Washington University Journal of Law & Policy

Volume 30 *Open Source and Proprietary Models of Innovation*

January 2009

It Really Does Take a Village: Recognizing the Total Caregiving Network by Moving Toward a Functional Perspective in Family Law After Troxel v. Granville

Lauren Worsek
Washington University School of Law

It Really Does Take a Village: Recognizing the Total Caregiving Network by Moving Toward a Functional Perspective in Family Law After *Troxel v. Granville*

Lauren Worsek*

INTRODUCTION

In June of 2007, former teen pop star, Britney Spears, made headlines when she angrily confronted her mother, Lynne, in full view of the paparazzi, and presented her with an unidentified stack of papers.[1] Allegedly,[2] this mysterious stack contained a letter warning Lynne to stay away from Britney's two young sons and threatening legal action should she fail to comply.[3]

In the photographs documenting this exchange, Lynne appeared shocked.[4] This reaction made sense because until the recent commencement of this mother-daughter feud,[5] Lynne maintained a strong relationship with her grandsons.[6] Keeping this preexisting relationship in mind, it seems unnecessarily cruel to the boys to

---

* J.D. (2009), Washington University in St. Louis School of Law; B.A. (2006), Psychology and Sociology, University of Michigan in Ann Arbor. I would like to thank Professor Laura Rosenbury and Professor Susan Appleton for their helpful input. I dedicate this note to my late grandfather, Morris Davis.

1. This dramatic scene was documented in its entirety on film. *Britney Spears's Mom 'Brokenhearted' over Rift*, PEOPLE, June 29, 2007, http://www.people.com/people/article/0,,20044145,00.html [hereinafter *Spears's Mom*].

2. Several sources speculated that the papers contained a restraining order against Lynne. *See id*.; *Tears for Spears*, CHI. TRIB., June 30, 2007, at 36.

3. *Spears's Mom*, *supra* note 1.

4. *See id*.

5. There was much speculation that Britney's anger towards her mother stemmed from Lynne's role in Britney's forced stint in rehab earlier in the year and for Lynne's friendly relationship with Britney's ex-husband, Kevin Federline. David K. Li, *Britney Spears* [sic] *Ma*, N.Y. POST, June 29, 2007, at 3.

6. *See Mom to Brit—I Have Rights Too!*, TMZ, July 6, 2007, http://iww.tmz.com/2007/07/06/mom-to-brit-i-have-rights-too/10.

legally terminate their right to see their grandmother, especially over a completely unrelated feud between Britney and Lynne.[7] However, under California law and in every other state in the country, courts must apply an automatic presumption in favor of the legal (typically biological) parents when determining matters of child visitation.[8]

Although Lynne could petition for visitation under California's grandparent visitation statute,[9] the law makes it difficult to override the direct wishes of a parent.[10] In California, for example, grandparents such as Lynne may petition for visitation of their grandchildren when the children's parents are no longer married,[11] if the court finds that "there is a preexisting relationship between the grandparent and the grandchild that has engendered a bond such that visitation is in the best interest of the child."[12]

However, this relationship alone is not enough to merit visitation. Instead, the court must balance the child's interest in maintaining visitation against the parent's right to exercise parental authority.[13] The statute adds an additional barrier when both parents oppose the visitations, forcing grandparents to disprove a presumption that visits would be against the best interests of their grandchildren.[14] Thus, in

---

7. *See supra* note 5.

8. *See* Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865, 883 (2003) ("The majority of courts . . . apply a presumption that the parent's decision to deny or curtail visitation is in the child's best interest.").

9. CAL. FAM. CODE §§ 3103–3104 (West Supp. 2009).

10. *See* Elizabeth Williams, *Cause of Action by Grandparent to Obtain Visitation Rights to Grandchild*, *in* 17 CAUSES OF ACTION SECOND 331, 361–68 (2001).

11. *See* CAL. FAM. CODE § 3104(b) ("A petition for visitation under this section may not be filed while the natural or adoptive parents are married . . . ."). The legislature permitted exceptions to the divorce requirement when

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

Id.

12. *Id.* § 3104(a)(1).

13. *Id.* § 3104(a)(2).

14. *Id.* § 3104(e) ("There is a rebuttable presumption that the visitation of a grandparent is not in the best interest of a minor child if the natural or adoptive parents agree that the grandparent should not be granted visitation rights.").

the case of the Spears family, Lynne's future relationship with her grandsons could ultimately be at the mercy of her daughter's (and ex-son-in-law's) desires, no matter how irrational they may be.[15]

Family law in the American legal system operates under the principle that parents have a fundamental liberty interest in directing the upbringing of their children without undue state interference,[16] a right protected by the Due Process Clause of the Fourteenth Amendment.[17] Generally, this interest includes the power to foreclose their children from third-party influences and relationships, even when such third parties have previously provided care essential to a child's upbringing.[18]

Although this presumption originates from traditional notions of property and ownership,[19] modern family law justifies the parental-rights doctrine by the idea that parents are best equipped to protect the best interests of their children.[20] Under this more modern

15. *See supra* note 5. This point becomes even more disturbing when one takes into account the prevalent rumors of drug abuse and erratic behavior by both Britney Spears and Kevin Federline. Emily Bazelon, *Not That Innocent*, SLATE, Oct. 2, 2007, http://www.slate.com/id/2175128/ (detailing Spears's failure to comply with court-mandated drug tests); Ken Lee & Howard Breuer, *Former Britney Spears Bodyguard Alleges 'Drug Use,'* PEOPLE, Sept. 17, 2007, http://www.people.com/people/article/0,,20057339,00.html (discussing a former bodyguard's testimony in court regarding Spears's drug use); *Nancy Grace: Headline News* (CNN television broadcast Aug. 7, 2007) (noting magazine reports containing pictures of Kevin smoking marijuana).

16. *See* Maldonado, *supra* note 8, at 870 (discussing the traditional parent-centered presumption in the context of state third-party visitation statutes).

17. U.S. CONST. amend. XIV, § 1 (ensuring that no State shall "deprive any person of life, liberty, or property, without due process of law").

18. *See, e.g.*, Roberts v. Ward, 493 A.2d 478, 481 (N.H. 1985) ("Parental autonomy strengthens the family and the entire social fabric 'by encouraging parents to raise their children in the best way they can by making them secure in the knowledge that neither the state nor outside individuals may ordinarily intervene.'") (quoting Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 880 (1984)).

19. *See In re* B.G., 523 P.2d 244, 254 (Cal. 1974) ("[T]he doctrine of parental preference[] originally rested upon the theory that the right of a parent in his child was akin to that of a property owner in his chattel."); *see also* Barbara Bennett Woodhouse, "*Who Owns the Child?": Meyer and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992) (demonstrating that many of the landmark family law cases in favor of parental rights have been decided on a "narrow, tradition-bound vision of the child as essentially private property").

20. *See* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2476 (1995) ("The filial bond is central to the lives of both parents and children, is intense and intimate, and requires privacy to flourish. This, rather than any notion of

approach, states typically recognize the need to create legal exceptions to the parental-rights doctrine—such as third-party visitation statutes—to account for instances when parents act in opposition to their children's best interests.[21]

The actual best interests of the child, however, are at risk in many states in the aftermath of the Supreme Court's decision in *Troxel v. Granville*.[22] In a four-justice plurality accompanied by two concurrences and three dissents, the Supreme Court delivered a fractured holding reaffirming the parental-rights doctrine as applied to the specific facts of the case.[23] The narrowness of this holding leaves the states little guidance on how to apply this constitutional limitation to their own third-party visitation statutes.[24] As a result, many states have erred on the side of caution when confronted with this issue, mandating that third-parties make a threshold showing of harm to children in order to successfully petition for visitation in opposition to the parents' wishes.[25] This interpretation, which places an extremely high burden on nonparents, has the potential to cut children off from essential caregivers at the will of parents, no matter how irrational their decisions may be.

Part I of this Note discusses the relevant history surrounding the *Troxel* decision and its aftermath. Specifically, it traces the historical development of the parent-centered approach, criticism and ultimate legal backlash in support of a functional caregiving model, *Troxel*'s ambiguous reaffirmation of parents' rights, and the varied state attempts to apply this constitutional standard. Part II analyzes the states' varied jurisdictional approaches in applying *Troxel* and

---

entitlement, is the justification for the initial deference to parental judgments about [their] children's interests." (footnote omitted)).

21. *See, e.g.*, *In re* Jasmon O., 878 P.2d 1297, 1307 (Cal. 1994) ("Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent.").

22. 530 U.S. 57 (2000).

23. *Id.* at 66–67; *see also* Earl M. Maltz, *The Trouble with* Troxel, 32 RUTGERS L.J. 695, 695 (2001); Kristine L. Roberts, *State Supreme Court Applications of* Troxel v. Granville *and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV. 14, 21 (2003).

24. *See* Maltz, *supra* note 23, at 709.

25. *See, e.g.*, Santi v. Santi, 633 N.W.2d 312, 320–21 (Iowa 2001) (requiring grandparents to make a threshold finding of parental unfitness in order to satisfy the presumption in favor of parents as required by *Troxel*).

demonstrates how they relate to functional theories of caregiving. Finally, Part III proposes that the law needs to do a better job of recognizing the importance of functional caregiving networks in the context of third party visitation laws. In order to achieve this objective, the Supreme Court should revisit its initial holding in *Troxel*.

I. THE HISTORICAL CONTEXT OF *TROXEL*

A. Traditional Conceptions of Caregiving: The Parent-Centered Approach

In traditional family law, there is a default assumption that, absent state interference, the legal rights and entitlements of "private" child-rearing and custody vest exclusively in the parents.[26] This long-standing legal doctrine of parental rights,[27] which can be traced back centuries in Western legal history,[28] remains in American family law as a means of promoting social goals[29] under several philosophical and legal theories.[30] Under the "proprietarian" model, parental "ownership" of their children stems from traditional notions of property law, where the law views a child as either an extension of the parent's body[31] or a product of the parent's labor.[32] Another

26. DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 98–99 (1993) (arguing that parents' claims to their children originate from common law notions of property based on their creation of the child and "blood ties").

27. Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 643 (2006).

28. *Id.* at 643–44. Roman family law was governed by the principle of patria potestas: "The authority held by the male head of a family . . . over his legitimate and adopted children . . . ." *Id.* at 643 (quoting BLACK'S LAW DICTIONARY 1206 (8th ed. 2004)). This right extended to the life and death of each child. *Id.* at 643–44. A variation of this same theory prevailed over family law in the colonial period where the law entrusted authority over children solely to fathers. *See* STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 1–24 (1988) (describing the role of divinity in Puritan family structures).

29. *See* Roberts, *supra* note 23, at 15.

30. LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS 8 (2d ed. 2006) (dividing theories on parental rights into two categories: "consequentialist" and "deontological").

31. ARCHARD, *supra* note 26, at 99. Aristotle promoted this idea, equating a child to any other natural product of its parent's body (such as a tooth or hair). *Id.*

theory, the "blood ties" argument, assumes that that "natural bonds of affection" make the parents the most qualified to provide such care.[33]

Regardless of its specific justification, the parental rights model remains one of the dominant paradigms today.[34] The Supreme Court has reaffirmed parents' fundamental right to direct the upbringing of their children on multiple occasions[35] and in multiple contexts.[36] The parental rights model results in an "all-or-nothing situation," meaning that one can either be a parent with vested rights and responsibilities or a legal stranger.[37] Thus, under the parental rights model, any non-

32. *Id.* John Locke argued that "one owns the product of one's labour in virtue of owning one's body and thus one's labour." *Id.* By associating labor with childbirth, this theory can extend to parental rights. *Id.*

33. *Id.* at 102 ("The 'blood ties' argument says that parents have an innate tendency to bond to their children, and therefore . . . have a claim on their children which amounts to a right to rear."); *see also* Parham v. J.R., 442 U.S. 584, 602 (1979) (explaining that, throughout history, the laws have "recognized that natural bonds of affection lead parents to act in the best interests of their children") (citing WILLIAM BLACKSTONE, 1 COMMENTARIES *446, *447; JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW *189, *190).

34. *See* Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 89 (2004).

35. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 233 (1972); Ginsberg v. New York, 390 U.S. 629, 639 (1968); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923). For further discussion, see also Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 U. VA. L. REV. 385 (2008).

36. *See, e.g.*, *Yoder*, 406 U.S. at 233 (holding that parents have the right to direct the religious and cultural upbringing of their children and indoctrinate them into the required lifestyle); *Ginsberg*, 390 U.S. at 639 (declaring that parents have the right to determine whether it is appropriate to expose their minor children to "girlie" magazines); *Prince*, 321 U.S. at 166 ("[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Pierce*, 268 U.S. at 535 (concluding that a parent has a right to send their child to private school); *Meyer*, 262 U.S. at 400 (holding that, because "it is the natural duty of the parent to give his children education suitable to their station in life," a parent has the right to direct the upbringing and education of their children by encouraging their child to learn a foreign language).

37. *See* Murray, *supra* note 35, at 398–99 (arguing that this zero-sum conception of caregiving legally excludes non-parental caregivers; *see also* Huntington, *supra* note 27, at 664 (claiming that the parental rights model assumes autonomy from other actors in caregiving); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 131 (Supp. 2006) (discussing the traditional bright-line rule that legal parents are "entitled to custody of their children over the competing claims of non-parents"); Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 840 (2007) (comparing the legal conception of childrearing to a triangle, with the child, parents, and state at each point but excluding all other actors).

parental third parties are legally extraneous to the child's upbringing, regardless of their functional role in providing care for the child.[38]

B. Criticism of the Parent-Centered Approach and Reflections in the Law

Despite the seemingly widespread pervasiveness of the parent-centered approach, there has been significant backlash against traditional conceptions of caregiving during the past several decades.[39] Taking offense to the narrowness of the traditional legal caregiving structure, social scientists[40] and legal scholars[41] have urged the law to incorporate a more functional definition of caregiving.[42] Increases in divorce rates[43] and mobility[44] as well as

38. *See* Kavanagh, *supra* note 34, at 88 ("[A] legal doctrine of 'exclusivity' pervades [modern] family law . . . .") (citing Bartlett, *supra* note 18, at 879).

39. *See generally* Roberts, *supra* note 23, at 16 (describing the academic trend in 1970s social science literature to recognize the caregiving contributions of nonparents and their importance to child development).

40. *See, e.g.*, STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 241–43 (1992) (discussing the importance of kinship systems as essential support networks in African-American families and the pathologization of these systems in the dominant discourse); KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP 109 (1991) (analyzing the fluid boundaries of "chosen families" in LGBT communities); Bonnie Thornton Dill, *Fictive Kin, Paper Sons, and Compadrazgo: Women of Color and the Struggle for Family Survival*, *in* FAMILIES IN THE U.S.: KINSHIP AND DOMESTIC POLITICS 431, 438 (Karen v. Hansen & Anita Ilta Garey eds., 1998) (noting the "elaborate system of kinship and godparenting" serving as an essential linchpin to Mexican-American families); Niara Sudarkasa, *Interpreting the African Heritage in Afro-American Family Organization*, *in* FAMILIES IN THE U.S.: KINSHIP AND DOMESTIC POLITICS, *supra*, at 91, 93–95 (describing the inclusion of extended relatives in traditional African family structures and how African-American families reflect these models).

41. *See, e.g.*, Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 640–41 (2000) (describing traditional Native American kinship systems and their legal recognition in tribal jurisdictions); Bartlett, *supra* note 18, at 881 (arguing that even though children often form strong attachments to nonparental caretakers, "current law provides virtually no satisfactory means of accommodating such extra-parental attachments, however, because the presumption of exclusive parenthood requires that these relationships compete with others for legal recognition"); Jennifer R. Johnson, *Preferred by Law: The Disappearance of the Traditional Family and Law's Refusal to Let It Go*, 25 WOMEN'S RTS. L. REP. 125, 129 (2004) (distinguishing modern family structures from more traditional models by noting that "today's children form attachments to adults who are not part of their nuclear Family"); Martha Minow, *Redefining Families: Who's in and Who's Out?*, 62 U. COLO. L. REV. 269, 271 (1991) (advocating that "unless we start to make family law connect with how people really live, the law is either largely irrelevant or merely ideology").

42. Martha Minow defines this concept as a fact-specific determination of whether a

major advances in the arenas of civil rights,[45] gender equality,[46] and reproductive technology[47] over the past fifty years highlight how cultural, economic, gender, and historical factors interact, creating a wide range of caregiving relationships separate from the traditional nuclear family structure.[48] In addition to these sociological challenges, psychological studies began to question the legitimacy of the parent-centered perspective of caregiving.[49] One report in particular found that children, prior to learning the actual legal definitions of family, categorize family members based on common residence and by daily contact.[50]

Despite this criticism, the parent-centered conception of caregiving remains the dominant focus of family law in the United States.[51] However, the law does embrace a functional view of

group of people actually work together as a family unit. This includes considerations of the family's self-categorization, the way they present themselves to outsiders, and the sharing of affection and resources. *See* Minow, *supra* note 41, at 270.

43. *See* Lawrence Schlam, *Standing in Third-Party Custody Disputes in Arizona: Best Interests to Parental Rights—and Shifting the Balance Back Again*, 47 ARIZ. L. REV. 719, 720 (2005) ("With more than half of all marriages in America ending in divorce, children are increasingly being raised in nontraditional families." (footnotes omitted)).

44. *See* Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 118 (2007) ("Approximately six percent of the U.S. population moves each year, and 6.6% of divorced and separated individuals move out of their home county each year.").

45. *See* Dill, *supra* note 40, at 442–43; Atwood, *supra* note 41, at 625–26.

46. *See* ARLIE RUSSELL HOCHSCHILD WITH ANNE MACHUNG, THE SECOND SHIFT 4 (Penguin Books 2003) (1989) (theorizing that the significant growth of the female workforce in the aftermath of the Women's Liberation Movement has created a "second shift" for women who feel social pressure to also maintain sole caregiving responsibilities at home); *see also* Anita Ilta Garey & Karen V. Hansen, *Introduction: Analyzing Families with a Feminist Sociological Imagination*, *in* FAMILIES IN THE U.S.: KINSHIP AND DOMESTIC POLITICS, *supra* note 40, at xvii–xx (outlining various feminist perspectives on the family and their effects on the family structure).

47. *See* Minow, *supra* note 41, at 271 (discussing how development of in vitro fertilization permits a bypass of traditional rules of adoption and biological conception).

48. *See* Murray, *supra* note 35, at 390 ("In actuality, parents routinely rely on those outside of the nuclear family to help them discharge their caregiving responsibilities.").

49. *See generally* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 17–20 (1973) (claiming that children can form "psychological child-parent relationships" with adults who have spent a considerable amount of time with them).

50. Minow, *supra* note 41, at 275 (citing Rhonda L. Gilby & David R. Pederson, *The Development of the Child's Concept of the Family*, 14 CAN. J. BEHAV. SCI 110, 117–18 (1982)).

51. *See* Murray, *supra* note 35, at 394–96.

caregiving in some narrow situations.[52] In particular, third-party visitation statutes, which permit non-parental caregivers to petition for visitation against the wishes of parents, demonstrate legal recognition of functional caregiving models because these laws take into account the caregiving contributions of individuals outside the nuclear family structure.[53] In most states, third-party visitation laws apply only to grandparents.[54] Thus, even though pure functionalism focuses on actual relationships regardless of biological ties, this Note equates grandparent visitation statutes with third-party visitation statutes because both types of laws recognize the importance of caregiving outside the nuclear family.

Across cultures[55] and income levels,[56] grandparents often play significant roles in caregiving, providing material and emotional support.[57] Despite the regularity of such arrangements, however, the law historically bestowed no legal rights or protections on such

52. *Id.* at 415–32 (discussing the ways in which federal sentencing decisions, lifesaving medical care refusal cases, placement and jurisdiction of Native American children in the child welfare system, public assistance regulations, and open adoptions incorporate functional caregiving concepts). The Indian Child Welfare Act, enacted in 1978, follows a somewhat functional approach in its application. *See* 25 U.S.C. §§ 1901–1963 (2006); *see also* Murray, *supra* note 35, at 419–22. Though Congress passed this law for the purpose of cultural preservation, its provisions promote functional theories by giving legal rights to extended caregiving networks. *See* 25 U.S.C. §§ 1901, 1911–1923. The Act mandates that Native American tribal courts take jurisdiction over custody issues involving Native American children residing on reservations. *Id.* § 1911(a) ("An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."). In determining adoptive placements, courts must give preference to placements with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." *Id.* § 1915(a). Also, these jurisdictions must define "extended family" in accordance with the law or custom of the tribe. *Id.* § 1903(2). For further discussion on child welfare under tribal jurisdiction, see Atwood, *supra* note 41.

53. *See* Roberts, *supra* note 23, at 15 ("Nonparent visitation statutes, not existent before the late 1960s, today permit grandparents—and often other nonparents—in all fifty states to petition courts for the right to visit their grandchildren." (footnotes omitted)).

54. *See id*. at 15–16.

55. *See, e.g.*, Atwood, *supra* note 41, at 642 ("[I]t is common knowledge in Indian Country that both the maternal and paternal grandmothers traditionally play a very significant role in the Indian family."); *see also* Dill, *supra* note 40, at 430, 441–42.

56. *See* COONTZ, *supra* note 40, at 241.

57. *See* AARP, Family Relationships: A Grandparent's Role in the Family, http://www.aarp.org/families/grandparents/family_relationships/a2004-01-16-grandparentsrole.html (last visited Mar. 20, 2009).

arrangements.[58] As a result, grassroots movements advocating for grandparent rights gained significant momentum in the 1990s.[59] By 2000, all fifty states had some variation of a statute protecting grandparents' rights to visit their grandchildren.[60]

The concept of third-party visitation statutes runs counter to the traditional, parent-centered norms that have historically dominated family law. Thus, this counter-trend in the law faced immediate opposition.[61] Parental rights advocates began to challenge grandparent and other third-party visitation statutes in state courts on constitutional grounds.[62] Initially, most of these challenges failed.[63] However, by the mid-1990s, courts and legal scholars began to express concern about over-expansion of such laws and "the corresponding encroachment of parental rights."[64] This considerable shift in public opinion provides a contextual backdrop for *Troxel*, in which the Supreme Court ultimately addressed this controversial issue.

C. Troxel v. Granville*: Reaffirmation of Tradition*

Troxel arose out of the relationship between two young girls in Washington and their paternal grandparents, the petitioners.[65] The children's parents split up shortly after the children's births, and the father moved in with the petitioners.[66] The children's parents maintained a regular custody arrangement—the girls spent weekdays with their mother and weekends with their father and the petitioners.[67] After the unexpected death of the girls' father, the

58. *See* Bartlett, *supra* note 18, at 881.

59. Karen M. Thomas, *Generations Apart: Grandparents Are Going to Court to Gain Right to Visit Grandchildren*, DALLAS MORNING NEWS, Nov. 17, 1999, at C1 (describing that in advocating for grandparents rights, "[o]lder Americans have organized nationally and wield a considerable amount of political clout").

60. Troxel v. Granville, 530 U.S. 57, 73 n.* (2000); *see also* Stephen Elmo Averett, *Grandparent Visitation Right Statutes*, 13 BYU J. PUB. L. 355, 356 (1999).

61. *See* Roberts, *supra* note 23, at 16.

62. *Id.*

63. *Id.* at 17.

64. *Id.*

65. *Troxel*, 530 U.S. at 60.

66. *Id.*

67. *Id.*

family initially continued the same visitation arrangement.[68] Several months later, however, the mother informed the petitioners that she wanted to limit their visitation privileges to one short visit per month with no overnight stay.[69]

The petitioners, invoking a Washington third-party visitation statute,[70] filed suit in Washington Superior Court for Skagit County to obtain extended visitation rights[71] with the children.[72] In an oral ruling, the Superior Court granted petitioners one weekend per month, one week during the summer, and four hours on each grandparent's birthday.[73] The Washington Court of Appeals reversed the visitation order, reasoning that unless a custody action is pending, nonparents (such as the petitioners) lack standing to seek visitation under the visitation statute.[74] The Washington Supreme Court later affirmed on different grounds,[75] and the Supreme Court of the United States subsequently granted certiorari.[76]

The Supreme Court, in a fractured 6-3 opinion, affirmed the Washington Supreme Court's decision, thus rendering the third-party visitation statute unconstitutional as applied.[77] Justice O'Connor delivered the plurality opinion[78] by first paying deference to the

68. *Id.*

69. *Id.* at 60–61.

70. WASH. REV. CODE § 26.10.160(3) (1994). The relevant section provides as follows: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." *Id.*

71. Specifically, the petitioners "requested two weekends of overnight visitation per month and two weeks of visitation each summer." *Troxel*, 530 U.S. at 61.

72. *Id*.

73. *Id*.

74. *In re* Visitation of Troxel, 940 P.2d 698, 700–01 (Wash. Ct. App. 1997). Drawing on traditional notions of caregiving, the court noted that this limitation was "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the care, custody, and management of their children." *Id*. at 700 (internal quotation marks omitted).

75. Smith v. Stillwell-Smith (*In re* Custody of Smith), 969 P.2d 21, 26–27 (Wash. 1998). A divided court disregarded the lower court's treatment of standing, holding instead that the third-party visitation statute unconstitutionally interfered with the parental right to raise one's own children by failing to require a threshold showing of harm and by sweeping too broadly. *Id*. at 30–31.

76. Troxel v. Granville, 527 U.S. 1069, 1069 (1999) (granting certiorari).

77. Troxel v. Granville, 530 U.S. 57, 63 (2000).

78. Chief Justice Rehnquist, Justice Ginsberg, and Justice Breyer joined in O'Connor's opinion. *Id.* at 60.

functional rationale behind the statute in question.[79] Though the plurality recognized that such laws have a necessary purpose in the context of modern family life,[80] it held that this particular statute unlawfully infringed on the mother's Fourteenth Amendment right to make decisions regarding the upbringing of her own children.[81]

Referring to the statute's "breathtakingly broad" language,[82] the Court concluded that this law left any parental decision vulnerable to judicial review at the request of any third party.[83] The Court took particular offense to the fact that the best interest determination required by this statute gave no deference to the parents, whose "natural bonds of affection" should motivate them to "act in the best interests of their children."[84] This exclusive naturalization[85] of the parent-child bond gave further support to the Court's decision to affirm the Washington Supreme Court's holding and invalidate the existing statute in its application to the particular case.[86]

---

79. *Id.* at 64 (recognizing that "children should have the opportunity to benefit from relationships with statutorily specified persons" such as their grandparents).

80. *Id.*

81. *Id.* at 72–73. This right, O'Connor noted, "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65.

82. *Id.* at 67. Specifically, the Court took offense to the fact that the language allowed for *any* person at *any* time to petition for visitation so long as the presiding judge determined it to be within the best interests of the child. *Id.*

83. *See id.* (explaining that the "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").

84. *Id.* at 68. The Court argued that, in effect, this lack of deference places a burden on the parents to disprove that the visitation is in the child's best interest once a third-party files a petition for visitation. *See id.* at 68–69.

85. The Court emphasized this point even further by playing down the importance of the grandparent-grandchild bond:

> In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

Id. at 70.

86. *Id.* at 72.

D. Treatment of Troxel *by State Courts*

Though the plurality opinion reaffirmed the traditional, parent-centered approach to childrearing as a constitutionally protected right, its practical application is ambiguous. O'Connor, emphasizing the case-specific narrowness of the plurality holding, declined to define the parameters of many of the primary issues of *Troxel*.[87] The opinion deliberately abstained from invalidating all nonparental visitation statutes as per se unconstitutional,[88] but also refused to define the constitutional scope for such statutes.[89] Specifically, the Court left open the question of how much and what type of deference should be given to parents in response to a visitation request by a third party.[90] In addition to the O'Connor plurality, the Supreme Court produced two concurring opinions[91] and three dissents.[92]

---

87. *Id.* at 73 ("Accordingly, we hold that § 26.10.160(3), *as applied to this case*, is unconstitutional.") (emphasis added).

88. *Id.* ("Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.").

89. *Id.* ("[W]e do not consider the primary constitutional question passed on by the Washington Supreme Court . . . .").

90. *Id.*

91. Justice Souter, in a concurring opinion, supported the plurality's judgment but noted that he would have affirmed the Washington Supreme Court's facial invalidation of the statute. *Id.* at 75 (Souter, J., concurring). Justice Thomas wrote a separate concurrence, pointing out the need for an appropriate standard of review for determining infringements on parents' fundamental right to raise their children. *Id.* at 80 (Thomas, J., concurring).

92. Three justices dissented in separate opinions. Justice Stevens argued that the plurality should have addressed the Washington Supreme Court's facial invalidation of the statute. *Id.* at 81 (Stevens, J., dissenting). Stevens declared "that a facial challenge should fail whenever a statute has a plainly legitimate sweep." *Id.* at 85 (citation omitted). The Washington third-party visitation statute, he argued, qualified as such because there are a number of situations where it would be "constitutionally permissible" for a court to grant visitation under the proscribed standard. *Id.* Though Stevens agreed that parents will probably act in their children's best interests in the majority of situations, he recognized that this cannot be assumed in all cases. *See id.* at 86. Thus, a parent's constitutional right to control the upbringing of their child "should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child." *Id.* at 89.

Justice Scalia, in a separate dissent, questioned the credibility of all precedent supported by the notion of parental rights as a judicially vindicated liberty interest protected "under a Constitution that does not even mention them." *Id.* at 92 (Scalia, J., dissenting). He expressed federalism concerns about these cases, noting that family law has traditionally been an area of the law reserved to the states. *See id.* at 93.

The narrowness of the plurality holding combined with the fractured nature of the final opinion provide the states with little guidance in how to address the influx of visitation requests by nonparents.[93] Thus, predictably, states have varied in their post-*Troxel* treatment of grandparent visitation statutes.[94]

Many states interpret *Troxel* broadly in order to protect the Fourteenth Amendment rights of parents.[95] These jurisdictions have rejected grandparent visitation requests, either by finding the specific state law to be facially unconstitutional[96] or unconstitutional as applied to the facts at hand.[97]

The Supreme Court of Iowa, for example, used *Troxel* to invalidate a third-party visitation statute as unconstitutional on its face.[98] The statute at issue, section 598.35(7) of the Iowa Code, permitted grandparents or great-grandparents to petition for court-ordered visitation rights with their grandchildren or great-grandchildren if the parents had unreasonably restricted visitation, the grandparents or great-grandparents had developed a "substantial

---

Finally, Justice Kennedy dissented on two distinct but interrelated grounds. *See id.* at 93–102 (Kennedy, J., dissenting). He first criticized the Washington Supreme Court's requirement that third-parties must make a mandatory showing of harm to the child in order to successfully petition for visitation. *Id.* at 94. This rejection of the best interest standard, he argued, undercuts "a basic tool of domestic relations law in visitation proceedings." *Id.* at 99. In addition, Kennedy disagreed with the assumption supporting the thrust of the plurality's argument that parents are the primary caregivers of their children. *See id.* at 100–01. He pointed out that "a fit parent's right vis-a-vis a complete stranger is one thing; her right vis-a-vis another parent or a *de facto* parent may be another." *Id.*

93. For further discussion, see Roberts, *supra* note 23, at 21–22; *see also* Murray, *supra* note 35, at 403–04.

94. Murray, *supra* note 35, at 403–04; Roberts, *supra* note 23, at 21.

95. *See, e.g.*, Linder v. Linder, 72 S.W.3d 841, 858 (Ark. 2002); Punsly v. Ho, 105 Cal. Rptr. 2d 139, 147 (Cal. Ct. App. 2001); Kyle O. v. Donald R., 102 Cal. Rptr. 2d 476, 478 (Cal. Ct. App. 2000); Roth v. Weston, 789 A.2d 431, 434 (Conn. 2002); Wickham v. Byrne, 769 N.E.2d 1, 8 (Ill. 2002); Lulay v. Lulay, 739 N.E.2d 521, 534 (Ill. 2000); Santi v. Santi, 633 N.W.2d 312, 320–21 (Iowa 2001); Brice v. Brice, 754 A.2d 1132, 1136 (Md. Ct. Spec. App. 2000); Neal v. Lee, 14 P.3d 547, 550 (Okla. 2000).

96. *See, e.g.*, *Wickham*, 769 N.E.2d at 8 ("[A] fit parent's constitutionally protected liberty interest to direct the care, custody, and control of his or her children mandates that parents—not judges—should be the ones to decide with whom their children will and will not associate.").

97. *See, e.g.*, *Brice*, 754 A.2d at 1136 ("[W]e hold only that the statute was unconstitutionally applied to the facts in this case, which are strikingly similar to those in *Troxel*."); *Neal*, 14 P.3d at 550 ("[U]nder *Troxel*, grandparent visitation in the present case violated . . . [the parents'] constitutional rights . . . .").

98. *See Santi*, 633 N.W.2d at 321.

relationship" with the children prior to the petition, and the court found visitation to be in the best interests of the children.[99]

The Iowa Supreme Court determined that this provision violated due process by "fail[ing] to accord fit parents the presumption deemed so fundamental in *Troxel*."[100] The court held that a threshold finding of parental unfitness was necessary in order for the state to give any consideration to a grandparent's petition for visitation rights.[101] Though the court recognized the social desirability of grandparent-grandchild relationships, it concluded that, absent a required finding of parental unfitness, "the statute effectively substitutes sentimentality for constitutionality."[102]

Using almost identical reasoning, the Supreme Court of Kansas found that state's grandparent visitation statute to be unconstitutional, but only as applied to the particular facts of the case.[103] As in the Iowa statute, the Kansas law allowed courts to order reasonable visitation to grandparents if there was a preexisting substantial relationship, and visitation was in the child's best interests.[104]

Citing *Troxel*, the court emphasized that the Fourteenth Amendment creates a presumption that fit parents will act in their children's best interests.[105] The lower court's decision, on the other hand, seemed to rest on "the operative presumption . . . that a fit parent would not have denied visitation."[106] Thus, the Supreme Court

---

99. IOWA CODE § 598.35(7) (2001), *invalidated by* Santi v. Santi, 633 N.W.2d 312 (Iowa 2001), *repealed by* 2007 Iowa Acts, ch. 218, § 218. The new provision incorporating the holding of *Santi* reads as follows: "The court shall consider a fit parent's objections to granting visitation under this section. A rebuttable presumption arises that a fit parent's decision to deny visitation to a grandparent or great-grandparent is in the best interest of a minor child." IOWA CODE § 600C.1(2) (2007).

100. *Santi*, 633 N.W.2d at 320.

101. *Id.*

102. *Id.*

103. *See* Dep't of Soc. & Rehab. Servs. v. Paillet, 16 P.3d 962, 971 (Kan. 2001).

104. KAN. STAT. ANN. § 38–129(a) (2006). The provision reads as follows:

> The district court may grant the grandparents of an unmarried minor child reasonable visitation rights to the child during the child's minority upon a finding that the visitation rights would be in the child's best interests and when a substantial relationship between the child and the grandparent has been established.

Id.

105. *Paillet*, 16 P.3d at 970.

106. *Id.* The Court of Appeals of Kansas had previously placed blame on the mother for the child's lack of a substantial relationship with her grandparents. Dep't of Soc. & Rehab. Servs.

of Kansas concluded that because the lower court did not require the petitioners to rebut the presumption in favor of the children's parents, the visitation statute was unconstitutional as applied.[107]

In contrast, many states have upheld grandparent visitation statutes in the face of constitutional challenges.[108] These courts have generally construed the scope of *Troxel* more narrowly.[109] For example, in *Zeman v. Stanford*,[110] the Supreme Court of Mississippi upheld the state's third-party visitation statute as constitutional in one of the narrowest state interpretations of *Troxel*.[111] In this case, the petitioners sought visitation of their daughter's children after the children's father obtained sole custody.[112]

The children's father claimed that the Mississippi statute, which permitted grandparents to petition for visitation with their grandchildren upon a major change in the parenting arrangement (i.e., a court order granting custody to one of the parents, termination of the parental rights of one parent, or one parent's death),[113] violated

---

v. Paillet, 3 P.3d 568, 571 (Kan. Ct. App. 2000) ("Where [the mother] has prevented the grandparents from even seeing their grandchild, there is no way they could have formed the substantial relationship required by statute. . . . [The mother] is coming to this court with unclean hands and should not be allowed to hide behind the wording of the statute.").

107. *See Paillet*, 16 P.3d at 970–71 ("Such a 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 interests of the child.").

108. *See, e.g.*, Jackson v. Tangreen, 18 P.3d 100, 102 (Ariz. Ct. App. 2000); Rideout v. Riendeau, 761 A.2d 291, 294 (Me. 2000); Zeman v. Stanford, 789 So. 2d 798, 805 (Miss. 2001); Douglas v. Wright, 801 A.2d 586, 594 (Pa. Super. Ct. 2002); Brandon L. v. Moats, 551 S.E.2d 674, 676 (W. Va. 2001).

109. *See* Murray, *supra* note 35, at 403–04 (describing how states upholding grandparent visitation statutes post-*Troxel* have found the plurality's scope to extend only to the point of prohibiting third parties from usurping parental authority over their children); Roberts, *supra* note 23, at 25 (noting that states have been generally reluctant to declare nonparental visitation statutes facially unconstitutional even in the aftermath of *Troxel*).

110. 789 So. 2d 798.

111. *Id.* at 803.

112. *Id.* at 799.

113. MISS. CODE ANN. § 93-16-3(1) (2004). The actual text of the provision states:

> Whenever a court of this state enters a decree or order awarding custody of a minor child to one (1) of the parents of the child or terminating the parental rights of one (1) of the parents of a minor child, or whenever one (1) of the parents of a minor child dies, either parent of the child's parents who was not awarded custody or whose parental rights have been terminated or who has died may petition the court in which the decree or order was rendered or, in the case of the death of a parent, petition the

his constitutional right to control the upbringing of his children by granting the courts "unrestrained authority" to interfere with his family's privacy.[114] The statute required the court to make this determination by considering the best interests of the child and whether the grandparent had established a viable relationship with the child.[115] He compared the Mississippi governing statute to the "breathtakingly broad" provision in *Troxel* in its expansive grant of discretion to the courts.[116]

The court rejected the father's complaints, upholding both the statute on its face and the provision as applied to the petitioners.[117] The court distinguished the statute at issue from the Washington statute in *Troxel*, noting that an earlier Mississippi Supreme Court case[118] determined that the provision here required the presiding judge to balance the parent's authoritarian interests against the child's and grandparent's relationship interests through the consideration of ten specific factors.[119] These factors included (1) the amount of disruption that visits would bring upon the child's life; (2) the suitability of supervision at the grandparent's house; (3) the child's age; (4) the grandparent's age, physical health, and mental well-being; (5) "[t]he emotional ties between the grandparents and the grandchild"; (6) the grandparent's "moral fitness"; (7) the physical distance of the grandparent's home from the child's home; (8) "[a]ny undermining of the parent's general discipline of the child"; (9) the grandparent's employment responsibilities; and (10) the grandparent's willingness not to interfere in the parent's responsibility as primary caretaker.[120]

---

chancery court in the county in which the child resides, and seek visitation rights with such child.

Id.

114. *Zeman*, 789 So. 2d at 802–03.

115. *See id.* at 803–04 (asserting that in the determination of the appropriateness of grandparent visitation, "the best interest of the child must always remain the polestar consideration") (quoting Martin v. Coop, 693 So. 2d 912, 916 (Miss. 1997)).

116. *See id.* at 803.

117. *Id.* at 803, 805.

118. *Martin*, 693 So. 2d at 912.

119. *Zeman*, 789 So. 2d at 804.

120. *Id.* (citing *Martin*, 693 So. 2d at 916).

The court argued that these mandatory considerations would produce a "'narrower reading' that was lacking in *Troxel*."[121] Thus, the Supreme Court of Mississippi took a significantly different approach than other states by concluding that the presumption in favor of the parents as required by *Troxel* can be satisfied through a balancing of interests.[122]

II. STILL HAZY AFTER ALL THESE YEARS: THE CURRENT STATE OF THIRD-PARTY VISITATION STATUTES AFTER *TROXEL*

Almost a decade after *Troxel*, the practical effect of the holding is still extremely muddled.[123] By confining the holding to the specific facts of the case, the plurality left the states with an ambiguous and virtually unworkable standard to follow.[124] This point is most readily manifested through the incongruous treatment across various state jurisdictions.[125]

In the aftermath of *Troxel*, the states lack uniformity.[126] *Troxel* illuminates only one clear guideline: courts must accord special consideration to the wishes of parents.[127] Thus, the state legislatures and courts have generally made a point to include some sort of presumption in favor of the parents when drafting third-party visitation statutes and reviewing individual petitions.[128] However, because O'Connor's plurality declined to define the scope of this presumption,[129] the degree of deference fluctuates by state.[130]

Despite this seemingly parent-centered thrust, however, it is important to note that the Supreme Court supported functional

121. *Id.* at 803.
122. *See id*. New Hampshire, Ohio, and West Virginia courts follow similar multi-factor approaches. *See* Roberts v. Ward, 493 A.2d 478, 481 (N.H. 1985); Harrold v. Collier, 836 N.E.2d 1165, 1169–70 (Ohio 2005); State *ex rel*. Brandon L. v. Moats, 551 S.E.2d 674, 684–85 (W. Va. 2001).
123. *See supra* note 93 and accompanying text.
124. *See supra* notes 91–92.
125. *See supra* notes 95–97, 108.
126. *See supra* notes 95–97, 108.
127. *See supra* note 85 and accompanying text.
128. *See supra* notes 95, 109.
129. *See supra* note 89 and accompanying text.
130. *See supra* notes 95, 108.

theories of caregiving in the text of the plurality[131] and various dissents.[132] In addition, O'Connor explicitly limited the decision only to the facts of the particular case[133] and refused to hold third-party visitation statutes as per se unconstitutional.[134] This seems to indicate the Court's desire to uphold some sort of a functional analysis to keep the parent-centered presumption in check, leaving states to experiment in order to find the ideal balance.

The states which have chosen to construe the reach of *Troxel* more broadly, such as Iowa[135] and Kansas,[136] clearly satisfy the constitutionally required presumption in favor of the parents that was absent in the statute at issue in *Troxel*.[137] This approach rests on the traditional default that fit parents will make decisions that align with the best interests of their children.[138] Thus, these states tend to require a third-party petitioner to make a threshold showing of harm to the child, parental unfitness, or other extreme circumstances[139] in order to overcome this presumption—a burden which can be very difficult to meet.[140]

The rigidity of this rule raises significant concerns. First, this tacticly renders children legally invisible by absorbing their interests into those of their parents.[141] In addition, it penalizes non-traditional families by giving non-parental caregivers very little legal recourse when parents decide to terminate non-parents' visitation rights.[142] This is especially troubling when viewed in light of the well-documented diversity of modern caregiving arrangements.[143]

The Mississippi approach, on the other hand, provides courts with a more flexible standard to analyze caregiving arrangements.[144]

131. *See supra* notes 79–81 and accompanying text.
132. *See supra* note 92.
133. *See* Troxel v. Granville, 530 U.S. 57, 73 (2000).
134. *See id.*
135. *See* Santi v. Santi, 633 N.W.2d 312, 320 (Iowa 2001).
136. *See* Dep't of Soc. & Rehab. Servs. v. Paillet, 16 P.3d 962, 971 (Kan. 2001).
137. *See Troxel*, 530 U.S. at 73.
138. *See supra* note 84.
139. *See supra* note 95 and accompanying text.
140. *See Paillet*, 16 P.3d at 970.
141. *But see supra* note 21 and accompanying text.
142. *See supra* note 18 and accompanying text.
143. *See supra* notes 42–43.
144. *See supra* notes 110–22 and accompanying text.

Though the Mississippi legislature essentially requires that the courts focus on the same three general concepts as most other states (the parents' wishes, the best interests of the children, and whether there is a preexisting relationship between the third parties and the children),[145] the Mississippi Supreme Court chose to assess these concepts through a more thorough analysis.[146]

The ten factors required by the Mississippi Supreme Court[147] take into account the totality of the circumstances surrounding the care of children, including relevant factors regarding the parents' right to control the disciplinary and educational aspects of their children's upbringing.[148] These parent-centered factors include the suitability of supervision at the grandparent's house, the grandparent's "moral fitness," "any undermining of the parent's general discipline of the child," and the grandparent's demonstration of willingness not to interfere with the parent's responsibilities as primary caretaker.[149]

III. TAKING CARE OF UNFINISHED BUSINESS: THE SUPREME COURT'S NEED TO REVISIT *TROXEL*

The Supreme Court needs to finish where it left off and revisit the issues that it left open in *Troxel*. Specifically, the Court needs to define the constitutional limitations of the parent-centered presumption that O'Connor explicitly avoided in *Troxel*'s plurality opinion. The plurality created a sweeping constitutional requirement with virtually no guidance for determining the minimum level necessary to ensure protection of this right under current and future state laws.

There are many possible explanations for the Supreme Court's restraint in providing a definitive legal standard. For one, this may be a reflection of political strategy. The Supreme Court decided *Troxel* amid heated controversy among advocates for parental rights, grandparents' rights, children's rights, and the rights of functional

145. *See supra* note 115 and accompanying text.
146. *See supra* note 120 and accompanying text.
147. Zeman v. Stanford, 789 So. 2d 798, 804 (Miss. 2001).
148. *See id.*
149. *Id.*

caregivers.[150] The highly fractured nature of the *Troxel* opinion suggests that the Supreme Court was not immune to the tensions caused by this polarizing issue. Thus, the plurality's decision to confine the holding to the specific facts of the case[151] may have been motivated by a desire to play to the middle and avoid being too controversial. Additionally, family law is generally a legal domain left to the discretion of the states, with little interference from the federal government. Therefore, the plurality's intention simply may have been to provide general guidelines while allowing the states to experiment with their actual application.

Regardless of the plurality's reasoning at the time, the Court should take another look at the law in light of the conflicting state interpretations. Many states, such as Iowa and Kansas, have taken *Troxel*'s required parental presumption too far by creating bright line rules which refuse to consider third parties' established relationships with children and the essential care that these relationships provide. The multi-factor approach followed in Mississippi, on the other hand, accounts for the circumstances in each individual case.

This standard better supports the functional reality of family life in the United States through its recognition of alternative caregiving structures.[152] Through careful consideration of the individual components of a child's relationship with a third-party caregiver,[153] the Mississippi approach lends support to individuals traditionally treated as legal strangers despite their actual contributions to the children's upbringing. This factoring of nonparent caregiving contributions into the overall legal analysis represents a significant step toward recognition of functional caregiving models in family law.[154] Though this approach gives more discretion to the individual courts, the specified inquiry of the ten-factor test provides judges with a focused inquiry as to what factors essentially contribute to family functioning.[155]

150. *See supra* notes 58, 60.
151. *See* Troxel v. Granville, 530 U.S. 57, 73 (2000).
152. *See supra* notes 42–48 and accompanying text.
153. *See supra* note 120 and accompanying text.
154. *See supra* notes 52–53 and accompanying text.
155. *See supra* note 120 and accompanying text.

Most importantly, the Mississippi approach best conforms with the spirit of *Troxel*. When viewed in the context of the actual complexity of caregiving relationships, the Court's decision to avoid imposing an all-or-nothing standard to the detriment of essential caregiving networks makes logical sense.[156] The plurality, through dicta, seems to indicate that some type of balancing of interests is required.[157] Even the states that construe *Troxel* broadly recognize at least a minimum level of functional caregiving theory, as evidenced by the mere existence of third-party visitation statutes in all fifty states. However, mere facial recognition that such arrangements exist does not help when states construct their laws in such a way that their application virtually ignores functional caregiving.

Thus, I propose that the Supreme Court revisit its initial holding in *Troxel* and require a totality of the circumstances approach to define the constitutional limitations in the context of third-party visitation laws. This will ensure that the spirit of the original holding is not destroyed in the states.

CONCLUSION

The Supreme Court should not issue a ruling on a state law of such great constitutional magnitude without subsequently providing jurisdictions with a workable standard to ascertain how to remain within the scope of the Constitution. The current ambiguity in third-party visitation law essentially permits courts to deny children access to fundamental caregiving relationships. Termination of these caregiving networks may be devastating to children's emotional and social development.

The Supreme Court needs to provide a clear standard that requires states to carefully consider existing third-party caregiving relationships along with rights of legal parents. A totality of the circumstances approach breaks from the traditional, outmoded conceptions currently governing family law and recognizes the

156. *See supra* notes 42–48 and accompanying text.
157. *See* Troxel v. Granville, 530 U.S. 57, 64 (2000).

diversity of caregiving structures. Unless it takes into account how American families actually function, family law cannot serve its intended purpose.