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PRIVACY: THE REHNQUIST COURT'S UNMENTIONABLE "RIGHT"

Martin H. Belsky*

"Privacy rights" were once the terms used broadly by the Justices of the Supreme Court to indicate constitutional protection of certain personal decisions, especially those involving family, sexual, and reproductive choices¹ made by an individual as against government intrusion.² The premise was the "right to be left alone," articulated by Justice Brandeis in his dissent in *Olmstead v. United States*.³

This "right of privacy"⁴ was the constitutional basis to bar restrictions on the sale and use of contraceptives devices,⁵ on abortion,⁶ on the right to marry,⁷ and on the nature of a family.⁸ Later it had to be distinguished when the Court upheld restrictions on sexual orientation⁹ and the "right to die."¹⁰

"Privacy" was also the term used to indicate the right to exclude government from interfering with private rights of association. This includes the right to choose one's spouse,¹¹ and the right to belong to an association and keep that association secret.¹² This freedom to associate or not associate is broad enough to also cover other intimate and expressive activity.¹³

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1. See John Nowak & Ronald Rotunda, *Constitutional Law* 795-810 (5th ed. 1995). See also David J. Garrow, *Revelations on the Road to Roe*, *AMERICAN LAWYER*, May, 2000, at 80, 82.

2. Another strand of cases where the "zone of privacy" is raised has to do with "Big Brother" access to, and collection and disclosure of personal information by the government. See e.g. *Whalen v. Roe*, 429 U.S. 589 (1977) (claim that law requiring disclosure by doctors of information concerning drug use by patients invaded "zone of privacy" rejected).

3. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

4. For a discussion of the "right to privacy" and its application to all aspects of sexuality, see David J. Garrow, *LIBERTY AND SEXUALITY IN THE BURGER COURT - COUNTER-REVOLUTION OR CONFIRMATION* at 83 (Bernard Schwartz ed. 1998).

5. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

6. See *Roe v. Wade*, 410 U.S. 113 (1973).

7. See *Zablocki v. Redhail*, 434 U.S. 374 (1978) (stating the right to marry part of fundamental right of privacy implicit in the Fourteenth Amendment's Due Process Clause).

8. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

9. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

10. See *Cruzan v. Director*, 497 U.S. 261, 279, n.7 (1990).

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

12. See e.g. *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958) (first amendment right of association bars compelled production of membership lists); *NAACP v. Button*, 371 U.S. 415 (1963) (association's right to seek counsel for members). Both these cases were cited in *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) as indicating that there is a "penumbra" of privacy rights surrounding those protected by the First Amendment.

13. See *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988).

These privacy rights were “fundamental”, and any attempt or agreement to restrict them was to be reviewed with the strictest scrutiny. Only a compelling interest could justify restriction, and even then, only if the restriction was narrowly tailored.¹⁴

But this once helpful¹⁵ categorization of rights has been rejected by the Rehnquist Court. Specifically, in four major decisions of the 1999 Term,¹⁶ a privacy right could have been the basis for the decision or at least have required distinction. Yet the Court barely mentions the term at all.¹⁷ Rather, the Court relies on general “substantive due process,”¹⁸ or specific rights “to choose” an abortion,” to be left alone,” or of “expressive association.”¹⁹

This article will look at this set of cases, and examine if and how rejection of a specific and articulated fundamental right of privacy has affected Supreme Court decision-making.

I. THE RIGHT OF PRIVACY AND ABORTION

The modern history of the Constitutional “right to privacy” began in 1942, when an equal protection challenge was made to Oklahoma’s Habitual Criminal Sterilization Act in *Skinner v. Oklahoma*.²⁰ Justice Douglas in upholding the challenge specifically stressed reproductive rights, especially within the family context: “We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”²¹ The opinion went on to hold that any classification affecting these rights must be reviewed with the strictest scrutiny.²²

After successfully avoiding the issue for twenty-three years on procedural

14. This was Justice Douglas’s argument in *Griswold*. See Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1421-22 (1974). It was also the basis to reject privacy claims of an absolute freedom of association as including rights to discriminate. See e.g. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary International*, 481 U.S. 537 (1987).

15. In a recent phone conversation with a group of “constitutional law experts,” one commentator suggested that applying the concept of a right of “privacy” to the Court’s decisions on abortion, parents vs. grandparents rights, and the Boy Scouts right of intimate association was use of “unhelpful language.” But see Jeffrey Rosen, *My Child, Mine to Protect*, NEW YORK TIMES ABSTRACTS, June 7, 2000, at 31, available in 2000 WL 23201829.

16. See *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000) (voiding statute restricting “partial birth” abortions)[hereinafter *Stenberg*]; *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (upholding restrictions on contact outside a health care facility) [hereinafter *Hill*]; *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000) (barring application of New Jersey’s anti-discrimination law to Boy Scouts restrictions on gay scout leaders)[hereinafter *Boy Scouts*]; *Troxel v. Granville*, 120 S. Ct. 2054 (2000) (Washington courts mandate of grandparent visitation rights violates parents’ fundamental rights to rear children) [hereinafter *Troxel*].

17. Only in *Hill*, 120 S. Ct. at 2489 (2000), did Justice Stevens mention the “recognizable privacy interest [not right] in avoiding unwanted communication . . .” [emphasis and comment added].

18. See e.g. *Troxel*, 120 S. Ct. at 2060.

19. See *Stenberg*, 120 S. Ct. at 2609 (“right to abortion”); *Hill*, 120 S. Ct. at 2508 (right to be left alone); *Boy Scouts*, 120 S. Ct. at 2447 (expressive association).

20. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

21. *Id.* at 541.

22. See *id.* Chief Justice Stone, in his concurrence, was more direct in his assumption of a right to be free from invasion of “personal liberty.” *Id.*

grounds,²³ the Supreme Court directly addressed the issue of reproductive choice and birth control finally in *Griswold v. Connecticut*, and squarely placed those rights in a specific new category of "privacy rights."²⁴

The majority opinion of Justice Douglas in *Griswold* is often criticized as creating a "new right" out of penumbras of other rights and lacking any firm basis in the specific language of the Constitution.²⁵ Justice Douglas sought to avoid application of the Due Process Clause and instead looked to the First Amendment as establishing the rights of parents to educate their children as they deem appropriate, and of individuals to associate with whom they wish. He also pointed to other privacy protections against quartering of soldiers under the Third Amendment, against government invasions of personal privacy under the Fourth Amendment, and against forced testimony under the Fifth Amendment.

These specific rights had penumbras, creating a "zone of privacy", and this broad "right of privacy" is, in fact, "older than the Bill of Rights."²⁶ Justice Goldberg in his concurrence, joined by Chief Justice Warren and Justice Brennan, also found a "fundamental personal right of privacy" that could only be limited by a showing of "compelling subordinating state interest," but felt that it could be found in the Ninth Amendment.²⁷ It was not until eight years later that Justice Blackmun, in *Roe v. Wade*, specified a home for the right to privacy: "the Fourteenth Amendment's substantive due process concept of personal liberty and restrictions upon state action."²⁸ As a fundamental right, limits had to be justified by a "compelling state interest" and be "narrowly tailored."²⁹

A review of the ups and downs, the political and religious debate, and the impact of the changes in the Court on abortion law can be found in many other sources.³⁰ Generally, with one exception for funding,³¹ the Court for ten years

23. See e.g. *Poe v. Ullman*, 367 U.S. 497 (1961). In *Poe*, Justice Harlan dissented and would have heard the case. He would have found invalid a Connecticut law that prohibited the use of contraceptive devices and the giving of information on such devices. The statute, he urged, violated due process as it invaded "marital privacy." *Id.* at 522.

24. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

25. See e.g. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 INDIANA L.J. 1, 9 (1971). This criticism of a newly created "right to privacy" was, of course, made in Justice Black's dissenting opinion in *Griswold* itself. *Griswold v. Connecticut*, 381 U.S. 479, 530 (Justice Black dissenting).

26. *Griswold*, 381 U.S. at 484-86.

27. *Id.* at 502. Justice Harlan concurred finding support under the Due Process Clause. Justice White also concurred finding a "right . . . to be free of regulation of the intimacies of the marriage relationship." *Id.* at 502-03.

28. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

29. *Id.* at 155.

30. See e.g. LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990); ROBERT BORK, *THE TEMPTING OF AMERICA* (1990). See generally Michael Vitello, *How Imperial Is the Supreme Court? An Analysis of Supreme Court Abortion Doctrine and Popular Will*, 34 U. S. F. L. REV. 49 (1999).

31. The Supreme Court, early on, held that government could decide to fund birth programs and not fund abortion or other forms of birth control programs. Since it was spending its own money, it could make those kind of moral choices. Dissenters argued that this was discriminatory as it allowed the wealthy to have a right to an abortion and deprived the poor of an equivalent right. See e.g. *Maher v. Roe*, 432 U.S. 475 (1977); *Harris v. McRae*, 448 U.S. 297 (1980). See also *Rust v. Sullivan*, 500 U.S. 173 (1991).

strictly scrutinized state restrictions on abortions in the first two trimesters, in accordance with *Roe*.³² Then, as changes occurred in the make-up of the Court, there was hope by some, and fear by others, that the new Rehnquist Court would overrule *Roe*.

A five to four majority in *Webster v. Reproductive Health Services* (1989),³³ led by Chief Justice Rehnquist, strongly indicated that that expectation was justified. The Court upheld a rigid set of regulations on abortions. There was no statement at all about abortion being part of any "fundamental right of privacy" requiring strict scrutiny and narrow tailoring.³⁴ Justice Blackmun, the author of *Roe*, writing in dissent, characterized the review as barely "rational basis", and opined that the case effectively overruled *Roe*.³⁵ Justice Scalia, concurring, agreed with Blackmun's characterization and only wished that the majority would have done so explicitly.³⁶

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³⁷ Justice Scalia moved from an expectant concurrent to an angry dissenter.³⁸ In a plurality opinion written by Justice O'Connor, and joined by Justices Kennedy and Souter,³⁹ a woman's right to "choose to have an abortion before viability"⁴⁰ was upheld. The Court, however, did not even mention any right to privacy, but rather only talked about "liberty" interests under the due process clause.⁴¹ Review of restrictions would not be based on any compelling government interest or narrow tailoring standard, but rather on whether a restriction places an "undue burden"⁴² on the woman's right to choose.⁴³

Chief Justice Rehnquist wrote a very forceful and divisive dissent for the four dissenting Justices: "We believe that *Roe* was wrongly decided and should be overruled . . . We would adopt the approach of the plurality in *Webster*."⁴⁴ This opinion was obviously not shared by Justice Blackmun, the author of *Roe v. Wade*, and its strongest defender. He stated, nervously, in *Casey* his fear for the future:

32. See e.g. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

33. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

34. See Stephen E. Gottlieb, *The Philosophical Gulf on the Rehnquist Court*, 29 RUTGERS L. J. 1, 32 (1997).

35. See *Webster*, 492 U.S. at 543.

36. See *id.* at 532.

37. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

38. See *id.* at 996 ("the Imperial Judiciary lives").

39. Justices Stevens and Blackmun joined to make a majority but would have applied a stricter standard of review of any regulations. *Id.* at 913, 926.

40. *Id.* at 846.

41. See *id.*

42. The "undue burden" standard comes from the plurality plus the four Justices, who "concurred in part and dissented in part." Chief Justice Rehnquist, Justice Scalia, Justice Thomas, and Justice White would have overruled *Roe* but at a minimum they wanted a more lenient standard of review than strict scrutiny and so joined on the undue burden test. See *id.* at 874.

43. See Marcia Coyle, *Is 'Roe v. Wade' in Play?*, NAT'L L. J., July 10, 2000, at A-1, A-12. The "undue burden" test was defined as existing when the "purpose or effect" of a provision of law is to "place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 878.

44. *Casey*, 505 U.S. at 944.

the difference between the plurality and the dissenters was "world's apart." But, "in another sense, the distance between the two approaches is short - the distance is but a single vote."⁴⁵ That vote was of Justice Kennedy.⁴⁶

This bare majority supporting the right to choose, especially when untied from any fundamental privacy right, has set the stage for continuing political and legal challenges. Those attacking restrictions on abortion might still win, but they have a much tougher battle, as indicated by two decisions from the 1999 Term.

In *Hill v. Colorado*,⁴⁷ the Court considered a state statute to protect access to health care facilities, particularly those providing birth control and abortion services. Within 100 feet from any entrance to such a facility, it was made unlawful for any person to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person . . ."⁴⁸ Protestors claimed a First Amendment right to undertake "sidewalk counseling."⁴⁹ The Court in a 6 to 3 opinion upheld the ordinance as being a "reasonable time place and manner restriction."⁵⁰

What is significant is what the Court did not say. First Amendment free speech law provided that restrictions on protests, talks, leafleting and similar expressive activities on a public forum like a sidewalk had to be strictly scrutinized. Any restriction had to be based on substantial and perhaps compelling government interests, and be narrowly tailored as the least restrictive means to meet the desired legitimate purpose.⁵¹

If the Court had accepted the fundamental right to privacy, and inclusion of the right to an abortion within that right, resolution of this case would have been straightforward. Protection of a fundamental constitutional right is a compelling state interest. Providing access so the right can be exercised was a valid limitation of any countervailing First Amendment claim.⁵²

The Court, however, rejected a balancing between two fundamental rights. Privacy is not a fundamental right, and therefore there is no special need to

45. *Id.* at 943.

46. The vote in *Webster* was Chief Justice Rehnquist, Justices White, Kennedy, and Scalia. Justice O'Connor concurred. Justices Blackmun, Brennan, Marshall, and Stevens dissented. In *Casey*, O'Connor's plurality opinion was joined by Souter and Kennedy. Stevens and Blackmun concurred. Chief Justice Rehnquist, and Justices White, Scalia and Thomas dissented. In hindsight, Justice O'Connor has been consistent in accepting an abortion right, when tied to an "unduly burdensome" standard. See *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 504 (1983) (concurring opinion by Justice O'Connor). Also, in hindsight, it is clear that Justice Kennedy has only a tenuous tie to the majority opinion in *Casey*. See *Stenberg*, 120 S. Ct. at 2623 (dissenting opinion of Justice Kennedy).

47. *Hill v. Colorado*, 120 S. Ct. 2480 (2000).

48. *Id.* at 2483.

49. *Id.* at 2485.

50. *Id.* at 2481.

51. This "special status" was first articulated in the famous footnote 4 in *United States v. Caroline Products*, 304 U.S. 144, 152-53, n.4 (1938). See also *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) (comparing political speech to commercial speech). See generally, JOHN NOWAK & RONALD ROTUNDA, *CONSTITUTIONAL LAW* at 1002 (5th ed. 1995).

52. See e.g. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (right to associate can be limited by compelling interests; eradicating discrimination is such an interest).

protect access as part of the right. At best, the “common law ‘right’ [of privacy as articulated by Justice Brandeis in *Olmstead*] is “more accurately characterized as an ‘interest’ that States can choose to protect in certain situations.”⁵³ The difference is significant—an interest is optional and may be compelling; a right is mandatory and must be compelling.

On the other hand, the protestors had a clear fundamental First Amendment right.⁵⁴ The balancing factor was not that of a fundamental right, like privacy, but only the general “police powers to protect the health and safety of the citizens.”⁵⁵ To resolve the conflict between the right of free speech and the privacy “interest,” the Court falls back on traditional First Amendment doctrine. The government’s restriction here is merely a “time, place, and manner regulation” that is “content neutral” as to all protests or actions with one hundred feet of a medical facility.⁵⁶

The concurrence by Justice Souter [joined by Justices O’Connor, Ginsburg and Breyer] also focused on the “time, place and manner” doctrine.⁵⁷ No viewpoints or words were being restricted—only how and where they could be expressed. The dissent by Justice Scalia, with Justice Thomas, was almost sneering. Abortion was getting special privilege. This regulation “against the opponents of abortion . . . enjoys the benefit or the ‘ad hoc nullification machine’ that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.”⁵⁸ This is, he states, a content based regulation and therefore needs to satisfy a strict scrutiny review.⁵⁹ He finds no compelling interest—certainly not protecting some one from unwelcome communications.⁶⁰

As noted above, if “privacy” was still a right, access to a facility providing an aspect of that right would clearly be compelling. It would be entitled to “special privilege,” and Justice Scalia’s objections though still heated would be without a substantive basis. A similar opening was given to Justice Kennedy, by the Court’s unwillingness to maintain a privacy right. Justice Kennedy, who was in the bare majority in *Casey*, also dissented. He opined that this law barred certain types of protected speech based on content and was vague and overbroad.⁶¹ He makes it clear, that *Casey* had reduced the level of scrutiny of regulations affecting abortion.⁶² Abortion is now the subject of a “careful balance,” as opposed to

53. *Hill*, 120 S. Ct. 2490. The Court’s analysis focuses on privacy cases and the “right to be left alone.” *Id.* at 2508. Also, the “right to free passage in going to and from work,” including a medical facility. *Id.* at 2489. Yet, it rejects any ‘right’ and states at best that there is a “privacy interest in avoiding unwanted communication . . .” *Id.*

54. *See id.* at 2485.

55. *Id.* at 2489.

56. *Id.* at 2483. The court also rejected the idea that the regulation was overbroad and vague—again based on the idea that this was a “reasonable” prophylactic measure.

57. *Id.* at 2500-01.

58. *Id.* at 2503.

59. *See Hill*, 120 S. Ct. at 2503.

60. *See id.*

61. *See id.* at 2520-21.

62. *Id.* at 2529.

protection of a fundamental right.⁶³ By giving protection to access, this "non-right", the majority "turns its back on the balance."⁶⁴

That there is a reduced status of the "right to choose," because it is separate from a broader privacy right, was made clear in the so-called "partial-birth abortion" decision - *Stenberg v. Carhart*.⁶⁵ *Stenberg* involves a challenge to a Nebraska statute that barred certain types of abortions - termed by the legislature "partial birth abortions." Justice Breyer speaking for a five Justice majority, found that the statute, even when reviewed on its face,⁶⁶ is invalid.

First, the ban on "dilation and extraction" abortions applied to both pre-viability and post-viability procedures and covered a broad category of abortions.⁶⁷ It therefore violated the *Casey* doctrine that no "undue burden" can be placed "on the woman's decision before fetal viability."⁶⁸ It also did not provide any exceptions for the preservation of the health of the mother, even though this method of abortion may be, in some cases, more safe than other methods.⁶⁹ Regulations, even post-viability regulations, may not conflict with an "appropriate medical judgment" to protect the "life or health of the mother."⁷⁰

Nowhere in the majority decision was there any discussion of the right to privacy, or that abortion or the "right to choose" was part of that larger more fundamental protection. If such a right still existed, any restriction would have to be reviewed strictly—meaning inclusion of all possibilities of abuse. Arguments disputing "on its face" review would be contrary to the narrowly tailored doctrine. If such a broad right existed, the ban would clearly fall as there was no compelling interest justification. As Justice Stevens, in his concurrence, indicated, there could not be any "legitimate"[let alone compelling] interest in requiring a doctor to follow any procedures other than the one that he or she reasonably believes will best protect the woman"⁷¹

By focusing on the narrower "right to choose,"⁷² the majority apportioned room for continuing debate, and even bans to certain pre-viability abortions. In her concurrence, Justice O'Connor, the fifth vote, makes it clear that she would

63. *Id.*

64. *Id.*

65. *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000).

66. The dissenters argued that the Court should not have reviewed the statute without a specific application; the "on its face review" assumed improper applications. This went against recent Supreme Court jurisprudence, which focused only on specific improprieties and not mere possibilities of future improprieties. *See id.* at 2621.

67. The Attorney General of Nebraska and the dissenting Justices argued that reading the phrase "partial birth" together with the language of the statute meant that the restriction should be applied to a very narrow category of abortions. The majority rejected this argument. *See id.* at 2614.

68. *Id.* at 2600. "Undue Burden" is defined as "casting a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*

69. Justice Thomas argued, *id.* at 2651, that the *Casey* exception for safety and health only applied to situations where pregnancy was a threat to health. Breyer for the majority rejected this limitation. The exception must also apply to the risks involved among different methods of abortion. *See id.* at 2609.

70. *Id.* at 2609.

71. *Stenberg*, 120 S. Ct. at 2617.

72. *Id.* at 2604.

allow a prohibition of certain types of abortions, specifically the D&X method, provided there was some exception to protect the life and health of the mother.⁷³ The dissenters also saw room for future maneuvering because of the lower standard.⁷⁴ While *Roe* put abortion in the larger category of privacy rights, separating out the “abortion right” allowed a reduction in the level of review, which the dissenters urged was not followed in *Stenberg*.

Justice Kennedy,⁷⁵ who was in the majority in *Casey* explicitly stated that he saw *Casey* as changing the standard. Here, he said, the statute advanced “critical state interests”—not compelling state interests—and that alone should have been sufficient to uphold it.⁷⁶ *Casey*, he noted, repudiated prior law “which gave a physician’s treatment decisions controlling weight,”⁷⁷ explicitly “rejected a strict scrutiny review,”⁷⁸ and excised the *Roe* doctrine that in abortion cases, strict construction was required.⁷⁹

Justice Thomas stressed again that abortion was not a fundamental right. *Casey* had changed all that.

Although in *Casey* the separate opinions of The Chief Justice and Justice Scalia, urging the Court to overrule *Roe*, did not command a majority, seven members of that Court, including six members sitting today, acknowledged that States have a legitimate role in regulating abortion and recognized the States’ interest in respecting fetal life at all stages of development.⁸⁰

This case, Justice Thomas urged, went back to the days when abortion rights were more fundamental and “trump[ed] any contrary societal interest.”⁸¹ Since there is no broad privacy right, a fundamental right, including the right to abortion, the Nebraska statute should not be knocked down if any narrow construction was possible.⁸² “On its face” review is inappropriate. Restrictions on an ordinary right would be disallowed, if respondent has shown that “no set of circumstances exists under which the Act would be valid.”⁸³

Both *Hill* and *Stenberg* - though overtly upholding directly and indirectly the woman’s “right to choose” - still set the barrier lower for restrictions on those

73. *See id.* at 2620.

74. Justice Scalia’s attack was nothing more than a general attack on *Roe* and *Casey*. As he said, the only reason he wrote a separate dissent at all, it may be argued, was that “because of the Court’s practice of publishing dissents in the order of the seniority of the authors, this writing will appear in the reports before those others . . .” *Id.* at 2621.

75. Justice Kennedy was joined by Chief Justice Rehnquist.

76. *Stenberg*, 120 S. Ct. at 2623.

77. *Id.* at 2627.

78. *Id.* at 2597.

79. Justice Kennedy’s exact language was that *Casey* “banished this doctrine” that “in abortion cases, a permissible reading of a statute is to be avoided at all costs.” *Id.* at 2633.

80. *See id.* at 2635. Justice Thomas’s dissent was joined by Chief Justice Rehnquist and Justice Scalia.

81. *Id.* at 2636-37.

82. *See Stenberg*, 120 S. Ct. at 2636-37. Justice Thomas urged that the statute should be upheld if any “construction of the statute is fairly possible that would avoid the constitutional question.” *Id.* at 2637. This, of course, is typical “rational basis” review. *See e.g.* *United States v. Carolene Products*, 304 U.S. 144, 154 (1938) (“any state of facts”).

83. *Stenberg*, 120 S. Ct. at 2655.

rights. No broad and fundamental right of privacy exists. Abortion is *sui generis*. Restrictions would be reviewed on an *ad hoc* basis—using an *undue burden* standard and not a strict scrutiny. Only a significant interest - and not a compelling one - is needed to justify controls.

II. THE RIGHT OF PRIVACY, SEXUAL ORIENTATION AND THE BOY SCOUTS

The Rehnquist Court's unwillingness to state, let alone, apply a broad and fundamental privacy right is also indicated by cases dealing with sexual orientation, including the recent decision involving the Boy Scouts of America—*Boy Scouts of America v. Dale*.⁸⁴ The facts in *Dale* are relatively straightforward, and its conclusion is not surprising in light of the Court's insistence on narrowing the scope of the privacy right.

The saga begins with *Bowers v. Hardwick*.⁸⁵ Georgia's statute criminalizing sodomy was upheld in a five to four decision written by Justice White. The challengers sought to frame the issue as part of a broader privacy right—the right to be left alone, citing Justice Brandeis's dissent *Olmstead v. United States*.⁸⁶ Justice White for the majority defined the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”⁸⁷ Thus limited, the Court was able to distinguish all previous “right to privacy” cases as being related to “family, marriage, or procreation.”⁸⁸ Previous cases that related to activities that occurred in the privacy of one's home [as was the case in *Bowers*] were distinguished as involving other fundamental rights, such as those found in the First Amendment.⁸⁹ If there was no fundamental right involved, only a rational basis was needed to uphold the law.⁹⁰

*Romer v. Evans*⁹¹ indicated how the Court's failure to provide for a broad privacy right and apply it to sexual orientation can lead to some interesting hair-splitting. In *Romer*, a Colorado state Constitutional provision knocked out local ordinances that prohibited discrimination based on sexual orientation. The amendment also prohibited “all legislative, executive or judicial action at any level designed to protect the named class, a class we shall refer to as homosexual or gays or lesbians.”⁹² If the fundamental right of privacy included and protected “homosexual conduct,” a law that interfered with the exercise of that right would have to be strictly scrutinized, and only compelling justifications and narrow tailoring would allow a restriction. Here a broad law prohibiting discrimination against a group exercising its privacy rights would have been bad.

No such broad privacy protection could exist after *Bowers*. How then did

84. *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000).

85. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

86. *See id.* at 199 (dissenting opinion by Justice Blackmun).

87. *Id.* at 190.

88. *See* STEPHEN E. GOTTLIEB, *supra* note 34, at 13.

89. *Bowers*, 478 U.S. at 195 (1986).

90. *See id.* at 196.

91. *Romer v. Evans*, 517 U.S. 620 (1996).

92. *Id.* at 624.

the United States Supreme Court, in a six to three majority opinion, uphold a Colorado Supreme Court decision declaring the state constitutional provision unconstitutional?⁹³ First, *Bowers* is not even mentioned in the majority opinion. Still, the Court accepts that there is no fundamental right here [such as privacy], and so the standard of review is only rational basis. This state provision, however, violates even that standard.⁹⁴ Despite the provision's offense on a rational basis analysis, Justice Scalia, in his dissent, notes that this decision is inconsistent with *Bowers*.⁹⁵ "If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws *disfavoring* [italics in original] homosexual conduct."⁹⁶

This term the Court addressed discrimination against an individual because of sexual orientation in *Boy Scouts of America v. Dale*.⁹⁷ James Dale was a scout leader and openly gay. The Boy Scouts removed him from troop leadership as an Assistant Scoutmaster and even membership once it found out about his sexual orientation. There was no accusation of misconduct, or attempts to promote homosexual conduct among the scouts.⁹⁸ He was excommunicated because the Boy Scouts "specifically forbid membership to homosexuals."⁹⁹ The New Jersey Supreme Court held that this removal was in violation of a state statute that prohibited discrimination "on the basis of sexual orientation."¹⁰⁰ The Boy Scouts appealed and urged that applying this statute to them would violate their First Amendment "right to associate with others." More specifically, their right of "expressive association" allowed them to bar those with an inconsistent message.¹⁰¹

As with *Romer*, this case would have been relatively straightforward if sexual orientation was included as part of a larger privacy right. The First Amendment right could be limited, if government could show a compelling government interest

93. The Colorado Supreme Court declared the provision unconstitutional as it violated the "fundamental right of gays and lesbians to participate in the political process." The United States Supreme Court adopted a different rationale. *Id.* at 625-26.

94. *See id.* at 631-32.

95. *See id.* at 636.

96. *Id.* at 641.

97. *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000).

98. *See id.* at 2472 (dissenting opinion of Justice Stevens).

99. *Id.* at 2449.

100. *Id.* at 2459.

101. As the Court noted, *id.* at 622, 623, *Roberts v. United Jaycees*, 468 U.S. 609, 622 (1984) that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. Government actions that may unconstitutionally burden this freedom may take many forms, one of which is "intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire." Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, "[f]reedom of association . . . plainly presupposes a freedom not to associate."

The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. *See Boy Scouts*, 120 S. Ct. at 2451.

that was narrowly tailored.¹⁰² Discrimination against a group that is merely exercising its fundamental privacy right *may be* a compelling interest,¹⁰³ but, since *Bowers*, no such privacy right applied. The focus, instead, was on the fundamental rights of the Boy Scouts. The majority found that the Scouts had an "expressive associational right" and that a core value of the Scouts was "that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight, and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts."¹⁰⁴ No compelling justification was found that would allow a statutory restriction on that right.¹⁰⁵

The decision was five to four, and the four dissenting Justices, in an opinion by Justice Stevens, stated that there was no burden on the Scout's right to free speech.¹⁰⁶ There is no mention of any privacy right, or "right of association" by Dale even in the dissent. Justice Stevens focuses more on the problem of prejudice.¹⁰⁷

III. THE RIGHT OF PRIVACY, THE FAMILY, AND GRANDPARENT VISITATION RIGHTS

Having disposed of situations where the Court does not want a broad privacy right mandating treatment of certain interests or classifications, it then had to

102. *See Boy Scouts*, 120 S. Ct. at 2451.

103. Like the dissenters, I doubt if the majority would have upheld a Scout restriction based on race or religion. As Justice Stevens wrote: "The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual's—should be singled out for special First Amendment treatment." *Id.* at 2476.

Still, the Court, even accepting a fundamental privacy right here, could have found the First Amendment right to be superior. The balancing, however, clearly would have been different, and a specific reason to reject the privacy protection would have had to be articulated.

In reviewing it prior precedents of *Roberts v. United Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), the majority noted that those cases demonstrated that: "States have a compelling interest in eliminating discrimination against women in public accommodations." It then went ahead and nevertheless indicated that that compelling interest could have been overcome if application of the state law would have "materially interfere[d] with the ideas that the organization sought to express." *Boy Scouts*, 120 S. Ct. at 2456.

104. *Boy Scouts*, 120 S. Ct. at 2453. That this was a "core value" or even official policy was challenged by the New Jersey Supreme Court, which felt that the core values to have a "diverse and representative membership" and seek to reach "all eligible youth." *Id.* at 2450. It was also sharply challenged by Justice Stevens in his dissenting opinion. *Id.* at 2461.

105. *See id.* at 2457.

106. *See id.* at 2459-60.

107. *Id.* at 2477-78. Unfavorable opinions about homosexuals "have ancient roots." *See e.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986). Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. . . . [O]ver the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions. . . . [T]hat such prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect are established matters of fact that neither the Boy Scouts nor the Court disputes. That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers. As Justice Brandeis so wisely advised, "we must be ever on our guard, lest we erect our prejudices into legal principles." *See id.* at 2459 (quoting Justice Brandeis's dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)).

address those areas where it did want to use history to support some historic privacy rights. As with reproductive rights, the modern origin for a special "privacy right" protecting family decisions is *Skinner v. Oklahoma*,¹⁰⁸ where Justice Douglas stated that marriage [and impliedly family] were "basic civil rights" and "fundamental," and classifications limiting these rights had to be reviewed with the strictest scrutiny.¹⁰⁹ Later, in a dissent by Justice Harlan in the 1961 case of *Poe v. Ullman*, the concept of "marital privacy" and protection of the "marital relation" strongly suggested a special status for protection of family decision-making.¹¹⁰

In *Griswold v. Connecticut*,¹¹¹ Justice Douglas's majority opinion based his theory, in part, on a zone of privacy that included "the right to educate a child in a school of the parent's choice," found in the First Amendment.¹¹² He goes on to urge that there is a privacy right dealing with the family that is "older than the Bill of Rights."¹¹³ Similarly, Justice Goldberg in his concurrence in *Griswold* focused on the "rights of marital privacy" which applies to all aspects of the marital relationship.¹¹⁴ Finally, Justice White also concurred finding a "right . . . to be free of regulation of the intimacies of the marriage relationship."¹¹⁵

Following *Griswold*, the Supreme Court in a series of cases applying the equal protection clause stated again and again marriage and family are fundamental personal rights and that any restrictions needed compelling overriding significance.¹¹⁶ *Roe v. Wade* itself relied on the fundamental right of privacy that applies to "marriage . . . , family relationships and child rearing and education. . . ."¹¹⁷ *Roe* was followed by *Zablocki v. Redhail*, which again found that decisions to marry, as well as "other matters of family life," to be specifically within a "person's right to privacy," and any interference had to withstand a "critical examination."¹¹⁸

The Court in *Moore v. City of East Cleveland*¹¹⁹ specifically noted privacy interests are involved when government attempts to define or regulate family relationships. However, only a plurality would apply a strict scrutiny. In East Cleveland, a housing ordinance was passed that limited occupancy to members of

108. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

109. *Id.* at 541.

110. *See e.g. Poe v. Ullman*, 367 U.S. 497, 522 (1961) (dissenting opinion of Justice Harlan).

111. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

112. *Id.* at 482. Justice Douglas cited *Pierce v. Society of Sisters*, 268 U.S. 510 (1928), which held that a state law requiring students to attend public schools violated parental rights under the due process clause.

113. *Id.* at 486. "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id.*

114. *Id.* at 486.

115. *Id.*

116. *See e.g. Loving v. Virginia*, 388 U.S. 1 (1967) (ban on interracial marriage); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (fee for divorce invalid as applied to indigent).

117. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

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

119. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

a single family. Mrs. Moore lived in her house with her son and two grandsons [who are first cousins]. The city argued that Moore's living arrangement was not a "single family" within the definition of the ordinance.

The city, said a plurality of the Court, can not interfere in this "private realm of family life."¹²⁰ Citing Justice Harlan's dissent in *Poe v. Ullman*, the Court stated that the substantive due process clause protects family choice.¹²¹ Justice Stewart's dissent rejected the notion that the ordinance violated any due process right of association and privacy.¹²²

The most recent case, dealing with family rights, is *Troxel v. Granville*.¹²³ The facts are relatively straightforward. Washington State allows any person to petition for visitation rights and the family court is to grant visitation rights when it is "in the best interests of the child." Tommie Granville and Brad Troxel were the natural parents of two children. The father died, and the mother sought to limit the visitation rights of the paternal grandparents. The trial court insisted that broader grandparent visitation rights were "in the best interests of the children."¹²⁴

By the time the case came before the Supreme Court of Washington for final decision, the mother had remarried and the husband had formally adopted the two children.¹²⁵ The Washington Supreme Court stated that the visitation order "unconstitutionally infringe[d] on the fundamental right of parents to rear their children."¹²⁶ The Supreme Court of the United States agreed.

The Supreme Court would not, however, put this case into the context of privacy rights. Though the Court cited earlier cases, including *Meyer v. Nebraska*,¹²⁷ *Pierce v. Society of Sisters*,¹²⁸ and *Prince v. Massachusetts*,¹²⁹ used by the Court in deciding *Griswold*¹³⁰ and *Roe*¹³¹ to define the new constitutional right of privacy, it did not allude to that broad right but rather cited these cases to indicate "that there is a constitutional dimension to the right of parents to direct the upbringing of their children."¹³²

The constitutional hook is "substantive due process" which provides "heightened protection against government interference with certain fundamental

120. *Id.* at 499.

121. *See id.* at 502.

122. *See id.* at 535.

123. *Troxel v. Granville*, 120 S. Ct. 2054 (2000). Justice O'Connor wrote a plurality decision for herself, Chief Justice Rehnquist, Justices Breyer and Ginsburg. Souter and Thomas wrote individual concurring opinions. Stevens, Scalia and Kennedy filed dissenting opinions.

124. *Id.* at 2058.

125. The Superior Court granted visitation rights to the grandparents. The mother appealed, before the appeal was decided, the mother remarried. After the Washington Court of Appeals remanded for formal findings from the Superior Court, and before the appeal from that decision was determined, Granville's husband formally adopted the two children. *Id.*

126. *Id.*

127. *Meyer v. Nebraska*, 262 U.S. 510 (1925).

128. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

129. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

130. *Griswold*, 381 U.S. at 481.

131. *Roe*, 410 U.S. at 152-53.

132. *Troxel*, 120 S. Ct. at 2060.

rights and liberty interests.”¹³³ In this context, a fundamental right exists. It was not a broad right to privacy—which could include other historical but now disfavored protections. The right was a narrower “fundamental liberty interest” – the “interest of parents in the care, custody and control of their children.”¹³⁴

The Washington Supreme Court found that the substantive due process clause required “all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation rights.”¹³⁵ Justice O’Connor, for the plurality, stated the Court did not need to consider this issue.¹³⁶ The Washington statute, as written and as applied, is too broad and in violation of “parental due process rights.”¹³⁷

No special factors, let alone compelling interests,¹³⁸ were found to justify restrictions on the parents right to decide on family matters like visitation.¹³⁹ The trial court made precisely the wrong presumption—a grandparents rights should be upheld unless the children would be “impacted adversely.”¹⁴⁰ In fact, the rule states there is a presumption of parents acting in the “best interests of the child.”¹⁴¹ To avoid further litigation, and the necessarily involved continued “disruption” in the family, the Court would not remand to see if there are possible interpretations of the “best interests” standard that might be possible. The rule is both bad on its face and as applied.¹⁴²

133. *Id.* at 2059, 60.

134. *Id.* at 2060.

135. *Id.* at 2064.

136. *See id.*

Because we rest our decision on the sweeping breadth of [the Washington statute] and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court— whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context.

Id.

137. *Troxel*, 120 S. Ct. at 2064. Justice Souter concurred, stating that he would just have ruled that the statute on its face was bad. He would not have reached the issue “addressing the specific application of the state statute.” *Id.* at 2065.

138. Justice Thomas concurred in the judgment. He stated first that the issue of the breadth and application of the substantive due process clause is to be left “for another day.” *Id.* at 2067. However, accepting for now prior precedent that there is a “fundamental right of parents to direct the upbringing of their children,” this includes here the right to determine who is to be involved in the socialization process. *Id.* at 2068. Here the standard of review is “strict scrutiny” and “the State of Washington lacks even a legitimate government interest-to say nothing of a compelling one-in second-guessing a fit parent’s decision regarding visitation with third parties.” *Id.*

139. *See id.* at 2060. The Troxels did not allege, let alone prove that Granville was an unfit parent. *Id.*

140. *Id.* at 2062.

141. *Id.* at 2062.

142. *Id.* at 2065.

There is thus no reason to remand the case for further proceedings in the Washington Supreme Court. . . . [T]he burden of litigating a domestic relations proceeding can itself be so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child’s welfare becomes implicated. In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial. As we have explained, it is

Two of the dissenters did not disagree with the plurality and concurrences in finding a broad fundamental right. Justice Stevens commented there was no basis for any determination by the Washington Supreme Court that the statute would be invalid in “all its applications.”¹⁴³ There are limits to the fundamental right. The Washington Supreme Court seemed to put in place a rule that parental choice is mandated unless actual harm to the child is shown. Arguably, this test is too difficult. A countervailing fundamental interest is the right of the child “in preserving relationships that serve her welfare and protection.”¹⁴⁴ In other words, the “best interests of the child” standard could be available in some cases to allow third party and especially grandparents visitation rights.¹⁴⁵

Justice Kennedy similarly dissented and urged that a test of “harm to the child” is not constitutionally required.¹⁴⁶ Kennedy does accept the due process liberty right of a parent to determine “how best to raise, nurture, and educate the child.”¹⁴⁷ Yet, the best interests of the child test may be appropriate in some cases and the case should be remanded back to the Washington Supreme Court for further proceedings in that light.¹⁴⁸

Defining this fundamental right to the limited context of marriage and family, as compared to the broader right of privacy, of course, avoids precedents for abortion and sexual orientation. It also, however, can be the first step to future efforts to bar application of special protection in the more limited area. Justice Thomas concurred, wanting to leave for another day whether there are any

apparent that the entry of the visitation order in this case violated the Constitution. We should say so now, without forcing the parties into additional litigation that would further burden Granville’s parental right.

Id. (internal citations omitted).

143. *Troxel*, 120 S. Ct. at 2070.

144. *Id.* at 2072.

145. *Id.* at 2073-74.

[T]he Washington law merely gives an individual—with whom a child may have an established relationship—the procedural right to ask the State to act as arbiter, through the entirely well-known best-interests standard, between the parent’s protected interests and the child’s. It seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.

Id.

146. *Id.* at 2075.

147. *Id.* at 2076.

148. *See id.* at 2079.

It should suffice in this case to reverse the holding of the State Supreme Court that the application of the best interests of the child standard is always unconstitutional in third-party visitation cases. Whether, under the circumstances of this case, the order requiring visitation over the objection of this fit parent violated the Constitution ought to be reserved for further proceedings. Because of its sweeping ruling requiring the harm to the child standard, the Supreme Court of Washington did not have the occasion to address the specific visitation order the Troxels obtained. More specific guidance should await a case in which a State’s highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself. Furthermore, in my view, we need not address whether, under the correct constitutional standards, the Washington statute can be invalidated on its face. This question, too, ought to be addressed by the state court in the first instance.

Id.

fundamental rights, like those involving the family, that still exist under the “substantive due process” category.¹⁴⁹ Justice Scalia in his dissent argued that this “fundamental right” of parents to direct the upbringing of their children come from cases in “an era rich in substantive due process holdings that have since been repudiated.”¹⁵⁰

IV. CONCLUSION

A saying exists that “hard cases make bad law.” In the case of privacy rights, controversial cases make *ad hoc* law. A broad, explicit, fundamental right of privacy provided an environment to support reproductive rights, and particularly abortion. As with the privacy right of association, and the privacy rights of family, the privacy right of reproductive choice meant that any restrictions would be carefully scrutinized and only allowed with overwhelming justification and if the government restriction was carefully hewn. This was not acceptable to the members of the Rehnquist Court. Stripped of its privacy cocoon, abortion “rights” would have to stand on its own and in isolation of any broader fundamental rights. The isolated right of a woman to choose an abortion prior to the viability of the fetus would be maintained. Most restrictions, however, would be allowed, as having a reasonable basis, even if that basis was to promote the choice of birth. Some restrictions would be barred, but only when they went so far as to be an “undue burden.”

Rights once included under the umbrella of privacy would be maintained but only after being classified as fundamental under another category—such as marriage and family. And other rights that could be categorized as privacy rights, such as sexual orientation or preference, would have limited, if any, protection and certainly not be considered fundamental.

For the Rehnquist Court, privacy is, at best, an “interest,” and certainly not a right. Perhaps, it is believed, by not mentioning the right of privacy, it will be forgotten or at least minimized.¹⁵¹

149. See *Troxel*, 120 S. Ct. at 2067.

I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision. As a result, I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day.

Id.

150. *Id.* at 2074. Adopting this “unenumerated right” would usher in federal control of family law. See *id.* at 2075.

151. See Linda Greenhouse, *The Court Rules, America Changes*, N.Y. TIMES, July 2, 2000, § 4, at 1, 5. Ms. Greenhouse reviews all the major cases. The *Troxel* case is classified under “due process.” The *Stenberg* case is classified under “abortion.” The *Boy Scouts* case is classified under “association.” See also Stuart Taylor, Jr., *The Supreme Question*, NEWSWEEK, July 10, 2000, at 18, 23-25.