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Cover Page Footnote

J.D. Candidate, 2008, Fordham University School of Law. I would like to extend profound appreciation to Professor James Fleming for his insightful comments and suggestions throughout the editing process, and to Ben and my family for their infinite love and support.

THERE'S NO PLACE LIKE HOME: WHY THE HARM STANDARD IN GRANDPARENT VISITATION DISPUTES IS IN THE CHILD'S BEST INTERESTS

*Lauren F. Cowan**

> "In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance."[1]

INTRODUCTION

Barbara and Victor Genco lost their son Peter on September 11, 2001, and now they face losing their grandchildren as well.[2] Following the death of their son, the Gencos' relationship with their daughter-in-law became strained, and she refused to let the Gencos see their grandchildren.[3] Soon after, the Gencos petitioned the court to order visitation time with their grandchildren.[4] The daughter-in-law submitted court documents against the petition alleging abuse and neglect, including drinking in front of and striking the girls.[5] In 2003, the Nassau County Family Court issued an order granting supervised visitation of four hours per month.[6] The daughter-in-law has since requested that the monthly visitation end.[7] Thus, the legal battle rages on, drawing out a bitter dispute and preventing all parties from moving on with their lives.

While the Gencos' situation is certainly the exception,[8] it is not uncommon.[9] There are many situations where parents may object to grandparental relationships with their children. Such conflicts typically

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1. Troxel v. Granville, 530 U.S. 57, 70 (2000).
2. Paul Vitello, *For 9/11 Families, New Sorrow in Fight Over Grandchildren*, N.Y. Times, Jan. 19, 2007, at A1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *See id.*
9. A 9/11 mediator said that "1 in 10 of his cases involved estranged grandparents." *Id.*

arise after a change in family circumstances: Death in the family, incarceration, divorce, and drug abuse are common events that change the family dynamic and lead to visitation disputes.[10] The father could pass away, and the mother might cut off visitation with the paternal grandparents because she does not want her children to be exposed to the grandparents' worldview. Or the mother could be in rehabilitation for drug abuse, and the father could deny visitation rights to the maternal grandparents because he never particularly liked them. In many cases, parents do not altogether deny visitation rights, but seek to decrease the frequency of visitation.[11]

In *Troxel v. Granville*, the U.S. Supreme Court addressed the right of grandparents to seek visitation time with their grandchildren.[12] At issue was a Washington statute which granted visitation to grandparents if the court determined that it would be in the child's best interests.[13] The plurality found the Washington statute unconstitutional as applied because the trial court did not employ the presumption that fit parents act in the best interests of their child.[14] The plurality was clear that a best interests standard—without more—gives insufficient protection to parental rights.[15] However, the plurality did not decide the appropriate standard to guide courts and legislatures in the future.[16]

This Note addresses *Troxel*'s remaining question: What standard should legislatures adopt and courts apply to grandparent visitation to comply with *Troxel*'s constitutional mandate? Part I recounts the history of grandparent visitation rights and the emergence of competing standards that courts apply when evaluating visitation disputes. Part II discusses the two main competing standards: the "best interests plus" standard and the harm standard. Part III argues that legislatures should adopt the harm standard instead of the currently prevailing "best interests plus" standard and that courts should interpret statutes with "best interests" language to require a showing of harm.

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10. *See* Troxel v. Granville, 530 U.S. 57, 60-61 (2000) (dealing with a visitation dispute that arose after the death of one parent); M.S. v. D.C., 763 So. 2d 1051, 1051-52 (Fla. Dist. Ct. App. 1999) (dealing with a visitation dispute that arose after the incarceration of one parent); Steward v. Steward, 890 P.2d 777, 778 (Nev. 1995) (dealing with a visitation dispute that arose after the divorce of parents); Moriarty v. Bradt, 827 A.2d 203, 206-07 (N.J. 2003) (dealing with a visitation dispute that arose after the drug overdose and death of one parent).

11. *See Troxel*, 530 U.S. at 60-61 (dealing with a parent who limited grandparent visitation to once per month); Hiller v. Fausey, 904 A.2d 875, 877 (Pa. 2006) (dealing with a parent who limited grandparent visitation to three times in one year).

12. *See Troxel*, 530 U.S. at 60.

13. *Id.*

14. *Id.* at 67-69 ("The problem here is . . . [that] it gave no special weight at all to Granville's determination of her daughters' best interests.").

15. *See id.*

16. *Id.* 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.").

I. GRANDPARENT VISITATION RIGHTS BEFORE AND AFTER *TROXEL*

A. *Grandparent Visitation Disputes*

Historically, grandparents did not have a right to sue when they were denied visitation time with their grandchildren.[17] Today, however, grandparents have standing to sue for visitation time with grandchildren in all fifty states.[18] This section will briefly discuss the history of grandparent visitation rights and the question of whose rights are really at stake when a dispute about grandparent visitation arises.

1. General History

Over the past few decades, the nature of the American family has changed dramatically.[19] As women entered the work force and the divorce rate escalated,[20] the traditional notion of the stable, nuclear family dissipated.[21] Families attempted to regroup in a variety of ways. Often, Americans relied on extended family networks to maintain or regain a sense of family or belonging.[22] Frequently, in the event of a divorce or a death in the family, grandparents have increased their role in their grandchildren's lives to foster a sense of normalcy and security for the children.[23]

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17. *See* Naomi Karp, *Introduction* to Grandparent Visitation Disputes: A Legal Resource Manual 1, 1 (Ellen C. Segal & Naomi Karp eds., 1989) [hereinafter Grandparent Visitation Disputes].

18. Ellen C. Segal & Jody George, *State Law on Grandparent Visitation: An Overview of Current Statutes*, *in* Grandparent Visitation Disputes, *supra* note 17, at 5, 5.

19. *See Troxel*, 530 U.S. at 63-64; *see also* Economic and Statistics Admin., U.S. Census Bureau, 1997: Population Profile of the United States 27 (1998), *available at* http://www.census.gov/prod/3/98pubs/p23-194.pdf (noting the increase in children living with only one parent); Rose M. Kreider & Jason M. Fields, U.S. Dep't of Commerce, Number, Timing, and Duration of Marriages and Divorces: 1996, at 16, 18 (2002), *available at* http://www.census.gov/prod/2002pubs/p70-80.pdf [hereinafter U.S. Marriages and Divorces] (noting the increase in the divorce rate); Terry A. Lugaila, U.S. Dep't of Commerce, Marital Status and Living Arrangements: March 1998 (Update), at i (1998), *available at* http://www.census.gov/prod/99pubs/p20-514.pdf (noting that four million grandchildren now live with their grandparents); Oliver G. Hahn, Note, *Grandparent Visitation in the Face of the Fourteenth Amendment Due Process Clause: Parental or Grandparental Rights?* Troxel v. Granville, *530 U.S. 57 (2000)*, 24 U. Ark. Little Rock L. Rev. 199, 204-07 (2001).

20. *See* U.S. Marriages and Divorces, *supra* note 19, at 16, 18. The divorce rate has since leveled off and even showed a slight decline. *See* Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 Fam. Ct. Rev 22, 23 (2005).

21. *See* Jennifer Kovalcik, Note, Troxel v. Granville*: In the Battle Between Grandparent Visitation Statutes and Parental Rights, "The Best Interest of the Child" Standard Needs Reform*, 40 Brandeis L.J. 803, 803 (2002).

22. *See* Segal & George, *supra* note 18, at 7.

23. *See* Hiller v. Fausey, 904 A.2d 875, 895 (Pa. 2006); Segal & George, *supra* note 18, at 7; Jacquelyn E. Avin, Note, *Grandparent Visitation: The One and Only Standard–Best Interests of the Child:* Fairbanks v. McCarter, *330 Md. 39, 622 A.2d 121 (1993)*, 24 U. Balt. L. Rev. 211, 215 (1994) (noting that grandparents have a "nurturing relationship" with grandchildren, which is "especially important to a child when divorce divides the nuclear family").

Parents typically support their children spending time with grandparents.[24] There are circumstances, however, where parents object to grandparent visitation.[25] At common law, grandparents were without recourse since most courts would not order visitation over a parent's objection.[26]

> The rationale for the common law rule was explained as follows: the parent's obligation to allow grandparent visitation is moral not legal; a judicial award of visitation would hinder parental authority; forcing the child into the center of conflict between grandparent and parent is contrary to the child's best interests; and, natural ties, not judicial intervention, are the best means of restoring family harmony.[27]

The common law rule no longer applies. Between 1965 and 1988, every state legislature enacted a grandparent visitation statute[28] in recognition of the changing American family.[29] The statutes vary as to who has standing to petition for visitation, when a person may petition, and what standard courts should apply in considering visitation claims.[30]

Most state statutes require a disturbance in the traditional family relationship before a grandparent may have standing to sue.[31] Statutes commonly grant standing to a grandparent if visitation is restricted or denied after the child's parents divorce, one parent dies, or if the child previously lived with the grandparent.[32] Incarceration and drug abuse are also common events that change the family dynamic and lead to disputes over visitation.[33] A few states allow grandparents to petition for visitation when the family is still intact.[34]

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24. *See* Katharine T. Bartlett, *Grandparent Visitation: Best Interests Test Is Not in Child's Best Interests*, 102 W. Va. L. Rev. 724, 726 (2000) ("[P]arents can allow contact, and they usually do, when they feel it is beneficial to the child. Ordinarily parents do not need to be required by a court to allow the child to visit with the grandparents.").

25. *See supra* note 10 and accompanying text.

26. *See* Karp, *supra* note 17, at 1.

27. Naomi Karp, *Recent Case Law on Grandparent Visitation*, *in* Grandparent Visitation Disputes, *supra* note 17, at 23, 24.

28. *See* Segal & George, *supra* note 18, at 5.

29. *See* Troxel v. Granville, 530 U.S. 57, 64 (2000) ("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."); Hawk v. Hawk, 855 S.W.2d 573, 576 n.1 (Tenn. 1993) (recognizing that grandparent visitation statutes were "undoubtedly the product of the nation-wide increase in the number of families broken by divorce"); *see also* N.Y. Dom. Rel. Law § 72, ch. 657, § 1 (McKinney Supp. 2007) (historical and statutory notes section) (recognizing that there are "413,000 children living in grandparent headed households in New York state," and that "grandparents play a special role in the lives of their grandchildren and are increasingly functioning as care givers in their grandchildren's lives").

30. *See* Segal & George, *supra* note 18, at 6-13 (explaining how all fifty state statutes respond to each of these questions).

31. *See id.* at 9.

32. *Id.*

33. *See supra* note 10 and accompanying text.

34. *See* Segal & George, *supra* note 18, at 8; *see also* R.K. v. A.J.B., 666 A.2d 215, 216-17 n.2 (N.J. Super. Ct. Ch. Div. 1995) (noting that a "grandparent's right to visitation now

Generally, a grandparent petitions the court by filling out an affidavit explaining the situation and why it would be in the best interests of the child to have visitation time with the grandparent.[35] Some state statutes specify the court in which such petitions must be filed.[36] Once filed, a judge reviews the petition and may order the parties to submit to mediation,[37] issue a court order awarding visitation rights, or decide that a trial should be held.[38]

Procedural rules for grandparent visitation suits vary by state. Some state statutes expressly allow modification of visitation orders.[39] Others provide for counseling or mediation if one party is willing to pay for such services.[40] A few states provide that the petitioner must pay attorneys' fees if some element of good faith is missing.[41]

2. Defining the Dispute: Whose Rights Are at Stake? Parental Versus Grandparental Versus Children's

A central question in the debate over grandparent visitation is whose rights are really at stake. Is it the parents' constitutional right to control the upbringing of their children? Is it the children's right to have a meaningful relationship with their grandparents? Is it the grandparents' statutory right

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exists notwithstanding the integrity of the child's family unit"); Emanuel S. v. Joseph E., 577 N.E.2d 27, 28-29 (N.Y. 1991) (holding that a grandparent may demonstrate standing to obtain visitation time with a grandchild who has a nuclear, intact family); Frances E. v. Peter E., 479 N.Y.S.2d 319, 323 (Fam. Ct. 1984) (holding that a grandparent may seek visitation rights with a grandchild who has an intact family).

35. *See, e.g.*, Okla. Stat. Ann. tit. 10, § 5(E)(1) (West 2006) (vesting the court with jurisdiction to grant visitation "upon the filing of a verified application for such visitation rights"); Leonard L. Loeb, *Suggestions for Counsel Representing Parents or Grandparents*, *in* Grandparent Visitation Disputes, *supra* note 17, at 49, 49 ("[G]randparents . . . may simply petition the court for visitation . . . .").

36. *See, e.g.*, Ky. Rev. Stat. Ann. § 405.021(2) (LexisNexis 1999) (stating that a petition must be filed in circuit court); N.D. Cent. Code § 14-09-05.1 (2004) (stating that a petition must be filed in district court in conjunction with a divorce proceeding or, if no divorce proceeding has been instituted, as a civil action in the court of the county of residence of the child).

37. *See, e.g.*, Ark. Code Ann. § 9-13-103(g) (Supp. 2005) (discussing mediation); Okla. Stat. Ann. tit. 10, § 5(E)(2)-(3); *see generally* John M. Haynes, *The Use of Mediation in Grandparent Visitation Disputes*, *in* Grandparent Visitation Disputes, *supra* note 17, at 79, 79.

38. *See* Marcia B. Gevers, *Practice Tips for Attorneys Representing Grandparents*, *in* Grandparent Visitation Disputes, *supra* note 17, at 41, 44-46 (discussing grandparent visitation petitions and trials).

39. *See, e.g.*, Ark. Code Ann. § 9-13-103(f)(4)(C); Miss. Code Ann. § 93-16-5 (West 1999); Neb. Rev. Stat. § 43-1802(3) (2004).

40. *See, e.g.*, Ark. Code Ann. § 9-13-103(g); *see also* Okla. Stat. Ann. tit. 10, § 5(E)(2)-(3) (discussing mediation).

41. *See, e.g.*, Me. Rev. Stat. Ann. tit. 19-A, § 1804 (2006) (providing for fees if a party fails to mediate in good faith); Okla. Stat. Ann. tit. 10, § 5(E)(6)(d), (E)(7), (H) (awarding fees if the court sees fit); Utah Code Ann. § 30-3-5(6) to (7) (Supp. 2006) (allowing for fees if a petition to modify a visitation order is denied, and the petition was not made in good faith).

to have a meaningful relationship with their grandchild? Or is it the state's authority to promote the welfare of children?

The plurality in *Troxel* viewed the conflict as primarily between the parents' constitutional right and the state's interest.[42] It did, however, recognize that "children should have the opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents."[43] The plurality's recognition of a child's interest did not go as far as Justice John Paul Stevens's dissent, however, in which he argued that a child has a right to a meaningful relationship with his or her grandparents.[44]

The Supreme Court has recognized that parental rights to the care of children might extend beyond the nuclear family to grandparents in certain circumstances. In *Moore v. City of East Cleveland*, a grandmother challenged the constitutionality of a zoning regulation that permitted only certain family members to live together.[45] The grandmother lived with her two grandsons, who were related as cousins, not as brothers.[46] Their living arrangement was prohibited by the statute.[47] Had the grandchildren been related as brothers, the statute would have permitted such an arrangement.[48] The Court invalidated the statute on substantive due process grounds, holding that it infringed on family privacy rights.[49] The Court further stated that such privacy rights are not limited to the nuclear family, acknowledging that grandparents often play a significant role in child-rearing decisions.[50]

Although the Court implied the extension of due process protection to the grandparental relationship, the Court did not explicitly recognize that a grandparent has a right to a meaningful relationship with a grandchild. Further, any extension of due process protection may be limited to the facts of the case. *Moore* did not involve grandparental rights pitted against parental rights, but rather grandparental rights pitted against the state.[51] Thus, the facts did not implicate the traditionally protected parental due

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42. *See* Troxel v. Granville, 530 U.S. 57, 65-67 (2000).

43. *Id.* at 64.

44. *See id.* at 86-90 (Stevens, J., dissenting). Justice John Paul Stevens stated in his dissent,

> Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.

Id. at 86.

45. Moore v. City of E. Cleveland, 431 U.S. 494, 495-97 (1977).

46. *Id.* at 496.

47. *See id.* at 497.

48. *See id.* at 496 n.2.

49. *Id.* at 504-06.

50. *Id.* at 505.

51. *See supra* note 45 and accompanying text.

process right. In visitation disputes, where the parental interest is paramount, *Moore* may not apply as forcefully.[52]

Furthermore, in *Michael H. v. Gerald D.*, the Supreme Court refused to extend the parental right of care, custody, and control of a child beyond the marital family.[53] In that case, a married woman named Carole had an extramarital affair with Michael H. that produced a child, Victoria.[54] Under California law, Carole's then-husband Gerald was presumed to be Victoria's father because the statute presumed the husband of the mother to be the father of the child.[55] Michael H. challenged the law on substantive due process grounds, arguing that the parental right to the custody of the child extended to him as a biological parent.[56] The Court upheld the statute, explaining that substantive due process rights, such as the parental right over a child, derive from liberties that traditionally have been afforded protection.[57] Michael H.'s relationship with Victoria, as the biological father of an illegitimate child, was not traditionally protected.[58]

Similarly, the grandparental relationship does not fit within the *Michael H.* conception of the marital family and is not a relationship that traditionally has been afforded protection.[59] American courts have never explicitly recognized a grandparent's right to have a meaningful relationship with a grandchild. Courts do recognize that a grandparent has statutory rights to petition for visitation and to be granted visitation if the relevant state statute standard is met.[60] However, no court has explicitly recognized a grandparent's constitutional right to visit with his or her

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52. The Supreme Court of Pennsylvania explained the distinction between parental and grandparental rights in the recent case, *Hiller v. Fausey*, 904 A.2d 875 (Pa. 2006). Justice Max Baer explained that grandparental interests come into play only after parental rights have been considered. *Id.* at 899. Further, he reiterated that grandparental rights are entitled to "little weight." *Id.*

> Although third-party interests, the so-called external factors, may then be considered by the court only after resolving those interests that are fundamental. Often, non-parents, especially grandparents, form an emotional bond with the child. They may seek to perpetuate a continuing relationship with that child through visitation. Although they may sometimes enjoy a protected interest in the companionship of the child when standing in loco parentis, I agree that, within the legal landscape, the interests of the grandparents are entitled to little weight in comparison to the stronger interests of the parents and the children. Their greatest consideration only enters into a determination of the child's best interests.

Id.

53. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989).

54. *Id.* at 113.

55. *Id.*

56. *Id.* at 119-21.

57. *Id.* at 123-24.

58. *Id.* at 124.

59. The Court in *Michael H.* explained that only Gerald D., Carole, and Victoria were within the marital family. *Id.* at 124.

60. *See* Joan Catherine Bohl, *Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm*, 48 Drake L. Rev. 279, 316-17 (2000) (explaining that courts treat "grandparent visitation [as] a purely statutory right").

grandchild.[61] Even Stevens's dissent in *Troxel* notes that the battle over grandparent visitation includes only three parties: the state, the parent, and the child.[62] In fact, a Georgia appellate court has even stated that courts should not consider the interests of grandparents in determining visitation awards.[63]

It is ironic that much of the discussion over grandparent visitation is cloaked in the phrase "grandparent visitation rights," even though no court has specifically held that a grandparent has a right to visit with a grandchild. When discussing this topic, it is important to separate the language of rights from the substance of whose rights are actually at stake. This Note proceeds with two competing interests in mind: the parent's and the state's.[64]

B. *Development of the Best Interests Standard*

Part I.A discussed the emergence of grandparent visitation rights and the rights that a court must examine when hearing a visitation dispute. In addition to sorting out whose rights are at stake, courts must also determine which substantive standard to apply. Part I.B explains the development and application of the best interests standard to visitation disputes.

The standard governing parental rights concerning their children has undergone many transformations. Early American law viewed children as the property of their fathers, and gave full custody rights to fathers.[65] Children and fathers had mutual obligations: Fathers had to support their children, and children had to give all of their earnings to their father.[66] This view of child custody changed as a result of advocacy efforts in the early twentieth century.[67] Reformers argued that it unfairly denied mothers custody of their children.[68] In response to such advocacy, legislatures and courts adopted the tender years presumption, which gave custody to the

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61. The only language even implying that a grandparent might have rights regarding his or her grandchild is in Justice Anthony Kennedy's dissent in *Troxel*. Justice Kennedy argues that, where a grandparent has a substantial relationship with the child, the grandparent thereby attains a right vis-à-vis the parent. *See* Troxel v. Granville, 530 U.S 57, 99-101 (2000) (Kennedy, J., dissenting).

62. *See supra* note 44 and accompanying text.

63. "'[A]ny detrimental impact to the grandparents through the loss of visitation opportunities with a grandchild, whether due to the death or divorce of a child's parents, relocation of the family, or other unfortunate circumstances, is irrelevant to the court's determination of whether or not to grant visitation rights to the grandparents.'" Luke v. Luke, 634 S.E.2d 439, 442 (Ga. Ct. App. 2006) (quoting Hunter v. Carter, 485 S.E.2d 827 (Ga. Ct. App. 1997)), *cert. denied*, No. S06C2088, 2006 Ga. LEXIS 867 (Oct. 16, 2006).

64. This does not mean that the child's interest is disregarded. Rather, this Note will argue that the child's interest is best effectuated by deferring to parental decision making. *See infra* notes 321-30 and accompanying text.

65. *See* Mary Kate Kearney, *The New Paradigm in Custody Law: Looking at Parents With a Loving Eye*, 28 Ariz. St. L.J. 543, 547 (1996).

66. *See* Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 Notre Dame L. Rev. 325, 333 (2005).

67. *See* Kearney, *supra* note 65, at 547-48.

68. *See id.* at 547.

mother as long as she were deemed fit to care for the child.[69] The tender years presumption is based on the belief that a child's primary need is his or her mother's love and care, and that mothers are better able than fathers to fulfill these needs.[70] During the middle of the twentieth century, reformers again argued for a new standard. They maintained that the tender years presumption violated both procedural due process and the Equal Protection Clause by excluding men from equal consideration in custody disputes.[71]

A gender-neutral standard soon materialized[72] when legislatures and courts adopted the best interests of the child standard.[73] The standard requires courts to determine custody based on which placement (the mother or the father) would be in the best interests of the child, without any preconceived notions based on the parent's sex. It was not until 1965 that state legislatures imported this standard to the grandparent visitation context.[74] Beginning in 1965, most states enacted grandparent visitation statutes that adopted the best interests standard. Courts applied the best interests language to the facts of specific cases and, in so doing, gave meaning to the standard.[75]

Some courts developed multi-factor tests to determine what was in a child's best interests. New Jersey's pre-*Troxel* grandparent visitation statute included the following list of factors:

> (1) The relationship between the child and the applicant; (2) The relationship between each of the child's parents or the person with whom the child is residing and the applicant; (3) The time which has elapsed since the child last had contact with the applicant; (4) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing; (5) If the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child; (6) The good faith of the applicant in filing the application; (7) Any history of physical, emotional or sexual abuse or neglect by the applicant; and (8) Any other factor relevant to the best interests of the child.[76]

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69. *See id.* at 548; Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 Cal. L. Rev. 615, 619-20 (1992).

70. *See* Kearney, *supra* note 65, at 548.

71. *See id.* at 549; *see also* Johnson v. Johnson, 564 P.2d 71, 75 (Alaska 1977); Bazemore v. Davis, 394 A.2d 1377, 1380 (D.C. 1978); Watts v. Watts, 350 N.Y.S.2d 285, 287-88 (Fam. Ct. 1973) (rejecting the tender years doctrine because the best interests of the child are effectuated without "sex preconceptions of any kind").

72. *See* Kearney, *supra* note 65, at 549.

73. This standard first emerged in the middle of the nineteenth century. *See* Jill Elaine Hasday, *The Canon of Family Law*, 57 Stan. L. Rev. 825, 849 (2004). However, it was not widely used in custody disputes until the middle of the twentieth century. *See* Kearney, *supra* note 65, at 549.

74. *See* Segal & George, *supra* note 18, at 5-8.

75. For an example of an early case that gave meaning to the best interests standard, see *Lo Presti v. Lo Presti*, 355 N.E.2d 372 (N.Y. 1976) (holding that animosity between the child's parents and grandparents is not determinative in the analysis of what is in the best interests of the child).

76. N.J. Stat. Ann. § 9:2-7.1 (West 2002).

One Massachusetts family law judge described the factors he used to determine a child's best interests as follows:

> (1) Can the grandparents provide a safe, responsible and satisfactory atmosphere for the proposed visit? (2) What is the history of grandparent visitation in the past? (3) Is the child emotionally stable? Physically healthy? (4) Are the grandparents physically and emotionally equipped for handling visitation? (5) Is there an earnest desire on the part of the grandparents and the grandchild to have a meaningful visitation relationship? Or are the visits requested for any other reason? (6) What are the wishes of the child?[77]

Courts do not have expertise in the social development of children, so they often defer to experts, such as social scientists, on what is in the best interests of the child.[78] These experts "supply [courts] with up-to-date scientific concepts of proper child raising' that they might apply in judging and, where possible, rehabilitating parents who fall 'below acceptable standards."[79] Usually, these experts are social workers or psychologists who can testify to the developmental needs of children.[80] Sometimes, it is necessary to have a court-appointed psychologist evaluate all the parties to the dispute to determine what is in the best interests of the child.[81]

C. Troxel *and the Emergence of the "Best Interests Plus" Standard*

Part I.B explained the development and application of the best interests standard. Part I.C discusses the Supreme Court decision in *Troxel v. Granville* and the death knell of the best interests standard. This section then explains the new standards that emerged out of *Troxel* to replace the best interests standard.

For three decades, most states applied the best interests standard to visitation disputes without hesitation.[82] In 2000, the Supreme Court altered the terrain of grandparent visitation disputes with its decision in *Troxel*.[83] At issue in *Troxel* was a sweeping grandparent visitation statute that allowed "any person" to seek visitation "at any time" and granted such visitation if it would "serve the best interest[s] of the child."[84]

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77. Ernest Rotenberg, *Guidance for Judges Hearing Grandparent Visitation Cases*, *in* Grandparent Visitation Disputes, *supra* note 17, at 71, 73.

78. *See* Dana Mack, The Assault on Parenthood 84 (1997).

79. *Id.* (internal quotation marks omitted).

80. *See* Gevers, *supra* note 38, at 43.

81. *See id.*

82. *See* Segal & George, *supra* note 18, at 11-12 (noting that forty-one states used the best interests standard and the remaining states used variations thereof).

83. 530 U.S. 57 (2000).

84. *See* Wash. Rev. Code Ann. § 26.10.160(3) (West 2005) ("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.").

Tommie Granville and Brad Troxel lived together with their two children until the couple separated in 1991.[85] After the separation, Brad regularly brought the children to the home of his parents, Jenifer and Gary Troxel.[86] Shortly thereafter, Brad committed suicide.[87] For a short time, Tommie allowed the children to continue to visit the Troxels, but a few months later, she notified the Troxels that she wished to limit visitation to once per month.[88] The Troxels petitioned for increased visitation rights under Washington's visitation statutes.[89] Specifically, they requested "two weekends of overnight visitation per month and two weeks of visitation each summer."[90]

1. Plurality, Concurrences, and Dissents

Over six years of litigation ensued until the case finally reached the Supreme Court in January 2000. The Supreme Court issued six different opinions and did not lend much clarity to the dispute. The plurality[91] found that the Washington statute unconstitutionally infringed on the "fundamental right of parents to make decisions concerning the care, custody, and control of their children."[92] The plurality discussed a long line of substantive due process cases that establish a parent's right to direct the way in which his or her child is raised.[93]

One such case is *Meyer v. Nebraska*, where the Supreme Court held that a Nebraska statute forbidding the teaching of foreign languages to a child before he or she reaches the eighth grade violates the Due Process Clause.[94] The Court reasoned that "liberty" in the Due Process Clause was not limited to bodily restraint, but rather includes the right to "marry, establish a home and bring up children."[95] Parents have a fundamental right to control the education of their children under the Due Process Clause, and the Nebraska statute unconstitutionally infringed on that right.[96] The plurality in *Troxel* also discussed *Pierce v. Society of Sisters*,[97] where the Court struck down a law requiring children to attend public rather than private schools.[98] The Court held that parents have the "liberty . . . to direct the upbringing and

85. *Troxel*, 530 U.S. at 60.
86. *Id.*
87. *Id.*
88. *Id.* at 60-61.
89. *Id.* at 61.
90. *Id.*
91. *See id.* at 59. The plurality opinion was written by Justice Sandra Day O'Connor and joined by then-Chief Justice William Rehnquist, Justice Ruth Bader Ginsburg, and Justice Stephen Breyer.
92. *Troxel*, 530 U.S. at 66.
93. *See id.* at 65-66.
94. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
95. *Id.*
96. *Id.* at 400.
97. *See Troxel*, 530 U.S. at 65.
98. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

education of [their] children," and the statute at issue violated that fundamental right in an attempt to "standardize its children."[99] The plurality in *Troxel* used these cases and their progeny as the basis for striking down the trial court's application of the Washington statute.

The plurality determined that the statute was unconstitutional as applied for two reasons. First, the statute was overly broad in that any person could petition for visitation at any time.[100] Such a sweeping statute subjects parental decision making to court review at the whim of any third party.[101] Second, the trial court failed to give any special weight to Tommie's (the parent's) decision regarding visitation.[102] The trial court judge viewed the mother, Tommie, and the grandparents, the Troxels, on equal footing, and, in fact, placed the burden on Tommie to disprove that visitation would be in the child's best interests.[103] The plurality stated that fit parents are presumed to act in the best interests of their children.[104] Accordingly, the decisions of fit parents regarding visitation should be given some level of deference.[105] Because the Troxels did not allege that Tommie was unfit,[106] the trial court erred by not according special weight to her decision. Ultimately, the plurality found in favor of Tommie Granville, denying increased visitation to the Troxels.[107]

Justice David Souter's concurrence would have found the statute unconstitutional on its face.[108] Souter explained that the statute's "any person," "any time" provisions swept too broadly.[109] Those provisions infringed on the parent's right to control the child's upbringing by

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99. *Id.* at 534-35.
100. *Troxel*, 530 U.S. at 67.
101. *Id.*
102. *Id.* at 69.
103. *Id.*
104. *Id.* at 68.
105. *Id.* at 68-69.
106. *Id.* at 68. Fitness is a vague term that is defined differently by many courts and legislatures. Generally, fitness means that a parent can adequately care for his or her child and carry out regular caretaking responsibilities. For a specific definition of unfitness, see Okla. Stat. Ann. tit. 10, § 5(D)(2)(b) (West 2006) (stating that fitness "includes, but is not limited to, a showing that a parent . . . (1) has a chemical or alcohol dependency, for which treatment has not been sought or for which treatment has been unsuccessful, (2) has a history of violent behavior or domestic abuse, (3) has an emotional or mental illness that demonstrably impairs judgment or capacity to recognize reality or to control behavior, (4) has been shown to have failed to provide the child with proper care, guidance and support to the actual detriment of the child . . . or (5) demonstrates conduct or condition which renders him or her unable or unwilling to give a child reasonable parental care. Reasonable parental care requires, at a minimum, that the parent provides nurturing and protection adequate to meet the child's physical, emotional and mental health").
107. *Troxel*, 530 U.S. at 75.
108. Justice David Souter's opinion makes the four-justice plurality the operative opinion. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." (internal quotation marks omitted)).
109. *Troxel*, 530 U.S. at 76-77 (Souter, J., concurring).

subjecting the parent to the judge's choice of a child's associations "merely because the judge might think himself more enlightened than the child's parent."[110] Implicit in Souter's argument is the assumption that the right to control the upbringing of a child includes the right to determine a child's personal associations.[111] Without the consequent right to determine visitation, the parent's right to control a child's upbringing would be a "sham."[112] According to Souter, the statute's overbreadth was sufficient reason to strike it down, and the Court did not need to assess whether best interests or harm was the appropriate standard.[113]

Justice Clarence Thomas's concurrence also recognized the parent's fundamental right to control the upbringing of his or her child.[114] Thomas stated that the parent's fundamental right "resolves this case."[115] To him, it was a clear-cut fundamental rights case, where the state's interest in "second-guessing a fit parent's decision regarding visitation" was not compelling.[116] The state's interest, however, was in promoting the best interests of the child. Thomas's argument may imply that he would not deem promotion of the best interests of the child to be a compelling state interest.

Justice Stevens' dissent explained that he would have abstained from granting certiorari because the Washington state legislature simply had to "draft a better statute."[117] Having granted certiorari, however, Stevens disagreed with the plurality's approach.[118] First, he noted that there were many situations in which the statute could have been validly applied, such as visitation granted to prior caregivers and foster care situations, and that those situations justified upholding the statute.[119] Wherever there is a "plainly legitimate sweep," Stevens wrote, "a facial challenge should fail."[120] Second, as noted above, Stevens focused on a third interest that the majority sidestepped: the child's.[121] He noted that while the parent's right is paramount, it is not absolute.[122] When a child has developed a "familial or family-like" relationship that serves "her welfare and protection," the child has an interest in preserving that relationship.[123] In such circumstances, the parent's right may be outweighed by that of the child. Accordingly, Justice Stevens would have upheld the statute and the trial court's application of it.

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110. *Id.* at 79.
111. For further discussion of this right, see *Hoff v. Berg*, 595 N.W.2d 285 (N.D. 1999).
112. *Troxel*, 530 U.S. at 78 (Souter, J., concurring).
113. *Id.* at 76-77.
114. *Id.* at 80 (Thomas, J., concurring).
115. *Id.*
116. *Id.*
117. *Id.* at 80-81 (Stevens, J., dissenting).
118. *Id.* at 81.
119. *Id.* at 85.
120. *Id.* (internal quotation marks omitted).
121. *Id.* at 86.
122. *Id.* at 86, 88.
123. *Id.* at 88.

Justice Anthony Kennedy's dissent recognized that the best interests standard may sometimes provide insufficient protection to parental rights, but nevertheless refused to facially invalidate it or to adopt a harm standard.[124] He reasoned that case law and history do not establish as fundamental the right to be free from state interference in the visitation context.[125] Further, he noted that the best interests standard has been universally adopted in most child-related family law proceedings.[126] Despite weaknesses in the best interests standard, the Constitution neither forbids its application nor requires the harm standard.[127] The best approach, he argued, would be to uphold the best interests standard and require that courts apply it carefully.[128] The constitutionality of the approach would depend on the specific facts of the case and how the reviewing court analyzed the facts.[129]

Justice Antonin Scalia was the sole Justice to argue that parents are not guaranteed freedom from state intervention in raising their children.[130] He refused to extend the parental rights recognized in earlier cases to this context.[131] Finally, he argued that this issue should be left to state legislatures because courts should not recognize unenumerated rights.[132]

It is important to note that all of the Justices, except for Scalia, recognized that a parent has a constitutional right to the care, custody, and control of his or her child. Scalia recognized this right as well, but would not base it in the Constitution; thus, it is unenforceable by courts.[133]

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124. *Id.* at 94 (Kennedy, J., dissenting).
125. *Id.* at 100.
126. *Id.* at 99.
127. *See id.* at 98.
128. *Id.* at 100-01.
129. *Id.*
130. *Id.* at 92-93 (Scalia, J., dissenting).
131. *Id.* at 92.
132. *Id.* at 93.
133. *Id.* at 91. Justice Scalia stated,

> In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all Men . . . are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

Id. at 91-92.

2. The Aftermath of *Troxel*: States' Responses

a. *"Best Interests Plus" Standard*

Following *Troxel*, visitation statutes must protect the parent's right to control the upbringing of the child. It is unclear, however, what language statutes should employ to meet that constitutional mandate.[134] States responded to this uncertainty in a variety of ways. In some states, the legislature amended the relevant visitation statute to include substantive language favoring parental rights.[135] In others, the legislature changed only the procedural burden.[136] Despite different means, these approaches had the same goal: to recognize that the best interests standard alone grants insufficient protection to parental rights and, accordingly, to give greater weight to parental rights.[137] This Note refers to these approaches collectively as the "best interests plus" standard.[138]

The revised Pennsylvania statute illustrates the first, substantive, approach to increasing parental rights. The revised statute requires both that visitation be in the best interests of the child and that visitation not interfere with the parent-child relationship.[139] Rhode Island opted for the second, procedural approach and tried to comply with *Troxel* by requiring that the substantive burden be proven by clear and convincing evidence.[140] Both of these statutes recognize that the best interests standard alone insufficiently protects parental rights, and they add substantive or procedural hurdles to increase that level of protection.

To understand how courts interpret the "best interests plus" standard, one must look at how courts apply the standard to particular sets of facts. The Pennsylvania Supreme Court's application of this standard in *Hiller v. Fausey* illustrates the meaning of the standard.[141] In *Hiller*, a child grew

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134. *See* Robyn L. Ginsberg, Comment, *Grandparent Visitation Rights: The Constitutionality of New York's Domestic Relations Law Section 72 After* Troxel v. Granville, 65 Alb. L. Rev. 206, 212 (2001).

135. *See, e.g.*, *infra* note 139 and accompanying text.

136. *See, e.g.*, *infra* note 140 and accompanying text.

137. *See* Moriarty v. Bradt, 827 A.2d 203, 219 (N.J. 2003) ("[T]he leitmotif that runs through those cases is that the best interests standard standing alone, will not survive a constitutional challenge . . . .").

138. Coincidentally, one Delaware family court recently referred to Delaware's statutory approach using "best interests plus" language. *See* C.J.W. v. C.M.H., No. CN03-07001, 2006 Del. Fam. Ct. LEXIS 23, at *2 (May 15, 2006).

139. 23 Pa. Cons. Stat. Ann. § 5311 (West 2001) ("[T]he parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the court upon a finding that partial custody or visitation rights, or both, would be in the best interest[s] of the child and would not interfere with the parent-child relationship.").

140. *See* R.I. Gen. Laws § 15-5-24.3(a)(2)(v) (2003) (requiring that the person seeking visitation must rebut, by clear and convincing evidence, the presumption that the parent's decision to deny visitation was reasonable).

141. Hiller v. Fausey, 904 A.2d 875 (Pa. 2006).

very close to his maternal grandmother in the two years leading up to his mother's death.[142] During these two years, the grandmother performed most of the basic child care needs.[143] Upon the mother's death, however, the father ceased the grandmother's visitation with the child except for three times in a one-year period.[144] The grandmother petitioned for increased visitation, and the trial court granted it.[145]

When the Pennsylvania Supreme Court analyzed the trial court's determination, it noted that the trial court applied *Troxel*'s requirement of special weight to the father's determination.[146] The trial court also applied the presumption that, as a fit parent, the father acted in the child's best interests.[147] Next, the trial court looked at the extent of visitation the father would allow if the court did not grant the visitation order and decided that it was minimal.[148] Most importantly, the trial court asked whether visitation would be in the best interests of the child.[149] The court's reasons for deciding that it was in the best interests of the child are important. The trial court noted that the "[g]randmother is warm and loving and has developed a 'longstanding, very close relationship' with [the] [c]hild, and that [the] [c]hild enjoyed spending time with her, engaging in many activities with her, and visiting with his many maternal relatives during the family gatherings that occur during the court-ordered [visitation]."[150] Further, the child was having difficulty coping with the loss of his mother and "contact with his mother's side of the family is highly beneficial emotionally for [the] [c]hild."[151]

The language that the *Hiller* court used differs markedly from language used by courts that apply the harm standard.[152] The harm standard is a more stringent alternative to the "best interests plus" standard, requiring grandparents to demonstrate not simply that visitation would be in the best interests of the child, but that the absence of visitation would cause harm to the child.[153] Under the "best interests plus" standard, courts use language like beneficial and helpful, whereas under the harm standard, courts use language like "actual emotional harm"[154] and detriment.

After deciding that it would be in the best interests of the child, the trial court asked the most important question under Pennsylvania's "best interests plus" standard: Will the order of visitation interfere with the

142. *Id.* at 877.
143. *Id.*
144. *Id.*
145. *Id.* at 878-79.
146. *Id.* at 877-78.
147. *Id.* at 877.
148. *Id.* at 877-78.
149. *Id.* at 878.
150. *Id.* (internal quotation marks omitted).
151. *Id.* at 879 (internal quotation marks omitted).
152. *See infra* notes 165-95 and accompanying text.
153. *See infra* Part I.C.2.b.
154. *See, e.g., infra* notes 170, 179 and accompanying text.

parent-child relationship?[155] This question is the essence of the best interests plus standard post-*Troxel* because it gives the "special weight" to parental rights that the Supreme Court discussed in *Troxel*. In *Hiller*, the court found the grandmother to be credible when she promised not to disparage the father in front of the child, and thus determined that visitation would not hurt the parent-child relationship.[156] *Hiller* shows that courts apply the "best interests plus" standard by tipping the scale in favor of parents by requiring that visitation not interfere with the parent-child relationship. However, courts allow grandparents to tip the scale back in their favor by showing that visitation would be "beneficial" or useful to the child.

Finally, a concurrence in *Hiller* listed factors courts should use when applying the "best interests plus" standard:

> (1) the amount of disruption extensive visitation would cause in the child's life; (2) the suitability of the grandparents' home with respect to the amount of supervision received by the child; (3) the emotional ties between the child and the grandparents; (4) the moral fitness of the grandparents; (5) the distance between the child's home and the grandparents' home; (6) the potential for the grandparents to undermine the parent's general disciplining of the child as a result of visitation; (7) whether the grandparents are employed and the responsibilities associated with such employment; (8) the amount of hostility that exists between the parent and the grandparents; and (9) the willingness of the grandparents to accept the fundamental concept that the rearing of the child is the parent's responsibility and is not to be interfered with by the grandparents.[157]

These factors emphasize the importance of stability in the parent-child relationship and lend greater protection to it than the traditional best interests standard. Such strong language is the direct result of *Troxel*'s mandate and serves as the "plus" in the "best interests plus" standard.

b. *Harm Standard*

Many states have interpreted *Troxel* to require even more than a "best interests plus" approach. These states require that grandparents show that the denial of visitation time would cause harm to the child.[158] Upon such a showing of harm (and any other state specific requirements), some states automatically award visitation time to grandparents.[159] Other states use the harm standard only as a threshold test, whereby the next step is the best interests analysis.[160] The logic is that the state may not intervene absent a

155. *Hiller*, 904 A.2d at 879.
156. *Id.*
157. *Id.* at 901-02 (Newman, J., concurring).
158. *See* Roth v. Weston, 789 A.2d 431, 450 (Conn. 2002); Beagle v. Beagle, 678 So. 2d 1271, 1275-77 (Fla. 1996); Hawk v. Hawk, 855 S.W.2d 573, 579-80 (Tenn. 1993); Williams v. Williams, 501 S.E.2d 417, 418 (Va. 1998).
159. *See, e.g.*, *Roth*, 789 A.2d at 450.
160. *See* Brooks v. Parkerson, 454 S.E.2d 769, 773 n.5 (Ga. 1995).

showing of harm; but, once the grandparents demonstrate potential harm, the state may then intervene to determine if visitation would be in the child's best interests.[161] Both approaches initially require that the grandparents make out a showing of harm.

Five states have adopted the harm standard through statutory language.[162] Other states that employ the harm standard do so by court interpretation.[163] In other words, their statutes facially require only that visitation be in the best interests of the child. State courts have interpreted that language, in light of *Troxel*, to require a showing of harm.[164]

In order to understand the meaning of the harm standard, it is important to look at the way courts apply the standard to particular sets of facts. In *Moriarty v. Bradt*, the Supreme Court of New Jersey examined a visitation dispute under the harm standard.[165] In *Moriarty*, the parents divorced and remarried other people, but the children continued to spend a lot of time with the maternal grandparents.[166] The children's mother later died of a drug overdose, and the father greatly limited visitation with the maternal grandparents because he blamed them for his ex-wife's drug addiction.[167] The court explained that the grandparents must demonstrate harm to the

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161. *See id.*

162. *See* Ga. Code Ann. § 19-7-3 (2004) ("[T]he court may grant any grandparent of the child reasonable visitation rights if the court finds the health or welfare of the child would be harmed unless such visitation is granted, and if the best interests of the child would be served by such visitation."); Mich. Comp. Laws Ann. § 722.27b(4)(b) (West Supp. 2006) (requiring a grandparent to show that the "parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health."); Okla. Stat. Ann. tit. 10, § 5(A)(1)(b) (West 2006) (requiring "a showing of parental unfitness or unsuitability or that the child would suffer harm or potential harm without the granting of visitation rights" in addition to finding visitation to be in the child's best interests); Tenn. Code Ann. § 36-6-306(b)(1) (2005) ("[T]he court shall first determine the presence of a danger of substantial harm to the child."); Tex. Fam. Code Ann. § 153.433(2) (Vernon Supp. 2006) (requiring petitioner to demonstrate "that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being").

163. *See* Hiller v. Fausey, 904 A.2d 875, 888 n.21 (Pa. 2006) (listing courts of some of the states that require harm).

164. *See, e.g.*, *Roth*, 789 A.2d 431 (requiring a showing of harm to the child and a relationship similar to that of a parent with the child); Moriarty v. Bradt, 827 A.2d 203 (N.J. 2003) (requiring a showing of harm to the child before it will consider awarding visitation rights). This approach reads a requirement of harm into the statute, thereby preserving its constitutionality after *Troxel*. *See Roth*, 789 A.2d at 449-50. As the Supreme Court of Connecticut explained in *Roth*:

> We have the option simply to invalidate the statute. That course, however, would leave adrift the significant interests of the *children* harmed by the loss of visitation with a loved one, and would cause significant uncertainty concerning the rights of, and the limitations upon those persons seeking visitation. Moreover, such a decision would entail significant questions concerning the effect of the invalidation of § 46b-59 upon related provisions of §§ 46b-56 and 46b-57. . . . We therefore delineate a scheme consistent with the aforestated principles that will allow the statute to continue to function within the bounds of the constitution.

Id. at 449.

165. *Moriarty*, 827 A.2d 203.

166. *Id.* at 205-06.

167. *Id.* at 206-08.

children absent visitation with them, at which point the court would then consider what was in the children's best interests.[168]

The court found that denying the grandparents visitation rights would harm the children because the children previously had a very close relationship with the grandparents, and they had no other way to stay connected to the memory of their mother.[169] The grandparents presented expert testimony that the children were devastated by the death of their mother and that abruptly ending visitation with the grandparents would cause severe psychological damage to the children.[170] The grandparents further argued that, in their absence, the father might disparage the mother to the children, and therefore the children's only source of information about their mother would portray her as "evil."[171] Accordingly, the court upheld the visitation order.[172] The court's rationale helps clarify what constitutes harm to the child. Here, the lack of connection with a deceased parent and the consequent risk that the children will suffer psychologically constitutes harm.

In *Luke v. Luke*, the children's mother and father divorced, but continued to allow visitation with all grandparents.[173] The children spent every other weekend with their paternal grandparents, developing a very close bond.[174] When the children's father went overseas on military duty, however, the mother sought to limit the paternal grandparents' visitation.[175] The mother believed that the grandparents "shuffled" the children around too much, that the children returned from visits emotionally distressed, and that the grandmother may have slapped one of the children.[176] The Georgia Supreme Court found that the denial of visitation would cause harm to the children and awarded visitation rights to the paternal grandparents.[177] The grandparents explained that "with the children's father now serving with the U.S. Army, the children's ties with their paternal family would be virtually destroyed without such visitation."[178] Further, the grandparents had developed such an intense bond with the grandchildren that cutting off visitation with the grandparents would cause the children "actual emotional harm."[179] Here, harm includes the sudden termination of a strong, personal relationship and the threat of the children losing their memory of a parent.

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168. *See id.* at 221-22.
169. *Id.* at 224-25, 227-28.
170. *Id.* at 227.
171. *Id.*
172. *See id.* at 228.
173. Luke v. Luke, 634 S.E.2d 439, 440 (Ga. .Ct. App. 2006), *cert. denied*, No. S06C2088, 2006 Ga. LEXIS 867 (Oct. 16, 2006).
174. *Id.* at 440-41.
175. *Id.* at 441.
176. *Id.*
177. *Id.* at 443-44.
178. *Id.* at 440.
179. *Id.* at 442.

In the case of *In re Marriage of Howard*, the Supreme Court of Iowa addressed grandparent visitation for the second time post-*Troxel*.[180] The facts of *Howard* are as follows: A married couple had a daughter while going through divorce proceedings.[181] The paternal grandparents (Howards) petitioned for visitation time fearing that the divorce decree would not include grandparent visitation time.[182] The divorce decree did not grant the Howards visitation time because their son (the father) was given joint custody.[183] The court presumed that the Howards would see their granddaughter by spending time with their son.[184] Their son later lost custody, though, due to his failure to comply with a court-ordered drug rehabilitation program.[185] The Howards again petitioned for visitation, and the mother decided to grant visitation to the Howards, so long as it was supervised and minimal.[186] The Howards had four outings with the granddaughter following this agreement, all supervised by the mother.[187] The mother then expressed that "she did not foresee a time" that she would ever allow the Howards to have unsupervised visits with the granddaughter,[188] so the Howards petitioned the court for formal visitation rights for the third time. The trial court granted such rights.[189]

On appeal, the Iowa Supreme Court reversed and denied visitation rights to the Howards.[190] The court adopted the harm standard, and found that lack of visitation with the Howards would not cause harm to the grandchild.[191] It acknowledged that children could be harmed by denial of visitation after a well-established relationship with the grandparents, but found no such relationship.[192] The court implied that the Howards had not developed a meaningful relationship with their grandchild, such that ending visitation would damage the child's psyche.[193] Without a pre-formed relationship, there is no compelling interest that would justify court intervention.[194] Merely denying a relationship with grandparents that would be beneficial, but that has not yet been developed, does not constitute harm.[195] This case demonstrates that it reaches the level of harm only if the relationship was fully developed and meaningful prior to the denial of visitation.

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180. *In re* Marriage of Howard, 661 N.W.2d 183 (Iowa 2003).
181. *Id.* at 185.
182. *See id.*
183. *See id.*
184. *See id.*
185. *Id.*
186. *Id.* at 186.
187. *Id.*
188. *Id.*
189. *Id.* at 187.
190. *Id.* at 192.
191. *See id.* at 189-90.
192. *See id.* at 191.
193. *See id.* at 191-92.
194. *See id.* at 190-91.
195. *See id.*

II. *TROXEL*'S REMAINING QUESTION

Part I of this Note recounted the history of grandparent visitation rights and the impact of *Troxel* on various states' approaches. Part II discusses the two competing standards that emerged out of *Troxel*: the "best interests plus" standard and the harm standard. This discussion characterizes and examines the arguments of those who support and oppose each standard.[196]

A. *The "Best Interests Plus" Standard*

1. The "Best Interests Plus" Standard Effectuates the Intent of Legislatures in Passing Visitation Statutes

From the 1960s through the 1980s,[197] state legislatures enacted grandparent visitation statutes to foster grandparent-grandchild relationships.[198] Legislatures recognized the importance of such relationships, and sought to implement the broadest possible visitation rights in order to nurture these relationships.[199] Although there is little legislative history on these statutes,[200] courts have recognized that the intent of legislatures in enacting grandparent visitation statutes was to foster grandparental relationships and to promote broad visitation rights.[201]

The "best interests plus" standard best effectuates the legislative intent behind visitation statutes. "Best interests plus" places a lesser burden on grandparents seeking visitation rights than does the harm standard.[202] Rather than demonstrate harm, grandparents merely must show that

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196. The purpose of Part II is to characterize arguments typically made that support and undermine each standard. Not all of these arguments correspond with this Note's conclusions. This Note addresses them only to clarify the benefits and problems associated with each standard.

197. *See* Segal & George, *supra* note 18, at 5-8.

198. *See supra* note 29 and accompanying text.

199. *See supra* note 29 and accompanying text.

200. *See* Phyllis C. Borzi, Note, *Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interests of the Child*, 26 Cath. U. L. Rev. 387, 393 (1977) (explaining that there is no legislative history on these statutes).

201. The plurality in *Troxel* explains that states enacted such statutes in recognition of the increased role that grandparents were playing in children's lives and with a desire to protect such relationships. *See* Troxel v. Granville, 530 U.S. 57, 64 (2000). The plurality implies that legislatures intended broad visitation rights by stating that legislatures recognized that children should have close relationships with grandparents. *See id.*

> 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. 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. The States' nonparental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents.

Id.

202. *See* Roth v. Weston, 789 A.2d 431, 451 (Conn. 2002).

visitation is in the best interests of the child and typically prove one or two other state statutory requirements (for example, that visitation will not harm the parent-child relationship or that visitation will be in the child's best interests by clear and convincing evidence). Overall, "the statutory standard of the best interest of the child is a much lower threshold than the requirement of proving significant harm."[203] This leniency translates into more frequent awards of grandparent visitation.

It is a long-standing principle of statutory interpretation that statutes should be construed to effectuate the legislature's intent.[204] Proponents of the "best interests plus" standard argue that, because the legislature intended broad visitation rights and strong grandparental relationships, the "best interests plus" standard should be applied.[205]

2. The "Best Interests Plus" Standard Recognizes the Changing Family and Need for Extended Family Networks

Over the past few decades, the nature of the American family changed dramatically.[206] As women entered the workforce and the divorce rate rose,[207] the traditional, nuclear family dissolved to a degree.[208] Many single-parent households arose, and persons outside the nuclear family helped to raise the children.[209] Grandparents frequently assumed this position.[210] The Supreme Court of New Hampshire recognized this phenomenon in the mid-1980s:

> One of the frequent consequences, for children, of the decline of the traditional nuclear family is the formation of close personal attachments between them and adults outside of their immediate families. Stepparents, foster parents, grandparents and other caretakers often form close bonds and, in effect, become psychological parents to children whose nuclear families are not intact . . . . It would be shortsighted indeed, for this court not to recognize the realities and complexities of modern family life . . . ."[211]

The "best interests plus" standard is more likely than the harm standard to preserve a grandparental relationship once formed. Even if a grandparent participated actively in child rearing, as explained above, the grandparent's

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203. *Id.*

204. *See* United States v. Freeman, 44 U.S. 556, 565 (1845).

205. *See* Hiller v. Fausey, 904 A.2d 875, 890 (Pa. 2006) (stating that adopting the harm standard "would set the bar too high, vitiating the purpose of the statute and the policy expressed in [the statute], which is to assure the continued contact between grandchildren and grandparents"); Brief for the American Association of Retired Persons and Generations United as Amici Curiae Supporting Petitioners at 3-19, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-138) [hereinafter Brief for the AARP and Generations United].

206. *See supra* note 19-20 and accompanying text.

207. *See supra* note 19-20 and accompanying text.

208. *See* Karp, *supra* note 17, at 1.

209. *See* Troxel v. Granville, 530 U.S. 57, 63-64 (2000).

210. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 504-05 (1977).

211. Roberts v. Ward, 493 A.2d 478, 481 (N.H. 1985).

role in the child's life is not secure because the parent can challenge the grandparent visitation. The "best interests plus" standard makes it slightly easier for grandparents to maintain a relationship with grandchildren despite a parent's challenge to the visitation.[212] This leniency recognizes grandparents' increasing role in children's lives and protects the relationship that children form with their grandparents.[213]

3. The "Best Interests Plus" Standard More Likely Allows Grandparents to Serve as Important Resources for Their Grandchildren

Grandparental relationships may greatly benefit children. The "grandparent-grandchild bond is unique and precious, and stronger than any other except that between parent and child. Grandparents are said to provide stability and support in a child's life, especially when parents are divorced or separated, or a parent has died."[214] In such circumstances, grandparents can help "neutraliz[e] the damaging effects of divorce, death, or drug [addiction]."[215] Grandparental relationships may even give something to a child that, arguably, a parent cannot. Grandparents may provide information about the history and traditions of a family. They can offer "roots and a sense of identity" to grandchildren.[216]

The "best interests plus" standard recognizes the value of these benefits. The standard allows children to maintain a meaningful relationship with grandparents if the grandparents show that it is in the best interests of the children (and any other state-specific requirements). It can be argued that the harm standard, by requiring a showing of harm, denies the value of the benefits derived from the grandparental relationship. The harm standard assumes that no benefit from the grandparental relationship would justify intrusion into family life; rather, only harm to the child absent visitation would support such an intrusion. The "best interests plus" standard properly values grandparental relationship benefits by allowing these benefits to justify court intervention.

4. Because Grandparental Visitation Is Temporary and Occasional, the Resulting Intrusion upon Parental Authority Is Minimal

Proponents of the "best interests plus" standard argue that it does not significantly divest parental authority.[217] While they acknowledge some level of intrusion into parental authority, they argue that the intrusion is

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212. *See supra* notes 202-03 and accompanying text.

213. For a discussion of state recognition of extended families and the need for protection of the grandparental relationship, see *Troxel*, 530 U.S. at 63-64.

214. *See* Segal & George, *supra* note 18, at 7 (internal quotation marks omitted).

215. Hiller v. Fausey, 904 A.2d 875, 895 (Pa. 2006).

216. *See* Segal & George, *supra* note 18, at 7 ("[G]randparents are believed to be uniquely qualified to provide roots and a sense of identity to their grandchildren.").

217. *See Hiller*, 904 A.2d at 903; Brief for States of Washington et al. as Amici Curiae Supporting Petitioners at 18, *Troxel*, 530 U.S. 57 (No. 99-138) [hereinafter Brief for the States of Washington et al.].

simply not that great,[218] because visitation is not the equivalent of custody. Visitation is merely a "temporary and occasional" intrusion into parental authority.[219] Visitation arrangements with grandparents can be as little as one weekend per year or as frequent as two full weekends per month.[220] Even under a system of generous visitation rights,[221] a child still spends twenty-six out of thirty days per month with her parents. "Best interests plus" proponents defend the standard on the grounds that such transient and limited exposure to grandparents cannot be deemed a serious intrusion into parental authority.[222]

5. Supreme Court Adoption of the "Best Interests Plus" Standard Allows States to Decide Which Standard Meets Their Needs

Thus far, this Note has discussed which standard state legislatures and courts should adopt in the context of grandparent visitation disputes. This section focuses instead on which standard the Supreme Court should adopt.

Family law is an area traditionally left to the states.[223] The reason for this delegation is that the federal government possesses no general police power to interfere in purely social issues, and the power to regulate interstate commerce does not extend to the family.[224] Further, a state is in a better position than the federal government to weigh which interests are important to its people. An interest that is important to one state might be less important to another. For example, one state might view children's welfare as a paramount interest of the state, and believe that the state should interfere for lesser reasons than harm in order to secure child welfare. This state would likely adopt the "best interests plus" standard. Another state, however, might view the protection of its citizens' liberties (including the fundamental right of parents to direct the upbringing of their children) as among the most important interests of the state. The legislature of this state might adopt the harm standard. These standards then reflect the state legislature's determination of which interests are most important to the state.[225]

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218. *See Hiller*, 904 A.2d at 903.

219. *Id.*

220. *See Troxel*, 530 U.S. at 61 (dealing with grandparents who petitioned for two full weekends per month and two-week-long visits per summer with the grandchildren); *see also* Laurence C. Nolan, *Beyond* Troxel: *The Pragmatic Challenges of Grandparent Visitation Continue*, 50 Drake L. Rev. 267, 281 (2002) (explaining outside bounds of typical visitation orders).

221. An example of such a generous visitation right would be a grant of two weekends per month with the grandchildren.

222. *See supra* note 217.

223. *See* Boggs v. Boggs, 520 U.S. 833, 850 (1997) ("[D]omestic relations law is primarily an area of state concern . . . ."); Santosky v. Kramer, 455 U.S. 745, 791 (1982) (Rehnquist, J., dissenting).

224. *See* United States v. Lopez, 514 U.S. 549 (1995).

225. *See Santosky*, 455 U.S. at 788 n.13, 789 n.15 (Rehnquist, J., dissenting) (explaining how New York's grandparent visitation statute reflects the New York legislature's conception of its important interests).

If the U.S. Supreme Court determined that the harm standard (rather than the "best interests plus" standard) is necessary to protect the parent's fundamental right, then no individual state could employ the "best interests plus" standard. The Court's determination that the "best interests plus" standard insufficiently protects parental rights would govern. This would result in the federal judiciary determining for the states what their interests are in the area of family law.[226] It would constitute a federal, judicial intrusion into an area traditionally left to states. If instead the Supreme Court upheld the "best interests plus" standard, it would allow the states to choose either the "best interests plus" standard or the harm standard (since the harm standard gives greater protection to parental rights). Because states should determine their own interests, and the decision to adopt either standard should ultimately reside with the states, proponents argue that the Supreme Court should adopt the "best interests plus" standard.[227]

Further, states are good testing grounds for new family law ideas.[228] Requiring the harm standard would quell social experimentation of family law on a state-by-state basis. As then-Justice William Rehnquist explained in *Santosky v. Kramer*,

> [T]he majority's approach will inevitably lead to the federalization of family law. Such a trend will only thwart state searches for better solutions in an area where this Court should encourage state experimentation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[229]

To declare that all states must use a harm standard would deprive the states of the benefits of testing new standards in family law. Thus, supporters of the "best interests plus" standard argue that it should remain available to states.[230]

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226. *See* Troxel v. Granville, 530 U.S. 57, 90 (2000) (Stevens, J., dissenting) (arguing that it should be up to the states to "assess in the first instance the relative importance of the conflicting interests that give rise to [visitation] disputes").

227. *See* Brief for the Petitioners at 27-28, *Troxel*, 530 U.S. 57 (No. 99-138) [hereinafter Brief for the Petitioners]; *see also* Brief for the AARP and Generations United, *supra* note 205, at 17-24.

228. *See* United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (explaining the role of states as laboratories to test out new ideas); *Santosky*, 455 U.S at 773 (Rehnquist, J., dissenting) (explaining the role of states as laboratories to test out new ideas specifically within the area of family law).

229. *See Santosky*, 455 U.S. at 773 (Rehnquist, J., dissenting) (internal quotation marks omitted).

230. *See supra* note 227.

6. Requiring the Harm Standard Would Invalidate Most State Grandparent Visitation Statutes

Only five states, Georgia, Michigan, Oklahoma, Tennessee, and Texas, facially require harm.[231] The rest either require harm in application or do not require harm at all.[232] If the Court were to determine that "best interests plus" gives insufficient protection to parental rights, forty-five states would probably have to amend their grandparent visitation statutes.[233]

7. A View of the Family as a Collection of Individuals and a Circumspect View of the Family Would Support the "Best Interests Plus" Standard

Certain conceptions of the family may shape whether one supports the "best interests plus" or harm standard. This section discusses hypothetical conceptions of the family that this Note poses to demonstrate the types of conceptions that would support one standard or the other.

There are two particular views of the family that might support the "best interests plus" standard. The first view conceptualizes the family as a collection of individuals. One definition of this view of the family is as follows: "A family is a living system, an entity, whose members are its interacting parts . . . . A family . . . includes individuals who share or seek to share intimate relationships with each other."[234] Each individual has his or her own interests, and the family should support the maximization of those interests. If a family is a collection of individual self seekers, then each member's personal interest is important, not just the interest of the family as a whole. This recognizes a father's interests, a mother's interests, and also the child's interests. The emphasis placed on the child's interests means that the best interests of the child are an important concern, on par with the parental right to the care, custody, and control of the child. Such a view of children's rights would weaken the justification for deference to parental decision making absent harm. The role of the state is no longer merely to protect the parent's right, but also to protect the child's right. Protection of the child's right may require the state to intervene at an earlier point. Proponents of this view of the family would support the "best interests plus" standard because it gives greater weight to the child's interests vis-à-vis the parent's fundamental right.

The second view of the family that might support the "best interests plus" standard is wary of family autonomy, and questions whether state deference

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231. *See supra* note 162.

232. *See supra* notes 162-64 and accompanying text.

233. *See* Brief for the AARP and Generations United, *supra* note 205, at 19. This source asserts that forty-nine states would have to amend their statutes. The law has since changed, and five state statutes now explicitly adopt the harm standard. *See supra* note 162.

234. John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 Wash. & Lee L. Rev. 351, 372 (1998) (quoting Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 Cornell J.L. & Pub. Pol'y 1, 4 (1996)).

to parents is always positive for the child.[235] Like the previous view, this view of family recognizes children's interests. Yet, this view claims that it is the responsibility of the state to protect children from their parents. This view recognizes that "the idyllic picture of American family life portrayed by the Supreme Court clearly does not match the contemporary reality."[236] Some families are afflicted with domestic violence, child abuse, or emotional neglect. Some parents instill views in their children that may stunt children's growth. For example, suppose a parent believes that all women are inferior to men and should be subordinate to them. The "circumspect" view of the family would posit that the state is justified in intervening to protect the child from the "ignorant" view of his parents. The state could intervene by ordering visitation with a grandparent who believes that men and women are equals because exposure to such a viewpoint would be in the best interests of the child. Under this hypothetical view of the family, near-absolute deference to parental autonomy is no longer justified. Rather, the state may intervene earlier, upon a showing that it would be in the best interests of the child, to ensure that the child's individual interest is maximized.

B. *The Harm Standard*

Part II.A explained the arguments that support and undermine the "best interests plus" standard. This section explores the alternative standard post-*Troxel*, the harm standard, by examining arguments typically made for and against its use. Recall that the harm standard requires grandparents to demonstrate that the denial of visitation would cause harm to the child.

1. The Harm Standard Is Firmly Rooted in Constitutional Law Principles

The Supreme Court has established parental autonomy concerning child rearing as an essential component of liberty under the Due Process Clause of the Fourteenth Amendment. The Due Process Clause guarantees that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."[237] In *Meyer v. Nebraska*, the Court held that a Nebraska statute forbidding the teaching of foreign languages to a child before reaching the eighth grade violated the Due Process Clause.[238] The Court reasoned that "liberty" in the Due Process Clause was not limited to bodily restraint, but rather includes the right to "marry, establish a home

235. This view of the family has not been formally presented in any work. It is merely a hypothetical conception of the family that this Note poses in order to gain a sense of what types of conceptions would support one standard or the other.

236. *See* Howard Ball, The Supreme Court in the Intimate Lives of Americans 122 (2002) (citing Am. Psychological Ass'n, Adolescent Abortion: Psychological and Legal Issues 21 (Gary B. Melton ed., 1986)).

237. U.S. Const. amend. XIV, § 1.

238. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *see also supra* notes 94-96 and accompanying text.

and bring up children."[239] Parents have a fundamental right to control the education of their children under the Due Process Clause, and the Nebraska statute unconstitutionally infringed on that right.[240] Further, in *Pierce v. Society of Sisters*, the Court struck down a law that required children to attend public rather than private schools.[241] The Court held that parents have the "liberty . . . to direct the upbringing and education of [their] children," and the statute at issue violated that fundamental right in an attempt to "standardize its children."[242] Both *Meyer* and *Pierce* recognize that parents have a fundamental right to control the way in which their children are raised, and that courts will protect decisions that fall within the "private realm of family life."[243]

The Supreme Court has continually upheld parents' substantive due process right to the care, custody, and control of their children. In *Santosky v. Kramer*, the Court reaffirmed the "fundamental liberty interest of natural parents in the care, custody, and management of their child."[244] It noted that this interest cannot be overridden merely because parents are not "model parents."[245] In *Stanley v. Illinois*, the Court reiterated that "[t]he rights to conceive and to raise one's children have been deemed essential, basic civil rights of man . . . . It is cardinal with us that the custody, care and nurture of the child reside first in the parents."[246] The Court made clear that this interest "undeniably warrants deference and, absent a powerful countervailing interest, protection."[247] However, this interest is not absolute.[248] The question is, at what point and on what grounds may the State protect children notwithstanding this liberty interest of parents?

Traditionally, state intrusion into the private realm is permissible in order to protect the state's citizens from harm. In *Prince v. Massachusetts*, a child's custodial parent (the child's aunt) challenged the constitutionality of her conviction under a child labor statute.[249] The defendant had allowed children in her custody to preach for the Jehovah's Witness religion on public highways.[250] The Court found that there were dangers in preaching on public highways and selling religious materials.[251] The state's interest in protecting children from this potential danger justified its intrusion into

239. *Meyer*, 262 U.S. at 399.
240. *See id.*
241. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); *see also supra* notes 97-99 and accompanying text.
242. *Pierce*, 268 U.S. at 534-35.
243. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
244. Santosky v. Kramer, 455 U.S. 745, 753 (1982).
245. *Id.*
246. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (internal quotation marks omitted).
247. *Id.*
248. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) ("[T]he family is not beyond regulation."); *Prince*, 321 U.S. at 166.
249. *See Prince*, 321 U.S. at 159.
250. *Id.* at 162-63.
251. *Id.* at 168-69.

private family affairs, and the Court upheld her conviction.[252] Similarly, in *Jacobson v. Massachusetts*, compulsory small pox vaccinations ordered over a parent's objection were justified as an exercise of the state's police power to regulate the public health and prevent harm to its citizens.[253] Finally, in *Parham v. J.R.*, the Court overrode the parents' decision to institutionalize their child in a mental health facility.[254] The state argued that its trained professionals found institutionalization unnecessary,[255] that limited state resources should be saved for those truly in need,[256] and that unnecessary institutionalization stigmatizes children.[257] The Court upheld the state's determination, explaining that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."[258]

Certain Supreme Court cases indicate that, absent such harm, state intrusion may not be justified. In *Wisconsin v. Yoder*, two Amish parents challenged the constitutionality of a state statute that required children to attend public schools until the age of sixteen.[259] The Amish parents allowed their children to attend public school until they reached fourteen, but challenged the last two years of compulsory public school education.[260] The Supreme Court exempted plaintiffs from enforcement of the statute because the state's interest was not great enough to override their parental or religious rights.[261] While recognizing the state's interest in education and children's welfare, the Court made clear that the state may act to further that interest only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[262] In other words, the state could not compel public school attendance and interfere in parental decision making unless the failure to do so would cause emotional or physical harm to the child. The parents demonstrated that the lack of two more years of state education would not cause any harm to the long-term welfare of the child.[263] Accordingly, the state had no basis to intervene in this private, parental decision, and the

252. *See id.* at 169-70.
253. Jacobson v. Massachusetts, 197 U.S. 11 (1905).
254. Parham v. J.R., 442 U.S. 584 (1979).
255. *See id.* at 589-90.
256. *See id.* at 604-05.
257. *See id.* at 600 (noting that societal awareness that the child has received psychiatric help can itself be damaging).
258. *Id.* at 603.
259. Wisconsin v. Yoder, 406 U.S. 205 (1972).
260. *See id.* at 207.
261. *See id.* at 234-35.
262. *Id.* at 234. One could argue that *Yoder* is case specific and that the Court held for the parents because of their free exercise interests as Amish parents, or because of social burdens on the welfare system that Amish children could pose when they reached adulthood. However, the U.S. Supreme Court addressed this in *Employment Division, Department of Human Resources of Oregon v. Smith*, when it explained that it would not have ruled as it did were it not for the parent's Due Process Clause right to control child rearing. 494 U.S. 872, 881 (1990).
263. *See Yoder*, 406 U.S. at 222.

parents were granted an exemption from compulsory public education until their children reached sixteen.[264]

These cases highlight the constitutional law principle that a state may not interfere with private child-rearing decisions of parents unless such intervention prevents harm to their children. As Howard Ball explains, "Parental conduct, whether in disciplining the child or in general decision making on behalf of the child, is generally protected unless it constitutes abuse or neglect of the child."[265] The "harm standard" recognizes those boundaries set between the state and the individual, and by deferring to parental decisions absent harm, it fully effectuates the parental right to the care, custody, and control of one's child.

Critics of the harm standard argue that there is no fundamental, constitutional right to the care, custody, and control of one's child.[266] They claim that *Meyer* and *Pierce* do not stand for such a broad proposition.[267] Rather, *Meyer* and *Pierce* should be construed narrowly to hold that there is a fundamental right to learn the German language and to attend private school, or, at the most, that *Meyer* and *Pierce* stand for the right of parents to direct their children's education, not to control all aspects of their upbringing. Beyond this narrow construction, a parent does not have a general, abstract right to the care and control of a child. It follows that state intervention in parental decisions regarding visitation does not infringe on any fundamental right, since a parent does not possess such a fundamental right. The state would not have to defer to parental decision making absent a showing of harm; the basis for drawing the line at harm would erode. Rather than heightened scrutiny, courts would apply mere rational basis scrutiny. The state would claim that serving the best interests of the child is a legitimate state interest. Further, in any particular case, the state would claim that the court's application of a visitation statute to require grandparent visitation is rationally related to the child's best interests. Thus, reading *Meyer* and *Pierce* narrowly would undercut—if not destroy—the basis for the harm standard.

However, the broad language of *Pierce* may counsel against such a narrow construction. The Court in *Pierce* established as fundamental the right of parents "to direct the upbringing and education of children under their control."[268] Upbringing is not limited to the learning of foreign languages or the choice over a child's school. Upbringing typically means

264. *See id.* at 234.

265. *See* Ball, *supra* note 236, at 123 (internal quotation marks omitted).

266. *See* Troxel v. Granville, 530 U.S. 57, 91-93 (2000) (Scalia, J., dissenting). Justice Scalia acknowledges that such a right may exist in the Declaration of Independence, but denies that it is a constitutional right. *See supra* notes 130-33 and accompanying text; *see also* Brief for the States of Washington et al., *supra* note 217, at 12-14.

267. *See* Brief for the National Conference of State Legislatures et al. as Amici Curiae Supporting Petitioners at 7-12, *Troxel*, 530 U.S. 57 (No. 99-138); *see also* Brief for the Petitioners, *supra* note 227, at 25-26 (arguing that these cases should be construed as First Amendment cases only).

268. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

the "rearing and training received during childhood."[269] In fact, the Court itself acknowledges that a parent's role is to "nurture him and direct his destiny" and "prepare him for additional obligations."[270] This definition would seem to include the right to determine a child's associations and relationships. Further, even if the Supreme Court had intended such a narrow meaning at the time, the line of cases since *Pierce* assumes a broader, fundamental right of parents to control childrearing.[271] The harm standard respects this parental right as fundamental by deferring to a parent's decisions regarding visitation absent a compelling interest—to prevent harm to children.[272]

Another problem that proponents of the harm standard may face is that posed by *DeShaney v. Winnebago County Department of Social Services*.[273] *DeShaney*'s holding raises questions about the validity of the harm standard. The issue in *DeShaney* was whether the state Department of Social Services was obligated to protect a boy, Joshua, from his abusive father, who killed him after the state became aware of such abuse.[274] The Court held that the state did not have to protect Joshua because the state has no obligation to protect its citizens from harm caused by third parties.[275] Under *DeShaney*, then, the state does not have to intervene in visitation disputes even if there is a showing of harm caused by the denial of visitation. However, this in no way invalidates the basis for the harm standard. The harm standard merely holds that the state may intervene at the point of harm, not that it must do so.

2. The Prevention of Harm Survives Strict Scrutiny, While Best Interests Does Not

Conventional constitutional analysis supports states' adoption of the harm standard. Traditionally, laws that infringe on fundamental rights are subjected to strict scrutiny.[276] Strict scrutiny requires that the government assert a compelling state interest and that the law be narrowly tailored to further that state interest.[277] Here, the fundamental right at stake is the right of a parent to the care, custody, and control of one's child.[278] The Supreme

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269. The American Heritage Dictionary of the English Language 1889 (4th ed. 2000).

270. *Pierce*, 268 U.S. at 535.

271. *See supra* notes 238-47, 259-64 and accompanying text.

272. Brief for the American Civil Liberties Union and the ACLU of Washington as Amici Curiae Supporting Respondent at 22-24, *Troxel*, 530 U.S. 57 (No. 99-138) [hereinafter Brief for the American Civil Liberties Union]; Scott C. Boen, *Grandparent Visitation Statutes: The Constitutionality of Court Ordered Grandparent Visitation Absent a Showing of Harm to the Child*, 20 J. Juv. L. 23, 26-28 (1999).

273. 489 U.S. 189 (1989).

274. *See id.* at 191-94.

275. *Id.* at 195-96.

276. *See* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997); Roe v. Wade, 410 U.S. 113, 155-56 (1973).

277. *See Washington*, 521 U.S. at 720-21; *Roe*, 410 U.S. at 155-56.

278. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000).

Court has not explicitly stated that strict scrutiny analysis applies to fundamental rights regarding family autonomy.[279] However, most state courts have held that strict scrutiny applies when a state law infringes on the fundamental right of parents to control the upbringing of their children.[280] Under state law interpretation, grandparent visitation statutes must allege a compelling state interest and be narrowly tailored towards that interest.[281]

First, the state's interest in second-guessing a fit parent's decision is not compelling. Justice Thomas asserted that this was Washington state's interest in *Troxel*,[282] though no state has officially framed its interest as such. Thomas's conception of the state interest in *Troxel* likely reflects an anti-paternalistic belief that the state should not interfere in such private decisions.[283] Regardless of the state's true interest, it is likely that the interest in second-guessing a fit parent's decisions would not be deemed compelling.[284]

Second, the state's interest in promoting children's welfare or best interests is not sufficiently compelling to justify intrusion into a parent's fundamental right. The state argues that its interest in children's welfare is so important that it trumps the right of parents to direct the upbringing of their own children. Thus, if the state considers the parent's objection to visitation but determines that visitation with grandparents is good for the child, the state may grant visitation. The problem with universally accepting best interests as a compelling interest is that the state may abuse

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279. *See id.* at 65-74 (noting that the parental right at issue is fundamental, and deserves heightened protection, but failing to announce a standard of review); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (stating that the right of a parent is fundamental, "undeniably warrants deference and, absent a powerful countervailing interest, protection").

280. *See* Roth v. Weston, 789 A.2d 431, 441-42 (Conn. 2002) (stating that strict scrutiny is required where the fundamental right of parents to the care, custody, and control of their children is implicated, and the statute infringing on that right must be narrowly tailored "so that a person's personal affairs are not needlessly intruded upon and interrupted by the trauma of litigation"); Brooks v. Parkerson, 454 S.E.2d 769, 772 (Ga. 1995) ("The right to the custody and control of one's child is a fiercely guarded right in our society and in our law. It is a right that should be infringed upon only under the most compelling circumstances." (internal quotation marks omitted)); Lulay v. Lulay, 739 N.E.2d 521, 532 (Ill. 2000) (concluding that the state must prove that the Illinois visitation statute serves a compelling state interest and is narrowly tailored to serve that interest); Moriarty v. Bradt, 827 A.2d 203, 214-15 (N.J. 2003) (noting that when the state interferes with fundamental parental rights, the statute must be narrowly tailored to a compelling state interest).

281. *See supra* note 280. *But see* Campbell v. Campbell, 896 P.2d 635 (Utah Ct. App. 1995) (applying only rational basis scrutiny to the parent's right to care and control of a child).

282. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

283. *See generally* Scott Douglas Gerber, First Principles: The Jurisprudence of Clarence Thomas (1999).

284. The interest in second-guessing a fit parent's decisions has not yet been asserted by a state in a grandparent visitation dispute. Thus, there is no case law to support the statement that such an interest would not be deemed compelling. However, since it is debatable whether the interest in promoting the best interests of children is compelling, and the interest in second-guessing a fit parent's decisions seems weaker than that, common sense tells us that the latter interest would not be deemed compelling.

this power.[285] If it is good for a child to go to church, the state can require the parent to bring the child to church. If it is good for a child to play organized sports, the state can require the parent to take the child to soccer practice.[286] The result may be that whenever the state thinks that an activity is in the best interests of the child, it can interfere with the parent's fundamental right. Accordingly, best interests cannot be sufficient to override parental rights or else the child may truly become the "creature of the State."[287] The state's interest in furthering children's welfare per se may be compelling; however, it is not sufficiently compelling to trump the parental right to direct the upbringing of children.

To further illustrate this point, one need look no further than to *Troxel*. The state interest asserted in *Troxel* was promoting the best interests of the child.[288] One lower court noted that the Troxels (grandparents) could "provide opportunities for the children in the areas of cousins and music."[289] Further, this court stated that these things were in the best interest of the children.[290] While spending time with cousins and cultural enrichment may be beneficial, one would be hard pressed to argue that they are sufficiently compelling to justify intruding on a parent's fundamental right.

Finally, grandparent visitation statutes using the "best interests plus" standard are not narrowly tailored to promote a child's best interests. In fact, such statutes may hinder a child's best interests. Generally, spending time with grandparents is a positive activity, and children can benefit greatly from such exposure.[291] All things considered though, it is not beneficial when it is ordered over a parent's objection.[292] Visitation over a parent's objection leads to damaging consequences.[293] Children witness their parent's authority being questioned and may lose faith in the ability of their parents to parent properly.[294] Further, children may be subjected to hearing their grandparents disparage their parents.[295] Whatever a child gains from the grandchild-grandparent relationship, the child may be losing in the child-parent relationship. The child-parent relationship is the primary relationship of concern, and damage to that relationship does not serve a child's best interests.[296] Thus, grandparent visitation statutes using the

285. *See* Bartlett, *supra* note 24, at 725.
286. *See id.*
287. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).
288. *See In re* Custody of Smith, 969 P.2d 21, 29 (Wash. 1998).
289. Troxel v. Granville, 530 U.S. 57, 62 (2000).
290. *See id.*
291. *See supra* notes 214-16 and accompanying text.
292. *See* Bartlett, *supra* note 24, at 724.
293. *See infra* Part II.B.9.
294. *See infra* note 356 and accompanying text.
295. *See* Stephen A. Newman, *Grandparent Visitation Claims: Assessing the Multiple Harms of Litigation to Families and Children*, 13 B.U. Pub. Int. L.J. 21, 28 (2003).
296. *See* Bohl, *supra* note 60, at 326-28. Bohl argues that the deleterious effects of court-ordered grandparent visitation cancel out the benefits. Thus, grandparent visitation statutes cannot "be justified as an exercise of state power designed to promote children's health and

"best interests plus" standard are not narrowly tailored to promote a child's best interests.

Thus far, this section has explained the constitutional analysis that a proponent of the harm standard would use to show that the "best interests plus" standard fails strict scrutiny. The state's interest in second-guessing a fit parent's decisions is not compelling, and the state's interest in promoting the best interests of the child is not sufficiently compelling to override fundamental parental rights. Even assuming that promoting the best interests of the child were sufficiently compelling, the "best interests plus" standard is not narrowly tailored to serve that interest. The question remains if there is any interest sufficiently compelling to justify intrusion into a parent's fundamental right.

The state's interest in the prevention of harm is compelling. Only at this point, when there is harm to the child, may the state intervene in family affairs. Many state courts have held that the prevention of harm is a compelling interest specifically within the grandparent visitation context.[297] As a Pennsylvania superior court explained in *Hiller v. Fausey*, "hardly a more compelling State interest exists than to keep children safe from the kind of physical or emotional trauma that may scar a child's health and physical, mental, spiritual, and moral development well into adulthood."[298] The New Jersey Supreme Court went even further in *Moriarty v. Bradt* when it stated that

> the only state interest warranting the invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent is the avoidance of harm to the child. When no harm threatens a child's welfare, the State lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit.[299]

The harm standard recognizes that the prevention of harm is the only state interest sufficiently compelling to justify intrusion into the parent's fundamental right.

3. The Harm Standard Is Appropriate Because Parents and Grandparents Are Not Equals

The harm standard is appropriate because it gives the proper weight to parents' rights vis-à-vis the statutory rights of grandparents. Parents and

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welfare." *Id.* at 327. Rather, "court-ordered grandparent visitation must be considered contrary to the best interests of the child, at least to some extent." *Id.*

297. *See* Brooks v. Parkerson, 454 S.E.2d 769 (Ga. 1995); Moriarty v. Bradt, 827 A.2d 203, 222-23 (N.J. 2003).

298. Hiller v. Fausey, 904 A.2d 875, 895 (Pa. 2006).

299. *Moriarty*, 827 A.2d at 222. The New Jersey Supreme Court explained that while its decision was interpreting the New Jersey statute at issue, it was confident that U.S. Supreme Court precedent would support its conclusion. It cited *Yoder*, *Stanley*, *Pierce*, *Meyer*, and *Prince* as support. *See id.* at 213-14.

grandparents do not stand as equals in relation to children in the same way that two parents do. Where two parents are vying for custody or visitation, a best interests standard is appropriate.[300] Both parents enjoy the presumption that they will act in the best interests of their child. Both parents share a fundamental right to the care, custody, and control of the child. The court's only determination, when looking at two equals, is what is in the best interests of the child.

A grandparent does not stand as an equal to a parent.[301] Grandparents neither share the same presumption that they act in the best interest of the child nor have the same fundamental right that parents have in the care, custody, and control of the child. They are relatives petitioning to secure their relationship with their grandchild. As such, the petition for visitation requires the judge to perform a different analysis: Rather than seeing two equals, the judge sees greater parental interests than grandparental interests. The standard that a judge applies to a visitation dispute should reflect the relative importance of the parties' interests. The harm standard recognizes that parents and grandparents do not stand as equals, and gives parental interests greater deference by requiring a showing of harm before grandparents may secure visitation.[302]

4. The Harm Standard Recognizes that Parental Rights Must Be Commensurate with Their Responsibilities

The state cannot impose on parents grave responsibilities and then deny them the rights to carry out these responsibilities. In the United States, parents have the responsibility of raising their children.[303] Parents, not the state, have the primary obligation to prepare children for citizenship.[304] They are to exercise the maturity and the judgment that children lack, and prepare them for all future obligations.[305] However, under the "best interests plus" standard, parents do not have the rights necessary to fulfill these obligations. Instead, the state retains rights, through the use of the

300. Brief for The Domestic Violence Project Inc./Safe House (Michigan) et al. as Amici Curiae Supporting Respondents at 11-12, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-138) [hereinafter Brief for Domestic Violence Project].

301. *See* Gregory, *supra* note 234, at 385 (explaining that a different standard should apply where the parties are not two natural, fit parents).

302. *See generally* Brief for the American Civil Liberties Union, *supra* note 272, at 5.

303. Parham v. J.R., 442 U.S. 584, 602 (1979); Prince v. Massachusetts, 321 U.S. 158, 161 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

304. *See Parham*, 442 U.S. at 602; *Prince*, 321 U.S. at 161; *Pierce*, 268 U.S. at 535.

305. *Parham*, 442 U.S. at 602. Parents' rights have long been recognized as part of an exchange. Parents receive rights with respect to their children in exchange for agreeing to carry out certain responsibilities. *See* Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 Yale L.J. 293, 297-98 (1988). John Locke explained this best: "The *Power . . . that Parents have* over their Children, arises from that Duty which is incumbent on them, to take care of their Off-spring, during the imperfect state of Childhood." *Id.* at 297 (citing John Locke, Two Treatises of Government 306 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

"best interests plus" standard, which hinders parents' ability to carry out their responsibilities.

Wherever authority and responsibility are separate, the authority figure is less likely to internalize the consequences of its own decisions.[306] In the context of grandparent visitation, the state asserts the right to make decisions regarding children (by ordering visitation), but does not have responsibility over them. Instead, parents have the primary obligation to raise children.[307] The result is that the state does not bear the costs of deciding to order grandparent visitation. If the state orders visitation, it is the parent that has to drive the child to the grandparent's house and the parent's relationship with the child that may suffer as a result. Because the state does not bear those costs, it may order grandparent visitation without regard to them.

If parents have responsibility for child rearing, they should have commensurate authority.[308] This results in decision making that benefits children's welfare. Parents would retain requisite authority if states employed the harm standard. Use of the harm standard makes it less likely that the state (through the courts) will exercise authority over children because it requires a more difficult showing before the state may intervene. Thus, the harm standard more likely retains authority where it places responsibility—with the parent. The harm standard, by deferring to parental decision making absent harm, gives parents the authority to carry out their obligations of child rearing.

Professor Shelley Burtt's theory on parental rights supports the proposition that parents need authority to carry out their child-rearing duties.[309] In her article, Burtt critiques the position that parents should

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306. In an efficient system, rights are allocated to the same entity that has responsibility. In *Towards a Theory of Property Rights*, Harold Demsetz explains that rights and responsibilities should reside in the same entity because it forces the decision maker to internalize the consequences of his or her decisions. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347, 347-59 (1967). By internalizing the consequences of his or her decisions (externalities), the decision maker is more likely to make efficient decisions. Demsetz uses the example of a forest with a limited number of trees. When presented with a finite forest, an individual will chop down all of the trees immediately and convert them to his or her own use, rather than conserve trees for the community as a whole to use in the future. This is because future generations will bear the costs of the decision (the lack of trees), not the individual (who has enough trees today). Since the individual does not bear the cost of the decision, he or she makes an inefficient one. Instead, if the individual bore responsibility and rights, he or she would decide to conserve the trees because he or she would shoulder the consequences of the decision.

307. *See supra* notes 303-05 and accompanying text.

308. *See* B.B.D. v. D.D. and M.D., 984 P.2d 967 (Utah 1999) (recognizing that the rights of parents are commensurate with the responsibilities that they have assumed, and consequently, that a biological father who has assumed no responsibilities with respect to a child does not deserve constitutionally protected parental rights).

309. Shelley Burtt, *The Proper Scope of Parental Authority: Why We Don't Owe Children an "Open Future," in* Child, Family, and State 243, 243 (Stephen Macedo & Iris Marion Young eds., 2003).

provide children with an "open future."[310] An open future means that children should be exposed to "diverse points of view regarding understandings of . . . life," leaving them open to choose what they want upon reaching adulthood.[311] Those supporting the "open future" role of a parent ground parental authority on the child's deficit of rationality.[312] In other words, they believe that parents control children because children lack rational thought. They analogize children's rational deficit to that of incompetents, and accordingly, treat children like incompetents.[313] Until the age of majority, we allow parents to substitute their judgment for their children's much as we allow guardians to substitute their judgment for incompetents'.

Burtt argues that this analogy between children and incompetents is misguided.[314] Although children lack rational judgment until the age of majority, they will eventually be capable of making informed, rational decisions.[315] Incompetents, however, will never be able to make such decisions. Thus, the role of a guardian over an incompetent and a parent over a child is markedly different. The parent, rather than making the child a blank slate with an open future, must prepare the child to make important decisions and to fulfill other obligations of adulthood.[316] If adult rule over children's lives is not merely to guide them through life, as with an incompetent, but rather is to prepare and equip them for future obligations, then the parent must have greater authority to fulfill those duties than the "best interests plus" standard provides. "Any fully adequate account of the distribution of authority over children must incorporate this fact, acknowledging that adult rule over children exists not simply to supply a deficit until such time as the child matures but rather actively to shape the child's morals, goals, dispositions, habits, and virtues."[317]

Ultimately, "[a] different picture of children's needs will produce a different picture of what adult authority over them exists to supply—with a corresponding change in how we judge the scope and limits of that authority."[318] If we view the parent's responsibility not just as filling the gaps of rational deficit but also preparing children for the future, the parent must have greater authority to carry this out. The question becomes exactly how much authority is necessary. Burtt argues that parents can exercise "decisive influence over their children's worldviews and values" and that "the state properly intervenes in family decision making only when [a child's] developmental needs are demonstrably in jeopardy."[319] However,

310. *See id.* at 246.
311. *Id.* at 245.
312. *See id.* at 251.
313. *See id.* at 255.
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.* at 253.
318. *Id.*
319. *Id.* at 248.

if there were no basis for the belief that parents are to prepare children for the future, the entire exercise would be purely academic. The Supreme Court provides this authority. In *Parham* and its progeny, the Court explicitly stated that it is the role of parents to prepare children for the future, and that the state cannot fulfill that role.[320] The Supreme Court's view of parental responsibilities requires that parents have requisite authority to fulfill them.

5. The Harm Standard Actually Effectuates the Best Interests of the Child

The harm standard furthers children's best interests in two distinct ways: by reaffirming children's faith in their parents and by providing continuity in children's lives. First, children's interests are best served by giving their fit parents complete authority.[321] Children learn to rely on parents as trustees of their well-being. When the state questions a parent's ability to parent, the child is left confused and unsure of his or her own welfare. "When family integrity is broken or weakened by State intrusion . . . (the younger child's) needs are thwarted and his belief that his parents are omniscient and all powerful is shaken prematurely. The effect on the child's developmental progress is invariably detrimental."[322] It is important for children to have faith in a parent's authority and consequent ability to parent, and it is important that children not second-guess their parents' decisions because they have watched others do so. These benefits are best obtained through strong parental authority,[323] protected by the harm standard.

Moreover, courts have no reason to believe that strong parental authority does not effectuate a child's best interests. It is presumed that "fit parents act in the best interests of their children."[324] Fit parents will presumably make decisions in their children's best interests about whether to allow visitation time with grandparents. Unless there is a showing of unfitness, it is legally presumed that parental control will effectuate the child's best interests. Chief Justice Ralph Cappy, dissenting in the Pennsylvania superior court case *Hiller v. Fausey*, summed up this argument:

> I find it important to note that, in my view, this construct [the harm standard, including a presumption that fit parents act in the best interests of their child] promotes the best interest of the child. On the one hand, if a grandparent is unable to demonstrate harm in cases such as this, the court may not interfere with the parent's decisions. What is left is a fit parent who is presumed to act in the child's best interests. On the other

320. *See supra* note 304 and accompanying text.

321. *See generally* Bartlett, *supra* note 24.

322. *See* William Duncan, *The Constitutional Protection of Parental Rights: A Discussion of the Advantages and Disadvantages of According Fundamental Status to Parental Rights and Duties*, *in* Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century 431, 435 (John Eekelaar & Petar Sarcevic eds., 1993).

323. *See infra* notes 375-76 and accompanying text.

324. Troxel v. Granville, 530 U.S. 57, 68 (2000).

> hand, if a grandparent adequately demonstrates harm, then the court is left with the task of drafting an order which is narrowly tailored to protect the welfare of the child. Such an order, by its very nature, promotes the best interest of the child.[325]

Second, the harm standard furthers children's best interests by ensuring continuity in their lives. Continuity is extremely important for children of all ages.[326] For toddlers, continuity in the caretaker role establishes trust in the caretaker.[327] When there is a disruption in caretaker responsibilities, the child suffers "separation distress and anxiety," and may find it difficult to trust others in the future.[328] Further, lack of continuity in the lives of older children may affect their ability to subscribe to any one set of social principles, often manifesting itself in unruly school behavior.[329] The harm standard more likely secures continuity of the caretaker role by making it more difficult for grandparents to gain visitation rights. As Joseph Goldstein, Anna Freud, and Albert J. Solnit write, "To safeguard the right of parents to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment, is to safeguard each child's need for continuity."[330]

6. The Harm Standard Awards Visitation Only Where It Is Appropriate

Since both the "best interests plus" and harm standards will sometimes allow for visitation, the question is which standard grants visitation where appropriate. It can be argued that the harm standard would result in the denial of visitation where it is necessary and beneficial for the child.[331] For example, suppose that a mother recently passed away and the father denies visitation rights to the maternal grandparents.[332] Throughout the child's life, the grandparents saw the child daily by serving as the primary caretakers while the parents were at work. After the mother's death, the grandparents were a source of stability in the child's life and helped the child cope with the mother's death in ways that the father admittedly could not. Cases with such facts might be cited to denounce the harm standard as overly rigid, suggesting that visitation should be awarded in such a case. However, in such a case, the court would most likely grant visitation rights to the grandparents under the harm standard. Where the grandparents were

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325. Hiller v. Fausey, 904 A.2d 875, 905 n.3 (Pa. 2006) (Cappy, C.J., dissenting).

326. Joseph Goldstein, Anna Freud & Albert J. Solnit, Beyond the Best Interests of the Child 32 (1973).

327. *See id.* at 32-33.

328. *Id.* at 33.

329. *See id.* at 33-34.

330. *Id.* at 7.

331. *See* Hiller v. Fausey, 904 A.2d 875, 890 (Pa. 2006) (noting that the harm standard "would set the bar too high, vitiating the purpose of the statute").

332. These are the facts of *Hiller*, a Pennsylvania superior court case wherein the court applied the "best interests plus" standard. *Id.* The court awarded visitation rights to the grandparents in this case. This Note argues that, even under the harm standard, the court would in all likelihood have granted visitation time with the grandparents.

close to the child and could help the child cope with a parent's death in a way that the surviving parent could not, a court would likely find harm in the denial of grandparent visitation. Without such visitation, the child may suffer emotionally since the surviving parent is struggling to serve as a support system for the child.[333] In the end, the "harm" standard would grant visitation in the cases where such rights are appropriate.

7. The Harm Standard Should Be Applied Because Application of the "Best Interests Plus" Standard Would Lead to Judicial Supervision of Family Life

Advocates of the harm standard argue that it protects individuals from judicial supervision of their lives while the "best interests plus" standard invites it. The "best interests plus" standard requires a judge to make a determination about what is in the best interests of the child. In order to make such a decision, the judge will inquire into the child's relationship with both the parents and the grandparents. The parents will have to explain the activities that they choose to do with the child, how much time they spend with the child, etc. In short, parents will be forced to defend life choices that they have made for their children, not just the decision to deny visitation time with grandparents.

Judicial supervision may go beyond mere questioning.[334] Judges may impose their views of child rearing on a parent. If a judge thinks that it is important for children to spend time with their grandparents, he or she can order visitation time without fear of public inquiry into such decisions or public second-guessing. This is because the "best interests plus" standard is about balancing interests. The balancing approach allows judges to place great emphasis on certain factors, even the sentimental belief that children should spend time with grandparents, without having to give specific reasons. A judge's reasons may hide under the veil of "best interests of the child."[335] The result is judicial steering of child rearing, whereby the court decides with whom a child should associate. The fear is that judicial supervision in the visitation context may lead to judicial supervision of

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333. *See id.* at 878-79.

334. *See* Mack, *supra* note 78, at 84-85 (explaining the argument that the state has become a "superparent," using its experts to determine that a parent's techniques are not in the best interests of the child, and then imposing its own "effective and enlightened" child-rearing views on parents).

335. Professor Katharine Bartlett has noted that the best interests analysis does not "compel[] transparency." *See* Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 Hofstra L. Rev. 877, 884 & n.35 (2000). Bartlett gives examples of a number of cases where courts denied custody to white mothers after they had affairs with black men. In those cases, courts used other justifications for the denial of custody, such as "that the mother lied about the affair or that her sexual activity displayed poor moral judgment." *Id.* at 884. The "best interest plus" standard allows such pretextual justifications to hide within the best interests analysis. *See id.*

family life in general.[336] As discussed in Part II.B.2 of this Note, the judge could decide that other activities, such as going to church or to museums, are also in a child's best interest.[337] The harm standard does not allow such subjective determinations. To prevent the "[descent] into judicial supervision of family life,"[338] the harm standard should be adopted. Absent harm, the state should not determine, or even question, a parent's child-rearing decisions.

8. The Harm Standard Is Determinate

The harm standard is more determinate and more capable of being applied even handedly than the "best interests plus" standard. As explained in Part I, courts have found harm where a child will have only negative images of a deceased or divorced parent in the absence of grandparent visitation.[339] Courts have also found harm in the denial of visitation where abruptly ending visitation with the grandparents would cause severe psychological damage to the child.[340] These applications of the harm standard show that it has some outer limit. To the contrary, the factors that may serve a child's best interests seem endless. The few state courts that endeavor to list best interest factors give vastly different sets of factors to consider.[341] The result is a vague standard that cannot be evenly applied to all petitioners.[342]

To be sure, there is some subjectivity even in a harm standard. One judge's definition of what is harmful to a child may be different from another's. On the whole, however, the harm standard is more clearly defined and more grounded in public consensus than the "best interests plus" standard. "While there is no consensus about what is best for a child, there is much consensus about what is very bad . . . ."[343]

Not only is the definition of the "best interests plus" standard itself vague, but so is its application. Applying the "best interests plus" standard requires that the court give "special weight" to the parent's decision regarding visitation.[344] But what is special weight?[345] Does that mean a

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336. *See* Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 Okla. L. Rev. 29, 80 (1996) ("If we collectively allow grandparent visitation to be forced upon an unwilling family for no better reason than that some robed stranger thought it best, we have embarked upon a slow [descent] into judicial supervision of family life which has neither legal limits nor a logical end.").

337. *See* Bartlett, *supra* note 24, at 725.

338. *See* Bohl, *supra* note 336, at 80.

339. *See supra* notes 169-95 and accompanying text.

340. *See supra* notes 169-95 and accompanying text.

341. *See supra* notes 76-77 and accompanying text.

342. *See* Gregory, *supra* note 234, at 386-88.

343. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226, 261 (1975).

344. Troxel v. Granville, 530 U.S. 57, 69 (2000).

345. *See* Hiller v. Fausey, 904 A.2d 875, 904 n.1 (Pa. 2006) (Cappy, C.J., dissenting) (noting that the majority does not explain what special weight is or how a court is to apply it).

little weight or a lot? Does that mean that courts should tip the scales in favor of parental rights or that courts should give greater consideration to the rationale behind the parent's decision?

Further, the "best interests plus" standard is more susceptible to being applied discriminatorily. The "imprecise substantive standard[] . . . leave[s] determinations unusually open to the subjective values of the judge."[346] Judges are empowered to make decisions that involve moral and personal beliefs about families. Social bias inevitably pervades these determinations. The result is that "[p]oorer, less educated [yet fit] parents will always look worse in relation to older, seemingly more established and settled grandparents, who often have significantly more resources."[347] Fit, single parents will also experience discrimination at the hands of judges[348] who believe that children's lives are incomplete without both a mother and a father, and may order grandparent visitation to fill that perceived void. The real problem with the infiltration of bias is not lack of fairness per se, but rather that it violates the "fundamental precept that like cases should be decided alike."[349] Cases with identical facts will be decided differently because of preconceived judicial notions of the family. The only way to minimize the infiltration of bias, and thus ensure greater uniformity, is to choose the more determinate standard of harm.[350]

9. Grandparent Visitation Suits Are Damaging to All Parties Involved, and the Harm Standard Decreases the Likelihood that Grandparents Will Bring Visitation Suits

Grandparent visitation suits can be very damaging to children. Children are subjected to the "ill feelings, bitterness, and animosity" that grow between parents and grandparents in a visitation dispute.[351] Parents complain about the way their own parents raised them, bringing up unpleasant memories from childhood.[352] Grandparents launch personal attacks on the way that their children raise the grandchildren.[353] In the end, the child is stuck in the middle and feels compelled to choose sides. Or, even worse, the child blames himself or herself. The following summarizes some of the damaging effects of visitation disputes on children:

> Children in this situation will (1) see that they are at the heart of the family strife; (2) experience the stress of loyalty conflicts; (3) perceive that the normal authority of their parent has been undermined by the power of the grandparent and the judge; (4) have to deal with attempts by

346. Santosky v. Kramer, 455 U.S. 745, 762 (1982).
347. Brief for the Domestic Violence Project, *supra* note 300, at 21.
348. *See id.*
349. Mnookin, *supra* note 343, at 263.
350. *See* Gregory, *supra* note 234, at 387 (explaining the opinion that "almost any automatic rule would be an improvement over the present situation").
351. *See* Strouse v. Olson, 397 N.W.2d 651, 655 (S.D. 1986).
352. *See* Newman, *supra* note 295, at 28.
353. *See id.*

> parents, grandparents, or both to pressure or cajole them into taking sides in the conflict; (5) be exposed to a grandparent who communicates—explicitly or implicitly—anger at and criticism of the parent; (6) feel nervous, anxious, or frightened by the compulsion to do what their mother or father (or both) strongly opposes; (7) return from visitation to a parent who feels angered and upset by the grandparent's unwanted imposition and control; (8) experience the tensions in their own households caused by the tremendous stress of the litigation process.[354]

Further, these suits are usually initiated at a time when children are already vulnerable, such as after divorce or the death of one parent.[355] Children are already struggling to cope with the tearing apart of their family and a lawsuit threatens to further destroy their family.

Grandparent visitation suits also damage the parent-child relationship. The once-strong parent-child relationship is put under a microscope by a judge, and the parent's decisions are called into question. The child witnesses his or her parent's authority being questioned, and may doubt his parent's ability to parent. "No matter how hard the system may try to convey a 'best interest' message, the real message to the child is that there is no stability and certainty in the child's world and the child cannot look to his or her own fit parent for guidance."[356]

The system fails to appreciate the importance of parental autonomy for the parent-child relationship. Children need to feel that they can turn to their parents for guidance, and that their parents' guidance will be sound. Judicial second-guessing of parental decisions strips the parent-child relationship of this sense of security and confidence. "[M]ore than access to their grandparents, children need parents who have the kind of autonomy and responsibility that includes deciding with whom their children are going to spend time."[357] Justice Kennedy's dissent in *Troxel* summarized this point nicely:

> It must be recognized . . . that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated. The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in

354. *Id.* at 28-29.
355. *See id.* at 27.
356. Brief for Domestic Violence Project, *supra* note 300, at 18-19.
357. Bartlett, *supra* note 24, at 724.

> some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship.[358]

Rather than strengthen a familial bond, grandparent visitation suits may weaken one (the parent-child relationship).

Grandparent visitation may also damage child-rearing efforts. Families that rely on grandparents to assist in child rearing are often low-income or single parent households.[359] Sometimes, the relationship between the parents and grandparents deteriorates. The parents then look elsewhere for child-rearing help. In response, the grandparents may petition for formal visitation rights to continue seeing the grandchildren. This may result in litigation, whereby the parents are forced into court simply because they sought child-rearing assistance from grandparents and now want to seek alternative assistance. The parents' reliance on grandparent assistance may backfire on parents that so desperately need their help.[360] Parents should be able to rely on grandparents to help raise children without fear that it will subject them to litigation.[361]

The damaging effects of litigation on children, the parent-child relationship, and child-rearing efforts are more likely to occur under the "best interests plus" standard. The "best interests plus" standard creates incentives to litigate. "[T]he use of an indeterminate standard makes the outcome of litigation difficult to predict. This may encourage more litigation than would a standard that made the outcome of more cases predictable."[362] Since every litigant "can make plausible arguments why a child would be better off with him or her," the "best interests plus" standard invites such litigation.[363] Supporters of the harm standard argue for its adoption because its high threshold discourages such lawsuits and protects all parties from the damaging effects of litigation.

10. A View of the Family as a Buffer from an Overreaching State Supports the Harm Standard

Former Senator Rick Santorum wrote a book titled *It Takes a Family* to counter Senator Hillary Clinton's book *It Takes a Village*.[364] Both books ask two important questions: whether society should be structured in a top-down or a bottom-up approach, and, in turn, how American children should be raised.[365] A top-down approach relies on large institutions such as universities and government agencies to make important decisions that will

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358. Troxel v. Granville, 530 U.S. 57, 101 (2000) (Kennedy, J., dissenting) (citation omitted).

359. Brief for Domestic Violence Project, *supra* note 300, at 23-24.

360. *See id.*

361. *See id.*

362. Mnookin, *supra* note 343, at 262.

363. *Id.*

364. *See generally* Hillary Rodham Clinton, It Takes a Village (1996); Rick Santorum, It Takes a Family: Conservatism and the Common Good (2005).

365. *See generally* Santorum, *supra* note 364; Clinton, *supra* note 364.

trickle down to affect people.[366] A bottom-up approach relies on smaller, local organizations such as churches and civic groups to lead society, with the help of mothers and fathers.[367] Santorum argues that the family is the most important structure in American society, and that a bottom-up approach, starting with families, will return America to greatness.[368]

Santorum explains his view of the family through an ancient Kenyan story.[369] A father gives his children a bunch of sticks and tells them to try to break the sticks.[370] The children easily break each thin stick.[371] The father then hands the children a bunch of sticks tied together in a bundle and tells the children to try to break them.[372] The sticks remain bound together, unbreakable.[373] Santorum's point is that the family is strongest when it bands together, giving to each other without regard to individual interests.[374] Society then builds on the strong foundations of family.

Santorum argues, however, that the family cannot remain strong if the government constantly intervenes. As Santorum explains, "When [the] government steps in and imposes a bureaucratic solution based on individualistic presuppositions, it removes expectations and responsibilities from smaller social units—especially the family."[375] In the context of grandparent visitation, state intrusion through judicial intervention in family life hinders parents' ability to carry out their responsibilities, thus weakening the family. If the family is weakened, and families are the foundation of America, it follows that America too will suffer as a result.[376]

Santorum urges that the government's role is to assist parents in the education and upbringing of their children, but that this role remains secondary at all times to that of the parent.[377] "[P]arents, faults and all, know better than anyone else what is best for their children . . . ."[378] Santorum does recognize, though, that there are points at which the state must intervene in the private sphere. For example, he notes that the state was right to intervene to support the Civil Rights Movement by passing various civil rights laws and sending federal troops to enforce such laws.[379]

366. *See* Santorum, *supra* note 364, at 9, 67.
367. *See id.* at 67.
368. *See id.*; *see also* Dorothy Roberts, Shattered Bonds: The Color of Child Welfare (2002). Like Santorum, Roberts argues that state intrusion weakens the family by damaging the parent-child relationship, and stresses the importance of strengthening families by increasing parental rights. However, Roberts argues that race plays a central role in family policy making, and focusing on the harm of state intrusion alone without looking at racial harm fails to capture the full picture. *See id.* at 104-13, 225-28.
369. *See* Santorum, *supra* note 364, at 17.
370. *Id.*
371. *Id.*
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.* at 68-69.
376. *Id.* at 15.
377. *See id.* at 356-57.
378. *Id.* at 357.
379. *Id.* at 70-71.

State intervention was absolutely necessary because it was the smallest unit of society that could make a difference. In other words, families and smaller, local organizations failed at achieving racial justice. The harm posed by racial inequality continued, and federal governmental intervention became necessary to prevent such harm. Santorum recognizes that state intrusion is justified only in rare circumstances,[380] and the situations he uses to define rare circumstances all present harm.

Absent such harm, the state should not intervene in the private sphere, specifically in the decision of a parent to deny visitation to a grandparent. Santorum believes we must "trust parents to know what's best for their children," since they "have a much better idea of what their children need than any impersonal governmental institution."[381] The government is to be the "silent partner, not the managing partner," and "[o]nly rarely" impose its views.[382] Santorum's view of the family as the buffer from an overreaching state supports the harm standard in the context of grandparent visitation rights.

III. THE FATE OF THE HARM STANDARD

Part II discussed the arguments typically made in support of the "best interests plus" standard and the harm standard. Part III argues for adoption of the harm standard and predicts that courts will interpret statutory best interests language to require a showing of harm instead of invalidating such statutes. Finally, Part III argues that, at the standing stage, states should require grandparents to show probable cause to believe the child will be harmed in the absence of visitation.

A. *State Legislatures and Courts Should Adopt the Harm Standard*

Both sides to this debate agree that the goal is what is in the best interests of the child. The "best interests plus" standard does not further that goal as well as the harm standard. The "best interests plus" standard weakens the parent-child relationship by raising doubt as to the parent's decision-making abilities, and is more likely to put children through the stress of litigation at an already vulnerable time.[383] The "best interests plus" standard allows the state to intrude on the parent's fundamental right to direct the care, custody, and control of his or her child before such intrusion is necessary, superseding parental judgment with its own simply because it feels it could have made a better decision.[384] The standard is indeterminate,

380. Santorum notes that parents are the best decision makers "in the vast majority of cases." *Id.* at 364. "Only rarely should the government take the role of calling the shots." *Id.* at 71.

381. *Id.* at 364.

382. *Id.* at 71.

383. *See supra* notes 355-58 and accompanying text.

384. *See supra* notes 259-65, 285-87 and accompanying text.

unpredictable, and susceptible to social bias.[385] Such a standard is not in a child's best interests.

The best way to serve a child's interests is to adopt the harm standard. The harm standard strengthens the relationship between parents and children by showing children that they can feel confident in their parents' decision-making ability and respect their parents' authority.[386] Most importantly, the harm standard protects the parents' fundamental right to direct the care, custody, and control of children by respecting parental authority absent a showing of harm.[387] The harm standard denies the state power to intervene simply because a judge feels that he or she could have made a better decision, or would simply like to optimize a child's welfare.[388] Only a finding of harm could legitimize such state intrusion. The harm standard recognizes the grave responsibilities that parents have and grants parents the rights necessary to carry out those responsibilities.[389] It is more determinate, more predictable, and more evenhanded in application than the "best interests plus" standard.[390] The harm standard strikes the appropriate balance: It grants the protections necessary to strengthen the parent-child relationship while still deferring to the state where harm to the child is a danger.

B. *Increasingly, States Will Interpret Best Interests Language to Require Harm*

There is a trend in the United States to strengthen parental rights. When grandparent visitation statutes were first enacted, every state statute required merely that visitation be in the child's best interests.[391] None of the original statutes required additional findings, as the "best interests plus" standard requires. Certainly, none required a showing of harm. Today, thirteen states require a showing of harm, and every other state requires something more than mere best interests of the child.[392] The increase in states that require harm in the last two decades reflects a growing trend supporting the protection of parental rights.[393] States are moving towards requiring harm, not away from it.

Most states that require a showing of harm have done so through court interpretation.[394] State courts have read the harm requirement into current

385. *See supra* notes 346-50 and accompanying text.
386. *See supra* notes 356-58 and accompanying text.
387. *See supra* notes 259-65 and accompanying text.
388. *See supra* notes 286-87 and accompanying text.
389. *See supra* notes 303-08, 320 and accompanying text.
390. *See supra* notes 339-50 and accompanying text.
391. *See* Segal & George, *supra* note 18, at 11-12 (explaining that all states used some version of the best interests standard in 1989 (the year of the book's publication)).
392. *See supra* note 162-63.
393. *See* Bohl, *supra* note 60, at 315-19 (discussing the trend towards greater parental protection through strict substantive and procedural requirements in grandparent visitation statutes).
394. *See supra* notes 162-63 and accompanying text.

statutes.[395] Typically, a statute requires only best interests on its face, but the court "saves" the statute from unconstitutionality under *Troxel* by reading further requirements into it.[396] For a number of reasons, courts prefer to read requirements into statutes rather than strike them down. This technique comports with principles of statutory construction that urge courts, if possible, to interpret statutes in a way that will uphold them.[397] This technique is less contentious and draws less public attention to the matter. Further, it maintains judicial legitimacy since a typically unelected court is not explicitly overturning law made by elected officials that more closely represent the people's wishes.[398] Saving a statute rather than striking it down also more closely adheres to the principle of stare decisis, or let the decision stand.[399] Although reading a new requirement into a statute is a change in the law, it is not as great a deviation from prior law as would be a declaration of the entire statute's unconstitutionality. Thus, states will likely continue the trend of requiring harm before granting grandparent visitation by reading such a requirement into the relevant statute, rather than striking down the entire statute.

Finally, it is important to note that five states, Georgia, Michigan, Oklahoma, Tennessee, and Texas, adopted the harm standard through explicit statutory language.[400] This is not the norm, but nonetheless it shows that support for parental rights does not derive solely from the courts. These legislatures, elected bodies representing the public's wishes, chose to increase protection of parental rights through adoption of the harm standard. The fact that both courts and legislatures are recognizing the strength of a parent's fundamental right is crucial. It increases the likelihood that more states will require harm in the future, whether through explicit statutory adoption or judicial statutory interpretation.

C. *States Should Require Grandparents to Show Probable Cause to Believe that There Would Be Harm at the Standing Stage*

Not only should states require harm to grant grandparent visitation over a parent's objection, but states should also require that grandparents demonstrate potential harm in order to gain standing. This means that,

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395. *See supra* note 164 and accompanying text.

396. *See supra* note 164 and accompanying text.

397. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems."); Hooper v. California, 155 U.S. 648, 657 (1895); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

398. *See* Erwin Chemerinsky, *Wrong Questions Get Wrong Answers: An Analysis of Professor Carter's Approach to Judicial Review*, 66 B.U. L. Rev. 47 (1986) (explaining the anti-majoritarian problem of unelected judges overturning law).

399. *See* 16 Am. Jur. 2d *Constitutional Law* § 115 (2006) ("A longstanding, widespread practice is not . . . to be lightly brushed aside, and this is particularly so when the constitutional standard is . . . amorphous . . . .").

400. *See supra* note 162 and accompanying text.

before they could petition the court for visitation rights, grandparents would have to show probable cause to believe there will be harm to the child absent visitation. Admittedly, this requirement gives great weight to parental rights and makes it more difficult for grandparents to seek visitation. Yet, this requirement is necessary considering the damaging effects of litigation. As discussed in Part II.B.9 of this Note, grandparent visitation suits place pressure on the child and tension on the parent-child relationship.[401] A petition for visitation poses too great a threat to the child and the parent-child relationship to allow it to move forward without some initial hurdles. If courts allow grandparents to petition without an initial showing of harm, many grandparents may petition solely to punish the parents or seek revenge for denying visitation.[402] Imposition of the harm standard as a standing requirement weeds out these frivolous suits and protects the child and the parent-child relationship from their damaging effects.[403]

Joan Catherine Bohl argues that a trend has already begun to increase standing requirements for grandparents seeking visitation.[404]

> Gone is the virtually automatic presumption of standing, supported by generalizations and sentimental assumptions; in its place a realistic and specific assessment of relationships and circumstances. This realistic assessment reflects the judicial trend towards protecting family autonomy in the context of grandparent visitation. Indeed, real adherence to threshold requirements for standing becomes another path towards application of the harm standard in grandparent visitation law . . . .[405]

However, states will want to make sure that requiring harm to grant standing is not strict in theory, fatal in fact.[406] The purpose is not to set the bar so high that no grandparent would ever gain visitation rights. The purpose is merely to weed out frivolous suits in which grandparents would not be able to establish any harm at the litigation stage. Accordingly, state courts should not require that harm be demonstrated by clear and convincing evidence or be pled with particularity at the standing stage; those standards are reserved for review of the actual petition. Instead, in

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401. *See supra* notes 356-58 and accompanying text.

402. *See* Newman, *supra* note 295, at 32, 35 (explaining that "harmful or harassing" grandparents may bring vindictive suits to "indulg[e] their own hostility and generate[] legal conflict to achieve their own ends").

403. *See* Bohl, *supra* note 60, at 320 (arguing that "[s]trict adherence to threshold limitations on grandparent visitation suits" is necessary to protect family autonomy).

404. *See id.* at 315-19 (arguing that there is a trend to increase standing requirements and strictly adhere to them, rather than grant standing leniently based on sentimental presumptions about the grandparent-grandchild relationship).

405. *Id.* at 325.

406. This term has been used by the Supreme Court to explain the role of strict scrutiny. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978). In *Grutter v. Bollinger*, 539 U.S. 306, 326-327 (2003), and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995), the Court explained that strict scrutiny is meant to be strict and searching, but not always fatal in fact.

order to gain standing, state courts should require harm be shown by probable cause or the lesser standard of preponderance of the evidence.

D. *What Constitutes Harm Will Change with Time, but the Requirement of Harm Should Not*

Throughout history, the definition of what constitutes harm has changed. Two hundred years ago, it was acceptable for parents to use harsh physical discipline to punish their children. Today, those same methods of discipline are considered child abuse. The standard for what constitutes harm will continue to change, as it has in the past. Such flexibility allows the standard to adapt to shifting social norms and reflect the views of current society. Despite these fluctuations in definition, the requirement of harm should remain constant.

CONCLUSION

Troxel increased protection of parental rights by requiring deference to the decisions of fit parents. However, the decision hardly ended the debate on grandparent visitation rights. The plurality declined to address the most crucial question: Does a stricter version of the best interests standard sufficiently protect parental rights, or is the harm standard necessary for adequate protection? States are beginning to follow the latter approach, adopting the harm standard through statutory language or judicial interpretation. The trend toward adopting the harm standard will and should continue. The harm standard respects parental autonomy and protects the parent-child relationship from unwarranted state intervention while ensuring the welfare of children.