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The Scarlet "N": Grandparent Visitation Statutes That Base Standing on Non-Intact Family Status Violate the Equal Protection Clause of the Fourteenth Amendment

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THE SCARLET "N:" GRANDPARENT VISITATION STATUTES THAT BASE STANDING ON NON-INTACT FAMILY STATUS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

KAREN J. McMULLEN†

INTRODUCTION

At common law, grandparents were unable to petition for court-ordered visitation with their grandchildren.1 In response, state legislators of all fifty states adopted third-party visitation statutes; many of them were limited to grandparents.2 State legislatures passed the first wave of grandparent visitation statutes between 1966 and 1986.3 The statutes delineate the

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1 See Succession of Reiss, 15 So. 151, 152 (La. 1894) (stating that parents may have a moral obligation to allow their parents or in-laws visit their children but do not have a legal one); 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, 319 (1994) (stating that "common law denied grandparents the legal right to bring visitation suits"); Kristine L. Roberts, State Supreme Court Applications of Troxel v. Granville and the Courts' Reluctance To Declare Grandparent Visitation Statutes Unconstitutional, 41 FAM. CT. REV. 14, 15–16 (2003) (noting that before the passage of the grandparent visitation statutes, grandparents were in the position of all other non-parents in that they had no right to sue for court-ordered visitation).

2 In Troxel v. Granville, 530 U.S. 57 (2000), the Court noted that "all 50 states have statutes that provide for grandparent visitation" and listed each statute. Id. at 74 n.4; see also id. at 762 n.26 (listing the statutes); Jeffrey J. Trapani, Comment, Grandparent Visitation Rights in Massachusetts After Troxel: Blixt v. Blixt, 38 NEW ENG. L. REV. 759, 762 (2004) (stating that in a span of "less than thirty years" the legislatures of all fifty states passed third-party visitation statutes). The District of Columbia has never had a grandparent visitation statute.

3 New York passed the first grandparent visitation statute in 1966. See Ch. 631, 1966 N.Y. Laws 766 (McKinney). Nebraska was the last state to pass its first grandparent visitation statute when it did so in 1986. See Hamit v. Hamit, 715 N.W.2d 512, 525 (Neb. 2006) (citing Judiciary Committee Hearing, 89th Leg., 1st Sess. 91 (Neb. 1985)).
circumstances under which grandparents have standing to petition for court-ordered visitation with their grandchildren.4

Grandparent visitation statutes were a political phenomenon. Significant demographic changes took place during the time that the statutes were enacted—large numbers of seniors and diminishing numbers of traditional nuclear families.5 In the second half of the twentieth century, there was a strong pro-grandparent social and political sentiment6 and a strong political force of older Americans.7 Grandparents were “the most active lobby in the [United States].”8 In fact, commentators have suggested that because of the increasing number of seniors and their high level of political involvement, “[v]oting against grandparents is political suicide” for members of state

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4 See infra notes 14–18 and accompanying text. The state high courts often interpret the statutes and impose further requirements that are not found in the plain language of the statutes. See, e.g., Emanuel S. v. Joseph E., 78 N.Y.2d 178, 182, 577 N.E.2d 27, 30, 573 N.Y.S.2d 36, 39 (1991) (stating that a grandparent must prove a sufficient existing relationship with the grandchild or an effort to establish one to gain standing although the statute simply states that circumstances must be such that equity would see fit to intervene). This Note, however, solely addresses the statutes as written.

5 See Natalie Reed, Note, Third-Party Visitation Statutes: Why Are Some Families More Equal than Others?, 78 S. CAL. L. REV. 1529, 1533–38 (2005) (arguing that the organization previously known as the American Association of Retired Persons (“AARP”) and the senior lobby used the changing demographics and the unraveling of the nuclear family structure to invoke “America’s deep-rooted fear of the family’s breakdown” and to compel grandparent visitation legislation); see also Bostock, supra note 1, at 324 (“[C]hanges in family patterns made grandparent involvement in the nuclear family more attractive in the eyes of Americans and, at the same time, provoked grandparents to action.”).

6 See Bostock, supra note 1, at 322–25.

7 At a Congressional hearing, Representative Olympia J. Snowe stated that seventy-five to eighty-five percent of senior citizens are grandparents and that seniors “are... retiring earlier, living longer, and are becoming much more politically active.” Id. at 325 (citing Grandparents Rights: Preserving Generational Bonds, 1991: Hearing Before the Subcomm. on Human Servs. of the H. Select Comm. on Aging, 102d Cong., 1st Sess. 103, at 3 (1991) [hereinafter Grandparents Rights Hearing]) (internal quotation marks omitted). Supporters of grandparent-grandchild visitation are organized and still advocating their interests. For example, the mission of nonprofit organization Advocates for Grandparent Grandchild Connection is to “advocate[] for grandchildren” and “support[] grandparents who have suffered from loss of affection and contact from their grandchildren.” Advocates for Grandparent Grandchild Connection, About Us, http://grandparentchildconnect.org/about-us/ (last visited Oct. 2, 2009).

8 Bostock, supra note 1, at 325 (quoting Grandparents Rights Hearing, supra note 7, at 2 (statement of Rep. Downey)) (internal quotation marks omitted).
In addition, senior groups clearly impacted national politics; a joint resolution of Congress, with only eight House members in opposition, prompted President Clinton to name 1995 the year of the grandparent. During the 1990s, many Americans also focused on drug abuse problems of parents, significant poverty levels, and increasing numbers of out-of-wedlock children. In addition, during this period, Americans looked less to traditional social institutions, such as churches, and more toward the legal system as a way to solve their family problems.

What began as a social and political movement, however, quickly transformed into a constitutional hotbed. Grandparent visitation statutes implicate the Fourteenth Amendment in two ways: (1) the substantive due process rights of parents to direct the upbringing of their children in as much as parents’ decisions are challenged, and (2) the right to equal protection because many grandparent visitation statutes differentiate among parents based upon family status. This Note focuses on the equal protection problem.

This Note argues that statutes that allow grandparents to petition for visitation with children in specified non-intact families but do not grant such rights to grandparents seeking visitation with children in intact nuclear families violate the Equal Protection Clause of the Fourteenth Amendment. Part I is an overview of the current state of grandparent visitation statutes and gives examples of typical discriminatory statutes. Part II determines that because the statutory classifications result in infringement of parents’ fundamental right to direct the

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9 Id. at 325 (quoting ANDREW J. CHERLIN & FRANK F. FURSTENBERG, JR., THE NEW AMERICAN GRANDPARENT 5 (1986)) (internal quotation marks omitted).
10 See id. at 324.
11 See Reed, supra note 5, at 1536–37 (stating that, in California, the AARP worried that the drug epidemic, poverty, and single parenthood may result in children being “snatched away by their parents without notice or opportunity for further contact”).
12 See Janet L. Dolgin, The Constitution as Family Arbiter: A Moral in the Mess?, 102 COLUM. L. REV. 337, 337, 345–54 (2002) (discussing institutions such as schools, churches, and communal groups that have changed and withered since World War II and stating that “Americans have turned to the law... to define familial relationships and to help construct new familial forms”).
13 The pertinent clauses in the Fourteenth Amendment state that a state shall not “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
upbringing of their children, the classifications must be strictly scrutinized. Part III evaluates the constitutionality of the statutes. Section A of that Part argues that because all parents have a fundamental right to the care, custody, and control of their children, all parents are similarly situated, and similarly situated individual parents should not be treated dissimilarly. The discriminatory statutes, therefore, violate the Equal Protection Clause on this basis, even before they are strictly scrutinized. In Section B, the legitimate and compelling state interests in avoiding harm to children and promoting children's welfare are identified. Section C examines the classifications to determine whether they are narrowly tailored to achieve the compelling state interest and concludes that there are two reasons why the discriminatory statutes are not narrowly tailored. First, the classification of parents and children based on family status is not necessary nor is it narrowly tailored to determine which children need grandparent visitation to promote their welfare or protect them from harm. Thus, categorization based on non-intact family status is both over-inclusive and under-inclusive. Second, classifying parents based on familial status is not the least restrictive alternative because an individualized determination of the best interests of the grandchild will accomplish the state interest while impinging on parents' fundamental rights only when necessary. This Note argues that discriminatory grandparent visitation statutes that classify parents based on familial status should be held unconstitutional. That is, the classification is such that single, nonmarital, or divorced parents wear the invisible “Scarlet ‘N’” to court appearances in which a grandparents visitation rights are established.

I. STATUTES MANDATE JUDICIAL DISCRIMINATION

Equal protection concerns arise in the grandparent visitation context in about half of the states. Such states give grandparents standing to petition for visitation with grandchildren based on enumerated non-intact family statuses and enumerate various

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14 See infra Appendix for details of which non-intact family statuses are included in each statute, as well as the nuances of what the grandparent must plead to gain standing under each statute. There are twenty-six states that base grandparental standing on the familial status of the grandchild's parent, and, as some states have more than one pertinent statute, there are a total of thirty-four
non-intact family situations as the basis for standing: divorce or separation of the parents, death of one or both parents, or the non-marriage of the child’s parents. In approximately half of the states, therefore, grandparents cannot gain standing to petition for visitation with children in intact nuclear families. In contrast, slightly less than half of the states have either purely non-discriminatory statutes that apply equally to all families or hybrid statutes that enumerate one or more familial statuses as a basis for the grandparents’ standing to petition but also have provisions that permit grandparents to gain standing to petition for visitation with a child regardless of familial status.


See infra Appendix.

See supra note 14 and accompanying text.

There are a total of fifteen states with statutes that give grandparents equal standing to petition to visit with children in all families. See ALASKA STAT. § 25.20.065 (2009); CONN. GEN. STAT. § 46b-59 (2008); IDAHO CODE ANN. § 32-719 (2008); IOWA CODE § 600C.1 (2008); KAN. STAT. ANN. § 38-129 (2007); KY. REV. STAT. § 405.021 (West 2009); MD. CODE ANN. FAM. LAW § 9-102 (LexisNexis 2009); MONT. CODE ANN. § 40-9-102 (2007); N.J. STAT. ANN. § 9:2-7.1 (West 2002); N.D. CENT. CODE § 14-09-05.1 (2009); OR. REV. STAT. § 109.119 (2007); S.D. CODIFIED LAWS § 25-4-52 (2008); WYO. STAT. ANN. § 20-7-101 (2009); see also infra Appendix. There is also proposed legislation in Pennsylvania, which will modify that state's grandparent visitation statute such that it contains no discriminatory classifications. See S.B. 515, 190th Gen. Assem., 2007 Sess. (Pa. 2007).

There are a total of ten states that either have one statute that contains discriminatory and non-discriminatory components or multiple statutes that do the same. See ALA. CODE § 30-3-4.1 (2009); DEL. CODE ANN. tit. 10, § 1031 (2008); HAW. REV. STAT. §§ 571-46(a)(7), 46.3 (2008); ME. REV. STAT. ANN. tit. 19-A, § 1803 (1998); MISS. CODE ANN. § 93-16-3 (2008); N.M. STAT. § 40-9-2 (2009); N.Y. DOM. REL. LAW §§ 72(1), 240(1)(a) (McKinney 2009); R.I. GEN. LAWS § 15-5-24.1 to .3 (2009); TENN. CODE ANN. § 36-6-306 (2009); UTAH CODE ANN. § 30-5-2 (2008); see also infra Appendix.
The Nebraska and Nevada grandparent visitation statutes are examples of typical discriminatory statutes. Their provisions enumerate nearly all of the possible non-intact family situations as bases for grandparental standing and never permit grandparents to petition for visitation with children living in nuclear intact families.  The Nebraska statute states that a grandparent “may seek visitation” if one or both of the child’s parents are deceased, if the parents’ marriage is dissolved or is in the process of dissolution, or if the child’s parents “have never been married but paternity has been legally established.” In Nebraska, therefore, the decisions of widowed, never-married, and divorced parents regarding grandparent visitation are automatically subject to suit upon a grandparent’s petition, but the grandparent visitation decisions of married parents, even if made under substantially similar circumstances, can never be challenged in a court proceeding. Similarly, in Nevada, if a parent is deceased, grandparents may petition if the parents are divorced, separated, or if the parents never married but previously “cohabitated” and are now separated. If a child lives in an intact nuclear family in Nevada, his or her grandparents have no standing to petition for visitation.

20 Neb. Rev. Stat. § 43-1802(1). Many other statutes, such as the Arkansas statute, also apply to familial situations in which parents are divorced or separated, one parent is deceased, or the child is born out of wedlock. See Ark. Code Ann. § 9-13-103(b). Other statutes enumerate fewer non-intact family situations as a basis for grandparental standing. For instance, the Georgia statute grants standing only if the parents are divorced or separated but not if a parent is deceased or a child is born out of wedlock. Ga. Code Ann. § 19-7-3(b) (2008). The Wisconsin statutes apply only to nonmarital families or families in which one parent is deceased but not to divorced or separated parents. Wis. Stat. §§ 54.56, 767.43(3) (2008). For the diversity of familial situations included in the discriminatory grandparent visitation statutes, see Appendix.
22 See id. §§ 125C.050(1)(a)–(c).
23 See id. § 125C.050(1). Interestingly, from the plain meaning of the statute, it seems also to be true that grandparents in Nevada cannot gain standing to petition if the unmarried parents of the child have never lived together, even though this is also a non-intact family situation in which one parent is absent from the custodial home. See id. For example, if the parties lived together before and just after the birth of the child but then moved into separate residences, the parents’ decision to deny or restrict grandparental visitation with the child can be challenged in court. See id. On the other hand, if the unmarried parents never lived together, not even briefly, to mutually care for the child, then the parents’ decision of whether and to what extent to grant visitation to grandparents cannot be challenged in court. See id.
Part II and Part III evaluate the constitutionality of the discriminatory statutes that are in place in more than half of the states. Part II addresses the constitutional rights of parents that are at stake in grandparent visitation suits and determines that strict scrutiny applies to equal protection challenges to grandparent visitation statutes. Part III argues that the discriminatory statutes are a violation of the Equal Protection Clause because they treat similarly situated parents dissimilarly and they are not narrowly tailored to the compelling state interest.

II. STRICT SCRUTINY FOR INFRINGEMENT OF A FUNDAMENTAL RIGHT

In an equal protection analysis, a classification is subjected to strict scrutiny in two instances. First, when the classification implicates a suspect class, it must be strictly scrutinized. Alternatively, strict scrutiny is triggered when the statute significantly interferes with the exercise of an individual's fundamental right. The classifications present in state grandparent visitation statutes, based on marital, living, or familial status, do not implicate a suspect class. The rights of

24 See Romer v. Evans, 517 U.S. 620, 631 (1996) (stating that “if a law neither burdens a fundamental right nor targets a suspect class,” the rational basis test rather than strict scrutiny will be applied). The strict scrutiny test “is of relatively recent origin,” it was developed in several different constitutional law areas during the 1960s. See Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. REV. 1267, 1270, 1273–75 (2007).

25 See Fallon, supra note 24, at 1268–69 (stating that strict scrutiny is utilized under the Equal Protection Clause when “statutes... discriminate on the basis of race or other ‘suspect’ classifications”). For a recent example of a suspect racial classification that mandated strict judicial scrutiny, see Johnson v. California, 543 U.S. 499, 507–09 (2005).


27 Race, alienage, and ancestry are suspect classifications. See, e.g., Bush v. Vera, 517 U.S. 952, 958 (1996); Graham v. Richardson, 403 U.S. 365, 371–72 (1971); Oyama v. California, 332 U.S. 633, 646–47 (1948). Marital or familial status, however, do not constitute suspect classes, and no court has suggested otherwise. In Moore v. City of East Cleveland, 431 U.S. 494 (1977), a zoning ordinance case, the Court explained family arrangements under a constitutional law framework. The Court stated that families have a right of privacy, but instead of applying strict scrutiny, the Court stated that it “must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the
individual parents, which are at the center of grandparent visitations suits, are fundamental rights, and thus trigger strict scrutiny. Rights delineated by the Supreme Court to be explicitly or impliedly guaranteed by a constitutional provision are fundamental rights. The first time the Supreme Court utilized strict scrutiny in an equal protection case because a statutory classification constituted a threat to an individual's fundamental right was in *Skinner v. Oklahoma ex rel. Williamson*, which involved the forced sterilization of only certain three-time felons. Because the right to procreate is "fundamental," and the statute severely infringed or obliterated this right, the Court strictly scrutinized the classifications to avoid "invidious . . . discrimination" between the classes of three-time felons. More than a quarter century after *Skinner*, in *Shapiro v. Thompson*, the Court held that a state law that created a one-year waiting period before a new resident could collect welfare benefits was a penalty on the fundamental right to travel, and therefore, unconstitutional under the Equal Protection Clause. The Court explicitly stated that a classification that penalizes the exercise of a fundamental right is unconstitutional "unless shown to be

challenged regulation," therefore, applying some type of intermediate scrutiny. Id. at 499.

28 See infra notes 29–58 and accompanying text. Two state courts utilized strict scrutiny to evaluate equal protection challenges to grandparent visitation statutes. One court stated that "a statutory classification is permissible if it furthers a demonstrably compelling interest of the State and limits its impact as narrowly as possible consistent with the purpose of the classification." Blixt v. Blixt, 774 N.E.2d 1052, 1062 (Mass. 2002) (internal quotation marks omitted). Similarly, another court's utilization of strict scrutiny was based on "whether the classification is necessary to serve the Commonwealth's *parens patriae* interest and whether the means used are narrowly tailored to effectuate the state purpose." Schmehl v. Wegelin, 927 A.2d 183, 188 (Pa.), cert. denied, 128 S. Ct. 619 (2007). The components of the strict scrutiny analysis are further examined in this Part and Part III of this Note.


30 316 U.S. 535 (1942).

31 *Id.* at 536. Under the Oklahoma statute, three-time larcenists were subject to forced sterilization but three-time embezzlers were not. See *id.* at 538–39; see also Fallon, supra note 24, at 1281 (stating that the "first Supreme Court case to use the term 'strict scrutiny' in anything like the modern sense was *Skinner v. Oklahoma*").

32 *Skinner*, 316 U.S. at 541.

necessary to promote a compelling government interest." Thus, the Supreme Court’s decision in *Shapiro* created a precedent that “all classifications bearing on the distribution of fundamental rights trigger strict scrutiny.”

Recently, in *Troxel v. Granville*, the Supreme Court made a “rare[] venture[] into the troubled waters of family law” and deemed a parent’s right to the “care, custody, and control” of her children a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. The plurality in *Troxel* held that the state of Washington’s third-party visitation statute was unconstitutional as applied by the trial court; specifically, the Court held that the application of the statute violated the custodial parent’s substantive due process rights.

The Washington statute did not contain any classifications that invoked equal protection considerations because it was an unusually broad statute that allowed virtually every person in the state to petition to visit with a child. The Washington statute was “breathtakingly broad.” It allowed “[a]ny person” to petition for visitation with a child “at any time” and authorized state courts to order grandparent visitation if it was deemed to “serve the best interest of the child.” The Supreme Court’s holding was thus limited to due process grounds because there was no opportunity to review equal protection considerations in *Troxel*.

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34 Id. at 634.
35 Fallon, supra note 24, at 1282. Around the same time that the Supreme Court decided *Shapiro*, the Court also decided a voting rights case under the Equal Protection Clause, *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969), in which the Court used the same strict scrutiny formulation as in *Shapiro*. See Fallon, supra note 24, at 1283.
38 *Troxel*, 530 U.S. at 65.
39 Id. at 67.
40 See id. at 80 (Stevens, J., dissenting) (noting the “uniqueness of the Washington statute”).
41 Id. at 67 (plurality opinion).
42 WASH. REV. CODE § 26.10.160(3) (2005); see also *Troxel*, 530 U.S. at 60.
43 The case was, however, about a doubly non-intact family. Mother Tommie Granville and father Brad Troxel never married but lived together and had two daughters. *Troxel*, 530 U.S. at 60. When the couple split up, the father moved in with his own parents. *Id.* Brad Troxel regularly brought his daughters to their grandparents’ house during his visitation but later committed suicide, leaving the mother, Tommie Granville as the sole parent. *Id.* Tommie Granville allowed the
In *Troxel*, however, a plurality of the Supreme Court clearly stated that this grandparent visitation statute significantly infringed on the parent's fundamental, constitutionally protected right. To determine the nature of the parents' interest at stake, the *Troxel* plurality cited nine Supreme Court cases, dating from 1923 to 1997, to support its statement that "[t]he liberty interest at issue[,] . . . the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." The Court stated, "[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."

The Supreme Court clearly determined that the right of parents to make decisions about grandparent visitation is part of this fundamental right protected by the Fourteenth Amendment's Due Process Clause. Furthermore, the Court explained that grandparent visitation statutes significantly infringe on this parental right because they allow courts to decide whether to grant grandparents visitation with their

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Troxel's limited visitation, but they sought and petitioned for more. *Id.* at 60–61. Although the Court did not focus on the non-intact family status of Granville and her daughters, the plurality opinion did briefly note that "this case involves a visitation petition filed by grandparents soon after the death of their son." *Id.* at 68. The plurality resolved this brief interlude into the outer edges of equal protection by reiterating the due process holding; the court stated, "the combination of several factors here compels our conclusion that [the Washington State third-party visitation statute] as applied, exceeded the bounds of the Due Process Clause." *Id.* Thus, the Court focused on due process and did not address equal protection. See *id.*

*Id.* at 60.


*Troxel*, 530 U.S. at 66.

*Id.* at 66–67.
grandchildren, thus supplanting the parent's decision-making ability.\footnote{48 Id. at 68–73.} Specifically, because of the fundamental nature of the parent's right, a presumption in favor of a fit parent's decision to deny or limit visitation with grandparents is required.\footnote{49 See id. at 69–70.} "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made."\footnote{50 Id. at 72–73.}

Therefore, the \textit{Troxel} decision leaves room for the conclusion that strict scrutiny applies in an equal protection challenge to a grandparent visitation statute. The plurality opinion did not directly state the level of scrutiny applicable to grandparent visitation cases\footnote{51 Justice Thomas, in his concurring opinion, stated that the plurality did not "articulate[] the appropriate standard of review" and that he would "apply strict scrutiny to infringements of fundamental rights," such as the infringement by grandparent visitation statutes on parents' rights. \textit{Id.} at 80 (Thomas, J., concurring).} but did clearly state that a parent's right to the care, custody, and control of his or her children is "fundamental" and that the statute infringed that right.\footnote{52 Id. at 66–67 (plurality opinion).} Because significant infringements of fundamental rights trigger strict scrutiny, strict scrutiny is the proper standard to evaluate classifications within grandparent visitation statutes.

In addition, two state cases that addressed equal protection challenges after \textit{Troxel} strictly scrutinized discriminatory grandparent visitation statutes.\footnote{53 Blixt v. Blixt, 774 N.E.2d 1052 (Mass. 2002); Schmehl v. Wegelin, 927 A.2d 183 (Pa.), \textit{cert. denied}, 128 S. Ct. 619 (2007).} In the first case, \textit{Blixt v. Blixt}, the Supreme Judicial Court of Massachusetts used \textit{Troxel} to determine that a fundamental right was at stake,\footnote{774 N.E.2d at 1059.} and the court stated that "[b]ecause the statute's classifications implicate fundamental parental rights, 'strict scrutiny' analysis is . . . appropriate."\footnote{Id. at 1062.} Similarly, in \textit{Schmehl v. Wegelin}, the Supreme Court of Pennsylvania held that because the classification "authoriz[ed] an infringement on a parent's fundamental right to make child-rearing decisions," the court must apply strict scrutiny.\footnote{927 A.2d at 188 (citing Smith v. Coyne, 722 A.2d 1022, 1025 (Pa. 1999)).} Likewise, most post-\textit{Troxel} state
court decisions utilize strict scrutiny to evaluate due process challenges to grandparent visitation statutes, with limited exceptions. Abundant precedent, therefore, compels the use of strict scrutiny to analyze an equal protection challenge to discriminatory grandparent visitation statutes.

III. DISCRIMINATORY STATUTES VIOLATE THE EQUAL PROTECTION CLAUSE

This Part evaluates the constitutionality of discriminatory grandparent visitation statutes. To survive an equal protection challenge, the statutes must classify differently situated individuals and satisfy strict scrutiny. Section A argues that the statutes are unconstitutional because they treat similarly situated people differently to the disadvantage of non-intact family parents. Accordingly, Sections B and C subject discriminatory grandparent visitation statutes to strict scrutiny; to satisfy strict scrutiny there must be a compelling state interest and a demonstration that the classification based on family status is narrowly tailored to promote that compelling state interest.

A. Parents of Intact and Non-Intact Families Are Similarly Situated

Although grandparent visitation statutes promote compelling state interests, the discriminatory statutes are unconstitutional if, as a threshold determination, they treat similarly situated persons differently. All fit parents are

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57 See, e.g., Lamberts v. Lillig, 670 N.W.2d 129, 132 (Iowa 2003) (utilizing strict scrutiny to invalidate the grandparent visitation statute that permits grandparents to petition when a grandparent's child—the parent of the grandchild—has died); Koshko v. Haining, 921 A.2d 171, 187 (Md. 2007) (applying strict scrutiny to a due process analysis of the Maryland grandparent visitation statute due to direct and substantial interference with a fundamental right); Oliver v. Feldner, 776 N.E.2d 499, 505 (Ohio Ct. App. 2002) (applying strict scrutiny due to infringement of a fundamental right and stating that a law rarely survives strict scrutiny); In re Appel v. Appel, 109 P.3d 405, 410 (Wash. 2005) (stating that state interference with a parent's liberty interest must be subjected to strict scrutiny).

58 See, e.g., Seagrave v. Price, 79 S.W.3d 339, 343 (Ark. 2002) (applying the rational basis test to an equal protection challenge to an Arkansas grandparent visitation statute); Blakely v. Blakely, 83 S.W.3d 537, 546 (Mo. 2002) (stating that invalidating the statute under a due process analysis using strict scrutiny was not necessary and leaving the determination of the validity of a particular statute to a case-by-case analysis).
similarly situated. A court must give the same weight to a
custodial parent’s decision regarding grandparent visitation
whether that parent is married, divorced, separated, or a single
parent.\footnote{An unfit parent is an “unsuitable and neglectful” parent who is not suited to
have custody of his or her children. Stanley v. Illinois, 405 U.S. 645, 654 (1972). A fit
parent “adequately cares for his or her children.” Troxel v. Granville, 530 U.S. 57, 68
(2000). A parent’s fitness may be questioned in child abuse and child neglect
petitions in each state.} In\footnote{Troxel, 530 U.S. at 68–70.} Troxel, the Supreme Court stated that the children’s
mother, who had never married and was separated from the
children’s subsequently deceased father, was presumptively a fit
parent and must be treated as such.\footnote{Id. at 68–70.} The Supreme Court
further stated that in evaluating a grandparent visitation case,
the trial court must presume that a fit parent acts in the best
interests of her children, must place the burden of rebutting the
presumption on the grandparent, and must accord “material” or
“significant weight” to the parent’s decision.\footnote{See id. at 68 (stating that the court must presume a fit parent acts in her
child’s best interests and that as long as a parent is fit, there is normally no reason
for the state to question the parent’s child-rearing decisions).} These standards
apply to custodial parents of intact and non-intact families
alike.\footnote{405 U.S. 438, 450–53 (1972).} Thus, the legal status of all fit parents is the same, and
an identical amount of respect should be accorded to the
parenting decisions of married, separated, single, and widowed
parents, regardless of whether the parent is living with the
child’s other parent.

In Eisenstadt v. Baird, the Supreme Court established a
rubric to determine when two groups of people with different
marital statuses are actually similarly situated.\footnote{Id. at 441–42. The Court identified “three distinct classes of distributees”:
(1) married persons who can obtain contraceptives to prevent pregnancy with a
prescription, (2) single persons who may not obtain contraceptives to prevent
pregnancy, and (3) all people who may obtain contraceptives to prevent the spread of
disease. Id. at 442.} In Eisenstadt, the Court addressed a Massachusetts statute that permitted
married people to obtain contraceptives to prevent pregnancy but
denied contraceptives to unmarried people who wished to use
them for the same purpose.\footnote{Id. at 68–70, 72.} “[T]he right of the individual,
married or single, to be free from unwarranted governmental
intrusion into matters so fundamentally affecting a person as the
decision whether to bear or beget a child” was at the heart of the

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child’s other parent.

In Eisenstadt v. Baird, the Supreme Court established a
rubric to determine when two groups of people with different
marital statuses are actually similarly situated. In Eisenstadt, the Court addressed a Massachusetts statute that permitted
married people to obtain contraceptives to prevent pregnancy but
denied contraceptives to unmarried people who wished to use
them for the same purpose. “[T]he right of the individual,
married or single, to be free from unwarranted governmental
intrusion into matters so fundamentally affecting a person as the
decision whether to bear or beget a child” was at the heart of the

59 An unfit parent is an “unsuitable and neglectful” parent who is not suited to
have custody of his or her children. Stanley v. Illinois, 405 U.S. 645, 654 (1972). A fit
parent “adequately cares for his or her children.” Troxel v. Granville, 530 U.S. 57, 68
(2000). A parent’s fitness may be questioned in child abuse and child neglect
petitions in each state.

60 Troxel, 530 U.S. at 68–69.

61 Id. at 68–70, 72.

62 See id. at 68 (stating that the court must presume a fit parent acts in her
child’s best interests and that as long as a parent is fit, there is normally no reason
for the state to question the parent’s child-rearing decisions).


64 Id. at 441–42. The Court identified “three distinct classes of distributees”:
(1) married persons who can obtain contraceptives to prevent pregnancy with a
prescription, (2) single persons who may not obtain contraceptives to prevent
pregnancy, and (3) all people who may obtain contraceptives to prevent the spread of
disease. Id. at 442.
right of privacy at issue in the case.\textsuperscript{65} Similarly, the right of each fit parent to freely make decisions regarding the care, custody, and control of her children is the fundamental right at issue in grandparent visitation cases.\textsuperscript{66} Just as each individual married or unmarried person in \textit{Eisenstadt} had an identical constitutional right to decide whether to have children despite differing marital statuses, each individual parent, whether the head of an intact or non-intact family, has the same constitutional right to make decisions in the best interests of his or her children. Thus, from a constitutional perspective, all fit custodial parents are similarly situated.

The Equal Protection Clause generally mandates that similarly situated individuals be treated alike.\textsuperscript{67} In \textit{Eisenstadt}, the Court held that the contraceptive statute did not even pass the fairly deferential rational basis test\textsuperscript{68} because "dissimilar treatment for married and unmarried persons who are similarly situated" was a clear violation of equal protection.\textsuperscript{69} In essence, one standard for married people and a different standard for similarly situated single people denied equal protection of the law to unmarried people.\textsuperscript{70} Likewise, discriminatory grandparent visitation statutes violate equal protection because they treat similarly situated parents differently. The decisions of parents of

\textsuperscript{65} Id. at 453.
\textsuperscript{66} \textit{Troxel}, 530 U.S. at 72.
\textsuperscript{67} See F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (stating that under the Fourteenth Amendment "all persons similarly circumstanced shall be treated alike").
\textsuperscript{68} The Court did not determine the level of scrutiny that should apply but simply applied the less stringent rational basis test. \textit{Eisenstadt}, 405 U.S. at 447. The Court noted that if the statute impinged on the fundamental freedoms outlined in \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965), which involved the right of two married people to use contraceptives to prevent pregnancy, then strict scrutiny would have to be utilized. \textit{Eisenstadt}, 405 U.S. at 447 n.7. The Court decided, however, that the law did not satisfy the "more lenient equal protection standard," and therefore, the level of scrutiny need not be determined. \textit{Id}. There were three reasons why the Court found that the different treatment accorded married and unmarried persons by the statute could not be rationally explained. First, "[i]t would be plainly unreasonable to assume that Massachusetts has prescribed [unwanted] pregnancy . . . as punishment" for the misdemeanor of fornication. \textit{Id}. at 448. Second, there was no health reason to allow married people to use contraceptives but deny the products to unmarried people. \textit{Id}. at 450. Third, a simple prohibition on contraception did not apply because married persons had the right to use contraceptives. \textit{Id}. at 452–53.
\textsuperscript{69} \textit{Eisenstadt}, 405 U.S. at 454–55.
\textsuperscript{70} \textit{Id}.
non-intact families are called into question by the court when a
grandparent petitions for visitation, whereas grandparents are
prohibited from petitioning to question the similar decisions of
nuclear family parents.\textsuperscript{71}

This distinction based on familial status is arbitrary and
constitutionally unsatisfactory. For instance, divorce does not
diminish a parent's fundamental right to make decisions about
his or her child, and therefore, there is no "real and genuine
distinction" between divorced and married parents upon which to
permit state interference in the form of grandparent visitation
suits.\textsuperscript{72} To uphold the classification of parents based on marital
or familial status suggests that divorced parents are less fit than
married parents.\textsuperscript{73} This is clearly unconstitutional under \textit{Troxel},
in which the Court accorded the same presumptions and weight
to a fit parent's child-rearing decisions regardless of familial
status.\textsuperscript{74}

As shown by state court analyses of nondiscriminatory
grandparent visitation statutes that do not base standing on
familial status, state courts have noted that all fit parents must
be treated equally. In one pre-\textit{Troxel} case, a family court in New
York explained that intact families and single parents are subject
to an equal amount of state interference under the statute
because to treat divorced or out-of-wedlock parents differently
would be to inappropriately suggest that parents of non-intact
families are less fit.\textsuperscript{75} The New York Court of Appeals
subsequently confirmed that intact and non-intact families are
equally subject to grandparent visitation petitions.\textsuperscript{76}

\begin{thebibliography}{99}
\bibitem{71} See \textit{supra} notes 14–16, 19–23 and accompanying text.
\bibitem{72} Schmehl \textit{v.} Wegelin, 927 A.2d 183, 195 (Pa.) (Baldwin, J., dissenting), \textit{cert.}
\bibitem{73} See \textit{id.} at 192–93 (Cappy, C.J., dissenting) (stating that the classification in
the Pennsylvania statute did not separate children at risk but rather suggested
"that divorced or separated parents are inherently less fit to parent, as compared to
parents who have married, or to parents who have never married, but who
conjugate").
\bibitem{75} Frances \textit{E. v. Peter E.}, 125 Misc. 2d 164, 167, 479 N.Y.S.2d 319, 322 (Family
Ct. Nassau County 1984); \textit{see also} Von Eiff \textit{v. Azicri}, 720 So. 2d 510, 511, 515–16
(Fla. 1998) (holding that Florida Statute § 725.001(1)(a) (1993), which granted
grandparents standing to petition on the death of a parent, was unconstitutional).
\bibitem{76} \textit{See Emanuel S. v. Joseph E.}, 78 N.Y.2d 178, 179–82, 577 N.E.2d 27, 28–30,
address constitutional issues in this case. \textit{Id.} at 183, 577 N.E.2d at 30, 573 N.Y.S.2d
at 39.
\end{thebibliography}
The Supreme Court of Iowa, addressing the rights of a divorced parent after the Supreme Court decided *Troxel*, stated that there is a presumption that a fit parent acts in the best interests of his or her children and "[t]his presumption is not simply applicable to joint decisions of fit married parents, but applies to the decisions of all fit parents."77 "Divorce does not diminish the parent's fundamental interest in parenting and does not make them less capable parents," and therefore, divorced parents are presumed to be as fit as married parents and their decisions are given the same respect.78 Likewise, the Supreme Judicial Court of Maine noted that "parental death standing alone" was not an "urgent reason," as required by Maine, to justify "a court's interference" with the family.79 The Maine court stated that because the death of a parent does not affect "the surviving parent's fundamental right" to decide whether a grandparent should have visitation, it cannot be the sole basis on which a grandparent is granted standing to petition.80 Therefore, based on the precedent in *Eisenstadt* and state case law, all fit parents are similarly situated, and to discriminate between parents based on familial status is a violation of equal protection.

Therefore, even before strict scrutiny is applied, discriminatory grandparent visitation statutes are unconstitutional because they impermissibly discriminate against one subset of similarly situated parents. The next two Sections, however, argue that even if parents in non-intact and nuclear families are differently situated, the discriminatory grandparent visitation statutes do not satisfy strict scrutiny.

B. The Legitimate and Compelling State Interest

The first step of the strict scrutiny equal protection analysis is to determine the state's legitimate and compelling interest in grandparent visitation statutes.81 States claim that the same compelling interest that justifies classifying parents based on

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77 *In re Marriage of Howard*, 661 N.W.2d 183, 192 (Iowa 2003). This case was based on a Fourteenth Amendment substantive due process challenge. *Id.* at 187.
78 *Id.* at 192.
79 *Conlogue v. Conlogue*, 890 A.2d 691, 698 (Me. 2006).
80 *Id.* Although the rationale of the Maine court was based on substantive due process grounds, the court correctly granted equal respect to decisions of all fit parents. *Id.* at 699.
81 See Fallon, *supra* note 24, at 1321 ("Application of strict scrutiny obviously requires the identification of compelling governmental interests.").
family status justifies visitation statutes on the whole because the classification is meant to "narrow" the statute's application to the children who most need grandparent visitation. Thus, state courts have put forth one of two compelling interests: (1) avoidance of harm to the child, or (2) promotion of the child's health, safety, and welfare. Many legal scholars and state courts favor the harm standard. The Supreme Court in *Troxel*, refused to require that grandparents show that their absence would harm the child. Arguably, therefore, the Constitution does not recognize the avoidance of harm as the only state

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83 The New Jersey Superior Court stated the argument for the harm standard most clearly when it wrote 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 . . . is the avoidance of harm to the child." Daniels v. Daniels, 885 A.2d 524, 526 (N.J. Super. Ct. App. Div. 2005). Many other courts utilize similar approaches. See, e.g., Glidden v. Conley, 820 A.2d 197, 205 (Vt. 2003) (stating that a grandparent may rebut the presumption in favor of a fit parent by offering "evidence of compelling circumstances" such as "parental unfitness" or that "significant harm to the child will result in the absence of a visitation order"); In re Appel v. Appel, 109 P.3d 405, 410 (Wash. 2005) (stating that the grandparent must show that a denial of visitation would result in harm to the child). In addition, recent scholarship has argued for the harm standard. See, e.g., Stephen A. Newman, *Grandparent Visitation Claims: Assessing the Multiple Harms of Litigation to Families and Children*, 13 B.U. PUB. INT. L.J. 21, 23 (2003) (arguing that a grandparent should have to prove clear harm to the child to justify court-ordered visitation); Andres Mayor, Note, *Protecting Parents' Fundamental Rights and Children Under New Jersey's Grandparent Visitation Statute: The Need To Establish Harm to the Grandchild by Clear and Convincing Evidence*, 58 Rutgers L. Rev. 275, 276 (2005) (arguing that a state statute should require "clear and convincing evidence that the denial of visitation to the child will cause significant and demonstrable physical or psychological harm to the child"); cf. Elliott Scheinberg, *Grandparental Visitation: Its Evolution in New York State*, 2 Cardozo Pub. L. Pol'y & Ethics J. 289, 290–91 (2004) (arguing for a standard that necessitates evidence of a prior grandparent-grandchildren relationship). But see Susan Tomaine, Comment, *Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family*, 50 Cath. U. L. Rev. 731, 777 (2001) (noting that Justice Stevens's and Justice Kennedy's dissents rejected the harm standard and that Justice Scalia argued that such a decision is for the states). Pre-*Troxel* cases also utilized the harm standard. See, e.g., Brooks v. Parkerson, 454 S.E.2d 769, 772 (Ga. 1995); In re Herbst v. Sayre, 971 P.2d 395, 398–99 (Okla. 1998).

84 *Troxel* v. *Granville*, 530 U.S. 57, 73 (2000). The plurality stated that it did not consider "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." *Id.*
interest compelling enough for strict scrutiny, and states are free to evaluate the constitutionality of their visitation statutes on either ground.

In addition, the difference between the harm standard and the welfare standard is simply one of degree. The two state court cases that addressed equal protection challenges to grandparent visitation statutes, Blixt v. Blixt and Schmehl v. Wegelin, illustrate this point. In Blixt, the court "interpreted" the statute "to require a showing of harm" and found that the statute furthered "a compelling and legitimate State interest in mitigating potential harm to children in non-intact families." On the other hand, in Schmehl, the court stated that the "compelling state interest" was the protection of "the health and emotional welfare of children." The Schmehl court, nevertheless, dipped into the harm standard while analyzing equal protection; it recognized "the heightened risk of harm arising from the breakdown of a marriage" when it determined that the statute was "directed toward promoting the welfare of the child." Certainly, promotion of the welfare of a child includes the avoidance of harm. Thus, the harm standard is a more stringent and narrowly defined companion to the welfare standard.

Overall, the distinction between the two standards is simply one of degree and is not significant in evaluating the constitutionality of discriminatory statutes. This Note argues that state grandparent visitation statutes that contain classifications based on familial status violate the Equal

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86 Schmehl, 927 A.2d at 186–87 (citing Hiller v. Fausey, 904 A.2d 875, 886 (Pa. 2006)) (substantive due process case that focused on grandparent visitation). In Hiller v. Fausey, the Supreme Court of Pennsylvania stated that "requiring grandparents to demonstrate that the denial of visitation would result in harm . . . would set the bar too high," 904 A.2d at 890 and noted that some courts have rejected the harm standard. Id. at 889 n.22.
87 Schmehl, 927 A.2d at 187, 189–90. Of course, there are also other ways to promote the welfare of a child. Other courts have focused on promoting the relationship between the grandparent and the grandchild. See, e.g., Hamit v. Hamit, 715 N.W.2d 512, 527–28 (Neb. 2006) (noting the requirements of the Nebraska statute and stating that the grandparent must prove a significant, beneficial, existing relationship with a child but not providing the specific compelling state interest of the statute); In re Pensom, 126 S.W.3d 251, 255 (Tex. App. 2003) (mentioning the "child's well-being" and stating that the "State has a compelling interest in providing a forum for those grandparents having a significant existing relationship with their grandchildren").
Protection Clause because they are not narrowly tailored or necessary to promote either state interest. Where applicable, however, this Note references the harm standard because it is more prevalent in state court decisions and is the focus of many legal commentators.88

C. The Requirement That the Classification Is Narrowly Tailored To Achieve the Compelling State Interest

This Section argues that there are two reasons why discriminatory statutes are not narrowly tailored to avoid harm to the child and/or promote the welfare of the child. First, the classification based on family status is an inadequate proxy for determining which children are harmed by the absence of grandparent visitation, and, as a result, the classification is both over-inclusive and under-inclusive. Secondly, the classification based on familial status is not the least restrictive alternative. An individualized determination of the child's need for grandparent visitation would impinge on a parent's fundamental right only when necessary for the child's sake, rather than broadly grouping together all non-intact parents and children and subjecting all of their families to grandparent visitation suits. It is, therefore, a less restrictive alternative.

1. Non-Intact Family Status Is an Inadequate Proxy for Harm

The first reason the classification is not narrowly tailored to the compelling state interest is because familial status is not a proxy for determining which children are the most likely to be harmed by the absence of their grandparents. To use familial status as a proxy assumes that children of non-intact families are at a much greater risk of harm due to the absence of grandparent visitation than children of intact nuclear families. This is a dangerous assumption that has no basis in law or fact.

Two state courts have addressed the use of classifications based on family status as a proxy. Each court held that the classifications were satisfactory proxies, but the courts' analyses used generalized statements and contained no empirical data. In Blixt v. Blixt, the Supreme Judicial Court of Massachusetts held that a statute that did "not apply to grandparents of a minor child whose parents are living together" did not violate the Equal

88 See supra note 83 and accompanying text.
Protection Clause. The court reasoned that the “burden of the traumatic loss of a grandparent’s significant presence may fall most heavily on the child whose unmarried parents live apart.” The court asserted that this is because “a nonmarital child born out of wedlock, living apart from the child’s other parent” does not have two parents to help “in coping” with the absence of the grandparent. The court further stated that the legislature could conclude, from “social experience,” that there was a “heightened risk” to children in non-intact families and reiterated that these children “may be especially vulnerable to real harm from the loss or absence of a grandparent’s significant presence.” The Massachusetts court did not elaborate on the “social experience” component of its analysis or give any supporting empirical data or examples.

The Supreme Court of Pennsylvania, in Schmehl v. Wegelin, held that its grandparent visitation statute, which granted grandparents standing to petition when the child’s parents were divorced, divorcing, or separated for at least six months, did not violate the Equal Protection Clause. The court referenced a previous decision and found the classification of parents

89 Blixt v. Blixt, 774 N.E.2d 1052, 1062 (Mass. 2002). In addressing the equal protection challenge, the court went out of its way to state that its review of the statute applied only to the mother’s specific class—the “parent of a nonmarital child born out of wedlock, living apart from the child’s other parent.” Id. The court stated that divorced, married, and widowed parents raise different characteristics and issues such that only persons of those classifications can challenge them. Id. at 1063. Dissenting Justice Sosman disagreed with this approach and stated that “[i]t is the parent’s decision to live apart, not any other characteristic” that grants the grandparent standing to petition. Id. at 1076 (Sosman, J., dissenting).

90 Id. at 1065 (majority opinion).
91 Id. at 1062, 1065.
92 Id. at 1064.
93 Id.
94 Schmehl v. Wegelin, 927 A.2d 183, 184, 190 (Pa.), cert. denied, 128 S. Ct. 619 (2007). The Pennsylvania Supreme Court overturned the trial court, which held that the statute impermissibly treated intact families differently from divorced or separated parents. Id. at 185, 190. The trial court’s rationale was that the statute’s classifications burdened each parent’s fundamental right to make decisions about the upbringing of his or her children, which was not “necessary to vindicate a compelling government interest;” therefore, the classification did not survive strict scrutiny. Id. at 185. In overturning the trial court, the Pennsylvania Supreme Court referenced its own due process decision less than a year earlier, in Hiller v. Fausey, 904 A.2d 875, 886 (Pa. 2006), cert. denied, 127 S. Ct. 1876 (2007), and stated that the classification of parents “was at the heart of the determination that the statute was narrowly tailored to serve the compelling state interest” of protecting the welfare of children. Schmehl, 927 A.2d at 187.
permissible because the "classification scheme restrict[s] its reach to a limited class of grandparents." The Schmehl court noted the rather conclusory "public policy" included in the statute, which was to assure "the continuing contact of the child...with grandparents when the parent is deceased, divorced or separated." The court then recognized the "heightened risk of harm arising from the breakdown of a marriage" but did not state how this harm was related to a child's need to visit with a grandparent. Without further explanation or "proffering any independent analysis as to how classifying parents by marital status is necessary to protect the compelling interest of the state," the court held that the statute did not violate equal protection because "the classification...is directly and narrowly tailored to such breakdown" of the parent's marriage. The court did not describe how or why the welfare of a child of divorced parents would be negatively affected without court-ordered grandparent visitation.

Both cases were followed by strong and lengthy dissents. In his dissent in Schmehl, Justice Cappy argued that strict scrutiny is not satisfied by grouping parents based on marital status. Such classification does not protect the best interests of the child.

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95 Schmehl, 927 A.2d at 186–87 (citing Hiller, 904 A.2d at 886). The court's decision in Schmehl was arguably dependent on its previous decision in Hiller. In Hiller, the court referenced a different grandparent visitation statute of the state and a different type of non-intact family and stated that the statute "narrowly limits those who can seek visitation or partial custody...to grandparents whose child has died." 904 A.2d at 886. Thus, as Schmehl addressed a divorced parent and Hiller addressed a widowed parent, Hiller was not on point and therefore, the court's holding in Hiller was distinguishable. See Schmehl, 927 A.2d at 193 (Cappy, C.J., dissenting); id. at 195 (Baldwin, J., dissenting) (stating that Hiller did not apply "beyond the exceedingly narrow circumstance where a parent has died and the grandparent had a significant relationship with the child").

96 Schmehl, 927 A.2d at 187 (quoting 23 PA. CONS. STAT. § 5301 (2009)) (internal quotation marks omitted). The Schmehl court also posited the idea that "substantive due process and equal protection inquiries are essentially identical" in regard to determining the applicable level of scrutiny and whether the infringement on parents' rights is acceptable. Id. One of the dissents took exception to this statement, stating that the analyses differ in that due process asks if there is an acceptable infringement, whereas equal protection "considers whether the government's interest is sufficient to support a particular classification." Id. at 191 (Cappy, C.J., dissenting).

97 Id. at 189 (majority opinion).
98 Id. at 192 (Cappy, C.J., dissenting).
99 Id. at 189 (majority opinion).
100 See id.
because “divorce or separation alone is not a proxy for determining which parents might cause their children harm.”

In his dissent in *Schmehl*, Justice Baldwin argued that all fit parents are similarly situated and that the classification of parents was not based on a “real and genuine distinction.” In his dissenting opinion in *Blixt*, Justice Sosman argued that the court resorted to “vague generalizations verging on pure stereotypes of families that are not ‘intact.’” Sosman stated that the classifications of parents did not identify the children most likely to be harmed by a lack of grandparent visitation because classifications based on living status do “not identify a category of at-risk children with anything approaching the requisite degree of precision.” He then argued that a classification based on non-intact family status could not be narrowly tailored to achieve the compelling state interest.

These holdings are incorrect because familial status is not a proxy for determining whether and to what extent children are harmed due to the absence of a grandparent’s presence. The court’s holding in *Schmehl* was conclusory and lacked substance, and the court’s holding in *Blixt* was vague and based on a wide range of unsubstantiated assumptions about the vulnerability of children of non-intact families. Likewise, the statutory classifications approved by these state courts are over-inclusive because they permit grandparents to petition for visitation with every grandchild that lives in a non-intact family, whether or not that child is in need of the grandparent’s presence. Neither state court gave an adequate explanation of why or how children in non-intact families, due specifically to their familial status, are

101 Id. at 192 (Cappy, C.J., dissenting).
102 Id. at 195 (Baldwin, J., dissenting).
104 Id. at 1076.
105 Id. at 1077–81. The dissenting opinion analyzes the application of the statute to divorced parents, married parents who are not living together, instances of the death of one parent, and instances in which children are born out of wedlock and the parents do not live together. Id. at 1077–79. Justice Sosman’s arguments often focus on the fact that many parents from non-intact families are the head of stable families and that often one parent remarries or cohabits with another adult who is not the other biological parent but is instead a de facto parent for the child. Id. at 1077–80. The dissenting justice further points out that the court does not consider the following groups: stepparent families, families with adopted children, stable single-parent families, or gay and lesbian couples. As the dissenting justice states, all of these families may have safe and stable homes in which children are not subject to harm due to the absence of grandparent visitation. Id. at 1078–79.
automatically at great risk of harm due to lack of grandparent visitation. Therefore, the classification of parents based on non-intact family status rests on “arbitrary” and overbroad distinctions that are not a “substitute” for making an individualized determination as to whether a child, in any type of family, may be harmed in the absence of court-ordered grandparent visitation.

An opinion of the Supreme Court of Oklahoma sheds light on the reasoning behind discriminatory grandparent visitation statutes and courts’ willingness to uphold them. In *Graham v. Woffard*, the court made clear that it believed that children in nuclear families are insulated from any harm that may be caused by lack of grandparent visitation simply by virtue of their intact family status. The court stated that “unless something in the nuclear home harms or threatens to harm the child, the State may not interfere.” The Oklahoma court opined that if the harm to a child of an intact family is “great enough for State intervention” in an intact nuclear family, an abuse or neglect case against the parents would be warranted. This case illustrates the rationale that underlies discriminatory grandparent visitation statutes—the belief that nuclear families are all but indestructible and that the decisions of parents of intact families should never be questioned unless their acts rise to a level of harm that is so damaging to the child’s health and welfare that it cannot be ignored by the state. This position results in over-inclusive visitation statutes that are designed to protect the autonomy of the intact nuclear family instead of being designed to protect and promote the welfare of each individual child. Thus, the discriminatory statutes fail to find and protect all of the children who are genuinely in need of grandparent visitation.

The classification of parents based on familial status is also under-inclusive because it rests on a conclusory determination that no child in an intact nuclear family can be in need of court-

106 See generally Blixt, 774 N.E.2d 1052; Schmehl, 927 A.2d 183.
107 See Schmehl, 927 A.2d at 193 (Cappy, C.J., dissenting) (stating that the “distinction between parents based on marital or quasi-marital status is arbitrary” and that “separating the married or cohabiting from the divorced or separated is not a substitute for determining which parents might cause their children harm”).
109 Id. at ¶ 6, 12 P.3d at 488 (emphasis added).
110 Id. at ¶ 6, 12 P.3d at 488–89.
ordered grandparent visitation. Living with one’s parents, however, “does not serve to insulate a child from trauma, loss, or genuine disruption.” Situations in which nuclear family parents harm the child by denying contact with grandparents can be contemplated. For instance, nuclear family parents may cut off the grandparent-grandchild relationship in bad faith to derive a benefit from the grandparents or due to a petty grandparent-parent argument that does not involve the grandchild. In addition, Justice Sosman’s dissent argued that domestic violence within intact nuclear families may create a situation where the child is in need of grandparent visitation.

Situations in which one or both parents of a nuclear family suffer from substance abuse or a serious mental illness, medical disease, or disability may cause the child to rely on a grandparent for support and stability.

In short, the simple fact that a child’s parents are married and live together in the same household does not mean that the child is insulated from harm that could be avoided if grandparent visitation petitions were permitted.

2. A Less Restrictive Alternative Based upon Individual Determination Is Available

The last step in determining whether a statutory classification is narrowly tailored to the compelling state interest is to decide whether the classification is the least restrictive alternative. A classification that impinges on the parents’ fundamental right to the care, custody, and control of their children when a less restrictive alternative is viable violates the parents’ equal protection right embodied in the Fourteenth Amendment.

111 Blixt, 774 N.E.2d at 1083 (Sosman, J., dissenting).
112 Id.
113 Id.
114 See Fallon, supra note 24, at 1326 (stating that when there is infringement of a protected right, “the government’s chosen means must be the least restrictive alternative that would achieve its goals” and that “[a] law would not be necessary to achieve its ends if the government could accomplish the same result while inflicting lesser burdens on protected rights”) (internal quotation marks omitted).
115 See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 51 (1973) (stating that if “state action impinges on the exercise of fundamental constitutional rights or liberties,” the state must “be found to have chosen the least restrictive alternative” to satisfy strict scrutiny of the statute).
A statutory standing provision that mandates an individualized determination of whether a child is in need of grandparent visitation is a viable alternative that places fewer burdens on the parent’s fundamental right to direct the upbringing of his or her children. Instead of using familial status—a grossly inaccurate proxy for determining harm to children—grandparents would gain standing only when they can show that the particular child is likely to be in substantial need of court-ordered visitation. One prevalent example of an individualized determination grants a grandparent standing to petition for visitation with his or her grandchild only if the grandparent pleads that there is a significant existing grandparent-grandchild relationship that has been severed by the parent.

In fact, there is a significant movement toward implementing a standard that mandates that the petitioning grandparent plead and prove a significant and existing grandparent-grandchild relationship. Nearly a third of all states have codified the relationship standard for pleadings, and other state courts have interpreted their statutes to include such a requirement, even if it is not codified. Indeed, the


117 See, e.g., Blixt, 774 N.E.2d at 1060–61 (reading a requirement of harm to the child in the absence of grandparent visitation into the statute to render it constitutional); Emanuel S. v. Joseph E., 78 N.Y.2d 178, 182–83, 577 N.E.2d 27, 30, 573 N.Y.S.2d 36, 39 (1991) (holding that the equity-based statute requires that the grandparent seeking standing must prove a sufficient existing relationship with the grandchild or an effort to establish one).
child's past relationship with the grandparent and the beneficial nature of that relationship are arguably the best bases for understanding whether a child is in need of grandparent visitation and certainly is preferable to categorizing families based on marital status. For instance, if the child lived with and had a parent-like relationship with his or her grandparents for an extended period of time, it is irrelevant whether the child's parents are married. But it is clearly important that the child has an emotional need to continue the well-established and healthy grandparent-grandchild relationship. The grandparent-grandchild relationship standard, however, is one individualized pleading standard among others that may be considered by state legislatures.

There are two reasons why an individualized pleading standard is a less restrictive alternative. First, the Supreme Court has held that when a fundamental right is at stake, it is more likely that individualized determinations are necessary. Second, the statutory assumption that children in non-intact families are more in need of court-ordered grandparent visitation is weak and does not produce consistent and predictable results; thus, an individualized determination is necessary to make the statute constitutional.

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118 See, e.g., Sally F. Goldfarb, Visitation for Nonparents After Troxel v. Granville: Where Should States Draw the Line?, 32 RUTGERS L.J. 783, 791–98 (2001) (arguing that, to gain standing, the petitioning non-parent should have to prove he has played a role in the child's life); Scheinberg, supra note 83, at 290–91 (arguing that New York's standard should continue to demand evidence of a prior grandparent-grandchild relationship); Alessia Bell, Note, Public and Private Child: Troxel v. Granville and the Constitutional Rights of Family Members, 36 HARV. C.R.-C.L. L. REV. 225, 231 (2001) (arguing that only psychosocial parents of children should be permitted to gain standing to petition for visitation); see also supra note 115 and accompanying text.

119 See Rideout v. Rendeau, 761 A.2d 291, 301–02 (Me. 2000) (stating that when grandparents act as parents for their grandchild, the child has a "significant need" for continued contact with the grandparents that justifies state intervention).

120 If an individualized pleading standard is essential to the constitutionality of grandparent visitation statutes, some nondiscriminatory state statutes would also be held unconstitutional for failure to utilize the least restrictive alternative. It is likely that this would be a rare instance, because most state courts have read their broadly worded nondiscriminatory statutes to necessitate individualized pleading. See supra note 117 and accompanying text. That discussion, however, is outside the scope of this Note.

121 See infra text accompanying notes 123–132 and accompanying text.

122 See infra notes 133–139 and accompanying text.
When a fundamental right is at stake, there is a much stronger likelihood that a case-by-case determination is necessary. The opinions in *Califano v. Jobst*\textsuperscript{123}—an equal protection case applying the rational basis test—and *Stanley v. Illinois*\textsuperscript{124}—a procedural due process and equal protection case—provide examples. In *Califano*, a disabled child challenged a Social Security Act provision that terminated his insurance benefits when he married a woman who was not entitled to benefits under the Act.\textsuperscript{125} The Court held that Congress's decision not to require "individualized proof on a case-by-case basis" was rational, and the use of age and marital status to determine dependency on parents was justified.\textsuperscript{126} In contrast, in *Stanley*, the Court held that individualized proof was necessary to determine whether an unwed father was fit to raise his children when their mother died.\textsuperscript{127}

The major difference between *Califano* and *Stanley* was the presence or absence of a fundamental right. In *Califano*, the receipt of Social Security funds was not determined to be a fundamental right.\textsuperscript{128} On the other hand, in *Stanley*, the right of fit parents to raise their own children was a fundamental right with a strong historical tradition.\textsuperscript{129} In *Troxel*, the right of parents to the care, custody, and control of their children was at stake,\textsuperscript{130} and the Court stated that a court's determination of whether to grant grandparent visitation appropriately "occurs on a case-by-case basis."\textsuperscript{131} Accordingly, in deciding whether to

\textsuperscript{123} 434 U.S. 47 (1977).
\textsuperscript{124} 405 U.S. 645 (1972).
\textsuperscript{125} 434 U.S. at 48. The recipient's wife in this case was also permanently disabled but was not entitled to these benefits, which were based upon the wage-earner of the family rather than the disability of the recipient. *Id.*
\textsuperscript{126} *Id.* at 52–53.
\textsuperscript{127} *Stanley*, 405 U.S. at 649.
\textsuperscript{128} 434 U.S. at 52–54. The Supreme Court has held that procedural due process may be required for pre-termination of benefits but has not held that such benefits are anything but statutorily acquired rights that must be distributed and terminated fairly; government benefits are certainly not fundamental rights. *Goldberg v. Kelly*, 397 U.S. 254, 260–66 (1970).
\textsuperscript{129} 405 U.S. at 651 ("The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious ... than property rights.'") (alterations in original) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *May v. Anderson*, 345 U.S. 528, 533 (1953)).
\textsuperscript{131} *Id.* at 73.
establish individualized pleading standards in grandparent visitation cases, Stanley, rather than Califano, should be our guide, and therefore, an individualized determination is constitutionally necessary under the Equal Protection Clause as the least restrictive alternative.

Another situation that calls for an individualized determination is when the statutory classification rests on a weak assumption that does not constitute a strong proxy for the underlying rationale of the statute. The Court in Califano found marriage to be a strong proxy for financial status, stating that "there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried," and therefore, no case-by-case analysis was necessary.\textsuperscript{132} In contrast, the Court in Stanley found that no assumptions were permissible.\textsuperscript{133} The Court stated that all unmarried fathers are not neglectful parents, and, in fact, "some are wholly suited to have custody of their children."\textsuperscript{134} Therefore, the Court required a hearing to make an individualized determination as to whether an unwed father was fit to be a custodial parent.\textsuperscript{135} Likewise, in grandparent visitation cases, it is unwarranted to grant one fit parent's decision regarding grandparent visitation more deference and weight than another fit parent's decision.\textsuperscript{136} Therefore, an individualized determination is necessary to grant standing for grandparents to petition for visitation with their grandchildren.

Similarly, in Cleveland Board of Education v. LaFleur, the Court held that public school mandatory maternity leave policies that forced teachers to stop work in the fifth or sixth month of pregnancy swept "too broadly" and "amount[ed] to a conclusive presumption" that each pregnant teacher would be physically incapable of continuing work at the stated time without the necessary "individualized determination" of the woman's physical state.\textsuperscript{137} The Court found, based on medical testimony, that "the

\textsuperscript{133} Stanley, 405 U.S. at 654 (stating that some unmarried fathers may be "unsuitable and neglectful parents" but others may be "wholly suited to have custody of their children").
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 658.
\textsuperscript{136} See Troxel, 530 U.S. at 67.
\textsuperscript{137} 414 U.S. 632, 644 (1974).
ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter” and that not all women would be physically unfit to perform teaching duties during the fifth month of pregnancy.\footnote{Id. at 645–46. The Court further stated that even if some women would physically need to stop work in the fifth or sixth month, “it is evident that there are large numbers of teachers who are fully capable of continuing work for longer... [The conclusive presumption embodied in these rules... is neither ‘necessarily (nor) universally true,’ and is violative of the Due Process Clause.” Id. at 646. Although the Court’s opinion focused on the necessity of individual determinations, the concurring opinion stated, “[In light of the Court’s language... I would think that a four-week prebirth period would be acceptable.” Id. at 656 n.5 (Powell, J., concurring). Thus, it is possible that the Court would have found a more reasonable mandatory leave date permissible.} Therefore, the assumption that all pregnant women are not physically able to teach when five or six months pregnant was such a weak assumption that it violated the Fourteenth Amendment’s Due Process Clause.\footnote{Id. at 648 (majority opinion).}

Like the health of a woman at a certain stage in pregnancy at issue in *LaFleur* and the suitability of an unwed father in *Stanley*, drawing a line based upon non-intact family status is not accurate or helpful in determining which grandparents should be able to petition for visitation with their grandchildren. There is no evidence that children of non-intact families are in need of grandparent visitation and that children of intact nuclear families are not. Therefore, an individualized determination, such as a pleading standard based on the existence of a grandparent-grandchild relationship, is a less restrictive alternative. Because such less restrictive alternatives exist, discriminatory grandparent visitation statutes are not narrowly tailored and are unconstitutional.

**Conclusion**

As grandparent visitation law now stands, more than half of the states have discriminatory grandparent visitation statutes, and it is likely that children, parents, and grandparents of all types of families suffer injustice due to rigid imposition of these statutes. State courts and the Supreme Court should utilize strict scrutiny to hold such statutes unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Because parents from all types of families have the same fundamental
right to direct the upbringing of their children and are, therefore, similarly situated, it is constitutionally impermissible to classify some parents under the Scarlet “N” and treat their decisions with less respect or deference. In addition, state legislatures should recognize equal protection problems with the discriminatory statutes and remedy the problem by drafting nondiscriminatory statutes that incorporate individualized determinations of whether the child is likely to be in need of visitation with the grandparents.

Furthermore, discriminatory grandparent visitation statutes are both over-inclusive and under-inclusive. Classifying families based on family status does not constitute an adequate proxy to determine which children are in need of grandparent visitation because the classification scheme includes children from non-intact families who do not need a grandparent’s presence and excludes children from traditional nuclear families who may be in need of a supportive grandparent. Thus, it would be in the best interests of all children to eliminate statutes that based grandparental standing on family status in favor of nondiscriminatory statutes that utilize more individualized determinations. The suggestion proposed here—that statutes mandate that the grandparent plead a preexisting significant grandparent-grandchild relationship—is a viable and well-accepted statutory approach that would satisfy equal protection considerations. This less restrictive alternative would impinge on the parent’s fundamental right only when necessary and would better accomplish what all such statutes are designed to do—protect children from harm and promote their welfare.
### Appendix

**Chart of the Grandparent Visitation Statutes in the Fifty States as of November 2007**

**NOTE:** Comments in bold indicate conditions for visitation that require a "significant relationship" between the grandparent and child. The author argues that courts should differentiate between cases based upon these standards, rather than by using an “intact” v. “nonintact” family status mechanism.

<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>All</th>
<th>All, with conditions</th>
<th>Divorce</th>
<th>Separated</th>
<th>Out of Wedlock</th>
<th>Deceased Parent</th>
<th>Other</th>
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</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>ALASKA STAT. § 25.20.065 (2009).</td>
<td>X</td>
<td></td>
<td></td>
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<td></td>
<td>Grandparent must have established or attempted to establish ongoing personal contact with child.</td>
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<tr>
<td>Arizona</td>
<td>ARIZ. REV. STAT. ANN. § 25-409 (2009).</td>
<td>X</td>
<td>(for at least 3 mo.)</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>Missing parent for at least 3 months.</td>
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<tr>
<td>Arkansas</td>
<td>ARK CODE ANN. § 9-13-103(b) (2009).</td>
<td>X</td>
<td>X (legal separation)</td>
<td>X</td>
<td>(if paternal grandparent, paternity must be established)</td>
<td>X</td>
<td>X</td>
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<td>State</td>
<td>Statute</td>
<td>All</td>
<td>All, with conditions</td>
<td>Divorce</td>
<td>Separated</td>
<td>Out of Wedlock</td>
<td>Deceased Parent</td>
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<td>California</td>
<td>CAL. FAM. CODE § 3104(b) (West 2009).</td>
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<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>If parents are married, grandparent may not petition for visitation unless parents are separated, one parent is absent, one parent joins in petition with grandparent, child is not residing with parent or child has been adopted by a stepparent.</td>
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<tr>
<td>Delaware</td>
<td>DEL. CODE ANN. tit. 10, § 1031 (2009).</td>
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<td></td>
<td>X</td>
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<td>Court can &quot;grant grandparents reasonable visitation rights . . . regardless of marital status of the parents . . . provided . . . that when the natural or adoptive parents of the child are cohabitating as husband and wife, grandparental visitation may not be granted over both parents' objection.&quot; (emphasis added).</td>
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<td>State</td>
<td>Statute</td>
<td>All</td>
<td>All, with conditions</td>
<td>Divorce</td>
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<td>Out of Wedlock</td>
<td>Deceased Parent</td>
<td>Other</td>
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<tr>
<td>Georgia</td>
<td>GA. CODE ANN. § 19-7-3(b) (2009).</td>
<td>X</td>
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<td>X</td>
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<td>Standing based on intervention in court proceeding; no grandparent petition when parents are not separated and child lives with both parents.</td>
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<td>Hawaii</td>
<td>HAW. REV. STAT. § 571-46.3 (2009).</td>
<td>X</td>
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<td>Indiana</td>
<td>IND. CODE § 31-17-6-1 (2009).</td>
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<td>Iowa</td>
<td>IOWA CODE § 600C.1 (2009).</td>
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<td>Kentucky</td>
<td>KY. REV. STAT. ANN. § 405.021 (West 2009).</td>
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<td>LA. CIV. CODE ANN. art. 136(B) (2009).</td>
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</tbody>
</table>

The court may grant visitation if, among other factors, the grandparent or great-grandparent established there was a "substantial relationship" with the child dating from before the filing of the petition.

A "substantial relationship" between the grandparent and grandchild must be established.


Interdiction, incarceration, parents living apart.

Visitation granted under extraordinary circumstances only.

If parent has not died, sufficient relationship between grandparent and grandchild exists or grandparent has made a sufficient effort to establish one.
<table>
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<tr>
<th>State</th>
<th>Statute</th>
<th>All</th>
<th>All, with conditions</th>
<th>Divorce</th>
<th>Separated</th>
<th>Out of Wedlock</th>
<th>Deceased Parent</th>
<th>Other</th>
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<tbody>
<tr>
<td>Michigan</td>
<td><strong>Mich. Comp. Laws § 722.27b (2009).</strong></td>
<td>X</td>
<td>(see other)</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>Child placed out of parents' home; grandparent provided custodial environment for child w/in last year. In an action for separate maintenance or annulment, or under judgment of either. <strong>NOTE:</strong> PROPOSED LEGISLATION.</td>
</tr>
<tr>
<td>Minnesota</td>
<td><strong>Minn. Stat. § 257C.08 (2009).</strong></td>
<td>X</td>
<td>(see other)</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>Child has resided with grandparents for 12 months; special provisions for grandparent visitation with a child adopted by a stepparent. <strong>NOTE:</strong> Different section held unconstitutional on Due Process grounds. See Soohoo v. Johnson, 731 N.W.2d 815 (Minn. 2007).</td>
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<tr>
<td>State</td>
<td>Statute</td>
<td>All, with conditions</td>
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<td>Mississippi</td>
<td>MISS. CODE ANN. § 93-16-3 (2009).</td>
<td>X (see other)</td>
<td>X (in custody determination)</td>
<td></td>
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<td></td>
<td>Grandparent has “viable” relationship with grandchild and custodian denied visitation, meaning grandparent supported child for 6 months or more or had frequent visitation for at least 1 year.</td>
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<tr>
<td>Missouri</td>
<td>MO. REV. STAT. § 452.402 (2009).</td>
<td>X (see other)</td>
<td>X</td>
<td></td>
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<td></td>
<td>Statute states, “if the natural parents are legally married ... and are living together with the child,” grandparents cannot gain standing to petition Child resided in the grandparent’s home for at least 6 months within the 24 month period immediately preceding petition. A grandparent is unreasonably denied visitation with the child for more than 90 days.</td>
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<tr>
<td>Montana</td>
<td>MONT. CODE ANN. § 40-9-102 (2009).</td>
<td>X (see other)</td>
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<td></td>
<td>If parents are unfit and visitation is in the best interests of the child, or over objections of fit parent if presumption in favor of parents rebutted and grandparents show visitation is in the best interests of the child by clear and convincing evidence. NOTE: PROPOSED LEGISLATION.</td>
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<tr>
<td>State</td>
<td>Statute</td>
<td>All</td>
<td>All, with conditions</td>
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<td>Out of Wedlock</td>
<td>Deceased Parent</td>
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<tr>
<td>Nebraska</td>
<td>NEB. REV. STAT. § 43-1802 (2009).</td>
<td>X</td>
<td>X (divorced/divorcing)</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Nevada</td>
<td>NEV. REV. STAT. § 125C.050 (2009).</td>
<td>X</td>
<td>X (see other)</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>Child has resided with person with whom he has established a meaningful relationship. Parents never married but cohabitated and a parent is now deceased or parents are separated.</td>
</tr>
<tr>
<td>New Jersey</td>
<td>N.J. STAT. ANN. § 9:2-7.1 (West 2009). There is proposed legislation to REPEAL this statute: A. 212-2738 1st Sess., at 1 (N.J. 2006).</td>
<td>X</td>
<td></td>
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<td>The court must consider certain factors in its determination of whether to grant visitation to the grandparents.</td>
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<tr>
<td>New Mexico</td>
<td>N.M. STAT. § 40-9-2 (2009).</td>
<td>X</td>
<td>X (see other)</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>If child resided with grandparent for certain period of time based on child's age; if child was adopted</td>
</tr>
<tr>
<td>New York</td>
<td>N.Y. DOM. REL. LAW § 72(1) (McKinney 2009).</td>
<td>X</td>
<td>X (see other)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Grandparent has standing if &quot;circumstances show that conditions exist which equity would see fit to intervene.&quot;</td>
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<tr>
<td>State</td>
<td>Statute</td>
<td>All</td>
<td>All, with conditions</td>
<td>Divorce</td>
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<tr>
<td>N.Y. Dom. Rel. Law § 240(1X)(a) (McKinney 2009).</td>
<td>All</td>
<td>X (in divorce proceedings, see other)</td>
<td>X</td>
<td>X</td>
<td>This section on custody/visitation in divorce reads: “Such direction may provide for reasonable visitation rights to the maternal and/or paternal grandparents of any child of the parties.”</td>
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<td>Ohio Rev. Code Ann. § 3109.12 (West 2009).</td>
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<td>(Maternal &amp; paternal grandparents, but if paternal grandparents, paternity must be established)</td>
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<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>All</th>
<th>All, with conditions</th>
<th>Divorce</th>
<th>Separated</th>
<th>Out of Wedlock</th>
<th>Deceased Parent</th>
<th>Other</th>
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</thead>
<tbody>
<tr>
<td>Oklahoma</td>
<td>OKLA. STAT. tit. 10, § 5(c) (2009).</td>
<td>X</td>
<td>(pending before the court)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>All standing based on non-intact family status also requires relationship between grandparent and grandchild. Stating the requirement is that &quot;the intact nuclear family has been disrupted.&quot; NOTE: PROPOSED LEGISLATION</td>
</tr>
<tr>
<td>Oregon</td>
<td>OR. REV. STAT. § 109.119 (2009).</td>
<td>X</td>
<td>(see other)</td>
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<td>Significant relationship standard: &quot;[A]ny person . . . who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child may petition . . . .&quot;</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>23 PA. CONS. STAT. § 5311 (2009).</td>
<td>X</td>
<td>(see other)</td>
<td></td>
<td>X</td>
<td>(six months or more)</td>
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<td>Child resided with grandparent for 12 months or more and child was subsequently removed from the grandparent's home by his or her parents.</td>
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<td>23 PA. CONS. STAT. § 5312 (2009).</td>
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<td>23 PA. CONS. STAT. § 5313 (2009).</td>
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<tr>
<td>State</td>
<td>Statute</td>
<td>All, with conditions</td>
<td>Divorce</td>
<td>Separated</td>
<td>Out of Wedlock</td>
<td>Deceased Parent</td>
<td>Other</td>
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<tr>
<td>Rhode Island</td>
<td>R.I. GEN. LAWS § 15-5-24.1 (2009).</td>
<td></td>
<td>X</td>
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<td></td>
<td>Proposed legislation repeals sections 5312 and 5313; and removes the classification of parents formerly present in section 5311 such that it applies to all families.</td>
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<td></td>
<td>R.I. GEN. LAWS § 15-5-24.2 (2009).</td>
<td>X (see other)</td>
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<td></td>
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<td></td>
<td>Unreasonable denial of visitation by the parent for 90 days.</td>
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<tr>
<td>S. Dakota</td>
<td>S.D. CODIFIED LAWS § 25-4-52 (2009).</td>
<td></td>
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<td></td>
<td>Missing parent. Child resided in home of grandparent. Child and grandparent had significant relationship for 12 months or more, which was severed by parent causing harm to the child.</td>
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<tr>
<td>Tennessee</td>
<td>TENN. CODE ANN. § 36-6-306 (2009).</td>
<td>X (see other)</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>The parent that the grandparent is the parent of is incarcerated, incompetent or a non-custodial parent without visitation.</td>
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</tr>
<tr>
<td>Texas</td>
<td>TEX. FAM. CODE ANN. § 153.433 (Vernon 2009).</td>
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<tr>
<td>State</td>
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<td>All, with conditions</td>
<td>Divorce</td>
<td>Separated</td>
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<td>Deceased Parent</td>
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<tr>
<td>Texas</td>
<td>TEX. FAM. CODE ANN. § 153.434 (Vernon 2009).</td>
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<td></td>
<td>No grandparent standing if both of the child's parents are dead, their rights were terminated or released or if the child was adopted by person other than stepparent.</td>
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<td>Vermont</td>
<td>VT. STAT. ANN. tit. 15, § 1012 (2009).</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td></td>
<td>Also if parent is physically or mentally incapable of making a decision or has abandoned the child. Grandparent may make written request during custody or visitation proceeding.</td>
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<tr>
<td>Virginia</td>
<td>VA. CODE ANN. § 20-124.2(B) (2009).</td>
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<td>Statute has been repealed.</td>
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<tr>
<td>State</td>
<td>Statute</td>
<td>All</td>
<td>All, with conditions</td>
<td>Divorce</td>
<td>Separated</td>
<td>Out of Wedlock</td>
<td>Deceased Parent</td>
<td>Other</td>
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<td>Under (3), grandparent must &quot;demonstrate by clear and convincing</td>
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<td>evidence that a significant relationship exists with the child.&quot;</td>
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<td>NOTE: Statute found unconstitutional on Due Process grounds. See</td>
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<td>West Virginia</td>
<td>W. VA. CODE § 48-10-401 (2009).</td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>Pending custody or separation proceeding, annulment, establishment</td>
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<td></td>
<td>W. VA. CODE § 48-10-402 (2009).</td>
<td></td>
<td></td>
<td>(see other)</td>
<td></td>
<td></td>
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<td>of paternity proceeding. Grandparent may petition regardless of</td>
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<td></td>
<td>whether the parents of the child are married.&quot;</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>WIS. STAT. § 54.56 (2009).</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td></td>
<td>Applies to grandparents and stepparents.</td>
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<td></td>
<td>WIS. STAT. § 767.43(3) (2009).</td>
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<td>Necessitates a relationship between grandparent and grandchild and</td>
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<td>a denial of visitation by the custodial parent.</td>
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