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The Troxel Aftermath: A Proposed Solution for State Courts and Legislatures

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The *Troxel* Aftermath: A Proposed Solution for State Courts and Legislatures

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I. THE DEBATE OVER THE FEDERALIZATION OF FAMILY LAW

One of the biggest controversies in family law today stems from the lack of uniformity in laws across jurisdictions. Most people assume there has always been a lack of involvement in family law by the federal courts. Prior to the advent of modern family law statutes, the U.S. Supreme Court stated "the whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."[1] However, without the "federal government's role in the regulation of the family,"[2] family law would not exist as it does today. Only recently have scholars started to discuss the impact of federal law in shaping the development of family law. Historically, all branches of the federal government were "actively engaged in creating and enforcing laws that bore directly on families," often using "uniform federal standards" to do so.[3] For example, a pension program for the survivors of Revolutionary War veterans required rules on who could qualify as a spouse or child of the deceased veteran.[4]

In addition, the idea of state sovereignty has often been used "as a theory of convenience, strategically invoked and easily dismissed or ignored" in an effort to allow the federal government more flexibility to enter into the realm of family law at its discretion.[5] As Susan Collins points out, in the

> women's suffrage campaign, polygamy, liberalized divorce laws, and interracial marriage attracted national attention as

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1. *Ex parte* Burrus, 136 U.S. 586, 593–94 (1890).
2. Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1765 (2005).
3. *Id.* at 1767.
4. *Id.* at 1782.
5. *Id.* at 1768.

> threats to the traditional family. In the course of debates over proposed regulatory responses, the proper place of the family in the national republic emerged as a heavily contested issue, and the notion that domestic relations fall under the exclusive authority of the states took shape and gained force as a theory of federalism.[6]

The same moral debate continues to occur at the national level today when discussing same-sex marriage, abortion, and as exemplified in this Article, parental rights.[7]

However, the federal courts continue to treat matters of family law with much disdain.[8] One of the more recent examples is the Supreme Court's decision in *United States v. Morrison*.[9] In *Morrison*, the Court held that a provision of the Violence Against Women Act was unconstitutional due to the "need to distinguish 'between what is truly national and what is truly local.'" In the majority opinion, Justice Rehnquist assumed the federal government lacks any role in family law issues. If Congress may criminalize violence against women—due to its aggregate economic effect—under the Commerce Clause, then Congress may constitutionally regulate "family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and child rearing on the national economy is undoubtedly significant."[10] Justice Scalia uses the same rationale favoring state control of family law matters, or as he sometimes defines such matters as those of "morality"[11] in his majority opinion in *Town of Castle Rock v. Gonzales*[12] and dissenting opinion in *Lawrence v. Texas*.[13]

Contrary to these statements by the Supreme Court, there is actually a long "history of the federal government's role in crafting

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6. *Id.* Collins states that the use of this argument "is not because the state sovereignty paradigm is necessarily associated with a specific ideological agenda, but because its history demonstrates it to be a theory of convenience, rather than a meaningful or principled limit on federal power." *Id.* at 1768–69.

7. *See, e.g.*, Defense of Marriage Act, 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006); Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006); Gonzales v. Carhart, 550 U.S. 124 (2007) (discussing the constitutionality of the Partial Birth Abortion Ban Act).

8. *See* Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175, 176–77 (2000) (stating that "[t]his Article acknowledges that in the academic world, constitutional law is King and family law is Cinderella's sister").

9. 529 U.S. 598 (2000).

10. *Id.* at 617.

11. Lawrence v. Texas, 539 U.S. 558, 565 (2003).

12. 54 U.S. 748 (2005).

13. 539 U.S. at 565.

domestic relations law and policy."[14] While "states have primary responsibility for the regulation of families . . . the federal government has considerable authority to intervene and often has done so."[15] However, when the federal government does choose to enter into the realm of family law, as the Supreme Court did in *Troxel v. Granville*,[16] states do not understand the implications. After federal action, state laws often remain unchanged or inadequately amended, leaving state statutes subject to invalidation by the federal courts. More importantly, federal court decisions that were intended to be directly applicable to the entire nation, or at the very least to serve as guidelines for state legislative reforms, lead to completely different laws across state boundaries.

This Article does not argue for or against the federalization of family law but demonstrates why the debate exists and proposes a solution to one issue—third-party visitation—within this controversy. While many scholars have offered suggestions in the past to repair the problems created in the *Troxel* decision,[17] no one has proposed a uniform solution—a law which all states may use as guidance in redrafting their own third-party visitation statutes. This Article begins by discussing the history of parental rights, the oldest recognized fundamental right, in Part II. Part III addresses the history of third-party visitation statutes. Part IV analyzes the *Troxel* opinion in its entirety. Part V discusses the states' judicial and legislative responses to the Court's decision and the varying nature of third-party visitation statutes across the country. Part VI briefly discusses an alternative for state use of third-party visitation statutes as they currently function to argue why a uniform statute is so important. Part VII concludes by offering a solution to the *Troxel* puzzle by proposing the adoption of uniform third-party visitation legislation by states.

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14. Collins, *supra* note 2, at 1765.

15. Law, *supra* note 8, at 184.

16. 530 U.S. 57 (2000).

17. Nancy Levit, *Federalization of Family Law: A Supplemental Annotated Bibliography*, 20 J. AM. ACAD. MATRIMONIAL L. 351 (2007) (citing Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865 (2003) (urging that proof that a third party has been acting as a parent should be enough to defeat any "special weight" given to a parent's decision to deny visitation, absent exceptional circumstances); Stephen A. Newman, *Grandparent Visitation Claims: Assessing Multiple Harms of Litigation to Families and Children*, 13 B.U. PUB. INT. L.J. 21 (2003) (arguing that because of the harm to children from the effects of intergenerational litigation, courts should afford dispositive weight to a parent's decision unless the grandparent has clear and convincing evidence of probable harm to the child)).

II. THE HISTORY OF PARENTAL RIGHTS

The constitutionally protected right to control the care of one's children was first recognized in the 1920s in the United States Supreme Court decisions of *Meyer v. Nebraska*[18] and *Pierce v. Society of Sisters*.[19] *Meyer* and *Pierce* are "often seen as the only two remaining *Lochner*-era substantive due process cases that are still good law today."[20] In *Meyer*, Robert Meyer, an instructor at the Zion Parochial School, was convicted under a Nebraska statute that prohibited the teaching of foreign languages in schools until a student successfully completed eighth grade. Meyer challenged the law as a deprivation of teachers' and parents' liberty without due process of law.[21] While the Court conceded that the purpose of the statute was within the reasonable police powers of the state, the Court ultimately held that the law infringed on individual liberty, which, amongst many things, protects an individual's "right to . . . marry, establish a home and bring up children, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[22]

In *Pierce*, the Court reiterated the holding in *Meyer*. At issue in *Pierce* was an Oregon Compulsory Education Act, which required parents to send their children between the ages of eight and sixteen to a public school within their residential district.[23] Again, following the decision in *Meyer*, the Court held that the Act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[24]

Meyer and *Pierce* were cited repeatedly in numerous Supreme Court decisions that followed.[25] In addition, parental rights were

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18. 262 U.S. 390 (1923).
19. 268 U.S. 510 (1925).
20. *See* Susan E. Lawrence, *Substantive Due Process and Parental Rights: From* Meyer v. Nebraska *to* Troxel v. Granville, 8 J.L. & FAM. STUD. 71, 72 (2006).
21. *Meyer*, 262 U.S. at 396.
22. *Id.* at 399.
23. *Pierce*, 268 U.S. at 530–31.
24. *Id.* at 534–35.
25. *See* Parham v. J.R., 442 U.S. 584 (1979) (holding that with only a screening of a neutral fact-finder, parent can institutionalize their child based on a right to parental decision-making and the presumption that a parent acts in a child's best interests); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that a compulsory school attendance statute violated Amish parents' right to control the upbringing of their children and the parents' right to free exercise of religion); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding a child labor

seen as the "very foundation of social order."[26] Courts have always been hesitant to involve themselves in matters of the family or to allow other branches to interfere since the home has always been shielded by privacy. The assumption has been that the family itself is better equipped to deal with internal conflict and that government interference only leads to more disruption. Even in the early 1990s, when third-party visitation statutes existed in all states, the Supreme Court's jurisprudence continued to reflect a hands-off approach to the family.[27] In addition, it has often been argued in custody disputes that government recognition of the rights of a third party would create more conflict and also lead to a "detrimental impact [on] the child[ren]."[28]

However, the strength of the fundamental parental right of care, custody, and control in current constitutional family law jurisprudence was unclear until *Troxel v. Granville.*[29] In 2000, the Supreme Court directly addressed a parent's fundamental right in the context of the state of Washington's grandparent visitation statute. Since 2000, family law practitioners and, more importantly, judges have continued to struggle with the status and constitutionality of existing third-party visitation statutes. Further, the number of third parties, not just grandparents and relatives, who could potentially petition for visitation is growing exponentially given the changing dynamic of the family. *Troxel* was much needed when the case was decided, but the ultimate holding resolved very little for states.

III. THE HISTORY OF THIRD-PARTY VISITATION STATUTES

"The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of [the] changing realities of the American family."[30] State legislatures

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law stating that while there is a right to parental decision-making it is not absolute).

26. Kristine L. Roberts, *State Supreme Court Applications of* Troxel v. Granville *and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV. 14, 15–16 (2003).

27. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (striking down a spousal notification requirement due to desire to promote familial harmony and avoid the creation of more domestic conflict).

28. Susan Tomaine, Troxel v. Granville*: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family*, 50 CATH. L. REV. 731, 737 (2001).

29. 530 U.S. 57 (2000).

30. *Id.* at 64.

began drafting statutes allowing for third parties to petition for visitation rights of minors in the late 1960s for this exact reason—the changing composition and dynamic of family. Prior to *Troxel*, all states had third-party visitation statutes.[31] Even after *Troxel v. Granville* seemed to suggest third parties lacked all rights to petition for visitation, all states continue to have legislation that allows grandparents or other third parties to seek visitation.[32]

During the latter part of the century the country began experiencing high divorce rates.[33] As a result, single parenthood and "blended families" became more common.[34] Women and mothers began entering the workforce in large numbers.[35] State legislatures began recognizing the changing nature of the family by adopting third-party visitation statutes. Justice O'Connor addressed the advent of grandparent visitation statutes due to the changing dynamics of the family in her *Troxel* plurality opinion:

> The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children—or 5.6 percent of all children under the age of 18—lived in the household of their grandparents.[36]

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31. Maldonado, *supra* note 17, at 867.

32. *Id.* at 868.

33. "By 1965, 2.5 marriages per thousand people ended in divorce and the next decade saw that rate virtually double." Joan Catherine Bohl, *That "Thorny Issue" Redux: California Grandparent Visitation Law in the Wake of* Troxel v. Granville, 36 GOLDEN GATE U. L. REV. 121, 127 (2006).

34. "By 1975, the people who had divorced were remarrying at a rate of approximately 80% combining children from pervious marriages into a single family and creating 'blended families.'" *Id.* (citing to THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987)).

35. *Id.* ("In 1950, 11.9% of married women with children under six years of age worked outside the home. By 1965, that figure had more than doubled to 23.3%." By the end of 1970s, one-third of all married mothers with young children worked outside the home.).

36. 530 U.S. 57, 63–64 (2000).

In fact, most third-party visitation statutes prior to *Troxel* limited standing to grandparents only, seemingly recognizing the important role of grandparents within the modern-day American family. Most of the aforementioned grandparent visitation statutes "did not require evidence of preexisting relationships between grandparents and their grandchildren" for standing to exist.[37] This "reflected the perception among legislatures, courts, and the public that grandparents enjoy (or at least should enjoy) a 'unique and nostalgic' place in the family."[38]

In addition, seniors are a large and influential voting group. Thus, grandparents have gained legal recognition "due in large part to the wealthy and expansive seniors' lobby."[39] Indeed, after *Troxel* the efforts of grandparent interest groups intensified. The visibility of their websites increased.[40] A detailed book touted as the "legal guide to protecting your relationship with your grandchildren" was published with requirements for filing for custody—not just visitation.[41]

While grandparents obviously enjoy an important role within the family, the changing constitution of the American family also led to the recognition of rights for other third parties outside the traditional nuclear family: non-parent relatives, same sex co-parents, stepparents, and foster parents.[42] In the wake of the medical community's acknowledgement of psychological parenthood and the increasing importance of non-biological adult-child relationships, visitation statutes were enacted that provided standing to non-grandparent petitioners.[43]

There has always been great diversity among third-party visitation statutes. Some statutes allowed only grandparents to

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37. Roberts, *supra* note 26, at 16.

38. *Id.* (citing to Anne Marie Jackson, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563, 575–76 (1994)).

39. Tomaine, *supra* note 28, at 744.

40. *See* Aaron Larson, *Grandparents' Rights to Visitation*, EXPERTLAW.COM, Sept. 2003, http://www.expertlaw.com/library/child_custody/grandparents_rights.html; Loma Davis Silcott, *Grandparent Visitation Rights: Know Your Options, Choose a Plan of Action*, GRANDTIMES.COM, http://www.grandtimes.com/visit.html; Advocates for Grandparent Grandchild Connection, http://grandparentchildconnect.org/ (last visited Feb. 15, 2009).

41. The book not only outlines the requirements of the law of all fifty states, but provides parties with forms required by most courts. It is user-friendly with a complete glossary of legal terms and is intended to be a tool for *pro se* clients. "The purpose of this book is to help you secure visitation with, or obtain custody of, your grandchildren without hiring a lawyer." TRACI TRULY, ATTORNEY AT LAW—GRANDPARENTS' RIGHTS xi (3d ed. 2001).

42. Roberts, *supra* note 26.

43. *Id.*

petition for visitation while other state statutes permitted any third-party to petition for visitation.[44] States also vary regarding the standards courts use to decide whether third-party visitation is appropriate. Some legislatures instruct courts to apply the "best interests of the child" standard used in most cases involving minors in family and juvenile courts.[45] Other legislatures require the petitioning party to show that "harm" will occur to the child if visitation is not granted.[46] Very few legislatures provide a list of factors for courts to consider when determining whether to grant visitation to a petitioner.[47] After *Troxel*, the obvious conclusion was that the laws would become more uniform. However, states continue to drastically differ in their approaches to third-party visitation.

IV. *TROXEL V. GRANVILLE*

A. Facts

Brad Troxel and Tommie Granville, although never married, lived together and had two daughters, Isabelle and Natalie.[48] In June of 1991, Brad and Tommie ended their relationship, and Brad moved in with his parents, Jenifer and Gary Troxel. Brad had regular weekend visitation with his daughters, which meant his parents, the paternal grandparents, also saw Isabelle and Natalie during the regular visitation.[49] In May of 1993, Brad committed suicide.[50] After Brad's death the Troxels continued to have regular weekend visitation with their granddaughters. In October of 1993, Tommie informed the Troxels that she wanted to limit their visitation to one visit per month.[51]

B. Procedural History

In December of 1993, the Troxels petitioned for increased visitation with Isabelle and Natalie under the Washington state

44. *Compare* ALA. CODE 1975 § 30-3-4.1 (Supp. 2008) *with* CONN. GEN. STAT. ANN. § 46b-59 (West 2004).

45. *See, e.g.*, ALASKA STAT. § 25.20.065 (2006); CAL. FAM. CODE ANN. § 3104(b) (West 2004).

46. *See, e.g.*, DEL. CODE. ANN. tit. 10, § 1031 (West 2006); HAW. REV. STAT. ANN. § 571-46 (LexisNexis Supp. 2007).

47. Florida is one state that provides a list of factors via statute. *See* FLA. STAT. § 752.01 (WEST 2003). Hawaii provides a list of factors via case law. *See* Doe v. Doe, 172 P.3d 1067 (Haw. 2007).

48. Troxel v. Granville, 530 U.S. 57, 60 (2000).

49. *Id.*

50. *Id.*

51. *Id.* at 60–61.

third-party visitation statute.[52] The statute provided that "any person may petition for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interests of the child whether or not there has been any change in circumstances."[53] The Troxels asked the court for two weekends of overnight visitation per month and two weeks of summer visitation. In response, Granville asked the court for one day of visitation per month.[54] The trial court judge stated that "it is normally in the best interests of the children to spend quality time with the grandparent" and ordered one weekend of visitation per month, one week of visitation during the summer, and four hours of visitation on each of the petitioning grandparents' birthdays.[55]

Tommie Granville appealed the trial court's decision. He also married Kelly Wynn during that time.[56] The Washington Court of Appeals remanded the decision to the trial court to enter written findings of fact and conclusions of law. On remand, the trial court held that as long as visitation with the Troxels was balanced with the time spent with the nuclear family, visitation was in Isabelle and Natalie's best interests.[57] The court found "the Petitioners are part of a large, central, loving family, all located in this area, and the Petitioners can provide opportunities for the children in the areas of cousins and music."[58] Nine months after the trial court's decision on remand, Kelly Wynn, Tommie's new husband, adopted Isabelle and Natalie.[59]

The Washington Court of Appeals held that third parties did not have standing under the visitation statute unless a custody action was pending and, therefore, reversed the trial court and dismissed the Troxels' petition for visitation.[60] The Washington Court of Appeals stated that limiting third-party visitation to pending custody litigation was "consistent with the constitutional restrictions on state interference with parents' fundamental liberty

52. *Id.* at 61; WASH. REV. CODE ANN. § 26.10.160(3) (West 1994), *invalidated by Troxel*, 530 U.S. 57.
53. *Troxel*, 530 U.S. at 61 (citing to WASH. REV. CODE ANN. § 26.10.160(3)).
54. *Id.*
55. *Id.*; Petition of Certiorari at 68a, *Troxel*, 530 U.S. 5 (No. 99-138).
56. *Troxel*, 530 U.S. at 61.
57. *Id.*
58. *Id.* at 61–62 (citing Petition of Certiorari at 70a, *Troxel*, 530 U.S. 5 (No. 99-138)).
59. *Troxel*, 530 U.S. at 62.
60. *Id.*

interest in the care, custody, and management of their children."[61] The court therefore decided the case purely on statutory grounds.[62]

The Washington Supreme Court consolidated the case with two other visitation cases and affirmed the decision below on constitutional, not statutory, grounds.[63] The Washington Supreme Court stated that while the Troxels had standing, the Washington state visitation statute infringed on a parent's fundamental right to rear their children under the Due Process Clause of the Constitution.[64] The Washington Supreme Court stated that the statute was unconstitutional on two grounds. First, the statute did not require a showing of harm before infringing on the fundamental right of parents to rear their children.[65] Second, the statute was entirely too broad in that it allowed "any person at any time" to petition for visitation.[66]

C. The Decision

The United States Supreme Court, in an uncharacteristic alignment of six justices, voted to affirm the judgment of the Washington Supreme Court denying visitation to the Troxels. In a plurality opinion written by Justice O'Connor, she, along with Justices Rehnquist, Ginsberg, and Breyer, agreed that the Washington visitation statute was unconstitutional as applied to the facts at hand.[67] Justices Souter and Thomas agreed in the judgment denying visitation but did not agree with the plurality's reasoning, so each separately concurred.[68] Justices Stevens, Scalia, and Kennedy dissented.[69]

As stated above, the plurality failed to extend its decision to more than the Washington visitation statute as applied.[70] Therefore, the holding is quite limited. Justice O'Connor stated that because the statute was "breathtakingly broad" and allowed "any person at any time" to petition for visitation, Tommie Granville's Fourteenth Amendment substantive due process rights

61. *Id.*; *In re* Visitation of Troxel, 940 P.2d 698, 700 (Wash. Ct. App. 1997), *amended*, 954 P.2d 289 (Wash. Ct. App.), *aff'd in part In re* Smith, 969 P.2d 21 (Wash. 1998), *aff'd* Troxel v. Granville, 530 U.S. 57 (2000).
62. *Troxel*, 530 U.S. at 62.
63. *Id.*
64. *Id.* at 63.
65. *Id.* at 57.
66. *Id.* at 63.
67. *Id.* at 57.
68. *Id.*
69. *Id.*
70. *Id.* at 67.

were violated.[71] In granting visitation to the Troxels, the Court interfered with Granville's fundamental right to the care, custody, and control of her children.[72] Citing to *Pierce*, Justice O'Connor noted that "[t]he child is not a mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[73] In addition, there was no finding that Tommie Granville was unfit.[74] The lower state courts gave no weight to the constitutionally recognized presumption that a parent is fit and acts in a child's best interests. Instead, the trial court "judge placed the burden on Granville, the fit custodial parent, the burden of *disproving* that visitation would be in the best interests of her children."[75] In fact, "[t]he judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be 'impact[ed] adversely.'"[76]

Justice Souter argued for affirming the Washington State Supreme Court decision in its entirety. "The issues that might well be presented by reviewing a decision addressing the specific application of the state statute by the trial court . . . are not before us and do not call for turning any fresh furrows in the 'treacherous field' of substantive due process."[77] In other words, Justice Souter argued the highest court of a state is better equipped to address the application of that state's own statute, especially in an area like domestic relations, which is ripe for the extension of substantive due process rights.

While expressing no opinion on the issue, Justice Thomas stated that neither party "argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision."[78] Because substantive due process rights were not challenged, Justice Thomas concurred in the judgment and agreed that there is

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71. *Id.*
72. *Id.*
73. *Id.* at 65; Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).
74. *Troxel*, 530 U.S. at 68.
75. *Id.*

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham v. J.R., 442 U.S. 584, 602 (1979).
76. *Troxel*, 530 U.S. at 69.
77. *Id.* at 75–76; Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977).
78. *Troxel*, 530 U.S. at 80.

a fundamental parental right to the care, custody, and control of children.[79] However, Thomas noted that the plurality, Justice Souter, and Justice Kennedy recognized the fundamental right without applying the appropriate standard of review—strict scrutiny.[80]

Justice Stevens believed the Court should have denied certiorari in this case, stating this was an issue that should be left to the state courts.[81] The Washington Supreme Court indicated that the statute was unconstitutional, and the state legislature therefore needed to redraft the statute.[82] However, Justice Stevens noted that since the Court granted certiorari, it should find the statute unconstitutional on its face and address all the federal questions presented to the court.[83] First, Justice Stevens noted that the Court should not be involved in an independent fact assessment of the case.[84] Second, he stated that the standard used by the state courts in such visitation disputes should be the best interests of the child, not a harm threshold.[85] Stevens noted that there will be some instances where parental liberty will be outweighed by the best interests of the child "because even a fit parent is capable of treating a child like a mere possession."[86] Justice Stevens even suggested that there are constitutionally protected children's rights in that "it seems . . . extremely likely that, to the extent parents and families have fundamental liberty interests . . . so, too, do children have these interests, and so, too, must their interests be balanced in the equation."[87]

Justice Scalia and Justice Kennedy both wrote brief dissents in the case. Justice Scalia believed that such an issue should be left entirely to the states, for it is not the role of the Court to interfere in matters of family law.[88] While Justice Scalia obviously believed that no fundamental parental right is enumerated in the Constitution, he indicated that while he would "not now overrule" the cases which recognize such a right, neither would he extend those cases.[89] Justice Kennedy wrote that the case should be remanded due to the portion of the Washington Supreme Court's

79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 80–81.
83. *Id.* at 81.
84. *Id.* at 82.
85. *Id.* at 85–86.
86. *Id.* at 86.
87. *Id.* at 88.
88. *Id.* at 92.
89. *Id.*

holding requiring harm.[90] Kennedy asserted that this is not the framework for a federal question. There is only a federal question when the state court frames the issue more narrowly—as one regarding a fundamental parental right to the care, custody, and control of children.[91]

D. Issues Troxel *Addressed But Left Open*

While the holding of *Troxel v. Granville* is quite narrow in that it only found the Washington state visitation statute unconstitutional as applied, Justice O'Connor wrote a lengthy plurality decision addressing the many issues presented by the statute. Justice Stevens recognized the extent of O'Connor's decision while she remained indecisive when he stated,

> [I] believe that we should confront the federal questions presented directly. For the Washington statute is not made facially invalid either because it may be invoked by too many hypothetical plaintiffs, or because it leaves open the possibility that someone may be permitted to sustain a relationship with a child without having to prove that serious harm to the child would otherwise result.[92]

It is unknown what Justice O'Connor's reasoning was for writing such a lengthy plurality opinion, which, in light of the ultimate holding in the case, was mere dicta. However, the opinion does provide guidance for state courts and legislatures.

First, the plurality opinion discussed the idea of parental fitness. Justice O'Connor stated that the statute is overbroad because there were no requirements that a parent be found unfit.[93] Given the presumption adopted in *Parham v. J.R.* that a parent is presumed fit and to act in a child's best interests, this is unconstitutional.[94] Since the holding in *Troxel* is only applicable to the Washington statute, it is unclear whether there is a requirement that a parent be found unfit for a third party to be granted visitation. However, Justice O'Connor did state that the burden of proving unfitness should fall on the petitioning party.[95]

Second, while the Washington Supreme Court held the statute was unconstitutional because it did not require a showing of harm,

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90. *Id.* at 95.
91. *Id.*
92. *Id.* at 81.
93. *Id.* at 68.
94. *Id.* at 69; 442 U.S. 584, 602–03 (1979).
95. *Troxel*, 530 U.S. at 69.

O'Connor's plurality opinion failed to directly address the harm requirement. Justice O'Connor wrote that "special circumstances" may lead to the granting of visitation and suggests that situations where "harm" to the child is at issue could be such a circumstance.[96] In stating such, Justice O'Connor failed to indicate whether best interest of the child or harm should be the standard for petitions for visitation. The plurality also discussed other "special circumstances" where visitation may be granted to a third party. Other such circumstances include where there is an ongoing relationship between a child and a third party and where the child expresses a preference for visitation.[97]

Third, the plurality opinion discussed whether or not it is relevant if the parent allows some visitation, but there is disagreement with the third party as to the amount, and no agreement is reached regarding the dispute.[98] Justice O'Connor even mentioned that some state statutes do not allow a court to grant visitation unless a parent has clearly denied visitation.[99]

After the *Troxel* opinion, all fifty states were left with third-party visitation statutes of some kind. Many questions remained. Was *Troxel* even relevant to individual state statutes since the holding was only applied in the particular case? Or, were the lengthy opinions in *Troxel* supposed to provide guidance to state legislatures for their statutes to comply with the Constitution?

V. BUILDING A UNIFORM THIRD-PARTY VISITATION STATUTE

A. State Responses to Troxel

After *Troxel*, the majority of states waited for the challenges to visitation statutes to play out in court. Either through appellate court or supreme court decisions, twenty-one states found their third-party visitation statutes to be constitutional.[100] Only six states

96. *Id.* at 74.
97. *Id.*
98. *Id.* at 71.
99. *Id.*
100. Alabama, Alaska, Arizona, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Texas, Virginia, West Virginia, and Wisconsin all found their statutes to be constitutional. *See* L.B.S. v. L.M.S., 826 So. 2d 178 (Ala. Civ. App. 2002); Evans v. Taggert, 88 P.3d 1078 (Alaska 2004); Jackson v. Tangreen, 18 P.3d 100 (Ariz. Ct. App. 2000); Crafton v. Gibson, 752 N.E.2d 78 (Ind. Ct. App. 2001); Vibbert v. Vibbert, 144 S.W.3d 292 (Ky. Ct. App. 2004); Galjour v. Harris, 795 So. 2d 350 (La. App. 1st Cir. 2001); Rideout v. Riendeau, 761 A.2d 291 (Me. 2000); Blixt v. Blixt, 774 N.E.2d 1052 (Mass. 2002); Soohoo v. Johnson, 731 N.W.2d 815 (Minn. 2007);

found their third-party statutes facially unconstitutional.[101] Nine states found their third-party statutes unconstitutional as applied, and fourteen states made no court determination regarding their third-party visitation statutes.[102] Even in those instances where courts found third-party visitation statutes to be unconstitutional on their face, state legislatures did not always subsequently respond.

The variety among the individual third-party visitation statutes is even more apparent after *Troxel*. While most states limit third-party visitation to grandparents, many include great-grandparents, stepparents, siblings, and third parties who have a significant relationship with the child. For those states that permit third-party visitation, only some states define what is necessary to establish the significant or existing relationship required.[103] Further, some states do not rely on third-party visitation statutes to award visitation; instead, they use the common law doctrines of de facto parenthood, *in loco parentis*, or psychological parenthood.[104] In

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Zeman v. Stanford, 789 So. 2d 798 (Miss. 2001); Polasek v. Omura, 136 P.3d 519 (Mont. 2006); *In re* R.A. & J.M., 891 A.2d 564 (N.H. 2002); Williams v. Williams, 50 P.3d 194 (N.M. Ct. App. 2002); Davis v. Davis, 725 N.Y. S.2d 812 (N.Y. Fam. Ct. 2001); *In re* Marriage of O'Donnell-Lamont, 91 P.3d 721 (Or. 2004); Malone v. Stonerook, 843 A.2d 1278 (Pa. Super. Ct. 2004); Griffin v. Griffin, 581 S.E.2d 899 (Va. Ct. App. 2003); Brandon L. v. Moats, 551 S.E.2d 674 (W. Va. 2001); *In re* Paternity of Roger D.H., 641 N.W.2d 440 (Wis. Ct. App. 2002).

101. Only California, Florida, Illinois, Iowa, Michigan, and Washington found their statutes to be unconstitutional on their face. *In Re* Marriage of Harris, 37 P.3d 379 (Cal. 2006); Forbes v. Chapin, 917 So. 2d 948 (Fla. Ct. App. 2005); Belair v. Drew, 776 So. 2d 1105 (Fla. Ct. App. 2001); Wickham v. Bryne, 769 N.E.2d 1 (Ill. 2002); Santi v. Santi, 633 N.W.2d 312 (Iowa 2001); DeRose v. DeRose, 666 N.W.2d 636 (Mich. 2003); *In re* Paternity of Roger D.H., 641 N.W.2d 440 (Wis. Ct. App. 2002).

102. Arkansas, Connecticut, Kansas, Maryland, New Jersey, Oklahoma, South Carolina, South Dakota, and Vermont all found their statutes unconstitutional as applied. Seagrave v. Price, 79 S.W.3d 339 (Ark. 2002); Roth v. Weston, 789 A.2d 431 (Conn. 2002); Dep't of Soc. & Rehab. Servs. v. Paillet, 16 P.3d 962 (Kan. 2001); Koshko v. Haining, 921 A.2d 171 (Md. Ct. App. 2007); Wilde v. Wilde, 775 A.2d 535 (N.J. Super. Ct. 2001); Neal v. Lee, 14 P.3d 547 (Okla. 2000); Camburn v. Smith, 586 S.E.2d 565 (S.C. 2003); Currey v. Currey, 650 N.W.2d 273 (S.D. 2002); Glidden v. Conley, 820 A.2d 197 (Vt. 2003).

103. Alaska, California, Connecticut, Delaware, Hawaii, Louisiana, Virginia, and Wisconsin have broad visitation statutes that permit visitation to third parties more generally. *See* ALASKA STAT. § 25.20.065 (2006); CAL. FAM. CODE § 3104 (West 2004); CONN. GEN. STAT. ANN. § 46b-59 (West 2004); DEL. CODE. ANN. tit. 10, § 1031 (2006); HAW. REV. STAT. ANN. § 571-46 (LexisNexis Supp. 2007); LA. CIV. CODE ANN. art. 136(b) (1999); VA. CODE ANN. § 16.1-278.15 (West 2001); WIS. STAT. ANN. § 54.56 (West 2008).

104. *See infra* Part VI.

addition, even though part of the ultimate holding in *Troxel* articulated a longstanding constitutional presumption that a parent is fit and acts in a child's best interests, twenty-one states do not have such a presumption via statute or common law.[105] Most statutes use a "best interests of the child" standard in third-party visitation cases, but only some states provide factors to be considered by the court,[106] leaving the best interests standard open to interpretation by individual courts. In addition, only a few states require a showing of harm as discussed in *Troxel*.[107]

B. Questions a Visitation Statute Should Answer

1. Definitions of Familial Relationships

First and foremost, third-party visitation statutes should provide definitions of terms used within a statute. While it may seem obvious, biological and legal relationships are often not easily determined. Terms seemingly simple and well-understood—such as grandparent, sibling, and parent-child relationship—must be legally defined or left to open interpretation by the judiciary. With the changing and often varying definition of the family,[108] individual judges within the same locality may interpret familial relationships quite differently.

Statutes should begin by defining a parental relationship as "the child's biological mother or father or adoptive mother or father."[109] If the statute gives special standing, such as shorter time requirements, to grandparents or other biological or adoptive

105. Alabama, Colorado, Delaware, Georgia, Hawaii, Idaho, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Rhode Island, Tennessee, Utah, and Wyoming have no court determinations regarding their third party visitations statutes.

106. *See* ARIZ. REV. STAT. ANN. § 25-409 (2007); CONN. GEN. STAT. ANN. § 46b-59; FLA. STAT. ANN. § 39.509 (West 2003); LA. CIV. CODE ANN. art. 136(b); S.D. CODIFIED LAWS § 25-4-52 (2004); VT. STAT. ANN. tit. 15, § 1011 (1989); W. VA. CODE ANN. § 48-10-501 (West 2002); Dodd v. Burleson, 932 So. 2d 912 (Ala. Civ. App. 2005); Fairbanks v. McCarter, 622 A.2d 121 (Md. 1993).

107. Arkansas, Connecticut, Delaware, Georgia, Hawaii, Kentucky, Tennessee, and Texas all require harm in addition to best interests of the child in granting visitation to third parties. *See* ARK. CODE ANN. § 9-13-103 (LexisNexis Supp. 2005); CONN. GEN. STAT. ANN. § 46b-59; GA. CODE ANN. § 19-7-3 (West 2003); TENN. CODE ANN. § 36-6-302 (West Supp. 2008); TEX. FAM. CODE ANN. § 153.433 (Vernon Supp. 2008); Doe v. Doe, 172 P.3d 1067 (Haw. 2007); *In re* T.L.M., 852 A.2d 38 (Del. Fam. Ct. 2003); Scott v. Scott, 80 S.W.3d 447 (Ky. Ct. App. 2002).

108. *See supra* Part III.

109. Patricia S. Fernandez, *Grandparent Access: A Model Statute*, 6 YALE L. & POL'Y REV. 109, 132 (1988).

relatives, those relationships must be defined as well. Tennessee and Oregon both provide a definition of grandparent. Oregon merely defines grandparent as "the legal parent of the child's legal parent,"[110] while Tennessee provides more detail by stating that a grandparent is either (1) a biological grandparent, (2) the spouse of a biological grandparent, or (3) a parent of an adoptive parent.[111]

Oregon also goes so far as to define a "child-parent relationship" as

> [a] relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter, and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay, mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 18 months.[112]

The statute does not have to provide definitions as an introduction to statutes but may define terms by listing terms that a court "may" consider in interpreting such terms.[113]

2. Standing and Procedures for Petition

Should a statute be limited to grandparents or be more expansive to include all third parties? Should a petitioning party, including grandparents and other relatives, have to prove a prior established relationship with the child? Currently, many statutes only statutorily recognize grandparents as having standing to petition for visitation. Due to the continued expansion of other common law and equitable doctrines,[114] legislation should define all substantial or significant relationships and recognize third

110. OR. REV. STAT. ANN. § 109.119 (West 2003).
111. TENN. CODE ANN. § 36-6-302.
112. *Id.*
113. *See infra* Part VII.
114. *See infra* Part VI.

parties, more generally, as qualifying for visitation. Tennessee defines a "significant existing relationship" with a grandparent as:

> (A) The child resided with the grandparent for at least six (6) consecutive months; (B) The grandparent was a full-time caretaker of the child for a period of not less than six (6) consecutive months; or (C) The grandparents had frequent visitation with the child who is the subject of the suit for a period of not less than one (1) year.[115]

The same definition can be used for all third parties by removing "grandparent" from the definition and including all third parties with a significant relationship. Given the expanding definition of the family, the law cannot continue to ignore the developing role of non-relatives who serve in caretaking roles. If this continues, the role of third parties, and their contributions to the well-being of children, will be ignored.

Should third-party petitions be permitted if parents object to visitation? Should third parties be allowed to petition at anytime, or should a statute require an ongoing legal proceeding? The constitutionally protected rights of parents cannot be ignored. However, parental rights are not absolute. If both parents object to visitation, the third-party petition should be dismissed. Michigan provides that an affidavit from both parents will serve as grounds for a dismissal of a third-party petition for visitation.[116] In addition, the Court in *Troxel* held that parental rights were at issue because the Washington state statute was so overbroad as to allow third parties to petition at any time.[117] Many states began imposing additional requirements if parents are in an intact marriage. For example, California does not permit third-party visitation claims while parents are married, unless one or more of the following circumstances exist:

> (1) The parents are currently living separately and part on a permanent or indefinite basis. (2) One of the parents has been absent for more than one month without the other spouse knowing the whereabouts of the absent spouse. (3) One of the parents joins in the petition with the grandparents. (4) The child is not residing with either parent. (5) The child has been adopted by a stepparent.[118]

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115. TENN. CODE ANN. § 36-6-306(b)(1).
116. *See* MICH. COMP. LAWS ANN. § 722.27b(5) (West Supp. 2008).
117. Troxel v. Granville, 530 U.S. 57, 67 (2000).
118. CAL. FAM. CODE ANN. § 3104(b) (West 2004).

An ongoing proceeding was not required.[119] While an ongoing proceeding may show familial strife and provide grounds for state intervention with familial privacy, compelling state interests—such as child protection—often overcome the familial privacy interest. The parental presumption is constitutionally required while a narrow statute—only applicable during pending actions—is not.[120] Post-*Troxel*, many jurisdictions continue to allow third-party visitation petitions to be filed at any time and should continue to do so.[121]

States can protect against a burdensome number of third-party petitions for visitation by requiring a change of circumstances, which is a standard applied by most jurisdictions in custody cases. As with a requirement for a "significant existing relationship," the statute should define what qualifies as a material and substantial change of circumstances. With a statute providing factors to define "best interests of the child," there needs to be more judicial deference with the statutory definition of "material and substantial change." California provides excellent threshold factors that can be used as permissive factors to determine "material and substantial change."[122]

In addition, as a procedural protection, the statute should require verified affidavits from the petitioning party or opposing parents, so courts can easily dismiss claims that do not meet the statutory requirements. Maine requires:

> The grandparent must file with the petition for rights of visitation or access an affidavit alleging a sufficient existing relationship with the child, or that sufficient efforts have been made to establish a relationship with the child.

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119. *Id.*

120. The Supreme Court of Alaska refused to hold that the third party visitation statute was unconstitutional. The Alaska statute was distinguishable from the Washington state statute in *Troxel*. While the Alaska statute permitted filing of a petition at any time, it was sufficiently narrow because it applied the parental presumption and applied a clear and convincing evidence standard. *See* Evans v. Taggart, 88 P.3d 1078 (Alaska 2004). *See also In Re* Marriage of Harris, 96 P.3d 141 (Cal. 2004) (holding the statute facially constitutional due to application of parental presumption even though filing of action was permitted at anytime).

121. ARIZ. REV. STAT. ANN. § 25-409 (West 2007); CAL. FAM. CODE ANN. § 3104(b); HAW. REV. STAT. ANN. § 571-46 (LexisNexis Supp. 2007); KAN. STAT. ANN. § 60-1616 (2005); KY. REV. STAT. ANN. § 405.021 (West 2006); ME. REV. STAT. ANN. tit. 19-A, § 1803 (Supp. 2008); MD. CODE. ANN. FAM. LAW § 9-102 (West 2006); S.D. CODIFIED LAWS § 25-4-52 (2004); VT. STAT. ANN. tit 15, § 1011 (1989); VA. CODE ANN. § 16.1-278.15 (2001); W. VA. CODE § 48-10-501 (2002); WIS. STAT. ANN. § 54.56 (West 2008).

122. *See supra* note 120 regarding *In Re* Marriage of Harris, 96 P.3d at 143 and accompanying text.

> When the petition and accompanying affidavit are filed with the court, the grandparent shall serve a copy of both on at least one of the parents or legal guardians of the child.[123]

In addition, the Maine statute calls for an affidavit from protesting parents when necessary stating: "The parent or legal guardian of the child may file an affidavit in response to the grandparent's petition and accompanying affidavit. When the affidavit in response is filed with the court, the parent or legal guardian shall deliver a copy to the grandparent."[124]

Again, this protects courts from an inundation of third-party visitation claims. Courts do not then have to address the merits of the case, but only the existence of a significant or substantial relationship.[125]

3. Standard

States must determine what standard is appropriate for third-party visitation cases. All jurisdictions currently use some form of the 'best interests of the child" standard in third-party visitation cases. However, the "best interests of the child" standard varies greatly from jurisdiction to jurisdiction. If the "best interests" standard is used, states should err on the side of legislative clarity and provide factors within the statute itself. Some states allow for little judicial deference. For example, Alabama provides:

> (1) The willingness of the grandparent or grandparents to encourage a close relationship between the child and the parent or parents. (2) The preference of the child, if the child is determined to be of sufficient maturity to express a preference. (3) The mental and physical health of the child. (4) The mental and physical health of the grandparents. (5) Evidence of domestic violence inflicted by one parent upon the other parent or the child. If the court determines that evidence of domestic violence exists, visitation provisions shall be made in a manner protecting the child or children, parents, or grandparents from further abuse. (6) Other

123. ME. REV. STAT. ANN. tit. 19-A, § 1803(2)(A).

124. *Id.* As stated previously Michigan also requires the filing of an affidavit when filing the motion or complaint for visitation. *See* MICH. COMP. LAWS ANN. § 722.27b(5) (West Supp. 2008).

125. *See* Robichaud v. Pariseau, 820 A.2d 1212 (Me. 2003) (holding that an evidentiary hearing is not required before dismissing a grandparent's petition for lack of standing).

> relevant factors in the particular circumstances, including the wishes of any parent who is living.[126]

Other states define best interests while giving the courts room for interpretation. Arkansas provides a less exhaustive list of factors but clearly identifies harm:

> (1) The petitioner has the capacity to give the child love, affection, and guidance; (2) The loss of the relationship between the petitioner and the child is likely to harm the child; and (3) The petitioner is willing to cooperate with the custodian if visitation with the child is allowed.[127]

The best way to create a balance of power—and requiring more from a court than simple mechanics—is to provide a base of best interests of the child factors and allowing for further judicial interpretation.

Many states require a harm determination in addition to determining the best interests of the child,[128] while others include

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126. ALA. CODE § 30-3-4.1(d) (Supp. 2008). Arizona also provides a laundry list of best interests factors, which are not as easily defined:

> [T]he historical relationship, if any, between the child and the person seeking visitation; the motivation of the requesting party in seeking visitation; the motivation of the person denying visitation; the quantity of visitation time requested and the potential adverse impact that visitation will have on the child's customary activities; if one or both of the child's parents are dead, the benefit in maintaining an extended family relationship.

ARIZ. REV. STAT. ANN. § 25-409 (West 2007).

Michigan also has a laundry list of factors:

> (a) Love, affection and other emotional ties between the grandparent and the child. (b) Length and quality of the relation between the child and the grandparent, the role performed by the grandparent, and the existing emotional ties of the child to the grandparent. (c) The grandparent's moral fitness. (d) The grandparent's mental and physical health. (e) The child's reasonable preference. (f) The effect on the child of hostility between the grandparent and the parent of the child. (g) The willingness of the grandparent to encourage the child and the parent or parents of the child. (h) Any history, emotional, sexual abuse or neglect of any child by the grandparent. (i) Whether the parent's decision to deny, or lack of an offer of, grandparent time is related to the child's wellbeing or is for some other unrelated reason. (j) Any other factor relevant to the physical and psychological well-being of the child.

MICH. COMP. LAWS ANN. § 722.27b(5).

127. ARK. CODE ANN. § 9-13-103 (LexisNexis Supp. 2005).

128. *See* ARK. CODE ANN. § 9-13-103; CONN. GEN. STAT. ANN. § 46b-59 (West 2004); DEL. CODE. ANN. tit. 10, § 1031 (West 2006); GA. CODE ANN. § 19-7-3 (West 2003); Doe v. Doe, 172 P.3d 1067 (Haw. 2007); Scott v. Scott, 80 S.W.3d 447 (Ky. Ct. App. 2002).

harm as one of many best interests factors.[129] The plurality in *Troxel* advocates for a harm standard (by referring to the decision below by the Washington Supreme Court).[130] Even if harm is used in a best interests analysis, the statute should provide a definition of harm. For example, Oklahoma provides that the definition of harm or potential harm is "a showing that without court-ordered visitation by the grandparent, the child's emotional, mental or physical well-being could reasonably or would be jeopardized."[131] Oregon refers to harm in a different manner but provides for a similar definition in stating "circumstances detrimental to a child includes but is not limited to circumstances which may cause psychological, emotional or physical harm."[132] A harm standard should not be looked at separate and apart from best interests of the child as often the two are one in the same and are construed from the exact same set of facts. A "best interests of the child" definition —whether created via statute or common law—should incorporate a definition of harm in conjunction with other factors.

In addition, a third-party visitation statute should include an evidentiary standard. It is obvious that the burden of proof should be on the petitioning party as they are seeking to intervene—or interfere—with the parent-child relationship. Also, while some states have adopted a preponderance standard,[133] this is contrary to the parental rights decisions that create a higher threshold for the primary or higher "tiered" parent.[134] Most states have correctly deciphered these parental rights decisions and adopted a clear and convincing standard in third-party visitation statutes.[135]

4. Parental Fitness Presumption

Last, a state must determine whether a biological or legal parent is presumed fit. *Troxel* makes it clear that to comply with the fundamental constitutional right of parental control, a state visitation statue must include a presumption that a parent is fit and

129. ARK. CODE ANN. § 9-13-103.
130. Troxel v. Granville, 530 U.S. 57, 74 (2000).
131. OKLA. STAT. ANN. tit. 10, § 5 (West 2007).
132. OR. REV. STAT. § 109.119 (2003).
133. *See* DEL. CODE. ANN. tit. 10, § 1031; TEX. FAM. CODE ANN. § 153.433 (Vernon Supp. 2008).
134. Adam K. Ake, *Unequal Rights: The Fourteenth Amendment and De Facto Parentage*, 81 WASH. L. REV. 787, 787 (2006). *See also* Devine v. Devine, 398 So. 2d 686 (Ala. 1981); Jones v. Boring, 884 A.2d 915 (Pa. Super. Ct. 2005).
135. *See* COLO. REV. STAT. ANN. § 19-1-117 (West 2005); CONN. GEN. STAT. ANN. § 46b-59 (West 2004); GA. CODE ANN. § 19-7-3 (West 2003); IDAHO CODE ANN. § 32-719 (2006); VA. CODE ANN. § 16.1-278.15 (West 2001).

acts in a child's best interests.[136] While the majority of states that have parental presumptions of fitness do so via statute, eight states created a parental presumption through common law after the *Troxel* decision.[137] Therefore, a constitutionally sound state law *must* provide for a parental presumption of fitness. However, *Troxel* does not go so far as to state whether such a presumption may be rebutted, and if so, through what means. Given the growing role of third parties within the current familial structure, it is only practical that a state law provide for the rebuttal of parental fitness. In Virginia, "[t]he court shall give due regard to the primacy of the parent-child relationship but may upon showing by clear and convincing evidence that the best interests of the child would be served thereby award custody or visitation to any other person with a legitimate interest."[138]

A standard for overcoming the constitutional presumption that a parent is fit and acts in a child's best interests should be higher. In Illinois, the party filing must prove that the parent's actions and decision regarding visitation times are harmful to the child's mental, physical, or emotional health.[139] It thereby establishes a harm standard to overcome the presumption. Vermont also uses a harm standard to rebut the presumption: "To prove parental unfitness the grandparent must prove that the parent's actions or failure to grant grandparent visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare; this standard is similar to the standard for establishing abuse and neglect."[140]

Looking at the list of well-drafted third-party visitation statutes, there is an argument for the adoption of a uniform statute. Even with all of the aforementioned statutes, not one state statute provides answers to all of the questions that are needed for a navigable legislation.

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136. Troxel v. Granville, 530 U.S. 57, 74 (2000).

137. *See* McCune v. Frey, 783 N.E.2d 752 (Ind. 2003); Camburn v. Smith, 586 S.E.2d 565 (S.C. 2003); Glidden v. Conley, 820 A.2d 197 (Vt. 2003); Lindsie D.l. v. Richard W.S., 591 S.E.2d 308 (W. Va. 2003); Roth v. Weston, 786 A.2d 431 (Conn. 2002); Wood v. Wood, 835 So. 2d 568 (La. 2002); Blixt v. Blixt, 774 N.E.2d 1052 (Mass. 2002); Dodd v. Burleson, 932 So. 2d 912 (Ala. Civ. App. 2005).

138. VA. CODE ANN. § 16.1-278.15.

139. 750 ILL. COMP. STAT. ANN. 5/607 (West 2009).

140. VT. STAT. ANN. tit 15, § 1011 (1989).

VI. A STATE LOOPHOLE TO *TROXEL V. GRANVILLE*

Without consistent and thorough state third-party visitation statutes, courts continue to circumvent parental constitutional rights in favor of third parties by using other legal doctrines. In fact, states often "looked to authority under existing third-party visitation statutes to mandate the continuation of the relationship" with third parties seeking custody or visitation "despite the objection of the legal parent."[141] The most commonly used doctrine is that of de facto parenthood, which has long been recognized by most courts.

A de facto custodian is defined as a person who has taken over the role of parent as "caregiver, provider, and guardian"—physically and psychologically.[142] However, "[t]he courts have not applied functional parenthood to legalize the parent-child relationship. Rather, the courts have used the functional parenthood doctrine merely as a means of preserving a visitation relationship."[143] Given the growing number of children born to same-sex parents, de facto parenthood is a useful doctrine by which the parental rights of non-biological parents can be recognized.[144] But the doctrine will continue to be misused in determinations for visitation—as opposed to more complex custody decisions—when a third-party visitation statute is non-existent or inadequate.[145] The functional parenthood and de facto parenthood doctrines do not address the more significant issue of recognizing the co-parent as a legal parent in the eyes of the law.[146] Most parents are then "relegated to third-party status, resulting in both [the party] and [the] child failing to receive any legal benefits of parenthood."[147] With more limited use of the de facto parent or psychological parent doctrines, we are more likely to see the legal recognition of same-sex parents.

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141. *See* Ake, *supra* note 134, at 788.

142. Elizabeth Ashley Bruce, Note, *A Parent's Right Under the Fourteenth Amendment: Does Kentucky's De Facto Custodian Statute Violate Due Process?*, 92 KY. L.J. 529, 530 (2004) (citing KY. REV. STAT. ANN. § 403.270(1)(b) (West 2002)).

143. Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433, 436 (2005).

144. *Id.*

145. *See generally* William Turner, *The Lesbian De Facto Parent Standard in* Holtzman v. Knott*: Judicial Policy Innovation and Confusion*, 22 BERKELEY J. GENDER L. & JUST. 135 (2007).

146. Brooke Silverthorn, *When Parental Rights and Children's Best Interests Collide: An Examination of* Troxel v. Granville *as it Relates to Gay and Lesbian Families*, 19 GA. ST. U. L. REV. 893, 910–11 (2003).

147. *Id.*

The use of the de facto doctrine presents many constitutional problems that are contrary to the Court's holding in *Troxel*. "[T]he Fourteenth Amendment limits the extent to which courts can intrude on the parental rights of a natural or adoptive parent in an attempt to provide remedies for non-parent partners, who are usually legal strangers to the applicable statutory scheme."[148] If a court only determines whether parties meet the de facto parenthood definition necessary to bring a petition, they can award custody to those parties meeting the definition and avoid a thorough analysis of best interests of the child or harm to the child. Without addressing the merits of the case, the courts are then giving de facto parents the same constitutional protections as biological or adoptive parents. Again, this blatantly ignores longstanding constitutional principles—which favor biological parents—reiterated in *Troxel*.[149]

The Court's decisions regarding parental rights, "over time," have come to identify at least two "distinct tiers of parental rights."[150] In *Smith v. Organization of Foster Families for Equality and Reform*, the Court did not decide whether foster parents have fundamental parental rights, only stating in dicta that recognizing such rights "would conflict with the return to their biological parents."[151] In *Quilloin v. Walcott*, a father challenged a Georgia state law that required only the mother's consent for adoption of children born outside of marriage. The Court upheld the Georgia law distinguishing an unmarried father from a married father. The Court specifically stated that an unmarried father has less constitutional protection in "that the State could permissibly give appellant less veto authority than it provides to a married father."[152] "*Troxel* makes it clear that there are limits to the claims grandparents may assert where such claims conflict with a fit, upper-tier parent."[153] This is also clear in the above line of cases.

The danger of de facto parenthood is that it gives a third party parent-like—or legal-custodian-like—status in simple visitation cases. Unlike the common law doctrine of de facto parenthood, a third-party visitation statute does not give parties awarded visitation a new status as a parental equivalent. The statute only recognizes the importance of the third party's relationship with the child. While these third parties now have legally recognized rights

148. Turner, *supra* note 137.
149. Troxel v. Granville, 530 U.S. 57, 60 (2000).
150. Ake, *supra* note 134, at 791.
151. *Id.* at 793 (citing Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 847 (1977)).
152. *Id.* at 794 (citing Quilloin v. Walcott, 434 U.S. 246, 256 (1978)).
153. *Id.* at 800.

and duties because of their relationship with a child, this right is more akin to the second-tier status recognized by the Supreme Court in *Smith*[154] and *Quilloin*.[155] Visitation rights in no way give a third party a fundamental parental right as the de facto parent doctrine does.[156]

VII. CONCLUSION: PROPOSED LEGISLATION FOR THIRD-PARTY VISITATION

The problems created by the diverse nature of state statutes regarding third-party visitation are apparent. In an increasingly mobile society, many family law practitioners and judges deal with jurisdictional issues on a daily basis. Even when a judge can solve the jurisdictional issues present in any given case, statute variation may lead to forum shopping when family conflicts over visitation ensue. The same problems regarding great variation amongst state statutes existed mere decades ago in both custody and child support cases. In response to such problems, states adopted the Uniform Child Custody and Jurisdiction Enforcement Act[157] and the Uniform Interstate Family Support Act.[158] This recognizes that the federalization of family law debate continues, and a simple uniform statute—in another area in which children's interests are at the center of the case—can solve the widely misapplied decision in *Troxel*.

My proposal for a uniform third-party visitation statute is as follows:

1) Any party may file a petition or motion for visitation with an unmarried minor child in a pending action for divorce, custody, or visitation involving such minor child or where there has been a material and substantial change in circumstances for the minor child.
   a) If the party requesting visitation is alleging a material and substantial change in circumstances, a verified affidavit shall be filed with the initial pleadings detailing such material and substantial change.
   b) In determining whether a material and substantial change exists, the court *may* consider the following:
      i) The parents are now living separately and apart on a permanent or indefinite basis;

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154. 431 U.S. 816.
155. 434 U.S. 246.
156. Ake, *supra* note 134, at 796.
157. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 202 (1997).
158. UNIF. INTERSTATE FAMILY SUPPORT ACT (2001) (implemented by 42 U.S.C. § 666 (2000)).

ii) One of the parents has been absent for more than one month without the other spouse knowing the whereabouts of the absent spouse;
iii) One of the parents joins in the petition with the grandparents;
iv) The child is no longer residing with either parent; and
v) The child has been adopted by a stepparent.

2) The party requesting visitation must establish that a substantial relationship exists with the unmarried minor child and that the continuation of this relationship is in the child's best interests.
a) The party requesting visitation must state facts evidencing such a substantial relationship in a verified affidavit that shall be filed with the initial pleadings.
b) If both parents submit verified affidavits opposing visitation with the petitioning party, the court shall dismiss the petition for visitation unless there are material facts at issue which relate to determination of fitness as addressed in § 3 below.
c) In determining whether a substantial relationship exists, the court *may* consider the following:
i) Whether the petitioning party resided or recently resided with the child;
ii) Whether the petitioning party has been granted visitation with the unmarried minor child prior to the third party petition or motion. Visitation shall be defined as both possession, unsupervised visitation, and access, supervised visitation; and
iii) Whether the petitioning party provided for the physical and psychological needs of the child in addition to or in lieu of the biological or adoptive parent.

3) If an evidentiary hearing is held on this matter, the court *shall* presume that the fit parent has acted in the child's best interests with regard to visitation with the third party. The court *may* consider the following factors in determining whether the presumption is overcome:
a) Whether the legal parent is unwilling or unable to care for the child;
b) Whether the child is the subject of abuse or neglect by the legal parent;
c) Whether denial of visitation would result in physical or psychological harm to the child; and/or
d) The preference of the child, if the child is of an age to freely form and express such a preference.

4) The third party filing the petition or motion for visitation with an unmarried minor child shall bear the burden of proof.

While many practitioners, judges, and scholars may disagree with my proposal due to the resistance to the "federalization of family law," it is becoming a common practice for states to adopt uniform statutes due to jurisdictional and conflict of laws issues. My proposal for a uniform third-party visitation statute is not one that interferes with separation of powers or state sovereignty issues, but is a mere suggestion for state courts and legislatures that are struggling to make sense of a muddled United States Supreme Court decision and subsequent confused responses.