NO. 99-138

IN THE
SUPREME COURT OF THE UNITED STATES

In the Matter of the Visitation of NATALIE ANNE TROXEL and ISABELLE ROSE TROXEL, Minors,

JENIFER and GARY TROXEL,

***Petitioners*,**

v.

TOMMIE GRANVILLE,

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE COALITION FOR THE RESTORATION OF PARENTAL RIGHTS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Constitutions

Statutes

Commentary

INTEREST OF THE AMICUS CURIAE[1]

At present, in all 50 states, parents may be subjected to an intolerable intrusion upon a painful and personal decision. The state may, upon the petition of a grandparent[2], force a parent to relinquish temporary custody of his child, despite the parent's decision that contact or extensive contact with that grandparent is bad for the child. This amicus represents the interests of such parents and their families.

The Coalition for the Restoration of Parental Rights includes members from many states. They are parents, other family members, and friends of families affected by court-imposed grandparent visitation. The parents have been forced to air the most personal details of their family histories, in the attempt to defend their decisions to limit a grandparent's access to their children. Often those attempts have been futile, and the parents have been forced to accede to visitation they deem dangerous to their children's physical or emotional well-being. Always, the process has been expensive, invasive, exhausting, and highly stressful for children and parents alike. For many parents, the lawsuit was one more blow following the pain and disruptions of a spouse's death or a divorce.

These parents have seen their own assessments of their children's needs devalued; their own detailed knowledge of their families' history ignored in favor of what little a judge could learn in a hearing or two. Those more learned in the law realize that the state has infringed their fundamental rights. Others simply know that something has gone badly wrong.

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[1] The parties have consented in writing to the filing of this amicus brief.

[2] A few states, including Washington, allow other nonparents to file visitation petitions as well. The arguments in this brief apply with equal or greater force to such petitions.

SUMMARY OF ARGUMENT

Parents have a fundamental right to rear their children, and to make the necessary decisions involved in that most noble and most difficult task. This Court has recognized, over many years and in many decisions, that our Constitution as well as our traditions protect this right. Parents' rights to raise their children include, of necessity, the right to decide what caretakers to trust, what associations to encourage, what role models to endorse. All these decisions are inevitably involved in the decision whether and when to expose children to those outside the immediate family.

This fundamental right does not vanish when parents divorce, nor when one parent dies. This Court has recognized that parental rights do not depend on marital status. The legal tradition allowing parents to exclude grandparents arose at a time when divorce was not uncommon, and a parent's death more common than it is today.

Those who support court-imposed visitation usually claim that the infringement is minimal. On the contrary, the impact of the litigation on family privacy, the invasion of the family home, the coerced removal of the child from the parent's custody for days or weeks at a time and on repeated occasions, is a greater infringement than impacts deemed excessive in the seminal family rights cases.

In contrast to parents, grandparents have no traditional or common-law right to visit with children where the parents object. There is no basis for finding such a right to be among the substantive protections of the Fourteenth Amendment.

Absent a showing of harm, the state has no legitimate, let alone compelling, interest in overriding a parent's decision on who shall associate with or care for his child. Parents are presumed to act in the best interests of their children. They have the natural desire and the intimate knowledge necessary to perform that task. Courts cannot possibly match the depth of a parent's knowledge of the child's history and needs. Moreover, professional research does not indicate that relationships between grandparents and grandchildren typically have any lasting beneficial impact on the children. Whatever benefits may accrue in happier circumstances are unlikely to result when visitation is imposed over parental objection. There is thus no substantial state interest in disrupting families and overruling parental decisions in order to promote grandparent/grandchild relationships.

In fact, there is near universal consensus, even among those who support grandparent visitation statutes, that the litigation they foster is detrimental to the children involved. The proceedings subject the child to trauma comparable to divorce proceedings. The children's sense of stability is undermined by the challenge to parental authority. The invasive and adversarial nature of the proceedings exacerbates whatever difficulties gave rise to the dispute. The damage is even worse where the child's world has already been shaken by divorce or the death of a parent. If the goal is to strengthen familial bonds, such counterproductive means cannot be deemed even rationally related to that goal, let alone necessary and narrowly tailored.

Judges are not equipped to make the decisions being thus usurped. With little guidance, little information, and little time, judges are apt to award or deny visitation based on their personal views or unproved assumptions. It is hardly surprising that patterns of gender discrimination and racial discrimination have emerged in the application of grandparent visitation statutes.

ARGUMENT

I. CUSTODIAL PARENTS, WHETHER MARRIED OR SINGLE, HAVE A FUNDAMENTAL RIGHT TO AUTONOMY AND PRIVACY IN CHILD-REARING DECISIONS

A. Parental Child-Rearing is A Fundamental Constitutional Right and Includes the Right to Decide with Whom Child will Associate[3]

"One of the first rights to be recognized as fundamental was 'the liberty of parents and guardians to direct the upbringing ... of children under their control.'"[4] It has been reaffirmed throughout the ensuing decades, a constant rock amidst the ebb and flow of constitutional jurisprudence.[5]

A parent cannot direct the rearing of his or her children without the authority to screen the child's relationships with others. This authority constitutes "an

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[3] While this Court's case law has located fundamental rights as against the states in the Fourteenth Amendment's due process clause, the following arguments could also be made under that amendment's "privileges and immunities" clause. *See* John Hart Ely, *Democracy and Distrust* (1980), at 22-30; Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution* 52-54 (1991).

[4] Michael J. Minerva, Jr., *Grandparent Visitation: The Parental Privacy Right to Raise their "Bundle of Joy,"* 18 Fla. St. U. L. Rev. 533, 541 (1991), quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

[5] *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Griswold v. Connecticut*, 381 U.S. 479, 495-497 (Goldberg, J., concurring) (1965); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-620 (1984); *id.* at 631 (O'Connor, J., concurring); *Bowers v. Hardwick*, 478 U.S. 186, 190-192 (1986); *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990).

inseparable and inalienable ingredient of the parent's right to custody and control of a minor child." *Davis v. Davis*, 91 S.E.2d 487, 490 (Ga. 1956). [6]

Furthermore, "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children." *Pierce v. Society of Sisters*, *supra*, 268 U.S. at 535. For the state to insist upon grandparent visitation over parental objection, based on a presumption that families who welcome grandparents will be happier families, "amounts to the imposition of a state sanctioned ideal."[7]

B. Intact Marriage is Not a Prerequisite of Parental Rights

A parent who loses his or her partner through death or divorce does not become less of a parent. The parent's responsibility does not diminish; the rights which accompany that responsibility remain as well. Yet a single parent's task is more difficult, the family more vulnerable to stress and disruption. Governmental actions which infringe parental

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[6] As noted *infra*, the common law recognizes a parent's right to decide with whom the child will associate, and would not order grandparent visitation over parental objection absent exceptional circumstances. The fact that grandparent visitation statutes are currently ubiquitous in this country does not mean that our national values and traditions embrace such statutes. These statutes do not reflect legislative recognition of a change in societal mores; rather, they are the result of intense political activity by an increasingly powerful senior citizen's lobby. Andre P. Derdeyn, M.D., *Grandparent Visitation Rights: Rendering Family Dissension More Pronounced?*, 55(2) Amer. J. Orthopsychiatry 277, 282 (1985); Judith L. Shandling, Note, *The Constitutional Restraints on Grandparents' Visitation Statutes*, 86 Colum. L. Rev. 118, 121 (1986); Ross A. Thompson et al., *Grandparents' Visitation Rights: Legalizing the Ties that Bind*, Am. Psychologist 1217, 1218 (Sept. 1989).

[7] Joan Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49(1) Okla. L. Rev. 29, 33 (1996).

rights are even more devastating to a family where one parent bears his or her responsibility unshared.

In this Court's protection of fundamental family rights, "[t]he legal status of families has never been regarded as controlling." *Smith, et al. v. Organization of Foster Families*, 431 U.S. 816, 845, n. 53 (1977) [hereinafter *OFFER*]. The Constitution protects "the interest of *a* parent in the companionship, care, custody, and management of *his or her* children." *Stanley v. Illinois*, *supra*, 405 U.S at 651 (emphasis added). "The family unit accorded traditional respect in our society, which we have referred to as the 'unitary family,' is typified, of course, by the marital family, but also includes the household of unmarried parents and their children." *Michael H. v. Gerald D.*, 491 U.S. 110, 123, n. 3 (1989).[8] By the same token, parents who have undergone divorce or the bereavement of their spouse's death retain their fundamental rights to raise their children without state veto of their decisions.

Divorce has always been part of the American family landscape. Before the American Revolution, all the colonies allowed either divorce or partial divorce (separation).[9] After the revolution, almost all the states relaxed their divorce

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[8] Unwed fathers share in this protection, so long as they have accepted and borne the responsibilities of fatherhood. *Stanley v. Illinois*, *supra*; *see also Caban v. Mohammed*, 441 U.S. 380, 393 (1979). This Court's decision in *Quilloin v. Walcott*, 434 U.S. 246, 255-256 (1978), turned on the fact that the biological father had never had, or even sought, custody of the child, and had never filled the parental role. The plurality opinion in *Michael H.*, *supra*, turned on the father's very limited contact with the child and, even more, on the fact that the father was an adulterous intruder on an otherwise ongoing family relationship. Indeed, *Michael H.* emphasizes that the existing family's integrity and privacy would be improperly invaded by any state procedure that recognized the petitioner's claim. 491 U.S. at 124, 130-131.

[9] P. L. Griswold, *Adultery and Divorce in Victorian America, 1800-1900* 3, Institute For Legal Studies (1986).

laws, and divorce could be based on less serious allegations.[10] The divorce rate rose dramatically in the late nineteenth and early twentieth centuries.[11] Moreover, while divorce is even more commonplace now than in earlier decades, the death of a parent was undoubtedly more common in years past. Indeed, *Succession of Reiss*[12], the seminal case concerning grandparent visitation, involved a widowed father. Both the common-law and the constitutional precedent establishing a parent's fundamental autonomy rights developed against this backdrop. There is therefore no basis for the argument that a parent's death or divorce vitiates these rights.[13]

II. GRANDPARENT VISITATION STATUTES ARE UNCONSTITUTIONAL INFRINGEMENT ON PARENTAL AUTONOMY AND FAMILY PRIVACY RIGHTS

A. State Interference with Parental Decision-Making Is Subject to Intensified Scrutiny and Must be Presumed Unconstitutional

Government intrusions on fundamental rights, including the right of family privacy, are subject to strict scrutiny.[14] A statute impinging upon a fundamental right is

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[10] *Id.* at p. 5; Nelson Blake, *The Road to Reno: A History of Divorce in the United States* 49 (1977 ed.).

[11] P. L. Griswold, *supra*, at p. 2; Blake, *supra*, at p. 150.

[12] 15 So. 151 (La. 1894). *See also, e.g.*, *Noll v. Noll*, 98 N.Y.S.2d 938 (App.Div. 1950).

[13] Many proponents of grandparent visitation statutes point out the fallacies in any attempt to distinguish families according to the parents' marital status. *See, e.g.*, Sarah Norton Harpring, Comment, *Grandparent Visitation: Is the Door Closing?*, 62 U. Cinn. L. Rev. 1659, 1691 (1994); *Frances E. v. Peter E.*, 479 N.Y.S.2d 319, 322 (Fam. Ct. 1984).

[14] *Griswold v. Connecticut*, *supra*, 381 U.S. at 497 (Goldberg, J., concurring); *see also Bowers v. Hardwick*, *supra*, 478 U.S. 186 at 191 (privacy rights "to a great extent are immune from federal or state

presumed to be unconstitutional. *Harris v. McRae*, 448 U.S. 297, 312 (1980).[15] To overcome that presumption, the state must prove that it has a compelling state interest in its infringement of the protected right.[16] It must then prove not only that the challenged infringement is an effective means of serving that interest, but that no less restrictive means is available.[17]

This Court has not replaced the strict scrutiny afforded fundamental parental rights with the "undue burden" standard. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), emphasized that abortion was a unique case. Even in that admittedly unique context, a majority of the Justices opposed the *Casey* plurality's use of the "undue burden" standard, to the extent it fell below the level of strict scrutiny. Even if the "undue burden" standard applied, however, the judicial overthrow of the parent's decision to exclude a grandparent constitutes a severe and undue burden on the parental right to direct the child's upbringing and decide with whom the child shall associate.

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regulation or proscription"). *Meyer* and *Pierce*, the earliest cases establishing parental autonomy as a fundamental right, predated the establishment of varying layers of scrutiny in substantive due process cases. The standard of review they employed was effectively similar to the modern strict scrutiny standard.

[15] *See also* Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 Loy. L.A. L. Rev. 449, 453-455 (1988).

[16] *Regents v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, White, Marshall and Blackmun, JJ.); *San Antonio v. Rodriguez*, 411 U.S. 1, 16-17, 34, n. 33 (1973); *Carey v. Population Services*, *supra*, 431 U.S. at 686, 693, n. 15.

[17] *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Bakke*, *supra*, 438 U.S. at 357; *Dunn v. Blumstein*, 405 U.S. 330, 343, 353 (1972); *see Bowers v. Hardwick*, *supra*, 478 U.S. at 189; *Griswold v. Connecticut*, *supra*, 381 U.S. at 497 (J. Goldberg, concurring); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

B. Visitation Statutes' Significant Encroachment on Parental Rights is Greater than Infringements Disallowed in Previous Parental Rights Decisions of This Court

Proponents of court-imposed visitation typically describe it as, at most, a "minimal" infringement of the parent's custody and child-rearing rights.[18] This characterization utterly ignores the nature of the invasion and the factual context almost inevitably surrounding it.

Even if "grandparent visitation" meant only that the parent must allow the grandparent into the family home to see the grandchild, it would be a significant invasion of family privacy and a substantial infringement on parental child-rearing authority.[19] In most cases, parents welcome grandparents into the home, and rejoice to see the grandparents enjoy the grandchildren's company. Any departure from this attitude is likely to be the result of profoundly disturbing experiences. It is not a decision likely to be lightly made. For the state to overrule parental decisions this weighty and this painful cannot reasonably be characterized as a minimal infringement of the right to shape the children's environment. For the state to force open the doors of the family home, ushering in an outsider the parent no longer trusts, is no small intrusion.

However, visitation orders are rarely, if ever, this limited in nature. "Visitation" typically means that the child must be sent to the grandparent's home for a weekend, or a

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[18] Dicta in *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978), indicates that a state may impose reasonable regulations on exercise of a fundamental right -- so long as those regulations "do not significantly interfere with [the] *decisions*" underlying the exercise of the right. (Emphasis added.) State-imposed grandparent visitation strikes directly at the heart of the parent's decision on who shall guide and supervise his child.

[19] *See Brooks v. Parkerson*, 454 S.E.2d 769, 773, fn. 6 (Ga. 1995).

week, or even many weeks, and not just once but repeatedly. Such visitation is in essence a temporary form of custody, displacing for a time the custody of the parents.[20] The parent, let his fitness be unquestioned, is forced under threat of fine or imprisonment to send his child outside his protection and supervision. He can only hope that the parent's moral and disciplinary guidelines will be followed, his safety rules observed -- despite the likelihood that the grandparents' refusal to honor such parental decisions gave rise to their initial exclusion. The child may be unwilling or even afraid to go; the parent is forced to reject his child's heartfelt, and possibly reasonable, desires. The parent cannot exercise his parental function; the parent-child relationship is invaded and disrupted.

Finally, there is the nature of the litigation involved. As discussed further *infra* at D.3., the trial court is free to -- even obligated to -- dig deep into the confidential details of family history and family functioning, in the attempt to pin down the elusive "best interests of the child." Family privacy is sacrificed to the judge's mandate.[21]

The government intrusions overturned in *Meyer* and *Pierce* pale in comparison. *Meyer* found too great an infringement in the state's ban on certain foreign language lessons during school hours. That statute, "[u]nlike grandparent visitation, . . . would not separate parents and children who would otherwise be together. Furthermore, its ban could be completely circumvented by providing language

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[20] Anne Marie Jackson, Comment, *The Coming of Age of Grandparent Visitation Rights*, 43 Am. U. L. Rev. 563, 573, n. 59 (1994); *see, e.g.*, *Jackson v. Fitzgerald*, 185 A.2d 724, 726 (Col.App. 1962).

[21] *See Succession of Reiss*, *supra*, 15 So. at 152.

instruction at other times."[22] Similarly, *Pierce* forbade a state to require that a parent send his child to a public school, rather than a private school. Even though any omissions from the public school's curriculum could be ameliorated by home instruction, the parent had the right to choose the child's school environment. Where the state coerces the parent into giving a grandparent temporary custody, the divergence between the parent-approved environment and the state-imposed alternative may be as great or greater -- and the child will not be coming home after school.

C. Grandparents Have No Traditional or Constitutional Right to Visitation

1. The Common Law Acknowledged Parent's Rights and Would Not Compel Grandparent Visitation Over Parental Objection

There is overwhelming consensus that grandparents have no common law right to see their grandchildren when the parents object.[23] Courts repeatedly cited a number of reasons against overriding the parent's decision to exclude grandparents from the home. They recognized that parental autonomy was a fundamental value, not to be infringed by the courts. Granting grandparents an independent right of visitation would, they feared, undermine parental authority. Further, it would cause intergenerational conflict harmful to

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[22] Bohl, *The "Unprecedented Intrusion," supra*, at 64-65, n. 280.

[23] *See, e.g.*, Catherine Bostock, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 Colum. J. L. & Soc. Probs. 319, 326 (1994); Edward M. Burns, *Grandparent Visitation Rights: Is it Time for the Pendulum to Fall?*, 25(1) Fam. L. Q. 59, 61 (1991); Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 Conn. L. Rev. 1315, 1331 (1994); Derdeyn, *supra*, at 277; Elaine D. Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. Va. L. Rev. 295, 303, 310 (1985); Jackson, *supra*, at 573-574; Shandling, *supra*, at 118.

the child. Finally, the courts realized that the coercive measures under their command would not be an effective means of restoring harmonious relations between parents and grandparents.[24]

Courts would override the parent's decision only in exceptional cases. "[T]hose special circumstances uniformly included an established, close, and meaningful relationship between the grandparent and the grandchild."[25] Then some additional factor was necessary, such as a years-long custodial relationship, the provision in a father's will when the father died in battle, parental unfitness, or a father's inability to exercise his own visitation rights.[26] As noted above[27] at I.B., the death of a parent, or the parents' divorce, was not in itself sufficient basis for this exceptional treatment.

2. <u>There is No Basis in Constitutional Law for a Grandparent's "Right" to Visitation</u>

Given the great importance of tradition in establishing fundamental privacy rights not explicit in Constitutional text,[28] the common-law tradition described above precludes the existence of any substantive due process right of grandparents to visit their grandchildren where the parents object.[29]

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[24] Jackson, *supra*, at 573-74; Bostock, *supra*, at 326.
[25] Burns, *supra*, at 62.
[26] Bohl, *The "Unprecedented Intrusion*," *supra*, at 30-31, n. 9; Burns, *supra*, at 62; Bostock, *supra*, at 327.
[27] See I.B. of this brief, *supra* pp. 6-7.
[28] *Michael H.*, *supra*, 491 U.S. at 122-123; *Bowers v. Hardwick*, *supra*, 478 U.S. at 192; *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.).
[29] Jackson, *supra*, at 574-575 (1994); Minerva, *supra*, at 556.

A parent's fundamental liberty interest in his or her child's companionship derives in large part from the responsibilities the parent has assumed.[30] Grandparents have even less legal responsibility for their grandchildren than unwed fathers for their children, as grandparents generally have no duty to help support their grandchildren financially.

Proponents of visitation statutes frequently claim support from *Moore v. City of East Cleveland*, *supra*, 431 U.S. 494. There is no legal or logical justification for jumping from the liberty found in *Moore* to the state coercion at issue here. In *Moore*, a father and son chose to live with the paternal grandmother, and the father of another grandson consented to his son's joining the household after the mother's death. 431 U.S. at 496-497 incl. n. 4. A small group of blood relations freely chose to live together, with the consent of all living parents of the children. This choice did not challenge or infringe upon any other family rights. *Moore* focused exclusively on the rights inherent in a group of relations sharing a single household. It defended that household against the intrusion of state or local lawmakers. In no way did it authorize a nonresident relative's intrusion into the household. *Moore* shows us how the Constitution protects even a relatively unconventional family household from outside interference. A fortiori, parents living with their children have the right to such protection.

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[30] *Lehr v. Robertson*, 463 U.S. 248, 259-260 (1983), emphasized "[t]he clear distinction between a mere biological relationship" -- such as grandparent status -- "and an actual relationship of parental responsibility." *Quilloin v. Walcott*, *supra*, 434 U.S. at 256, similarly relied upon the fact that the unwed father "ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. . . . Even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage."

D. The States Have No Compelling, Substantial, or Legitimate Interest in Ordering Grandparent Visitation Over a Fit Custodial Parent's Objections

This Court has recognized that the state has no legitimate interest in directing how members of a family shall communicate or commune.[31] As stated above, the amicus believes this Court's precedents require strict scrutiny of grandparent visitation laws, so that the state must show a compelling interest that can be served no other way. However, whether the standard be strict scrutiny or some intermediate scrutiny, or even true rationality, grandparent visitation statutes fail the test.

1. Parents are Presumed to Act in Child's Best Interests, and Courts are Not Equipped to Supplant Them In That Role

In *Parham, et al. v. J.R., et al.*, 442 U.S. 584, 602-603 (1979), this Court summarized in the clearest terms the bedrock legal principle that parents are presumed to act in their children's best interests.

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. . . . That some parents "may at times be acting against the interests of their children" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. . . . The statist notion that

[31] *See Hodgson v. Minnesota*, *supra*, 497 U.S. at 452.

> governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.

Similarly, in *Hodgson v. Minnesota*, *supra*, 497 U.S. at 450, this Court noted that "the State has no legitimate interest in questioning one parent's judgment . . . or in presuming that the parent who has assumed parental duties is incompetent to make decisions regarding the health and welfare of the child."[32]

It takes only a little thought to see that it must be so. How many decisions must a parent make every day, every week, every year, in raising a child? Who can count how many of those decisions will change a child's life for good or ill, and to how great an extent? Every parent knows how terrifying, yet how ever-present and inescapable, is the responsibility to make decision after decision for the child's welfare. If state governments are to begin second-guessing these decisions, where shall they begin? and where will it end?[33]

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[32] *Hodgson* reaffirmed "the parental right ... to assess independently, for their minor child, what will serve that child's best interest." *Id*. at 453. *See also OFFER*, *supra*, 431 U.S. at 841, n. 44, noting that child's interests are usually represented in litigation by parents or guardians; *Santosky v Kramer*, *supra*, 455 U.S. at 760: ". . . the State cannot presume that a child and his parents are adversaries."

[33] *See Noll v. Noll*, *supra*, 98 N.Y.S.2d at 940, warning of the difficulties should judges "tell parents how to bring up their children." It should be noted that *Noll* involved a single parent (widow). Almost one-third of all families do not fit the "two married parents with their biological children" mold. Theresa H. Sykora, *Grandparent Visitation Statutes: Are the Best Interests of the Grandparent Being Met Before Those of the Child?*, 30(3) Fam. L. Q. 753, 754 (1996). If only families where two married parents live with their natural children are to retain their fundamental constitutional protection, the states will be busy indeed, superintending the conduct and reviewing the decisions of all those "second class" parents who bear their responsibilities without a spouse present.

> [L]aw does not have the capacity to supervise the delicately complex interpersonal bonds between parent and child. As *parens patriae* the state is too crude an instrument to become an adequate substitute for parents. The legal system has neither the resources nor the sensitivity to respond to a growing child's ever-changing needs and demands. It does not have the capacity to deal on an individual basis with the consequences of its decisions or to act with the deliberate speed required by a child's sense of time and essential to its well being. Even if the law were not so incapacitated, there is no basis for assuming that the judgments of its decisionmakers about a particular child's needs would be any better than (or indeed as good as) the judgment of his parents. Only magical thinking will permit the denial of these self-evident, but often ignored, truths about the limits of law.[34]

A parent's decision to cut off or reduce contact with a grandparent is the last act in a years-long drama. "[A] single court hearing is generally insufficient to resolve the background issues that have taken years to develop."[35] In *Parham*'s words, "neither state officials nor federal courts are equipped to review such parental decisions." 442 U.S. at 604.

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[34] Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 Yale L. J. 645, 650 (1977).
[35] Harpring, *supra*, at 1678.

2. Parens Patriae Power Does Not Justify Infringement of Parental Rights Absent Showing of Harm or Unfitness

The state may step in to protect children from abuse, neglect, a parent's refusal to supply essential medical treatment, and other such direct threats to the child's welfare.[36] However, the state's parens patriae powers[37] do not "trump" constitutional protections of fundamental liberties. The terms "welfare" and "best interests" are not synonymous: before the state may intervene, there must be a threat of harm to the former, rather than merely an opportunity to contribute to the latter.[38]

"To protect parental autonomy, the Supreme Court has developed a threshold test for the imposition of the state's *parens patriae* interests [citing, inter alia, *Meyer*, *Pierce*, and *Stanley*]. Generally, the state cannot interfere with the parents' right to raise a child in a particular manner unless the parents' practice endangers the child."[39] Where a parent has not been found unfit, the state "cannot presume that the parent and child are adversaries," or that their interests diverge. *Santosky*, *supra*, 455 U.S. at 760, 767, n. 17. "The

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[36] *Prince v. Massachusetts*, 321 U.S. 158 (1944) ; *Jehovah's Witness v. King County Hosp.*, 278 F.Supp. 488, 504-506 (W.D. Wash. 1967), *aff'd* 390 U.S. 598 (1968). *See* Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 J. Fam. L. 393, 426 (1985-86): "Absent extraordinary circumstances which seriously affect the welfare of the child, the state has no basis for displacing or intruding on parental control."

[37] This Court has described the meaning of the phrase "parens patriae" as "murky." *In re Gault*, 387 U.S. 1, 16 (1967).

[38] *See, e.g.*, *Brooks v. Parkerson*, *supra*, 454 S.E.2d at 772-773, incl. n. 5; *Williams v. Williams*, 501 S.E.2d 417, 423-424 (Va. 1988) (Kinser, J., concurring in part and dissenting in part); *Noll v. Noll*, *supra*, 98 N.Y.S.2d. at 940-941; *see also In re Marriage of Matzen*, 600 So.2d 487, 489-490 (Fla.App. 1992).

[39] Jackson, *supra*, at 571.

'best interests of the child' test is triggered after the finding of the failure of the parent-child relationship."[40] Thus, absent either the continuing danger posed by an unfit parent, or some extraordinary danger arising from the practices of otherwise fit parents (*e.g.*, refusal to allow vital medical treatment), the state's parens patriae role does not override parental control.

The main factor in determining how often children see their grandparents is not the status of the parent's marriage, or even the parent's attitude, but geographical distance.[41] May the states, under the rubric of parens patriae, decree that parents must reside within a fixed distance from grandparents? More generally, if the state may override parental decisions at will in pursuit of a child's "best interests," without showing the parents unfit or the child endangered, then the state may invade family privacy to direct the child's life in innumerable ways. "It behooves one to wonder as to what other arenas the legislature will deem parents unworthy to evaluate the best interest of their children."[42] What other "benefits" will the state step in to ensure? and at whose behest? State law could mandate prescribed diets and exercise regimes for children, from which parents departed at their peril. Legislators who cherished memory of their time in Boy Scouts could require all parents to send their children to Scout camp for two weeks every summer. Since wealth buys many advantages, children could be reassigned to wealthier families.[43] If the states,

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[40] Bean, *supra*, at 426.

[41] Andrew J. Cherlin & Frank F. Furstenberg, Jr., *The New American Grandparent: A Place in the Family, A Place Apart* 108, 117, 191 (1986).

[42] Moore, Student Article, *King v. King: The Best Interest of the Child: A Judicial Determination for Grandparent Visitation*, 20 N. Ky. L. Rev. 815, 828 (1993).

[43] The last example may seem wildly unlikely, but this very practice was relatively common during the early nineteenth century, a time when the courts stretched the notion of parens patriae authority beyond all

rather than the parents, are the guardians of the best interests of children with fit parents, then "we have embarked upon a slow de[s]cent into judicial supervision of family life which has neither legal limits nor a logical end."[44]

3. Research Does Not Indicate Lasting Positive Impact from Interaction with Grandparents, Let Alone Harm from Lack of Interaction

State courts that have upheld grandparent visitation statutes typically presume that grandparents play a unique, important and beneficial role in the lives of their grandchildren. However, as noted in *Roberts v. Jaycees*, *supra*, 468 U.S. at 628, this Court has "repeatedly condemned legal decisionmaking that relies uncritically on such assumptions." In fact, "[t]here are few research findings to support the presumption in grandparent statutes that the grandparent relationship is uniquely significant to either grandchildren or grandparents."[45]

The landmark study of sociologists Cherlin & Furstenberg revealed that greater involvement by grandparents had no ascertainable positive effect on the

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historical limits. *See* Joan Bohl, *Hawk v. Hawk: An Important Step in the Reform of Grandparent Visitation Law*, 33 J. Fam. L. 55, 69 (1994-95). Broad readings of parens patriae were increasingly criticized, and were curtailed in this Court's decision in *In re Gault*, *supra*, 387 U.S. at 16, 18.

[44] Bohl, *The "Unprecedented Intrusion," supra*, at 80.

[45] Ingulli, *supra*, at 305; *see also* Czapanskiy, *supra*, at 1330; *Brooks v. Parkerson*, *supra*, 454 S.E.2d at 773. There is relatively little research on the actual impact of grandparents on grandchildren. Bostock, *supra*, at 362, 368; Vivian Wood and Joan F. Robertson, *The Significance of Grandparenthood*, *in Time, Roles, and Self in Old Age* 278, 288 (Jaber F. Gubrium ed., 1976); Furstenberg & Cherlin, *Divided Families: What Happens to Children When Parents Part* 94 (1991).

behavior of grandchildren.[46] This was true regardless of family circumstances, whether or not the nuclear family life had been disrupted by circumstance. Nor do grandchildren typically include grandparents when listing members of their family, or regard them as sources of guidance.[47] As for transmission of values, grandparents transmitted values to grandchildren primarily through their impact on the intermediate generation, the parents, rather than directly.[48] Few grandparents believe they should even attempt to transmit moral values to their grandchildren.[49]

Grandparents tend to overstate the significance of their grandparental role compared to the actual level of their involvement: "While grandparents verbally attribute a great deal of significance to the role in discussions and interviews, the behavior of most grandparents in the role is relatively limited."[50] Given that many courts emphasis the importance of grandparents in passing on family history and customs, it is noteworthy that fewer than half the grandparents in one study reported that they had told their grandchildren about family history and customs, or had taught them a special skill

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[46] Cherlin & Furstenburg, *New American Grandparent, supra*, at 178, 181-183. In fact, grandchildren with more involved grandparents actually had more behavioral problems, though this may have been the reason for the greater involvement rather than a result of it. *Id*. at 181, 183. Other researchers have found similar results. Ingulli, *supra*, at 300.

[47] Cherlin & Furstenberg, *supra*, at 169, 182. Similarly, when respondents of various ages were asked to identify the sources of knowledge on how to get along in life, and to name those who help children grow into happy and competent adults, none of the respondents mentioned grandparents. College students appeared as likely to feel close to aunts, uncles and cousins as to grandparents. Wood & Robertson, *supra*, at 287.

[48] Cherlin & Furstenberg, *supra*, at 178.

[49] Colleen Leahy Johnson, Ph.D., *Active and Latent Functions of Grandparenting During the Divorce Process*, 28(2) Gerontologist 185, 189 (1988).

[50] Wood & Robertson, *supra*, at 301.

such as sewing, cooking, fishing, or a craft.[51] Most grandparents seek to satisfy their own and their grandchildren's need for fun and pleasure, rather than taking on any weightier role. They treat the relationship as a friendship with little emphasis on the generational difference.[52]

Even Kornhaber and Woodward[53], often cited by proponents of visitation statutes, state that "the overwhelming majority" of grandparents in their study "expect to receive more affection from the grandchildren than they themselves are willing to give."[54] While Kornhaber and Woodward dwell at length on the roles a grandparent can conceivably fill,[55] they acknowledge that few grandparents actually fill many of these roles.[56] Grandparents tend to be absorbed in their own lives and concerns, and their grandchildren perceive as much.[57] Kornhaber and Woodward also acknowledge that the distance between grandparents and grandchildren results primarily from the grandparents' own choices of lifestyle or role. "The overwhelming majority of

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[51] Wood & Robertson, *supra*, at 301-302.

[52] Johnson, *supra*, at 187-189.

[53] Arthur Kornhaber, M.D. & Kenneth L. Woodward, *Grandparents/Grandchildren: The Vital Connection* (1985). These authors assert that those few children who do have close relationships with at least one grandparent are more emotionally secure and have less fear of old age. They also claim that the bond between grandparent and grandchild, at least at its inception, is second only to that between parent and child. However, their assertions are based on a study with "several methodological weaknesses," and other researchers have been unable to duplicate their findings. Ingulli, *supra*, nn. 28 and 29 and accompanying text.

[54] Kornhaber & Woodward, *supra*, at 29.

[55] *Id*. at 38, 167-179.

[56] *Id*. at 37-39, 64-65. "[M]ost grandparents, including some otherwise altruistic persons, accept and even prefer a less than intimate relationship with their grandchildren." *Id*. at 102.

[57] *Id*. at 41, 88, 98.

grandparents . . . elected not to become closely involved with their grandchildren."[58]

In fact, the most common way in which grandparents indirectly affect their grandchildren is through their relationships with their adult children, the child's parents.[59] When grandparents can and do haul their adult children into court to force grandparent visitation, this indirect effect on the grandchildren becomes a profoundly negative one.

a. Grandparents' Role is Not Necessarily a Positive One When Parents Divorce

Grandparents are most satisfied with their role when the lives of their children and grandchildren are relatively free from problems.[60] Faced with the divorce of the parents, most grandparents tend to withdraw, rather than stepping in with some unique form of assistance.[61] Where grandparents do assist their recently divorced adult children, the parents "all too frequently" report that the grandparents interfered too much with the parent's authority or intruded into the private affairs of parent and child.[62]

Certainly, some grandparents react to the parents' divorce in constructive ways. However, others see it as an opportunity to reassert control over their adult children's

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[58] *Id*. at 88; *see also* at 78-79, 86, 98. Other research has indicated that grandparents are more concerned with their relationships with their peers than with their relationships with grandchildren. Ingulli, *supra*, at 301.
[59] Thompson et al., *supra*, at 1219.
[60] Johnson, *supra*, at 190.
[61] Kornhaber & Woodward, *supra*, at 40-41.
[62] Furstenberg & Cherlin, *Divided Families*, *supra*, at 55.

lives,[63] while yet others respond by "attacking their child's former spouse or even attacking their own child."[64]

4. Any Positive Roles Grandparent Might Normally Fulfill are Impossible when Visitation is Coerced

One commentator[65] lists the "important roles" that grandparents might[66] play in the life of a child (here renumbered for clarity):

(1) Grandparents can "maintain the identity of the family";

(2) Grandparents can mitigate disturbing events in the outside world;

(3) Grandparents can provide a stabilizing influence;

(4) Grandparents can be watchdogs for abuse or neglect;

(5) Grandparents can serve as mediators or arbitrators between the parents and the grandchildren;

(6) Grandparents can allow grandchildren to build connections with family history.

Where grandparent visitation is without the parent's consent, however, these roles are either impossible to fulfill, unlikely to succeed, or almost inevitably distorted. "Maintenance of family identity" will become a conflict between incompatible family identities. A grandparent not welcome in the

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[63] *Id*. *See also* Shandling, *supra*, at 122, n. 19, making the same observation in a broader context.

[64] Derdeyn, *supra*, at 285. It is sometimes argued that divorcing parents will let their animosity toward their spouses color their feelings toward the spouse's parents. As Derdeyn suggests, this concern must go both ways. Parents of the noncustodial spouse may view the custodial spouse as the enemy, and be more likely both to precipitate conflict and to take that conflict to court.

[65] *Jackson*, *supra*, at 567, n. 20.

[66] As noted above, research has not supported the argument that grandparents typically serve these functions.

household will be introducing further "disturbing events," rather than mitigating the pain of existing disturbances. Obviously, a grandparent who is hauling the family into court will not be providing a "stabilizing influence." The aggravated distrust between grandparent and parent will greatly interfere with the grandparent's ability objectively to assess whether the grandchildren are abused or neglected; indeed, the grandparent will have a potent motive to exaggerate or imagine any facts that would transform the obstructing parent into the "bad guy." A grandparent who has forced his or her way into the family circle with the help of a judge is the last person who could serve as a mediator or arbitrator between parents and grandchildren. Finally, as with "family identity," any connections the grandparent could build with family history will be hindered by the grandchildren's conflict of loyalties, and by the bitterness of the parents whose authority has been overthrown.

> [A] range of factors influence the degree to which benefits [from ongoing relationships with grandparents] can be realized by children in both stressed and unstressed families. . . . Foremost . . . is the quality of the relationship that exists between grandparents and the child's own parents. If the relationship is harmonious and supportive, this opens avenues for direct and indirect benefits that grandparents can offer their grandchildren. If not, these potential benefits are likely to be much more limited (indeed, children may suffer from extended contact with grandparents if significant intergenerational conflict exists). Consequently, most of the obstacles that grandparents may encounter in their efforts to support their grandchildren cannot readily be resolved through litigation that makes the

child's parents and grandparents adversaries in a courtroom.[67]

D. Grandparent Visitation Statutes are Not a Necessary, Rational or Effective Means of Furthering Any Permissible State Interest

1. Both Litigation and Resulting Court Orders are Detrimental to Children

The common law is replete with warnings that using judicial process to coerce a family into accepting grandparent visitation is ill-advised. "[C]ourts were concerned that an intergenerational conflict would only hurt the development of the child involved."[68] The judge in the first reported United States grandparent visitation case cautioned that "the intervention of the tribunals would ... render the dissensions of the family more pronounced by delivering them to the public." *Succession of Reiss*, *supra*, 15 So. at 152; *see also Brooks v. Parkerson*, *supra*, 454 S.E.2d at 773.

Legal scholars, psychologists and sociologists have pointed out the many ways that grandparent visitation statutes harm the children they are purportedly designed to serve, and their families as well.[69] First, there is the harm done by the litigation itself. These are emotionally wrenching, heated, adversarial conflicts,[70] of an intensity and

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[67] Thompson et al., *supra*, at 1219.

[68] Jackson, *supra*, at 574; *see also* Thompson et al., *supra*, at 1217.

[69] These include commentators who believe that one or another kind of grandparent visitation statute is desirable and/or constitutional despite these damaging effects. *See, e.g.*, Shandling, *supra*, and Harpring, *supra*, as detailed *infra* at notes 71-73.

[70] *See Parham v. J.R. et al.*, *supra*, 442 U.S. at 610, on the inappropriate nature of "adversary contest[s]" that challenge "whether the parents' motivation is consistent with the child's best interests."

traumatic impact comparable to divorce proceedings.[71] The litigation strains the family's economic resources.[72] The intrusiveness of the proceedings and the challenge posed to the parent's authority causes the child extreme anxiety, confusion and dislocation.[73] The detailed and public airing of family secrets and disagreements, in a process whose adversarial nature magnifies every disagreement, leaves a residue of anger, humiliation and distrust which greatly reduces the chances of a peaceful reconciliation between parent and grandparent.[74] The grandparent's power to interfere in the parent's family tends to sabotage the natural process by which parents of adult children relinquish their parental status to the next generation.[75] Then, if the grandparent's petition is granted, the child is trapped for years in an "emotional minefield,"[76] the innocent victim of long-term loyalty conflicts.[77]

As the Florida Supreme Court suggested in finding Florida's grandparent visitation statute unconstitutional, even if such statutes served a compelling state interest, "alternatives such as providing mediation services, counseling, or other non-mandatory (and non-adversarial)

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[71] Introduction, Ellen C. Segal and Naomi Karp, *Grandparent Visitation Disputes: A Legal Resource Manual*, pg. 2 (1989); Derdeyn, *supra*, at 284, 286; Harpring, *supra*, at 1677; Sykora, *supra*, at 761; Jackson, *supra*, at 588, incl. n. 150.

[72] Bostock, *supra*, at 355.

[73] Minerva, *supra*, at 537; Shandling, *supra*, at 124; Harpring, *supra*, at 1677.

[74] Derdeyn, *supra*, at 286 ; Harpring, *supra*, at 1677. Petitioners acknowledge this reality in their Brief for Petitioners at p. 6, n. 10, stating that a "public airing" of the parties' disagreements as to why visitation ceased "could complicate relations between the individuals involved."

[75] Derdeyn, *supra*, at 284.

[76] Jackson, *supra*, at 580.

[77] Sykora, *supra*, at 761; Thompson et al., *supra*, at 1220.

services" would be more appropriate and narrowly tailored to serving that interest.[78]

2. Impact of Visitation Lawsuits and Orders is Even More Harmful Where Parents' Marriage is No Longer Intact

Divorce rocks a child's world. The death of a parent is even worse. When a child and his family are enduring these most traumatic of changes, can there be a worse time for events that frighten and anger both parent and child? that distract the parent from meeting the child's special needs? Grandparent visitation lawsuits make it even harder for the child to cope.[79] The litigation drains away financial resources already strained by widowhood or divorce.[80] The parents inevitably see the lawsuit as a further threat to the family's integrity; this increases the child's emotional turmoil, and undermines his sense of security and stability just when it needs reinforcement.[81] Thus, "[t]his legislation cannot rationally be considered to alleviate situations for children during difficult times."[82]

Nor can the trial court, be it never so wise, avoid this damage by the manner in which it considers the facts. The damage has been done before the trial court plays that role.

Finally, it must be remembered that children of divorced parents are likely to have one formal visitation

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[78] *Von Eiff v. Azicri*, 720 So.2d 510, 517, fn. 4 (1998).
[79] Thompson et al., *supra*, at 1220; Derdeyn, *supra*, at 285.
[80] Bostock, *supra*, at 356. Grandparents are often better positioned to bear the costs of litigation. Thompson et al., *supra*, at 1220; *see also* Minerva, *supra*, at 557. This may allow the grandparents to coerce the parents into an undesirable settlement to avoid ruinous litigation expenses. Thompson et al., *supra*, at 1220.
[81] Derdeyn, *supra*, at 285.
[82] *Id*.

schedule to cope with already. If a state enables grandparents to insist on visitation as well, the disruptions of the child's home life -- and the child's insecurity and disorientation -- will be multiplied. Divorced parents, especially if they have remarried, must perform a difficult juggling act, trying to accommodate the needs of their children and the desires of family members both old and new. The heavy-handed intrusion of the state is anything but helpful.

3. Application of Statutes is Inconsistent, Subjective, and Frequently Discriminatory

Grandparent visitation statutes typically offer judges little guidance beyond the phrase "best interests of the child."[83] Even the minority of statutes that include specific factors for the court to consider generally add a "catch-all" under which the court is to consider any other unenumerated factors which might somehow be relevant.[84] "Determining the best interests of the child in grandparent visitation cases is a difficult task and one that courts are ill-equipped to make."[85] As this Court noted in *In re Gault*, *supra*, 387 U.S. at 19, fn. 25: "The judge as amateur psychologist . . . is neither an attractive nor a convincing figure." Judges "may rely on subjective value judgments and their own intuitive assessments of family functioning: criteria that are applied parochially and unreliably and that may vary widely on a

[83] Sykora, *supra*, at 761.

[84] *See, e.g.*, Nev. Rev. Stat. Ann. § 125C.050.3(j) (Michie Supp. 1999); N.J. Stat. Ann. § 9:2-7.1.b(8) (West Supp. 1999); N.M. Stat. Ann. § 40-9-2.G.(1) (Michie 1999); Vt. Stat. Ann. tit. 15, § 1013(b)(8) (1989); W. Va. Code Ann. tit. 14A, § 48-2B-5(b)(13) (Michie 1999); Wash. Rev. Code Ann. § 26.09.240(6)(h) (West 1997); cf. Ariz. Rev. Stat. Ann. § 25-409.C. (West Supp. 1999) ("all relevant factors, including [listed ones]").

[85] Bostock, *supra*, at 367.

case-by-case basis."[86] The fact that judges are likely to be grandparents or contemporaries of grandparents increases the likelihood of a bias in favor of grandparents' desires.

A judge attempting to apply the "best interest" standard must grasp at every factual detail he can uncover to resolve this dilemma. "Thus, apart from constitutional problems of using the best interest of the child standard without a prerequisite threshold showing of harm, the vagueness and subjectivity of such a standard lends itself to an invasion of family privacy which is abhorrent to our current society."[87]

Most disturbing of all, the application of grandparent visitation statutes tends to show racial and gender discrimination. Where the custodial parent is a mother, her objections to grandparent visitation are more likely to be discounted, and the court is more likely to ignore animosity between parent and grandparent. When custodial fathers object, courts are more likely to deny grandparent visitation.[88] African-American grandparents are more likely to have close relationships with their grandchildren, and to act as substitute parents for them. "Of all grandparents, then, they are the ones whose absence is most likely to hurt their

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[86] Thompson et al, *supra*, at 1220. As Justice Stevens noted in his concurring opinion in *Bellotti v. Baird*, 443 U.S. 622, 655-656 (1979) (*Bellotti II*):

> [T]he only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement ... -- particularly when contrary to [the party's] own informed and reasonable decision -- is fundamentally at odds with privacy interests underlying the constitutional protection afforded to [that] decision.

[87] Bean, *supra*, at 444.

[88] Czapanskiy, *supra*, at 1333-1334, 1343-46.

grandchildren. Nonetheless, they are among the least favored petitioning grandparents."[89]

Grandparent visitation statutes exacerbate family dissension, traumatize children, and tend to result in inconsistent and inequitable judgments. Even if the evidence supported a substantial or compelling state interest in "strengthening familial bonds," a means so counter-productive as this cannot be deemed rationally related to that goal, let alone "necessary" or "narrowly tailored" thereto.

CONCLUSION

For the reasons stated above, the amicus urges this Court to affirm the decision of the Washington Supreme Court, and in doing so to make clear that fit parents, whether married, single, divorced or widowed, retain their fundamental right to guide their children to adulthood.

Respectfully submitted,

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[89] *Id*. at 1341.