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The complex family

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The US Supreme Court handed down a decision this week that shows the court's members struggling admirably to do justice to the issues involved in deciding on the constitutionality of a state statute that allowed grandparents and others to petition for child visitation rights and authorized courts to grant such rights based solely on the "best interest of the child" standard.

The court's decision in *Troxel v. Granville* sets a standard that protects parents against undue intervention in their families while still giving appropriate scope for states to protect children.

The multiplicity of opinions reflects the complexity of the issues presented by the non-nuclear modern family, in which grandparents, step parents, unmarried same-sex partners, foster parents, and adoptive parents are often vying for the parenting role once thought of as belonging exclusively to biological parents.

The court ruled the Washington statute at issue unconstitutional as applied, calling it "breathtakingly broad" and noting that it gave state courts the power to force visitation rights upon fully fit parents without any deference to parents' views as to whether visitation would serve their children's best interest. The court gave appropriate recognition to the costs of having courts assert jurisdiction over family decision-making even in the name of an idea as worthy as that of promoting children's best interests. States have in the past used the vague best interest standard to interfere with parenting seen as unorthodox—taking children away, for example, simply because a parent was involved in an interracial or a same-sex relationship.

The court's constitutional standard means that state intervention must be based on something more than disagreement with the parent's lifestyle. Some states are contemplating legislation that would give biological parents enforceable visitation rights in their children's new adoptive families so long as a judge

finds such visitation consistent with the children's best interests.

Such legislation risks putting all adopted children in the same situation as the children of divorce, with courts sitting in continuing jurisdiction over the family as the multiple parents fight over how to divide up parenting rights. The court's constitutional standard should help protect against such broad-reaching legislation.

But the court doesn't set the constitutional standard so high as to prevent states from acting to protect children's interests in relationships with parent-like figures who may not fit the nuclear family convention. The court was invited by some of the litigants to establish a "strict scrutiny" standard, which would force states to justify any legislation limiting parental rights with evidence of compelling necessity, and it wisely refused to do so. Instead the court faulted the Washington statute only because it was so extreme, giving "any person" rights to petition for visitation without regard to whether they have an established relationship to the child or any other relevant factor.

States are free to design legislation giving grandparents, foster parents, preadoptive parents, and others with established relationships with children protection for those relationships. While the court's decision does not say exactly what standard will be used to assess the constitutionality of such legislation, it seems clear from the various opinions taken together that the standard will be one that gives decent weight to the state's interest in defining who is a parent as between different people who may

be vying for that role, as well as the state's interest in protecting children's relationships with official nonparents.

This is important in an era when reproductive technology is regularly producing multiple "parents." States need leeway to decide, for example, who should get parenting priority as between egg, sperm, gestational, and intended social parents. It is important in an era when grandparents and foster parents often function as the only real parents that children have.

The court's standard also gives states appropriate leeway to intervene to protect children against abuse and neglect. The Washington trial court's grant of visitation rights to the *Troxel* grandparents was found unconstitutional because the court failed to accord any deference to the presumption that parents will act in their children's best inter-

est. But in declining to adopt a strict scrutiny standard the court leaves states scope to intervene when there is evidence that that presumption is not warranted. This is important in an era when increasing numbers of children are at risk for increasingly severe forms of maltreatment.

Only one Justice—Justice Stevens—suggests that a child's interests deserve independent constitutional recognition. But the court's opinion does a good deal to protect children's interests and indicates that the justices are open to being educated about the complex nature and needs of today's families.

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