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## Note

### *Troxel v. Granville*: A Missed Opportunity to Elucidate Children's Rights

Christina M. Alderfer\*

#### I. INTRODUCTION

Robert and Sara Herndon owned an orchard in Missouri.<sup>1</sup> Their daughter, Ann, her husband, Randy, and their son, Cody, lived in the same town.<sup>2</sup> In fact, for eight years, Randy worked at the Herndon's orchard.<sup>3</sup> Cody had a close relationship with his grandparents because he spent a great deal of time with them at the orchard during preschool and elementary school.<sup>4</sup> Cody's grandparents were active participants in his life and in many ways helped to raise their grandson.<sup>5</sup> After Randy was fired from his job at the orchard without warning, the relationship between Cody's parents and grandparents became strained and Ann and Randy refused to allow the Herndons to visit with Cody.<sup>6</sup> The Herndons, however, wanted to maintain a relationship with their grandson and petitioned the court for visitation rights.<sup>7</sup>

The Missouri Supreme Court affirmed the order of the trial court that granted the Herndons visitation with Cody.<sup>8</sup> Because of the inconsistent

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\* J.D. expected May, 2002. I would like to thank my family and friends for their love, encouragement, and support.

1. Herndon v. Tuhey, 857 S.W.2d 203, 205 (Mo. 1993).

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id.* Cody and his grandparents spent a large amount of time together: Cody's grandmother took him to story hour at the library, Cody's grandfather coached his basketball team, his grandparents went to see all of Cody's sporting events, his grandmother taught Cody's Sunday school class, and they also went on vacations together. *Id.*

6. *Id.* at 205-06.

7. *Id.* at 206.

8. *Id.* at 211. The trial court had ordered visitation on the first and third weekends of each month and on certain holidays. *Id.* at 206. The state supreme court stated "[h]aving reviewed the evidence, we defer to the trial court's finding that grandparent visitation is in the best interests of

approaches taken by various courts, however, another court may have reached a different result.<sup>9</sup>

In response to these inconsistent approaches, the United States Supreme Court recently decided *Troxel v. Granville*,<sup>10</sup> a case involving a state grandparent visitation statute.<sup>11</sup> While this case provided the Supreme Court with the opportunity to resolve the divergent approaches with respect to grandparent visitation statutes, it did no such thing.<sup>12</sup> Instead, the Court made a decision that offended no one and provided no clear guidance.<sup>13</sup> If the Herndons petitioned for visitation today, it is unclear what, if any, effect the *Troxel* decision would have on the court that heard the case.<sup>14</sup>

Until the middle of the twentieth century, the Herndons would not have had an avenue by which to petition for visitation with Cody.<sup>15</sup> This is because grandparents had no legal right to visitation with their grandchildren.<sup>16</sup> Parents were said to have a moral, but not legal, obligation to allow grandparents to visit their grandchildren.<sup>17</sup> Only in

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Cody and would not endanger Cody's physical health or impair his emotional development." *Id.* at 211.

9. *Infra* notes 132-57 and accompanying text (discussing the various approaches taken by several state supreme courts).

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

11. *Id.* at 2055.

12. *Infra* notes 311-23 and accompanying text (examining the divergent approaches taken by different state courts prior to the Supreme Court's opinion in *Troxel*).

13. *Infra* notes 311-23 and accompanying text (discussing issues unresolved by the Supreme Court's opinion in *Troxel*).

14. *Infra* notes 331-48 and accompanying text (examining the continuing confusion in state courts over granting grandparent visitation since the *Troxel* decision).

15. See Michael Quintal, Note, *Court-Ordered Families: An Overview of Grandparent-Visitation Statutes*, 29 SUFFOLK U. L. REV. 835, 835 (1995); see also David T. Whitehouse, Comment, *Constitutional Law—Grandparent Visitation Rights: North Dakota Declares the Grandparent Visitation Statute Unconstitutional*, 76 N.D. L. REV. 191, 192-93 (2000).

16. Quintal, *supra* note 15, at 835; see also *King v. King*, 828 S.W.2d 630, 636 (Ky. 1992) (Wintersheimer, J., dissenting) (stating that at common law grandparents had no legal right to visitation with their grandchildren over the objection of the parent).

17. Scott C. Boen, *Grandparent Visitation Statutes: The Constitutionality of Court Ordered Grandparent Visitation Absent a Showing of Harm to the Child*, 20 J. JUV. L. 23, 28 (1999); see also *Pier v. Bolles*, 596 N.W.2d 1, 4 (Neb. 1999) (stating that at common law the parents' obligation to allow grandparents to visit with grandchildren was moral, not legal).

rare situations would courts invoke equity jurisdiction<sup>18</sup> and allow visitation to grandparents over the objections of the parents.<sup>19</sup>

Prior to the 1960s, courts provided several important reasons for not granting grandparents visitation rights.<sup>20</sup> First, some judges believed that granting visitation rights to grandparents would undermine parents' authority.<sup>21</sup> Second, courts were concerned that granting grandparents visitation rights would place the child in an inter-generational conflict.<sup>22</sup> Many courts reasoned that this conflict would negatively impact on the child's development and cause emotional or physical trauma to the child.<sup>23</sup> Finally, courts justified this position by holding that parental autonomy was a fundamental constitutional right protected by the Fourteenth Amendment.<sup>24</sup>

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18. Equity is "[j]ustice administered according to fairness as contrasted with the strictly formulated rules of common law." BLACK'S LAW DICTIONARY 540 (6th ed. 1990). The concept of equity is deeply ingrained in American jurisprudence and is usually considered "part of the inherent powers of the courts." Beth Neu, Note, *Wisconsin Brings Child Visitation Out of the Closet by Granting Standing to Nonparents in Custody of H.S.H.-K.*, 37 S. TEX. L. REV. 911, 929 (1996). Equity comes from the English system where equity courts were distinguished from common law courts. *Id.* at 929 n.76. Courts of equity were originally administered by the Lord Chancellor and later by the Court of Chancery. *Id.* During the Middle Ages, litigants could petition the King for a just result in a case. *Id.* The King would rely on the advice of his Chancellor. *Id.* By the 15th century, however, litigants went directly to the Chancellor who focused on a fair result instead of strict adherence to the law. *Id.* By the 19th century, the Court of Chancery had a body of precedent and established principles. *Id.* This tradition was adopted by the American court system, however today most courts are considered both courts of law and equity. *Id.*

19. Quintal, *supra* note 15, at 835-36.

20. Christopher M. Bikus, *One Step Forward, Two Steps Back: The Nebraska Supreme Court Perpetuates the Uncertainty Surrounding the Grandparent Visitation Statute in Eberspacher v. Hulme*, 75 NEB. L. REV. 288, 290-91 (1996); *see also* Whitehouse, *supra* note 15, at 192-93.

21. Bikus, *supra* note 20, at 290; *see, e.g.*, Odell v. Lutz, 177 P.2d 628, 629 (Cal. Dist. Ct. App. 1947) (stating that allowing grandparents to interfere in the parent-child relationship "would injuriously hinder proper paternal authority by dividing it").

22. Whitehouse, *supra* note 15, at 193.

23. *Id.*; *see, e.g.*, Commonwealth *ex rel.* Flannery v. Sharp, 30 A.2d 810, 812 (Pa. 1943) (explaining that ordering grandparent visitation against the wishes of a grandchild's parents may endanger the child's physical and psychological welfare).

24. Whitehouse, *supra* note 15, at 194. The United States Supreme Court stated in *Meyer v. Nebraska* that the Fourteenth Amendment protects "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Court explained that this includes, without doubt, the freedom to establish a home and bring up children. *Id.*; *see also infra* notes 56-61 and accompanying text (discussing *Meyer v. Nebraska*). *See generally* Brooks v. Parkerson, 454 S.E.2d 769 (Ga. 1995) (holding that allowing grandparent visitation over a parental objection was a violation of the rights of parents under *Meyer*); Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993) (holding that the Grandparents' Visitation Act violated parents' constitutional right to raise a child).

Courts in the United States followed this rule until 1965, when state legislatures began to enact grandparent visitation statutes.<sup>25</sup> States created these statutes in response to the decline in the “traditional ‘nuclear’ family”<sup>26</sup> and the desire to retain some aspects of the nuclear family.<sup>27</sup> Since 1965, all fifty states have enacted statutes<sup>28</sup> providing

25. Whitehouse, *supra* note 15, at 192-93. New York passed the first visitation statute in 1966. Linda Greenhouse, *Justices Deny Grandparents Visiting Rights*, N.Y. TIMES, June 6, 2000, at A1. By 1986, all fifty states had enacted “grandparent visitation laws that were sponsored by the American Association for Retired Persons” (“AARP”). David G. Savage, *Parents First: Supreme Court Warns Judges to be Cautious When Granting Visitation Rights to Grandparents*, 86 A.B.A. J. 38 (Aug. 2000).

26. The “traditional ‘nuclear’ family” consists of a heterosexual married couple living together with their biological or adopted children. Elizabeth Weiss, Comment, *Nonparent Visitation Rights v. Family Autonomy: An Abridgement of Parents’ Constitutional Rights?*, 10 SETON HALL CONST. L.J. 1085, 1090 (2000).

27. *Id.* These statutes were the result of the increasing number of unmarried or divorced parents, the existence of step-families, the decrease in numbers of grandchildren, and the increased life span of grandparents. Anne Marie Jackson, Comment, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563, 563-64 (1994). The court in *Hicks v. Enlow* stated:

The grandparents’ visitation statute was an appropriate response to the change in the demographics of domestic relations, mirrored by the dramatic increase in the divorce rate and in the number of children born to unmarried parents, and the increasing independence and alienation within the extended family inherent in a mobile society.

*Hicks v. Enlow*, 764 S.W.2d 68, 70-71 (Ky. 1989).

28. All fifty states have enacted either grandparent or third-party visitation statutes. ALA. CODE § 30-3-4.1 (Supp. 2000); ALASKA STAT. § 25.20.065 (Michie 2000); ARIZ. REV. STAT. ANN. § 25-409 (West 2000); ARK. CODE ANN. § 9-13-103 (Michie 1998 & Supp. 2001); CAL. FAM. CODE § 3104 (West 1994 & Supp. 2001); COLO. REV. STAT. ANN. § 19-1-117 (West 1999 & Supp. 2000); CONN. GEN. STAT. § 46b-59 (1995 & Supp. 2000); DEL. CODE ANN. tit. 10, § 1031(7) (1999); FLA. STAT. ANN. § 752.01 (West 1997 & Supp. 2001); GA. CODE ANN. § 19-7-3 (1999 & Supp. 1999); HAW. REV. STAT. ANN. § 571-46.3 (Michie 1999 & Supp. 2000); IDAHO CODE § 32-719 (Michie 1996); 750 ILL. COMP. STAT. 5/607 (1999 & Supp. 2000); IND. CODE ANN. § 31-17-5-1 (West 1999 & Supp. 2000); IOWA CODE ANN. § 598.35 (West 1996 & Supp. 2000); KAN. STAT. ANN. § 38-129 (1993 & Supp. 1998); KY. REV. STAT. ANN. § 405.021 (BANKS-BALDWIN 1990); LA. REV. STAT. ANN. § 9:344 (West 2000 & Supp 2001); LA. CIV. CODE ANN. art. 136 (West Supp. 2000); ME. REV. STAT. ANN. tit. 19-A, § 1803 (West 1998); MD. CODE ANN., FAM. LAW § 9-102 (1999 & Supp. 2000); MASS. GEN. LAWS ch. 119, § 39D (1994 & Supp. 2000); MICH. COMP. LAWS ANN. § 722.27b (West 1993 & Supp. 2000); MINN. STAT. ANN. § 257.022 (West 1998 & Supp. 2001); MISS. CODE ANN. § 93-16-3 (1994 & Supp. 2000); MO. REV. STAT. § 452.402 (1997 & Supp. 2001); MONT. CODE ANN. § 40-9-102 (1999 & Supp. 2000); NEB. REV. STAT. § 43-1802 (1998); NEV. REV. STAT. ANN. § 125c.050 (Michie 1999); N.H. REV. STAT. ANN. § 458:17d (1992 & Supp. 2000); N.J. STAT. ANN. § 9:2-7.1 (West 1993 & Supp. 2000 & Supp. 2001); N.M. STAT. ANN. § 40-9-2 (Michie 1999 & Supp. 2000); N.Y. DOM. REL. LAW § 72 (McKinney 1999 & Supp. 2001); N.C. GEN. STAT. § 50-13.2 (1999); N.D. CENT. CODE § 14-09-05.1 (1997 & Supp. 1999); OHIO REV. CODE ANN. §§ 3109.051, 3109.11 (West. 2000); OKLA. STAT. ANN. tit. 10, § 5 (West 1998 & Supp. 2001); OR. REV. STAT. § 109.121 (1999 & Supp. 2000); 23 PA. CONS. STAT. ANN. §§ 5311-5313 (West 1991 & Supp. 2001); R.I. GEN. LAWS §§ 15-5-24 to 15-5-24.3 (1996 & Supp. 1999); S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. 1995 & Supp. 2000); S.D. CODIFIED LAWS § 25-4-52 (Michie 1999 & Supp. 2000); TENN. CODE ANN. §§ 36-6-302, 36-6-306, 36-6-307 (1996 & Supp. 2000); TEX.

for grandparent visitation or visitation by third parties.<sup>29</sup>

The United States Constitution enumerates the areas in which Congress may legislate.<sup>30</sup> Family issues and grandparent visitation do not fall within any of these enumerated areas.<sup>31</sup> Therefore, because all powers not explicitly given to Congress are the domain of the states, grandparent visitation is regulated by the states.<sup>32</sup> The United States Supreme Court has shown substantial deference to state courts and legislatures in the area of family law<sup>33</sup> and chose not to hear a case regarding a grandparent visitation statute until January 2000.<sup>34</sup>

This Note will trace the development of the concept that parents have a liberty interest in raising their children without interference from the state.<sup>35</sup> This Note then will examine the various types of grandparent visitation statutes that have developed in different states and the requirements mandated by different states for visitation to be granted.<sup>36</sup>

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FAM. CODE ANN. § 153.433 (Vernon 1996 & Supp. 2001); UTAH CODE ANN. § 30-5-2 (1998 & Supp. 2000); VT. STAT. ANN. tit. 15, §§ 1011–1013 (1998 & Supp. 2000); VA. CODE ANN. § 20-124.2 (Michie 2000); WASH. REV. CODE ANN. § 26.09.240 (West 1997 & Supp. 2001) W. VA. CODE §§ 48-2B-1 to 48-2B-7 (Michie 1999 & Supp. 2000); WIS. STAT. ANN. § 767.245 (West 1993 & Supp. 2000); WIS. STAT. ANN. § 880.155 (West 1991 & Supp. 2000); WYO. STAT. ANN. § 20-7-101 (Michie 1999).

29. Boen, *supra* note 17, at 28.

30. U.S. CONST. art. I, § 8; *see also* Jackson, *supra* note 27, at 589.

31. Jackson, *supra* note 27, at 589. While Congress cannot legislate matters of family law, Congress can indirectly influence state policy. Sarah Norton Harpring, Comment, *Wide-Open Grandparent Visitation Statutes: Is the Door Closing?*, 62 U. CIN. L. REV. 1659, 1680 (1994). First, Congress can adopt concurrent resolutions, which have no legal force, but which urge states to pass legislation reflecting the same policy. *Id.* Alternatively, Congress can condition the receipt of federal funding on the state's compliance with certain conditions. *Id.* This requires, however, that the conditions bear some nexus to the funding. *Id.* The Subcommittee on Human Services of the House Select Committee on Aging conducted hearings on the subject of grandparent visitation rights in 1982 and 1983. *Id.* Several years later, a concurrent resolution was adopted by the House and the Senate which called for the development and enactment of a uniform state act. *Id.* Despite the adoption of the concurrent resolution, state statutes continue to vary significantly. *See infra* Part II.C (discussing the various types of grandparent visitation statutes).

32. U.S. CONST. amend. X. The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*; *see also* Jackson, *supra* note 27, at 589.

33. Erica L. Strawman, *Grandparent Visitation: The Best Interests of the Grandparent, Child, and Society*, 30 U. TOL. L. REV. 31, 35 (1998). "[F]amily law has been the province of state legislatures and state courts, with only rare occasions for Supreme Court intervention on such questions as the right of parents to choose private rather than public schools . . ." Linda Greenhouse, *Justices Deny Grandparent Visiting Rights*, N.Y. TIMES, June 6, 2000, at A1.

34. Troxel v. Granville, 120 S. Ct. 2054 (2000).

35. *Infra* Part II.B (reviewing the United States Supreme Court cases that established parents' liberty interests in raising children).

36. *Infra* Part II.C (examining the types of grandparent visitation statutes that have developed in different states).

This Note will then consider the approaches taken by various state supreme courts that have examined grandparent visitation statutes.<sup>37</sup> Next, this Note will review the state court decisions and the plurality, concurring, and dissenting opinions in the United States Supreme Court's decision in *Troxel v. Granville*.<sup>38</sup> This Note will then argue that there were three major problems with the Supreme Court's decision in this case that render the decision unhelpful.<sup>39</sup> Finally, this Note will discuss the minimal impact this decision has had on state courts and the continued confusion that exists about the requirements necessary before grandparent visitation is granted.<sup>40</sup>

## II. BACKGROUND

This section of the Note will examine the Fourteenth Amendment to the United States Constitution and the liberty interest of individuals protected by that amendment.<sup>41</sup> Next, this section will review the line of United States Supreme Court cases that established that parents have a fundamental liberty interest in raising their children.<sup>42</sup> This section will then consider the different types of state visitation statutes and the varying requirements imposed by states that must be satisfied before visitation is granted.<sup>43</sup> Finally, this section will examine the approaches taken by various state supreme courts in analyzing the constitutionality of the state's grandparent visitation statute and the factors that influence a state court's decision.<sup>44</sup>

### A. *The Liberty Interest Protected by the Fourteenth Amendment*

The Due Process Clause of the Fourteenth Amendment states that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."<sup>45</sup> There are two aspects to the Due Process Clause: procedural due process and substantive due process.<sup>46</sup>

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37. *Infra* Part II.D (comparing and reviewing several states' supreme court decisions where grandparent visitation was at issue).

38. *Infra* Part III (reviewing the state court decisions and the United States Supreme Court decision in *Troxel*).

39. *Infra* Part IV (detailing the problems with the United States Supreme Court's decision in *Troxel*).

40. *Infra* Part V (discussing the minimal impact the *Troxel* decision has had on subsequent grandparent visitation cases).

41. *Infra* Part II.A.

42. *Infra* Part II.B.

43. *Infra* Part II.C.

44. *Infra* Part II.D.

45. U.S. CONST. amend. XIV, § 1.

46. BLACK'S LAW DICTIONARY 500 (6th ed. 1990). The due process clause consists of a

Substantive due process operates to protect those liberty interests referred to by the Fourteenth Amendment<sup>47</sup> and is applicable when a state action infringes on an individual's interest in life, liberty, or property.<sup>48</sup> The Supreme Court has held that some of these liberty interests are fundamental,<sup>49</sup> primarily meaning that the interests are related to the right of privacy.<sup>50</sup> Such interests include the areas of marriage, childbearing, and child rearing.<sup>51</sup> The United States Supreme Court has long given deference to the right of parents to raise a child according to their wishes.<sup>52</sup> This right was long ago held to be a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution.<sup>53</sup> The Court has not defined, however, the extent of this liberty interest.<sup>54</sup> Therefore, the scope of parents' fundamental liberty interest in raising their children is unclear.<sup>55</sup>

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procedural aspect and a substantive aspect. *Id.* Procedural due process guarantees that individuals receive a particular process in the event that they are deprived of life, liberty, or property. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 510 (5th ed. 1995). By comparison, substantive due process protects certain fundamental rights or voids arbitrary limitations on individual freedom. *Id.*

47. Neu, *supra* note 18, at 940-41.

48. Mark Moody, Note, *Constitutional Questions Regarding Grandparent Visitation and Due Process Standards*, 60 MO. L. REV. 195, 199 (1995).

49. See Neu, *supra* note 18, at 941. The Supreme Court has held that a liberty interest protected under the Due Process Clause of the Fourteenth Amendment will be deemed fundamental if it is "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969) (considering whether the state's right to appeal in a criminal case violated the defendant's fundamental liberty rights protected by the Fourteenth Amendment). The Court has also referred to "those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment." *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997) (considering whether assistance in committing suicide is a fundamental liberty interest).

50. Karen Alyssa Nalle, Comment, *Whose Child is it Anyway?: The Unconstitutionality of the Texas Grandparent Visitation Statute*, 51 BAYLOR L. REV. 721, 730 (1999).

51. *Id.*

52. Weiss, *supra* note 26, at 1085; see also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (stating that Wisconsin's compulsory secondary school attendance law was unconstitutional as applied to the Amish); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (establishing that parents have a right to send their children to private schools by holding that a statute that required all children to attend public school was unconstitutional); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding a statute that prohibited teaching lessons in a foreign language to be unconstitutional and concluding that parents may engage a foreign language instructor to teach their children in school).

53. Boen, *supra* note 17, at 26. This was made clear in the seminal case of *Meyer v. Nebraska*, 262 U.S. at 399. See also *infra* notes 56-61 and accompanying text (discussing the facts, holding, and rationale of the Court in *Meyer*).

54. Neu, *supra* note 18, at 941.

55. *Id.* The Constitution does not mention the family or the parent-child relationship, and, therefore, judges have been provided with little guidance from the framers about the scope of



*B. Case Law Establishing Parents' Fundamental Liberty Interest in Raising their Children*

More than seventy-five years ago, in *Meyer v. Nebraska*,<sup>56</sup> the United States Supreme Court first acknowledged parents' Fourteenth Amendment liberty interest in raising their children.<sup>57</sup> In this seminal case, the Court held unconstitutional a statute that prohibited instruction in any language, other than English, to a schoolchild who had not graduated from the eighth grade.<sup>58</sup> The Court explained that while the liberty interest guaranteed by the Fourteenth Amendment had not previously been precisely defined, it protects more than freedom from bodily restraint and must also include the right to raise children without interference from the state.<sup>59</sup> *Meyer*, therefore, recognized parents' rights to raise their children as a liberty interest in which the state may not interfere without due process of law.<sup>60</sup> This liberty interest included the parents' right to have an instructor teach lessons to their children in a language other than English.<sup>61</sup>

Two years later, in *Pierce v. Society of Sisters*,<sup>62</sup> the Supreme Court examined a statute that required all children between the ages of eight and sixteen to attend a public school.<sup>63</sup> The Court reaffirmed parents' liberty interest in controlling the upbringing of their children.<sup>64</sup> While

parental rights. Andrew Schepard, *Muddled Impact of the High Court's Grandparent Visitation Decision*, N.Y. L.J., July 13, 2000, at 3.

56. *Meyer v. Nebraska*, 262 U.S. 390 (1923). In this landmark case, a schoolteacher, Robert Meyer, was convicted under a Nebraska statute that prohibited the teaching of any subject in any language other than English to a student who had not yet graduated from the eighth grade. *Id.* at 396-97. Meyer had taught a reading lesson in the German language to a ten-year-old child. *Id.* at 396. While the Court acknowledged the state's legitimate interest in regulating children's education, the Court held that the schoolteacher's right to teach and the right of parents to engage him to instruct their children are within the liberty interests protected by the Fourteenth Amendment, and therefore, the statute was unconstitutional. *Id.* at 399-402.

57. *Id.* at 399-400; Weiss, *supra* note 26, at 1087.

58. *Meyer*, 262 U.S. at 397-402.

59. *Id.* at 399. The Court stated:

While this Court has not attempted to define with exactness the liberty thus guaranteed . . . [w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Id.*

60. *Id.*

61. *Id.* at 400.

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

63. *Id.* at 530.

64. *Id.* at 534-35. The plaintiffs alleged that the statute at issue in *Pierce* interfered with the right of parents to select where their children would "receive appropriate mental and religious

the Court recognized that the state has a legitimate interest in regulating schools and requiring all children of certain ages to attend school, this interest was outweighed by the parents' interests in directing the raising of their children.<sup>65</sup>

More recently, in *Wisconsin v. Yoder*,<sup>66</sup> the Supreme Court reiterated the right of parents to control their children's education by examining a compulsory school-attendance law. The law, challenged by several Amish parents, required students to attend school until age sixteen.<sup>67</sup> The Court acknowledged two competing interests in this case.<sup>68</sup> First, the Amish parents had a First Amendment right to religious freedom in conjunction with their right to direct their children's upbringing,<sup>69</sup> and, second, the state had an interest as *parens patriae*<sup>70</sup> in extending the

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training, the right of children to influence their parents' choice of a school, the right of schools and teachers therein to engage in business or profession." *Id.* at 532. The Court stated that under the doctrine set forth in *Meyer v. Nebraska* it was clear the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35.

65. *Id.* The Court declared that "[t]he 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.

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

67. *Id.* Some Amish parents refused to send their children to school after the eighth grade, believing that by sending their children to high school they would expose them to a "worldly" influence in conflict with their religious beliefs. *Id.* at 207-11. They argued that this violated their rights under the First and Fourteenth Amendments. *Id.* at 208-09. The First Amendment to the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. This is made applicable to the states by the Fourteenth Amendment which states, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States . . ." U.S. CONST. amend. XIV, § 1.

68. *Yoder*, 406 U.S. at 214. The Court explained that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests . . . of parents . . ." *Id.*

69. *Id.* at 232-33. Again emphasizing parents' rights to control the rearing of their children, the Court stated, "[t]he 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." *Id.* at 232.

70. *Parens patriae* translated literally means "parent of the country" and refers to the role of a state as the sovereign and guardian of people under legal disability, including juveniles. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). When the state is acting as *parens patriae* it acts from the viewpoint and on behalf of the child. Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 OKLA. L. REV. 29, 68 (1996). In the United States, the idea of *parens patriae* can be traced to the King's authority under the English law to serve as the "guardian of persons under legal disabilities . . ." *Id.* at 68-69 (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972)). Chancellors, acting on behalf of the King, assumed responsibility for subjects who were legally unable to care for themselves and for their property. *Id.* at 69. Originally, *parens patriae* corresponded to a payment to the King, but by the 17th century the power was used to provide support and education for children in need

benefits of secondary education to each child regardless of the parents' wishes.<sup>71</sup> The Court recognized that both are legitimate interests, but held that in this case, the parents' interests outweighed the state's interests.<sup>72</sup> The Court, therefore, held that the First and Fourteenth Amendments prevented the state from exercising its *parens patriae* power and compelling the Amish parents to send their children to high school until the age of sixteen.<sup>73</sup>

The right of parents to dictate the care, upbringing, and control of their children, however, is not absolute.<sup>74</sup> This was first made clear in *Prince v. Massachusetts*,<sup>75</sup> where the Court examined a Massachusetts child labor law that prohibited any girl under the age of eighteen from selling newspapers or magazines on the street or in any public place.<sup>76</sup>

While the Court in *Prince* recognized that the care of a child resides first with the parents, it stated that the family is not beyond regulation when it is in the public interest to do so, even against a claim involving religious liberty.<sup>77</sup> The Court explained that under some circumstances

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regardless of any direct financial benefit to the King. *Id.*

71. *Yoder*, 406 U.S. at 229. The Court stated that "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." *Id.* at 213.

72. *Id.* at 232-34.

73. *Id.* at 234.

74. *E.g.*, *Bellotti v. Baird*, 443 U.S. 622 (1979) (limiting the absolute requirement of parental consent for a minor's abortion); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (stating that the state has the authority to limit parental rights, including limiting parents' rights to dictate the age at which a child begins to work). There are two sources of the state's authority to intrude in the parent-child relationship. *In re Smith*, 969 P.2d 21, 28 (Wash. 1998). The state is allowed to act pursuant to its police power to protect citizens from harm inflicted by third parties or to protect citizens from any threats to their health and safety. *Id.* For example, this police power allows the state to require that children be vaccinated against communicable diseases over the objections of fit parents and allows the state to override a parent's decision if that decision would severely harm a child. Bohl, *supra* note 70, at 68. The state may act as *parens patriae* in which the state acts from the viewpoint and on behalf of the interests of the child. *Smith*, 969 P.2d at 28.

75. *Prince*, 321 U.S. at 166.

76. *Id.* at 159-61. In *Prince*, a nine-year-old girl's aunt, who was also her guardian, was convicted of violating a Massachusetts child labor law. *Id.* The child and her aunt were Jehovah's Witnesses and they were offering religious publications on the streets of Brockton, Massachusetts. *Id.* at 161. The Court recognized that two claimed liberties were at stake. *Id.* at 164. The first liberty interest involved was the parent's liberty interest in choosing how to raise the child, which in this case included teachings about the tenets and practices of their shared faith. *Id.* The second liberty interest involved was that of the child to preach the gospel according to the scripture, "a little child shall lead them." *Id.* The Bible states that "[t]he wolf shall dwell with the lamb, and the leopard shall lie down with the kid, and the calf and lion and the fatling together, and a little child shall lead them." *Isaiah* 11:6.

77. *Prince*, 321 U.S. at 166. The Supreme Court has recognized the limitations on parents' authority to control their children in other cases, as well. *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972). In *Yoder*, the Court's decision was based upon the unique circumstances of the case

the state, as *parens patriae*, will interfere with a parents' liberty interest in controlling the upbringing of their children, such as by requiring attendance in school or prohibiting child labor.<sup>78</sup> The Court concluded that in areas affecting children's welfare the state has a significant range of power to limit parental freedom and authority.<sup>79</sup> While the Court made its decision after weighing the rights of the state and the rights of the parents, the Court recognized, for the first time, that children have liberty interests protected by the Constitution.<sup>80</sup>

While all states acknowledge that under some circumstances the state possesses the authority to interfere in the parent-child relationship, states have reached differing conclusions on the issue of whether granting visitation to nonparents is within the state's authority as *parens patriae*.<sup>81</sup>

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and the Amish convictions. Brief for Petitioners at 24, *Troxel v. Granville*, 120 S. Ct. 2054 (2000) (No. 99-138). The *Yoder* Court did not believe that the parent-child relationship was, by itself, sufficient to support the constitutional claim asserted by the parents. *Id.* The Court explained that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Yoder*, 406 U.S. at 233-34.

78. *Prince*, 321 U.S. at 166. The Court reasoned that "neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." *Id.* (citations omitted).

79. *Id.* at 167. The Court stated "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction." *Id.* The Court went on to say:

The state's authority over children's activities is broader than over like actions of adults . . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection . . . . It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.

*Id.* at 168-69. The Court recognized there will be instances where parents will make decisions that are not in the interests of their children and stated that "[p]arents may be free to become martyrs themselves. But 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." *Id.* at 170.

80. *Id.* at 164-65.

81. *E.g.*, *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995) (holding that Georgia's grandparent visitation statute unconstitutionally violates the protected interest of parents to raise their children without state interference); *King v. King*, 828 S.W.2d 630 (Ky. 1992) (holding that Kentucky's grandparent visitation statute was constitutional); *see infra* Part II.D (explaining how several different states have approved statutes providing for grandparent visitation).

### C. State Visitation Statutes

There are two main categories under which grandparent visitation statutes are grouped, the "special circumstances" statutes and the "open ended" statutes.<sup>82</sup> The "special circumstances" statute<sup>83</sup> represents the majority of jurisdictions and requires some sort of triggering event causing a disruption to the traditional family unit.<sup>84</sup> Most of these statutes only allow visitation by the grandparents under specific circumstances.<sup>85</sup> Such circumstances include the divorce or legal

82. Boen, *supra* note 17, at 29. These statutes vary significantly. John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 369-70 (1998). In fact, according to one commentator, "[t]he enactments and the scope of the rights granted are of an enormous variety and virtually defy rational classification." *Id.* at 371.

83. Arkansas' grandparent visitation statute is a "special circumstances" statute. The statute states:

(a)(1) Upon petition by a person properly before it, a chancery court of this state may grant grandparents and great-grandparents reasonable visitation rights with respect to their grandchild or grandchildren or great-grandchild or great-grandchildren at any time if:

(A) The marital relationship between the parents of the child has been severed by death, divorce, or legal separation; or

(B) The child is in the custody or under the guardianship of a person other than one (1) or both of his natural or adoptive parents; or

(C) The child is illegitimate, and the person is a maternal grandparent of the illegitimate child; or

(D) The child is illegitimate, and the person is a paternal grandparent of the illegitimate child, and paternity has been established by a court of competent jurisdiction.

(2) The visitation rights may only be granted when the court determines that such an order would be in the best interest and welfare of the minor.

(3) (A) An order denying visitation rights to the grandparents and great-grandparents shall be in writing and shall state the reasons for denial.

(B) An order denying visitation rights is a final order for the purposes of appeal.

(b) If the court denies the petition requesting grandparent visitation rights and determines that the petition for grandparent visitation rights is not well-founded, was filed with malicious intent or purpose, or is not in the best interest and welfare of the child, the court may, upon motion of the respondent, order the petitioner to pay reasonable attorney's fees and court costs of the attorney of the respondent, after taking into consideration the financial ability of the petitioner and the circumstances involved.

(c) The provisions of subsections (a) and (b) of this section shall only be applicable in situations:

(1) In which there is a severed marital relationship between the parents of the natural or adoptive children by either death, divorce, or legal separation; or

(2) In which the child is in the custody or under the guardianship of a person other than one (1) or both of his natural or adoptive parents; or

(3) If the child is illegitimate.

ARK. CODE ANN. § 9-13-103 (Michie 1999).

84. Boen, *supra* note 17, at 29.

85. Quintal, *supra* note 15, at 839.

separation of the parents, or the death of a natural parent.<sup>86</sup> Absent one of these situations, grandparents have no standing to petition for visitation.<sup>87</sup>

The “open ended” statute<sup>88</sup> represents the minority of jurisdictions and permits courts to grant visitation regardless of the family situation.<sup>89</sup> These statutes permit courts to grant grandparent visitation even when the family unit is still intact and one or both of the parents object to the visitation.<sup>90</sup> While most statutes only allow grandparents to petition for visitation, some state statutes allow other individuals to petition for visitation with a child as well.<sup>91</sup>

The state statutes vary not only in the requirements of whether a disruption to the family unit must be demonstrated, but also in whether, prior to permitting interference with parental rights, there must be a determination that a denial of visitation would cause harm to the child.<sup>92</sup> Citing to the United States Supreme Court cases discussed above, some courts interpret state statutes to require that visitation be denied unless there has been a determination that denial of visitation would cause harm to the child.<sup>93</sup> By comparison, some state courts have interpreted the state’s statute as allowing visitation without a finding that the child would be harmed if visitation did not occur.<sup>94</sup>

Regardless of the specific requirements of the statute, once the standing requirements<sup>95</sup> have been satisfied, almost all jurisdictions look to the facts of a particular case to determine whether visitation would be in the best interests of the child.<sup>96</sup> Some statutes enumerate

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86. *Id.*

87. *Id.* at 842.

88. Maryland’s grandparent visitation statute is an “open ended” statute. The statute states: “An equity court may: (1) consider a petition for reasonable visitation with a grandchild by a grandparent; and (2) if the court finds it to be in the best interests of the child, grant visitation rights to the grandparent.” MD. CODE ANN., FAM. LAW § 9-102 (1999).

89. Boen, *supra* note 17, at 29.

90. Quintal, *supra* note 15, at 840.

91. *Id.* at 839.

92. Weiss, *supra* note 26, at 1097.

93. *Id.* at 1099-1100; *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (establishing the right of parents to dictate the care, upbringing, and control of their children).

94. Weiss, *supra* note 26, at 1100.

95. “‘Standing to sue’ means that [a] party has a sufficient stake in an otherwise justiciable controversy [so as] to obtain judicial resolution of that controversy.” BLACK’S LAW DICTIONARY 1405 (6th ed. 1990) (citing Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972)). The standing requirement is satisfied if the plaintiff has a tangible interest at stake in the litigation that can be legally protected. *Id.*

96. Quintal, *supra* note 15, at 836. Some commentators have observed that courts sometimes

specific factors the court must weigh to determine whether visitation would be in the child's best interests,<sup>97</sup> while others rely on the court's general discretion to make such a determination.<sup>98</sup> Regardless of the type of statute, many visitation statutes have been constitutionally challenged on the ground that they violate parents' rights to raise their children free from state interference.<sup>99</sup>

#### *D. Approaches of Various State Supreme Courts*

Many grandparent visitation statutes have been challenged on the theory that they violate the Due Process Clause of the Fourteenth Amendment, which protects against state action<sup>100</sup> that infringes upon an individual's fundamental rights and liberty interests.<sup>101</sup> This argument rests on the premise that these statutes violate parents' fundamental liberty interests in raising their children and controlling the

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grant visitation based on the questionable presumption that visitation with grandparents is always in the child's best interests. *Id.* at 844.

97. For example, the court might consider whether the child has lived with the grandparent, the frequency of contact, the substance of the relationship, and what effects grandparent visitation will have on the ability of the parent to raise the child. *Id.* at 845-47.

98. Whitehouse, *supra* note 15, at 200.

99. *Id.* at 200-01.

100. "State action" is a term that is generally used in connection with claims under the Due Process Clause or the Civil Rights Act for which a private citizen is seeking damages or redress because of improper governmental intrusion into his or her life. BLACK'S LAW DICTIONARY 1407 (6th ed. 1990). In determining whether the action constitutes "state action" under the Fourteenth Amendment, a court must determine whether a sufficient nexus exists between the state and the challenged action so that the action may fairly be regarded as an action of the state itself. *Id.*

101. Whitehouse, *supra* note 15, at 201; *see also* Brooks v. Parkerson, 454 S.E.2d 769 (Ga. 1995) (holding that Georgia's grandparent visitation statute violated the constitutionally protected interest of parents to raise their children free from undue state interference since it did not promote the health or welfare of the child and did not require a finding of harm before state interference was permitted); King v. King, 828 S.W.2d 630 (Ky. 1992) (concluding that Kentucky's grandparent visitation statute was constitutional and did not unduly intrude on the parent-child relationship); Herndon v. Tuhey, 857 S.W.2d 203 (Mo. 1993) (stating that Missouri's grandparent visitation statute was constitutional since it involved only a minimal intrusion in the family relationship and it was narrowly tailored to protect the interests of parents and children); Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993) (holding that Tennessee's grandparent visitation statute was unconstitutional under the state constitution because it violated the right to privacy in making parental decisions); Williams v. Williams, 501 S.E.2d 417 (Va. 1998) (determining that a Virginia court will only consider the child's best interests after a finding that harm will result to the child if visitation is not ordered); Michael v. Hertzler, 900 P.2d 1144 (Wyo. 1995) (finding that Wyoming's grandparent visitation statute was constitutional because it did not violate the Due Process Clause).

people with whom their children associate.<sup>102</sup> This fundamental liberty interest was established in cases such as *Meyer*, *Pierce*, and *Yoder*.<sup>103</sup>

State supreme courts that have heard cases involving grandparent visitation statutes have reached differing conclusions.<sup>104</sup> The conclusions the courts have reached are influenced by each court's conception of three separate factors: the level of scrutiny used to review a statute, the sources of the state power to become involved in the parent-child relationship, and the court's view of the family integrity right.<sup>105</sup>

To determine whether a statute violates the Due Process Clause, a court must first determine under which level of scrutiny, rational basis or strict scrutiny, the statute will be analyzed.<sup>106</sup> The level of scrutiny the court chooses to apply to the grandparent visitation statute often dictates whether the statute will be held constitutional or unconstitutional.<sup>107</sup>

Rational basis review is the easiest standard of review that can be applied to a statute when a constitutional challenge is made.<sup>108</sup> This standard will be applied to a statute in two situations.<sup>109</sup> First, rational basis will be applied when no fundamental liberty interest is

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102. Whitehouse, *supra* note 15, at 201.

103. *Supra* Part II.B (discussing the United States Supreme Court cases establishing parents' fundamental liberty interest in raising their children).

104. See e.g., *Brooks*, 454 S.E.2d at 773-74 (holding that Georgia's grandparent visitation statute violated the constitutionally protected interest of parents to raise their children free from undue state interference since it did not promote the health or welfare of the child and did not require a finding of harm before state interference was permitted); *King*, 828 S.W.2d at 632 (concluding that Kentucky's grandparent visitation statute was constitutional and did not unduly intrude on the parent-child relationship); *Herndon*, 857 S.W.2d at 210 (stating that Missouri's grandparent visitation statute was constitutional since it involved only a minimal intrusion in the family relationship and it was narrowly tailored to protect the interests of parents and children); *Hawk*, 855 S.W.2d at 582 (holding that Tennessee's grandparent visitation statute was unconstitutional under the state constitution because it violated the right to privacy in making parental decisions); *Williams*, 501 S.E.2d at 418 (determining that a Virginia court will only consider the child's best interests after a finding that harm will result to the child if visitation is not ordered); *Michael*, 900 P.2d at 1151 (stating that Wyoming's grandparent visitation statute was constitutional because it did not violate the Due Process Clause).

105. Bohl, *supra* note 70, at 34.

106. See Whitehouse, *supra* note 15, at 201. Rational basis and strict scrutiny were the only two levels of review that existed until 1992. Moody, *supra* note 48, at 200. In 1992, in *Planned Parenthood v. Casey*, 510 U.S. 1309 (1994), the United States Supreme Court created a middle level of review, undue burden, to apply in abortion cases involving issues of substantive due process. *Id.* In that case, the plurality stated that in order for a statute involving abortion to be deemed unconstitutional, the state action must place an "undue burden" on a woman's choice. *Id.*

107. See Whitehouse, *supra* note 15, at 202.

108. See Moody, *supra* note 48, at 200.

109. *Id.*



implicated.<sup>110</sup> Second, this standard may be applied when the court determines that a fundamental liberty interest has not been infringed upon by the alleged state action.<sup>111</sup> Under the rational basis review, a statute must only “be rationally related to a legitimate government interest.”<sup>112</sup> The statute will be upheld, therefore, if the state’s action in granting visitation bears a reasonable relationship to a justifiable state interest.<sup>113</sup> At this level of review, the state action in granting visitation will almost always survive the constitutional analysis unless there is absolutely no rational relation between the grant of visitation and any valid governmental interest.<sup>114</sup>

As compared to the minimal scrutiny of rational basis review, strict scrutiny is the most difficult level of scrutiny for a state action to survive.<sup>115</sup> This level of scrutiny is applied when the state action infringes on a fundamental liberty interest.<sup>116</sup> A state action that infringes on a fundamental liberty interest can only be upheld if it furthers a compelling government interest.<sup>117</sup> Even if the state’s interest is compelling, the state action must be narrowly tailored, meaning that the statute must be the least restrictive means of achieving the state’s objective.<sup>118</sup> Indeed, a state action need not ban an activity completely in order to infringe on a fundamental right and, thereby, trigger a strict scrutiny analysis.<sup>119</sup> Consequently, state actions that infringe on fundamental rights are normally presumed to be unconstitutional.<sup>120</sup> Therefore, at this level of scrutiny, a grant of visitation will be upheld

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110. *Id.*

111. Whitehouse, *supra* note 15, at 202.

112. *Id.*

113. *Id.*; *see, e.g.*, King v. King, 828 S.W.2d 630, 632 (Ky. 1992) (stating that the state statute is an appropriate response to the disintegration of the family and bears a reasonable relation to the objective it is trying to achieve); Herndon v. Tuhey, 857 S.W.2d 203, 208-10 (Mo. 1993) (applying rational basis review and holding that Missouri’s grandparent visitation statute was constitutional).

114. *See* Moody, *supra* note 48, at 200.

115. Whitehouse, *supra* note 15, at 202.

116. *Id.*

117. Moody, *supra* note 48, at 199-200; *see, e.g.*, Beagle v. Beagle, 678 So.2d 1271, 1276 (Fla. 1996) (quoting Winfield v. Div. of Parimutuel Wagering, 477 So.2d 544, 548 (Fla. 1985) and stating that the statute can only be upheld “by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means”); Hawk v. Hawk, 855 S.W.2d 573, 577 (Tenn. 1993) (applying strict scrutiny and holding that Tennessee’s grandparent visitation statute was unconstitutional).

118. *See* Moody, *supra* note 48, at 200.

119. *Id.*

120. Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 638 (1992).

only if it furthers a compelling government interest and is narrowly tailored to achieve that objective.<sup>121</sup>

A court's interpretation of the breadth of the state's police and *parens patriae* powers to become involved in the parent-child relationship is another factor that influences its decision about the constitutionality of its grandparent visitation statute.<sup>122</sup> The courts that have held grandparent visitation statutes to be constitutional have focused on the state's role as *parens patriae* in protecting the child.<sup>123</sup> These courts have considered the rights of all the parties involved and have required that visitation only minimally infringe on the parents' privacy rights.<sup>124</sup> By comparison, courts that have invalidated a state's grandparent visitation statute generally have held that the state does not have a legitimate source of authority to interfere in the parent-child relationship absent a finding of parental unfitness, harm to the child, or the threat of harm to the child.<sup>125</sup>

Yet another consideration that influences a court's analysis of its grandparent visitation statute is the court's approach to the concept of family integrity.<sup>126</sup> Courts that have held "open ended" grandparent visitation statutes constitutional have viewed the right to family integrity as a limited right which is not offended by these statutes.<sup>127</sup>

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121. See Moody, *supra* note 48, at 199-200.

122. See Bohl, *supra* note 70, at 68-69.

123. See Toni Eddy, Article, *Grandparent Visitation Rights in Ohio When the Family is Intact*, 28 CAP. U. L. REV. 197, 212 (1999); see, e.g., King v. King, 828 S.W.2d 630 (Ky. 1992); Herndon v. Tuhey, 857 S.W.2d 203 (Mo. 1993); Michael v. Hertzler, 900 P.2d 1144 (Wyo. 1995).

124. Eddy, *supra* note 123, at 212. The Supreme Court of Missouri stated that "visitation rights by grandparents . . . are less than [a] substantial encroachment on a family." *Herndon*, 857 S.W.2d at 209. The court went on to say:

Missouri's statute is reasonable both because it contemplates only a minimal intrusion on the family relationship and because it is narrowly tailored to adequately protect the interests of parents and children. The statute provides that a court may grant visitation to a grandparent only if the grandparent has been unreasonably denied visitation for more than ninety days. A court may grant visitation only if it will be in the best interest of the child.

*Id.* at 210.

125. Bohl, *supra* note 70, at 70; see, e.g., *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996); *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993). The Supreme Court of Georgia stated in *Brooks v. Parkerson*, "[t]he statute in question is unconstitutional under both the state and federal constitutions because it does not clearly promote the health or welfare of the child and does not require a showing of harm before state interference is authorized." 454 S.E.2d at 774.

126. See Bohl, *supra* note 70, at 34.

127. *Id.* at 48.

This conclusion is based on one of two lines of reasoning.<sup>128</sup> First, some courts have found that the family integrity right is limited.<sup>129</sup> Second, some courts have viewed grandparent visitation as permissible because such visitation does not amount to a significant enough invasion of the family to implicate any right to familial autonomy.<sup>130</sup> In contrast, courts that have found state grandparent visitation statutes unconstitutional view the right to family integrity in a comprehensive manner such that the state may not interfere in the family through a grandparent visitation order.<sup>131</sup>

State courts have reached differing conclusions on the constitutionality of state grandparent visitation statutes based on the courts' treatment of these three factors.<sup>132</sup> For example, Kentucky

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128. *Id.*

129. *Id.*; *see, e.g., King v. King*, 828 S.W.2d 630, 631 (Ky. 1992) (explaining that while "the Constitution . . . does recognize the right to rear children without undue governmental interference, that right is not inviolate"); *Herndon*, 857 S.W.2d at 207 (stating that the constitutional right to freedom of personal choice in matters of family life is not absolute).

130. Bohl, *supra* note 70, at 49; *see, e.g., Herndon*, 857 S.W.2d at 208, 220 (stating that "the magnitude of the infringement by the state is a significant consideration in determining whether a statute will be struck down as unconstitutional" and that "visitation rights by grandparents . . . are less than [a] substantial encroachment on a family"); *Campbell v. Campbell*, 896 P.2d 635, 642 (Utah Ct. App. 1995) (holding that "visitation rights . . . do not substantially infringe upon the parent's fundamental rights or the autonomy of the nuclear family").

131. *See* Bohl, *supra* note 70, at 46-47; *see, e.g., Brooks v. Parkerson*, 454 S.E.2d 769, 772 (Ga. 1995) (explaining that "[t]he right to the custody and control of one's child is a fiercely guarded right in our society and in our law") (quoting *In re Suggs*, 291 S.E.2d 233 (Ga. 1982)); *Lingo v. Kelsay*, 651 So.2d 499, 500 (La. Ct. App. 1995) (stating that "[i]t is well settled that the right of parents to custody of their children is paramount"); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993) (discussing the rights of parents to raise their children without interference from the state).

132. Bohl, *supra* note 70, at 34; *see e.g., Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996) (finding that Florida's grandparent visitation statute which allowed visitation over at least one parent's objection in an intact family violated the fundamental rights of parents under the state constitution); *Brooks*, 454 S.E.2d 769 (holding that Georgia's grandparent visitation statute violates the right of parents to raise children without undue state interference guaranteed by the state constitution and federal Constitution); *King*, 828 S.W.2d 630 (concluding that Kentucky's visitation statute which provided for grandparent visitation was constitutional and did not unduly intrude in the fundamental rights of parents); *Fairbanks v. McCarter*, 622 A.2d 121 (Md. 1993) (holding that the decision to grant visitation under Maryland's grandparent visitation statute should be based exclusively on the best interests of the grandchild); *Herndon*, 857 S.W.2d 203 (holding that Missouri's statute, providing for grandparent visitation if it was in the best interests of the child, was constitutional); *Brown v. Earnhardt*, 396 S.E.2d 358 (S.C. 1990) (concluding that grandparents are not entitled to visitation rights absent exceptional circumstances); *Hawk*, 855 S.W.2d 573 (concluding that Tennessee's grandparent visitation statute, as applied to fit, married parents who have maintained custody of their children, violated the right to privacy in parenting decisions guaranteed by the Tennessee Constitution); *Campbell*, 896 P.2d 635 (holding that Utah's grandparent visitation statute was constitutional); *Williams v. Williams*, 501 S.E.2d 417 (Va. 1998) (stating that the court cannot award visitation to grandparents when there is no allegation or proof that denying grandparents visitation would be detrimental to the child's

allows reasonable visitation to grandparents when visitation is in the best interests of the child.<sup>133</sup> In 1992, the Supreme Court of Kentucky applied rational basis review<sup>134</sup> when it examined the state's grandparent visitation statute in *King v. King*.<sup>135</sup> The court recognized that the Constitution protects the right to raise children without undue governmental interference but noted that the right is not inviolate.<sup>136</sup> In addition, the court noted that legislatures increasingly pass legislation to protect the safety, education, and the physical and emotional welfare of children.<sup>137</sup> Further, the court explained that there are benefits to be derived from the grandparent-grandchild bond.<sup>138</sup> The court stated that in a time when society has seen a disintegration of the family, the visitation statute was an appropriate response by the General Assembly to attempt to strengthen familial relationships.<sup>139</sup> The court stated that the statute at issue sought to balance the fundamental rights of parents,

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welfare); *Michael v. Hertzler*, 900 P.2d 1144 (Wyo. 1995) (finding that Wyoming's grandparent visitation statute did not violate a parent's due process right).

133. Eddy, *supra* note 123, at 206.

134. See Bohl, *supra* note 70, at 54-55.

135. *King*, 828 S.W.2d 630. In *King*, W.R. King ("Mr. King") petitioned for visitation with his granddaughter Jessica. *Id.* at 631. Jessica and her parents, Stewart and Ann King, lived in a house located on Mr. King's farm which he had built for them. *Id.* at 630. Stewart and his family lived in the home rent-free. *Id.* Stewart worked for a company full time and also worked on the family farm. *Id.* When Jessica was sixteen-months-old, Mr. King ordered Stewart to move his family out of the house because Mr. King felt that Stewart was not working enough on the farm. *Id.* In addition, Mr. King thought that Stewart drank too much. *Id.* Stewart and Ann thought that Stewart's father was "overbearing and intrusive." *Id.* Mr. King had contact almost everyday with Jessica while she lived on the farm. *Id.* After the family moved out, Mr. King requested visitation with Jessica but it was denied by his son and daughter-in-law. *Id.* at 630-31. Mr. King then filed a petition for visitation under the state statute. *Id.* at 631. The visitation statute stated, "[t]he circuit court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interests of the child to do so." *Id.* (quoting KY. REV. STAT. ANN. § 405.021(1) (Banks-Baldwin 1990)).

136. *Id.* at 631. The court stated that:

While the Constitution, as interpreted by the various courts, does recognize the right to rear children without undue governmental interference, that right is not inviolate. Parents are required by law to see that their children are educated. Children must be inoculated against disease. Parents cannot abuse their children. Severe restrictions are placed upon the employment of children. Children must be restrained while riding in a motor vehicle.

*Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 632. The visitation statute was an "appropriate response to the change in the demographics of domestic relations, mirrored by the dramatic increase in the divorce rate and in the number of children born to unmarried parents, and the increasing independence and alienation within the extended family inherent in a mobile society." *Id.* (quoting *Hicks v. Enlow*, 764 S.W.2d 68, 70-71 (Ky. 1989)).

grandparents, and children,<sup>140</sup> and in most cases visitation will be beneficial to both the grandchild and the grandparent.<sup>141</sup> The court, therefore, held that the extremely broad statute was constitutional because the legislature had confined the situations in which grandparents could seek visitation to those instances when it would serve the best interests of the child.<sup>142</sup>

Other state supreme courts have also held the state's visitation statute to be constitutional.<sup>143</sup> For example, one year after *King*, the Supreme Court of Missouri held that its grandparent visitation statute did not violate the Constitution.<sup>144</sup> As in *King*, the *Herndon* court acknowledged that parents have a constitutionally protected right to make decisions about their family. The court, however, reached its

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140. *Id.* According to the dissenting opinion, the fatal flaw in the majority's opinion was its conclusion that a grandparent has a fundamental right to visitation with a grandchild. *Id.* at 633 (Lambert, J., dissenting). The dissent pointed out that no authority was cited for this proposition and stated that this is because there is no such right. *Id.* (Lambert, J., dissenting). Therefore, the majority simply pointed out the positive benefits both grandchildren and grandparents would derive from a continued relationship. *Id.* at 632 (Lambert, J., dissenting).

141. *Id.*

If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. That grandparents and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love. The grandparent can be invigorated by exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life. These considerations by the state do not go too far in intruding into the fundamental rights of the parents.

*Id.*

142. Julie E. Nichols, Note, *Grandpa Take Me Home: The Unconstitutionality of the Michigan Grandparent Visitation Statute Under the Due Process Clause*, 43 WAYNE L. REV. 1887, 1909 (1997).

143. *E.g.*, *Fairbanks v. McCarter*, 622 A.2d 121 (Md. 1993) (holding that the decision to grant visitation under Maryland's grandparent visitation statute should be based exclusively on the best interests of the grandchild); *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993) (holding that Missouri's statute that provided for grandparent visitation if it was in the best interests of the child was constitutional); *Michael v. Hertzler*, 900 P.2d 1144 (Wyo. 1995) (finding that Wyoming's grandparent visitation statute did not violate a parent's due process right).

144. *Herndon*, 857 S.W.2d at 209-10. Missouri's statute provided that, among other things, the court could grant visitation to a grandparent if the grandparent had been unreasonably denied visitation for ninety days so long as visitation would be in the grandchild's best interests. *Id.* at 207. Missouri's grandparent visitation statute stated:

The court may grant grandparent visitation when . . . [a] grandparent is unreasonably denied visitation with the child for a period exceeding ninety days. . . . The court shall determine if the visitation by the grandparent would be in the child's best interest or if it would endanger the child's physical health or impair his emotional development. Visitation may only be ordered when the court finds such visitation to be in the best interests of the child.

*Id.* at 206-07.

conclusion based on different reasoning.<sup>145</sup> The court held that the nature and scope of the state's infringement is an important consideration in determining whether the statute is constitutional.<sup>146</sup> The court determined that the statute was reasonable because it involved only minimal intrusion on the family, and the visitation rights provided for in the statute were not enough of an encroachment on the family to render the statute unconstitutional under the Fourteenth Amendment.<sup>147</sup>

In contrast, courts that have held the state's statute to be unconstitutional have considered the parents' rights to be paramount and have stated that visitation is permissible only if it is necessary to avoid some harm to the child.<sup>148</sup> Additionally, these courts have, either expressly or implicitly, applied the strict scrutiny standard.<sup>149</sup> For example, in *Hawk v. Hawk*,<sup>150</sup> the Supreme Court of Tennessee held that its state visitation statute was unconstitutional under the state constitution.<sup>151</sup> Like Kentucky, Tennessee had a fairly broad

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145. *See id.* at 207-10.

146. *Id.* at 208. "Even given the fact that the parents have a constitutional right to make decisions affecting the family, the magnitude of the infringement by the state is a significant consideration in determining whether a statute will be struck down as unconstitutional." *Id.*

147. *Id.* at 208-09. The court concluded that rational basis review was the appropriate level of scrutiny because granting grandparent visitation was not a substantial encroachment on the family. Whitehouse, *supra* note 15, at 204 & n.130. In addition, the court held that the statute included adequate safeguards to protect the interests of all of the parties involved. Eddy, *supra* note 123, at 207. The *Herndon* court stated:

Missouri's statute is reasonable both because it contemplates only a minimal intrusion on the family relationship and because it is narrowly tailored to adequately protect the interests of parents and children. The statute provides that a court may grant visitation to a grandparent only if the grandparent has been unreasonably denied visitation for more than ninety days. A court may grant visitation only if it will be in the best interest of the child. If visitation would endanger the child physically, mentally, or emotionally then visitation must be denied.

*Herndon*, 857 S.W.2d at 210.

148. Eddy, *supra* note 123, at 212.

149. Bohl, *supra* note 70, at 34-35.

150. *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993).

151. *Id.* at 577. In *Hawk*, Bill and Sue Hawk petitioned for visitation with their grandchildren, Megan and Steven Hawk. *Id.* at 576. The children and their parents, Bob and Bay Hawk, lived in the same town as Bill and Sue Hawk. *Id.* at 575. Bill owned and operated a bowling alley where Bob worked until 1989 when Bill fired Bob. *Id.* Until that time, Bob, his wife, and children often spent time with his parents and the two families attended the same church. *Id.* Bay and Sue bowled together and spent one afternoon a week together with the children. *Id.* Additionally, the children often spent nights with their grandparents and the grandparents frequently babysat the children. *Id.* Disputes arose between the couples over methods of disciplining the children, the children's activities, and their bedtimes. *Id.* at 575-76. After Bob was fired, Bill's relationship with his grandchildren was essentially terminated. *Id.* at 576. A few months later, after an intense family argument, Sue also ended her relationship with her son and his family. *Id.* Bill and Sue then sought court-ordered visitation with their grandchildren. *Id.*

grandparent visitation statute that allowed grandparents to petition for visitation when it was in the child's best interests.<sup>152</sup> The court in *Hawk* applied strict scrutiny and held that the statute violated the right to privacy in parenting decisions that was protected by the state constitution, and, therefore, the statute was unconstitutional as applied to married parents.<sup>153</sup> The court explained that because parental rights constitute a fundamental liberty interest, the state may not use its *parens patriae* power in the absence of the threat of substantial harm to the child.<sup>154</sup>

Following the rationale in *Hawk*, the Supreme Court of Georgia, in *Brooks v. Parkerson*,<sup>155</sup> held that the Georgia grandparent visitation statute was unconstitutional.<sup>156</sup> The *Brooks* court, however, did not

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152. Nichols, *supra* note 142, at 1910. The court rejected the argument that the best interests of the child was a sufficiently compelling state interest that could be sustained under a strict scrutiny analysis. Whitehouse, *supra* note 15, at 205.

153. *Hawk*, 855 S.W.2d at 582. The court declared the statute unconstitutional under the Due Process Clause of the Tennessee Constitution which is analogous to the Due Process Clause of the United States Constitution. Nichols, *supra* note 142, at 1911. The court stated that:

Without finding that the parents were unfit or that a dissolving marriage between the parents had brought the matter of child custody before the court, the court imposed its own notion of the children's best interests over the shared opinion of these parents, stripping them of their right to control in parenting decisions. We hold that . . . the Tennessee Constitution protects the privacy interest of these parents in their child-rearing decisions, so long as their decisions do not substantially endanger the welfare of their children. Absent some harm to the child, we find that the state lacks a sufficiently compelling justification for interfering with this fundamental right. When applied to married parents who have maintained continuous custody of their children and have acted as fit parents, we conclude that court interference . . . constitutes an unconstitutional invasion of privacy rights under the Tennessee Constitution.

*Hawk*, 855 S.W.2d at 582.

154. *Hawk*, 855 S.W.2d at 579-80. The court explained:

[W]hen no substantial harm threatens a child's welfare, the state lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit. Thus, we find the statute to be unconstitutional under . . . the Tennessee Constitution, as applied to this married couple, whose fitness as parents is unchallenged.

*Id.* at 577. In reaching this conclusion the court noted that in the context of other family law issues the state has a bifurcated system. Joan Catherine Bohl, *Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm*, 48 DRAKE L. REV. 279, 288 (2000). This means that in matters resulting in an intrusion on family life, there must be a finding of harm or threat of harm to the child, before an analysis of the best interests of the child can take place. *Id.* The court then concluded that this same bifurcated system must be utilized in the context of grandparent visitation. *Id.* at 288-89.

155. *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995).

156. *Id.* at 773-74. In *Brooks*, Ms. Parkerson, the child's maternal grandmother, filed for visitation. *Id.* at 770. The petition was opposed by Stacy and William Brooks, the child's parents, who challenged the constitutionality of the statute. *Id.* The Georgia statute stated that "the court may grant any grandparent of the child reasonable visitation rights upon proof of

explicitly limit its holding to situations involving children whose parents were married.<sup>157</sup>

### III. DISCUSSION

#### A. *The Facts*

Tommie Granville and Brad Troxel never married; Tommie, however, gave birth to two daughters, Isabelle and Natalie.<sup>158</sup> After Tommie and Brad separated in 1991, Brad moved in with his parents, Jenifer and Gary Troxel.<sup>159</sup> Brad regularly brought his daughters to his parents' house for weekend visits until he died in May 1993.<sup>160</sup> After Brad's death, the Troxels continued to see their granddaughters on a regular basis, but the girls did not stay overnight with the Troxels.<sup>161</sup> In October 1993, however, Granville informed the Troxels that she wished to limit their visitation with the girls to one short visit each month.<sup>162</sup> The Troxels were dissatisfied with Granville's limit on their visitation and, therefore, did not see their grandchildren between October and

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special circumstances which make such visitation rights necessary to the best interests of the child." *Id.* at 771.

157. Nichols, *supra* note 142, at 1912. The court focused on cases such as *Meyer*, *Pierce*, and *Yoder* and stated that the United States Supreme Court has long recognized the constitutionally protected right of parents to raise their children free from state interference. *Brooks*, 454 S.E.2d at 771-72. The court continued by stating that the United States Supreme Court has made clear that the state may only interfere in the parent-child relationship under certain circumstances. *Id.* at 772. These circumstances include when the state acts in its police power to protect the child's health or welfare and in situations where the parental decision would result in harm to the child. *Id.* Consequently, the *Brooks* court applied strict scrutiny. *Id.* at 773-74 & n.6 (explaining that the dissent incorrectly argues that rational basis review should have been applied); *see also* Whitehouse, *supra* note 15, at 205 (stating that the court applied strict scrutiny). The court held that the statute was unconstitutional under both the Georgia and the United States Constitutions because it did not clearly promote the health and welfare of the child and did not require a finding that the child would be harmed absent visitation as a condition precedent to granting visitation. *Brooks*, 454 S.E.2d at 774. The court held that:

[T]he state may only impose . . . visitation over the parents' objections on a showing that failing to do so would be harmful to the child. It is irrelevant, to this constitutional analysis, that it might, in many instances be "better" or "desirable" for a child to maintain contact with a grandparent. The statute in question is unconstitutional under both the state and federal constitutions because it does not clearly promote the health or welfare of the child and does not require a showing of harm before state interference is authorized.

*Id.* at 773-74.

158. *Troxel v. Granville*, 120 S. Ct. 2054, 2057 (2000) (O'Connor, J., plurality opinion).

159. *Id.* (O'Connor, J., plurality opinion).

160. *Id.* (O'Connor, J., plurality opinion).

161. *In re Troxel*, 940 P.2d 698, 699 (Wash. Ct. App. 1997), *aff'd in part sub nom. In re Smith*, 969 P.2d 21 (Wash. 1998).

162. *Troxel*, 120 S. Ct. at 2057 (O'Connor, J., plurality opinion).



December 1993.<sup>163</sup> The Troxels commenced their lawsuit in December 1993 pursuant to the “open ended” Washington statute that permitted any person to assert visitation rights with a child as long as visitation would serve the best interests of the child.<sup>164</sup>

When the trial began in December 1994, Natalie and Isabelle were five and almost three years old, respectively.<sup>165</sup> At trial, the Troxels requested visitation with the girls consisting of two weekends of overnight visits per month and two weeks during each summer.<sup>166</sup> Granville did not object to visitation altogether but asked the court to grant visitation of one day per month with no overnight stay.<sup>167</sup> The superior court entered a decree ordering visitation one weekend per month, one week each summer, and four hours on the grandparents’ birthdays.<sup>168</sup>

Granville appealed during which time she married Kelly Wynn.<sup>169</sup> Granville’s new husband adopted the girls in February 1996.<sup>170</sup> The Washington Court of Appeals initially remanded the case to the superior court because that court had failed to provide written findings of fact and conclusions of law to support its grant of visitation.<sup>171</sup> On remand, the superior court found that visitation was in the best interests of the girls since the Troxels were part of a large, loving family and could provide “cousins and music” for their grandchildren.<sup>172</sup>

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163. *Troxel*, 940 P.2d at 699.

164. *Troxel*, 120 S. Ct. at 2057-58 (O’Connor, J., plurality opinion). The Washington state statute at issue stated that “[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.” *Id.* (quoting WASH. REV. CODE § 26.10.160(3) (2000)).

165. *Troxel*, 940 P.2d at 699.

166. *Id.*

167. *Id.*

168. *Id.*

169. *In re Smith*, 969 P.2d 21, 23 (Wash. 1998), *aff’d in part sub nom. Troxel v. Granville*, 120 S. Ct. 2054 (2000).

170. *Id.*

171. *Troxel*, 120 S. Ct. at 2058 (O’Connor, J., plurality opinion).

172. *Id.* (O’Connor, J., plurality opinion). The Court found:

The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the Petitioners can provide opportunities for the children in the areas of cousins and music. . . . The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens’ [sic] nuclear family. The court finds that the childrens’ [sic] best interests are served by spending time with their mother and stepfather’s other six children.

*Id.* (O’Connor, J., plurality opinion).

*B. The State Appellate Court Decision*

The Washington Court of Appeals dismissed the Troxel's petition for visitation after holding that nonparents lacked standing to seek visitation absent a pending custody action.<sup>173</sup> The court discussed several reasons for this conclusion.<sup>174</sup> The court started by discussing the standing requirement and stated that a literal reading of the Washington statute allowing any person to petition for visitation would lead to an absurd result.<sup>175</sup> The court explained that limiting nonparental visitation petitions to circumstances under which a custody action was pending was consistent with the constitutional restrictions on interference with parents' fundamental liberty interests in the care, custody, and control of their children.<sup>176</sup>

Next, the court examined the statutory history of two provisions allowing nonparents to petition for visitation.<sup>177</sup> The first statute is located in the dissolution of marriage and legal separation section of the Washington Code ("Dissolution Statute").<sup>178</sup> The second statute is located in the nonparental actions for child custody section of the Washington Code and is the statute pursuant to which the Troxels initiated their lawsuit ("Nonparent Custody Statute").<sup>179</sup>

In 1987, the legislature enacted these two virtually identical provisions.<sup>180</sup> In 1996, however, the Legislature amended the Dissolution Statute to limit the circumstances under which a nonparent may petition for visitation.<sup>181</sup> These circumstances include situations where a custody action initiated by a parent is pending and where the petitioner can demonstrate a significant relationship exists with the child with whom visitation is sought.<sup>182</sup> The court could not find any reason why the Legislature would amend the Dissolution Statute and not the Nonparent Custody Statute, and concluded that the failure to amend the latter statute must have been due to an unintentional oversight.<sup>183</sup> The court concluded, therefore, that a petition for visitation under the

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173. *Troxel*, 940 P.2d at 699-701.

174. *See id.*

175. *Id.* at 699-700 (stating that "[o]ur Legislature could not have intended such an absurd and potentially pernicious result from so broad a reading of the statute").

176. *Id.* at 700 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

177. *Id.* at 699-700.

178. WASH. REV. CODE § 26.09.240 (2000).

179. WASH. REV. CODE § 26.10.160(3) (2000).

180. *Troxel*, 940 P.2d at 700.

181. *Id.*

182. *Id.*

183. *Id.* at 700-01.

Nonparent Custody Statute must be contemporaneous with a proceeding for child custody.<sup>184</sup> Having resolved the issue on statutory grounds, the Washington Court of Appeals did not address Granville's constitutional challenge to the statute.<sup>185</sup>

### C. *The Washington Supreme Court Decision*

The Washington Supreme Court held that the plain language of the statute gave the Troxels standing to seek visitation rights.<sup>186</sup> The court, however, then cited *Meyer v. Nebraska* and its progeny and stated that parents have a fundamental right to control the upbringing of their children.<sup>187</sup> The court dismissed the petitioners contention that a finding that visitation would be in the best interests of a child would be a sufficiently compelling justification to override parents' opposition to visitation.<sup>188</sup> The court reasoned that the holdings in *Meyer*, *Pierce*, and *Yoder* indicate that the state may only interfere in parents' rights to raise their children in order to prevent harm to a child.<sup>189</sup> The court stated that Washington had followed suit by allowing the state to interfere in

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184. *Id.* at 701.

185. *Id.*

186. *In re Smith*, 969 P.2d 21, 24 (Wash. 1998). The Supreme Court of Washington consolidated the Troxels' case with two other cases involving Washington's visitation statute. *Id.* at 23. The court stated that:

By its plain language, RCW 26.10.160(3) gives nonparents an avenue to obtain visitation rights with children outside of a custody proceeding. We decline to construe the language of RCW 26.10.160(3) because we find that the language of the statute is unambiguous. Further, we will not read qualifications into the statute which are not there. A "court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission."

*Id.* at 26 (quoting *Auto. Drivers & Demonstrators Union Local 882 v. Dep't of Retirement Sys.*, 598 P.2d 379 (1979)).

187. *Id.* at 27. The court held that "it is undisputed that parents have a fundamental right to autonomy in child rearing decisions." *Id.* The court went on to state that:

A parent's constitutionally protected right to rear his or her children without state interference, has been recognized as a fundamental "liberty" interest protected by the Fourteenth Amendment and also as a fundamental right derived from the privacy rights inherent in the constitution. Where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.

*Id.* at 28.

188. *Id.* at 29. "Petitioners contend that a judicially determined finding that visitation is in the best interests of the child is a sufficiently compelling justification to override a parent's opposition, regardless of the fact that the parent's fitness is not challenged or that there has been no showing of harm or threatened harm to the child." *Id.*

189. *Id.* The court stated that "the Supreme Court cases which support the constitutional right to rear one's child and the right to family privacy indicate that the state may interfere only 'if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.'" *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972)).

the parent-child relationship only to prevent harm or the risk of harm to the child.<sup>190</sup> The court held that in this case there was no such compelling state interest.<sup>191</sup> According to the Washington Supreme Court, the statute was also overly broad in allowing “any person” to petition for visitation at “any time” as long as it would be in the child’s best interests.<sup>192</sup> The court, therefore, affirmed the judgment of the court of appeals.<sup>193</sup>

#### D. The United States Supreme Court Decision

On June 5, 2000, the United States Supreme Court decided *Troxel v. Granville*<sup>194</sup> in a plurality decision.<sup>195</sup> Justice O’Connor, writing for the plurality, limited the Court’s holding to the Washington statute as applied to the facts of the case and concluded that the visitation order was an unconstitutional intrusion on Granville’s fundamental rights as a parent.<sup>196</sup> Justice Souter and Justice Thomas filed concurring

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190. *Id.* “This court has emphasized that a state can only intrude upon a family’s integrity pursuant to its *parens patriae* right when ‘parental actions or decisions seriously conflict with the physical or mental health of the child.’” *Id.* (quoting *In re Welfare of Sumey*, 94 Wash. 2d 757, 762 (1980)).

191. *Id.* at 30.

192. *Id.* In addition, the court noted that there was no requirement that the petitioner have a substantial relationship with the child nor did the court need to take into consideration factors such as the parents’ reasons for restricting visitation. *Id.* at 31.

193. *Id.* at 31. The court stated that:

We recognize that in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child. The difficulty, however, is that such a standard is not required in RCW 26.10.160(3) . . . There is no threshold requirement of a finding of harm to the child as a result of the discontinuation of visitation.

*Id.* at 30. The court continued by stating:

Short of preventing harm to the child, the standard of “best interest of the child” is insufficient to serve as a compelling state interest overruling a parent’s fundamental rights. State intervention to better a child’s quality of life through third party visitation is not justified where the child’s circumstances are otherwise satisfactory. To suggest otherwise would be the logical equivalent to asserting that the state has the authority to break up stable families and redistribute its infant population to provide each child with the “best family.” It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a “better” decision.

*Id.* at 30-31. The dissent argued that the holding was based on two flawed premises. *Id.* at 32. First, that parents’ fundamental liberty interests in raising their children is beyond regulation. *Id.* Second, that the state may not use its power as *parens patriae* unless there is a finding of harm to the child. *Id.*

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

195. *Id.*

196. See *infra* Part III.D.1 (discussing Justice O’Connor’s plurality opinion).

opinions.<sup>197</sup> Justice Souter stated that the statute was facially invalid and that the holding need not be limited to the facts of the case.<sup>198</sup> Justice Thomas noted, in his concurring opinion, that parental rights are unenumerated and that the original understanding of the Due Process Clause precluded judicial enforcement of unenumerated rights.<sup>199</sup> Justice Thomas acknowledged, however, that the Supreme Court had previously recognized a fundamental right of parents to direct the upbringing of their children, and, therefore, he concurred in the result.<sup>200</sup>

Justices Stevens, Scalia, and Kennedy filed dissenting opinions.<sup>201</sup> Justice Stevens stated that the Court should have considered not only the interests of the parents and the state but also the interests of the children.<sup>202</sup> He argued that children have a fundamental liberty interest in preserving bonds with nonparents.<sup>203</sup> In a second dissenting opinion, Justice Scalia stated that the right of parents to raise their children free from state interference is unenumerated, and, therefore, the Constitution did not give judges any right to invalidate the statute.<sup>204</sup> Finally, in a third dissenting opinion, Justice Kennedy made clear that a consideration of whether visitation would be in the child's best interests was appropriate even without a determination that the child would suffer harm if visitation was not granted.<sup>205</sup>

### 1. Justice O'Connor's Plurality Opinion

In a plurality decision,<sup>206</sup> the United States Supreme Court affirmed the judgment of the Washington Supreme Court.<sup>207</sup> Writing for the plurality, Justice O'Connor did not explicitly hold that Washington's visitation statute was unconstitutional.<sup>208</sup> Instead, Justice O'Connor limited the Court's holding to the Washington statute as applied to the

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197. *Troxel*, 120 S. Ct. at 2057.

198. *Infra* Part III.D.2 (discussing Justice Souter's concurring opinion).

199. *Infra* Part III.D.3 (discussing Justice Thomas' concurring opinion).

200. *Infra* Part III.D.3 (discussing Justice Thomas' concurring opinion).

201. *Troxel*, 120 S. Ct. at 2057.

202. *Infra* Part III.D.4 (discussing Justice Stevens' dissenting opinion).

203. *Infra* Part III.D.4 (discussing Justice Stevens' dissenting opinion).

204. *Infra* Part III.D.5 (discussing Justice Scalia's dissenting opinion).

205. *Infra* Part III.D.6 (discussing Justice Kennedy's dissenting opinion).

206. Justice O'Connor was joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer. *Troxel*, 120 S. Ct. at 2057-65. Justice Souter, *id.* at 2065-67, and Justice Thomas, *id.* at 2067-68, each wrote concurring opinions. Justice Stevens, *id.* at 2068-74, Justice Scalia, *id.* at 2074-75, and Justice Kennedy, *id.* at 2075-79, each wrote dissenting opinions.

207. *Troxel*, 120 S. Ct. at 2059 (O'Connor, J., plurality opinion).

208. *See id.* at 2064-65 (O'Connor, J., plurality opinion); Schepard, *supra* note 55, at 3.

facts of the case.<sup>209</sup> The Justice began by addressing the idea that in addition to procedural protection, the Due Process Clause of the Fourteenth Amendment provides a substantive component that protects against governmental interference with certain fundamental rights and liberty interests.<sup>210</sup> The plurality stated that parents' liberty interests in the care, custody, and control of their children at issue in this case is one of the oldest fundamental liberty interests recognized by the Supreme Court.<sup>211</sup> After looking to such precedent as *Meyer*, *Pierce*, *Yoder*, and *Prince*, the plurality concluded that the Fourteenth Amendment's protection of this fundamental right of parents cannot be doubted.<sup>212</sup>

Justice O'Connor declared the statute to be "breathtakingly broad" since the language of the statute effectively allowed any person to subject a decision made by parents about visitation to state-court review.<sup>213</sup> She stated that the Washington statute did not require that the court give the parents' decision any presumption of validity or weight whatsoever, but instead it placed the best interest determination solely in the hands of the judge.<sup>214</sup>

Justice O'Connor pointed to several factors that compelled the conclusion that the statute violated the Due Process Clause, as applied to this case.<sup>215</sup> First, the Troxel grandparents did not assert, and no lower court had determined, that Tommie Granville was unfit as a parent.<sup>216</sup> The Court stated that there is a presumption that fit parents make decisions based on their children's best interests.<sup>217</sup> Second, the

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209. *Troxel*, 120 S. Ct. at 2064-65 (O'Connor, J., plurality opinion); Weiss, *supra* note 26, at 1118. Justice O'Connor stated "we hold that § 26.10.160(3), as applied in this case, is unconstitutional." *Troxel*, 120 S. Ct. at 2064 (O'Connor, J., plurality opinion).

210. *Troxel*, 120 S. Ct. at 2059-60 (O'Connor, J., plurality opinion) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)) (stating that the court has "long recognized that the Amendment's Due Process Clause . . . 'guarantees more than fair process.' The Clause also includes a substantive component that 'provides heightened protection against governmental interference with certain fundamental rights and liberty interests'").

211. *Id.* at 2060 (O'Connor, J., plurality opinion).

212. *Id.* (O'Connor, J., plurality opinion).

213. *Id.* at 2061 (O'Connor, J., plurality opinion).

214. *Id.* (O'Connor, J., plurality opinion). "[I]n the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." *Id.* (O'Connor, J., plurality opinion).

215. *Id.* (O'Connor, J., plurality opinion).

216. *Id.* (O'Connor, J., plurality opinion).

217. *Id.* (O'Connor, J., plurality opinion). To support this proposition, the Court cited to *Parham v. J.R.*, 442 U.S. 584 (1979). *Id.* (O'Connor, J., plurality opinion). In *Parham*, the Court noted that historically the law has "recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham*, 442 U.S. at 602. This presumption, that the law accepts as a starting point, is based on "pages of human experience that teach that parents

Washington Superior Court gave no special weight to Granville's determination of what was in her daughters' best interests.<sup>218</sup> The plurality asserted that courts must accord at least some special weight to the decisions made by parents.<sup>219</sup> Finally, Justice O'Connor noted that there was no allegation that Granville ever sought to cut off visitation with the Troxels entirely.<sup>220</sup> Granville did not oppose visitation altogether, she simply objected to the amount of visitation requested by the Troxels.<sup>221</sup>

The plurality concluded that, based on the sweeping breadth of the statute and its application in this case, the visitation order was an unconstitutional intrusion into Granville's fundamental right to make decisions about the care, custody, and control of her two daughters.<sup>222</sup> The plurality, therefore, chose not to consider whether the Due Process Clause requires nonparental visitation statutes to include, as a condition precedent, a determination that the denial of visitation would cause harm to the child before visitation can be granted.<sup>223</sup> The plurality expressly stated that the Court, through this decision, was not defining the precise scope of the parental due process right in the visitation context and that the Court would be reluctant to hold that a state's nonparent visitation statute was a per se violation of the Due Process Clause.<sup>224</sup>

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generally do act in the child's best interest." *Id.* at 602-03.

218. *Troxel*, 120 S. Ct. at 2062 (O'Connor, J., plurality opinion). The plurality believed that the superior court had, in fact, applied the opposite presumption. *Id.* (O'Connor, J., plurality opinion). Based on the oral ruling pronounced by the superior court judge after the conclusion of the closing arguments, the plurality stated that the judge's comments suggested that "he presumed the grandparents' request should be granted unless the children would be 'impact[ed] adversely.'" *Id.* (O'Connor, J., plurality opinion). The plurality believed that "the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters." *Id.* (O'Connor, J., plurality opinion). This contradicted the traditional presumption that fit parents act in the best interests of their children. *Id.* (O'Connor, J., plurality opinion).

219. *Id.* (O'Connor, J., plurality opinion).

220. *Id.* at 2062-63 (O'Connor, J., plurality opinion).

221. *Id.* (O'Connor, J., plurality opinion).

222. *Id.* at 2063-64 (O'Connor, J., plurality opinion). Justice O'Connor stated that this case involved a simple disagreement between the Washington Superior Court and Granville about what was best for her daughters. *Id.* at 2063 (O'Connor, J., plurality opinion). Justice O'Connor explained that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 2064 (O'Connor, J., plurality opinion).

223. *Id.* at 2064 (O'Connor, J., plurality opinion).

224. *Id.* (O'Connor, J., plurality opinion). The plurality opinion stated that the Court "would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter." *Id.* (O'Connor, J., plurality opinion).

## 2. Justice Souter's Concurring Opinion

In a concurring opinion, Justice Souter stated that he would have affirmed the Washington Supreme Court's facial invalidation of its own statute and would not have elaborated on that decision.<sup>225</sup> He stated that the statute was unconstitutional in authorizing courts to grant visitation to any person, at any time, and that the holding need not be limited to the statute's specific application to the facts of the case.<sup>226</sup> Justice Souter believed that the Washington Supreme Court's invalidation of the statute rested on two independently sufficient grounds: the failure of the statute to require a condition precedent of harm to the child before visitation could be ordered, and the statute's authorization that any person could petition for visitation at any time, as long as it was in the child's best interests.<sup>227</sup> He stated that the fact that the statute was too broad was sufficient to invalidate the statute on its face.<sup>228</sup> Therefore, there was no need to determine whether there must be a finding that a denial of visitation would cause harm to the child or to consider the precise scope of parents' rights and the necessary protections for those rights.<sup>229</sup>

Justice Souter cited the line of United States Supreme Court cases that have recognized parents' liberty interest in the "nurture, upbringing, companionship, care, and custody of children . . ."<sup>230</sup> The Justice acknowledged that the Supreme Court cases have "not set out exact metes and bounds" to the parents' protected interests.<sup>231</sup> He stated, however, that "*Meyer's* repeatedly recognized right of upbringing would be a sham" if it did not include the right to be free from judicially ordered visitation every time a judge believed that the parent had not made the best decision.<sup>232</sup>

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225. *Id.* at 2065 (Souter, J., concurring).

226. *Id.* (Souter, J., concurring).

227. *Id.* at 2065-66 (Souter, J., concurring).

228. *Id.* at 2066 (Souter, J., concurring).

229. *Id.* (Souter, J., concurring).

230. *Id.* (Souter, J., concurring) (citing cases including *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

231. *Id.* (Souter, J., concurring).

232. *Id.* at 2066-67 (Souter, J., concurring). Justice Souter wrote:

It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent. To say the least (and as the Court implied in *Pierce*), parental choice in such matters is not merely a default rule in the absence of either governmental choice or the government's designation of an official with the power to choose for whatever reason and in whatever circumstances.



### 3. Justice Thomas' Concurring Opinion

In a separate concurring opinion, Justice Thomas noted that parental rights are unenumerated<sup>233</sup> and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights.<sup>234</sup> Justice Thomas agreed with the plurality, however, that the Supreme Court previously recognized parents' fundamental rights in controlling the upbringing of their children.<sup>235</sup> He continued by addressing the fact that strict scrutiny was the appropriate test for examining infringements of fundamental rights.<sup>236</sup> Moreover, he stated that in this case the State of Washington lacked even a legitimate government interest, let alone a compelling one, in interfering with a fit parent's decision regarding visitation.<sup>237</sup> Justice Thomas, therefore, concluded that the judgment of the Washington Supreme Court should be affirmed.<sup>238</sup>

### 4. Justice Stevens' Dissenting Opinion

In his dissenting opinion, Justice Stevens stated that the Court would have been wisest to deny certiorari.<sup>239</sup> Having granted certiorari, however, Justice Stevens believed the Court should have addressed the fact that the Washington Supreme Court held a state statute invalid on its face based on a federal constitutional judgment.<sup>240</sup> The Justice maintained that the statute was not made unconstitutional either by the fact that it could be invoked by too many plaintiffs or because there was the possibility that an individual could be granted visitation with a child

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*Id.* at 2067 (Souter, J., concurring).

233. Unenumerated rights are rights that are not mentioned specifically or, in other words, not expressly named or granted. *See* BLACK'S LAW DICTIONARY 534 (6th ed. 1990).

234. *Troxel*, 120 S. Ct. at 2067 (Thomas, J., concurring). Justice Thomas explained his position:

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 . . .

*Id.* (Thomas, J., concurring).

235. *Id.* at 2068 (Thomas, J., concurring).

236. *Id.* (Thomas, J., concurring).

237. *Id.* (Thomas, J., concurring).

238. *Id.* (Thomas, J., concurring).

239. *Id.* at 2068 (Stevens, J., dissenting). He wrote, "[g]iven the problematic character of the trial court's decision and the uniqueness of the Washington statute, there was no pressing need to review a State Supreme Court decision that merely requires the state legislature to draft a better statute." *Id.* (Stevens, J., dissenting).

240. *Id.* (Stevens, J., dissenting).

without proving that harm to the child would result if visitation did not occur.<sup>241</sup>

Justice Stevens agreed with Justice Souter that the Court's conclusion that the statute violated the Due Process Clause only as applied to the facts of this case was unsound.<sup>242</sup> As Justice Stevens read the Washington Supreme Court opinion, its interpretation of the United States Constitution rendered it unnecessary for the Washington Supreme Court to definitively interpret the statute or to determine whether the statute had been correctly applied to the Troxels' case.<sup>243</sup> Therefore, Justice Stevens argued that the Court should have instead identified and corrected the two flaws in the Washington Supreme Court's decision and remanded the case for further review of the Superior Court's decision.<sup>244</sup>

Justice Stevens posited that the Washington Supreme Court erred in its federal constitutional analysis because neither the provision granting any person visitation nor the absence of the requirement that there be a finding that the child would be harmed prior to granting visitation invalidated the statute in all instances.<sup>245</sup> According to Justice Stevens, a facial challenge to a statute should fail whenever a statute has a "plainly legitimate sweep."<sup>246</sup> According to Justice Stevens, one flaw in the Washington Supreme Court's decision was that there are numerous cases in which the person seeking visitation would be a "once-custodial caregiver, an intimate relation, or even a genetic parent."<sup>247</sup> He stated that even the majority of the Justices on the Court would agree that in

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241. *Id.* (Stevens, J., dissenting).

242. *Id.* (Stevens, J., dissenting).

243. *Id.* at 2069 (Stevens, J., dissenting). In particular, Justice Stevens noted that the state court gave no content to the phrase "best interest of the child." *Id.* (Stevens, J., dissenting). Justice Stevens commented that meaning could have been given to the phrase based on Washington's other statutes and decisions and the myriad other state statutes utilizing that standard. *Id.* (Stevens, J., dissenting). Justice Stevens added that the "best interests of the child" appeared in at least ten current Washington statutes. *Id.* at 2069 n.5 (Stevens, J., dissenting). In addition, Justice Stevens noted that a search of current state custody and visitation law revealed 698 different references to the "best interest of the child" standard, a number that "at a minimum, should give the Court some pause before it upholds a decision implying that those words, on their face, may be too boundless to pass muster under the Federal Constitution." *Id.* (Stevens, J., dissenting).

244. *Id.* at 2070 (Stevens, J., dissenting).

245. *Id.* (Stevens, J., dissenting).

246. *Id.* (Stevens, J., dissenting) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring)). Justice Stevens explained that since the statute "plainly sweeps in a great deal" of permissible cases in which visitation might be granted, the facial challenge to the statute must fail. *Id.* (Stevens, J., dissenting).

247. *Id.* (Stevens, J., dissenting).

many circumstances granting visitation would be appropriate.<sup>248</sup> Justice Stevens argued that another flaw in the Washington Supreme Court's decision was that there was no support in the case law for the proposition that the Federal Constitution requires a finding of harm or potential harm to a child before a court may grant visitation over parents' objections.<sup>249</sup> Justice Stevens stated that parents' liberty interests have never been held to be a rigid shield that protects all parental decisions from state intervention.<sup>250</sup>

Justice Stevens then stated that cases like *Troxel* do not merely entail a weighing of the interests of the parents and the state, but at minimum, must also include a consideration of the interests of the child.<sup>251</sup> The Justice agreed that prior Supreme Court cases have made it clear that parents have a fundamental liberty interest in child rearing and have a privacy interest in doing so without undue interference from strangers.<sup>252</sup> Furthermore, Justice Stevens acknowledged that the Court has not yet had occasion to elucidate the nature of children's liberty interests in preserving family or family-like bonds.<sup>253</sup> He stated, however, that it appeared extremely likely that children, as well as

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248. *Id.* (Stevens, J., dissenting).

249. *Id.* (Stevens, J., dissenting).

250. *Id.* at 2071 (Stevens, J., dissenting). Justice Stevens stated that "we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm." *Id.* (Stevens, J., dissenting).

251. *Id.* at 2071 n.7 (Stevens, J., dissenting). Justice Stevens stated that "[c]ases like this do not present a bipolar struggle between parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child." *Id.* (Stevens, J., dissenting). The Justice went on to explain the balancing of interests that must occur:

A parent's rights with respect to her child have . . . never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. . . . [A] parent's interest in a child must be balanced against the State's long-recognized interests as *parens patriae*, and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection.

*Id.* at 2072 (Stevens, J., dissenting) (citations omitted).

252. *Id.* at 2071 (Stevens, J., dissenting).

253. *Id.* at 2072 (Stevens, J., dissenting). The Court has acknowledged that children have rights and liberties that are protected by the Constitution. *See, e.g.,* *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (declaring that a state cannot unconstitutionally burden the right of a minor to obtain an abortion); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (stating that children have a substantial liberty interest in not being involuntarily confined); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (reiterating that minors, as well as adults, are protected by the Constitution and have constitutional rights); *Tinker v. Des Moines Indep. Sch. Dist.* 393 U.S. 503, 506-07 (1969) (holding that children have a First Amendment right to political speech); *In re Gault*, 387 U.S. 1, 13 (1967) (finding that children have due process rights in criminal trials).

parents, have fundamental liberty interests in preserving intimate relationships that must be balanced into the equation.<sup>254</sup> Justice Stevens concluded that it is clear that the Due Process Clause of the Fourteenth Amendment provides room for states to consider the impact on a child of possibly arbitrary parental decisions that do not serve the best interests of the child.<sup>255</sup>

### 5. Justice Scalia's Dissenting Opinion

In a separate dissenting opinion, Justice Scalia stated that he agreed that parents have a right to raise their children free from state interference.<sup>256</sup> Because, however, that right is unenumerated, Justice Scalia explained that, in his interpretation, the Constitution gave judges no right to invalidate the statute.<sup>257</sup> In addition, based on the diversity of opinions concerning parental rights, Justice Scalia stated that the theory of unenumerated parental rights had little claim to stare decisis protection.<sup>258</sup> He stated that while *Meyer*, *Pierce*, and *Yoder* should not

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254. *Troxel*, 120 S. Ct. at 2072 (Stevens, J., dissenting). Justice Stevens stated that “[a]t a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel.” *Id.* (Stevens, J., dissenting). Parental rights are not absolute and the “constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.” *Id.* (Stevens, J., dissenting). Justice Stevens explained the importance of considering children’s interests:

[W]e should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a “person” other than a parent. The almost infinite variety of family relationships that pervade our ever-changing society strongly counsels against the creation by this Court of a constitutional rule that treats a biological parent’s liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily. It is indisputably the business of the States, rather than a federal court emphasizing a national standard, to access in the first instance the relative importance of the conflicting interests that give rise to disputes such as this.

*Id.* at 2073 (Stevens, J., dissenting).

255. *Id.* at 2074 (Stevens, J., dissenting).

256. *Id.* (Scalia, J., dissenting).

257. *Id.* (Scalia, J., dissenting). Justice Scalia explained that:

[W]hile I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has no power to interfere with parents’ authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

*Id.* (Scalia, J., dissenting).

258. *Id.* (Scalia, J., dissenting).

be overruled, neither should the holdings be extended to reach this new context.<sup>259</sup>

### 6. Justice Kennedy's Dissenting Opinion

In a third dissenting opinion, Justice Kennedy focused on the Washington Supreme Court's conclusion that the statute was flawed because it allowed visitation by a third party, without first finding that the child would be harmed if visitation was denied.<sup>260</sup> The Justice criticized this holding because the theory behind the holding was "too broad to be correct."<sup>261</sup> Justice Kennedy stated that the holding appeared to contemplate that the best interests of the child standard was unconstitutional in all third-party visitation cases and that the state supreme court required a finding that harm to the child would result if visitation was withheld.<sup>262</sup> The Justice made clear that a determination that the child will suffer harm if visitation is not granted is unnecessary in every case where a third party is seeking visitation with a child.<sup>263</sup>

Justice Kennedy analyzed the Washington Supreme Court's requirement that, prior to granting visitation, a determination must be made that the child will suffer harm if visitation is not granted.<sup>264</sup> Justice Kennedy acknowledged that parents have a constitutionally protected right to raise their children, the precise scope of which is unclear and explained that the state supreme court attempted to give content to this parental right by requiring a threshold finding of harm to the child.<sup>265</sup> He pointed out that while the Court has acknowledged that

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259. *Id.* (Scalia, J., dissenting). Justice Scalia elaborated on his concern:

If we embrace this unenumerated right . . . we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantage of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.

*Id.* at 2074-75 (Scalia, J., dissenting).

260. *Id.* at 2075 (Kennedy, J., dissenting).

261. *Id.* (Kennedy, J., dissenting).

262. *Id.* (Kennedy, J., dissenting). Justice Kennedy acknowledged that the possibility existed that visitation cases would arise where the best interests of the child standard would not provide sufficient protection to parents' constitutional rights to raise their children without state interference. *Id.* (Kennedy, J., dissenting). He argued, however, that this is quite different than saying that harm to the child is required in every case. *Id.* (Kennedy, J., dissenting).

263. *Id.* at 2077 (Kennedy, J., dissenting). Justice Kennedy also mentioned that the state supreme court had found the statute flawed in allowing any person to seek visitation at any time, but he stated that the state supreme court's judgment should be vacated and remanded on the sole ground that the requirement of harm to the child was error because of its broad formulation. *Id.* at 2076 (Kennedy, J., dissenting).

264. *Id.* (Kennedy, J., dissenting).

265. *Id.* (Kennedy, J., dissenting). Justice Kennedy pointed out that "it might be argued as an

states have the authority to intervene to prevent harm to the child, this is not the same as requiring a heightened “harm to the child” standard in every third-party visitation case.<sup>266</sup> According to Justice Kennedy, the state supreme court’s holding that the Constitution forbids the application of the best interests of the child standard in any visitation proceeding appears to rest on assumptions not required by the Constitution.<sup>267</sup>

Justice Kennedy stressed that he was concerned that the state supreme court’s holding was based on the assumption that children were from a conventional nuclear family, that the parent resisting visitation had always been the children’s primary caregiver, and that the person seeking visitation had no legitimate relationship with the children.<sup>268</sup> The Justice pointed out that for many children a traditional family is “simply not the reality of their childhood.”<sup>269</sup>

Justice Kennedy stated that he did not believe that there was any right to be free from courts utilizing the best interests standard.<sup>270</sup> He explained that the best interests standard is widely used and has been recognized for many years.<sup>271</sup> The Justice argued that the extensive use of the best interests standard should give courts pause before rejecting the standard in all third-party visitation cases, as the Washington Supreme Court had done.<sup>272</sup> He argued that a more appropriate approach would be to determine whether the best interests standard is appropriate based on the specific facts of a particular case.<sup>273</sup> Based on

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abstract matter that in some sense the child is always harmed if his or her best interests are not considered . . . .” *Id.* (Kennedy, J., dissenting).

266. *Id.* at 2077 (Kennedy, J., dissenting).

267. *Id.* (Kennedy, J., dissenting).

268. *Id.* (Kennedy, J., dissenting).

269. *Id.* (Kennedy, J., dissenting).

270. *Id.* at 2079 (Kennedy, J., dissenting). Justice Kennedy declared that the best interests of the child standard has been recognized for many years in visitation proceedings and therefore courts should not be so quick to reject it, but should consider it as the Washington court did. *Id.* at 2078 (Kennedy, J., dissenting). The Justice noted that all fifty states have enacted visitation statutes and all except one of these statutes permit visitation to be granted in some circumstances if it is found to be in the best interests of the child. *Id.* at 2079 (Kennedy, J., dissenting). Justice Kennedy stated that only Georgia has adopted a general harm to the child standard and it did so only after its prior visitation statute was invalidated under the United States and Georgia Constitutions. *Id.* at 2078 (Kennedy, J., dissenting); *see also* Savage, *supra* note 25, at 38 (stating that all states except Georgia have visitation laws that permit the court to authorize visitation if the judge thinks it is in the best interests of the child); *supra* notes 155-57 and accompanying text (discussing the Georgia case that struck the grandparent visitation statute down as unconstitutional).

271. *Troxel*, 120 S. Ct. at 2078 (Kennedy, J., dissenting).

272. *Id.* (Kennedy, J., dissenting).

273. *Id.* at 2079 (Kennedy, J., dissenting). “[A] fit parent’s right vis-a-vis a complete stranger

these factors, Justice Kennedy concluded that 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 should have been reversed, the judgment should have been vacated, and the case should have been remanded.<sup>274</sup>

#### IV. ANALYSIS

In an unusual foray into the area of family law, the Supreme Court Justices divided sharply in this case.<sup>275</sup> Because the Court's opinion is quite unhelpful, the Court might as well have continued its traditional position of refusing to become involved in areas of family law.<sup>276</sup> *Troxel* is an unhelpful opinion because there are three major problems with the Court's approach. First, the Court should not have granted certiorari.<sup>277</sup> Second, the Court should have made clear that children have constitutional rights that courts must protect when it is in the best interests of the child to do so.<sup>278</sup> Finally, the Supreme Court's decision provides little guidance to the states, and leaves this area of law in as much confusion as it was prior to the *Troxel* decision.<sup>279</sup>

##### A. *The Court Should Not Have Granted Certiorari in this Case*

Prior to granting certiorari in *Troxel*, the Supreme Court had denied review to cases involving third-party visitation.<sup>280</sup> While all fifty states have third-party visitation statutes, Washington's statute is one of the broadest, because it allows, over the objections of the parents, any person to petition for visitation at any time.<sup>281</sup> Justice O'Connor was

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is one thing; her right vis-a-vis another parent or a de facto parent may be another." *Id.* (Kennedy, J., dissenting).

274. *Id.* (Kennedy, J., dissenting).

275. Tony Mauro, *Grandparent Visitation Law Struck Down*, N.Y. L.J., June 6, 2000, at 1.

276. Susan Nielsen, *State's High Court Does Better with Grandparents' Rights*, SEATTLE TIMES, June 8, 2000, at B6.

277. See *infra* Part IV.A (arguing that the Supreme Court should not have granted certiorari in this case).

278. See *infra* Part IV.B (stating that children have constitutional rights deserving of the Court's protection).

279. See *infra* Part IV.C (examining why the Court's decision provides no guidance to state courts and legislatures).

280. Strawman, *supra* note 33, at 35; see also Weiss, *supra* note 26, at 1118 (stating that by granting certiorari in *Troxel*, the Supreme Court forayed into this area of family law).

281. Rebecca Porter, *Supreme Court Delivers Narrow Ruling on Grandparents' Visitation Rights*, 36-AUG TRIAL 84; see also *supra* note 28 (listing grandparent and third-party visitation statutes from all fifty states).

correct in stating that the Washington statute was “breathtakingly broad,” however, most states’ grandparent visitation statutes are much

more narrowly tailored.<sup>282</sup> The statute, therefore, was not representative of the statutes found in most other states.<sup>283</sup>

The Court would have provided more guidance to state courts and legislatures if it had granted certiorari in a case involving a statute that was more representative of statutes in other states.<sup>284</sup> Had the Court done so, it would have provided state courts with some idea of the factors that must be examined in determining the constitutionality of a third-party visitation statute, and it could have provided legislatures with the direction that must be taken to draft statutes that will pass constitutional muster.<sup>285</sup> By granting certiorari in this case, however, the Court afforded no guidance whatsoever to states whose statutes are less broad than Washington’s statute.<sup>286</sup>

### *B. Children Have Constitutional Rights Deserving of the Court’s Protection*

The Supreme Court previously made clear that parents have a fundamental liberty interest in the care, upbringing, and control of their children.<sup>287</sup> In addition, it is beyond doubt that under some

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282. See *Troxel v. Granville*, 120 S. Ct. 2054, 2061-63 (2000) (O’Connor, J., plurality opinion); *supra* notes 92-93 and accompanying text (explaining that some state statutes require an initial showing of disruption to the family unit before a third party can petition for visitation and some state statutes require that there must be a showing of harm prior to permitting a third party to petition for visitation with a child).

283. See David N. Schaffer, *State Law on Grandparent Visitation Needs Revision*, CHI. DAILY L. BULL., June 20, 2000, at 6. “The Washington statute was an extreme example of a visitation statute trampling on a parent’s rights.” *Id.*; see also *supra* Part II.C (examining the wide variety of state grandparent visitation statutes).

284. See *infra* Parts IV.C, V (discussing the lack of guidance provided by the *Troxel* decision and the disparate results in various states since the decision). Justice Stevens also stated that the Court should not have granted certiorari in this case. *Troxel*, 120 S. Ct. at 2068 (Stevens, J., dissenting). Justice Stevens’ view was based on his belief that there was no need to review the decision of the Washington Supreme Court that simply required the state legislature to draft a better statute. *Id.* (Stevens, J., dissenting).

285. See Sylvia Law, *Rulings on Abortion and Grandparents’ Visitation*, NAT’L L.J., Aug. 7, 2000, at A26.

286. See *infra* Part V (discussing the continuing confusion and inconsistency in the approaches of state courts since the *Troxel* decision). Even if the Court had taken a more definitive position and held that the statute was unconstitutional on its face, as did the Washington Supreme Court, it still would not have resolved the issues dividing the state courts. See *supra* Part II.C (examining the various types of state grandparent visitation statutes).

287. See *supra* Part II.B (tracing the development of the concept that parents have a fundamental liberty interest in raising their children).



circumstances states will interfere in this fundamental liberty interest.<sup>288</sup> The majority of the Justices on the Supreme Court viewed this case as a balancing of the rights of parents to autonomously raise their children against the rights of grandparents to seek visitation with their grandchildren.<sup>289</sup> Most of the Justices did not consider children's rights in their analysis which indicates that the Court undervalues children.<sup>290</sup>

The Due Process Clause of the Fourteenth Amendment protects "all persons" and this includes children.<sup>291</sup> The Court, therefore, should have made clear that children have due process rights in preserving the relationships they have formed with nonparents when it is in the children's best interests to do so.<sup>292</sup> Sadly, Justice Stevens was the only member of the Supreme Court to recognize that visitation cases involve not only a weighing of the interests of the parents and the state, but in addition, the interests of the child.<sup>293</sup> As Justice Stevens stated, there is a third individual, the child, whose interests are implicated in every case involving a visitation statute.<sup>294</sup> It makes little sense to discuss the competing interests of parents and grandparents, as the plurality opinion did, without considering the implications to the child.<sup>295</sup>

The nature of the typical family has changed in the United States.<sup>296</sup> Today, many children are being raised in "nontraditional" families, and

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288. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (making clear that parental autonomy is not absolute and that under some circumstances the state will intervene in the parent-child relationship); see also *supra* notes 74-80 and accompanying text (examining the United States Supreme Court decision in *Prince v. Massachusetts*).

289. Judith Sperling-Newton et al., *Protect Children's Rights*, CHI. TRIB., June 26, 2000, § 1, at 10. Justice O'Connor's plurality opinion, for example, never suggested that children's interests should be weighed into the decision of whether or not to grant visitation. *Troxel*, 120 S. Ct. at 2057-67 (O'Connor, J., plurality opinion).

290. Sperling-Newton et al., *supra* note 289, at 10.

291. Brief of Amicus Curiae Grandparents United for Children's Rights, Inc. at 5, *Troxel* (No. 99-0138); see also U.S. CONST. amend. XIV, § 1.

292. Brief of Amicus Curiae Grandparents United for Children's Rights, Inc. at 3-4, *Troxel* (No. 99-0138).

293. Sperling-Newton et al., *supra* note 289, at 10. Justice Stevens stated that "[c]ases like this do not present a bipolar struggle . . . . There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child." *Troxel*, 120 S. Ct. at 2071 (Stevens, J., dissenting).

294. *Troxel*, 120 S. Ct. at 2071 (Stevens, J., dissenting).

295. *In re Smith*, 969 P.2d 21, 32 (Wash. 1998) (Talmadge, J., dissenting) (stating that the constitutional issue at stake "concerns the parameters and balancing of rights and interests of the State and child, as well as those of the parents."); Sperling-Newton et al., *supra* note 289, at 10.

296. Sperling-Newton et al., *supra* note 289, at 10. In her plurality opinion, Justice O'Connor acknowledged that the American family has changed significantly in the last century. *Troxel*, 120 S. Ct. at 2059 (O'Connor, J., plurality opinion). According to the statistics she cited, in 1996, twenty-eight percent of all children under eighteen only lived with one parent. *Id.* (O'Connor, J., plurality opinion). In addition, in 1998, four million children under the age of eighteen lived in

the child rearing responsibilities have shifted to include the assistance of grandparents, other relatives, and adults outside the family.<sup>297</sup> Children form deep, loving bonds with these individuals.<sup>298</sup> Arbitrarily severing the bond between a child and a loving caregiver will likely cause psychological harm to that child.<sup>299</sup> The Supreme Court should have recognized the child's right to maintain these relationships.<sup>300</sup> Any parent who attempts to sever the relationship without justification is not acting in the child's best interests, and, therefore, the parent's rights must yield to the needs of the child.<sup>301</sup>

It is clear that the best interests of a child cannot be dispositive in every case because parents also have interests deserving of protection.<sup>302</sup> It is unnecessary, however, when deciding whether to grant visitation to a third party that there be a finding that harm will result to the child if visitation is not granted, prior to considering the child's best interests.<sup>303</sup> Granting visitation to an individual does not involve the same level of encroachment on parental rights as does, for example, taking temporary custody of a child.<sup>304</sup> Therefore, the best

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their grandparents' household. *Id.* (O'Connor, J., plurality opinion).

297. Sperling-Newton et al., *supra* note 289, at 10.

298. *Id.*

299. *Id.* The term "psychological parent" has been used to describe the relationship that develops between a child and an adult playing the role of the parent. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 19 (1973). Once a child becomes bonded to the "psychological parent" severing the relationship is believed to be extremely painful to the child. *Id.* at 19-20.

300. Sperling-Newton et al., *supra* note 289, at 10. "If society agrees that severing of a loving bond between child and caregiver psychologically harms that child, why won't our nation's highest Court acknowledge that a child, like the caregiver, has a constitutional right to continue that relationship?" *Id.*

301. Schaffer, *supra* note 283, at 6.

If a child had a substantial relationship with a third party . . . it may cause severe psychological harm to arbitrarily sever that relationship. Any parent who so attempts to sever or limit such a relationship, without good reason or good motivations, is not acting within the best interests of the child. As such, an intrusion into the parent's decision-making process would be constitutionally permissible.

*Id.*

302. *In re Smith*, 969 P.2d 21, 30-31 (Wash. 1998) (explaining that parents have a right to raise their children free from state interference and state intervention simply to better a child's quality of life when the child's life is otherwise satisfactory is not acceptable).

303. *Troxel v. Granville*, 120 S. Ct. 2054, 2076 (2000) (Kennedy, J., dissenting) (stating that concerning the question of whether there is a requirement of a finding of harm before a consideration of the best interests of the child "[o]ur Nation's history, legal traditions, and practices' do not give us clear or definitive answers" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))).

304. *Herndon v. Tuhey*, 857 S.W.2d 203, 208-09 (Mo. 1993) (en banc) (stating that the "magnitude of the infringement by the state is a significant consideration in determining whether a statute will be struck down as unconstitutional" and that "visitation rights by grandparents . . .

interests of a child are appropriate interests to be weighed against the rights of the parents, grandparents, and the state.<sup>305</sup> It was shortsighted of the Court not to make clear that children have rights worthy of protection, even in the absence of harm, nor to recognize that children have interests in maintaining relationships with nonparents that will be protected.<sup>306</sup> The Court should have taken this opportunity to elucidate these rights<sup>307</sup> and to make clear that a determination that the child will suffer harm if visitation is not granted is unnecessary before the Court can step in to protect these rights.<sup>308</sup> Until the Court recognizes that children have constitutionally protected rights, it will continue to treat children as chattel.<sup>309</sup> Children are not property, rather they are the future of this nation, and, therefore, their rights must be protected.<sup>310</sup>

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are less than [a] substantial encroachment on a family”); *Smith*, 969 P.2d at 33 (Talmadge, J., dissenting) (explaining that terminating parental rights is an extreme abridgment of parental rights, while awarding custody results in a relatively minor infringement).

305. See *Smith*, 969 P.2d at 33-35 (Talmadge, J., dissenting).

306. *Id.* at 38-39 (Talmadge, J., dissenting). Justice Talmadge explained the importance of protecting the relationships children form with nonparents:

One of the frequent consequences, for children, of the decline of the traditional nuclear family is the formation of close personal attachments between them and adults outside of their immediate families. Stepparents, foster parents, grandparents and other caretakers often form close bonds and, in effect, become psychological parents to children whose nuclear families are not intact.

It would be shortsighted indeed, for this court not to recognize the realities and complexities of modern family life, by holding today that a child has no rights, over the objection of a parent, to maintain a close extra-parental relationship which has formed in the absence of a nuclear family.

*Id.* (Talmadge, J., dissenting).

307. Sperling-Newton et al., *supra* note 289, at 10.

308. See *Troxel*, 120 S. Ct. at 2077 (Kennedy, J., dissenting).

309. *Id.* at 2072 (Stevens, J., dissenting). Justice Stevens argued that “[a]t a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel.” *Id.* (Stevens, J., dissenting).

310. Sperling-Newton et al., *supra* note 289, at 10.

[C]hildren are not property. They are our nation’s future, and, as such, need our help and protection. The best way to ensure that the rights of children are protected is to recognize that children have constitutional rights to maintain important relationships. Until our courts confirm these rights, sadly, Justice Stevens is correct in lamenting that “children are just so much chattel.”

*Id.*

*C. The Court's Decision Provides No Guidance to State Courts and Legislatures*

The Court took a middle ground in this case,<sup>311</sup> thereby offending no one.<sup>312</sup> Unfortunately, the standard for governmental interference with parental rights remains extremely vague.<sup>313</sup> The plurality did not make clear what factors are important to consider when determining whether a visitation statute adequately protects parents' rights, and it did not examine the important constitutional issues implicated in the case.<sup>314</sup> In particular, the plurality left open one of the most divisive issues in this area of the law.<sup>315</sup> The Supreme Court failed to decide whether a court must first determine that the child would be harmed if visitation is withheld before the court can consider whether visitation would be in the child's best interests.<sup>316</sup> The standard, therefore, will remain uncertain until the Supreme Court reviews another case involving a third-party visitation statute and more directly confronts the issues involved.<sup>317</sup> Until then, state legislatures and courts will have to continue to guess as to whether the state's visitation statute adequately protects the rights of parents.<sup>318</sup>

The Court should have first made clear that a finding of harm is not necessary to raise children's rights to a level deserving of protection.<sup>319</sup>

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311. Sam Skolnik, *Case From Washington State Gives Parents Rights Over Visits; Treading a Legal Minefield Over the Family*, SEATTLE POST-INTELLIGENCER, June 6, 2000, News, at A1 ("They found a middle ground that recognized changes in the family while recognizing the role of parents in raising their child without state interference.").

312. Nielsen, *supra* note 276, at B6. The AARP issued a statement stating that the "AARP is gratified that the Supreme Court has proceeded cautiously in deciding this case. While the Court invalidated the Washington visitation statute, it clearly left the door open for more narrowly drawn grandparent visitation statutes . . ." Press Release, AARP, AARP Issues Statement on Supreme Court Ruling in Troxel Case (June 5, 2000) (on file with the author). A broad range of other groups, including the Christian right and women's rights groups also praised the decision. Mauro, *supra* note 275, at 1.

313. Nielsen, *supra* note 276, at B6.

314. Law, *supra* note 285, at A26.

315. Weiss, *supra* note 26, at 1131; *supra* Part II.C (explaining the inconsistent requirements among states for granting visitation).

316. See *Troxel v. Granville*, 120 S. Ct. 2054, 2064 (2000) (O'Connor, J., plurality opinion). Writing for the plurality, Justice O'Connor stated:

[W]e do not consider . . . 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.* (O'Connor, J., plurality opinion).

317. Nielsen, *supra* note 276, at B6.

318. *Id.*

319. See *Troxel*, 120 S. Ct. at 2077 (Kennedy, J., dissenting) (stating that the Constitution

Next, the Court should have articulated the best interests of the child standard as the standard to be used when making decisions affecting children.<sup>320</sup> In order to promote a level of uniformity, the Court could have suggested factors to be considered in making a best interests of the child determination.<sup>321</sup> The extreme diversity in American families and the unique nature of each case, however, demands that states not require mandatory consideration of certain factors.<sup>322</sup> Any list of factors, therefore, should only be illustrative of the types of factors necessary to adequately determine what is in the child's best interests.<sup>323</sup>

## V. IMPACT

After *Troxel*, most grandparent visitation statutes do not appear to be in serious constitutional danger.<sup>324</sup> Most Justices on the Court did not want to invalidate these statutes on their face.<sup>325</sup> While most of the Justices appear to believe that, at a minimum, parental decisions are deserving of some deference, they did not endorse the position that the constitutional protection of parental autonomy is inflexible or insurmountable.<sup>326</sup> The Court's opinion indicated that states can

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does not require a finding of harm to the child before the best interests of the child standard can be applied).

320. Brief of Amicus Curiae Grandparents United for Children's Rights, Inc. at 8, *Troxel* (No. 99-0138). "The 'best interest of the child' standard should guide both the courts' and legislatures' recognition of the constitutional rights of children as paramount." *Id.*

321. *Id.*

322. *In re Smith*, 969 P.2d 21, 40 (Wash. 1998) (Talmadge, J., dissenting).

323. *Id.* (Talmadge, J., dissenting).

324. Schepard, *supra* note 55, at 3. *Contra All Things Considered: Supreme Court Decision that Grandparents Can't Sue for Visits with Their Grandchildren* (NPR radio broadcast, June 5, 2000). Professor Erwin Chemerinsky, a Law Professor from the University of Southern California, stated:

I think that the practical effect of this will be to undermine grandparents' right statutes that exist in all 50 states. It's certainly possible to interpret this decision narrowly, it's just invalidating broad statutes like Washington's; however, I think that the clear implication of this is that parents have a fundamental right to control the upbringing of their children and if parents don't want grandparent visitation, the state can't order it over their objections.

*All Things Considered, supra.*

325. Schepard, *supra* note 55, at 3. Only Justice Souter explicitly stated that the Washington statute was facially unconstitutional because the statute swept too broadly in allowing "any person" at "any time" to petition for visitation subject only to the "free-ranging best-interests-of-the-child standard." *Troxel v. Granville*, 120 S. Ct. 2054, 2066 (2000) (Souter, J., concurring) (citation omitted).

326. Patricia M. Logue & Ruth Harlow, *Court Sees Complexity in Choosing Between Legal and De Facto Parents*, N.J.L.J., June 19, 2000.

override parents' decisions under some circumstances through carefully drafted visitation statutes applied on a case-by-case basis.<sup>327</sup>

In addition, no Justice on the Court explicitly endorsed a requirement that harm to the child be found as the only route to state entrance in the parent-child relationship.<sup>328</sup> Had the Court taken a more definitive position and reached this conclusion, as did the Washington Supreme Court, grandparent visitation would have been severely restricted.<sup>329</sup> Finally, the Court made clear that its decision did not invalidate other states' grandparent visitation statutes by restricting the holding to the facts of the case.<sup>330</sup>

The Supreme Court's decision in *Troxel* did not provide any instruction to states as to the constitutionality of the state statutes.<sup>331</sup> Subsequent to the Court's decision in *Troxel*, many state courts have examined the state's grandparent visitation statute.<sup>332</sup> Since the plurality restricted the opinion in *Troxel* to the facts of the case, the confusion that plagued state courts prior to the *Troxel* decision continues to create divergent opinions.<sup>333</sup> The *Troxel* opinion simply

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327. Shepard, *supra* note 55, at 3.

328. Logue & Harlow, *supra* note 326. "[N]o justice embraced a showing of harm as the only route to state intervention. The possibility was reserved by some justices and dismissed by others." *Id.*

329. *In re Smith*, 969 P.2d 21, 30 (Wash. 1998).

Short of preventing harm to the child, the standard of "best interest of the child" is insufficient to serve as a compelling state interest overruling a parent's fundamental rights. State intervention to better a child's quality of life through third party visitation is not justified where the child's circumstances are otherwise satisfactory.

*Id.*

330. Mary E. O'Connell, *The 'Troxel' Tightrope*, NAT'L L.J., June 26, 2000, at A20.

331. See *supra* Part IV.C (discussing the lack of guidance provided by the *Troxel* decision).

332. See, e.g., *Jackson v. Tangreen*, 18 P.3d 100 (Ariz. Ct. App. 2000) (holding that the Arizona grandparent visitation statute is constitutional); *Kyle O. v. Donald R.*, 102 Cal. Rptr. 2d 476 (Cal. Ct. App. 2000) (stating that the California statute allowing certain relatives to petition for visitation with children was unconstitutional as applied in this case); *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000) (determining that the state grandparent visitation statute did not violate the Due Process Clause); *Hertz v. Hertz*, 717 N.Y.S.2d 497 (N.Y. Sup. Ct. 2000) (holding that the New York grandparent visitation statute violated the parents' substantive due process rights); *Fitzpatrick v. Youngs*, 717 N.Y.S.2d 503 (N.Y. Fam. Ct. 2000) (concluding that the New York visitation statute was constitutional); *Neal v. Nesvold*, 2000 OK 90, 14 P.3d 547 (Okla. 2000) (holding that under the Oklahoma Constitution grandparent visitation can only be granted if the child would be harmed if visitation was not granted).

333. See, e.g., *Jackson*, 18 P.3d at 107-08 (holding that the Arizona grandparent visitation is constitutional); *Kyle O.*, 102 Cal. Rptr. 2d at 485-87 (stating that the California statute allowing certain relatives to petition for visitation with children was unconstitutional as applied in this case); *Rideout*, 761 A.2d at 301-04 (determining that the state grandparent visitation statute did not violate the Due Process Clause); *Hertz*, 717 N.Y.S.2d at 498-500 (holding that the New York grandparent visitation statute violated the parents' substantive due process rights); *Fitzpatrick*, 717 N.Y.S.2d at 506-07 (concluding that the New York visitation statute was constitutional);

provided no guidance to state courts and legislatures to aid in navigating through this area of the law.<sup>334</sup>

Quite understandably, state courts examining the state's grandparent visitation statute in light of *Troxel* have reached different decisions.<sup>335</sup> For example, the Supreme Judicial Court of Maine examined its state visitation act and determined it did not violate the Due Process Clause.<sup>336</sup> After reviewing *Troxel*, the court concluded that, as applied to the facts of the case, the state statute was narrowly tailored to serve the state's compelling interest and, therefore, could be applied without violating the constitutional rights of the parents.<sup>337</sup> By comparison, the Oklahoma Supreme Court held that under *Troxel*, the state's grandparent visitation statute violated the parents' federal constitutional rights to make decisions regarding the care, custody, and control of their children.<sup>338</sup> This holding was based on the fact that no court found that the parents were unfit or that the children would suffer harm if court-ordered grandparent visitation was not granted.<sup>339</sup>

Not only have different states reached different conclusions, even courts within the same state, examining the same statute, have reached different conclusions.<sup>340</sup> A New York Family Court examined the state

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*Neal*, 2000 OK 90, ¶¶ 5-13, 14 P.3d at 549-51 (holding that under the Oklahoma Constitution grandparent visitation can only be granted if the child would be harmed if visitation was not granted).

334. See *supra* Part IV.C (discussing the lack of guidance provided by the *Troxel* decision).

335. See, e.g., *Jackson*, 18 P.3d at 107-08 (holding that the Arizona grandparent visitation is constitutional); *Kyle O.*, 102 Cal. Rptr. 2d at 485-87 (stating that the California statute allowing certain relatives to petition for visitation with children was unconstitutional as applied in this case); *Rideout*, 761 A.2d at 301-04 (determining that the state grandparent visitation statute did not violate the Due Process Clause); *Hertz*, 717 N.Y.S.2d at 498-500 (holding that the New York grandparent visitation statute violated the parents' substantive due process rights); *Fitzpatrick*, 717 N.Y.S.2d at 506-07 (concluding that the New York visitation statute was constitutional); *Neal*, 2000 OK 90, ¶¶ 5-13, 14 P.3d at 549-51 (holding that under the Oklahoma Constitution grandparent visitation can only be granted if the child would be harmed if visitation was not granted).

336. *Rideout*, 761 A.2d at 303-04. The grandparents who sought visitation in this case had been the primary caregivers and custodians of the children for a significant period of time. *Id.* at 294-95.

337. *Id.* at 303. The court examined Maine's statute as applied to the facts of the case before it. *Id.* at 294. The court held that where a grandparent had served as the primary caregiver for a child for a period of years, the situation warranted use of the court's *parens patriae* authority and provided a compelling basis for the state's intervention into an intact family. *Id.* at 302.

338. *Neal*, 2000 OK 90, ¶¶ 9-13, 14 P.3d at 550-51 (holding that under the Oklahoma Constitution grandparent visitation can only be granted if the child would be harmed if visitation was not granted).

339. *Id.* ¶¶ 9-13, 14 P.3d at 550-51.

340. See, e.g., *Hertz*, 717 N.Y.S.2d 497 (holding that the New York grandparent visitation statute violated the parents' substantive due process rights); *Fitzpatrick*, 717 N.Y.S.2d 503

grandparent visitation statute and found it constitutional.<sup>341</sup> The court stated that unlike the Washington statute in *Troxel*, the New York statute has been narrowly construed to allow only certain relatives to petition for visitation.<sup>342</sup> In addition, the court explained that the Washington statute did not require any special deference be given to the wishes of the parents, but that the New York statute, as applied, gave special deference to the wishes of the parents.<sup>343</sup> Finally, the court added that New York courts carefully protected the best interests of the child.<sup>344</sup> In contrast, a New York trial level court examined the same statute and reached a different conclusion.<sup>345</sup> The court held that while the statute only allows certain individuals to petition for visitation, the statute contains no requirement that a court accord parents' wishes any presumption of validity and allows the court to substitute its own judgment for that of the parents.<sup>346</sup> The court concluded, therefore, that the statute was unconstitutional because it violated the parents' fundamental rights to make decisions about the care, custody, and control of their children.<sup>347</sup>

Clearly, courts will continue to reach inconsistent conclusions regarding the constitutionality of state statutes until the Supreme Court grants certiorari to another case involving a third-party visitation statute and more directly confronts the issues involved.<sup>348</sup>

## VI. CONCLUSION

The United States Supreme Court has a long history of giving deference to parents' rights to raise their children without interference from the government. This right has been determined to be a fundamental liberty interest protected by the United States Constitution. The Court has not defined the precise scope of this liberty interest, however, leading state courts to differing conclusions as to the constitutionality of grandparent visitation statutes.

The United States Supreme Court examined this issue in *Troxel v. Granville*. The Court examined a Washington state statute and held that

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(concluding that the New York visitation statute was constitutional).

341. *Fitzpatrick*, 717 N.Y.S.2d at 506-07.

342. *Id.* at 505-06.

343. *Id.* The court explained that, "Troxel cautions that parental decision making must be given some deference, and as applied this has occurred in New York." *Id.* at 506.

344. *Id.* at 505.

345. *Hertz*, 717 N.Y.S.2d at 500.

346. *Id.*

347. *Id.*

348. Nielsen, *supra* note 276, at B6.



the statute violated the mother's due process rights as applied to the facts of the case. The Court's unusual encroachment into the area of family law, typically left to the states, was wholly unhelpful as a divided Court failed to provide adequate guidance to state courts and legislatures. This was the result of several problems with the Court's opinion. The *Troxel* decision, therefore, has had minimal impact on state courts and has resulted in continued confusion about the requirements necessary before grandparent visitation is granted.

The Supreme Court should have taken this opportunity to make clear that a finding of harm is not necessary prior to considering children's best interests and to hold that children have rights which the Court will protect. Unfortunately, however, the rights of the group of individuals most needing the Court's protection were ignored.