

REMARKS

THE SUPREME COURT AND THE FAMILY

*Honorable Sandra Day O'Connor**

It is a true pleasure to be here at the University of Pennsylvania Law School's sesquicentennial celebration and at the Family Law Symposium. The celebration makes me feel young—by comparison. It is appropriate that one of the centerpieces of your celebration should be this symposium on family law. The family is at the heart of American life, as well as American law. As Justice Powell wrote on behalf of the Court in *Moore v. City of East Cleveland*, "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. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."¹

It is this deep commitment to the family that has led so many of you to dedicate your careers to the development of family law. Family law poses special challenges and requires judges and attorneys, as well as other professionals like psychologists and social workers, to study and work together. And you must work together often—in 1998 alone, approximately five million cases involving domestic matters were filed in state courts.²

The ultimate goal, of course, is to maintain and improve a legal system that protects and respects the family, both as a unit and as a group of individuals with their own rights and interests. It is not an easy task, particularly in light of the momentous changes in our society that are taking families and family law in new directions. This symposium is addressing many issues on the frontiers of family law, including new reproductive technologies, welfare reform, foster care

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¹ *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality opinion) (footnotes omitted).

² B. OSTROM & N. KAUDER, EXAMINING THE WORK OF THE STATE COURTS, 1998: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 40 (National Center for State Courts 1999).

reform, and changing ideas about what it means to be a family in the first place. It is therefore appropriate that you should gather at the beginning of this new millennium to assess the challenges and possibilities that face our nation's families.

I have been asked to speak this evening about the Supreme Court and the family. In looking at the agenda for this weekend's symposium, I could not help but notice that my remarks tonight are the only part of the weekend dedicated to the role of the Supreme Court and the Constitution in the development of family law. Your panels focus not on constitutional doctrine, but on such topics as "The Changing Status of the Child" and "The Future of Marriage." And your discussions are led not by federal judges, but by state judges, practicing attorneys, academics, psychologists, and social workers.

By structuring the symposium in this way, the organizers have, I think, struck a balance that correctly reflects the role of the Supreme Court in the development of family law. The Supreme Court has been one voice in the development of family law. At times, it has been a powerful voice. But it is certainly not the only voice in this area, or even the primary one. Rather, family law has traditionally been the domain of state government. Under our federal system, the States retain primary responsibility for promoting public health, safety, morals, and the general welfare. This police power gives the States the authority to regulate matters that directly affect the structure of family life, including marriage, divorce, abortion, contraception, legitimacy, child protection, adoption, custody, and child support. Although Congress has recently passed laws such as the Child Support Recovery Act and the Violence Against Women Act which seek to regulate certain aspects of family relations, these statutes are the exception rather than the rule.

The Framers' decision to leave the creation and administration of family law to the States was a wise one. As then-Justice Rehnquist once noted, "[w]e have found . . . that leaving the States free to experiment with various remedies has produced novel approaches and promising progress."³ It makes good sense to allow those who work most closely with families to use their experience to shape judgments about what laws and policies are best to keep children safe, to keep families nourished and sheltered, and to keep marriages together or, when they are beyond repair, to make the split as equitable as possible. Indeed, most, if not all, States have set up specialized courts to deal with family and/or juvenile matters. This structure recognizes that families need specialized and individualized attention, and that family law matters more often than not raise fact-specific problems regarding the equities of the particular case and the best interests of the parties involved.

³ *Santosky v. Kramer*, 455 U.S. 745, 771 (1982) (Rehnquist, J., dissenting).

But this is not to say that the States have unfettered power to regulate families. The States *are* subject to constitutional constraints, and the Supreme Court has, when appropriate, struck down state laws that intrude on the core functions of the family or on the individual liberties of family members. In fulfilling this role, the Court has spoken of our common understandings of the family, our common aspirations, and the need to have a deeper understanding of the values that lie at the heart of our tradition.

For example, the Court has identified the freedom to marry as “one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁴ Accordingly, we have struck down state laws prohibiting marriage between whites and persons of color,⁵ setting filing fees that in effect barred many poor people from receiving a divorce,⁶ requiring applicants for a marriage license to show that they have no current or future child support obligations,⁷ and barring state prisoners from marrying.⁸

Our cases recognize “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁹ Thus, we have invalidated state laws prohibiting the use of contraceptives¹⁰ and barring women from obtaining an abortion in the early stages of pregnancy.¹¹

And we have stated that natural parents have a “fundamental liberty interest . . . in the care, custody, and management of their child.”¹² We have found inconsistent with this interest certain state laws mandating public schooling,¹³ setting a low evidentiary threshold in proceedings allowing termination of parental rights,¹⁴ and allowing state courts to award nonparental visitation rights without considering the wishes of the parent.¹⁵

There is a limit, though, to the Supreme Court’s role in the development of family law. The Supreme Court generally becomes involved in family cases only when the case implicates an overarching constitutional issue, such as the scope of the due process or equal protection clauses. But the adjudication of constitutional disputes does not necessarily translate to the *effective* resolution of family disputes. While constitutional due process doctrine is primarily con-

⁴ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

⁵ *Id.*

⁶ *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

⁷ *Zablocki v. Redhail*, 434 U.S. 374, 377 (1978).

⁸ *Turner v. Safley*, 482 U.S. 78, 81 (1987).

⁹ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis omitted).

¹⁰ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Eisenstadt*, 405 U.S. at 443.

¹¹ *Roe v. Wade*, 410 U.S. 113, 164 (1973).

¹² *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

¹³ *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972).

¹⁴ *Santosky*, 455 U.S. 745 (1982).

¹⁵ *Troxel v. Granville*, 120 S. Ct. 2054, 2059 (2000).

cerned 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.¹⁶

Accordingly, family law is—and must be—a collaborative enterprise. While the Supreme Court is well positioned to articulate general principles of constitutional law, there is much more to family law than the setting of constitutional rules. Underlying each family law case that reaches us are issues of state law and policy, as well as an actual family with its own dynamics, challenges, and problems.

Three cases illustrate the Supreme Court's role in the development of family law, as well as the need for innovative family policy and family law practitioners who can give individual families the special attention they require. The first is a case we decided just last Term, *Troxel v. Granville*.¹⁷ Tommie Granville is the mother of two girls. While the girls' father, Brad Troxel, was alive, his parents, Jenifer and Gary Troxel, visited with their granddaughters regularly. However, some months after Brad committed suicide, Tommie informed the Troxels that she wanted to limit their visits with the girls to one short visit per month and special holidays. The Troxels went to state court, seeking to obtain more extensive visitation rights under a Washington state statute that authorized a state superior court to grant visitation rights to *any* person when the court was satisfied that such visitation would serve the best interests of the child. The state court determined that it was in the girls' best interests to have extended visitation with the Troxels. Granville appealed, arguing that the state statute unconstitutionally interfered with her fundamental right as a parent to rear her children.

From the perspective of constitutional law, Tommie Granville was correct. Under our "extensive precedent," we found it clear that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."¹⁸ Because the statute did not require the state judge to accord Tommie Granville's wishes any weight whatsoever, and because there was no showing that she was unfit to determine her daughters' best interests, we held that the Washington statute was unconstitutional as applied to the parties in the case. From this perspective, the *Troxel* case presented the Court with the opportunity to do what it does best—protect fundamental individual liberties against state infringement.

¹⁶ EVA R. RUBIN, *THE SUPREME COURT AND THE AMERICAN FAMILY* 6-7 (1986).

¹⁷ *Troxel*, 120 S. Ct. 2054 (2000).

¹⁸ *Id.* at 2060.

There is much more to the *Troxel* case than the conflict between a State and one mother's right to determine how to raise her children, however. From another perspective, *Troxel* is a human drama, centered on a particular family and its particular circumstances. The case tells a compelling story of parents who are grieving the loss of their son and trying to carry on his memory by maintaining a close relationship with his daughters. There is a mother who is seeking both to include her daughters' grandparents in their lives, and also to move on, remarry, and create a new family for her children. And there are two girls who lost their father but who have immediate and extended family members literally battling to spend time with them. As a matter of constitutional law, Tommie Granville may get to make the final decision as to whom her children will visit. But as a matter of parenting and family relationships, the decision is a difficult one and one for which the law has little to offer.

Troxel is not the only case in which the Court has dealt with the rights of grandparents. Another is *Moore v. City of East Cleveland*.¹⁹ In that case, a woman named Inez Moore shared her home with her son Dale and her two grandsons, Dale Jr. and John Jr. John Jr., the child of Mrs. Moore's other son, came to live with his grandmother after his own mother died. Approximately nine years later, Mrs. Moore, who was then sixty-three years old, received a notice from the city informing her that she was in violation of a housing ordinance that limited occupancy of a dwelling to members of a single family, and directing her to remove John Jr. from her home. When she refused to expel her ten-year-old grandson, Mrs. Moore was fined and sentenced to five days in jail. She appealed, arguing that the city ordinance violated the Due Process Clause by making a crime out of a grandmother's choice to live with her grandson.

Mrs. Moore was, of course, correct. The Court recognized that "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."²⁰ While the Court acknowledged the traditional state power to restrict land use, it confirmed that that power may not be used to "slic[e] deeply into the family itself,"²¹ particularly when the state law advances few, if any, other state regulatory interests.

Like *Troxel*, *Moore* was from one perspective a case uniquely within the competence of the Supreme Court because it dealt with the proper allocation of power between an individual and the State. But, both cases have an additional dimension: They reflect the "changing

¹⁹ 431 U.S. 494 (1977) (plurality opinion).

²⁰ *Id.* at 504.

²¹ *Id.* at 498.

realities of the American family”²² and serve to clarify the appropriate boundaries for state regulation of the family. Although the Court’s early family-related jurisprudence extolled the virtues of the nuclear family, we have recognized that “[t]he demographic changes of the past century make it difficult to speak of an average American family.”²³ As single parent households increase in number, “persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role.”²⁴

Moore teaches that when families work out their own guardianship arrangements, the State generally must respect those decisions. But *Troxel* clarified that States may also properly attempt to protect the relationships children form with parents outside the nuclear family. Although there are limits to what States can do, we noted in *Troxel* that each of the fifty states has passed a nonparental visitation statute. And we refused to hold that such statutes are per se invalid. Rather, the States are free to provide for nonparental visitation as long as they provide appropriate weight to the parent’s determination of the child’s best interests. In this way, we have given States the necessary space to create structures that promote the best interests of children. It is not the province of the Court to decide as a *policy* matter how best to allocate responsibility for the rearing of children.

Another case that exemplifies the abilities and the limitations of the Supreme Court in the area of family law is *Santosky v. Kramer*.²⁵ Unlike the *Troxel* and *Moore* children, the *Santosky* children had too few people wanting to care for them. Specifically, John and Annie *Santosky* neglected their three children, Tina, John, and Jed. The State of New York removed the children from the *Santoskys*’ custody and embarked on “diligent” but unsuccessful efforts “to encourage and strengthen the parental relationship.”²⁶ Four and a half years later, the State moved in family court to terminate the *Santoskys*’ parental rights. The court agreed, finding by a preponderance of the evidence that John and Annie *Santosky* were “incapable, even with public assistance, of planning for the future of their children.”²⁷ The *Santoskys* appealed, arguing that the statutory preponderance of the evidence standard unconstitutionally infringed upon their due process rights.

The majority agreed with the *Santoskys*. Given “[t]he fundamental liberty interest of natural parents in the case, custody, and management of their child[ren],” and because “parents retain a vital in-

²² *Troxel*, 120 S. Ct. at 2059.

²³ *Id.*

²⁴ *Id.*

²⁵ 455 U.S. 745 (1982).

²⁶ *Id.* at 752 (internal quotation marks omitted).

²⁷ *Id.*

terest in preventing the irretrievable destruction of their family life,"²⁸ the Court held that due process required the State to produce at least "clear and convincing evidence" of parental unfitness in proceedings to terminate parental rights.²⁹

Although I joined then-Justice Rehnquist's dissent and would have left New York's statutory domestic relations scheme intact, even the majority recognized the need for solicitude for state laws governing domestic relations. In reaching its holding, the majority may well have been moved by the fact that most states had already implemented a clear and convincing evidence standard of proof. Further, the majority declined to set a particular burden of proof, recognizing that "the determination of the precise burden . . . is a matter of state law properly left to state legislatures and state courts."³⁰

Thus, *Santosky* also demonstrates both the ability of the Court to vindicate individual rights, and the fact that it is for the States in the first instance to create and implement family law. And *Santosky* also reminds us that underneath every legal debate over family law is a family in crisis. After we remanded the case, the New York courts upheld the termination of the Santoskys' parental rights.³¹ Even under the higher standard of proof, the court found that the Santoskys had failed to plan for the future of their children. Applying state statutory and case law regarding what is required of parents in their situation, the court found that the Santoskys had refused family and child counseling and parenting classes, and therefore had "not only failed to take any steps toward formulating and acting upon a plan for the . . . support of their children . . . but they also displayed a total lack of awareness of the need for such a plan."³² Operating within the appropriate constitutional ground rules, this is precisely the type of determination our federal system has left to the state courts.

In sum, we all have our role to play in the development of family law. The Supreme Court has articulated ideals regarding who the family is and what its core functions are. The Court has imposed limits, consistent within the Constitution, on State efforts to impinge on those fundamental interests. But there are many questions the Supreme Court is not equipped to resolve. The primary responsibility for creating a legal system that effectively promotes the interests of families and their individual members lies with the States. And the importance of family law practitioners who take the time to give individualized attention to families and work to achieve their best interests cannot be overstated. As our society grows and changes, and as the issues facing families become more complex, your work will con-

²⁸ *Id.* at 753.

²⁹ *Id.* at 769.

³⁰ *Id.* at 769-70.

³¹ See *Kramer v. John "AA" I*, 453 N.Y.S.2d 942 (1982) (*In re John "AA" I*).

³² *Id.* at 945.

tinue to be a challenge. I wish you well this weekend as you engage in what I hope will be a useful dialogue. Thank you.