
Natania M. Soto

Follow this and additional works at: https://digitalcommons.law.ou.edu/olr

Part of the Family Law Commons

Recommended Citation

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.
Family Law: Whose Kids Are They, Anyway?:
Analyzing *Troxel v. Granville* and the Current State of
Oklahoma's Grandparent Visitation Statute

*The makers of the Constitution* conferred, as against the government,
the right to be let alone — the most comprehensive of rights and the
right most valued by civilized men.

— Justice Brandeis, *Olmstead v. United States*

**Introduction**

Suppose you're a parent. Your children mean the world to you; you would never
intentionally do anything to harm them. Every day you strive to make decisions
concerning your children that further their best interests. You have raised them in
a loving, stable environment. It is not always the easiest job, but nevertheless you
press on, making decisions as to which cartoons they should watch and which are
simply too violent. Should you raise your children to believe in Santa Claus or will
that fantasy inevitably lead to disappointment? Should you spank your children or
try to reason with them? Should you allow your child to associate with that "rough
crowd"?

Parents face these types of child-rearing dilemmas every day. The answers to
these questions will vary from parent to parent and person to person. However
difficult these decisions may be, you as a parent have the right to be the person
making them for your children. Imagine that you have been faced with an
exceptionally difficult decision, whether to discontinue your child's relationship with
his grandparents. You conclude that your child's best interests will be served by
severing that relationship. Perhaps you have made this decision because the
grandparents practice a different religion, or because they have harmed you in some
way and you fear they will bring the same harm to your child. Now imagine that
the grandparents petition a court to intercede. After enduring substantial family
turmoil, spending a significant amount of time in court, and spending a significant
amount of money on an attorney, the court orders you to allow the grandparents to
see your child because, in the judge's opinion, this serves your child's best interest.
Some state courts and legal scholars believe that such an order does not place a
significant or impermissible infringement on a parent's right to make decisions on
behalf of her children. Until last year, grandparent visitation statutes allowed just
such an order.

In September 1999, the U.S. Supreme Court granted certiorari to review the
constitutionality of Washington's grandparent visitation statute as it applied to
Tommie Granville's rights as a mother. Although the Court imposed certain

1. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
2. *Troxel v. Granville*, 527 U.S. 1069 (1999) (granting certiorari); *see also* *Troxel v. Granville*, 530
procedural safeguards to protect parental rights, the Court also held, "We do not, and need not, define today the precise scope of the parental due process right in the visitation context," leaving a number of questions unanswered. Mrs. Granville prevailed in this particular case, but for thousands of other parents the battle wages on in state courts to determine what the Supreme Court refused to answer: Whose kids are they, anyway?

This note seeks to flesh out the issues the Supreme Court faced in determining when a state may legitimately abrogate a parent's right to make decisions on behalf of his children. Part I explores the history of grandparent visitation statutes. Part II examines Supreme Court decisions establishing parental rights. Part III discusses the recent Supreme Court decision of Troxel v. Granville in which the Court reviewed the constitutionality of the State of Washington grandparent visitation statute. Part IV provides a framework for the circumstances under which a state's interest may prevail over that of a parent, with a particular emphasis on the appropriate level of scrutiny. Finally, Part V examines the procedural implications of the Troxel opinion. Throughout Parts IV and V, the analysis includes discussion regarding the most recent version of Oklahoma's grandparent visitation statute, court opinions interpreting that statute, and the impact of Troxel on Oklahoma law.

I. Grandparent Visitation Statutes

Human relationships are sensitive, extremely complex, and highly personal. Accordingly, Americans question the propriety of legislation that attempts to regulate such interaction. Traditionally, family matters have been an arena that states have declined to intrude upon except in cases of harm to a family member and cases involving issues arising from divorce. In recent years, however, all fifty states have passed statutes conferring upon grandparents the right to petition for

3. Troxel, 530 U.S. at 73.
4. Id.
5. See Sandra Joan Morris, Grandparents, Uncles, Aunts, Cousins, Friends: How Is the Court to Decide Which Relationships Will Continue?, 12 FALL FAM. ADVOC. 10, 10 (1989) (discussing instances in which a court may properly inject itself into familial matters); see also Troxel, 530 U.S. at 68-69 ("Accordingly, 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 to further question the ability of that parent to make the best decisions concerning the rearing of that parents children.").
6. ALA. CODE § 30-3-4 (1999); ALASKA STAT. § 25.20.065 (Michie 1995); ARIZ. REV. STAT. ANN. § 25-409 (West 1999); ARK. CODE ANN. § 9-13-103 (Michie 1998); CAL. FAM. CODE § 3103 (West 1994 & Supp. 1998); COLO. REV. STAT. ANN. § 19-1-117 (West 1999); CONN. GEN. STAT. ANN. § 46b-59 (West 1995); DEL. CODE ANN. tit. 10, § 1031(7) (1998); FLA. STAT. ANN. § 752.01 (West 2000); GA. CODE ANN. § 19-7-3 (Harrison 1999); HAW. REV. STAT. ANN. § 571-46.3 (Michie 1999); IDAHO CODE § 32-719 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/607 (West 1999); IND. CODE ANN. § 31-17-5-1 (Michie 1999); IOWA CODE § 598.35 (1997); KAN. STAT. ANN. § 38-129 (1998); KY. REV. STAT. ANN. § 405.021 (Michie 1998); LA. REV. STAT. ANN. § 9:344 (West Supp. 1999); ME. REV. STAT. ANN. tit. 19-A, § 1803 (West 1998); MD. CODE ANN., FAM. LAW § 9-102 (1999); MASS. ANN. LAWS ch. 119, § 39D (Law. Co-op. 1999); Mich. STAT. ANN. § 722.27b (Michie 1999); MINN. STAT. § 257.022 (1999); MISS. CODE ANN. §§ 93-16-1, 93-16-3 (1999); MO. REV. STAT. § 452.402 (1999); MONT. CODE...
visitation with their grandchildren.\textsuperscript{7} According to many of these statutes, courts must employ the "best interests of the child" test to determine whether visitation will be granted.\textsuperscript{8} These laws mark a significant departure from common law tradition. At common law, grandparents had no rights respecting their grandchildren.\textsuperscript{9}

Grandparent visitation statutes were conceived in response to changes in family dynamics and a redefinition of the term "nuclear family."\textsuperscript{10} The increased mobility of families, the frequent splintering of the extended family, the drastic increase of divorces, the increase of single parent homes, and the increase in the number of grandparents taking a more active parental role with children provide examples of the justifications given for the recognition of grandparents' rights.\textsuperscript{11}

Only in recent years have grandparent visitation statutes faced constitutional challenges. Grandparents' rights advocates maintain that grandparent-grandchild relationships benefit the child in unique ways, such that alienation of grandparents from their grandchildren results in disruption of the child's best interests. For example, grandparents provide children with intergenerational contact, emotional stability in times of family turmoil, and strong familial bonds.\textsuperscript{12}


10. Id. at 2 (“Today, the role of the grandparents has taken on a new importance as we struggle to deal with the problem of single parent families, of addition, or of employment.”).

11. Id. at 3.

12. Ross A. Thompson et al., Grandparents' Visitaton Rights: Legalizing the Ties That Bind, 44 AM. PSYCHOLOGIST 1217, 1221 (1989).}
Those supporting parental rights assert that these laws impermissibly abridge a parent's constitutionally protected right to the care and upbringing of his children. Further arguments assert that such legislation unnecessarily interferes with parental autonomy, changes the dynamics of a parent's role in her children's lives, and undermines a parent's authority to decide who associates with her children.

Parental rights have been expressed as a liberty interest secured by the Fourteenth Amendment and largely as a fundamental privacy right. While there can be no doubt that parents do have a right to raise their children as they see fit, the extent to which parents may exercise that right may be limited by the state. Pursuant to a state's police and parenthood powers, a state may act in the interest of a child's welfare and health. Traditionally, however, states have invoked these powers against a parent's wishes only upon a showing of harm or threat of harm to a child.

The constitutionality of grandparent visitation statutes has become a hotly debated issue. Perhaps in response to this surge of controversy, the U.S. Supreme Court

13. The Fourteenth Amendment provides:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
U.S. CONST. amend. XIV.

14. According to Justice Douglas, privacy rights are secured by the Constitution as follows:
Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

15. "Parenthood" literally means "parent of the country" and refers traditionally to the role of a state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, and in child custody determinations, when acting on behalf of the state to protect the interests of the child.
BLACK'S LAW DICTIONARY 1114 (6th ed. 1990)


struck down Washington's grandparent visitation statute as an unconstitutional infringement on Tommie Granville's parental rights.18

II. United States Supreme Court Decisions: Examining the Scope of Parental Rights

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.19

Dating as far back as 1923, the Supreme Court has recognized parents' fundamental right to raise their children in a manner they deem appropriate, without undue governmental intrusion.20 Although parental rights are constitutionally protected, such rights are not absolute.21 Therefore, in determining the constitutionality of grandparent visitation statutes, courts must balance the parent's constitutionally protected interest and the state's justification for any intrusion upon that interest. An examination of Supreme Court cases dealing with the scope of parents' authority over their children reveals three basic categories of issues decided by the Court: (1) the extent to which parents may exercise decision-making authority over their

---

Organizations supporting the grandparents included the AARP and the Grandparent Caregiver Law Center of the Brookdale Center on Aging. See Brief Amici Curiae of AARP and Generations United in Support of Petitioners, Troxel (No. 99-138); Brief for the Grandparent Caregiver Law Center of the Brookdale Center on Aging as Amicus Curiae in Support of Petitioners, Troxel (No. 99-138). Moreover, organizations such as the National Association of Counsel for Children and Grandparents United for Children's Rights filed amicus briefs asserting the children's constitutional rights. See Brief in the Interest of Amicus Curiae National Association of Counsel for Children in Support of Respondent at 13, Troxel (No. 99-138) (urging the Court to "affirm a child's fundamental liberty interest in a relationship with his or her parent); Brief of Amicus Curiae of Grandparents United for Children's Rights, Inc. at 3, Troxel (No. 99-138) (urging the Court's "recognition of the children's rights to liberty and equal protection in maintaining relationships with their grandparents.").

Law reviews have also addressed this topic. See Joan Bohl, Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm, 48 Drake L. Rev. 279 (2000) (surveying various state statutes requiring a showing of harm to a child before visitation may properly be granted to a third party); Christine Davik-Galbraith, "Grandma, Grandpa, Where Are You?" — Putting the Focus of Grandparent Visitation Statutes on the Best Interest of the Child, 3 Eld L.J. 143 (1995) (supporting the right of both the grandparents and grandchildren to maintain their relationship); Morris, supra note 5 (discussing the appropriateness of third party visitation statutes).

21. Michael H. v. Gerald D., 491 U.S. 110 (1989) (recognizing a parent's constitutional authority but denying a natural father rights of visitation to a child born to a married woman while living with her husband); Ginsberg v. New York, 390 U.S. 629, 632 (1968) (upholding a state statute restricting the availability of sex material to minors); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (finding that a state may impose regulations on child labor due to the potentially harmful effects on children, notwithstanding a mother's objections); Jacobson v. Massachusetts, 197 U.S. 11, 12 (1905) (upholding a state law mandating parents to submit their children to vaccinations).
children free from state interference; (2) the extent to which a state may interfere with parents' rights to the custody of their children; and (3) whether a state may override parental authority by providing a minor with access to an abortion absent parental consent.

A. Parents Asserting Decision-Making Authority over Their Children, As Against the State

In *Meyer v. Nebraska*, the Court struck down a state statute forbidding schools to teach foreign languages to children having an eighth-grade education or lower. The Court found that the State did have an interest in the education of its citizens. However, the Court further found that forbidding the teaching of a foreign language bore "no reasonable relation to any end within the competency of the state" to further that state interest. Further, the Court held that absent a clear showing of harm to the child, the statute unreasonably infringed upon a parent's right to determine the scope of her child's education. The Court noted that an individual's liberty interest, guaranteed by the Fourteenth Amendment, includes "the right . . . to marry, establish a home and bring up children." Similarly, in *Pierce v. Society of Sisters*, the Court struck down a state statute imposing compulsory public education for children. Applying the same reasoning as in *Meyer*, the Court held that the Constitution affords parents the right to decide whether their children will receive a public or private education.

In the case of *Wisconsin v. Yoder*, the Court examined whether the State could properly compel Amish parents to continue their child's education past the eighth grade. The Court noted that a state may exercise its parens patriae power upon a showing that its interest is of a magnitude sufficient to overcome parents' constitutionally protected interests in the upbringing of their child. The Court held that state action bears a "reasonable relation" to a state's interest in education where a state can demonstrate that "parental decisions [in that arena] will jeopardize the health or safety of the child, or have a potential for significant social burdens." Finding no harm, the Court once again held that the statute "unreasonably infringed" upon parents' rights to make decisions on behalf of their children and bore no "reasonable relation to some purpose within the competency of the State."

22. 262 U.S. 390 (1923).
23. *Id.* at 403.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 399.
29. *Id.* at 534-35.
30. *Id.* at 535.
32. *Id.* at 207.
33. *Id.* at 214.
34. *Id.* at 233-34.
35. *Id.* at 233.
Accordingly, the Court has consistently held:

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. And it is in recognition of this that these decisions have respected the private realm of family life, which the state cannot enter.36

In spite of the above decisions, states have successfully limited parental decision-making rights under certain circumstances. In these cases, the Court has balanced the parent's right against the state's interest in protecting the child's welfare. Notwithstanding the recognition of parental rights, the Court has observed that upon a demonstrated harm or threat of harm to the child, the state may intervene to act in the best interests of the child. For instance, in Prince v. Massachusetts,37 the Court examined the constitutionality of a state statute forbidding parents to permit their children to sell literature in public areas.38 The Court held that a state may contravene parents' authority over their children upon a demonstration that the exercise of such authority would prove harmful to the child.39 The Court reasoned that "[a]mong the evils most appropriate for [state intervention] are the crippling effects of child employment, ... and the possible harms arising from other activities subject to all the diverse influences of the street."40 Similarly, the Court has upheld state action, over parental objection, requiring mandatory vaccinations for children.41 There, the Court held that a state may act, pursuant to its police powers, to ensure the health and safety of its citizens.42

B. State Action Terminating Parents' Rights to Custody of Their Children

When a child's health and safety are in jeopardy, a state may properly act to preserve and promote a child's welfare.43 Thus, in the case of parental unfitness, a state may act on behalf of an abused or neglected child by terminating a parent's right to custody.44 However, because the termination of parental rights results in permanent revocation of a fundamental liberty interest held by the parent, the Court has required a state to prove parental unfitness by "clear and convincing evidence."45

38. Id. at 160.
39. Id. at 168.
40. Id.
42. Id. at 25.
44. Id.
45. Id. at 769. See generally BLAcK's LAW DICTIONARY 251 (6th ed. 1990) (stating clear and
In *Stanley v. Illinois*, the Court addressed the issue of whether mothers and fathers are similarly situated with regard to child rearing such that both parents, independent of one another, are afforded the same rights with respect to their children. The Court struck down an Illinois statutory scheme that declared children of unmarried fathers to be wards of the state upon the death of the child's mother. The father in *Stanley* was not married to the mother. However, prior to the mother's death, the parents lived together with their children for eighteen years. Balancing the interests of the parent and the State, the Court reasoned that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." Once again, the Court held that without proof of neglect, the State's interest fails to rise to a level powerful enough to warrant intrusion into a parent's fundamental right to the care and custody of her children.

C. Weighing the Rights of a Minor to Seek an Abortion Against the Right of a Parent to Assert Control over That Minor

In *Roe v. Wade*, the Court held that an individual's fundamental right to privacy includes the abortion decision. Where fundamental rights are implicated, "[T]he Court has held that regulations limiting these rights may be justified only by a 'compelling state interest' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." In a series of cases following the *Roe* decision, the Court reviewed the extent to which a parent may exercise control over his child's decision to have an abortion. In the most recent

convincing proof will be shown where the truth of the facts asserted is highly probable).

46. 405 U.S. 645 (1972).
47. Id.
48. Id.
49. Id. at 646.
50. Id.
51. Id. at 651.
52. Id. at 658; see also Caban v. Mohammed, 441 U.S. 380, 394 (1979) (striking down a New York statute requiring only the consent of the mother in an adoption proceedings where the father manifested a significant parental interest in the child). *But see* Quillian v. Walcott, 434 U.S. 246, 256 (1978) (upholding a Georgia statute requiring only the consent of the mother in an adoption proceeding of a child born out of wedlock and unlegitimized by the father and finding that the state had a more substantial countervailing interest when a father had never exercised actual or legal custody over his child).
54. Id. at 116.
56. Id. (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Aptheker v. Sec'y of State, 378 U.S. 500, 508 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940)).
57. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 441 (1983) (holding a state statute requiring parental consent of a minor child seeking an abortion significantly limited the minor's access to an abortion, absent a judicial bypass provision, and was therefore unconstitutional); Bellotti v. Baird, 443 U.S. 622, 651 (1979) (striking down a state statutory scheme requiring parental consent for a minor child to obtain an abortion as unconstitutionally burdensome on the right of the pregnant minor).
of these decisions, the Court upheld a state statute requiring a minor seeking an abortion to obtain parental consent or a judicial bypass. In past opinions pertaining to a minor's decision to have an abortion, the Court has recognized the "importance of the guiding role of parents in the upbringing of their children." The Court found, however, that adolescents face a unique and potentially severe detriment if forced to have a child. Therefore, the Court concluded that if a statute required parental consent, the statute must also provide the option of petitioning the Court for a judicial bypass.

III. Troxel v. Granville: Parents Versus the State and Third Parties

The issue facing the Troxel Court stood in marked contrast to those considered in the above opinions. Rather than reviewing a statute that reserved the state's power to challenge parents' discretion regarding their child's upbringing, the Court determined the constitutionality of a state statute that entitled private parties to challenge parents' rights to make decisions for their children.

A. Procedural Background of Troxel

The Washington statute conferred upon any third party reasonable rights of visitation with any child. Title 26, chapter 10.160(3), in pertinent part, provided that "[a]ny person may petition the court for visitation rights at any time . . . [t]he court may order visitation rights for any person when visitation may serve the best interest of the child." The parents in Troxel, Tommie Granville and Brad Troxel, were never married. However, they lived together with their children for some time. During a separation, Brad Troxel passed away. Subsequently, Granville sought to limit the amount of time the paternal grandparents spent with the children. As a result, the Troxels petitioned for court-ordered visitation pursuant to the above statute. The trial court awarded them significantly more time with the children than Granville was willing to grant them. Granville appealed this decision to the Supreme Court of Washington.

After carefully reviewing U.S. Supreme Court precedent dealing with parental rights, the Washington Supreme Court concluded that where an individual's fundamental right is implicated and sought to be limited by the state, the statute

60. Id. at 642-43.
61. See id. at 643; see also Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).
62. WASH. REV. CODE ANN. § 26.09.240 (West 1999); see also id. § 26.10.160.
63. Id. § 10.160(3).
must be strictly scrutinized. The court reasoned, "It is clear from Supreme Court precedent that some harm threatens the child's welfare before the state may constitutionally interfere with a parent's right to rear his or her child." The court struck down the statute, holding that the "best interest of the child" standard did not serve as a compelling state interest where a child's family environment is "otherwise satisfactory."

B. The Decision

In an exceptionally divided opinion, a plurality of the U.S. Supreme Court affirmed the Washington court's holding primarily because, in the Court's opinion, the statute was "breathtakingly broad." Contrary to the long line of Supreme Court decisions establishing a parent's constitutionally protected rights, the statute fatally "contain[ed] no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever." Absent a presumption in favor of the parent's decision, trial court judges are given an impermissibly large amount of discretion, limited only by the statute's requirement that the best interests of the child be served. The Court also viewed the statute as granting courts impermissible discretion, because it failed to set forth factors to be considered by trial court judges in determining whether a child's best interests would in fact be served by granting such visitation. Moreover, the statute provided no limitations as to who may petition the court and under what circumstances.

Accordingly, 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 to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

In striking down the statute, the Court placed particular emphasis on the fact that the mother never sought complete severance of the grandparent-child relationship, but sought only to limit the amount of visitation. Declining to render third-party

65. Id. at 30.
66. Id. at 29.
67. Id. at 30.
68. Justice O'Connor, joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer, delivered the opinion of the Court. Justice Thomas and Justice Souter, joining in the judgment, each wrote separate concurrences. In addition, Justice Scalia, Justice Kennedy, and Justice Stevens each wrote separate dissents.
70. Id.
71. Id.
72. Id. at 68.
73. Id. at 67.
74. Id. at 68-69.
75. Id. at 71.
visitation statutes unconstitutional per se, the Court found the Washington statute unconstitutional as applied.\textsuperscript{76}

Despite the Court's considerable emphasis on the existence of parental rights and the cases establishing them, the Court left several questions regarding these rights unanswered. First, the Court declined to address whether third-party visitation statutes require a showing of harm or potential harm to the child before visitation may properly be ordered.\textsuperscript{77} Second, the Court failed to indicate the level of proof necessary to overcome a presumption in favor of the parent's decision. Finally, the plurality made no mention as to the appropriate level of scrutiny for determining the constitutionality of state statutes that hinder the exercise of parental rights.\textsuperscript{78}

\textbf{IV. The Constitutional Analysis of Grandparent Visitation Statutes}

\textbf{A. What Should Be the Standard of Review?}

\textit{The opinions of the plurality, Justice Kennedy, and Justice Souter recognize [that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them], but curiously none of them articulates the appropriate standard level of review.}\textsuperscript{79}

The threshold constitutional inquiry of any grandparent visitation statute must begin with the level of scrutiny under which the statute is to be reviewed. In his concurrence, Justice Thomas urged that where fundamental rights are implicated, strict scrutiny is the appropriate standard.\textsuperscript{80} However, where family relationships and fundamental rights are concerned, the Court has failed to adopt a consistent standard. As a review, in cases where parents have asserted decision-making authority over their children, as against a state, the Court has held that state action may not "unreasonably infringe" on a parent's fundamental right.\textsuperscript{81} Moreover, a state's interest must bear some "reasonable relationship" to the means chosen to further that interest.\textsuperscript{82} In these cases, the Court has concluded that only upon a showing of harm will state action prevail over parents' rights to raise their children in the manner they deem fit.\textsuperscript{83} Here, the Court seems to have applied a "rational basis plus" standard of review. In other words, the statute must bear "a reasonable relationship to the attainment of some legitimate governmental objective,"\textsuperscript{84} and there must be some showing of harm to the child.

\textsuperscript{76} id. at 73.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 80 (Thomas, J., concurring in judgment).
\textsuperscript{80} Id.
\textsuperscript{81} See supra Part II.A.
\textsuperscript{82} See supra Part II.A.
\textsuperscript{83} See supra Part II.A.
\textsuperscript{84} Black's Law Dictionary 1262 (6th ed. 1990) (defining "rational basis").
In other cases involving fundamental rights, the Court dispensed with the rational basis test, thereby heightening the level of scrutiny. For example, in Zablocki v. Redhail,85 the fundamental right at stake was the right to marry.86 The Zablocki Court concluded that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."87 The standard articulated in Zablocki suggests the application of an "intermediate" level of scrutiny.88

Finally, where other fundamental rights are implicated, the Court has applied strict scrutiny to determine the constitutionality of the statutes.89 Strict scrutiny requires a state to demonstrate that its interference "is (1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that [compelling governmental] interest."90

Throughout the years, the Supreme Court has seemingly applied separate, competing standards of review to fundamental-rights analyses. However, Justice O'Conner's dissenting opinion in City of Akron v. Akron Center for Reproductive Health, Inc.,91 may help to resolve these competing standards. Justice O'Connor concluded that where fundamental rights are involved, strict scrutiny analysis is not automatically triggered.92 Instead, a threshold examination of the extent to which the state seeks to deprive an individual of her rights must be made.93 Justice O'Connor wrote:

[N]ot every regulation that the State imposes must be measured against the State's compelling interests and examined with strict scrutiny. . . . The requirement that state interference "infringe substantially" or "heavily burden" a right before heightened scrutiny is applied is not novel in our fundamental-rights jurisprudence . . . [W]e apply "strict judicial scrutiny" only when legislation may be said to have "deprived," "infringed," or "interfered" with the free exercise of some such fundamental personal right or liberty. If the impact of the regulation

86. Id.
87. Id. at 388.
88. Craig v. Boren, 429 U.S. 190, 196 (1976) (requiring that state action "serve important governmental objectives and must be substantially related to achievement of those goals").
89. Carey v. Population Servs. Int'l, 431 U.S. 678, 688 (1977) (holding strict scrutiny is the appropriate level of review for a statute seeking to limit an individual's access to contraceptives); Roe v. Wade, 410 U.S. 113, 166 (1973) (holding regulations seeking to limit an individual's fundamental rights are constitutionally permissible only when the state's interest is compelling and narrowly tailored); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding an individual has a fundamental right to decide whether to bear a child and therefore any state action seeking to limit that right "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms").
92. Id. at 462 (O'Connor, J., dissenting).
93. Id.
does not rise to the level appropriate for our strict scrutiny, then our inquiry is limited to whether the state law bears some "rational relationship to legitimate state purposes."  

Justice O'Connor's dissent in Akron became a plurality opinion in Planned Parenthood v. Casey.  

At least one state court has applied Justice O'Connor's test to conclude that grandparent visitation statutes are not a significant infringement on parental rights, and thus do not have to be analyzed under a strict scrutiny standard. The argument asserts that unlike custodial termination cases, the parents still retain physical and legal custody of the child when grandparents obtain visitation; therefore, the parents still make basic decisions with regard to their child's upbringing. By the very nature of the proceedings, termination cases are concededly more invasive to parental rights than grandparent visitation cases. However, that is not to say that grandparent visitation statutes do not also impose a substantial infringement on the freedom of parents to exercise their rights as parents. While an initial inquiry may be made to determine the extent to which grandparent visitation statutes actually interfere with a parent's decision-making rights as suggested by Justice O'Connor, these statutes should ultimately be strictly scrutinized. 

The Supreme Court has recognized varying circumstances under which state infringement has been found to be significant. For example, a state's imposition of certain regulations on a child's education is clearly not as considerable an intrusion into parental autonomy as terminating custody. Nevertheless, the Court still held that these regulations unreasonably infringe on a parent's fundamental rights. The same should be true in the grandparent visitation context. Parental decision making is critical to the parenting process. To ignore this reality is to trivialize the very nature of the role parents play in their children's lives. Decisions regarding with whom a child associates go to the very essence of parental control. Further, the U.S. Supreme Court has consistently held that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights [the] Court has ranked as of basic importance in our society" and when the interests of third parties conflict with familial rights, the former must give way to the latter.

94. Id. at 461-62. 
96. Herndon v. Tuhey, 857 S.W.2d 203, 208 (Mo. 1993). 
97. Id. at 209. 
98. See supra Part II.B; see also Santosky v. Kramer, 455 U.S. 745, 759 (1982) ("When a state initiates a parental rights termination proceeding, it seeks not merely to infringe [on a parent's] fundamental liberty interest, but to end it."). 
Therefore, it does not logically follow to hold that limiting a parent's role and right as decision maker is not a significant infringement on parental authority. Divesting a parent of a right that is crucial to effective parenting and vesting it in the court is nothing less than a "deprivation," "infringement," or "interference" into a realm of family matters that has been and should continue to be reserved for the parent.\(^{103}\) Accordingly, courts should review grandparent visitation statutes under a strict scrutiny analysis to determine the constitutionality of these regulations.

Significantly, the Supreme Court of Oklahoma is in alignment with this position and applies a strict scrutiny standard of review. As that court acknowledged:

> It is important to recognize that mandating the introduction of a third party, even a grandparent, into a family unit is state action limiting the parents' liberty. Because it is "long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment[,]" as well as Oklahoma's own constitution, the state's interest must be sufficiently compelling to warrant such a limitation and infringement.\(^{104}\)

In analyzing grandparent visitation statutes, state courts have struggled with the type of evidence that must be proffered before a court may constitutionally override a parent's decision to discontinue visitation. Some courts have held that harm to the child must be shown before visitation may properly be granted.\(^{105}\) Others have only required evidence that the child's best interest would be served by granting visitation.\(^{106}\) In *Troxel*, the primary question of constitutional import was "whether the Due Process clause requires all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting


\(^{104}\) In *re* Herbst, 1998 OK 100, ¶ 10, 971 P.2d 395, 397-98 (alteration in original) (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974)).

\(^{105}\) Von Eiff v. Azicri, 720 So. 2d 510, 516 (Fla. 1998) (affirming the "harm to the child" standard and explaining that the "best interest of the child" standard "permits the State to substitute its own views regarding how a child should be raised" for those the Constitution reserves for the parents); Beagle v. Beagle, 678 So. 2d 1271, 1276-77 (Fla. 1996) (concluding that the "best interests of the child" test is an inadequate standard to apply to a statute that restricts a parent's right to raise her child without governmental interference; without a requisite showing of harm to the child, there is no compelling state interest); Brooks v. Parker, 454 S.E.2d 769 (Ga. 1995) (holding that state interference is justified only where parental decisions pertaining to a child's health and welfare would result in harm to the child); Hawk v. Hawk, 855 S.W.2d 573, 578 (Tenn. 1993) (holding that to override a married couple's united opposition to visitation, the state must show a "substantial danger of harm to the child").

\(^{106}\) Graville v. Dodge, 985 P.2d 604, 610 (Ariz. Ct. App. 1999) (upholding a state statute requiring the application of the best interests of the child standard to determine whether grandparent visitation is appropriate); King v. King, 828 S.W.2d 630, 632 (Ky. 1992) (same); Herndon v. Tubey, 857 S.W.2d 203, 210 (Mo. 1993) (same).
visitation." Remarkably, the Court declined to address this question. Thus, state courts are left to decide whether a court may constitutionally compel a parent to submit to visitation based merely on an inquiry into the child's best interest, or if harm to the child is the more advisable standard.

Despite the Court's application of varying levels of scrutiny to fundamental-rights analyses over the years, the Court has set forth one "bright line" test to determine the constitutionality of state statutes that implicate parental rights. Since 1923, the Court has consistently held that test to be harm to the child. Yet, the Troxel Court declined to address, much less affirm, this precedent and many state statutes merely require that a child's best interest be served in awarding a grandparent visitation. However, applying the vague phrase "best interest of the child" would fatally flaw this constitutional analysis. Further, this standard would encourage arbitrary application of the law and "the State may no longer rely on a 'bright line' that separates permissible from impermissible regulation."

B. "Best Interest of the Child" Standard Frustrates Parents' Constitutional Rights to Raise Their Children

"Best interest of the child" is an ambiguous phrase at best. The phrase begs questions that have different answers for different people. Some people believe that spanking a child in order to teach her respect and obedience is in the child's best interest. Others believe that spanking is abusive and unnecessary. Some believe that parents should guard children from the harsh realities of life until children are mature enough to understand them; others believe that parents must bring up children with a realistic perspective of the world. Clearly, what or who serves a child's best interest is a subjective decision that will vary from person to person. Who is qualified to make that judgement? Traditionally and legally, the right to make such determinations is reserved for parents. Moreover, if a constitutional analysis of parental rights requires merely that a child's best interest be served, then to grant visitation only to grandparents seems to draw an arbitrary line. Surely a child's relationship with a teacher, aunt, or uncle may also be in the best interest of the child. This type of result, however, is precisely the reason the Court struck down the Washington statute. According to the Court, the language of the statute "effectively permi[t] any third party seeking visitation to subject any decision by

108. Id.
112. See generally Morris, supra note 5.
a parent concerning visitation of the parent's children to state-court review, "leaving the "best interest determination solely in the hands of the judge."  

The visitation rights conferred upon grandparents are purely statutory in nature; so, absent a powerful state interest, they are not comparable to a parent's constitutional right. A state's interest in preserving the best interests of the child or ensuring that a child has access to beneficial relationships is simply not strong enough to invade parental autonomy. Obviously, several factors determine the grandparent's role in a child's life such as the grandparent-parent relationship, the geographical proximity of the grandparent to the child, and the grandparent-grandchild relationship. These determinations will drastically vary from family to family. Thus, placing total discretion in the court by using the vague "best interest of the child" standard can lead to a tremendous amount of variance depending upon the judge and inevitably leads to impermissible intrusions on parental rights.  

The Court has consistently held that a state may not interfere in parental decision making, absent clear evidence that such disallowance would result in harm to the child. Examples of evident "harm" include a parent refusing to take a sick child to the hospital, a parent refusing to get a child vaccinated, and instances of abuse and neglect. In contrast, a parent refusing to allow a child to continue a relationship does not result in evident harm. Some argue, to the contrary, that divesting parents of their right to determine what is in the best interest of their child can actually be harmful to the child. At a 1991 hearing before the Subcommittee on Human Services, a chairman for the American Bar Association pointed out:  

Like many other types of family law cases, grandparent's visitation disputes tend to be painful and disruptive for all involved, including the children, their parents and their grandparents. These intrafamily conflicts in themselves are emotionally wrenching; litigating them may intensify the emotions and create conflict for the children at issue in the dispute.  

Because of the inherent ambiguity of the phrase "best interest of the child," the bright-line rule of harm to the child, advanced by the Supreme Court, is blurred. Employing a "best interest of the child" analysis to determine with whom children should establish or maintain relationships permits judges to impermissibly impose their own views of family values upon perfectly fit parents. The Washington Supreme Court held:  

"[T]he requirement of harm standard is the sole protection that parents have against pervasive state interference in the parenting process." For

113. Troxel, 530 U.S. at 67.
114. See supra Part II; cf. supra note 105 (giving examples of state court decisions).
the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give parents no authority at all.118

Further, by recognizing that parents have a fundamental right to determine the proper means to raise their children, the Supreme Court has placed a certain amount of trust in a parent's ability to make decisions in the child's best interest. This is clearly evidenced by the Troxel Court's determination that fit parents' decisions are presumed to be in the child's best interest.119 Therefore, it is illogical to allow a court to abrogate that right in favor of nonparents by applying a "best interest of the child" standard.

Grandparent visitation statutes attempt to legislate family values, an arena in which the government should tread carefully. The constitutional rights of parents far outweigh a grandparent's desire to "keep it in the family" or a court's opinion that such a relationship benefits the children. Certainly, a child might establish many beneficial relationships. However, unless the child faces risk of harm, courts should not have the authority to determine with whom a child establishes those relationships. Notably, Oklahoma courts seem, at least to some extent, to agree with this proposition. According to the Supreme Court of Oklahoma, "[A]bsent a showing of harm, it is not for the state to choose which associations a family must maintain and which the family is permitted to abandon."120 This same court, however, qualified this standard as follows: "To reach the issue of a child's best interests, there must be a requisite showing of harm, or threat of harm, to bring the issue before the court or some instance of death or divorce which brings the child's domestic situation within the province of the court."121

C. Broken Versus Intact Families: Is There a Meaningful Distinction in Terms of Parental Ability and Rights?

Some state courts agree that to bring the issue of the child's best interest into the province of the court, a party must make a threshold showing of harm to the child or a demonstration of parental unfitness.122 In determining the constitutionality of a state's grandparent visitation statute, state courts have zealously supported the constitutional rights of the parents, viewing the parent-child relationship as paramount over the grandparent-grandchild relationship.123 However, some courts

---

118. In re Smith, 969 P.2d 21, 29-30 (Wash. 1998) (citation omitted) (quoting Hawk v. Hawk, 855 S.W.2d 573, 580 (Tenn. 1993)).
119. Troxel, 530 U.S. at 67.
121. Id.
122. Von Eiff v. Azicri, 720 So. 2d 510, 514 (Fla. 1998) (citing Hawk and concluding that a state must first establish parental unfitness or significant harm to a child before a child's best interest can be determined by the court); Herbst, 1998 OK 100, ¶ 18, 971 P.2d at 399 (reasoning that to reach the issue of a child's best interest, there must be a showing of harm); Hawk v. Hawk, 855 S.W.2d 573, 581 (Tenn. 1993) (holding there must be a threshold demonstration of parental unfitness or harm to the child before a court can analyze the best interest of the child).
123. Brooks v. Parkerson, 454 S.E.2d 769, 772 (Ga. 1995); Herbst, 1998 OK 100, ¶ 17, 971 P.2d
have inexplicably restricted these holdings to cases involving "intact," two-parent families. Courts have concluded, whether expressly or by implication, that both the death of a parent and the dissolution of a marriage suffice as a demonstrated harm compelling enough for a state to intrude upon a parent's decision-making rights. In doing so, these courts have endorsed the proposition that parents' right to raise their children in a manner they deem fit depends on the family composition. Thus, courts afford more deference to the decisions of parents in intact nuclear families than to those of divorced or widowed parents. The State may properly abrogate a married couple's united opposition to visitation only upon a showing of harm to the child. The parental rights of those widowed or divorced, however, somehow lose their fundamental characteristics and must yield to the lower standard of best interest of the child. Oklahoma courts, in particular, have struggled with this distinction. In re Herbst and its progeny illustrate this type of judicial thinking.

In Herbst, a 1998 opinion, the Supreme Court of Oklahoma reviewed the constitutionality of the state's grandparent visitation statute. Recognizing that parents have a constitutionally protected right to raise their children without state interference, the court concluded that the statute must be examined under strict scrutiny analysis. The court reasoned that absent a compelling state interest, "Any conflict between the fundamental, constitutional right of parents to care for their children as they see fit and the statutorily created right of grandparental visitation must be reconciled in favor of the preservation of the parent's constitutional rights. The relationship between parent and child must be held paramount." Thus, a state's compelling interest is "implicated upon a finding of harm to the child . . . or of the custodial parent's unfitness." As noted above, however, the court further concluded that a state's interest may also rise to a level so compelling as to justify court-ordered grandparent visitation in cases of divorce or death of a parent.

at 399; Hawk, 855 S.W.2d at 575.
124. Herbst, 1998 OK 100, ¶ 18, 971 P.2d at 399; Hawk, 855 S.W.2d at 575.
125. Herbst, 1998 OK 100, ¶ 18, 971 P.2d at 399 (concluding that the best interests of the child issue may be implicated upon a showing of harm to the child, or some instance of death or divorce); Hawk, 855 S.W.2d at 578 (holding that to override a married couple's united opposition to visitation the state must show a "substantial danger of harm to the child"); Stockman Gan, supra note 100, at 272.
126. In 1998, the full text of title 10, section 5(A)(1) of the Oklahoma Statutes provided: Pursuant to the provisions of this section, each and every grandparent of an unmarried minor child shall have reasonable rights of visitation to the child if the district court deems it to be in the best interest of the child. The right of visitation to any grandparent of an unmarried minor child shall be granted only so far as that right is authorized and provided by order of the district court.
10 OKLA. STAT. § 5(A)(1) (Supp. 1998). The current version of the statute reads a bit differently: "[T]he grandparent of an unmarried minor child may seek and be granted reasonable visitation rights to the child which visitation rights may be independent of either parent if the district court deems it to be in the best interest of the child and" other factors must also be considered. 10 OKLA. STAT. § 5(A)(1) (2001).
128. Id. ¶ 17, 971 P.2d at 399.
129. Id. ¶ 13, 971 P.2d at 398.

https://digitalcommons.law.ou.edu/olr/vol54/iss2/7
parent. Accordingly, the court held Oklahoma's grandparent visitation statute to be unconstitutional only as applied to intact, fit families, where harm to the child could not be demonstrated. As of September 2001, a bill is pending in the Oklahoma legislature to amend the statute to reflect the Herbst holding.

Since the Herbst opinion, the Court of Civil Appeals has had ample opportunity to apply the case's holding. The first case, Fink v. Corlett, involved a remarried grandfather who, along with his new wife, had custody of the child at issue. The ex-wife/grandmother petitioned the court for visitation with the grandchild. Relying on Herbst, the court found the statute to be an unconstitutional infringement of parental rights when applied to a fit, intact nuclear family. Just a few months later, Queen v. Henson reached a similar outcome. The court found the statute constitutionally infirm as applied to a mother's refusal to allow her parents visitation with her child. In Queen, however, the court extended the definition of an intact family to include the child, the child's mother, and the child's stepfather. The stepfather in this case had not adopted the child and the biological father was unknown. Notably, the court held that the statute, as applied in Herbst, was unconstitutional not because it implicated the rights of parents in an intact family, but solely because there were no allegations of harm to the child or parental unfitness. Moreover, the court declined to endorse the notion that the marital status of the biological parents could be used as a vehicle to "erode a fit [parent's] fundamental right to determine whether her parents may have a relationship with her child."

In marked contrast to the above opinions, the Court of Civil Appeals rejected parents' constitutional challenges to the visitation statute in the cases of Sicking v. Sicking and Hartness v. Hartness. In Sicking, the paternal grandparents filed a petition to intervene in the parents' divorce, seeking visitation with their grandchild. The court awarded the grandparents visitation with the child, to be

130. Id. ¶ 18, 971 P.2d at 399.
131. Id.
132. A bill pending before the Oklahoma legislature provides:

In addition to determining the best interest of the child, in granting visitation rights to grandparents pursuant to this section over the objection of both parents, the court shall find that: (1) the child would suffer harm or potential harm without the granting of visitation rights to the grandparents of the child . . . or (3) the parents of the child are unfit.


133. 1999 OK CIV APP 44, 980 P.2d 1128.
134. Id. ¶ 2, 980 P.2d at 1129. The fit, intact nuclear family included the grandfather, his new wife, and the child. Id.
136. Id. ¶ 14, 980 P.2d at 131.
137. Id. ¶ 13, 980 P.2d at 131.
138. Id. ¶ 12, 980 P.2d at 131.
139. 2000 OK CIV APP 32, 996 P.2d 471.
exercised in conjunction with or in place of the father's visitation should he be unable to exercise such right. The custodial mother appealed this decision, arguing that even where a child's parents are divorced, awarding visitation to a nonparent is unconstitutional where a nonparent fails to show harm or a threat of harm to the child. Rejecting this argument, the court held that "the right protected in Herbst is a right enjoyed by both parents" and, in this case, only the mother opposed visitation.\(^{141}\) Unlike Queen, the Sicking court made much of the fact that this case did not involve an intact nuclear family where both fit parents objected to visitation.\(^{142}\) Citing Herbst, the Sicking court upheld the constitutionality of the statute as applied in this case because the parents' "divorce [brought] the child's domestic situation within the province of the court."\(^{143}\)

The facts in Hartness were nearly identical to those in Sicking with one possibly important distinction. The grandparents in Hartness petitioned for visitation after the divorce was granted and after custody was determined.\(^{144}\) In Hartness, the court reversed the dismissal of the grandparents' petition for visitation.\(^{145}\) Once again, the court noted that while harm to the child serves as a state interest compelling enough to justify court intervention, cases of divorce or the death of a parent also justify intervention.\(^{146}\) Interestingly, at least one civil court of appeals in Oklahoma has noted the obvious tension between the Queen and Sicking/Hartness opinions regarding whether harm to the child or parental unfitness is required before third parties may petition the court for visitation, or if the parents' marital status may properly serve as this vehicle.\(^{147}\)

Since Troxel, however, it appears that consideration of a parent's marital status has no place in this constitutional analysis. At the time the Troxel grandparents filed their petition, the father was deceased, leaving the mother a single parent. Perhaps even more significant, the parents in Troxel were never married. Evidently, these facts made absolutely no impression on the Court because the Court made no mention of the mother's marital status when it concluded: "[I]t 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

\(^{141}\) Sicking, 2000 OK CIV APP 32, ¶ 14, 996 P.2d at 474.

\(^{142}\) Id. ¶ 10, 996 P.2d at 474.

\(^{143}\) Id. ¶ 12, 996 P.2d at 474.

\(^{144}\) Hartness, 1999 OK CIV APP 138, ¶ 1, 994 P.2d at 1197.

\(^{145}\) Id. ¶ 4, 994 P.2d at 1198.

\(^{146}\) Id. ¶ 4, 994 P.2d at 1197.

\(^{147}\) Graham v. Woffard, 2000 OK CIV APP 101, 12 P.3d 487. As Judge Buettner noted:

Decisions since Herbst are in conflict. . . .

In Sicking v. Sicking, this court held that § 5 was constitutional where, in a divorce action, the grandparents sought and received visitation over the objection of mother but with the consent of father.

In Hartness v. Hartness, grandparents filed for visitation after the parents divorced. Mother objected while father consented. The Court of Civil Appeals reversed dismissal of the action.

Id. ¶ 3 n.2., 12 P.3d at 488 n.2.
control of their children.\textsuperscript{148} Accordingly, all fit parents, whether married, single, or widowed, are entitled to the same amount of constitutional protection of their parental rights. Thus, at least in the grandparent visitation context, statutes that distinguish between the rights of intact families and those of broken families are unconstitutional and courts that uphold these statutes are in error. "The Constitution protects the right of the \textit{individual} . . . to be free from unwarranted governmental intrusion,"\textsuperscript{149} not merely those individuals whose family composition mirrors the ideal family unit.

In accordance with \textit{Troxel}, the Supreme Court of Oklahoma abandoned its original position in \textit{Herbst} that the state may statutorily distinguish between the rights of married parents and those divorced or widowed.\textsuperscript{150} \textit{Neal v. Lee}\textsuperscript{151} involved a grandmother's petition to visit her daughter's three children. The oldest of the three, Joshua, was born out of wedlock. Joshua's parents never married and his father subsequently passed away. Joshua's mother then remarried. Of this marriage, Whitney and Hunter were born. A few years later, the maternal grandmother petitioned the court for visitation of all three children. Initially, the parents agreed to three supervised visits and a visitation plan formulated by a child therapist. The recommended plan was to be confirmed within ten days absent an objection by the parents. A timely objection was filed; three days later, the stepfather filed a petition to adopt Joshua. Finally, the parents moved for termination of the grandmother's visitation.

The district court granted the grandmother visitation with all three children in accordance with the visitation plan. The parents appealed, challenging the constitutionality of title 10, section 5 of the Oklahoma Statutes. Applying \textit{Troxel}, the court found that the awarded visitation violated the mother's constitutional rights with respect to Joshua and stood as an unconstitutional infringement of both parents' rights with respect to Whitney and Hunter.\textsuperscript{152} Adhering to the \textit{Herbst} harm requirement, the court held that this standard applied equally to intact families and single parents.\textsuperscript{153} Thus, the absence of one parent does not diminish the other parent's constitutionally protected rights to rear her children.\textsuperscript{154} Disregarding its original holding in \textit{Herbst}, the court noted: "The fact that in \textit{Herbst}, the child was living in an intact nuclear family was not necessary to the holding. Joshua's father's death does not affect [the mother's] fitness as a mother nor alter her constitutionally protected rights to rear her child without state interference."\textsuperscript{155}

Thus, according to \textit{Herbst}, absent a showing of harm, there is no statutory basis for grandparental visitation in the case of fit, married parents. Likewise, according to \textit{Neal}, the same result must be reached when a single parent, where the other

\textsuperscript{149} \textit{Eisenstadt} v. \textit{Baird}, 405 U.S. 438, 453 (1972).
\textsuperscript{150} \textit{Neal} v. \textit{Lee}, 2000 OK 90, 14 P.3d 547.
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.} \S 8, 14 P.3d at 550.
\textsuperscript{153} \textit{Id.} \S 11, 14 P.3d at 550.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.} (citation omitted).
parent is unknown or deceased, opposes visitation with her child. In other words, the absence of one parent does not diminish the other's fundamental rights such that the lower best-interest standard can be applied without violating that parent's constitutional rights. In light of Neal, several provisions of the current version of title 10, section 5 will have to be amended. As the statute now stands, grandparents need only show that visitation is in the child's best interest where one parent has deceased, 156 one or both parents have had their parental rights terminated, 157 or the child's parents have never married and are not cohabitating. 158 All of these provisions must now require a showing of harm to the child before an Oklahoma court may constitutionally grant visitation.

The question left unanswered is whether harm to the child must be shown when both parents are living, but divorced. According to Herbst, if the child's "domestic situation" is before the court, as it is in divorce proceedings, grandparents may properly petition for visitation. 159 A bill pending before the Oklahoma legislature would require a showing of harm or parental unfitness if visitation is requested "over the objection of both parents." 160 Strict adherence to this language mandates that courts invoke the harm standard in cases where both parents oppose visitation, even in cases of divorce, regardless of whether the grandparent's petition is in conjunction with the divorce proceedings.

Another questionable situation involves the case of divorced parents, both alive, where only one opposes visitation. As these facts were neither before the Troxel Court nor the Neal court, the status of divorced parents' rights when asserted against each other are uncertain. According to Troxel, all parents enjoy the same amount of constitutional protection to raise their children in a manner they deem fit. 161 Thus, the parents' respective rights, in this situation, might cancel each other out. The more probable result, however, is that the decision will turn on which parent has custody of the child. For example, a parent with sole custody would be entitled to require a showing of harm to the child before his decision to oppose visitation can be constitutionally infringed upon. The noncustodial parent, however, would not be entitled to the same bundle of rights with regard to his child's upbringing. Should the noncustodial parent oppose visitation, he may be forced to submit to the custodial parent's decision.

157. Id. § 5(A)(1)(h).
158. Id. § 5(A)(1)(g).
161. 530 U.S. 57, 68-69 (2000) ("[S]o 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 to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.")
D. Defining Harm in Oklahoma

Oklahoma law requires, regardless of the parent's marital status, a showing of harm to the child or parental unfitness before third parties may properly be granted visitation. The primary issue now facing Oklahoma courts is the precise nature of the harm necessary to overcome a parent's decision. This will depend on the court's definition of harm. However, "[t]he paradox is that if the harm is great enough for State intervention, the issue should not be grandparental visitation, but custody of the child."¹⁶²

If the bill pending in the Oklahoma legislature is enacted, Oklahoma's grandparent visitation statute will provide: "'Harm or potential harm' means a showing that without court-ordered visitation by the grandparents, the child's emotional or physical well being would be jeopardized."¹⁶³ This suggests that if a petitioner can show that severing the grandparent-grandchild relationship would have harmful effects on the child, the state may then have a compelling interest. Concededly, grandparents can be valuable in a child's upbringing and they can help provide the child with love, affection, and emotional stability. However, the core issue is not what the grandparent can provide the child. On the contrary, the central concern is whether forcing parents to allow their children to maintain these relationships furthers a child's best interests. Forcing a parent to appear in court, seek legal counsel, pay legal fees, and deal with the stress of litigation creates a tremendous amount of anxiety and does not encourage a healthy family environment. Arguably, if the parent faces such stress and turmoil, this will have a direct and harmful impact on the child. Thus, the court must weigh the harm a child might encounter upon severing the grandparent-grandchild relationship against the other harms implicated when the child becomes the source of litigation.

More often than not, however, the "harm" standard contemplated by the Supreme Court seems to suggest physical harm. Therefore, the harm a child may suffer from ceasing to maintain a relationship with a grandparent does not seem to be the type of harm the Supreme Court intended when setting this standard. The Court has found harm when parents expose their children to the "crippling effects of child employment,"¹⁶⁴ neglect or abuse,¹⁶⁵ and transmission of diseases that could otherwise be avoided.¹⁶⁶ In all of these cases, the parents caused a tangible, physical harm or threat of a tangible, physical harm to the child.

However, in Prince v. Massachusetts, the Court listed different ways in which harm can manifest in a child, including "emotional excitement and psychological or physical injury."¹⁶⁷ Accordingly, a valid argument for grandparent visitation

¹⁶⁷. 321 U.S. at 168.
statutes is that a child's psychological welfare could be in danger if she is stripped of a relationship she has come to depend upon. However, because of the limited amount of research conducted on grandparent-grandchild relationships, there is simply no evidence that this relationship is always beneficial to the child.\footnote{168} Despite the lack of scholarship on this subject, research has shown that a child's relationship with his grandparents directly correlates to the nature of the relationship between the parents and the grandparents.\footnote{169} Thus, if the grandparent-parent relationship is strained, there is a high likelihood that the grandparent-grandchild relationship will also be strained. Obviously, if the grandparent petitions the court to intercede, there has been a significant breakdown between the grandparent and the parent. Thus, the potential benefits of the grandparent-grandchild relationship are drastically limited.\footnote{170} "Consequently, most of the obstacles that grandparents may encounter in their efforts to support their grandchildren cannot effectively be resolved by litigation that makes the child's parents and grandparents adversaries in a courtroom."\footnote{171}

Further, granting grandparent visitation over the objection of the parent places children in the precarious position of having to choose loyalties between the parent and the grandparent.\footnote{172} "Children are likely to encounter loyalty conflicts during the judicial proceedings, and if a visitation petition is granted, loyalty conflicts are likely to be maintained over time as the child remains the focus of . . . conflict."\footnote{173} Surely, such situations pose a great deal of emotional and psychological harm to the child. Unless there is evidence that clearly and competently establishes that a child will suffer irreparable harm without the companionship of the grandparents, courts cannot grant grandparent visitation and feel confident that such visitation will always be in the best interest of the child. To the contrary, making a child the subject of litigation never furthers a child's best interests.

Finally, in Oklahoma, a petitioning grandparent may properly be awarded visitation if he can show parental unfitness. According to title 10, section 5 of the Oklahoma Statutes, parents with a history of substance abuse, domestic abuse, violent behavior, and emotional or mental disorders, may all be deemed unfit for the purposes of determining whether visitation may be granted.\footnote{174} This provision is nonsensical. Again, if this type of evidence can be provided to a court, the grandparents' petition is hopefully for custody rather than visitation. While the statute expressly provides that these parental behaviors do not have to rise to a level sufficient to terminate parental rights, courts always have the option of granting custody to the grandparents.

\footnotesize{\fullwidth{\url{https://digitalcommons.law.okstate.edu/olr/vol54/iss2/7}}}
V. The Procedural Implications of Troxel

A. The Presumption

If a statute is able to pass constitutional muster, such that the grandparent now has standing to petition a court for visitation, according to Troxel, the grandparent must also overcome certain procedural obstacles before visitation may properly be granted. In the Troxel Court's estimation, as long as a parent is fit, he is entitled to a presumption that his decision to disallow visitation is already in the child's best interest.175 Several conclusions can be drawn from this holding. As an initial matter, this requirement presupposes that all parents are entitled to such a presumption. Drawn to its logical conclusion, if the parent was not fit to adequately care for the child, the issue would be custody rather than visitation. Second, courts are no longer at liberty to make a determination regarding a child's best interest until the presumption has been successfully rebutted.176 According to the Troxel plurality, this dispenses with a judge's broad discretion to impose her own family values upon perfectly fit parents.177 Finally, this presumption effectively places the burden of proof on the petitioning grandparent. Despite the Court's failure to articulate the level of proof necessary to overcome this presumption, clear and convincing seems to have support from at least a plurality of the Court.178

Significantly, perhaps, the Court cited to grandparent visitation statutes adopted by Nebraska and Rhode Island.179 In Nebraska, petitioners must show by clear and convincing evidence that a "significant beneficial relationship" exists between the grandparent and child, that the best interests of the child would be served by continuance of that relationship, and that the parent-child relationship will not be adversely affected by such visitation.180 Similarly, the Rhode Island statute requires clear and convincing evidence that the petitioner "has successfully rebutted the presumption that the parent's decision to refuse the grandparent visitation with the grandchild is reasonable."181 Based on cites to these statutes, Troxel may require clear and convincing evidence of parental unfitness.

Interestingly, the most recent version of Oklahoma's grandparent visitation statute does not reflect the Court's parental-presumption requirement.182 In fact, the bill currently pending before the Oklahoma legislature also does not reflect Troxel's parental-presumption requirement.183 The Oklahoma Supreme Court did, however, acknowledge the Troxel Court's finding that the burden of proof lies with the

176. Id.
177. Id.
178. See id. at 70.
179. Id. at 70.
petitioning grandparents.\textsuperscript{184} For purposes of clarity and to ensure uniform adherence to the \textit{Troxel} presumption, the Oklahoma legislature should write this requirement into the statute and set forth the level of proof necessary to rebut this presumption. Also, according to \textit{Troxel}, all parents are equally entitled to this presumption. Thus, the threshold inquiry must be whether the petitioning grandparents have rebutted the presumption, rather than whether granting visitation is in the best interests of the child. Therefore, all provisions contained in the Oklahoma statute that require only an inquiry into the child's best interest must be amended.

B. Evidence That Sufficiently Rebutts a Presumption in Favor of the Parent's Decision

While the Court never addressed precisely what type of evidence sufficiently overcomes this presumption, the \textit{Troxel} opinion clearly holds that evidence of a "mere disagreement" concerning a child's best interest is insufficient to compel visitation.\textsuperscript{185} Moreover, the Court held that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a 'better' decision could be made."\textsuperscript{186} Additionally, the Court held that evidence proving that a continued relationship between the grandparent and child will benefit the child, without more, is unlikely to suffice to rebut the parental presumption.\textsuperscript{187}

The type of evidence contemplated by Oklahoma courts to overcome the presumption seems to be evidence of harm to the child or of parental unfitness. According to the \textit{Herbst} opinion, "To reach the issue of the child's best interest, there must be a requisite showing of harm, or threat of harm, to bring the issue before the court."\textsuperscript{188} This requirement has been applied by the Supreme Court of Oklahoma throughout the last few years.\textsuperscript{189}

C. How the Presumption Plays Out in Cases of Divorce

While a presumption in favor of the parents' decision now exists, applying the presumption may prove problematic in cases where the parents are divorced. Assuming that the parents of an intact family will agree as to the propriety of visitation, the courts should treat the parents as a unit and presume their collective decision to be in the child's best interest. Similarly, if one parent has passed away, then the presumption obviously runs in favor of the widowed parent. All of these cases assume that either the parents are in agreement as to visitation or that only one is entitled, by law, to make that decision. However, the difficulty arises in the case of divorced parents where only one parent opposes visitation. Which parent is entitled

\textsuperscript{184} Neal v. Lee, 2000 OK 90, ¶ 7, 14 P.3d 547, 549.
\textsuperscript{185} Troxel v. Granville, 530 U.S. 57, 67 (2000).
\textsuperscript{186} Id. at 73.
\textsuperscript{187} Id.
\textsuperscript{188} In re Herbst, 1998 OK 100, ¶ 18, 971 P.2d 395, 399.
\textsuperscript{189} Id.; Neal, 2000 OK 90, ¶ 10, 14 P.3d at 550.
to assert this presumption could become a point of contention. The answer may turn on which parent has custody of the child.

Because courts have several options when arranging custody, each custodial situation raises different concerns regarding the parental presumption in grandparent visitation cases. First, the court may award custody to one parent, granting the noncustodial parent visitation rights. In this case, the presumption should only extend to those decisions made by the custodial parent. This is especially true in Oklahoma, due to the following pronouncement of the Oklahoma Supreme Court:

It is not the business of the courts to become involved in everyday decisions of child rearing which are properly the prerogative of the parents or, in the case of divorced parents, the custodial parent. . . . In the absence of specific provisions in the divorce decree or an agreement between the parents, the sole decision making power over significant decisions affecting the child's welfare . . . resides in the custodial parent. The rights and obligations of custody are extensive and operate against third parties, including the non-custodial parent, as well as against the state.190

Accordingly, should a grandparent petition for court-ordered visitation rights, the court must accord special weight to only those decisions of the custodial parent.

Other custodial options available to the court are joint legal and joint physical custody. Joint physical custody means that each parent will receive equal amounts of time with the child.191 Conversely, "[j]oint legal custody' means that both parents have equal rights and responsibilities for major decisions concerning the child.192 Because joint physical custody contemplates equality only as to physical contact with the child, deciding which parent is entitled to the presumption may be a simple task. Suppose, for example, that maternal grandparents want visitation with their grandchildren, but dad opposes visitation. During mom's court-ordered time with the child, the presumption runs in favor of mom's decision. If the grandparents petition for visitation independent from that of their daughter's visitation rights, therefore interrupting dad's time with his child, the presumption runs in his favor.

However, if joint legal custody is shared, and each parent is equally entitled to assert decision-making authority over the child, which parent has legal standing to oppose visitation, and thereby assert the presumption in favor of his or her decision, may be more problematic. Oklahoma does not recognize, nor provide for by statute, any distinction between joint legal and joint physical custody.193 Ideally, the divorce

190. Stephen v. Stephen, 1997 OK 53, ¶ 2, 937 P.2d 92, 98 (Simms, J., concurring) (holding that the decision to homeschool is properly within the discretion of the custodial parent). Justice Simms' concurrence commanded an equal number of votes as the plurality opinion.


192. Id.

193. 43 OKLA. STAT. § 109(B) (2001) (stating "the terms joint custody and joint care, custody, and control mean the sharing by parents in all or some of the aspects of physical and legal care, custody, and
decree will set forth each parent's respective rights to the child. Barring such a provision, or if the parents are not in agreement as to who will exercise decision-making power over the child, which parent the presumption works in favor of remains uncertain.

D. Once the Presumption Has Successfully Been Rebutted

Assuming the parental presumption is successfully rebutted, the next procedural step will be to determine whether visitation is in fact in the child's best interest. The Troxel Court noted that grandparent visitation statutes should contain certain "special factors" for the court's consideration.194 Although the Court did not discuss what these factors might include, at least two possibilities can be gleaned from the opinion. First, the Court cited two state statutes that required the grandparents to show that visitation would not interfere with the parent-child relationship or hinder the parent's authority over the child.195 These factors, according to the Court, enforce the presumption and protect a parent's fundamental rights.196 Second, evidence that visitation has been denied altogether may also properly be considered by the court to determine the child's best interests. Notably, the Troxel Court made much of the fact that Mrs. Granville did not seek to sever the grandparent-grandchild relationship entirely.197 Rather, she merely sought to limit the amount of visitation. Endorsing several state statutes, the Court wrote, "Significantly, many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party."198

The current version of title 10, section 5 of the Oklahoma Statutes lists several factors for the court to consider in determining whether visitation is in a child's best interest. For example "the willingness of the grandparent or grandparents to encourage a close relationship between the child and the parent,"199 the length and quality of the prior relationship between the child and the grandparent or grandparents,200 and the child's need for continuing contact with the grandparent201 may be considered in determining the child's best interest.202 While the Oklahoma Supreme Court now

---

195. Id. at 70 (citing the Minnesota and Maine grandparent visitation statutes; see also ME. REV. STAT. ANN. tit. 19-A, § 1803(3) (West 1998) (requiring evidence that visitation "would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child"); MINN. STAT. § 257.022(2)(a)(2) (1999) (requiring evidence that "visitation would not interfere with the parent-child relationship").
196. Troxel, 530 U.S. at 70.
197. Id.
198. Id. at 71.
200. Id. § 5(D)(1)(b).
201. Id. § 5(D)(2)(g).
202. The statute also requires the court to consider the child's preference (if the court determines he is of sufficient maturity, considering the child's mental and physical health), the grandparents' mental and physical health, the parents' mental and physical health, the quality of the parent-child relationship, and other factors the court deems necessary in the specific circumstances. Id. § 5(D)(1)(a)-(e).
employs the harm standard regardless of the parents' marital status, the Oklahoma legislature has yet to draft a statute reflecting these opinions. Despite the legislature's resistance on this point, there can no longer be any doubt that all parents, united, divorced, or widowed, are meant to enjoy the same rights with respect to their children. To be sure, Oklahoma's statute is much more comprehensive than Washington's statute. To this end, once the parental presumption has been rebutted, a court's consideration of the factors contained in title 10, section 5(D)(1)-(6) will likely suffice as the "special factors" required by Troxel.

Conclusion

The underlying assumption that vests parents with decision-making authority over their children is that parents "possess what a child lacks in maturity, experience and capacity for judgment." Relying on this premise, any law that limits a parent's role in her child's life impliedly questions a parent's fitness. Thus, courts have always placed the burden on the state to prove that interference into a family's life is warranted by parental unfitness. This burden reflects the presumption that parents are fit to make decisions on behalf of their children unless the state can prove otherwise.

An individual's right to privacy is implicated the moment the legislature begins to require people to establish or maintain relationships with others. Once a parent's liberty to make those decisions for his children is interfered with, no matter how severe or minimal that interference, strict scrutiny is the appropriate standard of review. Thus, only upon a showing of harm to a child may a state permissibly intrude upon a parent's constitutionally protected right to raise her child in the manner she deems appropriate. Divesting a parent of this right leaves parents and their children at the mercy of the courts to impose a subjective "best interests of the child" standard and rely on the court's own notions of a healthy family.

The Supreme Court's decision in Troxel raised the bar on limiting a parent's rights. Courts must now approach all third-party visitation petitions assuming that the parent's decision regarding visitation furthers the child's best interest. Moreover, the best interest issue may not even be considered by a court until the presumption has been successfully rebutted by the petitioning party.

Inherent in parental rights are parental obligations. On a large scale, these obligations include financially supporting the child, preserving the child's health, and hopefully raising the child to become an emotionally mature, responsible adult. On a smaller scale, these obligations include bathing the child, feeding the child, and reading the child bedtime stories. If courts are willing to confer upon grandparents the right to the companionship of a child, the very same right, incidentally, that a noncustodial parent may have, then it is not unreasonable to also expect these grandparents to be held to the obligations of a parent. Parental rights are not free. Parents work hard every day to ensure their children's emotional, physical, and spiritual well being. Most parents take this job very seriously, especially when deciding with whom their children should establish and maintain relationships. Unless
these decisions illustrate a parent's unfitness to take on the daily responsibilities of parenthood, a state should not attempt to limit the parent's right to make them.

Natania M. Soto