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The Detritus of *Troxel*

JOHN DEWITT GREGORY*

I. Introduction

This essay addresses the aftermath of the United States Supreme Court's decision in *Troxel v. Granville*,¹ which the Court decided some six years ago as of this writing. It will be recalled that *Troxel* addressed the constitutionality of the grandparent visitation statute of the State of Washington.² The Court in *Troxel* affirmed the decision of the Washington Supreme Court and held that the state statute, as applied, unconstitutionally infringed on "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."³

A fresh look at *Troxel* certainly has a place in a symposium such as this, which examines legal issues that arise with respect to the rights of third parties in their relationships with children in several contexts. Accordingly, Part II of this essay sets out and discusses briefly the facts and several opinions in the case. Part III examines state statutes relating to grandparent visitation that were in effect long before the decision in *Troxel* and ways in which state courts reacted to those statutes. Then, in Part IV, the essay evaluates the impact of *Troxel* on the law of grandparent visitation.

II. *Troxel* and its Underpinnings

In *Troxel*, a man and woman who were unmarried became the parents of two children born out of wedlock.⁴ The parents separated after a time,

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1. *Troxel v. Granville*, 530 U.S. 57 (2000).

2. *Id.*; see WASH. REV. CODE § 26.10.160(3) (1997).

3. *Troxel*, 530 U.S. at 66–67.

4. *Id.* at 60.

and the father regularly visited his children at the home of his parents, the paternal grandparents of the children.⁵ Subsequently, the children's father committed suicide, and their mother eventually limited visits with the children's grandparents to one short visit each month.⁶ Dissatisfied with this limitation, the grandparents sued for greater visitation rights under the Washington statute, which 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 interests of the child whether or not there has been any change of circumstances."⁷

Writing for a plurality of the Court, Justice O'Connor found the statute to be "breathtakingly broad," pointing out that the statutory language "effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review."⁸ Also, Justice O'Connor noted, the statute "places the best interest determination solely in the hands of the judge,"⁹ whose view would prevail without any requirement that the court give any presumption of validity or any weight to the parent's decision that visitation would not be in the best interest of the child.¹⁰ Accordingly, Justice O'Connor stated, "In practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests."¹¹

Justice O'Connor then reviewed the facts set out in the trial record and concluded that the record revealed no special factors to justify the state's interference with the parent's "fundamental right to make decisions concerning the rearing of her two daughters."¹² The record lacked any allegation or any finding that the mother of the children was unfit, an important factor in view of the "presumption that fit parents act in the best interests of their children."¹³ Indeed, the Washington trial court gave no special weight to what the mother determined was in the best interests of the children involved, but, in effect, it placed on a fit parent "the burden of *dis-*

5. *Id.*

6. *Id.* at 60-61.

7. WASH. REV. CODE § 26.10.160(3) (1994).

8. *Troxel*, 530 U.S. at 67.

9. *Id.* at 67.

10. *Id.*

11. *Id.*

12. *Id.* at 68.

13. *Id.*

proving that visitation would be in the best interest of her daughters.¹⁴ Therefore, Justice O'Connor observed, "[t]he decisional framework employed by the [Washington] Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child."¹⁵ Justice O'Connor then concluded:

As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state [trial] judge believes a "better" decision could be made. Neither the Washington nonparental visitation statute generally—which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition maybe granted—nor the Superior Court in this specific case required anything more. Accordingly, we hold that [the statute] as applied in this case, is unconstitutional.¹⁶

It is important to note that the plurality of the Court based its decision "on the sweeping breadth of [the Washington visitation statute] and the application of that broad, unlimited power in this case," but stated explicitly that it did not consider "the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation."¹⁷ Because state courts decide visitation standards on a case-by-case basis, the Court stated that it was "hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter."¹⁸

That the Supreme Court would agree to review the decision of the Supreme Court of Washington in *Troxel* came as something of a surprise.¹⁹ As stated, the plurality opinion found significant the fact that state courts had reviewed third-party-visitation statutes on a case-by-case basis.²⁰ Indeed, long before the Supreme Court of Washington struck down that state's visitation statutes as it applied to grandparents, state courts had reviewed visitation statutes in several contexts, including visitation by stepparents, grandparents, and lesbian coparents.²¹ What is more, the Court

14. *Troxel*, 530 U.S. at 69.

15. *Id.* at 69.

16. *Id.* at 72–73.

17. *Id.* at 73.

18. *Id.*

19. Indeed, Justice Stevens, after commending the Court for "wisely declin[ing] to endorse either the holding or the reasoning of the Supreme Court of Washington," expresses his opinion that "the Court would have been even wiser to deny certiorari. *Troxel*, 530 U.S. 57, 80 (2000). (Stevens, J., dissenting).

20. *Id.*

21. See generally John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351 (1998) (collecting cases) (hereinafter Gregory, *Blood Ties*).

itself had long since established, and reaffirmed with some frequency, the constitutionally recognized principle of family autonomy and parental authority in American law.²² Thus, *Troxel* sheds no new light on the issue of grandparent visitation. Rather, the several conflicting opinions in the case are more likely to engender confusion.

The plurality opinion in *Troxel* acknowledges that “[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”²³ Similarly, Justice Souter, in a separate opinion, points out that the Court has “long recognized that a parent’s interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment.”²⁴ Further, Justice Thomas, while declining to take a view on the merits of the case, expresses his “agree[ment] with the plurality that this Court’s recognition of a fundamental right of parents to direct the upbringing of their children resolves this case.”²⁵ In the same vein, Justice Kennedy asserts that there is general, and perhaps unanimous agreement, in the separate opinions in *Troxel*, stating: “As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child.”²⁶

The reference in all of these opinions is, of course, to the long line of decisions in which the Court established, and has continued to recognize, the strong and enduring tradition of family autonomy and parental authority in American law,²⁷ which one commentator describes as follows:

The traditional view of our society is that the care, control, and custody of children resides first in their parents; in fact “constitutional interpretation has consistently recognized that the parents’ claim to authority in their household to direct the rearing of their children is basic in the structure of our society.” . . . This parental interest in family relationships has been defined as a liberty interest entitled to due process protection.²⁸

22. See CALEB FOOTE ET AL., *CASES AND MATERIALS ON FAMILY LAW* 1-26 (2d ed. 1976); Bruce Hafen, *Children’s Liberation and the New Egalitarianism: Some Reflections About Abandoning Youth to Their “Rights,”* 1976 BYU L. REV. 605, 615–26 (discussing the common law and constitutional backgrounds of parental rights).

23. *Troxel*, 530 U.S. at 65.

24. *Id.* at 77 (Souter, J., concurring).

25. *Id.* at 80 (Thomas, J., dissenting).

26. *Id.* at 95 (Kennedy, J., dissenting).

27. Gregory, *Blood Ties*, *supra* note 21, at 382–84.

28. Ellen B. Wells, *Unanswered Questions: Standing and Party Status of Children in Custody and Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW. 95, 109 (1995). Another writer accurately points out that the Supreme Court “has consistently held that matters touching

Early in the twentieth century, in *Meyer v. Nebraska*,²⁹ the United States Supreme Court recognized, and ringingly endorsed, the right “to marry, establish a home and bring up children” as a liberty guaranteed by the Fourteenth Amendment.³⁰ In the ensuing years, the Court has never faltered in its strong support of the prerogative of parents confronted by state intrusions into family affairs. Just two years after its decision in *Meyer*, the Court reaffirmed the family autonomy principle in *Pierce v. Society of Sisters*,³¹ when it enjoined the enforcement of the Oregon Compulsory Education Law against two private educational institutions. In *Pierce* the Court observed:

Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty interests of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations.³²

Accordingly, the Court found that the statute requiring public school attendance was violative of the Constitution and was, therefore, not enforceable.

Almost fifty years after its decisions in *Meyer* and *Pierce*, the Court in *Wisconsin v. Yoder*³³ once again relied on the principles of family autonomy and parental authority when it affirmed a judgment of the Supreme Court of Wisconsin that overturned the criminal convictions, under the state’s compulsory education law, of parents who were members of the Old Order Amish religion. The Court, quoting its language in *Pierce*, characterized that case as “perhaps the most significant statement of the Court in this area.”³⁴ The Court also observed:

[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental

on natural parent-child relationships and involving the custody and control of one’s children are fundamental liberty and privacy interests protected by the Fourteenth Amendment. As such, they are entitled to the greatest constitutional protection.” Marian L. Faupel, *The “Baby Jessica Case” and the Claimed Conflict Between Children’s and Parents’ Rights*, 40 WAYNE L. REV. 285, 289 (1994).

29. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

30. *Id.* at 399.

31. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

32. *Id.* (citation omitted).

33. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

34. *Id.* at 232.

concern for the nurture and upbringing of their children. The primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.³⁵

Thus, as most recently in *Troxel*, the Court in a variety of contexts has unswervingly, repeatedly, and strongly endorsed parental authority and the principle of family autonomy.³⁶

III. The Viability of Third-Party Visitation Statutes Before *Troxel*

Long before the Court's decision in *Troxel*, state courts had begun addressing with some frequency whether grandparents enjoyed a right to visitation with their grandchildren over the objection of the children's parents. This is not surprising in light of the fact that for several years there have been third-party-visitation statutes, applicable to grandparents, in all fifty states.³⁷ One commentator has expressed the view that, "[s]ince these statutes are the product of a combination of lobbying efforts of grandparent groups and the sentimentality of the state legislatures, they take so many different forms and limit visitation to so many different kinds of circumstances that it is extremely difficult to classify them."³⁸ Nevertheless, the approach of most of these statutes is based on the best-interests-of-the-child standard.³⁹ Purporting to apply this standard, a number of state

35. *Id.*

36. See *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) (stating that natural parent is entitled to due process at state-initiated parental rights termination proceeding); *Smith v. Org. of Foster Families*, 431 U.S. 816, 843-44 (1977) (outlining procedures required to remove foster children from foster homes); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (holding that mandatory termination provisions for pregnant public school teachers violate due process); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that state statute that allows removal of children from custody of unwed father upon death of mother violates due process rights of father); *May v. Anderson*, 345 U.S. 528, 534 (1953) (ruling that Wisconsin decree does not bind Ohio court in habeas corpus proceeding attacking right of mother to retain possession of minor children); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (stating that certain areas of family life exist, which state may not enter); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that state statute providing for sterilization of criminals violates prisoner rights).

37. See *Troxel v. Granville*, 530 U.S. 57, 73, n.1 (2000); see also David L. Walther, *Survey of Grandparents' Visitation Rights*, 11 J. FAM. L. 95, 96 (1997) (noting that all fifty states recognize grandparent visitation rights to some extent); Catherine A. McCrimmon & Robert J. Howell, *Grandparents' Legal Rights to Visitation in the Fifty States and the District of Columbia*, 17 BULL. AM. ACAD. PSYCH. & L. 355, 355-56 (1989) (observing that access to grandparents, regardless of other legal situations, is now considered the child's legal right).

38. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, 19.7 at 828 (2d ed. 1988).

39. See Gregory, *Blood Ties*, *supra* note 21, at 388 (noting that best interests of the child "is the dominant standard in statutes that permit third-party visitation by grandparents, stepparents, and other petitioners under a variety of circumstances").

courts rejected constitutional attacks on grandparent visitation statutes long before the Court's decision in *Troxel*. An early example is *King v. King*,⁴⁰ in which the Supreme Court of Kentucky granted a petition for grandparent visitation rights, despite the constitutionally based opposition of the child's parents. The court in *King*, citing *Meyer v. Nebraska*, asserted that it recognized "the right to rear children without undue governmental interference."⁴¹ But it promptly turned away from this constitutional principle, stating that "the right is not inviolate," as evidenced by the requirement that parents must provide for the education of their children, and citing laws that required restraint of children in motor vehicles, regulation of child labor, and requiring the inoculation of children against disease.⁴² Having cavalierly disposed of relevant constitutional principles, the Kentucky court addressed that state's grandparent visitation statute.

The statute seeks to balance the fundamental rights of the parents, grandparents and the child. At common law, grandparents had no legal right to visitation. However, the [legislature] determined that, in modern day society, it was essential that some semblance of family and generational contact be preserved. If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. That grandparents and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love. *The grandparent can be invigorated to exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life. These considerations by the state do not go too far in intruding into the fundamental rights of parents.*⁴³

As a dissenting judge in *King* cogently observed in reaction to the opinion of the majority of the Court:

The opinion of the majority makes little pretense of constitutional analysis but depends entirely on the sentimental notion of an inherent value in visitation between grandparent and grandchild, regardless of the wishes of the parents. The fatal flaw in the majority opinion is its conclusion that a grandparent has a "fundamental right" to visitation with a grandchild. No authority is cited for this proposition as there is no such right.⁴⁴

While it may be true that no other state court freighted its opinion with language that so blatantly ignores the constitutional rights of fit parents, there are certainly other cases in which states' highest courts have decided visitation petitions of grandparents with precious little concern for the

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

41. *Id.* at 631.

42. *Id.*

43. *Id.* at 632 (emphasis added) (citation omitted).

44. *Id.* at 633 (Lambert, J., dissenting).

parental autonomy decisions of the United States Supreme Court. A decision by the Supreme Court of Missouri in *Herndon v. Tuhey*⁴⁵ similarly upheld as constitutional a statute that permitted the trial court to grant to a grandparent reasonable visitation rights, if visitation was denied unreasonably for more than ninety days.⁴⁶ The statute in *Herndon* also required a determination by the court whether grandparent visitation would endanger the child's physical health or impair the child's emotional development,⁴⁷ and allowed the court to grant visitation by grandparents "when the court finds such visitation to be in the best interests of the child."⁴⁸ The court rejected the parents' argument that the statute was an infringement of their "basic constitutional right to raise their children as they see fit, free from state intrusion absent a showing of harm to the child."⁴⁹ After citing *King*, and quoting at length from the Kentucky Supreme Court's opinion, the court concluded:

Missouri's statute is reasonable both because it contemplates only a minimal intrusion on the family relationship and because it is narrowly tailored to adequately protect the interests of parents and children. . . . A court may grant visitation only if it will be in the best interest of the child. If visitation would endanger the child, physically, mentally, or emotionally then visitation must be denied.⁵⁰

As in *King*, however, a strong dissenting opinion observed that "[t]he majority opinion's holding rests in actuality upon a trial court's discretion, rather than upon traditional principles of constitutional analysis."⁵¹ The dissenting opinion also concluded that "[a] best interest test standing alone does not justify intrusion into the parents' constitutionally protected right of autonomy in child rearing."⁵²

The highest courts of several other states, prior to *Troxel*, followed the lead of *King* and *Herndon*, upholding grandparent visitations statutes over parents' constitutionally based objections.⁵³ Indeed, one academic legal

45. *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993).

46. *Id.* at 206-08.

47. *Id.* at 207.

48. *Id.*, (citing MO. REV. STAT. § 452.402 (West 1997)).

49. *Id.* at 207.

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

51. *Id.* at 211 (Covington, J., dissenting).

52. *Id.*

53. See, e.g., *Michael v. Hertzler*, 900 P.2d 1114, 1149 (Wyo. 1995) (holding that the Wyoming grandparent visitation was constitutional in light of the state's compelling interest in protecting the best interests of the child); *Martin v. Coop*, 693 So. 2d 912, 915 (Miss. 1997) (rejecting a parent's assertion that the statute was unconstitutional and holding that the statute "[d]id not deprive the parents of their right to raise their children by determining the care, custody and management of the child.").

commentator identified “a trend to extend grandparent visitation statutes to the traditional intact family.”⁵⁴ Yet not all of the highest state courts reviewing the statutes prior to the Supreme Court’s decision in *Troxel* were inclined to reject parents’ opposition to grandparent visitation. The decision of the Supreme Court of Tennessee in *Hawk v. Hawk*,⁵⁵ holding that the Tennessee grandparent visitation statute was unconstitutional, is the leading case to express a contrary view.

The parents in *Hawk*, after several family disputes, put an end to their children’s visitation with the paternal grandparents.⁵⁶ The grandparents sued under a Tennessee statute that permitted the court to order reasonable visitation between minor children and their grandparents after a determination that such visitation was in the child’s best interest. The trial court, finding that family disputes should not interfere with relationships between grandparents and their grandchildren, ordered liberal visitation. The Tennessee Supreme Court reversed the lower court’s order, holding that the statute violated the parents’ right to privacy under the Tennessee Constitution “as applied to [a] married couple whose fitness as parents is unchallenged.”⁵⁷ Although its decision was based on the state constitution, the court pointed out that “the right to rear one’s children is so firmly rooted in our culture that the United States Supreme Court has held it to be a fundamental liberty interest protected by the Fourth Amendment to the United States Constitution.”⁵⁸ After reviewing Supreme Court decisions carefully and at length, and citing federal and state cases and statutory law, the court determined that state interference with parents’ right to raise children must be based on harm to the child’s welfare.⁵⁹ The court concluded:

[W]ithout a substantial danger of harm to the child, a court may not constitutionally impose its own subjective notions of the “best interests of the child” when an intact, nuclear family with fit, married parents is involved. By holding that an initial showing of harm to a child is necessary before the state may intervene to determine the “best interests of the child,” we approve the reasoning of both Tennessee and federal cases that have balanced state interests against parental privacy rights.⁶⁰

54. Laurence C. Nolan, *Honor Thy Father and Thy Mother: But Court-Ordered Grandparent Visitation in the Intact Family?*, 8 *BYU J. PUB. L.* 52 (1993).

55. *Hawk v. Hawk*, 855 S.W. 573 (Tenn. 1993).

56. *Id.* at 575.

57. *Id.* (citing TENN. CONST. art. I, § 8).

58. *Id.* at 578.

59. *Id.* at 580–81.

60. *Id.* at 579–80. See also *Simmons v. Simmons*, 900 S.W.2d 682 (Tenn. 1995) (applying the principles of *Hawk* to deny visitation rights to paternal grandparents who sought visitation rights over the objections of the child’s mother and adopting father, rejecting the grandparents argument that constitutional protection of parental rights and family privacy was “limited to

In a holding that is entirely consistent with that of the Supreme Court of Tennessee, in *Brooks v. Parkerson*⁶¹ the Supreme Court of Georgia invalidated, on constitutional grounds, a grandparent visitation statute that allowed the court to "grant any grandparent . . . reasonable visitation with rights upon proof of special circumstances which make such visitation rights necessary to the best interests of the child."⁶² The court found that under both the state and federal constitutions the statute was unconstitutional, "because it does not clearly promote the health the health or welfare of the child and does not require a showing of harm before state intervention is authorized."⁶³

In *Beagle v. Beagle*,⁶⁴ the Supreme Court of Florida took a similarly jaundiced view of the grandparent visitation statute in that state. The court struck down as unconstitutional a statutory amendment that provided for grandparent visitation in intact families that required the trial court to grant reasonable visitation rights over a married natural parent's objection so long as the visitation would be in the child's best interests and regardless of the fact that the relationship between the child's parents and grandparents was fractured.⁶⁵ After canvassing the "divergent view in other jurisdictions as to whether the government can constitutionally infringe upon the rights of parents to raise their children,"⁶⁶ the court addressed the "very narrow" issue that it faced: "Does the state have a compelling state interest in imposing grandparental visitation rights, in an intact family, over the objection of at least one parent?"⁶⁷ Noting the clear holdings of its earlier cases, the court in *Beagle* held that the amended statute before it did not satisfy such a compelling state interest standard, such as "when it acts to prevent demonstrable harm to the child."⁶⁸

married, natural parents who have maintained continuous custody of their children and whose fitness as parents has not been challenged."), *Id.* at 684; see also *Ellison v. Ellison*, 994 S.W.2d 623 (Tenn. Ct. App. 1998).

61. *Brooks v. Parkerson*, 454 S.E.2d 769, 790 (Ga. 1995).

62. *Id.* at 770-71. Subsequently, the Georgia legislature amended the statute to permit visitation rights by grandparents when a "court finds the health or welfare of the child would be harmed unless such visitation is granted, and if the best interests of the child would be served by such visitation." GA. CODE ANN. § 19-7-3(C) (1999).

63. *Id.* at 774.

64. *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996).

65. *Id.* at 1273 (citing FLA. STAT. ANN. § 752.01(1)(e) (West 1997)).

66. *Beagle*, 678 So. 2d at 1272 (Fla. 1996) (citing *Brooks*, 454 S.E.2d at 773; *Herndon v. Tuhey*, 857 S.W.2d at 211 (Mo. 1993); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993); *Michael v. Hertzler*, 900 P.2d 1144, 1151 (Wyo. 1995)).

67. *Id.* at 1276.

68. *Id.*

IV. Post-Troxel Developments

Following the lead of *Hawk*, *Brooks*, and *Beagle*, some state courts, before *Troxel*, adopted an approach contrary to *King* and *Herndon* and have invalidated grandparent visitation statutes on constitutional grounds.⁶⁹ To put it simply, state courts in these more recent grandparent-visitation-statute cases have not hesitated in placing a constitutionally mandated limit on statutes that afford to grandparents rights that threaten family autonomy, impair parental privacy, and harm the rights of fit parents to raise, manage, and care for their children. Respectful of long-standing constitutional principles, these courts have declined to hold that the “best interest of the child” doctrine controls and outweighs family autonomy principles in grandparent visitation statutes.

One might have wished, in light of the slew of state grandparent visitation statutes in all fifty states,⁷⁰ that the Court would have issued a decision under which the constitutionality or invalidity of such statutes would be clear and settled. Instead, the Court produced a plurality opinion and five separate and conflicting concurring or dissenting opinions, one effect of which was to engender a not insignificant increase in the law review literature dealing with grandparent visitation.⁷¹ As one article in the popular press, published the day after the decision in *Troxel*, put it, “yesterday’s decision generated six separate opinions from the nine justices, producing enough confusion that some lawyers . . . argued that the Supreme Court ruling did not strike down the Washington state law but pertained only to this particular case.”⁷² Even if it is true that *Troxel* generated excitement among law review editors and confusion among lawyers, a review of decisions by the highest courts that have addressed grandparent visitation some six years after *Troxel* teaches that its impact has not been remarkable.

69. See, e.g., *Hoff v. Berg*, 595 N.W.2d 285 (N.D. 1999) (declaring that North Dakota’s grandparent visitation statute was unconstitutional); *Williams v. Williams*, 501 S.E.2d 417 (Va. 1998) (holding that a statute that permitted visitation by grandparents and other nonparents was unconstitutional); *Herbst v. Sayre*, 971 P.2d 395 (Okla. 1998) (holding that Oklahoma’s grandparent visitation statute was unconstitutional as applied in a case where neither harm to the child nor unfitness of the parent was shown).

70. See *supra*, note 37.

71. See, e.g., Sally F. Goldfarb, *Visitation for Nonparents After Troxel v. Granville: Where Should States Draw the Line*, 32 RUTGERS L.J. 727 (2001); Stephen G. Gilles, *Parental (and Grandparental) Rights After Troxel v. Granville*, 9 SUP. CT. ECON. REV. 69 (2001); Ellen Maurus, *Over the Hills and Through the Woods to Grandparents’ House We Go: Or Do We, Post Troxel?* 43 ARIZ. L. REV. 751 (2001); Solangel Maldonado, *When Father (or Mother) Doesn’t Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865 (2003).

72. Edward Walsh, *Court Limits Visitation Rights of Grandparents; State Can’t Overrule Decision of a Fit Parent, Justices Say*, WASH. POST, June 6, 2000, at A1.

Simply stated, *Troxel* has induced no startling or radical changes with respect to third-party visitation, and particularly grandparent visitation. Legislators in just a few states have amended their visitation statutes on the heels of *Troxel* in an apparent effort to make them compliant with the Supreme Court's pronouncements.⁷³ But judicial approaches are remarkably similar to those taken in the earlier decisions that we have discussed.⁷⁴

For example, the Supreme Court of Arkansas in *Linder v. Linder*,⁷⁵ some two years after *Troxel* was decided, rejected the arguments of three sets of grandparents who urged that the state statute should be subjected to strict scrutiny and was facially unconstitutional under that standard. It also rejected the position of the state, as intervenor in defense of the statute, and found that the statute was unconstitutional as applied.⁷⁶ The Supreme Court of Connecticut in *Roth v. Weston*,⁷⁷ noting that under *Troxel* "there is a presumption that a fit parent's decision is in the best interest of the child,"⁷⁸ held that in the absence of a finding that denial of visitation would harm the children involved, the trial court's grant of visitation violated the father's due process rights under the state and federal constitutions.⁷⁹ Again, the Supreme Court of Illinois held in *Wickham v. Byrne*,⁸⁰ that the state's grandparent visitation statute was unconstitutional on its face because it permitted the child's grandparents and great-grandparents to visit if the court found visitation to be in the child's best interest and welfare. Accordingly, the court held that the Illinois statute was like the one in *Troxel* in that it, "directly contravenes the traditional presumption that parents are fit and act in the best interest of their children . . . and allows the 'State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made.'"⁸¹

The Supreme Court of Iowa struck down provisions of its statute twice during the course of one year. In *In re Marriage of Howard*⁸² the court

73. See Holly M. Davis, Note and Comment: *Non-Parent Visitation Statutes: Was Troxel Their Death Knell?*, 23 WHITTIER L. REV. 721, 744-47 (2002).

74. See *infra*, notes and accompanying text.

75. *Linder v. Linder*, 72 S.W.3d 841 (Ark. 2002).

76. The court reversed the trial court decision, which had found an otherwise fit parent to be unfit based on her choosing to fight a nonparental visitation petition. *Id.* Two months later, in *Seagrave v. Price*, 79 S.W.3d 339 (Ark. 2002), the Arkansas court again found the statute to be unconstitutional as applied for failing to apply a presumption in favor of the parental decision on visitation.

77. *Roth v. Weston*, 789 A.2d 431 (Conn. 2002).

78. *Id.* at 451.

79. *Id.* at 453.

80. *Wickham v. Byrne*, 769 N.E.2d 1 (Ill. 2002).

81. *Id.* at 7-8.

82. *In re Howard*, 661 N.W.2d 183 (Iowa 2003).

noted that it had previously found one section of the statute facially unconstitutional under the Iowa Constitution.⁸³ The court emphasized that the fact that the child's parents were divorced did not affect the fundamental liberty interest of fit parents to care for their children and, accordingly, invalidated the provision of the statute that permitted grandparent visitation when the child's parents were divorced. The court also refused to depart from this principle in a case in which one of the parents had died. Again, the Supreme Court of Michigan in *Derosé v. Derosé*⁸⁴ found that the state's statute was "unconstitutional as written" because it "fails to require that a trial court accord deference to the decisions of fit parents regarding grandparent visitation. . . ."⁸⁵ Finally, the Supreme Court of Washington, in *In re C.A.M.A.*,⁸⁶ struck down the amended grandparent visitation statute that was enacted in response to the Court's holding in *Troxel* that invalidated its prior statute. The new Washington law provided that grandparent visitation was presumed to be in the best interest of the child on a showing that a significant relationship existed.⁸⁷ The Court found that the statute was unconstitutional because, among other things, it "contravenes the constitutionally required presumption that the fit parent acts in the child's best interests."⁸⁸

While the highest courts of several states, as discussed, have found grandparent visitation statutes to be facially unconstitutional, a few other states have determined that such statutes are unconstitutional as applied. In *Medaris v. Whiting*,⁸⁹ for example, the Supreme Court of South Dakota held that the trial court had failed to defer to the decision of a fit parent. In *Glidden v. Conley*,⁹⁰ the Supreme Court of Vermont, although it found that the statute was facially valid, held that the trial court had failed to consider a fit parent's decision, thereby violating the parent's rights under the Fourteenth Amendment to raise a child without undue state interference.⁹¹ As was the case before *Troxel*, a fair number of state's have found grandparent visitation statutes to be constitutional. In *Blixt v. Blixt*,⁹² for example, the Supreme Judicial Court of Maine held that its statute, enacted prior to the Supreme Court's decision, was not as broad as the Washington

83. *Id.* at 185 (citing *Santi v. Santi*, 633 N.W.2d 312 (Iowa 2001)).

84. *Derosé v. Derosé*, 666 N.W.2d 636 (Mich. 2003).

85. *Id.* at 643.

86. *In re C.A.M.A.*, 109 P.3d 405 (Wash. 2005).

87. *Id.* at 409.

88. *Id.* at 411.

89. *Medaris v. Whiting*, 695 N.W.2d 226 (S.D. 2005).

90. *Glidden v. Conley*, 820 A.2d 197 (Vt. 2003).

91. *Id.* at 205-07.

92. *Blixt v. Blixt*, 774 N.E.2d 1052 (Mass. 2002).

statute struck down in *Troxel* and survived a facial challenge based on both due process and equal protection grounds. The Supreme Court of Missouri in *Blakely v. Blakely*⁹³ similarly upheld its visitation statute as constitutional as it had done in *Herndon v. Tuhey*⁹⁴ some years before the *Troxel* decision.⁹⁵

Other state courts have either distinguished, followed, or applied the principles of the decision in *Troxel* in a variety of factual situations, leaving their states' grandparent visitation statutes intact.⁹⁶ The Supreme Court of Appeals of West Virginia, in *In re Cathy L.(R.) M.*,⁹⁷ for example, discussed the requirements of *Troxel* and emphasized that a parent's objection to visitation would not, in every case, defeat a grandparent's visitation petition. In the case before it, the court found that after incorporating the parents' wishes in its analysis, visitation was nevertheless not in the best interests of the child.⁹⁸ The Supreme Court of Maine, in *Conlogue v. Conlogue*,⁹⁹ citing and discussing both *Troxel* and its own prior holding, found no compelling state interest in establishing or maintaining a relationship between grandparents and a child whose parent had died. Accordingly, the court held that forcing the child's mother to defend against a grandparent visitation petition would be in violation of her due process rights.¹⁰⁰ In a case where none of the parties had relied on *Troxel*, the Supreme Court of Nebraska in *Nelson v. Nelson*¹⁰¹ relied on that decision in affirming the dismissal of a grandparent visitation order. These cases are typical of the fairly routine ways in which state courts have reacted to the decision of the Supreme Court in *Troxel*.¹⁰²

93. *Blakely v. Blakely*, 83 S.W.3d 537 (Mo. 2002).

94. *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993).

95. See also *Harrold v. Collier*, 836 N.E.2d 1165 (Ohio 2005) (holding that the state's visitation statute was not, under *Troxel*, either unconstitutional on its face or as applied); *State ex. rel Brandon L. v. Moats*, 551 S.E.2d 674, 685 (W. Va. 2001) (concluding that the statute, when compared with the flaws that the Court found in *Troxel*, "does not violate the substantive due process right of liberty extended to a parent in connection with his/her right to exercise care, custody, and control of his/her child[ren] without undue interference from the state).

96. See, e.g., *Walther*, *supra* note 37.

97. *In re Cathy L.(R.)M.*, 617 S.E.2d 866 (W. Va. 2005).

98. *Id.* at 875.

99. *Conlogue v. Conlogue*, 890 A.2d 691 (Me. 2006).

100. *Id.* at 695.

101. *Nelson v. Nelson*, 674 N.W.2d 473 (Neb. 2004).

102. See also *Kinnard v. Kinnard*, 43 P.3d 150 (Alaska 2002) (distinguishing *Troxel* in context of petition for stepparent visitation); *Ex parte D.W.*, 835 So. 2d 186 (Ala. 2002) (finding *Troxel* inapplicable where maternal grandparents sought visitation with child legally adopted by paternal grandparents); *In re Harris*, 96 P.3d 141 (Cal. 2004) (finding *Troxel* inapplicable when parents disagree with respect to grandparent visitation); *Camburn v. Smith*, 586 S.E.2d 565 (S.C. 2003) (reversing visitation order absent finding of parental unfitness or compelling reasons to overcome presumption that decision by fit parents is in child's best interests).

In sum, while the Court's fractionated decision in *Troxel* may have been a law review editor's dream, it has not turned out to be a practitioner's nightmare. The state courts that have decided grandparent visitation cases after *Troxel* have, for the most part, taken the Supreme Court's decisions in stride and continued to decide such cases without effecting significant changes in the legal landscape. The Court's decision in *Troxel* has had little, if any, predictive value. State courts analyzing grandparent visitation statutes will continue, it appears, to decide the cases on an ad hoc basis.

