
FAMILIA INTERRUPTUS: THE SEVENTH CIRCUIT'S APPLICATION OF THE SUBSTANTIVE DUE PROCESS RIGHT OF FAMILIAL RELATIONS

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INTRODUCTION

One of the oldest substantive due process rights derived from the Fourteenth Amendment and recognized by the Supreme Court is the right of individuals to be free from government intrusion into the control and management of their families.¹ Despite its rhetoric that familial rights are a fundamental liberty interest protected by the Fourteenth Amendment, the Supreme Court's recognition of this right has been far from clear. Until recently,² the articulation of this right has been enmeshed in the analysis of other constitutional rights, and even the recent Supreme Court jurisprudence is ambivalent towards this liberty interest, making it difficult to decipher the scope of this right and the appropriate standard to determine when it should be protected.

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¹ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

² *Troxel v. Granville*, 530 U.S. 57 (2000).

The Seventh Circuit's most recent case involving a claim of familial rights, *United States v. Hollingsworth*, is instructive because the court applied a balancing test developed by its previous decisions³ to determine when this substantive due process right should be protected.⁴ This decision serves as a predictive case study that illustrates how the Seventh Circuit will analyze familial rights claims in the future.

In this Note, I will argue that from its initial recognition of familial rights, the Supreme Court's jurisprudence on this liberty interest has been riddled with ambivalence. While the Court has rhetorically endorsed this right, its application in its decisions demonstrates that the Court has been and continues to be reluctant to fully embrace and define this liberty interest. Following the Supreme Court's lead, the Seventh Circuit's balancing test provides courts with the flexibility to both acknowledge this due process right but also allow the state to intervene when the safety and well-being of children is threatened.

Section I of this Note will analyze the evolution of the substantive due process right of familial relations. Subsection A of this first section will explore the Supreme Court's early decisions that recognized familial rights and the Court's inability to isolate and explicate this liberty interest in its holdings. Subsection B will analyze *Troxel v. Granville*,⁵ the Court's most recent and fractured treatment of familial rights. This subsection will underscore the Court's continued ambivalence and lack of clarity towards this liberty interest. Subsection C will introduce the Seventh Circuit's adoption of a balancing test in the wake of *Troxel*. Section II will present the procedural and factual background of *Hollingsworth*. This section will also analyze the court's application of its balancing test to the facts of the case. Section III will argue that the Seventh Circuit's application of the balancing test corresponds with the Supreme Court's ambivalent

³ *Brokaw v. Mercer County*, 235 F.3d 1000, 1018–19 (7th Cir. 2000); *Doe v. Heck*, 327 F.3d 492, 518–19 (7th Cir. 2003).

⁴ *United States v. Hollingsworth*, 495 F.3d 795 (7th Cir. 2007).

⁵ 530 U.S. 57.

position on familial rights, and provides a predictive measure of how future courts will recognize and protect familial rights.

I. THE EVOLUTION OF FAMILIAL RIGHTS

A. *The Substantive Due Process Right to Familial Relations*

The Fourteenth Amendment of United States Constitution states that “nor shall any State deprive any person of life, liberty, or property, without due process of law.”⁶ While this clause clearly provides a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a state, the Supreme Court has also recognized that this clause, as well as its Fifth Amendment counterpart, guarantees more than just fair process:⁷ it protects “individual liberty against ‘certain government actions regardless of the fairness of procedures used to implement them.’”⁸ Generally, the Court grants broad deference to the legislature and requires that laws merely be rational in relation to a legitimate governmental purpose.⁹ But when a law infringes on a substantive aspect of liberty or fundamental rights, the Court demands that the state narrowly tailor that law “to serve a compelling state interest.”¹⁰ In order to be protected by this heightened scrutiny standard, a right must be fundamental, which means that it is “implicit in the concept of ordered liberty” such that “neither liberty

⁶ U.S. CONST. amend. XIV, § 1.

⁷ *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) (holding that the due process clause of the Fourteenth Amendment contains a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests”).

⁸ *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

⁹ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 222 (1953) (stating that due process provides broad deference to government in choosing the ways and means by which it carries out its policies).

¹⁰ *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

nor justice would exist if they were sacrificed.”¹¹ The Supreme Court has held that the liberty protected by the due process clause includes the rights to marry;¹² to have children;¹³ to marital privacy;¹⁴ to the use of contraception;¹⁵ to bodily integrity;¹⁶ and to have an abortion.¹⁷

One of the oldest liberty interests recognized by the Supreme Court under the theory of substantive due process is the interest that parents have in the care, custody, control, and management of their children.¹⁸ In the first half of the twentieth century, the Court decided three cases that held that the fundamental liberty protections of the due process clause include the right of parents to direct the upbringing of their children and to control their education: *Meyer v. Nebraska*,¹⁹ *Pierce v. Society of Sisters*,²⁰ and *Prince v. Massachusetts*.²¹ The Court has invoked *Meyer* and *Pierce* as a starting point in much of its modern substantive due process analysis and in its recent parental rights cases.²² To best understand the Court’s most recent articulation

¹¹ *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937); *see also Glucksberg*, 521 U.S. at 721.

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

¹³ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

¹⁴ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

¹⁵ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

¹⁶ *Rochin v. California*, 342 U.S. 165, 171–72 (1952); *see also Wudtke v. Davel*, 128 F.3d 1057, 1062 (7th Cir. 1997) (holding that a public teacher successfully stated a substantive due process claim against a school district superintendent, who she claimed sexually assaulted her, based on her liberty interest in bodily integrity).

¹⁷ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

¹⁸ *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

¹⁹ *Id.*

²⁰ 268 U.S. at 534–535.

²¹ 321 U.S. at 164.

²² Susan E. Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville*, 8 J. L. & FAM. STUD. 71, 72 (2006)

of substantive due process rights in the parental rights context and the Seventh Circuits' application of this concept, it is necessary to examine the genesis and development of this jurisprudence.

Although the Supreme Court would later credit these early twentieth century decisions with unambiguously establishing the substantive due process right of family relations,²³ a careful examination of these cases demonstrates that the Court's rhetoric supporting this liberty interest outstripped the actual application and definition of this right. Rather than providing a clear endorsement of this liberty interest by basing its holdings solely on family rights, the Court's decisions in the context of educational rights primarily relied on the right to acquire knowledge²⁴ and focused on First Amendment liberty interests in the context of child labor laws²⁵ to reach these respective holdings. This inability to fully articulate the scope and definition of familial rights demonstrates the Court's ambivalence towards this substantive due process right from its inception and foreshadows the current ambiguity as to its application.

1. The Establishment of the Right of Parents to Control Their Children's Education

a. Meyer v. Nebraska

In 1919, spurred by anti-immigrant nativism and the experience of World War I, the Nebraska legislature enacted a statute, the "Siman language law," that restricted the teaching of foreign languages before the eighth grade in public and private schools.²⁶ In 1920, Robert

(arguing that use of *Meyer* and its progeny by the Court in support of a substantive due process liberty right of parents is "sporadic and often is joined with other constitutional claims" and that only the recent *Troxel v. Granville* unambiguously articulates a foundation for this substantive due process right).

²³ *Troxel*, 530 U.S. at 65.

²⁴ *Meyer*, 262 U.S. at 399; *Pierce*, 268 U.S. at 534–535.

²⁵ *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944).

²⁶ *Id.* at 73–74 (2006); Barbara Bennett Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1003–

Meyer, a teacher at a Lutheran parochial school, was convicted of violating the law by teaching a ten-year-old student German and was fined \$25.²⁷ The Nebraska Supreme Court upheld his conviction,²⁸ and Meyer appealed to the U.S. Supreme Court, which concluded that the Nebraska statute was unconstitutional.²⁹

The Supreme Court struck down the Nebraska statute because it conflicted with the due process clause of the Fourteenth Amendment, which it held guarantees an individual the liberty “to acquire useful knowledge” and “to establish a home and bring up children.”³⁰ In reaching its decision, the Court considered these two liberty interests in tandem and did not isolate or identify the scope of the right to establish a home and raise children. Rather, the Court reasoned that because education and the acquisition of knowledge are unquestionable values to citizens and it is the “natural duty of the parent to give his children education suitable to their station in life,” it follows that a teacher’s ability to teach diverse subjects and a parent’s ability to engage such a teacher for their children’s benefit are protected liberties under the Fourteenth Amendment.³¹ The Nebraska statute infringed on this liberty interest because it blocked parents from being able to hire or send their children to a school that teaches a language that they considered useful to the upbringing of their children.³²

04 (1992); William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. CIN. L. REV. 130, 135 (1988).

²⁷ Meyer v. Nebraska, 262 U.S. 390, 396–97 (1923).

²⁸ *Id.* Scholars have argued that the Nebraska Siman language law was part of a nationwide attack on parochial schools that sought to Americanize foreigners through legislation mandating compulsory public school attendance. William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 177 (2000); David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74, 75 (Oct. 1968).

²⁹ Meyer, 262 U.S. at 402–03.

³⁰ *Id.* at 399–400.

³¹ *Id.* at 400.

³² *Id.* Lawrence argues that Meyer’s focus on the danger of the state limiting the acquisition of knowledge and homogenizing its populace weakens claims that

The Court's recognition of the individual liberty interest in acquiring useful knowledge and bringing up children was a novel development.³³ During this period, the so-called *Lochner* Era,³⁴ the Court's recognition of liberty interests primarily focused on cases involving individual's ability to form and be bound by contracts free from state intervention without a valid police power rationale.³⁵ Nevertheless, in expanding its recognition of liberty interests beyond the contractual context, *Meyer* applied the standard *Lochner* Era test for laws infringing on substantive due process rights. The Court maintained that:

[T]his liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.³⁶

Thus, while the Court “appreciate[d]” that the Nebraska law sought to create a homogeneous population with American ideals and communicate an aversion to recent “truculent adversaries,” it held that the law was not aimed at eliminating an emergency, which “renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.”³⁷ In striking down this state statute, the

this case unambiguously established parental rights. She claims that in spite of the Court's “[l]ofty opening definitions of liberty” *Meyer* is primarily decided on educational grounds rather than on “state interference in the intimacies of home and family.” Lawrence, note 22, at 77.

³³ Lawrence, *supra* note 22, at 76 n.31.

³⁴ David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 1 (2003).

³⁵ *Id.* at 24.

³⁶ *Meyer*, 262 U.S. at 399–400.

³⁷ *Id.* at 402–03.

Court maintained that states may not interfere with the “long freely enjoyed” liberty interest of parents to control the upbringing of their children and to acquire useful knowledge unless the regulation sought to eliminate a harm to children or the populace at large.³⁸

b. Pierce v. Society of Sisters

Two years after *Meyer*, in *Pierce v. Society of Sisters*, the Court returned to the issue of parental rights to control their children’s education grounded in the due process clause.³⁹ In 1922, in an attempt to shut down private schools, Oregon adopted a statute that required that all children between the ages of eight and sixteen attend public schools.⁴⁰

Although the Court partially grounded its reasoning in a desire to limit states’ power to “homogenize its citizenry,”⁴¹ it directly applied *Meyer* and held that the Oregon statute “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”⁴² Like *Meyer*, *Pierce*’s recognition of parental rights was interwoven with the liberty interest to acquire useful knowledge.⁴³ Thus, while the Court again rhetorically recognized familial rights, its holding focused primarily on the need to protect the educational choices provided by private

³⁸ *Id.* at 403.

³⁹ *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

⁴⁰ Ross, note 26, at 178. This statute was part of a national campaign for compulsory public education that was at least partially motivated by anti-Catholicism. *Id.*

⁴¹ Lawrence, *supra* note 22, at 78.

⁴² *Pierce*, 268 U.S. at 534–35. “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Id.* at 535.

⁴³ Both *Meyer* and *Pierce* have been interpreted as being decided on property rights: “the liberty of the schools to conduct a business, the right of private school teachers to follow their occupation, and the freedom of schools and the parents to enter into contracts.” Ross, *supra* note 26, at 178.

schools that best prepare children for their later social obligations.⁴⁴ Familial rights in this instance were extended insofar as they aided educational rights.

Regardless of which liberty interest the court emphasized, their presence triggered the *Lochner* Era test for protected liberty interests, which stated that “the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.”⁴⁵ Concluding that there was nothing “inherently harmful”⁴⁶ in private schools and that they were in fact “long regarded as useful and meritorious,”⁴⁷ the Court held the state had no adequate rationale to justify the statute’s adoption.⁴⁸ The statute was therefore struck down under the Court’s supervisory power to protect the liberty interest of parents controlling their children’s upbringing and education.⁴⁹

2. The Assertion of the State’s *Parens Patriae* Power and the Limits of Parental Rights

Although the Court in *Meyer* and *Pierce* recognized broad parental rights in the realm of their children’s education and upbringing, subsequent Courts did not shy away from asserting the state’s power to protect the welfare of children. These cases demonstrate the deference that the Court granted to states, which enacted legislation intended to protect children, and the limitations of parental rights.

⁴⁴ *Pierce*, 268 U.S. at 534–35.

⁴⁵ *Id.* at 535. This test and the *Meyer* precedent were applied again in 1927 in another parental rights case in the context of foreign language instruction. *Farrington v. Tokushige*, 273 U.S. 284 (1927). The Court struck down Hawaii’s territorial legislation aimed at limiting the instruction of Japanese in private schools. The Court held that the statute infringed on the rights of the school’s owners as well as the parents who chose to send their children to these schools. *Id.* at 299.

⁴⁶ *Pierce*, 268 U.S. at 534.

⁴⁷ *Id.*

⁴⁸ *Id.* at 534–35.

⁴⁹ *Id.*

In *Prince v. Massachusetts*, the Court upheld the enforcement of Massachusetts' child labor laws, which restricted children from working on public streets.⁵⁰ The case involved the conviction of a nine-year-old girl and her guardian aunt for "selling" Jehovah Witnesses' publications on the public streets.⁵¹ Primarily challenging their conviction on First Amendment freedom of religion grounds "to preach the gospel . . . by public distribution" in conformity of their religious beliefs as Jehovah's Witnesses, the aunt also buttressed this claim by arguing that the statute infringed on her parental right to control the upbringing of her niece in accordance with their religious beliefs, as secured by the due process clause under *Meyer*.⁵²

Citing *Meyer* and *Pierce* as precedent, the *Prince* Court accepted the aunt's claim to a parental right, stating that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."⁵³ Further supporting the installment of parental rights as fundamental liberty interests, the Court considered parental rights to be "basic in a democracy."⁵⁴

Despite this clear rhetorical endorsement, the rationale of *Prince*'s holding was less precise. Like *Meyer* and *Pierce*, which recognized parental rights in tandem with the right to acquire useful knowledge, *Prince*'s discussion of parental rights was interwoven with the child's

⁵⁰ 321 U.S. 158 (1944). The law prohibited girls under eighteen to "sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place." *Id.* at 160–61 (quoting § 69 of Mass. Gen. Laws, Ter. Ed., c. 149, as amended by Acts and Resolves of 1939, c. 461). The law's enforcement provisions provided punishment of imprisonment or fines to "[a]ny parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation" of § 69. *Prince*, 321 U.S. at 161 (quoting § 81, Mass. Gen. Laws, Ter. Ed.).

⁵¹ *Prince*, 321 U.S. at 162.

⁵² *Id.* at 164. The Court articulated the aunt's liberty interest as her right as a guardian to "bring up the child in the way he should go, which for the appellant means to teach him the tenets and the practices of their faith." *Id.*

⁵³ *Id.* at 166.

⁵⁴ *Id.* at 165.

liberty interest in exercising her religion.⁵⁵ Thus, despite *Prince*'s recognition of parental rights, this substantive due process right was again inextricably bound to another liberty interest.

Irrespective of this intertwined recognition of parental rights, *Prince* held that the guardian's right to rear her child was outweighed by the state's broad *parens patriae*⁵⁶ power to protect the child's welfare.⁵⁷ A parent's authority over their child thus may be trumped by state regulations aimed to foster the child's interest. The fact that the parental right in this case involved matters of religion only strengthens the broad power of the state to trump this parental liberty interest.⁵⁸ Noting that the statute was adopted to protect young children from the "crippling effects of child employment,"⁵⁹ *Prince* concluded that "[p]arents may be free to become martyrs themselves . . . [b]ut it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."⁶⁰ The state thus possessed a "wide range of power for limiting parental freedom and authority in things affecting the child's welfare,"⁶¹ because the continuance of a "democratic society rests . . . upon the healthy, well-rounded growth of young people into full maturity as citizens."⁶² And, while the Court continued to recognize the important parental right to control and manage their children's upbringing, it was unwilling to

⁵⁵ *Prince*, 321 U.S. at 165. "The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters." *Id.*

⁵⁶ "[Latin for 'parent of his country'] 1. The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY (8th ed. 2004).

⁵⁷ *Prince*, 321 U.S. at 167.

⁵⁸ *Id.* at 166.

⁵⁹ *Id.* at 168.

⁶⁰ *Id.* at 170.

⁶¹ *Id.* at 167.

⁶² *Id.* at 168.

strike down a statute that “regulated within reasonable limits” the “legitimate objective[.]” of protecting the well-being of children.⁶³

Because the Court’s early cases involving parental rights did not specifically isolate this liberty interest,⁶⁴ it is difficult to determine whether its holdings would have been maintained based on familial rights alone.⁶⁵ What can be said, however, is that the Court’s rhetoric regarding familial rights outweighs the application of this right in these holdings. While the Court asserted the importance of protecting the parental right to control their child’s upbringing, its holding primarily relied on the importance of education in *Meyer*⁶⁶ and *Pierce*⁶⁷ and on religious expression in *Prince*.⁶⁸ The scope of familial rights was thus left undefined outside of the context of these other liberty interests.

Nevertheless, these early decisions did broadly define the parental realm as a constitutionally protected liberty interest based on substantive due process. From these cases, this protection extended to parents’ control of their children’s education and upbringing⁶⁹ and could only be trumped by the state if the regulation was reasonably limited and aimed at protecting the welfare of children.⁷⁰

⁶³ *Id.* at 169–70.

⁶⁴ Later cases involving parental rights continued to analyze this liberty interest in tandem with other claims. *See Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (striking down Wisconsin’s compulsory school attendance law and basing its holding more on the protection of the Free Exercise Clause of the First Amendment); *Runyon v. McCrary*, 427 U.S. 160, 176–79 (1976) (in upholding a federal statute that prohibited private schools from excluding students based on their race, the Court declined to extend the parental right to control their children’s education beyond the ability to challenge limitations to subject matter).

⁶⁵ Ross argues that the *Meyer* and *Pierce* decisions relied on substantive due process rights because freedom of religion and speech bases were not available to the Court because the Bill of Rights had not yet been incorporated into state law. Ross, *supra* note 26, at 178–79.

⁶⁶ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

⁶⁷ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

⁶⁸ 321 U.S. at 165.

⁶⁹ *Meyer*, 262 U.S. at 400; *Pierce*, 268 U.S. at 535.

⁷⁰ *Prince*, 321 U.S. at 170.

*B. Modern Familial Rights and the Introduction of New Ambiguity:
Troxel v. Granville*

In *Troxel v. Granville*, the Supreme Court issued its most recent articulation of the substantive due process right of familial relations.⁷¹ What makes *Troxel* important beyond its recentness is that it was the first Supreme Court case to recognize familial rights independent of any other constitutional claim.⁷² Thus, the Court had an opportunity to define the scope of this liberty interest and to provide a clear test for its application. While the Court definitively recognized the right to familial relations and removed any residue of uncertainty from its previous cases as to its status amongst the other established substantive due process rights, the plurality opinion in *Troxel* significantly diluted familial rights by limiting their protection to a rebuttable presumption that parents act in the best interest of their children.⁷³ In addition to lowering the protections afforded to familial rights, the Court also failed to provide lower courts with an applicable standard or review for this liberty interest.⁷⁴ Thus, in clarifying its past decisions regarding familial rights, the Court effectively introduced a new ambivalence towards this liberty interest.

1. The Plurality Decision

Writing for the plurality, Justice O'Connor, in one sentence, erased any doubt that parental rights were not a fundamental liberty interest protected by the due process clause of the Fourteenth Amendment. After reiterating the Court's recognition of substantive due process rights and the numerous parental rights precedents,⁷⁵

⁷¹ *Troxel v. Granville*, 530 U.S. 57 (2000).

⁷² *Lawrence*, *supra* note 22, at 100.

⁷³ *Troxel*, 530 U.S. at 67.

⁷⁴ *Id.* at 78 (Souter, J., concurring).

⁷⁵ *See also* *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the

Justice O'Connor stated that, "[i]n light of this extensive precedent, it cannot now be doubted 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."⁷⁶ Discounting any ambiguity in the Court's previous treatment of familial rights, the plurality further affirmed that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."⁷⁷

Troxel involved a Washington statute that permitted any person to petition the court for visitation rights whenever the visits served the best interest of the child.⁷⁸ Following this statute, a Washington trial court granted visitation rights to the paternal grandparents of children against the wishes of their mother, reasoning that these visits would be

Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children") (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'") (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

⁷⁶ *Troxel*, 530 U.S. at 66.

⁷⁷ *Id.* at 65 (Citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); and *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

⁷⁸ *Troxel*, 530 U.S. at 60.

in the interest of the children.⁷⁹ On appeal, the Washington Supreme Court held that this statute unconstitutionally interfered with the “fundamental right of parents to rear their children” because the statute required “no threshold showing of harm,” which it concluded contradicts the constitutional standard that allows state interference only to prevent harm to the child.⁸⁰

While Justice O’Connor’s plurality opinion affirmed the Washington Supreme Court’s judgment, it articulated a more limited definition of parental rights based on a burden-shifting mechanism to determine the child’s best interest.⁸¹ Whereas the Washington Supreme Court’s reasoning required a showing of harm to contravene parents’ liberty interest in controlling the upbringing of their children, the *Troxel* plurality maintained that parental rights required regulations only to show adequate deference to parents’ inherent ability to “act in the best interests of their children.”⁸² The plurality thus limited the scope of parental rights to a rebuttable presumption that fit parents “make the best decisions concerning the rearing of”⁸³ their children; in the parental visitation context this meant that the burden of proof was on third-parties seeking visitation to show that the child’s parent(s) were unfit and were not acting in the child’s best interest.⁸⁴

Accordingly, the Court declared the Washington statute unconstitutional because it was “breathhtakingly broad”⁸⁵ and failed to recognize proper deference to parents. The statute allowed *any person* at *any time* to petition the court for visitation when it would serve the best interest of the child, and it gave no deference to the parent’s decision that visitation would not be in the child’s best interest.⁸⁶ By placing the best-interest determination in the hands of a judge and

⁷⁹ *Id.* at 61.

⁸⁰ *Id.* at 60–63.

⁸¹ *Id.* at 67.

⁸² *Id.* at 68 (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

⁸³ *Troxel*, 530 U.S. at 68–69.

⁸⁴ *Id.* at 68–69.

⁸⁵ *Id.* at 67.

⁸⁶ *Id.*

giving no special weight to the parent's choice, *Troxel* concluded that this statute effectively took away the parents' control of the upbringing of their children and exceeded the bounds of the due process clause.⁸⁷

2. Concurring and Dissenting Opinions

As demonstrated by *Troxel's* concurring and dissenting opinions, this case, while firmly establishing familial rights as a protected liberty interest, introduced new ambiguities into the application and scope of this right.

In his concurring opinion, Justice Souter criticized the plurality opinion because it failed to "set out exact metes and bounds to the protected interest of a parent in their relationship with his child."⁸⁸ By not articulating a standard of review for legislation that infringes on parental rights,⁸⁹ Justice Thomas further noted that the plurality left lower courts with the task of determining the scope of this liberty interest.⁹⁰

Justice Souter, however, concentrated his criticism on the plurality's dilution of familial rights to a liberty interest protected only by a rebuttable presumption.⁹¹ He agreed with the Washington Supreme Court that the statute was unconstitutional on its face, and he disagreed with the plurality's recognition of only a presumption of parental deference.⁹² Stating that parental choice regarding their children is not "merely a default rule in the absence" of a more enlightened determination by a judge, Justice Souter criticized the

⁸⁷ *Id.*

⁸⁸ *Id.* at 78 (Souter, J., concurring).

⁸⁹ *Id.* at 80 (Thomas, J., concurring).

⁹⁰ Lenese Herbert, *Plantation Lullabies: How Fourth Amendment Policing Violates the Fourteenth Amendment Right of African Americans to Parent*, 19 ST. JOHN'S J. LEGAL COMMENT 197, 207–08 (2005). In pointing out this curious omission, Justice Thomas took the opportunity to state his preference that the appropriate standard of review for infringement on familial rights is strict scrutiny. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

⁹¹ *Id.* at 68 (Souter, J., concurring).

⁹² *Id.* at 75.

plurality's limitation of parental rights to only a presumption that their decisions were in the child's interest.⁹³ Citing the "repeatedly recognized right of upbringing,"⁹⁴ from *Meyer* onward, he warned that the plurality's rule threatened to make this right a sham if a judge's decision was able to trump that of parents.

In his dissent, Justice Stevens articulated a clearer approach to familial relations rights.⁹⁵ Agreeing with the plurality's limited definition of parental rights, he disputed Justice Souter's assertion that there is any precedent for the requirement that a threshold showing of harm be met before the state may challenge a parent's decision regarding their children.⁹⁶ In his view, such a standard would "establish a rigid constitutional shield" for any parental choice or action.⁹⁷

Justice Stevens came closest to articulating a standard for the analysis of familial relations cases by stating that there is a rebuttable "presumption that parental decisions generally serve the best interests of their children" and that "in the normal case [this] interest is paramount."⁹⁸ In his view, parental rights are not absolute, and the Court's precedent supports a balancing test of the parent's interests in a child "against the state's long-recognized interests as *parens patriae*."⁹⁹

C. The Seventh Circuit's Adoption of a Balancing Test

Despite its clear endorsement of familial rights as a fundamental right derived from the due process clause, the Supreme Court's

⁹³ *Id.* at 79.

⁹⁴ *Id.* at 78.

⁹⁵ *Id.* at 80–91 (Stevens, J., dissenting).

⁹⁶ *Id.* at 86.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 88 (citing *Reno v. Flores*, 507 U.S. 292, 303–04 (1993); *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *Parham v. J.R.*, 442 U.S. 584, 605 (1979); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

reluctance to articulate a test in which to analyze this right¹⁰⁰ has meant that circuit courts have had to develop this standard on their own. Two Seventh Circuit decisions decided after *Troxel* illustrate this Circuit's application of familial rights and its adoption of and development upon Justice Stevens' balancing test.

In *Brokaw v. Mercer County*, two children, six and three years old, were removed from their home and became wards of the state for four months after relatives of the parents filed claims of child neglect.¹⁰¹ In analyzing whether this separation violated the parents' due process right to familial relations, the court emphasized that the right of parents to "bear and raise their children is the most fundamental of all rights—the foundation of not just this country, but of all civilization."¹⁰² Nevertheless, the court acknowledged that this constitutional right is not absolute and is "limited by the compelling governmental interest in the protection of children particularly where [they] need to be protected from their own parents."¹⁰³

To determine whether familial rights should be protected, the Seventh Circuit adopted its own test used in the Fourth Amendment context¹⁰⁴ and balanced the fundamental right to familial relations against the government's interest in protecting children from harm or abuse.¹⁰⁵ In analyzing the government's interest, the court held that "a

¹⁰⁰ *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

¹⁰¹ *Brokaw v. Mercer County*, 235 F.3d 1000, 1007–08 (7th Cir. 2000).

¹⁰² *Id.* at 1018–19 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children . . . This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Doe v. Heck*, 327 F.3d 492, 517–18 (7th Cir. 2003).

¹⁰³ *Brokaw*, 235 F.3d at 1019 (Citing *Croft v. Westmoreland County Children and Youth Services*, 103 F.3d 1123, 1125 (3d Cir. 1997)); *see also* *Weller v. Dep't of Soc. Serv.*, 901 F.2d 387, 392 (4th Cir. 1990) (substantive due process does not categorically bar the government from altering parental custody rights).

¹⁰⁴ *Darryl H. v. Coler*, 801 F.2d 893, 901 n.7 (7th Cir. 1986). *See also* *Wallis ex rel Wallis v. Spencer*, 202 F.3d 1126, 1137 n.8 (9th Cir. 2000) (the same legal standard applies in evaluating Fourth and Fourteenth Amendment claims for the removal of children).

¹⁰⁵ *Brokaw*, 235 F.3d at 1019; *Heck*, 327 F.3d at 520.

state has no interest in protecting children from their parents unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse.”¹⁰⁶

Applying this test, *Brokaw* held that at the summary judgment stage there was insufficient evidence that the government possessed reasonable suspicion of abuse, and accordingly, the state’s interference in the parents’ right to bear and raise their children was not justified.¹⁰⁷ Although the lack of evidence for reasonable suspicion was a key to the court’s determination, the considerable period of time—four months—that the parents’ rights were violated was also determinative.¹⁰⁸

In a 2003 decision, *Doe v. Heck*, the Seventh Circuit expanded and refined this balancing test for analyzing familial relations cases.¹⁰⁹ The case involved the Wisconsin Department of Health and Family Services’ (the “Department”) investigation of alleged corporeal punishment at a private school.¹¹⁰ After the Department conducted prolonged interviews at the school with students thought to be involved in the alleged abuse, eight sets of parents brought suit against the Department and the workers who conducted the investigation for violating their constitutional right to familial relations under the Fourteenth Amendment.¹¹¹

The *Doe* court noted that *Troxel* failed to provide lower courts with the level of scrutiny to be applied in cases alleging violations of this constitutional right; however, it concluded that “courts are to use some form of heightened scrutiny.”¹¹² Echoing *Brokaw*, the court

¹⁰⁶ *Brokaw*, 235 F.3d at 1019; see also *Miller v. City of Philadelphia*, 174 F.3d 368, 373 (1999) (fundamental interest in the familial relationship must be balanced against the state’s interest in protecting children suspected of being abused).

¹⁰⁷ *Brokaw*, 235 F.3d at 1019.

¹⁰⁸ *Id.*

¹⁰⁹ 327 F.3d 492 (7th Cir. 2003).

¹¹⁰ *Id.* at 500.

¹¹¹ *Id.* at 517. This was one of numerous issues decided by the court.

¹¹² *Id.* at 519.

maintained that the right to familial relations is not absolute and is limited by the government's compelling interest in protecting children.¹¹³

In *Doe*, the Seventh Circuit also refined its balancing test by adopting reasonableness factors that it had previously used to evaluate Fourth Amendment claims.¹¹⁴ When considering the competing interests involved in familial relations claims, *Doe* held that courts must consider: the nature of the privacy interest upon which the action taken by the State intrudes; the character of the intrusion that is complained of; the nature and immediacy of the governmental concern at issue; and the efficacy of the means employed by the government for meeting this concern.¹¹⁵ These factors provide courts with an analytic framework in which to evaluate whether the governmental interference with an individual right is justified and whether this interference is “reasonably related in scope to the circumstances” to that original justification.¹¹⁶ Nevertheless, *Doe* emphasized that the last two factors constituted a threshold that must be met before inquiring further.¹¹⁷ If the challenged governmental actions were not based on “some definite and articulable evidence giving rise to a reasonable suspicion that a child ha[d] been abused of [was] in imminent danger of abuse,” the government can have no interest in protecting children from their parents.¹¹⁸

In applying this test, *Doe* concluded that the custodial interviews without parental consent were a considerable intrusion upon the parents' privacy, as the parents exhibited a subjective expectation of

¹¹³ *Id.* at 520.

¹¹⁴ 327 F.3d at 520.

¹¹⁵ *Id.* at 520 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 654, 654–60 (1995); *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1058–59 (7th Cir. 2000)).

¹¹⁶ *Doe*, 327 F.3d at 520.

¹¹⁷ *Id.* at 520–21.

¹¹⁸ *Id.* at 521 (citing *Brokaw v. Mercer County*, 235 F.3d 1000, 1019 (7th Cir. 2000); *Croft v. Westmoreland County Children and Youth Services*, 103 F.3d 1123, 1126 (3d Cir. 1997)).

privacy by enrolling their child in a private school.¹¹⁹ Moreover, the court considered the subject of the interview, potential abuse by the parents, to exacerbate the character of the intrusion.¹²⁰ Nevertheless, *Doe* ultimately held that the Department violated the parents' familial rights because there was no evidence that gave rise to a reasonable suspicion that the parents had abused their children.¹²¹ Emphasizing the constitutional presumption that fit parents act in the best interest of their children, *Doe* concluded that the Department failed to presume the fitness of the parents and treated corporeal punishment as per se abuse, which the Department's own standards considered insufficient without further evidence of physical injuries.¹²²

Doe demonstrates the Seventh Circuit's struggle to adopt a test that both protects parents' liberty interest in controlling their children but also recognizes the limits of this right. Acknowledging that the Supreme Court has provided little guidance to carry out this task,¹²³ *Doe*'s balancing test embodies the ambiguous status of this liberty interest and provides courts in its circuit ample freedom to protect this right based on the facts before them. The application of this balancing test and the exercise of this discretion is demonstrated in *U.S. v. Hollingsworth*.¹²⁴ This decision provides a predictive case study as to how future courts can and will treat familial rights claims.

II. U.S. v. HOLLINGSWORTH

A. *Factual Background*

For the first five months of the 2005 school year, Tamica Hollingsworth's nine-year old daughter, T.H., exhibited troubling

¹¹⁹ *Doe*, 327 F.3d at 512.

¹²⁰ *Id.*

¹²¹ *Id.* at 524.

¹²² *Id.* at 521–22.

¹²³ *Id.* at 519.

¹²⁴ 495 F.3d 795, 798 (7th Cir. 2007).

conduct at school that concerned school officials.¹²⁵ During this period, T.H. was late for school twenty times and was sent to the principal's office for disciplinary reasons on six occasions.¹²⁶ The school's truancy police officer, Steve Denny, and the school's principal, Darlene Westerfield, unsuccessfully attempted to contact Ms. Hollingsworth by phone and through notes sent home to discuss her daughter's behavior and tardiness.¹²⁷ The principal was eventually able to contact Ms. Hollingsworth and set up a meeting with her at the school.¹²⁸ When Ms. Hollingsworth failed to appear at a December 7, 2005 meeting, the principal questioned T.H. about the difficulty contacting her mother, and T.H. said that her mother would not answer phone calls that their caller ID identified as coming from the school.¹²⁹ When told that Officer Denny would then need to go to her home to contact her mother directly, T.H. responded that he could not come to the home until her mother and her boyfriend, James McCotry, were able to remove their "stuff" and other items that they did not want outsiders to see.¹³⁰ Breaking into tears, T.H. also informed the principal that her mother occasionally left her home alone and that this frightened her.¹³¹

Notified of T.H.'s remarks, Officer Denny began a criminal investigation of Ms. Hollingsworth and arranged for the school social worker, Julie Hoyt, to meet with T.H. for the sole purpose of furthering his investigation.¹³² Officer Denny was eventually able to contact Ms. Hollingsworth and discuss her daughter's behavior, but he did not seek permission for or inform Ms. Hollingsworth of Ms. Hoyt's scheduled meeting with T.H..¹³³ In the subsequent twenty-minute meeting at the

¹²⁵ *Id.* at 798.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 799 n.1.

¹³³ *Id.* at 798.

school conducted by Ms. Hoyt, T.H. identified the previously mentioned “stuff” as marijuana, which T.H. confirmed was smoked and found around her home on a daily basis.¹³⁴ She also told Ms. Hoyt that her mother and Mr. McCotry occasionally brought her along on drug runs.¹³⁵ Ms. Hoyt and Officer Denny subsequently transmitted this information to the prosecutor’s office, which used it to obtain a search warrant for Ms. Hollingsworth’s home.¹³⁶ The search of the home yielded a firearm and significant amounts of cash and crack cocaine in the master bedroom as well as on Mr. McCotry’s person.¹³⁷

After her indictment on numerous drug charges, Ms. Hollingsworth sought to suppress the evidence garnered from the search.¹³⁸ The district court granted Ms. Hollingsworth’s motion because it found that the police violated her substantive due process rights by questioning her daughter during school hours without her knowledge for the sole purpose of incriminating the mother, which amounted to an abuse of governmental power that “shocks the conscience.”¹³⁹

¹³⁴ *Id.* at 799.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* McCotry was charged with similar drug charges and also sought to suppress the evidence yield in the search. *Id.* Conceding that the police did not have probable cause to obtain the warrant, the district court, however, denied McCotry’s motion to suppress under the good faith exception to the exclusionary rule. *Id.* McCotry was convicted at trial of simple possession of crack cocaine and intent to distribute marijuana, and at sentencing the district court imposed 188-month sentence for the cocaine possession and a concurrent 120-month sentence for the marijuana conviction. *Id.* at 800. The court imposed these harsh sentences even though the jury did not determine the drug quantity, which is required by *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *Id.* The district court considered this *Apprendi* error harmless because the parties did not dispute the amount of drugs involved. *Id.* Along with the district court’s ruling on his motion to suppress and the admission of his suppression testimony at trial, McCotry appealed his sentence. *Id.* The Seventh Circuit panel considered his appeal along with Ms. Hollingsworth’s appeal and confirmed his conviction and sentence. *Id.* at 799–800, 803–806.

The government appealed the district court's ruling that granted Ms. Hollingsworth's motion to suppress, and the Seventh Circuit reviewed the issue *de novo*.¹⁴⁰ In reversing the district court's ruling, the Seventh Circuit applied the *Brokaw/Doe* test¹⁴¹ that balances an individual's right to familial relations against the government's competing interests and held that Ms. Hollingsworth's interest in "maintaining a relationship with her child free from state interference," while significant, was outweighed by the government's compelling interest in solving a drug crime as well as maintaining the safety of T.H..¹⁴² The court concluded that the government's conduct in interviewing Ms. Hollingsworth's daughter for a brief period of time without any coercive interrogation techniques was minimal and that this "*de minimis* intrusion" neither shocked the conscience¹⁴³ nor lacked "reasonable justification in the service of a legitimate governmental objective."¹⁴⁴

B. Hollingsworth's Application of the Balancing Test

In applying the *Brokaw/Doe* balancing test, *Hollingsworth* expanded its interpretation of governmental interests to include not only the protection of children from harm or abuse, but also the "solving drug crimes" involving the child's parent.¹⁴⁵ In addressing the nature and immediacy of the governmental concern at issue, the court maintained that the government had a compelling interest to speak with T.H. because Officer Denny had "some reason to believe that Hollingsworth was engaged in illegal activity."¹⁴⁶ Combined with T.H.'s behavioral issues at school and comments about being left home

¹⁴⁰ *Id.* at 800.

¹⁴¹ See *supra* Section I.B.2.c.

¹⁴² *Hollingsworth*, 495 F.3d at 802.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 803 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

¹⁴⁵ *Hollingsworth*, 495 F.3d at 802–03.

¹⁴⁶ *Id.* at 802.

alone, the court held that Ms. Hollingsworth's reluctance to speak with school officials provided Officer Denny with reasonable suspicion that Hollingsworth was exposing her child to drugs.¹⁴⁷ Despite the concern in T.H.'s safety in being left alone and exposed to illegal drugs, the court conceded that ultimately the government's interest was in solving the underlying crime of narcotics distribution.¹⁴⁸ Thus, in contrast to *Brokaw*,¹⁴⁹ and *Doe*,¹⁵⁰ which permitted governmental interference in familial relations in the context of potential child abuse,¹⁵¹ *Hollingsworth* expands the governmental justification to violate this constitutional right in circumstances where a child is present in a potentially criminal environment.¹⁵²

The court's expansion of governmental interest, however, must be seen in the context of the balancing test that it applies to Officer Denny's intrusive activities. The officer ordered the social worker to conduct the short and non-coercive interview while T.H. was in public school.¹⁵³ While this school interview of T.H. without her mother's permission raises privacy issues similar to those expressed *Doe*, the court distinguishes this interview with *Doe* because the private school principal in *Doe* objected to the interview with the Department¹⁵⁴

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 802–03.

¹⁴⁹ *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000).

¹⁵⁰ *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003).

¹⁵¹ *See also Tenenbaum v. Williams*, 193 F.3d 581, 601 (2d Cir. 1999)

(holding that removing a child from school for several hours without permission of parents to examine her for possible sexual abuse did not violate the parents' substantive due process rights because there was substantial evidence of abuse).

¹⁵² *See United States v. Penn*, 647 F.2d 876, 885–87 (9th Cir. 1980) (In an investigation of drug distribution, and officer offered child money at the family home to tell him where his mother's heroin was hidden. This evidence was held to be admissible, and the court rejected the defendant's substantive due process argument because police may pay informants for information and young children may aid investigation. In contrast, *Penn's* dissent argued that family relationship were highly valued and the law should not make parents and children apprehensive about exchanging information or encourage children to turn against their parents).

¹⁵³ *Hollingsworth*, 495 F.3d at 798.

¹⁵⁴ *Id.* at 802.

whereas T.H.'s principal was complicit in the interview of T.H..¹⁵⁵ Parents delegate some parental responsibilities to school officials when they send their children to school; however, parents also should reasonably expect these same officials to speak to their children and report problems to law enforcement if there are serious concerns with the child's home life.¹⁵⁶ Thus, the inquiries made by Officer Denny and conducted by the social worker did not infringe upon any reasonable privacy interest of Ms. Hollingsworth.¹⁵⁷

The court also questioned whether the twenty-minute interview conducted by the social worker constituted a substantial intrusion into the familial relationship.¹⁵⁸ Reasoning that the interview was brief and lacked any coercive interrogation techniques, the court concluded that the government's intrusion into Ms. Hollingsworth's familial relationship with her daughter was minimal—so much so that it commented that it was doubtful that such a minimal intrusion could ever constitute a substantial intrusion.¹⁵⁹

III. CONCLUSION

Applying the *Brokaw/Doe* balancing to the facts before it, *Hollingsworth* held that the government's interest in solving the underlying drug crime and in T.H.'s safety outweighed Ms. Hollingsworth's interest in preventing governmental intrusion into her familial relations with her daughter.¹⁶⁰ This holding effectively expanded the court's understanding of governmental interest from protecting children from actual or potential harm to solving drug crimes. Given that the courts' original justification for permitting the intrusion into familial relations stemmed from the state's interest in preventing child neglect and actual or imminent abuse, this expansive

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

definition into the realm of law enforcement outside of the direct effect on the child creates a potential for governmental overreach and abuse. The idea of public schools being used as quasi-interrogation rooms to further criminal investigations is chilling.

The balancing test endorsed by the Seventh Circuit, however, mitigates such fears because it protects individuals' right to be free from unwarranted governmental intrusion into the familial sphere by balancing this governmental interest with their expectation of privacy from unreasonable intrusions. Thus, while in *Hollingsworth* the nature of the privacy interest and the character of the intrusion was minimal,¹⁶¹ more intrusive governmental investigations will be prevented by the proper application of this balancing test. The adopted test is a practical tool that provides courts the ability to protect children from potential harm within the familial sphere while simultaneously protecting the familial sphere from unconstitutional intrusion into the preferences and proclivities of families.

The Seventh Circuit's test is also consistent with the Supreme Court's historical reluctance to fully protect and recognize familial rights. From its initial recognition of this liberty interest, the Court has voiced its support of familial rights rhetorically, but its early holdings involving this right consistently focused on other constitutional claims.¹⁶² Even when familial rights were unambiguously endorsed in *Troxel v. Granville*, the Court was deeply divided over the scope of this liberty interest and the standard of review with which it would be afforded protection.¹⁶³

The Supreme Court's struggle to clarify its position cannot be considered merely accidental. Rather, the ambivalence that surrounds the jurisprudence regarding familial rights is indicative of the Court's reluctance to permit the familial sphere to become sufficiently fortified such that it would prevent regular state intervention. While it considers

¹⁶¹ *Id.* at 802.

¹⁶² *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–535 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944).

¹⁶³ 530 U.S. 57, 66–68 (2000).

familial rights to be a fundamental right,¹⁶⁴ this right is significantly limited because the corollary of its exercise is the potential risk to the health, safety, and broadly defined well-being of children. Thus, at the same time that the Court has recognized familial rights to be a fundamental liberty interest it has obfuscated the application of its protection for fear of proscribing state intervention into the lives of children. The Court's ambivalence towards this due process right is thus intentional.

Hollingsworth provides an ideal example of the Supreme Court's ambiguous familial rights jurisprudence put into practice. The Seventh Circuit balancing test provides courts with the flexibility to protect familial rights in instances where the potential harm to the child is minimal and where the state oversteps its power to intrude into this sphere. In instances where this state intrusion is minimal, however, the threshold of harm to the child can be significantly lower. In *Hollingsworth*, the court was able to acknowledge that Mrs. Hollingsworth had a right to control the upbringing of her child, but it was also able to justify the state infringing on this right when there was a reasonable suspicion that the child was subject to the potential harm of being in the presence of illegal activity.¹⁶⁵ Because the interrogation was short and the mother had a diminished expectation of non-intervention in her relationship with her daughter while she attended school, the court did not consider this expansive idea of harm excessive.¹⁶⁶ In fact, this expansive conception of potential harm corresponds to the Supreme Court's ambivalence towards familial rights and serves as a predictive measure of future familial rights claims where the general well-being of a child is a stake.

¹⁶⁴ *Prince*, 321 U.S. at 165.

¹⁶⁵ *Hollingsworth*, 495 F.3d at 802.

¹⁶⁶ *Id.*