *Smith*, 431 U.S. at 846.

30. *Id.* at 846–47. Recently, one federal court extended this holding to deny constitutional protection to a foster family even in the absence of any conflicting claim by the child's "natural family." *See* Lofton v. Kearney, 157 F. Supp. 2d 1372 (S.D. Fla. 2001). The court held that a foster parent could claim no constitutional interest in "family integrity," even after the foster child had been freed for adoption. While acknowledging that the foster parent and child had established a "deeply loving and interdependent relationship" during their years together, one that was "as [emotionally] close" as between any parent and child, the court concluded that the unconventional origins of the relationship in a putatively temporary foster care arrangement meant they had "no right to exclude the State from their family lives." *Id.* at 1379–80.

31. *Smith*, 431 U.S. at 844–45.

32. Indeed, a constitutional preference for the "natural" family would seem to imply that even adoptive parents would be at some disadvantage in a child rearing or custody dispute with a biological parent. *See* Lloyd R. Cohen, *Rhetoric, the Unnatural Family, and Women's Work*, 81 VA. L. REV. 2275, 2277 (1995) ("To the extent that the word 'natural' is used with respect to familial relations, it is to describe a biological relationship as distinct from a social or legal relationship, as in 'natural parents' as opposed to 'adoptive parents.'"). If so, plainly a new class of "parents" who possess neither a biological nor an adoptive tie with a child would occupy a still more precarious position in the constitutional hierarchy.

33. Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

swath of public intrusions upon marriage, procreation, child rearing, and related liberties.[34] Yet, for the most part, the Court itself has managed to combine its penchant for exaggerated privacy rhetoric with a pragmatic realism in deciding actual cases.[35] Lower court judges, however, especially state court judges who most often encounter challenges to family law measures, have been less successful in marrying platitude and pragmatism.

Taking the Court at its word about the inviolable sanctity of the family, state and lower federal courts have often analyzed family privacy claims in rigid, categorical terms. Under this approach, virtually *any* substantial incursion on a parent's child rearing authority must be tested by the same grueling constitutional standard.[36] Given the ranking of parental child rearing as a fundamental right, these courts reason that any but the most incidental burdens can be sustained only if the government proves that the action is necessary to serve a compelling public interest.[37] What qualifies as "compelling," moreover, is usually fixed without regard to the magnitude of the state's intrusion. Indeed, it is common for state courts to look to cases involving the termination of parental rights or a permanent loss of cus-

34. For a fuller examination of the disjunction between the rhetoric and reality of family-privacy doctrine, see David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 531–54 (2000).

35. *See id.* Thus, in the very case in which the Court first insisted that there existed a "private realm of family life which the state cannot enter," the Court went on to uphold state intervention that overruled a guardian's decision to enlist the aid of her niece in religious leafletting. *See Prince*, 321 U.S. at 166.

36. I certainly do not mean to suggest that lower courts uniformly follow this approach. To the contrary, the courts follow widely divergent approaches in family-privacy cases. *Compare, e.g.*, Nunez v. City of San Diego, 114 F.3d 935, 946 (9th Cir. 1997) (subjecting juvenile curfew law, which intruded on parents' child rearing prerogatives, to strict scrutiny), *with* Hutchins v. Dist. of Columbia, 188 F.3d 531 (D.C. Cir. 1999) (en banc) (applying intermediate scrutiny in challenge to curfew law) *and* Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174, 179 (4th Cir. 1996) (suggesting that rational-basis scrutiny is appropriate), *cert. denied*, 519 U.S. 1111 (1997). My claim is only that the rigid, categorical approach is a common and recurring one.

37. *See, e.g.*, *Nunez*, 114 F.3d at 946 (applying strict scrutiny to juvenile curfew law that limited parents' ability to authorize late-night travels by their children); Alfonso v. Fernandez, 606 N.Y.S.2d 259, 265 (N.Y. App. Div. 1993) (applying strict scrutiny to state program to distribute condoms at public high schools), *leave to appeal dismissed*, 637 N.E.2d 279 (N.Y. 1994); Richard Garner, *Fundamentally Speaking: Application of Ohio's Domestic Violence Laws in Parental Discipline Cases—A Parental Perspective*, 30 U. TOL. L. REV. 1, 16 (1998) (concluding that all "[s]tate laws purporting to regulate parental discipline, directly or by implication," impinge upon parents' fundamental child-rearing rights and must be subjected to strict scrutiny).

tody in describing the showing necessary to justify a far lesser intervention, such as an order of unwanted visitation.[38]

In the *Troxel* case, for example, the Washington state supreme court held that because parents have a fundamental right to rear their children, including the authority to decide with whom their child will associate, any order for grandparent visitation over a parent's objection must survive strict scrutiny.[39] The only child welfare interest sufficiently strong to rank as "compelling," the court ruled, would be an interest in protecting a child from the infliction of serious harm.[40] By this view, however, the Constitution demands the same public justification for a relatively modest intrusion on parental prerogative, such as infrequent, brief visits with an extended family member,[41] as it does for a much more drastic intervention, such as depriving a parent of custody.[42]

The courts' absolutist bent can also exert pressure in the opposite direction, leading courts to minimize some constitutional safeguards

38. *See, e.g.*, *In re* Swanson, 2 S.W.3d 180, 188 (Tenn. 1999) (holding that the Constitution requires proof that "a parent is either unfit or will cause substantial harm to his or her child" to justify terminating parental rights); *In re* Askew, 993 S.W.2d 1, 3 (Tenn. 1999) (requiring same showing to justify granting custody to a nonparent); Hawk v. Hawk, 855 S.W.2d 573, 577 (Tenn. 1993) (requiring same showing to justify granting visitation to grandparents over parental objection).

39. *In re* Custody of Smith, 969 P.2d 21, 28 (Wash. 1998), *aff'd sub nom.* Troxel v. Granville, 530 U.S. 57 (2000); *accord* Hoff v. Berg, 1999 ND 115, 595 N.W.2d 285, 290 (N.D. 1999); Brooks v. Parkerson, 454 S.E.2d 769, 772–73 (Ga. 1995), *cert. denied*, 516 U.S. 942 (1995). Recently, in a case decided after the Supreme Court's decision in *Troxel*, the Maine Supreme Court reached the same conclusion. *See* Rideout v. Riendeau, 761 A.2d 291, 300–01 (Me. 2000).

40. *In re* Custody of Smith, 969 P.2d at 28–30.

41. The specific facts of the *Troxel* case involved quite substantial visitation with the grandparents, including one weekend every month, one week during the summer, and four hours on each of the grandparents' birthdays. *Id.* at 23. The court, however, did not suggest—and, indeed, implicitly rejected the notion—that lesser amounts of visitation could be justified by a lesser showing. *Id.* at 28–30 (stating broadly and without qualification that courts may order third-party visitation only upon proof of harm to child); *cf. id.* at 33–35 (Talmadge, J., dissenting in part) (arguing unsuccessfully for an approach that would correlate the strength of the requisite public interest with the specific amount of visitation allowed).

42. *See id.* at 33–35 (Talmadge, J., dissenting); *see also, e.g.*, *In re* A.R.A., 919 P.2d 388, 391–92 (Mont. 1996) (holding that parent may not constitutionally be denied custody absent proof of "abuse, neglect, or dependency"); *In re* M.M.L., 900 P.2d 813, 819 (Kan. 1995) (holding that parent may not constitutionally be denied custody absent proof of unfitness or serious harm to child). Indeed, the Constitution permits the complete and irrevocable *termination* of parental rights based upon clear and convincing evidence of parental unfitness, including the infliction of serious harm to a child by means of neglect or abuse. *See* Santosky v. Kramer, 455 U.S. 745 (1982).

while they exaggerate others. When courts are reluctant to bring down the boom of strict scrutiny on particular governmental regulation, for example, the only recourse under an absolutist conception of family privacy is to hold that the regulated activity or relationship falls outside the scope of the fundamental right.[43] Thus, in some recent cases courts have held that no special constitutional scrutiny is required of laws forcing parents to conform their educational plans to state standards,[44] to produce a child for visitation by extended relatives,[45] or even to appear regularly in court to defend against repeated petitions to terminate parental rights,[46] all on the rather implausible ground that these burdens were so minimal that they simply did not register on the constitutional radar. In this way, the all-or-nothing character of conventional fundamental rights analysis can lead to distortions at both ends of the spectrum.

In summary, the doctrinal currents of traditionalism and absolutism combine to spell trouble for certain of the ALI's more innovative custody provisions. Traditionalism leads the courts to recognize as holders of constitutional privacy rights only those persons whose claims to family status have long-standing societal approval.[47] Non-traditional family members, or even extended members of a traditional family,[48] may then be unable to invoke any privacy interests of their own with which to offset the competing claims of a traditional

43. *See* Meyer, *supra* note 34, at 561–65.

44. *See* People v. Bennett, 501 N.W.2d 106 (Mich. 1993).

45. *See* Jackson v. Tangreen, 18 P.3d 100 (Ariz. Ct. App. 2000) (holding, even after the Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), that because forced visitation with a grandparent is a sufficiently minimal intrusion on parental rights, it does not trigger strict scrutiny), *cert. denied*, 122 S. Ct. 351 (2001); *In re* G.P.C., 28 S.W.3d 357, 365–66 (Mo. Ct. App. 2000) (same).

46. *See* Phelps v. Sybinsky, 736 N.E.2d 809 (Ind. Ct. App. 2000) (holding that law requiring mentally ill parents with children in state custody to appear in court every eighteen months to defend against action to terminate parental rights does not infringe sufficiently on parents' fundamental right to trigger strict scrutiny).

47. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 122–23, 123 n.3 (1989) (Scalia, J., plurality opinion) (holding that man who fathered daughter in adulterous relationship with married woman could not claim fundamental privacy interest in relationship because society did not "respect" their parent-child relationship).

48. *See* Reno v. Flores, 507 U.S. 292, 302–06 (1993) (concluding that alien children in the custody of immigration authorities had no fundamental right to be released to the custody of an extended relative omitted from a statutory list); *cf.* Moore v. City of East Cleveland, 431 U.S. 494, 505–06 (1977) (finding constitutional protection for blood relatives "*in this degree of kinship*") (emphasis added).

family member.[49] At the same time, the absolutist impulse pushes the courts to demand exceptional justifications—such as proof of parental "unfitness" or the need to avoid "substantial harm" to a child—even for relatively minor interventions on behalf of a nontraditional family member.

C. Estoppel and De Facto Parents

The forces of traditionalism and absolutism might be expected to whipsaw the provisions in sections 2.03, 2.09, and 2.21 of the *Principles* because they confer parental status on certain caregivers notwithstanding their lack of any biological or adoptive relationship to a child. Those provisions treat an unrelated adult who has lived with and provided substantial care for a child as a "parent" who is presumptively entitled to at least some share of future custodial responsibility.[50] If the adult has acted as a parent to the child as a result of a good-faith, but mistaken, belief in his paternity or as a result of a coparenting agreement predating the child's birth, then the adult is considered a "parent by estoppel" with a claim to custody that is precisely equal to that of a legal (i.e., biological or adoptive) parent.[51] If the adult assumes a parenting role at some later date with the consent of the legal parent (as is customarily true of stepparents, for example), and performs that role while living with the child for at least

49. *See, e.g.*, Rideout v. Riendeau, 761 A.2d 291, 301 n.16 (Me. 2000) (rejecting contention that grandparents who helped to rear grandchildren might have countervailing constitutional interests of their own in continued contact with their grandchildren); *In re* Thompson, 11 S.W.3d 913, 923 (Tenn. App. 1999) (concluding that former live-in, same-sex partners who had helped to rear children could assert no constitutional privacy interest in maintaining relationship with children following breakup with children's biological mother; "we are unaware of . . . any prior controlling precedent that has utilized the concept of either *de facto* parenthood and/or *in loco parentis* to extend constitutional parental rights . . . ."). *But see In re* Guardianship of Zachary H., 86 Cal. Rptr. 2d 7, 16–17 (Cal. Ct. App. 1999) (holding that a child had a fundamental constitutional liberty interest in remaining in the custody of nonparent caregivers).

50. PRINCIPLES (Tentative Draft No. 4), *supra* note 3, § 2.03.

51. *Id.* §§ 2.03(1)(b), 2.21(1). This would represent a substantial change of law for many jurisdictions. *See, e.g.*, Van v. Zahorik, 597 N.W.2d 15 (Mich. 1999) (finding that man who had lived with and helped raise children in mistaken belief that he was their biological father had no legal basis for seeking custody or visitation after separation from children's mother); Price v. Howard, 484 S.E.2d 528 (N.C. 1997) (concluding that man in same situation could seek custody only by proving that biological parent had acted in a manner contrary to responsible parental role); *see also* PRINCIPLES (Tentative Draft No. 4), *supra* note 3, § 2.03 Reporter's Notes cmt. b (acknowledging that, under current law, "[m]any cases decline to apply any equitable theory, even under very compelling circumstances").

two years, the adult is classified as a "de facto parent."[52] A de facto parent is also presumptively entitled to some share of custodial time, although not to a "majority" of custodial responsibility.[53]

The difficulty this scheme will face under conventional constitutional analysis is that all these adults traditionally have been considered legal "strangers" to the child, barred from any child rearing role over a parent's objection except upon some quite extraordinary showing, such as the parent's unfitness. Consider, for instance, the following scenarios contemplated by the ALI *Principles*: (1) a stepfather who, having formed a close and loving relationship with his stepson, seeks custody following the death of the child's mother; (2) grandparents, or a close friend, who have served as a young girl's primary caregivers for years and now resist the mother's attempt to reclaim custody after having pulled her life together; and (3) a man who helps to rear two children in the mistaken belief that he is their father and who resists the mother's demand for exclusive custody after a falling out. All these caregivers would be considered "parents" under the ALI *Principles*. The stepfather and grandparents would be classified as "de facto parents,"[54] and the man in the third scenario a "parent by estoppel."[55] As such, the courts would be directed to give them a continuing role in rearing the child, one substantially similar to the role they played before the falling out with the legal parent brought them into court.[56] The parent by estoppel and the biological mother would be treated identically in any custody contest. Though de facto parents are at some disadvantage to other parents in seeking custody, if the legal parent were found not to have been "performing a reasonable share of parenting functions," the court would be permitted to allocate even primary custodial responsibility to the de facto parent without any need to demonstrate that "the alternative would cause harm to the child."[57]

Yet, it is a measure of the challenge confronting the ALI that

52. PRINCIPLES (Tentative Draft No. 4), supra note 3, § 2.03(1)(c).

53. *Id.* § 2.21(1)(a).

54. Each would qualify as a "de facto parent" so long as he or she had resided with the child for at least two years and had performed a leading or co-equal caretaking role for nonpecuniary reasons with the agreement of the legal parent. *See id.* § 2.03(1)(c).

55. *See id.* § 2.03(1)(b)(ii).

56. *See id.* §§ 2.09, 2.10 (directing courts, within certain limits, to seek to allocate custodial responsibilities in a manner that would replicate the allocation that existed before the dispute).

57. *Id.* § 2.21(1)(a).

state supreme courts have decided these very cases for "natural" parents on constitutional grounds.[58] Lacking traditional recognition as parents, long-time caregivers lacking biological or adoptive ties are classified as nonparents, or legal "strangers," for constitutional purposes.[59] It is then said to follow that the state may intrude on parental authority to foster their continued involvement in a child's life only on proof of a "compelling interest," such as the need to spare the child from substantial harm or the clutches of an unfit parent.[60] This standard obviously leaves little room for custody orders favoring a caregiver who is not a legal parent.[61] As one judge recently observed, "[i]t is a rare case in which a *de facto* parent can credibly argue that custody with *either* natural parent would really jeopardize

58. *See, e.g.*, *In re* Askew, 993 S.W.2d 1 (Tenn. 1999) (transferring custody to mother from family friend who had raised child for approximately eight years); Price v. Howard, 484 S.E.2d 528, 536–37 (N.C. 1997) (holding that man who had been child's primary caregiver in mutually mistaken belief that he was the child's biological father could retain custody against mother's claim only if she was unfit or acted in a manner inconsistent with presumed parental love); *In re* A.R.A., 919 P.2d 388 (Mont. 1996) (denying custody to stepfather); *In re* Guardianship of Williams, 869 P.2d 661 (Kan. 1994) (transferring custody from long-time friend/guardian to mother); Petersen v. Rogers, 445 S.E.2d 901 (N.C. 1994) (transferring custody from prospective adoptive parents, with whom child had been living after adoption had failed, to biological parents); Sheppard v. Sheppard, 630 P.2d 1121 (Kan. 1981) (transferring custody from grandparents to mother).

59. *See, e.g.*, *Petersen*, 445 S.E.2d at 906 (concluding that parents' fundamental right precludes custody claims by "strangers," including prospective adoptive parents who had been rearing child for extended period after adoption failed).

60. *See* Holland v. Holland, No. E1999-00586-COA-R3-CV, 2000 WL 337545, at *6 (Tenn. App. Mar. 31, 2000) ("Only if the Court first concludes that neither parent is fit and that awarding custody to either parent would put [the child] at risk of substantial danger of harm should the Court consider any other alternative custodian."); *In re* A.R.A., 919 P.2d at 392 (holding that the court may not "deprive a natural parent of his or her constitutionally protected rights [including awarding custody to a long-time, custodial stepparent] absent a finding of abuse and neglect or dependency"); *Sheppard*, 630 P.2d at 1127 ("[A] natural parent's right to custody of his or her children is a fundamental right which may not be disturbed by this State or by third persons [including grandparents who are a child's long-time, caregiving custodians], absent a showing that the natural parent is unfit."); *see also* Richardson v. Richardson, 766 So. 2d 1036, 1039 (Fla. 2000) (striking down statute permitting grandparents to compete for custody with parents under a "best interests of the child" standard); *In re* Askew, 993 S.W.2d at 4 (holding that parent may not constitutionally be denied custody in favor of a nonparent without proof of unfitness or substantial harm to child).

61. For a fuller discussion of the legal obstacles traditionally faced by a nonparent caregiver seeking to regain or retain custody against the wishes of a legal parent, see Bartlett, *supra* note 8, at 911–45; David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 793–98 (1999); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

the child."[62] To prove the point, consider that in recent months courts have ruled against nonparent caregivers on the basis that there were no constitutionally sufficient grounds to deny custody to a mother freshly acquitted of arranging the murder of the children's father and, in another case, to a mother who insisted upon leaving her young son each day in the care of a relative who had been previously convicted of sexually molesting a young boy.[63] Indeed, courts often are reluctant to find "harm" sufficient to override a parent's wishes, even when a child faces the prospect of losing all contact with a long-time nonparent caregiver.[64] Plainly, under this view, the ALI's directive—that "parents by estoppel" and "de facto parents" must share child rearing duties with legal parents without any showing that the legal parents are unfit or that the division of child rearing authority is necessary to avert substantial harm to the child—would be untenable.

II. A CONSTITUTIONAL ALTERNATIVE: SEEING FAMILIES IN SHADES OF GRAY

The main reason why the ALI's treatment of what current law calls nonparent caregivers scrapes up so hard against the conven-

62. John C. Sheldon, *Anticipating the American Law Institute's Principles of the Law of Family Dissolution*, 14 ME. B.J. 18, 28 (1999).

63. *See* Speagle v. Seitz, 541 S.E.2d 188 (N.C. 2000); Adams v. Tessener, 539 S.E.2d 324 (N.C. 2000).

64. In a recent Virginia case, for example, a court held that a father who gained custody of his son after being released from prison was constitutionally entitled to cut off contact with the foster parents who had raised the child since he was two months old. *See In re* Richardson, No. HK 1364-A, 2000 WL 869450 (Va. Cir. Ct. June 23, 2000). Notwithstanding expert testimony that "separation from the [foster parents] is the psychological equivalent to the death of a parent, placing [the child] in significant risk for depression, lowered self-esteem, and guilt in later years," *id.* at *2, the court concluded that the boy would not "suffer actual harm" sufficient to justify second-guessing the father's wishes, *id.* at *4; *see also, e.g.*, V.C. v. M.J.B., 725 A.2d 13, 23 (N.J. Super. Ct. App. Div. 1999) (Braithwhite, J., concurring in part & dissenting in part) (concluding that "the potential for serious psychological harm [would be], at best, a speculative possibility" if a girl were denied future contact with the woman who had helped to raise her since birth as her "other mother"), *aff'd*, 748 A.2d 539 (N.J. 2000), *cert. denied*, 69 USLW 3096 (U.S. 2000); *In re* Petition of Doe, 638 N.E.2d 181, 190 (Ill. 1994) (Heiple, J., concurring) (doubting that the four-year-old boy, known as "Baby Richard," would suffer long-term psychological harm from being abruptly transferred from the home of the couple who had raised him since birth to the custody of the biological father he had never met). As Barbara Woodhouse has shown, these cases are consistent with a long line of cases which, "[a]lthough giving lip service to children's interests, . . . fail to reflect children's experience of reality." Woodhouse, *supra* note 61, at 1809–10.

tional understanding of family privacy is that the ALI discerns shades of gray within the family that are often obscured by a fixation on tradition and categorization. Conventional analysis, or at least the predominant strain of it found in the state courts, favors bright lines. Courts feel compelled to classify a caregiver either as a parent or as a "stranger"; all child rearing authority is then assigned to parents, to the exclusion of all others.[65] Only if the parent's shortcomings are so total as to constitute "unfitness"—thereby providing grounds for stripping parental rights and transforming the "parent" into just another "stranger"[66]—may a court carve out a child rearing role for a nonparent.

The ALI, too, differentiates between "parents" and "nonparents," but its conception of parenthood is broader and the exclusionary heft attached to the concept is less total. Under the ALI *Principles*, parents may come to their status not only by way of a clear marker, such as childbirth or a court decree, but also gradually through the slow adjustment of caretaking roles within a functioning family. Parenthood, moreover, is not a unitary status encompassing a single package of duties and entitlements. Instead, chapter 2 of the *Principles* comprehends gradations of "parents" (legal, de facto, and by estoppel), each supported by a distinctive child rearing role and each conferring its own distinctive set of legal entitlements. Rather than searching for a prevailing rights-holder among these caregivers—some winner who shall then be crowned "custodian"—the ALI *Principles* favor an accommodation that would provide for the ongoing involvement of them all.[67] The ALI's approach, in short, blurs the lines that conventional constitutional doctrine strives to make bright. Instead of condemning the ALI *Principles* for deviating from the traditional constitutional schemata of "parents" and "nonpar-

65. *See, e.g.*, Bartlett, *supra* note 8, at 879–91, 918–19.

66. *See, e.g.*, *In re* Adoption/Guardianship No. T98314013, 758 A.2d 552, 558 (Md. 2000) ("'[A]doption decrees cut the child off from the natural parent, who is made a legal stranger to his offspring.'") (quoting Walker v. Gardner, 157 A.2d 273 (Md. 1960)); A.J. v. L.O., 697 A.2d 1189, 1191–92 (D.C. 1997) ("[T]he termination of plaintiffs' parental rights . . . changed plaintiffs into legal strangers . . . to their biological children."); Weaver v. Roanoke Dep't of Human Res., 265 S.E.2d 692, 695 (Va. 1980) ("[T]ermination of the legal relationship between parent and child . . . renders the parent 'a legal stranger to the child.'").

67. The "approximation standard" of section 2.09, under which a court's allocation of custodial responsibility is to be based chiefly upon the division of child-rearing roles established by the parties before the court's intervention, was first proposed by Professor Elizabeth Scott. *See* Scott, *supra* note 8, at 637–43.

ents," "fitness" and "harm," it is worth pausing to consider whether the conventional understanding of family privacy could benefit from the ALI's more nuanced vision of child rearing roles. Indeed, there is reason to believe that the conventional account overstates the strength and rigidity of the rights assigned to traditional parents and that the obsessive focus on bright-line categorization that characterizes so many recent state court decisions is not mandated by the Supreme Court's cases. Rather, if more judges acquired the ALI's sense of possibility about the family and its sense of proportionality in evaluating governmental responses, they might find a way to protect the core constitutional values of family integrity and intimacy without doing violence to families that fall outside the boundaries of convention. Even before the Supreme Court's latest foray into family privacy in *Troxel*, there was an obvious disjuncture between the Court's sprawling rhetoric about family autonomy and its pragmatic toleration of wide-ranging intrusions on the family.[68] Language insisting that the family resides in a "private realm" beyond the reach of the state decorates opinions that, as in *Prince v. Massachusetts*,[69] conclude by upholding coercive measures to enforce conformity with public norms concerning the conduct of family life.[70] Close reading of the Court's cases involving marriage, parenting, and kinship suggests that, notwithstanding the broad language exalting the "fundamental" nature of family privacy rights, the Court in truth has applied something less than strict scrutiny in their defense.[71] Far from the absolutist's assumption of strict scrutiny for every incursion, the Court's cases reveal a willingness, at least implicitly, to tailor the nature and strength of judicial scrutiny to the facts of each family privacy controversy.[72] In some cases, the Court has seemed sharply in-

68. *See supra* text accompanying notes 33–35.

69. 321 U.S. 158, 166 (1944).

70. Having asserted in *Prince*, for example, that the Constitution recognizes a "private realm of family life which the state cannot enter," *id.*, the Court went on to hold that a guardian could be prosecuted for enlisting the aid of her niece in proselytizing on a public street corner. *Id.* at 168–69.

71. *See, e.g.*, Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1231 (1999) (discussing right to marry); Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949, 951–54 (1992) (same); Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 988–89 (1988) (discussing rights of child rearing); Meyer, *supra* note 34, at 536–48 (discussing full range of family privacy cases); Meyer, *supra* note 61, at 838–43 (discussing right of child rearing).

72. *See* Meyer, *supra* note 34, at 580–91.

tolerant of state meddling,[73] while in others, impatiently dismissive of a parent's prerogative.[74] Across this range of cases, the Court has appeared to adjust the rigor of its review, and, thus, the strength of the public justification required to sustain the state action.[75] Among the relevant determinants are the depth of the state's intrusion on the family, the extent to which the family is unified in resisting the intervention, and the degree to which the burdened family choice or relationship enjoys historical veneration.[76] A closer look at these factors suggests that the ALI *Principles* are, in fact, rather nicely dovetailed with the constitutional constraints.

A. Presence of Internal Discord Within the Family

First, the Court has been especially wary of state intervention when the family appears to be intact and united in opposition to the state's meddling and less so when the affected family members have already been fractured by some internal discord. For example, the Court considered it constitutionally relevant in *Santosky v. Kramer*[77] and *Wisconsin v. Yoder*[78] that the children who were the subjects of the state's protective intervention appeared to join their parents in opposing the effort.[79] By the same token, the Court has pointed to divisions within the family as a reason to qualify the Court's constitutional scrutiny. In the context of abortion, for example, the Court recognized from the beginning that "[t]he pregnant woman cannot be isolated in her privacy" because her interest in controlling the future of her pregnancy might conflict with that of her husband or

73. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding right of Amish parents not to comply with state compulsory schooling law).

74. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 178 (1976) (rejecting claim that parents have a constitutional right to send their children to a racially exclusionary private school); Prince v. Massachusetts, 321 U.S. 158 (1944) (rejecting claim that guardian had a constitutional right to enlist child's aid in street corner proselytizing).

75. *See* Meyer, *supra* note 34, at 580–91.

76. *See id.*; David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 583 (2001) (considering how these factors might apply to the question of nonparent visitation).

77. 455 U.S. 745 (1982).

78. 406 U.S. 205 (1972).

79. *See Santosky*, 455 U.S. at 760–61; *Yoder*, 406 U.S. at 230–31; *id.* at 237 (Stewart, J., concurring); *id.* at 238 (White, J., concurring). For a critique of the Court's assessment in *Yoder*, see Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53, 66–70 (1999).

even the "potentiality of human life" within her.[80] So, even before the Court expressly qualified its scrutiny in the form of the "undue burden" test,[81] the Court's sensitivity to the potential for intrafamily conflict over the abortion decision quite apparently led it to loosen the rigor of its review.[82]

The presence of internal family conflict is relevant to the judicial role for at least two reasons. First, the degree to which all family members have coalesced around a given choice seems plainly relevant to assessing the intrusive quality of the state's interference. The state's intrusion upon privacy is surely greater when all those affected are opposed to the intervention than when the family is internally divided and some have invited the state to break the impasse.[83] Second, internal family conflict may call into question an important assumption supporting the constitutional bias against state intervention in family life. The constitutional deference to parental prerogative, for instance, is often justified by the reasonable belief that parents ordinarily are better situated and more motivated than judges or bureaucrats to identify and promote the interests of their children.[84] When the family is fractured, however, there may be greater reason to suspect that self-interest will overtake or compromise a parent's usual impulses on behalf of children; correspondingly, there may be somewhat less reason to defer to parental judgment.[85]

This appears to cut in favor of reduced scrutiny of the ALI custody principles. The provisions for allocating custodial responsibility to "parents by estoppel" or "de facto parents," and, in fact, all provisions of chapter 2, come into play only when there has been some

80. *See* Roe v. Wade, 410 U.S. 113, 156–59 (1973).

81. *See* Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992).

82. *See* Daniel A. Farber & John E. Nowak, *Beyond the* Roe *Debate: Judicial Experience with the 1980's "Reasonableness" Test*, 76 VA. L. REV. 519, 523 (1990) (contending, before *Casey*'s adoption of the "undue burden" test, that the Court in fact applied a flexible standard of "reasonableness" in reviewing abortion regulations); Meyer, *supra* note 2, at 1172–74 & nn.239–55.

83. *See* Meyer, *supra* note 34, at 582–83.

84. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 601–02 (1979) ("[N]atural bonds of affection lead parents to act in the best interests of their children."); Margaret F. Brinig & F.H. Buckley, *Parental Rights and the Ugly Duckling*, 1 J. L. & FAM. STUD. 41, 54–55 (1999); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 940, 951–60 (1996); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2431–37, 2443–44 (1995).

85. *See* MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 137–38 (2000); Scott & Scott, *supra* note 84, at 2446–47.

division or upheaval within the family.[86] This limitation reflects a conscious desire by the drafters to avoid incursions upon intact, unified families.[87] This might be thought, of course, to beg the question whether the relevant "family" whose unity counts is defined to include the adult caregiver with whom a legal parent is feuding. If the nontraditional parental caregiver can be excluded for these purposes, then the remaining family may appear relatively unified in opposition to state intervention.[88] Here too, however, the ALI drafters have made a strong case for finding family fracture by conferring parental status only upon individuals who were brought within the family fold, as understood by the participants themselves, by the actions of a legal parent. Status as a "parent by estoppel," for instance, depends upon the existence of "a prior co-parenting agreement with the child's legal parent"[89] or on other actions or representations by a legal parent that led the "parent by estoppel" to assume the parental role.[90] Similarly, status as a "de facto parent" requires the formation of a parent-child bond either "with the agreement of a legal parent" or "as a result of a complete failure or inability of [a] legal parent to perform caretaking functions."[91] If a legal parent has actively engendered a sense of family that includes a "de facto parent" or "parent by estoppel," it makes sense to regard the family as divided when the two later come to an impasse over custody.[92]

86. *See* PRINCIPLES (Tentative Draft No. 3, Part I), *supra* note 7, § 2.01 (stating that custody principles apply only when parents are separated or "when the circumstances underlying a child's residence with a de facto parent substantially change").

87. *See id.* § 2.01 cmt. b (noting that "[t]he Chapter does not cover disputes between parents arising in the context of an intact, two-parent family. It also does not cover challenges by third parties to the authority of legal parents living together, or to the authority of a parent who is the child's only parent. Ordinarily, state intrusion into the intact one- or two-parent family is justified only under the state's abuse and neglect laws.").

88. Of course, even if the independent interests of the nonparent caregiver were entirely disregarded, there would remain a potential conflict of interest between the parent who seeks to exclude the nonparent and the child whose relationship with the caregiver is jeopardized.

89. PRINCIPLES (Tentative Draft No. 4), *supra* note 3, § 2.03(1)(b)(iii).

90. *Id.* § 2.03(1)(b)(ii)(A) (requiring "marriage to the mother or . . . actions or representations of the mother" instilling in the man "a reasonable good-faith belief that he was the child's biological father"); *id.*, § 2.03(1)(b)(iv) (requiring "an agreement with the child's parent" to assume "full and permanent responsibilities as a parent").

91. *Id.* § 2.03(1)(c)(ii).

92. *See* Rubano v. DiCenzo, 759 A.2d 959, 976 (R.I. 2000); *cf.* Price v. Howard, 484 S.E.2d 528, 537 (N.C. 1997) (emphasizing that, by leading man to believe that he was the father of her child, biological mother "chose to rear the child in a family unit with plaintiff being the child's de facto father").

B. Extent of State Intrusion

A second consideration affecting the rigor of constitutional review in past cases is the extent of the state's intrusion into the family. For example, the Court has justified heightened constitutional safeguards in actions to terminate parental rights specifically because of the "severity" of the state's intrusion.[93] Less drastic forms of state intervention, by contrast, have encountered less restrictive review.[94] On this score, the ALI's rejection of the "winner-take-all" mentality of traditional custody law and substitution of a new understanding in which caretaking and decision-making responsibility can be allocated and shared along a broad and complex continuum weighs strongly in favor of the chapter 2 provisions.

Part of the constitutional hostility to nonparent custody found in past cases is attributable to the assumptions that surround an award of custody under traditional law—namely, that it will elevate the custodian to a role of overwhelming dominance in the child's upbringing and relegate the noncustodial parent, for all practical purposes, to a distant sideline.[95] The ALI *Principles* emphatically reject that as-

93. Santosky v. Kramer, 455 U.S. 745, 765–66 (1982); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 118 (1996) (emphasizing the "unique kind of deprivation" involved in an action to terminate parental rights and recognizing that "[t]he object of the proceeding is 'not simply to infringe upon [a parent's] interest,' . . . 'but to end it'"); Lassiter v. Dep't. of Soc. Servs., 452 U.S. 18, 27 (1981) .

94. In Runyon v. McCrary, 427 U.S. 160 (1976), for example, Justice Stewart suggested that a law prohibiting a parent from sending her child to a private school would trigger more substantial review than a law merely restricting the educational program at the parent's chosen school. *Id.* at 178. The Court also has differentiated its review of various regulations restricting entry into marriage based upon "[t]he directness and substantiality of the [particular] interference with the freedom to marry." Zablocki v. Redhail, 434 U.S. 374, 387 n.12 (1978).

95. Traditionally,

> child custody law was built on a model of one custodial parent, i.e., sole custody. That parent was both decision-maker and provider of residential care for the child. The noncustodial parent had a very limited role, and the term used by most statutes to describe the rights and status of the noncustodial parent—visitation—was indicative of that limited role.

Marygold S. Melli et al., *Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin*, 1997 U. ILL. L. REV. 773, 776; *see also* Beck v. Beck, 432 A.2d 63, 65 (N.J. 1981) (observing that "[s]ole custody tends . . . to isolate children from the noncustodial parent" and engenders bitterness "because of the absolute nature of sole custody determinations, in which one parent 'wins' and the other 'loses'"); Scott, *supra* note 8, at 624 ("The typical sole custody arrangement under the best interests standard relegates fathers to the status of 'visitors,' sharply diminishing their parent-child contact and withdrawing their parental authority."). Certainly, many noncustodial fathers have complained bitterly that they

sumption and, instead, encourage a highly interactive arrangement in which respective parenting roles can be creatively and flexibly tailored to fit individual families.[96] Accordingly, an allocation of "custodial responsibility" under the ALI *Principles* to a de facto parent or parent by estoppel will typically entail a less drastic incursion upon the child rearing role of the legal parent. Under the ALI *Principles*, the legal parent is not reduced to a noncustodial parent with occasional visitation; rather, the parent will be given her own share of "custodial responsibility," which will presumptively include the right to participate in major life decisions for the child[97] and "sole responsibility for day-to-day decisions for the child while the child is in that parent's care and control."[98] Section 2.09, in addition, directs that courts grant legal parents, at a bare minimum, a sufficient amount of custodial time to foster a meaningful relationship with the child,[99] and section 2.21 goes still farther by requiring in almost all cases that the role of de facto parents be capped at something less than that assigned legal parents.[100]

Moreover, in crafting the precise allocation of parenting roles, the *Principles* direct that the leading determinant should be the past practices of the parties themselves, providing reassurance that any court-ordered allocation will rarely involve a substantial diminution of a parent's established interaction with a child.[101] In this way, the

felt sidelined by the visiting role assigned them by traditional custody law. *See, e.g.,* Scott & Scott, *supra* note 84, at 2447 & n.136 (citing studies supporting the conclusion that "[m]any fathers tend to find this non-custodial relationship artificial and unsatisfactory").

96. PRINCIPLES (Tentative Draft No. 3, Part I), *supra* note 7, § 2.06 cmt. a ("The parenting plan concept . . . presupposes, and affirms, a diversity of child-rearing arrangements, rather than subscribing to a pre-established set of statutory choices about what arrangements are best for children. . . . The parenting plan requirement encourages parents to customize their arrangements to take account of the family's own actual circumstances; if they cannot agree, other rules retain the focus on the family's actual experience, by focusing on the past caretaking practices of the parents.").

97. *See* PRINCIPLES (Tentative Draft No. 4), *supra* note 3, § 2.10(1).

98. *See id.* § 2.10(3).

99. *See id.* § 2.09(1)(a).

100. *See id.* § 2.21(1)(a) (proposing that the court ordinarily "should not allocate the majority of custodial responsibility to a de facto parent over the objection of a legal parent or a parent by estoppel who is fit and willing to assume the majority of custodial responsibility").

101. *See id.* § 2.09(1) (stating that "the court should be required to allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation"); *id.* § 2.10(1)(b) (stating that, in allocating significant decision making responsibility for a child, the court should consider "the level of each parent's

Principles are crafted to minimize the courts' impact upon the most valuable aspect of the parent-child relationship, "the emotional attachments that derive from the intimacy of daily association."[102]

C. Historical Veneration

A final factor affecting the aggressiveness of judicial review has been the extent to which the family relationships burdened or advanced by the state's intervention have enjoyed societal respect and approval.[103] Tradition affects not only the Court's definition of the "family" entitled to constitutional protection at the outset, but, even after that hurdle is cleared, the extent of the protection afforded.[104] This factor is perhaps something of a mixed bag for the ALI *Principles*. On one hand, chapter 2 is careful to honor traditional conceptions of family by recognizing and giving special importance to the relationship between a child and her legal parents (at least as compared to de facto parents), but it then requires legal parents to share their privileged status with a new category of "parents by estoppel," traditionally regarded as nonparents.[105] The ALI's provision for a new category of parents, with legal entitlements equal to those of

participation in past decision making on behalf of the child").

102. Lehr v. Robertson, 463 U.S. 248, 261 (1983) ("[T]he importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children," not simply "from the fact of blood relationship.") (quoting Smith v. Org. of Foster Families for Equal. and Reform, 431 U.S. 816, 844 (1977)); *see also* Troxel v. Granville, 530 U.S. 57, 98–99 (2000) (Kennedy, J., dissenting); *see also* PRINCIPLES (Tentative Draft No. 3, Part I), *supra* note 7, § 2.03 cmt. f ("Because caretaking functions involve tasks relating directly to a child's care and upbringing, they are likely to have a special bearing on the strength and quality of the adult's relationship with the child. For this reason, the Chapter makes each parent's share of past caretaking functions central to the allocation of custodial responsibility at divorce.").

103. *See* Meyer, *supra* note 34, at 589–91.

104. As noted earlier, for instance, the Court has appeared more skeptical of government regulatory measures that seem novel. *See supra* text accompanying notes 22–24; *see also* Meyer, *supra* note 34, at 589–90.

105. *See, e.g.*, PRINCIPLES (Tentative Draft No. 4), *supra* note 3, § 2.03(1)(b)(iv) (making status as a "parent by estoppel" dependent upon the prior consent or agreement of the child's legal parents); *id.* § 2.10(4) (entitling only legal parents and parents by estoppel to presumptive access to a child's school and health care records); *id.* § 2.21(1)(a) (entitling legal parents and parents by estoppel to a presumption of a "majority" of custodial responsibility); *id.* § 2.21(2)(a)(i) (making the ability of a grandparent to seek visitation dependent upon the consent of a legal parent or parent by estoppel); *see also id.* § 2.03 cmt. b (noting that "[a] parent by estoppel is afforded all of the privileges of a legal parent under this Chapter").

biological and adoptive parents, undoubtedly represents a substantial departure from traditional expectations. Yet the significance of the innovation is limited by the fact that it is impossible to attain the status of "parent by estoppel" without the effective consent of the child's legal parents.[106] That the legal parent voluntarily created the family arrangement in the first instance lessens not only the substantiality of the state's intrusion on autonomy in directing that the arrangement be sustained, but also the novelty of the state's undertaking.

In sum, notwithstanding some very real innovations, the ALI *Principles* do contain significant limitations on the ability of courts to engage in "social engineering" of family life.[107] Although the *Principles* do recognize new "parents," they also limit that status to people who have an unusually deep involvement with a child that is fostered in some way by the legal parent. The *Principles* also limit the intrusive quality of custody orders by reconceiving what a grant of custodial responsibility entails, and by seeking to carry forward each parent's pre-established childrearing role. Past Supreme Court cases suggest that these limitations should temper the rigor of any constitutional scrutiny. By keying the *Principles*' sense of "family" and their allocation of custodial roles in most cases to the parties' own past practices and evident preferences,[108] the ALI has substantially bolstered the *Principles*' claim to constitutionality. Typically, child custody standards have sought to enforce particular conceptions of good child rearing.[109] The maternal preference of the tender-years doctrine, for example, reinforced a normative vision of appropriate

106. *See id.* § 2.03(1)(b); *see also supra* notes 89–92 and accompanying text.

107. Indeed, as Barbara Woodhouse has pointed out, in some instances these limitations may be unduly rigid and may well prevent courts from protecting very substantial relationships between children and nonparent caregivers. *See* Barbara Bennett Woodhouse, Horton Looks at the ALI Principles (unpublished manuscript, on file with author); *see also* Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 WILLAMETTE L. REV. 769, 776 (1999) (concluding that "[t]he narrow definition [of 'de facto parent'] leaves the ALI's promise for nonlegal parents largely unfulfilled").

108. *See* Bartlett, *supra* note 11, at 852 (noting that "[p]ast caretaking is . . . likely to reflect actual parenting preferences, which means less distortion in the divorce bargaining process"); Scott, *supra* note 8, at 617, 633–37 ("Although contemporary families do not follow any single prescription regarding the allocation of parenting roles, the division of roles that a given couple adopts likely reflects internalized values and preferences . . . .").

109. *See* JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 180 (2000) (observing that "[c]ustody paradigms have always reflected the dominant ideology of the family"); Bartlett, *supra* note 6, at 472–77.

sex roles in parenting.[110] Presumptions in favor of joint custody express a distinctive ideal of shared parenting,[111] and the best interests standard permits individual judges to enforce their own particular values, whether based on an assessment of the moral character of parents, the quality of their parenting, or any of innumerable other subjective, contestable judgments.[112] The ALI's custody standard, by contrast, does not seek to advance any particular vision of the ideal family or good parenting, but is driven instead by the goal of identifying and sustaining the past child rearing choices of the particular family before the court. The ALI custody standard thus honors family diversity, but not because the ALI favors non-traditional family arrangements; rather, it honors family diversity because it expresses

110. Under the tender-years doctrine, "[a]ll things being equal, the mother is presumed to be best fitted to guide and care for children of tender years." *Ex Parte* Devine, 398 So. 2d 686, 691 (Ala. 1981). The basis for this presumption, as explained by the Washington Supreme Court, was the belief that "[m]other love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring." Freeland v. Freeland, 159 P. 698, 699 (Wash. 1916).

111. *See, e.g.*, Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, BERKELEY WOMEN'S L.J. 9, 32–33 (1986) (advocating a preference for joint custody on the grounds that it expresses a "norm of parenting" under which "both parents should, and will, take important roles in the care and nurturing of their children"); Scott, *supra* note 8, at 616, 625 (noting that "[p]roponents rely heavily on the normative claim that a rule favoring joint custody is superior because it announces a societal commitment to promoting the sharing of parental responsibilities"); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1941 & n.105, 1969 n.190 (2000) (observing that laws favoring joint custody "expressed support for equal sharing of child care responsibility" and that "the predicted role change did not occur" partly because the norm of equal sharing is "inconsistent with the private preferences of parents regarding custodial arrangements").

112. *See, e.g.*, David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 488 (1983) (observing that the "best interests" standard lacks any "objective content" and can serve as a vehicle for the advancement of virtually any set of values); Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315, 1356 (1994) (describing the "best interests" standard as "an empty vessel usually filled by the preconceptions of judges and legislators about what they imagine would be good for 'children'"); Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191, 197 (1993) (noting "the invitation the 'best interests' standard's indeterminate qualities offers to judges to award custody to those litigants whose attributes and values most resemble their own"); Scott, *supra* note 8, at 622 (noting that "[t]he eventual [best interests] determination can be speculative and value-laden, as the standard encourages courts to assess the character of contestants and the potential capacity of each to assume the child's future care"); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 871–73, 893–94 (noting that judges have used the "best interests" standard to advance widely divergent values relating to sexual orientation and urging use of a statutory presumption to constrain judicial policymaking).

so few normative judgments about alternative family arrangements. As Elizabeth Scott noted when she first advocated a similar approach:

> In an era in which no consensus defines family roles, the approximation framework responds to normative variation among families by recognizing and reinforcing the existing pattern of child care in each family. Through this approach, custody law subtly encourages desirable reform without seeking to coercively restructure complex family relationships.[113]

That the ALI's central goal is to reinforce past child rearing practices—"enabling" families to chart their own course rather than "standardizing" custody outcomes with reference to a fixed social norm[114]—should count for a great deal to a constitutional ideal that is said to be chiefly concerned with avoiding state-enforced standardization of family life.[115]

III. *TROXEL V. GRANVILLE*

The analysis so far has not discussed what may be the most hopeful sign that the judiciary is starting to accept the ALI's view of family. The Supreme Court's most recent pass at family issues, last year in *Troxel v. Granville*,[116] was widely reported in the press as a victory for parents' rights. In fact, however, the decision striking down an order of grandparent visitation contains the seeds of a constitutional

113. Scott, *supra* note 8, at 671; *see also id.* at 672 (noting that the approximation approach ultimately embodied in the ALI *Principles* "offers the best available response to the dilemma of custody in a society in which each family functions according to an individual formula of values and preferences"); Bartlett, *supra* note 6, at 480 (observing that the ALI's approach to custody "declin[es] to impose some average, idealized family form on all families and instead favor[s] solutions that roughly approximate the caretaking shares each parent assumed before the divorce or before the custody issue arose").

114. S*ee* Bartlett, *supra* note 11, at 818, 851–52 (describing the *Principles* as "family[]enabling" rather than "family standardizing").

115. In summing up the constitutional defect in *Moore v. City of East Cleveland*, for example, Justice Powell observed:

> *Pierce* struck down an Oregon law requiring all children to attend the State's public schools, holding that the Constitution "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." By the same token the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.

431 U.S. 494, 506 (1977) (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)).

116. 530 U.S. 57 (2000).

doctrine quite favorable to the ALI *Principles*.

First, in assessing the constitutionality of Washington's law permitting nonparents to seek court-ordered visitation,[117] the Court again steered clear of the strict scrutiny standard.[118] Instead of striking down Washington's law for lack of tailoring to a compelling state interest, as the state supreme court had done below,[119] the plurality in *Troxel* held only that the trial court was obligated to give greater deference to a parent's own assessment of a child's interests in weighing the benefits of visitation with a grandparent or other claimant.[120] Indeed, *Troxel* went even farther than past cases in disavowing strict scrutiny in the context of family privacy. Whereas past cases had sometimes muddied the waters by using ambiguous synonyms for "compelling interest" scrutiny, the Court's wholesale avoidance of that approach in *Troxel* and its substitution of a flexible, fact-specific inquiry amounted to a tacit rejection of strict scrutiny.

Second, the Justices in *Troxel* demonstrated a powerful wariness of bright lines or broad holdings in the field of family privacy. Whereas the Washington Supreme Court struck the state's visitation law on its face, the United States Supreme Court addressed only the constitutionality of the trial court's application of the law.[121] Whereas the state court insisted broadly that the only sufficient basis for ordering visitation over the objections of a parent would be a finding that the child would otherwise suffer serious harm,[122] a majority of the United States Supreme Court refused to address the contention.[123] Justices Stevens and Kennedy, who *did* address the state court's "harm" test for visitation, rejected it on the grounds that it

117. The Washington statute allowed "[a]ny person" to petition a court "at any time" for an award of visitation and directed courts to grant such a request if it deemed visitation to be in "the best interests" of the child. WASH. REV. CODE § 26.10.160(3) (2001).

118. Although six members of the Court wrote opinions in *Troxel*, only Justice Thomas expressly endorsed the application of strict scrutiny. *See* 530 U.S. at 80 (Thomas, J., concurring).

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

120. *Troxel*, 530 U.S. at 67–69. The plurality refused to pass upon the state court's view that the only public interest sufficient to justify court-ordered visitation would be protecting a child from serious physical or psychological harm. *See id.* at 73 (O'Connor, J., plurality opinion); *see also id.* at 77 (Souter, J., concurring in the judgment).

121. *See Troxel*, 530 U.S. at 73 (plurality opinion).

122. *See Custody of Smith*, 969 P.2d at 28–30.

123. *See Troxel*, 530 U.S. at 73 (plurality opinion); *id.* at 77 (Souter, J., concurring).

reflected an unduly "inflexible,"[124] "rigid,"[125] and "categorical"[126] view of parents' constitutional rights. Instead of resolving the constitutional questions with the announcement of a clear rule, a majority of the Court insisted that the better course would be to decide the issues slowly and incrementally against the background of specific family controversies.[127] This consensus in favor of hesitation and restraint emerges as the most striking thing about *Troxel*.[128] The Justices' commitment to crafting the narrowest possible holding, replacing the state court's sweeping facial judgment with a decision arduously crafted to extend no further than the specific facts of the Granville-Troxel feud, suggests a more pragmatic approach to the problem of family privacy than is found in many state court decisions.[129]

The greater flexibility and self-restraint apparent across the great run of the Supreme Court's family privacy cases should be reassuring to supporters of the ALI *Principles*. But the evident *reasons* for the Justices' hesitancy in *Troxel* provide even more encouragement because they signal a dawning appreciation of the complexity and diversity of modern family life and the danger that bright constitutional lines might lead courts to trample on the integrity and autonomy of real families in the service of an historical ideal. Justice O'Connor, for example, began the plurality's analysis by observing that "[t]he demographic changes of the past century make it difficult

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

125. *Id.*

126. *Id.* at 96 (Kennedy, J., dissenting).

127. *See id.* at 73 (plurality opinion) ("[W]e agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care.'"); *id.* at 101 (Kennedy, J., dissenting) ("The protection the Constitution requires . . . must be elaborated with care, using the discipline and instruction of the case law system.").

128. *See* Emily Buss, *Adrift in the Middle: Parental Rights after* Troxel v. Granville, 2000 SUP. CT. REV. 279, 279 ("Although the decision split the Court six ways, it revealed considerable consensus. Eight Justices recognized some constitutionally protected right of parents to control their children's private associations, but seven did so haltingly, reflecting their readiness to qualify that right in the face of competing relational claims more compelling than these asserted by the grandparents in this case."); Meyer, *supra* note 2, at 1141 ("[T]he uniting theme of five of the six opinions in the case—representing a total of eight Justices—was a determination to tread softly and to avoid any heavy-handed formulations of parents' constitutional rights.").

129. *See generally* Meyer, *supra* note 76 (contending that *Troxel* represents a model of legal pragmatism in constitutional law).

to speak of an average American family."[130] As more and more children are raised in single-parent homes, she wrote, "persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing."[131] Other Justices expressed the same realization. Justice Kennedy argued for a narrow constitutional holding and explained that his "principal concern" regarding the state supreme court's broad ruling in favor of legal parents was that it

> seem[ed] to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households. For many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood.[132]

Justice Stevens agreed that a constitutional analysis narrowly focused on the child rearing interests of legal parents was inappropriate in the context of modern families: "The almost infinite variety of family relationships that pervade our ever-changing society," he wrote, "strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily."[133] Although Justice Stevens went furthest in advocating a direct balancing of the competing constitutional interests of parents, children, and nonparent caregivers,[134] other Justices, too,

130. *Troxel*, 530 U.S. at 63.

131. *Id.* at 64.

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

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

134. In Justice Stevens's view:

> Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the [visitation] statute applies—the child. . . . [I]t seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.

Troxel, 530 U.S. at 86, 88 (Stevens, J., dissenting).

seemed clearly to contemplate that constitutional solicitude for parental authority must bend to take account of a child's interest in preserving ties with other substantial caregivers.[135]

Ultimately, regardless of variations in the particular formulations each Justice advanced, a majority's apparent acceptance of the constitutional relevance of the evolving nature of family relationships is itself significant.[136] Crucially, these Justices seemed to share "the premise that people and their intimate associations are complex and particular, and imposing a rigid template upon them all risks severing bonds our society would do well to preserve."[137] That premise is obviously one shared by the drafters of the ALI *Principles*. That several Justices should express that sentiment so readily in *Troxel* gives real hope that constitutional law may well be learning the insights of the ALI *Principles* already.

IV. CONCLUSION

The boldness of chapter 2's custody provisions lies chiefly in the provisions' expansion of the concept of parenthood and the accompanying erosion of the privileged status traditionally reserved for biological and adoptive parents. This innovation seems daring because of the importance that conventional substantive due process analysis

135. Justice Kennedy, for one, insisted that "the constitutionality of the application of the best interests standard [in visitation disputes] depends on more specific factors. In short, a fit parent's right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a de facto parent may be another." *Troxel*, 530 U.S. at 100–01 (Kennedy, J., dissenting). Justice Scalia, though dissenting on the ground that parents have no special constitutional right to decide visitation matters, nevertheless agreed that giving protection to parents' privacy interests ultimately requires balancing the interests of other intimates:

> Judicial vindication of "parental rights" . . . requires (as Justice Kennedy's opinion rightly points out) not only a judicially crafted definition of parents, but also—unless, as no one believes, the parental rights are to be absolute—judicially approved assessments of "harm to the child" and judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents.

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

136. For a more complete account of the strands of consensus in *Troxel* and their significance, see Meyer, *supra* note 2, at 1152 ("[R]ecognizing substantial emotional relationships between children and non-parents as a counterweight to the authority of parents would constitute an important step in reorienting family privacy toward a model that is more concerned with the function and substance of intimate relationships than with historical notions of family form or allocations of decisional power.").

137. *Troxel*, 530 U.S. at 90–91 n.10 (Stevens, J., dissenting).

places on categorization and traditional prerogative. Yet the ALI's innovation is by no means confined to the choice of titles for significant adult caretakers. At least as significant, though less sensational, is the ALI's reconception of the range of roles that may be assigned to caretakers following a family breakup and its narrowing of judicial authority to impose on families arrangements that they have not effectively chosen for themselves, either by agreement or by past course of conduct. And, in important ways, it is these latter innovations that help to vindicate the first. In the ALI's view, custody is not a one-size-fits-all prize to be doled out to parents fitting a single, formalistic mold; instead, the role of parent can involve any of a broad range of caretaking and supporting endeavors, and the court's task is to help craft an individualized role that will build constructively upon that which the parent has established for herself in the past.

As the various opinions in *Troxel v. Granville* make clear, some judges are coming to share the insights of the ALI's approach. Although the ALI's innovations bristle against a constitutional doctrine that paints parents' privacy rights in bright, clear lines, they fare well with a doctrine that pictures family relationships and roles in all of their very real shades of gray. Even before *Troxel* and the ALI *Principles*, the Court had shown glimmers of this understanding. A fuller appreciation in the years to come, as *Troxel* seems to portend, would benefit not only supporters of the ALI *Principles*, but a great many families as well.