

# CUSTODY, VISITATION, AND PARENTAL RIGHTS UNDER SCRUTINY

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## INTRODUCTION

The Supreme Court recognized long ago that the United States Constitution protects parental rights, even though those rights are not expressly mentioned anywhere in that document. However, in many of the relevant cases, the Court recognizes the importance of parental rights on the one hand and undercuts the breadth or robustness of those very rights on the other. The Court's parental rights jurisprudence has consistently sent mixed messages, which has exacerbated the degree to which states differ with respect to how readily those rights may be overridden.

Part I of this Article discusses the Court's parental rights jurisprudence, noting how the Court consistently both reaffirms and undercuts the robustness of parental rights in many of the relevant decisions.<sup>1</sup> Part II examines state courts' analyses of statutes permitting non-parental custody or visitation, noting how the Court's mixed messages have resulted in very different protections for parental rights among the states. The Article concludes that the Court's ambiguous messaging has created confusion and inconsistency in the states—the interests of parent and child are treated quite differently across the states not merely because of differences in legislative priorities, but because of varying and contradictory

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<sup>1</sup> Commentators sometimes note that the Court sends mixed messages in particular cases, but such commentators seem not to appreciate how widespread this difficulty is. See, e.g., Emily Buss, *Adrift in the Middle: Parental Rights after Troxel v Granville*, 2000 SUP. CT. REV. 279, 279–80 (2000) (“The central problem with the Court’s decision in *Troxel* is not that it affords parents too much protection, as some have argued, or that it affords parents too little protection, as others have argued, but that it tries to have it both ways.”).

analyses of the degree to which the United States Constitution protects parental rights. This lack of clarity has likely resulted in parents' judgments about their children's best interests sometimes being overridden too readily, and also likely resulted in states being unnecessarily limited with respect to the ways that they can promote their compelling interest in helping children thrive. The Court's confusing messaging undermines the interests of parents, children, and society as a whole, and must be clarified at the earliest opportunity.

## I. PARENTAL RIGHTS UNDER THE FEDERAL CONSTITUTION

While the United States Constitution nowhere expressly mentions parental rights, the Supreme Court has nonetheless recognized that those rights are afforded constitutional protection. Regrettably, the case law over the intervening years consistently affirmed and undermined the importance and breadth of parental rights. By giving contradictory messages about the degree of protection afforded to parental rights, and even who counts as a parent, the Court has made it impossible for states to know what kinds of public policy choices are precluded by federal constitutional guarantees.

### A. *The Early Cases*

Over ninety years ago, the Court suggested that the Constitution protects parental rights. In two different cases involving state attempts to limit what children were taught, the Court suggested that the Constitution precludes states from interfering with parental decision-making.

In *Meyer v. Nebraska*,<sup>2</sup> the Court struck down a Nebraska law prohibiting teachers from teaching any living language<sup>3</sup> other than English<sup>4</sup> to students who had not yet finished the eighth grade.<sup>5</sup> When justifying the conclusion that the statute was constitutionally infirm, the Court explained that due process protects "the right of the individual . . .

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<sup>2</sup> 262 U.S. 390 (1923).

<sup>3</sup> *See id.* at 400–01 ("The Supreme Court of the state has held that 'the so-called ancient or dead languages' are not 'within the spirit or the purpose of the act.' Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian, and every other alien speech are within the ban." (quoting *Neb. Dist. of Evangelical Lutheran Synod v. McKelvie*, 187 N.W. 927, 928 (Neb. 1922))).

<sup>4</sup> *Id.* at 397 ("No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language." (quoting Act of Apr. 9, 1919, ch. 249, § 1, 1919 Neb. Laws)).

<sup>5</sup> *Id.* at 397 ("Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides." (quoting Act of Apr. 9, 1919, ch. 249, § 2, 1919 Neb. Laws)).

to marry, establish a home and bring up children . . . .”<sup>6</sup> The Constitution prohibits states from interfering with this liberty “under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.”<sup>7</sup>

Here, the Court recognized that there is a protected liberty interest in establishing a home and bringing up children, although the Court did not specify the kinds of state interests that might justify abridging or overriding this protected liberty interest. But the failure to discuss the nature of the state interests that would justify overriding those parental rights leaves open the robustness of those rights. If the recognized protection *only* prevents the state from interfering with the implicated liberty when the state does so under the *guise* of protecting the public good, i.e., preventing states from pretending to promote the public good while in reality passing laws that are arbitrary or unreasonable, then the afforded constitutional protection is not particularly robust.

Two years later, in *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*,<sup>8</sup> the Court examined another law involving the education of children, this time requiring that children between the ages of eight and sixteen attend public school.<sup>9</sup> Citing *Meyer v. Nebraska*,<sup>10</sup> the *Pierce* Court reasoned 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.”<sup>11</sup> Emulating the criticism offered by the *Meyer* Court, the *Pierce* Court suggested that the laws at issue did not involve “the exercise of any proper power . . . [but instead] arbitrary, unreasonable, and unlawful interference . . . .”<sup>12</sup>

*Meyer* and *Pierce* are viewed as seminal cases in parental rights jurisprudence.<sup>13</sup> But these cases do not guarantee much protection if they

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<sup>6</sup> *Id.* at 399 (citing *Slaughter-House Cases*, 83 U.S. 36 (1872); *Butchers’ Union Co. v. Crescent City Co.*, 111 U.S. 746 (1884); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Minnesota v. Barber*, 136 U.S. 313 (1890); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Lochner v. New York*, 198 U.S. 45 (1905)).

<sup>7</sup> *Id.* at 400.

<sup>8</sup> 268 U.S. 510 (1925).

<sup>9</sup> *Id.* at 530–31 (“The challenged act, effective September 1, 1926, requires every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him ‘to a public school for the period of time a public school shall be held during the current year’ in the district where the child resides; and failure so to do is declared a misdemeanor.”).

<sup>10</sup> *See id.* at 534.

<sup>11</sup> *Id.* at 534–35.

<sup>12</sup> *Id.* at 536.

<sup>13</sup> Brad J. Davidson, Comment, *Balancing Parental Choice, State Interest, and the Establishment Clause: Constitutional Guidelines for States’ School-Choice Legislation*, 33 TEX. TECH. L. REV. 435, 445 (2002) (“*Meyer* and *Pierce* are recognized as the seminal cases declaring the constitutional right of parents to direct the education and upbringing of their chil-

only prevent arbitrary and unreasonable regulations from infringing upon parental rights.<sup>14</sup> The Court has noted in a different context that “[t]he Due Process Clause . . . forbids arbitrary deprivations of liberty,”<sup>15</sup> which suggests that the state may not arbitrarily deprive individuals of mere liberty interests.<sup>16</sup> But if the holdings in *Meyer* and *Pierce* merely suggest that parental rights are protected from arbitrary state action, and if mere liberty interests are also only protected from arbitrary state action, then parental rights are not particularly robust and are subject to state limitation as long as the state is acting reasonably rather than arbitrarily.

What would more persuasively establish that the Constitution provides strong protection of parental rights? Consider the following scenario: a particular statute is closely tailored to promote important state interests, but the Court nonetheless holds the statute unconstitutional because the statute abridges fundamental parenting rights. Such a holding would demonstrate much more clearly that the Constitution affords robust protection to parental rights.<sup>17</sup>

The Court reaffirmed that the Constitution protects parental rights in *Prince v. Massachusetts*,<sup>18</sup> proclaiming “[i]t is cardinal with us that the

dren.”); Lauren Vanga, Comment, *Ending Bullying at A Price?: Why Social Conservatives Fear Legislatively Mandated LGBT Indoctrination in Schools*, 17 *CHAP. L. REV.* 659, 668 (2014) (“Today, *Meyer* and *Pierce* are recognized as the seminal cases establishing the right of the parent to direct the education and upbringing of the child as a component of fundamental liberty protected by the Constitution.”).

<sup>14</sup> See Jennifer Karinen, *Finding a Free Speech Right to Homeschool: An Emersonian Approach*, 105 *GEO. L.J.* 191, 206 (2016) (“[A] thorough examination of the content and context of these decisions suggests there has not been a robust and unequivocal endorsement by the Court of parenting as a fundamental right.”). But see Buss, *supra* note 1, at 290 (describing *Meyer* and *Pierce* as “cases that emphatically protected parents’ rights to make decisions about their children free from state interference”); Joanna L. Grossman, *Constitutional Parentage*, 32 *CONST. COMMENT.* 307, 311 (2017) (“Those early cases stood . . . for robust parental rights . . .”).

<sup>15</sup> *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

<sup>16</sup> *Cf. Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (“[O]ur decisions lead us to conclude that the asserted ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington’s assisted-suicide ban be rationally related to legitimate government interests.”) (citing *Heller v. Doe*, 509 U.S. 312, 319–320 (1993)).

<sup>17</sup> The Court’s striking down a statute because it was merely closely (rather than narrowly) tailored to promote important (rather than compelling) interests would indicate just how important the implicated interests were. See *Foucha v. Louisiana*, 504 U.S. 71, 115 (1992) (Kennedy, J., dissenting) (“Certain substantive rights we have recognized as ‘fundamental’; legislation trenching upon these is subjected to ‘strict scrutiny,’ and generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring.”).

<sup>18</sup> 321 U.S. 158 (1944).

custody, care and nurture of the child reside first in the parents.”<sup>19</sup> Yet, the *Prince* holding is double-edged.<sup>20</sup>

At issue was whether Sarah Prince could be prosecuted for permitting her legal ward, Betty Simmons,<sup>21</sup> to distribute religious tracts in exchange for donations<sup>22</sup> in violation of a Massachusetts Child Labor Law.<sup>23</sup> The *Prince* Court understood that both parental and free exercise interests were implicated—Sarah Prince’s constitutional challenge to the Massachusetts law “rests squarely on freedom of religion under the First Amendment, applied by the Fourteenth to the states. She buttresses this foundation . . . with a claim of parental right as secured by the Due Process Clause of the latter Amendment.”<sup>24</sup> The Court made clear that both interests had constitutional weight: “The parent’s conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters.”<sup>25</sup> However, the Court also made clear that “neither rights of religion nor rights of parenthood are beyond limitation,”<sup>26</sup> and that the legislation at issue in this case passed constitutional muster.<sup>27</sup>

*Prince* reaffirms that parental rights are important— “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents”<sup>28</sup>—but also asserts that the state is permitted to override the implicated parental and free exercise interests.<sup>29</sup> The positions may not be self-contradictory, depending upon the particular facts implicated in the case. For example, the Constitution’s affording strong protection to parental rights would not entail that parents were “free . . . to make martyrs of their children.”<sup>30</sup>

Yet, it was not at all clear that Sarah Prince was exposing Betty Simmons to grave danger by permitting Betty to hand out the pam-

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<sup>19</sup> *Id.* at 166.

<sup>20</sup> Cf. Christine M. Hanisco, Note, *Acknowledging the Hypocrisy: Granting Minors the Right to Choose Their Medical Treatment*, 16 N.Y.L. SCH. J. HUM. RTS. 899, 905 (2000) (noting that the “Supreme Court validated the *parens patriae* concept in *Prince v. Massachusetts*”).

<sup>21</sup> *Prince*, 321 U.S. at 161 (“Mrs. Prince . . . has legal custody of Betty Simmons who lives with them.”).

<sup>22</sup> See *id.* at 162.

<sup>23</sup> See *id.* at 160–61.

<sup>24</sup> *Id.* at 164.

<sup>25</sup> *Id.* at 165.

<sup>26</sup> *Id.* at 166.

<sup>27</sup> *Prince*, 321 U.S. at 170 (“[T]he rightful boundary of [the state’s] power has not been crossed in this case.”).

<sup>28</sup> *Id.* at 166.

<sup>29</sup> *Id.* at 170.

<sup>30</sup> *Id.*

phlets.<sup>31</sup> Sarah Prince and Betty Simmons were only about twenty feet apart when they both were distributing religious literature,<sup>32</sup> so Sarah could keep an eye on Betty. If the state's interest in protecting children from this less-than-significant risk nonetheless outweighed *both* the implicated free exercise *and* parental interests, then those interests must not have had great weight in the balance; this suggests that the parental interest alone did not carry much constitutional weight. That said, however, the *Prince* Court might have been seeking to prevent children from being forced to work in much more dangerous conditions,<sup>33</sup> even where the parent claimed that the child's engagement in such activity was religiously suggested or required.<sup>34</sup> If the work performed by Betty Simmons could not plausibly be distinguished from other kinds of child labor having "crippling effects,"<sup>35</sup> then *Prince* may not be undermining the robustness of parental rights after all.

In *Meyer* and *Pierce*, the Court found that the protected liberty interest in parenting precluded enforcement of statutes that the Court described as arbitrary and unreasonable.<sup>36</sup> In *Prince*, the Court upheld the law against asserted free exercise and parental rights, even though the implicated risks to the child did not seem great.<sup>37</sup> Together, these cases suggest that there is a protected liberty interest in parenting, but that the strength and breadth of that liberty interest are, at the very least, subject to very different interpretations.

### B. *The Rights of Non-Marital Fathers*

While the *Meyer-Pierce-Prince* line of cases suggests that parental rights are afforded constitutional protection,<sup>38</sup> those cases do too little to establish the strength of the underlying right. There is, however, another line of cases dealing with parental rights that potentially does a better job of filling that gap—the Court has heard several cases in which the (possible) rights of unmarried parents were at issue.

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<sup>31</sup> See *id.* at 167 ("The child's presence on the street, with her guardian, distributing or offering to distribute the magazines, it is urged, was in no way harmful to her, nor in any event more so than the presence of many other children at the same time and place, engaged in shopping and other activities not prohibited.").

<sup>32</sup> *Id.* at 162 ("[Betty] and Mrs. Prince took positions about twenty feet apart near the street intersection.").

<sup>33</sup> Cf. *Prince*, 321 U.S. at 168.

<sup>34</sup> *Id.* at 169.

<sup>35</sup> *Id.* at 168.

<sup>36</sup> See *supra* Part I.A.; see also *Caban v. Mohammed*, 441 U.S. 380, 414 (1979) (Stevens, J., dissenting) ("[T]he Court has not decided whether the Due Process Clause provides any greater substantive protection for this relationship than simply against official caprice.").

<sup>37</sup> *Prince*, 321 U.S. at 162, 167; see also *supra* text accompanying notes 31–32.

<sup>38</sup> See discussion *supra* Part I.A.

*Stanley v. Illinois*<sup>39</sup> involved the constitutionality of an Illinois statute making an unwed father's children wards of the state upon the death of their mother.<sup>40</sup> Peter Stanley lived with Joan Stanley for eighteen years, during which time they had three children.<sup>41</sup> When Joan Stanley died, the state took the children away from Peter.<sup>42</sup> Illinois employed a presumption that unwed fathers were unfit parents, so the state saw no need to hold individualized hearings in Peter's particular case.<sup>43</sup> The Court held that the state's employment of such a presumption was unconstitutional—"as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him."<sup>44</sup>

By suggesting that the state had to afford Stanley a hearing before his children could be taken away, the Court was addressing a few different issues at once. Basically, Illinois law permitted the state to take a child away from her unmarried father upon a showing that (1) the child's parents had never married, and (2) the child's mother had died.<sup>45</sup> But this meant that Stanley's children could be taken away even if Stanley could establish that he was a fit parent.<sup>46</sup> By striking down the Illinois statute, the Court made clear that a state could not use the nonmarital status of the father as a proxy for unfitness.<sup>47</sup>

In effect, the state of Illinois had included various types of individuals within the category of those with protected parental rights—married fathers,<sup>48</sup> married mothers,<sup>49</sup> and unmarried mothers;<sup>50</sup> however, never-married fathers who had not legitimated their children were excluded from that category.<sup>51</sup>

<sup>39</sup> 405 U.S. 645 (1972).

<sup>40</sup> *Id.* at 646 ("Under Illinois law, the children of unwed fathers become wards of the State upon the death of the mother.").

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* ("When Joan Stanley died, Peter Stanley lost not only her but also his children.").

<sup>43</sup> *Id.* at 647 ("The State . . . respond[s] that unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children.").

<sup>44</sup> *Id.* at 649.

<sup>45</sup> *See Stanley*, 405 U.S. at 646–47 ("The Illinois Supreme Court accepted the fact that Stanley's own unfitness had not been established but rejected the equal protection claim, holding that Stanley could properly be separated from his children upon proof of the single fact that he and the dead mother had not been married.").

<sup>46</sup> *Id.* at 647 ("Stanley's actual fitness as a father was irrelevant.").

<sup>47</sup> *See id.* at 658.

<sup>48</sup> This would also include those fathers who were "divorced, widowed, or separated." *See id.* at 647.

<sup>49</sup> *Id.* at 650 ("Parents," says the State, "means the . . . mother of a legitimate child . . .").

<sup>50</sup> *See id.*

<sup>51</sup> *Id.* at 650 ("Parents," says the State, "means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any

Suppose that a state afforded never-married fathers a hearing so they would have an opportunity to rebut the presumption of unfitness; unlike the Illinois statute, this statute would include a rebuttable presumption. Suppose further that the state imposed a heavy burden on those wishing to rebut that presumption. The *Stanley* Court implied that such a system would not pass constitutional muster, noting that “[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.”<sup>52</sup> That the Stanleys had never married was not dispositive: “Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony.”<sup>53</sup>

*Stanley* raised but did not resolve a number of issues. For example, while the Constitution affords unwed fathers some protection,<sup>54</sup> the Court did not explain how much protection. Nor did the Court explain which unwed fathers would be afforded protection.

In *Quilloin v. Walcott*,<sup>55</sup> the Court offered some guidance with respect to which unwed fathers received protection. Leon Quilloin and Ardell Williams Walcott had a child together,<sup>56</sup> although Leon and Ardell never married or lived together.<sup>57</sup> Before their child, Darrell, reached three years of age, Ardell married Randall Walcott.<sup>58</sup> Nine years later, Randall Walcott filed to adopt Darrell with Ardell’s consent.<sup>59</sup> Quilloin sought to block the adoption.<sup>60</sup> There was no finding that Quilloin had abandoned Darrell or was unfit.<sup>61</sup> Nonetheless, Quilloin was not allowed to block the adoption.<sup>62</sup>

*Quilloin* involved a stepparent adoption. In that kind of adoption, the spouse of the would-be adoptive parent has to consent to the adop-

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adoptive parent,’ but the term does not include unwed fathers.” (citation omitted) (quoting ILL. REV. STAT., c. 37, § 701-14 (current version at 705 ILL. COMP. STAT. 405/1-3 (11) (1987))).

<sup>52</sup> *Stanley*, 405 U.S. at 651.

<sup>53</sup> *Id.*

<sup>54</sup> *See id.* at 649, 651.

<sup>55</sup> 434 U.S. 246 (1978).

<sup>56</sup> Mark Strasser, *The Often Illusory Protections of “Biology Plus”: On the Supreme Court’s Parental Rights Jurisprudence*, 13 TEX. J. C.L. & C.R. 31, 39 (2007) (“At issue in the case was whether Leon Quilloin’s consent was necessary before Darrell, his son, could be adopted by the spouse of Quilloin’s former partner, Ardell.” (citing *Quilloin*, 434 U.S. at 246)).

<sup>57</sup> *Quilloin*, 434 U.S. at 247.

<sup>58</sup> *Id.* (“[I]n September 1967 the mother married appellee Randall Walcott.”).

<sup>59</sup> *Id.* (“In March 1976, she consented to adoption of the child by her husband, who immediately filed a petition for adoption.”).

<sup>60</sup> *Id.* (“Appellant attempted to block the adoption.”).

<sup>61</sup> *Id.* at 252 (“[T]he trial court did not make a finding of abandonment or other unfitness on the part of appellant.”).

<sup>62</sup> *Id.* at 247 (“[T]he adoption was granted over his objection.”).



tion,<sup>63</sup> but is not required to relinquish custody in order for his or her spouse to adopt.<sup>64</sup> A stepparent adoption will not be granted, however, unless the noncustodial parent's rights are no longer in existence, e.g., because the rights have terminated.<sup>65</sup>

Under Georgia law at the time, a child born in wedlock could not be adopted absent a finding of parental unfitness or voluntary relinquishment.<sup>66</sup> A child born out of wedlock, however, could be adopted as long as the mother consented.<sup>67</sup> In order for the nonmarital father to have the right to block an adoption, he would have to have legitimated the child, either by marrying the mother and acknowledging paternity of the child or by obtaining a court order legitimating the child.<sup>68</sup> Because Quilloin had not legitimated Darrell, Quilloin was barred from blocking the adoption.<sup>69</sup>

Quilloin argued that he was entitled to the same adoption veto power as was accorded to other parents as a matter of due process and equal protection.<sup>70</sup> The Supreme Court characterized the relevant issue as “whether, in the circumstances of this case and in light of the authority granted by Georgia law to married fathers, appellant’s interests were adequately protected by a ‘best interests of the child’ standard . . . under the Due Process Clause and . . . under the Equal Protection Clause.”<sup>71</sup>

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<sup>63</sup> See Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 TENN. L. REV. 1019, 1024 (1999) (“Courts will not allow the adoption by the stepparent unless . . . the biological parent consents.”).

<sup>64</sup> Theresa Glennon, *Binding the Family Ties: A Child Advocacy Perspective on Second-Parent Adoptions*, 7 TEMP. POL. & C.R. L. REV. 255, 269 (1998) (“[I]n the context of stepparent adoptions by the spouse of the consenting parent, the parental rights of the consenting parent need not be terminated.”).

<sup>65</sup> Strasser, *supra* note 63, at 1026 (“[T]he noncustodial parent’s rights must be terminated if the stepparent is to adopt the child.”).

<sup>66</sup> *Quilloin*, 434 U.S. at 248 (“[U]nder Georgia law a child born in wedlock cannot be adopted without the consent of each living parent who has not voluntarily surrendered rights in the child or been adjudicated a[n] unfit parent.”).

<sup>67</sup> *Id.* (“[O]nly the consent of the mother is required for adoption of an illegitimate child.”).

<sup>68</sup> *Id.* at 248–49 (“To acquire the same veto authority possessed by other parents, the father of a child born out of wedlock must legitimate his offspring, either by marrying the mother and acknowledging the child as his own . . . or by obtaining a court order declaring the child legitimate and capable of inheriting from the father.”).

<sup>69</sup> *Id.* at 249 (“But unless and until the child is legitimated, the mother is the only recognized parent and is given exclusive authority to exercise all parental prerogatives . . . including the power to veto adoption of the child.”).

<sup>70</sup> *Id.* at 253 (Appellant “claim[ed] that he was entitled as a matter of due process and equal protection to an absolute veto over adoption of his child, absent a finding of his unfitness as a parent.”).

<sup>71</sup> *Id.* at 254.

The Court began its due process analysis by noting that “the relationship between parent and child is constitutionally protected,”<sup>72</sup> and by explaining that due process guarantees would be violated “[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.”<sup>73</sup> The Court acknowledged, however, that the circumstances before it were much different—this was “not a case in which the unwed father at any time had, or sought, actual or legal custody of his child.”<sup>74</sup> Because permitting the adoption to go forward would “give full recognition to a family unit already in existence,”<sup>75</sup> the Court suggested that the state’s use of the best interests test did not violate due process guarantees.<sup>76</sup>

Quilloin argued that he had been denied equal protection, claiming that “his interests [we]re indistinguishable from those of a married father who [wa]s separated or divorced from the mother and [wa]s no longer living with his child.”<sup>77</sup> However, the Court disagreed, pointing out that “even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage.”<sup>78</sup>

Yet, the Court’s point is not entirely persuasive. Consider the married father who divorces before the birth of his child. He might never have had full responsibility for the rearing of his child, and the question at hand would be whether treating him differently than treating someone like Quilloin would offend constitutional guarantees.<sup>79</sup>

It is not as though Quilloin had done nothing for his son. Quilloin had paid intermittent support<sup>80</sup> and gave Darrell gifts and toys at various times.<sup>81</sup> Further, Darrell visited with his father on “many occasions,”<sup>82</sup>

<sup>72</sup> *Quilloin*, 434 U.S. at 255.

<sup>73</sup> *Id.* (citing *Smith v. Org. of Foster Families*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring)).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (“[W]e cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the ‘best interests of the child.’”).

<sup>77</sup> *Id.* at 256.

<sup>78</sup> *Quilloin*, 434 U.S. at 256.

<sup>79</sup> *Cf. MASS. GEN. LAWS ANN.* ch. 209C, § 6 (a) (1) (West 2018) (“In all actions under this chapter a man is presumed to be the father of a child and must be joined as a party if [ ] he is or has been married to the mother and the child was born during the marriage, or within three hundred days after the marriage was terminated by death, annulment or divorce.”).

<sup>80</sup> *Quilloin*, 434 U.S. at 251 (“[A]ppellant had provided support only on an irregular basis.”).

<sup>81</sup> *Id.* (“[T]he child . . . had been given toys and gifts by appellant ‘from time to time.’”).

<sup>82</sup> *Id.*

and Darrell had expressed an interest in continuing to see his biological father even if the adoption were approved.<sup>83</sup> Thus, Quilloin did have a noncustodial relationship with his son.

Darrell's mother suggested that Quilloin's visits with Darrell "were having a disruptive effect on the child and on appellees' entire family."<sup>84</sup> Regrettably, the Court did not specify whether the disruptive effect involved Quilloin's trying to alienate Darrell from his mother and stepfather or, instead, making it more difficult for Walcott to claim to be Darrell's "real" father.<sup>85</sup> Or, it may be that some of Quilloin's gifts created friction.<sup>86</sup> But the kinds of harms to a child that might result from one parent alienating his child from his other parent(s)<sup>87</sup> might differ significantly from the disruptive effects that might occur when a noncustodial parent gives gifts to the child that are, for example, too expensive.<sup>88</sup>

The *Quilloin* Court's analysis did not focus on whether Quilloin qualified as a parent. Instead, the Court focused on whether Quilloin had ever sought or had actual or legal custody.<sup>89</sup> But such a focus was surprising. Noncustodial parents are still parents,<sup>90</sup> and a focus on whether Quilloin sought custody suggests that those who want to protect their parental interests should seek custody even if they believe that the child would be better in the custody of the other parent.<sup>91</sup> In any event, the *Quilloin* reasoning suggests that the Court misspoke when suggesting that the Constitution protects parental rights; instead, the Court should have said that the Constitution protects the parental rights of *custodial* parents. As far as the rights of parents as a general matter are concerned,

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<sup>83</sup> *Id.* at 251 n.11 ("The child also expressed a desire to continue to visit with appellant on occasion after the adoption.").

<sup>84</sup> *Id.* at 251.

<sup>85</sup> See Strasser, *supra* note 56, at 40 (noting these different possible disruptive effects).

<sup>86</sup> See Serena Mayeri, *Intersectionality and the Constitution of Family Status*, 32 CONST. COMMENT. 377, 401 (2017) ("[A]ll agreed that Quilloin had given Darrell gifts, such as a new bicycle, which his mother felt were 'disruptive to family harmony.'").

<sup>87</sup> *Cf.* Meeker v. Howard, 2017-Ohio-9410, at ¶ 10 ("Appellant's actions indicated she had no concern for the stress caused to her children or the lasting impacts of parental alienation. Instead, appellant was only interested in using the children to spite appellee.").

<sup>88</sup> See Mayeri, *supra* note 866, at 401 (suggesting that Quilloin's having bought Darrell a bicycle caused friction). Of course, there are various reasons that a gift of a bicycle might cause friction. Such a gift might be problematic because too expensive or because there are no safe places to ride, which might lead to many arguments between parent and child.

<sup>89</sup> *Quilloin*, 434 U.S. at 256.

<sup>90</sup> See Mandy S. Cohen, *A Toss of the Dice . . . the Gamble with Post-Divorce Relocation Laws*, 18 HOFSTRA L. REV. 127, 151 (1989) (discussing "the parental rights of the noncustodial parent").

<sup>91</sup> *Cf.* Mayeri, *supra* note 866, at 402 ("Quilloin sought neither full custody nor equal standing with Ardell—he 'honestly believed that [Darrell's] rightful place is with his mother.'").

the *Quilloin* Court followed past practice by both affirming and undermining the robustness of the implicated constitutional protections.

*Caban v. Mohammed*<sup>92</sup> did not clarify whether the Constitution protected parental rights generally or, instead, the parental rights of those who had or sought custody. At issue was whether the children of Abdiel Caban and Maria Mohammed could be adopted without Caban's consent by Mohammed's husband, Kazim, via a stepparent adoption.<sup>93</sup>

Caban and Mohammed had lived together with their two children, David and Denise;<sup>94</sup> however, they never married.<sup>95</sup> Indeed, Caban had been married to someone else while he and Mohammed lived together.<sup>96</sup>

Under New York law, an adoption could be blocked by an unwed mother but not by an unwed father.<sup>97</sup> New York law permitted unwed fathers to testify at an adoption hearing, but only with respect to the suitability of the would-be adopter(s)<sup>98</sup>—in this case, Kazim Mohammed.<sup>99</sup> Caban challenged the constitutionality of the differential treatment accorded to him as an unwed father and to Mohammed as an unwed mother.<sup>100</sup>

The Court began its analysis by explaining that “[g]ender-based distinctions ‘must serve important governmental objectives and must be substantially related to achievement of those objectives’ in order to withstand judicial scrutiny under the Equal Protection Clause.”<sup>101</sup> The Court rejected “the apparent presumption . . . [that] maternal and paternal roles are . . . invariably different in importance.”<sup>102</sup>

<sup>92</sup> 441 U.S. 380 (1979).

<sup>93</sup> See *id.* at 381–82 (“The appellant, Abdiel Caban, challenges the constitutionality of § 111 of the New York Domestic Relations Law (McKinney 1977), under which two of his natural children were adopted by their natural mother and stepfather without his consent.”).

<sup>94</sup> *Id.* at 382 (“While living with the appellant, Mohammed gave birth to two children: David Andrew Caban, born July 16, 1969, and Denise Caban, born March 12, 1971. Abdiel Caban was identified as the father on each child’s birth certificate, and lived with the children as their father until the end of 1973. Together with Mohammed, he contributed to the support of the family.”).

<sup>95</sup> *Id.* (“[T]hey never legally married.”).

<sup>96</sup> *Id.* (“[U]ntil 1974 Caban was married to another woman, from whom he was separated.”).

<sup>97</sup> See *Caban*, 441 U.S. at 386–87 (“[A]n unwed mother has the authority under New York law to block the adoption of her child simply by withholding consent. The unwed father has no similar control over the fate of his child.”).

<sup>98</sup> See *id.* at 406 n.13 (Stevens, J., dissenting) (“As a substantive matter, the natural father is free to demonstrate . . . that the best interests of the child favor the preservation of existing parental rights and forestall cutting off those rights by way of adoption.”).

<sup>99</sup> *Id.* at 384 (“[T]he court considered the evidence presented by the Cabans only insofar as it reflected upon the Mohammeds’ qualifications as prospective parents.”).

<sup>100</sup> See *id.* at 385 (“[H]e argues that the distinction drawn under New York law between the adoption rights of an unwed father and those of other parents violates the Equal Protection Clause of the Fourteenth Amendment.”).

<sup>101</sup> *Id.* at 388 (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

<sup>102</sup> *Caban*, 441 U.S. at 389.

The *Caban* Court implicitly distinguished what was at issue in this case from what had been at issue in *Quilloin*, noting that: “Appellant Caban, appellee Maria Mohammed, and their two children lived together as a natural family for several years. As members of this family, both mother and father participated in the care and support of their children.”<sup>103</sup> The Court’s analysis would have been different had Caban never participated in the lives of his children. The Court explained that “[i]n those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child.”<sup>104</sup>

Yet, the Court did not explain what would satisfy the requirement that an individual participate in the rearing of his child. Darrell had visited with Quilloin,<sup>105</sup> during which time Quilloin might have been providing love and guidance.<sup>106</sup> Further, Quilloin had provided some support.<sup>107</sup> Should these be viewed as different kinds of rearing responsibility?<sup>108</sup> There are various ways in which individuals can participate in the rearing of their children even without ever having custody—the Court needed to say much more to clarify who would count as never having “come forward to participate in the rearing of his child.”<sup>109</sup>

Not only had Caban had actual custody of his children, but he and his current wife were seeking legal custody of the children.<sup>110</sup> Thus, his case was distinguishable from Quilloin’s in a few different respects, and *Caban* might be read to be protecting those parents who had, at some point, actual custody (and perhaps those who sought custody)<sup>111</sup> rather than protecting parents as a general matter. However, the Court decided *Caban* on equal protection rather than due process grounds.<sup>112</sup>

Caban also argued that he had been denied his due process rights, asserting that the “Court’s decision in *Quilloin* . . . recognized the due process right of natural fathers to maintain a parental relationship with their children absent a finding that they are unfit as parents.”<sup>113</sup> But the

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 392.

<sup>105</sup> See *Quilloin v. Walcott*, 434 U.S. 246, 251 (1978); *supra* text accompanying note 822.

<sup>106</sup> *Cf. In re Adoption of E.R.*, 2018 PA Super 1084U, ¶ 13 (“[T]hey have failed to perform their parental duties in providing love, protection, guidance, and support . . .”).

<sup>107</sup> See *Quilloin*, 434 U.S. at 251 (“[A]ppellant had provided support only on an irregular basis.”); *supra* text accompanying note 80.

<sup>108</sup> *Cf. Cameron v. Cameron*, 111 A.3d 733, 743 (N.J. Super. Ch. Div. 2014) (“[A] child support order is generally necessary to ensure that a child’s basic needs are provided by his or her parents, who might otherwise neglect their responsibilities of child rearing.”).

<sup>109</sup> *Caban*, 441 U.S. at 392.

<sup>110</sup> See *id.* at 383 (“[T]he Cabans cross-petitioned for adoption.”).

<sup>111</sup> See *id.* at 389, 392 and *supra* text accompanying notes 103–104.

<sup>112</sup> See *Caban*, 441 U.S. at 388.

<sup>113</sup> *Id.* at 385.

Court had no need to address this alleged due process right in light of its finding that equal protection guarantees had been violated.<sup>114</sup> Further, the Court might have preferred not to address this claim, given the Court's refusal to hold that the Constitution protected Quilloin's parenting rights, absent a finding of his unfitness.<sup>115</sup> By not addressing the due process claim, the Court did not make clear whether Quilloin did not count as a parent because of his limited role in rearing Darrell, or whether Quilloin counted as a parent but the protections for those rights were not sufficiently robust.

Finally, *Caban* used intermediate scrutiny to invalidate the New York law under equal protection,<sup>116</sup> and thus did not discuss the due process implications.<sup>117</sup> However, if strict scrutiny was triggered under a due process analysis in that case, one would expect the Court to have mentioned that. Indeed, the Court could have struck down the New York law under both due process and equal protection guarantees.<sup>118</sup>

*Lehr v. Robertson*<sup>119</sup> continued to muddy the jurisprudence, making it even more confusing. Jonathan Lehr and Lorraine Robertson had a child together, although Lehr never lived with his daughter, Jessica, never provided financial support for her, and never offered to marry Lorraine.<sup>120</sup> However, these "failures" do not seem particularly damning once one understands what happened, assuming that Lehr's account is accurate.<sup>121</sup>

Lehr and Robertson lived together for two years leading up to Jessica's birth.<sup>122</sup> During and after her pregnancy, Robertson acknowledged to family and friends that Lehr was the father.<sup>123</sup> Further, she told Lehr that she had acknowledged his paternity to the New York State Department of Social Services.<sup>124</sup>

<sup>114</sup> See *id.* at 385, 394.

<sup>115</sup> See *Quilloin v. Walcott*, 434 U.S. 246, 252–53 (1978).

<sup>116</sup> See *Caban*, 441 U.S. at 392.

<sup>117</sup> See *id.* at 385, 392 and *supra* text accompanying notes 113–14.

<sup>118</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down Virginia anti-miscegenation law as a violation of both equal protection and due process guarantees).

<sup>119</sup> 463 U.S. 248 (1983).

<sup>120</sup> *Id.* at 252 ("He did not live with appellee or Jessica after Jessica's birth, he has never provided them with any financial support, and he has never offered to marry appellee.").

<sup>121</sup> See *Lehr*, 463 at 268–89 (White, J., dissenting) and *infra* text accompanying notes 121–31.

<sup>122</sup> *Id.* 463 U.S. at 268–69 ("According to Lehr, he and Jessica's mother met in 1971 and began living together in 1974. The couple cohabited for approximately two years, until Jessica's birth in 1976.").

<sup>123</sup> *Id.* at 269 ("Throughout the pregnancy and after the birth, Lorraine acknowledged to friends and relatives that Lehr was Jessica's father.").

<sup>124</sup> *Id.* ("Lorraine told Lehr that she had reported to the New York State Department of Social Services that he was the father.").

Lehr visited Lorraine and Jessica every day while they were in the hospital after Jessica's birth.<sup>125</sup> However, Lorraine and Jessica left the hospital and concealed their whereabouts for two years.<sup>126</sup> Lehr found them sporadically and visited with Jessica to the extent Lorraine permitted.<sup>127</sup> At one point, Lorraine and Jessica disappeared entirely.<sup>128</sup> Lehr hired a private detective to find them.<sup>129</sup> When they were finally located, Lorraine had already married someone else.<sup>130</sup> Lehr offered financial support for Jessica, which was refused.<sup>131</sup>

If Lehr's claims are accurate, then: (1) the reason that he did not have a substantial relationship with his daughter was that his ex-partner precluded him from doing so,<sup>132</sup> (2) the reason that he did not support his daughter was that his ex-partner refused that support when it was offered,<sup>133</sup> and (3) his not having offered to marry Lorraine hardly indicates his unwillingness to "do the right thing"<sup>134</sup> when she was already married to someone else.<sup>135</sup> In any event, the Court's analysis of Lehr's (non-existent) parental rights did not help clarify the jurisprudence very much.

The *Lehr* Court interpreted *Meyer*, *Pierce*, and *Prince* to stand for the proposition that "the relationship of love and duty in a recognized family unit is a liberty interest entitled to constitutional protection,"<sup>136</sup> although the Court also recognized that "the Constitution affords protection to the relationship between natural parents and children

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<sup>125</sup> *Id.* ("Lehr visited Lorraine and Jessica in the hospital every day during Lorraine's confinement.").

<sup>126</sup> *Lehr*, 463 U.S. at 269. ("[F]rom the time Lorraine was discharged from the hospital until August 1978, she concealed her whereabouts from him.").

<sup>127</sup> *Id.* ("During this time Lehr never ceased his efforts to locate Lorraine and Jessica and achieved sporadic success until August 1977 . . . . On those occasions when he did determine Lorraine's location, he visited with her and her children to the extent she was willing to permit it.").

<sup>128</sup> *See id.* at 269 (noting that he saw them sporadically until "August 1977, after which time he was unable to locate them at all").

<sup>129</sup> *Id.* ("Lehr, with the aid of a detective agency, located Lorraine and Jessica in August 1978.").

<sup>130</sup> *Id.* ("When Lehr, with the aid of a detective agency, located Lorraine and Jessica in August 1978, Lorraine was already married to Mr. Robertson.").

<sup>131</sup> *Lehr*, 463 U.S. at 269 ("Lehr asserts that at this time he offered to provide financial assistance and to set up a trust fund for Jessica, but that Lorraine refused.").

<sup>132</sup> *See id.* at 271 ("This case requires us to assume that Lehr's allegations are true—but that but for the actions of the child's mother there would have been [a] significant relationship.").

<sup>133</sup> *See id.* at 269.

<sup>134</sup> *Cf. Lundy R. Langston, Save the Marriage Before (Not After) the Ceremony: The Marriage Preparation Act - Can We Have A Public Response to A Private Problem?*, 9 U. MIAMI INT'L & COMP. L. REV. 141, 145 (2000–2001) ("People marry . . . because one individual may feel it is the right thing to do; because the woman (and sometimes girl) is pregnant.").

<sup>135</sup> *See Lehr*, 463 at 269 (White, J., dissenting).

<sup>136</sup> *Id.* at 258 (majority opinion).

born out of wedlock.”<sup>137</sup> The *Lehr* Court briefly discussed *Stanley*, *Quilloin*, and *Caban*,<sup>138</sup> expressly noting that the *Caban* opinion did not address *Caban*’s due process claim.<sup>139</sup> However, the *Lehr* Court noted that the *Caban* dissent had addressed the merits of *Caban*’s due process claim, quoting Justice Stewart: “Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.”<sup>140</sup>

Suppose that such a relationship exists. Justice Stevens in his *Caban* dissent suggested that while “the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process,”<sup>141</sup> the nature of that protection might not be particularly robust, since “the Court has not decided whether the Due Process Clause provides any greater substantive protection for this relationship than simply against official caprice.”<sup>142</sup> But if that is all the protection that is accorded, then this alleged increased protection is not worth very much.<sup>143</sup>

The *Lehr* Court wrote: “The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant.”<sup>144</sup> Here, the Court was distinguishing between cases in which the unwed father had actual custody (*Stanley* and *Caban*) and cases in which the unwed father had not (*Quilloin* and *Lehr*). The Court continued: “When an unwed father demonstrates a full commitment to the responsibilities of parenthood by ‘[coming] forward to participate in the rearing of his child,’ his interest in personal contact with his child acquires substantial protection under the due process clause.”<sup>145</sup>

Yet, the Court’s grouping of *Lehr* and *Quilloin* was rather misleading. *Quilloin* had a relationship with his son, Darrell, although that relationship was never custodial.<sup>146</sup> *Lehr* never had the opportunity to have a relationship with his daughter, although he went to great lengths to find her, including hiring a private detective to discover where she and her

<sup>137</sup> *Id.*

<sup>138</sup> *See id.* at 258–61.

<sup>139</sup> *Id.* at 259 (“Because this Court upheld his equal protection claim, the majority did not address his due process challenge.”).

<sup>140</sup> *Caban*, 441 U.S. at 397 (Stewart, J., dissenting).

<sup>141</sup> *Id.* at 414.

<sup>142</sup> *Id.*

<sup>143</sup> *See Goss v. Lopez*, 419 U.S. 565, 574 (1975); *supra* notes 13–144; *supra* text accompanying notes 13–155.

<sup>144</sup> *Lehr*, 463 U.S. at 261.

<sup>145</sup> *Id.* (citation omitted) (citing *Caban*, 441 U.S. at 392).

<sup>146</sup> *See Quilloin v. Walcott*, 434 U.S. 246, 251–53 (1978); *supra* text accompanying notes 80–82.



mother had gone.<sup>147</sup> Neither the facts of *Quilloin* nor the facts of *Lehr* involve an unwed father relying on his biological connection alone to justify blocking his child's adoption by another, and the Court's point that "the mere existence of a biological link does not merit equivalent constitutional protection"<sup>148</sup> did not capture the claims of *Quilloin* or of *Lehr*.<sup>149</sup>

The *Lehr* Court explained:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development.<sup>150</sup>

Yet such a comment must be understood in the context in which it was made, namely, denying that *Quilloin* and *Lehr* had met the relevant standard. *Quilloin* had taken the opportunity to develop a relationship with his son, although that noncustodial relationship apparently did not trigger the relevant protections. *Lehr* had been denied the opportunity to develop a relationship with her daughter by his ex-partner. Ironically, one reading of *Lehr* is that the unwed father who fails to develop a relationship with his child through no fault of his own, nonetheless does not have constitutionally protected parental rights.<sup>151</sup>

The Court continued its practice of both affirming and undercutting the importance of parental rights in *Michael H. v. Gerald D.*<sup>152</sup> At issue was whether the Constitution protected the parental rights of a nonmarital father who had a relationship with his child when that child was born into an existing marriage.<sup>153</sup>

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<sup>147</sup> See *Lehr*, 463 U.S. at 268–69 (White, J., dissenting).

<sup>148</sup> *Id.* at 261 (main opinion).

<sup>149</sup> Strasser, *supra* note 566, at 53 ("Neither of these potential relationship cases involved someone claiming parental rights based purely on his biological relationship with his child.").

<sup>150</sup> *Lehr*, 463 U.S. at 262.

<sup>151</sup> Strasser, *supra* note 566, at 53–54 ("By suggesting that the father's failure to establish a relationship with the child, despite his great efforts to do so, put him in the position of having inferior or perhaps nonexistent rights, the Court seems to suggest that the relevant test is not what the father tried to do, but whether the father was in fact successful. Where the father has an established, substantial relationship with his child, his rights will be protected. If he does not, then his relationship is merely inchoate and not entitled to constitutional protection.").

<sup>152</sup> 491 U.S. 110 (1989).

<sup>153</sup> *Id.* at 113 ("The instant appeal presents the claim that this presumption infringes upon the due process rights of a man who wishes to establish his paternity of a child born to the wife of another man, and the claim that it infringes upon the constitutional right of the child to maintain a relationship with her natural father.").

Michael H. had an adulterous affair with Carole D.,<sup>154</sup> resulting in the conception and birth of a child, Victoria.<sup>155</sup> Under California law, Gerald D., Carole's husband,<sup>156</sup> was presumed the father of Victoria, and that presumption could only be rebutted if challenged by either Gerald or Carole within two years of the child's birth.<sup>157</sup>

The jurisprudential difficulty was that Michael H. had not only fathered Victoria, but lived with her and held her out as his own.<sup>158</sup> If his biological *and* emotional connections with his daughter<sup>159</sup> were enough to trigger constitutional protection of his parental interests,<sup>160</sup> then due process guarantees might invalidate the California law, at least as applied to Michael H.<sup>161</sup>

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<sup>154</sup> *Id.* ("In the summer of 1978, Carole became involved in an adulterous affair with a neighbor, Michael H.")

<sup>155</sup> *Id.* at 113–14 ("In September 1980, she conceived a child, Victoria D., who was born on May 11, 1981. . . . Soon after delivery of the child, however, Carole informed Michael that she believed he might be the father."); *see also id.* at 114 ("Carole and Michael had blood tests of themselves and Victoria, which showed a 98.07% probability that Michael was Victoria's father.")

<sup>156</sup> *See Michael H.*, 491 U.S. at 113 ("On May 9, 1976, in Las Vegas, Nevada, Carole D., an international model, and Gerald D., a top executive in a French oil company, were married.")

<sup>157</sup> *See id.* at 117–18 ("§ 621. Child of the marriage; notice of motion for blood tests (a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage. (b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly. (c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth. (d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child." (quoting 1981 Cal. Stat. 4761 (current version at CAL. FAM. CODE § 7541 (Deering 2019))))

<sup>158</sup> *Id.* at 114 ("In January 1982, Carole visited Michael in St. Thomas, where his primary business interests were based. There Michael held Victoria out as his child."); *see also id.* ("For the ensuing eight months, when Michael was not in St. Thomas he lived with Carole and Victoria in Carole's apartment in Los Angeles and held Victoria out as his daughter.")

<sup>159</sup> *Cf. id.* at 115 ("The psychologist recommended that Carole retain sole custody, but that Michael be allowed continued contact with Victoria pursuant to a restricted visitation schedule.")

<sup>160</sup> *See id.* at 142–43 (Brennan, J., dissenting) ("[A]lthough an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so.")

<sup>161</sup> *See Michael H.*, 491 U.S. at 151 ("Section 621 as construed by the California courts thus cuts off the relationship between Michael and Victoria—a liberty interest protected by the Due Process Clause—without affording the least bit of process. This case, in other words, involves a conclusive presumption that is used to terminate a constitutionally protected interest—the kind of rule that our preoccupation with procedural fairness has caused us to condemn.")

The *Michael H.* plurality mentioned the following characterization of the existing jurisprudence: *Stanley*, *Quilloin*, *Caban* and *Lehr* together “establish[ ] that a liberty interest is created by biological fatherhood plus an established parental relationship . . .”<sup>162</sup> However, the plurality rejected that reading, instead characterizing the cases as resting “upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family.”<sup>163</sup>

Yet, the plurality reading was not plausible. First, the Stanleys were a nontraditional family.<sup>164</sup> If the claim was that they were nonetheless a unitary family because they functioned like a family,<sup>165</sup> then the same claim might have been made about Michael H., Carole, and Victoria: “The evidence is undisputed that Michael, Victoria, and Carole did live together as a family; that is, they shared the same household, Victoria called Michael ‘Daddy,’ Michael contributed to Victoria’s support, and he is eager to continue his relationship with her.”<sup>166</sup>

It simply is not clear what to say about the unitary family in *Caban*. Presumably, the *Michael H.* plurality is suggesting that the relevant unitary family is Caban, Mohammed, and their children, notwithstanding that Caban was married to someone else while he lived with Mohammed.<sup>167</sup> Since *Caban* establishes that individuals in an adulterous relationship can nonetheless be part of a unitary family for constitutional purposes, this supports the notion that Michael H., Carole, and Victoria were a unitary family.<sup>168</sup>

The unitary families in *Lehr* and *Quilloin* were of a different sort. In each of those cases, the mother formed (or attempted to form) a new unitary family after the birth of the child or children.<sup>169</sup> But that is ex-

<sup>162</sup> *Id.* at 123.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 133 (Stevens, J., concurring in the judgment) (“[C]ases like *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Caban v. Mohammed*, 441 U.S. 380 (1979), demonstrate that enduring ‘family’ relationships may develop in unconventional settings.” (parallel citations omitted)).

<sup>165</sup> *Id.* at 143 (Brennan, J., dissenting) (“If . . . the plurality meant only to describe the kinds of relationships that develop when parents and children live together (formally or informally) as a family, then the plurality’s vision . . . would be correct.” (citation omitted)).

<sup>166</sup> *Id.* at 143–44.

<sup>167</sup> See *Caban v. Mohammed*, 441 U.S. 380, 382 (1979) (“[T]hey never legally married . . . [U]ntil 1974 Caban was married to another woman, from whom he was separated.”); *supra* text accompanying note 95–96.

<sup>168</sup> See *id.* at 389 (“The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother. Appellant Caban, appellee Maria Mohammed, and their two children lived together as a natural family for several years.”).

<sup>169</sup> See *Lehr v. Robertson*, 463 U.S. 248, 250 (1983) (“Jessica M. was born out of wedlock on November 9, 1976. Her mother, Lorraine Robertson, married Richard Robertson eight months after Jessica’s birth.”); see also *Quilloin v. Walcott*, 434 U.S. 246, 247 (1978) (“The

actly the kind of unitary family that Mohammed formed or tried to form,<sup>170</sup> which suggests that the jurisprudence as described by the *Michael H.* plurality should have supported Mohammed's attempt to solidify the unitary family, which would have meant that Caban's attempt to block the adoption should have been denied.

As Justice Brennan suggested in dissent, the more plausible account of the Court's past holdings was offered by the *Lehr* Court:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child" . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children."<sup>171</sup>

This more plausible account of the case law explained the results in *Stanley*, *Quilloin*, *Caban*, and *Lehr*,<sup>172</sup> but also should have afforded protection to Michael H.'s parental rights.<sup>173</sup>

The *Michael H.* plurality noted that "to provide protection to an adulterous natural father is to deny protection to a marital father,"<sup>174</sup> explaining that "[o]ne of them will pay a price . . . Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and Victoria have established."<sup>175</sup> The plurality then disclaimed responsibility for choosing a winner and loser: "Our disposition does not choose . . . , but leaves that to the people of California."<sup>176</sup> Ironically, that same analysis would have justified precluding Caban from blocking the stepparent adoption, at least as a matter of due process.<sup>177</sup> Rather

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mother and the child's natural father . . . never married each other or established a home together, and in September 1967 the mother married appellee Randall Walcott.").

<sup>170</sup> See *Caban*, 441 U.S. at 382 ("In December 1973, Mohammed took the two children and left the appellant to take up residence with appellee Kazim Mohammed, whom she married on January 30, 1974.").

<sup>171</sup> *Michael H.*, 491 U.S. at 143 (Brennan, J., dissenting) (citing *Lehr*, 463 U.S. at 261 (quoting *Caban*, 441 U.S. at 392, 389 n.7)).

<sup>172</sup> *Id.* ("This commitment is why Mr. Stanley and Mr. Caban won; why Mr. Quilloin and Mr. Lehr lost.")

<sup>173</sup> See *id.* ("This commitment is . . . why Michael H. should prevail today."); see also Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 976 (1994) ("The facts of *Michael H.* clearly satisfied the biology plus formula ostensibly established by the previous Supreme Court cases.").

<sup>174</sup> *Michael H.*, 491 U.S. at 130.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See *Caban v. Mohammed*, 441 U.S. 380, 385–87 (1979).

than choose between the adulterous father and the mother's husband, the Court would have let the people of New York decide.

If Justice Brennan's "biology plus" interpretation is correct, then the *Michael H.* plurality opinion should be read to amend the *Lehr* position that the biological father is afforded a unique opportunity to establish a relationship with his offspring.<sup>178</sup> The amended position would suggest that by being married to the mother at the time of the child's birth, the mother's spouse would also be afforded an opportunity to establish a relationship with the child and that an individual taking advantage of such an opportunity would be entitled to constitutional protection.<sup>179</sup> Were there no amendment to the *Lehr* position, then Michael H and Gerald D. would not have had *competing* claims to parenthood.<sup>180</sup> If both of those interests had not triggered constitutional guarantees, then the plurality would not have been asked to declare a winner and a loser,<sup>181</sup> but instead asked to point out that constitutional protections were only accorded to one of those parties (namely, Michael H.).

The *Michael H.* plurality might have believed there was an important difference between the family relationships at issue in *Caban* and the family relationships at issue in *Michael H.* While each case involved an adulterous father, only the *Michael H.* marriage (between Gerald D. and Carole) not only existed at the time of the conception and birth of the child but also continued to exist throughout the litigation.<sup>182</sup>

*Michael H.* makes the parental rights jurisprudence even more confusing. Perhaps the case merely adds an asterisk to the biology plus parental rights jurisprudence—a parent with both a biological and emotional relationship with his or her child will trigger constitutional protection unless the child was born as a result of an adulterous relationship and the marriage nonetheless remains intact.<sup>183</sup> But there are numerous ways to read *Michael H.* including the emphasis on the unitary family, however defined.<sup>184</sup>

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<sup>178</sup> See *Lehr v. Robertson*, 463 U.S. 248, 262 (1983); *supra* text accompanying note 150.

<sup>179</sup> See *Michael H.*, 491 U.S. at 129 ("Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage.").

<sup>180</sup> See *id.* at 130; *supra* text accompanying note 175.

<sup>181</sup> See *id.*; *supra* text accompanying note 176.

<sup>182</sup> Cf. Strasser, *supra* note 566, at 57 ("According to this view, the relevant issue was not merely that Victoria was a product of an adulterous relationship, since the Caban children were also the product of an adulterous relationship, but that the mother had been legally married to the same individual throughout the period." (footnotes omitted)).

<sup>183</sup> See *id.* at 58 ("Arguably, the *Michael H.* plurality decision can be limited to the less frequent case where a husband wishes to adopt a child born as a result of an adulterous union during his own marriage.").

<sup>184</sup> Cf. *Michael H.*, 491 U.S. at 143 (Brennan, J., dissenting) ("If . . . the plurality meant only to describe the kinds of relationships that develop when parents and children live together (formally or informally) as a family, then the plurality's vision of these cases would be correct.

### C. Troxel's *Nonclarification*

The Court discussed parental rights in another case involving an unwed father, although this case was much different from the others. In *Troxel v. Granville*,<sup>185</sup> the Court addressed parental decision-making,<sup>186</sup> continuing the practice of both affirming and undermining the strength of the implicated rights.

At issue was a dispute over grandparent visitation.<sup>187</sup> Tommie Granville wanted to limit the contact her children had with their paternal grandparents.<sup>188</sup> She and Brad Troxel had been in a nonmarital relationship resulting in two children, Isabelle and Natalie.<sup>189</sup> When the relationship between Brad and Tommie ended, Brad went to live with his parents.<sup>190</sup> When the children visited him, they visited his parents as well.<sup>191</sup>

After Brad committed suicide in May 1993,<sup>192</sup> the children continued to make regular visits to their grandparents' house.<sup>193</sup> In October of the same year, Tommie informed the Troxels that she wanted to limit the children's visits to one a month.<sup>194</sup>

The Troxels petitioned for the right to see their grandchildren<sup>195</sup> in light of a Washington statute providing:

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

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But that is not the plurality's message. Though it pays lipservice to the idea that marriage is not the crucial fact in denying constitutional protection to the relationship between Michael and Victoria, the plurality cannot mean what it says." (citations omitted)).

<sup>185</sup> 530 U.S. 57 (2000).

<sup>186</sup> *See id.* at 66.

<sup>187</sup> *See id.* at 68.

<sup>188</sup> *Id.* at 60 ("Jenifer and Gary Troxel petitioned a Washington Superior Court for the right to visit their grandchildren, Isabelle and Natalie Troxel. Respondent Tommie Granville, the mother of Isabelle and Natalie, opposed the petition.").

<sup>189</sup> *Id.* ("Tommie Granville and Brad Troxel shared a relationship that ended in June 1991. The two never married, but they had two daughters, Isabelle and Natalie.").

<sup>190</sup> *Id.* ("After Tommie and Brad separated in 1991, Brad lived with his parents.").

<sup>191</sup> *Id.* ("Brad . . . regularly brought his daughters to his parents' home for weekend visitation.").

<sup>192</sup> *Id.* ("Brad committed suicide in May 1993.").

<sup>193</sup> *See Troxel*, 530 U.S. at 60 ("[T]he Troxels at first continued to see Isabelle and Natalie on a regular basis after their son's death.").

<sup>194</sup> *Id.* at 60–61 ("Tommie Granville informed the Troxels in October 1993 that she wished to limit their visitation with her daughters to one short visit per month.").

<sup>195</sup> *Id.* at 60 ("Petitioners Jenifer and Gary Troxel petitioned a Washington Superior Court for the right to visit their grandchildren, Isabelle and Natalie Troxel.").

whether or not there has been any change of circumstances.<sup>196</sup>

The *Troxel* plurality began its analysis by noting that “[t]he demographic changes of the past century make it difficult to speak of an average American family.”<sup>197</sup> States have been trying to keep up with these changes by enacting laws that better reflect existing families,<sup>198</sup> for example, laws recognizing the roles played by grandparents and others in children’s lives.<sup>199</sup> However, the plurality cautioned, “[t]he extension of statutory rights in this area to persons other than a child’s parents, however, comes with an obvious cost,”<sup>200</sup> namely, “the State’s recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship.”<sup>201</sup> But placing a substantial burden on that interest implicates constitutional protections if only because “[t]he liberty interest at issue . . . —the interest of parents in the care, custody, and control of their children—is . . . [among] the fundamental liberty interests recognized by this Court.”<sup>202</sup> After affirming the fundamental nature of the interest at issue, the plurality held that the Washington statute “as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right”<sup>203</sup> because the statute “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”<sup>204</sup> and, further, “a parent’s decision that visitation would not be in the child’s best interest is accorded no deference.”<sup>205</sup>

Still lingering is why this statute was unconstitutional as applied to Granville and her family. One explanation is that the plurality was distinguishing the treatment accorded to Granville, a fit parent, from the treatment that might constitutionally be accorded to an unfit parent—the plurality noted that “the Troxels did not allege, and no court has found, that Granville was an unfit parent.”<sup>206</sup> That Granville was a fit parent

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<sup>196</sup> *Id.* at 61 (quoting WASH. REV. CODE § 26.10.160(3) (1994)).

<sup>197</sup> *Id.* at 63.

<sup>198</sup> *Id.* at 64 (“The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States’ recognition of these changing realities of the American family.”).

<sup>199</sup> *Troxel*, 530 U.S. at 64 (“Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties.”).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 65.

<sup>203</sup> *Id.* at 67.

<sup>204</sup> *Id.*

<sup>205</sup> *Troxel*, 530 U.S. at 67.

<sup>206</sup> *Id.* at 68.

was important. No reason had been offered to rebut the “presumption that fit parents act in the best interests of their children.”<sup>207</sup> Absent some evidence casting doubt upon a parent’s fitness,<sup>208</sup> “there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”<sup>209</sup> Not only was the State inserting itself into the private realm of family when there had been no trigger, such as evidence that Granville was unfit, the trial court was giving “no special weight at all to Granville’s determination of her daughters’ best interests.”<sup>210</sup>

There may be another way to understand the constitutional defects of the statute “as applied to Granville and her family in this case.”<sup>211</sup> Granville had married,<sup>212</sup> and it may be that the plurality envisioned Granville, her husband, and the children as a unitary family in need of protection from state interference.<sup>213</sup> The difficulty posed by that interpretation, however, is that if the plurality were only focused on the parental rights of a fit parent, then the statute would have been constitutionally infirm as applied to Granville alone rather than as applied to Granville *and her family*.

Granville’s justification for limiting the grandparent visitation was that she wanted to stabilize their blended family.<sup>214</sup> By referring to Granville’s family when striking down the statute as applied,<sup>215</sup> the *Troxel* plurality brought another consideration into the mix, possibly undermining the strength of Granville’s parental rights claim. Suppose that there had been no blended family considerations. Would Granville’s decision

<sup>207</sup> *Id.*

<sup>208</sup> *See id.* (protecting the family from state intrusion “so long as a parent adequately cares for his or her children (i.e., is fit) . . .”).

<sup>209</sup> *Id.* at 68–69.

<sup>210</sup> *Id.* at 69.

<sup>211</sup> *Troxel*, 530 U.S. at 67.

<sup>212</sup> *Id.* at 61 (“Granville . . . married Kelly Wynn.”).

<sup>213</sup> *See* Michael H. v. Gerald D., 491 U.S. 110, 123, 133, 143–44 (1989); *see also* Caban v. Mohammed, 441 U.S. 380, 382 (1979); *supra* text accompanying notes 163–167 (discussing the unitary family).

<sup>214</sup> *Cf.* 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, 18 n.81 (2003) (“Granville claims that she ‘asked the Troxels to respect her efforts to nurture her new blended family with Kelly Wynn’ and ‘proposed this schedule as a starting point, until Kelly and she had the opportunity to stabilize their new blended family.’” (quoting Brief for Respondents at 9, *Troxel*, 530 U.S. 57 (2000) (No. 99-138))); *see also* Ellen Marrus, *Over the Hills and Through the Woods to Grandparents’ House We Go: Or Do We, Post-Troxel?*, 43 ARIZ. L. REV. 751, 780 n.219 (2001) (“The new family included Natalie and Isabelle, Ms. Granville’s three children from her first marriage, Mr. Wynn’s two children from a previous marriage, as well as a new child Ms. Granville and Mr. Wynn were expecting.” (citing Brief for Respondents at 9, 10 n.4, *Troxel*, 530 U.S. 57 (2000) (No. 99-138))).

<sup>215</sup> *Troxel*, 530 U.S. at 75.



to reduce the contact between the grandparents and her children have been entitled to the same deference? Some of the plurality opinion suggests that the answer is “[y]es;”<sup>216</sup> although by qualifying its analysis “as applied to Granville and her family in this case,”<sup>217</sup> the plurality seemed to undercut the very analysis that it was offering.

The plurality also suggested that the statute itself was overly broad<sup>218</sup>—it allowed practically anyone to seek court review of a parent’s decision concerning visitation.<sup>219</sup> But if the statute was fatally flawed because it was so broad, there was no need for the plurality to even mention whether a statute written more narrowly would need to include a showing of harm to justify an order of nonparent visitation over parental objection.<sup>220</sup> Indeed, by mentioning the harm requirement but failing to address whether such a requirement is necessary to avoid running afoul of constitutional guarantees, the Court almost guaranteed that some states would impose such a requirement while others would not.<sup>221</sup>

The difficulty posed by the plurality’s mention of the harm requirement is not merely that some, but not other, states might require a showing of harm before a parent’s wishes regarding third party visitation could be overridden. Rather, it would be that at least some of the states imposing such a requirement might be doing so out of a belief that such a requirement was constitutionally imposed rather than because it would promote good public policy.

The plurality sent additional mixed messages when discussing why the Washington statute was constitutionally infirm. When criticizing the reasoning of the Superior Court, the plurality noted that the court “failed to provide any protection for Granville’s fundamental constitutional right to make decisions concerning the rearing of her own daughters.”<sup>222</sup> The plurality then pointed out some statutes that seemed to provide more protection. For example, the plurality quoted with approval the Maine statute’s requirement that the court find that grandparent visitation “would not significantly interfere with any parent-child relationship or with the

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<sup>216</sup> See *id.* at 68–69; *supra* text accompanying notes 207–10.

<sup>217</sup> *Id.* at 67.

<sup>218</sup> *Id.* at 73 (“[W]e rest our decision on the sweeping breadth of § 26.10.160(3).”).

<sup>219</sup> See *id.* at 67.

<sup>220</sup> *Troxel*, 530 U.S. at 73 (“[W]e do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.”).

<sup>221</sup> See *Roth v. Weston*, 789 A.2d 431, 445–46, 450 (2002); *Blixt v. Blixt*, 774 N.E.2d 1052, 1062 (2002); *Linder v. Linder* 72 S.W.3d 841, 858 (2002); *Troxel v. Granville*, 530 U.S. 57, 73 (2000); *infra* text accompanying notes 253–256 (discussing Connecticut’s requirement of harm).

<sup>222</sup> *Troxel*, 530 U.S. at 70.

parent's rightful authority over the child,"<sup>223</sup> the Minnesota requirement that the visitation "would not interfere with the parent-child relationship,"<sup>224</sup> and the Nebraska requirement that the "court must find 'by clear and convincing evidence' that grandparent visitation 'will not adversely interfere with the parent-child relationship.'"<sup>225</sup>

The plurality seemed to be endorsing these other statutes because they provided more protection to the parent's right than the Washington statute did,<sup>226</sup> but the plurality never stated which of the cited statutes passed constitutional muster. The failure to identify which, if any, of the cited statutes pass muster is regrettable because that finding would have clarified the strength of the implicated parental right. For example, in many cases, it might be relatively easy for a court to find that grandparent visitation once or twice a month would not significantly interfere with the parent-child relationship or the parent's rightful authority. Thus, if merely including that added protection would make a statute constitutional, the implicated parental right does not seem especially robust.

In addition, there was a further difficulty with these statutes—it is not at all clear how requiring a court to make an additional finding regarding harm to the parent-child relationship or to the parent's rightful authority over the child constitutes giving special weight to the parent's considered opinion. While the Maine, Minnesota, and Nebraska statutes seemed more protective of parental rights than the Washington statute,<sup>227</sup> they did not incorporate one of the protections emphasized by the *Troxel* plurality, namely, that the fit parent's considered judgment about visitation must be given special weight.<sup>228</sup>

The plurality also pointed to Rhode Island and Utah statutes requiring that the grandparents rebut the presumption that the parent's decision to deny visitation was reasonable by clear and convincing evidence.<sup>229</sup> These statutes accorded the parent's decision special weight—the grandparents would have to bear a difficult burden<sup>230</sup> to rebut the presumption that the parent's judgment was correct.

<sup>223</sup> *Id.* (citing ME. REV. STAT. ANN. tit. 19A, § 1803(3) (1998)).

<sup>224</sup> *Id.* (citing MINN. STAT. § 257.022(2)(a)(2) (1998)).

<sup>225</sup> *Id.* (citing NEB. REV. STAT. § 43-1802(2) (1998)).

<sup>226</sup> *See id.* at 69–70.

<sup>227</sup> *See Troxel*, 530 U.S. at 69–70 (suggesting that these statutes were more protective than the Washington statute).

<sup>228</sup> *See id.* at 70 ("[I]f 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.").

<sup>229</sup> *See id.* (citing R.I. GEN. LAWS § 15-5-24.3(a)(2)(v) (Supp. 1999) and UTAH CODE ANN. § 30-5-2(2)(e) (1998)).

<sup>230</sup> *See United States v. Penny Lane Partners, L.P.*, No. 06-1894 (GEB), 2010 WL 5796465, at \*9 (D. N.J. Oct. 26, 2010), *report and recommendation adopted*, No. 06-1894 (GEB) 2011 WL 550883 (D. N.J. Feb. 9, 2011) ("Proving a claim with clear and convincing evidence is a difficult burden, and a party only 'establishes a fact by clear and convincing

The *Troxel* plurality seemed to endorse all of these statutes.<sup>231</sup> But this is quite surprising both because some do not accord special weight to a parent's visitation decision,<sup>232</sup> and because it is not at all clear that these statutes would pass muster under strict scrutiny. But if parental rights are fundamental,<sup>233</sup> then statutes infringing upon those rights should be examined with strict scrutiny.<sup>234</sup>

*Troxel* fits firmly within the tradition of both affirming and undermining parental rights. The plurality cites the parental rights jurisprudence<sup>235</sup> but does not articulate a level of scrutiny that has been triggered for a "fundamental liberty interest[ ]."<sup>236</sup> The plurality faults the statute for being overly broad, but does not say whether a statute affording grandparents, in particular, the right to petition would pass constitutional muster.<sup>237</sup> Presumably, a narrower statute that also afforded some special weight to the parent's wishes<sup>238</sup> would have addressed the plurality's concerns.<sup>239</sup> Yet, limiting the nonparents who could petition for custody

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evidence . . . if the evidence place[s] in the ultimate factfinder an abiding conviction that the truth of its factual contentions are highly probable.'" (citing *United States v. Valenzuela-Puentes*, 479 F.3d 1220, 1228 (10th Cir. 2007) (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (parallel citations omitted))).

<sup>231</sup> See Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 *FAM. L. Q.* 1, 5 (2013) ("Changes in state laws following *Troxel* have come from legislatures and court decisions. Some states modified their third-party visitation statutes to provide more explicit protections for the rights of parents. The additional statutory protections include: A presumption that the parents' decision is correct—thirteen states (Arkansas, California, Illinois, Michigan, Missouri, Montana, Nevada, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Virginia); A requirement that allowing grandparent visitation will not adversely interfere with the parent-child relationship—nine states (Maine, Minnesota, Nebraska, North Dakota, Pennsylvania, South Carolina, South Dakota, West Virginia and Wyoming). A heightened burden of proof on the grandparent—showing by clear and convincing evidence that visitation is in the best interests of the child or that denial of visitation was unreasonable—eleven states (Delaware, Iowa, Kentucky, Montana, Nebraska, Nevada, Oklahoma, Rhode Island, South Carolina, Utah, Virginia).").

<sup>232</sup> See *Troxel*, 530 U.S. at 70; *supra* text accompanying note 228.

<sup>233</sup> See *Troxel*, 530 U.S. at 65, 67; *supra* text accompanying notes 202–03.

<sup>234</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973) (discussing "the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights").

<sup>235</sup> See *Troxel*, 530 U.S. at 65–66 (referencing *inter alia Meyer, Pierce, Prince, Stanley, and Quilloin*).

<sup>236</sup> *Id.* at 65; see also *id.* at 80 (Thomas, J., concurring) ("The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights.").

<sup>237</sup> *Cf. Troxel*, 530 U.S. at 61 (quoting *WASH. REV. CODE* § 26.10.160(3) (1994)) (text of visitation statute).

<sup>238</sup> See *id.* at 68–69; see also *supra* text accompanying notes 209–10.

<sup>239</sup> *Cf. Roberts, supra* note 214, at 22 ("So long as fit parents' decisions are presumed correct, and so long as courts give 'at least some special weight to the parent's own determination,' precisely how this requirement is met is less important, for now at least." (footnote omitted) (quoting *Troxel*, 530 U.S. at 70)).

and visitation, and giving some special weight to a parent's wishes regarding who would see his or her children would hardly seem to meet the requirements of strict scrutiny.<sup>240</sup>

The Supreme Court's parental rights jurisprudence sends the states very mixed messages. The Court has consistently reaffirmed that the Constitution affords protection to parental rights, but the Court has also consistently refused to specify how much protection. To make matters worse, the Court has offered varying accounts of who qualifies as a parent. State courts have read between the lines but have come up with very different interpretations of the jurisprudence, some treating parental rights as robust and others treating those rights as subject to being overridden relatively easily.

## II. STATE ANALYSES OF PARENTAL RIGHTS

All of the states have statutes granting third-party visitation under certain conditions,<sup>241</sup> which suggests that *Troxel* may have important implications for the constitutionality of those statutes.<sup>242</sup> But the state courts have offered very different views of what *Troxel* requires and permits,<sup>243</sup> which means that parental decisions regarding visitation are robustly protected as a federal constitutional matter in some states and not others. This likely means that in some states parental rights are not being given their due, or that in other states the legislature is being handcuffed in its ability to implement its own understanding of what would constitute good public policy, or both.

### A. Courts Striking Down State Statutes Post-Troxel

Some state courts struck down their own visitation statutes in light of *Troxel*. Those courts noted the *Troxel* plurality's recognition that a

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<sup>240</sup> Cf. David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711, 714 (2001) (“[T]he alternative approach taken by at least six Justices amounted, in fact, to an implicit rejection of strict scrutiny.”).

<sup>241</sup> Natalie Reed, *Third-Party Visitation Statutes: Why Are Some Families More Equal than Others?*, 78 S. CAL. L. REV. 1529, 1530 (2005) (“All fifty states have reacted to the diversification of families and the emergence of an elder generation with less access to their grandchildren and more time for political activism by passing statutes that grant standing to certain third parties to seek visitation with a child over a parent's objection.” (footnotes omitted)).

<sup>242</sup> Katie L. Ranker, *Over the Constitution and Through the Legislature: Redefining the Constitutionality of Grandparents' Rights to File for Custody and Visitation in Pennsylvania*, 122 PENN ST. L. REV. 269, 279 (2017) (noting that the *Troxel* “Court's reasoning . . . has the potential to apply to a vast array of grandparent visitation statutes in other states”).

<sup>243</sup> Roberts, *supra* note 214, at 26 (“Although there appears to have been a movement among some state supreme courts to strike down statutes as unconstitutional because they failed to require a showing of harm, other courts disagreed with this view and instead upheld the statutes' constitutionality and the use of the best-interests standard to determine if visitation was appropriate.”).

fundamental interest was implicated, and then applied strict scrutiny and found that the statutes could not pass muster.<sup>244</sup>

The Illinois Supreme Court examined Illinois's grandparent visitation statute,<sup>245</sup> which was not nearly as broad as the Washington statute because the Illinois law only focused on visitation privileges for grandparents, great-grandparents, and siblings.<sup>246</sup> But the *Lulay* court noted *Troxel's* discussion of the fundamental liberty interest at stake<sup>247</sup> and concluded that the statute did not pass muster under strict scrutiny.<sup>248</sup>

When examining the constitutionality of the Connecticut visitation statute, the Connecticut Supreme Court noted that the *Troxel* Court did not seem to use strict scrutiny when overriding a fit parent's objection to third-party visitation.<sup>249</sup> But because "a parent's interest in the care, custody and control over his or her children is 'perhaps one of the oldest of

<sup>244</sup> See, for example, *Santi v. Santi*, 633 N.W.2d 312, 317–18 (Iowa 2001); *State, Dep't of Soc. & Rehab. Servs. v. Paillet*, 16 P.3d 962, 971 (Kan. 2001).

<sup>245</sup> See *Lulay v. Lulay*, 739 N.E.2d 521, 524 (Ill. 2000)

The court may grant reasonable visitation privileges to a grandparent, great-grandparent, or sibling of any minor child upon petition to the court by the grandparents or great-grandparents or on behalf of the sibling, with notice to the parties required to be notified under Section 601 of this Act, if the court determines that it is in the best interests and welfare of the child, and may issue any necessary orders to enforce such visitation privileges. Except as provided in paragraph (2) of this subsection (b), a petition for visitation privileges may be filed under this paragraph (1) whether or not a petition pursuant to this Act has been previously filed or is currently pending if one or more of the following circumstances exist: (A) the parents are not currently cohabiting on a permanent or an indefinite basis; (B) one of the parents has been absent from the marital abode for more than one month without the spouse knowing his or her whereabouts; (C) one of the parents is deceased; (D) one of the parents joins in the petition with the grandparents, great-grandparents, or sibling; or (E) a sibling is in State custody.

*Id.* (quoting 750 ILCS 5/607(b)(1) (West 1998)).

<sup>246</sup> See *id.* ("The court may grant reasonable visitation privileges to a grandparent, great-grandparent, or sibling of any minor child . . .").

<sup>247</sup> See *id.* at 530 ("[T]he 'liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court.'" (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000))).

<sup>248</sup> *Id.* at 534 ("We hold that section 607(b)(1), as interpreted and applied to this case, does not serve a compelling state interest and therefore does not satisfy the strict scrutiny test."); see also *Doe v. Doe*, 172 P.3d 1067 (Haw. 2007) (striking down grandparent visitation statute under strict scrutiny). Cf. *Roth v. Weston*, 789 A.2d 431, 437 (Conn. 2002) ("[A]ny statute implicating such a fundamental right [i.e., the right to family integrity] must be strictly scrutinized.").

<sup>249</sup> *Roth*, 789 A.2d at 441 ("Despite its recognition of a parent's liberty interest in the care, custody and control of his or her children in general and in visitation matters in specific, the court in *Troxel* abstained from applying the strict standard of review typically utilized when a state action infringes on enjoyment of a fundamental right."); see also *In re Marriage of Howard*, 661 N.W.2d 183, 187 (Iowa 2003) ("*Troxel* did not follow the strict scrutiny standard of review traditionally used when a statute burdens a fundamental liberty." (citing *Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001))).

the fundamental liberty interests recognized by [the] Court,'<sup>250</sup> the Connecticut Supreme Court concluded that the statute nonetheless triggered strict scrutiny.<sup>251</sup>

Rather than follow the Illinois Supreme Court's example and strike the statute by holding that it failed to pass muster under strict scrutiny,<sup>252</sup> the Connecticut Supreme Court instead imposed a further condition—there must be evidence that “the parent’s decision regarding visitation will cause the child to suffer real and substantial emotional harm.”<sup>253</sup> The harm requirement was one that the *Troxel* plurality expressly declined to consider, much less impose,<sup>254</sup> and a requirement that other jurisdictions also did not believe to be constitutionally demanded.<sup>255</sup> Nonetheless, by interpreting the statute to require harm before a parent’s wishes regarding third-party visitation could be overridden, the court offered a construction that would pass constitutional muster.<sup>256</sup>

Yet, there are costs associated with offering an arguably overzealous interpretation of what the United States Constitution requires. The Connecticut court imposed two conditions in order for a third party to be awarded visitation against a parent’s wishes: (1) “any third party, including a grandparent or a great-grandparent, seeking visitation must allege and establish a parent-like relationship as a jurisdictional threshold;”<sup>257</sup> and (2) the third party would have to establish that “the parent’s decision regarding visitation will cause the child to suffer real and substantial emotional harm.”<sup>258</sup> Such a constitutional construction would limit a

<sup>250</sup> *Roth*, 789 A.2d at 441 (citing *Troxel*, 530 U.S. at 65).

<sup>251</sup> *Id.* (“[T]he application of the strict scrutiny test is required to any infringement [the parent’s right to care custody and control of the child] may suffer.”); see also *Santi*, 633 N.W.2d at 318 (reviewing grandparent visitation statute under strict scrutiny); *Linder v. Linder*, 72 S.W.3d 841, 855 (Ark. 2002) (“We hold that strict scrutiny is the standard that should apply to this case.”).

<sup>252</sup> See *Roth*, 789 A.2d at 449 (“We have the option simply to invalidate the statute.”); see also *Lulay v. Lulay*, 739 N.E.2d 521, 530, 534 (Ill. 2000); *supra* text accompanying notes 247–248 (discussing the Illinois Supreme Court’s invalidation of that state’s statute).

<sup>253</sup> *Roth*, 789 A.2d at 445; see also *Blixt v. Blixt*, 774 N.E.2d 1052, 1062 (Mass. 2002) (upholding Massachusetts’ grandparent visitation statute against constitutional challenge after construing that statute as requiring of showing of harm to the child by the denial of visitation); *Linder*, 72 S.W.3d at 858 (“There must be some other special factor such as harm to the child or custodial unfitness that justifies state interference.”).

<sup>254</sup> *Troxel*, 530 U.S. at 73 (“[W]e do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.”).

<sup>255</sup> *Roth*, 789 A.2d at 446 (“We recognize that some jurisdictions do not consider a showing of harm to the child to be constitutionally required before a third party will be afforded visitation over the parents’ objections.”).

<sup>256</sup> See *id.* at 450.

<sup>257</sup> *Id.* at 443.

<sup>258</sup> *Id.* at 445.

state's ability to award custody of a child to a stepparent over a fit, non-custodial parent.<sup>259</sup>

At least two points might be made about the Connecticut limitation. First, (1) it begs the question as to whether someone who has a parent-like relationship with a child might be treated as a parent for constitutional purposes and thus not be limited with respect to contact with a child in the same ways that third parties are limited.<sup>260</sup> For example, while states might debate the wisdom of awarding custody of a child to a stepparent who has lived in the same home as the child for years rather than the child's other parent who did not have custody for a long period, it would be good to know whether the United States Constitution permits a stepparent (or, perhaps, a child's functional parent) to be awarded custody in such circumstances, even absent a showing of harm.<sup>261</sup> Where there is a lack of clarity with respect to the conditions under which a third party may be awarded custody or visitation over parental objections, states must simply guess about what the United States Constitution requires.<sup>262</sup>

### B. Other Court Applications of *Troxel*

Some state courts reading *Troxel* have decided that federal constitutional protections of parental rights are not particularly robust after all. In a case with parallels to *Troxel*, the Mississippi Supreme Court addressed the constitutionality of Mississippi's grandparent visitation statute.<sup>263</sup>

At issue was a limitation imposed by the children's father on their visitation with the maternal grandparents,<sup>264</sup> notwithstanding the existing

<sup>259</sup> Cf. *Taylor v. Becker*, 708 A.2d 626, 629 (Del. 1998) (upholding validity of stepparent custody statute).

<sup>260</sup> The Connecticut Supreme Court has taken a somewhat unusual view with respect to the conditions that must be satisfied when third parties seek custody, rather than visitation, over a fit parent's objection. See *Fish v. Fish*, 939 A.2d 1040, 1054–55 (Conn. 2008) (“[I]n light of the fact that a third party custody petition *directly challenges* the overall competence of the parent to care for the child, the standard employed to protect the liberty interest of the parent must be more flexible and responsive to the child's welfare than the standard applied in visitation cases, in which the underlying parent-child relationship is not contested.”).

<sup>261</sup> See, e.g., *In re Parentage of M.F.*, 228 P.3d 1270, 1272 (Wash. 2010) (“The legislature has created and refined a statutory scheme by which a stepparent may obtain custody of a stepchild.”); *In re Guardianship of Reena D.*, 35 A.3d 509, 514–15 (N.H. 2011) (“[F]or the purposes of a statutory provision that allow[s] a court to award custody to a stepparent or grandparent if the award [i]s in the child's best interests, the State Constitution require[s] the stepparent or grandparent seeking custody to prove by clear and convincing evidence that the stepparent or grandparent should obtain custody.”).

<sup>262</sup> See *infra* Section III.B.

<sup>263</sup> See *Zeman v. Stanford*, 789 So. 2d 798, 801 (Miss. 2001).

<sup>264</sup> *Id.* (“Jonathan requested that the Stanfords be enjoined from visiting, coming about or around him or his children unless specifically invited by him and under the circumstances and conditions of visitation with the grandchildren as dictated by him and him alone.”).

relationship between the children and grandparents.<sup>265</sup> Before the parents, Lesa and Jonathan, had split up, the children saw their grandparents frequently—they had Sunday dinners together and spent time there for some holiday and birthday celebrations.<sup>266</sup>

When the Zemans divorced, Jonathan was awarded custody of the two children and Lesa was awarded visitation.<sup>267</sup> Lesa moved back into her parents' home, and she brought the children there when she had visitation.<sup>268</sup> Even after Lesa was incarcerated, the Stanfords continued to see their grandchildren regularly.<sup>269</sup> Jonathan remarried,<sup>270</sup> which required reallocating visiting time among family members in light of the new blended family.<sup>271</sup> The Stanfords petitioned for visitation<sup>272</sup> under the state's grandparent visitation statute.<sup>273</sup>

In a decision issued before *Troxel* was decided,<sup>274</sup> the Mississippi Supreme Court offered ten factors to be considered when awarding grandparent visitation.<sup>275</sup> Then, in *Zeman* which was decided after *Troxel*

<sup>265</sup> See *id.* at 800.

<sup>266</sup> *Id.* (“The children had routinely eaten Sunday dinners, spent Christmases, and celebrated their cousins’ birthdays at the Stanford home prior to the divorce.”).

<sup>267</sup> *Id.* at 799 (“Jonathan Blake Zeman (‘Jonathan’) and Lesa Stanford Zeman (‘Les’) were divorced by decree dated May 3, 1999. Sole custody of the two children born of their marriage, Jonathan Blake Zeman, II (‘Blake’), age 7, and Lesa Brooke Zeman (‘Brooke’), age 10, was granted to Jonathan. Lesa was granted regular visitation, but such visitation was restricted after Lesa was subsequently incarcerated in Arkansas.”).

<sup>268</sup> See *Zeman*, 789 So. 2d at 800 (“After the divorce, Lesa would bring the children to the Stanfords’ home since she was living with the Stanfords at that time.”).

<sup>269</sup> *Id.* (“After Lesa was incarcerated . . . , the Stanfords continued to visit with the children regularly. Jonathan permitted visitation usually one weekend per month, which included overnight visitation.”).

<sup>270</sup> *Id.* at 801 (“In early December of 1999, Jonathan married his present wife, Regina. Regina and her three children from a prior marriage moved in with Jonathan and his two children.”).

<sup>271</sup> *Cf. id.* (“Jonathan testified that the holiday situation was different now since he had remarried and had other family members to visit.”).

<sup>272</sup> *Id.* (“The Stanfords filed a Petition for Grandparents’ Visitation Rights on November 29, 1999. They testified that they did not wish to interfere with the way Jonathan rears his children, but that they wish to maintain a normal relationship with the children.”).

<sup>273</sup> *Zeman*, 789 So. 2d at 802 (“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 chancery court in the county in which the child resides, and seek visitation rights with such child.” (citing MISS. CODE ANN. § 93-16-3(1))).

<sup>274</sup> *Martin v. Coop*, 693 So. 2d 912 (Miss. 1997).

<sup>275</sup> See *Zeman*, 789 So. 2d at 804 (“1. The amount of disruption that extensive visitation will have on the child’s life. This includes disruption of school activities, summer activities, as well as any disruption that might take place between the natural parent and the child as a result of the child being away from home for extensive lengths of time. 2. The suitability of the grandparents’ home with respect to the amount of supervision received by the child. 3. The age



had been issued, the Mississippi Supreme Court reasoned that *Troxel* did not undermine the constitutionality of the state statute (even as interpreted in the pre-*Troxel* decision) because the *Troxel* plurality had struck down a Washington statute that was “breathhtakingly broad,”<sup>276</sup> whereas the Mississippi statute was limited to grandparents.<sup>277</sup> Further, Mississippi not only gave specific directions via the ten factors,<sup>278</sup> but also expressly prohibited depriving parents “of their right to rear their children and determine their children’s care, custody, and management.”<sup>279</sup> Like the *Troxel* court, the *Zeman* court nowhere mentioned the level of scrutiny that was being employed.

Certainly, the Mississippi statute was narrower than the Washington statute, although it seems doubtful that the Court would uphold the Mississippi statute if only because the decision-maker was afforded a “wide range of discretion . . . on matters of visitation”<sup>280</sup> with no special weight to be given to parental decision-making. That said, however, the *Troxel* plurality impliedly upheld several visitation statutes affording no special weight to parental wishes;<sup>281</sup> thus, it is difficult to tell what the *Troxel* plurality would have said about the Mississippi statute.

The Court’s mixed messaging throughout the parental rights jurisprudence has made it difficult to determine the appropriate level of scrutiny to employ when examining statutes permitting third-party visitation over parental objection. Further, the lack of clarity in this jurisprudence may have regrettable implications for how differing levels of scrutiny are employed in other contexts.

Consider *Harrold v. Collier*,<sup>282</sup> which involved the constitutionality of the Ohio nonparent visitation statute.<sup>283</sup> A trial court found that permitting grandparent visitation would be in a child’s best interests,<sup>284</sup> but

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of the child. 4. The age, and physical and mental health of the grandparents. 5. The emotional ties between the grandparents and the grandchild. 6. The moral fitness of the grandparents. 7. The distance of the grandparents’ home from the child’s home. 8. Any undermining of the parent’s general discipline of the child. 9. Employment of the grandparents and the responsibilities associated with that employment. 10. The willingness of the grandparents to accept that the rearing of the child is the responsibility of the parent, and that the parent’s manner of child rearing is not to be interfered with by the grandparents.” (citing *Martin v. Coop*, 693 So. 2d 912, 916 (Miss. 1997)).

<sup>276</sup> *Id.* at 803 (quoting *Troxel v. Granville*, 530 U.S. 57, 67 (2000)).

<sup>277</sup> *Id.* at 802.

<sup>278</sup> *Cf. id.* at 803 (“[T]he Chancellor in the case sub judice carefully considered each factor in light of the evidence presented at trial before entering his order setting visitation between the Stanfords and their grandchildren.”)

<sup>279</sup> *Zeman*, 789 So. 2d at 803 (citing *Martin*, 693 So. 2d at 915).

<sup>280</sup> *Id.* at 805.

<sup>281</sup> See *Troxel*, 530 U.S. at 70; *supra* text accompanying notes 223–25.

<sup>282</sup> 836 N.E.2d 1165 (Ohio 2005).

<sup>283</sup> *Id.* at 1168.

<sup>284</sup> *Id.* at 1167 (“After conducting an independent review of the magistrate’s findings and decision, the juvenile court judge issued an order granting appellees visitation with Brittany.”).

held that the Ohio nonparent visitation statute was unconstitutional in light of *Troxel*.<sup>285</sup> The intermediate appellate court reversed.<sup>286</sup> The Ohio Supreme Court agreed to hear the case to resolve a conflict in the courts of appeal.<sup>287</sup>

In *Harrold*, the Ohio Supreme Court noted the *Troxel* plurality's requirement that "if a fit parent's decision regarding nonparental visitation becomes subject to judicial review, 'the court must accord *at least some special weight* to the parent's own determination,'"<sup>288</sup> and then explained that "Ohio courts are obligated to afford some special weight to the wishes of parents of minor children when considering petitions for nonparental visitation."<sup>289</sup>

What special weight? Ohio law requires that when nonparent visitation is requested, the court shall consider *inter alia* "the wishes and concerns of the child's parents, as expressed by them to the court."<sup>290</sup> The court must also consider a host of other specified factors,<sup>291</sup> and, in addition, can consider "[a]ny other factor in the best interest of the child."<sup>292</sup> The *Harrold* court was persuaded that Ohio law met the *Troxel* requirement that special weight be accorded to parental wishes because Ohio law expressly requires that parental wishes be considered whenever nonparental visitation is requested.<sup>293</sup> The Ohio law was distinguishable from the challenged law in *Troxel*, 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 interest of the child whether or not there has been any change of circumstances."<sup>294</sup>

The Washington statute did not require consideration of the parent's wishes when the court was deciding what would promote the best inter-

<sup>285</sup> *Id.* ("[T]he juvenile court ruled that, although the statutory factors seemed to support visitation with appellees over the objection of appellant, there was insufficient proof in the record to find overwhelmingly clear circumstances for overruling the wishes of appellant. Consequently, the juvenile court sustained appellant's objections and dismissed appellees' motion for visitation.").

<sup>286</sup> *Id.* ("On appeal, the Ninth District Court of Appeals held that the juvenile court erred in its interpretation and application of *Troxel* to the case." (citing *Estate of Harrold v. Collier*, No. 03CA0064, 2004 WL 1837186, at \*6 (Ohio App. Aug. 18, 2004))).

<sup>287</sup> *Harrold*, 836 N.E.2d at 1167–68 ("The cause is now before this court upon our determination that a conflict exists, as well as our acceptance of a discretionary appeal.").

<sup>288</sup> *Id.* at 1168 (emphasis added) (citing *Troxel*, 530 U.S. at 70).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 1170 (citing OHIO REV. CODE ANN. § 3109.051 (D) (15)).

<sup>291</sup> *See id.* at 1169–70 (listing factors in OHIO REV. CODE ANN. § 3109.051 (D)).

<sup>292</sup> *Id.* at 1170 (citing OHIO REV. CODE ANN. § 3109.051 (D) (16)).

<sup>293</sup> *See Harrold*, 836 N.E.2d at 1172.

<sup>294</sup> *Troxel*, 530 U.S. at 61 (citing WASH. REV. CODE §26.10.160 (3) (1994)).

ests of the child,<sup>295</sup> but the Ohio law does so require.<sup>296</sup> Further, the Ohio statute is more narrowly drawn than the challenged Washington statute.<sup>297</sup> Thus, the Ohio law does not suffer from the same defects as the Washington law, and the Ohio Supreme Court was correct that *Troxel*'s invalidation of the Washington law was not dispositive with respect to the constitutionality of the Ohio statute.

Yet, the *Harrold* court's analysis of why the Ohio statute passed muster was not persuasive because that analysis only established that parental wishes must be given some weight;<sup>298</sup> the court did not establish that parental wishes must be given special weight. Indeed, Ohio courts are directed by statute to "consider all relevant factors,"<sup>299</sup> but are not directed to weigh one factor more than another, which undercuts the claim that the parent's judgment is given "special" weight.<sup>300</sup>

The *Harrold* court seemed aware of this potential criticism, but argued that "[t]his requirement is not minimized simply because Ohio has chosen to enumerate 15 other factors that must be considered by the trial court in determining a child's best interest in the visitation context."<sup>301</sup> While it is true that the factor is not minimized merely because other factors are also considered, the consideration of all of the other factors, including anything that would be in the best interest of the child, undercuts the claim that parental wishes have special weight.<sup>302</sup>

The Ohio Supreme Court claimed that it was "examin[ing] Ohio's nonparental-visitation statutes under the strict-scrutiny standard,"<sup>303</sup> but spent surprisingly little time establishing that such a demanding standard had been met. The court noted "nothing in *Troxel* suggests that a parent's wishes should be placed before a child's best interest,"<sup>304</sup> but seemed not to appreciate that one of the reasons that the Washington statute failed to pass muster was that it did not require courts to give special weight to

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<sup>295</sup> See *Harrold*, 836 N.E.2d at 1171 ("[T]he Washington statute at issue in *Troxel* . . . contained no reference to the parents' wishes as a factor to be weighed.").

<sup>296</sup> See *id.* at 1170 (citing OHIO REV. CODE ANN. § 3109.051 (D) (15)); *supra* text accompanying note 290.

<sup>297</sup> *Id.* at 1171 ("[T]he Ohio statutes are more narrowly drawn and capable of a more narrow construction than the Washington statute in *Troxel*.").

<sup>298</sup> See *id.* at 1168.

<sup>299</sup> *Id.* at 1169.

<sup>300</sup> See *Harrold*, 836 N.E.2d at 1168.

<sup>301</sup> *Id.* at 1172.

<sup>302</sup> Cf. Brent Bennett, Jennifer Herbert & Jeanette McClellan, *To Grandmother's House We Go: Examining Troxel, Harrold, and the Future of Third-Party Visitation*, 74 U. CIN. L. REV. 1549, 1549 (2006) ("The Ohio Supreme Court found that because the parents' wishes were considered, even as one of sixteen factors, the *Troxel* burden was met in *Harrold*.").

<sup>303</sup> *Harrold*, 836 N.E.2d at 1171.

<sup>304</sup> *Id.* at 1172.

parental judgments concerning what in fact would promote the child's best interests.<sup>305</sup>

The *Harrold* court announced that “[t]he state has a compelling interest in protecting a child’s best interest,”<sup>306</sup> and concluded that “Ohio’s nonparental-visitation statutes are narrowly tailored to serve that compelling interest.”<sup>307</sup> The court did not discuss whether a more narrowly tailored law would and should have given additional weight to the parent’s determination of what promoted the child’s best interests.<sup>308</sup> The court did not examine whether Ohio law permitted the “trial court [to] disregard[ ] the traditional presumption that a fit parent acts in the best interest of his or her child”<sup>309</sup> by permitting the presumption for the parent to be outweighed by any or all of the other Ohio factors.<sup>310</sup> Nor did the court discuss whether a more narrowly tailored law would and should have mirrored California’s rebuttable presumption that grandparent visitation is not in the child’s best interests.<sup>311</sup>

The point here is not that the *Harrold* court reached the wrong result. The child, Brittany, lived with her maternal grandparents for the first five years of her life,<sup>312</sup> almost three years of which had been after

<sup>305</sup> *Troxel v. Granville*, 530 U.S. 57, 67 (2000) (“Once the visitation petition has been filed in court and the matter is placed before a judge, a parent’s decision that visitation would not be in the child’s best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent’s decision any presumption of validity or any weight whatsoever.”).

<sup>306</sup> *Harrold*, 836 N.E.2d at 1172 (citation omitted) (citing *In re T.R.*, 556 N.E.2d 439, 451 (Ohio 1990)).

<sup>307</sup> *Id.*

<sup>308</sup> *See id.* at 1168.

<sup>309</sup> *Id.* (citing *Troxel*, 530 U.S. at 69).

<sup>310</sup> *Cf. DeRose v. DeRose*, 666 N.W.2d 636, 641 (Mich. 2003) (“According to Justice O’Connor, in order for a nonparental visitation statute to allow for such deference, it must articulate a presumption that parents act in their children’s best interests.”); *id.* at 643 (striking down Michigan visitation statute because “[t]here is no indication that the statute requires deference of any sort be paid by a trial court to the decisions fit parents make for their children”).

<sup>311</sup> *See In re Marriage of Harris*, 96 P.3d 141, 143 (Cal. 2004) (“Family Code section 3104, subdivision (f), imposed a rebuttable presumption affecting the burden of proof that grandparent visitation was not in the child’s best interest.”); *see also* *Glidden v. Conley*, 820 A.2d 197, 204 (Vt. 2003) (“To accord with due process, an evaluation of the best interests of the child under § 1011 requires that a parental decision concerning grandparent visitation be given a presumption of validity.”); *Camburn v. Smith*, 586 S.E.2d 565, 568 (S.C. 2003) (“Before visitation may be awarded over a parent’s objection, one of two evidentiary hurdles must be met: the parent must be shown to be unfit by clear and convincing evidence, or there must be evidence of compelling circumstances to overcome the presumption that the parental decision is in the child’s best interest.”).

<sup>312</sup> *Harrold*, 836 N.E.2d at 1167 (“On July 31, 2002, appellant removed Brittany from appellees’ home, where she had lived for the previous five years, and refused to permit any further visitation between Brittany and appellees.”).

her mother had died.<sup>313</sup> When Brittany's father, Brian Collier, was awarded residential custody, he refused to permit the grandparents to see her.<sup>314</sup> Thus, the facts of *Harrold* and *Troxel* differed in important ways. The father was cutting off all visitation in *Harrold*,<sup>315</sup> whereas the mother was not cutting off all visitation with the grandparents in *Troxel*.<sup>316</sup> In *Troxel*, the children visited with their grandparents on some weekends.<sup>317</sup> Further, in *Troxel*, the children did not live with their grandparents.<sup>318</sup> In contrast, Brittany lived with her grandparents for five years.<sup>319</sup> Precisely because of that longstanding parental relationship, the child would likely have been harmed by a complete cessation of contact.<sup>320</sup> Thus, even using the arguably over-rigorous requirements used in Connecticut,<sup>321</sup> the grandparents in *Harrold* would likely have been successful in seeking visitation.

Nonetheless, the *Harrold* reasoning is disappointing for a number of reasons. Listing parental wishes among a host of other factors, including any other factors relevant to the child's best interests,<sup>322</sup> cannot plausibly be thought to be giving special weight to parental wishes—the court's understanding of what special weight involves gives the word "special" no meaning. Suppose, for example, that the Washington statute had been construed to direct the court to consider all factors relevant to the child's best interest, including the parents' wishes—a construction that was presumably intended by the legislature.<sup>323</sup> It is difficult to believe that such a statute would have passed muster, if only because such a statute would

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<sup>313</sup> *Id.* at 1166 ("Renee Harrold was suffering from cancer, and appellees took care of Renee until her death on October 10, 1999.").

<sup>314</sup> *Id.* at 1167 ("On July 31, 2002, appellant removed Brittany from appellees' home, where she had lived for the previous five years, and refused to permit any further visitation between Brittany and appellees.").

<sup>315</sup> *Id.*

<sup>316</sup> *Troxel v. Granville*, 530 U.S. 57, 71 (2000) ("[T]here is no allegation that Granville ever sought to cut off visitation entirely.").

<sup>317</sup> *Id.* at 60 ("Brad lived with his parents and regularly brought his daughters to his parents' home for weekend visitation.").

<sup>318</sup> *See id.*

<sup>319</sup> *Harrold*, 836 N.E.2d at 1167.

<sup>320</sup> *See Rideout v. Riendeau*, 761 A.2d 291, 303 (Me. 2000) ("We conclude therefore that where the grandparents have acted as the children's parents for significant periods of time, the Grandparents Visitation Act serves a compelling state interest in addressing the children's relationship with the people who have cared for them as parents. Because the Act is narrowly tailored to serve that compelling interest, it may be applied in this case without violating the constitutional rights of the parents.").

<sup>321</sup> *See Roth v. Weston*, 789 A.2d 431, 443, 445 (Conn. 2002); *supra* text accompanying notes 257–58.

<sup>322</sup> *See Harrold*, 836 N.E.2d at 1167; *supra* text accompanying note 292 (describing factor 16).

<sup>323</sup> *See In re Custody of Smith*, 969 P.2d 21, 30 (Wash. 1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57 (2000) (requiring that any visitation ordered by the court "serve the best interest of the child").

not afford parental judgment any special weight.<sup>324</sup> But the Washington statute so construed would not significantly differ from the Ohio statute.<sup>325</sup>

Perhaps the more alarming part of the decision was its conclusion that strict scrutiny had been met. If considering a host of factors without according any factor particular weight meets the narrow tailoring standard, then states should have little difficulty in meeting strict scrutiny whenever they have (arguably) compelling interests at stake. But this means that strict scrutiny as a general matter is at risk of becoming a much less robust standard of review than it is generally thought to be.<sup>326</sup>

### CONCLUSION

The Supreme Court has long recognized that the United States Constitution protects parental rights, but the Court has consistently sent mixed messages about who qualifies as a parent and about the robustness of parental rights. Unsurprisingly, some state courts have inferred that the constitutional protections for parental rights are very difficult to overcome, while other courts have concluded that those protections are relatively weak.

That states have differing policies regarding the conditions under which parental wishes may be overridden. Different states prioritize interests and goals differently, so one would not expect the states to come up with identical solutions to common problems. But the difficulty pointed to here is that the Court's mixed messaging has prevented states from knowing what the Constitution requires, permits, and prohibits with respect to the conditions under which parental wishes may be overridden. This means that some states are likely affording parental rights too much protection (at least as a matter of federal constitutional guarantee), and thus may be unnecessarily constraining their legislature's ability to pursue good public policy, while other states are likely affording parental rights too little protection, and thus are too quick to overrule parents' judgments about what would promote their children's best interests.

The Court's mixed messaging imposes additional costs by watering down the strict scrutiny standard. When the Court talks about certain interests as fundamental but nonetheless seems to employ a lower level of scrutiny when examining state laws and practices adversely affecting those interests, the Court undermines its own recognition that such inter-

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<sup>324</sup> See *Troxel*, 530 U.S. at 67.

<sup>325</sup> See *Harrold*, 836 N.E.2d at 1169; *supra* text accompanying note 299 (noting that Ohio courts are to consider all factors relevant to the child's best interests).

<sup>326</sup> Cf. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1292 (2007) ("[T]he compelling interest formula gave content to the notion that preferred rights were indeed preferred and that strict scrutiny was truly strict . . . .").

ests are fundamental and, perhaps, undermines the protection for all fundamental interests by suggesting that the appropriate standard for assessing abridgements of fundamental rights is relatively weak. By the same token, when the Court announces that an interest is fundamental but seems to uphold the constitutionality of statutes that either are not promoting compelling interests or are not closely tailored to promote compelling interests, the Court implicitly weakens the strict scrutiny standard.<sup>327</sup>

At its first opportunity, the Court must make clear whose parental rights are protected, what that protection involves, and the conditions under which that federal protection must give way. The Court's mixed messaging in this area puts parental and child interests in jeopardy and, further, destabilizes the protection of any and all rights as a general matter. The Court must do better for the sake of individual parents and children, and for the sake of society as a whole.

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<sup>327</sup> *Cf. Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 888 (1990) (“[I]f ‘compelling interest’ really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test.”).

