Public and Private Child: *Troxel v. Granville* and the Constitutional Rights of Family Members

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Family relationships have made me so *ill*!
—Sophia Tolstoy, diary entry, July 23, 1897[1]

I. INTRODUCTION

The first six months of the year 2000 saw two legal proceedings featured on the front pages of newspapers and in television news reports. Both highlighted the family, a concern of the law going back at least three millennia.[2] Much of the media coverage focused on the international fiasco surrounding photogenic Elián Gonzalez, in whose case the judiciary upheld a biological parent's rights over the pleas of the child's politically minded uncle and cousins.[3] Polls revealed that most Americans supported the decision to return the boy to his father in Cuba,[4] suggesting a stronger public commitment to parental rights than to anticommunism, something of a change for a nation that long believed "better dead than red." Careful followers of the news during these months also learned of *Troxel v. Granville*,[5] the case examined in this Note. In *Troxel*, a plurality of the United States Supreme Court deemed a Washington third-party visitation statute unconstitutional as applied. Like the Gonzalez matter, *Troxel* taps into deeply held beliefs, but raises legal issues of greater significance in defining the future of the family.

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[1] THE DIARIES OF SOPHIA TOLSTOY 219 (Cathy Porter trans., Random House 1985) (1978).

[2] *See generally* ALAN DERSHOWITZ, THE GENESIS OF JUSTICE: TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS AND MODERN LAW (2000).

[3] Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000), *cert. denied*, 120 S. Ct. 2737 (2000).

[4] Rick Bragg, *Elián Waits Outside as Tension Grows*, N.Y. TIMES, Apr. 5, 2000, at A19 (citing ABC and Gallup/CNN/USA Today polls indicating that fifty-nine to sixty-four percent of Americans supported Elián's return to his father in Cuba).

[5] 120 S. Ct. 2054 (2000).

Beyond our individual experiences, beyond the sociobiological structure that with Sophia Tolstoy we love to hate, we are not certain what "family" is or should be. The rearing of children, biological or not, is at the core of what defines a family. A single person living alone and with no connections to parents, children, or siblings, is commonly described as having "no family." Society often disparages members of a childless marriage or a domestic partnership as biologically deficient or excessively career-oriented people who reject their own fruitful heritage. The child, then, is the raison d'être of family. Contemporary law knows this. Above all else, it is to defend the interests of children that family law exists in the modern world. Even the most unequivocal property-based, patriarchal canons have yielded in our own time to covenants that give substantial weight to the child's interests. Family law now recognizes that not only fathers, but also mothers and siblings, extended relatives, and nonparent caretakers may serve the child's interests. In turn, people other than biological parents have gained legally enforceable visitation rights to children for whom they have provided responsible care: sustenance, love, and money.[6] Further questions abound. Is the parent who daily bathes and feeds the child more part of her family than an aunt who visits every weekend? Is a rarely present biological father more part of the child's family than a loving, ever-present, in-house nanny? Is a nongenetically related lesbian caregiver less a mother to the child than the partner linked genetically, gestationally, or both? To what extent should the person upon whom nature or law bestows the title of parent have the right to exclude or restrict others' access to a child?

In *Troxel*, the Supreme Court held that grandparent visitation, ordered at a judge's discretion without deference to a fit mother's determination of her daughters' best interests, impermissibly burdened that mother's constitutionally protected due process rights.[7] Only on the surface, however, is *Troxel* a grandparents' rights case. Its lasting importance lies in the Supreme Court's examination of the child-parent-state relationship. *Troxel* required the Court, a seasoned if reluctant arbiter in family matters, to rule on the rights[8] of persons, biologically linked and not, who wish to have access to and control over the child. Reaching only

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[6] *See, e.g., id.* at 2059 (plurality opinion) ("Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties."). For a discussion of two cases in which an aunt and a lesbian nongenetic caregiving mother respectively were granted visitation, see *infra* notes 326–349 and accompanying text.

[7] *Id.* at 2061–64.

[8] Derived from classical liberal thinking concerned largely with interactions between white adult males and the state, the terms "rights," "autonomy," and "liberty" are decidedly problematic when applied to children, parents, and other family members. Nonetheless, since the focus of this Note lies elsewhere, I use these terms interchangeably, with a preference for "rights" when speaking of the legal powers of children.

a plurality decision, nine justices split six ways. The division among members of the Court mirrors the American public's conflicting views on the definition and scope of parenting.

The 1999 Supreme Court docket was replete with high profile cases of interest to groups across the political and ideological spectrum.[9] Newspapers and television stations reported on decisions with fanfare and excitement typically reserved for coverage of sports and hurricanes. But when the Court handed down the *Troxel* decision, public reaction was decidedly temperate. Commentators seemed rather confused. One opined that differences among the justices were "nuanced rather than fundamental,"[10] while another felt that "the nine justices couldn't agree on anything."[11]

"Winners all" characterizes the public response of the forty-three special interests groups who filed passionate amicus curiae briefs on both sides of the *Troxel* issue.[12] While the Troxels were openly disappointed

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[9] *See, e.g.*, Linda Greenhouse, *Split Decisions: The Court Rules, America Changes*, N.Y. TIMES, July 2, 2000, § 4, at 1 ("It was a Supreme Court term of surpassing interest, rich in symbol and substance . . . ."). The 1999 docket included many significant cases. United States v. Morrison, 120 S. Ct. 1740, 1745 (2000) (striking, by a 5-4 vote, provisions of the Violence Against Women Act); Dickerson v. United States, 120 S. Ct. 2326, 2329 (2000) (reaffirming, by a 7-2 vote, *Miranda v. Arizona*, 384 U.S. 436 (1966)); Santa Fe Independent School District v. Doe, 120 S. Ct. 2266, 2282–83 (2000) (holding, by a 6-3 vote, that the practice of organized, student-led prayer at public high school football games was tantamount to an unconstitutional establishment of religion); Stenberg v. Carhart, 120 S. Ct. 2597, 2604 (2000) (holding, by a 5-4 vote, that a Nebraska law prohibiting partial birth abortions in all circumstances is unconstitutional); Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2449 (2000) (ruling, by a 5-4 vote, that the Boy Scouts can discharge a gay scoutmaster because opposition to homosexuality is part of the organization's expressive message).

[10] Linda Greenhouse, *Justices Deny Grandparents Visiting Rights*, N.Y. TIMES, June 6, 2000, at A1.

[11] Susan Nielsen, *State's High Court Does Better With "Grandparents' Rights,"* SEATTLE TIMES, June 8, 2000, at B6.

[12] Several organizations filed briefs in support of Tommie Granville. *E.g.*, Brief of Amicus Curiae American Center for Law and Justice Supporting Respondent, *Troxel* (No. 99-138); Brief of Amicus Curiae American Civil Liberties Union and ACLU of Washington in Support of Respondent, *Troxel* (No. 99-138); Brief of Amici Curiae Lambda Legal Defense and Education Fund and Gay and Lesbian Advocates and Defenders in Support of Respondent, *Troxel* (No. 99-138); Brief of Amicus Curiae American Center for Law and Justice Supporting Respondent, *Troxel* (No. 99-138); Brief of Amicus Curiae Center for Children's Policy Practice & Research at the University of Pennsylvania in Support of Respondent, *Troxel* (No. 99-138); Brief of Amici Curiae Christian Legal Society and the National Association of Evangelicals in Support of Respondent, *Troxel* (No. 99-138); Brief of the Institute for Justice, Alabama Family Alliance, and the Minnesota Institute as Amici Curiae in Support of Respondent, *Troxel* (No. 99-138); Brief of Northwest Women's Law Center, Connecticut Women's Education and Legal Fund, National Center for Lesbian Rights, and the Women's Law Center of Maryland, Inc. as Amici Curiae in Support of Respondent, *Troxel* (No. 99-138).

A different set of organizations submitted briefs supporting the Troxels. *E.g.*, Brief of Amici Curiae AARP and Generations United in Support of Petitioners, *Troxel* (No. 99-138); Brief of Amicus Curiae Grandparents United for Children's Rights, Inc., *Troxel* (No. 99-138); Brief of the States of Washington, Arkansas, California, Colorado, Hawaii, Kansas, Missouri, Montana, New Jersey, North Dakota, Ohio, and Tennessee as Amici Curiae In Support Of Petitioners, *Troxel* (No. 99-138).

with the Court's refusal to uphold the visitation decree, their counsel and prominent supporters, the American Association of Retired Persons ("AARP"), were far more optimistic. "[T]he court has left the door open for grandparent visitation statutes," declared Rochelle Bobroth of the AARP.[13] Richard Victor of the Grandparents' Rights Organization went even further, proclaiming, "This is the best thing that could have happened to grandparents."[14] In contrast, echoing the views expressed in the amici curiae briefs of the Christian Legal Society and the American Civil Liberties Union, University of Southern California Law Professor Erwin Chemerinsky declared:

> [T]he practical effect of [*Troxel*] will be to undermine the grandparents' rights statutes that exist in all 50 states . . . . [T]he clear implication of this is that parents have a fundamental right to control the upbringing of their children and if parents don't want grandparent visitation, the state can't order it over their objections.[15]

Gay rights organizations and scholars who had urged a balancing test and an expansive definition of family praised *Troxel* for its recognition of diversity.[16] "What really comes through in the [*Troxel*] decisions is that the Constitution has the flexibility to come to terms with changes in the American family," noted attorney Pat Logue of the Lambda Legal Defense and Education Fund.[17] Child advocates were pleased that certain justices suggested that the independent interests of children merit constitutional protection in intrafamily disputes.[18]

Positive reaction to the *Troxel* decision is in part warranted. Each special interest group indeed got its smidgen. *Troxel* affirmed the constitutionally protected liberty interests of parents, but not just those of the egg-and-sperm, mom-at-home-dad-at-work variety. One *Troxel* justice suggested that children have independent interests, not on par with those of adults, but nonetheless protected.[19] Another suggested that in modern,

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[13] *Morning Edition* (National Public Radio broadcast, June 6, 2000).

[14] Adam Pertman, *Court Backs Prime Role of Parent Topples a Law on Visitation; Justices' View of Family Hailed*, BOSTON GLOBE, June 6, 2000, at A1.

[15] *All Things Considered* (National Public Radio broadcast, June 5, 2000). Likewise, Sanford Ain, counsel for the American Academy of Matrimonial Lawyers, declared that "[i]f there's a disagreement between a third party and a parent, the parent prevails unless there's some compelling need for the state to intervene." *Id.*

[16] *E.g.*, Elizabeth Bartholet, *The Complex Family*, BOSTON GLOBE, June 8, 2000, at A19.

[17] Deb Price, *Court Grasps Changing Nature of Families*, DETROIT NEWS, June 12, 2000, at 9.

[18] *E.g.*, Pertman, *supra* note 14. Joan Hollinger, director of the child advocacy program at the University of California Law School at Berkeley, Boalt Hall, who submitted a brief in this case for the National Association of Counsel for Children, praised the opinion: "It's an incredibly important ruling . . . as much for what it doesn't say as what it does." *Id.*

[19] *Troxel*, 120 S. Ct. at 2071–72 (Stevens, J., dissenting); *see also infra* Part II.C.4; *in-*

non-nuclear families, third parties[20] might have a right to petition for access to children.[21]

Ultimately, however, the decision's ambiguity allowed for the hopeful reactions from amici curiae who had initially argued for antithetical rulings.[22] The Court left unanswered the most challenging questions raised in *Troxel*. Within the next decade, in a variety of contexts, the nine justices are likely to struggle again with *Troxel*-type issues.[23] Disputes between lesbian mothers most clearly evince the issues involved in third-party visitation.[24] In a prototypical case, one woman is the child's gestational and genetic mother, while her partner (the "caregiving mother") has all the responsibilities and rewards of motherhood, save for a biological link. The parties' loving relationship ends, and since gay and lesbian marriage is legally impermissible,[25] the women arrive in court as legal strangers. The biological mother usually claims that a visitation order would violate her constitutionally protected right to control her child's upbringing, while the caregiving mother typically argues that visitation is in the best interests of the child. Lower courts have produced different interpretations of the bounds of same-sex parents' federal constitutional rights in the visitation context.[26]

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fra notes 157 and 315–316 and accompanying text.

[20] I use the term "nonparent" interchangeably with "third party" to refer to a person, biologically related or not, who is not the child's biological or adoptive parent.

[21] *Troxel*, 120 S. Ct. at 2075–79 (Kennedy, J., dissenting). *See also infra* Part II.C.6; *infra* notes 317–320 and accompanying text.

[22] *See* Nielsen, *supra* note 11, at B6. Criticizing *Troxel*, editorialist Nielsen noted, "No wonder the ruling was praised by conservatives, liberals, grandparents and parents. Nobody won, nobody lost, and the standard for government intervention against parents' will is as vague as ever." *Id.*

[23] Analyzing *Troxel* and concluding that visitation statutes should require a showing of harm to the child, one commentator asserted that "the plurality's failure to address whether a showing of harm is required under the Due Process Clause provides little instruction to state legislatures and courts . . . the Court leaves the door open to great variation in decisions on visitation and room for abuse of discretion by state courts." Elizabeth Weiss, Comment, *Nonparent Visitation Rights v. Family Autonomy: An Abridgement of Parents' Constitutional Rights?*, 10 SETON HALL CONST. L.J. 1085, 1131 (2000).

[24] *See infra* Part III.C.4.

[25] Recognition that same-sex partners are entitled to marry or enter legally equivalent domestic unions would likely prove useful to gay and lesbian parents, who would presumably enjoy the same rights as heterosexual stepparents to adopt their partner's biological children. *See* Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that Vermont is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law). However, recognition of marriage between same-sex couples is widely and fiercely opposed. In the November 2000 elections, 70% of voters in both Nebraska and Nevada approved ballot measures barring the recognition of gay marriages. *E.g.*, Carey Goldberg, *The Ballot Initiatives: Changes in Drug Policy and Gun Laws are Picked*, N.Y. TIMES, Nov. 9, 2000, at B12.

[26] Some courts have allowed a biological parent's former same-sex partner to petition for visitation, upon a factual finding of the petitioner's caregiving, parent-like relationship with the child. *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000) (holding that the biological mother's former same-sex partner, who had assumed a parental role in helping to raise the child, was a psychological parent and thus had a legal right to petition for custody and visitation); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000) (upholding the right of a

While lesbian mothers serve as prominent examples, the impact of the constitutional scope of parents' and third parties' right to have contact with children extends to other family members and forms. Disputes between foster and biological parents pit the constitutional rights of third parties serving as parents against the autonomy of biological parents.[27] Likewise at stake are the rights of adoptive parents who care for a child for a period of time, balanced against the rights of biological parents who decide, after initially consenting to adoption, to seek legal custody.[28] The rights of surrogate mothers,[29] neighbors,[30] estranged biological[31] or care-

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lesbian psychological mother to petition for enforcement of a settlement agreement allowing visitation); Holtzman v. Knott (*In re* Custody of H.S.H.-K.), 533 N.W.2d 419 (Wis. 1995) (allowing former female partner of a biological mother to invoke equitable power of the court to obtain visitation if the biological parent has interfered substantially with the former partner's parent-like relationship with the child). However, other courts have refused to allow former same-sex partners' visitation petitions over the objections of a fit biological parent. *See, e.g.*, Lynda A.H. v. Diane T.O., 673 N.Y.S.2d 989 (N.Y. App. Div. 1998). In *Lynda A.H.*, the court declared that even a former life partner who had functioned as a psychosocial parent has the burden of proving extraordinary circumstances (e.g., biological mother's unfitness or persistent neglect) in order to petition for visitation. Accordingly, the court reversed a visitation order granted to the biological mother's former life partner who had functioned as the child's parent from birth and for three and half years thereafter, finding that such visitation impermissibly impaired the biological mother's right to custody and control of her child. *Id. See also* Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) (holding that a biological mother's former life partner, who had functioned as a psychosocial parent, was not a parent under New York's visitation statute and was not permitted to petition for visitation, since a visitation petition would impermissibly infringe upon the rights of a fit biological mother).

[27] *See, e.g.*, Rodriguez v. McLoughlin, 214 F.3d 328 (2d Cir. 2000). The *Rodriguez* court reversed a monetary judgment against a private agency and municipal department of social services for due process violations with respect to removal of a foster child from the home of a plaintiff foster mother. The court held that neither federal constitutional provisions nor New York state statutes afforded foster parents or children due process rights. Reporting on the case, *The New York Times* noted that "family-law experts said the case, which was decided on narrow grounds, could provide the Supreme Court with an opportunity to clarify its position on the broader and contentious issue of what rights arise from relationships in a changing array of family relations." Nina Bernstein, *Ruling Limits Some Foster Parents' Rights: Issue Is Procedural Safeguards When Officials Remove Children*, N.Y. TIMES, June 9, 2000, at B3; *see also* People v. S.L.F. (*In re* A.W.R.), No. 99CA1188, 2000 Colo. App. LEXIS 1634 (Colo. Ct. App. Sept. 14, 2000) (holding that a foster mother's relationship with child did not give rise to a constitutionally protected interest). *But see In re* Guardianship of D., 404 A.2d 663 (N.J. Juv. & Dom. Rel. Div. 1979) (holding that the foster parents, who were the child's psychosocial parents, were entitled to custody over natural parents who had lacked contact for four years).

[28] *See, e.g.*, People *ex rel.* Scarpetta v. Spence-Chapin Adoption Serv., 269 N.E.2d 787 (N.Y. 1971) (returning the child to the natural mother after she rescinded her relinquishment); Steven A. v. Rickie M. (*In re* Adoption of Kelsey S.), 823 P.2d 1216 (Cal. 1992) (holding that a biological father who demonstrates a full commitment to parental responsibilities is entitled to rights equal to those of the mother, including the right withhold consent to adoption).

[29] *See, e.g.*, *In re* Baby M, 537 A.2d 1227 (N.J. 1988) (voiding a surrogacy contract).

[30] *See, e.g.*, *In re* Guardianship of Sedelmeier, 491 N.W.2d 86 (S.D. 1992) (denying visitation to a couple who had provided primary care of a neighbor's child for seven years).

[31] *See, e.g.*, *In re* A.J.F., 764 So. 2d 47 (La. 2000) (holding that the Due Process Clause of the Fourteenth Amendment requires that a biological mother make reasonable efforts to notify an unwed father of her decision to place their child for adoption).

giving nongenetic fathers,[32] grandparents,[33] and others who love and nurture children are also affected.

At the heart of visitation disputes is the definition of parenting. The myriad questions and factual complications presented in *Troxel* and similar cases can be distilled into a twofold issue: when should third parties be entitled to petition for and obtain visitation with children, and when should judges enforce biological[34] parents' refusals of third party visitation requests? The answer should not depend on whether the third party is a lesbian caregiver or a grandmother, whether state legislation grants favored status to the third party, or whether a judge identifies with either the biological parent or the third party. The Constitution should define and limit both third parties' rights to petition for visitation and parents' authority to restrict access to their children.

In this Note I propose that the Supreme Court afford and restrict third-party visitation to psychosocial parents, persons whom I define as the physical, material, intellectual, and emotional caregivers of children. Since *Troxel* outlines the Supreme Court's current views on parental rights, I begin with a review of the case, followed by a summary of common threads and a critique of the decision. I then discuss the traditional models, based on biology and state, that courts have used to address child visitation disputes. In Part III.A, "Blood," and later in Part III.C, "Sweat," I focus my historical analysis on contrasting interpretations of the Bible to illustrate the historical foundations for popular and legal conceptions of family and to suggest new uses for this text. Although blood and judicial discretion frameworks are reflected in the *Troxel* opinion and are likely to persist in future cases, I argue that both prove inadequate for resolving third-party visitation proceedings. Thus, building upon history, scholarship, constitutional precedent, lower court jurisprudence, and the more forward-looking aspects of *Troxel*, I propose that the Supreme Court employ a psychosocial parenting doctrine for resolving visitation disputes. While focused on the visitation context, it is my hope that the normative approach outlined in Part IV suggests a viable means to address the balance between public and private child.

II. Case Summary

A. The Facts

The cast of characters in *Troxel* illustrates the moral and legal complexity of the visitation dispute. Natalie, born in 1989, and Isabelle, born

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[32] *See infra* Part III.C.4.

[33] *See, e.g.*, *Troxel*, 120 S. Ct. at 2054.

[34] Unless otherwise specified, I use the term "biological parents" to include adoptive parents, who after decades of struggle and advocacy, have acquired the legal rights of genetic parents. Also, the term "parents" alone refers to biological and adoptive parents.

in 1991,[35] are the biological daughters of Brad Troxel and Tommie Granville, who never married.[36] After the couple separated, Brad lived with his parents; the girls visited their father regularly on weekends at the Troxels' home.[37] In 1993, Brad committed suicide.[38] The children continued to see Brad's parents, Jenifer and Gary Troxel, for several months, until Tommie Granville (now remarried) decided to restrict, but not to eliminate, visitation with the girls' grandparents.[39]

Both the grandparents and the parents are sympathetic and seemingly well-intentioned. Married for thirty-five years, the Troxels have four children and five grandchildren.[40] Gary Troxel is an original member of the Fleetwoods (a 1960s musical group). Remarkably, the Skagit County Superior Court judge,[41] the Troxels in their brief to the Supreme Court,[42] and many newspaper articles about the case[43] highlighted Gary Troxel's Fleetwoods career, as if musical ability and fame might indicate superior grandparenting skills. "We're not saying how they should be educated, how they should be disciplined, what religion they should be raised in," said Jenifer Troxel, speaking to the press on the eve of the Supreme Court oral argument,[44] "We just want a relationship with the girls, so they can know us and we can know them. The only way to get to know them is through a regular visitation."[45]

From Tommie Granville's point of view, this case affected the well-being of her household. Granville and her current husband, Kelly Wynn, have a number of dependents: in addition to the contested Natalie and Isabelle, there are three children from Granville's first marriage, two from Wynn's prior marriage, and one Wynn-Granville child.[46] After Brad Troxel's death, Granville thought the Troxels' requests for visitation were becoming unpredictable.[47] Concerned that the Troxels were using the girls as a substitute for their dead son, she wished to restrict, but not to eliminate, visitation.[48] Granville and Wynn felt vilified by the grandparents and by the press. "It is really mind-blowing to us that this is being

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[35] James Grimaldi, *Justices Question Grandparents' Rights Argument*, SEATTLE TIMES, Jan. 12, 2000, at A1.

[36] *Troxel*, 120 S. Ct. at 2057.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 2057–58.

[40] Timothy Egan, *After Seven Years, Couple is Defeated*, N.Y. TIMES, June 6, 1999, at A22.

[41] *Troxel*, 120 S. Ct. at 2058 (citing the superior court's finding that "the Petitioners can provide opportunities for the children in the areas of cousins and music").

[42] Brief for Petitioners at 2, *Troxel* (No. 99-138).

[43] *E.g.*, Egan, *supra* note 40 (quoting Jenifer Troxel as stating, "Gary was quite well known in the music world, and these girls have a right to know him").

[44] Grimaldi, *supra* note 35.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

portrayed as these poor grandparents who are wonderful and generous and kind," said Wynn in a January 2000 interview.[49] Wynn continued: "'The real[ ] story is that there is this family of 10 that has been continually attacked for six years by grandparents who are . . .' 'Insatiable,' Tommie [Granville]" interjected, finishing Wynn's sentence.[50]

B. Procedural History

In late 1993, the Troxels sued in Skagit County Superior Court, pursuant to Washington's third-party visitation statutes,[51] for more frequent visits with Natalie and Isabelle.[52] Two years later, the superior court issued an expansive visitation order, requiring visits one weekend each month, one week every summer, and four hours on each grandparent's birthday.[53] In addition, the superior court ordered Granville not to speak with her children about their father's suicide until she and the Troxels had agreed on a joint explanation.[54] Granville appealed,[55] challenging, among other things, the superior court's application of the best interests standard in awarding visitation to the Troxels.[56] She also challenged the Troxels' standing to petition for visitation, in light of the fact that Kelly Wynn had adopted Natalie and Isabelle after the superior court entered its order on remand.[57] The court of appeals invalidated the visitation order, holding that nonparents lack standing to seek visitation unless a custody proceeding is pending.[58] The court of appeals did not reach the constitutionality of the third-party visitation statute.[59]

On appeal to the Supreme Court of Washington, the case was consolidated with other cases in *Smith v. Stillwell-Smith*.[60] The Supreme Court of Washington reversed the lower court on the issue of standing but affirmed the decision to strike the visitation order.[61] Further, the Washington Supreme Court held that the visitation statutes impermissibly in-

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[49] *Id.*

[50] *Id.*

[51] WASH. REV. CODE ANN. § 26.09.240 (West 1995) (amended 1996); WASH. REV. CODE ANN. § 26.10.160(3) (West 2000). While the Troxels pursued visitation under both statutes, only section 26.10.160(3) was at issue before the United States Supreme Court. *Troxel*, 120 S. Ct. at 2057.

[52] *Troxel*, 120 S. Ct. at 2057.

[53] *Id.* at 2058.

[54] Brief for Petitioners at 5, *Troxel* (No. 99-138).

[55] Troxel v. Granville (*In re* Visitation of Troxel), 940 P.2d 698 (Wash. Ct. App. 1998). Prior to addressing the merits of Granville's appeal, the Washington Court of Appeals remanded the case to the superior court for entry of written findings of fact and conclusions of law. *Id.* at 699.

[56] *Id.* at 701.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] Smith v. Stillwell-Smith (*In re* Custody of Smith), 969 P.2d 21 (Wash. 1998).

[61] *Id.* at 26–31.

terfered with parents' fundamental interest in the care, custody, and companionship of their children.[62] The contested language is as follows: "*Any person* may petition the court for visitation rights *at any time* including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been a change in circumstances."[63]

The Washington Supreme Court declared that parenting is a cardinal liberty protected by the Fourteenth Amendment and a fundamental right derived from the privacy interest inherent in the United States Constitution.[64] Accordingly, the five-justice majority applied a strict scrutiny analysis, which required that the state's interference with parental autonomy be narrowly tailored to meet a compelling state interest.[65] The Washington statute was deemed facially unconstitutional because it lacked the threshold requirement of a finding of harm to the child and centered on the fuzzy, overbroad best interests of the child test.[66] A stinging four-justice dissent would have upheld the statute and visitation order.[67] The dissent criticized the majority's far-reaching and flawed premises as "oblivious to the varied relationships that flourish in our society" and "cruel both to the child . . . and to third parties,"[68] foreshadowing fissures that would appear in the ultimate decision by the United States Supreme Court.

C. United States Supreme Court

The Supreme Court affirmed.[69] Utilizing an as-applied balancing test, the plurality held that the visitation order impermissibly infringed upon Granville's right to direct the care, custody, and control of her children.[70] According to the plurality, the problem was not that the Washington superior court intervened, but that when it did so, it impermissibly

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[62] *Id.* at 23, 28.

[63] WASH. REV. CODE ANN. § 26.10.160(3) (West 2000) (emphasis added). The language of section 26.10.160(3) is substantially similar to the language of former section 26.09.240. Prior to a 1996 amendment, section 26.09.240 provided:

> The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances. A person other than a parent may petition the court for visitation rights at any time. The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

WASH. REV. CODE ANN. § 26.09.240 (West 1995) (amended 1996).

[64] *Smith*, 969 P.2d at 28–31.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 32–42.

[68] *Id.* at 43.

[69] Troxel v. Granville, 120 S. Ct. 2054, 2065 (2000).

[70] *Id.* at 2061–64.

placed on a fit parent the burden of disproving that visitation would be in her children's best interests.[71] Justice Souter, concurring, would have simply affirmed the Washington Supreme Court's ruling without undertaking an as-applied analysis.[72] In a separate concurrence, Justice Thomas would have applied strict scrutiny review and affirmed.[73] Dissenting, Justice Stevens found the statute constitutional on its face.[74] Justice Scalia, also dissenting, found that the Court had no power to invalidate a statute based on an alleged violation of an unenumerated constitutional right.[75] In the final dissenting opinion, Justice Kennedy would have vacated the judgment and remanded the case, allowing the Washington Supreme Court to correct its overbroad showing of harm requirement.[76]

1. Plurality

Writing for the plurality, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Ginsburg and Breyer, began by acknowledging that demographic changes have resulted in great variety among modern households.[77] Justice O'Connor reasoned that the nationwide enactment of grandparent visitation statutes is due in part to the fact that grandparents and other relatives increasingly care for children and that children may benefit from relationships with statutorily specified persons.[78] Nonetheless, legally enforceable third-party visitation "can place a substantial burden on the traditional parent-child relationship."[79]

In an explicit recognition of substantive due process rights, the plurality stated that the Court has "long recognized" that the Due Process Clause of the Fourteenth Amendment "'guarantees more than fair process' . . . [and] includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests."[80] Of these, perhaps the oldest is parents' interest in the care, custody, and control of their children. The plurality sketched the long stream of precedent supporting parents' liberty interests from *Meyer v. Nebraska*[81] through *Santosky v. Kramer*,[82] and concluded that "it cannot now be doubted that the Due Process Clause of the

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[71] *Id.* at 2062.
[72] *Id.* at 2065 (Souter, J., concurring).
[73] *Id.* at 2067–68 (Thomas, J., concurring).
[74] *Id.* at 2068 (Stevens, J., dissenting).
[75] *Id.* at 2074 (Scalia, J., dissenting).
[76] *Id.* at 2075 (Kennedy, J., dissenting).
[77] *Id.* at 2059 (plurality opinion).
[78] *Id.*
[79] *Id.*
[80] *Id.* at 2059–60 (quoting Washington v. Glucksberg, 521 U.S. 702, 719 (1997)).
[81] 262 U.S. 390 (1923) (holding that a statute forbidding instruction in non-English languages violates parental liberty protected by the Fourteenth Amendment).
[82] 455 U.S. 745 (1982) (holding that the Constitution requires clear and convincing evidence of child abuse before a state may terminate parental rights).

Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[83]

The plurality held that the Washington visitation statute, as applied in this case, unconstitutionally infringed upon Granville's fundamental parental rights.[84] Though the term "fundamental" in the substantive due process context often indicates strict scrutiny protection, the plurality used a balancing test to conclude that the visitation order was unconstitutional.[85]

Affirming the Washington Supreme Court's expansive reading of the visitation statute,[86] Justice O'Connor declared that the statute accorded no deference to a fit parent's determination of the child's best interests.[87] "In practical effect, in the State of Washington a court can disregard *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests."[88]

After scrutinizing the "combination of . . . factors" in the record,[89] the plurality concluded that the superior court's visitation order was based on a disagreement between judge and fit parent "and nothing more."[90] First, the plurality found that Tommie Granville, a fit parent, was entitled to the presumption that she acts in the best interests of her children.[91] Next, the plurality stressed that the "Superior Court had applied exactly the opposite presumption,"[92] essentially placing "on Granville . . . the burden of *disproving* that visitation would be in the best interest of her daughters."[93] The plurality criticized the superior court's comments, such as "I think [visitation with the Troxels] would be in the best interest of the children and I haven't been shown it is not."[94] Given the broad scope of judicial review under the Washington visitation statute, Justice O'Connor emphasized that courts "must accord at least some special weight to the parent's own determination."[95] Finally, the plurality chastised the superior court for failing to give favorable weight to Tommie Granville's initial consent to limited visitation, citing state statutes to

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[83] *Troxel*, 120 S. Ct. at 2060 (plurality opinion).

[84] *Id.* at 2064.

[85] *Id.* at 2061–65.

[86] *Id.* at 2061. "[The statute] allow[s] 'any person' to petition for forced visitation of a child at 'any time' with the only requirement being that visitation serve the best interests of the child." *Id.* (quoting Smith v. Stillwell-Smith (*In re* Custody of Smith), 969 P.2d 21, 30 (Wash. 1998)).

[87] *Id.*

[88] *Id.*

[89] *Id.* at 2063.

[90] *Id.*

[91] *Id.* at 2062.

[92] *Id.*

[93] *Id.* (emphasis added).

[94] *Id.* at 2062 (quoting Verbatim Report of Proceedings at 213, *In re Troxel*, No. 93-3-00650-7 (Wash. Super. Ct. Dec. 14, 19, 1994)).

[95] *Id.*

suggest that court-ordered visitation perhaps should be warranted only if parents unreasonably deny visitation.[96]

Before closing its factual analysis, the plurality again disapprovingly cited the superior court's justification for ordering summertime visitation:

> I look back on some personal experiences . . . . We always spent as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out.[97]

The plurality restated that the Due Process Clause bars judges from imposing their own judgment over the wishes of fit parents.[98] Justice O'Connor declined to consider the primary constitutional question that the Washington Supreme Court decided, namely whether the powerful visitation statute or any other nonparental visitation statutes would survive a facial challenge:

> We do not, and need not, define today the precise scope of the parental due process right in the visitation context. . . . Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.[99]

After defending its as-applied consideration of the Washington statute against attacks by fellow justices, the plurality refused to remand the case, agreeing with dissenting Justice Kennedy that protracted litigation would itself impermissibly burden Granville's parental rights.[100]

2. Justice Souter's Concurrence

Justice Souter concurred in the judgment.[101] He would have simply affirmed the Washington Supreme Court's facial invalidation of the visitation statute without engaging in an as-applied analysis and "[turning] any fresh furrows in the 'treacherous field' of substantive due process."[102]

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[96] *Id.* at 2062–63.

[97] *Id.* at 2063 (quoting Verbatim Report of Proceedings at 220–21, *In re Troxel*, No. 93-3-00650-7 (Wash. Super. Ct. Dec. 14, 19, 1994)).

[98] *Id.* at 2063–64.

[99] *Id.* at 2064.

[100] *Id.* at 2065.

[101] *Id.* (Souter, J., concurring).

[102] *Id.* (quoting Moore v. East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion)).

Justice Souter agreed with the Washington Supreme Court that the conjunction of permitting "any person . . . at any time" to petition for visitation according to the best interests standard was unconstitutionally overbroad[103] and found it unnecessary to consider the lower court's requirement of a showing of harm prior to court-ordered visitation. Justice Souter commented:

> *Meyer*'s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation . . . . It would be anomalous . . . to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the parent.[104]

Justice Souter concluded by acknowledging that a state's highest court has the power to interpret its domestic statute and to utilize a demanding standard when determining its facial constitutionality.[105]

3. Justice Thomas's Concurrence

In a brief concurrence, Justice Thomas called for strict scrutiny review of infringements of parents' fundamental right to rear children.[106] Expressly leaving for another day the questions of whether the Court's substantive due process cases were wrongly decided and whether the judiciary ought to enforce unenumerated rights, Justice Thomas agreed with the plurality that, commencing with *Pierce v. Society of Sisters*, the Court has acknowledged the fundamental liberty of parents to direct the upbringing of their children.[107] Accordingly, Justice Thomas would have simply affirmed the lower court ruling since the state lacked a legitimate, let alone compelling, reason for contravening a fit parent's decision about visitation with grandparents.[108]

4. Justice Stevens' Dissent

Justice Stevens, who would have remanded the case, dissented.[109] Noting at the outset that the Court should have denied certiorari, Justice Stevens maintained that the Court should have directly examined the fed-

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[103] *Id.* at 2066.
[104] *Id.* at 2066–67.
[105] *Id.* at 2067.
[106] *Id.* (Thomas, J., concurring).
[107] *Id.* at 2067–68 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).
[108] *Id.*
[109] *Id.* (Stevens, J., dissenting).

eral questions presented.[110] Like Justice Souter, Justice Stevens found untenable the plurality's as-applied review, deeming it to be based upon a guess about the Washington Supreme Court's interpretation of its statute. This guess depended on an assessment of the facts that the Court was "ill-suited and ill-advised to make."[111]

Nonetheless, Justice Stevens discerned two flaws in the Washington Supreme Court's reasoning. First, disagreeing with Justice Souter, Stevens argued that since the statute has a "plainly legitimate sweep"[112]—often the "any person" seeking visitation is an intimate relation or previously custodial caregiver—a facial challenge should fail.[113] Second, Justice Stevens found that there was no constitutional basis for the lower court's requirement of a showing of harm.[114] While parents undoubtedly have a "fundamental liberty interest in caring for and guiding their children and a corresponding privacy interest . . . in doing so without the undue interference" of third parties, Justice Stevens found these interests not "so inflexible as to establish a rigid constitutional shield."[115] Justice Stevens praised the presumption that parents serve the best interests of their children but noted that "even a fit parent is capable of treating a child like a mere possession."[116]

Justice Stevens provided the clearest argument to date for the claim that the Court has recognized the independent constitutional rights of children vis-à-vis their parents:

> Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at minimum a third individual, whose interests are implicated in every case to which the statute applies—the child. . . . [T]o the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.[117]

Citing, inter alia, *Lehr v. Robertson*[118] and *Michael H. v. Gerald D.*,[119] Justice Stevens noted that parents' rights have always been limited

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[110] *Id.*
[111] *Id.* at 2068–69.
[112] *Id.* at 2070 (quoting Washington v. Glucksberg, 521 U.S. 702, 739–40 (1997)).
[113] *Id.* at 2069–70.
[114] *Id.* at 2070–71.
[115] *Id.* at 2071.
[116] *Id.*
[117] *Id.* at 2071–72.
[118] 463 U.S. 248 (1983) (holding that a putative biological father who had never established an actual relationship with a child did not have a constitutional right to notice of his child's adoption by the man who had married the child's mother and acted as a de facto father).
[119] 491 U.S. 110 (1989) (plurality opinion of Scalia, J.) (holding that a biological fa-

by the "existence of an actual, developed relationship with a child," balanced against the state's role as *parens patriae*.[120] In addition, Justice Stevens reproached the plurality for suggesting that children are chattel.[121] Although children's rights need not uniformly be considered equal to their parents' contrary interests, children's interests are by no means limited to protection from domestic abuse and neglect. Justice Stevens' views stemmed from his recognition of family diversity: "[T]he almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily."[122] The Due Process Clause, concluded Justice Stevens, allows states to craft and enforce statutes that use the well-established best interests of the child standard to mitigate arbitrary parental decisions and mediate between the protected interests of parent and child.[123]

5. Justice Scalia's Dissent

Justice Scalia, who would have reversed the judgment below, likewise dissented.[124] First, Justice Scalia asserted that, while in his own view parents should have, among other rights, the right to direct the upbringing of their children, the federal judiciary has no authority to "identify what [such rights] might be, and to enforce the judge's list [of rights] against laws duly enacted by the people."[125] Justice Scalia then launched his now trademarked attack on substantive due process, this time with parents' rights as the target.[126] *Meyer* and *Pierce*, in Justice Scalia's view, harked back to an era of now repudiated substantive due process holdings.[127] Like Justice Thomas, Justice Scalia did not call for the overruling of *Meyer* and *Pierce*, yet he noted that the "sheer diversity" of the *Troxel* opinions indicated that the notion of unenumerated parental rights has little claim to stare decisis protection.[128] Justice Scalia saw in the very

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ther who had a limited but mutually recognized emotional relationship with his daughter had no constitutional right to overcome the presumption of California law that the husband of the child's mother, who had in this case lived with and cared for the child her whole life, is the child's father).

[120] *Troxel*, 120 S. Ct. at 2072 (Stevens, J., dissenting).

[121] *Id.*

[122] *Id.* at 2073.

[123] *Id.* at 2073–74.

[124] *Id.* at 2074 (Scalia, J., dissenting).

[125] *Id.*

[126] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 841 (1992) (Scalia, J., concurring in part and dissenting in part) (concluding that a woman's decision to have an abortion is not a constitutionally protected liberty because the Constitution says absolutely nothing about it, and the longstanding traditions of American society have permitted it to be legally proscribed).

[127] *Troxel*, 120 S. Ct. at 2074 (Scalia, J., dissenting).

[128] *Id.* at 2074.

existence of *Troxel* the twin evils of expansive constitutionalization and judicial activism. "I think it obvious—whether we affirm or reverse the judgment here, or remand as Justice Stevens or Justice Kennedy would do—that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law."[129]

6. Justice Kennedy's Dissent

Justice Kennedy also dissented.[130] Deeming impermissibly broad the Washington Supreme Court's theory that a showing of harm is required for judicially enforced third-party visitation, Justice Kennedy would have vacated and remanded the case, allowing the Washington Supreme Court to determine whether Granville's constitutional rights were curtailed.[131] Case law, according to Justice Kennedy, grants the custodial parent the right to determine, without undue interference from the state, how best to rear the child.[132] Although he agreed with the lower court's contention that grandparents historically have not enjoyed visitation rights, Justice Kennedy asserted that the standard for court-ordered visitation remains unclear.[133] Justice Kennedy then found that the Washington Supreme Court's showing of harm requirement was unsound.[134] Without reservation, Justice Kennedy accepted the changing composition of families: "As we all know, [the nuclear family] is simply not the structure or prevailing condition in many households."[135] Like Justice Stevens, Justice Kennedy found fault in the presumption that third parties have no significant relationship with the child: "Cases are sure to arise—perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto."[136] Consequently, when state courts apply the best interest standard to a child's caregivers, they may appropriately limit parents' constitutional rights.[137] "In short," concluded Justice Kennedy, "a fit parent's right vis-a-vis a complete stranger is one thing; her right vis-a-vis another parent or a de facto parent may be another."[138] Justice Kennedy recognized that protracted domestic proceedings may impinge on parents' constitutional rights. Even so, he would have reversed the Washington Supreme Court's blanket holding on the inappropriateness of the best interests standard

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[129] *Id.* at 2075.
[130] *Id.* at 2075 (Kennedy, J., dissenting).
[131] *Id.* at 2075–79.
[132] *Id.* at 2076.
[133] *Id.* at 2076–77.
[134] *Id.* at 2077.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 2077–79.
[138] *Id.* at 2079.

and remanded the case for further proceedings to determine whether Granville's constitutional rights were curtailed.[139]

D. Beyond Troxel

Three trends emerge from the *Troxel* cacophony. First, and most significantly, the plurality applied a middle-tier balancing analysis to a challenge implicating parental autonomy.[140] Justices Stevens and Kennedy likewise adopted a balancing approach,[141] with only Justice Thomas explicitly endorsing strict scrutiny review.[142] Scholars and judges heretofore had disagreed on the constitutional standard applicable to parents' rights. Past Supreme Court decisions in the family law arena are replete with phrases referring to parents' cardinal and fundamental liberty to control their children, and scholars and judges have consequently attached strict scrutiny protection to parents' rights.[143] However, looking beneath the rhetoric and analyzing the Court's reasoning, others have posited that precedent supports intermediate scrutiny, requiring a balancing of parents' rights against the state's authority to intervene for the welfare of children.[144] Although deriving authority from a line of family

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[139] *Id.*

[140] *Id.* at 2061–63 (plurality opinion). The plurality states, "The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughter's best interests." *Id.* at 2062. The plurality considered "the combination of factors," *see supra* notes 89–96 and accompanying text, to conclude that the Washington statute as applied in this case violated Granville's parental rights. *Id.* at 2063.

[141] As Justice Stevens stated:

> Despite this Court's repeated recognition of these significant parental liberty interests, these interests have never been seen to be without limits. . . .
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> . . . .
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> A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child . . . . These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interest in a child must be balanced against the State's long recognized interests as *parens patriae* . . . .

Id. at 2071–72 (Stevens, J., dissenting). Justice Kennedy maintained that a parent's right to the custody and care of children exists in "broad formulation," but that courts must carefully adhere to the "incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right." *Id.* at 2076 (Kennedy, J., dissenting). Furthermore, Justice Kennedy urged that the Constitution does not require a showing of harm before states may apply the best interests of the child standard in visitation proceedings. *Id.* at 2077.

[142] *Id.* at 2068 (Thomas, J., concurring).

[143] *See, e.g.*, John Dewitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 382–84 (1998) (arguing that a long line of Supreme Court cases grants biological parents a constitutionally protected liberty interest in their relationships with and custody and control over their own children).

[144] The view that the Supreme Court has balanced, and should continue to balance, parents' rights against the state's authority has been praised by some scholars, *see gener-*

law cases that use the term "fundamental parental liberties," the plurality evaluated the claimed infringement of Tommie Granville's rights by applying intermediate, rather than strict scrutiny.[145] *Troxel* requires courts to balance the state's *parens patriae* power to enforce third-party visitation against parental rights, while applying the constitutionally mandated presumption that fit parents act in the best interests of their children. The application of *Troxel* in the Rhode Island Supreme Court case *Rubano v. DiCenzo*[146] is illustrative. In upholding the right of a lesbian psychological mother to petition for enforcement of a settlement agreement allowing visitation, the *Rubano* court acknowledged that *Troxel* requires that a biological parent's wishes be afforded special weight in any contested custody proceeding.[147] The court, however, held that a natural mother's constitutional liberty interest "is not an unqualified one because the rights of a child's biological parent do not always outweigh those of other parties asserting parental rights, let alone do they trump the child's best interests."[148]

The *Troxel* Court's application of intermediate scrutiny accurately reads precedent and is appropriate on policy grounds. Strict scrutiny, favored by Justice Thomas alone, might have resulted in the same overdeference to parental autonomy as that exhibited in *Santosky v. Kramer*.[149] *Troxel*'s balancing approach allows states to craft statutes to protect children from parental abuse and neglect while accommodating diverse family forms. Intermediate scrutiny ensures that judicial determinations as to children's best interests will not supersede those of fit parents, thereby avoiding outcomes such as the one in *Bottoms v. Bottoms*.[150] Further, judicial review using a balancing test allows for more careful evaluation of allegations that states have wrongfully infringed parental rights.[151]

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ally Laurence C. Nolan, *Unwed Children and Their Parents Before the United States Supreme Court from* Levy *to* Michael H.*: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1 (1999), and criticized by others as an intrusion on the natural rights of parents, *see generally* JOHN W. WHITEHEAD, PARENTS' RIGHTS 121–24 (1985).

[145] *See supra* notes 118–120 and accompanying text.

[146] 759 A.2d 959 (R.I. 2000).

[147] *Id.* at 961, 973.

[148] *Id.* at 973.

[149] 455 U.S. 745 (1982). In *Santosky*, the Court decreed clear and convincing to be the standard required to terminate parental rights, even in the face of horrific child abuse.

[150] 457 S.E.2d 102 (Va. 1995). In *Bottoms*, the Virginia Supreme Court, scornful of what it considered the felonious conduct "inherent in lesbianism," *id.* at 108, awarded custody to a maternal grandmother despite the objections of the child's lesbian, biological mother. *See infra* note 215.

[151] Such a test would be useful, for example, in pending cases in New York City, where the government in 1999 kept 2525 children in foster care without legal authority due to bureaucratic backlog. Nina Bernstein, *Suit Charges That Boy Was Illegally Kept in Foster Care as Mother Sought Return*, N.Y. TIMES, Aug. 31, 2000, at B4. The report discusses the struggle of Joanne M., a once troubled but now employed and drug-free mother, who is suing New York City for damages for illegally keeping her son for two and a half years in foster homes, causing the boy physical injury and emotional distress. *Id.*

The second common theme of *Troxel* is the explicit recognition that the nuclear family is no longer the norm and that the law should protect members of nontraditional, complex families. The *Troxel* Court's acknowledgement of family diversity stands in stark contrast to Justice Scalia's pronouncement eleven years earlier in *Michael H.* that "California law, like nature itself, makes no provision for dual fatherhood."[152] The *Troxel* plurality stated that "[t]he composition of families varies greatly from household to household";[153] Justice Stevens discussed "[t]he almost infinite variety of family relationships that pervade our ever-changing society";[154] and Justice Kennedy noted that "[a]s we all know, [the nuclear family] is simply not the structure or prevailing condition in many households."[155] Again the *Rubano* case is instructive, as the Rhode Island Supreme Court relied on *Troxel*'s recognition of family diversity for the following proposition:

> [U]nder certain circumstances, even the existence of a developed biological, parent-child relationship . . . will not prevent others from acquiring parental rights vis-a-vis the child. . . . We recognize that . . . a person who has no biological connection to a child but who has served as a psychological or de facto parent to that child may . . . establish his or her entitlement to parental rights vis-a-vis the child.[156]

Finally, in dissent, Justice Stevens provided the strongest recognition of Supreme Court precedent for the independent, constitutionally protected interests of children. He argued that children have interests in preserving familial or family-like bonds, which "must . . . be balanced in the equation" alongside, albeit not invariably on par with, the rights of parents and family members.[157] While the plurality did not recognize children's independent constitutional intrafamily rights, both its recognition that states may craft statutes to protect relationships that children form with third parties,[158] and its application (along with Justice Kennedy, in dissent[159]) of a balancing test are consistent, if not doctrinally aligned, with Justice Stevens' concerns for the welfare and interests of children.

Troxel thus marks an important step in the Court's family jurisprudence. At best, *Troxel* promotes intrafamily diversity, preserves parents' liberty interests, and protects children. Yet the impact of *Troxel* might be

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[152] Michael H. v. Gerald D., 491 U.S. 110, 118 (1989).
[153] *Troxel*, 120 S. Ct. at 2059 (plurality opinion).
[154] *Id.* at 2073 (Stevens, J., dissenting).
[155] *Id.* at 2077 (Kennedy, J., dissenting).
[156] *Rubano*, 759 A.2d at 974–75.
[157] *Troxel*, 120 S. Ct. at 2072 (Stevens, J., dissenting); *see also supra* Part II.C.4.
[158] *Id.* at 2059 (plurality opinion).
[159] *See supra* Part II.C.6.

less far-reaching and perhaps less rosy. Within the five months following the decision, forty-three lower courts cited *Troxel*, almost exclusively for a proposition first set forth in the 1920s[160]—that parents have a fundamental interest in the care, custody, and control of their children.[161] Grandparent visitation statutes, even those that permit visitation orders solely based on the best interests standard, appear to remain intact.[162] The more ambitious aspects of the decision—recognition of intrafamily diversity, consideration of children's interests, even the balancing test itself—have, at least in these early citations, with the notable exception of *Rubano*,[163] faded behind a stock catch phrase. More importantly, in considering an as-applied rather than a facial challenge to Washington's "breathtakingly broad"[164] statute, and in failing to issue a unified opinion, the *Troxel* Court left lower courts to struggle with numerous difficult questions: Who is a parent, and what is the scope of parental rights in the visitation context? When, if ever, does an unmitigated best interests standard sufficiently protect parental liberty and promote children's welfare? As reporter Linda Greenhouse of *The New York Times* perceptively noted, "The tentative, splintered nature of the decision . . . all but guaranteed that challenges to other state laws will reach the Supreme Court."[165] Nev-

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[160] The notion of parents' fundamental right to control the upbringing of their children was first set forth in *Meyer v. Nebraska*, 262 U.S. 390 (1923), in which the Court found no legitimate state interest in a statute forbidding instruction in languages other than English.

[161] *E.g.*, Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000) (holding that, given parents' fundamental liberty interest in their children, a parent whose children were abducted should not be barred from petitioning for their return); Hodgkins v. Peterson, No. IP 99-1528-C-T/G, 2000 U.S. Dist. LEXIS 11801 (S.D. Ind. July 3, 2000) (granting plaintiff parents' motion for summary judgment on the issue of whether an Indianapolis curfew law violated, inter alia, parents' fundamental right in the control of their children). The Ninth Circuit has also cited *Troxel* for the proposition that only parents, and not other kinfolk, have a fundamental right to control the care, custody and management of their children. Beardslee v. Dep't of Soc. & Health Servs., No. 99-35752, 2000 U.S. App. LEXIS 18588 (9th Cir. July 17, 2000) (holding that an uncle had no constitutional right to be included in nephew's custody proceedings).

[162] Recent cases applying *Troxel* run contrary to the immediate postdecision prediction of some scholars who believed that *Troxel* jeopardized the constitutionality of grandparent visitation statutes. *Compare supra* text accompanying note 15, *with* Cabral v. Cabral, 28 S.W.3d 357, 363 (Mo. Ct. App. 2000) (noting that parents' situation has not changed since *Troxel*), Jones v. Slick, No. 97-007636-CZ, 2000 Mich. App. LEXIS 222, at *1 (Mich. Ct. App. Oct. 10, 2000) (noting that "[t]he impact, if any, of *Troxel* on the viability of Michigan's third-party visitation statutes has yet to be determined"), *and* Gestl v. Frederick, 754 A.2d 1087, 1102 (Md. Ct. Spec. App. 2000) (holding that a nonbiological parent claiming to be the de facto parent had standing under Maryland law to petition for visitation). The *Gestl* court indicated that "[t]he Supreme Court's decision in *Troxel* may require some modification of Maryland's standards respecting visitation by third parties, but *Troxel* does not prohibit courts from ordering third-party visitation, so long as the decision-making process affords adequate protection to the parent's constitutional rights." *Id.*

[163] *See supra* text accompanying notes 146–148.

[164] *Troxel*, 120 S. Ct. at 2059 (plurality opinion).

[165] Greenhouse, *supra* note 10. *But see A Parent's Right*, WASH. POST, June 6, 2000, at A26 (acknowledging that "[t]he justices' wide disagreement . . . suggests there is plenty of refining still to come" but arguing that "[m]uch of it will take place, as it should, in the state courts that have traditionally handled the volatile area of family law").

ertheless, as I explain in Part III of this Note, Justices Stevens' and Kennedy's dissents, consonant with the reasoning of the plurality opinion, provide at least a partial foundation for a constitutional framework for resolving future visitation disputes.

III. BLOOD, STATE, AND SWEAT

The law divides parenting into three broad forms: blood, state, and sweat. "Blood parents"—biological mothers and fathers, as well as adoptive parents, who, after decades of struggle, have earned the rights of "natural" parents—enjoy the greatest constitutional liberties and societal regard. In favoring certain forms of families or in affording rights to biological parents or relatives and caretakers, the state exerts its power in all family disputes that come before a court of law. In some contexts, "state parenting" refers to foster families or government-run institutions for abused, abandoned, or orphaned children. The term "state parenting" in this Note, however, applies only to visitation and custody disputes between fit parents and thus refers to legal mechanisms in which the state's authority is most clearly manifest: in the use of the best interests of the child standard and the recognition of the independent, intrafamily rights of children. Finally, "sweat parents," refers to the group I define as psychosocial parents, whose physical and emotional nurturing forms a cognizable parent-child bond.

Courts have responded to the dilemmas raised in *Troxel* and addressed the scope of parental authority by turning first to blood, then to state, and most recently, however tentatively, to sweat. Blood and state remain important to our legal and popular understanding of parental autonomy and judicial authority, but taken alone each fails as a practical and analytical framework through which we can resolve future visitation disputes. In each of the following sections, I briefly review the historical underpinnings of different forms of parenting. In the blood and state sections, I discuss precedent and scholarship and suggest that granting or denying visitation based on biology or on state determination of children's best interests and rights is a flawed solution. Finally, I analyze the history, scholarship, and precedent that support psychosocial parenting and propose granting constitutional rights to sweat parents as a means to balance, in the visitation context and beyond, the relationship between child, parent, and state.

In providing the historical background in this Note, I focus in part on the Bible. Even in this secular age, the Bible is central to family law discourse, implicitly evinced in courts' reasoning, if not explicitly articulated in their rhetoric.[166] Yet, for those who seek to expand the

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[166] *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (asserting that nature itself provides no room for dual fatherhood); Katharine T. Bartlett, *Rethinking Parenthood as an*

definition of parenting, biblical analysis—a challenge from *within* rather than *without*—is a particularly worthy undertaking.[167] An acknowledgment that the origins of psychosocial parenting can be traced to the Bible helps counter the assumption of many courts, scholars, and the public that the Judeo-Christian tradition defines "natural parents" solely as one egg-mother plus one sperm-father, allowing only for the nuclear family form. In Part III.A, I briefly review the traditional use of biblical tenets. In Part III.C, treating the Bible as a historical text rather than as divine truth, I explore the ways in which biblical accounts support a definition of parenting beyond the biological and into the psychosocial.

A. Blood

In past centuries and across varied disciplines, biology and property have been central to our understanding of parenting. The persistent primacy of blood ties is established in the Bible. *Exodus* provides us with the fourth of God's Ten Commandments: "Honor your father and your mother, so that your days may be long in the land that the Lord your God is giving you."[168] Significantly, the three commandments that precede this one tell the Jewish people how God should be worshipped, and five that follow enjoin them from usurping others' property.[169] This placement is hardly accidental, as it accurately reflects the position of family law midway between the sacred and the secular, between lordship and ownership. Children must honor (not worship) their parents and, in so doing, they shall be the beneficiaries (owners) of what the Lord, through their obedient parents, has provided for them. Rights and responsibilities are all expressed forcefully from the outset.

Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed, 70 VA. L. REV. 879, 886–88 (1984). Professor Bartlett notes that

> The concept of parenthood as an exclusive status has developed from long and complex legal traditions. . . . [One of the two] most prominent [is] natural or divine law, which assumes the existence of a fundamental social order. . . . [P]arental rights are deemed the very foundation of social order. Unless parents are left free to raise their own children, the entire social fabric will be destroyed . . . .

Id.

[167] For a similar deployment of an internal biblical challenge in legal academia, see Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 549 (1990), in which the author challenges the notion that homosexuality is immoral by reporting on scholarship that highlights the ambiguity in the Bible's treatment of homosexuality.

[168] *Exodus* 20:12; *see also Deuteronomy* 4:16.

[169] For this claim, I understand adultery as a property issue and bearing false witness as a means of using the law to gain what rightfully belongs to another person. *See Exodus* 20:14, 20:16 (sixth and eighth commandments).

Punishment and rewards are equally explicit. Parents who fail to heed the commandments of their jealous God may expect eventual repercussions, but justice is fierce and fast for children who disobey their earthly parents. The Bible states, "Whoever curses father or mother shall be put to death."[170] If a stubborn and rebellious son does not obey his father and mother, "the men of the town shall stone him to death."[171] Corporal punishment of offspring and unruly women—Eve for offering Adam a forbidden apple,[172] Jezebel for using eye makeup and styling her hair to entice Jehu from his warrior duties[173]—is not only sanctioned but required. Lord the Father stands far above, man somewhere in the middle, and women and children far below. The Bible thus sets forth a clear, patriarchal hierarchy, one that has been followed by Judeo-Christian families and legal systems throughout the ages.[174]

Though mitigated by a later understanding of children as objects of affection, the biblical view of children as property persisted through common law. In common law, the father, as master of the family, reaped the benefits of his children's economic contributions. For the good of society and for their own welfare, children belonged to their father:

> Undoubtedly, the father has primarily, by law as by nature, the right to custody of his children. . . . Because he is the father, the presumption naturally and legally is that he will love them the most, and care for them the most wisely. . . . [T]he real interest of the child is that it should be in the custody of its father.[175]

Custody disputes were thus unencumbered by modern considerations:

> We are informed by the first elementary books we read, that the authority of the father is superior to that of the mother. It is the doctrine of all civilized nations. It is according to the revealed law and the law of nature, and it prevails even with the wandering savage, who has received none of the lights of civilization.[176]

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[170] *Exodus* 21:17.

[171] *Deuteronomy* 21:18–:21. For a later codification of this biblical provision, see *infra* note 174.

[172] *Genesis* 3:6–:16.

[173] 2 *Kings* 9:30–:37.

[174] For instance, following biblical language described above, *see supra* notes 170–171 and accompanying text, the Massachusetts Stubborn Child Statutes of 1646 allowed a father to order the execution of rebellious or stubborn sons over fifteen. ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 33 (1999).

[175] Hibbette v. Baines, 29 So. 80, 81 (Miss. 1900).

[176] Foster v. Alston, 7 Miss. 406, 463 (1842) (Sharkey, C.J., dissenting).

Beginning in the 1930s, the mother increasingly became the preferred custodian of young children and daughters.[177] The so-called "tender years presumption" persisted until the last third of the twentieth century, when it was systematically replaced with the now nearly universal and purportedly gender-neutral[178] best interests of the child standard.[179] West Virginia alone decides custody disputes according to the primary caretaker presumption, which awards custody to the parent who more often bathes, feeds, clothes, teaches, and tends to the child.[180] A growing number of states incorporate the primary caretaker presumption into a best interests determination.[181]

The shift in child custody law—from a presumption favoring the father, to a presumption favoring the mother, to a best interests of the child standard—roughly parallels the shift in the rationale supporting the constitutional rights of parents—from property and biology to child-rearing. In *Meyer v. Nebraska*[182] and *Pierce v. Society of Sisters*,[183] both decided prior to the modern articulation of constitutional "scrutiny" standards, the Supreme Court upheld the freedom of parents to control their children's upbringing. The principles of parental liberty expressed in *Meyer* and *Pierce* survived the Court's subsequent repudiation of economic substantive due process and form the foundation for the due process rights of parents affirmed in *Troxel*. While widely praised for protecting pluralism,[184] scholars have criticized *Meyer* and *Pierce* for revitalizing and reinforcing views of children as the possessions of their biological parents.[185] Arguably, the views can be reconciled. The Court in the 1920s intended

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[177] The American origin of the "tender years presumption," also called the "maternal preference rule," dates to an 1830 Maryland decision. Devine v. Devine (*Ex parte* Devine), 398 So. 2d 686, 689 (Ala. 1981) ("[T]he court, while recognizing the general rights of the father, stated that it would violate the laws of nature to 'snatch' an infant from the care of its mother." (citing Helms v. Franciscus, 2 Bland 544 (Md. Ch. 1830))).

[178] While the best interests of the child standard is facially gender neutral, empirical evidence suggests that most courts continue to award custody to the mother. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 112–13 (1992).

[179] MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS 121–22 (1994).

[180] *See* Shearer v. Shearer, 448 S.E.2d 165 (W. Va. 1994) (reversing conferral of custody to the father and instead awarding custody to the mother, after scrutinizing testimony regarding the two clearly fit parents' caretaking functions).

[181] *See, e.g.*, Foreng v. Foreng, 509 N.W.2d 38 (N.D. 1993) (incorporating primary caretaker presumption into a best interests determination). *But see, e.g.*, Harris v. Harris, 647 A.2d 309, 312 (Vt. 1994) (rejecting the primary caretaker presumption as biased against working mothers and women generally).

[182] 262 U.S. 390 (1923).

[183] 268 U.S. 510 (1925).

[184] *E.g.*, Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1363 (1994) (arguing that *Meyer* and *Pierce*, grounded in antislavery traditions that originally produced the Fourteenth Amendment, promote pluralism by allowing families room to embrace their own values).

[185] *E.g.*, Barbara Bennett Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

to foster citizens' diversity and autonomy, but its reasoning was still grounded in a property-centered, patriarchal model of parenting. As explained in Part III.C below, the Court has in large part abandoned property and supplemented biology with actual caretaking as the basis for parental rights. Yet criticism of the Court for treating children as possessions remains, as, for example, in Justice Stevens's castigation of the plurality in *Troxel* for its presumed implication that children are mere "chattel."[186]

Deference to biology—to Yahwistic and Roman *paterfamilias* mandates[187]—persists in the realm of child abuse and neglect, where government intervention is arguably most warranted. The Court's failure to recognize that children most importantly need fit, not necessarily biological, parents has led to alarming and unpalatable results. In *DeShaney v. Winnebago County Department of Social Services*,[188] baby Joshua's father repeatedly beat him until age four, when the boy suffered severe brain damage and was committed to an institution.[189] Joshua's father had been awarded custody in a divorce proceeding. Subsequently, state child protective authorities investigated numerous abuse reports but never removed Joshua from his father's home. After Joshua's final beating, his father was tried and convicted of child abuse.[190] Joshua and his mother sued the state, claiming that the state should be held accountable for Joshua's injuries based on its failure to protect him from his father.[191] The Court held that since the state had no affirmative constitutional duty to protect Joshua from harm in his father's home, the state bore no responsibility.[192] Likewise, in *Santosky v. Kramer*,[193] three children who had suffered severe abuse at the hands of their biological parents were placed in foster care.[194] After four and one-half years, the state terminated parental rights, allowing the children to be placed for adoption.[195] The Supreme Court found the termination of rights unconstitutional, ruling that states cannot terminate "natural" parents' rights without providing clear and convincing evidence of unfitness.[196]

The rulings and rhetoric of the Supreme Court in *Santosky* and *DeShaney* demonstrate the high status accorded the rights of even the most dangerous biological parents. *Santosky* illustrates the potentially abhorrent implications of using strict scrutiny to protect parents' constitutional

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[186] Troxel v. Granville, 120 S. Ct. 2054, 2072 (2000) (Stevens, J., dissenting).
[187] *See infra* Part III.C.2.
[188] 489 U.S. 189 (1989).
[189] *Id.* at 191–93.
[190] *Id.* at 193.
[191] *Id.*
[192] *See id.* at 191, 195–202.
[193] 455 U.S. 745 (1982).
[194] *Id.* at 751.
[195] *Id.* at 751–52.
[196] *Id.* at 747–48, 769–70.

rights, the approach endorsed by Justice Thomas in *Troxel*. On its face, *DeShaney* is not a case about children but rather a case about the application of state versus federal law, and the Court's disinclination, mirrored in other areas of the law, to use the Constitution as a sword. Yet the Court's refusal to recognize for children an affirmative right to freedom from parental abuse and neglect—a right considered basic in all developed nations save the United States and Somalia[197]—highlights the Court's reluctance to place protection of children above the liberties of biological parents and the policies of state legislators.[198] Such anticonstitutionalization persists in *Troxel*, where Justice Scalia urges that the entire realm of family cases be left to state legislators.[199]

Past cases suggest the negative implications of excessive deference to biology. Modern reproductive technology and genetics offer yet more compelling reasons for deeming biology to be secondary at best in questions involving visitation of children.[200] Simply put, the number of biological links for every one of us approaches infinity and therefore is indeterminate. Humans are all genetically related in some form. Reproductive technology allows a child to have any combination of a candy-box assortment of parents: a sperm-donating biological father, an egg-donating biological mother, a womb-only surrogate mother along with a "creational" father and mother who turned to reproductive technology to create the child. Add adoptive, step-, foster, and functional parents into the mix, and biology becomes of limited importance indeed. One might view the increasing precision of genetics as a justification for allowing blood relatives the right to visitation with children. But how much blood is enough? If a grandparent, why not a great-grandparent, aunt, or cousin?[201] Viewing a certain amount of DNA as a prerequisite to legally

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[197] *See* NANCY E. WALKER ET AL., CHILDREN'S RIGHTS IN THE UNITED STATES: IN SEARCH OF A NATIONAL POLICY 28–44 (1999). The United States and Somalia are the only two developed nations that refused to ratify the United Nations Convention on the Rights of the Child ("U.N. Convention"), a seminal human rights treaty that defines minimum standards for civil, economic, humanitarian, and political rights for children throughout the world. Among the enumerated guarantees to children in the U.N. Convention is protection from harm at parental hands. Conservative groups in the United States, including the Christian Coalition and the John Birch Society, have staunchly opposed the U.N. Convention. *Id.* at 40. A key obstacle to ratification of the U.N. Convention, and an issue central to the *DeShaney* opinion, is the belief that the states, rather than the federal government, should enact laws protecting children. *Id.* at 36.

[198] *See* BARTHOLET, *supra* note 174, at 35–36. Professor Bartholet, excoriating the *DeShaney* Court, states that "[t]he Court's reasoning shows the family autonomy model at work. . . . [T]he Court talks of Joshua operating in a 'free world' as if the brutalized child were a free agent. . . . The Court's decision seems shocking. . . . But the philosophy expressed is quite consistent with our nation's general approach to child maltreatment." *Id.* at 36.

[199] Troxel v. Granville, 120 S. Ct. 2054, 2075 (2000) (Scalia, J., dissenting).

[200] *See generally* MATT RIDLEY, GENOME: THE AUTOBIOGRAPHY OF A SPECIES IN 23 CHAPTERS (2000).

[201] Seventeen states have determined that great-grandparents' genetic connection suffices for at least some type of great-grandparent visitation. *See* ARIZ. REV. STAT. ANN.

enforceable third-party visitation is arbitrary at best and at worst connotes the nefarious one-eighth rule once used to categorize racially mixed individuals.[202]

B. State

1. Best Interests of the Child

The state of ancient Sparta claimed a direct interest in raising its children to be great warriors, purportedly going so far as to expel obese boys at the age of fourteen.[203] Discussing the well-known prescriptions for his ideal republic, Plato declared, "the children of the inferior [parents], and any defective offspring of the others, will be quietly and secretly disposed of."[204] The modern best interests standard, though flawed, is far less insidious than these approaches. Between 1960 and 1980, the entrenched maternal presumption waned, and in its place state legislatures enacted statutes directing judges to award custody, postdivorce parent visitation, and third-party visitation based on the best interests of the child.[205] Currently, the best interests standard is used in all states save West Virginia to resolve custody disputes[206] and in forty-seven states to resolve visitation disputes.[207]

Despite its prevalent codification, scholars have excoriated the best interests standard.[208] As early as 1975, Robert Mnookin exposed the inherent indeterminacy of the best interests test, asserting that a coin flip

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§ 25-409 (West 2000); ARK. CODE ANN. § 9-13-103 (Michie 1999); DEL. CODE ANN. tit. 10, § 1009 (1999); FLA. STAT. ANN. § 752.001 (West 2000); GA. CODE ANN. § 19-7-1 (2000); IDAHO CODE § 32-719 (Michie 2000); 750 ILL. COMP. STAT. ANN. 5/607 (West 2000); IOWA CODE ANN. § 598.35 (West 1999); MINN. STAT. ANN. § 257.022 (West 2000); MONT. CODE ANN. § 40-9-102 (2000); NEV. REV. STAT. § 125C.050 (1999); N.M. STAT. ANN. § 40-9-1.1 (Michie 2000); N.D. CENT. CODE § 14-09-05.1 (1999); OKLA. STAT. ANN. tit. 10, § 5 (West 1999); 23 PA. CONS. STAT. ANN. § 5313 (West 2000); TENN. CODE ANN. § 36-1-102 (1999); UTAH CODE ANN. § 78-3a-307 (2000).

[202] Several states have in the past used the one-eighth rule to determine whether the law would consider an individual with mixed heritage black or white. *See, e.g.*, Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1495–96 & n.25 (2000).

[203] *See, e.g.*, RUDOLPH M. BELL, HOW TO DO IT: GUIDES TO GOOD LIVING FOR RENAISSANCE ITALIANS 168 (1999) (describing a 1589 piece by Renaissance Italian writer Nicolò Vito di Gozze admiring the Spartan practice).

[204] PLATO, THE REPUBLIC 460c, at 241 (Desmond Lee trans., Penguin Books 2d ed. 1974).

[205] MASON, *supra* note 179, at 123.

[206] *See* WALKER, *supra* note 197, at 84–85.

[207] Edward Walsh, *Court Limits Visitation Rights of Grandparents*, WASH. POST, June 6, 2000, at A1. As Justice Stevens notes in *Troxel*, a search of current state custody and visitation laws reveals 698 separate references to the best interests of the child standard. Troxel v. Granville, 120 S. Ct. 2054, 2070 (2000) (Stevens, J., dissenting).

[208] *See generally* David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

would yield fairer results in custody disputes.[209] At the same time that reliance on a supposedly objective best interests standard increased, blood relationship became the default definition of what was in the child's best interest.[210] Courts often overlook the fact that the presumption laid out in *Parham v. J.R.*[211]—that "natural bonds of affection lead parents to act in the best interests of their children"[212]—is rebuttable.[213] This is particularly unfortunate in instances of child abuse and neglect.[214]

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[209] Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 289–91 (1975). Professor Mnookin notes that

> We would more frankly acknowledge both our ignorance and the presumed equality of the natural parents were we to flip a coin. . . . [T]he process . . . would avoid the pain associated with an adversary proceeding that requires an open exploration of the intimate aspects of family life and an ultimate judgment that one parent is preferable to the other.

Id. at 289–91.

To counteract the indeterminacy inherent in the standard, a growing number of states have made a parent's status as the child's primary caretaker an important factor in the best interests calculus. *See supra* note 181 and accompanying text; *see also In re* Marriage of Kovacs, 854 P.2d 629 (Wash. 1993); Lewis v. Lewis, 433 S.E.2d 536 (W. Va. 1993). Some scholars praise the primary caretaker presumption for its facial gender neutrality. *See, e.g.*, Robert F. Cochran, Jr., *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 U. RICH. L. REV. 1, 37 (1985) (arguing that the presumption grants custody to the parent who has behaved as the primary caretaker and, theoretically, has the stronger bond irrespective of gender); Chambers, *supra* note 208, at 527–38 (advocating a primary caretaker presumption for children aged six months to five years). Some feminist scholars note that, as applied by courts, the primary caretaker presumption is detrimental to mothers. *See, e.g.*, Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 192–202 (1992) (contending that the purported gender neutrality of the primary caretaker presumption discounts emotional caregiving and the care that women give during infancy); *cf.* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 626 (1992) (asserting that courts applying the formally gender-neutral primary caretaker presumption tend to favor mothers, but that the neutrality can lead women, who "care more about having custody than do men, to insure custody by trading away claims for support and property").

[210] In deference to biological bonds, some courts have interpreted best interests of the child statutes to require a showing of harm, a threat of harm to the child, or parental unfitness before ordering visitation. *See, e.g.*, Hawk v. Hawk, 855 S.W.2d 573, 582 (Tenn. 1993) (finding a Tennessee statute that permitted courts to award grandparent visitation in the best interests of the child unconstitutional, pursuant to the privacy rights guaranteed by the state constitution).

[211] 442 U.S. 584 (1979).

[212] *Id.* at 602.

[213] Troxel v. Granville, 120 S. Ct. 2054, 2071 (2000) (Stevens, J., dissenting) (citing *Parham* for the fact that the presumption relied upon heavily by the plurality is rebuttable).

[214] *See* BARTHOLET, *supra* note 174, at 7.

> At the core of current child welfare policies lies a powerful blood bias—the assumption that blood relationship is central to what family is all about. Parents have God-given or natural law rights to hold on to their progeny. Children's best interests can be equated with those of their parents.

Id. Describing the "Baby Jessica" case, in which a child who had been living with her

Perhaps more pernicious is judges' self-referential aversion to nontraditional families: in the name of the child's best interests, courts have denied custody based on a parent's sexual orientation,[215] race,[216] financial status,[217] or presumed promiscuity.[218]

The best interests standard is devoid of objective value in visitation disputes as well. Award or denial of visitation often amounts to little more than a good faith guess, based on a judge's personal experience and preference, about what best serves children. The *Troxel* plurality recognized the best interests trap but failed to escape its grasp. Although the plurality ridiculed the trial judge for ordering visitation based on the trial judge's childhood vacations with his own grandparents, the plurality nonetheless refused to question more broadly (beyond an as-applied analysis) the constitutionality of the best interests standard.[219] Yet, as

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adoptive family for two and one-half years was returned to her birth parents in deference to their biological rights, Professor Bartholet notes that "the highest courts of two states found Jessica's interests irrelevant, and allowed blood rights to trump social bonds, and the Supreme Court of the United States refused to intervene." *Id.* at 22.

[215] *See* Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995). *Bottoms* is the first known case in which a court awarded custody to a nonparent based on a parent's sexual orientation. *See* WALKER, *supra* note 197, at 86. In *Bottoms*, Sharon Bottoms' mother sued for custody of her grandson, asserting that Sharon's lesbianism made her an unfit mother. The trial court awarded custody to the grandmother. *Bottoms*, 457 S.E.2d at 104. Sharon appealed and regained custody. *Id.* Ruling on the grandmother's appeal, the Virginia Supreme Court reasoned, "Conduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth, Code § 18.2-361; thus, that conduct is another important consideration in determining custody." *Id.* at 108. Despite the expert testimony of a child psychologist, who opined that children do not suffer adverse affects from growing up in a household with lesbian parents, the court considered the mother's sexual orientation and reinstated the grandmother's custody. *Id.* Other courts have found homosexuality per se evidence of unfitness. *See, e.g.*, Jacobsen v. Jacobsen, 314 N.W.2d 78 (N.D. 1981). Some courts have presumed adverse impact and required the parent to prove the absence of harm. *See, e.g.*, Thigpen v. Carpenter, 730 S.W.2d 510 (Ark. Ct. App. 1987). The emerging consensus among courts is to apply the "nexus test," denying custody only on proof that the parent's sexual orientation has, or will have, an adverse impact on the child. *See, e.g.*, A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992); Conkel v. Conkel, 509 N.E.2d 983 (Ohio Ct. App. 1987).

[216] *See* Palmore v. Sidoti, 466 U.S. 429 (1984). In *Palmore*, the Supreme Court reversed a Florida court ruling removing a white child from her white mother's custody because the mother began a relationship with an African American man. While the case was pending before the Supreme Court, the father moved to Texas with the child, and the mother attempted to have the court enforce its ruling. Following the Supreme Court decision, the Florida court of appeals concluded that given the passage of time, and the "subsequent upheavals of [the child's] life," it would be in the child's best interests to remain in her father's custody. Palmore v. Sidoti, 472 So. 2d 843, 847 (Fla. Dist. Ct. App. 1985). Post-*Palmore*, race remains a factor (albeit a rare one) in best interests determinations. See *Farmer v. Farmer*, 439 N.Y.S.2d 584, 590 (N.Y. Sup. Ct. 1981), in which a New York trial court held that while not a controlling factor, "[r]ace is to be weighed along with all other material elements of the lives of this family."

[217] *See* Burchard v. Gray, 724 P.2d 486 (Cal. 1986) (transferring custody from mother to father because of father's superior economic position compared to homemaker wife).

[218] *See* Jarrett v. Jarrett, 400 N.E.2d 421 (Ill. 1974) (removing children from mother because she was living with a male lover).

[219] *Troxel*, 120 S. Ct. at 2058–63 (plurality opinion).

Justice Stevens noted, the judge had done nothing more than attentively apply the best interests standard, exercising a permissible, commonsensical best interests analysis, not a presumption in favor of grandparents.[220]

Recalling that the Troxels' argument to the Supreme Court relied in large part on the prevalence of grandparent visitation statutes, the nascent history of grandparents' rights further elucidates problems with the best interests standard. According to the *Troxel* plurality, visitation statutes result from a best interests determination of who should be entitled to petition for visitation.[221] State legislatures have come to a reasoned and informed judgment, or so goes the argument, that visitation with statutorily specified individuals serves children's best interests.[222] Grandparents had no historical right to petition for visitation; only in the 1990s did grandparent visitation statutes grow from rare to widespread.[223]

Earnest concern for children's welfare likely contributed to the enactment of these statutes. Nationwide, approximately one-third of out-of-home foster care placements involve kinship care,[224] typically with a grandmother,[225] and many grandparents play a crucial role in their grandchildren's lives following a parent's death or divorce. But the perceived crisis of the disintegration of the nuclear family, and perhaps the fact that many judges have grandchildren, also help to account for the expansion of grandparents' rights. Grandparents' commercial and political force surely contributed to their increasing rights within the family.[226] Grandparent visitation statutes thus may derive more from the current distribution of political and economic power than they do either from empirical data or from a normative analysis of child welfare.

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[220] *Id.* at 2069 n.3 (Stevens, J., dissenting).

[221] *Id.* at 2058 (plurality opinion).

[222] Although for many centuries the common law granted grandparents no visitation rights, today all fifty states (but not the District of Columbia) have grandparent visitation statutes. *See* Catherine Bostock, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 COLUM. J.L. & SOC. PROBS. 319, 319 (1994). Compared to other nonparents—stepparents, foster parents, and functional co-parents—no group has been treated more favorably than grandparents with respect to visitation. Four types of statutes exist: (1) those conditioned on the parents' rights; (2) those based on family disruption (e.g., death of a parent or divorce); (3) those based on the best interests standard; and (4) those requiring a "substantial relationship" between grandparent and child. *Id.* at 332–41.

[223] *Id.* at 319, 332–48.

[224] BARTHOLET, *supra* note 174, at 89.

[225] *Id.* at 90.

[226] Christopher Lasch makes a somewhat similar point in his classic, if harsh, sociological analysis of the family: "The sanctity of the home is a sham in a world dominated by giant corporations and by the apparatus of mass promotion." CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED, at xvii (1977).

2. Children's Constitutional Rights

At first glance, vesting constitutional rights in children seems to be an extremely attractive solution not only to visitation dilemmas but also to broader issues affecting children. In the election year just past, "leave no child behind" was the battle cry of Republicans and Democrats alike.[227] What better way, some have argued, to ensure that children are happy and healthy than to give our youth a voice protected by the Federal Constitution? Extending children's constitutional rights to the family setting is a powerful and, in many ways, laudable goal. Closer examination, however, exposes intractable problems in granting children rights against their parents.

For centuries children were treated as chattel or worse, commonly abused and neglected with legal impunity and societal approbation.[228] But in the 1800s, children's decreasing economic worth[229] and the influence of the philosophies of John Locke, Thomas Hobbes, and John Stuart Mill gave rise to a view of children as a special class requiring state protection.[230] In the hopes that better-treated children would support elderly parents and would be more likely to become rational adults, children were to be nurtured until they acquired full personhood. The early twentieth century saw another shift in emphasis, this time from child-saving to child-as-savior. Compulsory education, child labor laws, and the juvenile court system were designed with the belief (still prevalent today) that the young were the future and that the state must therefore nurture and promote children's development.[231] Finally, in the 1960s, echoing tenets of the women's and civil rights movements, reformers advocated

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[227] As much time has been devoted to discussing who coined the slogan—former First Lady and current New York Democratic Senator Hillary Rodham Clinton or then-Republican candidate and now President George W. Bush—as has been devoted to debating what "leave no child behind" means. *See, e.g.*, Bob Herbert, *In America: Children's Champions?*, N.Y. TIMES, Aug. 31, 2000, at A25 ("George W. Bush and the Republicans . . . have gone so far as to hijack the phrase 'leave no children behind' from the very liberal Children's Defense Fund . . . . Mr. Bush and Mr. Cheney and the Republicans have stolen its motto."); Somini Sengupta, *For Mrs. Clinton, G.O.P. Theme is Like Old Times*, N.Y. TIMES, Aug. 2, 2000, at B5 (quoting Clinton as stating that "[m]any of the issues that were discussed and the way they were discussed were very much in line with what I've written about and talked about for 30 years").

[228] *See, e.g.*, Woodhouse, *supra* note 185, at 1043–50. Professor Woodhouse notes that "[t]he notion of the child as property is at least as ancient as the Greek and Judeo-Christian traditions of identifying man as the procreative force." *Id.* at 1043. Woodhouse goes on to argue forcefully that even as twentieth-century courts grew more gender neutral, "only the locus and distribution of power over children shifted. Judges and litigants still often reasoned in the language of ownership and possession . . . [that] children pass from owner to owner in the formal language of property . . . ." *Id.* at 1048–49.

[229] Industrialization led to a decline in children's economic value. *See* JOHN GILLIS, YOUTH AND HISTORY: TRADITION AND CHANGE IN EUROPEAN AGE RELATIONS, 1770–PRESENT, at 56–57 (1981).

[230] *See* WALKER, *supra* note 197, at 21.

[231] *Id.*

the liberation of children as autonomous individuals, equal in status to adults.[232]

The Supreme Court has afforded children many of the same constitutional rights as adults, albeit sometimes to a lesser degree. Children enjoy freedom of expression, though limited in schools[233] and with restricted access to certain sexually explicit materials;[234] freedom of choice about abortion, though sometimes requiring parental notification[235] or judicial bypass;[236] freedom from unwarranted searches and seizures, though again limited in certain environments;[237] and the right to representation in a criminal proceeding.[238] Certain rights, however, apply to children alone: the right of special-needs students to an individualized education;[239] the right to adequate care when in the foster system;[240] and the right to a hearing before being suspended from school.[241]

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[232] *See* RICHARD FARSON, BIRTHRIGHTS (1974); Pat Wald, *Making Sense out of the Rights of Youth*, 55 CHILD WELFARE 379, 386–91 (1976).

[233] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (holding it impermissible for students to be suspended for wearing black armbands to protest the Vietnam war, since children do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate," but also recognizing that reasonable fear of disruption of scholastic activities would justify school officials' restriction of student speech); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (finding that a high school principal did not violate the First Amendment by exercising editorial control over school-sponsored student newspaper where the principal's actions were reasonably related to legitimate pedagogical concerns).

[234] Ginsberg v. New York, 390 U.S. 629 (1968) (upholding conviction for sale of adult magazines that were considered illegal and obscene for minors).

[235] H.L. v. Matheson, 450 U.S. 398 (1981) (holding that states may require an unemancipated minor dependent to notify parents before obtaining an abortion).

[236] Bellotti v. Baird, 443 U.S. 622 (1979) (holding that states must provide minors a judicial bypass procedure, available in lieu of parental consent even when only one parent's consent is required for an abortion).

[237] New Jersey v. T.L.O., 469 U.S. 325 (1985) (holding that, since Fourth Amendment protections do apply to children but to a lesser degree than to adults, suspected violation of school rule may justify a search).

[238] *In re* Gault, 387 U.S. 1, 28 (1967) (concluding that "the condition of being a boy does not justify a kangaroo court" and that the juvenile court had become so marked by abuses as to no longer justify the suspension of rights to a hearing, to cross-examination, and to legal counsel).

[239] Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. §§ 1400–1487 (Supp. IV 1998).

[240] Marisol v. Guiliani, 929 F. Supp. 662 (S.D.N.Y. 1996); *see also* Adoption Assistance and Child Welfare Act of 1980 ("AACWA"), 42 U.S.C. §§ 620–672 (1994) (providing that states must make "reasonable efforts" to avoid removing the child from the home and must facilitate the child's return as soon as possible).

[241] Goss v. Lopez, 419 U.S. 565 (1975). Demanding due process rights, the plaintiffs invoked the dignity, autonomy, and independence of students. The defendants, by contrast, analogized school to a family, and argued that affording rights to students would subvert shared familial interests. The Supreme Court held that once states have chosen to extend education rights to students in general, the Due Process Clause of the Fourteenth Amendment requires schools to give students a right to be heard prior to suspension. Justice Lewis Powell wrote a stinging dissent. "[T]he Court ignores the commonality of interest of the State and pupils in the public school system. . . . [T]he teacher must be free to discipline without frustrating formalities." *Id.* at 593–94. Justice Powell's view is comparable to the nonadversarial relationship the Court presumed to exist even when parents seek to

From these examples, three principles emerge.[242] First, as the Supreme Court declared in a landmark case, *In re Gault* (which, notably, enforced children's rights against the state, not against their parents), "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[243] Second, as evinced in the line of cases from *Meyer* to *Troxel*, parents have a broad range of constitutionally protected authority over their children.[244] Third, children need not be treated as adults; the state has a compelling interest in protecting the welfare of children.[245]

Among those who seek expanded constitutional rights for children, the century-old debate over protection versus self-determination rages: both children's dependence and their nascent independence are used to justify an expansion of children's rights. Psychologists, sociologists, and legal scholars disagree on the types of rights that best serve children, leading some to posit that children's rights should be determined on a case-by-case basis.[246] Such a solution might lead to differential treatment of similarly situated children and accordingly might violate the Equal Protection Clause.[247] Discord among experts—not to mention within families—over children's needs and entitlements illuminates a fundamental problem in the call for expanding children's constitutional rights as a solution to intrafamily disputes. Professor Mnookin's observations about the indeterminacy of the best interests standard apply with equal force to the notion of enforcing even well-defined rights for children within the family:

> Deciding what is best for a child often poses a question no less ultimate than the purposes of life itself. Should the decision maker be primarily concerned with the child's happiness or with his or her spiritual and religious training? Is the primary goal long-term economic productivity when the child grows up? Or are the most important values in life warm relationships? . . . [I]f one looks to our society at large, one finds neither a clear consensus as to the best child rearing strategies, nor an appro-

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commit their children to mental hospitals. Parham v. J.R., 442 U.S. 584 (1979).

[242] *See* ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN 32 (1996).

[243] 387 U.S. 1, 13 (1967) (granting a child the right to counsel in a juvenile delinquency proceeding).

[244] *See* MNOOKIN, *supra* note 242, at 32.

[245] *See id.*

[246] WALKER, *supra* note 197, at 43–66.

[247] *See generally* Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that the Equal Protection Clause is violated by statutes that afford married, but not unmarried, persons the right to contraception); Caban v. Mohammed, 441 U.S. 380 (1979) (holding unconstitutional a state statute that permitted unwed mothers, but not unwed fathers, to block adoption of child by withholding consent); Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that the Equal Protection Clause is violated when a judge considers private societal biases in determining parental rights under best interests standard).

priate hierarchy of ultimate values. In short, there is in our society no apparent consensus about the good life for children.[248]

Substantive due process sends shivers down the spines of stalwart conservatives, but in the family context, constitutionalization of rights should give even good liberals more than a moment's pause. In an incisive analysis of the Supreme Court's cases involving families, Professor Laurence Tribe concludes that "what at first may appear to be 'family rights' emerge as the rights of individuals only."[249] Young children's rights belong neither to them nor to their families. Until the nebulous point at which a child acquires the capacity and maturity to articulate her own independent interests, her voice is indistinguishable from that of other individuals: parent, guardian *ad litem*, relative, advocate.[250]

One response to the problems of indeterminacy and state paternalism focuses on the dynamic effects of expanding children's constitutional rights. First, the assertion of rights lends public voice to and encourages public resolution of what otherwise would be a private conflict.[251] Second, while it is true that children's competence poses a serious obstacle to the expansion of rights, the young are no more vulnerable than adults to legal misrepresentation.[252] Scholars accordingly have suggested that courts appoint multiple representatives to offer contrasting views of children's rights or require representatives to explore exhaustively the interests potentially implicated at the outset of litigation.[253]

The claim that expansion of rights would provide children with an "equality of attention" is forceful.[254] Justice Stevens' suggestion in *Troxel* that children have constitutionally protected interests within the family[255] is a small victory for advocates who have for decades struggled to secure independent rights for children. Indeed, in disputes where the state seeks to restrict a minor's expressive, reproductive, or physical freedom, even modified rights ensure that children are treated as developing individuals. Moreover, affording children the right (especially a constitutional one) to

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[248] Robert H. Mnookin, *Children's Rights: Beyond Kiddie Libbers and Child Savers*, 7 J. CLINICAL CHILD PSYCHOL. 164 (1978).

[249] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-20, at 1416 (2d ed. 1988).

[250] Accordingly, Professor Mary Ann Glendon urges a family "ecology" rather than a policy. Such an ecology would "proceed modestly, encouraging local experiments, and avoiding the court-imposed uniformity that would follow from excessive constitutionalization of family issues." MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 134 (1991).

[251] MARTHA MINOW, MAKING ALL THE DIFFERENCE 292–96 (1990).

[252] *Id.* at 304–06.

[253] *Id.* at 306; *see also* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1830–41 (1993) (suggesting that advocates and representatives use "child questions" in determining children's rights and needs).

[254] MINOW, *supra* note 251, at 297.

[255] *See supra* Parts II.C.4, II.D.

be safe from abuse and neglect would help to protect the young against harm at their parents' hands.[256]

Nevertheless, with fit parents, children's competence remains a fundamental obstacle, one that is not resolved simply because adults in the legal arena may be as poorly represented as children. Assigning multiple representatives to offer contrasting views of children's substantive due process rights might result in protracted litigation and subject children to strife at home. As with the best interests standard, children would remain pawns in the hands of adults, well-intentioned or not.

C. Sweat

1. Psychosocial Parenting Defined

In the past decade, courts have increasingly followed what is alternately called a "de facto," "equitable," "functional," or "psychological" parenting doctrine. Each of these terms is slightly misleading. "De facto" carries the secondary meaning of "illegitimate" and has its genesis in juvenile dependency proceedings.[257] "Equitable" is applied primarily to husbands who are not the biological fathers of the child.[258] "Functional" evokes images of furniture rather than family. The word "psychological," although it serves as my starting point below, is encumbered by the baggage of the influential, but controversial, work of Goldstein, Freud, and Solnit.[259] For this reason, I ultimately use the term "psychosocial" parent: "psycho" to convey a mutually recognized parent-child relationship; and "social" to denote sustained physical and emotional nurturing, the "sweat" that, along with a psychological bond, forms the basis of what the law should recognize as parenting.

Based on psychoanalytic theory, Joseph Goldstein, Anna Freud, and Albert J. Solnit, respectively a law professor, a psychiatrist, and a psychologist, formulated the concept of a "psychological parent" and urged that child placement decisions reflect, above all, the child's need for continuity of relationships.[260] The trio's familiar theory merits quotation:

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[256] *See infra* Part IV.

[257] *See, e.g.*, Kathleen C. v. Lisa W. (Guardianship of Z.C.W.), 71 Cal. App. 4th 524, 528 (1999).

[258] The doctrine of equitable parenthood appears, for example, in *Atkinson v. Atkinson*, 408 N.W.2d 516 (Mich. Ct. App. 1987). In *Atkinson*, the court found that a husband who is not the biological father of a child may be considered a natural parent for the purpose of visitation if the father meets three conditions: (1) he has a mutually acknowledged parent-child bond; (2) he desires to be afforded the rights of a parent; and (3) he is willing to pay child support.

[259] *See infra* notes 260–262 and accompanying text.

[260] JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 7 (1973).

> [W]here the family exerts its influence benevolently, with consideration, understanding, and compassion for each individual child member, the balanced opportunities for unique development are maximized. In such families—whether they develop out of biological, adoptive, foster, or common-law adoptive ties—the adults are the psychological parents and the children are wanted .... Whether any adult becomes the psychological parent of a child thus depends on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.[261]

Some of Goldstein, Freud, and Solnit's more controversial prescriptions, notably the high priority placed on family preservation even when children are subject to sexual abuse, have been rejected on empirical and normative grounds.[262] Their work, however, had a profound impact on views of parenting. In the fields of sociology and psychology, near consensus now exists on the paramount importance for a child of being wanted and of maintaining a continuous relationship with a caretaking, loving parent.[263]

A worthy substantive definition of psychosocial parenting is found in the inspired exegesis of Justice O'Hern of the New Jersey Supreme Court. In *V.C. v. M.J.B.*,[264] which recently affirmed the constitutionally protected rights of psychosocial parents, O'Hern wrote that

> The relationship that develops between children and those who function as their parents ... ordinarily creates a life-long bond between them.
>
> That bond is not the result of the sexual orientation of the adults or of their marital status. It does not arise solely from biology or legal adoption. Rather, it is borne out of the daily toil parents engage in to keep their children healthy and safe from harm; out of the love and attention provided to children; and out of the unconditional regard returned by the children to the parental figures....

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[261] *Id.* at 16, 19.

[262] *See, e.g.*, JAMES GARBARINO ET AL., THE PSYCHOLOGICALLY BATTERED CHILD (1986). Psychologist Garbarino explains that sexual abuse has extraordinarily harmful psychological consequences; therefore children should be protected from sexually abusive parents.

[263] *See, e.g.*, JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 39, 142–44 (1980).

[264] 748 A.2d 539 (N.J. 2000).

> . . . [T]he existence of such a bond reflects that the singular emotional and spiritual connection, ordinarily only expected in the relationship of a legal parent and child, has been created between an adult and a child who are not related by blood or adoption. It is different from the bond between great friends or the bond between uncle and nephew, aunt and niece. It is the special connection between a parent and a child.[265]

According to Justice O'Hern, neither biology nor adoption, but rather sweat (daily toil, unconditional regard for children, and a life-long bond) forms the basis of parenting. Justice O'Hern maintains that the singular connection between a psychosocial parent and his or her child differs in cognizable and, as I explain below, legally significant ways from the bond between a child and a relative or other third party.[266]

Psychosocial parenting has been informally acknowledged for centuries, especially in non-Western cultures.[267] In the West, however, including the United States, where families headed by a (married) heterosexual couple were both statistically predominant and considered morally superior,[268] it was only as the nuclear family model waned that psychosocial parents began to acquire legal recognition. With an increasing number of disputes pitting lesbian genetic mothers against caregivers,[269] natural against foster parents,[270] and other similar battles, scholars and growing numbers of courts in the 1990s argued that state legislatures and lower courts should afford psychosocial parents visitation rights similar or equal to those of biological parents.[271] After reviewing the historical and

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[265] *Id.* at 557 (O'Hern, J., concurring).

[266] *See infra* notes 337–349 and accompanying text.

[267] *See, e.g.*, Martha C. Nussbaum, *Constructing Love, Desire, and Care*, *in* SEX, PREFERENCE, AND FAMILY 17, 31 (David M. Estlund & Martha C. Nussbaum eds., 1997). Professor Nussbaum notes that "even the most cursory excursion into comparative anthropology and social history makes plain that the 'nuclear' family . . . is so far from being 'natural' that it has hardly ever existed outside of Western Europe and North America after the Protestant Reformation." *Id.*

[268] Professor Nussbaum posits that while many societies recognize groupings that are somewhat "nuclear" in structure, "the peculiar Western emphasis on the moral worth of the intimate bonds of the family and on the privacy of the dwelling place as scene for this intimate moral bonding is virtually unique." *Id.* at 42.

[269] *See supra* note 26.

[270] *See supra* note 27; *see also infra* notes 300–308 and accompanying text.

[271] As alternative families became functionally prevalent and morally acceptable, legal academics advanced rationales for expanding the definition of parenting beyond biology. Professor Katharine T. Bartlett redefines parenthood as a nonexclusive status, urging that biological and psychological parents should have standing to petition for visitation, which courts should grant in accordance with a best interests test. Bartlett, *supra* note 166. While Professor Bartlett's test is largely consistent with the test proposed in Part IV, this Note departs from her conclusions on two bases. First, Professor Bartlett endorses the enactment of specific visitation statutes for grandparents and other relatives, *id.* at 958, an approach that runs counter to my basic premise that caregiving, not biology, should be the primary prerequisite to visitation rights. Next, Professor Bartlett opposes the legalization of visitation petitions when the child lives in an intact (i.e., pre-divorce) nuclear family, deeming

legal treatment of psychosocial parenting, I argue that, consistent with the existing doctrine on parents' constitutional rights and building upon the dissents of Justices Kennedy and Stevens in *Troxel*, the Supreme Court should vest psychosocial parents with a *constitutionally* protected right to visitation, coupled with a mandatory presumption that visitation is in the best interests of the child.

2. Historical Setting

The Bible may seem an unorthodox source for support of psychosocial parenting. However, in the context of the Yahwistic insistence on parental property rights explored in Part III.A above, one may better understand the challenges raised by the Gospels, and in particular Jesus' designation of his kinfolk as those who would leave their parents and follow him.[272] Jesus' call is to children, in defiance of their parents, to join him in a family linked by religious and social, rather than biological, ties. Consider first the account in *Matthew*, which is essentially the same message *Mark* records:

> While he was still speaking to the crowds, his mother and his brothers were standing outside, wanting to speak to him. Someone told him, "Look, your mother and your brothers are standing outside, wanting to speak to you." But to the one who had told him this, Jesus replied, "Who is my mother, and who are

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this "too great an intrusion on parents who have managed to raise their children in traditional nuclear families." *Id.* Not only might such an approach contravene the Equal Protection Clause of the Fourteenth Amendment, *see supra* note 247, but it might unduly privilege nuclear families at the expense of a psychosocial parent-child relationship. Gilbert Holmes argues that children should be afforded the constitutional right to maintain relationships with parent-like individuals. Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-like Individuals*, 53 MD. L. REV. 358, 410–11 (1994). However, Professor Holmes disregards the indeterminacy of extending children's constitutional rights to the intrafamily setting. Holmes's approach, by his own admission, is inconsistent with constitutional precedent. *Id.* at 380 (maintaining that constitutional family law cases "uniformly failed to recognize that children have an independent right to maintain or sever family relationships").

Thus, prior scholarship complements but does not replace several propositions set forth in this Note, namely that previously unchallenged "divine law" offers some recognition of psychosocial parenting and that constitutional precedent may be understood as protecting the rights of nonbiological caregivers.

[272] Nor is the Old Testament itself without precedent in support of psychosocial parenting, as shown in Solomon's famous judgment about the true mother of the contested baby brought before him. 1 *Kings* 3:16–:28. When Solomon suggests that he will divide the living baby in half, only one of the two women, "because compassion for her son burned within her," agrees to give the child to the other. *Id.* at 3:26. Solomon then knows the compassionate woman before him is the mother and awards the child to her. "All Israel heard of the judgment that the king had rendered; and they stood in awe of the king, because they perceived that the wisdom of God was in him, to execute justice." *Id.* at 3:28. We are not told, of course, whether or not the compassionate woman is the biological mother.

> my brothers?" And pointing to his disciples, he said, "Here are my mother and my brothers! For whoever does the will of my Father in heaven is my brother and sister and mother."[273]

Although this language is likely to be passed over in many Sunday school and catechism lessons, and notwithstanding the Bible's usage by modern day religious extremists, Jesus' words offer a biblical injunction of great weight in support of the psychosocial family, flagrantly transgressive of biological links. This is not an isolated or exceptional passage. A more subtle yet ultimately more radical challenge to the blood-based patriarchal family appears in *John*:

> Meanwhile, standing near the cross of Jesus were his mother, and his mother's sister, Mary the wife of Clopas, and Mary Magdalene. When Jesus saw his mother and the disciple whom he loved standing beside her, he said to his mother, "Woman, here is your son." Then he said to the disciple, "Here is your mother." And from that hour the disciple took her into his own home.[274]

This "last will and testament," far from being simply a dying son's expression of loving concern for his mother, is a defiant break with patriarchal law.[275] Under the Old Testament rule practiced by Jews in Jesus' time, Mary, upon the death of her only son (assuming that her husband Joseph must have been dead, as he is never mentioned in any of the crucifixion accounts), became an unattached person, property that had to be returned to its rightful owner, who had to be male.[276] Accordingly, Mary should have been "assigned" to the nearest male relative of her dead husband Joseph, or, in the absence of any kin on his side, to her own natal family.[277] Under no circumstances should she have been given over to a mere friend or disciple. In this direct violation of what the law prescribed as the rights and obligations of the biological family, the widowed Mary was to be cared for by her psychosocial family, the family that would continue to provide her moral and material comfort after Jesus died.[278]

A closer interrogation of biblical precedent shows considerable appreciation for a variety of family forms, even though the text has been used to defend vigorously the patriarchal norm. Roman law, the other major foundation for the patriarchal nature of Anglo-Saxon law, also rec-

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[273] *Matthew* 12:46–:50; *see also Mark* 3:31–:35.
[274] *John* 19:25–:27.
[275] *See* IDA MAGLI, GESÙ DI NAZARET: TABU E TRASGRESSIONE 66–68 (1982).
[276] *See id.* at 66–67.
[277] *See id.*
[278] *See id.* at 68.

ognized, at least in part, the social family.[279] The adult male, the *paterfamilias*, was autonomous in the Roman family;[280] he had *patria potestas*, or legal power, over his children, descendants, and in early Rome, over his wife.[281] His vast authority extended not only to daily household life and to inheritance, but also to the power of life or death over those under his legal control.[282] However, as Jane F. Gardner illustrates in her recent revisionist work *Family and* Familia *in Roman Law and Life*, this narrow, legally defined situation did not govern Romans' real lives and fails to reflect the evolution and expansion of family in their law. Through mechanisms similar to modern-day adoption, existing family members were emancipated from the *patria potestas* and new, biological strangers were taken in by the family.[283] Civil law, particularly relating to inheritance, slowly modified and adapted to the needs and desires of changing Roman families, incorporating those emotionally and socially closest to them.[284] The higher purpose of Roman law "was not to compel society into a predetermined mould" but rather to advance towards an ideal we strive for even today: "[T]o facilitate society's wants and purposes, so far as these could be identified and agreed upon, as they changed over time."[285]

In attempting to capture, however briefly, the underlying family values of a self-consciously multi-ethnic society such as modern America, one might wish to explore the legacies of African, Asian, and Native American peoples. The Supreme Court recognized in *Moore v. City of East Cleveland* that "the accumulated wisdom of civilization" vests value in "a larger conception of the family."[286] Still, *Moore* reflects an exceptional view of family history, rather than the norm. Non-European traditions, important though they are as cultural determinants, have not dominated the American legal tradition.[287] Non-Judeo-Christian traditions

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[279] Closer examination of the texts of Greek philosophers also reveals at least a partial acknowledgement of psychosocial parenting aside from the Platonic ideal of state control of children. For instance, Professor Nussbaum finds such recognition in Aristotle's *Problemata*, wherein a bright pupil asks why human children born from semen are called "offspring" but worms born when semen falls to the ground (Aristotelians believed in spontaneous generation) are not called "offspring." *See* Nussbaum, *supra* note 267, at 32. Professor Nussbaum maintains that the query echoes modern controversies about the meaning of parenthood and family, and concludes that what Aristotle is "really getting at is that being a parent of offspring is a cultural and social matter, a matter of recognition and responsibility, not of mere bodily continuity." *Id.*

[280] JANE F. GARDNER, FAMILY AND *FAMILIA* IN ROMAN LAW AND LIFE 1, 6 (1998).

[281] *Id.* at 2, 6.

[282] *Id.* at 2.

[283] *Id.* at 4.

[284] *Id.*

[285] *Id.*

[286] Moore v. City of East Cleveland, 431 U.S. 494, 505 (1977); *see also infra* notes 295–299 and accompanying text; *infra* Part III.C.4.

[287] Although American jurisprudence does not generally recognize the rights of extended families, parenting is, in practice, a communal responsibility in certain regions of the United States. Anthropologist Carol Stack described the practice of "child-keeping" in

make more accommodation for extended and nonbiological family formations than do even the most supportive precedents found in the Bible and in Roman law.[288] Confucius was a patriarch to be sure, but he expressed more concern for propriety than property.[289] Also, the village traditions of Yoruba peoples,[290] the *zadrugas* of pre-Christian Slavic origin,[291] and the communal childcare practices of native southwestern corn mothers[292] suggest social, not biological, parenting. Alternative views of Jesus' message notwithstanding, biological parents in modern America who wish to invoke history and tradition in their efforts to restrict third-party visitation to their children are more likely to find support in Judeo-Christian prescriptions than in the folklore and wisdom of the rest of the world.

3. Constitutional Landscape

The constitutional landscape supports two conclusions. First, the Supreme Court has employed an intermediate level of scrutiny, weighing parental privacy and diversity against states' power to protect children's welfare. Divergent opinions notwithstanding, *Troxel* as a whole clearly

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the Flats, a composite black community representative of the poorest section of a midwestern city. Professor Stack described the confluence of responsibilities and rights of biological mothers and relatives and friends also engaged in child-rearing, despite the refusal of the legal system to recognize joint parenting. *See* CAROL STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY 81–89 (1974).

[288] *See generally* A HISTORY OF THE FAMILY (Andre Burguiere et al. eds., Sarah Hanbury Tenison trans., Harvard University Press 1996) (1986); HOUSEHOLD AND FAMILY IN PAST TIME (Peter Laslett & Richard Wall eds., 1972); THE FAMILY IN VARIOUS CULTURES (Stuart A. Queen & Robert W. Habenstein eds., 3d ed. 1967); THE FAMILY IN GLOBAL TRANSITION (Gordon Anderson ed., 1997); FAMILIES IN CONTEXT: A WORLD HISTORY OF POPULATION (G. Robina Quale ed., 1992).

[289] Confucian Analects, for example, convey a sensibility far removed from that of the Old Testament:

> The Master said, "While a man's father is alive, look at the bent of his will; when his father is dead, look at his conduct. If for three years he does not alter from the way of his father, he may be called filial" . . . . In practicing the rules of propriety, a natural ease is to be prized. In the ways prescribed by the ancient kings, this is the excellent quality, and in things small and great we follow them.

CONFUCIUS, CONFUCIAN ANALECTS, THE GREAT LEARNING & THE DOCTRINE OF THE MEAN 142–43 (James Legge trans., Dover Publications 1971).

[290] *See* SARA BERRY, FATHERS WORK FOR THEIR SONS: ACCUMULATION, MOBILITY, AND CLASS FORMATION IN AN EXTENDED YORUBA COMMUNITY 43–44 (1985); P.C. LLOYD, POWER AND INDEPENDENCE: URBAN AFRICANS' PERCEPTION OF SOCIAL INEQUALITY 119–27 (1974).

[291] *See generally* COMMUNAL FAMILIES IN THE BALKANS: THE *ZADRUGA* (Robert F. Byrnes ed., 1976); ANDREJS PLAKANS, KINSHIP IN THE PAST: AN ANTHROPOLOGY OF EUROPEAN FAMILY LIFE, 1500–1900, at 203 (1984).

[292] *See* RAMÓN A. GUTIÉRREZ, WHEN JESUS CAME, THE CORN MOTHERS WENT AWAY: MARRIAGE, SEXUALITY, AND POWER IN NEW MEXICO, 1500–1846, at 75–81 (1991).

indicates that parental rights are subject to a balancing test.[293] Second, since the 1970s,[294] the Court has recognized the liberty interests of foster parents, unwed fathers, and nonbiological, nonadoptive caretakers—in other words, psychosocial parents. *Troxel* presented an opportunity for the Court to advance the nascent but discernable constitutional protection afforded to children's caregivers, yet only Justices Kennedy and Stevens (and in limited fashion, the plurality) suggest in *Troxel* that psychosocial parents might be entitled to constitutional rights. Below, I explore the constitutional cases that lay the groundwork for the psychosocial parenting doctrine that should guide the Court's reasoning in future cases implicating the rights of parents, nonparents, and children.

Interestingly, the evolution of the Court's recognition of psychosocial parenting began with a grandmother. In *Moore v. City of East Cleveland*,[295] a plurality of the Supreme Court recognized that a psychosocial parent-child relationship is a family relationship entitled to constitutional protection. The Court struck down a municipal housing ordinance that prohibited a grandmother from living in her home with her son and two grandsons, who were first cousins rather than brothers, because they did not meet the ordinance's definition of family.[296] Balancing the city's legitimate goals of preventing overcrowding and traffic congestion against the interests of a grandmother-headed family, the Court found that municipal goals were at best marginally served by the ordinance.[297] Restriction of family to the formally recognized two-parent unit, declared the Court, is inappropriately narrow:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and deserving of constitutional recognition . . . . [T]he accumulated wisdom of civilization . . . supports a larger conception of the family. . . . [T]he Constitution prevents East Cleve-

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[293] *See* discussion *supra* Part II.D; *see also* Laurence C. Nolan, *"Unwed Children" and Their Parents Before the United States Supreme Court from* Levy *to* Michael H.*: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1 (1999).

[294] Even before the Court explicitly considered the rights of nonlegal parents, it took significant steps towards recognition of functional parenting in *Prince v. Massachusetts*, 321 U.S. 158 (1944). Mrs. Prince, legal custodian and functional caretaker of her niece, Betty, faced criminal prosecution for taking Betty along to sell Jehovah's Witness literature. *Id.* at 159–64. The Court upheld the Massachusetts laws prohibiting child labor against First and Fourteenth Amendment challenges. *Id.* at 164–71. Nevertheless, the Court considered Mrs. Prince's parental rights in full, balancing her cardinal right to care for, have custody of, and nurture Betty against the state's role as *parens patriae*. *Id.* at 165–66.

[295] 431 U.S. 494 (1977).

[296] *Id.* at 496.

[297] *Id.* at 499.

> land from standardizing its children—and its adults—by forcing them all to live in certain narrowly defined family patterns.[298]

While generous in its esteem for the extended family, the *Moore* court did *not* grant constitutional protection specifically to the grandparent-grandchild relationship or to a child's relationship with any other kinfolk. Instead, the Court acknowledged that people other than biological parents sometimes do the real parenting. "Decisions concerning child rearing, which *Yoder*, *Meyer*, *Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on a major responsibility for the rearing of children."[299]

Smith v. Organization of Foster Families for Equality and Reform ("OFFER")[300] also supports constitutional protection for primary custodians—the psychosocial parents—as members of full-fledged legal families. Although *OFFER* illustrates the persistence of the premise that "natural" families are best for children, the case nevertheless stands as an important indication that the Federal Constitution may protect the liberty interests of foster parents, at least those who have functioned as psychosocial parents.[301] In *OFFER*, individual foster parents and an organization of foster families alleged that New York City's procedures for removal of children from the foster home constituted an unconstitutional deprivation of due process.[302] Upon carefully reviewing the New York laws, the goals of the foster system, and the interests of foster and "natural" parents, the Court held that the pre-removal hearing regulations afforded by New York City and the state granted sufficient due process protection to foster parents.[303] The Court accorded high praise to the psychosocial parenting functions of foster families. With a nod to *Wisconsin v. Yoder*,[304] the Court explained that

> biological relationships are not exclusive determination of the existence of a family. . . . [T]he importance of the familial rela-

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[298] *Id.* at 504–06.

[299] *Id.* at 505.

[300] 431 U.S. 816 (1977).

[301] For an interpretation of *OFFER* consonant with the one proposed herein, see *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000). The *Rubano* court quotes *OFFER* to support a ruling in favor of a psychosocial mother's petition for visitation against the wishes of the biological mother, who had formerly approved of the petitioner's parent-like relationship. *Id.* at 973. *But see* Rodriguez v. McLoughlin, 214 F.3d 328, 337 (2d Cir. 2000) (citing *OFFER* to acknowledge that "the emotional bonds formed in a foster family may . . . be just as strong as those formed by blood or marriage," but finding that a foster mother and her child have no constitutionally protected due process interests because the relationship is one created at the outset through a contractual relationship with the state).

[302] *OFFER*, 431 U.S. at 818–20.

[303] *Id.* at 820–56.

[304] 406 U.S. 205 (1972).

> tionship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association .... No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant [and does not have contact with the biological parents] ... it is natural that the foster family should ... fulfill the same socializing functions as a natural family.[305]

Nevertheless, in this case decided during the ascendancy of the still dominant view that foster care is a band-aid solution to temporary crises in natural families,[306] the Court failed to answer the question of whether foster parents are entitled to due process rights. Although it accepted the presumption that foster families have a protected liberty interest derived from the "close emotional ties analogous to those between parent and child,"[307] the Court distinguished the natural family, whose origins are apart from the state, and the foster family, in which the state from the outset is a partner.[308]

Strong support for the constitutional rights of psychosocial parents comes from the controversial case of *Michael H. v. Gerald D.*,[309] in which the Supreme Court addressed the rights of a biological father vis-à-vis those of a psychosocial father. Writing for a plurality of the Court, Justice Scalia stated that the biological father had no constitutional right to be considered the legal parent of his biological daughter, Victoria.[310] Gerald D., the nonbiological father who was at the time married to and living with the mother, was Victoria's legal father.[311] Despite his occasional nurturing behavior, Michael H., the biological father, could not also be the father: "California law, like nature itself, makes no provision for dual fatherhood."[312] Justice Scalia declared that Michael H.'s due process claim did not implicate a constitutionally protected liberty interest as it did not merit the "historic respect ... traditionally accorded to the relationships that develop within the unitary family."[313] According to the plu-

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[305] *Id.* at 843–44.

[306] *See, e.g.*, Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 5 (1995) (noting that "[t]he belief that parents could be trained to care more appropriately for their children led to the current perception that child rearing by a substitute family should be temporary").

[307] *OFFER*, 431 U.S. at 850.

[308] *Id.* at 845.

[309] 491 U.S. 110 (1989).

[310] *Id.* at 124–27.

[311] *Id.* at 113–14.

[312] *Id.* at 118.

[313] *Id.* at 123. Criticism of *Michael H.* rests in part on the fact that Justice Scalia privileged Gerald D. because Gerald was married to Victoria's mother. Courts have denied the visitation and custody requests of psychosocial fathers who are not married to the child's

rality, the facts of Michael H.'s inconsistent involvement in Victoria's life, his adulterous relationship with the mother, and the disruptive effect on the family of his challenge to the legal father/husband, all justified California's statutory presumption that Gerald D. was Victoria's father.[314] The expansive recognition of alternative family forms in *Troxel* undermines Justice Scalia's problematic focus on marriage as the validating basis for Gerald D.'s parental rights. Still, the *Michael H.* plurality's acknowledgment that a legal father who has cared for a child has constitutionally protected liberties, even in the face of a challenge by a biology-plus-nurturing father, provides further support for the Court's recognition of psychosocial parenting and survives *Troxel.*

Finally, close analysis of *Troxel* itself indicates that the divergent opinions share a unified twofold concern: preserving parents' liberty to direct the upbringing of their children while ensuring (particularly in light of changing family structures) that caregiving adults maintain relationships with children. Recognition of psychosocial parenting would effectuate the apparent intent of Justices Stevens and Kennedy and the plurality. First, Justice Stevens felt that Washington's statute had a plainly legitimate sweep because "any person" might include a "once custodial caregiver [or] . . . an intimate relation"[315]—in other words, a psychosocial parent. Further, Justice Stevens declared that children's interests merit constitutional protection and that states should be allowed to enact legislation designed to contravene the arbitrary exercise of parental authority.[316] While Justice Stevens placed the focus on children's rather than caregivers' rights (a laudable but untenable solution), his essential concerns were that children maintain a bond with caregiving individuals and that parents not arbitrarily curb this relationship. Second, Justice Kennedy distinguished the greater right of a parent vis-à-vis a complete stranger from the parent's right vis-à-vis a de facto parent.[317] Justice Kennedy highlighted the fact that there are numerous cases where "a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto."[318] Moreover, Justice Kennedy noted, as did the plurality, that the disruption ensuing from court-ordered visitation might itself infringe upon a parent's rights.[319] Justice Kennedy maintained that caregivers have rights above those of ordinary third parties, and parents' autonomy might not include the blanket right to restrict psycho-social

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mother. *See* Polikoff, *supra* note 167, at 543 n.473.

[314] *Michael H.*, 491 U.S. at 126–32.

[315] Troxel v. Granville, 120 S. Ct. 2054, 2070 (2000) (Stevens, J., dissenting).

[316] *Id.* at 2071–72; *see also supra* Part II.C.4.

[317] *Id.* at 2079 (Kennedy, J., dissenting).

[318] *Id.* at 2077.

[319] *Id.* at 2079 (Kennedy, J., dissenting); *id.* at 2065 (plurality opinion).

parents' access to their children.[320] Third, the plurality emphasized that judges should not exercise too much discretion by ordering visitation against the wishes of fit parents, particularly because protracted litigation burdens parental rights.[321] The plurality's position is consistent with the idea that judicial discretion should be accompanied by a clear, widely agreed upon standard that would preserve diverse intrafamily arrangements while appropriately deferring to the wishes of fit parents.

4. State Court Application of the Federal Constitution

While many state courts continue to emphasize blood rather than sweat[322] as the foundation of parenting, an increasing number have interpreted federal constitutional precedent, along with their own state case law and legislation, to vest rights in parents who care for children. Lesbian mothers in particular have been receiving much of the increasing attention on psychosocial parenting, a marked shift from even a decade ago, when, in the prominent case *Alison D. v. Virginia M.*,[323] a lesbian de facto mother was denied all access to a child. Nonbiological fathers, foster parents, and relatives who act as psychosocial parents have also had increasing success in securing visitation rights in the past decade.[324] While state court interpretation of the United States Constitution is obviously not binding on the Supreme Court, the following two groundbreaking cases are examples of viable and normatively preferable methods of analyzing psychosocial parents' claims for custody and visitation.[325]

Youmans v. Ramos[326] pitted the rights of a psychosocial parent—in this case, a maternal aunt—against those of an absentee father. Tamika, at the time eleven years old, had lived in Massachusetts for most of her life with her aunt and sometime legal guardian, Cynthia Ramos.[327] Her biological but largely absent father, Donald Youmans, a resident of Georgia, nonetheless sought legal and physical custody of his daughter.[328] The trial judge vacated the aunt's guardianship, awarded full custody to Youmans, and ordered that Tamika visit her aunt during a school vacation and for six weeks in the summer at her father's expense.[329] The father appealed,

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[320] *Id.* at 2077–78 (Kennedy, J., dissenting); *see also supra* Part II.C.6.

[321] *Id.* at 2061–65 (plurality opinion).

[322] *See generally* BARTHOLET, *supra* note 174, at 7–8.

[323] 572 N.E.2d. 27 (N.Y. 1991).

[324] *See supra* notes 26–27, 222 and accompanying text; *infra* notes 325, 332, 349.

[325] *See also* E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (upholding trial court's award of visitation to a de facto parent, defined as a nonbiologically related person who resides with the child, and, with the consent and encouragement of the legal parent, cares for the child emotionally and intellectually at least as much as the legal parent).

[326] 711 N.E.2d 165 (Mass. 1999).

[327] *Id.* at 166–67.

[328] *Id.*

[329] *Id.*

claiming that the visitation order violated his constitutionally protected liberty to raise his child without state interference.[330]

The Massachusetts Supreme Judicial Court, after transferring the case on its own initiative from the appeals court, affirmed.[331] The court found that since her mother died when Tamika was five years old, and her aunt taught her to walk, talk, and read, and arranged for her medical care, schooling, and extracurricular activities, Ramos "was in every sense Tamika's de facto parent."[332] Notably, the court considered Ramos's biological relationship to Tamika to be irrelevant and instead focused on her actual, sustained caregiving to her niece. Youmans, who was never married to Tamika's mother, had previously agreed that the two would share legal custody of their daughter, while the mother would retain physical custody.[333] Upon the death of Tamika's mother, Ramos petitioned for and was granted temporary guardianship of her niece, while Youmans, a member of the armed forces who frequently served abroad, was granted visitation rights. The father did not challenge the custody order at that time or in subsequent hearings; he visited his daughter intermittently over the years.[334] The court emphasized the fact that Youmans had permitted Ramos to form a de facto parent relationship with Tamika, that he was ignorant of the details of his daughter's daily life, and that, above all, the court must preserve Tamika's access to the only adult who had acted as her parent.[335] The court asserted that in cases where a bond between a de facto parent and his or her child is at stake, "the interests of the natural parent . . . must be completely subordinated to the permanent interest of the child."[336] Accordingly, the court held that the visitation order did not impermissibly infringe upon Youmans' constitutional rights.

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[330] *Id.*

[331] *Id.*

[332] *Id.* at 167. The Massachusetts Supreme Judicial Court employed the following de facto parent test, proposed by the American Law Institute ("ALI") reporters on the proposed *Principles of the Law of Family Dissolution*:

> A de facto parent is an adult, not the child's legal parent, who for a period that is significant in light of the child's age, developmental level, and other circumstances,
> (i) has resided with the child, and
> (ii) for reasons primarily other than financial compensation, and with the consent of a legal parent to the formation of a de facto parent relationship . . . regularly has performed
> (I) a majority of the caretaking functions for the child.

Id. at 167 n.3 (quoting PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03(1) (Tentative Draft No. 3, Part I, 1998)).

[333] *Id.* at 168.

[334] *Id.*

[335] *Id.* at 172.

[336] *Id.* at 172 n.20.

In *V.C. v. M.J.B.*,[337] a unanimous New Jersey Supreme Court recognized the right of *all* psychosocial parents—explicitly including homosexual ones—to visitation. The United States Supreme Court denied the biological mother's petition for certiorari.[338] The bold opinion issued in *V.C. v. M.J.B.*, in conjunction with the Supreme Court's refusal to hear the case, suggests that the Supreme Court is not now prepared to disapprove of state courts' grants of rights to gay men, lesbians, and other psychosocial parents.

V.C., a nonbiological and nonadoptive but highly involved lesbian psychosocial mother, petitioned for legal custody and visitation rights to her former partner's biological and legal children.[339] Following the "psychological parent doctrine"—specifically the four-prong psychological parenthood test outlined by the Wisconsin Supreme Court[340]—and reading New Jersey lower court opinions and statutes as authorizing a very broad definition of parent, the court held that V.C., as a psychological parent, had standing to petition both for custody and visitation.[341] While V.C. was as capable, loving, and responsible a parent as M.J.B., she had not been involved in decisionmaking for the children for nearly four years; thus, the court mandated that the children were to remain in M.J.B.'s legal custody.[342] However, since visitation for psychological parents was the "presumptive rule," the court affirmed the appellate court's decision awarding V.C. visitation.[343]

The court found M.J.B.'s constitutional rights to parental privacy nonetheless intact for several reasons. First, the court relied on *Lehr v. Robertson*[344] and *OFFER* to maintain the Supreme Court's recognition of children's constitutionally protected interest in continuing relationships with adults who love and rear them.[345] Note that the New Jersey Supreme Court did not fully explain how constitutional precedent protects children's interests. Instead, its finding is based mainly on lower court decisions in New Jersey and on other states' decisions that consider psychological aspects of parenting in custody proceedings.[346] Second, the court highlighted the fact that M.J.B. consented to and encouraged V.C.'s parent-to-child relationship with the children and found that, despite her legal parent status, M.J.B. could not end this relationship simply because she separated from V.C.[347] Third, the high standard set forth in the

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[337] 748 A.2d 539 (N.J. 2000).
[338] M.J.B. v. V.C., 121 S. Ct. 302 (2000).
[339] *M.J.B.*, 748 A.2d at 541–46.
[340] Holtzman v. Knott (*In re* Custody of H.S.H.-K.), 533 N.W.2d 419, 421 (Wis. 1995).
[341] *M.J.B.*, 748 A.2d at 549–50.
[342] *Id.* at 555.
[343] *Id.* at 554–55.
[344] 463 U.S. 248 (1983).
[345] *Id.* at 550.
[346] *Id.* at 550–53.
[347] *Id.* at 553–55.

psychological parent test, combined with the best interests standard used in New Jersey's postdivorce custody proceedings, ensured that the rights of M.J.B. and the children were appropriately weighed against those of V.C.[348] Along with New Jersey, the highest courts of Alaska, Colorado, Kentucky, Massachusetts, Utah, and Wisconsin have held that psychological parents have standing to petition for custody and/or visitation based on children's strong interest in maintaining ties with adults who love and provide for them.[349]

IV. RECOMMENDATIONS

As illustrated in Jesus' New Testament mandate and ancient Roman society's acceptance of adoption and alternative family forms, the Bible and Roman society in part validate psychosocial parenting. Anglo-Saxon law has also slowly shifted from recognizing biology as the only necessary and sufficient basis of parenting towards emphasizing the nurturing of children and the development of the parent-child bond. The Supreme Court, along with forward-looking state courts, has increasingly conditioned constitutionally protected liberty interests on psychosocial parenting.

In recognizing nurturing as the basis of parenting, the Court should vest psychosocial parents, and *only* psychosocial parents, with privacy and liberty rights, protected, as in *Troxel*, by intermediate scrutiny. Beginning with the birth or adoption of their child, biological and adoptive parents should enjoy a presumption that they are also their child's psychosocial parents, only losing that presumption upon proof of unfitness. Psychosocial parents should be afforded the right to exclude even loving relatives and friends from their children's lives. On a facial basis alone, a statute such as the one considered in *Troxel* should thus fail any future balancing test analysis, as granting "any person, at any time" the right to petition for visitation is overbroad. The Platonic ideal decried in *Pierce*, which sees the child as a creature of the state, is one to strive against. Moreover, the best interests of the child standard, unaccompanied by threshold requirements, has yielded at best inconsistent results.

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[348] *Id.*

[349] *See* Carter v. Brodrick, 644 P.2d 850, 855 (Alaska 1982) (recognizing that stepparents who stand *in loco parentis* may petition for visitation); C.R.S. v. T.A.M. (*In re* Custody of C.C.R.S.), 892 P.2d 246, 247 (Colo. 1995) (holding that the best interests test applies to determine custody between biological and psychological parents); Simpson v. Simpson, 586 S.W.2d 33, 35 (Ky. 1979) (acknowledging that nonparents who stand *in loco parentis* may petition for custody); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (holding that the trial court had jurisdiction to award visitation to a de facto parent); *In re* J.W.F., 799 P.2d 710, 714 (Utah 1990) (holding that absence of a biological or legal relationship to a child does not prevent a person from seeking custody); Holtzman v. Knott (*In re* Custody of H.S.H.-K.), 533 N.W.2d 419, 421 (Wis. 1995) (setting forth a four-prong test for establishing de facto parent relationship).

Giving children independent, intrafamily rights faces similar problems of indeterminacy. In guiding their children along the path to adulthood, psychosocial parents, not well-meaning judges or guardians *ad litem*, should be trusted to act on the child's behalf. Affording grandparents or others a per se enforceable right to visitation interferes with fit parents' autonomy and threatens to drag children into the courtroom unduly. In addition, allowing judicial determinations to supersede those of fit parents undermines parental decisionmaking, which is an essential part of psychosocial parenting. In trying to protect its young citizens, the state may in fact be frustrating the children's best interests. Even if it is not, the threshold for state intervention should be high, at the level of patent abuse rather than personal preference.

Concomitantly, the Court should announce that psychosocial parents, and *only* psychosocial parents, have a constitutionally protected procedural due process right to petition for visitation. Carefully tailored constitutionalization of a right to petition for visitation would not result in hordes of pseudoparents storming the courts. The Court would acknowledge that physical and emotional nurturing and the formation of a mutually recognized bond with a child are the foremost attributes of a parent.[350] Further, psychosocial parent visitation statutes should require proof by clear and convincing evidence of a lengthy, continuous, intensive, parent-like caregiving relationship to the child, one either arising out of necessity (death of the legal parent) or authorized (at least initially) by the legal parent.[351] Biological and adoptive parents, absent

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[350] For a standard counter-argument centered on blood rights, see, e.g., *Holtzman*, 533 N.W.2d at 440–41 (Steinmetz, J., dissenting).

> Providing parents a superior ability to influence the upbringing of their child is clearly in the interests of the child .... Contrary to the majority opinion, the child here does not need the "protection of the courts." His mother is the one who should have had the courts protecting her right to raise her own child ....

Id. (internal citations omitted). Echoing a wider jurisprudential debate, Judge Steinmetz also argued:

> [T]he legislature should be the body that decides what grouping of adults living together may be defined as a "non-traditional family" .... There is no justification for a court to seek to impose in the name of the law, common or equitable, its own ideas of social policy and a new found theory of family law which creates new "rights" for those who have no legally binding relationship to the child ....

Id. at 442. This argument is both flawed and circular. Nontraditional families are entitled to court-enforced constitutional protection even in the face of a contrary statute. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977). Further, the idea of family and parenting extending beyond the nuclear and biological definition is neither new nor obscure in theory or practice. Finally, it is illogical to say that only the legislature should dictate rights for those who have no legally binding relationship to the child when the very reason such persons have no legal rights is due to the legislature's definition.

[351] The standard I propose is a slight variation of the one proposed in *V.C. v. M.J.B.*, *see supra* Part III.C.4. This standard is also consonant with the position of the ALI. *See*

proof of abuse or neglect, should be considered psychosocial parents. For other parties, living with the child generally should be considered necessary (unless, for example, the child and psychosocial parent are neighbors or otherwise spend a significant amount of time together). Financial support should be considered relevant to, but not determinative of, an assumption of child-rearing responsibilities. Most importantly, there should be a cognizable parent-child bond. Hopefully, this high burden of proof of psychosocial parenthood would dissuade parties from frivolously petitioning for access to children; restricting visitation rights to psychosocial parents would encourage families to resolve disputes outside the courtroom.[352]

Coupled with the right to petition for visitation, the Court should find that states are constitutionally required to adopt a rebuttable presumption that visitation with a psychosocial parent serves the best interests of the child.[353] Psychosocial parents' visitation rights should not arise only in proceedings following divorce, death of a parent, or other disruptions of a nuclear family. Such an approach, distinguishing "intact" from dissolved families, would arguably violate divorced or single parents' rights to equal protection under the Fourteenth Amendment.[354] States

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Rubano v. DiCenzo, 759 A.2d 959, 975 (R.I. 2000) (citing PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §§ 2.03–.21 (Tentative Draft No. 4, 2000)). The ALI acknowledges that persons who have significantly cared for, supported, and acted as parents for children may obtain legally enforceable rights to visitation and custody. This includes persons who, with the consent of the legal parent, have regularly performed a substantial share of the child's caregiving. *Id.* (citing PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03 cmt. (b)(iii)). No jurisdiction has yet adopted the ALI Principles, but, notably, Justice Kennedy cited the substantially similar March 1998 version in critiquing the best interests test as applied in *Troxel*. Troxel v. Granville, 120 S. Ct. 2054, 2079 (2000) (Kennedy, J., dissenting). Further, the Rhode Island Supreme Court in *Rubano* cited the draft adopted May 16, 2000. "[T]he effect of the ALI's position is to recognize, as do we . . . that, under certain limited circumstances, an unrelated caregiver can develop a parent-like relationship with the child that could be substantial enough to warrant legal recognition of certain parental rights and responsibilities vis-a-vis that child . . . ." *Rubano*, 759 A.2d at 975 (citing PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §§ 2.03–.21 (Tentative Draft No. 4, 2000)).

[352] With proof of psychosocial parenthood required even to petition for visitation, this threshold test is designed to minimize the burdens that an unaccompanied best interests standard places on children. *See, e.g.*, Barbara Kaplan Lane, *Custody Disputes Taking Heavy Toll On the Children*, N.Y. TIMES, Mar. 22, 1998, at A10.

[353] By contrast, if a psychosocial parent were to petition not only for visitation but also for child custody, the court should consider the psychosocial parent in parity with the legal parent and make custody determinations according to the best interests of the child or other standard set forth by the state's legislature, as the New Jersey Supreme Court did in *M.J.B.* Where all is truly equal between a biological/legal/psychosocial parent and a solely psychosocial parent, a state legislature or court may presume that custody should be awarded to the biological/legal parent, since requiring courts to ignore biological/legal parent status when all else is equal is constitutionally and normatively unsound.

[354] *See supra* note 247; *see also* MARTIN GUGGENHEIM ET AL., THE RIGHTS OF FAMILIES 19–20 (1996). Some statutes allow third-party visitation petitions where a court has heard any custody or divorce proceeding. *See* JOHN P. MCCAHEY ET AL., CHILD CUSTODY AND VISITATION LAW AND PRACTICE § 16.03[3][a], at 16–57 (1983). This is despite the fact that such a distinction threatens to burden parents and children with multiple visitation petitions, since eight different grandparents could petition for visitation of a child of di-

should be free to utilize the best interests of the child standard as articulated in their legislation and case law to determine specifically both the grounds for granting or denying visitation and the duration of visitation. From a normative standpoint, state courts should order visitation such that it approximates a child's prior relationship with his or her psychosocial parent. If the psychosocial parent has financially supported the child, she should continue to do so; if the psychosocial parent has engaged in considerable physical and emotional but not economic nurturing, a court should order similar time-intensive visitation.

The crucial counterpart to upholding the rights of psychosocial parents both to refuse and to petition for visitation, however, is also lessening the rights of unfit parents. Only a fit parent may be a psychosocial parent, and *only a psychosocial parent should be granted full constitutional protection.* In the realm of child abuse and neglect, the presumption favoring family preservation and deference to biological bonds is harmful to children. Placing primary emphasis on psychosocial parenting and viewing biology as a secondary, indeed sometimes irrelevant, consideration would help protect abused and neglected children. Parents who batter, neglect, or sexually assault their children have failed in their primary duties as parents. In the next case involving unfit parents, therefore, the Supreme Court should grant certiorari and clarify that a balancing analysis should curtail the constitutional rights of unfit parents and increase the power of the state to intervene and to place children in safe, nurturing environments.

V. CONCLUSION

The Supreme Court took several important, laudable steps in *Troxel.* First, accurately reading precedent and promoting sound policy, the Court applied intermediate scrutiny, balancing the rights of a fit parent against the authority of the state to protect children. Next, the Court acknowledged that the nuclear family is no longer the norm and that, accordingly, the notion of family should be more expansive. Finally, Justices Stevens and Kennedy recognized that the Constitution might, in

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vorced parents. In contrast, consistent with my argument that distinguishing between married and divorced parents' rights likely infringes upon divorced parents' constitutionally protected parental liberties and possibly their right to equal protection, other states have refused to award grandparent visitation over the objections of fit divorced parents. *See, e.g.*, Brooks v. Parkerson, 454 S.E.2d 769, 774 (Ga. 1995) (declaring a third-party visitation statute unconstitutional under both the Georgia Constitution and the Federal Constitution because it did not clearly promote the child's welfare and did not require evidence of prior harm before authorizing state interference with the family); Steward v. Steward, 890 P.2d 777, 782 (Nev. 1995) (interpreting a statute that granted visitation rights to a nonparent over the objection of divorced, fit parents as having "the absurd result of permitting the state to intrude solely because the parties are divorced, regardless of the fact that both parents are in agreement as to what was in the best interests of their child").

some cases, protect relationships formed between children and nonparent caregivers.

Yet, in splitting six ways and focusing on the particular claims of Granville and her children's grandparents, the Supreme Court failed to provide clear guidance for lower courts on the scope of parental liberty and third-party visitation rights. Reproductive technology and changing mores are rapidly expanding the cultural definition of family, and courts should arbitrate the competing claims for control and access to children through a legitimate framework. Traditionally, judges have turned to biology, viewing the rights of genetic parents as special and superior. Over time, however, courts have tempered the presumption that biological parents act in their children's best interests by reinforcing the state's role as *parens patriae* and intervening to protect the rights and welfare of children, even if in a discretionary and sometimes problematic manner. Increasingly, the Supreme Court and, more explicitly, some lower courts have recognized that nurturing is the basis of parenting and have asserted that nongenetic parents may have constitutionally protected rights. While the dissents of Justices Stevens and Kennedy, along with elements of the plurality opinion, support this latter reasoning, the fractured *Troxel* decision ensures that the Supreme Court will need to articulate more clearly the rights of parents and third parties.

The psychosocial parenting framework, if set forth in a future Supreme Court case, would allow lower courts to resolve visitation disputes in a manner that, while consistent with precedent, is normatively more viable and desirable. Emphasizing psychosocial parenting would acknowledge that relying on outmoded parenting doctrines often proves inadequate in ameliorating intrafamily conflicts. Predicating a constitutional right to restrict and petition for visitation on psychosocial parenthood would affirm that in law, as in reality, responsible care and lasting bonds are the essence of parenting.