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Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family

Susan Tomaine
COMMENT

TROXEL V. GRANVILLE: PROTECTING FUNDAMENTAL PARENTAL RIGHTS WHILE RECOGNIZING CHANGES IN THE AMERICAN FAMILY

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On January 12, 2000, the Supreme Court of the United States heard oral arguments in a case arising from a family quarrel over grandparents seeking access to their two young grandchildren. Although it is an anomaly for the highest court in the land to hear a domestic relations dispute, the Supreme Court's ruling in Troxel v. Granville had potential national implications. The dispute in Troxel centered on the constitutionality of a Washington statute, which allowed Jenifer and Gary Troxel to petition the state court for visitation rights concerning their two grandchildren and permitted the court to grant these rights despite the objections of the children's mother. All fifty states have enacted "grandparent visitation" statutes, which afford grandparents a judicial remedy when they are denied access to their grandchildren. Consequently, this family dispute justifiably received national attention.

2. See Linda Greenhouse, Justices Deny Grandparents Visiting Rights, N.Y. TIMES, June 6, 2000, at A26 (reporting the Court's hesitancy to rule on questions of state law involving parental rights).
4. Troxel, 530 U.S. at 60-61.
5. Id. at 73-74, n.* (citing every state's grandparent visitation statute). The Washington statute at issue in Troxel applies not only to grandparents, but also to other third parties. See infra note 157 (discussing the implications of a ruling on Washington's third party visitation statute on other states' grandparent visitation statutes).
6. See, e.g., Richard W. Garnett, A Victory for the Family, WALL ST. J., June 6, 2000, at A26; Greenhouse, supra note 2; Edward Walsh, Court Limits
For the past forty years, state legislatures have created grandparent visitation statutes to allow grandparents to seek judicial intervention when they are denied access to their grandchildren.\(^7\) Congress and the President have supported such legislation.\(^8\) In addition, this issue has captured the nation's attention,\(^9\) in part because powerful lobbying groups represent grandparents' interests and most people willingly presume that time spent with a grandparent is important for a child.\(^10\)

Recently, several states broadened the circumstances under which grandparents can petition the courts for visitation.\(^11\) The expansion of "grandparents rights" has raised concern over when the state government, acting through a trial judge, may influence the resolution of an internal family dispute.\(^12\) Several

\(^7\) See e.g., infra note 85 and accompanying text (listing third party visitation statutes); see generally John DeWitt Gregory, Blood Ties: A Rationale for Child Visitation by Legal Strangers, 55 WASH. & LEE L. REV. 351 (1998) (discussing the issues that "arise when nonparents seek visitation with other peoples' children").


\(^9\) See Majorie Williams, Grandparents in Court, WASH. POST, Jan. 14, 2000, at A27 (discussing the facts in Troxel and commenting on the difficulty of involving the courts in family disputes); Cliff Collins, Family Ties: Family Law Practitioners Await Clarification of Nonparental Rights, OR. ST. BAR BULL., May 2000, at 7, 9 (explaining the interest of family law practitioners in a clarification of nonparental rights); see also supra note 6.


\(^12\) See, e.g., Joan C. Bohl, Family Autonomy vs. Grandparent Visitation: How Precedent Fell Prey to Sentiment in Herndon v. Tuhey, 62 Mo. L. REV. 755-58 (1997) (criticizing the Missouri Supreme Court's decision to declare the state's grandparent visitation statute constitutional); Joan C. Bohl, The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases, 49 OKLA. L. REV. 29, 80 (1996) [hereinafter Unprecedented Intrusion] (concluding that states are not authorized to order forced grandparent visitation); Bostock, supra note 11 (discussing the expansion of grandparent visitation rights and suggesting that visitation be granted only when the grandparents can show they had a sufficient relationship); Burns, supra note 10 (tracing the development of grandparent visitation statutes and suggesting that possible constitutional violations stem from granting grandparent visitation over the objections of the married parents); Cynthia L. Greene, Grandparents' Visitation Rights: Is the Tide Turning?, 12 J. AM. ACAD. MATRIMONIAL LAW., 51, 51
state supreme courts, namely Tennessee, Georgia, North Dakota, and Washington have invalidated their grandparent visitation statutes, claiming that the provisions violate parents' constitutional rights of privacy and autonomy.

Tommie Granville, the respondent in Troxel, argued the same when her children's paternal grandparents, Jenifer and Gary Troxel, petitioned the Washington Superior Court for a visitation order which would grant them more visitation rights with their two granddaughters. The court granted the Troxels' petition and issued the order. The Washington Supreme Court and the Washington Court of Appeals, however, determined that the order violated Granville's right to raise her children without state interference.

The United States Supreme Court affirmed the Washington Supreme Court's ruling, holding that the trial court applied the visitation statute in a manner that violated Granville's constitutional rights. Because the Court issued a fragmented opinion that failed to articulate the precise scope of the right to parental autonomy and neglected to specify when a state may intervene in a visitation dispute, the ruling will have a minimal impact on current state legislation.

(1994) (criticizing the rapid development of grandparent visitation statutes that allow ordered visitation absent a finding of potential harm to the child).

17. See infra Part I.D. (summarizing the holdings of state court cases that have addressed the constitutionality of grandparent visitation statutes).
20. Id. at 700 (recognizing that the statute should be limited for it to be "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the 'care, custody, and management' of their children"); see also Smith, 969 P.2d. at 31 (asserting that "[p]arents have a right to limit visitation of their children with third persons").
22. Id. at 71-72; see, e.g., Kyle O. v. Donald R., 85 Cal. App. 4th 848, 850 (2000) ("Following the lead of Troxel we need not decide whether California's nonparental visitation statute . . . is unconstitutional on its face."); Department of Soc. and Rehab. Servs. v. Pallett, 16 P.3d 962, 971 (Kan. 2000) (noting that the Troxel Court did not rule on the validity of nonparental visitations statutes per se, thus finding that the Kansas grandparent visitation statute was not
This Comment first discusses the common law roots of parental autonomy rights and the subsequent development of grandparent and third party visitation statutes. Second, this Comment outlines the Supreme Court precedent relating to family privacy and parental autonomy. Next, this Comment analyzes the fragmented opinion issued by the Supreme Court in Troxel and addresses how each Justice's opinion relates to the current statutory law governing grandparent and third party visitation. Finally, this Comment suggests how, in light of Troxel, state legislatures should utilize open-ended standing provisions and codify a legal presumption into the visitation statutes in favor of parents to advance effectively the policy behind visitation rights and to protect simultaneously fundamental parental rights.

I. INTRODUCTION AND DEVELOPMENT OF VISITATION STATUTES

A. Common Law Foundation of Parental Rights

1. Parents' Moral Obligation To Care for Their Children Gives Rise to a Right of Parental Autonomy

Common law provided grandparents with no legal right to access their grandchildren, and, therefore, they had no standing to petition the courts for ordered visitation.23 Parents, on the other hand, maintained complete discretion over who could spend time with and influence their children.24 This

unconstitutional).

23. In re Reiss, 15 So. 151, 152 (La. 1894); see also Bronstein v. Bronstein, 434 So. 2d 780, 782 (Ala. 1983); Odell v. Lutz, 177 P.2d 628, 629-30 (Cal. Dist. Ct. App. 1947); Chodzko v. Chodzko, 360 N.E.2d 60, 61-62 (Ill. 1976); Hicks v. Enlow, 764 S.W.2d 68, 70 (Ky. 1989) ("Before the enactment of the grandparents' visitation statute in 1976... it was a statutory fact that grandparents could visit with their grandchildren only with parental permission."). In re Reiss is often cited as one of the first cases to state explicitly the common law position that refused to recognize third party standing to petition for court-ordered visitation. SCOTT E. FRIEDMAN, THE LAW OF PARENT-CHILD RELATIONSHIPS 172 (1992); Phyllis C. Borzi, Note, Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interests of the Child, 26 CATH. U. L. REV. 387, 388 (1977). But see Hawkins v. Hawkins, 430 N.E.2d 652, 653 (Ill. App. 1981) (rejecting a father's argument that the grandparent visitation order should be void because grandparents lacked explicit statutory authority to petition for visitation with their grandchildren).

24. See Chodzko, 360 N.E.2d at 63 ("The right to determine the third parties who are to share in the custody and influence of and participate in the visitation privileges with the children should vest primarily with the parent who
centralization of authority was a necessary function of states’ reliance on parents to raise their citizens and the corresponding duty of parents to provide their children with stability, financial security, health care, education, and moral values. In order to carry out these duties effectively, parents must have the authority to act in the interest of their children without state interference. Courts have recognized this arrangement and have viewed parents’ obligation to foster ties between their children and third parties, including grandparents, as strictly a “moral, not a legal obligation.”

is charged with the daily responsibility of rearing the children.”; In re Reiss, 15 So. at 152.

25. Troxel, 530 U.S. at 72; Ward v. Ward, 537 A.2d 1063, 1068-69 (Del. Fam. Ct. 1987); see also Sanford N. Katz, When Parents Fail 3-14 (1971). “Grandparents, as a general rule, are not charged with the responsibilities of raising their grandchildren . . . and, absent such a custodial relationship, no liberty interest is conferred upon them.” Ward, 537 A.2d at 1068-69. In addition, Katz discussed societal expectations regarding the family’s role in raising children. Katz, supra, at 3-14. American society is built upon the notion that the immediate family will accept responsibility for raising its youngest children and the state must step in upon the failure of the parents to do so. See id.; see also Natalie Loder Clark, Parens Patriae and a Modest Proposal for the Twenty-first Century: Legal Philosophy and a New Look at Children’s Welfare, 6 Mich. J. Gender & L. 381, 396-400 (2000) (suggesting that parents’ legal and moral duty to care for their children is based upon the state’s interest in preventing children from burdening the community at large).

26. See Odell, 177 P.2d at 629 (“The legal obligations of parenthood include the duties of support, of care and protection, and of education . . . [therefore], the law recognizes certain rights in the parent.”); In re Reiss, 15 So. at 152 (“To permit [third parties] to intervene would occasion embarrassment and annoyance . . . [and] it would injuriously hinder proper paternal authority by dividing it.”); see also Katz, supra note 25, at 4. Katz suggests that the doctrine of parental right to custody was rooted in the view that children constitute property. Id. Gradually, the focus shifted from children as property to the implications of the parent-child relationship. Id.

27. Bronstein, 434 So. 2d at 782; see also In re Reiss, 15 So. at 152 (“The obligation ordinarily to visit grandparents is moral and not legal.”); Friedman, supra note 23, at 172 (noting that Reiss is often cited for its proposition that grandparent visitation is a moral, not legal obligation, and thus, not enforceable by courts). In re Reiss is one of the earliest cases that considered a request for court-ordered grandparent visitation. In re Reiss, 15 So. at 151. In In re Reiss, a grandmother sued her son-in-law to compel him to send her two grandchildren to visit her at her home. Id. at 152: see also Borzi, supra note 23, at 388 n.7. The court recognized that the grandmother’s desire to maintain a relationship with her grandchildren was motivated by affection, but was reluctant to arbitrate between two adults who could not resolve this issue because of “bad blood.” In Re Reiss, 15 So. at 152-53. The court held for the father because (1) it is against the children’s interest to undermine parental authority; and (2) because a court order could not effectively resolve a family dispute. Id. Whatever laws of nature require parents to foster relationships
Although the common law assumed that parents had the duty and the authority to control the upbringing of their children, the state retained the power and the responsibility ultimately to protect its defenseless citizens.\textsuperscript{28} The doctrine of \textit{parens patriae}\textsuperscript{29} allows the state to intervene when parents cannot provide their children with adequate care.\textsuperscript{30} At common law, the state exercised its \textit{parens patriae} power only when parents violated their legal obligations to their children through abuse or neglect.\textsuperscript{31}

In the absence of specific legislation on this subject, courts historically have resisted attempting to resolve internal family conflicts.\textsuperscript{32} Courts have reasoned that any interference with

\begin{quote}
among children and grandchildren are based in individual morals and are not required by law. \textit{Id} at 152.
\end{quote}

\textsuperscript{28} See Bostock, supra note 11, at 328 (noting that the state's \textit{parens patriae} power authorizes state action aimed to protect children from severe harm).

\textsuperscript{29} \textsc{Black's Law Dictionary} 1114 (6th ed. 1991). Black's defines \textit{parens patriae} as:

\textit{[L]iterally, 'parent of the country,' refers traditionally to role of state as sovereign and guardian of persons under legal disability, such as juveniles... and, in child custody determinations, when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents. It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc.... In the United States, \textit{parens patriae} function belongs with the states.}\textit{Id.} (citations omitted).

\textsuperscript{30} \textsc{Katz, supra} note 25, at 4 ("Under the doctrine of \textit{parens patriae} the state has invoked power in unusual circumstances to promote certain policies for the protection of children." (footnote omitted)).

\textsuperscript{31} See \textit{id.; In re Reiss}, 15 So. at 152. "There may be cases of downright wrong and inhumanity" that would justify judicial intervention. \textit{Id.} But, "[i]ll feeling and bad blood" between a parent and grandparent does not justify judicial action. \textit{Id.; see generally Clark, supra note 25} (discussing the philosophical policies behind the \textit{parens patriae} power and suggesting reasons for limiting it). Clark argues that state involvement in family relationships harms the interests involved because family autonomy rights usually outweigh the state's interests. \textit{Id.}

\textsuperscript{32} See, e.g., \textit{In re Reiss}, 15 So. at 152. The father, in refusing to take his children to visit their grandmother, "owes no account to any one for his motives. They may be so intimate that the honor of the family requires that they shall remain a secret." \textit{Id.} The \textit{In re Reiss} court's reluctance to overrule parental discretion did not reflect the severity of the issues before them. \textit{Id.} The court expressed sympathy for the parties involved, but acknowledged that even though family disputes could produce the fiercest arguments, the court did not constitute the appropriate venue for determining the outcome of these
parental decision-making would undermine parental authority and impede parents from accomplishing the legal and moral duties imposed by society. Moreover, courts have recognized that the family unit is better equipped than the courts to resolve family disputes effectively. Even if a court attempted to legally require a parent to consent to grandparent-grandchild contact, it could not repair relationships or monitor adult behavior. In fact, some commentators argue that allowing grandparents to sue parents may further isolate members of a divided family, and the resulting legal battle could detrimentally impact the child.

Common law courts, however, did recognize equitable exceptions to the blanket rule against interfering with parental autonomy. Some courts granted visitation rights to

*In re Reiss,* 15 So. at 152; *see also* Odell v. Lutz, 177 P.2d 628, 629 (Cal. Dist. Ct. App. 1947) ("The supremacy of the mother and father in their own home in regard to the control of their children is generally recognized."); *Ward,* 537 A.2d at 1069 ("The common law rule against coercing grandparent visitation over parental objection demonstrates a respect for family privacy and parental autonomy.").

33. *In re Reiss,* 15 So. at 152; *see also* Odell v. Lutz, 177 P.2d 628, 629 (Cal. Dist. Ct. App. 1947) ("The supremacy of the mother and father in their own home in regard to the control of their children is generally recognized."); *Ward,* 537 A.2d at 1069 ("The common law rule against coercing grandparent visitation over parental objection demonstrates a respect for family privacy and parental autonomy.").

34. *In re Reiss,* 15 So. at 153 ("The ties of nature will prove more efficacious in restoring kindly family relations than the coercive measures which must follow judicial intervention."); *see also* Patricia S. Fernández, *Grandparent Access: A Model Statute,* 6 YALE L. & POL’Y REV. 109, 113 (1988). But see *Grandparents Rights: Preserving Generational Bonds: Hearing Before the Subcomm. on Human Services of the Select Comm. on Aging,* 102d Cong. 54-55 (1991) (statement of Arthur Kornhaber, M.D., President, Foundation for Grandparenting) [suggesting that there is a role for judges to set guidelines for feuding families and "sentenc[ing] the family to healing"] (hereinafter *Generational Bonds*).

35. *See Ward,* 537 A.2d at 1069.

36. *E.g.*, BARRY BRICKLIN, PH. D., *THE CUSTODY EVALUATION HANDBOOK* 200 (1995) (commenting that it is hard evaluate tell whether grandparents will use their statutory standing wisely and noting that if there is already a divorce or family disruption, a lawsuit by the grandparents may increase the amount of conflict the child faces).

37. *See e.g.*, Loveless v. Michalak, 522 N.E.2d 873 (Ill. App. Ct. 1988) (upholding an order granting grandparents visitation with a child, in the absence of a death or divorce, because the parents' abandonment of the child
grandparents under exceptional circumstances, typically characterized by an “established, close, and meaningful relationship” between the petitioning grandparents and their grandchildren, as well as a broken nuclear family due to divorce, separation, or death.

2. Constitutional Interpretation Indicates Parents’ Fundamental Right To Raise Their Children

Although federal statutes do not identify parental rights, they do receive constitutional protection. The Due Process Clause of the Fourteenth Amendment has been interpreted to protect a “private realm of family life which the state cannot enter.”

constituted “special circumstances” warranting judicial intervention).

38. See id.; Hawkins v. Hawkins, 430 N.E.2d 652, 654 (Ill. App. Ct. 1981) (granting visitation to a grandparent who had daily contact with a child following the death of the child’s parent); Lucchesi v. Lucchesi, 71 N.E.2d 920, 920-22 (Ill. App. Ct. 1947) (granting visitation after the death of the child’s father in World War II); Solomon v. Solomon, 49 N.E.2d 807, 807-08, 818. 822-23 (Ill. App. Ct. 1943) (allowing paternal grandparents to seek visitation while their son, the grandchild’s father, was on active duty in the in the Armed Services); Skeens v. Paterno, 480 A.2d 820, 827 (Md. Ct. Spec. App. 1984) (allowing grandparent visitation of an child born out of wedlock); see also JOHN C. MAYOUE, COMPETING INTERESTS IN FAMILY LAW 143-44 (1998) (noting that at common law, courts focused on the facts of each case and occasionally issued visitation orders for grandparents if they had a close relationship with the child and there was a disruption in the nuclear family).

39. Ward, 537 A.2d at 1067 (Indicating that in cases in which courts have found grandparents to have a protected interest in their grandchildren, the grandparents had provided day-to-day care and nurturing for the minors, which formed a custodial relationship); Burns, supra note 10, at 62. But see Robertson v. Robertson, 164 P.2d 52, 57 (Cal. Dist. Ct. App. 1945) (stating that even though the parents are divorced, the grandparent’s “right, if it can be called that, is no different from that of any third person or stranger”).

40. Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”); see also Santosky v. Kramer, 455 U.S. 745, 753 (1982) (noting the Supreme Court’s “historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment”).

41. U.S. CONST. amend. XIV, § 1 (“No state . . . shall deprive any person of life, liberty, or property without due process of law.”).

42. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The Fourteenth Amendment’s promise that no one shall be deprived of liberty without due process of law has been interpreted to include more than “fair process” and “the absence of physical restraint.” Washington v. Glucksburg, 521 U.S. 702, 719 (1997). Fundamental rights and liberties that are not enumerated in the Bill of Rights or specifically mentioned in the text the Constitution fall within the Fourteenth Amendment’s protected liberty interest. Id. at 720. In 1905, the Supreme Court, in Lochner v. New York, 198 U.S. 45, 62 (1905), struck down a
Specifically, state and federal courts have recognized the "liberty of parents and guardians to direct the upbringing and education of children under their control," and the Fourteenth Amendment prohibits states from interfering with this liberty. In some instances, however, states may regulate matters that affect the family unit. The application of grandparent visitation statutes raises the issues of what extent parents are protected from state interference and when the state may exercise its authority to regulate in the interests of its citizens.

B. Introduction of Grandparent Visitation Statutes

1. Demographic Shifts Reflect a Changing Society

In the past half-century, our society's demographics have changed significantly, modifying the shape of the American family. The divorce rate has nearly doubled, and the number of births out of wedlock continues to rise. These two factors

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state statute that regulated the hours of bakers because it was "unreasonable and entirely arbitrary" and thus violated the Fourteenth Amendment. See Lochner. The Lochner Court held that there is a "limit to the valid exercise of the police power...[otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power." Lochner at 56

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44. Pierce, 268 U.S. at 534-35.

45. Prince, 321 U.S. at 166 ("[T]he family itself is not beyond regulation in the public interest."); see supra notes 29-31 and accompanying text (discussing a state's parens patriae power).

46. See infra Part I.D. (discussing how state courts and the Supreme Court have addressed the constitutional limitations of grandparent visitation statutes).


48. See U.S. Census Bureau, Statistical Abstract of the United States: 1999, No. 91 (119th ed. 1999) (recording that, in 1950, there were 2.6 divorces per 1000 people and, in 1997, there were 4.3 divorces per 1000 people); Beth Bailey, Broken Bonds: The Effects of Divorce on Society, Family, and Children, Chi. Trib., Feb. 9, 1997, at 6 (observing that the United States has the highest divorce rate among advanced Western nations).

49. See U.S. Census Bureau, Statistical Abstract of the United States: 1999, No. 100 (119th ed. 1999) (recording that between 1980 and 1996 births to unmarried women increased from 18.4% to 32.4%).
have increased the number of children raised in single-parent households.\textsuperscript{50} Meanwhile, an individual's life expectancy has risen, and people are retiring earlier and wealthier.\textsuperscript{51} As a result, members of the older generation often have the time and the resources to play an active role in their adult children's and grandchildren's lives at a time when such assistance is desperately needed.\textsuperscript{52}

\textsuperscript{50} See U.S. Bureau of the Census, \textit{Children Under 18 Years Living With Mother Only, by Marital Status of Mother: 1960 to Present} <http://www.census.gov/population/socdemo/ms-la/tabch-5.txt> (last modified Jan. 7, 1999) (recording that, in 1960, approximately 5,105,000 children lived solely with their mothers; 1,210,000 of these single mothers had divorced and 221,000 of these single mothers never married; and in 1998, approximately 16,634,000 children lived solely with their mothers; 5,704,000 of these single mothers were divorced, and 6,700,000 of these single mothers never married); U.S. Bureau of the Census, \textit{Children Under 18 Years Living With Father Only, by Marital Status of Father: 1960 to Present} <http://www.census.gov/population/socdemo/ms-la/tabch-6.txt> (last modified Jan. 7, 1999) (recording that, in 1960, approximately 724,000 children lived solely with their father; 129,000 of these single fathers were divorced, and 22,000 of these single fathers were never married; and, in 1998 approximately 3,143,000 children lived solely with their fathers; 1,397,000 of these single fathers were divorced and 1,046,000 of these single fathers never married).

\textsuperscript{51} See \textit{Grandparents: The Other Victims of Divorce and Custody Disputes: Hearings Before the Subcomm. on Human Serv. of the House Select Comm. on Aging, 97th Cong. 1-2} (1982) (noting that many Americans will be grandparents for twenty to thirty years).

\textsuperscript{52} See U.S. \textit{CENSUS BUREAU, \textbf{STATISTICAL ABSTRACT OF THE UNITED STATES:} 1999 No. 85} (recording that, in 1980, 2,306,000 children lived in their grandparents' home: in 1,008,000 of these households one parent was present and in 988,000 of these households, no parents were present; and, by 1998, the number of children living their grandparents' home increased to 3,989,000: in 2,068,000 of these households, one parent was present and in 1,417,000 of these households, no parents were present); \textit{Generational Bonds, supra} note 34, at 1 (opening statement of Chairman Thomas J. Downey) (noting the increase in grandparents who raise their grandchildren when the parents cannot); \textit{id.} at 84-85 (statement of Sharron Roller) (discussing her experience raising her grandchild born to her teenage son). The number of organizations that have formed to aid these grandparents also evidences the increase in grandparents raising their grandchildren. See \textit{American Association for Retired People, Support Groups for Raising Grandchildren} <http://www.aarp.org/confacts/health/grandsupport.html> (last visited Feb. 24, 2001). The American Association for Retired People (AARP) Grandparent Information Center, the Brookdale Foundation Group, and Generations United are a few examples of organizations that provide resources for grandparents raising children. See \textit{id.} (listing organizations that provide information to grandparent care givers).
2. Legislative Recognition of Changes in the Nuclear Family
Through Creation of Grandparent Visitation Statutes

Whether due to marriage, divorce, relocation, or another
significant event, the American family's changing demographics
have increased intergenerational conflicts that sometimes
prohibit contact between grandparents and their grandchildren. In recognition of these conflicts, a handful of
states enacted legislation in the late 1960s that provided grandparents with a statutory right to petition courts for
intervention. Other states followed suit, and today all fifty
states have adopted grandparent visitation statutes. These
statutes are viewed as a codification of the equitable exceptions
recognized at common law because they apply only in the
limited circumstances surrounding divorce or the death of a
parent. Although grandparent visitation statutes are not
uniform, they are characterized by two analytical

53. See Generational Bonds, supra note 34, at 9 (statement of John H.
Pickering, Chair, Commission on Legal Problems of the Elderly, American Bar
Association, Washington, DC) (noting the increase in litigation regarding
grandparents' rights because of the changes in American society).

54. See id. at 27; see also Hicks v. Enlow, 764 S.W.2d 68, 70-71 (Ky. 1989)
("[T]he 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."); Judith L. Shandling, Note, The
Constitutional Constraints on Grandparents' Visitation Statutes, 86 COLUM. L.
REV. 118, 119 (1986) (observing that forty-one states enacted visitation statutes
after 1975).

55. See Troxel v. Granville, 530 U.S. 57, 73 n.* (2000); Shandling, supra
note 54, at 119 (observing that most statutes were enacted in the 1980s, and by
1986, forty-eight states had grandparent visitation statutes).

56. See Hicks, 764 S.W.2d at 70; Generational Bonds, supra note 34, at 3
(statement of Rep. Snowe) (stating grandparent visitation rights were generally
recognized following the death or divorce of a child's parents); Burns, supra
note 10, at 62 (arguing that the codification of the special circumstances
justifying ordered grandparent visitation at common law signaled to the courts
that they should defer to the legislature to specify the particular circumstances
under which ordered grandparent visitation is appropriate).

57. See Generational Bonds, supra note 34, at 2 (statement of Chairman
Thomas J. Downey) (noting that the scope of grandparent visitation statutes
vary widely). Chairman Downey points out that because state grandparent
statutes are not uniform, the efforts of grandparents seeking visitation in one
state may be thwarted if the child moves to a state that has different
grandparent visitation laws. Id.
components. First, such statutes define the circumstances under which grandparents have standing to petition for court-ordered visitation. Second, these statutes articulate the


The court shall order reasonable access to a grandchild by a grandparent if:
- at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent’s parental rights terminated; and
- access is in the best interest of the child, and at least one of the following facts is present:
  1. the grandparent requesting access to the child is a parent of a parent of the child and that parent of the child has been incarcerated in jail or prison during the three-month period preceding the filing of the petition or has been found by a court to be incompetent or is dead;
  2. the parents of the child are divorced or have been living apart for the three-month period preceding the filing of the petition or a suit for the dissolution of the parents’ marriage is pending;
  3. the child has been abused or neglected by a parent of the child;
  4. the child has been adjudicated to be a child in need of supervision or a delinquent child under Title 3;
  5. the grandparent requesting access to the child is the parent of a person whose parent-child relationship with the child has been terminated by court order; or
  6. the child has resided with the grandparent requesting access to the child for at least six months within the 24-month period preceding the filing of the petition.


A biological or adoptive grandparent may not request possession of or access to a grandchild if:
- each of the biological parents of the grandchild has:
  1. died;
  2. had the person’s parental rights terminated; or
  3. executed an affidavit of waiver of interest in child or an affidavit of relinquishment of parental rights under Chapter 161 and the affidavit designates an authorized agency, licensed child-placing agency, or person other than the child’s stepparent as the managing conservator of the child; and
- the grandchild has been adopted, or is the subject of a pending suit for adoption, by a person other than the child’s stepparent.

Tex Fam. Code Ann. § 153.434. Maryland’s visitation statute, entitled “Petition by grandparents for visitation,” by comparison provides: “An equity court may consider a petition for reasonable visitation of a grandchild by a grandparent:
standards by which judges must abide in order to grant a visitation petition. All fifty states require any grant of visitation to be in the child's best interests, although the legislatures often leave this standard undefined.

60. See Research Service Report, supra note 58, at 4.

61. Id. at 22 (noting that very few states articulate the best interest standard in the text of their statutes); see also Generational Bonds, supra note 34 (noting that the downfall of the indefinite "best interests" standard is the lack of restraint on judicial discretion in making decisions regarding family relationships); John DeWitt Gregory, Blood Ties: A Rationale for Child Visitation by Legal Strangers, 55 Wash. & Lee L. Rev. 351, 385-86 (1998) (suggesting that although the best interest standard may be appropriate in disputes between parents, it is too vague to sufficiently guide judges in non-parent visitation disputes); Shandling, supra note 54, at 122-25 (criticizing the best interest standard as being indeterminate). The states that do define the best interests standard typically enumerate several factors for the courts to consider in determining whether ordered visitation is in the child's best interest. E.g., Va. Code Ann. § 20-124.3 (Michie 1995 & Supp. 2000). The Virginia statute states:

Best interests of the child.; visitation—In determining best interests of a child for purposes of determining custody or visitation arrangements including any pendente lite orders pursuant to § 20-103, the court shall consider the following:

The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
The age and physical and mental condition of each parent;
The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;
The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
The role which each parent has played and will play in the future, in the upbringing and care of the child;
The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;
The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;
The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;
Any history of family abuse as that term is defined in § 16.1-228; and
Such other factors as the court deems necessary and proper to the determination.
The judge shall communicate to the parties the basis of the decision either orally or in writing.
In addition, although the law of domestic relations usually resides solely within the domain of the states, the movement to strengthen grandparents' rights through the enactment of grandparent visitation statutes has gained the attention and support of the federal government. In 1983, after a congressional hearing on grandparents' rights, the Senate and the House of Representatives passed a concurrent resolution, which found that "grandparents play a vital role in millions of American families" and urged states to develop and to enact a uniform statute that would allow grandparents to petition state courts for visitation privileges with their grandchildren. The House Select Committee on Aging and the Subcommittee of Human Services followed up the resolution with several hearings to assess the adequacy of the states' grandparent visitation statutes and to discuss the possibility of further congressional action. Even the executive branch responded to this issue; President Clinton, at the urging of Congress, declared 1995 "The Year of the Grandparent."

Grandparents' rights received recognition and affirmation from the federal government due in large part to the wealthy and expansive seniors' lobby. The lobbying efforts of seniors have

Id.; see also, e.g., FLA. STAT. ANN. ch. § 752.01(2), § 751.01(2) (1997); ME. REV. STAT. ANN. tit. 19-A, § 1803(3) (West 1998); NEV. REV. STAT. ANN. § 125.480(4)(1)(b) (Michie 1998); N.H. REV. STAT. ANN. § 458:17-d(1)(b) (Michie 1998); OHIO REV. CODE ANN. § 3109.05.1(B) (Anderson 1996 & Supp. 1999); OKLA STAT. ANN. tit. 10, § 5(B) (West 1998).

62. See Generational Bonds, supra note 34, at 2 (opening statement of Chairman Thomas J. Downey) ("Congress did not then, and does not now, have any general authority to legislate on family law questions . . .").

63. See Grandparents: New Roles and Responsibilities: Hearing Before the Subcomm. on Human Serv. of the Select Comm. on Aging, 103d Cong. 1 (1992) (hereinafter Roles and Responsibilities) (opening statement of Chairman Thomas J. Downey) ("While Congress has no general legislative authority over family law matters such as grandparent visitation . . . we have tried in many ways to influence the States to adopt uniform grandparent visitation laws.").

64. H.R. Res. 45, 98th Cong. (1983); see also Generational Bonds, supra note 34, at 2 (opening statement of Chairman Thomas J. Downey) (explaining that the concurrent resolution regarding grandparent visitation was an indirect attempt to influence the states' policies).

65. See Roles and Responsibilities, supra note 63, at 1 (opening statement of Chairman Thomas J. Downey).


67. See Generational Bonds, supra note 34, at 2 ("[I]t is a well-known fact that seniors are the most active lobby in this country, and when it comes to grandparents there is no one group more united in their purpose . . . without the aid and support of these groups many grandparents would not know that
made grandparents' rights, including grandparent visitation, an important legal and political issue.\textsuperscript{66} Due to their strength in numbers, wealth, and historical political activism, grandparents command the attention of legislators at the state and federal levels.\textsuperscript{69} Lobby groups in support of grandparent visitation cite the changes in demographics that gave rise to the earliest legislation, and also promote legislation that secures rights that are tied to their status as grandparents.\textsuperscript{70} Supporters of grandparents' rights argue that grandchildren and grandparents have a legal right to benefit from their unique relationship.\textsuperscript{71}

A number of states responded to this lobby and broadened their grandparent visitation statutes.\textsuperscript{72} Instead of making
standing contingent upon a disruption in the nuclear family, as do the statutes based on the equitable exceptions recognized at common law, the broadened statutes grant standing based on the status of being a grandparent. 73 Fourteen states have adopted open-ended statutes that grant standing to all grandparents. 74 Six states have statutes that grant standing to

of the state legislature's enactment of the grandparent visitation statute in light of these inherent benefits; Unprecedented Intrusion, supra note 12, at 30-31 (discussing how the grandparent lobby gave rise to the "open-ended" grandparent visitation statute). Some states have created a statutory right to grandparent visitation by requiring the court to grant such visitation. E.g., ALA. CODE § 30-3-4.1 (1989 & Supp. 2000) (providing that the court "shall grant any grandparent" visitation so long as it is in the child's best interests and establishing a rebuttable presumption in favor of grandparents); HAW. REV. STAT. ANN. § 571-46(7) (1999) (providing that visitation "shall be awarded" to grandparents "unless it is shown that rights of visitation are detrimental to the best interests of the child"); N.D. CENT. CODE § 14-09-05.1 (1997) (providing that grandparents "must be granted reasonable visitation rights" unless it is not in the child's best interest). In 1996, the Michigan legislature changed from allowing a grandparent to seek "visitaton" to allowing a grandparent to seek "grandparenting time." MICH. COMP. LAWS ANN. § 722.27b (West 1993 & Supp. 2000).

73. See MAYOUE, supra note 38, at 143-46 (1998) (explaining that the two basic types of grandparent visitation statutes are those derived from equity and those that are open-ended and noting that the rational behind open-ended statutes is that visitation with grandparents is generally in a child's best interests).

74. CONN. GEN. STAT. ANN. § 46b-59 (West 1995) (authorizing the court to grant grandparent visitation of a minor child "subject to such conditions and limitations as it deems equitable"); HAW. REV. STAT. ANN. § 571-46(7) (Michie 1999) (authorizing the court to grant grandparents reasonable visitation "unless it is shown that rights of visitation are detrimental to the best interests of the child"); IDAHO CODE § 32-719 (Michie 1996) (authorizing court to grant reasonable visitation to grandparents "upon a proper showing that visitation would be in the best interests of the child"); KY. REV. STAT. ANN. § 405.021(i) (Michie 1999) (authorizing a court to grant visitation to grandparents "if it determines that it is in the best interest of the child to do so"); MD. CODE ANN., [FAM. LAW] § 9-102(2) (Michie 1999) (authorizing a court to grant reasonable visitation of a grandchild if it "finds it to be in the best interests of the child"); Mo. ANN. STAT. § 452.402(1)(3) (West 1997) (authorizing a court to grant visitation to grandparents if the grandparent is unreasonably denied visitation for a period exceeding ninety days); MONT. CODE ANN. § 40-9-101 (1997) (authorizing a court to grant reasonable rights to contact with a grandchild "if it would be in the bests interests of the child"); N.Y. DOM. REL. LAW § 72 (McKinney 1999) (authorizing a grandparent to petition for visitation rights in any circumstances which "warrant the equitable intervention of the court"). But see Hertz v. Hertz, 717 N.Y.2d 497, 500 (2000) (holding the New York statute facially unconstitutional because it impermissibly interferes with parental autonomy rights). See N.D. CENT. CODE § 14-09-05.1 (1997) (requiring a court to grant reasonable visitation rights "unless a finding is made that visitation is not in the best interests of the minor"); OKLA. STAT. tit. 10, § 5 (1998) (providing that a grandparent "shall have reasonable rights of visitation to the child if the
grandparents if they have established or attempted to establish relationships with their grandchildren. Two states allow grandparents to petition for visitation at any time unless the children’s natural or adoptive parents are living together and

district court deems it to be in the best interest of the child); S.D. CODIFIED LAWS § 25-4-52 (Michie 1999) (authorizing a court to "grant grandparents reasonable rights of visitation with their grandchild, with or without petition by the grandparents, if it is in the best interests of the grandchild"); UTAH CODE ANN. § 30-5-2 (1998 & Supp. 2000) (authorizing a court to grant visitation rights to a grandparent if it is in the best interests of the child, the grandparent is a fit and proper person, repeated attempts to visit with the grandchild have been thwarted, court intervention is necessary, and the grandparent rebutted the presumption that the parent's decision to restrict visitation was reasonable); W. VA. CODE § 48-2B-5(a) (Michie 1999) (requiring the court to grant reasonable visitation to a grandparent if "visitation would be in the best interests of the child and would not substantially interfere with the parent-child relationship"); WIS. STAT. § 767.245(1) (West 1993 & Supp. 1999) (authorizing a court to grant reasonable visitation rights to a grandparent if it is in the best interest of the child); WYO. STAT. ANN. § 20-7-101 (Michie 1999) (authorizing a grandparent to bring an action for visitation rights and authorizing the court to grant the petition if it is in the best interest of the child and the parent's rights are not substantially impaired). The North Dakota statute was invalidated by Hoff v. Berg, 595 N.W.2d 285 (1999). See infra notes 146-50 and accompanying text (discussing the Hoff decision).

75. ALASKA STAT. § 25.20.065(a) (Michie 1998) (allowing a grandparent to establish reasonable rights of visitation if "(1) the grandparent has established or attempted to establish ongoing personal contact with the child; and (2) visitation by the grandparent is in the child's best interest"); CAL. FAM. CODE § 3104(a) (West 1999) (authorizing a court to grant reasonable visitation to a grandparent if the court "(1) finds that there is a preexisting relationship between the grandparent and grandchild that has engendered a bond such that visitation is in the best interest of the child; and (2) balances the interest of the child in having visitation with the grandparent against the right of the parents to exercise parental authority"); ME. REV. STAT. ANN. 19-A § 1803(1) (West 1998) (granting standing to a grandparent to petition the court for reasonable visitation if "[t]here is a sufficient existing relationship between the grandparent and grandchild that the grandparent has made a "sufficient effort" to establish such a relationship); MISS. CODE ANN. § 93-16-3(2)(a), (b) (1999) (authorizing a court to grant visitation rights to grandparents if "the grandparent of the child had established a viable relationship with the child and the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child; and [t]hat visitation rights of the grandparent with the child would be in the best interests of the child"); OR. REV. STAT. § 109.1211(a)(A), (B) (1999) (authorizing grandparents to petition the court for visitation rights if they have established or attempted to establish "ongoing personal contact with the child" and the custodian of the child denied them reasonable visitation); R.I. GEN. LAWS § 15-5-24.3 (1996) (authorizing a court to grant visitation rights to grandparents if it is in the best interest of the child, the grandparents are fit and proper people, the grandparents attempted to visit the child and were denied visitation and they rebutted the presumption that the parent's decision was reasonable).
both object to the visitation. Once the standing requirement is satisfied, all fifty states require the grandparents to demonstrate that visitation is in the best interests of the children by the state's applicable standard.

3. Third Party Visitation Statutes

The changing shape of American families has also caused third parties, other than grandparents, to seek visitation rights. Third parties, including stepparents, siblings and other relatives, foster parents, prospective adoptive parents, and biological parents' non-marital partners who play an essential role in a child's life may also want to obtain visitation rights with a minor child. However, other third parties have not had the

76. See Del. Code Ann. tit. 10 § 1031(7)(a) (1999) (authorizing a court to grant reasonable visitation to grandparents unless "the natural or adoptive parents of the child are cohabiting as husband and wife, and both parents object"); Ga. Code Ann. § 19-7-3(b)(1999 and Supp. 1999) (authorizing a grandparent to file an action for visitation unless "the parents of the minor child are not separated and the child is living with both of the parents").

77. See Research Service Report, supra note 58, at 4. Only a limited number of states define the best interests of the child. See supra note 61 (listing state statutes that list factors used to evaluate the best interests of the child).

78. See generally Gregory, supra note 7, (addressing issues that arise when a legal stranger seeks court-ordered visitation of a minor child).

79. See, e.g., Hickenbottom v. Hickenbottom, 477 N.W.2d 8, 17 (Neb. 1981) (holding that a stepfather was entitled to visitation with his stepdaughter because of his parent-like relationship to her); Cox v. Williams, 502 N.W.2d 128, 131 (Wisc. 1993) (holding that a former stepparent did not have standing to petition for visitation of a child of deceased husband).

80. See, e.g., In re Tamara R., 764 A.2d 844, 847-50 (Md. App. 2000) (allowing a child deemed "in need of assistance" by Social Services to petition for visitation with her other siblings); Noonan v. Noonan, 547 N.Y.S.2d 525, 526-27 (Kings 1989) (allowing a mother to sue on behalf of her two children to visit with their two half-siblings who had previously resided with them).

81. See, e.g., In re Melissa M., 421 N.Y.S.2d 300, 304 (N.Y. Fam. Ct. 1979) (denying foster parents visitation rights after child was returned to biological father and stepmother).

82. See, e.g., E.N.O. v. L.L.M., 711 N.E.2d 886, 892, 894 (Mass. 1999), cert. denied, 528 U.S. 1005 (1999) (holding that the biological mother's former lesbian partner could be granted visitation in equity because she was the child's de facto parent); V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000) (upholding a grant of visitation rights to a biological mother's former same-sex partner); In Re Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wisc. 1995) (holding that biological mother's former lesbian partner did not have standing to seek visitation of a child under the state's third party visitation statute, but that the court had equitable authority to grant such visitation).

83. See supra notes 78-82 (listing cases in which a third party, other than a grandparent, petitioned the court for access to a child); see also Eric G.
same success as grandparents in influencing states to provide them with a statutory remedy. Studies show that a non-parent’s close relationship with a child warrants a grant of visitation rights and have thus enacted statutes granting limited standing to third parties.

Andersen, *Children, Parents, and Nonparents: Protected Interests and Legal Standards*, 1998 B.Y.U. L. Rev. 935, 945-46 (1998). Andersen suggests that a non-parent's interest in visitation stems from two possible circumstances: a right derivative of the parent's interest in the child or a right stemming from a developed relationship with the child. Id. at 945. Andersen suggests that the non-parent must have "commenced the relationship in good faith and in a socially approved context" and further observes that courts will consider the interest of the third party based on the legitimacy of the third party's relationship with the minor child. Id. Therefore, a grandparent would have a stronger interest in visitation than a non-relative, and a stepparent would have a stronger interest in a child than does a non-marital cohabiting partner.

84. See Gregory, supra note 61, at 371 ("No other group of legal strangers to children has been as favorably treated with respect to visitation."). Even if other third parties are given statutory rights to petition the court for visitation, they usually are not granted the same visitation rights as grandparents. Id. at 351-52 (observing that "grandparents, aided by a raft of legislation and judicial decisions, fare infinitely better when petitioning for visitation" than other interested third parties). For example, California authorizes courts to grant "the children, parents, and grandparents of the deceased parent" visitation rights of a child. CAL. FAM. CODE § 3102(a) (West 1999). However, grandparents may seek visitation rights at any time. Id. § 3104.


Third party visitation has generated a large amount of scholarly commentary, with many authors urging a redevelopment of the basic principals that guide the law governing domestic relations. See Andersen, supra note 83, at 1000-01 (suggesting that as traditional legal standards relating to parent-nonparent disputes are challenged, courts should develop standards relative to the status of the parties involved in each case); Gregory, supra note 7, at 372-382 (discussing several different commentators' approaches to third party
C. Constitutional Limitations on Grandparent Visitation Statutes

Grandparent visitation statutes raise questions regarding the constitutional protection of parental autonomy and the ability of a state to foster and protect grandparent-grandchild relationships. In *Troxel v. Granville*, the Supreme Court reviewed a Washington Supreme Court ruling that the state's third party visitation statute was unconstitutional. Prior to *Troxel*, several grandparent visitation statutes were challenged in state supreme courts on the ground that the statutes violated the Due Process Clause of the Fourteenth Amendment. Critics argue that a visitation order issued over the objections of fit parents constitutes an impermissible infringement of the parents' fundamental liberty interest in raising their children.

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86. See infra Part I.D (discussing various state supreme court cases which consider the constitutional constraints of grandparent visitation statutes).


88. Id. at 60; see In re Custody of Smith, 969 P.2d 21, 30 (Wash. 1998), cert. granted, 527 U.S. 1069 (1999).

89. See U.S. CONST. amend. XIV, §1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law."); see also Brooks v. Parkerson, 454 S.E.2d 769, 774 (Ga. 1993) (holding that Georgia's grandparent visitation statute violated the Constitution); King v. King, 828 S.W.2d 630, 632-33 (Ky. 1992) (holding that Kentucky's grandparent visitation statute was constitutional and upholding a grant of visitation to paternal grandfather over the objections of the child's two married biological parents); Herndon v. Tuhey, 857 S.W.2d 203, 211 (Mo. 1993) (en banc) (holding that a grant of visitation rights to grandparents where a child's family was intact was a less than substantial encroachment on the parents' rights and thus the statute did not interfere with the parents' fundamental right to raise their child); Hoff v. Berg, 595 N.W.2d 285, 291 (N.D. 1999) (holding that North Dakota's grandparent visitation statute unconstitutionally infringed upon parents' fundamental rights to raise their children).

90. See Bostock, supra note 11, at 355; Burns, supra note 10, at 80-82; see also supra note 12 (listing commentators who have criticized grandparent visitation statutes as an unconstitutional infringement of parental rights). Attempts by grandparents to seek the protection of the fourteenth amendment have not succeeded. See, e.g., Cox v. Stayton, 619 S.W.2d 617, 620-21 (Ark.
Both common law and Supreme Court precedent firmly establish that an individual's right to be free from state interference in matters regarding his or her family is a fundamental right protected by the constitution. More specifically, a parent's fundamental right to direct the upbringing of his or her children without interference from the state is one of the most firmly established fundamental rights related to family privacy.

This liberty interest was first articulated by the Supreme Court in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. In both cases, the Court struck down a state statute because it unreasonably infringed upon "the liberty of parents and guardians to direct the upbringing and education of children under their control." In *Meyer*, the Supreme Court invalidated a Nebraska provision that prohibited teaching children a foreign language before they reached the ninth grade. In *Pierce*, the Court invalidated an Oregon statute requiring children between the ages of eight and sixteen to attend a local public school. In both opinions, the Court recognized that a state has the authority to regulate and protect the public and promote the

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92. See *Quillioin v. Walcott*, 434 U.S. 246, 255 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

93. 262 U.S. 390 (1923).

94. 268 U.S. 510 (1925); see also *Meyer*, supra note 91, at 533 (citing *Meyer* and *Pierce* as the "foundational family privacy cases").

95. *Pierce*, 268 U.S. at 534-535 (citing *Meyer*); see also *Meyer*, 262 U.S. at 399 (stating that the Fourteenth Amendment protects parents' rights to "establish a home and bring up children").


97. *Pierce*, 268 U.S. at 530, 536.
welfare of its citizens by requiring school attendance and regulating the qualifications of schools and teachers.\(^9\) However, the Court held that states cannot enact legislation that arbitrarily substitutes the state's judgment in place of the parents.\(^9\) The Court aptly notes in *Pierce* that "[t]he child is not the mere creature of the State."\(^{100}\) Thus, states can regulate to ensure the general welfare of children, but they cannot control the content of their education without special justification.\(^{101}\)

The Court subsequently relied upon the *Meyer-Pierce* doctrine of parental rights to decide an array of family privacy cases.\(^{102}\)

\(^{98}\) *Meyer*, 262 U.S. at 401 ("That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear . . ."); *Pierce*, 268 U.S. at 534. The *Pierce* court stated that:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

*Id.*

\(^{99}\) *Meyer*, 262 U.S. at 399-400; *Pierce*, 268 U.S. at 535.

\(^{100}\) *Pierce*, 268 U.S. at 535. Significantly, the *Meyer* Court anticipated this finding when it described Plato's *Ideal Commonwealth* where, in order to produce "ideal citizens," the most capable children are separated from their inferiors and raised together outside their individual family structure. *Meyer*, 262 U.S. at 401-02. The Court pointed out that this vision of society is in direct opposition to the notions on which our country was founded. *Id.* at 402. Because the state protects its citizens but does not take direct responsibility for their upbringing, as in Plato's *Ideal Commonwealth*, it should not take on this task indirectly via legislation that commandeers parental decision-making. See *Id.*

\(^{101}\) See *Pierce*, 268 U.S. at 534-35.

\(^{102}\) See Santosky v. Kramer, 455 U.S. 745, 753, 768 (1982) (citing *Meyer* and *Pierce* to illustrate the "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest" and thus holding that using a "fair preponderance of the evidence" standard in a parental rights hearing does not adequately protect this interest); Parham v. J.R., 442 U.S. 584, 602, 620-21 (1979) (citing *Pierce* and *Meyer* to establish that parents have the right and duty to raise their children, but holding that Georgia's procedures for admitting children into mental health facilities did not violate a child's due process rights under the Fourteenth Amendment); Zablocki v. Redtail, 434 U.S. 374, 385 (1978) (noting that *Meyer* and *Pierce* established that a parent's interest in child-rearing was part of a larger fundamental right of personal privacy); Quilloin v. Walcott, 434 U.S. 246, 255-56 (1978) (citing *Meyer* to support the notion that a parent-child relationship is protected by the Constitution, but holding that a Georgia statute allowing an illegitimate child to be adopted without the father's consent did not violate the father's Fourteenth Amendment Due Process or Equal Protection rights); Stanley v. Illinois, 405 U.S. 645, 651-52, 658 (1972) (citing to *Meyer* to establish that a father has a
In addressing state interference with parental decision-making, the Court has consistently affirmed the sanctity of parents' liberty interest in directing the upbringing of their children, emphasizing its "high place in our society." For example, in Wisconsin v. Yoder, the Court upheld the right of Amish parents to remove their children from school after eighth grade to raise them in the Amish value system. The Court noted that "[t]his primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." constitutional protected interest in retaining custody of his children and thus holding that by denying the father of an illegitimate child a fitness hearing, the state violated the Equal Protection Clause of the Fourteenth Amendment; Prince v. Massachusetts, 321 U.S. 158, 166, 170 (1944) (citing Pierce to establish that there is a "realm of family life which the state cannot enter," but holding that a Massachusetts child labor law did not impermissibly enter this realm).

These early substantive due process cases, which establish a fundamental right in child-rearing, have since become part of a line of precedent holding that the Fourteenth Amendment embodies a constitutional right of family privacy. See Meyer, supra note 91, at 531-44. Since deciding Meyer and Pierce in the 1920s, the Court has found family privacy to include fundamental rights to marriage, contraception, abortion, and kinship. See id. Yoder, 406 U.S. at 213-14; see also Hawk v. Hawk, 855 S.W.2d 573, 578 (Tenn. 1993) ("The right to rear one's child is... heavily protected by federal constitutional jurisprudence.").

In Yoder, the parents' assertion of parental rights under the Fourteenth Amendment was bolstered by a claim of religious freedom under the First Amendment. Id. at 233. The combination of rights to parental autonomy and religious freedom created a burden on the state to show that the legislation was more than merely rational and competent. Id. at 233-34. In Meyer and Pierce, parents challenged state legislation because they sought to provide their children with education that was impermissible under state law. Pierce, 268 U.S. at 511; Meyer, 262 U.S. at 402-03. These two cases can be contrasted to grandparent visitation cases, where the state is seeking to broaden, not limit, the child's education opportunity. See e.g., King v. King, 828 S.W.2d 630, 632 (Ky. 1992). Grandparent visitation cases are analogous to the Yoder case, because in Yoder, the State's position was that the child would have more complete educational experiences in public schools, as opposed to being educated in the Amish community. Yoder, 406 U.S. at 208, n.3. Similarly, the states support grandparent visitation legislation by arguing that the statutes are aimed at advancing a children's welfare by securing their opportunity to
Despite its lip service to parental rights, the Court will not strike down state legislation merely because it touches upon a parental decision. Some state regulation affecting the family is necessary because states endeavor to protect the population's welfare even while relying on the family to nurture their citizens. Moreover, the Court has yet to consistently use a single test to consider state regulation challenged under the Due Process Clause. Often the Court will employ a strict scrutiny analysis that renders a statute unconstitutional if it infringes upon a fundamental right unless it is narrowly tailored to serve a compelling state interest. In reality, however, the Court has reap the benefits of the grandparent-grandchild relationship. See, e.g., King, S.W.2d at 632.

107. See, e.g., Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating that "the family itself is not beyond regulation in the public interest").

108. See supra notes 30-32 and accompanying text (discussing the parents patriae doctrine). In Prince, the Court upheld a labor law forbidding minor children to sell merchandise in public places against a challenge from a legal custodian who sought to allow her children to sell religious publications on the street. Prince, 321 U.S. at 170. In its analysis, the Court reaffirmed that "it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Id. at 166. However, the Court stated that the family was not totally outside the realm of state legislation, particularly in light of the "crippling effects of child employment" that the state was seeking to remedy. Id.

The Court has also held that an unsound decision by a parent does not void that parent's fundamental right of parental autonomy. See Santosky v. Kramer, 455 U.S. 745, 753-54 (1982). In considering the evidentiary burden a state is required to meet to terminate parental rights, the Supreme Court noted that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents." Id. at 753. Although this case addressed complete termination of parental rights, while considering the grandparent visitation issues, it raises the question of when state intervention is permissible if it is not justified merely because the parent is not a model parent. Id.

109. See Meyer, supra note 91, at 534-35.

110. See Washington v. Glucksberg, 521 U.S. 702, 721 (1997). In analyzing the constitutionality of a statute under the Fourteenth Amendment's Due Process Clause, a court must begin by identifying the nature and classification of the liberty interest that opponents of the statute seek to protect. See Reno v. Flores, 507 U.S. 292, 302 (1993) ("Substantive due process analysis must begin with a careful description of the asserted right."). A liberty interest is deemed fundamental, and thus protected by the Fourteenth Amendment, if it is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." Glucksberg, 521 U.S. at 720-21 (internal citations omitted). To classify a liberty interest as "fundamental," the Court may examine whether the right was recognized at common law. Id. at 709-18. The Court may also rely on precedent to determine if a right should be treated as fundamental. See Reno, 507 U.S. at 303. If the Court identifies the liberty interest as "fundamental,"
not uniformly relied on this analysis. For example, in Planned Parenthood of Southeastern Pa. v. Casey, the Court failed to apply "strict scrutiny" to a statute infringing the right to an abortion, which it previously had declared a fundamental right. Instead, the Court inquired whether the state statute "unduly burdened" this right.

Moreover, in considering a substantive due process claim, the Court may decline to articulate the analysis upon which it relied. In Moore v. City of East Cleveland, in which the court struck down a housing ordinance defining "family" so as to prevent two cousins from residing together in their grandmother's home, the Court avoided applying a specific test. Instead, the plurality noted that "appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society."

Some commentators suggest that the level of scrutiny a court applies depends on the specific interest invoked by the facts of each case. Due to the different approaches the Court uses in

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111. See Meyer, supra note 91, at 556-57.
113. Id. at 874 ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the state reach into the heart of the protected liberty. . . ."); see also generally Roe v. Wade, 410 U.S. 113 (1973).
114. Casey, 505 U.S. at 876-79.
115. See, e.g., infra note 118 and accompanying text.
117. See id. at 505-06. Relying heavily on the doctrine of Meyer and Pierce, the plurality found that by preventing a grandmother from establishing a home with two cousins because they were not brothers, the city's ordinance impermissibly dictated state policy inside the family realm. Id. The plurality did not employ a strict scrutiny analysis, but instead cited the holding of Pierce and found "by the same token the Constitution" prohibits the Ohio statute. Id. at 506.
118. Id. at 503 (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (Harlan, J., concurring)).
119. See Meyer, supra note 91, at 575. Professor Meyer suggests that whichever level of scrutiny the Court purports to apply, it will ultimately use a reasonableness standard. Id. at 548. He also points out that the lack of a
its substantive due process cases, the perimeters of fundamental rights is often regarded as a "quagmire" of jurisprudence. Accordingly, whenever the Supreme Court grants certiorari to a substantive due process claim, legal commentators and practitioners follow the case with great anticipation.

D. Anticipating Troxel: State Supreme Courts Offer Substantive Due Process Analysis of Grandparent Visitation Statutes

The Troxel case enjoyed a wide audience because the state supreme courts that had considered the constitutional limitations on grandparent visitation statutes reached conflicting conclusions. While the Kentucky and Missouri grandparent visitation statutes survived constitutional challenge, four states—Tennessee, Georgia, North Dakota, and Washington—declared that their states' grandparent visitation statutes unconstitutionally violated substantive due process rights.

Kentucky was the first state supreme court to rule explicitly on the constitutional issues arising from grandparent visitation statutes. In King v. King, the Kentucky Supreme Court acknowledged that while parents enjoy a constitutional right to raise their children free from government interference, that right is not absolute. The court agreed with the Kentucky consistent standard is troublesome because it fails to give lower courts proper guidance. Id. at 547.

120. Id. at 531.
121. See Collins, supra note 9, at 9.
122. See infra Part I.D (discussing the holdings of state supreme court cases addressing the constitutionality of grandparent visitation statutes).
123. See King v. King, 828 S.W.2d 630, 632 (Ky. 1992); Herndon v. Tuhey, 857 S.W.2d 203, 208 (Mo. 1993).
125. See King, 828 S.W.2d at 630. The Kentucky grandparent visitation statute, at issue in King, provided:

**Reasonable Visitation Rights to Grandparents**

The 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 interest of the child to do so . . . .

The action shall be brought in Circuit Court in the county in which the child resides.


126. See King, 828 S.W.2d at 631. The court pointed out that state
legislature that allowing grandparents to petition for visitation rights was "an appropriate response to the change in the demographics of domestic relations" and that the procedural requirements of the statute would adequately protect parental rights. Therefore, the statute did not violate the United States Constitution.

The Supreme Court of Missouri considered the constitutionality of its grandparent visitation statute in Hemdon v. Tuhey. The Hemdon court focused on the extent to which the statute infringed upon parents' constitutional rights.

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127. Id. at 632. In expressing its approval of the policy behind rule 12.9, section 405.021 of the Kentucky Code, the court asserted:

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 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.

128. Id. The procedures, which the court concluded would adequately protect parental rights, include filing an action, conducting a hearing before a judge or commissioner, and recording findings of facts and conclusions demonstrating that the ruling is in the best interest of the child. Id.

129. Id. 857 S.W.2d 203 (Mo. 1993). The Missouri grandparent visitation statute, in pertinent part, states:

The court may grant reasonable visitation rights to the grandparents of the child and issue any necessary orders to enforce the decree. The court may grant grandparent visitation when:

- The parents of the child have filed for a dissolution of their marriage. A grandparent shall have the right to intervene in any dissolution action solely on the issue of visitation rights. Grandparents shall also have the right to file a motion to modify the original decree of dissolution to seek visitation rights when such rights have been denied to them;
- One parent of the child is deceased and the surviving parent denies reasonable visitation rights; or
- 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. The court may order reasonable conditions or restrictions on grandparent visitation.


131. Hemdon, 857 S.W.2d at 208 ("[T]he magnitude of the infringement by the state is a significant consideration in determining whether a statute will be
Because the grandparent visitation would be "temporary" and "occasional," the court found that the resulting intrusion upon parental authority was "minimal." Like the Kentucky court in King, the Hemdon court approved of the legislature's desire to foster grandparent-grandchild relationships. Accordingly, the Hemdon court upheld the Missouri statute.

In contrast, the Tennessee Supreme Court, in Hawk v. Hawk, ruled that Tennessee's Grandparents' Visitation Act interfered with the fundamental liberty interests in parental autonomy articulated in Meyer and Pierce. The court focused on the standard used by the trial judge considering the case. Because the statute did not require the trial judge to make any initial findings that would justify disregarding a parent's judgment, the trial judge could usurp parental authority whenever he or she disagreed with the parents regarding the best interests of the child, based solely on the generalized

struck down as unconstitutional.").

132. Id. at 209-10.
133. Id. For a critique of the Hemdon decision see Joan C. Bohl, Family Autonomy vs. Grandparent Visitation: How Precedent Fell Prey to Sentiment in Hemdon v. Tuhey, 62 Mo. L. Rev. 755, 757 (1997), arguing that Hemdon was wrongly decided because the court based its ruling on generalized notions of sentiment. But see Parham v. J.R., 442 U.S. 584, 602 (1979) ("As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point... but [the fact that some people act contrary to the presumption] is hardly a reason to discard wholesale those pages of human experience... ").

134. Hemdon, 857 S.W.2d at 210-11.
135. 855 S.W.2d 573 (Tenn. 1993).
136. TENN. CODE. ANN. § 36-6-301 (1985) (allowing the court to grant "reasonable visitation" if it serves "the best interests of the minor child"). The ruling in Hawk has not thwarted the legislature's efforts to allow for grandparent visitation. See id. § 36-6-301(B) (1996 & Supp. 2000) [authorizing grandparents' to petition for visitation rights when the state places their grandchild in a foster home]; id. § 36-6-306(4) (1996 & Supp. 1999) [authorizing grandparents to petition for visitation rights upon the death or divorce of their grandchild's parents]; id. § 36-6-307(b) (1996 & Supp. 2000) [authorizing grandparents to petition for visitation of a grandchild who has been adopted by a relative or stepparent if the grandparent had a close relationship with the grandchild and the grandchild's welfare would be threatened without visitation).

137. See Hawk, 855 S.W.2d at 578. "[T]he right to rear one's children is so firmly rooted in our culture that the United States Supreme Court has held it to be a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution." Id. (citing Meyer, 262 U.S. at 399). "The Supreme Court has reaffirmed this right on many occasions." Id. (discussing Pierce, 268 U.S. at 534-45).
138. Id. at 577, 582.
notion that grandparent visitation is beneficial.\textsuperscript{139} The Tennessee court concluded that in order to adequately protect a parent's constitutional rights, a court should grant visitation only upon proof of harm or potential harm to the child.\textsuperscript{140}

Two years later, the Supreme Court of Georgia in \textit{Brooks v. Parkerson},\textsuperscript{141} reached a similar conclusion regarding its grandparent visitation statute.\textsuperscript{142} The court declared the statute unconstitutional under both the U.S. and Georgia State Constitutions.\textsuperscript{143} The court determined that the right to raise a child without state interference constituted a fundamental

\begin{itemize}
  \item \textsuperscript{139} \textit{Hawk} declared that court-ordered visitation despite the objection of two fit parents, who are married and retain custody of their child, amounted to a constitutional violation. \textit{Id.} at 582. The Court justified the "harm to the child" standard by finding that "[t]he federal cases that support the constitutional right to rear one's child and the right to family privacy also indicate that the state's power to interfere in the parent-child relationship is subject to a finding of harm to the child." \textit{Id.} at 580. In reviewing Supreme Court jurisprudence on this issue, the \textit{Hawk} court noted that in \textit{Yoder, Pierce,} and \textit{Meyer}, the fact that the child was not subject to harm in receiving an Amish (\textit{Yoder}) or private school education (\textit{Pierce}) or learning a foreign language (\textit{Meyer}) was an essential factor in the Court's ruling that the statutes were unconstitutional. \textit{Id.} Similarly, the Supreme Court held that a state cannot eliminate parental rights without finding, by clear and convincing evidence, that the child was neglected. \textit{Id.} (discussing \textit{Stanley v. Illinois}, 405 U.S. 645 (1972)). On the other hand, in \textit{Prince}, the Supreme Court allowed the state to prohibit children from selling materials on the street because of the potential harms associated with child employment. \textit{Id.} (discussing \textit{Prince v. Massachusetts}, 321 U.S. 158, 170 (1944)).
  \item \textsuperscript{140} The Tennessee legislature incorporated the "harm to the child" standard along with a public policy rationale in the text of its visitation statute, providing that:
    
      [T]he general assembly finds that it is sound public policy to provide children with the stability and continuity of meaningful relationships in their lives. If grandparents have had a sufficient existing relationship with a child, a loss of that relationship would be a severe emotional and psychological blow to the child, and such a loss creates a rebuttable presumption of substantial danger to the welfare of the child.

      \textbf{TENN. CODE ANN.} § 36-6-307 (1996 & Supp. 1999). This statute now reads more explicitly, providing that "in considering a petition for grandparent visitation the court shall first determine the presence of a danger of substantial harm to the child." \textit{Id.} § 36-6-306 (Supp. 2000).
  \item \textsuperscript{141} \textit{Id.} at 769 (Ga. 1995).
  \item \textsuperscript{142} \textit{Id.} at 770; see \textbf{GA. CODE ANN.} § 19-7-3 (Harrison 1988). The Georgia grandparent visitation statute provides that "the court may grant any grandparent of the child reasonable visitation rights upon proof of special circumstances which make such visitation rights necessary to the best interests of the child." \textit{Id.}
  \item \textsuperscript{143} \textit{Brooks}, 454 S.E.2d at 773.
\end{itemize}
liberty that warranted the protection of the Fourteenth Amendment. The court further agreed with the Tennessee Supreme Court's holding in *Hawk* that a "harm to the child" standard must be used in visitation cases.

Unlike the Tennessee and Georgia courts, the Supreme Court of North Dakota, in *Hoff v. Berg*, did not require proof of harm to the child to justify state action in grandparent visitation cases. Rather, the court first identified parental autonomy as a fundamental interest and then applied strict scrutiny to the statute. The court held that North Dakota's grandparent visitation statute was not sufficiently narrow, and thus was unconstitutional, because the state could not articulate a compelling interest in the presumption that grandparent visitation was in the best interests of a child unless the parents could prove otherwise.

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144. Id. at 772.

145. Id. The court found that a state can interfere with this right only to protect the health and welfare of the child and when "parental decisions in the area would result in harm to the child." Id. Section 19-7-3(c) of the Georgia Code allows courts to grant grandparent visitation if it "finds the health or welfare of the child would be harmed unless such visitation is granted, and if the best interests of the child would be served by such visitation." GA. CODE ANN. § 19-7-3(c).

146. 595 N.W.2d 285 (N.D. 1999).

147. Id. at 287; see N.D. CENT. CODE § 14-09-05.1 (1997). The statute provides in relevant part:

**GRANDPARENTAL RIGHTS OF VISITATION TO UNMARRIED MINORS—MEDIATION OR ARBITRATION.** The grandparents of an unmarried minor must be granted reasonable visitation rights and the great-grandparents may be granted reasonable visitation rights to the minor by the district court upon application by the grandparents or great-grandparents unless a finding is made that visitation is not in the best interests of the minor. Visitation rights of grandparents to an unmarried minor are presumed to be in the best interest of the minor. The court shall consider the amount of personal contact that has occurred between the grandparents or great-grandparents and the minor and the minor's parents. This section does not apply to agency adoptions or when the minor has been adopted by a person other than a stepparent or grandparent.

Id.

148. *Hoff*, 595 N.W. 2d at 289-90. Describing the strict scrutiny standard, the North Dakota court explained that "[w]here fundamental rights or interests are involved, a state regulation limiting these fundamental rights can be justified only by a compelling state interest and legislative enactments must be narrowly drawn." Id. (quoting Alexander v. Whitman, 114 F.3d 1392, 1403 (3d Cir. 1997) (citations omitted)).

149. Id. at 291-92. For further comment on *Hoff*, see generally David T. Whitehouse, *Constitutional Law—Grandparent Visitation Rights: North Dakota*.
II. TROXEL V. GRANVILLE: NINE JUSTICES AND SIX OPINIONS

The constitutional questions concerning the validity of visitation statutes came to the forefront in Troxel v. Granville when the Supreme Court considered the application of the statutes to real families.\(^\text{150}\) The respondent, Tommie Granville, and the petitioner's son, Brad Troxel, shared a serious relationship from January 1989 until June 1991.\(^\text{151}\) Although they were never married, they had two daughters together, Natalie and Isabelle Rose.\(^\text{152}\) Upon severing their relationship in 1991, Granville retained primary custody while the girls spent every other weekend with Brad Troxel, often staying at Brad's parents' home.\(^\text{153}\) Brad Troxel committed suicide in May 1993.\(^\text{154}\)

After his death, Brad's parents, Gary and Jenifer Troxel, maintained regular contact with the girls, until October 1993 when a dispute arose between Granville and the Troxels regarding the frequency of the Troxels' request to visit with the children.\(^\text{155}\) Because Granville had married and her new husband had two children from a prior marriage, she sought to limit her daughters' visitation with the Troxels to once a month in an effort to foster the development of her new blended family.\(^\text{156}\) Dissatisfied with Granville's proposal, the Troxels petitioned the Skagit County Superior Court pursuant to Washington's third party visitation statute seeking court-ordered visitation with their granddaughters two weekends a month, Thanksgiving, Christmas, and Easter, and visitation for two weeks during the summer.\(^\text{157}\)

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\(^\text{150}\) Troxel v. Granville, 530 U.S. 57, 60 (2000).
\(^\text{151}\) Id.
\(^\text{154}\) Troxel v. Granville, 530 U.S. at 60.
\(^\text{155}\) Id. at 60-61.
\(^\text{156}\) Respondent's Brief at 9.
\(^\text{157}\) Troxel, 940 P.2d at 699; Petitioner's Brief at 4-5. Section 26.10.160(3) of the Washington Code is classified as a third party visitation statute because "[a]ny person" has standing to petition the court for visitation of a minor child; the statute on its face is not limited to grandparents. WASH. REV. CODE § 26.10.160(3) (1997). However, under the facts of Troxel, the third party petitioners were grandparents and thus the case was analogous to cases arising under the more common grandparent visitation statutes. Troxel, 530 U.S. at 57. The Troxel case was billed as a "grandparents rights" case by the media and received national attention because its ruling was anticipated to impact grandparent visitation legislation, unlike third party visitation...
At trial in 1994, Granville testified that she did not want to completely deny the Troxels visitation with their grandchildren, but sought only to limit the length and frequency of the visits. Specifically, the parties disagreed on whether the girls should stay overnight in the Troxels' home. The trial judge granted the Troxels one overnight visit a month, one week during the summer, and four hours on each of the Troxel's birthdays.

Granville appealed the trial judge's decision to the Washington Court of Appeals. After reviewing the legislative history of Section 26.10.160(3), the Court of Appeals reversed the trial court and held that the Troxels did not have standing to petition for visitation without a separate custody action pending. The Court of Appeals ruled that this limitation was necessary to make the statute "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the 'care, custody, and management' of their children." The Washington Supreme Court subsequently granted the Troxels' appeal and affirmed the decision of the appellate court. The Washington Supreme Court, however, declined to follow the appellate court's holding. Instead, the supreme statutes, which have been enacted in all fifty states. See supra note 6 (listing major newspaper articles discussing Troxel as a grandparent visitation rights case). The media correctly anticipated that the fact that the case arose from a third party visitation statue as opposed to a grandparent visitation statute was not significant due to factors the Court considered; the status of the Troxels as "grandparents" did not impact the outcome. See infra notes 186-91 and accompanying text (explaining the three factors that supported the Troxel plurality's holding).

158. Troxel, 940 P.2d at 699.
159. Tommy hired a counselor who recommended that the Troxels visit with Natalie and Isabelle one day a month without an overnight stay. Id.
160. Id.
161. Id. at 698.
162. Id. at 699-701. The court reasoned that because parents enjoy a constitutionally protected right to be free from state interference in the "care, custody, and management" of their children, the legislature could not have intended the statute to have the meaning as read on its face, i.e., that "any person" could petition the court at "any time." Id. at 700.
163. Id. at 701. The Troxels unsuccessfully argued that a 1992 proceeding brought under the Uniform Parentage Act resulting in a parenting plan between Tommie and Brad satisfied the conditions necessary to give them standing. Id. at 701. The court rejected this argument because the parenting plan was not in the record, furthermore, it interpreted the statute to require that visitation be granted as part of the proceedings, not subsequent to them. See id.
164. Id. at 700.
166. Id. at 26 ("Our concern with the Court of Appeals analysis is its reluctance to address the plain language of RCW 26.10.160(3."). Although the
court accepted the plain meaning of the statute and held that as written, Section 26.10.160(3) granted standing to the Troxels. The court went on to hold that the visitation statute was unconstitutional on its face. The court reasoned that allowing a judge to order visitation over the objections of parents without an initial finding of potential harm to the child was an infringement on parents' fundamental rights to rear their children without state interference.

In its analysis, the Washington Supreme Court emphasized its desire to protect the integrity of the family unit, which has been "zealously guarded by the courts." To achieve this protection, the court reviewed the sources of state power and reasoned that the state is not authorized to intrude upon parental decision-making absent a finding of harm to the child. Therefore, the court found that the visitation statute was unconstitutional because it did not safeguard parents' fundamental rights.

The Troxels appealed their case and the United States Supreme Court granted certiorari in 1999. The Supreme Court upheld the Washington Supreme Court's ruling six to

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supreme court agreed that to allow any person to petition for visitation at any time had "potentially troubling" consequences, it found that the statute unambiguously permitted this. Id. at 26-27. Therefore, it struck the statute down and forced the legislature to redraft it. Id. at 27.

167. See id. at 25 ("When the words in a statute are clear and unequivocal, this court is required to assume the Legislature meant exactly what it said and apply the statute as written.") (quoting Duke v. Boyd, 942 P.2d 351, 354 (Wash. 1997)).

168. Id. at 29.

169. Id.

170. Id. at 28.

171. Id. The court stated that Washington's two sources of authority are derived from the police power and the parens patriae power. Id. According to the opinion, the police power authorizes states to "protect citizens from injuries inflicted by third persons or to protect its citizens from threats to health and safety." Id.

172. Id. at 30-31. The court further explained that allowing Washington to issue a visitation order over parental objection without a showing of harm to the child "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.'" Id. In addition, the court suggested that the statute required the petitioner to show he or she had a substantial relationship with the child. Id. at 31. The court reasoned that in the absence of a substantial relationship, the child probably won't be harmed by a lack of visitation. Id.

173. Id.

three with no majority opinion.\textsuperscript{176}

A. The Plurality Focuses on the Application of an Open-ended Third Party Visitation Statute

Justice O'Connor, joined by Chief Justice Rehnquist, Justice Ginsburg and Justice Breyer, wrote the plurality opinion, which held that Section 26.10.160(3) was unconstitutional as applied by the trial court to Tommie Granville.\textsuperscript{176} Justice O'Connor noted that Washington's legislature enacted the third party visitation statute in response to changes in the composition of the American family, particularly the increase in single-parent households.\textsuperscript{177} However, despite the legislature's legitimate motives, laws that allow non-parents to challenge parental discretion in a judicial proceeding come with the cost of burdening the parent-child relationship.\textsuperscript{178} Justice O'Connor revisited the substantive due process precedent that established the right of parents to be free from state influence in decisions regarding the care, custody, and control of their children.\textsuperscript{179} She discussed the protection of the Fourteenth Amendment, citing the \textit{Meyer-Pierce} doctrine,\textsuperscript{180} and reaffirmed that "[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."\textsuperscript{181}

Although the Washington Supreme Court declared Section 26.10.160(3) unconstitutional pursuant to the Fourteenth Amendment and the \textit{Meyer-Pierce} doctrine, the plurality limited this holding by finding the statute unconstitutional only as applied to Granville.\textsuperscript{182} The plurality stressed that a combination

\textsuperscript{176} \textit{Id.} The Court discussed parental rights in relation to all third parties. \textit{Id.} at 63-64.
\textsuperscript{177} \textit{Id.} at 64 (noting that "while many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households . . . . In these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing.").
\textsuperscript{178} \textit{Id.}
\textsuperscript{179} \textit{Id.} at 66.
\textsuperscript{180} See supra Part I.C (explaining how \textit{Meyer} and \textit{Pierce} established a parent's fundamental right to raise his or her children free from state interference).
\textsuperscript{181} \textit{Troxel}, 530 U.S. at 66.
\textsuperscript{182} \textit{Id.} at 74-75.
of factors contributed to their finding that the trial judge's initial ruling in Troxel clearly violated Granville's constitutional rights.\(^{183}\) First, the Court stated that "there is a presumption that fit parents act in the best interests of their children."\(^{184}\) Therefore, absent evidence to the contrary, the trial judge should have given preference to Granville's evaluation of the best interests of her daughters.\(^{185}\) Second, not only did the trial judge ignore the presumption in favor of Granville, but also he erroneously based his decision on the opposite presumption—that unless proven otherwise, grandparent visitation is in the best interests of grandchildren.\(^{186}\) Third, Granville did not want to completely deny the Troxels visitation with their grandchildren; she sought only to limit the visitation to one short visit per month and limited holidays.\(^{187}\) In light of these factors, the plurality held that, the visitation order issued by the Washington Superior Court violated Granville's due process rights.\(^{188}\)

The plurality did not define the precise scope of the parental right to make decisions regarding grandparent visitation.\(^{189}\) It neither adopted nor rejected the standard proposed by the Washington Supreme Court that there must be a potential for harm to the children in order to justify judicial intervention.\(^{190}\) Instead, the plurality criticized the Washington statute for enabling a judge to substitute his or her judgment for that of a fit parent.\(^{191}\) The plurality stated that the trial judge must "accord at least some special weight" to parents' judgment when considering whether to grant a third party visitation rights.\(^{192}\) However, the plurality declined to incorporate that special weight into a standard that would consistently guarantee

\(^{183}\) Id. at 68.
\(^{184}\) Id.
\(^{185}\) Id. at 70.
\(^{186}\) Id. at 69.
\(^{187}\) Id. at 71.
\(^{188}\) Id. at 72.
\(^{189}\) Id. at 73.
\(^{190}\) Id.
\(^{191}\) Id. at 67 ("[T]hus, in practical effect, in 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.").
\(^{192}\) Id. at 70.
sufficient constitutional protection of parents' rights. 193

B. Two Concurring Justices Support a Facial Invalidation of Washington's Third party Visitation Statute

Justice Souter did not join the plurality, but instead wrote a separate concurrence, stating that he would uphold the Washington Supreme Court's decision, which declared the statute unconstitutional on its face. 194 Like the plurality, Justice Souter declined to evaluate the Washington Supreme Court's holding; however, he supported the Washington Supreme Court's finding that by allowing a judge to grant visitation rights to "any person" who petitioned the court "at any time," based solely on a best interests standard, the statute was impermissibly broad. 195 Because the statute completely disregarded a fundamental right, Justice Souter concluded that the Washington Supreme Court correctly struck down the statute as unconstitutional based on its breadth. 196

Justice Thomas, who wrote a separate concurrence, also found the Washington Statute facially unconstitutional on its face. 197 While Justice Thomas agreed with the plurality regarding the statute's infringement upon a recognized fundamental right, he criticized the plurality for not applying the strict scrutiny standard. 198

C. Dissenting Justices Cite Insufficient Findings and Lack of

193. Id. at 68.
194. Id. at 75 (Souter, J., concurring).
195. Id. at 78 (Souter, J., concurring) (relying upon Meyer). Justice Souter also noted that "parental choice in such matters is not merely a default rule" in the absence of a government interest. Id. at 79 (Souter, J., concurring).
196. Id. at 77-79 (Souter, J., concurring). Justice Souter found it unnecessary to define precisely which statutory provisions would sufficiently protect parental rights. Id. at 78-79 (Souter, J., concurring).
197. Id. at 80 (Thomas, J., concurring). Justice Thomas argued that the Washington statute could not survive strict scrutiny because the state of Washington did not have a compelling interest in "second-guessing a fit parent's decision regarding visitation with third parties." Id. (Thomas, J., concurring).
198. Id. (Thomas, J., concurring). Justice Thomas implied that the plurality approached the issue improperly: "I write separately to note that neither party has argued that our substantive due process cases were wrongly decided . . . ." Id. (Thomas, J., concurring). Although Kennedy and Souter found that the Washington statute touched upon a fundamental right, Justice Thomas commented that neither applied strict scrutiny as precedent requires. Id. (Thomas, J., concurring).
Precedent To Sustain a Constitutional Challenge

Justice Stevens wrote the first of three dissenting opinions in arguing that the trial court did not make sufficient findings of fact to allow the case to be reviewed. Justice Stevens believed that the Court should have corrected the Washington Supreme Court's flawed reasoning and remanded the case for additional findings.

The broad language of the Washington statute did not trouble Justice Stevens. He suggested that the open standing provision was justified by the legislature's recognition of third parties who should be able to obtain a visitation order in light of their well-established relationship with the child. Next, Justice Stevens criticized the Washington Supreme Court's holding that judicial intervention is not permissible absent a showing of potential harm to the child, arguing that precedent does not mandate such a rigid and extreme standard.

Justice Scalia wrote a brief dissent in which he argued that the right of parents to be free from state intervention in the care, custody, and control of their children is not as well established as the other Justices suggest. By recognizing and affirming the existence of parental rights "under a Constitution that does not even mention them," Justice Scalia argued that the Court has begun to federalize family law. He would have reversed the Washington Supreme Court's holding in Troxel on the grounds that the judiciary lacked the authority to interfere with the state legislature's action on this issue.

In the final dissent, Justice Kennedy disagreed with the Washington Supreme Court's holding that a "harm to the child" standard must be applied in all third party visitation cases.
He argued that Supreme Court precedent did not require such a strict standard. Moreover, Justice Kennedy believed that the Washington Supreme Court was imprudent in replacing the universally adopted "best interests of the child" standard with a new "harm to the child" standard. Justice Kennedy conceded that awarding visitation privileges to a third party based on a judge's assessment of the child's best interests may not adequately protect parents' rights in all cases, and contended that the Washington Supreme Court went too far in holding that proof of potential harm to the child is necessary to justify judicial intervention in all cases. Justice Kennedy called for a flexible standard that would allow the family courts to use their discretion and experience in resolving such difficult cases.

III. UNCOVERING THE CONSENSUS IN THE TROXEL OPINIONS

A. The First Component: An Open Grant of Standing Raises Little Concern

The plurality in Troxel did not express concern regarding the open standing provision in Section 26.10.160(3). Rather, the plurality discussed the policies that motivated the legislatures to give third parties a statutory right to petition for visitation, and

208. Id. at 96-98 (Kennedy, J., dissenting) (noting that although cases such as Prince and Yoder have held that states possess authority to intervene to protect a child from harm, these cases fail to establish that state intervention is limited to cases in which a potential for harm exists).

209. Id. at 99-100 (Kennedy, J., dissenting) (explaining that the state court should more appropriately find that the statute was unconstitutional as applied).

210. Id. at 98, 100-01 (Kennedy, J., dissenting). Justice Kennedy suggested that parents' fundamental rights stem from their role as custodian by explaining that "the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child." Id. at 95 (Kennedy, J., dissenting) [emphasis added]. Kennedy points out that in many cases, a non-parent may have been the child's primary caregiver. Id. at 98-99 (Kennedy, J., dissenting). In these cases, this "defacto parent" may have an interest in visitation with the child that justifies interfering with parental rights. Id. at 100 (Kennedy, J., dissenting) ("In short, a fit parent's right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a de facto parent may be another.").

211. Id. at 100-01 (Kennedy, J., dissenting). Justice Kennedy believed that the "family courts . . . are best situated to consider the unpredictable, yet inevitable, issues that arise." Id. at 101 (Kennedy, J., dissenting).

212. Id. at 57, 69 ("The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests.").
further validated these policies with government statistics to illustrate the changes in modern families.\textsuperscript{213} Although the plurality ultimately found that the statute was unconstitutionally applied, it did not base this finding on the fact that the statute granted standing to the Troxels to allow them to challenge Granville in court.\textsuperscript{214} The plurality, which described the Washington statute as "breathtakingly broad" still refrained from adding the statute's open grant of standing to its list of factors that influenced the decision.\textsuperscript{215} The Court's recognition of the policy supporting non-parent visitation statutes and their lack of criticism of the open standing provision in the Washington statute suggests that Justices O'Connor, Breyer, and Ginsburg, and Chief Justice Rehnquist believe that an open grant of standing to grandparents and other third parties does not constitute a constitutional violation.\textsuperscript{216}

Dissenting Justices Stevens, Scalia and Kennedy appear to accept the proposition that the Washington statute's broad grant of standing does not render it unconstitutional.\textsuperscript{217} Two dissenting Justices approved this standing provision.\textsuperscript{218} Justice Stevens specifically stated that "the Washington statute is not made facially invalid . . . because it may be invoked by too many

\textsuperscript{213} Id. at 63-64. The plurality noted that states enacted third party visitation statutes in response to the increase in single-family homes and the resulting increase in grandparents and other parties who play active roles in raising children. Id. at 64. The plurality also attributes the enactment of visitation situations to the recognition "that children should have the opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents;" a rationale supported by the grandparents' lobby. Id.; see also Bostock, supra note 11, at 337-41 (discussing visitations statutes that give rights to grandparents based on their status as grandparents).

\textsuperscript{214} Troxel, 530 U.S. at 72 (explaining that the ruling was based on a combination of factors relating to the trial judge's application of the visitation statute); see also Brice v. Brice, 754 A.2d 1132, 1136 (Md. App. 2000) ("[T]he Supreme Court's holding in Troxel was not decided on the fact that 'any person' could petition for visitation, rather, was decided on grandparents seeking visitation rights."); In re G.P.C. 28 S.W.3d 357, 364-65 (Mo. Ct. App. 2000), application for transfer denied, Oct. 31, 2000 ("The Court [in Troxel] noted that the problem was not the intervention of the Superior Court, but the fact that it omitted any consideration of the parent's decision regarding the children's interests.").

\textsuperscript{215} Id. at 67 ("Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference.") (emphasis added).

\textsuperscript{216} Id. at 63-64, 69.

\textsuperscript{217} Id. at 81, 92, 94 (Stevens, J., dissenting).

\textsuperscript{218} Id. at 90, 98.
hypothetical plaintiffs." Justices Stevens and Kennedy observed that among the wide array of cases that come before a family court, situations may arise in which it would be permissible and prudent for a court to grant visitation rights to a former caregiver who was not a biological parent.

Regardless of his opinion regarding third party visitation statutes, Justice Scalia would not strike down an open-ended visitation statute on constitutional grounds. Justice Scalia stated that the creation of family law falls solely within a state's power, and, therefore, it is the state's prerogative to authorize third parties to petition for visitation. As a permissible (though unwise) exercise of state power, Justice Scalia's creation of standing rights for non-parents to petition for visitation presents no federal constitutional issue.

Although concurring Justices Souter and Thomas did not specifically address the constitutional implications of an open standing provision, allowing grandparents and other third parties to petition for visitation, they suggest that they would

219. Id. at 81 (Stevens, J., dissenting).
220. Id. at 90-91 (Stevens, J., dissenting). Justice Kennedy suggested that the family courts are best suited to evaluate "the unpredictable, yet inevitable, issues that arise" from visitation disputes. Id. at 101 (Kennedy, J., dissenting). Despite his belief that the family courts are well equipped to handle visitation cases, Justice Kennedy expressed concern that the emotional and monetary costs of the litigation (as opposed to the substantive claim by the third party) could interfere with a parent's constitutional rights. Id. (Kennedy, J., dissenting).
221. Id. at 92-93 (Scalia, J., dissenting). Justice Scalia posited that the issue of state power in this context should be argued "in legislative chambers or in electoral campaigns." Id. (Scalia, J., dissenting). Because a parent's right to direct the upbringing of one's child is a "unenumerated" right not found in the Bill of Rights, the Supreme Court should not, and cannot, create a new constitutional right. Id. at 92 (Scalia, J., dissenting).
222. Id. at 91-92 (Scalia, J., dissenting). Justice Scalia did not approve of the Washington statute, but argued that the state legislature is directly accountable for the wisdom of the statute and that accountability, not the constitution, will appropriately limit the legislation. Id. (Scalia, J., dissenting). Justice Scalia pointed out that "state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people." Id. at 93 (Scalia, J., dissenting) (citations omitted).
223. Id. at 91-92 (Scalia, J., dissenting). Justice Scalia remarked that visitation statutes may infringe upon the "unalienable Rights" referred to in the Declaration of Independence, but "the Declaration of Independence ... is not a legal prescription conferring powers upon the courts." Id. at 91 (Scalia, J., dissenting).
find that such a grant could render a statute unconstitutional.\textsuperscript{224} Justice Souter agreed with the Washington Supreme Court that the statute swept too broadly and, thus, was unconstitutional.\textsuperscript{225} That the statute granted standing to "any person" to petition for visitation "at any time" only contributed to Justice Souter's opinion that the statute was facially invalid; Souter did not expressly state that an open-ended grant of standing would make the statute unconstitutional.\textsuperscript{226} Because Souter failed to address the standing issue separately from his analysis of the trial judge's application of the statute, it is difficult to discern on which argument Souter based his opinion.\textsuperscript{227}

Justice Thomas's strict scrutiny analysis rendered the statute unconstitutional because the state "lacks even a legitimate governmental interest—to say nothing of a compelling one" in enacting the statute.\textsuperscript{228} Because the Washington state legislature did not have a compelling interest in second-guessing parental decision making, Justice Thomas did not address the substance of the statute.\textsuperscript{229} However, in order to withstand a strict scrutiny analysis, the standing provision of the statute would have to fall within "narrowly tallied" means.\textsuperscript{230} Considering the Washington statute was described as "breathtakingly broad" by the plurality, it is unlikely that an open standing provision could be found to be sufficiently narrow.\textsuperscript{231}

\textbf{B. The Second Component: Applying the Proper Standard}

\textbf{1. The Requirement of a Presumption in Favor of Parental Discretion}

Despite the absence of a majority opinion in \textit{Troxel}, the plurality agreed that there is a legal presumption that parents act in the best interests of their children.\textsuperscript{232} This recognition is

\begin{itemize}
  \item \textsuperscript{224} \textit{Id.} at 76-77, 80 (Souter, J., concurring).
  \item \textsuperscript{225} \textit{Id.} at 76-77 (Souter, J., concurring).
  \item \textsuperscript{226} \textit{Id.} (Souter, J., concurring).
  \item \textsuperscript{227} \textit{See id.} at 75-79 (Souter, J., concurring).
  \item \textsuperscript{228} \textit{Id.} at 80 (Thomas, J., concurring).
  \item \textsuperscript{229} \textit{Id.} (Thomas, J., concurring).
  \item \textsuperscript{230} \textit{Id.} (Thomas, J., concurring).
  \item \textsuperscript{231} \textit{Id.} at 67.
  \item \textsuperscript{232} \textit{Compare id.} at 68 ("[T]here is a presumption that fit parents act in the best interests of their children."), with \textit{id.} at 79 (Souter, J., concurring) ("[P]arental choice in such matters is not merely a default rule in the absence
important because, as the plurality stated, if parents are presumed to act in their child's best interest, "there will normally be no reason for the State to interject itself into the private realm of the family" and to question parental decision making. This presumption, which is established as a matter of law, could be a significant obstacle to third party petitioners seeking court-ordered visitation over the objection of natural parents.

According to the plurality and Justice Souter, the application of a pure "best interests" standard allows a judge to substitute his own judgment for that of the parents regarding whether third party visitation serves the child's best interest. However, if the judge is explicitly bound by legislation to presume the parents' decision is in the child's best interests, the judge cannot interfere until the third party petitioner affirmatively satisfies the burden of rebutting this presumption. The plurality indicates that this legal presumption can prevent the substitute-judgment of governmental choice.

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233. Id. at 68. Unfortunately, the plurality does not articulate when a situation is "normal" or when it is sufficiently "abnormal" to justify state intervention. Id. at 68-69. "Normal" could be narrowly defined as a traditional intact family and thus any disruption or variation would justify state interference. See, e.g., In re Herbst, 971 P.2d 395, 396, 399 (Okla. 1998) (finding that an Oklahoma visitation statute was unconstitutional as applied to two married parents who were living together and objected to grandparents' visitation). "Normally" could be defined very broadly by finding that it includes all circumstances in which the child is not subject to harm. E.g., Neal v. Lee, 14 P.3d 547, 550 (Okla. 2000) ("After Troxel, it is unclear whether a showing of harm is necessary under the United States Constitution. However, this Court's application of the Oklahoma Constitution has found that to reach the issue of a child's best interests, there must be a requisite showing of harm, or threat of harm.") (internal quotations omitted).

234. See infra notes 293-97 and accompanying text (describing how a legal presumption in favor of parents serves to protect their constitutional interests).

235. Troxel, 530 U.S. at 67, 77-78.

236. See, e.g., Lulay v. Lulay, 739 N.E.2d 521, 534 (Ill. 2000) ("The facts of this case do not warrant the state's interference with the parents' joint decision regarding who may have visitation privileges with their children. To allow such interference would unconstitutionally infringe on the parents' constitutional rights.")
protection by forcing the judge to give "special weight" to the parents' position and ensuring that it is more than a mere "default rule." \(^{237}\)

The plurality, however, stopped short of holding that state legislatures must codify this presumption in order for a third party visitation statute to be valid. \(^{238}\) In fact, the plurality declined to articulate a standard, which would ensure adequate protection of parental rights in third party visitation disputes. \(^{239}\)

Because they agreed with the plurality that there is a presumption that parents act in their children's best interests, Justices Stevens and Kennedy would agree that a third party visitation statute should require special weight to be given to parental discretion. \(^{240}\) However, Justice Stevens suggests that, depending on state law, the judicial application of the best-interests standard may already include giving special weight to the parents' decisions. \(^{241}\) Clearly, Justices Stevens and Kennedy

\(^{237}\) Troxel, 530 U.S. at 68-70. But see In re G.P.C., 28 S.W.3d 357, 364 (Mo. Ct. App. 2000) (finding that Missouri's grandparent visitation statute sufficiently protected parents' rights because the denial of visitation must be unreasonable and have continued for ninety days before the grandparents may petition the court).\(^{238}\) Troxel, 530 U.S. at 73. Even more important to the plurality's finding that the trial court neglected the presumption in favor of the parents was the application of the presumption in favor of court-ordered visitation. \(\text{id.} \text{ at 69.}\) The trial judge had found that it was "commonsensical" that the grandparents receive visitation and did so in the absence of being shown otherwise. \(\text{id.} \text{ at 69.}\) The plurality is most concerned with this "substitute judgment" result. \(\text{id.} \text{ at 69-70.}\)

\(^{239}\) See \(\text{id.} \text{ at 73;}\) In re Aubin, 29 S.W.3d 199, 203 (Tex. App. 2000) (noting that "[in Troxel the Court declined to define the precise scope of the parental due process right in the visitation context . . . ."). But see \(\text{id.} \text{ at 204 (Walker, C.J., dissenting) ("Troxel more clearly and more definitively sets forth those 'liberty' interests afforded parents through [the Fourteenth] Amendment.").}\) The plurality avoided this decision, in part, because it did not address the constitutionality of the statute on its face, but limited its ruling to the statute as applied in Troxel. \(\text{Troxel, 530 U.S. at 73.}\) Consequently, the court focused more on the trial judge's decisional framework, as opposed to the language of the statute. \(\text{id.} \text{ at 69-70.}\)

\(^{240}\) Id. at 87 (Stevens, J., dissenting) [explaining that because the parent-child relationship is a fundamentally protected interest, precedent has established a rebuttable presumption that parents act in the best interest of their children]; \(\text{id.} \text{ at 101 (Kennedy, J., dissenting) (noting that application of the best interest standard may not sufficiently protect the parent-child relationship if no other limitations are in place).}\)

\(^{241}\) Id. at 84 n.5 (Stevens, J., dissenting) [pointing out that the best interest standard is mandated by ten other Washington state statutes relating to the protection of minors]; see, e.g., Smolen v. Smolen, 713 N.Y.S.2d 903, 905-06 (2000) (noting that third party visitation cases utilizing the best interest standard mandated by New York's visitation statute do not contravene Troxel
agree with the plurality that the standard applied in third party visitation cases must provide some protection for the parent-child relationship by incorporating a legal presumption favoring parental discretion.\textsuperscript{242} Their dissent is based on procedural disagreements, as opposed to doctrinal differences.\textsuperscript{243} Justices Stevens and Kennedy expressed further doubt as to whether the Supreme Court would be wise to elaborate one national standard that would be universally applicable to visitation cases.\textsuperscript{244} Both Justices observed that the proper standard must be tailored to the specific facts of each case, and, thus, they expressed reluctance in advocating any standard other than the best interests standard because a stricter standard would prevent trial judges from utilizing their experience and discretion.\textsuperscript{245} On this point, Justice Scalia is likely to agree, as he argued that the federal courts are ill-equipped to address the issue of grandparent visitation statutes because domestic relations law is reserved to and best resolved by the states.\textsuperscript{246}

\textsuperscript{242} Troxel, 530 U.S. at 89-90 (Stevens, J., dissenting) (explicitly stating that "because our substantive due process case law includes a strong presumption that a parent will act in the best interest of her child, it would be necessary ... to consider whether the trial court's assessment of the 'best interest of the child' incorporated that presumption.") (emphasis added); see also id. at 94 (Kennedy, J., dissenting) (acknowledging "the distinct possibility that visitation cases may arise where ... the best interests of the child standard would give insufficient protection to the parent's constitutional right to raise the child without undue intervention by the state").

\textsuperscript{243} See id. at 81, 101-02 (Stevens, J., dissenting & Kennedy, J., dissenting). Justice Stevens noted that the Court "wisely declines to endorse either the holding or the reasoning of the Supreme Court of Washington." Id. at 80 (Stevens, J., dissenting). Because of the Washington Supreme Court’s "sweeping ruling," Kennedy stated that it was not necessary to decide whether the trial court’s visitation order in Troxel violated the right of a fit parent or whether the Washington statute could be invalidated on its face. Id. at 101-02 (Kennedy, J., dissenting).

\textsuperscript{244} Id. at 90 (Stevens, J., dissenting) (noting that these type of disputes are "indisputably the business of the States, rather than a federal court"); see also id. at 101 (Kennedy, J., dissenting) (noting that state family courts have the most experience in resolving visitation disputes).

\textsuperscript{245} Id. at 83, 100-01 (Stevens, J., dissenting & Kennedy, J., dissenting).

\textsuperscript{246} See id. (Stevens, J., dissenting & Kennedy, J., dissenting) (suggesting that by establishing that parents’ a constitutional right invoked in visitation cases, the court will be "ushering in a new regime of judicially prescribed, and federally prescribed, family law").
Finally, Justice Thomas stated that the Washington visitation statute had no legitimate or compelling interest in "second-guessing a fit parent's decision." This implies that Justice Thomas would not only accord a presumption in favor of parents, but would also require a finding that the parents are unfit before a visitation order could be issued against the parents' wishes.

2. The Requirement of Proof of Potential Harm to the Child

Before the Court's ruling in Troxel, three state supreme courts suggested that the U.S. Constitution mandates third party visitation statutes to incorporate a legal standard requiring the court to inquire whether the child will be harmed without the requested visitation. The Troxel Court, however, declined to acknowledge definitively whether this standard is mandated by the constitution.

The plurality did not discuss the validity of the harm standard; it only stated that the standard applied under the statutes must give parental discretion "some special weight," and that normally there is no reason for a court to intervene in a family decision. One can speculate that the plurality would have used stronger language if it were inclined to hold that parental discretion can only be outweighed upon a showing of harm to the child. The plurality instead chose to craft its opinion carefully basing its holding on a combination of factors as opposed to specific findings regarding the scope of parental rights. This leaves serious doubt as to whether the Court would ever set forth a

247. Id. at 80 (Thomas, J., concurring).
248. See id. (Thomas, J., concurring).
250. See Neal v. Lee, 14 P.3d 547, 549-50 (Okla. 2000) (explaining that although Troxel neglected to clarify whether a showing of harm to the child is required to justify judicial intervention under the U.S. Constitution, the Oklahoma Constitution requires the harm-to-the-child standard).
251. Troxel, 530 U.S. at 73.
252. Compare id. at 68-72 (describing the three factors regarding the trial judge's ruling that supported the holding that the statute was unconstitutionally applied to Granville), with Brooks, 454 S.E.2d at 773-74 (finding that a showing of harm to the child is required to justify court-ordered visitation), and Hawk 855 S.W.2d at 580 (finding that Supreme Court precedent limits states to grant visitation rights to third parties only upon a showing of harm to the child).
standard to be used uniformly throughout the states.253 Moreover, the plurality recognized the policy and rationale behind the enactment of states’ visitation statutes.254 Thus, it is unlikely that the Court would articulate a standard to nullify a large number of statutes and thwart the states’ attempts to promote a legitimate state policy.255 Finally, the plurality stated that because the cases arising from visitation statutes are factually diverse, it “would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter.”256 Therefore, the plurality shared Justice Kennedy’s concern that a “harm to the child” standard would unduly constrain the trial courts.257

Even Justice Souter, one of two Justices who would uphold the Washington Supreme Court’s facial invalidation of the statute, did not address the issue of whether the constitution requires “harm to the child,” basing his decision solely on the breadth.258 He also did not reveal his position on the validity of this portion of the Washington Supreme Court’s holding.259

Justice Thomas argued that the Washington statute was unconstitutional on its face, because the statute had no legitimate interest in second-guessing the wishes of a fit parent.260 Thus, even a threshold showing of harm would not save a visitation statute from being struck down under strict scrutiny if the parents were still found to be fit.261 Justice Thomas suggested that he would require application of an unfit

253. Cf. Rubano v. DiCenzo, 759 A.2d 959, 968 (R.I. 2000) (citing to the Troxel plurality to support its finding that in order for the family court to grant visitation to a lesbian de facto parent, it must find, by clear and convincing evidence, such visitation is necessary to prevent harm to the child). But see In re G.P.C., 285 S.W.3d 357, 365-66. (Mo. Ct. App. 2000) (“Conflating the three plurality opinions in Troxel does not indicate that the Missouri Supreme Court’s use of rational basis review . . . was incorrect.”).
254. Troxel, 530 U.S. at 63-64.
255. See id. Despite its expressed support of the policy behind visitation statutes, the plurality did not indicate whether the state has a “compelling interest” in granting visitation to a third party. Id.
256. Id. at 73 (footnote omitted).
257. See id. at 95-96, 100-01 (Kennedy, J., dissenting) (suggesting that the proper analysis will vary based upon the interests presented in each case).
258. Id. at 76-77 (Souter, J., concurring) (explaining that the Washington Supreme Court decision was based on two separate principles: the absence of the required harm standard and the breadth of the statute, finding the second ground sufficient to end the inquiry).
259. Id. at 77-78 (Souter, J., concurring).
260. Id. at 80 (Thomas, J., concurring).
261. See id. (Thomas, J., concurring).
parent standard in all visitation cases.\(^{262}\)

In their opinions, Justices Stevens and Kennedy addressed the harm standard on its merits and concluded that the Washington Supreme Court erred by holding that the U.S. Constitution requires application of the harm standard in all visitation cases.\(^{263}\) Both Justices contended that neither the U.S. Constitution nor precedent mandates such an untested and rigid harm standard.\(^{264}\) Similarly, Justice Scalia submitted that whether harm to the child was required was a decision for the states because the visitation statute did not raise federal constitutional issues.\(^{265}\)

**IV. REFOCUSING VISITATION LEGISLATION ON A PRACTICAL APPLICATION THAT ADVANCES SOUND POLICY**

In spite of the fragmented *Troxel* opinion, the Supreme Court recognized that the Due Process Clause provides parents with a liberty interest in the upbringing of their children without state interference.\(^{266}\) *Troxel* reaffirmed that parents are presumed to act in the best interests of their children.\(^{267}\) State courts have embraced this proposition in subsequent decisions.\(^{268}\) Even

\(^{262}\) See id. (Thomas, J., concurring).

\(^{263}\) See id. at 85-86, 96 (Stevens, J., dissenting & Kennedy, J., dissenting).

\(^{264}\) Id. at 86, 96 (Stevens, J., dissenting & Kennedy, J., dissenting).

\(^{265}\) Id. at 91-92, 93 (Scalia, J., dissenting).

\(^{266}\) See id. at 95 (Kennedy, J., dissenting) ("[T]here is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child."); see also Lulay v. Lulay, 739 N.E.2d 521, 531 (Ill. 2000) ("Encompassed within the well-established fundamental right of parents to raise their children is the right to determine with whom their children should associate."); *In re RFF*, 618 N.W.2d 575, 578 (Mich. 2000) ("The Supreme Court recently reaffirmed the liberty interest of parents in the custody, care, control, and upbringing of their children."). *But see Troxel*, 530 U.S. at 92 (Scalia, J., dissenting) (criticizing the other *Troxel* opinions for embracing "the theory of unenumerated parental rights").

\(^{267}\) Troxel, 530 U.S. at 95 (Kennedy, J., dissenting); id. at 92 (Scalia, J., dissenting); see also supra Part III.B.1 (noting that each opinion in *Troxel* recognizes the presumption that parents act in their children's best interest).

\(^{268}\) See, e.g., *Stills v. Johnson*, 533 S.E.2d 695, 702 (Ga. 2000) (quoting *Troxel* to establish "a presumption that fit parents act in the best interests of children"); *Lulay*, 739 N.E.2d at 525 (citing *Troxel* to establish that the court must presume parents are acting in their children's best interests); *Rideout v. Riendeau*, 761 A.2d 291, 299 (Me. 2000) (quoting *Troxel* finding that "so long as a parent adequately cares for his or her children (i.e., is fit) there will normally be no reason for the State to inject itself into the private realm of the family") (citation omitted) (alteration in original); *Brice v. Brice*, 754 A.2d 1132,
though third party visitation statutes receive support from valid concerns about children raised in a changing society, fundamental parental rights cannot be discarded.\textsuperscript{269}

Prior to \textit{Troxel}, grandparent visitation statutes received criticism because their open standing provisions allowed parents to be hauled into court regardless of the status of the nuclear family.\textsuperscript{270} Commentators have argued that parental autonomy rights required courts to apply these statutes only in limited situations, such as when death or divorce had disrupted the family, circumstances that have traditionally warranted equitable relief.\textsuperscript{271} Nonetheless, in considering Washington's "breathtakingly broad" visitation statute, \textit{Troxel} ignored these criticisms and declined to declare the statute facially unconstitutional because of its open-ended standing provision.\textsuperscript{272} The Court aligned itself with state legislatures by concluding that the changing traditions of the American family warranted the creation of a statutory remedy for third parties who have a stake in a child's development.\textsuperscript{273} A majority of Justices in \textit{Troxel} recognized that the evolution of the American

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1135 (Md. Ct. Spec. App. 2000) (noting that because the mother in \textit{Troxel} qualified as a fit parent she was "entitled to the presumption that she acted in the best interests of her children"); \textit{In re G.P.C.}, 28 S.W.3d 357, 364 (Mo. Ct. App. 2000) (comparing \textit{Troxel} with \textit{G.P.C.} because both involved fit parents who were "entitled to the presumption that as fit parents, they act in the best interests of their children"); Rubano v. DiCenzo, 759 A.2d 959, 973 (R.I. 2000) (finding that \textit{Troxel} established "a presumption that fit parents act in the best interests of their children").

269. See \textit{Troxel}, 530 U.S. at 63-64.

270. Hawk v. Hawk, 855 S.W.2d 573, 576 n.1 (Tenn. 1993); Bohl, supra note 12, at 80 ("Open-ended grandparent visitation statutes... intrude directly upon a central aspect of family life."); Bostock, supra note 11, at 355-359 (explaining how expanded grandparent visitation rights infringe upon parental autonomy); Karen Alyssa Nalle, \textit{Whose Child Is It Anyway?: The Unconstitutionality of the Texas Grandparent Visitation Statute}, 51 BAYLOR L. REV. 721, 740-41 (1999) (criticizing Texas's open-ended visitation statute); Burns, supra note 10, at 81 ("There also remains a serious constitutional question as to whether grandparents should be allowed to petition the court for visitation with a grandchild who remains living with his married parents.").


272. \textit{Troxel}, 530 U.S. at 67, 73.

273. Id. at 63-64; id. at 90 (Stevens, J., dissenting) ("[T]here 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."); id. at 101 (Kennedy, J., dissenting) (commenting that "the unpredictable, yet inevitable, issues that arise" in visitation disputes are best handled by local state courts).
family will produce situations that would justify court-ordered visitation absent the traditional standing requirements, which are codified in equitable statutes.\textsuperscript{274}

Although grandparents in all fifty states benefit from visitation legislation, they are only one type of third party that acts as childcare providers and forms significant relationships with the children they help raise.\textsuperscript{275} Step-parents, siblings, foster parents, prospective adoptive parents, and the non-marital partners of biological parents also assume essential care giving roles in children’s lives.\textsuperscript{276} Disputes arise and separate the children from people with whom they have intimate and important relationships.\textsuperscript{277} A state’s interest in protecting a child’s relationship with a non-parent caregiver has heightened because in some instances, there is no stable family to protect the child.\textsuperscript{278} In some situations, the non-parent may become a “psychological parent”\textsuperscript{279} to a child and establish equitable parental status.\textsuperscript{280} In other cases, the third party’s role may not

\begin{footnotesize}
274. See supra note 273 and accompanying text. The plurality, along with Justices Stevens and Kennedy, note that familial relationships are evolving and unpredictable. Troxel, 530 U.S. at 63-64, 90, 101.

275. Troxel, 530 U.S. at 64 (noting that grandparents and other relatives assume parent-like roles in many households). But see Rubano v. DiCenzo, 759 A.2d 959, 977, 989 (R.I. 2000) (Bourcier, J., dissenting) (“In Troxel the Supreme Court referred only to ‘relatives’ when referring to ‘persons outside the nuclear family . . .’. The High Court does not mention unrelated third parties when discussing duties of a parental nature.”) (citations omitted).

276. Supra notes 78-82 and accompanying text (describing cases when third parties other than grandparents have sought court-ordered visitation with a child).

277. See supra notes 78-82.

278. See Andersen, supra note 83, at 946-48. Society has an interest in preserving the family unit because the state relies on the family to raise its children. Id. at 946. Andersen suggests that three interests emerge in every non-parent visitation case: that of the parent in parental autonomy; the interest of the petitioning adult; and the social interest in fostering the family, which includes protecting the family and the child. Id. at 953-54.

279. V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000) (defining a psychological or de facto parent). The New Jersey Supreme Court has used a four-part test to determine whether a person should be legally recognized as a psychological parent: “[1] the legal parent must consent to and foster the relationship between the third party and the child; [2] the third party must have lived with the child; [3] the third party must perform parental functions for the child to a significant degree; and most important, [4] a parent-child bond must be forged.” Id.

280. See, e.g., E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999), cert. denied, 528 U.S. 1005 (1999) (confirming that the trial court had jurisdiction to grant a birth mother’s former same-sex partner de facto parent status); V.C., 748 A.2d at 555 (finding a biological mother’s same sex partner who had participated in
be equivalent to the role of a parent, but the connection between the child and the third party is significant enough for the state to intervene and to foster the relationship.281

Given the multitude of parties who may be involved in these disputes, it is unrealistic for the text of a statute to enumerate each circumstance that could warrant court intervention regarding a child's welfare.282 Instead, an open standing provision grants courts flexibility to provide a remedy to a non-parent petitioner whose relationship with the child the legislature could not anticipate.283

In light of Troxel, it appears evident that eliminating open-ended standing provisions will not cure the constitutional flaws of visitation statutes, as the respondent-mother in Troxel could have been sued for visitation under a narrow equity-based visitation statute and suffered the same unconstitutional infringement.284 Instead of limiting the class of people who are

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281. See, e.g., Rideout v. Riendeau, 761 A.2d 291, 301 (finding that the state had a compelling interest in considering a petition for visitation rights from grandparents who have a sufficient existing relationship with their grandchild); Noonan v. Noonan, 547 N.Y.S.2d 525 (1989) (allowing a sibling to petition for visitation).


283. See Santosky v. Kramer, 455 U.S. 745, 771 (1982) (noting that in the area of domestic relations law "leaving the States free to experiment with various remedies has produced novel approaches and promising progress"); Rubano, 759 A.2d at 974 ("[U]nder certain circumstances, even the existence of a developed biological, parent child-relationship . . . will not prevent others from acquiring parental rights vis-a-vis the child.").

284. See Troxel, 530 U.S. at 69 (noting that the problem in Troxel was not that the grandparents had standing to petition the Washington Superior Court, but that the trial judge applied an inappropriate standard). The petitioning
granted standing, third party visitation statutes should include an explicit presumption that favors parents, which would adequately protect parental autonomy rights. The Troxel Court supports this approach as long as the trial court applies the presumption correctly. Despite the fragmented opinion, each Justice explicitly reaffirmed that parents possess a fundamental liberty interest in the upbringing of their children.

The legislature, by explicitly recognizing the legal presumption in favor of parents in visitation statutes, can reduce the possibility that a trial court will violate parental rights by

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grandparents in Troxel could have petitioned under and equitable or open-ended statute because their son, the children's father, had died. Id. at 60.

285. E.g., CAL. FAM. CODE § 3103(d) (West 1999) (providing for a "rebutable presumption affecting the burden of proof that the visitation of a grandparent is not in the best interest of a minor child if the child's parents agree that the grandparent should not be granted visitation rights"); NEB. REV. STAT. § 43-1802(2) (1998) (providing for "[r]easonable rights of visitation... [upon] clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and... child, that it [serves] the best interests of the child that such relationship continue, and that... visitation will not adversely interfere with the parent-child relationship"); R.I. GEN. LAWS § 15-5-24.3(a)(2)(r) (1996) (allowing visitation to be granted when petitioner "by clear and convincing evidence, has successfully rebutted the presumption that the parent's decision to refuse the grandparent visitation with the grandchild was reasonable"); UTAH CODE ANN. § 30-5-2(2) (1998) (establishing "a presumption that a parent's decision with regard to grandparent visitation is reasonable"); W. VA. CODE § 48-2B-7(c) (Michie 1999) (providing for a presumption that when a grandfather files for visitation, "privileges need not be extended to grandparent[s] if the parent through whom the grandparent is related to the grandchild has custody..., shares custody..., or exercises visitation privileges... that would allow participation in the visitation by the grandparent if they... chose").

286. Troxel, 530 U.S. at 69-70; see also Dep't of Soc. and Rehab. Servs. v. Paillet, 16 P.3d 962, 966 (Kan. 2001) (identifying the core issue in Troxel as whether in the court's decision "the parent's fundamental right to direct her child's upbringing (is) reflected in a presumption that she acts in the child's best interest").

287. Troxel, 530 U.S. at 95 (Kennedy, J., dissenting) (indicating the general agreement that "the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child."). But see id. at 91-92 (Scalia, J., dissenting) (arguing that parental rights are found in the Declaration of Independence, but are not protected by the U.S. Constitution). This liberty interest implicitly premises that fit parents make decisions in the best interests of their children. See Lulay v. Lulay, 739 N.E.2d 521, 531 (Ill. 2000) ("[T]he decisionmaking function of parents with respect to the relationships that their children will have... lies at the core of parents' liberty interest in the care, custody, and control of their children.").
substituting its will for that of the parents. Moreover, a legal presumption in favor of parental discretion will minimize the dangers associated with an open-ended statutory grant of standing. First, because the evidentiary burden clearly rests with the petitioner, parties will be reluctant to file claims without strong evidence of circumstances that justify intervention. Second, if claims are filed that amount to nothing more than an internal family dispute, the petition may be disposed with a summary judgment motion because a conflict stemming from a difference in opinion is insufficient to rebut the presumption in favor of the parents. The petitioner cannot force the parents

288. See, e.g., In re Tamara R., 764 A.2d 844, 852-53 (Md. App. 2000) (finding that the best way to meet the requirements of Troxel "is to apply a presumption that the parent's decision to decline visitation is in the best interest of the child over whom the parent has custody"); cf. ALA. CODE § 30-3-4.1(e) (1998) ("There shall be a rebuttal presumption in favor of visitation by any grandparent."); HAW. REV. STAT. § 571-46(7) (Michie 1999) (providing for "reasonable visitation rights [to] be awarded to parents, grandparents, and any person interested in the welfare of the child in the discretion of the court, unless it is shown that rights of visitation are detrimental to the best interests of the child."); N.D. CENT. CODE § 14-09-05.1 (1997) (providing that "visitation rights of grandparents to an unmarried minor are presumed to be in the best interest of the minor"); Hoff v. Berg, 595 N.W.2d 285, 291 (N.D. 1999) (Invalidating the North Dakota statute).

289. See, e.g., In re Richardson, No. HK 1364-A, 2000 WL 869450, at *4 (Va. Cir. Ct.) (holding that even though former foster parents were "persons with a legitimate interest" under Virginia's third party visitation statute and thus had standing to petition the court, no sufficient evidence existed to warrant infringing upon a fit parent's fundamental rights by requiring third party visitation).

290. See, e.g., Smolen v. Smolen, 713 N.Y.S.2d 903, 908 (N.Y. Fam. Ct. 2000) (holding that unless grandparent-petitioners could clearly show that the mother's decision to deny visitation was not based on the child's best interests, the mother's discretion "must be afforded substantial weight as required by Troxel and cannot be not second guessed").

291. See Hicks v. Enlow, 764 S.W.2d 68, 73 (Ky. 1989). The Hicks court stated that:

A trial of this nature [i.e., a hearing on grandparent visitation] is extensive and burdensome . . . . [T]here is sound policy in limiting the circumstances in which grandparents can seek a hearing on the merits to consider visitation. The limits to the use of courts as an arena to settle domestic strife are set by statute, and it is wise policy that these limitations should be respected.

Id. But see King v. King, 828 S.W.2d 630, 632 (Ky. 1992). The King court stated that:

There is no reason that a petty dispute between a father and son should be allowed to deprive a grandparent and grandchild of the unique relationship that ordinarily exists between those individuals. One of the main purposes of the statute is to prevent a family quarrel of little significance to disrupt a relationship that should be encouraged
to endure a full hearing without producing evidence that the circumstances are severe enough to warrant examining the parents' discretion. Finally, if a trial court inappropriately substitutes its judgment for that of the parents, a legal presumption in favor of the parents will ensure that this constitutional violation is easily identified and reversed on appeal.

V. CONCLUSION

Family courts regularly face disputes involving children that cannot be harmonized with existing precedent and that the legislature cannot anticipate. As state legislatures and courts have begun to recognize, in many cases, third party petitioners present well-founded claims when seeking court intervention. Visitation statutes should grant standing broadly in order to provide a legal remedy to petitioners in unforeseen cases. On the other hand, the law must simultaneously protect the well-recognized and important right of parental autonomy. A statutory presumption in favor of parents will best serve the parents, the child, and the legal system that seeks to protect them all.

rather than destroyed.

Id.

292. See Troxel, 530 U.S. at 68 (noting that courts must base visitation orders on special circumstances).

293. See, e.g., Lulay v. Lulay, 739 N.E.2d 521, 534 (Ill. 2000) (finding that because parents presumably act in the best interests of their children, the state cannot mandate visitation with grandparents).