Missouri Law Review

Volume 62
Issue 4 *Fall 1997*

Article 2

Fall 1997

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Family Autonomy vs. Grandparent Visitation: How Precedent Fell Prey to Sentiment in *Herndon v. Tuhey*[1]

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I. INTRODUCTION

In 1993, the Missouri Supreme Court affirmed a trial court decision awarding visitation with Cody Christopher Tuhey to the plaintiff grandparents over the united objections of Cody's parents, Randy and Ann Tuhey.[2] The Tuheys, as married natural parents of unquestioned fitness, had argued that every theory of constitutionally based privacy and familial autonomy protected the fundamental child rearing decision of with whom their young son would visit. The Missouri Supreme Court disagreed.[3]

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1. 857 S.W.2d 203 (Mo. 1993).

2. *Id.* at 211. After concluding that the grandparent visitation statute was constitutional and the visitation award itself was proper, the court stated that the *amount* of visitation was excessive and remanded the case to the trial court for reassessment. *Id.* at 211.

3. *Id.* at 207-08. Five judges joined in this majority opinion; two judges dissented. Currently nineteen states have open ended grandparent visitation statutes: CAL. [FAM.] CODE § 3100 (a) (West 1994); IDAHO CODE § 32-1008 (1983) (repealed 1994); IOWA CODE ANN. § 598.35 (West 1996 & Supp. 1997); KAN. STAT. ANN. § 60-1616 (1994); KY. REV. STAT. ANN. § 405.021 (Banks-Baldwin Supp. 1996); MD. CODE ANN. [FAM. LAW] § 9-102 (1994 & Supp. 96); ME. REV. STAT. ANN. tit. 19, § 1003 (West 1996); MISS. CODE ANN. § 93-16-3 (Supp. 1997); MO. REV. STAT. § 452.402 (1996); MONT. CODE ANN. § 40-9-102 (1997); N.D. CENT. CODE § 14-09-05.1 (Supp. 1997); N.J. STAT. ANN. § 9:2-7.1 (West Supp. 1997); N.Y. [DOM. REL.] LAW § 72 (McKinney Supp. 1997); OR. REV. STAT. § 109.121 (1994); R.I. GEN. LAWS § 15-5-24.3 (1993); S.D. CODIFIED LAWS § 25-4-52 (Michie 1992); VA. CODE ANN. § 20-124.2 (Michie 1995 & Supp. 1997); VT. STAT. ANN. tit. 15, § 1013 (1989); WYO. STAT. § 20-7-1-1 (Michie 1997). The first state to enact an open ended grandparent visitation statute was New York in 1966. Prior to 1966, states typically enacted statutes permitting suits for grandparent visitation only when the child's family had already suffered disruption through divorce or death of a parent. After 1966 some states bowed to pressure from politically active older constituents and broadened extant grandparent visitation statutes to permit suit regardless of whether family disruption had occurred. For an explanation of the evolution of two grandparent visitation statutes, *see* Beagle v. Beagle, 654 So. 2d 1260, 1260-61 (Fla. Dist. Ct. App. 1995) (tracing the evolution of Florida's open-ended grandparent visitation statute), *rev'd*, 678 So. 2d 1271 (Fla 1996) (holding state grandparent visitation statute

Any gloss of intellectual legitimacy the Missouri Supreme Court's opinion has acquired must be dispelled.[4] Joining the long and sorry tradition of family law decisions that cloak their authors' subjective views in "best interests of the child" terminology,[5] *Herndon v. Tuhey* failed to acknowledge controlling, established

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unconstitutional); Hawk v. Hawk, 855 S.W.2d 573, 576 n.1 (Tenn. 1993) (tracing the evolution of the open ended grandparent visitation statute, and subsequently concluding that it violated the Tennessee Constitution); Steward v. Steward, 890 P.2d 777, 781-82 (Nev. 1995) (tracing unsuccessful legislative attempts to expand Nevada's grandparent visitation statute into an open ended grandparent visitation statute). Missouri's grandparent visitation statute became open-ended in 1991. *See* Joan C. Bohl, *The Unprecedented Intrusion: A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 OKLA. L. REV. 29 (1996) for a discussion of the evolution of open-ended grandparent visitation statutes.

4. The following grandparent visitation cases cite *Herndon v. Tuhey*: Peterson v. Peterson, 559 N.W.2d 826 (N.D. 1997); Komosa v. Komosa, 939 S.W.2d 479 (Mo. Ct. App. 1997); Wolinski v. Browneller, 693 A.2d 30 (Md. Ct. App. 1997); Ward v. Dibble, 683 So. 2d 666 (Fla. Dist. Ct. App. 1996); Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996); Pollard v. Pollard, No. 532463, 1995 WL 534244 (Conn. Super. Ct. Aug. 25, 1995); Sanchez v. Parker, No. CN93-09822, 1995 WL 489146 (Del. Fam. Ct. June 20, 1995); Ridenour v. Ridenour, 901 P.2d 770 (N.M. Ct. App. 1995); Campbell v. Campbell, 896 P.2d 635 (Utah Ct. App. 1995); Brooks v. Parkerson, 454 S.E.2d 769 (Ga. 1995) (Benham, P.J., dissenting); R.T. v. J.E., 650 A.2d 13 (N.J. Super. Ct. Ch. Div. 1994). Since only 5 state family court opinions are reported, either by state reporters or by electronic services, the true extent of *Herndon v. Tuhey*'s influence cannot be gauged with accuracy. In addition to cases which cite *Herndon* explicitly, some cases rely upon its reasoning indirectly by citing one of its progeny. For example, *Maner v. Stephenson*, 677 A.2d 560 (Md. 1996) cites *Campbell v. Campbell* for ideas the *Campbell* court derived from *Herndon v. Tuhey*. In addition, *Lucerno v. Hart*, 907 P.2d 198 (N.M. Ct. App. 1995), uses a *Herndon* type analysis but cites to *Ridenour v. Ridenour*, rather than to the *Ridenour* court's source—*Herndon v. Tuhey*.

5. This inglorious tradition dates back to the sixteenth century, at least. In 1562 Parliament passed the first of several statutes designed to address the education of children born into poverty. Under the Statute of Artificers, 5 ELIZ. c4 (1562), children could be removed from their parents and apprenticed "in such a manner as may render their abilities in their several stations, of the greatest advantage to the commonwealth." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (discussing education under a statutory scheme which included the Statute of Artificers and the Poor Law Act of 1601, 43 ELIZ. c2 (1601)). In America, the use of the legal system to "improve" children's lives may have reached its zenith in the 19th century. Armed with their convictions and a distorted sense of *parens patriae* authority, judges separated children from impoverished parents without formal determinations of parental unfitness, on the one hand, or formal determinations that the children had engaged in any criminal activity, on the other. Such judicial intrusion on family rights and children's lives was endorsed as "improvement, reformation, wholesome restraint, and protection from depraved parents or environment." Douglas R. Rendleman, *Parens Patriae: from Chancery to the*

principles, policies and definitions, which dictate a different result. Indeed, the court not only overlooked concepts of federal constitutional jurisprudence, but also ignored the precedent of its own decisions. This Article takes the position that *Herndon* is fatally deficient in three distinct respects, all related to the court's failure to harmonize its conclusions with relevant law. First, the *Herndon* court failed to apply United States Supreme Court decisions and related Missouri caselaw to correctly define the constitutional concept of "family."[6] Its flawed handling of this crucial threshold issue lead inexorably to its misapprehension of family integrity as a limited and limitable right. Second, the *Herndon* court failed to identify the proper standard of constitutional review.[7] Since the Herndons' suit against the Tuheys implicated a single fundamental right, the Tuheys' right to family integrity, strict judicial scrutiny was required. Instead, the *Herndon* court engrafted undue burden test terminology onto its analysis and improperly applied rational basis review.

Finally, the *Herndon* court failed to correctly identify the applicable sources of state power to intrude in family life.[8] This failure caused the *Herndon* court to misunderstand the relationship between the family and the state established by the United States Supreme Court. Instead of recognizing that the state lacked authority to oversee the Tuheys' family life absent a finding of harm or potential harm to Cody, the *Herndon* court treated state power as the unbridled authority to oversee family life and to "better" the lives of children whenever and however it is moved to do so.[9] Had the three concepts of the family in constitutional law, the appropriate standard of review, and the sources of state authority been

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Juvenile Court, 23 S.C. L. REV. 205, 218 (1971) (discussing *Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1839)); *see also* Joan C. Bohl, *Brave New Statutes; Grandparent Visitation Statutes as Unconstitutional Invasions of Family Life and Invalid Exercises of State Power*, 3 GEO. MASON U. CIV. RTS. L.J. 271, 288-98 (1993) (discussing police power, *parens patriae* power, and paternalism in the context of grandparent visitation statutes). There are, of course, always exceptions. *See, e.g.*, O'Connell v. Turner, 55 Ill. 280, 286 (1870) ("If without crime . . . the children of the State are to be thus confined for the 'good of society' then . . . free government [had better be] acknowledged a failure.").

6. *See supra* notes 34-150 and accompanying text.

7. *See supra* notes 159-211 and accompanying text.

8. *See supra* notes 257-310 and accompanying text.

9. Justice Woodside summarized this concept in scathing terms thirty-five years earlier:

> If the 'better home' test were the only test, public welfare officials could take children from half the parents in the state whose homes are considered to be the less desirable and place them in the homes of the other half of the population considered to have the more desirable homes. Upon extending this principle further we would find that the family believed to have the best homes would have the choice of any of our children.

Benson v. Child Welfare Services, 181 A.2d 850, 852 (Pa. Super. Ct. 1962).

accurately understood and properly applied, they would have led to invalidation of Missouri's grandparent visitation statute on constitutional grounds. Instead, the *Herndon* court's conceptual and analytical errors threaten not only the proper development of grandparent visitation law, but also proper constitutional review in other contexts where the permissible scope of a state's control over its citizens is at issue.[10]

II. FACTUAL BACKGROUND

Ann and Randy Tuhey were married in December 1981; their son, Cody, was born eleven months later.[11] Ann and Randy Tuhey and Ann's parents, Robert and Sara Herndon, all lived in Marionville, Missouri.[12] The Herndons owned an orchard, where Mr. Tuhey worked after his marriage to Ann.[13] During the time that Mr. Tuhey worked at the orchard, Cody visited the Herndons both as a preschooler and later as an elementary school student.[14] After school Cody would get off the school bus at the Herndons' orchard and stay until his mother picked him up or his father took him home.[15]

Sometime during Mr. Tuhey's seventh year at the orchard, the Herndons apparently became dissatisfied with his work, although they never expressed their dissatisfaction directly to him.[16] Instead, their disapproval apparently took the form of conflicting instructions causing Mr. Tuhey to feel that no acceptable alternative existed. "[I]f he followed Mrs. Herndon's orders he was criticized by Mr. Herndon, and if he followed Mr. Herndon's orders he was criticized by Mrs. Herndon."[17] About a year and a half later this inchoate disapproval culminated in a telephone call from Mrs. Herndon to her daughter, directing Mrs. Tuhey to tell her husband that he no longer had a job at the orchard.[18]

Shortly after the Herndons fired Mr. Tuhey, the Tuheys experienced marital problems and briefly separated. During this period, Cody lived with his mother and visited his father.[19] Several months into the separation Cody apparently said

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10. *See*, Sandra Lynne Tholen & Lisa Baird, Note, *Con Law is as Con Law Does: A Survey of* Planned Parenthood v. Casey *in the State and Federal Courts*, 28 LOY. L.A. L. REV. 971, 1029 (1995) (suggesting that the undue burden test was never intended to be applied outside the abortion context).

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

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Herndon*, 857 S.W.2d at 205.

that he did not feel like visiting his father on that particular weekend.[20] Hearing this, Mrs. Herndon asked if Cody could stay at the orchard for the weekend instead.[21] Mrs. Tuhey declined, explaining the arrangements she and her husband had made for Cody.[22] Later, when Mrs. Tuhey returned to pick up Cody's bicycle, Mrs. Herndon renewed her objections to the arrangements the Tuheys had made for their son. An argument ensued, with Mrs. Herndon "uttering profanities" about Mr. Tuhey. Mrs. Tuhey, angered, struck Mrs. Herndon and left.[23]

Both Herndons then drove to Mr. Tuhey's home, apparently arriving while Mrs. Tuhey was there delivering Cody's bicycle. Mr. Herndon confronted Mr. Tuhey, and an altercation involving all four adults ensued.[24] Following this incident, the Tuheys reconciled; the Tuheys and the Herndons did not. First, the Herndons sued the Tuheys seeking repayment of money that the Herndons loaned to the Tuheys for the purchase of a house.[25] In a second lawsuit, the Tuheys sought return of cattle they had given to the Herndons for breeding purposes.[26] Third in the series of lawsuits, the Herndons sought court ordered visitation with Cody.[27]

The trial court rejected the Tuheys' challenge to the constitutionality of Missouri's grandparent visitation statute and ordered extensive visitation.[28] The Tuheys were to deliver their son to the Herndons on two Saturdays per month, from 9:00 a.m. to 6:00 p.m. The visitation schedule was to be altered several months later to allow for a longer visit on the third Saturday of each month, which was to include an overnight visit.[29] The trial court also made extensive provisions for holiday and vacation visitation, and included the requirement that the Tuheys advise the Herndons of all of Cody's school activities that the grandparents reasonably could be expected to attend.[30] The Tuheys appealed, reasserting their constitutional challenge to the grandparent visitation statute itself.[31]

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20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Herndon*, 857 S.W.2d at 206.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* The Tuheys also argued that the amount of visitation awarded was excessive. *Id.* at 210. The court agreed, reversing that aspect of the trial court's decision and remanding the case for "reassessment of the visitation granted." *Id.* at 211.

The Missouri Court of Appeals transferred the case to the Missouri Supreme Court,[32] noting that "the parents' constitutional attack on the grandparent visitation statute is substantial and not merely colorable."[33] Five judges of the Missouri Supreme Court joined in a decision rejecting the Tuhey's constitutional challenge; two judges dissented.

III. FAMILY INTEGRITY RIGHT

The *Herndon* court's threshold error was its misrepresentation of the family integrity right as limited and limitable, rather than as the comprehensive right to autonomy apparent in the historical origins of the concept of the family and in federal constitutional jurisprudence. The definition of family integrity is a crucial threshold for the *Herndon* court's analysis, and for any grandparent visitation suit, because it is the right at stake for parents and children when grandparents file suit to override the child rearing decisions of fit parents. If the right to family integrity is misinterpreted to apply only to certain aspects of family life and not to others, then a court may find the right does not apply to court ordered grandparent visitation. If the right to family integrity is misunderstood as applying only when state intrusion reaches a certain level, then a court also may conclude that it does not apply to grandparent visitation on a theory that forced visitation is not significant enough to activate its protections.

The *Herndon* court committed both of these errors. The *Herndon* court first recognized that the United States Supreme Court has found "certain rights" related to marriage, family relationships, child rearing, and education of children to be constitutionally protected.[34] It qualified this observation, however, by noting that the protection is "not absolute;"[35] that under "many circumstances"[36] state regulation of family life is "proper and not unconstitutional." The *Herndon* court noted, as examples, that the state may require school attendance and prohibit child labor.[37] The court failed to explain the logical limits of the family integrity right, however. Nor does it suggest why the family integrity right might not apply to the examples cited, leaving the family integrity right in a sort of analytical limbo. For the *Herndon* court, the family integrity right has no clear analytical boundaries and therefore can erect no real barriers against intrusion.

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32. The Missouri Supreme Court has exclusive appellate jurisdiction over cases involving the validity of state statutes. MO. CONST. art. V, § 3.

33. Herndon v. Tuhey, No. 17897, 1992 WL 206868, at *2 (Mo. Ct. App. Aug. 26, 1992), *aff'd*, 857 S.W.2d 203 (Mo. 1993).

34. Herndon v. Tuhey, 857 S.W.2d 203, 207 (Mo. 1993).

35. *Id.*

36. *Id.*

37. *Id.*

Under a second line of reasoning, the *Herndon* court acknowledged the full panoply of familial rights articulated by the United States Supreme Court, but concluded that an award of grandparent visitation is not an intrusion of sufficient magnitude to implicate any right to family integrity.[38] To accomplish this legerdemain, the *Herndon* court first listed cases in which the United States Supreme Court used the family integrity right to invalidate state action, setting forth each holding in parentheticals.[39] Its list included, for example, the holding in *Santosky v. Kramer*[40] that heightened procedural protection must accompany permanent termination of parental rights,[41] and the Court's conclusion in *Stanley v. Illinois*[42] that a state law unconstitutionally infringed on an unwed father's parental rights when it sought to terminate those rights by presuming him unfit.[43] The court then not only expressly acknowledged that "parents have a constitutional right to make decisions affecting the family,"[44] but also conceded that court-ordered grandparent visitation is an "encroachment"[45] and an "intrusion"[46] on family life. The court concluded, nevertheless, that forced grandparent visitation is constitutionally permissible because it is a smaller infringement on family life than the intrusions the court has listed.[47] The statutes invalidated by the United States Supreme Court, the *Herndon* court noted, contemplate "complete and permanent" intrusions.[48]

The fallacy of the *Herndon* court's conclusion is immediately evident in its conspicuous failure to suggest exactly how one is to distinguish between an intrusion which is great and therefore of constitutional significance and one which is small and therefore of insignificant magnitude. Indeed, the infringement on family life in some of the cases *Herndon* cited as examples of major intrusions seem indistinguishable from the infringement on family life caused by court-ordered grandparent visitation. In *Meyer v. Nebraska*,[49] *Pierce*

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38. *Id.* at 207-08.

39. *Id.*

40. 455 U.S. 745 (1982).

41. Herndon v. Tuhey, 857 S.W.2d 203, 207 (Mo. 1993) (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982)).

42. 405 U.S. 645 (1972).

43. *Herndon*, 857 S.W.2d at 207 (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

44. *Id.* at 208.

45. *Id.* at 209.

46. *Id.* at 210.

47. *Id.* at 209.

48. *Id.*

49. 262 U.S. 390 (1923).

v. Society of Sisters,[50] and *Wisconsin v. Yoder*,[51] for example, the U.S. Supreme Court found state education laws unconstitutional where those laws infringed upon a parent's right to direct his or her child's education and to oversee the child's experiences and upbringing generally.[52] In *Meyer*, the state sought to ensure children a thorough grounding in the English language by prohibiting instruction in any modern foreign language until the child finished eighth grade.[53] In *Pierce*, the state sought to compel attendance in public as opposed to private schools.[54] In *Yoder*, the state sought to compel Amish children to attend public school until they were sixteen.[55] In each case, the Court found the laws in question impermissible because each diverted some of the responsibility for the child's upbringing away from its proper source in the parents.[56] Similarly, when a court imposes grandparent visitation, the parents loose the right to decide with whom their child will spend time, and how that time will be spent.[57] Like

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50. 268 U.S. 510 (1925).

51. 406 U.S. 205 (1972).

52. *Meyer*, 262 U.S. at 401-02; *Pierce*, 268 U.S. at 534; *Yoder*, 406 U.S. at 234-35.

53. *Meyer*, 262 U.S. at 396-97.

54. *Pierce*, 268 U.S. at 530.

55. *Yoder*, 406 U.S. at 207.

56. *Meyer*, 262 U.S. at 403 ("No emergency has arisen which [justifies state limitation on teaching of modern foreign languages] with the consequent infringement of rights long freely enjoyed."); *Pierce*, 268 U.S. at 534-35 (law prohibiting attendance at private or parochial schools "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Yoder*, 406 U.S. at 232, 234 (law requiring Amish children to attend school until age 16 violated the "the fundamental interest of parents, as contrasted with that of the State to guide the religious future and education of their children").

57. Sometimes this interference is direct and explicit. In *Hawk v. Hawk*, for example, the parents wished to be the only ones to physically discipline their children and wanted to be consulted regarding the children's activities and bedtimes when the children were in the company of their grandparents. At trial, the judge not only awarded the grandparents extensive, unsupervised visitation but commented:

> [T]he grandparents don't have to answer to anybody when they have the children. They can take the children to visit friends of theirs, they can have friends in to visit with the children. They can take the children anywhere they please .... [T]hey're not restricted as to where they can take them, because the court is fully convinced that they would not do anything or take these children anywhere that would adversely affect these children.

Hawk v. Hawk, 855 S.W.2d 573, 577 (Tenn. 1993).

At other times the interference is simply implicit in the visitation award since it removes children from their parents' custody and control:

> Some parents and judges will not care if children are physically disciplined by the grandparents; some parents and judges will not care if the grandparents

the parents in *Meyer, Pierce*, and *Yoder*, the Tuhey's lost some of their right "to direct the upbringing and education of [their] children."[58]

These logical difficulties with the court's position aside, the fundamental flaw in the court's conclusion lies in its failure to understand family integrity as a comprehensive set of rights rooted in the historical tradition of family life[59] as a "private realm . . . the state cannot enter."[60] In the writings of Lord Coke, for example, the relationship between members of the family fundamentally is

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> teach children a religion inconsistent with the parents' religion; some judges and parents will not care if the children are exposed to or taught racist beliefs or sexist beliefs; . . . . But some parents and some judges will care. Between the two, the parents should be the ones to choose not to expose their children to certain people or ideas . . . .

King v. King, 828 S.W.2d 630, 635 (Ky.), *cert. denied*, 506 U.S. 941 (1992) (Lambert, J., dissenting) (citing Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 J. FAM. L. 393 (1985)).

58. *Pierce*, 268 U.S. at 534.

59. The nature of the family integrity right, like any constitutional right, must be understood through examination of history and tradition; "the due process clause protects only those interests so rooted in the traditions and conscience as to be ranked as fundamental." Michael H. v. Gerald D., 491 U.S. 110, 122 (1989). This is a practical necessity in our legal system: by identifying the history, tradition and rationale for protecting a given right as specifically as possible, at least as a point of reference, the Court adheres to the concept of a legal system which relies on the rule of law rather than depending on the predilections of the particular decision maker. *Id.* at 127 n.6. Indeed, the Court has cautioned that it becomes "most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." Bowers v. Hardwick, 478 U.S. 186, 194 (1985). In some circumstances, discerning the role of history and tradition in the evolution of a right or interest may be complex and subject to debate. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), for example, the Court was faced with a law which prohibited the use of contraceptives by married women, a phenomenon which obviously had no direct analog at common law.

Although agreeing that the law was unconstitutional, the majority and each of the three concurrences differed on the exact role of history and tradition in the analysis. No such difficulty arises in the present context. Although the legal relationship of men and women may have changed over time, the fact that history and tradition respected the unitary family as the basis of civil society and shielded it from governmental interference has not. Similarly, although societal changes may have extended the lives of grandparents and increased their social role beyond any circumstance Kent and Blackstone could have imagined, grandparents themselves are not a new phenomenon. The process of using history and tradition as a point of reference in the analysis of grandparent visitation cases is thus a straightforward process of identifying the boundaries of families as established by history and tradition, the defining characteristics of the interface of family and state.

60. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

governed not by statutory law but by common law,[61] and thus by the "order and course of nature."[62] The resulting conception of the family is of a self-contained unit, independent of state control and so wholly reciprocal that parents and children "may maintain the suits of each other, and justify the defense of each other's person."[63]

In commentaries written a little over a hundred years after those of Lord Coke, Sir William Blackstone echoed this conception of family life as a comprehensive set of mutual obligations and benefits running between parents and children "founded in nature"[64] rather than civil society. According to Blackstone, parents maintain,[65] protect[66] and educate[67] their children. For their part, children owe duties to their parents corresponding to the benefits they receive. Before emancipation, children owe their parents obedience and subjection,[68] just as parents owe children appropriate guidance and education.[69] During their minority, children also owe their father the benefits of their labors as long as they live in the father's home and are maintained by him. This obligation, too, is tempered by reciprocal parental considerations, for although a father receives the profits during the children's minority, he has to account for them when the children come of age.[70]

The archetypal family emanating from common law tradition—the nuclear family—thus is self-governing through reciprocal obligations among its members. The concept of family life that animates American constitutional jurisprudence, therefore, is, first, that a family consists of a husband, a wife, and their children. Second, as long as this primary unit is functional, it is self governing—a "private realm" insulated from state oversight or control.

Not all groups claiming familial status conform to the archetype of Blackstone's day, however,[71] and the characteristics of family life which the

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61. LORD COKE, FIRST INSTITUTE OF THE LAWS OF ENGLAND 11 (1628).

62. *Id.* at 12.

63. SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND 109 n.9 (2d ed. 1836) (citations omitted).

64. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 410 (1st ed. 1979) (1765).

65. 1 *id.* at 439.

66. 1 *id.*

67. 1 *id.* Blackstone reasoned that a parent confers no "benefit upon his child by bringing him into the world . . . if he afterwards entirely neglects his culture and education and suffers him to grow up like a mere beast." 1 *id.*

68. 1 *id.* at 441.

69. 1 *id.* at 438.

70. 1 *id.* at 441.

71. Modern circumstances affecting families may differ from any analog of Blackstone's time. At common law, for example, state actions to terminate parental rights

Court has isolated to address the familial rights of disparate groups of cohabitants further illuminate the scope of the family integrity right. Generally, these factors are considered: first, a finding that the members of the familial group were brought together by private commitments rather than by operation of law, second, the existence of a biological relationship between some members of the group, and third, close and ongoing relationships among members, reflecting the fact that the importance of family life lies in "the emotional attachments that derive from the intimacy of daily association."[72] Collectively these characteristics are important to the present analysis because they highlight the essence of the modern relationship between family and state, and, thus, the error of the *Herndon* court's conclusion that government may intrude on decisions made by fit parents for their child within the context of a family relationship.

The first characteristic of a family is that it must consist of a group of people who have made a personal decision to live together for mutual economic and social support. In *Moore v. East Cleveland*,[73] for example, appellant Moore challenged the validity of an ordinance which defined "family" so narrowly that she could not live with her son and two grandsons who were first cousins rather than brothers.[74] Invalidating the ordinance as an impermissible intrusion into the protected area of family life, the Court noted that Moore, her son, and her grandsons had made a personal commitment[75] to unite in a single household for mutual sustenance and to share "the duties and satisfactions of a common home."[76]

In contrast, the Court found an indispensable characteristic of family life missing when the group seeking familial status was both initiated by operation of state law rather than voluntary association, and remained under continuous state regulation. In *Smith v. Organization of Foster Families for Equality and Reform*,[77] ("OFFER"), foster parents argued that the psychological ties created

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were unknown, Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 229 (1971), as were formal adoptions, divorce or remarriage, LAWRENCE STONE, BROKEN LIVES: SEPARATION AND DIVORCE IN ENGLAND 1660-1857, at 18 (1993).

72. Smith v. Organization of Foster Families for Equality and Reform [hereinafter OFFER], 431 U.S. 816, 844 (1977).

73. 431 U.S. 494 (1977).

74. *Id.* at 496.

75. The Court applied the same reasoning to reach a contrary conclusion in *Village of Belle Terre v. Boras*, 416 U.S. 1 (1974), when it declined to find that a group of six unrelated students acquired familial status simply by living together for convenience in a rented house.

76. *Moore*, 431 U.S. at 505.

77. 431 U.S. 816 (1977).

with the foster children placed in their homes should confer upon the unit thus created the status of "psychological family," with the attendant constitutional protections accorded to families.[78] Rejecting the foster parents' argument, the Court held that emotional bonds created within a foster family are inherently different from the bonds between parent and child since foster care is "an arrangement in which the State has been a partner from the outset."[79] The Court noted the unitary family arises from the personal commitment of individuals and lies "entirely apart from the power of the State;"[80] the familial interest the foster parents sought to assert, on the other hand, "derives from a knowingly assumed contractual relation with the State"[81] and must be ascertained from state law,[82] not from the history and tradition which informs our understanding of the natural family.

Indeed, the absence of state oversight with regard to the details of family life is an indispensable characteristic of the family even when the group upon which oversight is imposed could continue to carry out other typically familial activities. In *Stanley v. Illinois*,[83] for example, an unwed father challenged a state law which, in pertinent part, defined "parent" as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child."[84] The father, Stanley, had lived with his children and their mother for eighteen years. Upon the mother's death, Stanley's children were declared wards of the state and removed from Stanley's home on the theory that, as an unwed father, he was not a "legal parent" under state law.

The Court first rejected the state's theory that any detriment Stanley suffered was not legally cognizable under the Fourteenth Amendment since Stanley could have petitioned the court for "custody and control" of the children. The Court observed that even apart from the illogic of suggesting that an unmarried father "without funds and already once presumed unfit"[85] could prevail on such a petition, legal guardianship is not equivalent to the status of a parent. As a legal guardian, Stanley would be subject to continuing judicial supervision. A state court could require him to report on his handling of the children's affairs,[86] for example, and in the event that his judgment were found wanting, the court could remove him as guardian without the procedural protections available to a parent

78. *Id.* at 839.
79. *Id.* at 845.
80. *Id.*
81. *Id.*
82. *Id.*
83. 405 U.S. 645 (1972).
84. *Id.* at 647, 650 n.4.
85. *Id.* at 648.
86. *Id.* at 649.

in a neglect proceeding.[87] The distinction for the Court was, thus, the loss of autonomy and the issue of state control. If the state had become a silent partner in the lives of Stanley and his children, no family really could have existed at all. State intrusion into family life is not merely inconsistent with the concept of a family as a private sphere of life, it is literally contrary to a definition of the family itself.

As *Stanley* itself suggests, a second familial characteristic the Court has identified is the presence of some blood relationship between some members of a household. Thus, some of Stanley's familial rights arose from the fact that the state sought to separate him from the children he had "sired"[88] as well as "raised."[89] Similarly, Moore's household acquired some constitutionally significant familial status in part because of the degree to which its members were related.[90] For the court's purposes, however, the familial characteristic of a blood relationship is as important for what it does *not* signify as for what it *does* signify, for the fact that Moore was a grandparent, as opposed to any other relative, had no particular significance.[91] Although the Court noted Moore's relationship to the children, it made no distinction between grandparents and any other relatives[92] who draw together to "participate in the duties and the satisfactions of a common home."[93] The Court's focus was on the family-like function of the household and the "mutual sustenance"[94] it provides.

The Court's functional analysis of Moore's household illustrates the third and final factor the Court has identified as characteristic of a family: for the Court, the existence of relationships arising from the "intimacy of daily

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87. *Id.* at 648-49.

88. *Stanley*, 405 U.S. at 651.

89. *Id.*

90. Moore v. East Cleveland, 431 U.S. 494, 498-99, 504 (1997).

91. *Herndon*'s parenthetical description of the Court's holding in *Moore* suggests that *Herndon* misinterpreted *Moore* as signifying the Court's willingness to expand the constitutional definition of "family" to include grandparents. Herndon v. Tuhey, 857 S.W.2d 203, 207 (Mo. 1993) (suggesting that *Moore* represents "strong tradition and recognition of the extended family"). *Herndon* is not alone in this misinterpretation of *Moore*. *See, e.g.*, *Grandparents: The Other Victims of Divorce and Custody Disputes: Hearing Before the Subcomm. on Human Services of the House of Representatives Select Comm. on Aging*, 97th Cong., 2d Sess. 77 (1982) (statement of Judith Areen, Professor of Law and Professor of Community and Family Medicine, Georgetown University, Georgetown University Medical Center); Judith L. Shandling, Note, *The Constitutional Constraints on Grandparent Visitation Statutes*, 86 COLUM. L. REV. 118, 129, 132 (1986).

92. *Moore*, 431 U.S. at 504.

93. *Id.* at 505.

94. *Id.*

association"[95] is the pivotal characteristic of a family. Moore's household was most fundamentally family-like because of the ongoing and interdependent relationships within it and because it demonstrated the shared lives of a single household. The Court noted, for example, that Moore's grandson, John, lost his mother and came to live with his grandmother to provide a "substitute for his mother's care."[96] The concurring opinion noted that the grandsons had, in essence, a "sibling" relationship, and that John's relationship with Moore was "the only maternal influence he had during his entire life."[97] The minutiae of daily life which constitute the relationships from which a family is formed are both the defining aspect of the family and the aspect of family life to which constitutional protections attach.[98]

The *Herndon* court erred, therefore, in failing to recognize that the family integrity right fully protected the Tuheys' right to live together without state intrusion on their decisions as fit parents. Like Stanley and his children, the Tuheys were entitled to live without judicial second guessing of their parenting decisions. The state oversight of family life implicit in a grandparent visitation award, like the state oversight postulated in *Stanley*, is simply incompatible with family life. Furthermore, the parenting decision countermanded by the grandparent visitation award was part of the constellation of relationships and concerns, plans and promises that collectively made the Tuheys parents, rather than some sort of hired hands contracting with the state like a foster family to provide child rearing services for Cody.

This emphasis on defining the family through ongoing relationships within a single household, and on granting constitutional protection to such relationships once they take shape, is nowhere clearer than in a synthesis of the four cases the Supreme Court has heard regarding the rights of unwed fathers. In two of the cases, the unwed fathers seeking to assert familial rights had lived with their children in common households for periods of time and had otherwise maintained active parent-child relationships;[99] in the two other cases, the fathers had not.[100] The presence or absence of a strong and ongoing parental

95. Smith v. OFFER, 431 U.S. 816, 844 (1977).

96. *Moore*, 431 U.S. at 505 n.16.

97. *Id.* at 506 n.2 (Brennan, J. concurring).

98. Although it declined to find that the relationship between a foster parent and foster child was entitled to the full protection of the family integrity right, the Court expressly affirmed the constitutional significance of daily contact between a child and a caretaker in *Smith v. OFFER*, 431 U.S. at 844. Since the foster care system entrusts the daily care of a child to foster parents, the Court reasoned that over time the daily contact would render the foster family functionally the equivalent of a natural family. *Id.*

99. Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972).

100. Lehr v. Robertson, 463 U.S. 248 (1983); Quilloin v. Walcott, 434 U.S. 246

relationship was so crucial to the Court's analysis that the outcome of each case expressly rested on that factor.[101]

In the first case, Stanley, an unwed father who had lived with his children for their whole lives[102] argued that the family integrity right should protect his relationship with his children despite a state statute which defined "parent" to exclude unwed fathers.[103] Affirming the right of Stanley and his children to be free of state intrusion in their family life, the Court held that the family integrity right protects the bond between a man and the children he has "sired and raised."[104] The Court stressed the relational nature of family rights by noting that the state statute in question actually invaded an intact family to separate a father from his children.[105]

In *Caban v. Mohammed*,[106] the Court again affirmed the constitutional significance of family relationships by recognizing a constitutionally significant parental right where a father who no longer lived with his children nevertheless managed to maintain a consistent, if clandestine relationship with them. Caban initially lived with his children and their mother, provided support, and participated in their upbringing. Caban's situation differed from Stanley's however, in that the children's mother moved out, taking the children with her. Through his own mother and mother-in-law, Caban managed to continue an active parental relationship with his children, a relationship of which the children's mother was completely unaware.[107] When the mother's new husband initiated adoption proceedings, Caban tried unsuccessfully to block the adoption in state court. He ultimately prevailed, however, in the United States Supreme Court; the Court specifically found that Caban had a "substantial" parental relationship with his children[108] which gave rise to constitutionally protected

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(1978).

101. Indeed, the Court was unmoved by allegations that the mother of one child had thwarted the father by hiding the child, *Lehr*, 463 U.S. at 269 (White, J., dissenting), and rejected arguments that a biological connection coupled with desire for contact should serve as a basis for access to the children in question.

102. *Stanley*, 405 U.S. at 646, 650 n.4 (the custody of two of Stanley's children was at issue).

103. Stanley made an equal protection argument: since the right to family integrity protects the relationship between married parents and their children absent a showing of unfitness, his relationship with his children was entitled to the same protection. *Stanley*, 405 U.S. at 646-47.

104. *Id.* at 651.

105. *Id.* at 652-53 (noting that the issue at stake for Stanley was "the dismemberment of his family").

106. 441 U.S. 380 (1979).

107. *Id.* at 383.

108. *Id.* at 388.

family rights. The Court noted that since Caban had lived with his children and maintained a close relationship thereafter, "[t]here was no reason to believe that the Caban children—aged 4 and 6 at the time of the adoption proceedings—had a relationship with their mother unrivaled by the affection and concern of their father."[109] The fact that Caban's arrangements to see his children had been clandestine did not affect the Court's conclusion at all; the existence of a parent-child relationship was the defining factor.[110]

The Court's reasoning in the two cases in which the unwed biological fathers could not show a substantial parental relationship demonstrated that the Court will not entertain any other basis for familial rights.[111] In both *Quilloin v. Walcott*[112] and *Lehr v. Robertson*,[113] the unwed fathers tried to block[114] or invalidate[115] their children's adoption by the new husband of each child's biological mother. In each case, the child in question was integrated into a new family consisting of his biological mother and her new husband; neither child had ever lived with his biological father. In each case, the unwed father tried, in effect, to challenge the teaching of *Stanley*, amplified in *Caban*, that family rights arise from and protect the ongoing responsibility of parent for child and the reciprocal relationship thus engendered. In each case, the biological father took the position that although he had no actual parental relationship with his child on which constitutional protection could be premised, the Court should

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109. *Id.* at 389.

110. *Id.* at 389 n.7, 393 n.14.

111. The Court had occasion to address directly the significance of the genetic connection between putative father and child in *Rivera v. Minnich*, 483 U.S. 574 (1987). Respondent Minnich, the mother of a newborn child, successfully alleged that petitioner Rivera was the father of her child and was awarded child support. The state supreme court upheld the unanimous jury award in her favor; Rivera petitioned the U.S. Supreme Court for review. Rivera argued that the higher burden of proof required to *terminate* the parent-child relationship under *Santosky v. Kramer*, 455 U.S. 745 (1982), should be constitutionally required in a paternity determination that could *create* a parent-child relationship. Rejecting his argument, a seven-justice majority held that the constitutionally protected aspects of the parent-child relationship arose from an actual relationship. *Rivera*, 483 U.S. at 579-80. The Rivera court, quoting *Lehr v. Robertson*, 463 U.S. 248 (1983), stated "[t]he mere existence of a biological link does not merit equivalent constitutional protection." *Rivera*, 483 U.S. at 580 n.7. In fact, the Court noted the "nonadmission of paternity" was "a disavowal of any interest in providing the training, nurture and loving protection that are at the heart of the parental relationship protected by the Constitution." *Id.* at 580.

112. 434 U.S. 246 (1978).

113. 463 U.S. 248 (1983).

114. *Quilloin*, 434 U.S. at 247.

115. *Lehr*, 463 U.S. at 250.

give constitutional protection to his potential relationship with his child.[116] The Court's characterization of family rights as relational foreclosed both fathers' claims. For the Court, where no relationship exists, there is nothing to protect.[117] Rejecting Quilloin's claim, for example, the Court pointed out that Quilloin had "never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[118] The Court rejected Lehr's claim on the same theory, even in the face of evidence that the child's mother had thwarted Lehr's attempts to establish a relationship with the child by moving frequently and keeping her new addresses secret.[119] Whatever the perceived unfairness of denying familial rights to one who *would* have been willing to actively parent a child, the rule is clear. Familial rights are the reciprocal rights of parents and children to continue the ongoing relationships of a common home without state interference.

Missouri case law is consistent with this conception of family rights as comprehensive rights, arising out of and protecting the reciprocal obligations and ongoing relationships of members within a household. In *Ellis v. Northwest Missouri Juvenile Council, Inc.*[120] and *Vinita Park v. Girls Sheltercare, Inc.*,[121] for example, group homes for juveniles adjudged neglected or in need of supervision were proposed in residential neighborhoods zoned for single family use.[122] The respective neighbors of each group home challenged establishment of the homes on the ground that groups of unrelated minors under the supervision of resident professionals could not constitute "families."[123]

Rejecting the neighbors' arguments, the court in each case noted that the proposed size of each group fell generally within the objective specifications set by the zoning ordinance,[124] and that the groups conformed to the "broad and primary sense" of family rooted in common law tradition.[125] Each group was intended to "approximate a single family setting,"[126] with the members assuming "reciprocal natural or moral duties to support and care for each other."[127] The

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116. *Id.* at 255; *Quilloin*, 434 U.S. at 253.

117. *See* Rivera v. Minnich, 483 U.S. 574 (1987), discussed *supra* note 104.

118. *Quilloin*, 434 U.S. at 256.

119. *Lehr*, 463 U.S. at 249-50 (White, J., dissenting).

120. 520 S.W.2d 644 (Mo. Ct. App. 1975).

121. 664 S.W.2d 256 (Mo. Ct. App. 1984).

122. *Ellis*, 520 S.W.2d at 645; *Vanita Park*, 664 S.W.2d at 258.

123. *Ellis*, 520 S.W.2d at 646-47; *Vanita Park*, 664 S.W.2d at 259.

124. *Ellis*, 520 S.W.2d at 650-51; *Vanita Park*, 664 S.W.2d at 259.

125. *Ellis*, 520 S.W.2d at 650; *accord Vanita Park*, 664 S.W.2d at 259.

126. *Vanita Park*, 664 S.W.2d at 259.

127. *Ellis*, 520 S.W.2d at 650 (quoting Steva v. Steva, 332 S.W.2d 924, 926 (Mo. 1960)).

private relationships planned within each group home as "substitutes for [parents'] care"[128] made each as essentially family-like as the "common home" of grandmother and grandsons[129] protected in *Moore*.

Missouri courts also applied this definition of family in the context of probate law. In *Steva v. Steva*,[130] the plaintiff filed a claim against her brother-in-law's estate for the reasonable value of cleaning and housekeeping services provided to him while he lived near her home.[131] The estate disputed her claim, arguing that a "family relationship" existed between the plaintiff and the deceased, and the plaintiff was therefore presumed to have provided all services for nothing.[132] Rejecting the estate's argument, the court noted that the plaintiff and her brother-in-law could not be considered "family" since they did not live in one household, under "one domestic government" with "reciprocal natural or moral duties to support and care for each other."[133] Similarly, in *Sturgeon v. Estate of Wideman*[134] the court concluded that the plaintiff stated a valid claim against her deceased mother's estate for services rendered because, although the mother had actually lived in the plaintiff's house, the evidence showed that the mother was incapable of providing the "mutual services" or assuming the "reciprocal duties" essential to any definition of family.[135]

A Missouri grandparent visitation case, which apparently escaped the attention of the *Herndon* court, helps to establish the fact that these reciprocal obligations give rise to a "private realm"[136] upon which the state may not intrude. In *Aegerter v. Thompson*,[137] a child's paternal grandparents petitioned for visitation with their grandchild after the grandchild was adopted by their former daughter-in-law's new husband. Rejecting the grandparents' petition,[138] the court noted that the child was now part of a new family. Not only was she no longer the child of divorced parents and a deceased father, but her new parents were totally responsible for her welfare and for the direction of her life. With this responsibility, the court concluded, should come full authority to determine her best interests without intrusion from those who were now strangers to the

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128. Moore v. East Cleveland, 431 U.S. 494, 505 n.16 (1997).
129. *Id.* at 505.
130. 332 S.W.2d 924 (Mo. 1960).
131. *Id.* at 925.
132. *Id.*
133. *Id.* at 926-27.
134. 608 S.W.2d 140 (Mo. Ct. App. 1980).
135. *Id.* at 142.
136. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
137. 610 S.W.2d 308 (Mo. Ct. App. 1980).
138. The court noted that even prior to the adoption the grandparents had only an inchoate right to reasonable visitation with their grandchild based on her parents' divorce and the father's death. *Id.* at 310.

family.[139] Indeed, all Missouri cases addressing the welfare of children correctly recognize family privacy as a threshold bar to state intervention.[140] Under Missouri law the state reaches any consideration of the best interests of the child only after some harm or threat of harm is demonstrated.[141] The right and obligation of parents to keep custody of their children, providing for their material and moral needs, is "a fundamental concept of our society"[142] in the eyes of the Missouri judicial system as well as in federal constitutional jurisprudence.

A Missouri case addressing the rights of an unwed father suggests that Missouri may extend even greater protection to family integrity than that accorded to the family by common law tradition and United States Supreme Court cases. In *J.D.S. v. Edwards*,[143] the child's biological father asserted his parental rights, attempting to block transfer of guardianship of the child to the state division of Family Services after the mother's parental rights were terminated. Missouri law provided, in pertinent part, that "[i]f the court terminate(s) the parental rights of both parents (or) of the mother if the child is illegitimate . . . it may transfer the guardianship and legal custody of the child to . . . the state division of welfare (now the Division of Family Services)."[144] Applying the United States Supreme Court's holding in *Stanley v. Illinois,* the court concluded that the statute was unconstitutional to the extent that it permitted severance of all parental rights to an illegitimate child by terminating the mother's rights only.[145] In deciding upon the proper standard to apply to a determination of an unwed father's substantive rights, however, the Missouri Supreme Court declined to follow the United States Supreme Court's holding in *Quilloin.* Noting that *Quilloin* allowed a best interests of the child determination to extinguish an unwed father's parental rights where the child had never lived with him and had been part of a new family unit for a substantial period of time, the court held that the Missouri Constitution forbade such a dilution of familial

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139. *Id.*

140. *See, e.g.*, State v. Couch, 294 S.W.2d 636, 639 (Mo. Ct. App. 1956) (holding that parental autonomy is a fundamental concept of our society limited only where the child requires protection).

141. *See, e.g.*, MO. REV. STAT. § 211.447.2 (1)-(3) (1994) (providing that statutory grounds for termination of parental rights include, *inter alia*, abandonment of the child, abuse, neglect and parental inability to provide necessary care); *In re* T.S., 925 S.W.2d 486, 488 (Mo. Ct. App. 1996) (holding that a court may reach the issue of the best interests of the child only after one or more of the statutory grounds have been met); *In re* M.H., 859 S.W.2d 888, 892 (Mo. Ct. App. 1993) (same).

142. State v. Couch, 294 S.W.2d 636, 639 (Mo. Ct. App. 1956).

143. 574 S.W.2d 405 (Mo. 1978).

144. *Edwards*, 574 S.W.2d at 407-08.

145. *Id.* at 408.

rights.[146] Instead, the court concluded that after a "reasonable showing of fatherly concern," an unwed father was entitled to the same presumption of fitness accorded to married fathers.[147]

Under Missouri law as well as federal law, then, a "family" is typically the nuclear unit of parent and children characterized by reciprocal relationships arising from a shared life. The grandparent who does not live in the same household and under the same "domestic government" cannot be considered part of the family. The rights attaching to the family unit are the logical corollaries of its fundamental characteristics. Family members have the right to maintain their relationships with each other free of state interference or oversight. Parents have a right to make decisions concerning their children's education and experiences; children have a right to have those decisions made by their parents, as the people most committed to their welfare.[148]

Since these relationships necessarily involve all aspects of life, all are embraced by the family integrity right. Because the family integrity right protects the Tuheys, as fit parents, in all child rearing decisions, no independent best interests of the child analysis may be undertaken. Under Missouri law,[149] as well as federal constitutional theories,[150] the state may not substitute its judgment for the judgment of fit parents. There is thus no basis for concluding, as the *Herndon* court did, that some family rights are somehow different in nature from others and thus outside the reach of the family integrity right. Similarly, any state intrusion on these rights is constitutionally cognizable; none can be said to be of insufficient magnitude. The *Herndon* court's failure to apply the family integrity right to invalidate the visitation award made against the wishes of the Tuheys is legally unsustainable.

Clues to the real basis for the *Herndon* court's flawed conclusions regarding the family integrity right can be found in the incidental phrases and word choices in the majority opinion and in the explication provided by the dissent. The majority opinion begins with the statement, "Cody Christopher Tuhey, age ten,

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146. *Id.* at 409.

147. *Id.*

148. *See supra* notes 59-70 and accompanying text.

149. *See supra* notes 140-42 and accompanying text.

150. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977) (holding that the right of personal privacy includes "the interest in independence" in making decisions "relating to marriage; procreation; contraception; family relationships and child rearing and education"); Jan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 806 (1985) (noting that "the Constitution surely reserves to the people the right to decide for themselves how to try to maximize the development of their own children-whether by having a home life that emphasizes human affection, or academic skills, or religion, or cultural affinity, or materialism, or other values").

descended from strong, proud stock."[151] Perhaps most obviously this is a statement of sentiment rather than fact or law. It is irrelevant to the matter before the court and so suggests that sentiment replaced precedent in the court's decision-making process.[152] It also suggests, however, that from the very beginning the court was substituting a convenient, lay concept of "family" for the constitutionally required definition founded in history and tradition. To analyze the intrusion occasioned by grandparent visitation accurately the court had to correctly conceptualize the family integrity right and the parameters of the group it protects. A definition disposed to include an undefined and unlimited collection of ancestors necessarily produced an inaccurate understanding of family integrity.

When the court described the factual basis of the suit, the nature of its misunderstanding became clearer. The parties' different surnames would have allowed the court to refer to all adults as "Mr." or "Mrs." without possibility of confusion: Mr. Herndon, Mr. Tuhey, Mrs. Herndon, Mrs. Tuhey. The court nevertheless chose to refer to the grandparents with honorifics and surnames and to Cody and his parents by their first names,[153] as though the parents still had the subordinate status of children in what the court unconsciously regarded as a single "family," with the grandparents at the head.[154]

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151. Herndon v. Tuhey, 857 S.W.2d 203, 204 (Mo. 1993).

152. Readers who find this assessment unnecessarily harsh should note that in areas of law not usually subject to sentiment, shareholder derivative suits for example, opinions typically begin with statements of relevant fact, or of the procedural posture of the case, not with legal irrelevancies like "love of money is the root of all evil."

153. *See, e.g.*, *Herndon*, 857 S.W.2d at 205 ("Mr. Herndon," "Mrs. Herndon," "Randy," "Ann").

154. The close connection between specific word choices and the speaker's own perspective has been well documented and applied in a variety of contexts. Linguists have long recognized the "close connection between the way we talk about something and the way we regard it. The language we use about it betrays our views on what it is." S. PIT CORDER, INTRODUCING APPLIED LINGUISTICS 19 (1973).

Indeed, capitalizing on this close connection between word and thought, activists in the 1980's urged journalists and scholars to refer to street people as "homeless" rather than calling them "drifters" or "beggars." By the mid 1980's widespread use of the term "homeless" helped engender more empathy for street people. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows and Public Space Zoning*, 105 YALE L.J. 1165, 1192 (1996). And of course every student of trial advocacy knows that "labels," the way one refers to "parties, events and other important things during the trial, . . . are important because they convey attitudes and messages." THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 46 (1992).

Finally, two Missouri appellate court cases illustrate alternate ways of indicating the parties in cases involving parents, grandparents and children. In *Aegerter v. Thompson* the court referred to the grandparents as "appellants," the parents by their full

The dissent's criticism of the majority's assessment of the intrusion involved perhaps most clearly demonstrates the source of the majority's errors. Discussing the grandparent visitation approved by the majority, Judge Covington described the level of intrusion as "far from insignificant," noting that "allowing the government to force upon an unwilling family a third party *even when the third party happens to be a grandparent*, is a significant intrusion into the integral family unit."[155] This is, of course, exactly what the majority did; it expressly endorsed the significant forcible invasion of a functional family over the united objections of fit parents. Equally clear, however, is the fact that this is not at all what the majority thought its opinion did. For example, the majority first carefully reviewed the United States Supreme Court's family integrity cases, purported to compare the intrusions described to the intrusions of grandparent visitation, and concluded that grandparent visitation is a "less than substantial encroachment of a family."[156] The majority then commented on the rationale for a grandparent visitation statute:

> One of [its] main purposes . . . is to prevent a family quarrel of little significance to [sic] disrupt a relationship which should be encouraged rather than destroyed.
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> . . . .
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> [I]t is not unreasonable for the state to say that the development of a loving relationship between family members is desirable . . . .[157]

Its reference to family integrity cases notwithstanding, the court obviously was not referring to the relationship between Mr. and Mrs. Tuhey when it referred to a "family" quarrel. At this point, the majority was no longer treating the issue of grandparent visitation as an issue of family autonomy for parents and child; the identities of the litigants had become blurred. At some points in its discussion, the majority properly treated parents and children as the "family"; at other points, the meaning of the word "family" changed as the court implicitly redrew the boundaries of the family unit to include grandparents.[158] The

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names and the child by her first name alone. Aegerter v. Thompson, 610 S.W.2d 308, 309 (Mo. Ct. App. 1980). In *Farrell v. Denson* the court refers to the parties as "grandmother," "mother," and "children." Farrell v. Denson, 821 S.W.2d 547, 548 (Mo. Ct. App. 1991).

155. *Herndon*, 857 S.W.2d at 212 (Covington, J., dissenting) (emphasis supplied).

156. *Id.* at 209 .

157. *Id.* at 209-10.

158. Compare the following two excerpts: (1) "The Tuheys [parents] contend that they have a constitutional right to raise their children as they see fit, free from state intrusion . . . . Of course this constitutional right is not absolute."; (2) "There is no reason a petty dispute between a *father* [referring to the plaintiff] and *son* [referring to the defendant] should be allowed to deprive a grandparent and grandchild of the unique

majority seems to have been unaware that these shifts had occurred, much less able to acknowledge these shifts had dictated the court's result. They are neither legally defensible nor, apparently, the product of conscious thought.

Despite its use of family integrity terminology and its citations to United States Supreme Court cases, the *Herndon* court made no actual comparison between government intrusions on family life, which the Court has held violate the right of familial privacy, and a grandparent visitation suit. Instead, the *Herndon* court unthinkingly confused the constitutional concept of "family" with a vague, lay definition; grandparents are unstated quasi-family members. Since the *Herndon* court perceived grandparents already to be included in the family unit, it perceived the "magnitude of the intrusion" as minor indeed.

IV. STANDARD OF REVIEW

The *Herndon* court erred in limiting its review of the grandparent visitation statute to an examination of whether the statute bore a rational relationship to a legitimate state purpose. Since the Tuheys' right to family integrity was the single fundamental right at stake, strict scrutiny rather than rational basis review was necessary.

The *Herndon* court compounded the error of engaging in rational basis review by asserting that it can be justified under an undue burden analysis. This odd attempt to import Justice O'Connor's balancing test from the abortion context, where competing rights of constitutional magnitude must be reconciled, fails on logical as well as legal grounds. In a grandparent visitation suit, no second right exists against which family integrity can or should be balanced.

Further, the *Herndon* court did not engage in genuine rational basis review, and did not establish a rational basis for the statute even under the most lenient incarnation of the test. The court failed to suggest any rational connection between the statute and a legitimate state goal—or even a connection between the statute and the policy it purports to further.

Finally, the *Herndon* court's rational basis review of the grandparent visitation statute before it lacks legitimacy, not only because it is contrary to constitutional principles established in United States Supreme Court decisions, but also because it conflicts with those principles as articulated in settled Missouri law.

The *Herndon* court justified its use of rational basis review by first acknowledging the line of United States Supreme Court cases affirming a constitutional right to privacy in family life, but without describing the specific

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relationship that ordinarily exists between these individuals. One of the main purposes of the statute is to prevent a *family* quarrel of little significance to disrupt a relationship which should be encouraged rather than destroyed." *Id.* at 207-09 (emphasis supplied).

right at issue.[159] Then, describing this right as "not absolute" and, therefore, limitable, provided state infringement upon family life is below a certain "magnitude," the *Herndon* court quoted dicta in *Zablocki v. Redhail*[160] which purports to allow state regulation to intrude upon the family's right to privacy when the intrusion is minimal.

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.[161]

This attempt to legitimize forced grandparent visitation as a constitutionally acceptable intrusion on family life, because it is a minimal one, is doomed, however, for the *Herndon* court's use of *Zablocki* misconstrued the distinction between types of regulation central to the *Zablocki* analysis.

In *Zablocki*, appellant Redhail successfully challenged a state statute which prevented the noncustodial parents of minor children from marrying unless they could demonstrate not only that all support obligations had been met but also that the children covered by support orders "[were] not then and [were] not likely thereafter to become public charges."[162] When he was an unemployed minor, appellant Redhail had fathered a child and had admitted paternity. As a result, he had been subject to an order to pay child support.[163] The order had gone largely unsatisfied[164] since the child's infancy. Appellant Redhail subsequently wished to marry, and, as he pointed out to the Court, the challenged statute prevented him from doing so, either in his home state or in any other.[165] In light of the fundamental status of the right to marry,[166] it is hardly surprising that the Court invalidated the statute as a virtually complete prohibition of marriage as applied to individuals such as the appellant.[167] Indeed, for present purposes, the

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159. *Herndon*, 857 S.W.2d at 207-08.
160. 434 U.S. 374 (1978).
161. *Herndon*, 857 S.W.2d at 208 (quoting *Zablocki*, 434 U.S. at 386).
162. *Zablocki*, 434 U.S. at 375.
163. *Id.* at 377-78.
164. *Id.*
165. *Id.* at 376.
166. *Id.* at 374 (citing Loving v. Virginia, 388 U.S. 1 (1967)).
167. *Zablocki*, 434 U.S. at 387. Although appellant had argued that the statute was violative of his rights under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the majority invalidated the statute on equal protection grounds. *Id.* at 377, 387.

significance of the Court's decision lies not in its rejection of what amounted to a statutory ban on certain marriages, but in the precise nature of that interference as contrasted with the interference the Court addressed in the companion case of *Califano v. Jobst.*[168]

Unlike the statute challenged in *Zablocki*, the Court noted that the legislation at issue in *Jobst* was permissible because it placed no "direct legal obstacle in the path of persons desiring to get married."[169] In *Jobst,* petitioner Jobst unsuccessfully challenged provisions of the Social Security Act which specified that certain benefits he received as a result of his dependent disabled child classification[170] were automatically terminated since he had married a woman not entitled to benefits under the Act, even though his new wife was also permanently disabled.[171] Comparing Jobst's circumstances with those at issue in *Zablocki*, the *Zablocki* Court noted that Jobst was able to marry despite the challenged provision; although he lost $20 per month in benefits,[172] no aspect of the protected activity of deciding to marry and establish a family was directly affected at all.[173]

The distinction made in *Zablocki* thus is not as the *Herndon* court represented it. It is not a distinction between legislation having a greater or lesser impact on a fundamental right, but rather a distinction between legislation which affects a constitutionally protected right directly as opposed to legislation which does not. Since a fit parent's right to make child rearing decisions is both the constitutionally protected activity itself and the protected activity upon which a grandparent visitation award directly intrudes, grandparent visitation statutes are conceptually identical to the legislation which *Zablocki* found impermissible.

Indeed, not only is the *Herndon* court's use of *Zablocki* completely inconsistent with *Zablocki*'s actual holding, it is also inconsistent with the Missouri Supreme Court's own correct use of *Zablocki* in earlier decisions. In

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168. 434 U.S. 47 (1977).

169. *Zablocki*, 434 U.S. at 387 n.12.

170. *Jobst*, 434 U.S. at 48.

171. *Id.*

172. *Jobst*, 434 U.S. at 57 n.17.

173. *Zablocki*, 434 U.S. at 387 n.12. In finding the regulation constitutionally permissible the Court noted that petitioner Jobst had, in fact, married during the pendency of the appeal. This conclusion can also be expressed as the court's recognition that although the state may discourage the exercise of fundamental rights by reducing government benefits "where a state enacts regulations that affirmatively limit the exercise of a fundamental right the state must prove that its act serves a compelling end." Valerie J. Pacer, Note, *Salvaging the Undue Burden Standard—is it a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. UNIV. L.Q. 295, 302 (1995).

Burnside v. Burnside,[174] the Missouri Supreme Court reversed a trial court's conclusion that a prison inmate had not entered into a valid marriage[175] despite the fact that a ceremonial marriage had been performed.[176] Holding that the trial court had "erred in its declaration and application of the law,"[177] the court cited *Zablocki* to affirm the constitutional right to marry even in the prison context.[178] The court correctly declined to suggest that some minimal burden may be placed on the exercise of the fundamental right itself. Indeed, the court supported its conclusion that marriage is an autonomous right, even under the circumstances, by noting the many significant aspects of marriage that are viable apart from any issue of incarceration.[179]

The Missouri Supreme Court's use of *Zablocki* in an unrelated setting was similarly accurate and apposite. In *Waites v. Waites*,[180] the court reviewed a child custody dispute between divorcing parents. Citing *Zablocki* for the proposition that it would ordinarily "clothe the interests of parents in the raising and educating of their children with the right of personal privacy,"[181] the court noted that in the case of conflict between parents, the principle of family privacy necessarily gave way to a best interests of the child analysis.[182] The *Waites* court thus correctly recognized that *Zablocki* represents an affirmance of the constitutional right of privacy in marriage and family life, not a suggestion that the exercise of that right could properly be intruded upon by the state to any degree.

The next step in the *Herndon* court's attempt to legitimize its application of rational basis review to a grandparent visitation statute was to make the inapposite argument that since, in its view, *Zablocki* permits "some" regulation

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174. 777 S.W.2d 660 (Mo. 1989).

175. *Id.* at 662.

176. *Id.* at 661.

177. *Id.* at 662. It appeared that the trial court had relied on a "civil death statute" which had been held unconstitutional in *Thompson v. Bond*, 421 F. Supp. 878 (W.D. Mo. 1976). The statute, when in effect, had been construed to prevent a convict from contracting a valid marriage. *Burnside*, 777 S.W.2d at 662.

178. *Burnside*, 777 S.W.2d at 663 (quoting Turner v. Safley, 482 U.S. 78, 95 (1987)).

179. *Burnside*, 777 S.W.2d at 663. The court notes, *inter alia*, that "inmate marriages, like others, are expressions of emotional support and public commitment .... [I]n addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication." *Id.* at 663 (quoting *Turner*, 482 U.S. at 95).

180. 567 S.W.2d 326 (Mo. 1978).

181. *Id.* at 330-31.

182. *Id.* at 331.

of family life, rational basis is appropriate under the undue burden test.[183] As articulated by Justice O'Connor, writing for the dissent in *City of Akron v. Akron Center for Reproductive Health*,[184] the undue burden test represents an attempt to accommodate a conflict between two different interests, both of undisputed constitutional magnitude. In the First Amendment context, for example, the undue burden test has been applied to reconcile the conflict between an individual's rights of free speech and association and the government's right and obligation to conduct legislative investigations. Thus, although the government's power of inquiry is as great as its power to legislate,[185] its inquiries were impermissible where they destroyed the privacy essential to a group espousing dissident beliefs.[186] In that context, the Court found that the government's power of inquiry "infringe[d] substantially" on associational rights.[187] In the context of the abortion regulations in *Akron*, Justice O'Connor framed the conflict as one between a woman's "personal right" to decide whether to have an abortion and the state's "important interests" in medical standards and procedures, coupled with the state's interests in protecting human life.[188]

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183. Herndon v. Tuhey, 857 S.W.2d 203, 208 (Mo. 1993). Subsequent grandparent visitation cases have cited *Herndon* for this idea, in what can only be described as a "knee jerk" fashion, with no attempt to independently analyze the postulated relationship between *Zablocki* and the undue burden test. *See, e.g.*, Campbell v. Campbell, 896 P.2d 635, 642 (Utah Ct. App. 1995). Apart from *Herndon*'s own progeny, however, the *Herndon* court appears to be the only court to attempt to wed *Zablocki* to an undue burden analysis. In *Potter v. Murray City*, 585 F. Supp. 1126 (D. Utah 1984), decided six years after *Zablocki* and a year after *Akron*, a police officer challenged his termination from the force, made on the grounds that he engaged in plural marriage in violation of state law. Although the court not only cited *Zablocki*, and also discussed the state's interest in requiring compliance with its criminal laws, it made no reference to the undue burden test and, indeed, used the words "undue burden" in their lay sense. *Id.* at 1138-39.

184. 462 U.S. 416 (1983) (O'Connor, J., dissenting).

185. Gibson v. Florida Legislative Comm., 372 U.S. 539, 545 (1963) (citing Barenblatt v. United States, 360 U.S. 109, 111 (1959)).

186. *Gibson*, 372 U.S. at 558.

187. *Id.* at 545 (citing Watkins v. United States, 354 U.S. 178 (1957)).

188. *Akron*, 462 U.S. at 454. The abortion regulations at issue in *Akron*, for example, endeavored to further both aspects of the state's interests in several ways. They provided that: (1) all abortions performed after the first trimester be performed in a hospital; (2) that a doctor obtain parental or judicial consent for any abortion to be performed on an unmarried minor; and (3) that the attending physician provide certain specified information concerning fetal development, the risks of the procedure, and possible psychological sequellae. The *Akron* majority applied a strict scrutiny standard to find all of these provisions unconstitutional, either because they "unreasonably infringe[d]" upon a woman's access to abortion or because they intruded upon her right

Writing for the dissent, Justice O'Connor argued that under an undue burden standard, rational basis review rather than strict scrutiny was appropriate because the right to an abortion "cannot be said to be absolute."[189] It is, instead, a "limited" fundamental right[190] inevitably qualified by the state's ever-present interest in potential life.[191] Given the competing rights at issue in the abortion context, therefore, Justice O'Connor framed the appropriate inquiry not as whether some infringement of a woman's right to an abortion occurred, for the state's compelling interests permit it to permissibly inhibit abortions to some degree.[192] Instead, Justice O'Connor stated that only when the challenged regulation of abortion represented an "absolute obstacle" could the law be said to represent an undue burden.[193] Absent an undue burden, an appropriate balancing of competing interests mandated rational basis review. The undue burden test, in short, is designed to evaluate legislation that has the effect of pitting two rights or interests of constitutional magnitude against each other.

As a threshold matter, then, the logical flaw in using the undue burden test to analyze the intrusion occasioned by grandparent visitation statutes is evident simply in the nature of the test itself. Since the only constitutionally significant interest implicated is the right of parents and children to familial autonomy, the substantial burden test literally cannot be used to analyze a grandparent visitation statute. With only one interest at stake, no assessment of how challenged legislation either furthers or inhibits the competing rights and interests can occur.[194] The *Herndon* court conceded the existence of a constitutional right to familial autonomy,[195] for example, and the appellant parents argued that the grandparent visitation statute in question unconstitutionally inhibited their exercise of that right.[196] Since the grandparent visitation statute does not further a constitutionally valid competing interest, however, the next step of the undue

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to make the abortion decision free of governmental intrusion by limiting the discretion of her physician or healthcare provider.

189. *Id.* at 463 (quoting Roe v. Wade, 410 U.S. 113, 154 (1973) (O'Connor, J., dissenting)).

190. *Akron*, 462 U.S. at 465 n.10.

191. *Id.* at 459.

192. *Id.* at 461.

193. *Id.* at 464.

194. In *Akron*, for example, Justice O'Connor made it clear that the right to an abortion "can be understood only by considering both the woman's interest and the nature of the state's interference, because the state possesses compelling interests in the protection of potential human life and in maternal health throughout the pregnancy." *Id.* at 461.

195. Herndon v. Tuhey, 857 S.W.2d 203, 209 (Mo. 1993).

196. *Id.*

burden test cannot be taken; there is nothing to balance against the asserted right to family autonomy.[197]

The *Herndon* court attempted to circumvent the practical difficulties of applying the undue burden test in the absence of a conflicting, constitutionally significant interest in two ways. Its first tactic simply was to adopt Justice O'Connor's "extent of the infringement" language regardless of the absence of a comparable context.[198] The court established a comparison between the intrusion occasioned by an award of grandparent visitation and the intrusion occasioned by other regulations touching on family life.[199] Since this comparison did not involve *competing* rights, the *Herndon* court could not actually implement the balancing process involved in Justice O'Connor's analysis by weighing the validity of the competing interests and by assessing the impact of the constitutional interest underlying the regulation on the constitutional right it touches. The court, therefore, made a general comparison between intrusions the United States Supreme Court has condemned and the effect of the grandparent visitation statute on the family, concluding that court-ordered grandparent visitation is appropriate based on this "casual comparison" alone.[200]

The second way in which the *Herndon* court attempted to justify its use of the undue burden test is by following the *King* majority, and locating the missing

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197. The *Herndon* court noted that state regulation of the family "is proper and not unconstitutional" in many circumstances, and its analysis slips into the general deference to legislative judgment which Justice O'Connor specifically rejected in this context. *Id.* at 207, 209-10. *See also Akron*, 462 U.S. at 465 (O'Connor, J., dissenting).

198. *Herndon*, 857 S.W.2d at 208. The court referred to "[t]he importance of the extent of the infringement in a fundamental rights analysis," although the undue burden test has never been generally applied in cases involving most fundamental rights. *Id.*

199. *Id.* at 209.

200. *Id.* "A casual comparison of the visitation rights contemplated for grandparents . . . with the magnitude of the infringement in [the U.S. Supreme Court cases] demonstrates that no constitutional violation is present . . . ." *Id.* Perhaps wisely, the *Herndon* court did not suggest any means of quantifying the relative intrusions, for it is by no means clear that such a comparison would support the conclusion it wishes to draw. A state ban on teaching certain foreign languages during school hours, which the U.S. Supreme Court held to unconstitutionally infringe on child rearing autonomy, *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923), for example, could impose a far more minimal intrusion on the parent-child relationship than grandparent visitation. Unlike grandparent visitation it would not separate parents and children who would otherwise be together; its ban, furthermore could be completely circumvented by providing language instruction at other times. Instead, the *Herndon* court simply asserted that "even a casual comparison" of grandparent visitation and the infringements invalidated by the U.S. Supreme Court suggests the statute at issue is constitutional, leaving unstated the fact that an exacting comparison might yield a different conclusion and that the balancing analysis of Justice O'Connor's undue burden test cannot be applied literally.

competing interest in a combination of interests and factors of varying logical and constitutional legitimacy, all added together. This process of discerning a whole that is greater than its parts required the *Herndon* majority to borrow the language of parental rights cases. Using such language out of context, the court described *grandparents* as having an "important role in the raising of their grandchildren."[201] The *Herndon* court cited no authority for this grandparent "right," beyond the *King* majority's words; as the *King* dissent acidly noted with regard to this "right," no authority was cited because none exists.[202] The *Herndon* majority also approvingly noted the *King* majority's assertion that the state has an interest in "strengthen[ing] familial bonds."[203] The fatal flaw in this assertion is, of course, that the constitutional concept of "family" does not include "grandparent" at all.

Leaving aside this obvious difficulty, however, the *Herndon* court's assertion fails on other logical and analytical grounds. Even assuming, simply for sake of argument, that by "familial bonds" the court really meant "generational contact,"[204] and that it thereby described a legitimate state goal,[205] a grandparent visitation statute is neither a narrowly tailored means of furthering

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201. *Herndon*, 857 S.W.2d at 209.

202. King v. King, 828 S.W.2d 630, 633 (Ky. 1992) (Lambert, J., dissenting).

203. *Herndon*, 857 S.W.2d at 209 (quoting *King*, 828 S.W.2d at 632).

204. The court does use this phrase at a later point in its description of the interest it is advancing. *Herndon*, 857 S.W.2d at 210 (quoting *King*, 828 S.W.2d at 632). In what is perhaps a further attempt to spin familial or generational considerations into the competing state interest it lacks, *Herndon* later quoted *King* approvingly for the proposition that grandparent visitation statutes are justified as a means of furthering "loving relationship[s] between family members." *Herndon*, 857 S.W.2d at 209-10 (quoting *King*, 828 S.W.2d at 632). This assertion fails as an impermissible excursion into paternalism, if not into pure fantasy. The state has no legitimate interest in the tenor of relationships within a functional family unit or in "making things better" by imposing a state-approved model of family life.

205. An exercise of the government's legislative power will generally be considered legitimate if it relates to the health, safety, morals or welfare of its citizens. *See, e.g.*, Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926) (holding that land use regulations satisfy substantive due process unless they have "no substantial relation to the public health, safety, morals or general welfare"). This definition obviously provides the legislature with considerable latitude. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986) (upholding a ban on consensual homosexual sodomy as a rational method of furthering legitimate interests in conventional morality). However, it clearly stops short of sanctioning legislation with the clear political purpose of harming or benefitting groups that are simply socially disfavored or particularly influential. *See, e.g.*, USDA v. Moreno, 413 U.S. 528, 534 (1973) (ban on giving "household" food stamps to groups of unrelated people invalidated in part because its purpose of harming "hippies" was not legitimate).

that goal[206] nor is it even clear that it is rationally related to that goal.[207] As the *King* dissent noted, it may sometimes be true that grandparents can share a close relationship with grandchildren, and in other cases it is not.[208] There is, furthermore, little evidence, anecdotal or otherwise, that creating a new means for grandparents to sue their children is a significant source of bonhomie.[209] Finally, there is ample evidence from all disciplines that judicial intrusion in the

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206. Statutes purporting to regulate the exercise of a fundamental right require "strict scrutiny," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and must be analyzed in light of any "less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960). The State should then prevail "only upon showing a subordinating interest which is compelling." City of Bates v. Little Rock, 361 U.S. 516, 524 (1960). This standard is articulated in the specific context of grandparent visitation by Judge Lambert in his dissent to *King v. King*:

> [Since] parents have a fundamental liberty interest in maintaining an autonomous family unit . . . court ordered visitation with a minor child by one outside the nuclear family amounts to an invasion of family autonomy. The question thus becomes what is the compelling state interest in requiring visitation . . . .

King, 828 S.W.2d at 634 (Lambert, J., dissenting).

207. If, as courts upholding awards of grandparent visitation assert, rational basis review were appropriate, the standard could be described in these terms.

208. *King*, 828 S.W.2d at 634 (Lambert, J., dissenting).

209. Indeed, a statute permitting grandparents to sue for visitation may simply serve to arm the grandparents with the coercive power of the state. Although many grandparent visitation suits may be grounded in an unselfish interest in the grandchildren, a disturbing number of cases and commentators refer to grandparent visitation suits as veiled attempts to control or punish the grandparent's adult child, and note their deleterious effect on the parent-grandparent relationship as well as on the child. *See, e.g.*, Steward v. Steward, 890 P.2d 777, 778-79 (Nev. 1995) (describing evidence of the grandmother's general attempts to control family members, and specifically, her attempt to control her son through a grandparent visitation suit); Hawk v. Hawk, 855 S.W.2d 573, 576 n.1 (Tenn. 1993) ("[I]t has been suggested that forced visitation in a family experiencing animosity between a child's parents and grandparents merely increases the potential for animosity . . . ."); *King*, 828 S.W.2d at 633, (Lambert, J., dissenting) ("[T]he evidence is clear that [the grandfather] is an overbearing individual who intruded with impunity upon [his son and daughter-in-law's] family life demonstrating total indifference to their wishes."); Elizabeth M. Belsom, Note, *Grandparent Visitation: A Florida Focus*, 41 FLA. L. REV. 179, 207 (1989) (because Florida grandparents may be more settled than their children, courts should be wary of situations in which grandparents want to control their children's lives); Elin McCoy, *Grandparents Seek Rights to Visit With Grandchild*, N.Y. TIMES, Oct 4, 1984, at C1 (quoting Dr. Justin D. Call, Chief of Child and Adolescent Psychiatry at the University of California Irvine Medical Center) ("[the grandmother in question] wasn't really interested in her grandchild; she only wanted control over [her son]").

family unit is an inevitable source of trauma to the child,[210] and may affect the parents' marriage as well.[211] In short, grandparents have no legally cognizable interest in their grandchildren's upbringing, and grandparent visitation statutes do not further any other legitimate state goal. Viewed either individually or in sum, the considerations the *Herndon* court advanced as the "competing interests" to support its undue burden test are simply unequal to the task.

Although the fundamental nature of the single right at stake in *Herndon* makes the *Herndon* court's application of rational basis review patently improper, it is by no means clear that the grandparent visitation statute at issue satisfies rational basis review, even in the lenient form that the court purportedly applied.[212] Rational basis review of a statute is the level of review most deferential to the legislature's choice in enacting the statute. Thus, "[a] classification does not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequality."[213] Under rational basis review, courts must "accept a legislature's generalizations even when there is an imperfect fit between means and ends."[214] Although the extent of the "imperfection" to be tolerated has been the subject of some disagreement on the Supreme Court,[215] the disagreement can generally be reduced to two different conceptions of rational basis review, one comparatively lenient, under which virtually all legislation will be found acceptable, the other

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210. *See infra* note 317 and accompanying text

211. Sharon F. Ladd, Note, *Tennessee Statutory Visitation Rights of Grandparents and the Best Interest of the Child*, 15 MEM. ST. U. L. REV. 635, 652 (1985). "If the natural parents have a viable marriage, it is not wise to allow parents of either parent to bring suit as this could have a devastating effect on the marriage . . . ." *Id.*

212. Herndon v. Tuhey, 857 S.W.2d 203, 209 (Mo. 1993).

213. Heller v. Doe, 509 U.S. 312, 321 (1993) (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

214. *Id.* at 321.

215. A significant number of courts and commentators agree that rational basis review has involved varying degrees of judicial scrutiny rather than a single clear standard. In *United States Railroad Retirement Board v. Fritz*, Justice Rehnquist, writing for the majority listed eleven U.S. Supreme Court cases which had applied a rational basis standard of review and commented: "The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles." United States R. R. Retirement Board v. Fritz, 449 U.S. 166, 176-77 n.10 (1980). *See also* City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 451-52 (1985) (Stevens, J., concurring) (discussing the term "rational" and the "continuum of judicial responses" reflected in the Court's decisional process); United States R. R. Retirement Board v. Fritz, 449 U.S. 166, 182-198 (1980) (Brennan, J., dissenting); GERALD GUNTHER, CONSTITUTIONAL LAW 472 (1985); Robert J. Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261, 280-290 (1990).

more demanding and less deferential to legislative choice.[216] Under "lenient" rational basis review, "any reasonable basis"[217] for the statute at issue is sufficient. In contrast, the more rigorous "traditional"[218] rational basis review requires factual support for legislative assumptions. Thus, although a court applying traditional rational basis review may favor the legislature's understanding of the circumstances it sought to address, the reviewing court may not overlook those specific circumstances themselves in order to reach a conclusion based only on general pronouncements.[219] Under both incarnations of rational basis review, however, the challenged statute "must find some footing in the realities of the subject,"[220] and therein lies the problem for Missouri's grandparent visitation statute.

Had the *Herndon* court applied traditional rational basis review to the grandparent visitation statute before it, its conclusions obviously would have been quite different, for generalizations regarding "the development of . . . loving relationship[s]"[221] and a presumption of some unspecified benefit to the

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216. Professor Galloway has subdivided rational basis review into two categories which recognize the different conceptualizations of the standard, describing them as the "deferential rational basis test" and the "nondeferential rational relation test." Russel W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 451 (1988). Although the Court itself has not expressly acknowledged different tiers of rational basis review, it has repeatedly recognized and often disapproved the different faces rational basis review can have. United States R. R. Retirement Board v. Fritz, 449 U.S. 166, 186 (1980) (Brennan, J., dissenting).

Some justices have further contributed to the difficulties of isolating a single rational basis standard by suggesting that *all* constitutional review is rational. These justices suggest that differences in the level of scrutiny applied are better explained by examining the interests at stake than by attempting to identify specific analytical tiers. *See* Craig v. Boren, 429 U.S. 190, 211-14 (1976) (Stevens, J., concurring); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. at 451-55 (1985) (Stevens, J., concurring).

217. Williamson v. Lee Optical, 348 U.S. 483, 488 (1955).

218. *Fritz*, 449 U.S. at 186.

219. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) (stating that "mere recitation of a benign, compensatory purpose is not an automatic shield that protects against any inquiry into the actual purposes underlying a statutory scheme"). For other examples of the Supreme Court's traditional approach to rational basis analysis, *see* Califano v. Goldfarb, 430 U.S. 199, 212-213 (1977); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (holding that rational basis review is satisfied only when legislation "rationally furthers some legitimate, articulated state purpose"); Johnson v. Robison, 415 U.S. 361, 381-82 (1974) (upholding legislation because Congress had expressly recognized the resulting distinctions and those specific distinctions were rationally related to the Congressional purpose).

220. Heller v. Doe, 509 U.S. 312, 321 (1993).

221. Herndon v. Tuhey, 857 S.W.2d 203, 209 (Mo. 1993).

grandchild quoted from an opinion in another jurisdiction would not have sufficed. The United States Supreme Court's use of traditional rational basis review to invalidate a statute in *City of Cleburne v. Cleburne Living Center, Inc.*[222] illustrates the requirement that available data support the statutory classification at issue.[223] In *Cleburne*, Cleburne Living Center, Inc. ("C.L.C.") endeavored to open a group home for the mentally retarded. A zoning ordinance required it to obtain a special permit, even though no special permit would have been required had the group home been a "hospital[], sanitarium[], nursing home[], or home[] for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts,"[224] or, indeed, had it been one of a host of

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222. 473 U.S. 432 (1985).

223. In contrast to *Herndon*, and indeed to all grandparent visitation cases, *Cleburne* involved an equal protection challenge rather than a substantive due process challenge. Although grandparent visitation cases involve substantive due process challenges to the statutes at issue, the standard of review applicable to a due process challenge is to be found in both the United States Supreme Court's due process cases and in its equal protection cases. During the Court's modern era it has employed an equal protection analysis far more frequently than it has employed a due process analysis. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 383 (5th ed. 1995). This does not result from any theoretical preference for equal protection analysis over due process analysis, but rather reflects the fact that most laws operate by classifying people in some way. *Id.* Thus, the Court will generally examine a constitutional challenge to economic and social regulation, for example, to decide whether the distinctions that it draws between groups of people are rationally related to a legitimate interest of the government, rather than examining it to decide if it is rationally related to a legitimate government interest. *Id.*

Similarly, if the Court is facing a challenge to regulations affecting fundamental rights, and determines that the regulations affect only one group of people, it strictly scrutinizes the classification thus created to determine if it is narrowly tailored to achieve a compelling state interest. If, on the other hand, the regulation affecting a fundamental right affects *everyone's* ability to exercise that right, the Court will strictly scrutinize the regulation to determine if it is narrowly tailored to achieve a compelling state interest. *Id.*

Regardless of whether analysis has proceeded under the equal protection clause or the due process clause, therefore, the standard of review the Court has developed is identical. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 308 (1993) ("[Respondents' next contention] is just the 'substantive due process' argument recast in 'procedural due process' terms, and we reject it for the same reasons."); *Weinberger*, 420 U.S. at 638 n.2; Schlesinger v. Ballard, 419 U.S. 498, 500 (1975); Bolling v. Sharpe, 347 U.S. 497 (1954). In this article, therefore, no distinction is made between a definition of "rational basis review" which is articulated in equal protection analysis and a definition of "rational basis review" articulated due process analysis.

224. City of Cleburne v. Cleburne Living Center Inc., 473 U.S. 432, 436 n.3 (1995).

other social or institutional facilities.[225] After C.L.C. submitted the required special permit, the city council voted to deny it. C.L.C. challenged the ordinance upon which the council voted, arguing that it "discriminated against the mentally retarded in violation of the equal protection rights of C.L.C. and its potential residents."[226] Applying rational basis review, the United States Supreme Court invalidated the ordinance, finding that it bore no rational relationship to any legitimate governmental purpose.[227]

The *Cleburne* Court's application of rational basis review stands in sharp contrast to the approach taken in *Herndon*, for the *Cleburne* Court engaged in a detailed, factual analysis of the operation of the statute and in a critical analysis of the justification argued by the state. In *Herndon*, the court justified the impact of the open-ended grandparent visitation statute on the Tuheys simply by quoting from the Kentucky Supreme Court's opinion in *King v. King*: "the grandparents' visitation statute was an appropriate response to the change in the demographics of domestic relations."[228] It explored the argument no further than this, and attempted no reconciliation of its own pronouncement and the fact that no issue of family breakdown was before it.

The *Cleburne* Court, on the other hand, noted that although the state raised general safety concerns because of the proposed group home's proximity to a junior high school, closer examination showed that those concerns were merely "vague, undifferentiated fears."[229] The *Cleburne* Court commented further that thirty mentally retarded students already attended the junior high school and that this fact, rather than some general assumption regarding mentally retarded individuals, must control.[230]

Under traditional rational basis review, then, the grandparent visitation statute at issue in *Herndon* cannot be said rationally to address the breakdown of family life where it is applied to an intact family and applies indiscriminately to *all* families, whether they have suffered any "breakdown" or not.

Similarly, the *Herndon* court's related assertion that the statute is rational and therefore constitutional because grandparent visitation "will ordinarily benefit" a grandchild[231] fails under traditional rational basis review. Any coercive state interference in family life has been condemned as harmful to

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225. *Id.*

226. *Id.* at 437. (C.L.C. lost in District Court, won in the Court of Appeals, and therefore was the respondent when the United States Supreme Court granted certiorari, 469 U.S. 1016 (1984)).

227. *Id.* at 448.

228. Herndon v. Tuhey, 857 S.W.2d 203, 209 (Mo. 1993) (quoting *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992)).

229. *Cleburne*, 473 U.S. at 449.

230. *Id.*

231. *Herndon*, 857 S.W.2d at 210 (quoting *King*, 828 S.W.2d at 632).

children, no matter how laudable its goal.[232] Whatever philosophical differences individual professionals may espouse,[233] all disciplines agree that children require the stability of a continuous relationship with fit parents. Indeed, "the child's need for . . . stability is so great that disruptions of the child-parent relationship by the state, even when there appears to be inadequate parental care, frequently do more harm than good."[234] When, as in *Herndon,* the quality of a

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232. *See, e.g., Jordan v. Jackson,* 15 F.3d 333, 346 (4th Cir. 1994) ("[D]elay [in returning the child erroneously removed from his parents to their custody] implicates the child's interests in family's integrity and in the nurture and companionship of his parents."). In a marginal aside, the *Jordan* court rather tartly observes that "the Commonwealth should not blithely presume in a context as grave as this one where children have been taken from their families by the state that it is free not to seek review [of the removal] before the Monday or next business day following a Friday or weekend removal." *Id.* at 344 n.12. *See also* Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (describing a family's right "to remain together without the coercive interference of the awesome power of the state" as the most fundamental component of familial privacy). Indeed, grandparent visitation statutes may be particularly irrational in light of the harm caused by judicial intervention itself. *See* Brooks v. Parkerson, 454 S.E.2d 769, 773 (Ga. 1995).

233. Three cursory examples of the points on the continuum of thought regarding the best interests of the child help illustrate the range of positions taken. For Joseph Goldstein, the child's best interests are primarily served by non-intervention, except in clear cut, truly egregious circumstances of "serious bodily injury" or where parents may actually have attempted to do them injury. JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 72 (1979).

Standards promulgated under the aegis of the American Bar Association, but never adopted, generally require a less definitive demonstration of injury or threat of injury to the child, but nevertheless advocate caution in initiating any state intervention. With regard to cultural differences, for example, these standards note that "failure to recognize that children can develop adequately in a range of environments and with different types of parenting may lead to intervention that disturbs a healthful situation for the child." INSTITUTE OF JUDICIAL ADMINISTRATION & THE AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT, comment to § 1.4, at 44 (1977).

Farther along the continuum, Professor Garrison advocates inclusive statutory definitions of abuse and neglect, on a theory that achieving an environment which is both stable and nurturing is sufficiently important to justify more proactive state intervention. "[S]eparation from a disturbed home, which produces an improvement in the child's care, is often preferable to a child's remaining in the disturbed environment." Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative,* 75 GEO. L.J. 1745, 1780 (1987). These commentators thus advocate stability; differences arise as to how and where the stability is best achieved.

234. Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests,* 81 MICH. L REV. 463, 474 (1983); *see also* ANN. M. HARALAMBIE, HANDLING CHILD CUSTODY CASES 187 (1983)

child's family life has not been called into question at all, legislative coercion of grandparent visitation has what can only be described as an entirely irrational cast.

Although "lenient"[235] rational basis review would demand less justification to uphold a challenged statute, it is by no means certain that the grandparent visitation statute could satisfy this standard of review either. Under lenient rational basis review, a legislature is not required to "actually articulate at any time [its] purpose or rationale,"[236] and legislation will survive a constitutional challenge "if there is any reasonably conceivable state of facts that could provide a rational basis."[237] Furthermore the state need not even "produce evidence to sustain [its] rationality."[238] Legislation will survive constitutional challenge if it could have been "based on rational speculation."[239] Although the statute at issue in *Herndon* legitimately might seem to have survived rational basis review given a standard that seems scarcely more than a rubber stamp,[240] in practice even this lenient rational basis review appears to require a more rational footing than the statute can muster.

("Courts increasingly are recognizing the inherent value in keeping children with their parents even though the parents may provide only marginal parenting."). The author subsequently adds the following practical advice: "The attorney for the parent . . . should emphasize [that] the disruption to the child of any removal from home and placement with strangers is worse than the speculative danger to the child pending a hearing on the merits of the case." *Id.* at 177.

See also Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards For Removal of Children From Their Homes Monitoring The Status of Children In Foster Care and Termination of Parental Rights*, 28 STAN. L. REV. 623, 639 (1976) ("Because children are strongly attached to their parents, even "bad" parents, intervention that disrupts the parent/child relationship can be extremely damaging to the child."); Mookin, *Foster Care—In Whose Best Interest?* 43 HARV. ED. REV. 599 (1973); Disruptions of the parent-child relationship have also been strongly disapproved in custody determinations between fit parents. *See, e.g.*, Delzer v. Winn, 491 N.W. 2d 741, 744 (N.D. 1992) (holding that "[m]aintaining stability and continuity in the child's life is a very compelling consideration when determining child custody issues").

235. Professor Galloway has labeled these two levels or types of rational basis review "the deferential rational basis test" and "the non deferential rational relation test." *See* Russel W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 451 (1988).

236. Nordlinger v. Hahn, 505 U.S. 1, 15 (1992).

237. FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993).

238. Heller v. Doe, 509 U.S. 312, 319 (1993).

239. *Beach Communications Inc.*, 508 U.S. at 315.

240. In *U.S. Railroad Retirement Board v. Fritz*, Justice Brennan, a proponent of traditional rational basis review, observed that lenient rational basis analysis reduces judicial review to a tautology. "It may always be said that [a legislative body] intended to do what it in fact did." U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 187 (1980).

Although lenient rational basis review involves emphasizing specific facts and data consistent with the scope and operation of the statute in a process less searching than traditional rational basis review would allow, the process is nevertheless fact specific, replete with citation to authority, and devoid of bald assumptions.[241] In *Heller v. Doe*,[242] for example, mentally retarded citizens challenged a statutory scheme that provided fewer procedural protections in commitment proceedings for them, as a class, than it did for mentally ill citizens. For example, an involuntary commitment based on mental retardation had to be established by clear and convincing evidence, while involuntary commitment based on mental illness had to be proved necessary beyond a reasonable doubt.[243] The state contended that the lower standard of proof in commitments for mental retardation reflected the fact that mental retardation is easier to diagnose than is mental illness.

Finding a rational basis for the distinction, the Court first noted the well-established diagnostic differences between the two conditions, supporting its assertion with multiple citations to five different medical and diagnostic treatises.[244] The Court then related the diagnostic differences thus established to the circumstances of the case. It noted, for example, that "[m]ental retardation is a permanent, relatively static condition," so given the class of adults before it, the characteristics requiring involuntary commitment would be established by at least an 18 year record.[245] Finally, the Court noted that its conclusions regarding the nature of mental illness and retardation harmonized with the greater body of law on the subject. It cited Blackstone, for example, noting that the distinction between the mentally retarded and mentally ill is rooted in Anglo-

241. The majority opinion in *Heller* is a particularly apt example of the actual limits of lenient rational basis review, since three members of the Court found the majority opinion insufficiently searching. Heller v. Doe, 509 U.S. 312, 335 (1993) (Souter, J., dissenting).

242. *Id.* at 312.

243. *Id.* at 315.

244. The Court cites AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 29 (3d rev. ed. 1987); AMERICAN ASSOCIATION ON MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5, 16-18 (9th ed. 1992); SAMUEL J. BRACKEL ET AL., THE MENTALLY DISABLED AND THE LAW 16-17, 137 (3d ed. 1985); JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 71-72 (1981); HENRY J. STEADMAN, EMPLOYING PSYCHIATRIC PREDICTIONS OF DANGEROUS BEHAVIOR: POLICY VS. FACT IN DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 123, 125-128 (C. Frederick ed. 1978). *Id.* at 324-25.

245. *Heller*, 509 U.S. at 323.

American jurisprudence.[246] It also cited a United States Supreme Court case dealing with mental disability and three journal and law review articles.[247]

Not only did the *Herndon* court fail to conduct an equivalent review to establish a rational basis for the grandparent visitation statute before it, it could not, in fact, have done so had it tried. The *Herndon* court's first step in a rational basis review should have been to cite authority for its first justification for the open-ended grandparent visitation: the fact that society is experiencing "a general disintegration of the family"[248] which could or should be legislatively addressed. This it did not do, but certainly could have.[249]

Then, consistent with the *Heller* approach, the *Herndon* court should have related the authority supporting its conclusions regarding family breakdown to the facts before it. Although under lenient rational basis review a court can overlook "an imperfect fit between means and ends,"[250] the *Herndon* court would have been forced to concede that there was no fit at all, for a statute designed to remedy family breakdown[251] had been applied where there simply was none.

Finally, the *Herndon* court should have completed its demonstration of rationality by establishing that its conclusion fit within the context of other law and could be harmonized with its own decisions. This, of course, it could not do, for Missouri courts have generally found judicial intrusion in family life to be an impermissible threat to family stability and autonomy. In *State v. Couch*,[252] for example, the court affirmed the "fundamental concept of our society," that parents have the paramount right and obligation "to meet the needs of their children and to provide their material and moral requirements."[253] Similarly, in

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246. *Id.* at 326.

247. *Id.* at 322-25 (citing Addington v. Texas, 441 U.S. 418 (1979)); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985); Kozol et al., The Diagnosis and Treatment of Dangerousness, 18 CRIME & DELINQUENCY 371, 384 (1972); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1242-43 (1974)).

248. Herndon v. Tuhey, 857 S.W.2d 203, 209 (Mo. 1993).

249. Between 1950 and 1992 the number of divorces obtained per year in this country more than tripled, from 385,000 to 1,215,000. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 73, table no. 87 (115th ed. 1995). For an overview of changes in family structure in the United States and the corresponding changes in societal values and attitudes, *see* Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 OKLA. L. REV. 29, 29-31 (1996).

250. *Heller*, 509 U.S. at 321.

251. *Herndon*, 857 S.W.2d at 209.

252. 294 S.W.2d 636 (Mo. Ct. App. 1956).

253. *Id.* at 639.

Aegerter v. Thompson,[254] the court held that since the child's parents were totally responsible for her welfare, they were entitled to autonomy in child rearing decisions. Grandparent visitation over parental objection, it seems, would threaten the stability of family life.

The fundamental nature of the single right at stake in *Herndon* makes rational basis review improper. The right to family integrity should have insulated the Tuheys from state control of their family life in the guise of a grandparent visitation award. The Herndons' grandparent visitation suit, by definition, directly infringed upon the Tuheys' responsibilities and on their joint child rearing decision. It can not be justified, therefore, as an ancillary or incidental intrusion. Since grandparent visitation implicates no competing constitutionally significant interests, an undue burden test is logically inapplicable. Even if, for argument's sake, the undue burden test were to apply, forcing parents to relinquish their minor child to the custody of a third party, whether for a day or an hour, is a "significant intrusion".[255] Finally, even if rational basis review were appropriate, the open-ended grandparent visitation statute at issue finds insufficient "footing in the realities of the subject"[256] to survive any genuine judicial review.

V. SOURCES OF STATE POWER

The *Herndon* court erroneously concluded that the state has the inherent power to override the child rearing decisions of fit parents whenever it concludes a different alternative would be "better." The court specifically rejected a finding of harm or a threat of harm to the child as a prerequisite to state intrusion on family life and opined that this conclusion reflects federal constitutional law.[257] The court reached this conclusion by citing permissible intrusions upon family life which it described as intrusions designed simply to improve a child's life. For example, it characterized *Prince v. Massachusetts*[258] as standing for the proposition that a state "'has a wide range of power for limiting parental freedom' and 'may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.'"[259] In fact, *Prince* expressly acknowledged a parent's constitutionally protected right to child

254. 610 S.W.2d 308 (Mo. Ct. App. 1980).

255. *Herndon*, 857 S.W.2d at 212 (Covington, J., dissenting).

256. Heller v. Doe, 509 U.S. 312, 321 (1993).

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

258. 321 U.S. 158 (1944).

259. *Herndon*, 857 S.W.2d at 207 (quoting Prince v. Massachusetts, 321 U.S. 158, 169 (1944)).

rearing autonomy[260] before it identified a narrow exception to that precept applicable when the child is substantially harmed or threatened with substantial harm.[261] This misapprehension of the basis of state power over family life leads to the *Herndon* court's express rejection of *Hawk v. Hawk*[262] and its requirement that harm or the threat of harm to the child precede state intrusion in the form of court ordered grandparent visitation. Finally, *Herndon* is also in direct conflict with all other domestic relations cases in Missouri. Missouri opinions recognize a threshold requirement of harm or the threat of harm to the child, consistently rejecting any notion that the state can supplant parental decisions simply because it has concluded that another course of action would be better.

The *Herndon* court attempted to rest its conclusion that the state has power to intrude on family life simply to improve it on United States Supreme Court opinions upholding certain statutes affecting children. The court cited *Prince v. Massachusetts* for its validation of child labor laws,[263] suggesting that this demonstrates that state intrusion on family life is constitutionally permissible.[264] The court also quoted *Ginsberg v. New York*: "The well being of its children is a subject within the state's constitutional power to regulate."[265] The court did not, however, analyze the bases for the specific regulations it cited from *Prince*. It did not explore the context of the *Ginsberg* Court's reference to the "well-being of minors." It, therefore, did not discover the difference between a regulation protecting minors from the crippling effects of child labor,[266] or a regulation protecting unsupervised minors from deleterious exposure to pornography,[267] and a regulation like the one before it which simply imposes a judge's preference on fit parents. The court's cursory references completely missed the threshold requirement of harm embedded in the United States Supreme Court precedent cited.

The state's only sources of authority to intrude on family life, its police power and its authority as *parens patriae*, are limited to situations in which a child is harmed or threatened with harm; harm is an indispensable prerequisite. Police power is the power to preserve social order, and its scope is therefore consonant with the general purposes for which the state was created. Thus, the state's police power allows the state to override a decision of otherwise fit

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260. *Prince* described child rearing autonomy as "the private realm of family life which the state cannot enter." *Prince*, 321 U.S. at 166.

261. *Id.*

262. 855 S.W.2d 573 (Tenn. 1993).

263. *Herndon*, 857 S.W.2d at 207 (quoting *Prince*, 321 U.S. 166-67).

264. *Herndon*, 857 S.W.2d at 207.

265. *Id.* (quoting Ginsberg v. New York, 390 U.S. 629, 639 (1968)).

266. *Prince*, 321 U.S. at 168.

267. *Ginsberg*, 390 U.S. at 641.

parents where the decision could severely harm the child, under a theory that the survival of its children is essential to society as a whole.

The state's other source of authority to intrude on family life, its *parens patriae* power, is also triggered only by a severe threat of harm to the child. As *parens patriae,* the state acts as "father of all" to help children or others "legally unable . . . to take proper care of themselves and their property."[268]

In fact, *Herndon*'s interpretation notwithstanding, *Prince* and *Ginsberg* demonstrate the nature of the harm to the child that must precede any state intrusion on family life. In *Prince v. Massachusetts* the Court refused to invalidate legislation which prohibited a "parent" from permitting a minor to sell pamphlets on a public street, citing the inherent police power of the state.[269] The Court first acknowledged the parent's constitutionally protected right to child rearing autonomy, characterizing family life as a "private realm"[270] and noting that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[271] Against this backdrop, however, it identified a narrow exception to this right to familial autonomy, rooted in the survival of "democratic society" as a whole and applicable when a limitation on parental control was necessary to insure children's growth and progression towards maturity and full citizenship. In the case before it, the Court noted that the child's development was imperiled by the "restraints and dangers" of the street and by the "crippling effects" of child employment.[272] The Court therefore concluded that the statute before it was an appropriate exercise of police power.[273]

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268. JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PEROGATIVES OF THE CROWN 155 (1820). *Compare* 3 WILLIAM BLACKSTONE, COMMENTARIES 47 ("The sovereign [is] the general guardian of all infants, idiots, and lunatics . . . .") (cited in Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972)). In the American constitutional system the state's power to act as *parens patriae* is derived from the King's right and obligation under English law to act as "guardian of persons under legal disabilities to act for themselves." *Standard Oil Co.*, 405 U.S. at 257 (1972).

Although the original exercises of *parens patriae* authority corresponded to allegiance paid to the King, by the seventeenth century the nature of *parens patriae* authority had changed and expanded. From that point on, orders were issued providing for the education or support of minors apparently simply because cases of demonstrated need were brought to the Chancellor's attention rather than because of any direct financial interest of the Crown. Neil Howard Cogan, *Juvenile Law Before and After the Entrance of "Parens Patriae,"* 22 S.C. L. REV. 147, 148-52 (1970).

269. Prince v. Massachusetts, 321 U.S. 158, 169 (1944).

270. *Id.* at 166.

271. *Id.*

272. *Id.* at 168.

273. *Id.* at 169.

Similarly, although the *Herndon* court cited *Ginsberg v. New York* for the idea that the state may regulate the family,[274] *Ginsberg* provides an example of the other type of harm which can justify state intrusion on family life. In contrast to *Prince*, which addressed child labor as a threat to "democratic society," *Ginsberg* addressed the situation before it as one in which the child, as opposed to the society, may be harmed. In *Ginsberg v. New York*,[275] the Court held that the enactment of a statute prohibiting the sale of "girlie" magazines[276] to minors was a proper exercise of the state's *parens patriae* authority. Appellant Ginsberg was convicted of selling several such magazines to a minor. He unsuccessfully appealed on the theory that the magazines in question would not be obscene for persons seventeen years of age or older, and an individual's constitutional right to read or see material concerning sexuality should not depend on his or her age. Rejecting this contention, the Court found that the legislation in question limited minors' access to material that would "impair [their] ethical and moral development."[277] The Court noted, further, that the legislation's impact on the minors was permissible because it did not supplant any parental authority or decisionmaking. Although *minors* could not purchase the material in question, nothing in the statute prohibited their parents from purchasing it for them, so parents could "deal with the morals of their children as they saw fit."[278] The legislation was therefore a proper exercise of *parens patriae* authority. Its impact on the minors' lives occurred only during times when the minors lacked direct parental supervision and were, therefore, technically—if fleetingly—without fit parents.

Thus *parens patriae* power and police power both provide the state with authority to act to protect children who have been harmed or threatened with harm by the absence of fit parents and the lack of guidance those parents would have provided. Although *parens patriae* power protects the child in need and police power purports to protect society's interest in insuring its own survival by

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274. Herndon v. Tuhey, 857 S.W.2d 203, 207 (1993).

275. 390 U.S. 629 (1968).

276. The statute in question defined these magazines, *inter alia*, as having "that quality of . . . representation . . . of nudity . . . [which] (i) predominately appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors." *Id.* at 633.

277. The Court expressed some doubt that this conclusion could be supported with any empirical data. It noted, however, that since obscenity is not protected expression it was required to conclude only that the legislature was "not irrational" in finding that exposure to the material in question was harmful to minors, a conclusion it could easily reach. *Id.* at 641.

278. "*Parens patriae*" literally means "parent of the country." BLACK'S LAW DICTIONARY 1114 (6th. ed 1990).

protecting children in need, in practice these terms have been used nearly interchangeably.[279] Both concepts have been used in Anglo-American jurisprudence to equate harm to a child with the absence of a fit parent. In *Bellotti v. Baird*,[280] for example, the Court noted that "[t]he State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent or involvement."[281] Similarly, in *In re Gault* the Court stressed that where state action impacts a child, parental involvement is an indispensable component of the due process to which a child is entitled.[282]

Gault involved prosecution of a minor, Gerald Gault, for making "lewd" phone calls.[283] Gerald was initially detained without any attempt to notify his parents,[284] and his subsequent prosecution was notably lacking in procedural formality. Although *Gault* is a landmark statement of the proposition that "benevolently motivated" judicial discretion in the juvenile context cannot substitute for procedural formality, it is also significant for its express recognition of the family integrity right in the context of the parents' role as protectors of the child. The Court held that Gerald Gault and his parents both were entitled to procedural protection, not simply because of the minor's constitutional rights, but because the presence of a minor's parents, in and of itself, is a necessary part of protecting the minor's rights.[285] A determination of parental unfitness, thus, necessarily describes a "substantial" harm, whether a court uses that word or not, and, conversely, an allegation of "harm" will not rise to a sufficiently "substantial" level to serve as a compelling state interest absent a finding of parental unfitness. The Tuheys' argument that the court could not order grandparent visitation against their united wishes absent some showing of harm to their son, Cody, thus simply expressed the well established

279. In *Prince v. Massachusetts*, for example, the Court cites both the state's *parens patriae* authority and its police power in concluding that the state may restrict a minor's right to sell pamphlets on the street. Prince v. Massachusetts, 321 U.S. 158, 169 (1944).

280. 443 U.S. 622 (1979).

281. *Id.* at 637.

282. *In re* Gault, 387 U.S. 1 (1967).

283. *Id.* at 4, 6.

284. *Id.* at 5.

285. *Id.* at 41, 52-56 (citing with approval a state court decision concluding that two minors' confessions were involuntary where the children's parents were not allowed to be with them while they were being questioned).

constitutional significance of the parent-child relationship.[286] As fit parents, the Tuhey's decision was—or should have been—beyond any state review.

Hawk not only illustrates the proper operation of this threshold precondition in the context of grandparent visitation, but also demonstrates the essential connection the *Herndon* court missed between a grandparent visitation suit and other domestic relations law. *Hawk* held that absent a substantial danger of harm to the child, parents have a right to care for their children without unwarranted state intrusion.[287] Thus, *Hawk* explained that in divorce cases the "harm from the discontinuity of the parent's relationship" empowers a court to determine child custody.[288] Similarly, in cases of child abuse and neglect the state seeks to prevent physical harm to the child.[289] And where the parent denies the child medical treatment on religious grounds, the state can intercede to provide treatment where the condition is life threatening.[290] In contrast, grandparent visitation is qualitatively different; *Hawk* noted that it involves no harm at all, only an unprovable and credibly disputed possibility of some "benefit."[291]

The threshold requirement of harm thus makes a balancing of state interests and family rights possible. Without the harm requirement, the state's power would enable it to countermand any parental decision on the mere supposition that some alternative was preferable. The state as *parens patriae* would become the state as dictator, transformed into a totalitarian system of child rearing, a system the United States Supreme Court expressly rejected nearly three quarters of a century ago.[292] As *Hawk* correctly concluded, allowing a court to impose "its own opinion of the best interests of children" in a grandparent visitation suit diminishes parental rights in other contexts and threatens the broader "privacy rights inherent in the federal constitution." In fact, despite its express rejection of *Hawk*, the *Herndon* court appears to have suffered from the uncomfortable premonition that this was exactly the effect of its rejection of any threshold

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286. The classic articulation of this precept is probably still Justice McReynolds' rejection of Plato's suggestions for state-directed child rearing in favor of the American constitutional conception of an autonomous parent-child relationship. Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923).

287. Hawk v. Hawk, 855 S.W.2d 573, 579 (Tenn. 1993).

288. *Id.* at 580.

289. *Id.*

290. *Id.*

291. *Id.* at 581.

292. In *Meyer v. Nebraska*, Justice McReynolds noted that to "develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest. . . ." Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

requirement of harm. Without such a threshold, potentially limitless awards of visitation loomed; visitation on a par with normal parental contact, visitation which a stroke of the legislative pen could expand to include anyone willing to allege that court ordered contact was in the child's best interest.[293]

The *Herndon* court's response to the logically troubling problem of sanctioning essentially limitless intrusions on family life was to focus on the *amount* of visitation awarded. Characterizing the trial court's extensive and detailed[294] award of visitation to the Herndons as "excessive,"[295] the court noted that the statute permitted visitation only after the grandparent was "unreasonably denied" contact with the minor grandchild for more than ninety days.[296] Actually, although the *Herndon* court made no reference to it, a Missouri appellate court decision had specifically addressed this ninety-day provision some two years earlier. In *Farrell v. Denson*[297] the court of appeals upheld an award of grandparent visitation when only forty-five days had elapsed since the last visitation, concluding that "the 90 [sic] day rule . . . is not jurisdictional."[298] This holding notwithstanding, the *Herndon* court concluded, with no explanation, that the ninety-day period was a "precondition."[299] It then stated that the "precondition" indicated that any award of grandparent visitation made under the statute should not approximate "parental visitation in custody matters"[300] or contact that had occurred voluntarily at any earlier point in time.[301] The court did not explain how, specifically, the ninety-day provision should limit

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293. This is, in fact, exactly what happened in Connecticut. CONN. GEN. STAT. ANN. § 46(b)-59 (West 1995) was enacted in 1978 as a grandparent visitation statute. In 1983 it was amended to allow *any* person to sue for visitation with a child, providing he or she asserted that it was in "the best interest of the child."

294. The court ordered visitation from 9:00 A.M. until 6:00 P.M. on the first and third Saturday of each month; this schedule was to change several months later to permit the Herndons to have Cody spend one overnight visit with them per month. The Herndons were also to have visitation with Cody for two consecutive days, including an overnight visit during his Christmas vacation, and for one week during Cody's summer vacation. The Tuheys were also ordered to "notify the Herndons of all school, social, and athletic activities in which Cody [was] participating that grandparents would reasonably be expected to attend." *Herndon v. Tuhey*, 857 S.W.2d 203, 206 (Mo. 1993).

295. *Id.* at 210.

296. *Id.*

297. 821 S.W.2d 547 (Mo. Ct. App. 1991).

298. *Id.* at 549 (emphasis supplied). In a move that would have pleased the city fathers of Sparta, *see supra* note 295, *Farrell* stated: "[q]uite simply . . . [the grandparent visitation statute] empowers the court to examine grandparent visitation after petition, to evaluate the best interests of the children and to order reasonable visitation . . . . " *Id.*

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

300. *Id.*

301. *Id.*

future visitation awards or why parents should be allowed autonomous child rearing for eighty-nine days but not ninety. Indeed, after setting up this amorphous comparison, the court simply asserted that its interpretation "is based in part on the fact that if the statute allowed a great amount of visitation [it] would be more likely to . . . hold that [the statute is] unconstitutional."[302]

In fact, as the dissent pointed out, the majority's purported limit on grandparent visitation simply made the constitutionality of the statute dependent on the trial court's discretion. If the trial court's visitation award can be characterized as "minimal," the statute is constitutional. If the award is more extensive, the statute, chameleon-like, may become unconstitutional. As the dissent noted, this certainly is no way to order the "decisional process on questions of constitutionality . . . [and is] insupportable in terms of traditional principles of constitutional analysis."[303] The majority rubber-stamped a sentimental notion rather than applying the threshold requirement recited in Missouri domestic relations law, applied in numerous Missouri domestic relations cases, and implicit in federal constitutional law: the state may not intrude on family life absent harm to the child.

Cases involving the medical treatment of children against the express wishes of their fit parents further illustrate the error of *Herndon*'s conclusion that state authority justifies intrusion on family life simply to improve it. Since grandparent visitation suits, like medical treatment cases, involve fit parents,[304] the medical treatment cases provide a particularly useful analogy; they not only illustrate the concept of "substantial harm" in the context of a child with fit parents but also demonstrate how the threshold requirement of harm limits state intrusion into family life.

In *Jehovah's Witnesses v. King County Hospital Unit No. 1*,[305] for example, the court concluded that court-ordered blood transfusions of children against the express wishes of fit parents were consistent with the rule set forth in *Prince v. Massachusetts*.[306] *Jehovah's Witnesses* involved a suit by the plaintiff religious

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302. *Id.* at 210-11.

303. *Herndon*, 857 S.W.2d at 211 (Covington, J., dissenting). It has also proved unworkable in subsequent Missouri grandparent visitation cases: "We can only wonder how courts are to determine when visitation has been unreasonably denied [for ninety days] where, as here, a parent and adult child have become so estranged that they can not communicate and act only to hurt one another. We can also only wonder what business courts have getting into such intra-family disputes." Komosa v. Komosa, 939 S.W.2d 479, 482 n.2 (Mo. Ct. App. 1997).

304. If parental unfitness were alleged, the case would be brought pursuant to state statutes dealing with abused, neglected, or delinquent children.

305. 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (one sentence affirmance).

306. *Id.* at 504 (citing Prince v. Massachusetts, 321 U.S. 158 (1944)).

group, seeking, *inter alia*, a permanent injunction prohibiting the defendant hospitals and doctors from administering blood transfusions to children of members of the group.[307] The court noted that providing life-saving medial care to children who would not otherwise receive treatment was within the state's *parens patriae* authority. Although the court affirmed the primacy of a parent's right to child rearing autonomy, it concluded that the court-ordered blood transfusions of children were not inconsistent with that right, because child rearing autonomy was unaffected except as necessary to save the life of the child. Furthermore, the statute authorizing emergency medical treatment of children whose parents withheld consent provided that a child was considered a ward of the state only for purposes of ordering a blood transfusion and only when the transfusion was deemed medically necessary by the attending physician.

Similarly, in *Crouse Irving Memorial Hospital, Inc. v Paddock*,[308] the court issued as limited an order as possible when it authorized a blood transfusion for a newborn infant over the objections of the Jehovah's Witness parents.[309] Although the court held that its *parens patriae* authority required the order, given the *probability* that the infant would otherwise die, it noted that had the parents been able to choose among reasonable alternative treatments for their baby, the state would have been powerless "to determine the most 'effective' treatment" and impose that judgment upon them.[310] In short, no best interests determination would have been possible.

This same conviction animates Missouri case law addressing the emergency treatment of children against the wishes of otherwise fit parents. In *Morrison v. State*[311] blood transfusions were ordered for an infant suffering from a fatal blood disorder,[312] over the objections of her Jehovah's Witness parents. The parents

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307. *Jehovah's Witnesses*, 278 F. Supp. at 491. The plaintiff religious group, its governing agency and certain individuals sought a declaration of their right to decline blood transfusions for themselves and their minor children, as well as a permanent injunction prohibiting defendant hospitals and doctors from administering blood transfusions to them or their children.

308. 485 N.Y.S.2d 443 (Sup. Ct. 1985).

309. *Id.* at 445.

310. *Id.*

311. 252 S.W.2d 97 (Mo. Ct. App. 1952).

312. Testimony of the infant's attending physician and the medical technician in charge of laboratory records established that the infant suffered from erythroblastic anemia. *Id.* at 98-99. The attending physician testified that this condition resulted in the progressive destruction of red blood cells leading to destruction of brain tissue followed by death. She testified that in her opinion, and that of four other doctors qualified in this field of medicine and practicing in this community, a blood transfusion was the only remedy. *Id.* at 99.

argued that the parent-child relationship was "sacred," the product of "natural law," and could not be intruded upon by the state even to save a child's life.[313] Invoking both the state's police power and its *parens patriae* authority,[314] the court noted the state's obligation to provide essential medical care for a child where the parents would not. It carefully delimited this concept, however, by noting that even where the child's life was endangered, the parents' opinion would not necessarily be overridden "[w]here the proposed treatment is dangerous to life, or there is a difference of medical opinion as to the efficacy of a proposed treatment or where medical opinion differs as to which of two or more suggested remedies should be followed. . . ."[315] The Missouri Supreme Court's understanding of *parens patriae* authority, and its deference to the parent-child relationship thus properly limited state intrusion on the decisions of fit parents to situations where substantial harm loomed and no medical doubt arose. Gray areas and judgment calls are the province of the fit parent, not the state.

Legitimate state intrusion into family life under either the state's police power or its *parens patriae* authority thus coincides with substantial harm or the threat of substantial harm to the child. Where the child has no fit parents, this harm, by definition, continues. The state necessarily remains an ongoing feature in the child's life, through foster care, placement services, plus the assorted means of oversight and regulation which are the sequellae of each. Where the child has fit parents, however, legitimate state intrusion is coextensive with the harm. When the harm ends, the state must again forgo all oversight, defer to all parental decisions, and abandon any nascent plans to improve. If this reflects the historical and constitutional reality of the concept of family and of family autonomy, it reflects no less the reality of the human condition.

In reality, at no point in our history have we, as a society, been able to agree on where a child's best interest lie.[316] We know that a child requires at least minimal care and an uninterrupted relationship with fit parents. We know that state intrusion into the parent-child relationship is harmful.[317] We know that "fit

313. *Id.* at 101.

314. *Id.* at 102-03.

315. *Id.* at 102.

316. *See, e.g.*, People v. Turner, 19 Am. L. Reg. 366, 368 (Ill. 1871) ("What is proper parental care? The best and kindest parents would differ in an attempt to solve the question.").

317. There is considerable judicial comment both in grandparent visitation cases and in other contexts concerning the harm inflicted on a child by the litigation process itself. *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 443 (1989) (judicial process involved in bypassing the parental notification requirement in a statute governing minors' access to abortion); Brooks v. Parkerson, 454 S.E.2d 769, 773 (Ga. 1995), *cert. denied*, 116 S. Ct. 377 (1995) ("[T]he impact of a lawsuit to enforce [visitation] over the parents'

parent" means nothing more than "adequate parent,"[318] but beyond this threshold no agreement exists. There is certainly no consensus regarding the general value of the grandparent-grandchild relationship. The *Herndon* court may conceive of the grandparent-grandchild relationship as a "special bond"[319] of great benefit to both, and, hopefully, that is often so. Other courts have disagreed, however, noting the lack of any evidence that this is always, or even most often, the case. And if some grandparents have a genuine interest in a grandchild, it is an unfortunate truth others do not, and may, in fact, use a visitation suit to control and harass their own child, whatever the cost to the grandchild.[320]

The results of a longitudinal study undertaken by psychologists at the University of California, Berkeley underscores society's inability to predict what the "best" experiences for a child would be. Beginning in 1929, researchers studied a group of 166 infants born in that year, tracking aspects of those individuals' lives for the next thirty years. Among the various analyses made of

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objection can only have a deleterious effect on the child."); Hunter v. Carter, 485 S.E.2d 827, 829 (Ga. Ct. App. 1997) ("There is extensive, compelling justification for requiring a judge to look so closely at the impact of forced visitation on a child and his immediate family."); Dearborn Fabricating & Eng'r Corp. v. Wickham, 551 N.E.2d 1135, 1137 (Ind. 1990) (litigation involved in a loss of parental consortium claim); McMain v. Iowa, 559 N.W.2d 12, 14 (Iowa 1997) ("Our own court has recognized the adverse effect [on children] of litigation to enforce visitation."); Shioji v. Shioji, 712 P.2d 197, 206 (Utah 1985) (Zimmerman, J., dissenting) (litigation involved in a change of custody proceeding).

318. Hafen, *supra* note 234, at 473-94. *See* HARALAMBIE, *supra* note 234, at 177-87. *See also* Wald, *supra* note 234 at 639-40; Mookin, *supra* note 234 at 599.

319. Herndon v. Tuhey, 857 S.W.2d 203, 210 (Mo. 1993) (citing King v. King, 828 S.W.2d 630, 632 (Ky. 1992), *cert. denied*, 506 U.S. 941 (1992)).

320. *See, e.g.*, *King*, 828 S.W.2d at 633 ("[T]he evidence is clear that [the grandfather] is an overbearing individual who intruded with impunity upon [his son and daughter-in-law's] family life, demonstrating total indifference to their wishes."); Steward v. Steward, 890 P.2d 777, 778 (Nev. 1995) (noting grandmother's attempts to control her son); Komosa v. Komosa, 939 S.W.2d 479, 481 (Mo. Ct. App. 1997) ("[Paternal] grandmother and father have a deep and abiding dislike for each other which is manifested by their continuing warfare over the child."). In Congressional Hearings on grandparent visitation Dr. Andre Derdeyne, a child psychiatrist, testified that with all his experience he could not identify characteristics which distinguish grandparents with a genuine interest in their grandchildren from those who, when their child divorced, became "completely caught up in attacking their child's former spouse or even attacking their own child with grave consequences for their grandchildren." *Grandparents: The Other Victims of Divorce and Custody Disputes: Hearing Before the Subcomm. on Human Services of the House of Representatives Select Comm. on Aging*, 97th Cong., 2d Sess, 77 (1982) (statement of Dr. Andre Derdeyne, Professor of Psychiatry, Director, Division of Child and Family Psychiatry, University of Virginia School of Medicine); Belsom, *supra* note 209 at 207; McCoy, *supra* note 209 at C1.

this fund of data, one monograph focused on the socialization process of children up to age fourteen.[321] After 200-plus pages of painstaking analysis, the authors concluded that "[i]f [a child] is under fairly stable and not too discontinuous pressures and secures enough approval and support . . . he becomes, to use the vernacular, 'socialized'[;] . . . even without this optimum combination, he frequently arrives at stable maturity [anyway] . . . [W]e are not sure that we have begun to understand how or why."[322]

VI. CONCLUSION

The fundamental flaw in the *Herndon* decision, Missouri's grandparent visitation statute, and indeed all grandparent visitation statutes, [323] is the apparent assumption that all grandparents are good.[324] Many, of course, are wonderful.[325]

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321. JEAN W. MAC FARLANE ET AL., A DEVELOPMENTAL STUDY OF THE BEHAVIOR PROBLEMS OF NORMAL CHILDREN BETWEEN TWENTY-ONE MONTHS AND FOURTEEN YEARS (1954).

322. MAC FARLANE, *supra* note 321, at 221.

323. Grandparent visitation statutes that include a threshold requirement of harm or the threat of harm to the child, *see, e.g.*, GA. CODE ANN. § 19-7-3 (1991), are, of course, not only constitutionally permissible but desirable, for they provide a legal avenue for a grandparent to assist the child who lacks a functional unit.

324. *See, e.g.*, Herndon v. Tuhey, 857 S.W.2d 203, 210 (Mo. 1993); Beckman v. Boggs, 655 A.2d 901, 909 (Md. Ct. App. 1995) ("[I]t is fundamentally in the best interests of any child to have contacts with his or her grandparents.") (quoting trial court with approval); King v. King, 828 S.W.2d 630, 632 (Ky 1992), *cert. denied*, 506 U.S. 941 (1992) ("That grandparents and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love . . . "). The fallacy of the assumption has been noted by other judges. *See, e.g.*, King v. King, 828 S.W.2d at 635 (Lambert, J., dissenting) ("[The majority makes] the per se assumption that deprivation of access to the grandparent is harm. There is no authority for this proposition and it is otherwise illogical."); Hawk v. Hawk, 855 S.W.2d 573, 581 (Tenn. 1993) ("[W]e also seek to avoid the unquestioning "judicial assumption" that grandparent-grandchild relationships always benefit children . . . ") (citation omitted).

325. The author would point, for example, to her daughter's own grandfather, Leland S. Bohl Sr.

But Good Samaritans,[326] thieves,[327] liars[328] and control freaks[329] alike may all, eventually, become grandparents. The question thus is really who will decide how a child will be raised. Will it be a politician appointed to the bench—for all judgeships are fundamentally political posts[330]—or will it be the child's own fit, married parents?

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326. For example, in *Coberly v. Coberly*, No. 97-00493, a case currently pending in the Florida Court of Appeals, First District, one set of grandparents is assisting in the appeal of an award of grandparent visitation, entered in favor of the child's other grandparents, out of a conviction that the intrusion of the court ordered grandparent visitation on family life is wrong, and interferes with "necessary parental rights." Telephone interview with Theodore Wendler, grandfather (June 19, 1997).

327. Cannon v. Strachman, FD-2180-95A (N.J. Super. Jan. 26, 1996)

328. Steward v. Steward, 890 P.2d 777 (Nev. 1995)

329. *King*, 828 S.W.2d at 630. (Ky. 1992) (Lambert, J., dissenting).

330. In thirty-nine states judges are selected with direct input from the electorate, Daniel R. Deja, *How Judges are Selected: A Survey of the Judicial Selection Process in the United States*, 75 MICH. B.J. 904, 905-06 (1996) (limited jurisdiction judges like family court judges, are nearly all selected in the same manner as judges of general jurisdiction courts). Everywhere judicial selection is by executive appointment, giving the chief executive the opportunity to identify the most qualified candidates for judicial posts, "political expediency may outweigh considerations of professional qualifications." Harry O. Lawson, *Methods of Judicial Selection*, 75 MICH. B.J. 20, 21 (1996). Finally, the addition of a nominating committee to the judicial selection process, touted for nearly a century as a way to remove politics from the process, *Id.* at 23, has been criticized as simply altering the *nature* of the politics involved. "It substitutes bar and elitist politics for those of the electorate as a whole." *Id.* at 24. See also DAVID R. ROTTMAN, U.S. DEPT OF JUSTICE, STATE COURT ORGANIZATION 1993 (1995) at 48-69.