Troxel and the Rhetoric of Associational Respect

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A recent decision by the United States Supreme Court has brought into sharp focus important questions about the nature and extent of parents' prerogatives to dictate how their children are raised. In the case of Troxel v. Granville, the Court addressed a Washington third-party visitation statute that permitted "any person" to petition for visitation with a child. Under the statute, a petitioner had to allege that visitation would serve the child's best interest. A judge hearing such a petition could order visitation whenever he or she found that such visitation may serve the child's best interest.

In Troxel, the petitioners, Jenifer and Gary Troxel, were the grandparents of two young girls. Their son was the father of the girls. Following his death, the Troxels wanted to continue seeing the girls on a regular basis. The girls' mother, Tommie Granville, eventually informed the Troxels that they could see the girls only once a month. The Troxels then petitioned a Washington State trial court to order more frequent visitation pursuant to the state's third-party visitation statute. The trial court judge found that the requested visitation would serve the girls' best interest and ordered visitation one weekend per month, one week during the summer, and four hours on both of the Troxels' birthdays.

The Washington State appellate courts reversed the trial court's decision, with the Washington Supreme Court striking the statute down as unconstitutional on its face. The state supreme court determined that the statute unconstitutionally infringed on the rights of custodial parents to rear their children. Specifically, the Washington court held that the statute impermissibly allowed the state to interfere with the decision of a custodial parent in the absence of a threat of harm to the affected child. In addition, it held that the best interest of the child standard included in the statute swept too broadly by authorizing the state to displace a custodial parent's decision...
on visitation merely because the state presumably could make a "better" decision.

With this decision, the Washington Supreme Court forthrightly acknowledged a right of custodial parents to be free from state intrusion if their decisions concerning their children do not threaten the children with actual harm. Implicitly, the court held that children do not have a right to the "best possible outcomes," as determined and constructed by the majoritarian state. They only have a right to be free from a serious threat of the infliction of actual harm.

The Justices of the United States Supreme Court affirmed the decision of the Washington Supreme Court. However, they wrote a collection of opinions that reveal the Court's uncertainty concerning the extent and strength of custodial parents' rights to direct the upbringing of their children. Except for the concurring opinion authored by Justice Thomas, none of the opinions were as forthright and straight-forward as the opinion of the Washington Supreme Court.

In the second paragraph of his two-paragraph opinion, Justice Thomas clearly and concisely finds that parents have a fundamental right to direct the upbringing of their children. As support for this fundamental right, he cites Pierce v. Society of Sisters, a 1925 decision of the Court that struck down an Oregon statute requiring children to attend public schools. According to Thomas, Pierce unequivocally established parents' right to determine who shall educate and socialize their children. Because this right is fundamental, the Court must apply strict scrutiny to any infringement, with the state having the burden of establishing a compelling reason for the infringement. In Troxel, Thomas finds that the State of Washington "lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties."

In his separate concurrence, Justice Souter writes that the Washington Supreme Court's decision is consistent with this "Court's prior cases addressing the substantive interests at stake." Thus, like Justice Thomas, he cites Pierce, along with several other parental rights cases such as Meyer v. 

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4. Troxel, 120 S. Ct. at 2065.
6. Troxel, 120 S. Ct. at 2068.
7. Id. at 2065.
Nebraska, Wisconsin v. Yoder, and Santosky v. Kramer. However, unlike Justice Thomas, he does not appear to find that parents have a fundamental right to decide with whom their children will associate. Justice Souter is much more equivocal, merely stating that “[w]e have long recognized that a parent’s interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment.”

Justice Souter does eventually draw a close analogy between the parental decision at issue in Pierce and the one at issue in the instant case:

Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child’s social companions is not essentially different from the designation of the adults who will influence the child in school. Even a State’s considered judgment about the preferable political and religious character of schoolteachers is not entitled to prevail over a parent’s choice of private school.

But despite drawing this analogy, Justice Souter fails to expressly recognize a fundamental right, and as Justice Thomas points out, he fails to apply a standard of strict scrutiny in reviewing the Washington statute. Instead, he expresses uncertainty as to the scope of parents’ rights in this area. He then focuses on the breathtaking breadth of the Washington statute and the best interests of the child standard that it employs as a decisionmaking rule and states,

Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child, but Meyer’s repeatedly recognized 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.

This focus allows him to defer to the decision of the Washington Supreme Court finding the statute invalid on its face. He does not have to define the “metes and bounds” of a parent’s constitutional right to make decisions for his or her children, because he would allow a state supreme court to “apply a demanding standard when ruling on its facial constitutionality.”

11. Troxel, 120 S. Ct. at 2066 (emphasis added).
12. Id. at 2067.
13. Id. at 2066-67.
14. Id. at 2067.
In structuring his opinion in this manner, Justice Souter avoids defining a fundamental right of parents to control their children's associates that would dictate strict scrutiny review of any third-party visitation statute. Despite his express recognition of the strength of the Court's prior rulings in analogous situations, he does not fully endorse them. He simply allows the Washington Supreme Court to endorse them. Thus, the reader remains uncertain as to how Justice Souter would rule directly on this type of third-party visitation statute and certainly as to how he would rule on a more narrowly constrained visitation statute. He does not go nearly as far as Justice Thomas in endorsing parents' fundamental right to make visitation decisions for their children absent a compelling state interest. In summary, Justice Souter leaves himself a great deal of "wiggle room," and in the process, appears to sketch out a relatively weak right of parents to decide with whom their children will associate.

If Justice Souter's opinion seems to establish an anemic parental right to make visitation decisions, Justice O'Connor's plurality opinion largely avoids addressing the nature and extent of this parental right. Justice O'Connor begins her analysis by recognizing the Court's long history of recognizing "the fundamental right of parents to make decisions concerning the care, custody and control of their children." She cites a long line of relevant cases that include Pierce, Meyer, Yoder and Santosky and concludes, "In 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."

But after articulating this fundamental right, Justice O'Connor fails to subject the Washington statute to any form of strict scrutiny. First, she refuses to examine the statute for facial invalidity, instead reviewing the statute only as applied in this specific case. In this way, she effectively avoids the need to determine the parameters and the strength of the "fundamental" parental right that she identified initially. She expressly states,

Because we rest our decision on the sweeping breadth of [the Washington statute] and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.16

15. Id. at 2060.
16. Id. at 2064.
Thus, the Justices who signed on to the plurality opinion implicitly indicate that statutes allowing third-party visitation without requiring a showing of harm may be valid in certain cases. It is left to state legislatures and courts to identify and address the types of cases in which a court can permissibly order visitation over the objections of fit custodial parents even if a failure to allow such visitation does not present a threat of harm to affected children.

As Justice O'Connor states, this type of narrow, only-as-applied, decision may be appropriate in a context where much state court adjudication occurs on a case-by-case basis, but the reader is struck by just how far Justice O'Connor must stretch in order to write such a narrow opinion. As two of the dissenting Justices point out, the Washington appellate courts never applied the statute in this case. Justice Stevens states,

The task of reviewing a trial court’s application of a state statute to the particular facts of a case is one that should be performed in the first instance by the state appellate courts. . . . Any as-applied critique of the trial court’s judgment that this Court might offer could only be based upon a guess about the state courts’ application of that State’s statute, and an independent assessment of the facts in this case—both judgments that we are ill-suited and ill-advised to make.\(^1\)

Both Justice Stevens and Justice Kennedy use this powerful point to limit their review to whether the Washington State Supreme Court was correct in concluding that the statute was invalid on its face. Both of them determine that the State Supreme Court erred in finding the statute invalid on its face and make strong arguments for a remand of the case so that the lower courts can apply the statute to the facts of this case.

Justice O'Connor expressly recognizes the point made by Justices Stevens and Kennedy, stating, “There is no need to hypothesize about how the Washington courts might apply [the statute] because the Washington Superior Court did apply the statute in this very case.”\(^2\) With this statement, it is clear that the Justices who join the plurality opinion are essentially willing to take a direct appeal from the state trial court. They are willing to live with this procedural situation in order to avoid a remand to the State Supreme Court and in order to write a narrow, only-as-applied, opinion. They obviously want to address the issues presented by the application of third-party visitation statutes, but they do not want their ruling to have a broad prescriptive effect.

Even more interesting than Justice O’Connor’s procedural maneuvering in order to write a narrow opinion is her undermining of the conception of

\(^1\) Id. at 2068-69.
\(^2\) Id. at 2065.
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parental rights as fundamental substantive rights. As noted above, she begins with an express recognition of the fundamental right of parents to make decisions for their children. She then moves to her only-as-applied analysis by examining the case facts, concluding at one point, "The problem here is not that the Washington [Trial] Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughter's best interests." For the Justices who joined the plurality opinion, the basic problem with the trial judges' decision is that he did not presume that the mother's decision served her children's best interests and did not require the grandparents to overcome this presumption.

This identification of the statute's basic problem could be viewed as consistent with the fundamental nature of custodial parents' rights if, as Justice Thomas articulated in his opinion, the presumption in favor of a parent's decision is irrebuttable or if the state must establish a compelling state interest in overcoming the presumption. But Justice O'Connor appears to articulate a much weaker presumption. First, she begins this part of the discussion by stating,

so long as a parent adequately cares for his or her children (i.e., is fit), 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.

She concludes this section of the opinion as follows:

In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

With these words, it hardly seems that Justice O'Connor is articulating a fundamental right. She perceives no problem with court intervention in the family association as long as an appropriate presumption in favor of the parent is applied, a presumption that appears rather weak—one that the state cannot "normally" overcome as to fit parents; and one that a court must accord "at least some special weight." This is a long way from the Washington Supreme

19. Id. at 2062.
20. Id. at 2061 (emphasis added).
21. Id. at 2062 (emphasis added).
Court’s requirement that the state intervene only if a child is threatened with harm as a result of the parent’s decision and that once it intervenes, the state cannot overturn a parent’s decision simply because it believes it can make a better decision. This is also far removed from a traditional strict scrutiny approach.

In sum, Justice O’Connor’s opinion leaves a great deal of room for state legislatures to draft statutes that allow for judicial review of a parent’s third-party visitation decision (this is further evident by Justice O’Connor’s listing of state statutes (with seeming approval) that allow courts to order grandparent visitation if the presumption in favor of a parent’s decision is included in some form) and for state court judges, on a case-by-case basis, to overcome a presumption in favor of the custodial parent’s decision. The room that states have to override a parent’s visitation decision belies the earlier characterization of the parent’s right to make this type of decision as fundamental.

The Justices who authored dissenting opinions provide insights into the relatively weak endorsement of parental rights by the plurality and by Justice Souter. In his dissent, Justice Stevens refuses to find the state statute invalid on its face because, in his opinion, the statute sweeps in many permissible results. He states,

Even the Court would seem to agree that in many circumstances, it would be constitutionally permissible for a court to award some visitation of a child to a parent or previous caregiver in cases of parental separation or divorce, cases of disputed custody, cases involving temporary foster care or guardianship, and so forth.\(^*\)

Thus, in Stevens’ mind the statute does not invariably run afoul of the Fourteenth Amendment and cannot be declared invalid on its face.

Justice Stevens goes on to address the fundamental nature of parental rights and to explain why many of the results reached under the third-party visitation statute are permissible. Initially, he states that the Washington Supreme Court erred in holding that the Federal Constitution requires a showing of actual or potential harm to the child before a court may order visitation over a parent’s objections. He does expressly recognize that parents have a fundamental liberty interest in caring for and guiding their children. But he also asserts that, “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

\(^{22}\) Id. at 2070.
threshold finding of harm.” According to Justice Stevens, parental liberty interests have never been seen to be without limits.

Justice Stevens justifies limits on parental interests not only by citing the Court’s prior decisions which indicate such limits, but also by express recognition of children’s interests. He states,

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

Thus, for Stevens there are at least three entities that have an important interest at stake in visitation decisions—the parent who has established a prior relationship with the child; the State in its parens patriae role; and the child who has a relationship with a third party that serves her welfare and protection.

The recognition of the child’s interests leads Justice Stevens to conclude that parental interests cannot dictate in these cases; they must be limited. He expressly recognizes that the Court has not addressed the nature of a child’s liberty interests in preserving established familial or family-like bonds, but he states, “it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.”

He uses this insight to conclude, “we should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a ‘person’ other than a parent.” Pursuant to his conclusion, state legislatures ought to be able to provide for court ordered visitation in many situations in which the child is not threatened with harm.

In his dissent, Justice Kennedy largely agrees with Justice Stevens. He finds that the Washington Supreme Court erred in holding that a “harm to the child” standard is constitutionally required in every third-party visitation case. He also finds that the best interests of the child standard may be permissible in some third-party visitation cases.

Like the other Justices discussed above, Justice Kennedy recognizes that “the custodial parent has a constitutional right to determine, without undue

23. Id. at 2071.  
24. Id. at 2071.  
25. Id. at 2072.  
26. Id. at 2073.
interference by the state, how best to raise, nurture, and educate the child."^{27} He also states that the Washington Supreme Court "sought to give content to the parent's right by announcing a categorical rule that third parties who seek visitation must always prove the denial of visitation would harm the child."^{28} Justice Kennedy believes that this categorical rule goes too far, especially in cases in which the third party has an established relationship with the child, possibly even as a *de facto* parent. As he states, "Cases are sure to arise—perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto."^{29} Thus, in his view a parent's right to decide with whom his or her child will associate is not absolute, even in cases in which a denial of visitation will not threaten harm to the child. He concludes,

> In short, a fit parent's right vis-a-vis a complete stranger is one thing; her right vis-a-vis another parent or a *de facto* parent may be another. The protection the Constitution requires, then, must be elaborated with care, using the discipline and instruction of the case law system.

In the end, Justice Kennedy agrees with and reinforces Justice Stevens' express finding that parental rights must, in many conceivable situations, yield to the interests of other individuals.

The interests of other individuals (e.g., the child, a former caretaker, a grandparent) identified by Justices Stevens and Kennedy may help to explain Justice Souter's failure to apply strict scrutiny and to explain the plurality's narrow, "only as applied" review of the Washington statute. In both opinions, the Justices take great pause and actually refuse to act upon their expressed view concerning the fundamental nature of parents' rights to control the custody and care of their children. Unlike Justice Thomas, they are not willing to define parents' rights as truly fundamental, thus requiring strict scrutiny review.

It is likely that Justice Souter and the Justices who joined the plurality opinion hedge this way because of what Justice Stevens states about the constellation of entities involved in third-party visitation cases. These are not the ordinary two-party rights cases that pit an individual against the state. Instead, these cases involve at least four entities—the custodial parent, the

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27. *Id.* at 2076.
28. *Id.* at 2076.
29. *Id.* at 2077.
30. *Id.* at 2079.
child, the third party seeking visitation and the state. Although the third party may not possess a fundamental liberty interest in his or her relationship with the child (although that is certainly not ruled out), the child, as Stevens indicates, may have such an interest at stake depending on the facts of the specific case. In a case in which one faces two or three competing, yet fundamental interests, it is impossible to apply strict scrutiny in favor of one of the identified fundamental interests. In the end, Justice Thomas refuses to acknowledge these multiple interests, recognizing only the custodial parents' interest. The other Justices, although not expressly acknowledging these other interests, implicitly recognize them by writing or joining opinions that, in practical terms, call into question the fundamental nature of a custodial parent's right to control the custody and care of his or her child.

Justice Scalia writes a separate, three-paragraph dissent that does not relate neatly to the other opinions. His opinion is extremely interesting and it actually presents an opportunity to move beyond the "fundamental interests," "fundamental rights" rhetoric that is such an influence in the other opinions. This opportunity comes into being because of Justice Scalia's refusal to speak in terms of parents' constitutional rights.

Interestingly, he begins his opinion with a form of personal rights rhetoric. In the first two sentences, he states,

In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all Men . . . are endowed by their Creator." And in my view that right is also among the "other[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage."31

However, he immediately refuses to utilize the Declaration of Independence or the concept of unenumerated rights "to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right."32 In his view, the Constitution does not confer such power upon judges.

Scalia does state that he would be comfortable pressing his view of the unenumerated right of parents to direct the upbringing of their children in legislative chambers or in electoral campaigns. It appears that in these settings, legislator or citizen Scalia would argue strongly that "the state has no power to interfere with parents' authority over the rearing of their children . . ."33 But in the Supreme Court setting, despite his strong personal feelings

31. Id. at 2074.
32. Id.
33. Id.
concerning parents' rights, Justice Scalia refuses to find that the Washington statute touches on any fundamental liberty interest for purposes of the Fourteenth Amendment Due Process Clause.

In reaching this conclusion, Justice Scalia discounts the applicability of the Court's three prior decisions finding a substantive constitutional right of parents to direct the upbringing of their children—Meyer, Pierce and Yoder. He notes that Meyer and Pierce were decided in an "era rich in substantive due process holdings that have since been repudiated." He also states, "[t]he sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to stare decisis protection."

Although he balks at overruling the earlier cases, he expressly refuses to extend them to the third-party visitation context. He refuses to usher in a new regime of federally prescribed family law that will require judges to define the term "parent" and to qualify parental rights by defining such terms as "harm to the child" and "close relative to the child." He thus would leave this issue to state legislatures rather than federal courts because "state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people." Based on this reasoning, Justice Scalia would reverse the Washington Supreme Court outright, upholding the trial court's third-party visitation order.

In the end, Justice Scalia appears to agree with Justice Thomas concerning the fundamental right of parents to direct the upbringing of their children. However, he disagrees with Thomas' finding that this fundamental right emanates from the Fourteenth Amendment Due Process Clause or from any other clause of the Federal Constitution. He also appears to agree with Justices Stevens and Kennedy that entities other than the parents and the state have possibly important, even fundamental interests, at stake in third-party visitation cases. As to children specifically, he raises the possibility of enumerated First Amendment rights of association or free exercise being relevant. However, this issue was not raised in the case, and the interests that were actually raised in this case are appropriate for the legislative and political arenas, but not for the judicial arena through the development of federal constitutional rights doctrine.

34. Id.
35. Id.
36. Id. at 2075.
Justice Scalia essentially throws the third-party visitation issue to the arena of public discourse within which rights rhetoric does not have the same preclusive effect as it does in the judicial arena. He moves the discussion away from constitutional rights talk. As noted above, this presents the opportunity for a fruitful public discussion of this issue.

However, Scalia's opinion seems to present only a small opportunity for rich public discussion because he clearly indicates that he would immediately inject rights rhetoric. It would be a rights rhetoric emanating from sources other than the text of the Federal Constitution. It would spring from the text of the Declaration of Independence and from his view of the rights guaranteed to individuals by the Creator. In this latter sense, this rhetoric would appear to have religious, faith-based roots.

Certainly this type of rhetoric is allowed within a comprehensive public discussion of third-party visitation issues and family issues generally. But to open the door to a full public discussion, the participants must move beyond not only constitutional rights rhetoric, but also other forms of rights rhetoric. This type of rhetoric tends to squelch public discussion of important issues. Even when discussion continues after the infusion of rights talk, it often becomes embittered, with any opportunity for flexibility, moderation, and the discovery of common ground largely lost. Furthermore, rights rhetoric often prevents participants in a public discussion from articulating and exploring their positions fully. Phrases such as, "it is a basic individual right"; "it is a natural right"; or "it is one of the rights with which all individuals are endowed by their Creator," take the place of rigorous analysis and justification.

If rights rhetoric is avoided, participants in a public discussion open an issue to public scrutiny within a political context. In this context, the development of new forms of rhetoric is possible. Specifically, in the remainder of this essay, I introduce a new form of rhetoric—a rhetoric of associational respect—that may enhance public discussions of issues that affect the family association such as third-party visitation.

It is fortunate that the building blocks for the development of a rhetoric of associational respect exist in the literature addressing political theory and political systems. Namely, traditional works such as James Madison's Federalist No. 10, along with relatively recent theories concerning pluralism

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and the development of an intellectual character of tolerance, provide useful perspectives on the family and its political functions in a large, pluralistic democracy. They allow for the identification and exploration of the political functions of the family in American society, and these political functions provide a mechanism for the development and implementation of a rhetoric of associational respect that may significantly enhance the public discussion of issues affecting the family. 38

Issues surrounding third-party visitation statutes offer a specific opportunity to explore the possibility of such an enhanced public discussion. By considering the political functions of the family, participants in a public discussion may be able to more fully assess the impact of third-party visitation statutes.

The work of family scholars and political theorists allows one to identify political functions served by the family within a democratic society. 39 Several of these functions are facilitative in nature, meaning that they facilitate the functioning and/or power of the democratic state. Although these facilitative functions do not provide independent justifications for maintaining the family association itself, they allow one to identify the needs and desires of liberal democratic societies and articulate a vision of how these societies may use the family association to serve those needs and desires. 40 As a result, these functions can legitimately claim a place within public discussions of issues that affect the family association. As citizens and legislators make decisions about family policies, they should expressly consider whether their policy choices will frustrate or further the needs and desires of their specific democratic society.

Several political functions of the family are subversive in nature. The subversive functions do provide strong justifications for the maintenance of the family association itself, and as with the facilitative functions, allow one to identify how the family association contributes to the proper functioning of a large pluralistic democracy. 41 As a result, it is important to consider the subversive functions within public discussions that affect the family. If a public policy decision would diminish the family association’s capacity to

39. See generally id. at 212-56. It should be noted that the family could serve some of the same functions in non-democratic regimes, including totalitarian regimes. This is especially true for the three facilitative functions discussed below.
40. See id. at 212-14.
41. See id. at 214-56.
serve these functions, a democratic society would incur costs that advocates of the policy must address by identifying and articulating benefits that outweigh these costs.

The first facilitative political function of the family is the production of "good democratic citizens." Family scholars have written extensively about this function of the family. In current American society, the family is charged with raising children to be adult citizens who can participate competently in a pluralistic democracy. Adult members of the family ensure that child members are appropriately socialized and educated. As a result, children become adult citizens who can engage in democratic deliberation, thus forming the foundation of a democratic society. Although this function could conceivably be served by associations other than the family or even by state entities, the family has been assigned this function within American society. This function arguably lies at the core of the state's *parens patriae* power and its adoption of the best interests of the child standard.

A third-party visitation statute would not appear to have much of an impact on the family's capacity to serve this function. First, the number of families actually affected by such a statute is likely to be relatively small. It is highly unlikely that a large number of disputes will arise in which a third party is seeking visitation with a child against the wishes of a custodial parent. Because the number of disputes of this type is likely to be relatively low, it is unlikely that a third party visitation statute would affect the family association's general capacity to produce good democratic citizens. Second, even for families for which a third-party visitation dispute arises, it is extremely difficult to predict the result in terms of the production of good citizens. The affected children may experience some disruption and anguish, but this experience is unlikely to disable their capacity to develop into competent democratic citizens. In fact, their experience under the statute may


43. See Emily Buss, *Court is Moving in Wrong Direction on Parents' Rights*, Chi. Trib., June 7, 2000, at 21. See also Herring, *supra* note 38, at 229-33, 241-42 (making a similar point related to foster care placements).
actually improve their capacity for democratic deliberation, especially in the face of emotional conflict. (This positive effect is also extremely difficult to predict.) Due to the low number of families and children directly affected by a third-party visitation statute and the difficulty in predicting the impact on families that are directly affected, the consideration of the family’s function in producing good democratic citizens would not appear to contribute significantly to the public discussion of third-party visitation statutes.

The second facilitative political function of the family is to mask dependency. Martha Fineman has articulated this function. She starts with the observation that the family is enmeshed in addressing inevitable dependency. Each individual experiences dependency at some point, with everyone experiencing childhood and many experiencing disability and old age. Fineman then identifies two metanarratives that assign to the family the task of providing care for dependent individuals. First, many individuals view the family as “natural” in the sense that it is naturally constructed on the relationship between two adults joined by a heterosexual affiliation. Second, many view the family as a “private” association. When combined, these two articulated views or metanarratives give rise to the public construction of the “autonomous family.” The autonomous family cares for dependent members on its own, thus masking dependency by relieving the state of the burden of providing care for dependent individuals. Whether or not one views this as an appropriate function for the family to serve, the family, in serving this function, facilitates state functioning and power. The state is not burdened with caring for dependent individuals directly and is left free to focus on other issues and endeavors.

The enactment of a third-party visitation statute is unlikely to significantly affect the family’s capacity to serve its masking of dependency function. First, as noted above, it is unlikely that many families would actually experience a third-party custody dispute. Thus, the scope of the statute’s impact would be very limited. Second, even for those families directly involved in a custody dispute, it is unclear what type of effect such a dispute would have on the family’s capacity to serve this political function. If a judge orders a custodial parent to comply with a third-party visitation


46. See supra note 43.
schedule, he or she does not unmask dependency. The public does not step in to provide care for the affected child. The subject family may be somewhat less "natural," "private," or "autonomous," but not in a way that diminishes its capacity to provide for its child member. In other words, the state may intervene in a family, to require visitation with a third party, but such intervention does not have the effect of relieving the family of responsibility for providing care to its child members. The affected family association may operationally include more adults, but this association is still autonomous and is still expected to provide care to its child members without state or other public assistance. Because of the insignificant impact on the family's function in masking dependency, consideration of this function does not add much to the public discussion of third-party visitation statutes.

The third facilitative political function of the family is to enhance state power by diminishing the importance of other intermediate associations within a democratic society. French scholar Philippe Meyer has articulated the conception of this function.\textsuperscript{47} He begins by asserting that modern democratic societies have embraced the concept of an all-important, precious childhood. As a result, adult citizens increasingly turn to "experts" to tell them how to competently and carefully raise and educate their children. These experts have an interest in raising the stakes of childhood—in professing opinions on the crucial nature of childhood and the dire ramifications if children’s experiences are not properly structured. The resulting perception that much is at stake in rearing children in the "right way" calls for parents and other adults to invest a great deal in raising children. They come to believe that they must provide children with a certain type of secure and special environment that offers children opportunities to become the absolute best that they can be—that they realize their full potential.

The call for a high level of investment in childrearing primarily requires adult citizens to invest heavily in their family associations. They must provide not only adequate care for child members, they must provide optimal care. As a result, adult citizens become focused on the family association and on family activities. Other associations become a less important part of their lives. As Richard Putnam has noted, the level of activity in associations other than the family has in fact fallen.\textsuperscript{48} As one small example, individuals now bowl alone or with their family members rather than in leagues that include


non-family members. This explains the title to Putnam’s article, “Bowling Alone.”

According to Meyer, the diminishment of intermediate associations other than the family enhances state power. Associational activity is at times deeply subversive in nature, and even if an association is not currently engaged in subversive activity, it has the potential to engage in such activity. This potential for subversive activity places a check on state power. The state does not stand unopposed. Groups of individual citizens may actively resist the state’s influence and power.

But this resistance may vary in strength depending on the type of associations that possess the capacity to resist. Broad based, politically active associations are likely to pose stronger resistance to state power than small, insular neighborhood groups. Certainly, the family association lies at the weaker end of the spectrum in terms of its capacity to resist and check state power. The family association may support other more powerful associations (e.g. by producing individuals who possess basic associational skills), but if associational activity is to effectively check state power, associations other than the family must be active and powerful. If the family becomes the overriding focus of citizens’ associational lives, other more powerful and robust associations are diminished. They pose less of a restriction on state power, resulting in the enhancement and facilitation of state power.

Third-party visitation statutes could increase citizens’ focus on the preciousness of childhood and the importance of the family association. Such statutes arguably encourage third parties, such as the grandparents in Troxel, to focus their lives on participating in and structuring childhood. The law reinforces a view that each child is special and that all adults who have played a significant role (under the Washington statute, any role) in a child’s life should have access to the child. The law could also provide the basis for viewing grandparents or other significant third parties who do not seek continued contact with a child as uncaring and deviant. Many may adopt the view that these individuals should be spending time and effort on becoming part of a child’s life and family through visitation, rather than on other associational activity. In these ways, a third-party visitation statute would seemingly enhance the capacity of the family to facilitate state power by

50. See MEYER, supra note 47.
51. Id.
increasing citizens' focus on the family association and diminishing citizens' activity within other, potentially more powerful associations.

Whether a society wants to encourage the family to serve this political function is highly debatable. However, incorporating the consideration of this function into the public discussion of third-party visitation statutes would enhance the discussion. Participants would realize more fully the consequences of their decision concerning the proposed visitation statute. They could openly discuss the extent to which enactment would increase citizens' focus on the family association, effectively diminish other associational activity, and possibly enhance state power. They could also consider whether these effects are desirable, and if not, whether they are avoidable.

In summary, consideration of the family's facilitative political functions does not significantly enlighten the public discussion of third-party visitation statutes. Such statutes do not significantly enhance or imperil the family's capacity to produce good democratic citizens or to mask inevitable dependency. A third-party visitation statute may increase citizens' focus on structuring precious childhoods and on the family association, thus diminishing the power of other intermediate associations and enhancing the power of the state. But it is unclear whether the enhancement of this political function of the family is desirable. Although participants in the public discussion of third-party visitation statutes should consider the potential enhancement of the family's capacity to serve this facilitative political function, this consideration certainly does not dictate any specific result. In fact, it does not move the discussion in any clear direction at all.

A consideration of the family's subversive political functions may add more to the public discussion of third-party visitation statutes. The subversive functions are arguably more important because they actually provide justifications for the family association itself. While the facilitative political functions currently served by the family are important, associations quite different from the family could conceivably serve these functions. In contrast, the subversive political functions require the existence of small, intimate, family-like associations.

The family's first subversive political function is to provide support for a broad array of diverse intermediate associations. Such an array of


associations is important in checking factious behavior—group action that does not serve the true, long-term interests of the public. According to James Madison in Federalist 10, factious behavior is group action that arises out of the self-love and flawed reasoning of individual members and that undermines the community good. A faction may consist of a majority of citizens acting on a common impulse. Within a democratic society, majority factions pose serious threats to the public good.

In Federalist 10, Madison explained how the proposed federal republic would provide a check on factious behavior. First, the federal republic would encompass a large geographic area. Second, it would include a large population. In essence, Madison argued that largeness was a virtue—small direct democracies are vulnerable to factious activity and a large federal republic would reduce this vulnerability. Namely, a large, diverse population would make it difficult for a politically significant number of citizens to share the same factious opinions, passions or interests. Furthermore, even if a majority of citizens did come to share an opinion, passion or interest that would form the basis for factious behavior, the large territory, combined with a large population, would render it extremely difficult to achieve the broad, secretive communication necessary to mobilize a strong faction. Thus, the large federal republic would make it very difficult to form and mobilize a strong faction.

Madison's prescription for factious behavior has been fairly effective, but the checks he relied upon have been weakened by modern technology. Modern transportation and communication technologies have effectively shrunk the geographic expanse of the American republic. Ideas and thoughts can be shared from one end of the country to the other virtually instantaneously. The Internet has made this type of quick communication possible, and, most importantly for factious activity, it can be done in a quasi-private environment because messages can be targeted to specific individuals and groups. All of this makes it much easier to construct, identify, and act upon shared opinions, passions, and interests. Because some of these opinions, passions and interests will be factious in nature, the likelihood and threat of faction is increased. Madison's safeguards may no longer provide an adequate check.

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55. Id.
57. Id.
If the check on factious behavior is to be maintained, we must rely on something more than geographic breadth and large numbers of citizens. The fundamental safeguard lies in fostering a broad diversity of opinions, passions, and interests. Such diversity will lead to the formation of diverse groups that have the potential to check each other’s factious behavior. Thus, the enhancement of individual and associational diversity provides a vital check on factions within a modern democratic society.  

The family association has the potential to play a vital role in the production of diverse individuals—the raw material for the construction of the broad array of diverse associations necessary to check factious behavior. For example, by allowing parents to provide divergent settings for the raising of children, a society helps to ensure that individuals will develop distinct opinions, passions, and interests. As adults, citizens who have experienced very different childhoods will likely form widely divergent alliances and associations based on their distinct opinions, passions, and interests. These divergent associations will have the capacity to check each other’s activities, especially when such activities are factious in nature. In this way, the family association serves an important subversive function, contributing to the construction of an effective check on factious behavior.

The enactment of a third-party visitation statute may affect the capacity of specific families to serve this function. However, these cases are likely to be rare and the overall impact is likely to be insignificant. As noted in the discussion of the facilitative political functions, the number of families directly affected by a third-party visitation dispute is likely to be small. More importantly, even those families that are directly affected will be unlikely to experience a significant diminution in their capacity to support associational diversity. The statute could lead only to a visitation order. Affected children would have to visit with a third party against the wishes of their custodial parents, but their lives would not be standardized to any significant degree. Their custodial parents, and even the third party with whom they must visit, would remain largely free to raise and interact with the children as they see fit. The public and the state would not dictate day-to-day family interactions and influences. Thus, affected children would retain a full opportunity to form distinct opinions, passions, and interests, and the affected families would still possess the capacity to support associational diversity.

58. Id. at 222-25.
59. Id.
60. See supra note 43.
In rare cases, state actors may have to monitor a third-party visitation decree in order to ensure compliance. Such state monitoring may lead to state intervention in the affected family. State actors may discover “parenting problems” and require parents to participate in parenting classes or act to remove children from parental custody. In these types of cases, the children’s lives are substantially influenced by the state—they become subject to a standardized approach to structuring childhood. If widespread, this result could seriously diminish the capacity of the family to produce diverse individuals. But again, because very few families would experience this extreme outcome as a result of a third-party visitation order, a statute authorizing such court orders would not appear to seriously threaten the family association’s capacity to support associational diversity. Thus, the consideration of this subversive political function of the family would not significantly enhance the public discussion of third-party visitation statutes.

The family’s second subversive political function is to support a broad array of powerful associations. Intermediate associations must possess a significant degree of power in order to ensure the proper functioning of a large pluralistic democracy. As noted above, these associations must have the capacity to check each other’s activities that would undermine the public good. In order to maintain this type of associational check, a democratic society must include a critical number of associations that possess the power to check the activity of other associations. In addition, associations have the potential to influence, define, work towards and secure the public good. Theories of pluralism and interest group politics reveal and reinforce this positive aspect of group behavior. But to have any real effect on their society and political system, these groups must possess a significant degree of political power. Furthermore, intermediate associations insulate individual citizens from the direct influence of the state. They allow individuals to construct and pursue life goals outside the state or public sphere.

62. See Herring, supra note 38, at 225-33.
63. Id. at 233-43.
Associational power holds the key to achieving a perception that life pursuits outside the state sphere are viable—a significant number of associations must have the power to insulate the individual from the overwhelming influence of the state sphere and power of the state.

The family association contributes to associational power by providing individuals with their first experiences in an associational setting removed from the public sphere. 66 Within this original associational setting, children develop a cognitive model of associational relationships. This cognitive model has two important components. First, children living within functioning family associations develop the interpersonal skills that allow them to eventually reach out beyond the family and form new, strong relationships and associations with others. Through a process of attachment, bonding, separation and associational growth, children and adult caretakers interact in a way that allows children to develop basic associational skills. These skills provide the foundation for the formation and maintenance of powerful intermediate associations. In other words, because of their experiences within the family association, most individuals learn how to sustain coherent and cohesive associations. 67

Second, individuals living within family associations learn that associations can exist and function outside the public sphere. 68 Through their day-to-day activities, family members learn deep lessons about their capacity to make important decisions without public intervention. As an individual within a functioning intermediate association, they learn that they possess the power to determine their own life goals and how they will pursue those goals. This knowledge provides the basis for associational power to permeate society. Individual citizens emerge from the family with the capacity and confidence to act in concert with some of their fellow citizens outside the public sphere. They know that such associations are viable and have the potential to insulate them from state or other public actors. In summary, two important components of the cognitive model that individuals form within a minimally adequate family association constitute the bedrock of the associational power that is necessary for the proper functioning of a large pluralistic democracy.

A third-party visitation statute may diminish the capacity of affected families to support associational power. On one hand, a third-party visitation

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66. See Herring, supra note 38, at 237-43.
67. Id.
68. Id.
order is unlikely to affect children's development of basic associational skills. As long as the family association that includes the custodial parent functions adequately, child members would experience the process of attachment, bonding, separation and associational growth. Thus, they would likely have an adequate opportunity to form a cognitive model that provides them with the basic skills to form relationships and associations outside the family context. On the other hand, a third-party visitation order is likely to disrupt affected children's formation of a cognitive model of associations that can exist outside the public sphere. Members of an affected family would become fully aware that state actors can dictate decisions on fundamental matters, such as with whom family members will associate. Even if an affected child agrees with the state's decision to order visitation, this child learns a vivid lesson about how the public can trump a decision made within the family association by his or her custodial parent. In this child's eyes, the family association is less powerful, less insulated, less viable. This realization would likely diminish the child's motivation to form other associations, to have faith in the strength of associations, and to invest in associations. As a result, affected individuals would be less able to form and maintain powerful associations.69

Fortunately, the number of families affected directly by a third-party visitation statute is likely to be low. Thus, the negative consequences for the family's capacity to support associational power will be limited.70 For this reason, consideration of this political function of the family would likely have the same negligible impact on the public discussion of third-party visitation statutes as the other functions examined above. However, the significant impact on families directly affected by such a statute raises a red flag surrounding the enactment of such statutes and calls for further examination and exploration. Consideration of the third subversive political function of the family allows for this further examination and exploration.

The third subversive political function of the family is to foster the development of an intellectual character that supports associational tolerance.71 Fostering such an intellectual character is vital to ensuring society's capacity to support the associational diversity and power that is necessary for the proper functioning of a large pluralistic democracy.

The maintenance of associational diversity and power is extremely difficult because of the basic impulse to intolerance.72 Intolerant reactions to

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69. See id.
70. See supra note 43.
71. See Herring, supra note 38, at 243-50.
72. See generally Lee C. Bollinger, The Tolerant Society: Freedom of Speech and
others are common and prevalent. This is especially true in relation to group or associational activity, which is often perceived as more threatening than individual behavior. Thus, there is a common and strong impulse to eliminate or reduce associational diversity and power. The widespread reaction to a group of citizens who engage in activities that do not fit the common, acceptable, majoritarian mode is rejection. Many citizens view such group activities as a threat, demanding public and state action to restrain and/or eliminate this type of associational behavior. These citizens realize that the state possesses the power to crush associational activity and they naturally petition state actors to exercise such power.

In the face of this impulse to associational intolerance and the capacity of the majoritarian state to effectively act on this impulse, the challenge faced by a democratic society is how to foster a citizenry that possesses an intellectual character of associational tolerance. One way to foster this intellectual character is through vivid demonstrations of governmental restraint. If the government publicly restrains itself from prohibiting what appears to be threatening associational activity, it demonstrates the viability of tolerance. It educates citizens that they and their society can survive while allowing objectionable associational activity to occur. Society will not fall apart as a result of tolerance for a wide range of associational activities.

The family association provides a relatively safe association for the exercise of governmental restraint and the demonstration of associational tolerance. Families are small associations that possess little political power within a democratic political system. Thus, their activities do not present a significant threat to or check on the state.

Yet many citizens view the family as a very important association. This was the original, most intimate association for most and many retain a deep emotional attachment. As a result, many individuals are interested in how the state treats and regulates families. Therefore, citizens pay attention when the state refuses to regulate family activities and decisions, especially when these activities and decisions depart significantly from what most citizens would themselves find acceptable. They watch closely and learn deep lessons concerning associational tolerance. They learn that families are allowed to

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73. See Herring, supra note 38, at 247.
74. See id. at n.379.
75. See id. at 247-50.
76. See id. at 247-56.
77. See id. at 247-58.

EXTREMIST SPEECH IN AMERICA 109-10 (1986); Herring, supra note 38, at 244-47.
make widely divergent decisions and engage in a broad array of activities, but that society continues to survive and function. In other words, they learn that associational tolerance is viable. In this way, the family provides government actors with a relatively safe opportunity to vividly demonstrate associational tolerance and to foster the intellectual character of tolerance.\textsuperscript{78}

Consideration of the family's political function in supporting associational tolerance adds an important element to the public discussion of third-party visitation statutes. Such statutes constitute a failure to exercise governmental restraint. The legislature empowers a government actor, the judge, to veto a decision made by custodial parents within a functioning family association. In Troxel, for example, the trial judge refused to tolerate the mother's decision to limit visits between her daughters and the paternal grandparents. Feeling that allowing visits with grandparents is the generally accepted and proper decision, the judge failed to respect and tolerate a different decision. Thus, rather than providing a demonstration of tolerance, a government official acted in a way that vividly demonstrated associational intolerance.

Authorizing such demonstrations of intolerance for decisions made within adequately functioning family associations clearly diminishes the family's capacity to support associational tolerance.\textsuperscript{79} The state employs the family to reinforce the impulse to intolerance.

Of course, it would have been safe for the judge to honor the custodial parent's decision in Troxel. Society would have continued to function. In addition, the judge would have provided a powerful demonstration of tolerance for a family association's decision with which few citizens may agree.

By enacting third-party statutes, state legislatures would reject a comprehensive and safe exercise of governmental restraint. Instead, the public would authorize government officials to interfere with, and effectively veto, a decision made within the family association. This sends a clear message—citizens can seek government control of even the most intimate intermediate associations. They do not have any reason or obligation to tolerate and respect associational diversity and power.

Participants in the public discussion concerning third-party visitation statutes should consider the diminishment of the family association's capacity

\textsuperscript{78} See id.

\textsuperscript{79} See generally id.
to support associational tolerance that such statutes are likely to cause. Unlike the consideration of the family's other political functions, the relevance of this political function does not depend on a direct effect on a large number of individuals and family associations.\textsuperscript{80} The demonstrations of intolerance provided by government actions that directly affect only a few families would reverberate throughout society. Because the demonstrations of intolerance would be observed by many, decisions by government officials that directly affect only a few families would have a broad impact on a democratic society. It would be important to consider such a broad social impact in any public discussion of third-party visitation statutes. In this way, consideration of this final political function of the family would significantly enhance the public discussion of a proposed third-party visitation statute, providing a strong argument against the enactment of such statutes. Proponents of third-party visitation statutes should be required to address this argument within the public discussion and should not be allowed to simply rely on vague references to the best interests of children.

Of course, consideration of the political functions of the family does not dictate the final result of the public discussion of third-party visitation statutes. There are certainly important considerations in addition to the impact on the family's capacity to serve its instrumental political functions within a democratic society. Considerations such as child well-being and happiness, parental satisfaction and responsibility, and third-party interests and attachments should be included in the discussion.\textsuperscript{81} But these considerations are commonly included in discussions of public policies that affect families. Other than the family's function in producing good democratic citizens, the political functions of the family are often left out of the public discussion or are poorly articulated and largely glossed over.\textsuperscript{82} While consideration of the family's political functions would have a more substantial impact on public discussions of proposed legislation that would affect the family in a more profound way than would third-party visitation statutes, in the end, the express recognition and consideration of all of the family's political functions would significantly enhance and enrich the public discussion of third-party visitation statutes.

\textsuperscript{80} See id. at 256-58.
\textsuperscript{81} See generally Annette R. Appell, Court-Ordered Third Party Visitation and Family Autonomy, 3 ADOP\textsuperscript{ION} QUARTERLY 93 (2000).
\textsuperscript{82} See generally SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY, supra note 42.
With the splintered array of opinions in the *Troxel* case, it is time for a serious and full public discussion of third-party visitation statutes. Justice Scalia's opinion opens the door to such a discussion by moving the issues away from constitutional rights rhetoric that only leads to confusion and stalemate in discussions of family policies and issues. He wisely calls for the public discussion and debate to begin. The participants in this public discussion would be well served by a deep and probing consideration of the family's political functions within a large pluralistic democracy.