In 2000, the Supreme Court handed down its decision in *Troxel v. Granville*. There, the Court considered the constitutionality of the State of Washington's third-party visitation statute - governing when persons other than parents have a right to visitation with children.

The Court held Washington's visitation statute unconstitutional as applied in that case - but the fate of other states' statutes remained unclear. Indeed, even now, five years later, state courts continue to face questions about the *Troxel* decision's scope and meaning.

Last month, the Supreme Court of Ohio joined the discussion -- unanimously upholding as constitutional the state's grandparent visitation law.

Why was Ohio's law upheld as constitutional, while Washington's was held unconstitutional as applied in similar circumstances? And what about the laws of other states - given that every state has a third-party visitation statute on the books? Which are unconstitutional, and which are not?

*Troxel v. Granville*: The Statute, the Facts, and the U.S. Supreme Court's Ruling

The Washington statute at issue in *Troxel* was, in the Court's language, "breathtakingly broad": It permitted "any person" (notably, not any relative) at "any time" to petition for visitation rights to a child, and it authorized courts to grant such requests if it was shown to be in the "best interests of the child."

In *Troxel*, the plaintiffs petitioned for visitation with their daughter-in-law's two children -- over her objection. (Their son - the children's' father - had died.) The trial court undertook a standard "best interests" analysis, which entails an open-ended consideration of all relevant factors, and ordered that the daughter-in-law had to permit fairly substantial visitation of the grandparents with their grandchildren.

The mother appealed the order, arguing that the statute, and the "best interests" analysis it authorized, gave insufficient deference to her rights as a parent to decide with whom her children should have relationships and contact. The U.S. Supreme Court agreed, holding that the visitation statute, as applied to her, was unconstitutional.

The constitutional right at stake is a parent's liberty interest, rooted in the Due Process Clause of the Fourteenth Amendment, in the care, control, and education of his or her children. For many years, parents had long drawn successfully on a line of Supreme Court cases to ward off challenges by the state to their decisions respecting the education, religious upbringing, discipline, and medical care for their children. With *Troxel*, this line of cases was extended to parents' decisions regarding visitation with their children.

The Court, 6-3, struck down the Washington statute as applied in the particular circumstances of the *Troxel* case. But of the six, two were unwilling to flesh out the scope of the parental right at stake. The remaining four, however, agreed that, at a minimum, a visitation statute must give "special weight" to the decision by a parent to deny a given third party visitation with the child.

The Justices in the majority did agree, however, that the "best interests of the child" standard was troubling in that it appeared to give equal weight to the preferences of the
parent objecting to visitation and the third party seeking it.

Constitutionally, the Court noted, parents who are not unfit must be presumed to act in the best interests of the child. Thus, their decision to deny visitation to a grandparent (or other third party) must be presumed to be in their best interests as well.

The Ohio Statute: How It Differed From the Statute at Issue In Troxel

That brings us to the Ohio statute that the Ohio Supreme Court recently upheld.

The Ohio statute provides that if either parent of a child is deceased, the "parents and other relatives of the deceased" parent may request "reasonable companionship or visitation rights."

The Ohio statute is thus far narrower than the Washington statute at issue in Troxel - under which "any person" could, in theory, gain visitation. It was also tailored to a particular and fairly common situation: A widower or widow who is feuding with in-laws decides to cut them off from their grandchild.

As with the Washington statute, under the Ohio statute, the court can grant such a request if it is in the best interests of the child. But unlike the Washington statute, the Ohio statute guided the "best interests" analysis with a list of enumerated factors.

These included typical factors such as the child's age, psychological adjustment, and available time for visitation. But significantly, they also included the "wishes and concerns of the child's parents."

As interpreted by the trial court, the statute squarely lodged the burden of proof with the party seeking visitation, rather than with the parent refusing it.

The Facts of the Ohio Case

Young Brittany Collier lived with her mother and her maternal grandparents, Gary and Carol Harrold, from birth to age two. Her father (who had never been married to her mother) received supervised visitation with Brittany twice a week. Then, Brittany's mother died of cancer. Brittany continued to live with the Harrolds until age five - with her father continuing twice-a-week visitation.

Eventually, her father petitioned for and was awarded custody of Brittany, and thus removed her from the Harrolds' home. After that, he refused to permit the Harrolds to have any contact with Brittany. They filed a request for visitation under the Ohio law.

The trial court refused to grant their request - contending that Troxel requires "overwhelmingly clear circumstances" of benefit to the child, in order to force visitation over the opposition of the custodial parent.

But the Ohio Supreme Court disagreed with that formulation of the applicable legal standard. What Troxel requires, it held, is that courts accord "some special weight" to the wishes of parents when considering requests for visitation by third parties. And it found that the Ohio statutory scheme is sufficiently narrow - or susceptible of a sufficiently narrow interpretation by the court - to fulfill Troxel's requirements. The Ohio visitation statute gave that "special weight" to parents' wishes by making them an express factor in the balance the trial court had to strike.

Interestingly, and somewhat unusually, the Ohio Supreme Court did not send the case back to the trial court, so that it could re-balance the factors putting aside the erroneous "overwhelmingly clear circumstances" standard it had used. Instead, the Ohio Supreme Court simply ruled that the record clearly supported the Harrolds' request for visitation and granted it. The trial court is thus now charged only with establishing a schedule for visitation.

Perhaps the Ohio Supreme Court thought
the Harrolds had waited long enough: After all, they had been forbidden to see a little girl who had lived with them for five years, ever since she was born - and to whom they must have been very close.

Harrold in the Broader Post-Troxel Landscape

The results in similar cases in other states have been mixed.

Most recently, the California Supreme Court upheld that state's visitation law (as I discussed in a previous column). In that case, Butler v. Harris, the California court found significant several factors that operated to constrain courts' ability to grant visitation requests to third parties. Courts, for example, had to find a "pre-existing bond" between the requester and the child before ordering visitation.

In contrast, the Iowa Supreme Court, for example, struck down the state's third-party visitation statute, holding that it failed to accord parents' the presumption that they act in the best interests of their children. The court there, in Santi v. Santi, worried that "the statute effectively substitutes sentimentality for constitutionality. It exalts the socially desirable goal of grandparent-grandchild bonding over the constitutionally recognized right of parents to decide with whom their children will associate."

Through both sets of cases - those that uphold visitation statutes and those that strike them down - the courts have considered some of the same factors. Statutes that survive constitutional review tend to do some or all of the following things: (1) narrow the class of third parties that have standing to petition for visitation; (2) permit third-party requests only when the parent has refused all visitation, as opposed to a request to increase visitation; (3) permit third-party requests only when the child does not live in an intact, nuclear family with married, living parents; (4) require a pre-existing relationship between the third party and the child (or evidence of significant efforts by the third party to establish or maintain one); and (5) expressly create a presumption in favor of the parent's wishes.

The strictest statutes require a showing of harm to the child or parental unfitness as a prerequisite to third-party visitation, but such a high standard is clearly not necessary to render a statute constitutional under Troxel. What is required, instead, under Troxel is some meaningful deference to the right of parents to control the relationships their children have with other people.

How Are State Courts Doing In Navigating Troxel's Ambiguities?

Is this legal landscape too confusing? It is often the case that the Supreme Court announces a general constitutional rule, leaves lower courts to implement it, and then steps back in later to reconcile and clean-up the resulting mess. (In the sexual harassment arena, for example, there was a troubled twelve years between the time the Court announced that employers could be held liable for sexual harassment at work and the time it clarified the specific circumstances under which liability is appropriate.)

It may be, however, that - when it comes to third-party visitation with children -- state courts are proving themselves capable of implementing a general standard without further guidance from the U.S. Supreme Court. While the outcomes have been mixed, as noted above, a core set of common factors and rationales have emerged to create a sensible framework for analyzing third-party visitation claims - one that does not vary very greatly, as one moves from state to state.

Through Troxel, parents gained ground, while grandparents lost some. But, in most cases, there is room for courts to make a case-
by-case determination that will avoid undue infringement on the parents' rights, and serve the best interests of the child - even if those best interests suggest the grandparents ought to be able to see the child over the parents' objection.

Even if it's a little messy, that's not such a bad outcome.