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The Unprecedented Intrusion: A Survey and Analysis of Selected Grandparent Visitation Cases

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THE "UNPRECEDENTED INTRUSION":* A SURVEY AND ANALYSIS OF SELECTED GRANDPARENT VISITATION CASES

JOAN C. BOHL**

Grandparent visitation statutes are creatures of the late twentieth century, born, with varying degrees of legitimacy, from the confluence of the political, social, and medical changes of our time. At common law, parental decisions concerning a child's contact with a grandparent or, indeed, with anyone outside of the nuclear unit, were constrained, if at all, by moral rather than legal forces.[1] Grandparent visitation statutes were unknown at common law as were most grandparents themselves, given typical life expectancies.[2] Beginning with medical advancements in the latter half of this century, however, the lifespans, and indeed the quality of life itself, began changing dramatically for average Americans. The man who might have lived to forty-seven at the turn of the century[3] could now expect to live a vigorous life into his seventies.[4] The woman who had a one-in-fifty chance of dying in childbirth in 1970 saw the chance reduced to one in 125 by 1991.[5] A growing divorce rate[6] and changes in societal attitudes towards illegitimacy[7] served to make single parenthood

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

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1. *In re Reiss*, 15 So. 151, 152 (La. 1894), contains one of the earliest judicial statements, of this proposition and is generally representative of the position taken in common law jurisdictions in the absence of some legislative grant of grandparent visitation. *See* Deweese v. Crawford, 520 S.W.2d 522, 524 (Tex. Civ. App. 1975, writ ref'd n.r.e.); 59 AM. JUR. 2D *Parent and Child* § 92 (1987); J.F. Rydstrom, Annotation, *Visitation Rights of Persons Other Than Natural or Adoptive Parents*, 98 A.L.R.2d 325, 326 (1964).

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

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

4. BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., STATISTICAL ABSTRACT OF THE UNITED STATES 87-88 (1994) [hereinafter 1994 STATISTICAL ABSTRACT].

5. In 1970, 21.5 women per thousand died in childbirth in the United States; by 1991 this rate had dropped to 7.9 women per thousand. 1994 STATISTICAL ABSTRACT, *supra* note 4, at 91.

6. Between 1950 and 1992 the number of divorces obtained per year in this country more than tripled, from 385,000 to 1,215,000. 1994 STATISTICAL ABSTRACT, *supra* note 4, at 75. This trend has been the subject of frequent comment in connection with issues of grandparent visitation. *See, e.g.*, *Grandparents Rights: Preserving Generational Bonds: Hearing Before the Subcomm. on Human Services of the House of Representatives Select Comm. on Aging*, 102d Cong. 9 (1991) [hereinafter *1991 Congressional Hearings*] (statement of John H. Pickering, Chair, Commission on Legal Problems of the Elderly, American Bar Association, Washington, D.C.).

7. In 1970, 11% of all children born in the United States were born to unmarried women; by 1991 that percentage had almost tripled, increasing to 30%. 1994 STATISTICAL ABSTRACT, *supra* note 4, at 958. This acceptance of illegitimacy was permanently enshrined in American popular culture by a series

acceptable and correspondingly more common, further changing the face of American society. Most of the foregoing may be common knowledge. A less conspicuous byproduct of these changes, however, was the fact that when hard times befell the inevitably more vulnerable single parent family, grandparents were a more common source of child-rearing help.[8]

Early grandparent visitation statutes thus responded, legitimately, to the plight of grandparents who assumed parental roles during the precarious times of their children's divorces, illnesses, or deaths, only to be shut out when stability returned to their children's lives.[9] In this form, grandparent visitation statutes simply protected

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of episodes in the television situation comedy "Murphy Brown," originally airing in 1992, in which Murphy becomes pregnant, decides she will not marry the father of her child, and decides, instead, to raise the baby on her own. Condemning the story line and the social phenomenon it reflects, Vice President Dan Quayle characterized both as factors in the breakdown of family values and social order, *Quayle Gives Birth to Furor over TV Mom*, ORLANDO SENTINEL TRIB., May 21, 1992, at A1, and immediately found himself at the vortex of a firestorm of criticism. For feminist leaders, Quayle's remarks demonstrated his "blindness and insensitivity to social reality: that a growing number of women are choosing to have children outside of marriage." James Rowley, *More and More Unwed Women Bearing Children*, AP, July 14, 1993, *available in* LEXIS, News Library, AP File. Ethel Long-Scott, executive director of the Women's Economic Agenda Project, called Quayle's remarks "an assault on women." Alice Kahn & Sam Whiting, *Dan Quayle Is No Ladies' Man*, S.F. CHRON., May 21, 1992, at D3. Said one single mother, "Murphy Brown create[s] a feeling of belonging to the new American family." Rowley, *supra*. The contours of this new American family were evident in census findings released in June 1992. Among women 18-44 who had never married, 24% were mothers in 1992, as opposed to 15% in 1982. AMARA BACHU, U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, FERTILITY OF AMERICAN WOMEN: JUNE 1992, at xv (1993). This trend appeared "in all levels of society," according to Carl Haub, a demographer at the Washington research organization Population Reference Bureau. Rowley, *supra*. A 1995 survey conducted by *U.S. News and World Report* found that 70% of those questioned stated that "when children are born to single mothers, it is 'preferable for them to be raised by their mothers' than in a two parent adoptive family." Joseph P. Shapiro et al., *Honor Thy Children*, U.S. NEWS & WORLD REPORT, Feb. 27, 1995, at 42.

8. *1991 Congressional Hearings*, *supra* note 6, at 1-2 (opening statement of Chairman Thomas J. Downey). Aggressive lobbying and support groups representing grandparents who have assumed parental roles have proliferated nationally, with ever increasing visibility. *Grandparents Raising Grandchildren Resolution Adopted by 1995 White House Conference on Aging*, 1 PARENTING GRANDCHILDREN, Summer 1995, at 1-2 (Brookdale Newsletter from the AARP Grandparent Information Center, Washington, D.C.). In May 1995, delegates to the White House Conference on Aging passed resolution 20.3, "Addressing Issues Related to Grandparents Raising Grandchildren," which called for comprehensive increases in the financial, social, and legal support available to grandparent caregivers. *Id.* at 3.

9. In a typical scenario, a mother dies in childbirth and the grieving father entrusts the infant to one set of grandparents or the other. After a period of months or years the child's father wants to reclaim his child and resume the role of custodial parent. Although the grandparents, now attached to the child resist, the rights of a fit parent typically prevailed. *See* Sloan v. Jones, 62 S.E. 21 (Ga. 1908); Miller v. Wallace, 76 Ga. 479 (1886). Grandparents were occasionally awarded some sort of visitation after custody was returned to the father. *See* Wofford v. Clark, 102 S.W. 216, 218-19 (Ark. 1907). Generally, however, that possibility was not even entertained. *Sloan*, 62 S.E. at 30 ("As fond grandmothers sometimes do, she even feels that she has legal rights to the child superior to his father. But however tender may be her love for her grandchild, God gave the child to his parents, not his grandparents. In law the father is entitled to the custody . . . ."). Recent courts and commentators have noted the continued significance of a custodial relationship between grandparent and grandchild in grandparent visitation decisions. *See* Pollard v. Pollard, No. 532463, 1995 WL 534244 (Conn. Super. Ct. Aug. 25,

the quasi-familial status the grandparent had acquired by temporarily assuming a parental role. But if politics makes strange bedfellows, it makes even stranger laws. Gradually, under the impressive political clout wielded by a graying America,[10] grandparent visitation laws evolved from a constitutionally proper protection of a quasi-parental *role*, which had been occupied, fortuitously, by a grandparent, to the constitutionally questionable protection of people who were grandparents simply because they were grandparents.[11] In this new incarnation, grandparent visitation statutes did not concern themselves with whether the grandchildren's family life had suffered disruption.[12] Instead, they allowed grandparents to use "the awesome power of the state"[13] to challenge the child-rearing decisions of a child's own fit married parents. The open-ended grandparent visitation statute had been born.

Challenges brought in different jurisdictions to the constitutionality of open-ended grandparent visitation statutes have been answered with wildly inconsistent judicial pronouncements; two examples can best illustrate the polarization of thought. In August 1988 a dispute arose between one W.R. King and his son and daughter-in-

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1995); *1991 Congressional Hearings*, *supra* note 6, at 22. Indeed, in *Spradling v. Harris*, 778 P.2d 365, 369 (Kan. Ct. App. 1989), the court affirmed an award of grandparent visitation, noting that the children had lived with the grandmother and citing with approval an earlier case which found the fact that the grandchild had lived with the grandmother so significant that it awarded visitation in spite of testimony from a psychologist that the visitation "would be detrimental to the child's health." *Id.* at 369 (citing Commonwealth *ex rel.* Goodman v. Dratch, 159 A.2d 70, 71 (Pa. Super. Ct. 1960)).

10. In 1992, 70.1% of all people 65 years of age and older voted. In contrast, the percentages of people voting were consistently and significantly lower in the age groups most likely to include parents, as opposed to grandparents. In 1992, 53.2% of those aged 25-34 voted, and 63.6% of those 35-44 voted. Furthermore, as the over-65 age group grew in absolute numbers over the 14 years between 1978 and 1992, so too did the percentage who voted. Thus, 65.1% of the 23 million Americans 65 years of age and older in 1984 voted, whereas 70.1% of the 30.8 million Americans 65 years of age and older voted in 1992. 1994 STATISTICAL ABSTRACT, *supra* note 4, at 287; *see also 1991 Congressional Hearings*, *supra* note 6, at 1-2 (opening statement of Chairman Thomas J. Downey) (noting that approximately three-fourths of older Americans are grandparents and that "[i]t is a well-known fact that seniors are the most active lobby in this country"); *id.* at 4 (statement of Olympia J. Snowe) (noting the increased political activity of seniors).

11. This pattern underlies virtually all open-ended grandparent visitation statutes. *See, e.g.*, 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); 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); Hawk v. Hawk, 855 S.W.2d 573, 576 n.1 (Tenn. 1993) (tracing the evolution of the open-ended grandparent visitation statute that it subsequently concluded violated the Tennessee constitution).

12. The first state to enact an open-ended grandparent visitation statute was N.Y. in 1966. *See* N.Y. DOM. REL. LAW § 72 (McKinney 1988). Currently statutes in 17 states are "open-ended." *See* CAL FAM. CODE § 3100(a) (West 1994); CONN. GEN. STAT. § 46(b)-59 (1986); FLA. STAT. ANN. § 752.01 (West 1986); IDAHO CODE § 32-1008 (1983) (repealed 1994); KAN. STAT. ANN. § 60-1616 (1994); KY. REV. STAT. ANN. § 405.021 (Michie Supp. 1989); MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1995); MISS. CODE ANN. § 93-16-3 (1994); MO. REV. STAT. § 452.402 (1992); MONT. CODE ANN. § 40-9-102 (1995); N.J. STAT. ANN. § 9:2-7.1 (West 1996); N.Y. DOM. REL. LAW § 72 (McKinney 1988); N.D. CENT. CODE § 14-09-05.1 (Supp. 1995); OR. REV. STAT. § 109.121 (1994); R.I. GEN. LAWS § 15-5-24.3 (Supp. 1995); S.D. CODIFIED LAWS ANN. § 25-4-52 (1992); VT. STAT. ANN. tit. 15, § 1013 (Supp. 1995).

13. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

law, Stewart and Ann King, the married, natural parents of a child named Jessica, who was then almost a year-and-a-half old.[14] The elder Mr. King alleged that the younger Mr. King did not work hard enough on the family farm and evicted the King family from the house they occupied on the elder Mr. King's land.[15] The King family moved, Jessica's parents being of the opinion that the elder Mr. King was overbearing and intruded excessively in their family life.[16] This incident might have remained simply one more indication that human relations rarely correspond to any ideal, sentimentalized[17] or otherwise, but for Kentucky's grandparent visitation statute. Without statutory limitation or qualification of any kind, section 405.021 of the Kentucky Revised Statutes conferred standing on the elder Mr. King to sue the King family for court-ordered access to Jessica.[18] This he did and was awarded biweekly visitation. The King family unsuccessfully appealed; the constitutionality of the grandparent visitation statute was confirmed by five of the seven justices of the Kentucky Supreme Court.[19]

While the King family's appeal wound its way through the Kentucky appellate process, a similar scenario was unfolding across the state line in Tennessee between grandparents Bill and Sue Hawk and their son and daughter-in-law, the married, natural parents of Megan and Steven.[20] Bill Hawk accused his son of being unable to stand up to his wife "as a man."[21] The younger Hawks disapproved of Bill Hawk's means of disciplining Megan and Steven.[22] In May 1989, Bill Hawk fired his son from his job at the bowling alley owned by the elder Hawks. The elder Hawks then filed suit pursuant to Tennessee's grandparent visitation statute, seeking court-ordered access to Megan and Steven.[23] Like Kentucky's grandparent visitation statute, a Tennessee statute conferred on grandparents an essentially unlimited right to sue;[24] like the elder Mr. King in Kentucky, the elder Hawks were awarded regular visitation. The younger Hawks appealed. In contrast to the Kentucky Supreme Court majority's uncritical approval of Kentucky's open-ended grandparent visitation statute, the Tennessee Supreme Court found functionally identical statutory language to be

14. King v. King, 828 S.W.2d 630, 630 (Ky. 1992).

15. *Id.*

16. *Id.*

17. In his comprehensive and strongly worded dissent to the *King* majority opinion, Justice Lambert characterizes the majority's analysis as based entirely on a "sentimental notion" of the relationship between a grandparent and grandchild. *Id.* at 633 (Lambert, J., dissenting).

18. *Id.* at 631. The statute provides, in pertinent part: "Reasonable Visitation Rights to Grandparents. (1) The circuit court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is the best interest of the child to do so." KY. REV. STAT. ANN. § 405.021 (Michie 1989).

19. Justice Lambert dissented with a separate opinion in which Justice Wintersheimer joined: Justice Wintersheimer dissented with a separate opinion in which Justice Lambert joined. *Id.* at 633-38.

20. *See* Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993).

21. *Id.* at 575.

22. *Id.*

23. *Id.* at 576.

24. "[TENN. CODE ANN. § 36-6-301 (1991)] . . . allows a court to order 'reasonable visitation' with grandparents if it is 'in the best interests of the minor child.'" *Hawk*, 855 S.W.2d at 576.

unconstitutional as applied to "admittedly good parents,"[25] describing it as "a virtually unprecedented intrusion into a protected sphere of family life."[26]

These two irreconcilable assessments of the validity of open-ended grandparent visitation statutes, far from being merely two academically interesting anomalies, actually represent the two prototypical judicial responses. With remarkably little variation, all open-ended grandparent visitation suits[27] follow either one analytical pattern or the other.[28] Although it has certainly been criticized as an exercise in unthinking sentimentality,[29] the majority view of the Kentucky Supreme Court proceeds from the essentially laudable impulse to use the strong arm of the law to "improve" its citizens and thereby provide children with better lives.[30] The fact that an award of grandparent visitation under those circumstances amounts to the imposition of a state sanctioned ideal is easily obscured in the court's appealing characterization of grandparents as a group.[31] The Tennessee Supreme Court's view, in contrast, finds the best interests of the child under the circumstances to be best

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25. *Id.* at 577.

26. *Id.*

27. Although the origins of the family integrity right make constitutional arguments especially compelling when the child lives in an intact family, *see infra* notes 46, 47-69 and accompanying text, family privacy interests do not disappear following death or divorce. These two opposing analyses of grandparent visitation statutes also surface in cases where the statute in question allow a suit for visitation only after a disruptive event has occurred within the family. *See, e.g.*, Campbell v. Campbell, 896 P.2d 635, 641 (Utah Ct. App. 1995) (finding familial privacy rights inapplicable in challenge to constitutionality of a grandparent visitation statute); McIntyre v. McIntyre, 461 S.E.2d 745, 749-50 (N.C. 1995) (rejecting grandparents' attempt to seek visitation under a statutory amendment which equated "custody" and "visitation" both in light of applicable principles of statutory construction and in light of parents' right to determine with whom their children will associate).

28. Very little data exists concerning the number of grandparent visitation suits actually filed. Many cases may settle before any formal judicial proceeding; those that do not may be resolved at the trial level, in unreported decisions, with the losing party lacking either the resources or the resolve to appeal. Reports generated by the State of California suggest that approximately 5% of its custody/visitation disputes are grandparent visitation disputes, although the figure is probably low. *1991 Congressional Hearings*, *supra* note 6, at 43 (statement of Judith M. Filner, Senior Associate, National Institute for Dispute Resolution). The unscientific observations of one California family law practitioner suggested that 20% of his practice consisted of grandparent visitation cases, and confirmed that most cases settle prior to trial. Telephone Interview with Robert S. Walmsley, Partner, Walmsley and Walmsley, Orange County, Cal. (Mar. 20, 1996).

29. *King*, 828 S.W.2d at 633 (Lambert, J.. dissenting).

30. One of the best commentaries on the concept of using law in this fashion is still that of on retired Vermont Supreme Court Justice Isaac F. Redfield, commenting on the Illinois Supreme Court case of *People v. Turner* in 1871:

> The love of reform comes always from the best of purposes; from a desire to have others participate in the beauty and excellence which we have found ourselves. But we cannot disguise the fact, as we look back across the dark tract of the ages, that reformers in all times and in all countries, invoke the aid of force and compulsion, in some form. They sincerely believe themselves entitled to exercise the strong arm of the law.

Isaac F. Redfield, Annotation to *People v. Turner*, 19 AM. L. REG. (O.S.) 372, 374 (1871).

31. *See, e.g.*, *King*, 828 S.W.2d at 632. This sentimentalization of grandparents as a group actually results in clearly discernible distortions and errors in the analytical processes of courts which uphold the constitutionality of grandparent visitation statutes. *See infra* notes 178-90 and accompanying text.

served by remaining in the undisturbed custody of fit parents.[32] By thus resting its decision on the presumption that parents and their children occupy a private sphere the state may not enter, the court adds a constitutionally based conception of privacy to its grandparent visitation analysis. Ultimately, therefore, the significance of an open-ended grandparent visitation statute extends beyond the specific effect it may have on the individual grandparents, parents, and children involved, for it requires us to consider, if only obliquely, the contours of family privacy, the nature of state control over its citizens, and the sources of the state power to exert that control.

The conclusions a given court will reach regarding a grandparent visitation suit applied to an intact family are predetermined by the court's understanding of three related key concepts: the family integrity right,[33] the appropriate standard of constitutional review for a grandparent visitation statute,[34] and the sources of state power.[35] With regard to the family integrity right, for example, courts which validate open-ended grandparent visitation statutes find that family privacy is limited and limitable. They do not conceptualize family life as fundamentally distinct from state control, "the private realm . . . which the state may not enter."[36] The *King* court states, for example, that "while the [federal] Constitution . . . does recognize the right to rear children without undue governmental interference that right is not inviolate."[37]

In contrast, courts which invalidate grandparent visitation awards on constitutional grounds share an expansive understanding of the family integrity right. The *Hawk* court notes, for example, that United States Supreme Court cases affirming specific aspects of child-rearing autonomy actually "reflect[] the Court's larger concern with privacy rights for the family."[38] The *Hawk* court notes, further, that familial privacy is in fact the cornerstone of a constitutional right to privacy: "The Court's protection of parental rights thus evidences a deeper concern for the privacy rights inherent in the federal Constitution."[39] This article takes the position that courts which uphold the validity of open-ended grandparent visitation statutes share a common misapprehension of the family in constitutional jurisprudence and of the family integrity right and have produced analyses of grandparent visitation which are correspondingly flawed.

A second characteristic of grandparent visitation decisions which distinguishes opinions invalidating open-ended grandparent visitation statutes from those that do not is the constitutional standard of review applied. Courts which invalidate grandparent visitation awards on constitutional grounds apply a standard of strict

32. "We find . . . that without a substantial danger of harm to the child, a court may not constitutionally impose its own subjective notions of the 'best interests of the child' when an intact, nuclear family with fit, married parents is involved." *Hawk*, 855 S.W.2d at 579.

33. *See infra* text accompanying notes 134-70.

34. *See infra* text accompanying notes 191-296.

35. *See infra* text accompanying notes 298-393.

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

37. *King*, 828 S.W.2d at 631.

38. *Hawk*, 855 S.W.2d at 578.

39. *Id.* at 579.

scrutiny, either expressly or implicitly. The *Hawk* court states, for example, that in the circumstances under review, "[t]he state lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit."[40]

Perhaps, not surprisingly, courts holding that awards of grandparent visitation may properly be made against the wishes of intact families employ a standard of review far less demanding than strict scrutiny. Some courts in this category simply assert that the intrusion occasioned by a grandparent visitation suit is not a constitutionally cognizable infringement of the family integrity right. Other courts in this category reach the same diminished level of scrutiny by applying the undue burden test[41] and concluding that rational basis review is appropriate because an award of grandparent visitation does not "unduly burden" the constitutional right to familial autonomy. Under either strand of analysis, review is deemed appropriately made under a rational basis standard, a standard so deferential that a grandparent visitation statute will be upheld if the reviewing court can hypothesize any justification for it at all. This article takes the position that since grandparent visitation legislation inevitably impacts a single fundamental right, the right to family integrity, neither deferential rational basis review nor the balancing process embodied in an undue burden test are appropriate. Under appropriately strict judicial scrutiny, grandparent visitation statutes fail to directly further any legitimate state goal and are therefore constitutionally unsustainable.

The final characteristic of grandparent visitation opinions which correlates closely with whether or not a reviewing court will find a grandparent visitation statute constitutional on its face[42] or as applied[43] is the individual court's understanding of the sources of state power. Courts which invalidate awards of grandparent visitation on constitutional grounds recognize that all coercive state intrusions in the family are justified only when they respond to harm or a threat of harm. These opinions recognize, for example, that the state's parens patriae power is properly invoked only to protect minors from harm when the minors lack fit parents or proper guardians of their own. Courts which uphold grandparent visitation awards, on the other hand, neither recognize nor analyze the state's legitimate sources of authority. The *King* majority, for example, supports its assertion that "the [parents'] right to rear [their] children without undue governmental interference . . . is not inviolate"[44] with a

40. *Id.* at 577.

41. The definitive modern statement of this standard is found in Justice O'Connor's dissent in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (O'Connor, J., dissenting). Although the standard is not always expressly described in terms of conflicting constitutional interests, as a practical matter that is the only circumstance in which it is regularly employed.

42. *See, e.g.*, Brooks v. Parkerson, 454 S.E.2d 769, 774 (Ga. 1995) ("The statute . . . is unconstitutional under both the state and federal constitutions because it does not clearly promote the health or welfare of the child and does not require a showing of harm before state interference is authorized.").

43. *See, e.g.*, Hawk v. Hawk, 855 S.W.2d 573, 575 (Tenn. 1993) ("[W]e conclude that the application of the statute to the facts in this case violates the constitutional right to privacy in parenting decisions.").

44. *King*, 828 S.W.2d at 631.

hapless mix of examples that draw on exercises of parens patriae authority and of police power without recognizing or identifying the threat of harm that justified them. This article takes the position that the status of family life as a private sphere insulated from governmental intrusion leads inevitably to the conclusion that where fit married parents decide grandparent visitation is not in their offspring's best interest, state authority provides no legitimate means of overriding that decision.

I. The Family Integrity Right

At its most basic, the family integrity right arises from historical tradition and must be understood specifically in that context,[45] for the due process clause protects only those interests "so rooted in the traditions and conscience as to be ranked as fundamental."[46]

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45. In the interests of accuracy, it is important to note that the role of history and tradition in constitutional interpretation is far more complex and unsettled than the following discussion may suggest. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (invalidating Connecticut statutes that prohibited giving advice to married people regarding contraception use and prohibited use of contraceptives by the married couples themselves). Although agreeing on the statute's unconstitutionality, the *Griswold* majority and each of the three concurrences take a different view of the proper role of history and tradition in the analysis. Rounding out the picture, Justice Black, dissenting, comments that although he considers the law at issue unwise and its policy ill-conceived, *id.* at 507 (Black, J., dissenting), neither history and tradition nor an examination of "basic values" can support its invalidation, *id.* at 519 (Black, J., dissenting). Extended discussion of the nuances of this debate is, fortunately, of little relevance in the present context. The question presented in *Griswold* of whether married couples were entitled to birth control as part of the liberty interest attaching to the marital relationship obviously required the Court to consider how the circumstances of a distant day could be translated into a useable constitutional jurisprudence for modern times. 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 and so on.

46. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989). In *Michael H.*, the Supreme Court explained the practical necessity of "refer[ring] to the most specific level at which a relevant tradition protecting . . . the asserted right can be identified." *Id.* 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 furthers the concept of a legal system relying on the rule of law rather than depending on the predilections of the particular decision maker. Failing to seek specific historical guidance, the Court notes, necessarily reduces the data on which judges may rely and may actually require judges to impose their own subjective impressions on the right or interest they seek to discern. *Id.* at 121-22. Not coincidentally this is also the position espoused by at least one of those sources of tradition himself. Writing in 1765, Sir William Blackstone commented on the importance of "abid[ing] by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady and not liable to waiver with every new judge's opinion; [what becomes a] permanent rule . . . it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments." 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

The traditional conceptualization of the family as a natural unit of society consisting of married parents and their children permeates the writings of all early common law commentators. This natural unit is generally treated as an essentially private sphere of life not only with regard to the organization of the family but in dissertations on the organization of society itself. In the writings of Lord Coke, for example, although the formalities of entering a valid marriage may be governed by statutory law,[47] the relationship between members of the family are fundamentally governed not by statute but by common law[48] and thus by "the order and course of nature."[49] In Lord Coke's view, for example, parents have power over their children by the law of nature and Divine Law. The resulting conception of the family is functionally complete and self contained as well as wholly reciprocal. Parents must educate, maintain, and defend their children, but have an interest in the profits of their labors. Because the interests of parent and child are reciprocal, they "may maintain the suits of each other, and justify the defense of each other's person."[50]

In commentaries written a little over a hundred years later, Sir William Blackstone affirmed the reciprocal nature of the family unit[51] as well as its fundamental importance by noting that single families "formed the first society, among themselves."[52] Dividing society into two separate spheres, Blackstone describes the "public" sphere as all matters pertaining to King and government. In contrast, the "private" sphere consists of an individual's family life and private economic concerns and personal endeavors, within which Blackstone conceives the

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47. LORD COKE, FIRST INSTITUTE OF THE LAWS OF ENGLAND 123, 127 (1628).

48. *Id.* at 11.

49. *Id.* at 12.

50. SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND 109 n.(1)(A) (J.H. Thomas, ed., Alexander Towar 2d Am. ed. 1836) (citations omitted).

51. Common law principles of family life generally, and Blackstone's writings in particular, have occasionally been targeted as representing a paternalistic, repressive, system, to be shunned rather than emulated. *See, e.g.*, Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 974 (1993). Such criticisms represent, at best, an unwillingness to view Common Law concepts in the context of their own time, and, at worst, the convenient stereotypes of those who have not bothered to read Blackstone's actual writings at all. *See* J. Bohl, *"Those Privileges Long Recognized": Termination of Parental Rights Law, the Family Right to Integrity and the Private Culture of the Family*, 1 CARDOZO WOMEN'S L. J. 323, 329-33 (1994) (discussing the social context of Common Law concepts of family life). Civil law and the "old [common] law" *did* allow a husband to beat his wife "for some misdemeanors." 1 BLACKSTONE, *supra* note 46, at *432-33. Under the Common Law of Blackstone's time, however, "the husband was prohibited to use any violence to his wife." 1 *id.* at *432. "[W]ith us," Blackstone notes, "in the politer reign of Charles the second . . . a wife may now have security of the peace against her husband." 1 *id.* at *433. Nicole Brown Simpson, it seems, might have fared better two centuries earlier than she did when she sought the intervention of twentieth-century Brentwood police.

Indeed, the legal effect of marriage on women appears to have troubled Blackstone, moving him to observe "that even the disabilities which the wife lies under, are for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England." 1 *id.* This and other sophisticated and oddly modern ruminations on legal classifications, restraints and rights should also serve to discredit Stanley N. Katz's flippant remark that "Sir William Blackstone was undoubtedly a dull man." Stanley N. Katz, *Introduction to* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND iii (facsimile 1st. ed. 1979) (1765).

52. 1 BLACKSTONE, *supra* note 46, at *47.

"great relations" of private life to lie.[53] The first relation is of "Master and Servant," and is a relationship "founded in convenience."[54] The second relation is that between husband and wife, which Blackstone describes as a union "founded in nature," and modified by "civil society."[55] The third "great relation," also "founded in nature" is that of parent and child, a relationship which, for Blackstone, is inextricably linked to the union of husband and wife by virtue of being "consequential to []marriage . . . [and] it's [*sic*] principle end and design."[56]

For Blackstone, as for other common law authorities, a comprehensive set of mutual obligations and benefits running between parents and children lie within the realm of family life. Parents must first maintain their children, a duty imposed "not only by nature herself" but by the parents' own "proper act" in bringing children into the world.[57] Blackstone notes that although the "laws of all well regulated states" enforce this obligation, the natural and insuperable degree of affection which providence awakens in the "breast of every parent" accomplishes this end more effectively than any law.[58] Parents must also protect their children,[59] a natural duty generally working so strongly that municipal law is applicable more as "a check than as a spur."[60] Parents' final and most important duty is to give children "an education suitable to their station in life,"[61] for, to Blackstone's thinking, 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."[62] As with the other obligations which run between members of a family, Blackstone stresses that this duty arises within the private sphere of family life rather than as a function of the external forces of government.[63]

For their part, the duties children owed their parents corresponded to the benefits they received from their parents.[64] Before their emancipation, children owed their parents obedience and subjection,[65] just as parents owed children appropriate guidance and education.[66] During their minority, children also owed their father the benefits of their labors as long as they lived in the father's home and were maintained by him. This obligation, too, was tempered by reciprocal parental

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53. 1 *id.* at *410.

54. 1 *id.*

55. 1 *id.*

56. 1 *id.*

57. 1 *id.* at *435.

58. 1 *id.* Blackstone stresses the significance and strength of this parental impulse by adding that "not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children can totally suppress or extinguish [it]." 1 *id.*

59. 1 *id.* at *438.

60. 1 *id.* at *439.

61. 1 *id.* at *438.

62. 1 *id.* at *439.

63. 1 *id.* Indeed, Blackstone finds laws mandating education to be generally lacking in this context, with the possible exception of provisions for apprenticeship applicable "past the age of nurture." 1 *id.*

64. 1 *id.* at *441.

65. 1 *id.*

66. 1 *id.* at *438.

considerations for although a father received the profits during the children's minority, he had to account for them when the children came of age.[67] When the children reached twenty-one, the duty of obedience gave way to a duty of "honor and reverence." Further, since parents "protected the weaknesses of [a child's] infancy, parents were entitled to [the child's] protection in the infirmity of their age."[68] Again, Blackstone notes, although these obligations, like those running from parent to child, may also be mandated by civil law, their true source lies in the private, reciprocal relationships between parents and children.[69]

The archetypal family emanating from common law tradition is thus the nuclear family. The primary assumptions concerning family life that were imported into American jurisprudence, therefore, were first that a family consisted of a husband, a wife, and their children. Second, as long as this primary unit was functional,[70] it was defined by the web of reciprocal obligations and supportive relationships within it. Family life occupied an exclusive, private sphere of life which the state could neither intrude upon nor control.

In the context of grandparent visitation suits, the continued validity of the nuclear model of family life is a key barrier to the plaintiff grandparents because what the grandparents are really seeking is the implicit reconfiguration and expansion of the boundaries of the family. If "family" could be divorced from the concept of the "*nuclear* family," plaintiff grandparents could include themselves with parents and children under a new definition of "family" that substituted an illegitimate lay concept for the legal term based in history and tradition. If a court can be persuaded to define "family" so that grandparents are appended to the nuclear family, the outcome of the litigation is obviously set, for the common law concept of family life as insulated from state control loses all practical significance. Parents and children can no longer assert that a right to family integrity protects them from a visitation order. A grandparent visitation suit under these circumstances corresponds, analytically, to custody and visitation disputes between divorcing parents. With the boundaries of the family redrawn, both parents and grandparents become part of the child's family and thus acquire the same legitimate claim to the child's company that the child's divorcing parents would have. This attempt to reconfigure the family would obviously have puzzled and dismayed the original common law commentators. It is equally inconsistent, however, with the modern legal conception of a family.

Although the common law concept of the family retains its significance and vitality in modern constitutional jurisprudence, not all groups claiming familial status conform to the archetype of Blackstone's day, and circumstances affecting families may differ from anything Blackstone could have foreseen. At common law, for example, state actions to terminate parental rights were unknown,[71] as were

67. 1 *id.* at *441.

68. 1 *id.*

69. 1 *id.*

70. For a more comprehensive discussion of family function, particularly as that function can and should be assessed by social service agencies, see Bohl, *supra* note 51.

71. Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV.

formal adoptions and those staples of modern American society, divorce and remarriage.[72] Translating the common law tradition of the family into a useable constitutional "language" has therefore required the modern Court[73] to identify the core values underlying and animating that tradition and to identify corresponding factors characterizing family life. The first factor is a finding that the members of the familial group were brought together by private commitments rather than by operation of law. The second factor is a finding that biological relationships link some members of the group. The third factor is a finding that close, ongoing relationships have been established among members of the group, reflecting the fact that the importance of family life lies in "the emotional attachments that derive from the intimacy of daily association."[74] Collectively, these characteristics are important in the present context not only because they demonstrate the parameters of the

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205 229 (1971)

72. "Lustful, or conscience-stricken, or both, Henry VIII [who lived 1491-1547], the king with six wives, never did obtain a divorce. Nor did anyone else, royal or no, during his reign or for 130 years after, as divorce was unknown in England." ALLEN HORSTMAN, VICTORIAN DIVORCE 1 (1985). Indeed, the most obvious method of ending a marriage was "simply to leave home." LAWRENCE STONE, BROKEN LIVES: SEPARATION AND DIVORCE IN ENGLAND 1660-1857, at 18 (1993). Individuals of social standing for whom this was an unacceptable alternative often resorted to separation by private agreement. *Id.* at 19. These agreements purported to settle financial obligations, set child custody and bestow the right to remarry without fear of legal suit filed by the former spouse. Although cooperative adults could thus acquire the practical equivalent of full divorce by mutual consent, those who entered such agreements with spouses lacking the necessary bonhomie could find themselves with the capital offense of bigamy at some later time, for the agreements were neither enforceable nor honored by any court of law. Those who wanted to legally remarry and have children who were legitimate in the eyes of the law could go through a process of filing separate suits in both civil and ecclesiastical court and then seeking an act of Parliament. This process was so expensive and time consuming that on average only three or four parliamentary divorces were obtained per year. *Id.* at 25; *see also* HORSTMAN, *supra*, at 16-17.

73. The "modern Court" can best be understood as the Unites States Supreme Court from 1937 to the present because of the permanent change which occurred in 1937 in the Court's view of its own role in American society. Prior to 1937, the Court's opinions reflect a tension between a long-standing tradition of judicial forbearance, R.G. MCCLOSKEY, THE AMERICAN SUPREME COURT 137-39 (1960), and the Court's conception of itself as guardian of the free enterprise system, required in this latter role, to invalidate any social legislation which tended to limit freedom of contract, *id.* at 138-39. This tension resulted in an uneven and inconsistent judicial response to legislation. *Compare* Nebbia v. New York, 291 U.S. 502, 556 (1934) (upholding legislative controls on the price of milk) *with* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935) (invalidating some provisions upheld in *Nebbia* because issues of interstate commerce were implicated). In the early to mid-1930s it also led to judicial invalidation of key New Deal legislation, *see, e.g.*, Panama Refining Co. v. Ryan, 293 U.S. 388, 433 (1935); A.L.A. Schechter Poultry Corp v. United States, 295 U.S. 495, 551 (1935), and thus to President Roosevelt's "court packing" plan. Although Roosevelt's plan for judicial reform was, of course, never implemented, the Court, in essence, "reformed" itself. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.7, at 155 (5th ed. 1995). It adopted its present deferential posture with regard to social and economic legislation, retreating from substantive review of legislation where neither fundamental rights nor suspect classifications were implicated. *See infra* note 192 regarding the corresponding change in the significance of the term "reasonable relationship" in the Court's analyses.

74. Smith v. Organization of Foster Families for Equal. & Reform [OFFER], 431 U.S. 816, 844 (1977).

family but also because, by so doing, they describe the focus and scope of the family integrity right.

The first characteristic of a family is that it must be composed of people who have made a personal decision to live together for mutual economic and social support. In *Moore v. City of East Cleveland*,[75] for example, Appellant Moore challenged the validity of an ordinance that restricted occupancy of homes to members of "family" and then defined "family" so narrowly that it prohibited her from establishing a home that included her son and two grandsons who were cousins rather than brothers.[76] Invalidating the ordinance as an impermissible intrusion into the protected area of family life, the Court noted that Mrs. Moore, her son, and her grandsons had made a personal commitment to unite in a single household for mutual sustenance and to share "the duties and satisfactions of a common home."[77]

In contrast, in *Village of Belle Terre v. Boraas*,[78] the Court declined to find that a group of six unrelated students acquired familial status by living together in a rented communal house.[79] The owner of the house in question was cited for zoning violations under a provision which limited occupancy to "families" and defined "family" so that more than two people living together would not qualify unless they were related by adoption, blood, or marriage. Describing the circumstances of the case, the Court noted the transience of the students; all were enrolled at a nearby college, and their numbers fluctuated even during the original eighteen-month term of the lease.[80] The Court concluded that under the circumstances presented, the zoning restrictions implicated no fundamental rights and were, therefore, entirely sustainable as economic and social legislation.[81] A family, therefore, is rooted in the relationships of people living together for mutual support rather than for simple convenience.

The Court has found this indispensable characteristic of family life missing when the group seeking familial status is both initiated by operation of state law rather than voluntary association and remains under continuous state regulation. In *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*,[82] foster parents argued that the psychological ties created 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.[83] The Court conceded that many children develop deep emotional ties with their foster parents, and those ties do entitle them to some procedural protection from state action.[84] It held, however, that those emotional bonds were inherently different

75. 431 U.S. 494 (1977).
76. *Id.* at 496.
77. *Id.* at 505.
78. 416 U.S. 1 (1974)
79. *Id.* at 8.
80. *Id.* at 2-3.
81. *Id.* at 7-8.
82. 431 U.S. 816 (1977).
83. *Id.* at 839.
84. After describing the existing procedural protections available to foster parents, *id.* at 829-32, the

from the bonds between parent and child since they arose from "an arrangement in which the state ha[d] been a partner from the outset."[85] The Court noted the unitary family arises from the personal commitment of individuals and lies "entirely apart from the power of the state."[86] The familial interest the foster parents sought to assert, on the other hand, "derives from a knowingly assumed contractual relationship with the state."[87] The rights of foster parents, therefore, should be ascertained from state law[88] rather than from the history and tradition which inform our understanding of the natural family.

Indeed, the absence of state oversight with regard to the details of family life is such a defining characteristic of the family for the modern Court that the Court regards it as indispensable, even when the group upon which oversight was imposed could have continued to carry out other typically familial activities. In *Stanley v. Illinois*,[89] for example, an unwed father challenged a state law which, in pertinent part, defined "parents" as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child."[90] 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 his 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.[91] The Court observed that even apart from the illogic of suggesting that an unmarried father "without funds and already once presumed unfit" could prevail on such a petition, legal guardianship is not equivalent to the status of a parent.[92] 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,[93] for example, and in the event that his judgment is found wanting, the court could remove him as guardian without the procedural protections available to a parent in a neglect proceeding.[94] 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 could have really 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.

Court concluded that "those procedures satisfy constitutional standards," *id.* at 849.

85. *Id.* at 845.
86. *Id.*
87. *Id.* at 845.
88. *Id.*
89. 405 U.S. 645 (1972).
90. *Id.* at 650.
91. *Id.* at 647.
92. *Id.* at 648.
93. *Id.* at 649.
94. *Id.* at 648-49.

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 arise from the fact that the state sought to separate him from the children he had "sired"[95] as well as "raised."[96] Similarly, Moore's household acquires some constitutionally significant familial status, in part because of the degree to which its members are related.[97] For present purposes, however, the familial characteristic of some blood relationship may be as important for what it does not signify as for what it does signify. Although blood relationships are clearly significant in any analysis of family-like groups, the specific blood relationship of "grandparent" has no special significance at all.

The Court's holding in *Moore*, for example, that a grandmother living with her son and grandson was entitled to some familial status and the corresponding constitutional protection from state intrusion[98] is sometimes erroneously interpreted to signify the Court's willingness to expand the constitutional definition of "family" to include grandparents.[99] The Court does, indeed, specifically note how the members of Moore's household are related.[100] The Court also alludes to the tradition of the extended family sharing a household[101] and comments that state power is limited when it acts to deny "relatives in this degree of kinship"[102] the choice of living together. The real significance, however, of the blood relationships in Moore's household is not limited to, or even focused upon, the specific genetic connections present. Grandparents or other relatives,[103] the Court notes, may often draw together to "participate in the duties and the satisfactions of a common home."[104] They do so for "mutual sustenance"[105] and support and, as part of an interdependent household, may share child-rearing decisions. Indeed, once it identifies a blood relationship, the Court immediately looks past it to the responsibilities and commitments the members of the group have assumed.[106] Although the Court finds Moore's blood tie to those with whom she lives characteristic of a family, her specific status as a grandparent is not more significant, in and of itself, than any other genetic connection.

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95. *Id.* at 651.
96. *Id.*
97. *Moore*, 431 U.S. at 498-99, 504.
98. *Id.* at 494.
99. *See, e.g., Grandparents: The Other Victims of Divorce and Custody Disputes: Hearing Before the Subcomm. on Human Services of the House of Representative Select Comm. on Aging*, 97th Cong. 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 Grandparents' Visitation Statutes*, 86 COLUM. L REV. 118, 129, 132 (1986).
100. *Moore*, 431 U.S. at 496.
101. *Id.* at 504.
102. *Id.* at 505-06.
103. *Id.* at 504.
104. *Id.* at 505.
105. *Id.*
106. *Id.*

The Court's functional analysis of Moore's household illustrates the third and final factor it has identified as characteristic of a family; for the Court, the presence of relationships rooted in the "intimac[ies] of daily association"[107] dominate any analysis of quasi-familial groups. However necessary it may be to inquire into the origins of family-like groups or seek out blood relationships between members, for the Court, Moore's household is most fundamentally family-like because of the ongoing daily interaction of the individuals living within it. The Court notes, 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."[108] The concurring opinion notes that the grandsons have, in essence, a "sibling" relationship and that for John, Moore is "the only maternal influence that he has had during his entire life."[109] Moore's household was a family because ongoing, interdependent relationships and the cumulative details of shared life made it so.

Similarly, in *OFFER*, the Court expressly affirmed the enormous significance of the daily contact between a child and the child's caretaker,[110] even though it held that the status of a foster family was ultimately limited by its contractual origins in state law.[111] In the foster care system, the Court noted, foster parents provided for "the child's daily needs . . . feed[ing] him, provid[ing] shelter, put[ting] him to bed, send[ing] him to school, see[ing] that he washes his face and brushes his teeth."[112] Over time, the Court noted, this relationship would make the foster family not merely important in the emotional life of the foster child but so important that, in this particular respect, the foster family would be functionally the same as a natural family.[113]

Perhaps nowhere in constitutional jurisprudence is the Court's emphasis on the relational nature of the family thrown into sharper relief than in a synthesis of the four cases the Court has heard concerning the familial rights of unwed fathers. In two of the cases, the unwed fathers seeking to retain parental rights to their children were active participants in ongoing relationships with those children. In two they were not. So significant was the presence or absence of an active parent-child relationship to the Court's analysis that the outcome of each case literally turned on that factor.

In the first case, Stanley, an unwed father living with his children, argued that he was entitled to retain parental rights to his children after their mother died, despite a state statute which defined "parent" to exclude unwed fathers.[114] Stanley had lived intermittently with his children and their mother for eighteen years.[115] The

107. Smith v. Organization of Foster Families for Equal. & Reform [OFFER], 431 U.S. 816, 844 (1977).

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

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

110. *OFFER*, 431 U.S. at 836.

111. *Id.* at 845.

112. *Id.* at 827 n.17 (citing ALFRED KADUSHIN, CHILD WELFARE SERVICES 354-55 (1967)).

113. *Id.* at 844.

114. *Stanley v. Illinois*, 405 U.S. 645, 646 (1972).

115. *Id.* at 646.

Court agreed with Stanley, holding that the family integrity right protects the familial bond between a man and the children he has "sired and raised."[116] The Court stressed the relational nature of familial rights by noting that the challenged procedure had actually invaded an intact family to separate a father from his children.[117]

In *Caban v. Mohammed*,[118] the Court amplified its focus on the relational nature of family rights by recognizing a constitutionally significant parental interest where a father who no longer lived with his children nevertheless managed to maintain a consistent, if clandestine, relationship with them.[119] Caban initially lived with his children's mother and participated in the children's 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 his mother-in-law, Caban arranged to continue an active parental relationship with the children; all arrangements were apparently made without the mother's knowledge.[120] When the mother and her new husband sought to adopt the children, Caban tried unsuccessfully to block the adoption in state court. He ultimately prevailed on appeal to the United States Supreme Court, however. The Court specifically found that Caban had a "substantial" parental relationship with his children which gave rise to constitutionally protected familial rights.[121] The Court noted that Caban not only lived with them during their earliest years but contributed to their support. It concluded that "[t]here is no reason to believe that the Caban children — aged 4 and 6 at the time of the adoption proceeding — had a relationship with their mother unrivaled by the affection and concern of their father."[122] The fact that arrangements to see the children had been clandestine did not affect the Court's conclusion at all; the existence of a parent-child relationship was the defining factor.[123]

The Court's reasoning in the two cases in which the biological fathers could *not* show a substantial parental relationship also demonstrates the relational nature of a family and of familial rights. In both *Quilloin v. Walcott*[124] and *Lehr v. Robertson*,[125] the unwed fathers tried to block[126] or to invalidate[127] their children's adoption by the new husband of each child's biological mother. In both cases each child lived with his respective biological mother and her new husband;[128] neither child had ever lived with his biological father. In both cases, the

116. *Id.* at 651.
117. *Id.* at 650.
118. 441 U.S. 380 (1979).
119. *Id.* at 382.
120. *Id.* at 383.
121. *Id.* at 388.
122. *Id.* at 389.
123. *Id.* at 389 n.7, 393 n.14.
124. 434 U.S. 246 (1978).
125. 463 U.S. 248 (1983).
126. *Quilloin*, 434 U.S. at 247.
127. *Lehr*, 463 U.S. at 250.
128. *See Quilloin*, 434 U.S. at 252-53; *Lehr*, 463 U.S. at 262 n.19.

unwed fathers tried, in effect, to challenge the teaching of *Stanley*, amplified in *Caban*, that familial rights are purely relational rights. 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 find that he had an individual right to constitutional protection of his potential relationship with his child.[129] In each case, the father's arguments were resoundingly unsuccessful.

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. Rejecting Quilloin's claim, for example, the Court pointed out that Quilloin had "never exercised actual or legal custody over his child and thus had never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[130] Interestingly, the Court rejects 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.[131] 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 relational rights, not the individual interests of either parent or child.

These judicially recognized characteristics of a family are especially significant in an analysis of open-ended grandparent visitation statutes because these characteristics dictate the proper relationship between the family and the state and thus illuminate the full scope of the family integrity right. The family integrity right obviously protects the family when state action threatens to remove children or terminate a parental right. But since the family is a private sphere of life, formed from personal commitments apart from state control and characterized by a web of interdependent relationships, the family integrity right necessarily protects against lesser intrusions as well. The state may not intrude on family functioning even to a minor degree. It may not, for example, dismiss a potential loss of familial autonomy as negligible and therefore permissible as it sought to in *Stanley* by arguing that the status of legal guardian should be a satisfactory alternative to one who had been a father for eighteen years.[132] The state also may not intrude on family functioning even to further some otherwise desirable goal. It may not, for example, require a child to attend school past the seventh grade, where the totality of circumstances render such attendance inimical to family functioning and community culture, as it sought to in *Wisconsin v. Yoder*,[133] although a fully educated citizenry is certainly a laudable goal. It stands to reason, therefore, that, consistent with the family integrity right, the state may not invade an intact family

129. *See Quilloin*, 434 U.S. at 253-54; *Lehr*, 463 U.S. at 249-50.
130. *Quilloin*, 434 U.S. at 256.
131. *Lehr*, 463 U.S. at 269 (White, J., dissenting).
132. Stanley v. Illinois, 405 U.S. 645, 648 (1972).
133. 406 U.S. 205, 215, 233 (1972).

by means of a grandparent visitation order, no matter how brief the visitation periods or how desirable the goals of intergenerational contact.

Courts which find grandparent visitation statutes unconstitutional as applied to intact families interpret the family integrity right in exactly this comprehensive manner, recognizing its full scope and the nature of the underlying family rights themselves both directly in their express holdings and indirectly in their interpretation of the legal significance of the parties' conduct. In *Hawk v. Hawk*,[134] for example, the underlying dispute included the parents' objection to the grandparents' means of punishing the children and the length of the trips on which the grandparents had taken the children.[135] The trial court made a generous award of visitation to the grandparents. It then stated that the grandparents were free to "take the children anywhere they please"[136] and were held to no other restrictions "because the Court is fully convinced that they would not do anything or take these children anywhere that would adversely affect these children,"[137] essentially depriving the parents of a dimension of the right to define their family group. Reversing the lower court, the *Hawk* court quoted this particular portion of the lower court's opinion, commenting that such interference represented "a virtually unprecedented intrusion into a protected sphere of family life."[138] The court noted that a grandparent visitation suit against fit parents differed fundamentally from a situation in which parental unfitness required the state to redraw the boundaries of a family group or assess and reorder its relationships. By characterizing the family as a "private realm,"[139] the court not only recognized the essential right of a family to define itself and order its affairs free of any state interference but correctly characterized the right at issue as one which extended beyond any specific child-rearing decision to encompass the parent's general right to "the custody, companionship and care of the child"[140] and "all of the consequences that naturally follow from [that] relationship."[141]

Other opinions invalidating awards of grandparent visitation on constitutional grounds have expressed a similarly comprehensive understanding of the family's right to be free of state interference. In both *Brooks v. Parkerson*[142] and *Lingo v. Kelsay*,[143] for example, the courts recognized a broad right of parents to the uninterrupted custody of their children. Quoting earlier Georgia case law, *Brooks* noted that "the right to the custody and control of one's child is a fiercely guarded

134. 855 S.W.2d 573 (Tenn. 1993).

135. *Id.* at 576.

136. *Id.* at 577.

137. *Id.*

138. *Id.*

139. *Id.* at 579.

140. *Id.* at 577 (quoting State *ex rel.* Bethell v. Kilvington, 45 S.W. 433, 435 (Tenn. 1898)).

141. *Id.* at 578 (quoting *In re* Knott, 197 S.W. 1097, 1098 (Tenn. 1917)). The *Hawk* court thus correctly conceptualized the family right to be free of state interference not only as a broad, comprehensive right, but as an organizing principle within American jurisprudence, inextricably linked to all concepts of privacy embodied in the United States Constitution.

142. 454 S.E.2d 769 (Ga.), *cert. denied*, 116 S. Ct. 377 (1995).

143. 651 So. 2d 499 (La. Ct. App. 1995).

right in our society and in our law."[144] The court also emphasized the reciprocal, relational nature of the right by observing that "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."[145] To explain the scope of this right to autonomous child-rearing, *Brooks*, like *Hawk*, invoked federal constitutional jurisprudence to find the right extending from the constitution's comprehensive concept of privacy.[146] Similarly, *Lingo* rejected the petitioning grandparent's assertion that the hypothetical benefits of visitation could constitute the statutory "extraordinary circumstances"[147] under which visitation could be ordered and state interference justified. After noting that no other statutory provision had been satisfied, the court simply asserted the broad principle that "[i]t is well settled that the right of parents to custody of their children is paramount."[148]

State cases which uphold the constitutionality of open-ended grandparent visitation laws, on the other hand, all conceptualize the family integrity right as a far more limited right which does not, therefore, require invalidation of open-ended grandparent visitation statutes. Those courts reach this conclusion by following one of two related lines of reasoning. First, courts may simply describe the family integrity right itself as essentially limited and limitable. The court in *Herndon v. Tuhey*[149] states, for example, that the "[c]onstitutional right [to autonomous child-rearing] is not absolute."[150] Similarly, although the court in *King v. King*[151] concedes that "the Constitution, as interpreted by the various courts, does recognize the right to rear children without undue governmental interference," it notes that that right is not inviolate.[152] For other courts, this conceptualization is not expressly articulated but, instead, is implied in the conclusion that a legislature can properly enact an open-ended grandparent visitation statute. In *Fairbanks v. McCarter*,[153] for example, the grandparents were denied visitation when a lower court interpreted Maryland's open-ended grandparent visitation statute to include a requirement that "special circumstances" be shown.[154] Overruling the lower court, the Maryland Court of Appeals commented that visitation is a considerably less weighty matter

144. *Brooks*, 454 S.E.2d at 772.

145. *Id.* (quoting *In re* L.H.R., 321 S.E.2d 716 (Ga. 1984)).

146. *Id.*

147. *Lingo*, 651 So. 2d at 500.

148. *Id.* For the court, the only circumstances sufficiently "extraordinary" to justify the state intervention of forced visitation would be inadequate parental care. The court notes that the parental right of custody "is outweighed only by a showing of sufficiently great detriment to the child's best interest." *See* discussion of sources of state authority to intrude on familial autonomy *infra* notes 298-393 and accompanying text.

149. 857 S.W.2d 203 (Mo. 1993) (en banc).

150. *Id.* at 207.

151. 828 S.W.2d 630 (Ky. 1992).

152. *Id.* at 631.

153. 622 A.2d 121 (Md. 1993).

154. *Id.* at 124.

than outright custody[155] and upheld the validity of the statute without much further discussion.[156]

Under a second line of reasoning, the reviewing state court in question acknowledges the full panoply of familial rights as articulated by the United States Supreme Court but simply finds grandparent visitation permissible because it is not an intrusion of sufficient magnitude to implicate any right to familial autonomy. The *Herndon* court, a principal architect of this perspective, meticulously traces the development of the concept of family integrity through the key United States Supreme Court cases,[157] acknowledging that "parents have a constitutional right to make decisions affecting the family."[158] It concedes, further, that an award of grandparent visitation is an "intrusion."[159] The court holds, however, that the grandparent visitation statute is constitutional because an infringement is constitutionally significant only at a certain "magnitude"[160] which, the court notes, has not been reached.

The practical difficulty in distinguishing between a great intrusion on family life and a small one is illustrated by the *Herndon* court's failure to suggest any bright line test at all. The *Herndon* court and all those to subsequently follow it simply assert that "visitation rights by grandparents . . . are less than a substantial encroachment on a family."[161] Indeed, any attempt to state such a test would almost certainly be doomed to failure since the effect of a grandparent visitation award on the parent-child relationship mirrors attempts at state intrusion struck down by key Supreme Court decisions. In *Meyer v. Nebraska*,[162] *Pierce v. Society of Sisters*,[163] and *Wisconsin v. Yoder*,[164] for example, the Court found state education laws unconstitutional where those laws infringed upon a parent's right to direct her child's education and to oversee the child's experiences and upbringing generally.[165] 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.[166] In *Pierce*, the state sought to compel attendance in public as opposed to private schools,[167] and in *Yoder*, the state sought to compel Amish children to attend public school until they were sixteen.[168] In each case, the Court noted the valid state interest in an educated and patriotic

155. *Id.* at 126.
156. *Id.*
157. *Herndon*, 857 S.W.2d at 207-08.
158. *Id.* at 208.
159. *Id.*
160. *Id.* at 209.
161. *Id.*; *see also* R.T. v. J.E., 650 A.2d 13, 16 (N.J. Super. Ct. Ch. Div. 1994) (quoting *Herndon*, 857 S.W.2d at 209).
162. 262 U.S. 390 (1923).
163. 268 U.S. 510 (1925).
164. 406 U.S. 205 (1972).
165. *See Meyer*, 262 U.S. at 401-02; *Pierce*, 268 U.S. at 534; *Yoder*, 406 U.S. at 234-35.
166. *Meyer*, 262 U.S. at 396-97.
167. *Pierce*, 268 U.S. at 530.
168. *Yoder*, 406 U.S. at 207.

citizenry[169] but 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.[170] Similarly, removing a child from his parents' company through an award of grandparent visitation necessarily deprives the parents of some of their role in directing the child's upbringing.

Sometimes this interference is direct and explicit. The parents in *Hawk*, for example, wanted to determine how their children would be disciplined; the grandparents would not defer to their decisions. On other occasions the interference surfaces simply by necessary implication:

> 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 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 . . . .[171]

In either event, the intrusion on the parents' interest in directing their children's upbringing is different neither in kind nor quality from the intrusions the Court has specifically disapproved.

In essence, then, these judicial attempts to create subcategories of direct state intrusions on family life, labeling some small and permissible and others great and impermissible, logically fails simply because of the nature of the family integrity right itself. Family life consists of, and is defined by, the relationships within it. It cannot be divided into discrete lists of rights, claimable individually by parent or child; direct intrusions by state authority cannot be dismissed as deminimus simply because they are less than other direct intrusions. Grandparent visitation cases which nevertheless struggle to discern such an artificial distinction often cite the termination of parental rights case of *Santosky v. Kramer*,[172] arguing that the sheer scope and permanence of a termination action sets it apart from the more modest

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169. *See Meyer*, 262 U.S. at 401 ("Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution — a desirable end cannot by promoted by prohibited means."); *Pierce*, 268 U.S. at 534 ("No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school . . . ."); *Yoder*, 406 U.S. at 213 ("Providing public schools ranks at the very apex of the function of a State.").

170. *See 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 (holding that a 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").

171. *King*, 828 S.W.2d at 635 (Lambert, J., dissenting) (quoting Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. LOU. J. FAM. L. 393 (1985)) (first omission in original).

172. 455 U.S. 745 (1982).

or temporary intrusions at issue in other family rights cases — and from any grandparent visitation case.[173] *Santosky* involved parents whose parental rights to three of their children had been terminated on the statutory grounds of "permanent neglect." The Santosky parents successfully challenged the statute under a theory that familial bonds could not constitutionally be severed upon proof of neglect established only by a preponderance of the evidence.[174] By its own terms, however, *Santosky* does not limit the constitutional significance of the parent-child relationship to situations where permanent severance is at issue;[175] indeed, its dicta is quite to the contrary. Reviewing the constitutional interest at stake, the Court comments that the Santoskys' interest in "the care custody and management"[176] of their children is of such overriding importance that it is *still* significant, despite the fact that the Santoskys have not been "model parents."[177] Even in the shadow of the "awesome intrusion" which a termination action represents, it is the day to day contact between parents and child, and the relationships grounded in that ordinary round of daily life which demand the Court's attention.

Although no logical basis exists in either the concept of "family," or in the nature of the family integrity right for grandparent visitation cases to distinguish great intrusions from small, the distinction these courts have created is hardly random. A clue to their real basis for determining the "magnitude" of an intrusion, as well as the reason that this basis is not expressly articulated in any majority opinion, can be found in the *Herndon* dissent. Discussing the grandparent visitation approved by the majority, Justice Covington describes the level of intrusion as "far from insignificant" and notes that "[a]llowing 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."[178] This is, of course, exactly what the majority opinion has done; it has expressly endorsed significant forcible invasions of functional families. Equally clear, however, is the fact that this is not at all what the majority *thinks* its opinion has done. For example, the majority reviews the United States Supreme Court's family integrity cases and states that the statutory grandparent visitation rights at issue are, in contrast, a "less than substantial encroachment of a family."[179] The majority then comments 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. . . . [I]t is not unreasonable for the state to say that the development of a loving relationship between family members is

173. *See, e.g.*, *Herndon*, 857 S.W.2d at 209; Pollard v. Pollard, No. 532463, 1995 WL 534244, at *5-*7 (Conn. Super. Ct. Aug. 25, 1995); R.T. v. J.E., 650 A.2d 13, 15-16 (N.J. Super. Ct. Ch. Div. 1994) (citing *Herndon's* distinction between termination of parental rights cases and lesser encroachments).

174. *Santosky*, 455 U.S. at 747-48.

175. *Id.* at 753 (noting that the parents' "fundamental liberty interest" lies in "the care, custody and management of their child," not simply physical custody or avoidance of "forced dissolution").

176. *Id.*

177. *Id.*

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

179. *Id.* at 209.

desirable . . . ."[180] That said, the majority concludes that the grandparent visitation statute at issue is "reasonable both because it contemplates only a minimal intrusion on the family relationship and because it is narrowly tailored to adequately protect the interests of parents and children."[181]

The majority is obviously no longer treating the issue of grandparent visitation as an issue of family autonomy, although it has been using the terminology of a family rights analysis and referring to the key United States Supreme Court cases defining these rights.[182] For the majority, the identities of the litigants have blurred. At some points in its discussion the majority properly treats the parents and children as the family, at other points it has implicitly redrawn the boundaries of the family unit to include grandparents.[183] The majority does not and probably cannot explain that these shifts have dictated its conclusion; they are neither legally defensible nor, apparently, the product of conscious analysis.

This confusion of parties and blurring of the boundaries of the family, with its consequent misstatement of the constitutional concept of "family," characterizes all opinions which find grandparent visitation awards constitutionally permissible.[184] In *R.T. v. J.E.*,[185] for example, the court cites *King* approvingly for the idea that grandparent visitation statutes are permissible "to advance loving relations among families."[186] Similarly, in *Campbell v. Campbell*,[187] the court notes that "grandparents are members of the extended family"; the grandparent visitation statute merely "give[s] added meaning" to this fact.[188] Even courts that uphold grandparent visitation awards without any express discussion of family autonomy at all often reveal their own underlying confusion regarding the constitutional

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180. *Id.* (quoting King v. King, 828 S.W.2d 630, 632 (Ky. 1992))

181. *Id.* at 210.

182. *See, e.g., id.* at 209.

183. *Compare id.* at 207-08 ("The Tuheys [parents] contend that they have a constitutional right to raise their children as they see fit, free form state intrusion. . . . Of course this Constitutional right is not absolute.") *with id.* at 209 ("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 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.") (emphasis added).

184. Michael v. Hertzler, 900 P.2d 1144 (Wyo. 1995) is an exception to this general pattern, and its pronouncements serve to expressly articulate what is merely implied in decisions following the *Herndon* pattern just described. Although *Michael* did not involve suit against an intact family, most of its discussion makes no such distinction. The *Michael* court first notes that it cannot find "much discussion in the authorities [regarding] the rights of grandparents and grandchildren to associate [as family members]." *Id.* at 1150. Kentucky Supreme Court Justice Lambert could succinctly explain why. *See supra* note 281 and accompanying text. The *Michael* court then asserts that the "right to associate with one's family" is a fundamental right under the Wyoming constitution. *Michael*, 900 P.2d at 1147. It identifies the purported "precious[ness]" of grandparent-grandchild relationships as a sufficiently significant indice of family status, *id.* at 1150, and thus finds that coerced grandparent visitation is not only constitutionally permissible, but constitutes a compelling state interest, *id.* at 1151.

185. 650 A.2d 13 (N.J. Super. Ct. Ch. Div. 1994).

186. *Id.* at 15.

187. 896 P.2d 635 (Utah Ct. App. 1995).

188. *Id.* at 642-43.

concept of "family" and the status of grandparents. In *Fairbanks v. McCarter*, for example, the court comments that grandparent visitation statutes are generally unnecessary because children see grandparents through "the customary interaction"[189] with them; the court unthinkingly assumes the same pattern of ongoing conduct one might expect to find between a parent and child.

Despite numerous citations and a full panoply of family integrity terminology, then, these cases make no actual comparison between a grandparent visitation suit and the circumstances underlying cases in which the United States Supreme Court has invalidated legislation as violative of familial rights. Instead, these courts unthinkingly confuse the constitutional concept of "family" with a vague lay view found only in their imaginations or in their personal experiences.[190] Grandparents thus become unstated quasi-family members; since the judge perceives them to be already included in the family unit, the "magnitude of the intrusion" appears minor indeed.

II. Standard of Review

Courts that review open-ended grandparent visitation statutes with a flawed and incomplete perception of the family integrity right itself and an unrecognized confusion concerning the legal relationship of petitioning grandparents to respondent parents' family unit perhaps predictably apply the most lenient standard of review possible.[191] By applying the most lenient incarnation of rational basis review,[192]

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189. Fairbanks v. Mc Carter, 622 A.2d 121, 127 (Md. 1993).

190. *See, e.g., King*, 828 S.W.2d at 633 (Lambert, J., dissenting) ("[The majority opinion] depends entirely on the sentimental notion of an inherent value in visitation between grandparent and grandchild . . . .").

191. All grandparent visitation statutes implicate the family integrity right; ensuing litigation thus focuses on the substantive reach of a grandparent visitation statute rather than on any classifications of people it creates. Although grandparent visitation cases thus 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, *see supra* note 73, it has employed an equal protection analysis far more frequently than it has employed a due process analysis. NOWAK & ROTUNDA, *supra* note 73, § 11.4, at 383. 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 v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Schlesinger v. Ballard, 419

furthermore, these courts are easily able to find open-ended grandparent visitation statutes constitutional.[193] This lenient rational basis review first presumes the validity of a legislative enactment by placing the burden on those challenging the law to demonstrate that it is "essentially arbitrary."[194] Although it does not specifically so state, the *Fairbanks* court thus commences a rational basis review when its analysis of a grandparent visitation statute focuses on the words of the statute itself.[195] The court's assumption is that if the "ordinary and natural import" of the words[196] makes sense, the statute is valid.[197] Similarly, the *Herndon* court commences its rational basis review of Missouri's grandparent visitation statute by remarking that it must "begin [its] analysis with the presumption that [the grandparent visitation statute] is constitutional."[198]

This lenient incarnation of rational basis review then requires only that the statute at issue have "any reasonable basis;" a reviewing court will find a statute

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U.S. 498, 500 n.3 (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 an equal protection case, and a definition of "rational basis review," articulated in a due process case.

192. A significant number of courts and commentators agree that rational basis review has involved varying degrees of judicial scrutiny rather that a single clear standard. In *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980), Justice Rehnquist, writing for the majority, listed 11 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." *Id.* at 176 n.10; *see also* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 451-52 (1984) (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 Bd.*, 449 U.S. at 182-98 (Brennan, J., dissenting); GERALD GUNTHER, CONSTITUTIONAL LAW 472 (1985); Robert Jerome Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261 (1990).

193. In a curious misuse of terminology, the *King* majority quotes *Meyer* for the proposition that the state may interfere with the liberty interest underlying family autonomy when the legislation at issue bears a "reasonable relation to some purpose within the competence of the state to effect." *King*, 828 S.W.2d at 632 (citing Meyer v. Nebraska, 262 U.S. 390, 400 (1923)). Clearly the *King* majority intended to demonstrate that the lenient rational relationship standard as articulated by the modern Court is a sufficiently demanding standard of review where, as in *Meyer*, family life is affected by state action. This is in fact, what *Meyer* appears to state. The *King* majority's error lies in its failure to recognize that *Meyer* and its terminology are rooted in a philosophically and semantically different judicial era. During this period, the *Lochner* era stretching from 1900 to 1937, the Court interpreted its role as one of protecting Americans and American business from burgeoning economic and social regulation. NOWAK & ROTUNDA, *supra* note 73. One of the Court's primary means of doing so was through application of a substantive due process test to all challenged legislation. This test required the government to establish that the legislation at issue bore a rational relationship to a legitimate governmental goal. Since the Court conceived of the government's proper role in society as extremely limited, its substantive due process analyses resulted in the invalidation of hundreds of laws. Read in their proper historical context, therefore, the words the *King* majority quotes from *Meyer* actually state a standard of review which is ironically similar to the modern standard of strict scrutiny which the *King* majority seeks to avoid.

194. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 79 (1911).

195. *Fairbanks*, 622 A.2d at 125.

196. *Id.*

197. *Id.* at 125-26.

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

constitutional if any conceivable factual circumstance could justify it.[199] *King* illustrates this approach with its extensive discussion of possible legislative motives for enactment of Kentucky's open-ended grandparent visitation statute.[200] The court notes that

> the grandparents' visitation statute [is] an appropriate response to the change in the demographics of domestic relations, mirrored by the dramatic increase in the divorce rate and in the number of children born to unmarried parents, and the increasing independence and alienation within the extended family inherent in a mobile society.[201]

The lenient rational basis standard the court is applying requires neither evidence that its hypothesis corresponds to any actual findings in the statute's legislative history nor that any such circumstances actually existed at the time of enactment.[202] The *King* court's speculation thus supports its conclusion that the Kentucky statute is rationally based and therefore constitutional despite the fact that in the case before it the statute is being applied to an intact family whose members have neither contributed to the cited increase in divorce nor produced any illegitimate children.

The *King* court's uncritical approval of the legislative motives it has hypothesized appears to allow it to approve any resulting imposition whatsoever on the grounds that it is not only rationally based but accompanied by procedural protection. The court notes that an action must be filed in circuit court and a hearing conducted with findings of fact and conclusions of law entered into the record.[203] These formalities "preclude either injustice or an unwarranted intrusion into the fundamental liberty of the parents and child."[204] Good motives, it seems, necessarily produce permissible laws when they are accompanied by procedural formality. Applying the *King* court's understanding of rational basis review, a grandparent visitation award which separated a child from her own fit parents for half of her waking life would be acceptable if proper procedures were followed first.[205] The theoretical virtues

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199. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955).

200. *King*, 828 S.W.2d at 632.

201. *Id.* at 632 (quoting Hicks v. Enlow, 764 S.W.2d 68, 70-71 (Ky. 1989)).

202. *Id.* (describing sentimentalized and unsupported generalities concerning grandparents and grandchildren as "considerations by the state").

203. *Id.*

204. *Id.*

205. This particular aspect of its own grandparent visitation statute did, however, appear to concern the *Herndon* court, thereby forcing upon it the logically troubling problem of reigning in potentially limitless awards of visitation without recognizing any parental right which might, in turn, cast doubt on the constitutional validity of the statute. *See* Herndon v. Tuhey, 857 S.W.2d 203, 210 (Mo. 1993) (en banc). The *Herndon* court's solution was to focus on the fact that the statute permitted an award of visitation only after the grandparent was "unreasonabl[y] deni[ed]" contact with the minor grandchild for at least 90 days. *Id.* at 210. This 90-day prerequisite, the court concluded, was an indication that any visitation under the statute should not attempt to approximate the amount of voluntary contact which had occurred at an earlier time and should not be commensurate with the amount of parental visitation awarded in custody matters. *Id.* Although the discerning reader may find this implied limitation on

of a grandparent/grandchild relationship thus provide the court with both the rational basis for the law and the substantive limits, or more accurately, absence of limits on grandparent visitation.[206]

Although courts using this form of rational basis review are easily able to find open-ended grandparent visitation statutes constitutional, it is by no means clear that they could do so under the United States Supreme Court's alternative and more rigorous formulation of this standard.[207] Under the Court's alternate conceptualization of rational basis review, the term "rational basis" describes a certain level of analysis required rather than describing the form of judicial review applied by *King* and its progeny[208] in which assumptions and hypotheses can provide any justification needed. Application of this different approach to rational basis review would alter even the approach taken to the statutory language itself by a grandparent visitation decision. State courts which find open-ended grandparent visitation statutes constitutional could no longer simply conclude that since the words of the statute express a plain meaning the statute is constitutional on the grounds that "[b]oth the language and the purpose of the statute are clear."[209] Contrasting this more demanding analysis, which he describes as "traditional" rational basis review,[210] with the extremely deferential approach, Justice Brennan has observed that courts deviating from traditional rational basis analysis reduce judicial review

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visitation awards a rather weighty matter to be sustained by such a slender thread of logic, the court apparently did too. After setting up its comparison between an award of visitation and the statutory reference to a 90-day period the court simply asserted that its interpretation "is based in part on the fact that if the statute allowed a great amount of visitation we would be more likely to . . . hold that [the statute is] unconstitutional." *Id.* at 210-11. This is the proper interpretation, in other words, because it is the necessary one.

206. This conclusion is consistent with the conclusions generally reached under the most lenient incarnation of rational basis review. Under this standard, a statute may be sufficiently rational to satisfy the constitution even though it results in some inequity. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

207. 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 Bd. v. Fritz, 449 U.S. 166, 186 (1980) (Brennan, J., dissenting). *See also infra* note 192. 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, 212 (1976) (Stevens, J., concurring); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (Stevens, J., concurring).

208. Several cases have expressly followed *King* with regard to the form of judicial review. *See* Pollard v. Pollard, No. 532463, 1995 WL 534244, at *9-*10 (Conn. Super. Ct. Aug. 25, 1995); Herndon v. Tuhey, 857 S.W.2d 203, 209-10 (Mo. 1993) (en banc); R.T. v. J.E., 650 A.2d 13, 15 (N.J. Super. Ct. Ch. Div. 1994).

209. Fairbanks v. McCarter, 622 A.2d 121, 125 (Md. 1993).

210. *United States R.R. Bd.*, 449 U.S. at 186 (Brennan, J., dissenting).

to a tautology.[211] His dry comment regarding the effect of this analysis in the context of pension legislation would provide an equally appropriate condemnation of an open-ended grandparent visitation statute: "[i]t may always be said that [a legislative body] intended to do what it in fact did."[212]

As Brennan's comment regarding the tautology implicit in such minimal review suggests, traditional rational basis analysis rejects such circular reasoning and rootless assumptions as justifications for legislative enactments, requiring, instead, specific factual support for any determination that a rational basis exists. Thus, although a court applying traditional rational basis review may favor the legislature's understanding of the specific circumstances it sought to address, the court may not overlook those specific circumstances themselves in order to reach a conclusion based only on general pronouncements.[213] The Court's analysis of the circumstances underlying the challenged ordinance in *City of Cleburne v. Cleburne Living Center*[214] illustrates this rejection of general statements to justify a statutory classification when those statements cannot be supported by the available data. In *Cleburne*, respondent Cleburne Living Center, Inc. (CLC) endeavored to open a group home for the mentally retarded. It was required to obtain a special permit, even though no such 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,"[215] or, indeed, had it been one of a host of other social and institutional facilities.[216] After CLC submitted the required special permit, a public hearing was held, and the City Council voted to deny the permit. CLC filed suit,[217] arguing that the zoning ordinance at issue "discriminated against the mentally retarded in violation of the equal protection rights of CLC and its potential residents."[218] Although the United States Supreme Court disagreed with the contention that mental retardation constituted a quasi-suspect classification requiring heightened scrutiny, it never-

211. *Id.* at 187 (Brennan, J., dissenting).

212. *Id.* (Brennan, J., dissenting).

213. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) (stating that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme"); *see also* Califano v. Goldfarb, 430 U.S. 199, 212-13 (1977); 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); 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").

214. 473 U.S. 432 (1985).

215. *Id.* at 436 n.3 (emphasis omitted).

216. *See id.*

217. *Id.* at 437 (CLC lost in district court, won in the court of appeals, and the United States Supreme Court granted certiorari, 469 U.S. 1016 (1984)).

218. *Id.* Although CLC raised an equal protection challenge, the analysis of the applicable standard of review is the same regardless of whether the challenge is rooted in the equal protection clause or the due process clause. *See supra* note 191.

theless invalidated the ordinance by finding that under the circumstances it bore no rational relationship to any legitimate governmental purpose.[219]

The *Cleburne* Court's application of rational basis review stands in sharp contrast to the approach taken in grandparent visitation cases, for the *Cleburne* Court engages in a detailed, factual analysis of the operation of the statute and in a critical analysis of the justification argued by the state. The *King* court, for example, justifies the impact of its open-ended grandparent visitation statute on the defendant family by simply noting that it is an "appropriate response to the change in the demographics of domestic relations,"[220] including divorce and illegitimacy, and by announcing that a "grandchild will ordinarily benefit from contact with the grandparent."[221] It explores the state's argument no further than this, either in theory or in practice. The *Cleburne* Court, on the other hand, notes that although the state raised general safety concerns because of the proposed group home's proximity to a junior high school, closer examination shows that those concerns are merely "vague, undifferentiated fears."[222] The *Cleburne* Court comments further that thirty mentally retarded students already attended the junior high school and that this evidence of the actual relationship between the parties, rather than some general presumption, must control.[223]

Had the *King* court applied this "traditional" conception of rational basis review to the open-ended grandparent visitation statute before it, its conclusions would obviously have been quite different. Even if the *King* court's asserted interest in preservation of family structure[224] could appropriately apply to grandparents asserting visitation rights to children living with their married natural parents,[225] the grandparent visitation statute before the court bore "no fair or substantial relation" to that objective.[226] Like the grounds unsuccessfully asserted in *Cleburne*, the *King* majority's validation of the statute as necessary to strengthen familial bonds is an unsubstantiated generality actually at odds not only with the specific circumstances before the court but with many future circumstances as well. Under the traditional conceptualization of rational basis review approved in *Cleburne*, a statute cannot be said to rationally address the breakdown of family life where, by its express terms, it can act indiscriminately upon all families, whether they have suffered any "breakdown" or not.

The *King* majority's other assertion that the statute is rational and therefore constitutional because grandparent visitation "will ordinarily benefit" a grandchild[227] suffers a similar fate when traditional rational basis review is applied

219. *Cleburne*, 473 U.S. at 450.

220. King v. King, 828 S.W.2d 630, 632 (Ky. 1992).

221. *Id.*

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

223. *Id.*

224. *King*, 828 S.W.2d at 632.

225. *See infra* notes 298-307 and accompanying text regarding legitimate exercises of the government's legislative power.

226. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 416 (1920).

227. *King*, 828 S.W.2d at 632.

in this manner. Coercive state interference in family life has been condemned as harmful to children, no matter how laudable its goal.[228] Whatever philosophical differences individual professionals may espouse,[229] all disciplines agree that children require the stability of a continuous relationship with fit parents.[230] Indeed, "[t]he 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."[231] When, as in *King*, the quality of a

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228. *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 his 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.), *cert. denied*, 116 S. Ct. 377 (1995).

229. Three cursory examples of 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 nonintervention, 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 § 1.4 cmt., 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.

230. *See infra* notes 365-72 and accompanying text.

231. 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) (Family Law Series) ("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 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 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."); Robert H. Mnookin, *Foster Care — In Whose Best Interests?*, 43 HARV. ED. REV. 599 (1973).

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

In contrast to grandparent visitation decisions which apply rational basis review under a hybrid theory that the intrusion on family life is minimal and the virtues of visitation many,[232] *Herndon v. Tuhey*[233] arrives at its application of a rational basis standard by a different, and even more circuitous, route.[234] To address the constitutionality of its open-ended grandparent visitation statute as applied to an intact family unit, *Herndon* first acknowledges the line of United States Supreme Court cases articulating a familial right to privacy.[235] The court describes this constitutional right as "not absolute,"[236] however, and as a right which can be limited provided that "the magnitude of the infringement by the state"[237] is below a certain level. To support this curiously grudging conceptualization of the constitutional protection to be afforded to a fundamental right, the *Herndon* Court quotes United States Supreme Court dicta in *Zablocki v. Redhail*[238] concerning limitation on the fundamental right to marry:

> 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.[239]

The *Herndon* court's attempt to thus legitimize its theory that an award of grandparent visitation is a constitutionally acceptable intrusion on family life is doomed, however, for the court's use of *Zablocki* misconstrues the distinction between types of regulation which is central to the *Zablocki* analysis.

In *Zablocki*, Appellee 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."[240] Appellee Redhail had fathered a child and had admitted paternity. As a result, he had been subject to an order to pay child support,[241] largely unsatisfied,[242] since the child's infancy. The parties stipulated,

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232. *See, e.g., King*, 828 S.W.2d at 632; Sanchez v. Parker, 1995 WL 489146, at *2 (Del. Fam. Ct. June 20, 1995).

233. 857 S.W.2d 203 (Mo. 1993) (en banc).

234. The path which *Herndon* followed is of particular significance since it was followed by many subsequent decisions.

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

236. *Id.*

237. *Id.* at 208.

238. 434 U.S. 374 (1978).

239. *Herndon*, 857 S.W.2d at 208 (quoting Zablocki v. Redhail, 434 U.S. 374, 386 (1978)).

240. *Zablocki*, 434 U.S. at 375.

241. *Id.* at 378.

242. *Id.*

further, that the child would have been a public charge even if appellee had been current in his child support payments throughout the six years which had elapsed since the child's birth.[243] Appellee 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.[244] In light of the fundamental status of the right to marry,[245] it is hardly surprising that the Court invalidated the statute as a virtually complete prohibition of marriage as applied to individuals such as Appellee.[246] Indeed, for present purposes, the significance of the Court's decision lies not in its rejection of statutory interference with 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*,[247] decided the same term.

Unlike the statute challenged in *Zablocki*, the Court noted that the legislation at issue in *Jobst* placed no "direct legal obstacle in the path of persons desiring to get married."[248] 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[249] 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.[250] Comparing Jobst's circumstances with those at issue in *Zablocki*, the *Zablocki* Court noted that Jobst was able to marry despite the challenged provision;[251] although he lost $20 per month in benefits,[252] no aspect of the protected activity of deciding to marry and establish a family was directly affected at all.[253] The distinction made in *Zablocki* is thus 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

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243. *Id.* Argument was held before the United States Supreme Court on October 4, 1977.

244. *Id.* at 375.

245. *Id.* at 383 (citing Loving v. Virginia, 388 U.S. 1 (1967)).

246. *Id.* 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, *id.* at 376-77, the majority invalidated the statute on equal protection grounds, *id.* at 391.

247. 434 U.S. 47 (1977).

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

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

250. *Id.*

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

252. *Jobst*, 343 U.S. at 57 n.17.

253. 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. U. L.Q. 295, 302 (1995).

are conceptually identical to the legislation which *Zablocki* found impermissible. Indeed, *Zablocki* actually contradicts the argument for which the *Herndon* court has cited it.[254]

The next step in the *Herndon* court's attempt to legitimize its application of rational basis review to a grandparent visitation statute is to make the inapposite argument that because *Zablocki* permits "some" regulation of family life, rational basis is appropriated under the undue burden test.[255] As articulated by Justice O'Connor, writing for the dissent in *City of Akron v. Akron Center for Reproductive Health*,[256] the undue burden test represents an attempt to accommodate a conflict between two different interests, both of undisputed constitutional validity.[257] In the First Amendment context, for example, it 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.[258] Thus, although the government's power of inquiry is as great as its power to legislate,[259] its inquiries were impermissible where they destroyed the privacy essential to a group espousing dissident beliefs.[260] In that context, the Court found that it "infringe[d] substantially" on associational rights.[261] 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

254. The *Herndon* court compounds this error by suggesting that the *Zablocki* Court's distinction between direct and indirect statutory infringement bears some logical relationship to the undue burden test. Some state courts evaluating grandparent visitation statutes have followed *Herndon's* reasoning, adopted its use of *Zablocki* and thereby repeated this error. *See, e.g.*, Pollard v. Pollard, 1995 Conn. Super. LEXIS 2509, at *8. In light of the fact that the undue burden test is applicable, if at all, to the quite different situation in which legislation furthers one constitutionally protected interest by burdening another, *see infra* notes 257-62 and accompanying text, it is hardly surprising that no United States Supreme Court or federal court decision has ever recognized any relationship between *Zablocki's* reasoning and the undue burden test.

255. *Herndon*, 857 S.W.2d at 208. 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, 643 n.18 (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 *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), 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 *Potter* court not only cited *Zablocki* but 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. *Potter*, 585 F. Supp. at 1139.

256. 462 U.S. 416 (1983).

257. *Id.* at 452 (O'Connor, J., dissenting).

258. *Id.* at 462-63 (citing Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963)).

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

260. *Id.* at 558.

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

standards and procedures, coupled with the state's interests in protecting human life.[262]

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 all abortions performed after the first trimester be performed in a hospital, that a doctor obtain parental or judicial consent for any abortion to be performed on an unmarried minor, and that the attending physician provide certain specified information concerning fetal development, the risks of the procedure, and possible psychological sequellae.[263] The *Akron* majority applied a strict scrutiny standard to find all of these provisions unconstitutional, either because they "unreasonably infringe[d]" on a woman's access to abortion[264] or because they intruded upon her right to make the abortion decision free of governmental intrusion by limiting the discretion of her physician[265] or healthcare provider.[266] Justice O'Connor, on the other hand, writing for the dissent, argued that under an undue burden standard, rational basis review rather than strict scrutiny was appropriate. Justice O'Connor noted that the right to an abortion "cannot be said to be absolute."[267] It is, instead, a "limited" fundamental right[268] qualified by the state's ongoing interest in potential life.[269] Given the competing rights at issue in the abortion context, therefore, the appropriate inquiry was not 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.[270] 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.[271] 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, no logical basis exists for its use. Indeed, in a very real sense the substantial burden test literally cannot be used to analyze a grandparent visitation statute at all. With

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262. *Akron*, 462 U.S. at 454 (O'Connor, J., dissenting).

263. *Id.* at 422-24 nn.3-5. The challenged regulations also provided that fetal remains were to be disposed of in a "humane and sanitary manner," a prim and curiously vague provision which appeared to leave justices on both sides of the holding somewhat nonplused. *Id.* at 451.

264. *Id.* at 439.

265. *Id.* at 445.

266. *Id.* at 447-48.

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

268. *Id.* at 465 n.10 (O'Connor, J., dissenting).

269. *Id.* at 459 (O'Connor, J., dissenting).

270. *Id.* at 461 (O'Connor, J., dissenting).

271. *Id.* at 464 (O'Connor, J., dissenting).

only one interest at stake, no assessment of how challenged legislation either furthers or inhibits the competing rights and interests can occur.[272] The *Herndon* court identifies a constitutional right to familial autonomy,[273] for example, and the appellant parents argue that the grandparent visitation statute in question unconstitutionally inhibits the exercise of that right.[274] Since the grandparent visitation statute does not further a constitutionally valid competing interest, however, the next step of the undue burden test cannot be taken. Instead, the *Herndon* court notes that state regulation of the family "is proper and not unconstitutional"[275] in many circumstances, and its analysis slips into the general deference to legislative judgment[276] which Justice O'Connor specifically rejected in this context.[277]

The *Herndon* court attempts 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 is to simply adopt Justice O'Connor's "extent of the infringement" language regardless of the absence of a comparable context.[278] It establishes a comparison between the intrusion occasioned by an award of grandparent visitation and the intrusion occasioned by other regulations touching on family life.[279] Since this comparison does not involve *competing* rights, the *Herndon* court cannot actually implement the balancing process involved in Justice O'Connor's analysis by weighing the validity of the competing interests and assessing the impact of the constitutional interest underlying the regulation with the constitutional right upon which it touches. It, therefore, makes a general comparison between intrusions the United States Supreme Court has condemned and the effect of its grandparent visitation statute on the family, concluding that court-ordered grandparent visitation is appropriate based on this "casual comparison" alone.[280]

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272. In *Akron*, for example, Justice O'Connor makes 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 pregnancy." *Id.* at 461 (O'Connor, J., dissenting).

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

274. *Id.*

275. *Id.*

276. *Id.* at 209-10.

277. *Akron*, 462 U.S. at 465 (O'Connor, J., dissenting).

278. *See Herndon*, 857 S.W.2d at 208. The court refers 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.*

279. *Id.* at 209.

280. "[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 does not suggest any means of quantifying the relative intrusions, for its 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 in *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

The second way in which the *Herndon* court attempts to justify its use of the undue burden test is by following the *King* majority and locating the missing competing interest in a combination of interests and factors of varying logical and constitutional legitimacy all added together. To accomplish this process of discerning a whole that is greater than its parts, the *Herndon* majority first borrows the language of parental rights cases and uses it out of context to describe *grandparents'* "important role in the raising of their grandchildren."[281] The *Herndon* court cites no authority for this grandparents' "right" beyond the *King* majority's own words; as the *King* dissent acidly notes with regard to this "right," no authority is cited because none exists.[282] Second, the *Herndon* majority approvingly notes the *King* majority's assertion that the state has an interest in "strengthen[ing] familial bonds."[283] 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 the court means "promoting generational contact"[284] rather than "strengthening familial bonds" and that it has thereby described a legitimate state goal,[285] a grandparent visitation statute is neither a

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parents and children who would otherwise be together. Furthermore, its ban could be completely circumvented by providing language instruction at other times. Instead, the *Herndon* court simply asserts that "even a casual comparison" of grandparent visitation and the infringements invalidated by the U.S. Supreme Court suggests that the statute at issue is constitutional, *Herndon*, 857 S.W.2d at 209, 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 literally cannot be applied at all.

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

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

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

284. The court does, in fact, use this phrase at a later point in its description of the interest it is advancing. *See 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 quotes *King* approvingly for the proposition that grandparent visitation statutes are justified as a means of furthering "loving relationship[s] between family members." *Id.* 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.

285. 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 clearly political purpose of harming or benefiting groups that are simply socially disfavored or particularly influential. *See, e.g.*, USDA v. Moreno, 413 U.S. 528, 534 (1973) (invalidating, in part, ban on giving "household" food stamps to groups of unrelated people because its purpose of harming "hippies" was not legitimate).

narrowly tailored means of furthering that goal[286] nor, indeed, even rationally related to it.[287] As the *King* dissent notes, it may sometimes be true that grandparents can share a close relationship with grandchildren, in other cases it is not.[288] 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.[289] Finally, there is ample evidence from all disciplines that judicial intrusion in the family unit is an inevitable source of trauma for the child[290] and may affect the parents' marriage as well.[291] 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 advances as the "competing interests" to support its undue burden test are simply unequal to the task.

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286. Statutes purporting to regulate the exercise of a fundamental right require "strict scrutiny." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). The statutes 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." Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). This standard is articulated in the specific context of grandparent visitation by Justice Lambert in his dissent to *King*. *See King*, 828 S.W.2d at 634 (Lambert, J., dissenting) ("[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 . . . .").

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

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

289. 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 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.*, *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"); 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 increases the potential for animosity . . . ."); Elizabeth M. Belsom, Note, *Grandparent Visitation: A Florida Focus*, 41 U. FLA. L. REV. 179, 183 (1989) ("Because of the relatively comfortable lifestyle of Florida grandparents, 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].").

290. *See supra* notes 228-31 and accompanying text.

291. Sharon Furr 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 . . . .").

The fundamental nature of the single right at stake in grandparent visitation cases makes the rational basis review applied by courts upholding grandparent visitation statutes improper. The right to family integrity insulates fit parents living with their children from state control of their family life. A grandparent visitation suit, by definition, directly infringes on parents' child-rearing choices and responsibilities. It cannot be justified, therefore, as an ancillary or incidental intrusion. Similarly, since grandparent visitation implicates no competing constitutionally significant interest, an undue burden test is logically inapplicable. Even if such a test were, for argument's sake, applied, it would be difficult to argue that forcing parents to deliver their minor child to the custody of a third party whether for a day or an hour is not a "significant intrusion" indeed.[292] Since family rights are relational and family autonomy protects this indivisible whole, grandparent visitation statutes cannot be justified as legislation having a rational basis.

In contrast to the often awkward process[293] of fashioning some sort of a distinction between forced grandparent visitation and other intrusions on family life in order to justify rational basis review, for courts invalidating grandparent visitation statutes, the conclusion that strict scrutiny is necessary follows directly from their conceptualization of the family integrity right. Since these courts recognize the right as a broad, comprehensive right, essentially relational in nature, they correctly consider the intrusion resulting from forced visitation to be a constitutional significant infringement of a protected right. The *Hawk* court observes, for example, that the constitutionally protected relationship between parents and child includes "all of the consequences that naturally follow from [that] relationship."[294] Similarly, the dissents in *Herndon* and the concurrence in *Beagle v. Beagle*[295] find it unnecessary to consider the specific conditions or duration of a grandparent visitation award; the simple fact that the government can force a third party on an unwilling family is a significant intrusion in and of itself.[296] Under this conceptualization of the family integrity right, all governmental intrusions are constitutionally significant, all must be evaluated

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

293. For a striking example of sheer awkwardness, one need only look at the *Herndon* majority's attempt to extrapolate a nonconstitutionally based limitation on grandparent visitation awards from the fact that the statute at issue specified that visitation be "unreasonably denied" for ninety days prior to suit. *See supra* note 205.

294. Hawk v. Hawk, 855 S.W.2d 573, 578 (Tenn. 1993).

295. 654 So. 2d 1260 (Fla. Dist. Ct. App. 1995).

296. *See id.* at 1265 (Webster, J., concurring); *Herndon*, 857 S.W.2d at 212 (Covington, J., dissenting). Although the *Beagle* majority rejected a constitutional challenge to Florida's open-ended grandparent visitation statute, it certified the question of the statute's constitutionality to the Florida Supreme Court. *Beagle*, 654 So. 2d at 1263. In a separate opinion, Justice Webster disputed the conclusion that the statute was constitutional under either the Florida Constitution or the United States Constitution. *Id.* at 1263 (Webster, J., concurring). Since Justice Webster agreed that the constitutional issue should be resolved by the Florida Supreme Court, he technically concurred with the majority, and his opinion must therefore be described as a concurrence. In function, however, it is really an exceptionally eloquent and detailed dissent.

under a strict scrutiny standard. When strict scrutiny is applied to grandparent visitation statutes which override the child-rearing decisions of fit, married parents, the grandparent visitation statute fails.

III. Sources of State Power

Since the family's constitutionally protected interest lies in its private relationships and in the child-rearing decisions parents make, the only circumstance in which the state has a compelling interest in forced intervention, and therefore a legitimate source of power to intrude, would be when the child is threatened with "substantial harm." The state, acting through its police power, can act to protect its individual citizens from injuries inflicted by third parties or to protect its citizenry as a whole from threats to its health and safety. Since police power is the power to preserve social order, its proper use is consonant with "the general purposes for which the state was created."[297] Thus, in the context of family life, the state's police power provides authority to require the vaccination of children against communicable diseases even over the objections of their fit parents.[298] Similarly, the state's police power allows it to override a decision of otherwise fit 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. In *Prince v. Massachusetts*,[299] for example, the Court refused to invalidate legislation which prohibited a parent[300] from permitting a minor to sell merchandise on a public street.[301] Although the Court acknowledged the parent's constitutionally protected right to child-rearing autonomy, it found a narrow exception necessary in light of the "crippling effects"[302] of child employment, "more especially in public places."[303] Police power thus empowered the state to intrude on a parental decision in the interests of society as a whole where the decision directly and severely imperiled the child.

The state's other source of authority to intrude on family life, its parens patriae power, is also activated only by a severe threat of harm to the child, but as parens patriae the state acts from the viewpoint and in the interests of the child. In the American constitutional system, the state's power to act as parens patriae is generally derived from the King's right and obligation under English law to act

297. Note, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1200 (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798)).

298. In *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905), the Court affirmed a state's authority, acting pursuant to its police power, to require vaccination of adults and children regardless of their wishes and exempting children only when "certified by a registered physician to be unfit subjects for vaccination."

299. 321 U.S. 158 (1944).

300. The "parent" in *Prince* was actually the child's "aunt and guardian." *Id.* at 159. The Court consistently treats her as a parent, however, referring to her conduct, for example, as "motherlike." *Id.* at 162.

301. *Id.* at 160.

302. *Id.* at 168.

303. *Id.*

as "guardian of persons under legal disabilities to act for themselves."[304] The King, acting through his chancellors, thus assumed responsibility for those among his subjects "legally unable . . . to take care of themselves and their property."[305] Although the original exercises of parens patriae authority corresponded to allegiance paid to the King, by the 17th century the scope of the parens patriae interest had expanded. From that general period 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.[306]

Thus, parens patriae power and police power both provide the state with authority to act to protect children lacking the guidance and protection of fit parents of their own, and although they may represent different perspectives, both contemplate harm to the child and, in practical terms, have been used nearly interchangeably in the fashioning of a threshold requirement of parental unfitness, harm, or threatened harm. Since society vests child-rearing responsibility in parents,[307] parents are the children's protection from the forces and pressures of society around them. In *Bellotti v. Baird*,[308] for example, the Court reviewed the constitutionality of a state statute which required, inter alia, that a minor seeking an abortion get the consent of both her parents.[309] Although the Court concluded that a minor's emerging constitutional rights prevented a state from "impos[ing] a blanket provision . . . requiring the consent of a parent," it expressly affirmed the significance of the parental role.[310] "The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent or involvement."[311]

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304. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972).

305. JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PEROGATIVES OF THE CROWN; AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT 155 (1820). Compare 3 BLACKSTONE, *supra* note 46, at *47 ("[The sovereign] is the general guardian of all infants, idiots, and lunatics . . . .").

306. Neil Howard Cogan, *Juvenile Law Before and After the Entrance of "Parens Patriae,"* 22 S.C. L. REV. 147, 149 (1970).

307. 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) (citing Plato's *Ideal Commonwealth*).

308. 443 U.S. 622 (1979).

309. *Id.* at 626.

310. *Id.* at 643. The Court thus implicitly recognizes that "family" is a relational concept rather than a static one, and that the family integrity right may not apply to it in the same way as its members mature. Indeed, the Court has suggested that when a child is mature enough to become pregnant a family autonomy analysis of her relationship to her parents is not longer sufficient. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."). Nor is one transformed from child to adult or parent in a magic flash. The process of becoming independent of one's family and the corresponding change in the contours of the family integrity right occurs in tandem with other facets of maturation. Ultimately the "child" is an independent adult, capable of forming and being part of a different and separate family.

311. *Bellotti*, 443 U.S. at 637.

Similarly, in *In re Gault*,[312] 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.[313] *Gault* involved prosecution of a minor, Gerald Gault, for making "lewd" phone calls.[314] Gerald was initially detained without any attempt to notify his parents,[315] 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 parent's role as protectors of the child. The Court held that Gerald Gault and his parents were both 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.[316] 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. Courts invalidating open-ended grandparent visitation statutes by imposing a requirement of harm as a jurisdictional prerequisite to the grandparent's suit are thus simply recognizing the well-established constitutional significance of the parent-child relationship. The threshold finding of harm these cases require is the same threshold approved in all other cases involving family rights. Indeed, by establishing a bifurcated proceeding in which a determination of parental unfitness must precede any argument over the best interests of the child, this group of grandparent visitation cases actually legitimize the concept of grandparent visitation itself, shifting its basis from sentiment and speculation to the constitutional principles of parental authority and family autonomy essential to a free society.

Courts which invalidate grandparent visitation awards made against the united wishes of the child's parents consistently conceptualize the required threshold threat in this manner, finding no legitimate source of authority to intrude on family life absent a parental unfitness, harm to the child, or the threat of harm to the child. Discussing the role of state intervention in the family under the law of its state, for example, the *Brooks* court notes that the same threshold requirement of threatened harm to the child permeates its case, statutory, and constitutional law.[317] A Georgia trial court may issue orders promoting a child's welfare pursuant to statutory law, for instance, only if the child is living "under

312. 387 U.S. 1 (1967).

313. *Id.* at 53-54, 56.

314. *Id.* at 4, 6.

315. *Id.* at 5.

316. *Id.* at 41, 56; *see also id.* at 53 (citing with approval a state court decision concluding that two minors' confessions were involuntary where, inter alia, the children's parents were not allowed to be with them while they were being questioned).

317. Brooks v. Parkerson, 454 S.E.2d 769, 773 (Ga.), *cert. denied*, 116 S. Ct. 377 (1995).

circumstances of destitution and suffering, abandonment . . . ."[318] The plain import of both federal and state law, the court reasons, is thus that prevention of harm cannot be equated to promoting health and welfare. Furthermore, the court concludes, this principle would require invalidation of any[319] grandparent visitation provision not specifying some threshold finding of harm to the child, even if grandparent visitation could be assumed to be of universal benefit to the targeted child.[320]

All other courts invalidating awards of grandparent visitation have also done so because the threshold precondition to the state's power to act was not met through allegations of harm to the child; by so holding they have made the same distinction between harm to the child and the simple absence of a purported perceived benefit. In *Lingo v. Kelsay*,[321] for example, the court rejected the grandparents' position that the parent's conduct in denying them contact with their grandchildren constituted the statutory criterion of "extraordinary circumstances" necessary to justify an award of visitation.[322] The court noted that there were no allegations of neglect or inadequate parental care and then found an award of visitation inconsistent with both the overall statutory scheme and with the parental right to custody.[323] Similarly, in his dissenting opinion to *King*, Justice Lambert noted that even if children's lives *were* invariably enriched by intergenerational contact, "mere improvement in quality of life" provides no justification for state intervention where the child's circumstances are otherwise satisfactory.[324] As Justice Lambert notes, to suggest otherwise is the logical equivalent of asserting that the state has the power to redistribute its infant population to provide each child with the "best family."[325]

By identifying the compelling state interest necessary to override a family's integrity right as parental unfitness, with its corresponding harm to the child, courts applying strict scrutiny to invalidate grandparent visitation statutes divorce grandparent visitation law from any illegitimate roots in sentiment and make it consistent with the vast body of law articulating the relationship of the family to the state.[326] Although these courts describe that interest in a variety of ways, it

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318. *Id.*

319. The *Brooks* decision goes a step further in this regard than any previous decision that invalidated an award of grandparent visitation on constitutional grounds. *Brooks* invalidates *any* award of grandparent visitation made over the objection of a fit parent, rather than distinguishing between an award of visitation made where the child lives in an intact family and an award made where the child's family has already suffered the disruption of death or divorce. *See id.*

320. Both the *Brooks* majority and concurrence take issue with this supposition from several perspectives. *See id.* at 775 (Sears, J., concurring).

321. 651 So. 2d 499 (La. Ct. App. 1995).

322. *Id.* at 500.

323. *Id.*

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

325. *Id.* (Lambert, J., dissenting).

326. Justice Webster's concurrence in *Beagle*, disagreeing with the majority's conclusion that Florida's open-ended grandparent visitation statute is constitutional, focuses on exactly this issue. He notes the extensive Florida precedent affirming the "longstanding and fundamental liberty interest of

is clear that they are really identifying the same single clear threshold. The *Hawk* court, for example, describes this threshold as an interest in preventing the "harm" that occurs when "the child's welfare [is] threatened."[327] The court elaborates by linking a finding of significant harm to a finding of "parental unfitness."[328] Similarly, in *Brooks* the court notes that the United States Supreme Court has held that state interference in the family is justifiable only where parental decisions "would result in harm to the child."[329] The threshold finding of harm these courts establish[330] is thus the same threshold of parental unfitness described by *Santosky v. Kramer*[331] as the indispensable precondition to governmental intrusion in the family. Phrases referring to the child's "harm"[332] or "neglect"[333] thus reference the child's perspective; phrases referring to parental "inadequacy"[334] or "unfitness"[335] reference the parent's perspective. All of these phrases describe the single circumstance in which the "family" as recognized by our constitutional jurisprudence no longer exists,[336] and the state is permitted, and indeed obligated, as parens patriae, to intervene.

Clearly, either the state's police power or its parens patriae responsibilities would obligate it to care for a child who has been orphaned or abandoned. Similarly, state intervention is clearly appropriate and necessary where the child

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parents in determining the care and upbringing of their children free from the heavy hand of government paternalism." *Beagle*, 654 So. 2d at 1265 (Webster, J., concurring) (quoting Padgett v. Department of Health & Rehabilitative Servs., 577 So. 2d 565, 570 (Fla. 1991)). Relating this concept of court-ordered grandparent visitation, he then comments that Florida's open-ended grandparent visitation statute intrudes "into one of the most delicate areas of parental decision-making — with whom their child shall form and maintain relationships" and "sends the clear message that the state knows better with whom a child should associate than do the child's parents." *Id.* at 1265 (Webster, J., concurring).

327. *Hawk*, 855 S.W.2d at 580.

328. *Id.* at 581.

329. *Brooks*, 454 S.E.2d at 772 (citations omitted).

330. The dissenting justices in *King* and *Herndon*, and the concurring justice in *Beagle* all advocate this same threshold. *See Beagle*, 654 So. 2d at 1265 (Webster, J., concurring); *King*, 828 S.W.2d at 635 (Lambert, J., dissenting); *Herndon*, 857 S.W.2d at 211 (Covington, J., dissenting).

331. 455 U.S. 745 (1982).

332. *See Brooks*, 454 S.E.2d at 772; *Hawk*, 855 S.W.2d at 580-81.

333. *See Brooks*, 454 S.E.2d at 772 (interference with "health or welfare" of child); *Lingo*, 651 So. 2d at 500; *Hawk*, 855 S.W.2d at 580.

334. *See Lingo*, 651 So. 2d at 500.

335. *See Brooks*, 454 S.E.2d at 774 (Sears, J., concurring) (fit parents must have exclusive right to determine what is in child's best interest); *Hawk*, 855 S.W.2d at 581.

336. This threshold is also applicable to circumstances in which harm to the child is threatened, but has not yet occurred. The state, as parens patriae, need not sit idly by if it can demonstrate the *probability* of impending harm by clear and convincing proof. Indeed, provisions providing for intervention in a family based upon findings of a danger of harm to the child are included in some form in the child welfare laws of all jurisdictions. *See, e.g.*, S.D. CODIFIED LAWS § 26-8a-2(6) (Michie 1992). Thus, if "harm to the child" and "parental unfitness" reference the same threshold viewed from two different perspectives, the term "substantial *danger* of harm," *Hawk*, 855 S.W.2d at 579 (emphasis added), can be understood as referencing that threshold from a different temporal point. Courts invalidating grandparent visitation statutes are thus logically consistent in this respect as well with the established framework for deferring to the family integrity right in other contexts.

is abused or neglected and a "family" in the constitutional sense no longer exists. The state may also override parental decisions, however, where a child has parents whose fitness is unquestioned, but the child is nevertheless subject to some discrete or temporary threat of harm which the parents are unable or unwilling to avert. It is this last aspect of parens patriae authority which is typically invoked either expressly[337] or by implication[338] when grandparents seek court-ordered visitation, for it avoids the practical and ethical difficulties of alleging unfitness[339] and corresponds to the occasional temporary nature of the visitation sought.

The fact that parens patriae power may apply to some circumstances when a child is living in the uninterrupted custody of fit parents is ultimately of no genuine significance in the context of a grandparent visitation suit, however, since it neither eliminates a threshold requirement of harm to the child nor provides any means of circumventing constitutional principles of parental authority. Indeed, the operation of parens patriae authority in this limited context serves, instead, to highlight these controlling principles and further demonstrate the constitutional primacy of parental authority. In *Ginsberg v. New York*,[340] for example, the United States Supreme Court held that the enactment of a statute prohibiting the sale of "girlie" magazines[341] 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 which it had determined would "impair[] [their] ethical and moral development."[342] The Court noted, further, that the legislation's impact on the minors was permissible because it did not supplant any parental authority or decision-making.[343] Although *minors* could not purchase the material in question, nothing

337. *See, e.g., Hawk*, 855 S.W.2d at 579.

338. *See, e.g., King*, 828 S.W.2d at 632 (grandparent visitation is necessary to preserve "special bond").

339. No allegations of parental unfitness are involved in any of the cases on which this analysis is based; in some instances the court expressly praises the parents' parenting abilities. *See, e.g., Hawk*, 855 S.W.2d at 577.

340. 390 U.S. 629 (1968).

341. 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.

342. *Id.* at 641. 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.*

343. *Id.* at 639.

in the statute prohibited their parents from purchasing it for them, and parents could thus "deal with the morals of their children as they saw fit."[344] The statute, furthermore, was an appropriate supplement to parental authority; it simply implements society's "transcendent interest" in furthering appropriate child development in the limited circumstances when parents could not do so. It did not, therefore, represent an infringement on parental authority.

Similarly, courts have found orders permitting certain discrete aspects of emergency medical treatment of children, given against the express wishes of their fit parents, constitutionally permissible because of the magnitude of the documented threat of harm to the child. In *Jehovah's Witnesses v. King County Hospital Unit No. 1*,[345] for example, the district court rejected a request by Plaintiff religious group, its governing agency, and certain individual members for a declaration of their right to decline blood transfusions for themselves and their minor children and for a permanent injunction prohibiting defendant hospitals and doctors from administering blood transfusions to them or their children.[346] The court noted that, insofar as the suit attempted to limit the emergency medical treatment necessary for the well being of minor children, it challenged the state's parens patriae authority.[347] Although the Court affirmed the primacy of the parent's right to child-rearing autonomy, it concluded that the court-ordered blood transfusions of children were not inconsistent with that right.[348] The court noted that child-rearing autonomy was unaffected except as necessary to save the life of the child.[349] Since the state statute at issue declared a child a ward of the state for purposes of ordering a blood transfusion only when the transfusion was deemed medically necessary by the attending physician, the court concluded that it was bound by the rule set forth in *Prince v. Massachusetts*.[350] Neither "rights of religion nor rights of parenthood"[351] permits parents to expose children to communicable disease or consign them "to ill health or death."[352] Just as the state's police power permits it to intrude on familial autonomy to prevent the

344. *Id.*

345. 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (one-sentence affirmance).

346. *Jehovah's Witnesses*, 278 F. Supp. at 491.

347. *Id.* at 504.

348. *Id.*

349. *Id.* The court cited medical testimony that in each of the ten cases under its review that the attending physician was of the opinion "that a blood transfusion was or would be vital to save the life of the patient." *Id.* at 503 n.10. This analysis of the proper exercise of parens patriae power is not limited to circumstances in which a child will literally die, however. In the overwhelming majority of jurisdictions the risk of serious but non fatal injury occurring in the absence of a blood transfusion is sufficient to justify the state's intervention. *See* Muhlenberg Hosp. v. Patterson, 320 A.2d 518, 521 (N.J. Super. Ct. Law Div. 1974). Thus the state acted properly where it ordered a child transfused over the religious objections of her otherwise fit parents in order to prevent the child from experiencing a series of strokes which could mean a loss of intellectual function. *In re* Cabrera, 552 A.2d 1114, 1119 (Pa. Super. Ct. 1989).

350. 321 U.S. 158 (1944).

351. *Id.* at 166.

352. *Id.* at 166-67.

crippling effect of child labor, so the state as parens patriae may act when parents are unable or unwilling to protect children from impending danger or death.

Subsequent judicial review of orders providing for the medical treatment of children against the express wishes of their fit parents further highlights the limited nature of the state's right as parens patriae to intrude on family life and the seriousness of the threat of harm which must precede any such intrusion. In *Crouse Irving Memorial Hospital v. Paddock*,[353] for example, respondents Mr. and Mrs. Paddock were expecting a baby by cesarean section and had been advised that the baby would require immediate medical treatment. In the judgment of their attending physician, the lives of both mother and baby would probably be in jeopardy without blood transfusions, to which mother and father as devout Jehovah's Witnesses refused to consent.[354] Noting that the state's interest in the welfare of its children permitted it to override parental decisions where the life of a child was threatened, the court ordered any necessary transfusions to the baby[355] and any transfusions at the time of the baby's delivery as necessary to stabilize Mrs. Paddock's condition.[356] The court noted, however, that in deference to her right to control her own body, Mrs. Paddock was to receive blood transfusions only as medically necessary at the time of delivery. Parens patriae authority could not be interpreted to interdict her "freedom to direct the course of her own treatment" after that point.[357] Furthermore, 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.[358] In short, the state's authority as parens patriae was limited even within the confines of the life threatening circumstances before it to the task of alleviating the direct and immediate threat to the child.

Cases invalidating open-ended grandparent visitation statutes recognize not only that the threat of serious harm to the child is a necessary precondition to any intrusive power but also that it is a logical corollary of the concept of parental autonomy as well. The *Hawk* court stressed the limited nature of parens patriae power, for example, noting that its reach is limited by constitutional principles rendering the legislature and courts literally powerless to supplant parents.[359] Indeed, *Hawk* characterizes a judicial best interests of the child analysis made in the absence of a threshold finding of harm as "judicial second guessing,"[360] thereby affirming not only the primacy of familial autonomy but also the reality that no quantifiable "best interests of the child" really exists for a given child, apart from the child's continuous relationship with fit parents. Trial justices applying a "best interests of the child" standard under an open-ended grandparent

353. 485 N.Y.S.2d 443 (Sup. Ct. 1985).
354. *Id.* at 444.
355. *Id.* at 445.
356. *Id.* at 446.
357. *Id.*
358. *Id.* at 445.
359. *Hawk*, 855 S.W.2d at 581 (quoting Bennett v. Jeffreys, 356 N.E.2d 277, 281 (N.Y. 1976)).
360. *Id.*

visitation statute are not uncovering scientific truth. Instead, all the trial justice can really do is decide whose opinion as to the "best interests" of that particular child most closely corresponds to his own.[361] Indeed, as the *Brooks* court notes, although there are probably many instances in which a grandparent-grandchild bond can benefit a child, there is little evidence that this is always, or even most often, the case[362] and ample evidence that the impact of the grandparent visitation suit on the grandchild can cause great harm.[363]

This rejection of a best interests of the child standard where no finding of parental unfitness has been made is actually the most accurate reflection of the current consensus regarding children's needs. All we really know about a child's best interests is that a child requires at least minimal care and an uninterrupted relationship with fit parents.[364] We know that state intrusion into the parent-child relationship may be harmful.[365] We know that "fit parent" means nothing more than "adequate parent."[366] But beyond this threshold, no agreement exists.

The results of a longitudinal study undertaken by psychologists at Berkeley underscore 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. Various analyses were made of this fund of data. One such monograph focuses on the socialization process of children up to age fourteen.[367] 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

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361. The analysis in *Lingo v. Kelsay*, 651 So. 2d 499 (La. Ct. App. 1995), is different because Louisiana's grandparent visitation statute requires a finding of "extraordinary circumstances" prior to an award of visitation. LA. CIV. CODE ANN. art. 136 (1996). Since the term "extraordinary circumstances" is interpreted quite differently from "best interests of the child" the Louisiana statute is not open-ended.

362. *Brooks*, 454 S.E.2d at 773.

363. *Id.* (citing J. 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, 294-98 (1993)).

364. *See supra* note 234.

365. *See, e.g.*, Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 889 (1975) (noting that there is little agreement among experts and commentators as to when state intervention in a child's life is justified or constructive). There is considerable judicial comment 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, 442 (1989) (judicial process involved in bypassing the parental notification requirement in a statute governing minors' access to abortion); Dearborn Fabricating & Eng'g Corp. v. Wickham, 551 N.E.2d 1135, 1137 (Ind. 1990) (litigation involved in a loss of parental consortium claim); Shioji v. Shioji, 712 P.2d 197, 206 (Utah 1985) (Zimmerman, J., dissenting) (litigation involved in a change of custody proceeding).

366. Santosky v. Kramer, 455 U.S. 745, 765 n.15 (1982) ("Even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare.").

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

this optimum combination, he frequently arrives at stable maturity [anyway]. . . . [W]e are not sure that we have begun to understand how or why."[368]

Reviewing the results at the thirty-year point of the study, Dr. Arlene Skolnick made similar comments:

> The experience of the Berkeley subjects showed the error of assuming that childhood stress must inevitably lead to adult maladjustment . . . . [T]he adult data showed that early difficulties could be overcome and compensated for. The theoretical predictions of the researchers were also jarred from the other direction by the adult status of the children who had seemed especially blessed with ability, talent, popularity or easy and confidence-inducing family lives.[369]

By taking the position that children's best interests are simply to remain in the continuous undisturbed custody of their own fit parents, therefore, *Hawk* and *Brooks* have simply applied well-settled constitutional principles of family integrity to grandparent visitation law. When a child has fit, married parents who have not faltered in their "high duty"[370] as parents, "[t]he judge as amateur psychologist . . . is neither an attractive nor a convincing figure."[371]

Courts which affirm open-ended grandparent visitation statutes, on the other hand, all purport to discern a "best interest of the child" apart from the child's uninterrupted contact with fit parents and uniformly fail to recognize harm or the threat of harm to a child as a prerequisite to intrusive state action on a functional family. Cases in this category all add two basic ingredients to hold that court-ordered grandparent visitation is in the best interests of the child. The first ingredient is the assertion that the development of a relationship between a grandparent and a grandchild is presumptively beneficial. This finding is supported by assertions which simply reference what the judges perceive to be common experience. The *King* court announces, for example, that "a grand child will ordinarily benefit from contact with the grandparents" and "[t]hat grandparents and grandchildren normally have a special bond that cannot be denied."[372] The *Herndon* court cites this language from *King*, adding that "the development of a loving relationship" is desirable.[373] Similarly, in *R.T. v. J.E.*,[374] the court cited *King's* assertion that grandparent visitation statutes reasonably "advance" loving relationships among families and noted that its own grandparent visitation statute was "premised upon

368. *Id.* at 221.

369. ARLENE SKOLNICK, THE INTIMATE ENVIRONMENT, EXPLORING MARRIAGE AND THE FAMILY 353-54 (1978).

370. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

371. *In re* Gault, 387 U.S. 1, 19 n.25 (1967) (citing David R. Barrett et al., Note, *Juvenile Delinquents: The Police, State Courts and Individual Justice*, 79 HARV. L. REV. 775, 808 (1966)).

372. *King*, 828 S.W.2d at 632.

373. *Herndon*, 857 S.W.2d at 209-10.

374. 650 A.2d 13 (N.J. Super. Ct. Ch. Div. 1994).

the presumed beneficial relationship existing between grandparents and grandchildren."[375]

The second ingredient courts in this category add to their analyses to reach the conclusion that court-ordered visitation serves the best interest of the child is a finding that the visitation will not harm the child. Thus, in a curious inversion of the principle that the state may not intrude on a functional family absent a finding of harm or the threat of harm to the child, these courts essentially conclude that unless parents can demonstrate that their child will be in danger, the fact that the child will be safe with the grandparent, coupled with the presumed benefit to be derived from the relationship, demonstrates that court-ordered grandparent visitation serves the best interests of the child. For example, the *Herndon* court specifically notes that "visitation would not endanger [the child's] physical health or impair [the child's] emotional development."[376] Similarly, the *King* court notes that "[t]he condition and safety of [the grandfather's] home was never in issue."[377] And in the only reported case in which a court emphatically validated the constitutionality of an open-ended grandparent visitation statute but found any award of visitation as contrary to the best interests of the child, the court's refusal was grounded on a finding of harm to the child. The court found that the grandmother's repeated allegations that the child's father was sexually abusing the child had so embittered the parents and so traumatized the child that an order of visitation would serve only to add stress and anxiety to the child's already fragile emotional condition.[378] The best interests of the child determinations these courts make thus rest upon an assertion that the child will be unharmed, coupled with a presumption that reduces grandparents to a sentimental stereotype and contradicts common human experience in the diversity and range of possible relationships to be found among people of all ages.

The failure of courts validating open-ended grandparent visitation statutes to recognize harm or the threat of harm to the child as an indispensable prerequisite to coercive state intrusion on the functional family stems from a consistent misapprehension of the legitimate sources and limitations of state power. To illustrate the fact that a constitutional right to familial autonomy is not absolute, for example, the *Herndon* court cites *Ginsberg v. New York* and *Prince v. Massachusetts*, asserting that they demonstrate the state's constitutional power to regulate children and limit parental freedom.[379] It fails to note, however, that a finding of threatened harm to the child or children involved in each case was an indispensable threshold in each decision. The *Ginsberg* Court carefully framed its opinion around the state's duty to protect children from the harmful effects of pornography in circumstances which supplemented rather than supplanted parental authority.[380] No

375. *Id.* at 16.

376. *Herndon*, 857 S.W.2d at 206.

377. *King*, 828 S.W.2d at 633.

378. Sanchez v. Parker, No. CN93-09822, 1995 WL 489146, at *2 (Del. Fam. Ct. June 20, 1995).

379. *Herndon*, 857 S.W.2d at 207 (citing Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944)).

380. *Ginsberg*, 390 U.S. at 639.

such threshold of threatened harm or respect for familial autonomy animates the *Herndon* court's use of *Ginsberg*; however, to the *Herndon* court, *Ginsberg* simply stands for the idea that "[t]he well being of its children is a subject within the state's constitutional power to regulate,"[381] apparently without precondition or limit.[382] Similarly, although the *Prince* Court found state contravention of a parenting decision permissible only because of the "crippling" nature of the child labor at issue,[383] *Herndon* interpreted *Prince* simply as recognition of the state's "wide range of power for limiting parental freedom."[384]

This general notion, that coercive state intrusion into the details of family life is permissible absent any sign of familial inadequacy simply because a judge has approved it, underlies every other decision validating grandparent visitation. The *King* court asserts that familial privacy is not inviolate and lists circumstances where regulation is appropriate without citation of specific authority or acknowledgment that each circumstance described involved a threshold threat of harm.[385] Similarly, the *Beagle* majority specifically rejects the argument that a finding of harm to the child must precede the intrusion of court-ordered grandparent visitation. Quoting an earlier Florida opinion, the *Beagle* majority agreed that it too could "find nothing . . . that would preclude the state from passing a statute providing for reasonable visitation by a grandparent with grandchildren upon the finding that such visitation is in the child's best interest."[386] With only minor variations, these unsupported pronouncements have been repeated in all subsequent cases, affirming the validity of open-ended grandparent visitation.[387]

Indeed, for these decisions, the idea that a limitation on state power is appropriate and necessary at some point is virtually absent, with analysis focusing instead on the "perceived benefit"[388] of visitation. Presiding Justice Benham, dissenting from the majority's invalidation of Georgia's open-ended grandparent visitation statute in *Brooks*, first cites *Prince* and *Ginsberg* for the general proposition that a state may constitutionally impose regulations simply to enhance the well being of its children.[389] He then notes the decades of judicial recognition that a child's best interests will often include grandparent visitation.[390] He illustrates the primacy that he believes a best-interests-of-the-child determination commands by describing a 1910 Georgia case in which a widowed father of unquestioned fitness is denied

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

382. The only apparent limitation *Herndon* places on this power to regulate involves inquiry into the *magnitude* of the infringement on parental autonomy. *Id.* at 208. *See supra* notes 205-06 and accompanying text.

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

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

385. *King*, 828 S.W.2d at 631.

386. Beagle v. Beagle, 654 So. 2d 1260, 1262 (Fla. Dist. Ct. App. 1995).

387. *See, e.g.*, Pollard v. Pollard, No. 532463, 1995 WL 534244, at *8 (Conn. Super. Ct. Aug. 25, 1995); R.T. v. J.E., 650 A.2d 13, 15-16 (N.J. Super. Ct. Ch. Div. 1994).

388. Hawk v. Hawk, 855 S.W.2d 573, 581 (Tenn. 1993).

389. Brooks v. Parkerson, 454 S.E.2d 769, 777 (Ga.) (Benham, P.J., dissenting), *cert. denied*, 116 S. Ct. 377 (1995).

390. *Id.* at 771.

custody of his child "because it is 'the welfare of the little one' which is paramount."[391] Even this Orwellian conclusion, expressly condemned by the United States Supreme Court in *Stanley v. Illinois*,[392] fails to provoke discussion of the limitations on the state's power to coercively intrude on family life. The *Hawk* court's assertion that "[t]he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process"[393] needs no further explication.

Conclusion

Open-ended grandparent visitation statutes override the decisions of fit parents regarding who their minor children will associate with, thus allowing the state to intrude directly upon a central aspect of family life. Since this intrusion implicates the family's constitutional right to integrity, grandparent visitation statutes necessarily trigger strict judicial scrutiny; since they further no compelling state interest, they inevitably fail.

On the most basic level, furthermore, grandparent visitation statutes are invalid because they are not a legitimate exercise of state power. A state simply has no general authority to "make things better." The most optimistic advocate of visitation statutes could hardly find them an appropriate exercise of police power; the uneventful life of a child living with fit parents does not trigger the parens patriae authority of the state. Indeed, although we recognize that a child needs fit parents, we cannot even agree on where else that child's best interests might lie.

Perhaps the real significance of forced grandparent visitation, therefore, lies not in individual grandparent visitation statutes or in the individual grandparent visitation suits but in the implications of this type of statute for society as a whole. We may treasure our own grandparents or delight in our children's children; however, the profound pleasures of such voluntary associations are simply not relevant here. If we collectively allow grandparent visitation to be forced upon an unwilling family for no better reason than that some robed stranger thought it best, we have embarked upon a slow decent into judicial supervision of family life which has neither legal limits nor a logical end.

391. *Id.* at 773 (citing Evans v. Lane, 70 S.E. 603 (Ga. 1910)).
392. 405 U.S. 645 (1972).
393. *Hawk*, 855 S.W.2d at 580.