SUPREME COURT OF THE UNITED STATES

No. 99–138

JENIFER TROXEL, ET VIR, PETITIONERS *v.*
TOMMIE GRANVILLE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[June 5, 2000]

JUSTICE SCALIA, dissenting.

In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all Men . . . are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

Only three holdings of this Court rest in whole or in part

upon a substantive constitutional right of parents to direct the upbringing of their children[1]— two of them from an era rich in substantive due process holdings that have since been repudiated. See *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 401 (1923); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925); *Wisconsin* v. *Yoder*, 406 U. S. 205, 232–233 (1972). Cf. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937) (overruling *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 (1923)). The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.

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. If we

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[1]Whether parental rights constitute a "liberty" interest for purposes of procedural due process is a somewhat different question not implicated here. *Stanley* v. *Illinois*, 405 U. S. 645 (1972), purports to rest in part upon that proposition, see *id.*, at 651–652; but see *Michael H.* v. *Gerald D.*, 491 U. S. 110, 120–121 (1989) (plurality opinion), though the holding is independently supported on equal protection grounds, see *Stanley*, *supra*, at 658.

embrace this unenumerated right, I think it obvious– whether we affirm or reverse the judgment here, or remand as JUSTICE STEVENS or JUSTICE KENNEDY would do– that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.[2]

For these reasons, I would reverse the judgment below.

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[2]I note that respondent is asserting only, *on her own behalf*, a substantive due process right to direct the upbringing of her own children, and is not asserting, *on behalf of her children*, their First Amendment rights of association or free exercise. I therefore do not have occasion to consider whether, and under what circumstances, the parent could assert the latter enumerated rights.