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Family Privacy and the Custody and Visitation Rights of Adult Outsiders

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The subject of this symposium, custody law and practice, could not be more appropriate in light of Professor Robert J. Levy's grand contributions to the field as both a scholar and a lawyer. I first met Bob Levy some thirty years ago when I attended a three-week teaching conference sponsored by the Association of American Law Students, at which Professor Levy was a faculty member. During the ensuing three decades or so, he has been a generous, kind, and nurturing mentor for me. If a law professor can have a guru, then Bob Levy is certainly mine. More importantly, his contributions to the field of matrimonial and family law are virtually incalculable. His 1976 casebook, *Cases and Materials on Family Law*, has influenced this field enormously, and I would venture to say that every casebook editor since that time owes Bob Levy a debt of gratitude. His many articles on a variety of topics have similarly influenced not only scholars but also decision-makers in the field. Future family law teachers would do well to aspire to the standard that Bob Levy has set.

To provide a context for the subject of this article, here is a brief passage by Professor Levy, a respected family law scholar, teacher, and practitioner who was the William J. Prosser Professor of Family Law at the University of Minnesota Law School:

> My concern is perpetuation of the family as the most important relationship in our society—as the unit which provides, and should continue to provide, the basic emotional and socializing experiences for our children. Those functions can be served effectively, I believe, only if the family is

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> considered to be and is treated as an autonomous unit, and if families are protected from untoward governmental interference with their operations. Yet, the current "children's rights" campaign, by increasing government intrusion into family decision making, has at least the potential to upset the traditional social compact that undergirds these family-centered values. To eliminate the threat, we must strive to maintain a stance of "family privacy"—a policy that families may not be supervised by judicial or other agents of the state. I choose to call that stance "Respect for Family Autonomy"; the people I call the "new child savers" claim that I am simply an old-fashioned supporter of "parental rights."[1]

Remarkably, although he made them a quarter of a century ago, Professor Levy's observations are no less true today. Indeed, if the future could have been foretold back in 1976, one might have responded to Professor Levy's concerns by quoting Al Jolson's storied remark, "You ain't seen nothin' yet, folks."[2]

Professor Levy wrote against the background of the children's rights or children's liberation movement, which was trendy and fashionable in the 1970s. During that era, few would quarrel with judicial holdings that protected the rights of children by insistence on due process protections in cases in which their physical liberty might have been restrained.[3] Several commentators, however, did not limit their advocacy of children's rights to arguments favoring due process; instead, they sought affirmative rights for children. For example, explicitly rejecting a double standard, one writer called for "the right to a single standard of morals and behavior for children and adults."[4] Another prominent

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1. Robert J. Levy, *The Rights of Parents,* 1976 BYU L. REV. 693.

2. John Bartlett, BARTLETT'S FAMILIAR QUOTATIONS (15th ed. 1980), describing the quoted language as follows: "Ad lib remark introduced in the first talking motion picture, The Jazz Singer, July 1927."

3. *See, e.g.,* Haley v. Ohio, 332 U.S. 596 (1948) (holding that the Fourteenth Amendment made inadmissible the coerced confession of a 15-year-old boy); Kent v. United States, 484 U.S. 541 (1966) (holding in light of procedural protections and benefits to child that inhered in juvenile court jurisdiction, waiver of jurisdiction and transfer of proceeding to adult court could not be accomplished without hearing that comported with constitutional due process); *In re* Gault, 387 U.S. 1 (1967) (holding that in juvenile court proceeding in which youth could be committed to an institution, due process required adequate notice of charges; right to counsel; and right to confrontation, cross-examination, and constitutional privilege against self-incrimination); *In re* Winship, 397 U.S. 358 (1970) (holding that proof beyond a reasonable doubt in juvenile delinquency proceedings was due process requirement). *But see* McKiever v. Pennsylvania, 403 U.S. 528 (1971) (holding that the Fourteenth Amendment did not require states to provide jury trials in adjudicative stage of juvenile delinquency proceedings). *See generally* John DeWitt Gregory, *Juvenile Court Jurisdiction Over Noncriminal Misbehavior: The Argument against Abolition,* 39 OHIO ST. L.J. 242, 243–44 (1978).

4. *See,* RICHARD FARSON, BIRTHRIGHTS (1974). Farson states,

> Children, like adults, should have the right to decide the matters which affect them most directly. The issue of self-determination is at the heart of children's liberation.

children's rights advocate proposed that any young person have "[t]he right to do, in general, what any adult may legally do."[5]

These days, one does not often hear such radical—indeed absurd—suggestions concerning so-called children's rights. Nevertheless, a new and increasingly vocal generation of child savers has taken the stage, purporting to speak for children and imperiling fundamental principles of family privacy. Modern day self-styled child advocates have largely abandoned the notion of children's rights and have adopted in its place the shibboleth *best interest of the child.*

This article examines and comments on some of the legal issues relating to third-party visitation, in which claims by legal strangers of the right to associate with other people's children are invariably based on assertions of children's best interests. *Legal and Mental Health Perspectives on Child Custody Law: A Deskbook for Judges*,[6] for which Professor Levy is the general editor, addresses these issues in chapter 17, "Grandparent and Third-Party Visitation." In the relatively few years since the *Deskbook* appeared, there have been significant and startling developments with respect to the legal treatment of claims by legal strangers, particularly grandparents and other third parties. This

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It is, in fact, the only issue, a definition of the entire concept. The acceptance of the child's right to self-determination is fundamental to all the rights to which children are entitled. . . . Children would have the right to engage in acts which are now acceptable for adults but not for children, and they would not be required to gain permission to do something if such permission is automatically granted to adults. *Id.* at 27.

5. JOHN HOLT, ESCAPE FROM CHILDHOOD 19, 29 (1974). Holt flatly states, "[T]he rights, privileges, duties, responsibilities of adult citizens *available* to any young person, of whatever age, who wants to make use of them." These would include, among others:

1. The right to equal treatment at the hands of the law, *i.e.,* the right, in any situation to be treated no worse than an adult would be.
2. The right to vote, and take full part in political affairs.
3. The right to be legally responsible for one's life and acts.
4. The right to work, for money.
5. The right to privacy.
6. The right to financial independence and responsibility-*i.e.,* the right to own, buy and sell property, to borrow money, establish credit, sign contracts, etc.
7. The right to direct and manage one's own education.
8. The right to travel, live away from home, to choose or make one's own home.
9. The right to receive from the state whatever minimum income it may guarantee to adult citizens.
10. The right to make and enter into on a basis of mutual consent, quasi-familial relationships outside one's immediate family-*i.e.,*the right to seek and choose guardians other than one's own parents and to be legally dependent on them.

Id. at 18–19.

6. *See* NATIONAL INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY, LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES (Robert J. Levy ed., 1998) [hereinafter DESKBOOK FOR JUDGES].

article serves as an update of the relevant statutes and cases on the subject. There is, however, one caveat. It should come as no news that in June 2000, in *Troxel v. Granville*[7] the U.S. Supreme Court decided the first third-party visitation case it had ever undertaken to review, holding that the Washington state grandparent visitation statute was unconstitutional as applied. Since then there has been a welter of state court decisions that interpret, follow, or purport to distinguish *Troxel,* some of which have come down subsequent to the preparation of this article. Undoubtedly, there will be many more such decisions in the foreseeable future.[8]

Historically, in this country respect for and recognition of the autonomy of the family and the authority of parents over their children was well established, not only in law but also in societal cultural values. Simply stated, there is a strong and enduring tradition of family autonomy in American law, of which the natural concomitant is parental authority. Indeed, the Supreme Court established the principle quite early in the twentieth century in *Meyer v. Nebraska*[9] by explicitly recognizing the right "to marry, establish a home and bring up children"[10] as a liberty interest that the Fourteenth Amendment guaranteed, thereby supporting the rights of parents and contradicting assertions of the interests of the state. Just two years later, the Court reinforced its opinion in *Meyer* when it enjoined the enforcement of Oregon's compulsory education law against two private schools in *Pierce v. Society of Sisters.*[11] 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 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.[12]

7. 530 U.S. 57 (2000).

8. Despite the Supreme Court's long silence with respect to third-party visitation, there has long been an abundance of state court decisions and legislative enactment on the subject. *See generally,* John DeWitt Gregory, *Whose Child Is It Anyway: The Demise of Family Autonomy and Parental Authority,* 33 FAM. L.Q. 833 (1999); John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers,* 55 WASH. & LEE L. REV. 351 (1998).

9. 262 U.S. 390 (1923).

10. *Id.* at 399.

11. 268 U.S. 510 (1972).

12. *Id.* at 534–35.

For the most part, scholarly commentary has viewed the Court's decisions in *Meyer* and *Pierce* as strongly supporting the prerogatives of parents against challenges by states. One writer points out that the Supreme Court "has consistently held that matters touching 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."[13]

Despite these unequivocal holdings by the Court, advocates described by Professor Levy as the "new child savers" have been in full cry against family privacy and autonomy principles. Common law courts rarely intervened in the affairs of parents and their children on behalf of legal strangers. Occasionally but infrequently, state courts would afford standing to assert rights against a parent to a person who, with respect to a particular child, had acted *in loco parentis*. Except in such rare cases, courts respected the constitutionally protected liberty interest of parents and rejected the claims of suitors who could not show kinship with children who were the subjects of proceedings.

The first and thus far most extensive rejection of the family privacy principle that was reflected in courts' traditional deference to parental authority occurred in the context of grandparent visitation. Common-law grandparents were considered legal strangers to the same extent as other third parties who sought to intervene in the autonomy of families. By now, however, legislatures in every state have enacted statutes that provide for some form of child visitation rights for grandparents.[14] An authoritative commentator has astutely observed that since "these statutes are the product of a combination of the lobbying efforts of grandparents groups and the sentimentality of the state legislatures, they take so many forms and limit visitation to so many different kinds of cir-

13. *See* Marian L. Faupel, *The "Baby Jessica Case" and the Claimed Conflict Between Children's and Parents' Rights,* 40 WAYNE L. REV. 285, 289 (1994). *See also* Ellen B. Wells, *Unanswered Questions: Standing and Party Status of Children in Custody and Visitation Proceedings,* 13 J. AM. ACAD. MATRIM. 95 (1955). The writer observes,

> 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 own 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.

Id. at 109.

14. *See Troxel v. Granville,* 530 U.S. at 74, n.1 (observing that every state provides for grandparent visitation in some form and listing the statutory provisions in the 50 states).

cumstances that it is extremely difficult to classify them."[15] The authors of the *Deskbook* make a similar observation, albeit more pungently:

> Under the English common law, a grandparent did not have a legal right to petition a court to consider whether that grandparent should be allowed to visit a grandchild. Indeed, grandparent visitation laws are a very recent statutory innovation. To be sure, grandparent visitation and custody issues have occasionally been presented to some courts, even in the absence of a standing statute, in the disguise of adoption, guardianship, and neglect proceedings; but without the benefit of legislation specifically authorizing standing, judges could and certainly often did refuse to hear such cases.[16]

Regrettably, the days of respect for family privacy appear to be gone forever. Nowadays, grandparent visitation laws are so dazzlingly varied that one can find a statutory provision in one state or another to fit almost every conceivable situation. In some states, grandparents may petition for visitation with their grandchildren when the parents are either divorced or in the process of becoming divorced.[17] In other states, grandparents may petition for visitation rights when either one or both of a child's parents are dead[18] or when a court has terminated the parental rights of one or both parents.[19] Still other statutes authorize grandparents to sue when visitation is unreasonably denied for a specific period of time[20] or when a grandparent and a child resided together for a specified time period.[21] Among the broadest grandparent visitation statutes is New York's, which permits grandparents to petition for visitation when "circumstances show that conditions exist which equity would see fit to intervene."[22]

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

16. DESKBOOK FOR JUDGES, *supra* note 6, at 104.

17. ALASKA STAT. § 25.24.150(A)(Michie 1998); GA. CODE ANN. § 19–7-3(b) (Supp. 1997) HAW. REV. STAT. § 571–46–3 (1999); IOWA CODE ANN. § 598.35 (West 1999); MASS. GEN LAWS ANN. Ch. 119, § 39D (West 1996); MO. ANN. STAT. § 452.402(1) (West 1999); NEB. REV. STAT.§ 43–1802(1)(b) (1998).

18. ALASKA STAT. § 25.24.150 (Michie 1999); COLO. REV. STAT. ANN. § 19–1-117(1)(c) (1999) (West 1997); FLA. STAT. ANN. § 752.01(1)(a) (West 1997); MICH COMP. LAWS ANN. § 722.27(b) (Supp. 1999); MINN. STAT. ANN. § 257.022 (West 1998); OHIO REV. CODE ANN. § 3109.11 (Supp. 1999); 23 PA. CONS. STAT. ANN. §5311 (West 1991); TEX, FAM. CODE §153.433(2)(A)(Supp. 2000).

19. GA. CODE ANN. § 19–7-3(b) (1991); MISS. CODE ANN. § 19–16–3(1)(1999); NEV. REV. STAT. § 125C.050(d)(Supp. 1999); OKLA. STAT. ANN. tit. 10, § 5C(A)(1)(k), (1998); TEX. FAM. CODE ANN. § 153.433 (2)(E) (West Supp. 2000).

20. MISS. CODE ANN. § 93–16–3(2)(1994); MO. ANN. STAT. § 452.402(3) (West Supp. 1999).

21. MINN. STAT. ANN. § 257.022(2a)(1998); N.M. STAT. ANN. § 40–9-2CC (1999); PA. CONS. STAT. ANN. § 5313(a)(1991); TEX. FAM. CODE ANN. § 153.433(2)(F) (Supp. 2000).

22. N.Y. DOM. REL. LAW § 72 (McKinney Supp. 1997–98).

Courts in a number of states have been no less zealous in their concern for grandparent visitation rights than legislators have been. Illustrative is the decision of the Supreme Court of Kentucky in *King v. King*.[23] The court in *King* upheld the constitutionality of a statute under which a trial court had ordered visitation by a child's grandfather over the objection of the natural parents of a child. Somewhat inventively, the court provided the following reasoning for its decision:

> This 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. . . . The grandparent can be invigorated by 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.[24]

One could not ask for a more valid characterization of the holding and reasoning of this case than that which a dissenting opinion provides:

> 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 in its conclusion that a grandparent has as "fundamental right" to visitation with a grandchild. No authority is cited for this proposition as there is no such right.[25]

The decision in *King* is one of many blatant examples of courts' assertion of the so-called best interests of a child to reach a decision that has no doctrinal support. In *Herndon v. Tuhey*[26] the Supreme Court of Missouri permitted grandparent visitation under a statute that authorized the court to grant visitation rights to grandparents if visitation was unreasonably denied for more than ninety days.[27] The statute also required a determination whether visitation would be in the child's best interests or would endanger the physical health or impair the emotional development of the child.[28] In addition, the statute allowed a visitation

23. 828 S.W.2d 630 (Ky. 1992).
24. *Id.* at 632 (citation omitted).
25. *Id.* at 633 (Lambert, J. dissenting).
26. 857 S.W.2d 203 (Mo. 1993).
27. *Id.* at 206–07.
28. *Id.* (citing MO. ANN. STAT. § 452.402 (West 1997)).

order only "when the court finds such visitation to be in the best interests of the child."[29]

Despite the fact that there were arguments, physical altercations, and lawsuits involving money and property between the parents and grandparents of a ten-year-old child, the court found that the grandparent visitation statute was constitutional and ordered visitation. The court in *Herndon* agreed with the Kentucky Supreme Court's opinion in *King* and 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.[30]

As in *King,* the Missouri court's opinion in *Herndon* evoked a strong and persuasive dissent. The dissenting opinion pointed out that the decision of the majority of the court "rests in actuality upon the trial court's discretion, rather than upon traditional principles of constitutional analysis."[31] Moreover, "[a] best interest test standing alone does not justify intrusion into the parents' constitutionally protected right of autonomy in child rearing."[32]

For anyone who is respectful of parental autonomy, it is encouraging to note that the dissenting opinions in *King* and *Herndon,* or at least the principles set out in those dissents, have emerged in grandparent

29. *Id.*

30. *Id.* at 210; *see also* Michael v. Hertzler, 900 P.2d 1144 (Wyo. 1995) (holding that the Wyoming grandparent visitation statute was constitutional and concluding that "in addition to the compelling state interest attaching to the best interest of the children, the compelling state interest exists in maintaining the right of association of grandparents and grandchildren"). *Id.* at 151 Martin v. Coop, 693 So. 2d 912 (Miss. 1997) (holding that a statute permitting either parent of the deceased parent of the child to petition for visitation with the child "[did] not deprive the parents of their right to raise their children by determining the care, custody and management of the child"). *Id.* at 915.

31. Herndon v. Tuhey, 857 S.W.2d 203, 211 (Mo. 1993) (Covington, J., dissenting).

32. *Id.* at 211. Supreme Court of Wyoming was similarly sharply divided in Michael v. Hertzler, 900 P.2d 1144 (Wyo. 1995) (upholding the state's grandparent visitation statute). The statute before the court gave a grandparent a cause of action against the custodian of a minor grandchild. *Michael,* 900 P.2d at 1146 (citing WYO. STAT. ANN. § 20–7-101 (Michie 1994)). A majority of the court found that there was a compelling state interest in protecting the best interests of a child that justified the grandparent visitation statute. *Id.* at 1149. The court then sought to balance the "compelling interest of the state in protecting the best interest of the child" against the natural parent's fundamental liberty right. *Id.* at 1149. Finding the statute constitutional, the court concluded, "In addition to the compelling state interest attaching to the best interests of the children, the compelling state interest in maintaining the right of association of grandparents and grandchildren." *Id.* at 1151.

visitation cases in several states. The first such case, which is arguably the most significant one, is the decision of the Supreme Court of Tennessee in *Hawk v. Hawk*,[33] in which the court found the state's grandparent visitation case to be unconstitutional. Subsequently, the Supreme Court of Georgia in *Brooks v. Parkerson*,[34] the Supreme Court of Florida in *Beagle v. Beagle*,[35] and the Oklahoma Supreme Court in *Herbst v. Sayre*[36] invalidated statutory provisions relating to grandparent visitation.

In *Hawk*, after a number of family disputes over a long period of time, the parents of two minor children denied visitation to the children's grandparents. The grandparents asked a court to grant visitation pursuant to a statute that authorized reasonable court-ordered visitation when it was in a child's best interest.[37] Without finding parental unfitness, the court ordered liberal visitation, having found that conflicts within the family did not have to interfere with the relationship between the children and their grandparents.[38]

The Supreme Court of Tennessee reversed the trial court's decision and found that under the Tennessee Constitution the statute violated the right to privacy "as applied to [a] married couple, whose fitness as parents is unchallenged."[39] Subsequently, in *Simmons v. Simmons*[40] grandparents sought visitation over the objection of a child's natural mother and a father who had adopted the child. The Tennessee Supreme Court rejected the grandparents' argument that the decision in *Hawk* was "limited to married, natural parents who have maintained continuous custody of their children and whose fitness as parents has not been challenged."[41] Approving denial of visitation to the grandparents, the court held that absent substantial harm or danger to the child, the decisions of both adoptive parents and natural parents were constitutionally protected from intrusion by the state.[42]

33. 855 S.W.2d 573 (Tenn. 1993).
34. 454 S.E.2d 769 (Ga. 1995).
35. 678 So. 2d 1271 (Fla. 1996).
36. 971 P.2d 395 (Okla. 1998).
37. 855 S.W.2d at 576.
38. *Id.* at 577.
39. *Id.* (citing TENN. CONST. art I, § 8).
40. 900 S.W.2d 682 (Tenn. 1995).
41. *Id.* at 684.
42. *Id.* at 684–85. *See also* Brooks v. Parkerson, 454 S.E.2d 769 (Ga. 1995) (holding that the Georgia statute affording visitation rights to grandparents upon proof of circumstances making such rights necessary to a child's best interests was unconstitutional). *Id.* at 770–71. The court found the statute to be unconstitutional under both the federal and state constitutions "because it does not clearly promote the health and welfare of the child and does not require a showing of harm before state interference is authorized." *Id.* at 774. The amended Georgia visitation statute gives visitation rights

In *Beagle v. Beagle*[43] the Supreme Court of Florida invalidated on constitutional grounds provisions of a Florida statute that permitted grandparent visitation over parental objections in intact families.[44] The statutory amendment under review in *Beagle* required a trial court to award reasonable grandparent visitation rights, even when a natural parent had prohibited visitation, if the visitation would be in a child's best interest.[45]

The court in *Beagle* took note of and summarized "the divergent views in other jurisdictions as to whether the government can constitutionally infringe upon the rights of parents to raise their children."[46] After a review of the legislative history of the Florida statute,[47] the court, which described the issue as "very narrow," addressed the following question: "Does the state have a compelling interest in imposing grandparent visitation rights, in an intact family, over the objection of at least one parent?"[48] Stating that "[o]ur cases have made it abundantly clear that the State can satisfy the compelling state interest standard when it acts to prevent demonstrable harm to a child," the court held that the statute did not show the requisite compelling state interest.[49]

Simply stated, several courts in a number of jurisdictions have rendered conflicting decisions under state law as well as state or federal constitutional grounds in a variety of circumstances and factual settings relating to the rights of grandparents to visitation. And then along came *Troxel v. Granville.*[50]

Undoubtedly, most family law practitioners and teachers were surprised when for the very first time the U.S. Supreme Court decided to review a state court judgment relating to grandparent visitation. In *Troxel* a plurality of the Court affirmed a decision by the Washington Supreme Court, which had held that Washington's grandparent visitation statute[51] was unconstitutional. A quite narrow decision by a plu-

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to grandparents when "a court finds the health or welfare of a 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) (Supp. 1997).

43. 678 So. 2d 1271 (Fla. 1996).

44. *Id.* at 1272.

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

46. *Beagle,* 678 So. 2d at 1274–76 (citing *Brooks,* 454 S.E.2d at 773; Herndon v. Tuhey, 875 S.W.2d 203, 211 (Mo. 1993); Hawk v. Hawk, 855 S.W.2d 573, 579 (Tenn. 1993); Michael v. Hertzler, 900 P.2d 1144, 1151 (Wyo. 1995)).

47. *Beagle,* 678 So. 2d at 1275.

48. *Id.* at 1276.

49. *Id.*

50. 530 U.S. 57 (2000).

51. *See* WASH. REV. CODE § 26.10.160(3) (1994).

rality of the Court held that the state statute, as applied, was an unconstitutional infringement of "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[52]

In *Troxel* unmarried parents had two children out of wedlock.[53] After the parents separated, the children's father visited them regularly at the home of the paternal grandparents.[54] The father killed himself, and the children's mother subsequently limited the paternal grandparents' visitation to one brief visit each month.[55] The parents sued for more liberal visitation[56] pursuant to the state 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."[57]

Describing the Washington statute as "breathtakingly broad," Justice O'Connor pointed 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."[58] Additionally, Justice O'Connor noted that the statute "places the best interest determination solely in the hands of the judge."[59] That judge's view would prevail with no requirement that a court extend any presumption of validity or any weight whatsoever to the parent's decision that visitation would not be in a child's best interest.[60] According to Justice O'Connor, "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 interest."[61]

Justice O'Connor then turned to the facts in the trial record, noting that no special factors justified the state's interference with the parent's "fundamental right to make decisions concerning the rearing of her two daughters."[62] There had been no finding of the mother's unfitness, an important factor in light of the "presumption that fit parents act in

52. 57 U.S. at 66–67.
53. *Id.* at 60.
54. *Id.*
55. *Id.* at 60–61.
56. *Id.* at 61.
57. WASH. REV. CODE § 26.10.160(3) (1994).
58. 57 U.S. at 67.
59. *Id.* at 67.
60. *Id.*
61. *Id.*
62. *Id.* at 68.

the best interests of their children."[63] The state trial court had given no special weight to the mother's determination respecting the best interest of her children; in fact, it placed on a fit parent "the burden of *disproving* that visitation was in the best interest of her daughters."[64] Thus, "[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."[65] Justice O'Connor concluded,

> As we have explained, 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 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 may be 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.[66]

Importantly, the Court explicitly rested its decision "on the sweeping breadth of [the Washington statute] and the broad unlimited power in this case" but did not address 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."[67] Rather, offering the rationale that state courts adjudicate visitation standards case by case, the Court was hesitant to hold that specific non-parental visitation statutes violate the due process clause as a per se matter.[68]

Because of time and space constraints, I shall save for another day comments concerning the separate concurring opinions of Justices Souter and Thomas and the dissents of Justices Stevens, Scalia, and Kennedy. The omission of this discussion is not meant to suggest, however, that these additional opinions are not persuasive or that they will not influence future decisions of the Court or state courts.[69] At

63. *Id.*
64. *Id.* at 69.
65. *Id.* at 69.
66. *Id.* at 72–73.
67. *Id.* at 73.
68. *Id.*
69. Anyone who has tried to assess the impact of *Troxel* will soon realize that it is frequently cited for propositions that have scant relevance to the issues addressed in that case. *See, e.g.*, Central Texas Nudists v. County of Travis, 2000 WL 1784344 (Tex. App. 2000) (holding that county park rules that banned children from a clothing-optional park did not violate parent's due process rights to direct the upbringing of their children); Cooper v. United States Ski Club, 2000 WL 1159066 (Colo. App. 2000) (holding that release signed by parent of child who was subsequently injured seriously was valid and enforceable against the child).

this point, then, I shall discuss the impact of *Troxel* thus far and attempt to divine the future impact of *Troxel* on third party visitation—the custody and visitation rights of adult outsiders.

Since the Supreme Court's decision in *Troxel* state courts have rendered several decisions that cite the case in a variety of contexts, and they continue to do so week after week. In light of the six separate opinions in *Troxel*, including three dissenting opinions, it is hardly surprising that subsequent state court decisions treating grandparent visitation have made law on the subject even more disordered than it had been before the case was decided. Simply stated, the Court's opinion has not evoked a uniform response to the question of whether a given state's grandparent visitation statute meets constitutional requirements.

As of this writing, the highest courts of Florida,[70] Illinois,[71] Iowa,[72] Kansas,[73] Maine,[74] Mississippi,[75] and Oklahoma[76] issued opinions that take *Troxel* into account. In *Belair v. Drew*[77] the Supreme Court of Florida noted that *Troxel* was consistent with earlier decisions in which it had found various provisions of the Florida grandparent visitation statute to be unconstitutional.[78] Accordingly, the court quashed a trial court's decision that had temporarily given a grandmother visitation rights because "[o]n its face, such ruling directly contravenes the [divorced custodial mother's] right to privacy and decision-making in rearing her child."[79]

The Supreme Court of Illinois in *Lulay v. Lulay*[80] cited and quoted *Troxel* while denying visitation rights to a maternal grandmother of three minor children whose divorced parents had joint custody. The court held that the applicable statute as applied in the case was unconstitutional but declined to address the father's argument that the statute

70. *See* Belair v. Drew, 770 So. 2d 1164 (Fla. 2000).
71. *See* Lulay v. Lulay, 739 N.E.2d 521 (Ill. 2000).
72. *See* Santi v. Santi, 633 N.W.2d 312 (Iowa 2001).
73. *See* Kansas Dep't Soc. & Rehabilitative Serv. v. Paillet, 16 P.2d 962 (Kan. 2001).
74. *See* Rideout v. Riendeau, 761 A.2d 291 (Me. 2000).
75. *See* Zeman v. Stanford, 789 So. 2d 798 (Miss. 2001).
76. *See* Neal v. Lee, 14 P.3d 547 (Okla. 2000).
77. 770 So. 2d 1164.
78. *Id.* at 1166. Court cited its decisions in Saul v. Brunetti, 753 So. 2d 26 (Fla. 2000) (declaring to be unconstitutional a statutory provision permitting grandparent visitation with a child born out of wedlock); Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998) (finding unconstitutional a provision that concerned grandparent visitation when one or both of the child's parents are deceased); and Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996) (holding unconstitutional statutory provision relating to grandparent visitation with child living with both parents).
79. 770 So. 2d at 1167.
80. 739 N.E.2d 521 (Ill. 2000).

was facially unconstitutional.[81] The facts in *Kansas Dep't of Soc. & Rehabilitative Services v. Paillet*[82] were remarkably similar to those in *Troxel* in that a child's father had died suddenly (in this case in an automobile accident). A statute in Kansas permitted a court to grant to the grandparents of an unmarried minor child reasonable visitation rights "upon a finding that the visitation right would be in the child's best interest and when a substantial relationship between the child and the grandparent has been established."[83] As did the high court in Illinois, the Supreme Court of Kansas found the statute unconstitutional as applied, noting that the intermediate appellate court's decision "essentially circumvents the presumption that a fit parent makes decisions in the best interests of his or her child."[84] Further, the court observed that the decision "would not allow a fit parent to limit a grandparent's visitation without losing the presumption that the parent is making the decision in the best interest of the child."[85] As in *Troxel,* the court explicitly declined to find that the statute was facially violative of due process.

In *Santi v. Santi,*[86] however, while ruling that Iowa's grandparent visitation statute was unconstitutional, the approach of the Supreme Court of Iowa departed somewhat from the analysis adopted in other states that had reached a similar result. The grandparent visitation statute before the Iowa court allowed a trial court to order visitation "regardless of whether circumstances such as divorce, the death of a parent, or an adoption have otherwise prompted court intervention in the family's affairs."[87] The parents in *Santi* had been living together with their three-and-a-half-year-old child in an intact family. After a series of disputes with the child's grandparents and unsuccessful counseling, the parents ended visitation between the grandparents and the child.

The court pointed out that while the grandparents alleged violation of their substantive due process rights, they did not indicate whether their challenge was based on Iowa's constitution or the U.S. Constitution. Because the trial court had found that the statute violated Iowa's constitution, the Iowa Supreme Court acknowledged that the state and federal due process clauses were virtually identical but focused its review on the Iowa Constitution.

81. 739 N.E.2d at 534.
82. 16 P.2d 962 (Kan. 2001).
83. KAN. STAT. ANN. § 38-129.
84. 16 P.3d at 970.
85. *Id.* at 970–71.
86. 633 N.W.2d 312 (Iowa 2001).
87. *Id.* (citing IOWA CODE § 598.35(7)(1999)).

Pointing out that "the *Troxel* plurality did not specify the appropriate level of scrutiny for statutes that infringe on the parent child relationship,"[88] after an extensive review of state and federal cases the Iowa court determined that the Iowa statute required review under a strict scrutiny standard. The court then discussed state court opinions in other jurisdictions that had addressed grandparent visitation statutes, both prior to and subsequent to *Troxel,* and pointed out that "[a] greater number of courts, applying strict scrutiny, have ruled that their grandparent visitation statutes are unconstitutional to the extent they permit a court to order grandparent visitation over the objections of married, fit parents without a showing of actual or potential harm to the children."[89] The court then stated,

> Turning to the Iowa statute before us, we note that while it does not suffer from the patently unconstitutional scope of the Washington statute, it nevertheless fails to accord fit parents the presumption deemed so fundamental in *Troxel.* [The statute] places the best interest decision squarely in the hands of a judge without first according primacy to the parents' own estimation of their child's best interests. Without a threshold finding of unfitness the statute effectively substitutes sentimentality for constitutionality. It exalts the socially desirable goal of grandparent-grandchild bonding over the constitutionally recognized right of parent to decide with whom their children will associate.[90]

The court concluded that the Iowa grandparent statute was "fundamentally flawed, not because it fails to require a showing of harm, but because it does not require a threshold finding of parental unfitness before proceeding to the best interest analysis."[91] Further, the court stated that it was "convinced that fostering close relations between grandparents and grandchildren is not a sufficiently compelling state interest to justify court ordered visitation over the joint objection of married parents in an intact nuclear family."[92] Accordingly, the court did not limit its finding to the application of the statute in the case before it, as had been done in *Troxel* and its progeny. Rather, it soundly determined that the Iowa statute was unconstitutional on its face.

In *Hoff v. Berg*[93] the Supreme Court of North Dakota joined the ranks of state courts that had found grandparent visitation statutes to be unconstitutional. In *Hoff* the paternal grandparents of an out-of-wedlock child whose parents married three years after the child's birth were

88. *Id.* at 317.
89. *Id.* at 319.
90. *Id.* at 320.
91. *Id.* at 321.
92. *Id.*
93. 595 N.W.2d 285 (N.D. 1999).

dissatisfied with the visitation that the child's mother had given them and sued for a schedule what would allow them to enforce their visitation rights.[94] The court affirmed a trial court's decision that the visitation statute under which the grandparents sued,[95] which permitted the court to award visitation rights to the grandparents of an unmarried minor, was unconstitutional. In summary of its holding, the court stated,

> We conclude [that the statute] is unconstitutional to the extent it requires courts to grant grandparents visitation rights with an unmarried minor unless visitation is found not to be in the child's best interests, and presumes visitation rights of grandparents are in a child's best interests, because it violates parents' fundamental liberty interest in controlling the persons with whom their children may associate, which is protected by the due process clauses of our state and federal constitutions.[96]

In contrast to the cases just discussed, the highest courts of both Maine[97] and Mississippi[98] interpreted grandparent visitation statutes subsequent to the decision in *Troxel* and readily found them to be constitutional. In *Rideout v. Rideau*[99] the Supreme Judicial Court of Maine identified the issue before it as

> whether Maine's Grandparent Visitation Act violates the constitutional rights of competent parents who choose not to have their children visit with their grandparents. We conclude that the Act, as applied to the facts presented to us, is narrowly tailored to serve a compelling state interest, and thus does not violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[100]

The Maine statute permitted a grandparent to petition for visitation when "[t]here is a sufficient existing relationship between the grandparents and the child."[101] After a careful review of *Troxel,* the court noted that the grandparents in the case before it had acted as the children's parents for a significant period of time and therefore concluded that the statute "serves as a compelling state interest in addressing the children's relationship with the people who have cared for them as parents."[102] However, the court did not find the statute to be facially

94. The child's father had been so adjudicated but had not formally been granted rights to visitation with the child. *Id.* at 286.

95. *See* N.D. CENT. CODE § 14-09-05.1 (1993).

96. *Id.* at 291–92. *See also* Wickham v. Byrne, 769 N.E.2d 1 (Ill. 2002) (holding that provisions of Illinois grandparent visitation statute were "facially unconstitutional").

97. *See* Rideout v. Riendeau, 761 A.2d 291 (Me. 2000).

98. *See* Zeman v. Stanford, 789 So. 2d 798 (Miss. 2001).

99. 761 A.2d 291 (Me. 2000).

100. *Id.* at 294.

101. ME. REV. STAT. ANN. tit. 19, § 1803(1)(B) (1998).

102. 761 A.2d at 303.

constitutional, finding that "[b]ecause the Act is narrowly tailored to serve that compelling interest, it may be applied in this case without violating the rights of the parents."[103]

In *Zeman v. Stanford*[104] the Supreme Court of Mississippi addressed a constitutional challenge to Mississippi's visitation statute, pointing out that it had addressed the identical issue some years earlier.[105] The court compared the broad sweep of the Washington statute invalidated in *Troxel* with its own interpretation of the Mississippi statute, having found in the earlier case that it had "specifically require[d] the Chancellor to consider certain factors before awarding visitation in order to ensure that parents are not deprived of their right to rear their children and determine their children's care, custody, and management."[106] The court concluded that the limits it had imposed in its interpretation of the statute "clearly result in the 'narrower reading' that was lacking in *Troxel*."[107] Accordingly, the father's constitutionally grounded argument was without merit.[108]

In a similar vein but with a contrary result, the Supreme Court of Oklahoma in *Neal v. Lee*[109] re-examined its earlier holding in *In re Herbst*[110] that the state's grandparent visitation statute violated Oklahoma's constitution. The court noted that the facts in *Neal* were similar to those in *Troxel*, found that the Supreme Court's decision in *Troxel* was applicable to the case before it, and held that *Troxel* did not change its earlier interpretation of the state constitution in *Herbst*.[111]

Not long after the Court's decision in *Troxel,* two distinguished academic commentators made the following observation: "Perhaps it is a sign of the complex time in which we live that at the same time the United States Supreme Court is reaffirming 'fundamental' parental rights, more nonparents, whether they be domestic partners, grandparents, or others are 'parenting' children and seeking to continue relationships with them."[112] Stated differently, the writers are referring to a line of state court decisions addressing the visitation claims of lesbian co-parents that run roughly parallel in time to the aforementioned

103. *Id.*
104. 789 So. 2d 798 (Miss. 2001).
105. *Id.* at 803 (citing Martin v. Coop, 693 So. 2d 912 (Miss. 1997)).
106. *Id.* (citing 693 So. 2d at 915).
107. *Id.*
108. *Id. See also* Stacy v. Ross, 798 So. 2d 1275 (Miss. 2001).
109. 14 P.3d 547 (Okla. 2000).
110. 971 P.2d 395 (Okla. 1998).
111. *Neal,* 14 P.3d at 549.
112. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Refining Support Issues,* 34 FAM. L.Q. 607 (2001).

grandparent-visitation decisions. The paradigmatic case is the decision in 1991 by the Court of Appeals of New York in *Alison D. v. Virginia M.*[113] Having established a relationship and lived together for approximately two years, Alison and Virgnia decided to have a child and agreed that Virginia would be artificially inseminated.[114] The couple gave both of their surnames to the baby boy to whom Virginia gave birth, and Alison shared in expenses incident to the child's birth, provided support, participated in child care, and shared in parental decisions in accordance with their agreement to share the rights and responsibilities of raising the child.[115]

When the boy was two years and four months old, the couple separated, and Virginia subsequently stopped Alison's visitation. Alison sued for visitation rights.[116] After a trial court and intermediate appellate courts dismissed the action, the appellate court affirmed in an opinion that emphasized Alison's concession that she was not the child's biological or adoptive mother.[117] Rather, she argued that she had acted as a de facto parent[118] or that the court should recognize her as a parent by estoppel[119] and give her standing to assert visitation rights.[120] Discussing the requirements of the applicable statute, the court observed,

> Traditionally, in this state it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parents' consent. . . . To allow the courts to award visitation—a limited form of custody—to a third person would necessarily impair the parents' right to custody and control.[121]

On the basis of this reading of the statute, the court rejected Alison's claims of parental and visitation rights. Although *Alison D.* was the

113. 572 N.E.2d 27 (N.Y. 1991).
114. *Id.* at 28.
115. *Id.*
116. *Id.* at 29.
117. *Id.*
118. *See* Nancy S. v. Michelle G., 279 Cal. Rptr. 212, 216 (Ct. App. 1991) (describing de facto parent as one who, "on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care" (quoting *In re* B.G., 523 P.2d 244, 253 n.18 (Cal. 1974)).
119. *See, Id.* at 217 (explaining that some courts will employ equitable estoppel to deny existence of parent-child relationship previously encouraged and supported by legal parent).
120. Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991).
121. *Id.* at 30 (citations omitted). The governing statute, New York's Domestic Relations Law, provides that "either party may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court . . . may award the natural guardianship, charge and custody of such child to either parent . . . as the case may require." N.Y. DOM. REL. LAW § 70(a) (McKinney 2000).

first decision by the highest court of a state concerning visitation by co-parents, it was not the first such case nor the last.[122] Arguably, the most significant cases were decided by the Supreme Court of Wisconsin. In *In re Interest of Z.J.H.*[123] Wendy L. Sporleder sought the right to visit the adopted child of her former partner,[124] Janice Hermes, with whom she had lived for eight years.[125] The parties had entered into a co-parenting agreement providing that Hermes would adopt and that if they later separated, they would decide on custody through mediation and that the non-custodian would have liberal visitation rights.[126]

After the parties separated, Hermes prevented Sporleder from seeing the child, and Sporleder initiated an action to enforce the co-parenting agreement.[127] A family court granted visitation rights to Sporleder, but a circuit court of appeals reversed, holding that Sporleder did not have the legal rights of a parent, that she lacked standing to exercise rights as a parent, and that the agreement was void as against public policy.[128] The intermediate appellate court also held that Hermes was not equitably estopped from denying parental status to Sporleder.[129] The Supreme Court of Wisconsin affirmed[130] in a comprehensive and well-reasoned opinion.

The court first pointed out that a non-parent enjoyed no right to sue for custody of a minor without showing unfitness of the natural or adoptive parent or the existence of compelling circumstances that would justify awarding custody to a third party.[131] Next, the court held that Sporleder was not eligible for visitation under the governing statute, which allowed visitation petitions "by a grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar

122. *See, e.g.*,Curiale v. Reagan, 272 Cal. Rptr. 520 (Ct. App. 1990) (holding that no statutory or decisional basis existed for awarding visitation over the objection of the natural parent with whom the child lives to plaintiff who was not child's natural mother, step-mother, nor adoptive mother of the child); *Nancy S. v. Michele G.*, 279 Cal. Rptr. 213 (Ct. App. 1991) (rejecting co-parent's claim for visitation on ground that plaintiff could not establish visitation right under California law nor under such alternative theories as such as de facto parenthood, the in *loco parentis* doctrine, or equitable estoppel). *But see* A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992) (remanding case in which there was an oral co-parenting agreement for evidentiary hearing on whether visitation would be in best interests of child).

123. 471 N.W.2d 202 (Wis. 1991).

124. *Id.* at 206.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 213.

131. *Id.* at 204–09 (discussing standing in visitation and custody cases).

to a parent-child relationship with the child" [132] if a court found such visitation to be in the best interest of a child.[133] Based on its earlier decisions, the court concluded that the statute applied only when there was an underlying legal action affecting the family unit.[134] As for the parties' co-parenting agreement, to the extent that the agreement purported to give custody or visitation rights to Sporleder, it was "inconsistent with legislative intent behind the custody and visitation statutes, which prefer parents over third parties. It is also inconsistent with our conclusion that, unless circumstances compel a contrary conclusion, it is in [the child's] best interest to live in his legal parent's home."[135] Finally, the court rejected the assertion that Hermes was equitably estopped from denying that Sporleder was the child's parent because "[t]he legal effects and consequences of statutory limitations cannot be avoided by estoppel."[136]

Simply stated, the Wisconsin Supreme Court absolutely rejected the proposition that a lesbian co-parent could be recognized as a parent under the law whether because of statutory provisions, de facto parenthood, or equitable estoppel. Any satisfaction that could be taken from this strong assertion of family autonomy and parental authority was short-lived. Within two years, the Supreme Court of Wisconsin in *In re Custody of H.S.H.-K.*[137] had managed a complete flip-flop on the issue, leaving in the dust its decision in *Z.J.H.*

The facts in *H.S.H.-K.* were remarkably similar to those in other lesbian co-parent visitation cases. Sandra Holtzman sought either custody or visitation rights with the biological child of Elsbeth Knott, her former partner.[138] As it had in its earlier decision, the Supreme Court of Wisconsin held that the governing visitation statute in Wisconsin was not applicable because the legislature intended it to apply only to cases involving marriage dissolution.[139] The court then concluded that it was not the intent of the legislature that the visitation statute "be the exclusive provision on visitation" nor that it "supplant or preempt the courts' long recognized equitable power to protect the best interest of

132. WIS. STAT. ANN. § 767.245(1) (West 1993 & Supp. 1997).

133. *See In re* Interest of Z.J.H., 471 N.W.2d 202, 210–11 (Wis. 1991) (explaining legislative intent and applicable case law) (*overruled by In re* Custody of H.S.H.-K., 533 N.W.2d 419, 434 (Wis. 1995)).

134. *Id.* at 209.

135. *Id.* at 211.

136. *Id.* at 212.

137. 533 N.W.2d 419 (Wis. 1995).

138. *Id.* at 420.

139. *See id.* at 424 (explaining that the custody provisions of the Wisconsin statute did not apply to situations involving nonmarital relationships) (citing WIS. STAT. ANN. § 767.245 (West 1993 & Supp. 1997)).

a child by ordering visitation in circumstances not included in the statute."[140]

Assuring that it was "[m]indful of preserving a biological or adoptive parent's constitutionally protected interests and the best interest of a child," the court ruled that for a court to determine that visitation was in a child's best interest, a petitioner would have to prove her parent-like relationship with the child and that "a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent."[141] To show the existence of this critical parent-like relationship, the party claiming it had to satisfy four requirements, the court said. First, the petitioner had to prove consent and fostering of the relationship by the biological or adoptive parent.[142] Second, the child and the party asserting the claim must have lived in the same household.[143] Third, the party must have assumed the obligations of a parent by taking, without expecting compensation, significant responsibility for the care, education, and development of the child, including contributions toward child support.[144] Finally, the petitioner must have maintained her parental role long enough to create "a bonded, dependent relationship parental in nature."[145] The court would not consider awarding visitation unless all four of the conditions were met.[146]

Turning to the "significant triggering event" that would justify a court's intervention in the relationship between a child and a natural or adoptive parent, the Supreme Court of Wisconsin stated that the claimant for visitation had to prove substantial interference by the parent with the claimant's parent-child relationship and prove that the claimant had sought an order of visitation within a reasonable time after that interference.[147] In summary, if a petitioner for visitation could prove the elements of a parent-child relationship together with a substantial triggering event and a petition for court-ordered visitation within a reasonable time after that event, the trial court would then determine whether visitation was in the child's best interests.[148]

One might well argue that the Wisconsin Supreme Court's decision, which effectively found equitable principles in the air and was concededly unsupported by any statutory authority whatsoever, was beyond

140. *Id.* at 424–25.
141. *Id.* at 435.
142. *Id.*
143. *Id.*
144. *Id.* at 435–36.
145. *Id.* at 436.
146. *Id.* at 435.
147. *Id.* at 436.
148. *Id.*

the court's authority or competence. Nevertheless, courts in other jurisdictions rushed to adopt its reasoning in lesbian co-parent visitation disputes. The Supreme Judicial Court of Massachusetts in *E.N.O. v. L.M.M.*[149] reached the same result since the facts were similar to those in *H.S.H.-K* and other visitation cases involving lesbian co-parents. The Massachusetts court conceded to the natural mother's argument that it lacked statutory authority to order visitation to someone who stood in a parent-like position. Nevertheless, the court held that a trial judge could award visitation pursuant to its equity jurisdiction and that the former partner of the natural mother was a de facto parent of the child in a nontraditional family. The only dissenter in the case made the point cogently and persuasively:

> The probate court's order in this case was wholly without warrant in statute, precedent, or any known legal principle, and yet the majority of this court has upheld it. As such, the opinion the court delivers today is a remarkable example of judicial lawmaking. It greatly expands the courts' equity jurisdiction with respect to the welfare of children and adopts the hitherto unrecognized principle of de facto parenthood as a sole basis for ordering visitation. Even while expanding judicial authority and making an addition to the common law, the court speaks as though the decision were nothing extraordinary. In light of the denigration of parental rights and the judicial infringement on the province of the Legislature effected by the court's decision, all without an acknowledgment of the novelty of that decision, I must respectfully dissent.[150]

The Supreme Court of New Jersey also seized upon the novel rationale enunciated in Wisconsin. In *V.C. v. M.L.B.*[151] The court adopted the de facto parent definition and recognized the right of a lesbian former partner to seek visitation as a psychological parent. The court stated,

> Third parties who live in familial circumstances with a child and his or her legal parent may achieve, with the consent of the legal parent, a psychological parent status vis-á-vis a child. Fundamental to a finding of the existence of that status is that a parent-child bond has been created. That bond cannot be unilaterally terminated by the legal parent. When there is a conflict over custody and visitation between the legal parent and a psychological parent, the legal paradigm is that of two legal parents and the standard to be applied is the best interest of the child.[152]

As in Wisconsin, the natural parent had to consent to the relationship between a third party and the child and, indeed, must have fostered the

149. 711 N.E.2d 886 (Mass. 1999).
150. *Id.* at 894–895.
151. 748 A.2d 539 (N.J. 2000).
152. *Id.* at 555.

relationship.[153] These cases and their ilk are likely to be relied on in the future by courts seeking to exercise discretion in matters involving children, free of the restraint of legislative requirements. It is ironic that while the court in *Troxel* placed constitutional limitations, however ill-defined, on grandparent visitation, without even a nod in the direction of *Troxel* state courts are likely to continue to chip away at family autonomy and parental authority for the benefit of adult outsiders.

The cases that afford visitation to self-defined lesbian co-parents over the objections of natural parents do not reach irrational results. After all, the lesbian co-parents who sought visitation in these cases were not only present at the creation, in a manner of speaking, but also participated in child-rearing and the other sorts of traditional family functions that society values. As appealing as the results may be, such decisions—or to put it more pointedly, the process by which the courts reach them—can open the door to virtually unfathomable exercises of judicial discretion, all in derogation of the constitutionally protected interests of natural parents with respect to their children.

Anyone who has the least doubt about the confusion and uncertainty about grandparent visitation wrought by the plurality opinion in *Troxel* or the spate of cases likely to adopt the questionable analysis of the majority's co-parent visitation decision *In re Custody of H.S.H.-K.*[154] need only consult several trial court opinions in New York that purport to have resolved these issues. Three months after the Supreme Court decided *Troxel*, a family court in New York in *Smolen v. Smolen*[155] declined to hold that a New York statute that governed grandparent visitation[156] violated, as applied, a mother's due process rights. A little more than three months later, the New York Supreme Court in *Hertz v. Hertz*[157] held that the statute was "unconstitutional, in that it violates the [parents] due process rights, specifically their fundamental right to make decisions concerning the care, custody, and control of their children."[158]

Exactly one week after the decision in *Hertz,* another New York family court in *Fitzpatrick v. Youngs*[159] ruled that New York's statutory

153. *See also* Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000).
154. 533 N.W.2d 419 (Wis. 1995).
155. 713 N.Y.S.2d 903 (Fam. Ct. 2000).
156. *See* N.Y. DOM. REL. LAW § 72 (providing that "[w]here either or both of the parents of a minor child are deceased or where circumstances show that conditions exist which equity would see fit to intervene," the court may "make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child").
157. 717 N.Y.S.2d 497 (Sup. Ct. 2000), rev'd 738 N.Y.S.2d 62 (App. Div. 2000).
158. *Id.* at 500 (citing Troxel v. Granville, 530 U.S. 57, 66 (2000)).
159. 717 N.Y.S.2d 503 (Fam. Ct. 2000).

grandparent visitation scheme did not violate parents' due process rights. In *Davis v. Davis*[160] a New York family court skirted the question of the statute's constitutionality and purported to interpret it so as to avoid running afoul of *Troxel.* Subsequently, the New York Supreme Court in *Levy v. Levy*,[161] relying expressly on *Troxel*, declared that the New York statute was, as applied, unconstitutional. Finally, an intermediate appellate court in New York reversed and remanded the lower court's determination in *Hertz* that the statute was facially unconstitutional but declined to express an opinion with respect to the constitutionality of the statute as applied in the case before it.[162] In sum, the New York cases, like those in other jurisdictions, rather than reinforcing the long-standing respect for family autonomy and parental authority, reflect the confusion and uncertainty that are the progeny of *Troxel.*

With respect to the novel lesbian co-parent visitation doctrine that appears to be sweeping the country, the picture in New York is less clear, although there has been at least one warning sign. In *Alison D. v. Virginia M.*[163] New York's highest court rejected the visitation petition of a lesbian co-parent, who claimed standing as a de facto parent or as a parent by estoppel. Some two decades later, a New York family court in *Matter of J.C. v. C.T.*[164] has opened the door to recognition of such claims, despite the clear and unequivocal teaching of *Alison D.* After citing with approval the dissenting opinion in *Alison D.*, the court embraced the opinions of the Wisconsin Supreme Court in *Custody of H.S.H.-K.*[165] and the Supreme Court of New Jersey in *V.C. v. M.J.B.*[166] The family court summarized the elements of the test under which a biological stranger to a child could be granted standing to seek visitation as follows: If a non-biological or non-adoptive person who is not otherwise granted statutory standing sought visitation with a child or children with whom he or she alleged a parental relationship, they had to demonstrate

(1) that the biological or adoptive parent consented to and fostered the petitioner's formation and establishment of a parent-like relationship with the child;

(2) that the petitioner and the child lived together in the same household;

160. 725 N.Y.S.2d 812 (Fam. Ct. 2001).
161. 28 N.Y.J.L. col. 2 (Mar. 22, 2001).
162. *See* Hertz v. Hertz, 738 N.Y.S.2d 62 (Sup. Ct. App. Div. 2002).
163. 572 N.E.2d 27 (N.Y. 1991).
164. 711 N.Y.S.2d 295 (Fam. Ct. 2000).
165. 533 N.W.2d 419, 421 (Wis. 1995).
166. 748 A.2d 539 (N.J. 2000).

(3) that the petitioner assumed the obligations of parenthood by undertaking significant responsibility for the child's care, education and development, including contributions to the child's support, financial or otherwise without the expectation of financial compensation; and

(4) that the petitioner had been in a parental role for a length of time sufficient to establish with the child a bonded, dependent relationship which was parental in nature.[167]

This New York court's words are strikingly familiar because the court entirely relied on the Wisconsin Supreme Court's opinion in *Custody of H.S.H.-K.*[168] The court cited *Alison D.* only in an attempt to distinguish it and heavily relied on the dissenting opinion in that case. What might one conclude from all of this? Family autonomy and its concomitant parental authority are under an unrelenting attack from the new child savers. The spate of lesbian co-parent visitation cases that emerged in the 1990s, decided without statutory authority or constitutional concerns, have clearly intensified this attack. *Troxel,* as it has been read by state courts purporting to apply it to grandparent visitation statutes, further endangers family privacy by adding to the confusion about visitation rights of adult outsiders that existed prior to the Supreme Court's decision.

167. *In re* J.C., 711 N.Y.S.2d 295, 299 (Fam. Ct. 2000).
168. 533 N.W.2d 419 (1995).