

Constitutional Challenges to Indiana's Third-Party Custody Statutes

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Liberty finds no refuge in a jurisprudence of doubt.¹

INTRODUCTION

American families are changing.² While families traditionally consisted of a father, a mother, and some children, modern families are increasingly diverse. In 1950, married-couple households represented seventy-eight percent of families; in 2000, they represented only fifty-two percent.³ Nationally, more than 2.4 million grandparents are their grandchildren's primary caregivers.⁴

With these changes, "persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing."⁵ These caregivers frequently lack legal authority to effectively parent: they cannot sign school permission slips, consent to medical care, secure public assistance, or obtain proper health insurance for children in their care.⁶ In response, several states, including Indiana, have enacted third-party custody and visitation statutes.⁷ While these changes were meant to assist third parties who are legitimately caring for others' children, they pose a constitutional threat to natural parents capable of caring for their own children.

This Note examines Indiana's third-party custody and visitation statutes for violations of constitutional parental rights. Part I of this Note traces the evolution of parental rights jurisprudence at the United States Supreme Court level, beginning with *Meyer v. Nebraska* and continuing to the most recent developments in *Troxel v. Granville*. Part II synthesizes the cases to define the current scope of parental rights. Part III describes Indiana's child custody statutes and related case law. Part IV analyzes several potential constitutional challenges to Indiana's child custody statutes based on the understanding of parental rights discussed in Part II. Finally, the Note concludes by proposing solutions that would protect parental constitutional rights while allowing third parties to have custody in legitimate cases.

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1. *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992) (plurality opinion).

2. *See Troxel v. Granville*, 530 U.S. 57, 64 (2000) (plurality opinion) (citing statistical rises in the number of minors being raised by single parents or grandparents).

3. FRANK HOBBS & NICOLE STOOBS, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY: CENSUS 2000 SPECIAL REPORTS 130-31 (2002), <http://www.census.gov/prod/2002pubs/censr-4.pdf>.

4. Elizabeth Barker Brandt, *De Facto Custodians: A Response to the Needs of Informal Kin Caregivers?*, 38 FAM. L.Q. 291, 291 (2004).

5. *Troxel*, 530 U.S. at 64.

6. Brandt, *supra* note 4, at 292.

7. *See id.* at 300-12. All states also have grandparent visitation statutes. *See Troxel*, 530 U.S. at 74 n.1.

I. THE NATURE OF THE RIGHT TO PARENT

Following in the Anglo-American tradition,⁸ the United States Supreme Court has long recognized that parents have a right to raise their children free from state interference;⁹ however, the Court has failed to articulate exactly what that right encompasses. Partly to blame for the Court's lack of precision is the nature of the parenting cases brought: most parental rights cases involve claims to other rights, particularly First Amendment rights. Adding to the confusion is the underlying debate over substantive due process.

A. *Meyer v. Nebraska, Pierce v. Society of Sisters, and the Birth of Parental Rights*

The Supreme Court first recognized parental rights in 1923 when Justice McReynolds, writing for a majority of the Court in *Meyer v. Nebraska*, articulated "the right of the individual . . . to marry, establish a home and bring up children."¹⁰ In *Meyer*, a teacher appealed his conviction under a Nebraska law banning instruction in languages other than English.¹¹ The Court found the statute unconstitutional and reversed Meyer's conviction. First, the Court identified a right to parental control in the Due Process Clause of the Fourteenth Amendment:¹² "the power of parents to control the education of their own."¹³ Having implicated a due process right, the Court reviewed Nebraska's statute using an arbitrariness or rational basis standard,¹⁴ analyzed the benefits of modern language instruction, and found no emergency justifying the state's need to foster homogeneity.¹⁵ Ultimately, the Court decided that the statute was arbitrary.

Had the *Meyer* Court limited itself to the parental rights theory, its opinion would have been more instructive. Instead, the *Meyer* opinion began a line of unclear parental rights cases. The Court seems to have invalidated the statute because it interfered with four sets of due process rights: the right of the modern language teacher to fulfill his

8. WILLIAM BLACKSTONE, 1 COMMENTARIES *443–46.

9. *E.g.*, *Troxel*, 530 U.S. 57; *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

10. *Meyer*, 262 U.S. at 399.

11. *Id.* at 396–97.

12. In doing so, the Court relied on *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), *Lochner v. New York*, 198 U.S. 45 (1905), and *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), cases whose approach to substantive due process became disfavored. Moreover, the Court failed to mention contrary precedents of lower courts. Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1091 & nn. 524–25 (1992).

13. *Meyer*, 262 U.S. at 401. "Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws." *Id.* at 400.

14. "[L]iberty may not be interfered with . . . by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." *Id.* at 399–400.

15. *Id.* at 401–02.

calling, the right of the students to acquire language, the right of students to speak in a foreign language, *and* the right of parents to control their children's education.¹⁶

Despite *Meyer's* ambiguity, two years later the Court incorporated *Meyer's* parental rights language into its opinion in *Pierce v. Society of Sisters*.¹⁷ *Pierce* involved a dispute over the constitutionality of the Oregon Compulsory Education Act, which required parents to send their children to public schools.¹⁸ Two private schools challenged the law, alleging that it violated the Fourteenth Amendment rights of parents, students, and teachers.¹⁹ However, unlike in *Meyer*, this time parental rights were the only set of rights that the Court relied on when striking down the law.²⁰ The Oregon law could not pass the rational basis test articulated in *Meyer* because it had "no reasonable relation to some purpose within the competency of the state."²¹ After embracing the new *Meyer* right and its accompanying standard, the *Pierce* Court added some language of its own, language which would resonate throughout future parental rights cases: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."²²

B. Limiting Parental Rights: Prince v. Massachusetts and Ginsberg v. New York

The next major parental rights case arose in 1944 after a guardian was convicted for allowing her niece to sell religious tracts in violation of a Massachusetts child labor law.²³ The woman challenged her conviction, claiming first that the law violated her child's free exercise rights, and second that it violated her parental right to instruct her child in religion.²⁴ The Court disagreed. Although it paid homage to *Meyer* and *Pierce* in its opinion, declaring that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents,"²⁵ the Court ultimately held that "neither rights of religion nor rights of parenthood are beyond limitation."²⁶ The state, as *parens patriae*, did not violate parental rights by regulating child labor.²⁷ Such regulations protected children from the "evils . . . [of] the crippling effects of child employment" and were therefore within the state's power to enact.²⁸

16. See *id.* at 401–03. See generally Woodhouse, *supra* note 12, for an interesting historical analysis of the first two parental rights cases.

17. 268 U.S. 510, 534–35 (1925).

18. *Id.* at 510, 530–31. Parents who failed to send their children to public school would be found guilty of a misdemeanor. *Id.* at 530 n.1. The statute did contain some exceptions—for example, for children who had completed the eighth grade or who were physically unable to attend school—but the exceptions were unimportant to the case. *Id.*

19. *Id.* at 531–33.

20. *Id.* at 534–35.

21. *Id.* at 535.

22. *Id.*

23. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

24. *Id.* at 164.

25. *Id.* at 166.

26. *Id.*

27. *Id.* at 166 & n.10 (citing *Muller v. Oregon*, 208 U.S. 412 (1908)).

28. *Id.* at 168–69.

Twenty-four years later, the Court again relied on the state's interest in children's welfare to uphold a New York statute that prohibited the sale of obscene material to minors.²⁹ The challenger argued that the statute interfered with parents' rights to guide their children's development.³⁰ While agreeing with the *Prince* Court that "the custody, care and nurture of the child reside first in the parents,"³¹ the *Ginsberg* Court did not find a violation of parental rights because the law was rationally related to the state's interest in child welfare.³² To further justify the law, the Court stated that instead of violating parental rights, the law actually supported parents by shielding their children from harm.³³

C. Increasing Protection for Parental Rights: Stanley v. Illinois, Wisconsin v. Yoder, Parham v. J.R., Lassiter v. Department of Social Services, and Santosky v. Kramer

As noneconomic substantive due process doctrine grew, parental rights were acknowledged in numerous decisions and gained status as one of the "basic civil rights of man,"³⁴ a right "far more precious . . . than property rights."³⁵ The family—and the rights of the parent within the family—became protected under both the Fourteenth Amendment's Due Process and Equal Protection Clauses and the Ninth Amendment.³⁶ And the language used to describe and analyze those rights began to change.

In *Stanley v. Illinois*, *cognizable* and *substantial* were the words used to describe a father's interest in the custody, companionship, and care of his children.³⁷ The Court found that the father's interests were protected by the Equal Protection and Due Process Clauses against state action, including the state's practice of presuming the unfitness of unmarried fathers for administrative convenience.³⁸ Still, the Court failed to articulate a test for balancing parental rights and state action.

*Traditional*³⁹ and *fundamental*⁴⁰ were the words used to describe parents' interests in the religious instruction of their children in *Wisconsin v. Yoder*. *Yoder* involved a review of convictions of Amish men for violating Wisconsin's compulsory school-attendance law.⁴¹ The men argued that compulsory high school education, with its emphasis on "worldly success,"⁴² threatened the survival of their community, which was premised on a religious belief that salvation requires a life separated from worldly

29. *Ginsberg v. New York*, 390 U.S. 629 (1968).

30. *See id.* at 637–43. The challenger made several other arguments as well.

31. *Id.* at 639 (quoting *Prince*, 321 U.S. at 166) (internal quotation marks omitted).

32. *Id.* at 640–41.

33. *See id.* at 639–41. The Court acknowledged that parents were still free to legally provide their children with obscene material by purchasing the material for their children. *Id.* at 639.

34. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

35. *May v. Anderson*, 345 U.S. 528, 533 (1953).

36. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

37. *Id.* at 652.

38. *Id.* at 656, 658.

39. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

40. *Id.* at 232.

41. *Id.* at 207.

42. *Id.* at 211.

influence.⁴³ Because of this threat, Amish parents preferred to keep their high-school-aged children within the Amish community.⁴⁴

Because of the combination of free exercise and parental rights, the Court required “more than merely a ‘reasonable relation to some purpose within the competency of the State’”⁴⁵ to uphold state action. The state’s interest in universal education, while legitimate, was insufficient to justify the compulsory education law,⁴⁶ particularly because the wishes of the Amish parents would not harm the child or the public welfare.⁴⁷ And although *Yoder* provided another example of balancing parental rights against state action, the Court again failed to articulate a clear test.

State power to override parental decisions was further limited in *Parham v. J.R.*⁴⁸ In *Parham*, the Court reviewed a Georgia statute allowing parents to voluntarily commit their children to mental institutions. Although voluntary commitment involved some danger of parental abuse and harm to the child, the Court held that “the traditional presumption that the parents act in the best interest of their child should apply.”⁴⁹ The state’s interests in the efficient use of its health facilities and the prevention of improper commitments, while significant, were not sufficient to require increased procedures before voluntary commitments.⁵⁰ *Parham* meant that states could not interfere with parental authority just because there was a risk of harm to the child, but there was still no test providing exactly when the state could interfere.

Procedural protection of parental rights came in *Lassiter v. Department of Social Services*⁵¹ and *Santosky v. Kramer*.⁵² In *Lassiter*, the Court required the state to provide counsel to indigent parents in proceedings to terminate parental rights,⁵³ and in *Santosky*, the Court required the state to prove its case by clear and convincing evidence in proceedings to terminate parental rights.⁵⁴ *Lassiter* characterized the parental right as an “important” and “commanding” interest, describing the interest with strong language: “This Court’s decisions have by now made plain beyond the need for multiple citation that a parent’s desire for and right to ‘the companionship, care, custody and management of his or her children’ is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’”⁵⁵ Likewise, *Santosky* described the right as a “fundamental liberty interest of natural parents in the care, custody, and management of their child.”⁵⁶

43. *Id.* at 210.

44. *Id.* at 212.

45. *Id.* at 233 (citation omitted by the Court).

46. *Id.* at 233–34.

47. *Id.* at 230. Had the parental decisions harmed the child or society, the state could have intervened. *Id.* at 233–34. Note that not everyone saw the Amish parental actions as so benign. *See id.* at 241–42 (Douglas, J., dissenting).

48. 442 U.S. 584 (1979).

49. *Id.* at 604.

50. *See id.* at 602, 604–05.

51. 452 U.S. 18 (1981).

52. 455 U.S. 745 (1982). These cases balanced parental rights against a state interest in procedural efficiency and cost.

53. *See Lassiter*, 452 U.S. at 18.

54. *Santosky*, 455 U.S. at 761–67.

55. *Lassiter*, 452 U.S. at 27 (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

56. *Santosky*, 455 U.S. at 753.

D. Troxel v. Granville: The Most Recent Statement of Parental Rights

In 2000, the Supreme Court decided its most recent parental rights case, *Troxel v. Granville*. Although the Court again failed to produce a clear standard—no opinion received a majority—the numerous *Troxel* opinions at least show us the individual Justices' views. This Part analyzes the six *Troxel* opinions to show what standards come closest to receiving a majority.

1. The Facts

Tommie Granville and Brad Troxel were involved in a relationship and had two daughters.⁵⁷ The relationship ended in 1991, but Brad continued to visit with his daughters on the weekends. These visits frequently occurred at the home of Brad's parents, allowing the grandparents an opportunity to visit with the girls. In May of 1993, Brad committed suicide. After Brad's death, the grandparents continued regular visitation with the girls, but in October, Tommie Granville decided that she would like to limit the Troxels' visitation to one visit each month.

The Troxels filed a petition for visitation rights under a Washington statute which provided that “[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.”⁵⁸ They requested two weekends of overnight visitation each month and two weeks of summer visitation; Granville continued to maintain her desire to limit visitation to one day each month.⁵⁹

The trial court entered an order in favor of the Troxels, but the Washington Court of Appeals reversed.⁶⁰ The Washington Supreme Court affirmed the court of appeals, holding that the statute “unconstitutionally infringe[d] on the fundamental right of parents to rear their children” because the statute was overbroad and allowed third parties to interfere without showing potential harm to the child.⁶¹ The United States Supreme Court granted certiorari.

2. The Plurality Opinion

Justice O'Connor delivered a plurality opinion joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer. First, the plurality acknowledged the interest of parents in the care, custody, and control of their children, labeling the interest as both a fundamental liberty interest and as a fundamental right.⁶² Second, the plurality offered two reasons why the statute unconstitutionally burdened Granville's parental rights: (1) the statute was “breathtakingly broad” and allowed anyone to petition for visitation at

57. *Troxel v. Granville*, 530 U.S. 57, 60 (2000). Tommie and Brad never married. *Id.*

58. *Id.* at 61 (citing WASH. REV. CODE § 26.10.160(3)).

59. *Id.*

60. *Id.* at 62.

61. *Id.* at 63.

62. *Id.* at 66–67 (plurality opinion).

any time⁶³ and (2) the statute gave no weight to Granville's decision as a fit parent.⁶⁴ Missing from the plurality's analysis were a concrete definition of the parental right and a clear standard for balancing parental rights against the state's interest in allowing grandparent visitation.

3. Justice Souter's Concurrence

Although Justice Souter agreed that the statute was unconstitutionally overbroad,⁶⁵ he disagreed with the plurality's discussion of the scope of the parental right and the necessity of showing harm to the child.⁶⁶ Justice Souter was alone in including an "interest in controlling a child's associates" in defining a parent's right to have a relationship with his or her child.⁶⁷ If *Pierce* gave parents the authority to choose educational influences, he argued, parents should also have the authority to choose their child's associates, who are also strong social and moral influences.⁶⁸

4. Justice Thomas's Concurrence

Granting *arguendo* that the Due Process Clause includes unenumerated rights, Justice Thomas recognized "a fundamental right of parents to direct the upbringing of their children," including their education and socialization.⁶⁹ Because a fundamental right is involved, Justice Thomas applied strict scrutiny, requiring a compelling governmental interest to justify the statute.⁷⁰ Since Justice Thomas saw no compelling state interest, he found the statute unconstitutional.⁷¹

5. Justice Stevens's Dissent

Justice Stevens disagreed that the statute was unconstitutional on its face because it was not unconstitutional in all of its applications:⁷² in some cases, a third party could constitutionally petition for visitation without showing potential harm to the child.⁷³ However, he agreed that the Fourteenth Amendment covers a parent's "fundamental

63. *Id.* at 67.

64. *Id.* at 67–69. The plurality relied heavily on the "presumption that fit parents act in the best interests of their children." *Id.* at 68.

65. *See id.* at 76–77 (Souter, J., concurring).

66. *Id.* at 77.

67. *Id.* at 78.

68. *Id.* at 78–79.

69. *Id.* at 80 (Thomas, J., concurring).

70. *Id.*

71. *Id.*

72. *Id.* at 85 (Stevens, J., dissenting). "Any person" includes people with legitimate reasons to seek visitation, such as previous caregivers and grandparents. *See id.* Justice Stevens did not believe that a showing of harm to the child was necessary: "we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm." *Id.* at 86.

73. *See id.*

liberty interest” in raising his or her children, with the rebuttable presumption that parents will act in their children’s best interests.⁷⁴

Justice Stevens elaborated on what he saw as the limitations to parental rights. First, Stevens saw the rights as limited “by the existence of an actual, developed relationship with a child.”⁷⁵ Second, Stevens noted that in some cases, the child’s interest in associating with others could outweigh the parental interest.⁷⁶ Third, Stevens would leave unprotected “arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.”⁷⁷

6. Justice Scalia’s Dissent

Justice Scalia dissented because he disagreed that the Constitution contained an unenumerated right of parents to raise their children.⁷⁸ He questioned the wisdom of relying on precedents such as *Meyer* and *Pierce*, precedents established in the otherwise long-overruled substantive due process era.⁷⁹ Finally, Justice Scalia cautioned against the Court entering the realm of family law.⁸⁰

7. Justice Kennedy’s Dissent

Justice Kennedy dissented because of his disagreement with the Washington State Supreme Court’s holding that the best interests of the child standard is unconstitutional in third-party visitation cases and that harm to the child must always be shown before third-party visitation is allowed.⁸¹ Allowing third-party visitation, while perhaps damaging to a traditional family, is less intrusive in many of today’s households where third parties assume a significant caregiving role and develop strong bonds with the children under their care.⁸² “[A] fit parent’s right vis-à-vis a complete stranger is one thing,” Justice Kennedy wrote, “her right vis-à-vis another parent or a *de facto* parent may be another.”⁸³ While Justice Kennedy could imagine situations where application of the best interests standard would violate the parental constitutional rights,⁸⁴ he concluded that courts should not completely discard the best interests standard because it is the traditional visitation standard in family courts⁸⁵ and would not always deprive a parent of his or her rights.⁸⁶

Justice Kennedy also addressed the harm issue. He argued that while some precedents had allowed state action to prevent harm to children to proceed against a

74. *Id.* at 87. Justice Stevens also asserted that parents have a privacy interest in raising their children without the “undue interference of strangers.” *Id.*

75. *Id.* at 88.

76. *See id.* at 89–90.

77. *Id.* at 91.

78. *Id.* at 91 (Scalia, J., dissenting).

79. *Id.* at 92.

80. *Id.* at 93.

81. *Id.* at 94, 101 (Kennedy, J., dissenting).

82. *Id.* at 98.

83. *Id.* at 100–01 (emphasis in original).

84. *Id.* at 99–101.

85. *Id.* at 99.

86. *Id.* at 101.

parent's wishes,⁸⁷ a third-party petitioner need not prove harm to the child in every case.⁸⁸ Based on this argument, Kennedy would conceivably require a showing of harm from a complete stranger petitioning for visitation, but not from a *de facto* parent who had cared for and established a relationship with the child.⁸⁹

II. JUST WHAT IS A PARENT'S RIGHT TO CARE, CUSTODY, AND CONTROL OF CHILDREN?

One thing is clear: the majority of Justices past and present agree emphatically that the Due Process Clause of the Fourteenth Amendment guarantees parents a right to the care, custody, and control of their children.⁹⁰ The clarity ends there. The Court has left open for debate the nature of the right, the appropriate standard of review, and which state interests allow for a decision against a parent's wishes for his or her child.

Perhaps intentionally, the Supreme Court has used sloppy language to describe the parental protection afforded by the Fourteenth Amendment. Some opinions simply call it a right, while others label it a liberty,⁹¹ a liberty interest,⁹² a fundamental liberty interest,⁹³ or a fundamental right.⁹⁴ This inconsistent language trivializes the importance of the label, which determines the level of scrutiny applied to the law.⁹⁵

If the parent's interest is merely a right, then the government can interfere with it as long as the interference is reasonably related to a legitimate state interest and is not arbitrary.⁹⁶ This standard, however, is outdated: it was applied only in *Meyer*⁹⁷ and *Pierce*,⁹⁸ the oldest parental rights cases. More recent cases, such as *Yoder* and *Stanley*, have required "*more than merely* a 'reasonable relation to some purpose within the

87. *Id.* at 97–98 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972) and *Prince v. Massachusetts*, 321 U.S. 158, 168–69 (1944)).

88. *Id.*

89. *See id.* at 98–99.

90. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). *But see Troxel*, 530 U.S. at 91–92 (Scalia, J., dissenting) (“[W]hile I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has *no power* to interfere with parents’ authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.”) (emphasis in original). *Cf. id.* at 80 (Thomas, J., concurring) (hinting that had the parties raised the issue of whether unenumerated rights exist under the Due Process Clause, he would have held differently).

91. *E.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

92. *E.g.*, *Troxel*, 530 U.S. at 65.

93. *E.g.*, *Santosky v. Kramer*, 455 U.S. 745, 753 (1981).

94. *E.g.*, *Lassiter*, 452 U.S. at 48 (Blackmun, J., dissenting).

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

96. *See Meyer*, 262 U.S. at 400.

97. *Id.*

98. *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925) (citing the *Meyer* doctrine in holding that the “[education act at issue] unreasonably interferes with the liberty” rights of parents in educating their children).

competency of the State.”⁹⁹ More telling is that no *Troxel* Justice used the reasonable relationship test,¹⁰⁰ suggesting that today, the parental interest is not *just* a right.

On the other end of the due process spectrum are fundamental rights, rights which cannot be infringed unless the state’s actions are justified by a compelling state interest and are narrowly tailored to achieve that interest.¹⁰¹ The Court has reserved strict scrutiny for a limited group of rights such as speech and racial equality under the law. So although the Court sometimes labels parental rights as “fundamental” or “fundamental interests,” the Court has not applied strict scrutiny to parental rights,¹⁰² making these labels more adjectival than legal.¹⁰³

If the parent’s interest exists but is neither a right nor a fundamental right, it likely exists somewhere in between these ends of the spectrum as a liberty interest. The Court has labeled several of these intermediate interests as liberty interests,¹⁰⁴ and the language of *Troxel* suggests that the current Court sees the parental right as a liberty interest as well.¹⁰⁵

III. INDIANA ALLOWS THIRD PARTIES TO PETITION FOR CUSTODY

Indiana has not escaped the recent changes to the American family.¹⁰⁶ Children frequently live with caregivers other than their parents—typically grandparents.¹⁰⁷ In 1999, to assist third parties in their parental roles, Indiana passed a statute to allow de facto custodians to petition for custody.¹⁰⁸ Viewed together, the Indiana statutes and cases grant third parties custody when doing so is in the best interests of the child.

99. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (emphasis added) (citing *Pierce*, 268 U.S. at 534–35); *accord Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.”).

100. *See supra* Part I.D.

101. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 155–56 (1973) (“Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these interests may be justified only by a ‘compelling state interest,’ . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”) (internal citations omitted).

102. *Contra Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

103. For example, *fundamental* could mean that a right has a respected tradition or a right that is important to the structure of our society. *See* Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975 (1987).

104. *E.g.*, *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 287 (1990) (O’Connor, J., concurring) (agreeing that refusing medical treatment is a “liberty interest”); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 520 (1989) (describing a woman’s “liberty interest” to an abortion).

105. *See supra* Part I.D.

106. *See* Jennifer Wagner, *More Grandparents Returning to Parenting*, THE INDIANAPOLIS STAR, Aug. 7, 2001, at D1, D7.

107. *See id.*

108. *Id.*; Brandt, *supra* note 4, at 292.

A. Indiana's Child Custody and Visitation Statutes

A child custody proceeding¹⁰⁹ begins with a petition. In Indiana, any person¹¹⁰ may petition the court for a custody determination, a “court decision . . . providing for the custody of a child, including visitation rights.”¹¹¹ The court then holds a hearing on the petition to determine custody.¹¹²

The judge awards custody “in accordance with the best interests of the child”¹¹³ by balancing several statutory factors. These factors include:

- (1) The age and sex of the child.
- (2) The wishes of the child’s parent or parents.
- (3) The wishes of the child, with more consideration given to the child’s wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with: (A) the child’s parent or parents; (B) the child’s sibling; and (C) any other person who may significantly affect the child’s best interests.
- (5) The child’s adjustment to the child’s: (A) home; (B) school; and (C) community.
- (6) The mental and physical health of all individuals involved.
- (7) Evidence of a pattern of domestic or family violence by either parent.
- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.¹¹⁴

In determining custody, a court first must find “that the child has been cared for by a de facto custodian, then the de facto custodian must prove three factors by clear and convincing evidence:¹¹⁵ (1) that he or she is the primary caregiver of the child; (2) that he or she provides the primary financial support of the child; and (3) that he or she has resided with the child for the required period.¹¹⁶ If the court finds that the individual is a de facto custodian, the court must make the de facto custodian a party to the proceeding,¹¹⁷ and the court must consider several additional factors when making its custody determination. These factors are:

- (1) The wishes of the child’s de facto custodian.
- (2) The extent to which the child has been cared for, nurtured, and supported by the de facto custodian.
- (3) The intent of the child’s parent in placing the child with the de facto custodian.
- (4) The circumstances under which the child was allowed to remain in the custody of the de facto custodian, including whether the child was placed with the de facto

109. A custody proceeding is a “proceeding[] in which a custody determination is one of several issues . . .” IND. CODE § 31-17-3-2(3) (2006).

110. § 31-17-2-3. This provision allows either a parent or “a person other than a parent” to petition the court. *Id.*

111. § 31-17-3-2(2).

112. §§ 31-17-2-6 to -7.

113. § 31-17-2-8.

114. *Id.* According to the statute, the court “shall consider all relevant factors” and not just those listed specifically. *Id.*

115. *Id.* § 31-17-2-8.5(a).

116. *Id.* § 31-9-2-35.5. To be a de facto custodian, a person must have resided with a child for at least six months if the child is under the age of three or for at least one year if the child is at least three years old. *Id.*

117. *Id.* § 31-17-2-8.5(c).

custodian to allow the parent now seeking custody to: (A) seek employment; (B) work; or (C) attend school.¹¹⁸

After balancing both the original and de facto custodian factors, the court awards custody based on the best interests of the child—to the parent, to the de facto custodian,¹¹⁹ or even to another party.¹²⁰ In most situations, whichever party receives custody may then “determine the child’s upbringing, including the child’s education, health care, and religious training.”¹²¹

B. Application of the Indiana Statutes

1. Who May Petition for Custody?

At one time, there was some confusion about whether and when third parties could seek custody.¹²² Today, however, Indiana statutes allow any person to seek a custody determination independently of any marital dissolution, legal separation, or child support action.¹²³ The plain language of the statute allows anyone to file for a custody determination at any time, and the Indiana Court of Appeals has held that the statute also allows the court to award anyone custody.¹²⁴

The statute is not limited by the de facto custodian statute; a third party need not claim to be a de facto custodian before petitioning for custody.¹²⁵ Not only are third parties permitted to petition for custody, but they have petitioned successfully despite not meeting the de facto custodian factors.¹²⁶ Indiana courts believe that “allowing a third party to seek custody of a child by filing a direct cause of action . . . is wholly

118. *Id.* § 31-17-2-8.5(b).

119. Section 8.5(d) provides that “[t]he court shall award custody of the child to the child’s de facto custodian if the court determines that it is in the best interests of the child.” § 31-17-2-8.5(d).

120. No Indiana statute prohibits awarding of custody to a non-parent or non-de facto custodian. Any individual may petition the court seeking a grant of custody and become a party to the custody proceeding. § 31-17-2-3(2).

121. § 31-17-2-17(a).

122. *See In re Custody of G.J.*, 796 N.E.2d 756 (Ind. Ct. App. 2003). At one time there was an absolute bar against a third party receiving custody through a dissolution action. *Id.* at 761.

123. § 31-17-2-3(2) (authorizing “a person other than a parent” to file a petition seeking a custody determination); *In re G.J.*, 796 N.E.2d at 761 (“[T]he absolute bar against a trial court awarding custody of a child to a third party in the course of a dissolution action was removed by the 1999 de facto custodian amendments to [Indiana Code Title 31-9-2-35.5].”).

124. *In re G.J.*, 796 N.E.2d at 762–63.

125. *Id.* at 761. The court surmised that:

[I]f the legislature had intended to allow only de facto custodians to file a direct child custody action, it would have been a simple matter to amend Section 31-17-2-3(2) at the time the de facto custodian statutes were added in 1999 to expressly provide that a de facto custodian, rather than “a person other than a parent,” could file a child custody petition.

Id.; *see also In re Parentage of A.B.*, 835 N.E.2d 965, 967 (Ind. 2005).

126. *E.g.*, *Allen v. Proksch*, 832 N.E.2d 1080 (Ind. Ct. App. 2005) (granting physical and legal custody to a grandmother who had lived with a child over the age of three for only nine months).

consistent with Indiana public policy.”¹²⁷ When a “parent is unfit or otherwise unable to care for a child, it may be in the child’s best interests to be placed in the custody of a third party.”¹²⁸

2. What Must a Third Party Show to Receive Custody?

Indiana recognizes that “a child’s natural parent is presumed to be entitled to custody of his or her child as opposed to a third party.”¹²⁹ To overcome this presumption, a third party must prove “by clear and convincing evidence that the child’s best interests would be substantially and significantly served by placement with the [third party].”¹³⁰ The Indiana Supreme Court has provided some guidance for when a third party might overcome the presumption.¹³¹ Evidence of the natural parent’s unfitness, acquiescence, or a “strong emotional bond” between the child and third party is important, but not dispositive.¹³² A third party’s ability to provide “better things in life for the child” is insufficient to overcome the presumption, as is a general finding that third-party custody is in the child’s best interests.¹³³ The trial court is free to consider other criteria,¹³⁴ and its judgment is afforded “deferential review,” reversed only for clear error or abuse of discretion.¹³⁵

3. Third-Party Success Stories

Courts have repeatedly awarded custody to third parties over the natural parent’s objections. In *Francies v. Francies*, the appellate court upheld the trial court’s grant of custody to the grandmother—a de facto custodian—over the natural mother’s

127. *In re G.J.*, 796 N.E.2d at 762–63 (citing *Gilchrist v. Gilchrist*, 75 N.E.2d 417, 419 (Ind. 1947)).

128. *Id.* at 763.

129. *Id.*; *In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002). This presumption traces back to *Gilmore v. Kitson*, 74 N.E. 1083, 1087 (Ind. 1905), and *Jones v. Darnall*, 2 N.E. 229, 232 (Ind. 1885). These early cases allowed for third party custody only if the natural parent was unsuitable, had abandoned the child, or had acquiesced in the third party’s care so that the child and third party were “so firmly interwoven that to sunder them would seriously mar and endanger the future happiness and welfare of the child.” *Gilmore*, 74 N.E. at 1084.

130. *In re G.J.*, 796 N.E.2d at 763 (citing *In re B.H.*, 770 N.E.2d at 287). De facto guardians must also overcome the presumption. *Francies v. Francies*, 759 N.E.2d 1106, 1115 (Ind. Ct. App. 2001).

131. *In re B.H.*, 770 N.E. 2d at 287 (defining a standard requiring “clear and convincing evidence” that third party placement serves the child’s best interests).

132. *Id.* These factors also originated in early cases. See *Jones*, 2 N.E. at 232; *Gilmore*, 74 N.E. at 1085.

133. *In re B.H.*, 770 N.E.2d at 287 (citing *Hendrickson v. Binkley*, 316 N.E.2d 376, 381 (Ind. Ct. App. 1974)). Detailed and specific findings are required to support the finding that third-party custody is in the child’s best interests. *Id.* (citing *In re Marriage of Huber*, 723 N.E.2d 973, 976 (Ind. Ct. App. 2000)).

134. *Id.*

135. *Id.* at 288 (citing IND. R. TRIAL P. 52(A); *Chidester v. City of Hobart*, 631 N.E.2d 909, 909–10 (Ind. Ct. App. 2000)); see also *Clark v. Clark*, 726 N.E.2d 854, 856 (Ind. Ct. App. 2000) (“Child custody determinations fall squarely within the discretion of the trial court and will not be disturbed except for an abuse of discretion.”).

objections.¹³⁶ The trial court found that the grandmother had rebutted the parental custody presumption by presenting evidence that the mother had voluntarily relinquished her custody to the grandmother and that the child would be harmed by breaking his strong emotional bond with his grandmother.¹³⁷ The parental custody presumption rebutted, the trial court found that placement with the grandmother was in the child's best interests because of the son's angry feelings toward his mother and the grandmother's ability to provide emotional and financial support and a stable home.¹³⁸

In *In re Guardianship of B.H.*, a mother and father married, had two children, and later divorced.¹³⁹ The mother remarried and later died.¹⁴⁰ The stepfather was appointed as the children's permanent guardian, a result upheld by the Indiana Supreme Court.¹⁴¹ In upholding the stepfather's guardianship, the supreme court held that the trial court was not limited to considering only whether the father was unfit, that he had relinquished his parental rights, or that the children would be harmed by placement with the father or separation from the stepfather.¹⁴² Instead, the court relied on several findings to determine that the stepfather was a "substantial and significant advantage to the children." These findings were essentially the statutory best interest factors:¹⁴³ the father had not had significant interaction with the children for about seven years; the father had been behind in his child support payments; the father had been abusive before separating from the mother;¹⁴⁴ the father had a history of violence, excessive drinking, and alcohol-related convictions; the stepfather had served as a psychological father; living with the stepfather provided the children with better community and family connections; the children desired to stay with the stepfather;¹⁴⁵ and the stepfather provided more substantive financial support to the children.

The maternal grandmother retained permanent custody of two children over their father's request for modification in *In re Paternity of V.M.*¹⁴⁶ Benavides, the father, had previously relinquished custody to the children's grandparents because he was unwilling and unfit to be a parent.¹⁴⁷ Seven years later, the father had cleaned up: he stopped drinking and using drugs, began attending church regularly, visited with his children on alternate weekends, and paid child support to the grandparents.¹⁴⁸ The father subsequently sought to modify the custody order.¹⁴⁹ The court found that the

136. 759 N.E.2d 1106, 1120–21 (Ind. Ct. App. 2001).

137. *Id.* at 1114.

138. *Id.* at 1117.

139. 770 N.E.2d at 285.

140. *Id.*

141. *Id.* at 285, 289.

142. *Id.* at 288.

143. IND. CODE § 31-17-2-8 (2006).

144. *In re B.H.*, 770 N.E.2d at 288. The opinion does not say whom the father abused prior to the separation, but notes that the father had a "violent confrontation with the children's maternal aunt after the separation." *Id.*

145. § 31-17-2-8. The children were thirteen and fourteen at the time of the action. The statute gives more consideration to the wishes of children "at least fourteen (14) years of age." *Id.*

146. 790 N.E.2d 1005 (Ind. Ct. App. 2003).

147. *Id.* at 1006.

148. *Id.*

149. *Id.*

father was “now capable of caring for the children”¹⁵⁰ and expressed its satisfaction with his progress.¹⁵¹ Ultimately, the court found that the presumption in favor of the father taking custody had been rebutted because of his “past unfitness, voluntary abandonment of the children, long acquiescence of the [grandparents’] custody, and other factors,”¹⁵² including the finding that modifying custody would harm the children by damaging their strong relationship with the grandparents.¹⁵³ The children’s best interests were met by remaining with the grandparents because the children were the focus of the grandparents’ attention and affection,¹⁵⁴ the children could have a larger home and more privacy with the grandparents, and the children liked their new school and were doing well there.¹⁵⁵

In *Nunn v. Nunn*, the Indiana Court of Appeals shed more light on how a third party could overcome the parental presumption.¹⁵⁶ Elijah Nunn and Kristina Nunn were married and had two children; Elijah was the biological father of the son but not the daughter.¹⁵⁷ When the couple divorced, the trial court denied Elijah custody and visitation to his stepdaughter.¹⁵⁸ The appeals court reversed and remanded because “[t]he trial court did not establish how Elijah’s relationship with [his wife’s child from a prior relationship] and Kristina affected his relationship with [his stepdaughter] or why Elijah did not meet his burden of proof regarding [his stepdaughter’s] best interests.”¹⁵⁹ Elijah showed that he was a de facto custodian, had been a “father figure” to the stepdaughter, and had a special father-daughter bond.¹⁶⁰ He also showed evidence from which the trial court could conclude that custody with him was in the stepdaughter’s best interest—evidence of his daily care and financial support of the stepdaughter.¹⁶¹

A fourth, more recent example of third-party success is *Allen v. Proksch*, a case where the court granted custody to the maternal grandmother over the father’s objections.¹⁶² The background facts are complex. The mother and father had a child, married, and divorced, agreeing to joint legal custody.¹⁶³ Over the next few years, there were some problems with visitation and communication between the parents.¹⁶⁴ The father later remarried and acquired two stepsons.¹⁶⁵ There were some problems with the stepsons during visitation, and the father did not have any more contact with his

150. *Id.* at 1008.

151. *Id.*

152. *Id.* at 1009.

153. *Id.*

154. The father had a young daughter and two stepsons living with him at the time, and the court felt that “he already has his hands full.” *Id.* at 1008.

155. *Id.*

156. 791 N.E.2d 779 (Ind. Ct. App. 2003).

157. *Id.* at 782.

158. *Id.*

159. *Id.* at 786.

160. *See id.*

161. *Id.*

162. 832 N.E.2d 1080 (Ind. Ct. App. 2005).

163. *Id.* at 1083–84.

164. *Id.* at 1084.

165. *Id.*

child until 2003, when the mother initiated a lawsuit for increased support.¹⁶⁶ The mother, however, had not seen the child either, and was using the child support payments for her own benefit. She had since left the child permanently with his grandmother. The child was with the grandmother from June 2002 until the mother filed the petition in January 2003, at which time the father petitioned to modify custody. The father was not aware that his son was staying with the grandmother. In March, the grandmother petitioned for custody of the boy.¹⁶⁷

Nearly two years later, the trial court awarded legal and physical custody to the grandmother.¹⁶⁸ The court found that the grandmother had overcome the presumption in favor of the father because he had previously abandoned his son.¹⁶⁹ Placement with the grandmother was in the child's best interests because the grandparents provided him with greater stability, better care for his unique medical and psychological needs, and financial support.¹⁷⁰ The court of appeals affirmed the trial court's holding, finding that there was no abuse of discretion and that the trial court could have made its findings based on the evidence.¹⁷¹

4. Parental Success Stories

Third parties have been less successful in their attempts to attain custody when the natural parent is clearly capable and willing to raise his or her child. For example, in *In re Guardianship of L.L.*, a fit mother prevailed over a grandmother.¹⁷² In 1992, Trudy Litrell married Jerry Litrell, Wilma Clark's son. Trudy and Jerry had two sons but were unable to care for them because of their drug and alcohol abuse, so Wilma stepped in and was appointed temporary guardian.¹⁷³ In 1994, Trudy dissolved the guardianship for the older boy (then five years old), but she failed in her attempts to dissolve the guardianship of the younger boy (then two years old).¹⁷⁴

Meanwhile, the mother cleaned up her life. She remarried a successful construction manager, started a steady job, and lived in "a very nice country home with plenty of play space and good neighbors with young children."¹⁷⁵ Nevertheless, the trial court again denied her petition to terminate her son's guardianship.¹⁷⁶ On appeal, the court acknowledged *Troxel's* constitutional "preference in favor of a parent having custody

166. *Id.*

167. *Id.* The mother did not oppose the grandmother's petition and did not appear at later hearings. *Id.*

168. *Id.* at 1088.

169. *Id.* at 1094.

170. *See id.*

171. *Id.* at 1101.

172. 745 N.E.2d 222, 233 (Ind. Ct. App. 2001). Although the matter was technically a guardianship case, the court of appeals applied the same standards and precedents used in custody cases. The mother petitioned to terminate the grandmother's guardianship. *See id.* at 227 ("This appears to be . . . in essence, a child custody proceeding that raises important concerns about parental rights and the 'best interests' of children.").

173. *Id.*

174. *Id.* at 225–26.

175. *Id.* at 226. The mother had been drug- and alcohol-free for six years at this time. *Id.*

176. *Id.* at 227.

of his or her children, where the parent has not been shown to be unfit.”¹⁷⁷ Applying this presumption, the court terminated the guardianship because the grandmother had presented insufficient evidence to rebut the presumption: “[t]here is absolutely no indication that Trudy is presently an unfit parent. . . . It was Wilma’s burden to prove Trudy’s unfitness at the present time, not at some time in the past.”¹⁷⁸

The natural father in *In re Paternity of J.A.C.* was also capable and willing to raise his child.¹⁷⁹ After the father and mother had begun a relationship, the mother was diagnosed with cancer.¹⁸⁰ Two years after the diagnosis, they had a child together.¹⁸¹ Six weeks after the birth, the mother was told she had six months to live.¹⁸² She left the house¹⁸³ and moved in with her sister, appointing her sister to be the child’s guardian upon her death.¹⁸⁴ The mother died, and the child’s aunt became guardian. The father moved to dismiss this guardianship.¹⁸⁵ The trial court did award custody to the father; however, it also awarded visitation rights to the child’s aunt over the father’s objections.¹⁸⁶ On appeal, the father argued that the trial court’s findings of fact and conclusions of law were insufficient to support the visitation order.¹⁸⁷ He also argued that the visitation order interfered with his constitutional right to family privacy, citing *Troxel*.¹⁸⁸ The appeals court reversed the trial court because the aunt had not shown that she had a “custodial and parental” relationship with the child or that visitation would be in the child’s best interests.¹⁸⁹ The appeals court declined to reach the constitutional question because it resolved the case on an evidentiary basis.¹⁹⁰

IV. IS INDIANA’S “MEASURE OF PROTECTION FOR RIGHTS OF A NATURAL PARENT” ENOUGH? POTENTIAL CONSTITUTIONAL PROBLEMS WITH THE INDIANA STATUTES

The Fourteenth Amendment of the Federal Constitution protects a natural parent’s liberty interest in the care, custody, and control of his or her children, absent a “powerful, countervailing”¹⁹¹ state interest.¹⁹² While a narrow interpretation of *Troxel* applies only to parent’s rights regarding third-party visitation, a broader interpretation would subject third-party custody statutes to *Troxel*’s standards. Because of their permanence, custody determinations pose a greater threat to a parent’s liberty interest than do visitation orders. Visitation may be for a week, a few days, or even just hours, and may be supervised or in the parent’s home. Custody determinations, however, may

177. *Id.* at 229.

178. *Id.* at 231.

179. 734 N.E.2d 1057 (Ind. Ct. App. 2001).

180. *Id.* at 1058.

181. *Id.*

182. *Id.*

183. *Id.* The mother and father’s relationship was “tumultuous.” *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 1058 n.1 (citing *Troxel v. Granville*, 530 U.S. 57 (2000)).

189. *Id.* at 1060 (quoting *Francis v. Francis*, 654 N.E.2d 4, 7 (Ind. Ct. App. 1995)).

190. *Id.* at 1058 n.1; *id.* at 1061 n.5 (Robb, J., concurring).

191. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

192. *See supra* Part II.

completely strip a parent of his or her opportunity to care for his or her children, perhaps even making the parent the visitor.¹⁹³

Indiana's statutes and interpretive case law do provide a "measure of protection for the rights of the natural parent" by presuming that custody with the parent is in the child's best interest.¹⁹⁴ But that measure of protection may not be enough to satisfy the constitutional requirements. Several potential constitutional problems exist with Indiana's current third-party custody scheme.

*A. Indiana Code Section 31-17-2-3(2) Is Unconstitutional
Under Troxel v. Granville*

A strict, plain-meaning interpretation of the Indiana statutes would permit anyone to petition the court for custody or visitation at any time.¹⁹⁵ Indiana Code section 31-17-2-3(2) specifically grants any "person other than a parent" standing to petition for a custody determination,¹⁹⁶ and the courts have accepted this literal interpretation.¹⁹⁷ This interpretation exposes the statute to two constitutional criticisms: (1) overbreadth and (2) the threat of burdensome litigation.

1. A Statute Allowing Any Person to Petition at
Any Time Is Unconstitutionally Overbroad

A majority of Justices in *Troxel* acknowledged that a statute which allowed *any* person to petition the court for visitation rights at *any* time, subject only to a "best interests test," was unconstitutionally overbroad.¹⁹⁸ Four Justices come from the plurality, which based its decision on the statute's "sweeping breadth."¹⁹⁹ Justice Souter makes five Justices because of his statement that the "right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by *any party* at *any time* a judge believed he could make a better decision than the objecting parent had done."²⁰⁰ Justice Stevens might be a sixth Justice, because he reasoned that an "any person" statute could be valid in some applications but invalid in others, depending on the child's relationship to the third-party petitioner.²⁰¹

2. Burdensome Litigation Could Unconstitutionally Burden a Parent's Rights

While it may not be against public policy to allow third-party petitioners in the majority of cases, the possibility of abuse is another constitutional problem with

193. See *In re Paternity of V.M.*, 790 N.E.2d 1005 (Ind. Ct. App. 2003).

194. *Id.* at 1007.

195. See *supra* Part III.A.

196. A custody proceeding is a proceeding in which a custody determination is one of several issues. IND. CODE § 31-17-3-2(3) (2004).

197. See, e.g., *In re Custody of G.J.*, 796 N.E.2d 756, 762 (Ind. Ct. App. 2003).

198. *Troxel v. Granville*, 530 U.S. 57, 76 (2000) (Souter, J., concurring).

199. *Id.* at 73 (plurality opinion).

200. *Id.* at 78 (Souter, J., concurring) (emphasis added) (footnote omitted).

201. See *id.* at 85 (Stevens, J., dissenting). His examples of valid third parties are those with a genetic or emotional relationship to the child.

Indiana's statute. A majority of the Justices²⁰² in *Troxel* hinted that "the burden of litigating a domestic relations proceeding can itself be so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated."²⁰³ The plurality said it did not want to remand the case and "further burden Granville's parental right."²⁰⁴ This language indicates that litigation can burden the parental right and that Granville's rights had already been burdened by the previous litigation.

The overbreadth of Indiana's statute allows for the possibility of litigation that would burden the parental right. In most cases, the third-party petitioner will be quite familiar with the parent and child and will be acting out of concern. In some cases, however, the third-party petitioner's judgment could be clouded by emotions such as anger or revenge.²⁰⁵ In these cases, the parent is more likely to be fit and willing to raise his or her child than in cases where the third-party petitioner acts out of concern. A third-party petitioner with improper motives interferes with the parent's right to custody of the child by initiating burdensome litigation.

B. The Statutes Give No Special Weight to a Fit Parent's Decision

Not giving a fit parent's wishes some "special weight" in a best interests decision infringes on a parent's interest in the care, custody, and control of his or her children.²⁰⁶ The *Troxel* plurality held that "if a fit parent's decision . . . becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination."²⁰⁷ Even though no fifth *Troxel* Justice required special weight be given to the parent's wishes, statutes giving equal weight to de facto guardians and parents are constitutionally risky because a fifth Justice could be easy to come by and because the Court's composition has changed since *Troxel*.²⁰⁸ To be safe, any "best interests analysis" should include the presumption that the parent will act in his or her child's best interests.²⁰⁹

In Indiana, in custody cases not involving de facto custodians, "the wishes of the child's parent or parents" is one factor the court may consider in determining the child's best interests.²¹⁰ In cases where a third party has established himself as a de facto custodian by clear and convincing evidence,²¹¹ courts may also consider "[t]he

202. For those keeping score, the plurality Justices (O'Connor, Rehnquist, Ginsberg, and Breyer) and Kennedy mentioned the possibility of litigation infringing on parental rights.

203. *Troxel*, 530 U.S. at 75 (plurality opinion) (quotations omitted); *see id.* at 101 (Kennedy, J., dissenting).

204. *Id.* at 75 (plurality opinion).

205. *See* Lynn D. Wardle, *All You Need Is Love?*, 14 S. CAL. REV. L. & WOMEN'S STUD. 51, 57-58 (2004) (explaining how emotions drive most family law proceedings).

206. *See Troxel*, 530 U.S. at 69-70.

207. *Id.* at 70.

208. Two members of the *Troxel* plurality were Chief Justice Rehnquist and Justice Sandra Day O'Connor, Justices who are no longer on the Court. The additions of Chief Justice Roberts and Justice Alito could preserve the plurality, dissolve the plurality, or present new lines of thought regarding the parental fitness presumption.

209. *See Troxel*, 530 U.S. at 89-90 (Stevens, J., dissenting).

210. IND. CODE § 31-17-2-8(2) (2006).

211. IND. CODE § 31-17-2-8.5(a) (2006).

wishes of the child's de facto custodian.²¹² As the statutes do not prioritize the best interest factors, technically the wishes of the parents and the wishes of the de facto custodian could receive equal consideration.²¹³ And even if there is no de facto custodian, the parent's wishes are not required to receive any special weight.

C. The Standard for Rebutting the Parental Fitness Presumption Is Too Lax

"There is a presumption that fit parents act in the best interests of their children."²¹⁴ Without a finding of unfitness, "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."²¹⁵ Six *Troxel* Justices agreed that state interference without some showing of unfitness could unconstitutionally burden a parent's liberty interests.²¹⁶ In the plurality's view, the trial court was wrong to ignore the mother's wishes absent a finding that she was an unfit parent.²¹⁷ In dissent, Justice Stevens stated that the statute's failure to require a finding of parental unfitness did not make the statute *facially* unconstitutional,²¹⁸ suggesting that a showing of unfitness might be constitutionally required in another situation. Finally, while Justice Kennedy would not require satisfying the harm to the child standard in every case,²¹⁹ he

acknowledge[d] the distinct possibility that visitation cases may arise where, considering the absence of other protection for the parent under state laws and procedures, the best interests of the child standard would give insufficient protection to the parent's constitutional right to raise the child without undue intervention by the state²²⁰

Essentially, the *Troxel* Court collectively upheld the presumption that parents act in their children's best interests. If parents act in their children's best interests, it follows that the parent's decision *is* the best interest, and any "best interests analysis" before a finding of parental unfitness is premature and could unconstitutionally burden the parent's rights.²²¹

Indiana law claims to require a third party to rebut the parental fitness presumption before engaging in a "best interests analysis."²²² Indiana law, however, allows rebuttal

212. IND. CODE § 31-17-2-8.5(b)(a) (2006).

213. *But see In re Guardianship of L.L.*, 745 N.E.2d 222, 230 (Ind. Ct. App. 2001) ("We believe the intent of the 'de facto custodian' amendments is to clarify that a third party may have standing in certain custody proceedings, and that it may be in a child's best interests to be placed in that party's custody. We do not believe there was [legislative] intent to displace the parental preference presumption.").

214. *Troxel*, 530 U.S. at 68 (plurality opinion).

215. *Id.* at 68–69.

216. *See id.* (plurality opinion); *id.* at 86 (Stevens, J., dissenting).

217. *See id.* at 68–70 (plurality opinion).

218. *Id.* at 85 (Stevens, J., dissenting).

219. *See id.* at 94, 98 (Kennedy, J., dissenting).

220. *Id.* at 94.

221. This rule would apply only to disagreements between a parent and a third party, not to disagreements between parents.

222. *See In re Guardianship of B.H.*, 770 N.E.2d 283 (Ind. 2002).

of the parental fitness presumption without specifically addressing parental unfitness. The law states that to successfully rebut the parental fitness presumption, a third party must prove “by clear and convincing evidence that the child’s best interests would be substantially and significantly served by placement with the [third party].”²²³ Under this test, a third party could overcome the presumption by showing evidence of a strong emotional bond with the child or evidence that the third party’s judgment of the child’s best interests is better than the parent’s.²²⁴ Such a disjointed standard allows for the possibility that “a court [could] disregard and overturn *any* decision by a fit custodial parent . . . based solely on the *judge*’s determination of the child’s best interests.”²²⁵ And because the trial court’s judgment is given such “deferential review,”²²⁶ (and because parties may not be financially able to appeal) such abuses of parental constitutional rights may remain unchecked.

CONCLUSION: SOLUTIONS FOR THE INDIANA STATUTES

A. Statutory Solutions for Indiana’s Custody Statutes

Although Indiana’s current custody statutes often reach the “right” practical results, constitutional problems present the potential for abuse. As such, the statutes should be amended to prevent abuses. Amendments can easily bring Indiana’s statutes into conformity with the Federal Constitution by meeting *Troxel*’s three requirements: giving special weight to a fit parent’s decision, not allowing “anyone, anytime” statutes, and acknowledging the parental fitness presumption.

The Indiana Code provision allowing anyone to petition for custody at any time²²⁷ is overbroad²²⁸ and must be changed in one of several ways. First, the provision could be deleted, allowing third parties seeking rights in relation to a child to meet their needs using other laws with less danger of abuse.²²⁹

Second, the “anyone, anytime” problem could be fixed by amending the statute to allow only parents or de facto custodians to petition for custody. Parties claiming to be de facto custodians would need to plead their status when filing for custody. This change would require that the third-party petitioner have a significant relationship with the child and would decrease the chance that more distant third parties would petition out of improper motives. Because several of the Justices in *Troxel* suggested that a relationship is important, this change would probably make the statute constitutional and allow third parties to get custody in a direct action. If the legislature thought that

223. *In re G.J.*, 796 N.E.2d at 763 (quoting *In re B.H.*, 770 N.E.2d at 287). De facto guardians must also overcome the presumption. See *Francies v. Francies*, 759 N.E.2d 1106, 1115 (Ind. Ct. App. 2001).

224. See *In re B.H.*, 770 N.E.2d at 287. The test allows for other criteria to be used, too. See *id.* By considering any evidence instead of requiring a more specific showing, Indiana law actually weakens the parental presumption it seeks to protect. See *id.* at 289–90 (Shepard, C.J., concurring).

225. *Troxel v. Granville*, 530 U.S. 57, 67 (plurality opinion) (second emphasis added).

226. *In Re B.H.*, 770 N.E.2d at 288.

227. See IND. CODE § 31-17-2-3 (2006).

228. See *supra* Part IV.A.1.

229. See *Brandt*, *supra* note 4, at 292, 297–300 (analyzing alternatives to de facto custody).

the qualifications for a de facto custodian were too high to be practical, it could always reduce them in a way that still required a meaningful relationship.²³⁰

A third alternative—addressing the constitutional importance of the parental fitness presumption—would be to require a third party seeking custody to plead parental unfitness by a heightened standard. Currently, the Indiana Rules of Trial Procedure require only “a short and plain statement showing that the pleader is entitled to relief”²³¹ unless the party is pleading fraud or mistake.²³² The reputational interests supporting heightened pleading in fraud and mistake²³³ could also support heightened pleading in parental unfitness matters. This would make third-party petitions more difficult and give greater protection to the parent’s rights. Third parties could meet this heightened standard by pleading that a parent was harming a child, perhaps because of alcoholism, drug abuse, failure to provide financially, or failure to care for the child. Requiring this extra step of specifically pleading parental unfitness protects a fit parent’s right to the care, custody, and control of his or her children. This extra requirement is logical if courts really mean what they say when they quote the presumption that fit parents act in the best interests of their children.

Depending on changes in the previous provision, an additional statute providing the factors for consideration in a parent/third-party custody action may also be necessary. This statute would contain all the factors in the current best interests statute²³⁴ but would also include the presumption that a fit parent acts in his or her child’s best interests and his or her decisions must be given special weight. However, this addition would be unnecessary if third parties had to prove parental unfitness before petitioning for custody.

B. Nonstatutory Solutions for Indiana’s Custody Statutes

In addition to (or in lieu of) statutory changes, a secondary legal action could provide the necessary check on the overbreadth of Indiana’s custody statutes. Parents whose custody was challenged frivolously by a third party could bring a malicious prosecution claim²³⁵ against the third party or the third party’s attorney. However, this option may not sufficiently deter malicious lawsuits because malicious prosecution claims could only be brought *after* the parent won the custody case,²³⁶ and courts use a high standard in judging malicious prosecution claims so as not to chill legitimate litigation.²³⁷ Additionally, the successful parent may not have the financial or emotional resources to bring a malicious prosecution claim.

230. *See id.*

231. IND. R. TRIAL P. 8(A)(1) (2006).

232. IND. R. TRIAL P. 9(B) (2006).

233. *See generally* 5A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE, § 1296 (3d ed. 2006).

234. IND. CODE § 31-17-2-8 (2006).

235. A successful malicious prosecution requires proof that the defendant maliciously and without probable cause brought an action which was resolved in the plaintiff’s favor (including withdrawal of claims by the defendant). *See, e.g.,* City of New Haven v. Reichart, 748 N.E.2d 374, 378 (Ind. 2001); Kho v. Pennington, 846 N.E.2d 1036, 1041 (Ind. Ct. App. 2006).

236. *See Reichart*, 748 N.E.2d at 378.

237. *See Kho*, 846 N.E.2d at 1042.

Unresolved issues surrounding parental constitutional rights certainly create difficulties at the courts and the legislatures. This ambiguity dates from the first parental right case and has only increased with subsequent cases. Future cases should clarify some of the mysteries of *Troxel v. Granville* and the other parent's rights cases. Until then, we will continue to quote the century-old language of *Meyer* and *Pierce* without knowing what rights parents really have or what protection those rights receive.