

Changing Family Realities, Non-Traditional Families and Rethinking the Core Assumptions of Family Law

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Non-traditional family forms continue to vex a family law structure built on status and form, challenging courts to consider relational and contextual analyses that focus on emotion, care, and the content of relationships. In the process concepts of privacy, equality and liberty are questioned and defended, or recast. The naming of families as "non-traditional," or the use of other modifiers, reinforces the implicit norm and definition of a "real" family. Non-traditional families also frequently generate competing images of decline or creativity, crumbling social foundations or healthy fluidity, and historical consistency versus modern malaise. Much of the challenge to traditional American family law structure has been at the state and local level.¹ Less frequently the United States Supreme Court has considered the implications of current family realities for family and constitutional law.

During the 1999-2000 term, however, the Court exercised its discretion to hear Troxel v. Granville,² a case that brought many issues of changing family forms, and the Court's view of family and parents, into sharp relief. In Troxel the Court had to decide whether a Washington state statute that permitted a petition for visitation by third parties was unconstitutional in the context of grandparents seeking visitation with the grandchildren of their deceased son. The Court concluded, in a surprisingly splintered

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¹ For example, challenges to marriage statutes on behalf of same sex couples, the liberalizing of access to adoption records, and permitting adoption by gay and lesbian parents as joint parents or as co-parent adoption all are examples of recent changes in family law at the state level.

² 530 U.S. 57 (2000).

opinion, that *as applied* the statute constituted an unconstitutional invasion of parental autonomy.³ While Troxel most directly affected grandparent visitation, and more generally third party visitation, in a broader sense the case became an opportunity for an examination of changing family forms. The case is important for what it says about conceptions of family and the ability of courts to accept functional definitions, grounded in emotional and psychological relationships, as opposed to structural, biological, or status-oriented definitions that tend to privilege traditional nuclear, marital, biological, heterosexual families with well-defined gender roles. It is also significant for its discourse about non-traditional families. In Part I of this Article I describe the Troxel case, including the family stories, the course of the litigation, the arguments raised before the Supreme Court, and the six opinions filed in the Court's decision. In Part II I explore Troxel's significance for visitation by grandparents and other third parties. Because Troxel reached a result based on the application of the statute rather than its facial validity, it has done little to resolve many of the issues raised by third party visitation statutes. In Part III I consider the broader conceptual implications of the case for non-traditional families.

I. The Troxel Decision

A. Stories, decisions, arguments

(1) The family stories

Troxel began as three separate visitation petitions that were eventually consolidated in an appeal to the Supreme Court of Washington. Only the Troxel family's petition was appealed to the United States Supreme Court. The three family stories

³ Id. at 73. (O'Connor, J., plurality)

involved in the original stage of the litigation are notable for their intersection with the realities of diverse families and the view they provide of the changing, evolving nature of family life.

The Troxel petition involved a request for visitation by paternal grandparents with their two grandchildren.⁴ The family story includes the threads of non-marital parenthood, extended family, step-parent adoption, and blended family. The children's father, Brad, never married the mother, Tommie Granville, but they lived together intermittently from 1988 to 1991.⁵ Tommie previously had three children with Jeff Granville, and had two children with Brad, their daughters Natalie and Isabelle.⁶ The couple separated before Natalie was born, and Brad then lived with his parents, Jennifer and Gary Troxel.⁷ The Troxels had been married over 30 years and Gary was a member of the Fleetwoods, a nationally famous band in the 60s. All of the Troxels' four children and their grandchildren lived in Skagit County, Washington.⁸ Tommie and Brad agreed to custody and visitation, devised a parenting plan, and filed the plan in 1992 in state court.⁹ Under the plan, the girls spent every other weekend with Brad, usually at their grandparents' home.¹⁰

Brad committed suicide in May 1993.¹¹ In the period immediately following his death, Brad's brother and sister assisted Tommie in caring for the girls, and frequently the grandparents saw their children during this period at the homes of their other children.¹²

⁴ In re Visitation of Troxel, 940 P.2d 698, 699 (Wash. Ct. App. 1997).

⁵ Brief for Petitioner at 2, Troxel v. Granville, 530 U.S. 57 (no. 99-138).

⁶ Petitioner for Certiorari at 4, Troxel v. Granville, 530 U.S. 57 (no.99-138).

⁷ Id. at 3.

⁸ Id.

⁹ Brief for Petitioner at 2, Troxel v. Granville, 530 U.S. 57 (no. 99-138).

¹⁰ Id.

¹¹ Id.

¹² Id.

In October 1993, Tommie informed the grandparents that she wanted to limit their contact with the girls to one visit per month, a request with which the grandparents disagreed. The apparent reason for Tommie's request was her relationship with Kelly Wynn, a divorced father of two, and her desire to stabilize their blended family.¹³ From October to December the girls did not visit their grandparents at all.¹⁴ In December 1993 the grandparents filed a petition seeking visitation. Regular visits did not resume until April 1994, after a temporary visitation order was obtained by the grandparents.¹⁵

The trial was held in 1995, nearly a year after the action was filed, when the girls were five and almost three years old. Tommie did not object to visitation, but did not agree with the extent of visitation that Gary and Jennifer requested.¹⁶ The grandparents sought two weekends of visitation each month and two weeks during the summer. In part their rationale was that they would stand in the shoes of their deceased son in relation to his child. Tommie asked for one day of visitation each month but no overnight stays.¹⁷ Tommie's expert also suggested that the Troxels be included in the holiday celebrations of the Wynns. The trial court entered a compromise order, granting the Troxels visitation of one weekend per month, one week in the summer, and four hours on the birthday of each grandparent.¹⁸ Tommie appealed, objecting to overnight visits and the summer vacation visit, and challenged the standing of the grandparents.¹⁹ On appeal, the Court of Appeals agreed that the Troxels lacked standing to file for visitation, since no

¹³ Id. (The timing of the marriage is a bit unclear. Petitioner's Brief states that Granville married Wynn in 1994, while Justice O'Connor's opinion states that Granville did not marry Wynn until after the visitation trial, which occurred in 1995. *Troxel v. Granville*, 530 U.S. 57 at 61 (O'Connor, J. plurality)).

¹⁴ Id. at 2.

¹⁵ Id. at 3.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id. 4-5.

¹⁹ Id. 5.

custody proceeding was pending at the time they requested visitation, and dismissed the petition.²⁰

In the course of the litigation Tommie married Kelly Wynn and had a child with him, and Mr. Wynn also adopted Natalie and Isabelle in 1996.²¹ The controversy regarding visitation was framed, however, as a controversy between Tommie and the Troxels only with respect to Natalie and Isabelle.

The second family story involved the petition of David Clay for visitation in order to maintain a relationship with Justin Wolcott. David's petition was unique because he was not Justin's biological father nor had he ever been married to Justin's mother; his claim for visitation was premised on this status as a psychological father.²² Justin was born in 1986 to Lisa Wolcott, who was unmarried at the time. Lisa began a relationship with David, and they lived together from 1988 to 1992. After they separated, David continued to see Justin, who he regarded as his son.²³ When the relationship between David and Lisa deteriorated, David filed a visitation petition in 1993, and a temporary order gave him visitation every other weekend, which was later reduced to one Saturday per month.²⁴ In 1994 Lisa sought to terminate visitation. After a trial in October 1995, David's petition was dismissed for lack of standing.²⁵ The Court of Appeals agreed that David had no standing to seek visitation.²⁶ Justin was then nine years old. During the

²⁰ In re Visitation of Troxel, 940 P.2d at 701 (Wash. Ct. App. 1997). In other words, rather than allowing a visitation petition to be brought whenever the parties disagreed, the Court reasoned that petitions were limited to changed family circumstances, and specifically to a pending custody dispute. This interpretation would have prevented the Troxels from ever filing a petition, since Tommie was the only surviving parent, so there was no one with whom to have a custody dispute.

²¹ Id. at 698.

²² In re Wolcott, 933 P.2d 1066 (Wash. Ct. App. 1997).

²³ Id. at 1067.

²⁴ Id.

²⁵ Id.

²⁶ Id. 1069

litigation Lisa married, and her husband adopted Justin.²⁷ As in Troxel, the threads of non-marital relationship, subsequent marriage, step-parenthood and step-parent adoption are present. The uniqueness of Wolcott, on the other hand, is the assertion of fatherhood by a non-biological, non-marital, non-adoptive father who acted as a de facto parent to the child.

The third petition was filed by paternal relatives, including grandparents, an aunt, and an uncle, to maintain their relationships with Sara Stillwell.²⁸ Sara was conceived during the marriage of Brian Smith and Kelly Stillwell with the assistance of artificial insemination from a donor, and was born in 1992.²⁹ In 1995 Kelly petitioned for divorce, and both parents sought custody of Sara. In February 1996 Kelly's mother and Brian had a violent altercation over the custody dispute, and both Brian and his mother-in-law died from gunshot wounds.³⁰ After this family tragedy, Kelly and Brian's relatives could not work out visitation. The Smith relatives then filed a visitation petition. A trial was held in April 1997, when Sara was five years old, and a visitation schedule was established.³¹ When Kelly appealed, the appeals court granted a motion to consolidate this case with the pending Troxel and Wolcott cases.³² The Smith case is a "true" single parent case with no stepparent or intimate partner in the picture. It also brings together intersections of death, divorce, and families formed within marriage through reproductive technologies.³³

²⁷ Id.

²⁸ In re Smith, et al, 969 P.2d 21 (Wash. 1998).

²⁹ Id. 24.

³⁰ Id.

³¹ Id.

³² Id. at 23.

³³ Id. at 24. The Smith case is unique for its exposure of the intersections between family realities and legal constructions. It can be characterized as a controversy between a widow and the surviving relatives of the father, or as the nearly ex-wife in a highly contested custody case versus family relatives related to the father who killed the mother's mother (who simultaneously killed her son-in-law). The child is biologically connected to the mother, but legally deemed also the child of the father by virtue of the operation of the

(2) The statutory scheme

The visitation orders in these three family situations were sought under a state law that permitted non-parents to seek visitation.³⁴ The statute in effect by the time the case reached the Washington Supreme Court provided:

Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.³⁵

The prior statute (effective until 1996) was quite similar:

The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

A person other than a parent may petition the court for visitation rights at any time.

The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.³⁶

The context in which these statutes were enacted include a series of revisions of state law to clarify the rights of non-custodial parents in a dissolution situation with respect to visitation, as well as the creation and clarification of statutes permitting visitation by non-parents independent of any particular circumstances, such as dissolution or a parental death, in the family unit.³⁷

state statute on artificial insemination as well as the marital presumption that any child born during the marriage is the child of the father.

³⁴ Wash. Rev. Code § 26.10.160(3) (2001) and Wash. Rev. Code § 26.09.240 (amended 1996).

³⁵ Wash. Rev. Code § 26.10.160(3) (2001).

³⁶ Wash. Rev. Code § 26.09.240 (amended 1996).

³⁷ See *In re Smith, et al*, 969 P.2d at 26 (Wash. 1998).

The Washington statute reflects similar provisions among all American jurisdictions permitting, to a greater or lesser degree, third party visitation.³⁸ While some statutes include only grandparents, other statutes more broadly provide for visitation by other third parties as well.³⁹ Washington's statute was exceptional in that it permitted

³⁸ All fifty states have statutes that provide for grandparent visitation in some form. Ala. Code § 30-3-4.1 Alaska Stat. Ann. § 25.20.065 (1998); Ariz. Rev. Stat. Ann. § 25-409 (1994); Ark. Code Ann. § 9-13-103 (1998); Cal. Fam. Code Ann. § 3104 (West 1994); Colo. Rev. Stat. § 19-1-117 (1999); Conn. Gen. Stat. § 46b-59 (1995); Del. Code Ann., Tit. 10, § 1031(7) (1999); Fla. Stat. § 752.01 (1997); Ga. Code Ann. § 19-7-3 (1991); Haw. Rev. Stat. § 571-46.3 (1999); Idaho Code § 32-719 (1999); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Ind. Code § 31-17-5-1 (1999); Iowa Code § 598.35 (1999); Kan. Stat. Ann. § 38-129 (1993); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1990); La. Rev. Stat. Ann. § 9:344 (West Supp.2000); La. Civ. Code Ann., Art. 136 (West Supp.2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Md. Fam. Law Code Ann. § 9-102 (1999); Mass. Gen. Laws § 119:39D (1996); Mich. Comp. Laws Ann. § 722.27b (Supp.1999); Minn. Stat. § 257.022 (1998); Miss. Code Ann. § 93-16-3 (1994); Mo. Rev. Stat. § 452.402 (Supp.1999); Mont. Code Ann. § 40-9-102 (1997); Neb. Rev. Stat. § 43-1802 (1998); Nev. Rev. Stat. § 125C.050 (Supp.1999); N.H. Rev. Stat. Ann. § 458:17-d (1992); N.J. Stat. Ann. § 9:2-7.1 (West Supp.1999-2000); N.M. Stat. Ann. § 40-9-2 (1999); N.Y. Dom. Rel. Law § 72 (McKinney 1999); N.C. Gen. Stat. §§ 50-13.2, 50-13.2A (1999); N.D. Cent. Code § 14-09-05.1 (1997); Ohio Rev. Code Ann. §§ 3109.051, 3109.11 (Supp.1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); Ore. Rev. Stat. § 109.121 (1997); 23 Pa. Cons. Stat. §§ 5311-5313 (1991); R.I. Gen. Laws §§ 15-5-24 to 15-5-24.3 (Supp.1999); S. C. Code Ann. § 20-7-420(33) (Supp.1999); S.D. Codified Laws § 25-4-52 (1999); Tenn. Code Ann. §§ 36-6-306, 36-6-307 (Supp.1999); Tex. Fam. Code Ann. § 153.433 (Supp.2000); Utah Code Ann. § 30-5-2 (1998); Vt. Stat. Ann., Tit. 15, §§ 1011-1013 (1989); Va. Code Ann. § 20-124.2 (1995); W. Va. Code §§ 48-2B-1 to 48-2B-7 (1999); Wis. Stat. §§ 767.245, 880.155 (1993-1994); Wyo. Stat. Ann. § 20-7-101 (1999).

For a good description of the movement to grandparent visitation pre-Troxel as well as third party visitation issues more generally, see generally Edward M. Burns, Grandparent Visitation Rights: Is it Time for the Pendulum to Fall, 25 Fam. L. Q. 59 (1991); Koreen Labrecque, Grandparent Visitation after Stepparent Adoption, 6 Conn. Prob. L. J. 61 (1991); Catherine Bostock, Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States, 27 Colum. J.L. & Soc. Probs. 319 (1994); Linda D. Elrod & Robert G. Spector, A Review of the Year in Family Law: Century Ends with Unresolved Issues, 33 Fam. L. Q. 865 (2000); Barbara L. Shapiro, Non-Traditional Families in the Courts: The New Extended Family, 11 J. Am. Acad. Matrim. Law 117 (1993); Ruthann Robson, Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory, 26 Conn. L. Rev. 1377 (1994); John DeWitt Gregory, Blood Ties: A Rationale for Child Visitation by Legal Strangers, 55 Wash. & Lee L. Rev. 351 (1998)

³⁹ As noted by one amicus, the tendency in visitation statutes has been toward expanding visitation to include extended family and kin:

Some state custody statutes provide that ...extended family or informal kin, who are neither parents nor grandparents, may petition for visitation. These include great-grandparents, stepparents, siblings, and relatives, or persons who have either maintained a parent-child relationship with the child or who once had physical custody of the child. Only a few states, in addition to Washington, allow any person to join or initiate an actin for visitation. In all, at least twenty-one state statutes specifically allow persons in addition to grandparents to petition for visitation. Finally, even in states where there is no statutory grant of standing to other third parties, many courts have exercised their discretion to grant visitation to third parties when it would be in the best interest of the child and/or when the third party has stood in loco parentis to the child.

Brief Amicus Curiae Center for Children's Policy Practice Research at the University of Pennsylvania in Support of Respondent, Lexsee 1999 U.S. Briefs 138 (December 13, 1999).

"any person" to file for visitation, and also without establishment of a preexisting relationship or attempted relationship with the child. Some states limit the circumstances under which a petition for visitation can be filed by third parties, such as the dissolution of a marriage or the death of a parent, or a finding of parental unfitness.⁴⁰ Washington's statute also was unusual in this respect, since it allowed a petition for visitation to be filed at "any time." Finally, like most visitation statutes, Washington's statute determined whether to grant visitation based on the "best interests" standard. Some states articulate specific factors to be taken into account in applying the standard, and frequently those factors include strong consideration of the objections of the child's parent(s).⁴¹

⁴⁰ Regarding the circumstances under which a visitation petition could be filed, one amicus brief summarizes the status of the statutes at the time the case was heard:

Twenty states do not permit grandparents to petition for visitation with grandchildren when the children's parents are married and both parents oppose such visitation. These states specify limited circumstances in which a grandparent may file a petition for visitation, such as a divorce or custody proceeding, the death of a parent, or a child born out-of-wedlock. The other thirty states, including Washington, permit grandparents to petition for visitation regardless of the parent's marital status, even when the parents oppose grandparent visitation. Of these states, four permit the grandparents to petition for visitation when the parents are married only if the child previously resided with the grandparents for a minimum period of three to twelve months. Another eight of these states permit a petition when the parents are married only if the grandparents have been denied visitation with the grandchild.

Brief Amici Curiae of AARP and Generations United in Support of Petitioners, Lexsee 1999 U.S. Briefs 138 (November 12, 1999).

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Twenty-seven states require courts to take into consideration whether the grandparent has already established a substantial relationship with the grandchild in determining whether to award visitation in an individual case. Eighteen states require the courts to consider the effect of the court-ordered grandparent visitation on the child's relationship with the parent. Thirty-one states explicitly permit grandparents to petition for visitation following adoption by a step-parent.

Id. For concern over parental objection, see *supra* note 40. Washington's revised statute required the following factors be included in a best interests determination: strength of the relationship with the child; the nature of the relationship of the petitioner with the parents or custodian of the child; reasons for objection to granting visitation; effect of visitation on the parental or custodial relationship; the residential time sharing arrangements; good faith of the petitioner, and criminal history or history of abuse or neglect, and any other factor relevant to the child's best interest. Wash. Rev. Code 26.09.240(6) (1996 Wash. Laws ch. 177, section 1). The state was amended in 1996 after the petition for visitation was filed in the Troxel case.

Washington's statute followed the best interests standard but did not articulate specific factors to be taken into consideration. A few states make the visitation determination based on a higher showing of harm to the child if visitation is denied, rather than meeting the more affirmative standard of best interests.⁴²

Washington's statute was distinctive, then, because it permitted "any person" to petition for visitation at "any time" and would grant visitation if it was in the best interests of the child. The petitioner was not required to make a showing of prior relationship in order to file, and no circumstance or change in circumstances were necessary to bring a petition. The breadth of those who could utilize the statute is reflected in the three cases before the court, including biological grandparents, a psychological parent/former boyfriend, and extended family members. Other family scenarios that might have generated a visitation petition include stepparents, non-biological lesbian or gay co-parents, de facto parents, psychological parents, and other extended or kinship or fictive kinship relations. The breadth of the statute's reach to "any person" would also by its terms include virtual strangers.⁴³

⁴² See, e.g., the revised Washington statute, *supra* note 41, and the use of procedural standing devices and the application of the best interests standard to in effect apply a "harm" standard. For an argument on the constitutional requirement of a harm standard, see, e.g., Brief of the American Civil Liberties Union and the ACLU of Washington in Support of Respondent, Lexsee 1999 U.S. Briefs 138 (December 13, 1999). For the more extreme position that third party visitation per se is an unconstitutional invasion under any standard, see Brief of the Coalition for the Restoration of Parental Rights as Amicus Curiae in Support of Respondent, Lexsee 1999 U.S. Briefs 138 (December 8, 1999).

⁴³ Brief of Northwest Women's Law Center, et al, 1999 U.S. Briefs 138 (December 10, 1999)(implications of the case for single mothers and lesbian non-biological parents); (Brief Amicus Curiae for Debra Hein in Support of Respondent, 1999 U.S. Briefs 138 (December 30, 1999 (mother with adoptive children); Brief of the Domestic Violence Project Inc./Safe House (Michigan), et al, 1999 U.S. Briefs 138 (December 13, 1999)(use of visitation statutes by domestic violence perpetrators as a weapon in abuse situations). Several of the briefs bring up the "stranger" scenario, as do some of the lower court opinions.

A literal reading of this statute could lead to the sort of absurd result that our canons of statutory construction forbid. Does "any person" have standing to petition "at any time" for visitation with a child? For example, could a member of the state Legislature who has displeased a constituent find herself faced with the considerable expenditure of time, money, and emotional energy to oppose a wholly frivolous petition by that constituent?

(3) The Washington Supreme Court opinion⁴⁴

The Washington Supreme Court rejected the statutory construction of the lower courts that a visitation petition could only be brought in the context of a custody proceeding which had been the basis for the finding that the parties lacked standing. The plain language of the statute stated otherwise: a visitation petition could be brought "at any time."⁴⁵ A majority of the Court nevertheless agreed with the Courts of Appeal that the visitation orders were invalid, albeit on the different basis that the statute, in its current or prior form, was unconstitutional under the U.S. Constitution.⁴⁶

The Court was closely divided in the case, 5-4, reflecting a strong difference of opinion on the meaning of federal precedents on the rights of parents. The majority opinion of Justice Madsen interpreted federal constitutional protection of family, including the right to non-interference into family privacy to rear one's children, as subject to state interference "only 'if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.'"⁴⁷ The Court found that the state could only exercise its *parens patriae* power to protect the child from harm.⁴⁸ Although the state could intervene to protect certain relationships with children, the Court construed those instances very narrowly to encompass only situations where a break in the relationship would cause "severe psychological harm to the child."⁴⁹ The Court rejected as a constitutionally compelling interest sufficient for

In re the Visitation of Troxel, 940 P.2d 698, 699 (Wash. 1997).

⁴⁴ In re Custody of Smith, 969 P.2d 21 (Wash. 1998)

⁴⁵ Id. at 26.

⁴⁶ Id. Because the state constitution provided no different or higher standard than the federal constitution, the court evaluated the challenge solely by reference to federal constitutional law. Id.

⁴⁷ Id. at 29 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

⁴⁸ Id. at 30.

⁴⁹ Id.

intervention the "best interests of the child." "State intervention to better a child's quality of life through third party visitation is not justified where the child's circumstances are otherwise satisfactory."⁵⁰ In addition, the Court viewed the broad language of the statute as dangerous and threatening to "stable" families who might be required to defend against frivolous or manipulative actions to seek visitation by anyone irrespective of relationship, since the statute did not impose a requirement of a showing of substantial prior relationship as a standing requirement for seeking visitation.⁵¹

Justice Talmadge, in dissent, strongly disagreed with the majority's interpretation of constitutional precedent as well as its rejection of the best interests standard as constitutionally sufficient. Justice Talmadge argued that parental rights are not absolute, nor is the state prohibited from intervening other than upon a showing of harm to the child.⁵² He disagreed with the majority's narrow interpretation of *parens patriae* power both from the perspective of state law and constitutional law.⁵³ He pointed out that most courts have held grandparent visitation statutes constitutional where they incorporate the best interests of the child standard.⁵⁴ Talmadge reasoned that a strong version of parental autonomy is grounded in the assumption that "family" means an intact traditional family. A less stringent protection for parents is justified by the "realities of modern living:"

The realities of modern living, however, demonstrate that the validity of according almost absolute judicial deference to parental rights has become less compelling as the foundation upon which they are premised, the traditional nuclear family, has eroded.... More and varied and complicated family situations arise.... One of the frequent consequences, for children, of the decline of the traditional nuclear family is the formation of close personal attachments between them and adults outside of their immediate families.... It would be shortsighted

⁵⁰ Id.

⁵¹ Id. at 30-1.

⁵² Id. at 32-3 (Talmadge, J., dissenting).

⁵³ Id. at 34 (Talmadge, J., dissenting).

⁵⁴ Id. at 37 (Talmadge, J., dissenting).

indeed, for this court not to recognize the realities and complexities of modern family life, by holding today that a child has no rights, over the objection of a parent, to maintain a close extra-parental relationship which has formed in the absence of a nuclear family.⁵⁵

Talmadge's opinion reflects a view seemingly more supportive of children's rights but less deferential to the privacy of non-traditional families.

(4) The appeal and decision in the United States Supreme Court

On appeal only the Troxel petition for visitation was considered by the United States Supreme Court, rather than all three cases before the Washington Supreme Court. The presence or absence of the other cases arguably was irrelevant, and even the facts of the Troxel case were irrelevant, because the Washington Supreme Court had ruled the statute *facially* unconstitutional.⁵⁶ Ultimately, however, the facts were important because the United States Supreme Court held the state statute invalid only *as applied*.

The arguments of the parties and amici on appeal included a range of positions on the implications of non-traditional families for constitutional analysis. The basic argument of the grandparents was that the state court had erred in its finding of facial invalidity because the statute was constitutional if the proper level of scrutiny was applied, and, most significantly, if all relevant interests were considered, not solely those of the parents. A balancing analysis should have been used, they argued, including all relevant interests and relationships.⁵⁷ Such an analysis would recognize current realities in American families, who represent a wide range of shapes and configurations that often change over time, rather than reflect assumptions tied to the idealized nuclear, marital family.

⁵⁵ Id. at 35 (Talmadge, J., dissenting).

⁵⁶ Id. at 27.

Advocates for the mother, on the other hand, focused on the importance of parental autonomy and the degree of infringement represented by this broadly worded statute. Emphasizing that this was not simply a grandparent visitation statute, they pointed out that the covered category of persons was limitless. Further more, evaluation under the best interests standard was insufficient protection of parental autonomy and family privacy. Because parental status confers constitutional protection, the mother's status as a single mother when the litigation began was irrelevant to her claim of constitutional protection. While some form of third party visitation, particularly grandparent visitation, would be constitutionally permissible, any valid statutory scheme required protection of parental autonomy through standing requirements and evidentiary presumptions that reflected due regard for parental autonomy, all of which were lacking in the Washington statute.⁵⁸ Parental status, rather than family structure, was the proper focus.

Interestingly, the amici who presented arguments in the case substantially agreed that parental autonomy is fundamental, extremely important and valued.⁵⁹ Disagreement

⁵⁷ Brief for Petitioner at 7, *Troxel v. Granville*, 530 U.S. 57 (no. 99-138).

⁵⁸ Brief for Respondents at 17, *Troxel v. Granville*, 530 U.S. 57 (no. 99-138).

⁵⁹ Brief of the States of Washington, Arkansas, California, Colorado, Hawaii, Kansas, Missouri, Montana, New Jersey, North Dakota, Ohio, and Tennessee as Amici Curiae in Support of Petitioners, Lexsee 1999 U.S. Briefs 138 ; Brief of Amicus Curiae of Grandparents United for Children's Rights, Inc.(for Petitioner), Lexsee 1999 U.S. Briefs 138 (November 16, 1999); Brief of the Amicus Curiae American Academy of Matrimonial Lawyers, 1999 U.S. Briefs 13 (November 12, 1999); Brief for the Grandparent Caregiver Law Center of the Brookdale Center on Aging as Amicus Curiae in Support of Petitioners, Lexsee 1999 U.S. Briefs 138 ; Brief of the National Conference of State Legislatures, Council of State Governments, National Association of Counties, National League of Cities, International City County Management Association, and U.S. Conference of Mayors as Amici Curiae in support of Petitioners, Lexsee 1999 U. S. Briefs 138 (November 12, 1999); Brief Amici Curiae of AARP and Generations United in Support of Petitioners, Lexsee 1999 U.S. Briefs 138 (November 12, 1999); Brief Amicus Curiae Center for Children's Policy Practice & Research at the University of Pennsylvania in Support of Respondent, Lexsee U.S. Briefs 138 (December 13, 1999); Amicus Curiae Brief of Professor Robert C. Fellmeth, et al, Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief of Lambda Legal Defense and Education Fund and Gay and Lesbian Advocates and Defenders as Amici Curiae in Support of Respondent, Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief of the Domestic Violence Projects Inc. / Safe House (Michigan), the Pennsylvania Coalition Against Domestic Violence, inc., the Florida Coalition Against Domestic Violence,

and debate largely focused around the definition and scope of parental autonomy and respect for family relationships and decision-making, and the interrelationship of parent-child relationships with other familial relationships.⁶⁰

Very different views also were presented on the significance of changing family forms and the presence of non-traditional families. Petitioners and their amici most strongly argued that the presence and growth of non-traditional families undercut traditional notions of parental autonomy because the children of such families needed all of the kin and non-kin relationships in their lives that they could get. At the same time, the structure and status of family members in non-traditional families required protection of their relationships.⁶¹ This view of non-traditional families as in need of greater

the Iowa Coalition Against Domestic Violence, and the Missouri Coalition Against Domestic Violence as Amici Curiae in Support of Respondent, Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief of the Institute for Justice, Alabama Family Alliance and the Minnesota Family Institute as Amici Curiae in Support of Respondent, Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief in Amicus Curiae for Debra Hein in Support of Respondent, Lexsee 1999 U.S. Briefs 138 (December 30, 1999); Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Washington in support of Respondent, Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief Amicus Curiae of the American Center for Law and Justice Supporting Respondent, Lexsee 1999 U.S. Briefs 138 (December 10, 1999); Brief of Amicus Curiae in Support of Respondent (Center for the Original intent of the Constitution), Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief Amici Curiae of Christian Legal Society and the National Association of Evangelicals in Support of Respondent, Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief of Northwest Women's Law Center, Connecticut Women's Education and Legal Fund, National Center for Lesbian Rights, and the Women's Law Center of Maryland, Inc. as Amici Curiae in Support of Respondent, Lexsee 1999 U.S. Briefs 138 (December 10, 1999); Brief of the Coalition for the Restoration of Parental Rights as Amicus Curiae in support of Respondent, Lexsee 1999 U.S. Briefs 138 (December 8, 1999).

⁶⁰ The amicus lined up on either side of the case argued about the standard of review and even the legitimacy of fundamental rights grounded in substantive due process, jurisprudential arguments frequently debated in substantive due process cases. How demanding the standard of review would be varied also depending upon whether one characterized this dispute as one between parents and state, or as intra-familial, between what might be best for the children and what might be best for the parents, and/or between two sets of relevant caretaking adults, parents and grandparents.

⁶¹ "Family units have changed.... The nurturing role of grandparents in raising grandchildren has become more frequent and more direct." Brief of Amicus Curiae of Grandparents United for Children's Rights Inc., Lexsee 1999 U.S. Briefs 138, 13 (November 16, 1999); "Because of the potential for serious psychological harm to children, there no longer is room in our jurisprudence for parents to maintain total hegemony over who may visit their children.... In addition, the present day variations in family arrangements seem boundless. In this fluid diversity of persons with ties to children, the only remaining constant is the children's best interests." Brief of the Grandparent Caregiver Law Center of the Brookdale Center on Aging, Lexsee 1999 U.S. Briefs 138, 2 (November 12, 1999); "[C]hild-grandparent relationships have important psychological and social contributions to make toward the healthy development of

support and therefore as necessitating greater invention melded with a strong children's rights orientation, emphasizing the needs of children more strongly than the desires of third parties for visitation.⁶² Finally, these advocates pressed the argument that parental autonomy has never been recognized as absolute, and in any case is sufficiently protected by the "best interests" standard.⁶³

The irony of the position advocated on behalf of the mother is the combination of making visible a range of family forms while arguing for, or permitting, greater regulation than would have been unthinkable for intact, two parent marital families. Framed within a more progressive definition and supportive recognition of non-traditional families, these advocates argued that these families deserve less support or justify greater intrusion. The affirmative view of this position is greater support for a functional view of family, and therefore the necessity of a standard that reflects actual relationships rather than status or form. The negative view of this position is that it is grounded in the view that anything other than the nuclear, marital heterosexual family is less functional, "broken," or "at risk," and therefore deviation from the unstated norm justifies state intervention. A more nuanced view of the greater needs of some families and some children is based on a case by case consideration of both relationships and circumstances, with a justifiable concern for greater support (and necessary intervention),

children.” Brief Amici Curiae of AARP and Generations United in Support of Petitioners, Lexsee 1999 U.S. Briefs 138, 12 (November 12, 1999). See also Brief of the States of Washington, et al, Lexsee 1999 U.S. Briefs 138 (November 12, 1999); Brief of the National Conference of State Legislatures, et al, Lexsee 1999 U.S. Briefs 138 (November 12, 1999).

⁶² Brief Amicus Curiae Center for Children’s Policy Practice & Research at the University of Pennsylvania in support of Respondent, Lexsee 1999 U.S. Briefs 138, at 15.

⁶³ Other amicus supporting the grandparents argued that the balance of interests that they saw as constitutionally necessary was not represented in the Washington statute, so that, ironically, while arguing on behalf of the grandparents, they nevertheless supported a statute with more protections for parental autonomy. Some amicus also pointed out the other relationships affected by the statute, and therefore the

when the child is in danger of losing an ongoing loving, caring relationship particularly where the child has special needs or the circumstances are those of family crisis.

On the other hand, amici supporting the mother's position enfolded all parents, including often stigmatized single parents, gay and lesbian and stepparents, and step-parents, within classic arguments for parental autonomy.⁶⁴ Advocates for the mother argued that non-traditional families deserved equal respect and privacy, which could only be accomplished by strong support of parental rights. Support for parents irrespective of the family forms in which they are embedded is linked with a view of parental autonomy historically tied to patriarchal, hierarchical family forms often antagonistic to the non-mainstream parents for whom the arguments are marshaled. Parental autonomy is presented as fixed, set, and strong; as a first principle, established in natural law, pre- or supra-constitutional.⁶⁵ According to this view, parental autonomy should be respected either absolutely or more vigorously than was the case under the Washington statute. According to absolutists in this camp, if grandparents need to bring a legal action to establish visitation, harm to the family is inevitable, since the strains of family

broad range of families affected by a finding of unconstitutionality, including gay and lesbian partners, stepparents, live in partners, psychological parents and de facto parents.

⁶⁴ Brief of the Coalition for the Restoration of Parental Rights as Amicus Curiae in Support of Respondent, Lexsee 1999 U.S. 138 (December 8, 1999); Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Washington, Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief Amicus Curiae for Debra Hein, 1999 U.S. Briefs 138 (December 10, 1999); Brief Amicus Curiae Center for Children's Policy Practice & Research at the University of Pennsylvania, Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief of the Northwest Women's Law Center, et al, Lexsee 1999 U.S. Briefs 138 (December 10, 1999); Brief Amici Curiae of Christian Legal Society and the National Association of Evangelicals, Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief Amicus Curiae of the American Center for Law and Justice, Lexsee 1999 U.S. Briefs 138 (December 10, 1999); Brief of the Domestic Violence Project Inc./Safe House (Michigan), et al, Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief of the Institute for Justice, et al, 1999 U.S. 138 (December 13, 1999); Brief of Lambda Legal Defense and Education Fund and Gay and Lesbian Advocates and Defenders, Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief of Professor Robert C. Fellmeth, et al, Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief of the Center for the Original Intent of the Constitution, Lexsee 1999 U.S. Briefs 138 (December 13, 1999).

⁶⁵ Id.

disagreement are now exacerbated by legal intervention into a private dispute.⁶⁶ Most of the amici, however, do not advocate such strong deference to parental authority. They acknowledge a role for relationships other than the parent-child relationship, and the appropriateness of state intervention to protect and support those relationships. But they would argue that other relationships still need to be important enough to merit a hearing, and visitation decisions should accord significant weight to parents' decisionmaking.⁶⁷

The argument for strong parental rights is also articulated as the constitutional insufficiency of the "best interests" standard. The critique of the "best interests" standard as a means to protect parental interests focuses on familiar criticism of the indeterminacy of the standard and the presence of judicial bias.⁶⁸ Non-traditional parents in particular need greater protection, not less, according to these amici, to counterbalance the majoritarian, conservative tendencies of judges.⁶⁹ Children are best protected, then, by protecting the presumed best judgments of their parents. Even children "at risk," meaning either those in non-traditional families generally or a smaller class of children who have suffered highly abusive or traumatic family circumstances, are better protected if the standard insures that only those who have meaningful, substantial relationships are supported, rather than simply "any" person.

The differences in these positions touch on core issues of family law, both constitutionally and otherwise.⁷⁰ They include the definition of family, the resolution of

⁶⁶ See, e.g., Brief of the Coalition for the Restoration of Parental Rights, Lexsee 1999 U.S. Briefs 138 (December 8, 1999).

⁶⁷ See supra note 64.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ One of the interesting patterns in the briefs before the Court, nevertheless, is the agreement among opposing advocates on certain propositions. Most advocates did not see the family as turning solely on the parent-child relationship, and recognized the value of kin and non-kin relationships. On the other hand, no party characterized the grandparent-child relationship as involving "rights" of grandparents. Third, briefs

intra-familial disputes as compared to disputes between families and the state; whether familial determinations should be made on the basis of form or function, and the critique of function as indeterminate. This case also raises questions about how to protect familial privacy and relationships without reinforcing traditional norms; whether to approach family disputes by balancing the rights of all relevant parties rather than preferring particular family decisionmakers; and whether differences among families merit differences in legal analysis.

B. The Supreme Court's decision: Troxel v. Granville⁷¹

The Supreme Court affirmed the judgment of the Washington Supreme Court 6-3, with six opinions filed in the case.⁷² Justice O'Connor's plurality opinion was joined by Chief Justice Rehnquist, Justice Ginsberg, and Justice Breyer. Justices Souter and Thomas concurred separately. The dissenters, each of whom separately filed an opinion, were Justices Stevens, Scalia and Kennedy. All in all, the case produced a very unusual alignment of justices. With so many opinions filed, it also produced considerable confusion as to where a majority of the Court stands either on the particular issues of this case or analysis of fundamental constitutional rights of families.

In brief, the plurality opinion of Justice O'Connor reads as if it is a judgment that the statute is facially invalid due to overbreadth, but the opinion avoids that conclusion by finding the statute unconstitutional as applied to the specific dispute between the

for both parties took the view that a more nuanced statute that limited standing to a narrower category of people based on the nature of their relationship with the child, and perhaps also limited visitation to changed family circumstances would most strongly support the value of non-parental family relationships. They differed only as to whether these qualifications of third party rights were constitutionally required.

⁷¹ 530 U.S. 57 (2000).

⁷² Id. at 60 (O'Connor, J., plurality).

Troxels and Tommie Granville.⁷³ Justice O'Connor takes the view that parental power, short of unfitness, should be respected and free from state interference, and constructs the case as an unwarranted power struggle between a parent and a judge.⁷⁴ Justice Souter, concurring in the result, would find the statute facially invalid on the basis suggested by the O'Connor opinion.⁷⁵ Justice Thomas also agrees that parental autonomy should prevail in this case. His concurrence underscores his view that strict scrutiny should be the standard to evaluate an infringement on fundamental rights, while also reserving the larger issue of whether the entire area of substantive due process merits review.⁷⁶

The dissenters take quite different positions. Justice Stevens argues that the case should not have been reviewed at all, but that once accepted, the grant of review requires that the Court address the facial invalidity issues. He concludes that the statute was not facially unconstitutional on either of the grounds that the Washington Supreme Court held that it was. According to Justice Stevens, a finding of harm is not constitutionally necessary in order for the state to exercise its *parens patriae* power because the right of parental autonomy must be balanced against the needs of children. The statute also is not unconstitutionally broad, in his view, because of the range of persons and circumstances under which a petition may be filed is limited by the best interests principle.⁷⁷ Justice Stevens sees parental power as less absolute, subject to challenge even if unfitness does not exist. He especially would see a basis for a more balanced analysis of contested

⁷³ Id. at 73 (O'Connor, J., plurality).

⁷⁴ Id. at 68-9 (O'Connor, J., plurality).

⁷⁵ Id. at 79 (Souter, J., concurring).

⁷⁶ Id. at 80. (Thomas, J., concurring).

⁷⁷ Id. at 84-91 (Stevens, J., dissenting).

intra-familial disputes based on children's rights, and in recognition of the fact that many third parties act as de facto parents or have important relationships with children.⁷⁸

In contrast, Justice Scalia focuses on the broader substantive due process issue noted by Justice Thomas, and concludes that parental rights are not constitutional rights. Under Scalia's view, the state is free to structure its statute as it wills without constitutional constraints grounded in the concept of fundamental rights, because no fundamental rights of family or parents are explicit in the text of the Constitution.⁷⁹

Finally, Justice Kennedy would vacate and remand the case to the Washington Supreme Court rather than reverse. In his view, one of the grounds for unconstitutionality below, that harm to the child is required before the state can intervene, rests on a misinterpretation of constitutional precedents. Based on his view that the "best interests" standard is constitutionally sound, Justice Kennedy argues that the Court should have reversed and remanded the case for further consideration after clarification of the state court's error in its reading of the constitutional precedents.⁸⁰

What these opinions suggest about how the Court defines "family," and in particular its view of nontraditional families, is especially significant. In several of the opinions the range of contemporary families, and an acceptance of non-traditional

⁷⁸ The critique of substantive due process analysis is interesting for family law analysis because it indicates whether the "constitutionalization" of family law would continue should this analysis become more dominant with a change in the personnel of the Court. See, e.g., Katherine B. Silbaugh, *Miller v. Albright: Problems of Constitutionalization in Family Law*, 79 B.U.L. Rev. 1139 (1999); Ann Laquer Estin, *Family Governance in the Age of Divorce*, 1998 Utah L. Rev. 211; 1994 U. Ill. L. Rev. 311; Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297 (1998); Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. Ill. L. Rev. 311. The controversy over substantive due process is an area of significant concern for family law and constitutional scholars that will not be addressed in this essay.

⁷⁹ *Id.* at 92 (Scalia, J., dissenting).

⁸⁰ *Id.* at 94 (Kennedy, J., dissenting).

families, is a strong theme.⁸¹ The nature of parental power with respect to the state and with respect to children, on the other hand, is sharply debated. Before discussing the implications of the opinions, I briefly describe each in greater detail.

(1)Justice O'Connor's plurality opinion

Justice O'Connor's decision reads as if it condemns the Washington statute as unconstitutional because of overbreadth and the failure to accord sufficient, constitutionally required weight to parental decision-making. She describes the Washington third party visitation statute as "breathtakingly broad" because it permits the filing of a petition by any person at any time.⁸² In reaching her conclusion that the decision below should be affirmed, she states that "we rest our decision on the sweeping breadth [of the statute] and the application of that broad, unlimited power in this case..."⁸³ Second, she sees as a significant flaw of the statute that it "contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever."⁸⁴ Citing the Court's prior precedents in Meyer v. Nebraska,⁸⁵ Pierce v. Society of Sisters,⁸⁶ and Prince v. Massachusetts,⁸⁷ she describes the rights of parents as a liberty interest that is "perhaps the oldest of the fundamental liberty interests recognized by this Court."⁸⁸ More specifically, she describes it as a "fundamental right of parents to make decisions concerning the care, custody, and control of their children."⁸⁹ The recognition of this fundamental right is further confirmed by subsequent cases; parental

⁸¹ Id. at 63-4 (O'Connor, J., concurring) and Id. at 101 (Kennedy, J., dissenting).

⁸² Id. at 67 (O'Connor, J., plurality).

⁸³ Id. at 73 (O'Connor, J., plurality).

⁸⁴ Id. at 69 (O'Connor, J., plurality).

⁸⁵ 262 U.S. 390 (1923).

⁸⁶ 268 U.S. 510 (1925).

⁸⁷ 321 U.S. 158 (1944).

⁸⁸ Troxel v. Granville, 530 U.S. at 65 (O'Connor, J., plurality).

⁸⁹ Id. at 60 (O'Connor, J., plurality)

rights as fundamental rights is thus a strong and honored constitutional principle.⁹⁰

Deference to parental decision making is entirely absent in this statutory scheme and, in her view, is glaringly apparent in the application of the statute in this case. Justice O'Connor cites by contrast the provisions in other states' statutes that establish a rebuttable presumption in favor of parental decisions regarding visitation, or make that an explicit and strong factor in reaching a determination under the "best interests" standard.⁹¹

Furthermore, in her evaluation of the application of the statute in this case she suggests additional analysis of facial invalidity. She notes that the mother was a fit parent and had not denied visitation to the grandparents entirely. While she does not see fitness as insulating parental decision making from challenge, she does see fitness as supporting a presumption that the parent's decision is in the best interests of the child.⁹² She expressly declines, however, to address the constitutional validity of the position taken by the state court below that the state could only intervene or order visitation upon a showing of harm to the child.

The significance of the mother in this case not denying *all* visitation was, in her view, that the parent had not cut off the relationship of the grandparents with their grandchildren. Support of the parental decision was therefore appropriate.⁹³ Justice O'Connor cited approvingly to the statutes of states that provide that visitation cannot be ordered unless a parent has denied all visitation as another means to support the primacy

⁹⁰ Id. at 66 (O'Connor, J., plurality). (citing *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Quillion v. Walcott*, 434 U.S. 246 (1978); *Parham v. J.R.*, 442 U.S. 584 (1979); *Stankosky v. Kramer*, 455 U.S. 745 (1982); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁹¹ Id. at 70 (O'Connor, J., plurality).

⁹² Id. at 66 (O'Connor, J., plurality) ("Our Jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children," quoting *Parham v. J.R.*, 442 U.S. at 602).

of parental decision making.⁹⁴ While she does not expressly support such provisions as constitutionally required, this sign of support provides another example of how a statutory scheme might appropriately give constitutionally required deference to parental decision-making.

Despite this analysis suggesting a conclusion of facial invalidity, Justice O'Connor's plurality opinion rests on the conclusion that the statute was not facially invalid, but rather was constitutionally invalid as applied. The error in the application, according to Justice O'Connor, was multiple: failing to give deference to the judgment of a fit parent, based on the constitutional rule that a fit parent will act in the best interests of the child; giving presumptive weight to the assumption that visitation was in the best interests of the children; allowing a judge to disagree with a parent and have that disagreement be enforced through an unbounded best interests analysis; and failing to consider that the mother had not denied visitation entirely. As applied, "this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests."⁹⁵ This violates the constitution because "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a "better" decision could be made."⁹⁶

Why did the Court avoid declaring the statute facially invalid? O'Connor states that this is an area where the Court should proceed with great caution, due to both

⁹³ Id. at 71 (O'Connor, J., plurality).

⁹⁴ See Id. at 71.

⁹⁵ Id. at 72 (O'Connor, J., plurality).

⁹⁶ Id. at 72-3 (O'Connor, J., plurality).

deference to state courts and the intricacies of family scenarios.⁹⁷ Finally, the pragmatic consequences for this family would be further litigation, which Justice O'Connor saw as especially burdensome for the mother in this case.⁹⁸

Justice O'Connor's reference to the complexity of the issues raised by this case relates back to the context in which Justice O'Connor places this constitutional issue. It is this statement about families, in addition to her articulation of the rights of parents, that is so important in considering the implications of this case. Justice O'Connor acknowledges the diversity of American families, the significance of grandparents in the care of children, the value and necessity of supporting third party relationships, and the challenges all of this creates. She opens her analysis with an acknowledgment of family complexity: "The demographic changes of the past century make it difficult to speak of an average American family."⁹⁹ She proceeds to focus especially on the prevalence of single parent families, who are nearly thirty percent of the families in which children under eighteen are raised,¹⁰⁰ and the greater likelihood that children's care and relationships in those families include non-parents, especially grandparents. Third party visitation statutes protect those relationships especially when third parties act as

⁹⁷ Id. at 73 (O'Connor, J., plurality).

⁹⁸ Id. at 75 (O'Connor, J., plurality). But her sense that the litigation would end at this point was apparently inaccurate. After the U.S. Supreme Court rendered its decision, the Troxels asked for the visitation that Tommie Wynn initially had offered. They indicated that if she did not agree to that visitation, they might return to court once again to seek a visitation order. Gordy Holt, *Grandparents Ready to Settle For Offer Made Early in Dispute*, Seattle Post-Intelligencer, A5, June 6, 2000. This continued litigation is entirely appropriate given the Court's judgment that the statute was only unconstitutional as applied on the facts of this visitation petition.

⁹⁹ Id. at 63-4 (O'Connor, J., plurality).

¹⁰⁰ Id. at 64 (O'Connor, J., plurality). See also Nancy E. Dowd, *In Defense of Single Parent Families* (New York: New York University Press 1997). The most recent demographics indicate continued growth of single parent families based on the 2000 census. In the 1990s the number of households with single mother head of households increased 25% during the 1990s, as compared to an increase of 6% of married couple households. Eric Schmitt, *For First Time, Nuclear Families Drop Below 25% of Households*, New York Times A1, A18 (May 15, 2001).

parents.¹⁰¹ In addition, she recognizes that third party visitation statutes incorporate the view that children's relationships with third parties should be supported, whether those relationships are de facto parental relationships or not.¹⁰² The challenge, as she sees it, of the statutes that spring from these objectives is the potential that they might harm the core parent-child relationship. "The extension of statutory rights in this area to persons other than a child's parents, however, comes with an obvious cost[it] can place a substantial burden on the traditional parent-child relationship."¹⁰³

(2) The Souter and Thomas concurrences

Justice Souter's concurrence in the judgment is grounded in his view that the Court should reach the issue of facial invalidity suggested but ultimately avoided by the plurality opinion. He finds the statute constitutionally overbroad, representing an undue infringement on "a parent's interests in the nurture, upbringing, companionship, care and custody of children."¹⁰⁴ While declining to set out the boundaries of parental rights, Justice Souter clearly sees the right to select and control a child's associations as crucial to development of the child's character, and therefore in the realm of primary parental decision making.¹⁰⁵ "To say the least...parental choice in such matters is not merely a default rule."¹⁰⁶ Justice Souter would therefore agree with the implicit facial invalidity analysis of Justice O'Connor concerning the failure to accord due deference to parental decisions. Because that analysis tracks one of the reasons given by the state court to hold its statute unconstitutional, he would decline to consider the validity of the other reason

¹⁰¹ Id. at 64 (O'Connor, J., plurality).

¹⁰² Id. at 64 (O'Connor, J., plurality).

¹⁰³ Id. at 64 (O'Connor, J., plurality).

¹⁰⁴ Id. at 77 (Souter, J., concurring) (citing same cases as O'Connor's plurality opinion).

¹⁰⁵ Id. at 76 (Souter, J., concurring).

¹⁰⁶ Id. at 79 (Souter, J., concurring).

given by the state court (that a finding of harm is required before the state can intervene), and simply affirm the finding of unconstitutionality.¹⁰⁷ He also sees the grant of review, and the basis of the decision below, as purely grounded on facial invalidity, which necessitates reaching the issue.

Justice Thomas' concurrence proceeds from an entirely different perspective. First, Justice Thomas reserves the question of the validity of the Court's substantive due process jurisprudence. Second, since that issue is not before the Court, he clarifies that the appropriate standard of review, in view of the Court's prior precedents recognizing a fundamental right of parents to control childrearing, is strict scrutiny. In this case, he concludes that the state's interest is not even legitimate, much less compelling. Framed this way, the state's argument would fail any level of scrutiny. He frames the state's interest as "second-guessing a fit parent's decision regarding visitation with third parties."¹⁰⁸ His brief statement suggests that he would support strong protection of parental rights that would limit state intervention to situations to prevent harm to the child.¹⁰⁹

(3) The Stevens, Scalia and Kennedy dissents

The dissents in this case are remarkably different. Justice Stevens would find the statute constitutionally valid under the same fundamental rights precedents cited by the justices voting in the majority.¹¹⁰ He disagrees with the conclusion that this statute is

¹⁰⁷ Id. at 79 (Souter, J., concurring).

¹⁰⁸ Id. at 80 (Thomas, J., concurring).

¹⁰⁹ Id. at 80 (Thomas, J., concurring).

¹¹⁰ Id. at 87. Justice Stevens is quite critical of the grant of certiorari in this case, but argues once the Court took the case, it was bound to decide it by interpreting constitutional principles as facially applied to the statute, since that was the decision of the court below. Id at 80-1. He agrees, then, with Justice Souter that the Court must address the state court's view of constitutional requirements. Id. 82-3. Justice Kennedy agrees that the Court must address the question of whether the analysis below was in error. But Stevens and Kennedy disagree on the appropriate analysis. Justice Stevens is ready to find the statute facially

fatally overbroad. If there is a legitimate, constitutional application, he argues, then the overbreadth challenge should fail.¹¹¹ An easy example, in his view, of a constitutional application of the visitation statute would be a petition by a prior caretaker of the child.¹¹² In these circumstances he imagines that an award of visitation would be reasonable and constitutionally sound. Second, Justice Stevens critiques the second basis for facial unconstitutionality of the state court, that visitation can only be awarded if there is a showing of harm to the child if it is denied.¹¹³ He finds that view totally without support in the Court's precedents. Parental authority is not, he points out, absolute:

[W]e have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm. The presumption that parental decisions generally serve the best interests of their children is sound, and clearly in the normal case the parent's interest is paramount. But even a fit parent is capable of treating a child like a mere possession.¹¹⁴

As examples of lack of absolute parental authority he cites to the Court's cases defining the rights of fathers.¹¹⁵ He particularly notes the Court's decision in Michael H. v Gerald D.,¹¹⁶ where the Court had to sort through the claims of a biological father who had established a social relationship with his child in contrast to the biological mother and her husband, the legal father of the child since the child was born during the marriage. He

valid, and return the case for the state court to evaluate whether the statute is constitutional as applied. *Id.* at 85. Justice Kennedy, on the other hand, would prefer to identify the flaws in the analysis and send the case back for the state court to reconsider the facial constitutional challenge. *Id.* at 94. Kennedy's approach is more deferential to state court construction of its own statutes, although it would require the state court to follow clarified federal interpretation. Justice Souter sees this as a point of difference between him and Justice Kennedy: Souter would permit a more demanding scrutiny by the state court, a higher standard than the federal government, while Kennedy would require the same approach, consistent with the federal standard. *Id.* at 79. (Souter, J., concurring)

¹¹¹ *Id.* at 85 (Stevens, J., dissenting).

¹¹² *Id.* at 85 (Stevens, J., dissenting).

¹¹³ *Id.* at 86 (Stevens, J., dissenting).

¹¹⁴ *Id.* at 86 (Stevens, J., dissenting).

¹¹⁵ *Id.* at 87 (Stevens, J., dissenting). (citing *Lehr v. Robertson* 463 U.S. 248 (1983); *Michael H v. Gerald D.* (1989)).

¹¹⁶ 491 U.S. 110 (1989).

cites to this case as an example of parental authority that was forced to yield to family interests.¹¹⁷ Parental rights, in his view, are tied to relationship and family; they are not merely rights in the abstract defined solely by status.¹¹⁸

Evaluating the interests at stake in this situation, according to Justice Stevens, is not simply a consideration of the parent versus the State, but must include the interests of the child.¹¹⁹ Children have liberty interests just as parents do, and must be considered in the analysis.¹²⁰ Just as the scope of parents' rights has not been defined, so too the Court has not defined the scope of children's liberty interests, and here Justice Stevens again cites to Michael H. Justice Stevens is careful to suggest that the child's interest is not co-extensive with the parent's, but at the same time he states that the child's interest is not sufficiently protected by a standard that requires a showing of harm before it can be acted upon.¹²¹ The insufficiency of that standard is linked by Justice Stevens to the very diversity of the family situations in which children find themselves:

[W]e should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a "person" other than a parent. The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily.¹²²

The Washington statute, in his view, provides the flexibility to consider the variable situations children find themselves in and protects parents and children through the

¹¹⁷ Troxel v. Granville, 530 U.S. at 88 (Stevens, J., dissenting).

¹¹⁸ Id. at 88 (Stevens, J., dissenting). Of course, one might also view Michael H as a case that reaffirms the importance of status over relationship, and simply puts parental status in this case below the status of parenthood within marriage.

¹¹⁹ Id. at 88.

¹²⁰ Id. at 88 and n.8 (Stevens, J., dissenting).

¹²¹ Id. at 90 (Stevens, J., dissenting).

¹²² Id.

familiar "best interests" standard. He also separately notes in a footnote that to suggest that the best interests standard is constitutionally deficient would have broad ranging consequences, considering its wide use in family law determinations.¹²³

Especially notable about Justice Stevens' opinion is his view that the range of family circumstances and nontraditional structures, and the variability in intimate, caring relationships, is critical to a more open consideration and balancing of parental rights with children's rights. Equally important, in his view, is analysis that permits variability rather than rigid rules. "[T]he instinct against over-regularizing decisions about personal relations is sustained on firmer ground than mere tradition. It flows in equal part from the premise that people and their intimate associations are complex and particular, and imposing a rigid template upon them all risks severing bonds our society would do well to preserve."¹²⁴

Justice Scalia's dissent takes an entirely different tack to reach the same conclusion that the Washington statute is constitutional. He would not recognize any *constitutional* limits on the state to legislate with respect to third party visitation because the constitution does not enumerate parental rights as a protected right. Justice Scalia leaves no doubt that he thinks parental rights are important: he views them as inalienable rights retained by the people under the Ninth Amendment.¹²⁵ But those rights are not rights protected by the Constitution.¹²⁶ He argues for limiting the reach of prior precedent precisely because the range of views articulated in this "simple" case indicates

¹²³ Id. at 84 n.5. (Stevens, J., dissenting).

¹²⁴ Id. at 91 n. 10. (Stevens, J., dissenting).

¹²⁵ Id. at 91 (Scalia, J., dissenting).

¹²⁶ Id.

the danger of proceeding in this area.¹²⁷ Further support for parental rights would require defining "parent," "family," and articulating the interests of others, with the result of federalizing and constitutionalizing family law. "I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people."¹²⁸ Having disposed of unenumerated rights, Justice Scalia indicates in a short footnote that the children might claim enumerated rights under First Amendment free exercise or freedom of association protections, a suggestion that would orient children's rights in a very different direction than that considered by Justice Stevens.¹²⁹

Finally, Justice Kennedy reaches no conclusion on the validity of the statute because he would remand the case back to the state after correcting the state's error in reading constitutional precedents. Justice Kennedy's dissent is particularly important because more than any other member of the Court he considers the implications of an argument that the "best interests" standard does not satisfy constitutional standards. He criticizes the decision below as incorrectly reading the Court's precedents to conclude that the "best interests" standard is constitutionally insufficient, and erroneously assuming that a showing of harm to the child is constitutionally required.¹³⁰ While he would not see the "best interests" standard as sufficient in all cases to protect parental interests, he

¹²⁷ Id. at 92 (Scalia, J., dissenting).

¹²⁸ Id. at 93 (Scalia, J., dissenting).

¹²⁹ Id. at 93 n.2 (Scalia, J., dissenting).

¹³⁰ Id. at 94. (Kennedy, J., dissenting).

nevertheless would not see a "harm" standard as constitutionally required in visitation statutes.¹³¹

Justice Kennedy sees the best interests and harm standards as distinctive. He approaches the question of whether either one is constitutionally required by asking whether history or tradition provides an answer.¹³² As he notes, because visitation is a twentieth century phenomenon, history and tradition is of little assistance.¹³³ Justice Kennedy does not see the consequence of that conclusion as leading to the result that parental authority should be dominant, a view that would support the harm standard. He sees the flaw in such reasoning as its presumption of a nuclear, marital family norm:¹³⁴

[It is based on the] assumption that the parent or parents who resist visitation have always been the child's caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is imply not the structure or prevailing condition in many households. For many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood. This may be so whether their childhood has been marked by tragedy or filled with considerable happiness and fulfillment.¹³⁵

The harm standard might, in his view, preclude recognition of constitutionally significant relationships.¹³⁶ By contrast, the best interests standard, a standard well settled in state law, would support recognition of those relationships.¹³⁷ Additional protection of

¹³¹ Id. at 94 (Kennedy, J., dissenting). Because he sees the "harm" analysis as not merely one of two independent grounds, but rather a "core" ground in the state court's opinion, he would reverse and remand the case for further proceedings. Id at 95.

¹³² Id. at 96-7 (Kennedy, J., dissenting).

¹³³ Id. at 96 (Kennedy, J., dissenting).

¹³⁴ Id. at 98(Kennedy, J., dissenting).

¹³⁵ Id. at 98 (Kennedy, J., dissenting). (internal cites omitted) It is significant to note that Justice Kennedy is careful to not assume that the presence or absence of parents may automatically mean a good or bad environment for children. He avoids, therefore, the common myth that two parents are always better than one or that a family with only one parent is by definition is an inferior family structure.

¹³⁶ Id. at 98 (Kennedy, J., dissenting).

¹³⁷ Id. at 95-102 (Kennedy, J., dissenting). .

parental interests can be accomplished by other means, including standing, presumptions, and evidentiary requirements.¹³⁸ Justice Kennedy is loath to consider the best interests standard as constitutionally deficient, although he leaves the door open to consideration of its insufficiency in certain circumstances. He acknowledges the critique of best interests as indeterminate and the invasiveness of a petition for visitation. If the standard was in fact standardless, it might violate the parent's constitutional rights.¹³⁹ But that cannot be known without applying the standard. Thus he concludes there is no constitutional right to a "harm" standard, and no constitutional defect in the use of "best interests" in this setting.

II. Implications: Troxel and Third Party Visitation Schemes

A. Grandparent visitation

Troxel most directly affects statutes governing grandparent visitation, and more generally third party visitation. Because the Court held the Washington statute unconstitutional only as applied, the case invites litigation in visitation controversies regarding whether particular decrees, in the context of specific facts, unconstitutionally invade parental prerogatives or children's interest in ongoing relationships. The Court's solicitude for fit parents invites the argument that visitation over parental objection is inappropriate or that the statutory structure facially fails to appropriately support the presumption that parents act in the child's best interest. On the other hand, the Court's balancing of parental interests against children's needs lends support to arguments that particular relationships should be supported even in the face of parental objection. Because the decision is limited to the unconstitutionality of the statute as applied, this

¹³⁸ Id. at 99-100 (Kennedy, J., dissenting).

¹³⁹ Id. at 101 (Kennedy, J., dissenting).

encourages successive litigation and therefore favors parties with greater resources. This configuration of incentives may exacerbate family tensions because the threshold for overcoming parental decision-making has been raised, while the incentive to downgrade or degrade third party relationships also has increased. On the other hand, the very use of litigation to settle these family matters arguably indicates family relationships are irretrievably broken and a court order will hardly make matters worse.¹⁴⁰

The array of opinions and range of disagreement among the justices may also generate structural arguments about existing statutes, while not making it entirely clear what structural changes would institutionalize the appropriate balance between the interests of the parents and the interests of the state. Structural arguments most likely will be raised as attacks on the facial validity of visitation statutes, resisting their application early in litigation. The split in the Court about evaluating visitation statutes makes it difficult to be clear about whether existing statutes should be amended and if so, what changes are necessary. A conservative approach would tend to buttress parental decision making at the expense of children's relationships with third parties, thereby insuring a constitutionally sufficient protection of parental autonomy.

The Court's structural disagreements are multiple, and the relationship among the structural issues is unclear. First, there is the issue of whether "fitness" triggers a strong, even irrebuttable, presumption of parental decision making as unassailable. Given the high threshold for finding a parent "unfit," such a presumption would effectively insulate

¹⁴⁰ As one commentator points out, grandparent visitation cases can often bring into view old family history of the parenting of the parents by the grandparents, as relevant to the issue of the value of grandparent visitation with children. Conversely, grandparents may have to critique the fitness of their own children. Stephen A. Newman, *The Dark Side of Grandparent Visitation Rights*, *New York Law Journal* 2 (June 14, 2000).

most parental judgments from challenge.¹⁴¹ The consequence of this view would also merge the best interests determination with fitness; that is, one could not hold a parent was not acting for the child's best interests without finding the parent unfit; or, refusing visitation would have to amount to an act that would establish unfitness. On the other hand, fitness might only create a presumption of good decision making that would simply shift the burden of showing otherwise to the third party, and would require that the showing be a strong one. The showing necessary, however, would not require painting the parent as unfit; rather, the showing would focus on the affirmative relationship with the child, the importance of ongoing contact, and the ability of the third party to work cooperatively and positively with the parent.

Closely linked to the issue of fitness is the issue of the operation of the "best interests" standard in this setting. It is unclear whether the "best interests" standard, as a distinct standard from parental fitness, is constitutionally sufficient to protect parental interests. Furthermore, it is unclear what factors are constitutionally relevant and necessary if the best interests standard is to withstand constitutional scrutiny. On the one hand, the application of best interests according to evolving caselaw is one possibility; on the other hand, an articulated set of factors, either exclusive or nonexclusive, might be necessary. It also is questionable what weight should be accorded certain factors, like the parent's objections or difficulties with the visitation request. If this is an evolving standard, then it also might be relevant to consider whether application of best interests in other settings is helpful or distinguishable (eg, should this be the same factors as those

¹⁴¹ On the high standard for determining lack of fitness, see generally Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 *Calif. L. Rev.* 757 (1996); Christina Dugger Sommer, *Empowering Children: Granting Foster Children the Right to Initiate Parental Rights Termination Proceedings*, 79 *Cornell L. Rev.* 1200 1994.

used in devising parenting plans for parents who have not married or those who have divorced, or are different factors relevant?) Questioning the best interests setting in this framework raises the issue of its sufficiency in other settings, and given the broad use of the standard, the implications beyond visitation statutes are staggering.¹⁴² At the same time, confronting the claims of judicial bias and the challenge of applying a discretionary standard in a fair way are critical issues for family law jurisprudence and constitutional due process.¹⁴³

Another structural disagreement among the justices is the strength of parental prerogatives. Some of the justices clearly see the balance as weighing very heavily, nearly conclusively, with parents, while others would see parental rights as one part of a balance of multiple rights-bearers. If parents are conceptualized in opposition to the state, the argument for family privacy is a strong one. On the other hand, if the state acts as a referee between competing interests, balancing and honoring diverse interests is essential. Clearly closely related to this conceptualization of parents' rights, then, is the issue of the scope and content of children's rights.¹⁴⁴ Still an developing concept, the acknowledgement of children and their unique perspective on needs and rights is an area that the Court continues to be pressed to address. Efforts to protect parental rights may run afoul of this countervailing interest, just as those promoting children's relationships may require fuller articulation of how those relational rights can be balanced against

¹⁴² As Justice Stevens noted in his opinion, a search of state custody and visitation laws generated 698 references to the best interests standard. *Troxel v. Granville*, 530 U.S. at 84 n.5. (Stevens, J., dissenting).

¹⁴³ For a more extensive discussion of the different biases claimed by mothers and fathers, see Nancy E. Dowd, *Redefining Fatherhood* 59-65 (New York: New York University Press 2000). See also Susan Beth Jacobs, *The Hidden Gender Bias Behind "The Best Interest of the Child" Standard in Custody*, 13 Ga. St. U.L. Rev. 845

¹⁴⁴ For discussion of the concept of children's rights, see generally Barbara Bennett Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 B.Y.U.L. Rev. 497; Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *Cardozo L. Rev.* 1747 (1993).

legitimate parental objections. The uncertainty about the scope of parents' and children's rights, and their interrelationship, links them to a final structural issue, that of the appropriate analysis of interfamilial disputes that include many parties with fundamental rights that must be balanced against other in a familial setting that may require parties who no longer share households or relationships to share and mutually support each other for the welfare of children.

Despite this uncertainty, the opinions nevertheless are suggestive of the kinds of features that members of the Court would view favorably in this kind of statute, even if it is unclear if they are constitutionally necessary. Standing limitations include limiting visitation to those of defined status (such as grandparents) or to those with a significant relationship with the child (such as those who have acted as a de facto parent, for instance a step-parent or god-parent). Evidentiary requirements might include not only a strong showing of relationship to establish standing, but also a significant burden of production to substantiate a claim that visitation is in the best interests of the child. In addition, requirements that petitioners for visitation demonstrate their cooperation with parents or a good reason to order visitation in spite of parental objection also appear to be viewed as means to protect parental autonomy while permitting the support of important relationships to children. Finally, articulation of a specific set of factors relevant to a best interests determination seems preferred over an open-ended standard. The range of disagreement among the justices means no template for constitutionality is provided, but drafters of statutes or amendments to existing statutes have indications of the provisions that might insulate a visitation statute against constitutional challenge.

B. Third Party Visitation

Many state statutes, like Washington's, are third party visitation statutes rather than grandparent visitation statutes, so the impact of Troxel reaches more broadly.¹⁴⁵ Outside of grandparent relationships, the issue raised is the difference that other relationships pose for constitutional analysis. Grandparents have a unique connection with at least one parent that may demonstrate the nature of their relationship with their grandchildren and their ability to work with the parent or parents. Grandparents are very common caregivers, both primary and secondary.¹⁴⁶ They characteristically maintain relationships over time.

Non-marital partners and stepparents, in contrast, have relationships with children often derivative of the primary parent. Partners' and step-parents' relationships with children often are not lifelong, if the relationship with the primary parent fails.¹⁴⁷ Some have available legal mechanisms (marriage and adoption) that provide a means to legalize and protect their relationships with children.¹⁴⁸ Homosexual partners, on the other hand, largely lack the ability to legalize their parent-child relationships by use of adoption, and none can formalize them through marriage.¹⁴⁹ Other adults with relationships to children,

¹⁴⁵ See supra notes 39 and 40.

¹⁴⁶ According to a survey commissioned by the American Association for Retired Persons, one in 10 grandparents are raising a grandchild or regularly providing childcare, and 4 in 10 see their grandchildren every week. Tamar Lewin, *Grandparents Play Big Part in Grandchildren's Lives, Survey Finds*, New York Times A16 (January 6, 2000).

¹⁴⁷ See, e.g., Dowd, *Redefining Fatherhood*, supra note 144 at 26-31.

¹⁴⁸ Not all stepparents can adopt, but all heterosexual stepparents can marry. On stepparent adoption, see generally Jennifer Wriggins, *Parental Rights Termination Jurisprudence: Questioning the Framework*, 52 S.C. L. Rev. 241 (2000); 1997, 26 Sw. U. L. Rev. 399, Jennifer Klein Mangnall, *Comment, Stepparent Custody Rights After Divorce*, 26 Sw. U. L. Rev. 399 (1997); Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 Tenn. L. Rev. 1019 (1999); Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 Yale J.L. & Feminism 29 (1998).

¹⁴⁹ No state in the U.S. permits same sex couples to marry; Vermont permits civil unions. On current marriage issues for same sex couples, see generally Mary Becker, *Queer matters: Emerging Issues in Sexual Orientation law: Women, Morality, and Sexual Orientation*, 8 UCLA Women's L.J. 165 (1998); Nancy Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 Am. U.J. Gender Soc. Pol'y & L. 167 (2000); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-community Critique*, 21 N.Y.U. Rev. L. & Soc. Change 567 (1994-95); William N.

such as godparents, birthparents, de facto or psychological parents, raise additional questions of whether the particular status and/or relationship is relevant to the analysis or whether the analysis turns not on status but rather on the nature of the relationship of the child to the third party, irrespective of status. In addition, it is not clear how relationships that are important to children but which cannot be characterized as parent-child relationships (such as uncles and aunts or non-kin adults who give care but are not parent figures) will be evaluated.

C. Post-Troxel Developments

Since Troxel was decided there appear to be several patterns of response by state and federal courts. What I sketch here is by no means intended to be comprehensive, but rather suggestive of major trends in the first year since Troxel was decided. First, many state courts have simply distinguished their state statute or the circumstances before them and found Troxel inapplicable. Where statutes include narrower standing requirements or more demanding evidentiary standards than the "breathtakingly broad" Washington statute, courts have found their statutes sufficiently support parental autonomy and therefore are constitutional.¹⁵⁰ Alternatively, where the facts have been sufficiently different, the courts have distinguished Troxel on the basis that its holding was limited to the statute's unconstitutionality as applied.¹⁵¹ Troxel also has been cited for the general

Eskridge, Jr., A History of Same-Sex Marriage, 79 Va. L. Rev. 1419 (1993). Same sex couples are barred by statute from adopting only in Florida, but by custom they are often disqualified from adopting. On same sex adoption see generally, Jennifer Wriggins, Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender, 41 B.C. L. Rev. 265 (2000); Elizabeth Rover Bailey, Note, Three Men and a Baby: Second-Parent Adoptions and Their Implications, May, 1997, 38 B.C. L. Rev. 569 (1997); Strasser, supra note 149.

¹⁵⁰ See, e. g., *Smolen v. Smolen*, 185 Misc.2d 828, 906 (NY Fam Ct 2000); *Lilley v. Lilley*, 2001 WL 359607 (unpublished Tex. App. 2001); *In re G.P.C.*, 28 S.W. 3d 357, 363 (Mo.App. 2000); *Macaronis, et al. v. Brown, et al.*, Lawyers Weekly No. 15-001-01 (Ma. Fam Ct February 19, 2001); *Zeman v Stanford*, 2001 Miss. Lexis 130 (Miss. May 10, 2001); *Jackson v. Tangreen*, 18 P. 3d 100 (Az Ct of App. 2000).

¹⁵¹ See, e.g., *In re G.P.C.*, 28 S.W. 3d 357, 363 (Mo. App. 2000); *Scott v. Scott*, 19 P.3d 273 (Ok 2001).

proposition that a parent's right to make decisions regarding the care and welfare of their child is fundamental and constitutionally protected.¹⁵²

In some cases, however, the courts have confronted, rather than avoided, the implications of Troxel. In instances where trial court judges have presumed the preferability of visitation, and seem merely to have substituted their judgment of what is best for children, appellate courts have reversed visitation orders that represented nothing more than, as in Troxel, a mere disagreement between a judge and a parent.¹⁵³ The potential to challenge best interests standards in many settings, not just with respect to visitation, is another predictable use of Troxel.¹⁵⁴

In applying Troxel to determine what elements are constitutionally essential in visitation statutes, however, courts have given the case inconsistent readings. In New York, for example, courts have held the New York statute both constitutional and unconstitutional, with little agreement on the reasoning or analysis of Troxel. In Hertz v. Hertz, the trial court found the state statute unconstitutional because it contained no requirement that parental decision making was presumptively valid, and therefore permitted a judge to impose his or her own view through the best interests standard.¹⁵⁵ Hertz involved a grandfather's petition with respect to fifteen grandchildren of his three children. In Levy v. Levy the judge not only followed Hertz but carried the reasoning regarding best interests even further, finding that use of a best interests standard was

¹⁵² See, e.g., Littlefield v. Forney Independent School District, 108 F. Supp 2d 681 (U.S. N.D. Tex. 2000); Gruenke v. Seip, 225 F. 3d. 290, 304-307 (3d. Cir. 2000).

¹⁵³ See, e.g., Punsly v. Ho, 87 Cal . App. 4th 1099, 105 Cal. Rptr. 2d 139 (March 16, 2001); Kyle O. v. Donald R., 85 Cal. App. 4th 848, 102 Cal Rptr 476 (Dec. 21, 2000).

¹⁵⁴ See, e.g., Esch v. Esch, 2001 WL 173198 (Ohio App. 2d Dist. 2001).

¹⁵⁵ Hertz v. Hertz, 186 Misc. 2d 222, 717 N.Y.S. 2d 497, 500 (Sup.Ct. Kings County October 26, 2000).

constitutionally inadequate if it did not link best interests to a finding of parental
unfitness:

Implicit, if not altogether explicit in Troxel, is the imposition of a finding of
unfitness on the part of the parent in order for the grandparent to assert and to
successfully enforce visitation, absent parental consent. Therefore, a finding of a
parent's unfitness appears to be a mandatory condition precedent to a court's
ability to exercise its judgment and discretion on the issue of a child's best interest
relative to grandparents' visitation.... the presumption that fit parents act in their
children's best interest will invariably constitute an impregnable barrier which a
court cannot breach or circumvent.¹⁵⁶

Levy involved the petition of the paternal grandfather to visit two children when the
children's mother terminated visitation about two years after the death of their father in an
accident. In contrast, the judge in In re Frank E. Smolen et al. found the New York
statute constitutional, on the basis that the statute's limitation of visitation to when
"equity" requires that visitation be granted had been interpreted by New York courts in a
manner sufficiently protective of parents' constitutional rights.¹⁵⁷ According to the court,
"equity" had been determined to limit standing to grandparents who could establish the
existence of a significant relationship with the child, or serious efforts to establish a
relationship. If the grandparent had standing under this requirement, it was then required
that the court examine the reason for the parent's denial of visitation, within a context of
deference to parents. Because this interpretation of the statute's terms is very protective
of parental autonomy, the court reasoned, it is constitutional as interpreted.¹⁵⁸ In
Smolen both parents were alive but unmarried, and the child and her mother lived with
the grandparents until the child was 2 1/2, and the child spent substantial time with her
grandparents until age six.

¹⁵⁶ Levy v. Levy, 28 New York Law Journal --- (Sup. Ct. Kings County March 22, 2001).

¹⁵⁷ In the Matter of Frank E. Smolen et al., 185 Misc. 2d 828, 832, 713 NY.S.2d 903 (Fam. Ct., Onondaga
County, September 15, 2000).

Troxel has also been read as strongly pro-parent while courts find ways to avoid the implications of that position. The Maine Supreme Court read Troxel as requiring strong protection of parental rights that would require a showing of harm to the child before a fit parent's decision could be overruled.¹⁵⁹ Yet the court disagreed that this meant the Maine statute, which did not require such a showing, was constitutionally infirm. In the case before the court the grandparents had cared for the children of their daughter born when she was a teenager and also after a disastrous first marriage, but then had their relationship with their daughter break down after her second marriage. Because these grandparents had acted *as parents* for their grandchildren for significant portions of the children's lives, the court found an equivalent constitutionally compelling state interest in protecting the substantial preexisting relationship. The court thus both followed Troxel and found a way around the case, by distinguishing the factual scenario from Troxel (the long term, parental relationship of the grandparents with the grandchildren and the parents' refusal of any visitation) and finding the relational difference one that required a de novo consideration of the constitutional analysis of the statute. Because the U.S. Supreme Court had held in Troxel that the statute was *unconstitutional as applied*, this gave the Maine Supreme Court the room to hold that its statute, facially far more restrictive than the statute at issue in Troxel in many respects¹⁶⁰ but lacking a harm requirement, nevertheless might be *constitutionally applied* because of the relational characteristics in the case.

¹⁵⁸ Id.

¹⁵⁹ Rideout v. Riendeau, 761 A.2d 291 (Me 2000)

¹⁶⁰ Under the Maine statute only grandparents could apply for visitation, and only in the event of the death of a parent or parents, or the existence of the relationship with the grandchildren, or if an effort had been made to establish a sufficient relationship. Rideout v. Reindeau, 761 A2d at 298-9.

Other scenarios similarly seem to tempt courts to find their way out of a strong reading of Troxel. An Arizona court interpreted its statute to allow only limited grounds for grandparent visitation, seeming to support parental objection to visitation in accord with Troxel. Nevertheless, the court went on to justify the difference in statutory treatment of stepparent adoption to permit grandparent visitation, despite the fact that adoption ordinarily would terminate the standing of grandparents linked through the surrendering parent.¹⁶¹ A stepparent does not, then, receive the strong deference to a "parent" that Troxel seems to dictate, despite the state court's acknowledgement of parent's constitutional rights. Similarly, the Mississippi Supreme Court found its statute constitutional as sufficiently protecting parents' rights, although its interpretation of the statute required only that visitation must not deprive parents of their right to rear their children or substantially interfere with that right, a liberal interpretation favoring visitation contrary to the state court's conservative read of Troxel.¹⁶² The Rhode Island Supreme Court also found Troxel distinguishable in a case determining the right of a lesbian co-parent to seek visitation over the objection of the biological parent, because the case turned on her claim to be a de facto parent, and therefore entitled to parental rights.¹⁶³ Similarly, a New Jersey court found no conflict between the state's recognition of the concept of a psychological parent¹⁶⁴ and Troxel's deference to the decisions of a fit parent.¹⁶⁵

III. Implications: Troxel and Nontraditional Families

¹⁶¹ Jackson v Tangreen, 18 P. 3d 100 (Az Ct of App. 2000).

¹⁶² Zeman v. Stanford, 2001 Miss. Lexis 130 (Miss. 2001).

¹⁶³ Rubano v. Diczno, 759 A. 2d 929 (R.I. 2000).

¹⁶⁴ V.C. v. M.J.B., 163 N.J. 200, 748 A.2d 539 (2000) (parent can include psychological parent, setting forth factors to establish this status that include the voluntary support of such status by the biological or adoptive parent).

¹⁶⁵ A.F. v. D.L.P., 2001 N.J. Super LEXIS 164 (Sup. Ct., App. Div., April 20, 2001) (former lesbian lover and friend could not qualify as psychological parent and therefore had no standing to seek visitation).

We may ultimately deem the confusion and avoidance generated by Troxel for third party visitation statutes unfortunate and tragic, or necessary and creative. The broader significance of Troxel, however, may be what it suggests about our view of families and constitutional analysis of family issues. It is particularly important, I would argue, to evaluate the definition of "parent" and "family" in Troxel from the perspective of non-traditional families. Those traditionally at the margins should be at the center in evaluating what the opinions have to say. The opinions suggest that clearly defined rules cannot capture the variables and intricacies of American families; such rules might ignore critical realities, especially when those realities defy our assumptions about families, family dynamics, and children's perspectives. Rules grounded in status and form are especially problematic in that respect. The quality, strength and importance of relationships is powerfully evident in the situations that give rise to third party visitation requests, irrespective of their fitting our norms, expectations or assumptions. A relational focus, on the other hand, raises problems of indeterminacy and bias. The challenge is to define the relational approach in a way that focuses on the presence of valued connections for children. Finally, a relational approach must interact with form and status-based approaches, particularly with marriage. In this section I briefly discuss these broad implications of Troxel.

First, the Court's views of "parent" and "family" in the case suggest a more fluid approach to "family" that recognizes the range of family structures, while their view of "parent" in the majority of the opinions largely reaffirms traditional deference to parental

decision-making.¹⁶⁶ The deference accorded to one with the status of "parent," therefore, combined with an acknowledgment that families come in a variety of forms and do not necessarily remain stable during a child's minority, may translate into significant protection for non-traditional families when the parent can resist state interference. Single parents, for example, could claim the power of parenthood just as married parents can, thus providing greater protection to their family from state intervention. This is consistent with prior caselaw validating extended families as constitutional equals to the married heterosexual nuclear norm.¹⁶⁷ At the same time, the recognition of family diversity seems to suggest an implicit weakening of the rationale to defend the family from state intervention or scrutiny. Several amicus argued that a balancing approach that included consideration of more than parents' interests was justified because of the range of different families that deviated from traditional norms, with the implication that distance from the norm justifies intervention.¹⁶⁸ These arguments echoed the dissenting opinion in the Washington Supreme Court, which justified the structure of the statute on the basis of the difference between non-traditional families and the marital, heterosexual norm. Movement away from the presumed norm of the patriarchal family comes with the price of allowing greater intervention. The opinions suggest that because non-traditional families, especially single parents, are less stable and the families are more challenged, visitation to perpetuate loving, significant relationships, even if intrusive, is important to

¹⁶⁶ Those implications may be particularly important as the Court during its current term has before it a case involving a non-traditional family in an immigration case involving issues of gender discrimination. (Tuan Anh Nguyen, Joseph Alfred Boulais, vs INS, No 98-60418)

¹⁶⁷ See *Moore v City of East Cleveland*, 431 U.S. 494 (1977).

¹⁶⁸ See, e.g., Brief Amicus Curiae Center for Children's Policy Practice & Research at the University of Pennsylvania in Support of Respondent, Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Washington in Support of Respondent, Lexsee 1999 U.S. Briefs 138 (December 13, 1999); Brief of the Amicus Curiae American Academy of Matrimonial Lawyers, Lexsee 1999 U.S. Briefs 138 (November 12, 1999).

counteract lacunae in these families.¹⁶⁹ Patriarchal norms reassert themselves in paternalistic rationales. Ironically, this may benefit the disproportionately female-headed single parent families by reinforcement of parental (and within two parent, traditionally paternal) authority.

Valuing parents while acknowledging a broader range of families also has implications for step-parents and for gay and lesbian parents. Rather than insulating these families, it has the potential of making them more vulnerable. To the extent adoption can be used by non-biological gay and lesbian parents, and by step-parents, it arguably affords the opportunity to be a legal parent with the high level of protection that Troxel appears to require. On the other hand, limited statutory mechanisms for adoption, and in the case of gay and lesbian parents, the bar to marriage, means a lack of protection for some parents and no legal structure to remedy the status problem. If the "family" definition includes step-parents and non-marital partners or both, then the rationale for greater intrusion for non-traditional families deserves questioning on behalf of gay and lesbian families, as well as blended families.

Even if all families should be valued irrespective of form, families nevertheless may vary as to their need for affirmative support, or even for intervention. If support and intervention is tied to status, structure, and a presumed, preferred norm, then the stigmatizing of certain children, because of the families in which they find themselves, will continue. A relational norm would approach the recognition of what constitutes family and the preconditions for support or intervention quite differently than a status-based definition. The critical challenge is how to value and support rather than

¹⁶⁹ For an extended discussion of the unfounded myths and stereotypes that underlies the stigmatization of single parent families, see Dowd, *In Defense of Single Parent Families*, supra note 100, chapter one.

stigmatize and undermine. Visitation statutes by their nature intervene, although they also support many valued relationships. In order to evaluate whether we are supporting all families, we must bring the marginal families to the center of the analysis, and ask whether they are served by a changing definition.

If nurture is what we mean to support, then nurture must be more carefully defined, and must include a positive relationships with other nurturers.¹⁷⁰ The challenges of a relational focus are defining what this means; addressing issues of quality versus quantity; considering the relationship of one caregiver to other caregivers; and clearly understanding children's needs and desires in the circumstances.¹⁷¹ Avoidance of these tasks because this is difficult privileges status, whether by marriage, birth, or adoption, over relational realities. Articulating more clearly what we mean by nurture, and the interaction of nurture among family members, is an alternative. In other words, we can make the reality and the values more explicit. For example, in my work on redefining fatherhood, I have argued that nurture should include physical, mental, spiritual, emotional, and psychological care, based on the developmental and other needs of children, and the needs generated by specific contexts.¹⁷² Nurture also must include a quantitative component that is significant enough to justify state intervention on behalf of a specific relationship.

Also included in this reorientation of core definitions and visions is the question of the scope of children's rights. "Rights" in fact may be a problematic conception, as it suggests autonomous, independent adults rather than dependent (to a greater or lesser

¹⁷⁰ Dowd, *Redefining Fatherhood*, supra note 144 at 157-180.

¹⁷¹ See Martha Minow's classic articulation of the distinction and implications of rules versus standards, in Martha Minow, *Making All the Difference* (1990).

¹⁷² Dowd, *Redefining Fatherhood*, supra note 144 at 157.

extent) and developing children. It is clear from Troxel that the independent perspective of children, rather than their presumed representation either by the state or by their parents, is emerging as a crucial consideration in family law analyses. Just as the implications of any definition of "family" must be considered from the margin, by putting the margin at the center, so too the resolution of intra-familial disputes over children must recognize children's voice, rather than presuming their representation by someone else.¹⁷³

Troxel's rethinking of family analysis might suggest the need to think whether a relational approach is incompatible with rules focused on status or form, or whether the two can comfortably coexist. For example, a relational approach toward family grounded in changing family realities is contrary to the historical, tradition-oriented analysis of marriage. Greater support for non-traditional families may eventually run into the problem of a constrained view of the right to marry. If marriage provides the best protection against state intrusion, then marriage must remain the strategy for non-traditional families to protect their privacy. But if marriage is in conflict with that broader recognition, then is that an additional argument to orient marriage around the relational inquiry of whether we should value long-term committed relationships between two adults or the traditional norm of heterosexual marriage.

Finally, alongside a more complex, nuanced definition of relationships and nurture must be a heightened concern for bias, given the complaints of both mothers and fathers about different biases in the family law structure. We cannot continue to ignore this complaint about the existing family law structure, nor implement a looser, more complex analysis without attending to this problem. Exploring how to correct for bias might include the articulation of a more complex standard, requiring explicit, detailed

¹⁷³ See supra note 145.

factual findings, supporting reports from expert witnesses and guardians ad litem, and monitoring outcomes for patterns of gender or race bias.

Conclusion

Troxel provides us with few answers, but many questions. It reflects the diversity of family forms, and the necessity of continued thinking about the function of families, the role of the state, and the resolution of intra-familial disputes. Most significantly, it suggests the dilemmas that face us in supporting all families without stigmatizing some by the manner and reasons for which we intervene. Relational definitions keep us focused on what really matters in family, while challenging us to more clearly articulate the content and value of those relationships.