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That "Thorny Issue" Redux: California Grandparent Visitation Law in the Wake of Troxel v. Granville

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COMMENT

THAT "THORNY ISSUE"[1] REDUX:

CALIFORNIA GRANDPARENT VISITATION LAW IN THE WAKE OF *TROXEL V. GRANVILLE*[2]

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INTRODUCTION

By the time the United States Supreme Court weighed in on the constitutionality of court-ordered grandparent visitation by deciding *Troxel v. Granville* in June of 2000, the issue already had a nearly thirty-year history; almost all state courts had contributed.[3] In some states the

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[1] *Butler v. Harris (In re Marriage of Harris)*, 96 P.3d 141 (Cal. 2004) [hereafter *Butler II*].

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

[3] ALABAMA, *B.R.O. v. G.C.O.*, 646 So. 2d 126 (Ala. Civ. App. 1994), ALASKA, *Brown v. Brown*, 914 P.2d 206 (Alaska 1996); ARIZONA, *Graville v. Dodge*, 985 P.2d 604 (Ariz. Ct. App. 1999); ARKANSAS, *Reed v. Glover*, 889 S.W.2d 729 (Ark. 1994); CALIFORNIA, *Benner v. Benner*, 248 P.2d 425 (Cal. 1952); COLORADO, *In re Marriage of Aragon*, 764 P.2d 419 (Colo. 1988); CONNECTICUT, *Mirto v. Bodine*, 294 A.2d 336 (Conn. Super. Ct. 1972); DELAWARE, *Ward v. Ward*, 537 A.2d 1063 (Del. Fam.1987); FLORIDA, *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996), GEORGIA, *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995); HAWAII, *Camerlingo v. Camerlingo*, 961 P.2d 1162 (Haw. Ct. App. 1998); IDAHO, ILLINOIS, *West v. West*, 689 N.E.2d 1215 (Ill. App. Ct. 1998); INDIANA, *Bailey v. Menzie*, 542 N.E.2d 1015 (Ind. Ct. App. 1989); IOWA, *Olds v. Olds*, 356 N.W.2d 571 (Iowa 1984); KANSAS, *Sowers v. Tsamolias*, 941 P.2d 949 (Kan. 1997) (adoption involved); KENTUCKY, *King v. King*, 828 S.W.2d 630 (Ky. 1992); LOUISIANA, *Lingo v. Kelsay*, 651 So. 2d 499 (La. Ct. App. 1995); MAINE, MARYLAND,

opposing parties on the issue had settled into an uneasy truce, at least on some issues.[4] In many more states a tug-of-war continued, in which legislatures expanded grandparents' rights to sue,[5] only to have state court judges reject legislative expansion of grandparents visitation rights, citing parental privacy.[6] When the United States Supreme Court agreed

Wolinski v. Browneller, 693 A.2d 30 (Md. Ct. Spec. App. 1997); MASSACHUSETTS, *Enos v. Correia*, 647 N.W.2d 1215 (Mass. App. Ct. 1995); MICHIGAN, *Frame v. Nehls*, 550 N.W.2d 739 (Mich. 1996); MINNESOTA, *Petition of Santoro*, 578 N.W.2d 369 (Miss. Ct. App. 1998); MISSISSIPPI, *Martin v. Coop*, 693 So. 2d 912 (Miss. 1997); MISSOURI, *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993); MONTANA, *Kanvick v. Reilly*, 760 P.2d 743 (Mont. 1988) (adoption involved); NEBRASKA, *Beal v. Endsley*, 529 N.W.2d 125 (Neb. Ct. App. 1995); NEVADA, *Bopp v. Lino*, 885 P.2d 559 (Nev. 1994) (adoption involved); NEW HAMPSHIRE, *Roberts v. Ward*, 493 A.2d 478 (N.H. 1985); NEW JERSEY, *Becker v. Becker*, 620 A.2d 1092 (N.J. Super. Ct. Ch. Div. 1992); NEW MEXICO, *Ridenour v. Ridenour*, 901 P.2d 770 (N.M. Ct. App. 1995); NEW YORK, *State ex rel. Foley v. Landberg*, 151 A.D.2d 439 (N.Y. App. Div. 1989); NORTH CAROLINA, *Acker v. Barnes*, 236 S.E.2d 715 (N.C. Ct. App. 1977) (adoption involved); NORTH DAKOTA, *Hoff v. Berg*, 595 N.W.2d 285 (N.D. 1999); OHIO, *Gaffney v. Menrath*, 724 N.E.2d 507 (Ohio Ct. App. 1999); OKLAHOMA, *Leake v. Grissom*, 614 P.2d 1107 (Okla. 1980) (adoption involved); OREGON, Machado v. Uri, 767 P.2d 106 (Or. Ct. App. 1989); PENNSYLVANIA, *Bishop v. Piller*, 581 A.2d 670 (Pa. Super. Ct. 1990); RHODE ISLAND, *In re Nicholas*, 457 A.2d 1359 (R.I. 1983) (adoption involved); SOUTH CAROLINA, *Brown v. Earnhardt*, 396 S.E.2d 358 (S.C. 1990); SOUTH DAKOTA, *Strouse v. Olson*, 397 N.W.2d 651 (S.D. 1986); TENNESSEE, *Simmons v. Simmons*, 900 S.W.2d 682 (Tenn. 1995) (adoption involved); TEXAS, *Tope v. Kaminski*, 793 S.W.2d 315 (Tex. Ct. App. 1990); UTAH, *Campbell v. Campbell*, 896 P.2d 635 (Utah Ct. App. 1995); VERMONT, *In re S.B.L.*, 553 A.2d 1078 (Vt. 1988); VIRGINIA, *Williams v. Williams*, 501 S.E.2d 417 (Va. 1998); WASHINGTON, *Bond v. Yount*, 734 P.2d 39 (Wash. Ct. App. 1987) (adoption involved); WEST VIRGINIA, *Elmer Jimmy S. v. Kenneth B.*, 483 S.E.2d 846 (W. Va. 1997); WISCONSIN, *Soergel v. Raufman*, 453 N.W.2d 624 (Wis. 1990) (adoption involved); WYOMING, *Goff v. Goff*, 844 P.2d 1087 (Wyo. 1993).

[4] In Tennessee, for example, the requirement that a grandparent demonstrate that court-ordered visitation was necessary to avoid harm to the child was initially denounced as the end of court-ordered grandparent visitation. In practice, however, this threshold certainly did not preclude all awards of grandparent visitation. *See, e.g., Hilliard v. Hilliard*, No. 02A01-9609-CH-00230, 1997 WL 61510 (Tenn. Ct. App. Feb. 14, 1997) (noting that court-ordered visitation was appropriate because the maternal grandmother had served in a maternal role to the child).

[5] Examples are found in many jurisdictions. *See, e.g., Hawk v. Hawk,* 855 S.W.2d 573, 577 & n.1 (Tenn. 1993) (describing the progressive expansion of Tenn. Code Ann. Section 36-6-301); *McMain v. Iowa Dist. Ct. for Polk County*, 559 N.W.2d 12, 18-19 (Iowa 1997) (describing the progressive expansion of "statutory circumstances for granting grandchild visitation with grandparents" under Iowa law); *Emanuel S. v. Joseph E.*, 577 N.E.2d 27, 28-29 (N.Y. 1991) (describing the progressive expansion of grandparent visitation rights under N.Y. Dom. Rel. Law Section 72); *Maner v. Stephenson*, 677 A.2d 560, 562-63 (Md. Ct. App. 1996) (describing the progressive expansion of grandparent visitation rights under Md. Fam. Law Code Ann. Section 9-102 (1999)).

[6] "Reading the statute literally . . . § 46b-59 allows any person, under any circumstances, to petition the court for visitation rights, no matter how remote his or her connection to the child ... Such a construction would be a . . . radical departure from the deeply ingrained tradition of family autonomy in such matters [and] would raise serious concerns about the effect of the statute on intact families and the constitutionally protected privacy interests of those families . . . ." *Castagno v. Wholean*, 684 A.2d 1181, 1184 (Conn. 1996), *overruled by Roth v. Weston*, 789 A.2d 431 (Conn. 2002). Six years later the Connecticut Supreme Court took further steps to "provid[e] a judicial

to hear *Troxel*, court watchers predicted major changes in grandparent visitation law.[7] When experts read the newly minted decision, they speculated on the dramatic theoretical changes it could trigger. When state courts actually shouldered the task of applying *Troxel*, it became apparent that although the changes it produced were not theoretically dramatic, they may ultimately have more practical impact than predicted. This article is about *Troxel*'s practical impact as it has played out in the laboratory of the California court system.

To understand *Troxel*'s effect, one must first understand the legal and social landscape that preceded it. Accordingly, the first section of this article explores the political and societal origins of grandparent visitation statutes. It also reviews the basic types of grandparent visitation statutes and the arguments made on each side of a typical pre-*Troxel* grandparent visitation suit. This section explains how these arguments evolved nationally over time, and how each was treated in the courts.

The second step in understanding *Troxel's* effect is to understand the decision itself. *Troxel* is a plurality opinion.[8] Although the individual concurrences and dissents will be of interest to constitutional scholars for years to come, the real importance of the decision, for state courts which must implement it, is found in Justice O'Connor's plurality opinion.[9] The second part of this article, therefore, reviews the plurality's decision and relates aspects of it to the corresponding principles in pre-*Troxel* decisional law.

In a third section, the article analyzes judicial responses to *Troxel*, focusing on California grandparent visitation decisions. This group of decisions is an ideal laboratory for several reasons. First, the California grandparent visitation scheme[10] differs significantly from the grandparent

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gloss" that would protect parental autonomy in the context of grandparent visitation by requiring that a court find the child would suffer harm absent visitation before awarding visitation over the parent's objection. *Roth v. Weston*, 789 A.2d 431, 436 (Conn. 2002). For a strikingly similar judicial effort to salvage a strikingly similar grandparent visitation statute see *In re Visitation of Troxel*, 940 P.2d 698 (Wash. Ct. App. 1997), *aff'd*, 503 U.S. 57 (2000).

[7] *See, e.g.*, David G. Savage, *Fractured Families at Core of Visitation Issue; Law: Single parents chafeat court orders granting privileges to grandparents. Supreme Court to Decide Case*, L.A. TIMES, May 22, 2000, at A1 (2000 WL 2243407).

[8] *Troxel*, 530 U.S. at 62. Justice O'Connor wrote the plurality opinion, and was joined by the Chief Justice and by Justices Ginsberg and Breyer. *Id.* at 80. Justices Souter and Thomas concurred in the judgment, writing separate opinions. *Id.* at 75, 80. Justices Stevens, Scalia and Kennedy each filed a separate dissenting opinion. *Id.* at 80, 91, 93.

[9] *See, e.g., Kyle O. v. Donald R.*, 102 Cal. Rptr. 2d 476, 485-86 (Ct. App. 2000) (applying the *Troxel* majority opinion only).

[10] California's statutory scheme provides three separate avenues for a grandparent seeking court-ordered visitation. Basically, a grandparent has standing when one parent has died (Cal. Fam.

visitation statute at issue in *Troxel*. *Troxel* involved Washington state's "breathtakingly broad"[11] statute, which imposed no limitations on who could sue for visitation or when suit could be brought.[12] This simplified the *Troxel* plurality's analysis considerably. Such unbounded statutory discretion made it unnecessary for *Troxel* to address the potential impact of family status, for example, on parental rights.[13] Most grandparent visitation statutes are more like California's statutes than the statute at issue in *Troxel*, however, and many – like California's – *do* condition some causes of action and some parental rights on family status.[14] Thus,

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Code § 3102 (2005)), or when the child's parents are seeking a divorce. Cal. Fam. Code § 3103 (2005). A third catch-all provision confers standing regardless of any disruption of the child's family, but includes the caveat that if the parents are united in their opposition to the visitation, a rebuttable presumption arises that grandparent visitation is not in the best interests of the child. *Id.* § 3103(d) (2005).

[11] *Troxel*, 530 U.S. at 67.

[12] Wash. Rev. Code § 26.10.160(3) (2005) provided that "any person" could petition for visitation "at any time," and that the petition could be granted simply upon a finding that "visitation may serve the best interest of the child."

[13] *See infra* notes 147-153 and accompanying text.

[14] Nineteen states have "open-ended" grandparent visitation statutes - statutes that permit grandparents to file suit regardless of the parents' marital status:

ALABAMA, Ala. Code § 30-3-4.1 (1989); ALASKA, Alaska Stat. § 25.20.065 (1998); ARIZONA, Ariz. Rev. Stat. Ann. § 25-409 (1994); COLORADO, Colo. Rev. Stat. § 19-1-117 (1999); DELAWARE, Del. Code Ann. tit. 10, § 1031(7) (1999); HAWAII, Haw. Rev. Stat. § 571-46.3 (1999); IDAHO, Idaho Code § 32-719 (1999); KANSAS, Kan. Stat. Ann. § 38-129 (1993); KENTUCKY, Ky. Rev. Stat. Ann. § 405.021 (Banks-Baldwin 1990); MAINE, Me. Rev. Stat. Ann. tit. 19A, § 1803 (West 1998); MARYLAND, Md. Code Ann., Fam. Law § 9-102 (1999); NEW JERSEY, N.J. Stat. Ann. § 9:2-7.1 (West 1999-2000); NEW YORK, N. Y. Dom. Rel. Law § 72 (McKinney 1999); NORTH DAKOTA, N.D. Cent. Code § 14-09-05.1 (1997); OREGON, Or. Rev. Stat. § 109.119 (2001); RHODE ISLAND, R.I. Gen. Laws §§ 15-5-24 - 15-5-24.3 (1999); SOUTH DAKOTA, S.D. Codified Laws § 25-4-52 (Michie 1999); VERMONT, Vt. Stat. Ann. tit. 15, §§ 1011-1013 (1989); VIRGINIA, Va. Code Ann. § 20-124.2 (Michie 1995); WASHINGTON, Wash. Rev. Code § 26.10.100 (West 2005); WEST VIRGINIA, W. Va. Code §§ 48-2B-1 - 48-2B-7 (1999) (current version at W. Va. Code § 48-10-101, *et seq.*); WISCONSIN, Wis. Stat. §§ 767.245, 880.155 (1993-1994); WYOMING, Wyo. Stat. Ann. § 20-7-101 (Michie 1999).

All other states have "closed-ended" statutes and do not permit a grandparent to seek court-ordered visitation when the child lives in an intact family:

ARKANSAS, Ark. Code Ann. § 9-13-103 (Michie 1998); CALIFORNIA, Cal. Fam. Code § 3104 (West 1994); CONNECTICUT, Conn. Gen. Stat. § 46b-59 (1995) (threshold requirement imposed by judicial decision); FLORIDA, Fla. Stat. ch. 752.01 (1997); GEORGIA, Ga. Code Ann. § 19-7-3 (1991); ILLINOIS, Ill. Comp. Stat. 5/607 (1998); INDIANA, Ind. Code § 31-17-5-1 (1999) IOWA, Iowa Code § 598.35 (1999); LOUISIANA, La. Rev. Stat. Ann. § 9:344 (West Supp. 2000), La. Civ. Code Ann. art. 136 (West Supp. 2000); MASSACHUSETTS, Mass. Gen. Laws ch. 119, § 39D (1996); MICHIGAN, Mich. Comp. Laws Ann. § 722.27b (West Supp. 1999); MINNESOTA, Minn. Stat. § 257.022 (1998) (current version at Minn. Stat. § 257C.08 (2005)); MISSISSIPPI, Miss. Code Ann. § 93-16-3 (1994); MISSOURI, Mo. Rev. Stat. § 452.402 (Supp. 1999); MONTANA, Mont. Code Ann. § 40-9-102 (1997); NEBRASKA, Neb. Rev. Stat. § 43-1802 (1998); NEVADA, Nev. Rev. Stat. § 125C.050 (1999); NEW HAMPSHIRE, N.H. Rev. Stat. Ann. § 458:17-d (1992); NEW MEXICO, N.M. Stat. Ann. § 40-9-2 (Michie 1999); NORTH CAROLINA, N.C. Gen. Stat. §§ 50-13.2, 50-13.2A (1999); OHIO, Ohio Rev. Code Ann. §§ 3109.051, 3109.11 (West 1999);

simply to decide the grandparent visitation case before it, most state courts must do what the California courts have done, and extrapolate *Troxel* principles to cover statutory distinctions that *Troxel* ignored.

Second, California's statutory scheme has forced California courts to address a key *Troxel* concept: courts ordering visitation must give the parent's wishes "special weight." Two of California's three grandparent visitation statutes purportedly protect parents' rights by creating a rebuttable presumption that grandparent visitation is contrary to the best interests of the child when both parents agree that it is.[15] Is this the protection the United States Supreme Court envisioned? Clearly a court can give special weight to a parent's preferences by simply deferring to the parent's proposed visitation schedule; this, in fact, is what *Troxel* itself seems to recommend.[16] But does *any* proposed schedule deserve deference? And what happens to the special-weight requirement if the parental right must be somehow apportioned between two parents who disagree? California courts have addressed these questions in light of *Troxel,* and so can provide a window into the future of grandparent visitation law. A final section of the article comments on the view from this window. Although *Troxel* carefully avoids established analyses and adds new terms to the language of grandparent visitation law, courts struggling to extend *Troxel*'s concepts have drawn on and incorporated pre-*Troxel* principles to do so. Ultimately, the view from this window may not be so different after all.

I. THE ORIGINS OF GRANDPARENT VISITATION LAW

Grandparent visitation statutes are creatures of mid to late 20th century America, arising from the social, political and economic changes of that time. At common law, grandparents had no legal right of contact with their grandchildren.[17] A child's parents decided with whom the child would associate and, as far as grandparents were concerned, the parents' decision was constrained, if at all, by moral rather than legal forces.[18]

OKLAHOMA, Okla. Stat. tit. 10, § 5 (1999); PENNSYLVANIA, 23 Pa. Cons. Stat. §§ 5311-5313 (1991); South Carolina, S.C. Code Ann. § 20-7-420(33) (Law. Co-op. 1999); TENNESSEE, Tenn. Code Ann. §§ 36-6-306, 36-6-307 (1999); TEXAS, Tex. Fam. Code § 153.433 (Vernon 2000); UTAH, Utah Code Ann. § 30-5-2 (1998).

[15] Cal. Fam. Code §§ 3103(d), 3104(e) (2005).

[16] *Troxel*, 530 U.S. at 69-70.

[17] *See, e.g., White v. Jacobs*, 243 Cal. Rptr. 597 (Ct. App. 1988) (noting that grandparent visitation rights are purely statutory).

[18] *In re Reiss*, 15 So. 151, 152 (La. 1894) is one of the earliest judicial statements of this proposition and is generally representative of the position of early courts in the absence of

Indeed, grandparents themselves were virtually unknown at common law given typical lifespans.[19] Even at the turn of the twentieth century, an average American died just before reaching 50.[20] By 1960, average Americans could expect to live to nearly 70.[21] Between the beginning of the twentieth century and its latter decades, elderly Americans also began to enjoy unprecedented good health. Medical advances nearly eliminated tuberculosis, for example, and antibiotics made it possible to contain influenza and pneumonia.[22] Although diseases of prosperity and old age, like cancer and cardiovascular disease remained nearly constant or increased slightly,[23] this slight increase in mortality did not begin to outweigh the medical advancements contributing to a healthy old age.

In addition to living longer, healthier lives, by the mid twentieth century elderly people became an increasingly independent group in other respects. At the beginning of the twentieth century, elderly people generally lived with relatives;[24] by 1960, however, 2.9 million Americans over 65 lived alone.[25] Every year after 1960, the number of elderly living alone increased.[26] At the turn of the twentieth century,

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grandparent visitation legislation. *See Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977) (natural family has "its origins entirely apart from the power of the State . . . [and] the liberty interest in family privacy has its source . . . not in state law [footnote omitted] but in intrinsic human rights . . .") (citing *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977); *see Deweese v. Crawford*, 520 S.W.2d 522, 524 (Tex. Civ. App. 1975, writ *ref'd* n.r.e.); 59 AM. JUR. 2E *Parent and Child* § 92 (1987); George L. Blum, Annotation, *Grandparent's Visitation Rights Where Child's Parents Are Deceased, Or Where Status Of Parents Is Unspecified*, 69 A.L.R. 5th 1, 1 (2005); George L. Blum, Annotation, *Grandparents' Visitation Rights Where Child's Parents Are Living*, 71 A.L.R. 5th 99, 99 (2005); *see* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 149 (1897); for a discussion of the common law concept of family in its historical context see J. Bohl, *"Those Privileges Long Recognized": Termination of Parental Rights Statutes, the Family Integrity Right and the Private Culture of the Family*, 1 CARDOZO WOMEN'S L.J. 323, 328-33 (1994).

[19] LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800, at 71-72 (1977).

[20] REBECCA J. DONATELLE & LORRAINE G. DAVIS, ACCESS TO HEALTH 475 (3d ed. 1994).

[21] Bureau of the Census, U.S. Dep't of Comm., Statistical Abstract of the United States 87-88 (1994).

[22] 1900-1970, U.S. Public Health Service, Vital Statistics of the United States, annual, Vol. I and Vol II; From Statistical Abstract of the United States,: 2004-2005; available at http://www.infoplease.com/ipa/A0922292.html (last visited Feb. 13, 2006) (showing in chart form that between 1900 and 2002, deaths from influenza and pneumonia fell from 202.2 per 100,000 Americans to just 22.7 per thousand).

[23] *Id.*

[24] U.S. Census Bureau, Current Population Reports, Households, Families and Married Couples, 1890-2002, available at http://www.infoplease.com/ipa/A0005055.html on 5/31/2005.

[25] Bureau of the Census, U.S. Dep't of Comm., *Demographic Trends in the 20th Century* 155 (2002).

[26] *Id.*

even those Americans lucky enough to enter their golden years in good health rarely had the financial security necessary for leisure. Social Security began paying benefits in 1940, but the full phase-in of those benefits and the corresponding development of private pensions took most of the next twenty years.[27] These turn-of-the-century elders also lacked the political voice that is an accepted part of the American political landscape today. With the advent of the American Association of Retired Persons (AARP) in 1958[28] came steadily increasing political power, effective lobbying and a voting rate for older Americans that increased even faster than the absolute increase in the elderly population.[29]

The parents' side of the grandparent visitation equation also changed significantly between the turn of the twentieth century and its latter half. In 1910, divorce occurred at a rate of less than one per thousand people.[30] By 1965, 2.5 marriages per thousand people ended in divorce and the next decade saw that rate virtually double.[31] By 1975, the people who had divorced were remarrying at a rate of approximately 80%[32] combining children from previous marriages into a single household and creating "blended families."[33]

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[27] Watson Wyatt – Insider, *The Early Economics of Social Security* at http://www.watsonwyatt.com/us/pubs/insider/printable.asp?ArticleID=8378&Component= (last visited May 31, 2005 (citing United States Bureau of the Census, Historical Statistics of the United States (Washington, D.C. Government Printing Office, 1975) p. 348.

[28] AARP History, http://www.aarp.org/about_aarp/aarp_overview/a2003-01-13-aarphistory.html (last visited Aug. 11, 2005).

[29] 65.1% of the 23 million Americans 65 years of age and older in 1984 voted, whereas 70.1% of the 30.8 million Americans 65 years of age and older voted in 1992. Bureau of the Census, U.S. Dept. of Comm., Statistical Abstract of the United States 87-88 (1994). Compare the voting rate for older Americans in 1992 (70.1%) with the voting rates in 1992 for those most likely to be parents: 53.2% of those aged 25-34 voted, while 63.6% of those aged 35-44 voted. *Id.; see also* Grandparents Rights: Preserving Generational Bonds: Hearing Before the Subcomm. on Human Services of the House of Representatives Select Comm. on Aging, 102d Cong. 9 (1991) (Opening Statements of Chairman Thomas J. Downey (noting that approximately three quarters of older Americans are grandparents and that "[i]t is a well-known fact that seniors are the most active lobby in this country")).

[30] *Statistical Abstract of the United States 1975*, 51 (96th Annual Ed.) Washington D.C. 1975.

[31] *Statistical Abstract of the United States 1976*, 359 (97th Annual Ed.) Washington D.C. 1976.

[32] Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Special Studies Series, 20, No. 312, Marriage, Divorce, Widowhood and Remarriage by Family Characteristics: June 1975, 8-10 (1977).

[33] A blended family is 'a family composed of a couple and their children from previous marriages.' The Random House Dictionary of the English Language (2d Ed. Unabridged 1987). The term "blended family" was developed to describe a "stepfamily" without the negative implications of "stepmother" etc. *See, e.g.*, John H. Harvey & Ann L. Weber, ODYSSEY OF THE HEART: CLOSE RELATIONSHIPS IN THE 21ST CENTURY 129 (2002); Ann L. Milne, et al., DIVORCE AND FAMILY

Never-married single parents also became an acceptable variation of American family life. Although these statistics are imprecise,[34] the general trend is clear. In 1970, 11% of all children born in the United States were born to unmarried women; by 1991, that percentage had almost tripled, increasing to 30%.[35] This acceptance of illegitimacy was permanently enshrined in American popular culture by a series of episodes in "Murphy Brown," a television situation comedy originally airing in 1992, in which the female protagonist becomes pregnant, decides not to marry the father of her child but, to instead, raise the baby on her own. One single mother, responding to the story line, was quoted as saying "Murphy Brown creates a feeling of belonging to the new American family."[36]

Even traditional nuclear families, untouched by divorce, changed dramatically as mothers joined the workforce. In 1950, 11.9% of married women with children under six years of age worked outside the home.[37] By 1965, that figure had more than doubled to 23.3%.[38] By the end of the next decade, more than one out of every three married mothers of small children worked outside the home.[39] "Parenthood" no longer necessarily referred to married natural parents of children living together, with mothers at home, caring for the youngest.[40]

The same decades that saw such extensive change in family structure were also a period of some clearly negative social trends outside the family circle. Dependency cases—defined as cases in which children eighteen years of age and younger were referred to the court because of inadequate care and supervision—nearly doubled between 1960 and 1973.[41] During this same period, cases of juvenile delinquency

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MEDIATION: MODELS, TECHNIQUES AND APPLICATIONS 336 (1994) (discussing characteristics and common myths of blended families).

[34] STATISTICAL HANDBOOK OF THE AMERICAN FAMILY 240 (The Oryx Press, Bruce A. Chadwick & Tim B. Heaton eds., 1992).

[35] Bureau of the Census, U.S. Dep't of Census, Statistical Abstract of the United States 87-88 (1994).

[36] James Rowley, *More and More Unwed Women Bearing Children*, AP, July 14, 1993, available in Lexis, News Library, AP File.

[37] *Statistical Abstract of the United States 1976*, 359 (97th Annual Ed.) Washington D.C. 1976.

[38] *Id.*

[39] In 1975, 36.6% of women with children under 6 years old worked outside the home. *Id.*

[40] For an interesting discussion of the theoretical basis for parenthood given these social changes, *see* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984).

[41] *Statistical Abstract of the United States 1975*, 166 (96th Annual Ed.) Washington D.C. 1975.

increased by more than one third.[42] Although sociologists may debate the correlation between a changing family structure and this particular set of social ills, they were firmly linked in popular opinion.[43]

The 1960's and 70's thus dawned on a graying America in which newly politicized elders could look forward to years of financial security, independent living and leisure. These elders had a front row seat as social ills multiplied and family structure appeared to disintegrate; and the political muscle to exert some control over the familial changes they saw. In hindsight, it is hardly surprising that grandparent visitation statutes were created, or that, in their earliest incarnation, they were linked to family structure.

Some early grandparent visitation statutes, for example, conferred a right to sue for court-ordered visitation when the grandparent's own child had died, creating, in effect, a specific derivative right of access to a grandchild.[44] Other early grandparent visitation cases focused on the reality that grandparents were increasingly likely to serve as emergency caretakers in a world of "stripped down families," and provided a right of access when grandparent and grandchild had already established a close relationship. In *Goodman v. Dratch*,[45] for example, the grandchild, Michael, lived with his maternal grandparents for about a year after his mother died, and saw his father only in the evenings. When the father remarried and established a new home for himself, his new wife and Michael, he also attempted to cut off contact between Michael and his grandparents. The grandparents' suit for visitation was successful; the court noted that the grandparents had "occupied the position of parents to the child."[46]

As grandparent visitation statutes became more common, however, and as elder Americans flexed their political muscle, the character of grandparent visitation statutes had changed. By 1991, all states had enacted grandparent visitation statutes.[47] And all of these statutes were more general than the early ones; the new statutes conferred rights based simply on the fact of grandparenthood rather than on a specific role the grandparent played in the grandchild's life. Thus, for example, New

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[42] *Id.*

[43] *See, e.g,. Graziano v. Davis*, 361 N.E.2d 525, 530 (Ohio Ct. App. 1976).

[44] *See, e.g., Emanuel S. v. Joseph E.*, 577 N.E.2d 27, 28 (N.Y. 1991) (describing New York's original grandparent visitation statute).

[45] *Commonwealth ex rel Goodman v. Dratch,* 159 A.2d 70 (Penn. Sup. Ct. 1960).

[46] *Id.* at 71.

[47] Most states had enacted grandparent visitation statutes by the late 1980's; Maine enacted its statute in 1991: Me. Rev. Stat. Ann. Tit. 19 § 1003 (1991) derived from Laws 1991, c 414 (repealed 1995).

York's grandparent visitation statute, as enacted in 1966, provided a grandparent with a right to seek court-ordered visitation only when the grandparent's own child had died.[48] By 1975, the statute was amended to confer standing on a grandparent when *either* of the grandchild's parents had died, or whenever "equity would see fit to intervene."[49] The pattern was set: all modern grandparent visitation statutes fit one of two models. Some grandparent visitation statutes attach no preconditions to suit, while others require only some general disruptive precipitating event in the child's family.[50]

A. EARLY GRANDPARENT VISITATION LITIGATION

The earliest grandparent visitation suits followed a simple pattern. Plaintiff grandparents alleged that grandparent visitation was in the best interest of the child.[51] Parents disputed this, often alleging that the grandparent's suit was motivated by spite,[52] or that visitation would be disruptive to the child.[53] The grandparents generally won, often in subjective and sentimental decisions that idealized grandparental love.[54]

A change occurred in the 1980's, when an increasing number of defendant-parents began making a constitutional argument against grandparent visitation.[55] The parents argued that ordering grandparent visitation over the objections of fit parents violated the parents' right to child rearing autonomy absent a showing of harm. The parents based this argument on the principle that only the state may countermand a fit parent's childrearing decision when the countermand is necessary to avoid harm to the child.[56] Absent that showing of harm, they argued,

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[48] *See Emanuel S. v. Joseph E.*, 560 N.Y.S. 2d 211, 213 (Sup. Ct. 1990) (explaining the evolution of New York's grandparent visitation statute) (citing N.Y. Dom. Rel. Law § 72 as amended by L. 1966, ch. 631), *rev'd by* 577 N.E.2d 27 (N.Y. 1991).

[49] *Id* .(citing N.Y. Dom. Rel. Law § 72 as amended by L. 1975, ch. 431).

[50] *See supra* note 10.

[51] *See, e.g., Graziano*, 361 N.E.2d at 526-27.

[52] *Id.* at 527.

[53] *Mimkon v. Ford*, 332 A.2d 199, 206 (N.J. 1975).

[54] *See, e.g., id.* at 204 (referring to grandparents as "generous sources of unconditional love and acceptance").

[55] *See, e.g., Bailey v. Menzie*, 542 N.E. 2d 1015 (Ind. Ct. App. 1989); *Frances E. v. Peter E.*, 479 N.Y.S. 2d 319 (1984).

[56] One of the most often cited statements of the harm standard in American Constitutional jurisprudence was cited in *Prince v. Massachusetts*, 321 U.S. 158 (1944), in which the Court countermanded the parent's decision to allow her child to sell magazines on the street citing the psychological and physical injury the child could sustain. *Id.* at 178. For a current discussion of the harm standard in the context of grandparent visitation, see Joan Catherine Bohl, *Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When The Child Would Otherwise Suffer Harm*, 48 DRAKE L. REV. 279, 286 (2000).

parents and child occupied a private realm of family life that the state could not enter.[57]

These early constitutional arguments were resoundingly unsuccessful. Some courts simply ignored them.[58] Most courts dismissed them with minimal discussion, often citing to best interests of the child tests that actually have nothing to do with the parents' harm arguments.[59]

This state of affairs persisted for years,[60] making grandparent visitation law, in effect, the illegitimate stepchild of family law. In other state actions that implicate parental rights, such as abuse and neglect cases, or medical treatment cases, courts used a "harm standard." So, for example, if a child risked death or disfigurement without certain medical treatment, a court would order the treatment over the parents' objection.[61] If the parent merely wanted to pursue one medically acceptable course of treatment over another, on the other hand, no judicial intervention would be appropriate. [62] Indeed, the court is literally without authority to countermand the parent's decision unless that decision threatened to harm the child.[63] In grandparent visitation cases, however, most opinions in the 1980's and early 1990's simply ignored these governing principles of family law, and rested decisions

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[57] In *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993), the court explains that an initial showing of harm to a child is a necessary prerequisite to any best interests of the child analysis in order to "balance[] various state interests against parental privacy rights," (*id.* at 580), tracing this concept through United States Supreme Court decisions. *Id.* at 580-82.

[58] *See, e.g., Lo Presti v. Lo Presti*, 355 N.E.2d 372 (N.Y. 1976) (court simply never addresses counsel's constitutional argument); *Emanuel S. v. Joseph E.*, 560 N.Y.S.2d 211, 213 (N.Y. Ct. App. 1990) (court expresses doubt that it has power to pass on the constitutional issue, then declines to do so).

[59] *See, e.g., Frances E. v. Peter E.*, 479 N.Y.S.2d 319 (N.Y. Fam. Ct. 1984); *Bailey v. Menzie*, 542 N.E.2d 1015 (Ind. Ct. App. 1989).

[60] One of the most dramatic shifts occurred over a twelve year period in Connecticut. In 1990, the Connecticut Supreme Court refused to directly discuss the constitutionality of its grandparent visitation statute, although assuming its constitutionality in dicta. *Lehrer v. Davis*, 571 A.2d 691 (Conn. 1990). In 2002, the Connecticut Supreme Court revisited the issue, interpreting the same statute to require a threshold finding of harm. *Roth v. Weston*, 789 A.2d 431 (Conn. 2002).

[61] *See, e.g., Crouse Irving Memorial Hosp. v. Paddock*, 485 N.Y.S.2d 442, 445 (Sup. Ct. 1985) (holding that state authority to override parental decision-making is limited to alleviating direct and immediate threats to the child).

[62] *Id.*; *see, e.g., King v. King*, 828 S.W.2d 630, 635 (Ky. 1992) (Lambert, J., dissenting) (contrasting the statement of parental rights in a recent Kentucky custody case with the absence of any recognition of the same right in the context of grandparent visitation.).

[63] *See, generally,* J.C. Bohl, *Brave New Statutes: Grandparent Visitation Statutes as Unconstitutional Invasions of Family Life and Invalid Exercises of State Power*, GEO. MASON UNIV. CIVIL RTS. L.J. 271, 288 (1993) (discussing theories under which the state may countermand parental decisions).

instead on pure sentiment.[64] Given this sentimental approach, perhaps it should not be surprising that some justices ignored even the prior grandparent visitation decisions from their own jurisdictions.[65] By circumventing the accepted principles of family law, grandparent visitation law occupied its discredited fringe[66] until 1993, when the Tennessee Supreme Court decided *Hawk v. Hawk.*

B. A SEA CHANGE[67] IN GRANDPARENT VISITATION LITIGATION: CONSTITUTIONAL ARGUMENTS RECEIVE RECOGNITION

Hawk v. Hawk[68] began, as most grandparent visitation cases have, as an unremarkable dispute between parents: in this case, the married, natural parents of two children aged three and five at the time of the initial petition[69] and the paternal grandparents.[70] The parents did not want the grandparents to spank the children; the grandparents felt they should be free to discipline the children as they saw fit.[71] The grandparents were unwilling to comply with the parents' wishes regarding the children's bedtimes and activities.[72] The parents complained that the grandparents used the parents' objections to make them the "bad guys" in front of the children.[73] The parents cut off contact with the grandparents, and the grandparents sued.[74] The parents

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[64] *See, e.g., Frances E. v. Peter E.*, 479 N.Y.S.2d 319, 323 (N.Y. Fam. Ct. 1984) (quoting *Ehrlich v. Ressner*, 55 N.Y.S.2d 152 (N.Y. Fam. Ct. 1977); *Lo Presti v. Lo Presti,* 355 N.E.2d 372 (N.Y. 1976); *Johansen v. Lanphear*, 464 N.Y.S.2d 301 (N.Y. App. Div. 1983)) (describing the policy underlying the grandparent visitation statute: "Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild . . . which he cannot derive from any other relationship").

[65] Missouri law provided that visitation could be awarded only if unreasonably denied by the parents for at least 90 days. Mo. Rev. Stat. § 452.402 (1992). Although the Missouri Supreme Court specifically addressed this provision in *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993), it made no mention of a Missouri Appellate Court decision that had specifically addressed the same provision two years earlier. *See Farrell v. Denson*, 821 S.W.2d 547 (Mo. Ct. App. 1991).

[66] *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, 771-75 (1997).

[67] Sea Change: 1. A striking change . . . often for the better, 2. Any major transformation or alteration. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, 1725 (2d ed. unabridged, Random House 1987).

[68] *Hawk*, 855 S.W.2d 573 (Tenn. 1993).

[69] Application for Permission to Appeal to the Supreme Court at 7, *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993) (No. 996 Court of Appeals).

[70] *Hawk*, 855 S.W.2d at 575.

[71] Application for Permission to Appeal to the Supreme Court at 8, *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993) (No. 996 Court of Appeals).

[72] *Id.*

[73] *Id.* at 10; *Hawk*, 855 S.W.2d at 575-76.

[74] The grandparents sued pursuant to Tennessee's grandparent visitation statute, T.C.A. § 36-

lost at the initial hearing; the trial judge did not address the parents' constitutional arguments at all, and instead awarded the grandparents unsupervised visitation and attached no restrictions. The court went on to announce that "the Court is fully convinced that [the grandparents] would not do anything or take these children anywhere that would adversely affect [them]."[75] The parents appealed to the Tennessee Supreme Court.[76]

For the first time since grandparent visitation appeared on the legal landscape, a state supreme court gave serious attention to its constitutional implications.[77] The court noted, first, that the right at stake was childbearing autonomy, which was protected under Tennessee law from state interference "except where the child's welfare is materially jeopardized"[78] by parental actions. The court reviewed the United States Supreme Court's affirmance that childrearing autonomy includes parents' right to direct the upbringing and education of their children,[79] unless their choices jeopardize the health or safety of the child, or create significant social burdens.[80] The court noted that the United States Supreme Court recognized childrearing autonomy as fundamental to both federal constitutional jurisprudence and to the concept of a private realm to family life.[81] Parental rights thus implicate the entire panoply of privacy rights inherent in the Federal Constitution.

The Tennessee Supreme Court thus concluded that a grandparent visitation suit was a direct challenge to a fundamental privacy interest. "Without a substantial danger of harm to the child,"[82] the court held, a parental decision regarding visitation could not be countermanded simply because the trial justice believed he could make a better decision.[83] And although the court elaborated extensively on the federal constitutional basis for this conclusion, it rested its holding exclusively on the state

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6-301, which allowed "a court to order 'reasonable visitation' with grandparents if it is 'in the best interests of the minor child.'" *Hawk*, 855 S.W.2d at 576-77.

[75] *Id.*

[76] *Id.* at 575 (stating it "granted review in this case primarily to decide the constitutionality of T.C.A. s 36-6-301").

[77] *Id.* at 573. This is not to minimize the importance of individual justices whose often impassioned criticisms of grandparent visitation surely primed the country's collective legal consciousness.

[78] *Id.* at 578.

[79] *Id.* (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925)).

[80] *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972)).

[81] *Id.* at 578-79.

[82] *Id.* at 579.

[83] *Id.* at 580-81 (citing Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. LOUISVILLE J. FAM.L. 393, 441 (1985-86).

constitution,[84] thereby insulating it from any further review.

By addressing the constitutional issues raised in detail and supporting each conclusion with citations to Tennessee cases, the *Hawk* court took two remarkable steps forward. First, it legitimized grandparent visitation law; it did not rest any aspect of any conclusion on sentiment. In fact, *Hawk* expressly disapproved of decisions in other jurisdictions which had.[85] Furthermore, *Hawk* used settled principles in Tennessee family law. Thus, to establish the nature of the right at stake, the court cited Tennessee custody cases regarding child rearing autonomy.[86] To explain the standard for permissible state action to protect children from a parent's harmful decision, the court used Tennessee cases where the court ordered medical treatment for children despite parental objections.[87]

The second remarkable step the *Hawk* court took was to invalidate the Tennessee grandparent visitation statute as an unconstitutional intrusion on the Hawk parents' family life, since it permitted the state to countermand the decisions of fit, married[88] parents without requiring a showing of harm to the child.[89] At least in Tennessee, grandparent visitation law was the poor stepchild of family law no longer.

In one fell swoop, *Hawk* legitimized constitutional arguments in the application of grandparent visitation laws.[90] The Georgia Supreme Court took the next step in *Brooks v. Parkerson,*[91] by finding that Georgia's open-ended grandparent visitation statute[92] was unconstitutional on its face, under the federal constitution. Relying on United States Supreme

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[84] *Hawk*, 855 S.W.2d at 582.

[85] *Id.* at 581-82 (discussing *In re Robert D.*, 198 Cal. Rptr. 801, 803-04 (Ct. App. 1984) and *King v. King*, 828 S.W.2d 630 (Ky. 1993)).

[86] *Id.* at 577-78 (citing *State ex rel. Bethell v. Kilvington*, 45 S.W. 433, 435 (Tenn. 1898); *In re Knott*, 197 S.W. 1097, 1098 (1917)).

[87] *Id.* at 580 (citing *Matter of Hamilton*, 657 S.W.2d 425 (Tenn. Ct. App. 1983)).

[88] Although the Tennessee Supreme Court apparently found it material that the Hawk parents were married, it subsequently repudiated the significance of marriage for a grandparent visitation analysis. *See also*, J. C. Bohl, Brave New Statutes: *Grandparent Visitation as Unconstitutional Invasions of Family life and Invalid Exercises of State Power,* 3 GEO. MASON U. CIV. RTS. L.J. 271, 276 (1993) (discussing the common law origin of the family as rooted in the union of husband and wife).

[89] *Hawk*, 855 S.W.2d at 582.

[90] *See, e.g., Simmons v. Simmons*, 900 S.W.2d 682 (Tenn. 1995) (extending Hawk's constitutional principles to a family formed by stepparent adoption); *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998) (same).

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

[92] *See id.* at 771. O.C.G.A. Section 19-7-3(c) provides, in pertinent part: "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." *Brooks*, 454 S.E.2d at 771.

Court cases, Georgia family law decisions, and the *Hawk* opinion itself, the *Brooks* court held that the state could not impose grandparent visitation over the parents' objections unless that visitation was necessary to prevent harm to the child.[93]

C. THE PATTERN IS SET: TYPICAL PRE-TROXEL JUDICIAL RESPONSES TO GRANDPARENT VISITATION SUITS

In the wake of *Hawk* and *Brooks*, courts no longer simply dismissed constitutional arguments. Some courts resolved cases based on best interests[94] or standing,[95] and found it unnecessary to address the constitutional question. Of those courts that did, however, judicial responses fall into two broad categories.

The first category validated grandparent visitation statutes by applying the same balancing test originally developed to harmonize competing constitutional rights in the context of marriage regulation,[96] First Amendment rights and abortion cases. This "undue-burden test"[97] is designed to evaluate legislation that effectively places two rights or interests of constitutional magnitude in conflict. In abortion cases, for example, a woman's "personal right" to decide whether to have an abortion conflicts with the state's "important interests" in medical procedures, and its interest in protecting potential human life. Since each right necessarily qualifies the other, as long as one does not unduly burden the other the statute can be evaluated under a lenient, rational basis review. The undue-burden test thus leads to rational basis review; rational basis review, in turn, requires only that the statute at issue be justifiable under some, conceivable circumstance. [98] A grandparent visitation statute would then survive judicial scrutiny simply because it was rationally related to any legitimate state goal.[99]

The logical flaw with this approach is that, unlike First Amendment cases or abortion cases, grandparent visitation cases do not include

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[93] *Id.* at 774.

[94] *See, e.g., Ward v. Dibble*, 683 So.2d 666 (Fla. Ct. App. 1996).

[95] *See, e.g., Frame v. Nehls*, 550 N.W.2d 739 (Mich. 1996).

[96] *See Zablocki v. Redhail*, 434 U.S. 374 (1978); *Califano v. Jobst*, 434 U.S. 47 (1977); Joan C. Bohl, *Family Autonomy vs. Grandparent Visitation: How Precedent Fell Prey to Sentiment in* Herndon v. Tuhey, 62 MO. L. REV. 755, 778-80 (1997) (discussing *Zablocki* and *Jobst* in the context of grandparent visitation).

[97] Justice O'Connor is the primary architect of this concept. *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting), *overruled on other grounds by Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992).

[98] *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

[99] *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993).

competing interests of constitutional magnitude. Parents certainly have a constitutionally protected interest in child rearing autonomy, but despite judicial intimation to the contrary, grandparents have no legal right to contact with grandchildren.[100] Furthermore, although the state, as *Parens Patria*, has an interest in child welfare, that interest is only triggered when parents are unfit.[101] Flawed or not, however, the use of the "undue-burden test" in grandparent visitation cases is significant for present purposes if for no other reason than that it received serious consideration from the courts of several different jurisdictions.[102] By the time *Troxel* was decided, this particular variation of the "undue-burden test" was a well-established feature on the landscape of grandparent visitation law.

The second category of judicial responses to the constitutional challenge of a grandparent visitation case recognizes that only one constitutional right is at stake: the parent's right to childrearing autonomy. This approach first examines the nature of the right at stake. Since childrearing autonomy is well established as a fundamental right,[103] the state may only intrude upon it to further a compelling state interest; a merely legitimate interest will not suffice. Even if the interest is compelling, the statute will only survive judicial scrutiny if it is narrowly tailored to further that interest. Cases taking this approach note that the state's interest is to prevent harm to the child. Although visitation with a grandparent may sometimes be beneficial, its absence can hardly be equated to harm as defined in the child welfare context.[104] Further, there is little evidence that grandparent visitation is always of benefit in the first place.[105] Courts using this fundamental right/strict scrutiny approach generally invalidate grandparent visitation statutes as

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[100] *See supra* note 17. Dissenting Justice Lambert provided an eloquent – if terse statement of this proposition in *King v. King*, "The fatal flaw in the majority opinion is its conclusion that a grandparent has a "fundamental right" to visitation with a grandchild. No authority is cited for this proposition as there is no such right." *King*, 828 S.W.2d at 633 (Lambert, J., dissenting).

[101] *See, e.g.*, Douglas R. Rendleman, *Parens Patria: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205 (1971) (tracing the evolution of the concept and discussing its use in juvenile courts).

[102] *See, e.g., Ridenour v. Ridenour*, 901 P.2d 770 (N.M. Ct. App. 1995); *R.T. & M.T. v. J.E. & L.E.*, 650 A.2d 13 (N.J. Super. 1994).

[103] The litany of U.S. Supreme court decisions cited in support of this proposition includes: *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 US. 158 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *see, e.g., Hawk*, 855 S.W.2d at 578; *Brooks*, 454 S.E.2d at 771. Some grandparent visitation cases added to this core group. *See, e.g., Hawk*, 855 S.W.2d at 578 (adding *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) to the basic litany).

[104] *See, e.g., Hawk*, 855 S.W.2d at 580.

[105] *Brooks*, 454 S.E.2d at 773. Some courts have taken the position that involvement in the judicial process itself inflicts harm on a child, furthering weakening any compelling state interest argument. *See, e.g., McMain v. Iowa Dist. Ct. for Polk County*, 559 N.W.2d 12, 14-15 (Iowa 1997).

unconstitutional.

In 2000, when the United States Supreme Court elected to review a Washington Supreme Court grandparent visitation decision,[106] both approaches were firmly entrenched in the legal landscape.[107]

II. TROXEL V. GRANVILLE[108]

A. "COUSINS AND MUSIC"[109] THE WASHINGTON SUPERIOR COURT AWARDS VISITATION

In Washington State, in the late eighties, two daughters were born to Tommie Granville and Brad Troxel: Natalie and Isabelle.[110] The girls' parents – Ms. Granville and Mr. Troxel – never married, and when their relationship ended in 1991,[111] Mr. Troxel moved in with his parents: he continued to see his daughters regularly at his parents' house.[112] In May of 1993, Mr. Troxel committed suicide.[113] The children continued regular visits with their paternal grandparents for a few months after their father's death.[114] In October of 1993, Ms. Granville decided fewer visits would be better for her daughters, and suggested reduced visitation of one weekend day per month.[115] The paternal grandparents declined her offer and sued, seeking court-ordered visitation that both was more extensive and included overnight stays.[116]

The pertinent Washington statute provided, in relevant part, that "any person" could seek court-ordered visitation "at any time" and that it could be granted whenever "visitation may serve the best interests of the child."[117] The Washington Superior Court awarded the grandparents a full weekend per month, a week in the summer, and additional time on

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[106] *Troxel v. Granville*, 527 U.S. 1069 (1999).

[107] The Court had denied certiori in a case using a rational basis review and a minimal intrusion theory, (*King v. King*, 828 S.W.2d 630 (Ky. 1992), *cert. denied*, 506 U.S. 941 (1992)), and in a case applying strict scrutiny (*Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995), *cert. denied*, 516 U.S. 942 (1995)).

[108] *In re Visitation of Troxel*, 940 P.2d 698 (Wash Ct. App. 1997), *rev'd by* 969 P.2d 21 (Wash. 1998); *aff'd sub nom Troxel v. Granville*, 530 U.S. 57 (2000).

[109] *Troxel v. Granville*, 530 U.S. at 62.

[110] *Id.* at 60.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 61.

[116] *Id.*

[117] Wash. Rev. Code § 26.10.160(3) (1994).

the grandparents' birthdays.[118] In support of its decision, the Superior Court noted that visitation with the grandparents could "provide opportunities for the children in the areas of cousins and music."[119] Ms. Granville appealed.[120]

B. "ABSURD"[121] ON ITS FACE: THE WASHINGTON COURT OF APPEALS REVERSES

The Washington Court of Appeals reversed the Superior Court's award of visitation and dismissed the case, holding that the grandparents did not even have standing to sue for two reasons.[122] The Court of Appeals noted, first, that the statute in question was "absurd"[123] on its face. It created a means for anyone to seek visitation, with anyone's child, for reasons that could be frivolous or downright vengeful, but would nonetheless require the parent to mount an expensive, time consuming and emotionally draining defense.[124] The legislature, the court concluded, could not have intended this result.[125]

The Court of Appeal's second basis for concluding that the Troxel grandparents had no standing to seek court-ordered visitation under the statute arose from its review of the context and history of the statute. The court noted that the legislature had amended a parallel provision of Washington law to limit circumstances in which non-parents could seek court-ordered visitation with children.[126] The court found no "plausible reason" for the legislature to add a limiting amendment to one provision, but not to the parallel provision conferring rights on grandparents.[127] The court thus concluded that the legislature must have intended to limit suits for grandparent visitation to situations in which the child's custody was already the subject of a judicial proceeding.[128] The grandparents appealed.[129]

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[118] *Troxel*, 530 U.S. at 61.

[119] *Id.* at 562 (describing the trial court's findings of fact after remand from the court of appeals).

[120] *Id.*

[121] *In re Visitation of Troxel*, 940 P.2d at 699.

[122] *Id.* at 700.

[123] *Id.*

[124] *Id.* at 699.

[125] *Id.* at 700.

[126] *Id.* (citing Wash. Rev. Code §§ 26.10.160(3), 26.10.030(1)).

[127] *Id.* at 700-01.

[128] *Id.* at 701.

[129] *In re Smith*, 969 P.2d 21, 24 (Wash. 1998).

C. THE WASHINGTON SUPREME COURT WEIGHS IN

The Washington Supreme Court took an entirely different view of the proper construction of the grandparent visitation statute at issue. It rejected the judicial gloss fashioned by the Court of Appeals, asserting that when the words of a statute are unambiguous, a court must "assume [] that the legislature means exactly what it says."[130] Since the statute's terms conferred standing on the petitioning grandparents without any precondition, that was the proper interpretation. The court held, however, that the effect of the statute was to "impermissibly interfere with a parent's fundamental interest in the care, custody and companionship of the child.[131] Thus, the court invalidated the statute on federal constitutional grounds.[132]

First, the court established the fundamental nature of the right at stake, as developed through United States Supreme Court precedent. It emphasized that the right to family integrity was specifically protected by the federal constitution through the Due Process and Equal Protection Clauses of the Fourteenth and the Ninth Amendments.[133] The court also linked the right to family integrity to the "privacy rights inherent in the [United States] Constitution." Since the right to decide with whom one's child will associate is a fundamental right, state action infringing upon it must serve a compelling state interest.[134]

Thus, the state can only "intrude upon a family's integrity. . .when 'parental actions or decisions seriously conflict with the physical or mental health of the child.'"[135] The statute at issue, however, incorporated no such threshold. The court observed that when a child has a "substantial relationship" with a non-parent, arbitrarily depriving the child of contact with that person would harm the child.[136] At a minimum, then, in order to pass constitutional muster, the statute must include a threshold requirement of a substantial relationship between the petitioning grandparent and the child.[137] Since it did not, it was unconstitutional on its face under the federal constitution.[138]

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[130] *Id.* at 25.

[131] *Id.* at 31.

[132] *Id.* at 29.

[133] *Id.* at 28.

[134] *Id.* at 30.

[135] *Id.* at 29 (citing *In re Sumey*, 621 P.2d 108 (Wash. 1980).

[136] *Id.*

[137] *Id.*

[138] Facial invalidation of a statute means that it is unconstitutional no matter how it is applied. In contrast, invalidating a statute "as applied," strikes down the statute only as it was applied in the individual case before the court; the statute itself remains intact. For further discussion see Richard

When the United States Supreme Court granted the Troxel grandparents' petition for certiorari,[139] the decision it agreed to review was a detailed articulation of a fundamental rights/strict scrutiny analysis which incorporated a specific discussion of how the harm standard could have been applied.[140] The Washington Supreme Court decision was not complicated by any references to independent state constitutional grounds;[141] if the decision were not drafted as a challenge to the high court, it could have been.

D. "UNCONSTITUTIONAL AS APPLIED": THE U.S. SUPREME COURT PLURALITY

The United States Supreme Court's plurality decision[142] did, in fact, affirm the Washington Supreme Court's decision.[143] The Supreme Court's first step, however, was to recast the question before it. The Washington Supreme Court had taken the position that the state's grandparent visitation statute was facially unconstitutional;[144] the United States Supreme Court, however, stated that it would "decide whether [the statute] *as applied to Tommie Granville and her family* violates the Federal Constitution."[145] This had the practical effect of making the Court's holding fact specific. With the question recast in this manner, the Court did not have to address the Washington Supreme Court's position that *any* grandparent visitation statute was an improper exercise of state power unless it incorporated a harm standard. Consequently, despite the narrow reach of the plurality decision, four aspects of the decision had enormous practical significance for state courts deciding grandparent visitation cases.

First, the Court held that the interest at issue was "[t]he liberty interest . . . of parents in the care, custody, and control of their children . .

H. Fallon, Jr., *As-Applied and Facial Challenges and Third Party Standing*, 113 HARV. L. REV. 1321, 1323 (2000); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 237-38 (1994).

[139] *Troxel v. Granville*, 527 U.S. 1069 (1999).

[140] *In re Smith*, 969 P.2d at 30-31.

[141] Reliance on state constitutional provisions would place a state court's holding beyond the reach of further appellate review by the U.S. Supreme Court because the highest court of any state is the final arbiter of that state's constitutional question. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

[142] Justice O'Connor wrote the opinion and was joined by the Chief Justice, Justice Ginsberg and Justice Breyer. *Troxel*, 530 U.S. at 59.

[143] *Id.* at 75.

[144] *In re Smith*, 969 P.2d at 28-30 (holding that the federal constitution permits state interference with parental rights only to prevent harm or potential harm to a child).

[145] *Troxel*, 530 U.S. at 65 (emphasis added).

. ."[146] The Court noted that parents are presumed to act in the best interests of their children, and that our legal concept of family rests on this presumption.[147] This holding is important to grandparent visitation law because it establishes once and for all that the right of family privacy applies in the context of grandparent visitation. Some pre-*Troxel* cases had taken the position that a grandparent visitation order was too minor an intrusion to implicate the parents' liberty interest at all. Others had recognized *some* right of parental autonomy, but had found it minimal and had concluded that it could be counterbalanced by general state interests in a minor's well being. *Troxel's* holding on this point ended a longstanding debate and legitimized constitutional arguments in grandparent visitation suits.

Second, the Court held that given a parent's liberty interest in childrearing, the state will "normally" have no reason to question parental decisions.[148] The Court did not define the word "normally," however. If "normally" simply referred to parental fitness, unmarred by any temporary and potentially harmful lapse in parental judgment, then it would fit neatly into the fundamental right/strict scrutiny analysis of the Washington Supreme Court, and of many of the grandparent visitation cases that preceded it.[149] In context, however, "normally" cannot simply refer to parental fitness. The Court is emphatic that its decision does not rest on a fit parent's "normal" right to be free of state intervention in parenting decisions,[150] but instead rests on the "combination of . . . factors"[151] it finds in the case.[152]

Third, the Court introduced a "special-weight" requirement; it held that the problem[153] is not that the Washington Superior Court ordered visitation, but that the court failed to give "at least some *special weight*"[154] to Mrs. Granville's "determination of her daughters' best interests."[155] The Court first noted that Mrs. Granville actually consented to *some* grandparent visitation; she simply proposed less visitation, and

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[146] *Id.*

[147] *Id.* at 68.

[148] *Id.* at 69.

[149] *See, e.g.*, *Hawk*, 855 S.W.2d 753.

[150] "We do not consider the primary constitutional question passed on by the Washington Supreme Court – 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 visitation." *Troxel*, 530 U.S. at 74.

[151] *Id.* at 68.

[152] *Id.* at 72.

[153] *Id.* at 69.

[154] *Id.* at 70 (emphasis added).

[155] *Id.* at 69.

sought a different schedule.[156] The Court stated, disapprovingly, that instead of deferring to her wishes the trial justice simply imposed a visitation schedule of his own.[157] In the same paragraph, the Court observed approvingly that some grandparent visitation statutes[158] contain limiting language that requires a grandparent to allege that the parents have denied access to the grandchild as a precondition to filing suit.[159] The connection seems to be that "special weight" could be interpreted as a legal standard or as a factual determination. Either the statute must specifically defer to a parent's wishes in some way or a court must defer, on a factual level, to the terms of a parent's offer. The fact that the parent offers *some* visitation thus becomes significant to the analysis.

This is not only contrary to the approach taken by the Washington Supreme Court, but also to other jurisdictions' pre-*Troxel* analyses of the familial interests at stake. The Washington Supreme Court took the position that grandparent visitation could properly be awarded over the objections of a fit parent when the parent arbitrarily deprived the child of contact with the grandparent *after* a close relationship had been established.[160] The parent's cooperation – or lack of it – would not factor into this analysis; the focus is simply on whether a substantial relationship exists between a grandparent and grandchild.

Other pre-*Troxel* decisions agree. In *Roberts v. Ward*,[161] for example, the New Hampshire Supreme Court held that court-ordered grandparent visitation was an appropriate exercise of *parens patriae* power where the child and grandparent had formed "close personal attachments."[162] In the more recent case of *O'Brien v. O'Brien*, the same court found that although the petitioning grandfather satisfied the statute's standing requirement, his petition was insufficient because it "d[id] not even allege that [the grandfather] has ever had any contact, meaningful or otherwise, with the child he now seeks to visit."[163] Unlike *Troxel*'s mandate to give special weight to the parent's willingness to allow some visitation, this approach would have given special weight to the existence of a relationship between grandparent and grandchild, regardless of whether the parent wanted any visitation to occur or not.

The fourth aspect of *Troxel* that has practical significance for

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[156] *Id.* at 71.
[157] *Id.* at 69.
[158] *Id.* at 70.
[159] *Id.* at 71-72.
[160] *In re Smith*, 969 P.2d 21, 28 (Wash. 1998).
[161] *Roberts v. Ward*, 493 A.2d 478 (N.H. 1985).
[162] *Id.* at 481.
[163] *O'Brien v. O'Brien*, 684 A.2d 1352 (N.H. 1996).

grandparent visitation law is the Court's disapproving comment on the effect of a grandparent visitation suit itself. The Court concluded that it is unnecessary to remand the case for further proceedings; the challenged order was clearly unconstitutional and the cost and disruption of additional litigation would "further burden Granville's parental right."[164] This general point had certainly been made in other pre-*Troxel* cases. In *Brooks v. Parkerson*,[165] for example, the Georgia Supreme Court noted that "the impact of a lawsuit to enforce [visitation] over the parents' objection can only have a deleterious effect on the child.[166] The Iowa Supreme court vacated an award of grandparent visitation while noting, in dicta, "the adverse effect [on children] of litigation to enforce visitation."[167] Child welfare experts and legal commentators had also pointed out the emotional injuries potentially flowing from the suit itself.[168] Prior to *Troxel,* however, the point seemed often lost in unrealistic and sentimental generalizations about grandparents[169] and in

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[164] *Troxel*, 530 U.S. at 75. Since it had decided that the challenged statute could not be constitutionally applied to the defendant mother, the plurality apparently concluded nothing remained to be decided. *Id.*

[165] *Brooks*, 454 S.E.2d 769 (Ga. 1995).

[166] *Id.* at 773.

[167] *McMain v. Iowa*, 559 N.W.2d 12, 14 (Iowa 1997).

[168] *See, e.g.*, Ross A. Thompson, et al., *Grandparents' Visitation Rights: Legalizing the Ties that Bind*, 44 AM. PSYCHOLOGIST 1217, 1220 (1989); JOSEPH GOLDSTEIN, ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 25 (Free Press, 1979); J. C. Bohl, *Brave New Statutes: Grandparent Visitation Statutes as Unconstitutional Invasions of Family Life and Invalid Exercises of State Power*, 3 GEO. MASON U. CIV. RTS. L.J. 271, 296-98 (1993); Sharon F. Ladd, Note, *Tennessee Statutory Visitation Rights of Grandparents and the Best Interest of the Child*, 15 MEM. ST. U.L. REV. 635, 652 (1985). In Congressional hearings on grandparent visitation, Dr. Andre Derdeyne, a child psychiatrist, testified that with all his experience he could not identify characteristics which distinguish grandparents with a genuine interest in their grandchildren from those who, when their child divorced, became "completely caught up in attacking their child's former spouse or even attacking their own child with grave consequences for their grandchildren." *Grandparents: The Other Victims of Divorce and Custody Disputes: Hearing Before the Subcomm. on Human Services of the House of Representatives Select Comm. on Aging*, 97th Cong., 2d Sess, 77 (1982) (statement of Dr. Andre Derdeyne, Professor of Psychiatry, Director, Division of Child and Family Psychiatry, University of Virginia School of Medicine).

[169] *See, e.g.*, *Herndon v. Tuhey*, 857 S.W.2d 203, 210 (Mo. 1993); *Beckman v. Boggs*, 655 A.2d 901, 909 (Md. Ct. App. 1995) ("'[I]t is fundamentally in the best interests of any child to have contacts with his or her grandparents'") (quoting trial court with approval) (citation omitted); *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992), *cert. denied*, 506 U.S. 941 (1992) ("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 fallacy of the assumption has been noted by other judges. *See, e.g., id.* at 635 (Lambert, J., dissenting) ("[The majority] makes the *per se* assumption that deprivation of access to the grandparent is harm. There is no authority for this proposition and it is otherwise illogical"); *Hawk*, 855 S.W.2d at 581 ("[W]e also seek to avoid the 'unquestioning judicial assumption' that grandparent-grandchild relationships always benefit children . . . .") (citation omitted).

legislators' rush to expand grandparents' statutory rights to visitation.[170]

Troxel's condemnation of the effects of a grandparent visitation suit on parents and children thus definitively established a point that had been – alternately – raised, disputed or ignored. By so doing, *Troxel* may have the general effect of discouraging future expansion of grandparent statutes, or of reining in expansive interpretations of existing statutory rights in the courts. *Troxel*'s recognition of this harm has already influenced one post-*Troxel* case in California: since grandparent visitation litigation burdens parental rights, any attempt to give special weight to a parent's decision must not only require deference to it, but must also compensate for the burden that litigation imposes.[171]

III. THE CALIFORNIA COURTS' RESPONSE TO *TROXEL*

Three California statutes provide grandparents with standing to seek court-ordered visitation with grandchildren.[172] The first, California Family Code Section 3102, applies to all "close relatives" of the child when one of the child's parents is dead. It directs the court to "consider" the amount of personal contact between the plaintiff and the child, unless the plaintiff is a grandparent.[173] If the plaintiff is a grandparent, then the court's decision rests solely on the best interests of the child; the court does not evaluate the amount of personal contact between grandparents and grandchildren. Opposition from the parent, if any, does not figure in the statutory framework at all.

The second provision, Family Code Section 3103, confers standing on the grandparent to seek court ordered visitation when the child's parents are divorcing or are involved in a similar proceeding. Under this provision, if the parents are united in their opposition to grandparent visitation, that opposition creates "a rebuttable presumption affecting the burden of proof" that grandparent visitation is not in the best interests of the child.[174]

The final provision, Family Code Section 3104, includes additional circumstances giving grandparents standing to sue, plus guidelines for a grandparent visitation award. The court is required to support an award of visitation with a finding that an emotional bond existed between grandparent and grandchild prior to suit "such that visitation is in the best

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[170] *See supra* note 4.

[171] *Butler II*, 96 P.3d 141, 169 (Cal. 2004) (Brown, J. concurring and dissenting).

[172] Cal. Fam. Code §§ 3102, 3103, 3104 (Deering 1994).

[173] *Id.* § 3102 (b) (Deering 1994).

[174] *Id.*§ 3103(d) (Deering 1994).

interests of the child."[175] The court must also balance the child's interest in visitation against the parents' right to exercise their parental authority.[176] Section 3104 prohibits a suit for grandparent visitation if the natural or adoptive parents are married, unless some sort of non-legal disruption of the relationship has taken place.[177] This Section also protects parents with a rebuttable presumption in favor of their wishes. If both parents agree that visitation is not in the best interests of the child, that opposition raises a rebuttable presumption in deference to the parents' decisions.[178] An identical presumption protects the decision of a parent with sole custody.[179]

In California, as in other jurisdictions, *Troxel*'s holding that forced grandparent visitation implicates the parent's right to childrearing autonomy sparked analysis of the constitutionality of the state's statutes.[180] Courts reviewing the constitutionality of these statutes commented, however, that the California statutes lacked the "breathtaking" breadth of the statute at issue in *Troxel*,[181] or avoided a facial analysis entirely, and focused on the constitutionality of the statute as applied.[182]

The question of how to implement *Troxel*'s "special-weight" requirement has been the central problem for California courts hearing grandparent visitation cases in a post-*Troxel* world. The most direct way to implement it is simply to defer to the parent's wishes where the parent – like the mother in *Troxel* – offers some visitation. This is exactly what several Court of Appeals justices did. In *Kyle O. v. Donald R.*,[183] for example, a widowed father argued that, although he wanted his daughter to have contact with her maternal grandparents, he wanted visits to occur spontaneously, as they did with his parents.[184] The maternal

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[175] *Id.* § 3104(a) (1) (Deering 1994).

[176] *Id.* § 3104(a) (2) (Deering 1994).

[177] *Id.* § 3104 (b)(1)-(4) (Deering 1994). The statute presumably contemplates informal separation, although its parameters have not been established by case law. *See id.*

[178] *Id.* § 3104(e) (Deering 1994).

[179] *Id.* § 3104(f) (Deering 1994).

[180] *See, e.g., Lopez v. Martinez*, 102 Cal. Rptr. 2d 71, 77 (Ct. App. 2000) ("Although appellant did not challenge the constitutionality of section 3104, we find a brief constitutional analysis of the statute is merited in light of the United States Supreme Court's recent consideration of the issue of grandparent visitation statutes in *Troxel v. Granville* . . ."). For two diametrically opposed examples of the responses to *Troxel* from other jurisdictions see *In re G.P.C.* 28 S.W.3d 357 (Mo. Ct. App. 2000) and *Howard v. Howard*, 661 N.W.2d 183 (Iowa 2003).

[181] *Lopez*, 102 Cal. Rptr. 2d at 77.

[182] *See, e.g., Zasueta v. Zasueta*, 126 Cal. Rptr. 2d 245, 253 (Ct. App. 2002); *Punsly v. Ho*, 105 Cal. Rptr. 2d 139, 147 (Ct. App. 2001); *Kyle O. v. Donald R.*, 102 Cal. Rptr. 2d 476, 486 (2000).

[183] *Kyle O.*, 102 Cal. Rptr. 2d 476.

[184] *Id.* at 483.

grandparents argued that the father was so hostile he might not promote regular visitation; the court vacated the standing visitation order, nevertheless. It observed, first, that the father's preferences must be honored.[185] Second, the court opined that hostilities might lessen without the negative effects of ongoing litigation – an implicit nod to *Troxel*'s comment on of the effect of grandparent visitation litigation itself.[186]

Similarly, in *Punsly v. Ho*,[187] a widowed mother proposed a limited schedule of visitation both before and after the grandparents petitioned for court ordered visitation.[188] Despite her offers, the trial court ordered a different and more extensive schedule of visitation;[189] the mother appealed.[190] On appeal, the mother argued that since she, like the mother in *Troxel,* had offered *some* visitation, her offer was entitled to special weight. The grandparents disagreed, arguing that *Troxel*'s deference to a parent's proposals should not apply because, although the mother had proposed some visitation, she had also cut off all visitation for a period of five months.[191] Rejecting the grandparents' argument, the Court of Appeals held that the details of the mother's proposed visitation were irrelevant. *Troxel* applied; the controlling consideration was that the mother had, in fact, proposed visitation, and had acknowledged the value of some contact with the grandparents.[192] Her wishes, like those of the mother in *Troxel*, were thus entitled to special weight. Given this conclusion, the Court of Appeals could have either refused to order any visitation at all or ordered exactly what the mother herself had proposed. Both options would have been consistent with Troxel. It elected to take the former, and dismissed the case.[193]

For the California Appellate Courts, giving special weight to parental decision-making by either ordering what the parent proposed or simply dismissing the case and making visitation voluntary was legally unassailable, where the case to be decided was factually similar to *Troxel*. The drawback, of course, was that when cases arose that did *not* involve the wishes of a single, accommodating parent, the simple factual analogies supporting the decisions in *Kyle O.* and *Punsly* provided no

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[185] *Id.* at 487.

[186] *Id.*

[187] *Punsly*, 105 Cal. Rptr. 2d at 139.

[188] The grandparents sued the mother pursuant to California Family Code Section 3102, and *Punsly v. Ho*, (105 Cal. Rptr. 2d at 141). This provision does not provide a statutory presumption against visitation if a parent is opposed to it. grandparent visitation. Cal. Fam. Code § 3102.

[189] *Punsly,* 105 Cal. Rptr. 2d. at 141.

[190] *Id.* at 140-41.

[191] *Id.* at 145.

[192] *Id.*

[193] *Id.* at 147.

logical guidance. Thus, in cases where the facts were dissimilar to *Troxel*, the California courts were forced to examine the logic behind Troxel's 'special-weight' requirement. The primary case detailing this examination is *Zasueta v. Zasueta.* [194]

In *Zasueta*, a widowed mother opposed all visitation with her child's paternal grandparents;[195] the trial court nevertheless awarded visitation.[196] Vacating this award, the Court of Appeals held that the trial court violated *Troxel*'s mandate to give special weight to a parent's decision.[197] Even though the mother had opposed *all* visitation, the court was nevertheless required to give weight to her preference.[198] Instead, the trial court discounted her objections, announcing, for example, that the mother's objections to the grandparents' use of alcohol must be taken "with a grain of salt."[199] When the mother's attorney argued that it was a matter of a parent's choice, the trial justice stated: "this court is going to make a choice."[200] The Court of Appeals held that the trial justice had thus improperly substituted his own judgment for the mother's judgment,[201] making his own preferences "weightier."

The Court of Appeals also rejected the grandparents' contention that the mother's opposition to *any* visitation distinguished her circumstances from the circumstances reviewed in *Troxel.*[202] The grandparents' position would "mean that, whenever a parent expresses opposition to grandparent visitation this opposition should automatically be considered a factor in favor of visitation." As the court noted, this would contradict *Troxel*'s "central holding" that parental decision-making should be respected.[203] After *Kyle O.*, *Punsly,* and *Zasueta*, then, the special-weight requirement had evolved: it no longer depended on the parent's willingness to allow visitation. Instead, "special weight" simply required deference to parental wishes and objections.

The Appellate Court was forced to further clarify the legal significance of a parent's visitation decision, and of a parent's proposed schedule of visitation, in *Fenn v. Sherriff.*[204] In *Fenn*, the widowed father

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[194] *Zasueta v. Zasueta*, 126 Cal. Rptr. 2d 245 (Ct. App. 2002).

[195] *Id.* at 247.

[196] *Id.* at 249.

[197] *Id.* at 254.

[198] *Id.* at 254-55.

[199] *Id.* at 248.

[200] *Id.*

[201] *Id.* at 255.

[202] *Id.* at 254-55.

[203] *Id.* at 254.

[204] *Fenn v. Sherriff*, 1 Cal. Rptr. 3d 185 (Ct. App. 2003). In *Sherriff*, the court's focus was on the propriety of a motion for summary judgment. *Id.* at 196. The children's father and adoptive

offered the maternal grandparents such a limited visitation schedule that they actually saw their grandchildren for only one hour every two and a half months.[205] The father required the grandparents to pay for a third party's services to supervise the visitation, so that the grandparents ended up paying approximately $6.00 for each minute of time they spent with the children.[206] Furthermore, the father prohibited the grandparents from giving gifts to the children, or taking pictures with them.[207] Reviewing these particulars, the court observed that failure to give special weight to such grudging and minimal visitation should have no constitutional significance.[208] The court stated that a "meaningful" offer of visitation – or presumably a meaningful *rejection* of visitation - deserves deference,[209] and the father's offer was not "meaningful." The essence of the ruling seems to be that the father's harsh limits were not reasonable because they did not correspond to the children's needs. Nothing in the record suggested that third party supervision was necessary or that the children were camera-phobic.[210]

Unlike the limits on visitation sought by the parents in *Troxel*,[211] *Kyle O.*,[212] or *Punsly*,[213] the limits Mr. Sherriff sought to impose on the maternal grandparents seem merely to express hostility. Thus, where a parent's proposed limitations on – or rejection of – visitation promote some stated childrearing goal, that parental decision deserves "special weight."[214] Where the parent's decision does not further any childrearing goal, however, that decision cannot be considered the exercise of recognized parental authority that *Troxel* sought to protect.

Basing grandparent visitation decisions on factual comparisons with

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mother had successfully moved for summary judgment on the grounds that the grandparent's petition for visitation was legally insufficient absent an allegation of parental unfitness. *Id.* at 197. The appellate court disagreed, holding that *Troxel*'s special-weight requirement did not necessarily preclude the trial court from awarding visitation over the objections of fit parents, making summary judgment improper. *Id.* at 198.

[205] *Id.* at 199.

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] Nothing in the opinion suggests otherwise.

[211] *Troxel*, 530 U.S. at 61 (mother seeking visitation that did not require the children to be away from home overnight).

[212] *Kyle O.*, 102 Cal. Rptr. 2d at 487 (father seeking visitation that would not interfere with "his quality parenting time . . . on the weekends" or with the child's "extracurricular activities").

[213] *Punsly*, 105 Cal. Rptr. 2d at 145 (mother seeking visitation that would distribute the burden of travel more evenly between her and the grandparents).

[214] *Troxel*, 530 U.S. 69; *see supra* notes 148-54 and accompanying text for a discussion of "special weight."

Troxel is obviously a strategy of limited usefulness, even when a court, as in *Zasueta*, uses logic to extend the comparison to new factual circumstances. If the "special-weight" requirement simply meant that a court had to rubber stamp legitimate parental decisions, then the *Troxel* plurality would at least have required strict scrutiny of grandparent visitation statutes – and perhaps invalidated them altogether.[215] Instead, "special weight" must involve balancing the parent's decision – no matter what it is – against the grandparent visitation statute's goal, while tipping the scales in favor of the parent. In an attempt to strike this balance, California courts began framing the special-weight inquiry in terms of whether the trial court had applied a presumption in favor of parental decision-making.

The fact that California's grandparent visitation statutes create a rebuttable presumption against visitation when the parents oppose it had not prompted any judicial discussion prior to *Troxel*. After *Troxel*, however, these presumptions became a vehicle for giving parental decisions special weight in the equation of a grandparent visitation suit.[216] Insofar as they were interpreted to do so, these presumptions created a federal constitutional mandate as well as a statutory obligation to follow the parent's wishes.

Some California courts held that this statutory presumption was sufficient to give parental decisions the special weight *Troxel* required without any judicial gloss.[217] As written, the presumption required grandparents to produce enough evidence that court-ordered grandparent visitation is in the best interest of the child to overcome any objection by the parents. In theory, at least, the presumption means that the parents' objection controls; they do not need to prove the basis for their objections. To overcome the presumption, the grandparents must provide more evidence favoring visitation under a best interests of the child analysis[218] than the parents can muster opposing it. If the grandparents fail to meet this evidentiary burden, but the trial judge nevertheless rules in their favor, the trial judge is elevating his or her

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[215] This was essentially Justice Thomas' position: "I would apply strict scrutiny to infringements of fundamental rights [such as court-ordered grandparent visitation]. *Id.* at 80 (Thomas, J., dissenting). Here, the State of Washington lacks even a legitimate governmental interest – to say nothing of a compelling one – in second guessing a fit parent's decision regarding visitation with thirds parties." *Id.*

[216] *See, e.g., Fenn*, 1 Cal. Rptr. 3d at 195 n.4.

[217] *See, e.g., Lopez*, 102 Cal. Rpt. 2d at 77.

[218] This is an important qualification. Although grandparent visitation statutes may, in reality respond to grandparents' interests, (*Blixt v. Blixt*, 774 N.E.2d 1052, 1083-84 (Mass. 2002) (Sosman, J. dissenting)), the focus of any proper inquiry is on the child's needs. *See, e.g., Butler II*, 96 P.3d at 141 (noting that the grandparents' extensive efforts to locate the child were legally irrelevant).

conclusions over the parents' in violation of the statute. The statutory presumption would certainly prevent a judge from simply substituting his or her judgment for that of the parents and so – in the opinion of some California courts – confer the required proof on parents' decisions. Since none of the statutes specify the burden of proof necessary to overcome the presumption, however, California law requires only a preponderance of the evidence.[219] The parents' decision can be overcome by a very small quantum of evidence indeed.

In *Butler v. Harris*, the Court of Appeals questioned whether the statutory presumption, as written, could satisfy the special-weight requirement given the constitutional significance of parental decision-making. Since *Troxel* forbids the state from infringing "on the fundamental rights of parents to make childrearing decisions simply because a state judge believes a *better* decision could be made," the preponderance of the evidence standards must be insufficient protection for parental rights.[220] A "better" decision correlates to evidence only slightly stronger than what the parent has presented; it gives, at best some weight not special weight to the parent's decision. Giving the parents only a slight advantage in the decision-making process allocates the risk of an erroneous decision almost equally between the parents and the grandparents.[221] Since *Troxel* recognized that the parental right implicated in grandparent visitation cases is a fundamental right, the constitution requires a more significant quantum of proof than mere preponderance to correctly allocate the risk of an erroneous decision.[222] Reasoning thus, the Court of Appeals ruled that the grandparent visitation statutes were constitutional under the California Constitution if, and only if, the rebuttable presumptions designed to protect parental decision-making were interpreted to require a grandparent to rebut the parental decision with clear and convincing evidence.[223]

Reviewing this decision, a majority of the California Supreme Court agreed that by statute, the grandparents were required to overcome a statutory presumption that visitation is not in the best interest of the child.[224] Therefore, when a trial justice simply concludes that visitation

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[219] The preponderance standard is generally accepted in civil actions where, for example, monetary damages are at stake. *See, e.g.*, *Peters v. Peters* (*In re Marriage of Peters*), 61 Cal. Rptr. 2d 493, 494 (Ct. App. 1997); *Lillian F. v. Superior Court*, 206 Cal. Rptr. 603, 606 (Ct. App. 1984).

[220] *Butler v. Harris* (*In re Marriage of Harris*), 112 Cal. Rptr. 2d 127, 142 (Ct. App. 2001) (citing *Troxel*, 530 U.S. at 72-73), *aff'd in part and remanded by* 96 P.3d 141 (2004) [hereafter *Butler I*].

[221] *Id.* at 141.

[222] *Id.* (citing *Peters*, 61 Cal. Rptr. 2d at 494).

[223] *Id.* at 142.

[224] *Butler II*, 96 P.3d at 154.

is in the best interests of the child, he has not applied the statutory presumption. The majority did not, however, address the Court of Appeals' position that the presumption could only be overcome by clear and convincing evidence.

Two dissenting justices did agree with the Court of Appeals, however, and expanded on its logic.[225] California Evidence Code Section 606 explains that the effect of a presumption like that provided for in Family Code Section 3104 is to require the party against whom it operates – here, the grandparents – to prove the nonexistence of the presumed fact.[226] Since parents oppose visitation, grandparents must disprove "the presumed fact" that visitation is contrary to the best interests of the child.[227] The comment to Evidence Code Section 606 explains that, absent a contrary interpretation, this requires only proof by a preponderance of the evidence. Despite the "formidable" ring to Family Code Section 3104's presumption, then, it requires nothing that the grandparents would not have done anyway[228] and, in fact, no more than would be required in a typical civil suit over money.[229]

As a practical matter, to overcome parental objections under a clear and convincing standard the grandparents must marshal more than the prospect of an array of pleasant experiences for the children they seek to visit.[230] In *Butler*, both the Appellate Court[231] and the dissenting justices on the California Supreme Court[232] observed that grandparents would have to prove that lack of visitation would cause detriment to the child. As Justice Chinn stated, "[i]n most cases, . . . grandparents would be successful in overcoming the presumption if they could "show that denial of visitation would result in some kind of harm or potential harm to the child."[233] The *Troxel* plurality had explicitly avoided endorsing the harm standard[234] that the Washington Supreme Court had espoused[235] and that so many jurisdictions had used. Yet application of the basic principles underlying the *Troxel* decision had led the California courts to the brink of such a position in less than five years. After *Butler*, it is at least

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[225] *Id.* at 164-68 (Chinn, J., dissenting); *Id.* at 169-70 (Brown, J., dissenting).

[226] *Id.* at 165 (citing Cal. Evid. Code § 606).

[227] *Id.*

[228] *Id.*

[229] *Peters*, 61 Cal. Rptr. 2d at 496; *Addington v. Texas*, 441 U.S. 418, 425 (1979).

[230] *Butler II*, 96 P.3d at 169 n.7.

[231] *Butler I*, 112 Cal. Rptr. 2d at 139-40.

[232] *Butler II*, 96 P. 3d at 170 (Brown, J. dissenting).

[233] *Butler II*, 96 P.3d at 169 n.7 (Chin, J., dissenting).

[234] *Troxel*, 530 U.S. at 73.

[235] *Id.* at 63 (citing *In re: Smith*, 969 P.2d at 28-30).

arguable that *Troxel*'s "special-weight" requirement prevents the award of grandparent visitation in California unless the grandparent can show by clear and convincing evidence that the child would suffer a detriment without the visitation.

The California courts also broke no new ground in their approach to the problem of apportioning special weight to parental decision-making when two parents disagreed on issues of grandparent visitation. In *Butler*, the only post-*Troxel* case to present the issue squarely, the parents divorced after a brief marriage.[236] The mother was granted sole legal and physical custody of the only child of the marriage, Emily.[237] The father was awarded limited, supervised visitation contingent on his participation in various therapeutic programs.[238] The paternal grandparents were awarded court-ordered visitation,[239] and years of litigation ensued, with the terms of the visitation in constant dispute.[240] When Emily was about five and living with her mother and adoptive father in Utah,[241] her biological father joined the paternal grandparents' motion to expand visitation.[242] The California trial court awarded the grandparents visitation totaling more than three weeks; Emily would be required to fly, unaccompanied, from Utah to California.[243] The mother appealed.

The California Court of Appeals ruled, *inter alia*, that the grandparent visitation statute was unconstitutional as applied to the mother.[244] The mother's opposition had not been given special weight in the trial court;[245] indeed, the trial court had discounted the mother's objections and substituted its own for hers. [246] The Court of Appeals decision does not address the fact that the biological father had joined the petition. In fact, the assumption underlying the decision is that the "fit custodial parent['s]" decision controls, and the non-custodial parent's views are irrelevant.

The Court of Appeals thus approached the allocation of special weight as the Tennessee Supreme Court might have more than a decade

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[236] *Butler II*, 96 P.3d at 143.

[237] *Id.* at 144.

[238] *Id.*

[239] *Id.* at 144-46.

[240] *Id.* at 144.

[241] *Id.*

[242] *Id.* at 145.

[243] The mother appealed and the ruling became the focus, first, of a Court of Appeals decision and then of a decision of the California Supreme Court. *Id.*

[244] *Butler I*, 112 Cal. Rptr. 2d at 130 (citation omitted).

[245] *Id.* at 143.

[246] *Id.* at 133, 143.

earlier, had it been required to do so in *Hawk v. Hawk.*[247] Both the Court of Appeals and the Tennessee Supreme Court approached the issue of parental decision-making in grandparent visitation cases by examining the issue in other family law decisions.[248] The California courts "are reluctant to interfere in family matters," the Court of Appeals observed, "absent a compelling need" to do so. Like the Tennessee Supreme Court, the Court of Appeals determined that the concept of "compelling need" must be given the accepted definition developed in abuse and neglect cases. The state has a compelling need to intervene in parental decision-making only when the parent provides less than adequate care.[249] The mother's visitation decision created no such threat of harm to Emily's well being; the Court of Appeals held that it was therefore entitled to deference.

On appeal, a slim majority of the California Supreme Court ignored both California decisional law and the out-of-state precedent the appellant mother had cited, reversing the Court of Appeals in a poorly supported decision[250] reminiscent of an earlier generation of grandparent visitation decisions.[251] Without discussing any of the California cases upon which the Court of Appeals had relied, the majority commented that no California authority was directly on point. It then held that the father's support for the grandparents' motion negated any constitutional protection to which the mother's decision would otherwise be due.[252]

Three dissenting justices[253] rejected the majority's conclusion regarding the significance of parental disagreement regarding visitation and, like the Court of Appeals, related their conclusions to other California family law decisions and to out-of-state precedent.[254] Justice Chinn noted that, under California law, the fact that the mother had both

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[247] *Hawk*, 855 S.W.2d 573 (discussed *supra* notes 49-67 and accompanying text).

[248] *See, e.g., id.* at 577-78; *Butler I*, 112 Cal. Rptr. 2d at 141.

[249] *Butler I*, 112 Cal Rptr 2d at 143.

[250] Note, *California Supreme Court Finds No Infringement of Custodial Mother's Due Process Parenting Interest When Noncustodial Father Supports Grandparent Visitation Petition.* – Butler v. Harris (In re: Marriage of Harris), 96 P.3d 141 (Cal. 2004), 118 HARV. L. REV. 1046, 1051 (2005) (noting, *inter alia*, that the California Supreme Court Majority's opinion "can survive only a cursory reading of *Troxel*"); *Butler II*, 96 P.3d 141, 163-64 (Cal. 2004) (Chinn, J., dissenting) (noting that the majority's conclusion on this point is "as troubling as it is unprecedented" and would remove any "constitutional constraint on the state's power to step in and override the custodial parent's decision" when "a third party's visitation request is supported by a noncustodial parent").

[251] *See supra* notes 36-43 and accompanying text.

[252] *Butler II*, 96 P.3d at 152.

[253] Justices Baxter, Chinn and Brown each filed a separate opinion concurring and dissenting. *Id.* ar 154 (Baxter, J., concurring and dissenting), 163 (Chinn, J., concurring and dissenting), 169 (Brown, J., concurring and dissenting).

[254] *See, e.g., id.*

sole legal and sole physical custody meant that she had the "*exclusive* 'right and responsibility to make the decisions relating to' [her daughter's] 'health, education, and welfare.'"[255] Even if custodial rights had *not* been fully vested in the mother, Justice Chinn notes, precedent from both California and other jurisdictions establishes that the decisions of divorced parents, without regard to a custody order, are entitled to as much protection as those of any other parents.[256] Since *each* parent's childrearing decision is entitled to respect, the court will not countermand one parent's decision at the behest of the other, absent a danger of harm to the child.[257]

Not only did the majority allow parental disagreement to negate parental rights, it compounded this analytical error by remanding the case to the trial court with instructions to apply the statutory presumption. By doing this, the majority implicitly rejected the idea that the statutory presumption was constitutionally significant. When the majority concluded that neither parent retained constitutionally protected rights to make childrearing decisions given the other parent's opposition, the presumption became a meaningless formality. With the statutory presumption no longer a vehicle for protecting parental rights, the majority had unwittingly called the entire statutory scheme into question, given *Troxel*'s special-weight requirement. As Justice Chinn observed, a majority of the California Supreme Court was willing to give a trial court *carte blanche* to order visitation whenever *one* parent argues to it, however capricious or poorly reasoned the argument may be.[258] This can hardly be squared with *Troxel*'s mandate.

IV. CONCLUSION

If the *Troxel* plurality introduced the concept of "special weight" in order to create a lesser standard of scrutiny and so avoid giving official imprimatur to the harm standard,[259] five years of California grandparent

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[255] *See e.g., id.* at 161 (Chinn, J., dissenting) (citing Cal. Fam. Code § 3006 (West 2003)). Justice Chinn notes that by stipulating to this allocation of parental responsibility the father relinquished his right "to have any legal say in most of the decisions regarding Emily's upbringing," (*id.*), including with whom she would associate. *Id.*

[256] *Id.* at 163. Justice Chinn notes "that caselaw in California reflects a salutary judicial disinclination to interfere with family privacy without the evidentiary establishment of compelling need . . . . The rationale that supports judicial respect for family privacy does not lose its force upon the dissolution of the marriage." *Id.* (internal quotations and citations omitted).

[257] *Id.*

[258] *Id.* at 163-64 (Chinn, J., dissenting).

[259] *See, e.g.*, David D. Meyer, *Who Gets the Children? Parental Rights After* Troxel v. Granville*: Constitutional Pragmatism for a changing American Family*, 32 RUTGERS L.J. 711, 714

visitation decisions suggest it was unsuccessful. Since *Troxel* provided no guidance on when a parent's visitation decision could be countermanded, the only answer lay in the judicial tradition of family privacy – which in fact, *Troxel* expressly affirmed.[260] This tradition taught that a parent's decision cannot be honored when it would cause the child harm.[261] In the visitation context, a child is harmed when an established relationship is suddenly disrupted.[262] Using this reasoning, many California courts interpreted *Troxel*'s special-weight requirement as consistent with the better reasoned majority of pre-*Troxel* grandparent visitation cases, and so applied strict scrutiny, either explicitly[263] or implicitly.[264] Regardless of how *Troxel* cast the issue, these courts appeared willing to intrude on parental decision-making only when the child would be harmed.

The California Supreme Court majority's approach to apportioning that special-weight requirement between warring parents, on the other hand, lacks any such logic, and is consistent only with discredited distinctions in parental rights based on family configuration rather than fitness.[265] For present purposes, it is crucial to note, however, that the flawed decision in *Butler* is not different from flawed decisions that preceded *Troxel*, and was not the *result* of *Troxel* in any respect. The *Troxel* plurality itself often refers to parental rights in the singular: "so long as *a parent* adequately cares for his or her children. . .there will normally be no reason for the state to. . .question the ability of *that parent* to make the best decisions concerning the rearing of *that parent's*

(2001); Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v Granville, 2000 SUP. CT. REV. 279, 303 (2001).

[260] *Troxel v. Granville*, 530 U.S. at 65-66 (citing, *inter alia*, *Stanley v. Ill.*, 405 U.S. 645 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)).

[261] *Stanley v. Ill.*, 405 U.S. 645 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944) *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

[262] *Troxel* itself acknowledges this, in dicta, while hypothesizing about the origins of grandparent visitation statutes. *Id.*, 530 U.S. at 64.

[263] *Butler I*, 112 Cal. Rptr. 2d 127, 140 (Ct. App. 2001) (holding that the grandparent visitation provision at issue is constitutional "provided [it] is read to require clear and convincing evidence that the child will suffer harm if visitation is not ordered").

[264] *See, e.g., Punsly v. Ho,* 105 Cal. Rptr. 2d 139, 147 (Ct. App. 2001) (holding that a visitation order must be vacated because it "unduly infringed on [the mother's] fundamental parenting rights" given that she was a fit mother, willing to voluntarily schedule some visitation); *Kyle O. v. Donald R.*, 102 Cal. Rptr. 2d 476, 486 (Ct. App. 2000) (holding that "[b]ecause the trial court did not make any finding that Kyle was an unfit parent, Kyle is entitled to a presumption that he will act in his child's best interests, and his decision regarding . . . visitation . . . must be given deference").

[265] A particularly compelling discussion of the legal and logical flaws of this approach can be found in *Blixt v. Blixt,* 774 N.E. 2d 1052, 1075-76 (Mass. 2002) (Sosman, J., dissenting).

children."[266] This implies that a constitutionally protected right is vested in *each* parent. In *Butler*, the California Supreme Court majority does make superficial references to *Troxel*.[267] In fact, however its conclusions regarding special weight are inconsistent with *Troxel's* central theme of deference to parental decision-making.[268]

Post-*Troxel* grandparent visitation law as glimpsed through the window of five years of California decisions is thus not radically different from pre-*Troxel* grandparent visitation law, both at its best and at its worst. But if *Troxel*'s language was not sufficiently assertive to eliminate flawed decisions like the California Supreme Court majority in *Butler*, it did address the wrong that grandparent visitation statutes had inflicted on "good parents"[269] for years. "[T]he 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."[270] *Troxel* thus fortified the parent's right to resist visitation. In practice, "special weight" seems to have come to mean the deference strict scrutiny requires. And *Troxel* brought recognition of the terrible emotional and financial cost of grandparent visitation suits for parents and children. As the *Troxel* legacy continues to unfold, the post *Troxel* era can only become brighter.

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[266] *Troxel*, 530 U.S. at 68-69. Much of the precedent the Court cites in its discussion of parental rights, (*id.* at 65), is also stated in the singular. For example, "[i]t is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this Court with a momentum for respect . . . .'" *Id.* at 66 (quoting *Stanley v. Ill.*, 405 U.S. 645, 651 (1972).

[267] *See, e.g., Butler v. Harris*, 96 P.3d 141, 151 (Cal. 2004) (asserting, without analysis , that the rebuttable presumption in the California statute gives "special weight" to the parental decision if the parents agree that visitation is not in the child's best interests); *id.* at 152 (stating that "[n]othing in the decision in *Troxel* suggests that an order for grandparent visitation that is supported by one parent infringes upon the parental rights of the other parent" without acknowledging the fact that since *Troxel* analyzes a statute *as applied to a single parent* any such discussion would be unlikely in the extreme).

[268] Diverse sources have agreed on this characterization of *Troxel*. *See, e.g., Zasueta v. Zasueta*, 126 Cal. Rptr. 2d 245, 254 (Ct. App. 2002); Note, *California Supreme Court finds no Infringement of Custodial Mother's Due Process Parenting Interest When Noncustodial Father Supports Grandparent Visitation Petition* – Butler v. Harris (In re Marriage of Harris), 96 P.3d 141 (Cal. 2004), 118 HARV. L. REV. 1046, 1053 (2005).

[269] The *Hawk* court notes that the lower court in that case referred to the parents being sued for visitation as "admittedly good parents." *Id.*, 855 S.W. 2d at 577.

[270] *Troxel*, 530 U.S. at 72-73.