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THE MODEST PROMISE OF CHILDREN'S RELATIONSHIP RIGHTS

David D. Meyer*

Adults now have well-established constitutional rights to establish and maintain vital family relationships. Children do not. A couple's decision to marry, a father's love for his child, a grandmother's wish to share her home with her extended family — all have been given special sanctuary from governmental interference by the Constitution.¹ Yet, at least for now, the parallel yearnings of children for family intimacy cannot claim the same constitutional protection. Although their interests are often said to be all-important in non-constitutional family law and policy — constituting a public concern of “the highest order”² — children occupy decidedly shadowy ground in the constitutional law protecting family privacy.

Children occupy this position, it seems, not so much because judges are hostile to their claims, but because judges don't know quite what to do with them within the existing framework of American law. In fact, the courts have been fairly receptive to claims for children's rights where the claims have seemed least novel — in classic individual-versus-state conflicts, where the child was posed directly against the coercive power of government. It was possible, for example, to extend the privilege against self-incrimination, the requirement of proof beyond a reasonable doubt, or the bar against double jeopardy to juvenile proceedings without seeming to unsettle basic social or legal assumptions.³ These guarantees, like rights to free expression and fair process in public schools,⁴ could be seen as

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¹ See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (addressing the right of extended family to share a common household); *Stanley v. Illinois*, 405 U.S. 645 (1972) (addressing the right of father to maintain ties with his children); *Loving v. Virginia*, 388 U.S. 1 (1967) (addressing the right to marry).

² *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (agreeing that “protect[ing] the interests of minor children, particularly those of tender years,” is, “of course, [a state interest] . . . of the highest order”).

³ See *Breed v. Jones*, 421 U.S. 519, 541 (1975) (extending the bar against double jeopardy to juvenile proceedings); *In re Winship*, 397 U.S. 358, 368 (1970) (extending the reasonable doubt standard of proof); *In re Gault*, 387 U.S. 1, 27–31 (1967) (extending the right of self-incrimination); see also Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L. REV. 39 (2003) (contending that the Court too readily adopted adult-modeled procedural safeguards in the juvenile court system without adequately tailoring the guarantees to the realities of child clients).

⁴ See *Ingraham v. Wright*, 430 U.S. 651, 653 (1977) (involving a due process claim against use of corporal punishment by school officials); *Tinker v. Des Moines Indep.*

limiting directly only the powers of the state, and so could be debated and conferred on apparently conventional terms.⁵ The suggestion that children might have rights corresponding to those held by adults against state coercion and abuse was essentially amendatory, not revolutionary.

The claim, however, that children might have their own constitutional rights of privacy or autonomy within the family, corollary to those of adults, obviously presents a different set of problems. Such a claim poses a direct challenge not only to the power of the state, but also to the authority of parents, an authority that itself is privileged by the Constitution. Faced with this quandary, courts have not categorically rejected children's privacy rights, but have proceeded haltingly. In the 1970s, at a time when some scholars and activists were calling for children's "liberation" through legal reform,⁶ the Supreme Court held that children do possess their own privacy rights with respect to contraception and abortion, and immediately confronted a tangle of vexing implications: Which children are competent to assert their rights? On what basis should courts resolve conflicts between a child's assertion of a right and her parent's assertion of childrearing authority?⁷ As a result, for much of the quarter-century since, the courts have largely retreated. Finding no satisfactory global answers to the potential intra-family conflicts of interests, the courts have simply suppressed the confounding questions posed by children's rights through tactical avoidance, such as by denying appellate review or standing to assert claims in the first instance, or by willfully presuming that children's privacy interests must be neatly aligned with those of their parents.⁸ The field of substantive due process protection is treacherous enough

Community Sch. Dist., 393 U.S. 503, 511 (1969) (recognizing a First Amendment right of schoolchildren to wear armbands protesting the Vietnam War).

⁵ This is not to say, of course, that the courts have extended these rights to children on *equal* terms. To the contrary, where the courts have been willing to recognize the constitutional claims of children, they generally have "made clear that the scope and implementation of th[o]se rights . . . may be conditioned in ways that they could not be limited for adults." Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799, 815-16 (1999); accord Emily Buss, *The Parental Rights of Minors*, 48 BUFF. L. REV. 785, 794 (2000) ("In every context in which the Supreme Court has considered children's claims of constitutional rights, the Court has concluded that children's minority justifies some curtailment of the adult right in question.").

⁶ See, e.g., Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449, 453-54 (1996); Martha Minow, *Children's Rights: Where We've Been, and Where We're Going*, 68 TEMP. L. REV. 1573, 1575-78 (1995).

⁷ See, e.g., Bellotti v. Baird, 443 U.S. 622, 643 (1979) (recognizing a minor's right to seek judicial consent to an abortion as an alternate to parental consent); Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977) (recognizing a minor's right of access to contraception); Planned Parenthood v. Danforth, 428 U.S. 52, 74-75 (1976) (recognizing a minor's right to elect abortion).

⁸ In case after case involving potential conflicts of interest between children and their

in the view of most judges without the addition of yet more claimants with potentially conflicting rights. And so it was possible by the 1990s for Martha Minow to observe that "it ha[d] even become fashionable to make fun of [calls for children's rights], and certainly to view them as misguided and counterproductive."⁹

Quite recently, however, there are signs that this ground might be shifting again. Recent decisions by state and lower federal courts have held that children possess their own constitutional rights to maintain important family relationships.¹⁰ In *Troxel v. Granville*,¹¹ the Supreme Court's most recent foray into the field, two Justices suggested that future claims of parental prerogative over child visitation would need to be balanced against the competing privacy rights of children themselves. Justice Stevens put it squarely:

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and

parents, the Supreme Court has dodged the dilemma by simply assuming that the interests of child and parent would be aligned in opposition to the state's intervention. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (assuming that daughter and the man legally presumed to be her father would share mutual interest in resisting contact with girl's biological father); *Santosky v. Kramer*, 455 U.S. 745, 760–61 (1982) (assuming that child and parent would both share similar interest in resisting state's petition to terminate parental rights); *Wisconsin v. Yoder*, 406 U.S. 205, 230–31 (1972) (assuming that parent and child would both concur in opposing state enforcement of mandatory schooling); see also Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 660–68 (2002) (questioning the Court's assumption in *Michael H.*); Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53 (1999) [hereinafter Buss, *Frieda Yoder*] (questioning the Court's assumption in *Yoder*).

⁹ Minow, *supra* note 6, at 1575.

¹⁰ See, e.g., *Doe v. Heck*, 327 F.3d 492, 518 (7th Cir. 2003) (recognizing fundamental "right of a child to be raised and nurtured by his parents"); *Brokaw v. Mercer County*, 235 F.3d 1000, 1018 (7th Cir. 2000) (holding that a child has a fundamental constitutional right to preserve a relationship with her parent); *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 724 (Ct. App. 2001) (recognizing that a child may have a constitutional right to maintain relationship with adoptive parents); *In re Guardianship of Zachary H.*, 86 Cal. Rptr. 2d 7, 16–17 (Ct. App. 1999) (holding that a child has a fundamental constitutional liberty interest in remaining in the custody of non-parent caregivers); *In re Harriett II*, 740 N.Y.S.2d 162, 164–65 (App. Div. 2002) (reserving judgment on whether trial court was correct in "holding that 'a child has an independent, constitutionally guaranteed right to maintain contact with a person with whom the child has developed a parent-like relationship'"); *Webster v. Ryan*, 729 N.Y.S.2d 315, 316 (Fam. Ct. 2001) (holding that a child has a constitutional right to maintain relationship with "parent-like" adult figures); *Meldrum v. Novotny*, 640 N.W.2d 460, 470 (S.D. 2002) (Konenkamp, J. concurring in part) ("Courts are beginning to recognize that 'a child has an independent, constitutionally guaranteed right to maintain contact with a person with whom the child has developed a parent-like relationship.'") (quoting *Webster*, 729 N.Y.S.2d at 316).

¹¹ 530 U.S. 57 (2000).

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.¹²

Justice Scalia agreed — though without Justice Stevens' apparent enthusiasm for the enterprise — that judicial recognition of parents' privacy interests in the family inevitably supports recognition of corresponding privacy interests on the part of others in the family as well.¹³ All of this suggests that courts may be readying themselves at last to deal seriously with the knotty questions posed by the idea of children's rights.¹⁴

In this Essay, I evaluate the growing momentum toward the recognition of children's independent constitutional rights of family privacy. I begin by considering three broad categories of potential objections to this trend rooted both in constitutional theory and in family policy. These concerns, I contend, warrant caution in developing and extending the constitutional rights of children in this context, but do not require their outright rejection. Instead, it seems to me that the articulation of children's constitutional rights is justified even though it is likely to be of limited utility. What is ultimately likely to be of most benefit to children, however, is not doctrinal innovation to give them new "rights," but innovation in the collection and dissemination of empirical knowledge about their developmental *needs*. That knowledge would be vitally helpful in resolving the potential objections to the idea of children's rights. Still more important, however, new

¹² *Id.* at 88 (Stevens, J., dissenting) (citation omitted).

¹³ *Id.* at 92–93 (Scalia, J., dissenting). Justice Scalia wrote:

Judicial vindication of "parental rights" under a Constitution that does not even mention them 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. Justice Scalia offered this observation, of course, as a reason *not* to recognize a fundamental childrearing right for parents, a contention rejected by all eight other members of the Court.

¹⁴ Beyond the interest in preserving family relationships, there is an emerging willingness in other contexts as well to recognize that children may have their own individual constitutional rights in opposition to the childrearing authority of their parents. See Buss, *Frieda Yoder*, *supra* note 8 (considering assertion of a minor's right to religious liberty independent of that of parents); Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223 (1999) (contending that under certain conditions mature minors may have a constitutional right to receive information over parental objections).

empirical knowledge emanating both from the laboratory and from the lived experience of family life in an increasingly diverse society is needed to build stronger public consensus about the proper limits of parental rights.

I. THE PROBLEM OF CHILDREN'S RIGHTS: KEEPING DEMOCRACY, AND JUDGES, IN THEIR PLACE

There is a broad range of possible objections to the idea of giving children their own independently enforceable constitutional rights within the family. The most substantial of these, however, can be organized into three basic types: (1) that recognizing independent privacy rights for children is incompatible with a desirable theory of constitutional law; (2) that recognizing independent privacy rights for children is incompatible with a desirable conception of family policy; and (3) that recognizing independent privacy rights for children, even if somehow theoretically justifiable, would simply introduce too many doctrinal imponderables to be useful in the real world occupied by lawyers and judges.

In a sense, all of these objections might be seen as driven by concern for the proper boundaries of democracy. Those who object on grounds of constitutional theory worry that the movement toward children's rights entails an invasion by politically unaccountable judges into a sphere that should be reserved for democratic action; the others fear that the movement, by aspiring to give each family member full constitutional identity and to enforce public norms of fairness and equality, threatens an invasion of the ideals of democracy into a private sphere where they have no place.

A. Theoretical Objections to the Source of Children's Constitutional Rights

The most obvious concern about allowing children to claim constitutional protection for their own sense of family is that the Constitution itself suggests no such right. The objection here is related not to anything distinctive about family, but to broader concerns about the proper role of judges in discerning and enforcing limitations on our democratic government that are not reasonably suggested by the text of the Constitution.

The Supreme Court has overcome these objections, of course, in recognizing other rights of family privacy. Notwithstanding the textual gymnastics of *Griswold v. Connecticut*,¹⁵ initially ascribing constitutional protection for privacy to the "emanations" of the First, Third, Fourth, and Fifth Amendments,¹⁶ the Court in recent decades has owned up to a privacy jurisprudence that has no real roots in the text of the Constitution. Yet, the theoretical justification for the judiciary's

¹⁵ 381 U.S. 479 (1965).

¹⁶ *Id.* at 484.

enforcement of non-textual rights remains famously contested.

The Court sometimes has insisted that the only legitimate basis for recognizing constitutional rights outside the text is a deeply rooted societal consensus about the outer limits of governmental power. Thus, in *Griswold*, the Court found protection for marital privacy partly on the basis that marriage, by common understanding, has long occupied a privileged, even “sacred” position in society somehow beyond the controlling reach of government.¹⁷ Likewise, in *Moore v. City of East Cleveland*,¹⁸ Justice Powell explained that “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”¹⁹ And so a grandmother’s decision to share her home with extended relatives was constitutionally privileged because “[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots [in social custom] equally venerable and equally deserving of constitutional recognition.”²⁰ This search for external validation of non-textual rights in historical practice is said to be necessary to the popular legitimacy of judicial intervention by ensuring that judges are not simply imposing their own value choices under the guise of the Constitution.²¹ This has led some judges to deny constitutional privacy protection to children on the ground that society can hardly be said to have long considered itself bound to respect children’s own sense of family.²² By this understanding of the courts’ authority, these decisions surely are correct. Indeed, *Troxel* itself indirectly proves the point. The Court’s readiness

¹⁷ See *id.* at 485–86; *id.* at 487, 493 (Goldberg, J., concurring) (contending that marital privacy is constitutionally protected because the value of freedom within marriage is deeply rooted in the “traditions and [collective] conscience of our people”) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (alteration in original).

¹⁸ 431 U.S. 494 (1977).

¹⁹ *Id.* at 503.

²⁰ *Id.* at 504.

²¹ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (explaining that the attribution of judicial intervention to deeply rooted societal understandings helps to “assure [the Court] and the public that announcing rights not readily identifiable in the Constitution’s text involves much more than the imposition of the Justices’ own choice of values on the States and the Federal Government”); *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (arguing that constitutional protection must be grounded in either text or traditional societal consensus about the limits of governmental power in order to ensure that, “[i]n determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions”).

²² See, e.g., *Reno v. Flores*, 507 U.S. 292, 302–03 (1993) (holding that alien children subject to the jurisdiction of immigration authorities have no fundamental constitutional right to be released to the custody of extended relatives rather than institutional caregivers); *Michael H. v. Gerald D.*, 491 U.S. 110, 130–31 (1989) (plurality opinion) (Scalia, J.) (holding that child born of an extramarital affair had no fundamental constitutional right to a relationship with her biological father); *Moe v. Dinkins*, 669 F.2d 67 (2d Cir. 1982) (holding that minors have no constitutional right to marry).

there to lend state validation to a mother's wishes to scale back the relationship between her daughters and their grandparents seems at odds with the suggestion that society owes fidelity to children's own sense of family.²³

There is another theory of constitutional privacy that is plainly more amenable to children's rights. In some cases, the Court has bottomed protection not on tradition, but on a modern assessment of the private stakes in government action. The Court has recognized a fundamental right of couples to marry across the color line or while incarcerated,²⁴ of unwed fathers to establish and maintain ties with their children,²⁵ of unmarried couples to use contraception,²⁶ of women to choose abortion.²⁷ None of these rights plausibly can claim veneration in society's deeply rooted and widely shared sense of family life. To the contrary, states had long and widely interfered with each of these intimate choices, making it impossible to find a historical consensus that government had no business regulating the specific practices at issue.²⁸ Nevertheless, the Court sustained the private claim in each of these cases, grounding constitutional protection in the overarching moral claims of the individuals to public respect — for instance, in the importance of marriage to personal fulfillment,²⁹ or in the profound consequences for individuals of state interference with decisions affecting procreation or childrearing.³⁰

²³ I am not claiming here that the parent's wishes in *Troxel* actually conflicted with those of her daughters. Rather, my point is only that the wishes of the *Troxel* children evidently were not essential to the outcome of that case.

²⁴ *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (finding that an interracial couple had a fundamental right to marry); *Turner v. Safley*, 482 U.S. 78 (1987) (finding that a prison inmate had a fundamental right to marry).

²⁵ *E.g.*, *Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972).

²⁶ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

²⁷ *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

²⁸ *See, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (O'Connor, J., concurring in part) (acknowledging that the narrow "mode of historical analysis [advocated by Justice Scalia's plurality opinion] . . . may be somewhat inconsistent with our past decisions in this area"); *id.* at 137–40 (Brennan, J., dissenting); WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 159–60 (1996) (discussing the impossibility of reconciling the Court's holding in *Loving* with a strict reliance on historical consensus in defining the boundaries of fundamental privacy rights); Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 91–92 (1989) (discussing the Court's inconsistent reliance on historical consensus).

²⁹ *See Loving*, 388 U.S. at 11 (finding a fundamental right to marry on the ground that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (quoting *Loving*, 388 U.S. at 11).

³⁰ *See Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding a fundamental right to abortion based largely upon the profound "detriment that the State would impose upon the pregnant

As yet, the Court has not resolved the tension between these competing approaches. In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³¹ the Court seemed to reject the strictest possible reliance on historical consensus, insisting that “[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.”³² Just five years later, however, the Court returned to emphasize the relevance of history in *Washington v. Glucksberg*,³³ finding no protection for assisted suicide on the ground that no embedded societal consensus supported such a right.³⁴ Most recently, in *Lawrence v. Texas*,³⁵ the Court again de-emphasized the importance of historical consensus in extending privacy protection to the sexual intimacy of same-sex couples. Indeed, it is perhaps not unfair to conclude that the Court emphasizes the importance of historical consensus when it wishes to deny constitutional protection and downplays it when it is otherwise inclined to extend protection.³⁶ If so, the Supreme Court’s eventual willingness to embrace children’s independent relationship rights will surely have more to do with contemporary policy assessments than with the historical record.

B. Policy Objections to the Constitutional “Liberation” of Children

A second set of objectors to the recognition of independent privacy rights for children are concerned less with constitutional legitimacy than with a normative vision of family. Many scholars have lamented generally the growth of “rights discourse” in the context of family law on the ground that it encourages a focus on individual entitlements rather than a sense of communal responsibility toward others.³⁷ Some have particularly objected to the move toward children’s rights,

woman by denying this choice”); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (finding a fundamental right to procreate on the ground that forced sterilization carries the potential for “subtle, farreaching, and devastating effects,” including the infliction of “irreparable injury” on the individuals affected).

³¹ 505 U.S. 833 (1992).

³² *Id.* at 848.

³³ 521 U.S. 702 (1997).

³⁴ *Id.* at 721.

³⁵ 123 S. Ct. 2472 (2003).

³⁶ See David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 562–63 (2000) (reviewing the various ways in which the Supreme Court has seemed to manipulate doctrine in the course of defining the boundaries of constitutional protection for family privacy).

³⁷ See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 121–30 (1991); MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 135 (1993); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 295–96 (1988); Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CAL. L.

however, either because they value parental autonomy as a superior good in itself or, more commonly, because they view parental autonomy as a means of maximizing the welfare of children.

Some have warned, for instance, that the constitutionalization of children's associational claims is corrosive of the very nature of family by spurring factionalization, encouraging children and parents "to think about their relationship . . . in abstract legal terms and concepts that foster separation and boundaries."³⁸ Margaret Brinig, for instance, has argued that by promoting judicially imposed solutions, rather than informal mediation and nonlegal norms, the extension of constitutional protection to children's relationships with "third parties" inevitably "disrupts the intimacy and autonomy necessary for families . . . to thrive."³⁹ Others, including Emily Buss and Elizabeth Scott, have focused directly upon the welfare of children and contended that the impulse to aid children by arming them with constitutional rights is likely to be self-defeating.⁴⁰ For many parents, privacy — including both the practical immunity from second-guessing and the public respect for private competence which that immunity signifies — may be an essential incentive to their full and unqualified investment in the hard work of parenting.⁴¹ Unqualified investment may well be vitally important to the bonding of parent and child and, ultimately, to the child's optimal development and maturation.⁴²

These are very substantial concerns. If the behavioral assumptions are correct, this argument poses a direct challenge to the core justification for recognizing children's rights — the notion that children's profound personal stakes in family-related disputes demand that they be given their own voice in any resolution. The assumptions are certainly plausible, and available empirical evidence offers some support. It seems clear, for instance, that substantial legal insecurity in the relationship between children and their adult caregivers — at least when it relates to doubts about the continuity of custody or future contact with the child — can impair the quality of bonding.⁴³ The risk that foster parents or prospective adoptive parents may abruptly lose ties with a child if the child's parents should reassert an

REV. 151, 157–58, 164–65 (1988).

³⁸ Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L.J. 321, 337 (1996).

³⁹ Margaret F. Brinig, *Troxel and the Limits of Community*, 32 RUTGERS L.J. 733, 765 (2001) (footnotes omitted); see also REGAN, *supra* note 37.

⁴⁰ See Emily Buss, *Children's Associational Rights?: Why Less Is More*, 11 WM. & MARY BILL RTS. J. 1101 (2003); Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071 (2003).

⁴¹ See Elizabeth S. Scott & Robert F. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); see also Brinig, *supra* note 39, at 778–79.

⁴² See Scott, *supra* note 40.

⁴³ See David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 798–803 (1999).

interest in custody undoubtedly leads some to temper their emotional investment in order to protect themselves.⁴⁴ Indeed, it may be that even the contingent prospect of losing custody upon divorce causes some fathers to limit their investment in childrearing during marriage.⁴⁵ Without doubt, there is considerable evidence that impaired bonding detrimentally affects the welfare of children.⁴⁶ Recently, for example, Margaret Brinig and Steven Nock documented significant differences in the well-being of children residing in foster and kinship care as opposed to those living with adoptive parents, a gap they attributed in part to “a lack of trust by participants [in the non-adoptive families] that the relationship will continue.”⁴⁷

Yet the overall evidence seems inconclusive. First, although *custodial* insecurity clearly can impair bonding with children, recognition of children’s relationship rights would not expose many parents to that degree of insecurity. Far more often, recognition of children’s rights would expose parents to lower-level meddling by courts, forcing them, for example, to tolerate occasional visitation by a former caregiving partner. It seems much less clear that this more modest hazard would diminish the satisfactions of parenthood enough to compromise bonding.

Moreover, there are surely cross-currents here. An expansive conception of parental childrearing privacy, unqualified by the countervailing rights of children, no doubt impresses some parents with an awesome sense of responsibility and inspires them to invest themselves in a manner worthy of this public reward. Yet it surely strikes others as little more than validation of their “natural” dominion and entitlement; for them, robust privacy rights operate not as a reward but as a windfall. Therefore, determining whether children, on balance, are ultimately benefitted requires an assessment not only of the relative numbers of each type of parent but also of the respective detriments their children may suffer. For instance, even if a robust conception of parental privacy is optimal for most children, it might be that the benefit they derived from that optimization is relatively modest and more

⁴⁴ See H. DAVID KIRK, *SHARED FATE* 10 (1964); ELINOR B. ROSENBERG, *THE ADOPTION LIFE CYCLE* 133 (1992); Lisa Belkin, *Now Accepting Applications for My Baby*, N.Y. TIMES, Apr. 5, 1998, § 6 (Magazine), at 58 (describing one couple’s calculated “reserve” in caring for their prospective adoptive child).

⁴⁵ See Margaret Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393, 402–03 (1998); cf. Scott & Scott, *supra* note 41, at 2450–51.

⁴⁶ This is surely the least controversial supposition of attachment theory in the child-development literature. See, e.g., VIRGINIA L. COLIN, *HUMAN ATTACHMENT* 96–97 (1996) (discussing relationship between impaired parent-child bonding and manifestations of anxiety and insecurity on the part of children); Grant Charles & Jane Matheson, *Children in Foster Care: Issues of Separation and Attachment*, 2 COMMUNITY ALTERNATIVES 37, 39–40 (1990) (observing that disruptions in attachments with caregivers is correlated with “anger and related dysfunctional responses” on the part of children); Meyer, *supra* note 43, at 798–801 (surveying additional studies).

⁴⁷ Margaret F. Brinig & Steven L. Nock, *How Much Does Legal Status Matter? Adoptions by Kin Caregivers*, 36 FAM. L.Q. 449, 467–69 (2002).

than offset by the harm suffered by the minority of children whose parents take privacy as a license to act selfishly.

C. Objections Based on Doctrinal Feasibility

Finally, the emergence of independent relationship rights for children might be opposed on more pragmatic grounds. Even if it could be established that the recognition of children's rights would not be directly inimical to democratic values or to the flourishing of family bonds, the idea might still be thought simply unworkable or unhelpful.

First, there is inevitably the problem of drawing lines. If parents and now children can each claim constitutional protection for their substantial intimate relationships, then why not countless "third-party" adults as well — grandparents, step-parents, foster parents, aunts, longtime nannies, and so on?⁴⁸

Second, recognizing multiple and potentially competing rights-holders simply does not fit within established constitutional doctrine. Notwithstanding ongoing murkiness in the Supreme Court's cases in this area,⁴⁹ the standard account continues to hold that state incursions on fundamental individual rights of privacy trigger strict judicial scrutiny. Allowing the interjection of a new set of rights-holders, with sometimes conflicting demands upon state authority, would make maintenance of that framework impossible. Consider, for instance, a case in which a parent seeks to reclaim custody of a child who has been living for years with substitute caregivers.⁵⁰ Under conventional thinking, government denial of custody to the parent would be a substantial burden on the parent's fundamental liberty and

⁴⁸ This seemed to be partly the basis of Justice Scalia's reluctance to recognize even parental rights in the context of visitation, though he had more foundational theoretical objections as well. See *Troxel v. Granville*, 530 U.S. 57, 92–93 (2000) (Scalia, J., dissenting).

⁴⁹ See, e.g., Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279; Naomi Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1231 (1999); David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125 (2001).

⁵⁰ This was the scenario, for instance, in the cases of "Baby Richard," see *In re* Petition of Kirchner, 649 N.E.2d 324 (Ill. 1995), and "Baby Jessica," see *In re* B.G.C., 496 N.W.2d 239 (Iowa 1992) — each of which spurred calls for the recognition of children's rights. See Marcus T. Boccaccini & Eleanor Willemssen, *Contested Adoption and the Liberty Interest of the Child*, 10 ST. THOMAS L. REV. 211 (1998); Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994); Suellen Scarnecchia, *A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case*, 2 DUKE J. GENDER L. & POL'Y 41 (1995); James G. O'Keefe, Note, *The Need to Consider Children's Rights in Biological Parent v. Third Party Custody Disputes*, 67 CHI.-KENT L. REV. 1077 (1991). For a fuller account of the legal responses to the Baby Richard and Baby Jessica cases, see Meyer, *supra* note 43.

therefore presumptively unconstitutional.⁵¹ Yet, if the child were also held to have her own fundamental right to maintain family ties with her longtime caregivers, and if that right were also protected by strict scrutiny, it would be presumptively unconstitutional for the state to order a change of custody, leaving the court in a potentially irreconcilable quandary.

Third, there is the vexing problem of conferring rights upon persons who may typically be incompetent to assert them. Children's dependency on others to articulate and represent their interests poses an obvious and basic dilemma for a program that seeks to empower them independently of their parents, the state, and other holders of power.

These concerns are indisputably weighty, but not necessarily insurmountable. Certainly lines would need to be drawn, but that task does not seem obviously more daunting here than in the context of other non-textual constitutional rights. If children's relationship rights rested on judicial recognition of the substantiality of the relationship and the profound consequences for them of its severance, then other claimants seeking protection presumably would be required to make a similar showing. There is good reason, moreover, to think that the consequences of relationship disruption are not identical for children and adults and, therefore, that extension of rights to others would not follow as a matter of course.

Likewise, significant doctrinal adjustments would indeed be required to account for the addition of new rights-holders and for the inability of some children to make the decisions necessary to assert those rights. But this, too, seems manageable. First, the courts already are gaining substantial experience with the problems of giving independent legal voice to children. As Barbara Woodhouse has observed:

The "children's attorney" is [of late] a common sight in modern family courts and most judges now have the authority to appoint a lawyer to represent the child in complex cases where it appears that a child's rights are at risk or that parents cannot sufficiently represent the child's interests.⁵²

Many scholars and lawyers recently have given thoughtful attention to the developmental and ethical dilemmas posed by this undertaking.⁵³ Although certain

⁵¹ See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 10.2.2, at 648 (1997) (concluding that "[t]he Supreme Court has recognized that parents have a fundamental right to custody of their children," and that deprivations of custody must therefore pass strict scrutiny).

⁵² Barbara Bennett Woodhouse, *The Status of Children's Rights: A Story of Emerging Rights*, in CROSS-CURRENTS: FAMILY LAW IN ENGLAND AND THE UNITED STATES 423, 436 (John Eekelaar et al. eds., 2000).

⁵³ See, e.g., Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999); Catherine J. Ross, *From Vulnerability to*

difficulties are surely inherent in the independent representation of children's interests, it can be expected that the rapidly growing practice of representing children in custody, visitation, abuse and neglect cases will yield greater confidence that the challenges are surmountable. Second, the adjustments needed to account for the creation of a new class of rights-holders in the privacy context would not be as transformative as the standard account supposes. As the Justices themselves seem increasingly willing to acknowledge, the potential for conflicting interests within the family already has exerted pressure on traditional doctrine, whether or not all of these various interests are denominated as "rights."⁵⁴ This pressure has created an awkward and uneven jurisprudence in which conflicting privacy interests are sometimes openly balanced (as in the case of minors' abortion rights) and sometimes accommodated *sub silentio*.⁵⁵ Therefore, to the extent that recognizing children's rights requires the formal abandonment of the strict-scrutiny formula, the burden of revision would fall more heavily on hornbook authors than on the Court's actual mode of analysis. Indeed, as I have argued elsewhere, frank acknowledgment by the Court that the standard strict-scrutiny framework is inapplicable in family-privacy disputes would be desirable without regard for whether the Court also recognized independent privacy rights for children.⁵⁶

Moreover, there are alternative doctrinal models that would help to bring more order to the courts' accommodation of intersecting constitutional rights. One possibility might be a loose analogy to the way in which the Court has sought to find balance between the respective constitutional powers of the President and Congress. In the *Steel Seizure Case*,⁵⁷ Justice Jackson famously suggested a three-part test for reviewing assertions of inherent presidential authority, in which judicial deference to executive action depends in part on whether the action conflicts or

Voice: Appointing Counsel for Children in Civil Litigation, 64 FORDHAM L. REV. 1571 (1996). See generally Symposium, *Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1281 (1996).

⁵⁴ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting); Sandra Day O'Connor, *The Supreme Court and the Family*, 3 U. PA. J. CONST. L. 573, 575-76 (2001). As Justice O'Connor recently observed,

While constitutional due process doctrine is primarily concerned with the relationship of individuals to the State, the resolution of family disputes focuses primarily on the relationship of individuals with each other. In family cases, the rights of individuals are intertwined, and the family itself has a collective personality. Thus, the due process model may not be the best framework for resolving multi-party conflicts where children, parents, professionals, and the State all have conflicting interests.

Id. (footnote omitted).

⁵⁵ See generally Meyer, *supra* note 49 (discussing the Court's balancing of conflicting interests in *Troxel* and *Stenberg v. Carhart*, 530 U.S. 914 (2000)).

⁵⁶ See Meyer, *supra* note 49; Meyer, *supra* note 36.

⁵⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

coincides with the independent assertions of legislative prerogative.⁵⁸ When Congress expressly concurs in the President's assertion of power, Justice Jackson wrote, the Court should almost always defer.⁵⁹ At the other extreme, "[w]hen the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb," and judicial deference should be minimal.⁶⁰ In between, when Congress has been silent or ambiguous about the presidential action, lies "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."⁶¹ In such cases, Justice Jackson wrote, the best that courts can do is to proceed pragmatically, case-by-case, with results usually turning "on the imperatives of events and contemporary imponderables rather than on abstract theories of law."⁶²

It might be possible to import something like this framework to legal disputes over family relationships. Where parent and child clearly concur with respect to the preservation or destruction of a relationship, state deference should be maximal.⁶³ On the other hand, where a parent's control of a relationship is unambiguously resisted by the child, state deference to the parent's prerogative should be notably weaker. In the "twilight zone" will lie a substantial number of cases in which the child's own assertion of interests cannot be reliably ascertained. The reasons for "silence" will be different, of course, for a child than for Congress. With respect to Congress, ambiguity often is the product of collective action problems and the difficulty of interpreting inaction⁶⁴; with respect to children, "silence" concerning a disputed relationship may come either from a child's failure to speak or from the unreliability of an immature child's expression of self-interest. In either case, doubt regarding the child's own wishes would warrant some diminution of the substantial deference owed parental judgment, though exactly how much probably cannot be reduced to a bright-line rule. Instead, given the complexity and diversity of family relationships, the balance would hinge on "the imperatives of events and contemporary imponderables."⁶⁵

⁵⁸ *Id.* at 635–39 (Jackson, J., concurring).

⁵⁹ *Id.* at 635–37.

⁶⁰ *Id.* at 637.

⁶¹ *Id.*

⁶² *Id.*

⁶³ As Barbara Woodhouse has noted, "[w]hen the interests of parents and children coincide, as in the original education cases, endowing the family patriarch or matriarch with autonomy from state intervention empowers all family members." Barbara Bennett Woodhouse, *Child Abuse, the Constitution, and the Legacy of Pierce v. Society of Sisters*, 78 U. DET. MERCY L. REV. 479, 484 (2001); see also Meyer, *supra* note 36, at 580–87 (contending that degree of unity or fracture within family should be relevant to determining the extent of deference owed by courts to parental prerogative).

⁶⁴ See, e.g., William N. Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

⁶⁵ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

As far afield as this analogy might seem, the framework it suggests actually seems quite compatible with the Court's recent decision in *Troxel v. Granville*. In that case, a majority of Justices signaled agreement that a parent's constitutional authority to terminate a child's other relationships depends in part upon an assessment of the child's own wishes and needs.⁶⁶ To be sure, *Troxel* did not hold that children possess independent constitutional rights in the matter, and made emphatically clear that courts owe substantial deference to a parent's assessment of her child's best interests.⁶⁷ Nevertheless, the notion that the deference due parents is variable and depends in part upon the child's concurrence with or hostility toward the parents' judgment is fundamentally consistent with Justice Jackson's approach. And the Justices' evident determination in *Troxel* to steer a pragmatic course with respect to family relationships, shunning strict scrutiny and other bright-line rules in favor of case-by-case adjudication, seems almost consciously reminiscent of Justice Jackson's prescription for pragmatic, "twilight zone" review.⁶⁸

None of this is to say, of course, that a framework along these lines would render the judicial resolution of relational disputes determinate and predictable. Plainly, it would not. But it could at least cabin the realm of indeterminacy and give trial judges some signals about how to balance the competing interests.

II. THE VALUE OF "CONSTITUTIONALIZING" CHILDREN'S INTERESTS

So far, I have sought mainly to show that there are no conclusive reasons to reject the trend toward recognizing constitutional relationship rights for children. I have tried to suggest a workable doctrinal approach through which courts might sensibly balance respect for the rights of both children and their parents. But I have only indirectly tried to explain what affirmatively would be gained by this maneuver. As I explain below, I believe there would be value, although I am also prepared to concede that it would be relatively modest.

Few today deny that children's *interests* are important and ought to be a substantial consideration in legal decisions significantly affecting them. This consensus can be seen readily in the common resort to the "best interests of the child" in laws governing custody, visitation, termination of parental rights, and

⁶⁶ See Buss, *supra* note 49; Stephen Gilles, *Parental (and Grandparental) Rights After Troxel v. Granville*, 9 SUP. CT. ECON. REV. 69 (2001); Meyer, *supra* note 49, at 1141-46, 1152-53.

⁶⁷ See *Troxel v. Granville*, 530 U.S. 57, 69 (2000) (suggesting that courts must give "special weight" to a parent's own assessment of her child's best interests in deciding whether to grant visitation over the parent's objection).

⁶⁸ See David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711, 722 (2001) (contending that "[a]bove all else, the Justices in *Troxel* embraced a quintessentially pragmatic approach to the dilemma of family privacy").

adoption.⁶⁹ But it also can be seen within the established constitutional law of family privacy. Indeed, part of my argument for the feasibility of integrating children's rights into family privacy doctrine rested on the observation that existing doctrine already balances parental prerogative against children's relational interests. Even the most ardent advocates of parents' rights generally agree, for instance, that a parent's prerogative to control a child's contacts must yield to a child's interest in avoiding the infliction of serious harm.⁷⁰ Consequently, it is not obvious what would be gained by giving children's interests the legal status of *rights*. After all, as the Court's experience with parental rights shows, recognizing a child's "right" to maintain a relationship with a non-parent caregiver, sibling, or other important intimate would not mean that the child was conclusively entitled to preserve that relationship; it would still be necessary to balance the child's claim against the competing claims of her parents to control her contacts with others.

Theoretically, at least, transforming children's "interests" into "rights" would change nothing of substance. Certainly, the reformulation would not necessarily elevate the degree of judicial protection now afforded children's "interests." As *Troxel* demonstrates, there is no basis for expecting that constitutionalization would bring with it the heightened protection of strict scrutiny. The problem of intersecting interests within the family already has effected the de facto abandonment of that standard in the context of family privacy. And children would have even less reason to expect aggressive scrutiny. Even when children's interests do *not* obviously conflict with those of parents or other family members, courts generally have held that children's "rights" are entitled only to a qualified form of constitutional protection.⁷¹ Thus, simply labeling children's interests as *rights* would not, of itself, necessarily alter the balancing process that already occurs. Whether the law provides that a parent's fundamental right of childrearing autonomy is qualified by the public interest in averting harm to children, or instead

⁶⁹ See generally James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845 (2003). This is not to say, of course, that children's interests are the exclusive, or even the dominant, consideration in each of these contexts. As James Dwyer persuasively demonstrates, legal decisions affecting children often are shaped by the interests of others, even when the governing law purports to focus exclusively on children's interests. See *id.* My point is only that, in most relevant contexts, legal decisionmakers at least claim to regard children's interests as an important consideration.

⁷⁰ See, e.g., *Troxel*, 530 U.S. at 92–93 (Scalia, J., dissenting); *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995); *Rideout v. Riendeau*, 761 A.2d 291, 300 (Me. 2000); *Hoff v. Berg*, 595 N.W.2d 285, 290 (N.D. 1999); *In re Custody of Smith*, 969 P.2d 21, 38–30 (Wash. 1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57 (2000).

⁷¹ E.g., *Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999) (en banc) (reviewing Supreme Court cases and concluding that juvenile curfew laws burdening minors' fundamental rights of travel are subject only to intermediate judicial scrutiny); see also Teitelbaum, *supra* note 5, at 814–16.

that a parent's childrearing right must be balanced against a child's own right to maintain important relationships, the outcome will depend ultimately upon the court's substantive assessment of the competing family interests.

I do not mean to suggest that the transformation of children's interests into constitutional *rights* would make no difference. In a substantial number of cases, it would make all the difference if the law classified children's relational interests as rights, even if the tipping point at which those interests prevailed over parental prerogative remained fixed at avoiding serious harm to children or some other pre-existing formulation. Recognizing a constitutional right held by children would help ensure children's standing to bring claims, filling in crucial gaps in current law.⁷² Armed with their own rights, children would no longer be dependent upon the government to choose to assert its *parens patriae* interest on their behalf; they could assert their interests when government was otherwise distracted or indifferent (although practical difficulties in arranging private representation would, of course, remain).

Moreover, it seems plausible that recognizing children's rights would change the outcome of the courts' balancing in at least some cases, even without formally altering the substantive standard of decision. Under current law, courts often are inclined to discount claims of harm to children.⁷³ The interests of parents, the only disputants armed with a constitutional right, generally are given much more credence. Judges, after all, understand legal rights; they are sometimes quite skeptical about the social science that underlies claims of psychological harm. If society is truly agreed that avoiding harm to children is a worthy counterweight to parents' childrearing liberty, the most reliable and effective way of ensuring that child harm is taken seriously may be to give it the designation of a legal right.⁷⁴

For these reasons, recognizing a child's independent right to maintain important relationships under the Constitution would have real value in a number of cases and, in my view, is worth its costs. And yet, I am not sanguine that this doctrinal change

⁷² See Barbara Bennett Woodhouse, *Children's Rights*, in HANDBOOK OF YOUTH AND JUSTICE 377, 396–98 (Susan O. White ed., 2001).

⁷³ See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1809–10 (1993) (analyzing cases favoring the claims of genetic over “gestational” parents and concluding that, “[a]lthough giving lip service to children's interests, they fail to reflect children's experience of reality”); Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1116–17 (1992) (contending that the Supreme Court “has shown a disturbing willingness to deny the child's reality in order to protect a hollow family integrity”).

⁷⁴ See Barbara Bennett Woodhouse, “*Out of Children's Needs, Children's Rights*”: *The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 339 (1994) (suggesting that “[a] discourse of children's rights might do a better job . . . by shifting [judges' focus] away from justice between adults and stressing instead the needs-based right of . . . children”).

would protect all, or even most, children who are now failed by our court system. Although some judges might be coaxed by the constitutionalization of children's interests to overcome their reluctance to find child harm, many others would not. My own sense, after reading too many judicial opinions expressing sunny optimism about children's natural resiliency in the face of grievous emotional loss,⁷⁵ is that the greatest obstacle to justice for children is not constitutional doctrine so much as a failure of consensus to care deeply about the welfare of children. In this sense, I believe that parent-focused constitutional doctrine often serves as cover, rather than cause, for many decisions subordinating children's welfare. Adjusting the doctrine, therefore, might eliminate that cover, but would not require abandonment of the underlying policy intuition which exalts the prerogatives of parents over the emotional needs of children.

Recent experience in Europe with the recognition of children's rights helps to illustrate my point. Traditionally, French law has recognized the right of women to refuse the legal status of motherhood after giving birth to a child. If a woman asserts this right, known as *accouchement sous X*, she is recorded simply as "X" on the child's birth certificate and her identity will remain an inviolable secret, even to the child.⁷⁶ This privilege to avoid family status might be thought inconsistent with the U.N. Convention on the Rights of the Child and with the European Convention on Human Rights. Article 8 of the U.N. Convention on the Rights of the Child, after all, guarantees "the right of the child to preserve his or her identity, . . . including family relations," and Article 7 specifically recognizes the right of every child, "as far as possible, . . . to know and be cared for by his parents." Similarly, though less specifically, Article 8 of the European Convention on Human Rights broadly declares that "[e]veryone has the right to respect for his private and family life."

These declarations of children's rights did indeed spur debate over the practice of anonymous motherhood in the French National Assembly, but the outcome was to *reinforce*, rather than to abandon, the customary option for women to spurn maternity. In 1993, the French Civil Code was amended to specify, through Article 341-1, the right of a woman to insist that "her identity shall remain secret" following childbirth.⁷⁷ According to Katherine O'Donovan, this was accomplished in part by recharacterizing "the right of giving birth anonymously [a]s a *fundamental freedom*" — an essential aspect of a woman's autonomy.⁷⁸ And, in

⁷⁵ See Meyer, *supra* note 49, at 1139–40 & nn.74–75 (collecting cases).

⁷⁶ See *Odièvre v. France*, App. No. 42326/98, Eur. Ct. H.R., ¶¶ 15–17 (Feb. 13, 2003), available at http://www.sternipark.de/oeffentlichkeit/presse/2003/februar/urteil_engl.pdf (describing French law); Katherine O'Donovan, *Constructions of Maternity and Motherhood in Stories of Lost Children*, in FEMINIST PERSPECTIVES ON CHILD LAW 67, 74–75 (Jo Bridgeman & Daniel Monk eds., 2000).

⁷⁷ *Odièvre*, Eur. Ct. H.R., ¶ 15.

⁷⁸ See O'Donovan, *supra* note 76, at 79 (emphasis added).

February 2003, the European Court of Human Rights upheld the French law against the claim that it contravened Article 8 of the European Convention.⁷⁹ The Court agreed that Article 8's prohibition against state interference with "private and family life" included protection for the right of persons to know the circumstances of their birth and family origin.⁸⁰ But it also observed that the child's right to know his or her origins clashed with other protected individual rights, including those of the birth mother and, potentially, the birth father, the adoptive parents, and "other members of the natural family."⁸¹ The Court then concluded that the French legislation struck a permissible balance between the competing individual interests in the family.⁸²

In effect, then, the recognition in European law of a child's "rights" in the matter simply spurred the elevation of women's interests into countervailing "rights," without affecting the pre-existing balance of interests struck by French law.⁸³ Of course, Article 7 of the U.N. Convention itself seemed to anticipate this possibility by asserting that a child has a right to know his or her parents only "as far as possible." Similarly, Article 8 of the European Convention on Human Rights expressly acknowledges that the individual's right to family privacy is qualified by the need to "protect[] the rights and freedoms of *others*." In short, there is simply no getting around the need to balance any concern for children with society's respect for the familial interests and prerogatives of adults, and the French experience with anonymous motherhood suggests that the balance point does not so much depend on the introduction of rights-analysis as it does on independent factors shaping social consensus about the nature of family and how competing conceptions of family life should be prioritized.⁸⁴

⁷⁹ See *Odièvre*, Eur. Ct. H.R.

⁸⁰ See *id.* ¶¶ 28–29.

⁸¹ See *id.* ¶ 44.

⁸² See *id.* ¶ 49.

⁸³ This outcome seems consistent with Barbara Woodhouse's observation that U.S. ratification of the U.N. Convention on the Rights of the Child would not require dramatic changes to existing U.S. family law, because nominally more expansive Convention guarantees concerning a child's "best interests" could be construed in a way that would be consistent with "American constitutional principles providing greater protection to family relationships." Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON POVERTY L. & POL'Y 313, 318 (1998). As Katherine O'Donovan noted about the differing responses of France and England to the Convention on the question of child abandonment and anonymous motherhood, "[w]here two jurisdictions are subject to the same international convention, history and culture will lead to different interpretations." O'Donovan, *supra* note 76, at 82.

⁸⁴ Two British scholars reached essentially the same conclusion in considering whether Article 8's recognition of family rights might change the outcome in disputes over grandparent visitation in English courts. Although the interest in preserving substantial established relationships between grandparents and grandchildren may well fall within

Accordingly, children's best hope may lie ultimately not with lawyers, but with social scientists and activists who might be able to gather the evidence necessary to muster a consensus to strike that balance differently. More evidence about the psychological and developmental stakes for children in the preservation of family or family-like bonds could help propel a new public judgment about the appropriate limits of parental choice in childrearing. It is ultimately that judgment — edifying not judges alone, but also legislators, public administrators, social workers, counselors, and parents themselves — that will do the real work of protecting the welfare of children.

CONCLUSION

Recently, *The New York Times* reported the story of a father in Afghanistan who, facing the prospect of starvation for his large family, made the desperate decision to sell two of his ten children.⁸⁵ The two boys, five and ten years old, were bought by a restaurateur in a nearby village and taken there to live and work for him, under very harsh conditions. Although the boys understandably expressed deep sorrow over their predicament in private, the restaurateur seemed oblivious to their anguish, reassuring the reporter that if the boys felt lonely, he would allow them to see their father every six months. Indeed, the purchaser boasted that this was a pareto-superior transaction: The boys were fed at the restaurant; the father received wheat to feed his remaining family; and the restaurant owner profited because it was cheaper to purchase the boys' servitude than to hire employees for wages. In fact, according to the restaurateur, the terms had been more generous than necessary. The father, he said, had been willing to part with the boys for nothing, just to see that they were fed. But, the purchaser added, "I know about human rights. I knew I was obligated to pay him something."⁸⁶

The agonizing facts of this story are mercifully alien and extreme from the perspective of modern America, and yet the story seems to capture the basic dilemma of children's rights. On the one hand, it demonstrates the strongest imperative for recognizing children's rights — that children not be regarded as solely the subjects of adult transactions. Utterly missing from the purchaser's account of the transaction was any sense at all of the children's enormous loss.

Article 8's protected scope, as incorporated into English law through the Human Rights Act of 1998, the authors concluded that "new rights are likely to do little to change the domestic legal landscape in relation to private law contact disputes. . . . [R]ights will not necessarily 'trump' prevailing constructions of welfare which place the child's best interests within the nuclear family under parental control." Felicity Kaganas & Christine Piper, *Grandparents and Contact: 'Rights v Welfare' Revisited*, 15 INT'L J.L., POL'Y & FAM. 250, 250 (2001).

⁸⁵ Barry Bearak, *A Nation Challenged: Survival; Children as Barter in a Famished Land*, N.Y. TIMES, Mar. 8, 2002, at A1.

⁸⁶ *Id.*

Recognizing the *right* of children to maintain vital family relationships would correct this glaring omission, requiring consideration of the children's sorrow. On the other hand, though, the story also illustrates the ultimate limitations on the promise of children's rights. After all, pronouncing legal rights would do nothing whatsoever for these boys absent some infusion of resources to address their family's terrible need. If they would otherwise starve, they probably *are* better off working in the restaurant and sleeping with the sheep.

That is essentially where I come out on the idea of children's relationship rights under American constitutional law. I find their call almost ineluctable, although I frankly doubt that they will go very far, by themselves, toward promoting the welfare of children. Recognizing children's rights would be useful in eliminating some of the procedural and tactical obstacles that now occasionally impede judicial consideration of children's interests. The denomination of children's associational interests as *rights* might lead some judges to give greater credence to the emotional losses suffered by children when important familial bonds are severed. But of even greater value to children would be an infusion of new resources in the form of knowledge and understanding that might build a stronger commitment to child welfare outside the courtroom, in the legislature, the classroom, and the home.