Over the Constitution and Through the Legislature: Redefining the Constitutionality of Grandparents' Rights to File for Custody and Visitation in Pennsylvania

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ABSTRACT

The rights of fit and loving parents are consistently being infringed upon under Pennsylvania's arbitrary grandparent visitation law and its mistreatment of divorced parents. Section 5325(2) of Pennsylvania's Domestic Relations Code provides standing for grandparents to file for partial physical custody and supervised physical custody of their grandchildren "where the parents of the child have been separated for a period of at least six months or have commenced and continued a proceeding to dissolve their marriage."

While grandparents' rights to visitation have been challenged before the Pennsylvania Supreme Court on several occasions, none of these challenges had yielded a successful result until *D.P. v. G.J.P.* was decided in 2016. In *D.P.*, the court held that the first half of Section 5325(2), which confers standing on grandparents where the child's parents have separated, unconstitutionally infringes on the parents' fundamental rights safeguarded by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. The outcome of this holding was to sever the first half of Section 5325(2) from the second half, which confers standing to grandparents where the child's parents have commenced divorce proceedings. Therefore, the second half of Section 5325(2) remains in effect.

This Comment will first examine the history of grandparents' rights to file for visitation in both the United States and in Pennsylvania, including a review of relevant case law and statutes. Second, this

* J.D. Candidate, The Pennsylvania State University School of Law, 2018. I would like to thank my friends and family who supported me over the last year. Specifically, I would like to thank my dad for the hours he spent working with me on developing my topic and editing the final product, and my mom for being my role model and fellow Nittany Lion, and for showing me the value of hard work and perseverance.

Comment will review the Pennsylvania Supreme Court's analysis in *D.P.* and will explore the court's reasons for invalidating the first half of Section 5325(2). Finally, this Comment will analyze the constitutionality of the second half of Section 5325(2). This Comment concludes that Section 5325(2) violates both the Due Process and the Equal Protection Clauses. Therefore, the second half of Section 5325(2) should be repealed and replaced with legislation that is consistent with *D.P.* and complies with the U.S. Constitution.

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I. INTRODUCTION

The U.S. Constitution has been interpreted to protect parents' liberty interest in raising their children as they see fit.[1] To illustrate, imagine a hypothetical happy family with two married parents and their minor child living in Pennsylvania. Imagine a stranger wants to file for partial custody

1. *See infra* Part II.A.

of that minor child. Of course, it would be absurd to imagine that any court could grant such a custody order, even if the court thought it would serve the child's best interests. Thankfully, third parties have no common law right to file for custody and visitation, and the Supreme Court has held that such an order is an unconstitutional infringement on the parents' fundamental right to make childrearing decisions.[2]

Now imagine the same hypothetical family, but instead of a stranger, the child's grandparent wants to file for partial custody. All 50 states have enacted legislation allowing grandparents to file for visitation in certain scenarios,[3] but under Pennsylvania law, this particular grandparent does not have standing to file for custody because the child's parents are alive, married, and living with the child.[4] This legislative scheme is consistent with the constitutional protection of parents' fundamental interest in controlling the custody and care of the child.[5]

Next, imagine that the hypothetical parents have separated, and after six months have passed, the grandparent wants to file for partial custody of the child over the parents' objections. The grandparent is barred from filing and will be denied standing after the Pennsylvania Supreme Court recently invalidated part of the Pennsylvania grandparent visitation statute in *D.P. v. G.J.P.*[6] The mere fact of the parents' separation does not diminish their fundamental right, and the *D.P.* court held that part of the statute to be unconstitutional as it did not withstand a strict scrutiny due process analysis.[7]

Finally, imagine that the hypothetical parents filed for divorce and the grandparent seeks partial custody of the minor child over both parents' objections. Thinking through the last three hypothetical scenarios, it would seem logical to conclude that the grandparent would still be barred from filing for custody, as there does not seem to be enough of a factual difference between separation and divorce to warrant an infringement on the parents' rights in the latter scenario but not the former. However, as Pennsylvania law stands today, grandparents have standing to file for custody and are able to tow the child's parents into court merely by virtue

2. *See* Troxel v. Granville, 530 U.S. 57, 72–73 (2000).

3. *See* Karen J. McMullen, Note, *The Scarlet "N:" Grandparent Visitation Statutes that Base Standing on Non-Intact Family Status Violate the Equal Protection Clause of the Fourteenth Amendment*, 83 ST. JOHN'S L. REV. 693, 693 (2009).

4. 23 PA. CONS. STAT. § 5325 (2010).

5. *See* Hiller v. Fausey, 904 A.2d 875, 883 (Pa. 2005) ("[A]ll the [U.S. Supreme Court Justices], with the exception of Justice Scalia, recognized the existence of a constitutionally protected right of parents to make decisions concerning the care, custody, and control of their children, which includes determining which third parties may visit with their children and to what extent.").

6. D.P. v. G.J.P., 146 A.3d 204, 215–16 (Pa. 2016).

7. *See id.* at 217.

of the parents' commencement of a divorce action.[8] This Comment advocates for an amendment to Pennsylvania law to eliminate the infringement of divorcing parents' rights.[9]

Part II of this Comment lays a foundation for understanding the development of grandparent visitation statutes in Pennsylvania and nationwide.[10] Throughout the first half of the twentieth century, the U.S. Supreme Court defined parents' liberty interest in rearing their children and established that interest as a fundamental right.[11] Over time, the average American household started to evolve away from the traditional nuclear family, resulting in an increase in grandparent involvement in family life.[12] Subsequently, each of the 50 states enacted statutes allowing grandparents to file for visitation or custody in certain scenarios.[13] Facing a challenge to Washington's third-party visitation statute, the U.S. Supreme Court in *Troxel v. Granville*[14] invalidated the statute, and further clarified the scope of parents' fundamental interest in raising their children, but left states to grapple with whether their own grandparent visitation statutes passed constitutional muster.[15]

Next, this Comment discusses Pennsylvania's grandparent visitation statute, Title 23, Section 5325 of the Pennsylvania Consolidated Statutes,[16] and the relevant case law.[17] The most recent Pennsylvania Supreme Court decision regarding the statute, *D.P. v. G.J.P.*, found part of Section 5325(2) unconstitutional under a due process strict scrutiny analysis, holding that grandparents may not establish standing to file for custody and visitation merely because the child's parents have been separated.[18]

Part III addresses the constitutionality of the second half of Section 5325(2), which grants standing to grandparents to file for custody and visitation when the child's parents have commenced a divorce action.[19] Specifically, Part III examines Section 5325(2) under the Due Process and

8. 23 PA. CONS. STAT. § 5325(2); s*ee also D.P.*, 146 A.2d at 216–17 (invalidating the part of Section 5325(2) which confers standing on grandparents when the parents are separated, but refusing to extend the invalidation to the part of Section 5325(2) which confers standing on grandparents when the parents have commenced or continued divorce proceedings).
9. *See infra* Part IV.
10. *See infra* Part II.
11. *See infra* Part II.A.
12. *See infra* Part II.B.
13. *See infra* Part II.B.
14. Troxel v. Granville, 530 U.S. 57 (2000).
15. *See infra* Part II.C.
16. 23 PA. CONS. STAT. § 5325(2) (2010).
17. *See infra* Part II.D.
18. *See infra* Part II.D.3.; *see also* D.P. v. G.J.P, 146 A.2d 204, 215–17 (Pa. 2016).
19. *See infra Part* III.

Equal Protection Clauses of the U.S. Constitution.[20] This Comment argues that Section 5325(2) fails a due process strict scrutiny analysis because the statute is not narrowly tailored to serve a compelling state interest.[21] In addition, Section 5325(2) fails an equal protection strict scrutiny analysis because the classification of parents by marital status is not necessary to serve a compelling state interest.[22]

Part IV proposes possible remedies to the constitutional violations discussed in Part III.[23] Upon the appropriate challenge, the Pennsylvania Supreme Court should invalidate the remainder of Section 5325(2) and overturn its decision in *Schmehl v. Wegelin*.[24] Preferably, the Pennsylvania General Assembly should also repeal and replace Section 5325(2) to provide standing to grandparents only upon a showing of harm to the child, without discriminating between families by classifying parents based on marital status.[25]

II. BACKGROUND

This Part explains the development of grandparent visitation statutes in Pennsylvania and nationwide and the resultant efforts of courts to determine the constitutional validity of these statutes in light of parents' fundamental interest in making childrearing decisions.

A. Parents' Liberty Interest in Raising Their Children as They See Fit

In order to fully comprehend the parental rights infringed by Pennsylvania's grandparent visitation statute, a brief history of parents' fundamental right to raise their children as they see fit is necessary. In *Meyer v. Nebraska*,[26] the Supreme Court of the United States recognized that the Due Process Clause of the Fourteenth Amendment[27] "denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children."[28] The Court clarified that this liberty includes the right of parents to educate their children, or

20. *See infra* Part III.
21. *See infra* Part III.A.
22. *See infra* Part III.B.
23. *See infra* Part IV.
24. Schmehl v. Wegelin, 927 A.2d 183 (Pa. 2007); *see infra* Part IV.A.
25. *See infra* Part IV.B.
26. Meyer v. Nebraska, 262 U.S. 390 (1923).
27. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").
28. *Meyer*, 262 U.S. at 399 (invalidating a Nebraska statute which prohibited the instruction of foreign languages in schools).

employ others to educate their children, in whatever way they determine to be suitable and beneficial.[29]

The Court subsequently reinforced this right in *Pierce v. Society of Sisters*[30] by clarifying the rights and obligations of parents in the upbringing of their children.[31] The Court stated that "[t]he 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."[32]

Despite defining this constitutionally protected liberty interest,[33] the Supreme Court has made it clear that parents' right to raise their children as they see fit is not completely immune from government interference. In *Prince v. Massachusetts*,[34] the Supreme Court acknowledged that childrearing is, first and foremost, the right and responsibility of the child's parents or guardians.[35] However, the Court pointed out that parental rights are "not beyond regulation" and that "the state as *parens patriae* may restrict the parent's control."[36] The doctrine of *parens patriae* allows the state to intervene in the protection, care, and custody of a child in its jurisdiction to protect the welfare and best interests of the child.[37]

While none of these early parental rights cases explicitly laid out the level of judicial scrutiny that must be met in order for the state to exercise this *parens patriae* power, they did lay a foundation for state courts to

29. *See id.* at 400.

30. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

31. *See id.* at 534–36 (invalidating a statute which required children to be enrolled in public school).

32. *Id.* at 535.

33. The Court has elaborated on this interest in subsequent cases. *See* Santosky v. Kramer, 455 U.S. 745, 769–70 (1982) (holding that the "preponderance of the evidence" test was an insufficient test under which parental rights may be judicially terminated, and that a clear and convincing standard was necessary to protect parents' due process rights); Parham v. J.R., 442 U.S. 584, 604 (1979) (finding that parents have a right to retain a dominant role in medical decisions regarding their children, absent a finding of neglect or abuse, which is consistent with the presumption that parents act in the best interests of their children); Wisconsin v. Yoder, 406 U.S. 205, 234–36 (1972) (holding that the state must not interfere with parents' decision to withhold their children from enrolling in public school after the eighth grade if such enrollment would violate their core religious beliefs); Stanley v. Illinois, 405 U.S. 645, 657–58 (1972) (holding that an unmarried father has a right to raise his illegitimate children, absent a showing of parental unfitness).

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

35. *See id.* at 166 (upholding a guardian's conviction for violating the state child labor laws by engaging her child in the sale and distribution of religious magazines on the street).

36. *Id.* (emphasis added).

37. *See* 47 AM. JUR. 2D *Juvenile Courts and Delinquent and Dependent Children* § 19 (2016); *see also* West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971) ("*Parens patriae*, literally 'parent of the country,' refers traditionally to the role of the state as sovereign and guardian of persons under a legal disability to act for themselves such as juveniles, the insane, or the unknown.") (emphasis added).

begin to grapple with the tension between the states' interests in protecting children and parents' interest in bringing up their children. This lack of guidance became especially difficult as divorce rates rose and parenting roles began to evolve.[38]

B. Emergence of the Grandparents' Role in the American Family

Over the last half-century, the structure of the American family transformed dramatically. The widespread adoption of no-fault divorce laws[39] throughout the 1970s jumpstarted the decline of the stereotypical nuclear family.[40] This demographic change coincided with both the social acceptance of nonmarital cohabitation and an increase in children born out of wedlock.[41]

In the United States today, "there is both 'more marriage but also more divorce,' and 'more movement into and out of marriages and cohabiting relationships' than in other Western countries, leading to more household transitions for children."[42] Overwhelming numbers of children in the United States are subjected to custody proceedings as a result of the high divorce rate and the number of children born outside of marriage.[43] This automatically places nontraditional families at a much higher risk of state intervention than those living in a traditional nuclear family arrangement.

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38. *See, e.g.*, Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 94–104 (2016) (summarizing the reforms within family law with respect to fathers' rights in the midst of the rising divorce rates). *See generally* DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 786–802 (4th ed. 2015) (summarizing the constitutional considerations of parents' interests in custody cases).

39. *See* 24 AM. JUR. 2D *Divorce and Separation* § 2 (2016); *see also* ABRAMS ET AL., *supra* note 38, at 507–09 (describing the transformation of American divorce law from a regime which required fault-based grounds for granting a divorce to one which granted divorces when there was simply a finding that the marriage had suffered "irretrievable differences" or the spouses had "irreconcilable differences").

40. The term "nuclear family" typically refers to two natural parents and their children. *See* Natalie Reed, Note, *Third-Party Visitation Statutes: Why Are Some Families More Equal than Others?*, 78 S. CAL. L. REV. 1529, 1529 (2005) ("Over the last quarter century, the definition of the American family has transformed from a clearly defined image of mother, father, and natural offspring to a kaleidoscopic vision of adoptive families, extended families, gay and lesbian families, stepparent families, and single-parent families."); *see also* ABRAMS ET AL., *supra* note 38, at 547 (explaining changing demographics of American families since the introduction of no-fault divorce).

41. ABRAMS ET AL., *supra* note 38, at 4–7 (quoting ISABEL V. SAWHILL, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE 4–8 (2014)).

42. *Id.* at 502 (quoting ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 19–24 (2010)).

43. *See id.* at 783.

As the divorce rates and the number of single parent households rose during the twentieth century, the baby boom generation aged[44] and the elderly population grew at a rate much higher than that of the American population as a whole.[45] From 1900 to 1985, the average life expectancy in the United States climbed from 46 years for each gender to 73 years for men and 80 years for women.[46] As the population aged and began to live longer, the relationships between grandparents and grandchildren strengthened as two-working-parent and single-parent households became more prevalent and grandparents played an important caretaking role in many families.[47] In many other families, grandparents became primary caregivers to children with absent parents.[48] However, while some grandparents were given opportunities to spend time with their grandchildren, other grandparents were kept at arm's length by the children's parents, usually as a result of animosity between the children's parents and grandparents.[49] Unfortunately, at common law, grandparents had no legal right to visit with their grandchildren, and any access to their grandchildren was left completely to the mercy of the children's parents.[50] As a result, grandparents sprang to action to legally ensure their ability to foster relationships with their grandchildren.[51]

Because of the growing elderly population, senior citizens had strong electoral power and became politically active through lobbying groups such as the American Association of Retired Persons (AARP) and Advocates for Grandparent-Grandchild Connection.[52] These groups used the changing family demographics to "fuel America's deep-rooted fear of the family's breakdown" in order to aggressively advocate for legislation that would give them access to their grandchildren.[53] They appealed to legislators' emotions by emphasizing the decline in family values, and argued that grandparent intervention was a necessary solution to the "[troubling] effect on children of the increasing rates of divorce, out-of-wedlock births, teen-pregnancy, drugs, AIDS, and child abuse and

44. *See* Reed, *supra* note 40, at 1535.

45. *See* Brief of Amici Curiae of AARP and Generations United in Support of Petitioners, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-138), 1999 U.S. S. Ct. Briefs LEXIS 744, at *12 [hereinafter AARP Brief].

46. *Id.*

47. *See* Reed, *supra* note 40, at 1535.

48. *See* AARP Brief, *supra* note 45, at *15.

49. *See id.* at *23–30 (summarizing the legislative intent for grandparent visitation statutes in several states).

50. *See* McMullen, *supra* note 3, at 693.

51. *See* Pamela Ferguson, *Trial Court Rules Grandparents Visitation Act Unconstitutional*, THE SIDEBAR 8 (Sept. 11, 2016), http://www.westbar.org/pdf/xxviii01-mar2016.pdf.

52. *Id.*

53. Reed, *supra* note 40, at 1535–36.

neglect."[54] As a result of the sheer number of grandparents' rights activists, voting against them was essentially "political suicide" for members of state legislatures.[55]

Between 1966 and 1986, each of the 50 states had enacted their own third-party visitation statutes in response to lobbying groups like the AARP.[56] These statutes provide standing in limited circumstances for visitation to grandparents and, in some states, other relatives or unrelated persons.[57] After standing has been established, a court will only grant visitation if the court finds visitation to be in the child's best interests.[58] In addition, most states require other criteria to be met before standing can be established, and these criteria vary from state to state.[59]

While these laws were enacted to promote the state's interest in protecting the welfare of children, the constitutionality of these statutes has been challenged in state courts as a violation of parental rights.[60] The United States Supreme Court addressed this issue when it decided *Troxel v. Granville*, holding that Washington's third-party visitation statute infringed on parents' constitutional rights to rear their children.[61]

C. Troxel v. Granville *and Its Effects on Third-Party and Grandparent Visitation Statutes*

In *Troxel v. Granville*, the Supreme Court was called on to resolve a matter involving paternal grandparents who sought increased visitation with their two granddaughters over the objection of the girls' mother.[62] The grandparents filed a petition for visitation under Washington's third-party visitation statute, which provided standing to file for visitation to "[a]ny person . . . at any time," and indicated that the court may grant the

54. AARP Brief, *supra* note 45, at *18.

55. McMullen, *supra* note 3, at 694–95 (quoting Catherine Bostock, Note, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 COLUM. J.L. & SOC. PROBS. 319, 325 (1994)).

56. *See id.* at 693; *see also* Reed, *supra* note 40, at 1536.

57. *See* AARP Brief, *supra* note 45, at *18–30 (briefly surveying the varying requirements of different states' grandparent visitation statutes).

58. *See id.*

59. *See, e.g.*, CONN. GEN. STAT. § 46b-59(b) (2016) (granting standing to grandparents who make a showing that they have a parent-like relationship with the grandchild in question); TEX. FAM. CODE ANN. § 153.433(a)(3) (West 2015) (granting standing to grandparents when their child, who is the parent of the child in question, is deceased, incompetent, incarcerated, or does not have possession or access to the child).

60. *See* AARP Brief, *supra* note 45, at 34–42 (summarizing the different constitutional challenges brought in state courts).

61. *See* Troxel v. Granville, 530 U.S. 57, 75 (2000).

62. *See id.* at 61.

petition if it would be in the child's best interest.[63] The Supreme Court analyzed the constitutionality of the statute under the Due Process Clause of the U.S. Constitution.[64]

The Court began its analysis by acknowledging that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[65] The Court determined that the statute was an unconstitutional infringement on that parental right.[66] Justice O'Connor's plurality opinion noted that the statute at issue effectively eliminated any deference to the parent's decision that visitation would not be in the best interests of the child, and placed that best-interest determination in the hands of the judge alone.[67]

In *Troxel*, the grandparents did not allege that the mother was an unfit parent or any other facts that might override the presumption that the mother was acting in the best interests of her daughters.[68] In fact, the trial judge placed the burden on the mother to show that grandparent visitation was *not* in her daughters' best interests, because children usually benefit from time spent with their grandparents.[69] However, the Supreme Court plurality disagreed and held that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."[70]

In support of the grandparents seeking visitation in *Troxel*, the AARP and Generations United filed an amicus brief to the U.S. Supreme Court prior to the Court's decision, warning the Court against the detrimental

63. *Id.*

64. *See id.* at 65; Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997) ("The Due Process Clause guarantees more than fair process . . . . The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests.") (citations omitted).

65. *Troxel*, 530 U.S. at 65.

66. *See id.* at 67. However, the Court did not explicitly apply a strict scrutiny test. *See id.* at 80 (Thomas, J., concurring) ("I would apply strict scrutiny to infringements of fundamental rights."); *see also* Reno v. Flores, 507 U.S. 292, 301–02 (1993) (explaining that the Fourteenth Amendment's due process guarantee "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."); Poe v. Ullman, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) ("This enactment involves what . . . must be granted to be a most fundamental aspect of 'liberty,' . . . and it is this which requires that the statute be subjected to 'strict scrutiny.'"); *infra* note 125.

67. *See Troxel*, 530 U.S. at 67.

68. *See id.* at 68; *see also* Parham v. J.R., 442 U.S. 584, 602 (1979) ("[H]istorically it has [been] recognized that natural bonds of affection lead parents to act in the best interests of their children.").

69. *See Troxel*, 530 U.S. at 69.

70. *Id.* at 72–73.

effects of holding the statute unconstitutional.[71] The amicus brief argued that if the Court were to invalidate Washington's statute in this case, such a holding would invalidate virtually all grandparent visitation statutes nationwide.[72] However, while it is true that the Court's *reasoning*, which asserts that the State's idea of the child's best interest must not automatically override the parent's judgment regarding visitation with third-parties,[73] has the potential to apply to a vast array of grandparent visitation statutes in other states, the *holding* is narrow and applies only to the Washington statute and the facts of that case.[74]

The Court in *Troxel* did not specifically identify the deficiencies or characteristics of the Washington statute that made it unconstitutional, and as a result, state courts and legislatures have grappled with the meaning of the decision and its application to their own statutes.[75] Specifically, it is not clear whether the Washington statute was overturned because of its "sweeping breadth" or because "it gave no special weight at all to [the mother's] determination of her daughter's best interests."[76] Likewise, it is unclear whether a statute must contain narrower standing requirements in order to pass constitutional muster or whether the statute may contain a similarly open standing provision if it requires a higher standard of proof.[77] Like other states, Pennsylvania courts struggled in the wake of *Troxel* to apply the Court's vague holding.[78]

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71. *See* AARP Brief, *supra* note 45, at 30–42 (predicting that an affirmance of the Washington Supreme Court decision would necessitate that grandparent visitation statutes require a showing of harm before grandparent visitation may be ordered).

72. *See id.*

73. *See Troxel*, 530 U.S. at 72–73.

74. *See id.* at 73. For example, the Court in *Troxel* explained:

> We do not, and need not, define today the precise scope of the parental due process right in the visitation context. . . . Because [most] state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.

Id.

75. *See* Reed, *supra* note 40, at 1540–41 ("[S]tate courts have split on the issue of review, which has lead [sic] to a lack of uniformity both across state lines and, even more disconcertingly, within states themselves.").

76. Mary E. O'Connell, *The Riddle of Troxel: Is Grandma the State?*, 41 FAM. CT. REV. 77, 81–82 (2003).

77. *See id.* at 82; *see also* Reed, *supra* note 40, at 1539 ("Unfortunately, the Court never actually defined what provisions would adequately address its constitutional concerns."). Here, an "open standing" provision refers to a provision that grants standing to any person at any time. *See* O'Connell, *supra* note 76, at 82.

78. *See infra* Part II.D.

D. Development of Pennsylvania's Grandparent Visitation Legislation and Case Law

Grandparent visitation statutes vary greatly from state to state, but this Comment focuses specifically on the constitutionality of Pennsylvania's grandparent legislation.[79]

1. Section 5312 and Its Application

Pennsylvania, like the other 50 states, enacted its own grandparent visitation statute, Section 5312,[80] which read:

> In all proceedings for dissolution, subsequent to the commencement of the proceeding and continuing thereafter or when parents have been separated for six months or more, the court may, upon application of the parent or grandparent of a party, grant reasonable partial custody or visitation rights, or both, to the unmarried child if it finds that visitation rights or partial custody, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the party and the child prior to the application.[81]

In 2007, the Pennsylvania Supreme Court was confronted with the constitutionality of its grandparent visitation statute in *Schmehl v. Wegelin*.[82] In *Schmehl*, the paternal grandparents of two children sought partial custody under Section 5312 over the objection of the children's mother, who had divorced the children's father.[83] The mother asserted that treating intact and non-intact families differently was a violation of the Equal Protection Clause.[84] The trial court ruled in the mother's favor, finding that there was no compelling reason to justify subjecting the children of divorced or separated parents, and not married or cohabitating parents, to additional periods of court-ordered custody and visitation.[85]

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79. The constitutionality of the other states' statutes is outside the scope of this Comment.

80. 23 PA. CONS. STAT. § 5312 (1985) (repealed 2010).

81. *Id.* The legislative intent of the drafters may be inferred from its declaration of policy. *See* 23 PA. CONS. STAT. § 5301 (1985) (repealed 2010). This declaration stated:

> The General Assembly declares that it is the public policy of this Commonwealth, when in the best interest of the child, to assure a reasonable and continuing contact of the child with both parents after a separation or dissolution of the marriage and the sharing of the rights and responsibilities of child rearing by both parents and continuing contact of the child or children with grandparents when a parent is deceased, divorced or separated.

Id.

82. Schmehl v. Wegelin, 927 A.2d 183, 184 (Pa. 2007).

83. *Id.*

84. *Id.*

85. *See* Schmehl v. Wegelin, 76 Pa. D & C.4th 569, 576 (Pa. Ct. Com. Pl. 2005).

The Pennsylvania Supreme Court reversed the trial court's decision, upholding the constitutionality of the statute under the Equal Protection Clause and finding that the classification set forth in the statute was narrowly tailored to serve the state's compelling interest in the children's wellbeing.[86] The court explained its finding by referring to its equal protection analysis in *Hiller v. Fausey*.[87] [88] The court in *Schmehl* reasoned that, unlike with intact families, children whose parents are separated or divorced are at a heightened risk of harm, and their environment has already been disturbed.[89] Thus, the court held that the classification within the statute withstood a strict scrutiny analysis and was constitutional.[90]

The majority in *Schmehl* failed, however, to explain *how* grandparent visitation serves to remedy the harm experienced by children with divorced or separated parents. In fact, in *Hiller*, the court had previously conceded that there is no guaranteed benefit to allowing grandparents to force their way into their grandchildren's lives through the courts when contrary to the wishes of a fit parent.[91]

Justice Baldwin and Chief Justice Cappy issued separate dissents in *Schmehl*, rejecting the court's finding that the statute withstands a strict scrutiny test.[92] Justice Baldwin argued that "divorce alone [does not diminish] the fundamental interest of parents who are making caretaking decisions."[93] She stated that two divorced parents are not any less fit to make decisions regarding the wellbeing of their children than two similarly situated parents who are married, and therefore, the majority opinion offends the presumption in favor of fit parents having a right to

86. *Schmehl*, 927 A.2d at 188, 190; s*ee also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (explaining that under an equal protection strict scrutiny analysis, "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."); Skinner v. State of Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (explaining that the equal protection guarantee of the U.S. Constitution requires that legislation involving a fundamental right be subject to strict scrutiny). For an explanation of the strict scrutiny standard, see *infra* note 125.

87. Hiller v. Fausey, 904 A.2d 875, 885–89 (Pa. 2006) (upholding 23 PA. CONS. STAT. § 5311 (1985), which allows a grandparent, when the grandparent's son or daughter has passed away, to file for visitation of the deceased's child, as the statute withstands strict scrutiny under the Equal Protection Clause by serving the state's interest in protecting children).

88. *See Schmehl*, 927 A.2d at 186–87.

89. *Id.* at 188–89*; see also id.* at 189 n.9 (citing Jack Arbuthnot, *Courts' Perceived Obstacles to Establishing Divorce Education Programs*, 40 FAM. CT. REV. 371, 371 (2002) (discussing a "growing awareness by academics, mental health professionals, community service providers, and court personnel alike that divorce can have devastating effects on those family members least empowered to protect themselves—the children")).

90. *See id.* at 190.

91. *See Hiller*, 904 A.2d at 886.

92. *See Schmehl*, 927 A.2d at 190–93 (Cappy, C.J., dissenting); *id.* at 193–97 (Baldwin, J., dissenting).

93. *Id.* at 195 (Baldwin, J., dissenting).

make decisions for their children's wellbeing.[94] Justice Baldwin pushed the equal protection analysis further by hypothesizing that *even if* divorce was harmful enough for the state to acquire a compelling interest, court-ordered time with grandparents would not be sufficient to safeguard children's welfare, and therefore is not narrowly tailored to serve the state's compelling interest.[95]

Similarly, Chief Justice Cappy attacked the majority's equal protection analysis for its failure to explain how the classification of marital status itself is necessary to protect the state's interest.[96] The Chief Justice argued that "[t]his classification suggests that divorced or separated parents are inherently less fit to parent, as compared to parents who have married, or to parents who have never married," which is arbitrary, as marital status alone does not determine parental fitness.[97]

After *Schmehl* upheld the constitutionality of Section 5312, grandparents' visitation and custody rights in Pennsylvania remained unchanged until the statute was repealed and replaced a few years later.[98]

2. The New Title 23, Sections 5325 and 5328

In 2010, the Pennsylvania General Assembly rewrote Title 23, the Domestic Relations Code, in its entirety.[99] Sections 5325[100] and 5328[101] replaced Section 5312 and created a bifurcated proceeding for grandparents to file for custody and visitation without changing the statute's effect.[102] The first step under the bifurcated proceeding requires grandparents to establish standing.[103] Section 5325 provides standing for

94. *See id.* at 195–97.

95. *See id.*

96. *See id.* at 192 (Cappy, C.J., dissenting) ("Under an equal protection analysis, it is incumbent upon this Court to first find the classification to be necessary to a compelling state interest.").

97. *Id.*

98. *See infra* Part II.D.2.

99. *See* Act of Nov. 23, 2010, No. 112, 2009 Pa. Laws 112; *see also* H.R. 1639, 2010 Gen. Assemb., Reg. Sess. (Pa. 2010) (explaining within a Fiscal Note the reasons for redrafting the statute, including amending the penalties for parties failing to comply, expanding on considerations of criminal convictions, codifying common law to include the rights of individuals standing *in loco parentis*, outlining guidelines for presumptions in custody cases, and including a list of factors to be considered when determining custody).

100. 23 PA. CONS. STAT. § 5325 (2010).

101. 23 PA. CONS. STAT. § 5328 (2010).

102. *See* D.P. v. G.J.P., 146 A.3d 204, 211 (Pa. 2016) (comparing the repealed Section 5312 with its rewritten counterpart, Section 5325).

103. *See id.* at 213–14. The court in *D.P.* explained:

> [S]uch bifurcation serves an important screening function in terms of protecting parental rights. . . . [I]t facilitates early dismissal of complaints, thereby relieving families of the burden of litigating their merits where a sufficient basis for

grandparents and great-grandparents to file for partial physical custody or supervised physical custody.[104] In relevant part, Section 5325(2) provides standing "where the parents of the child have been separated for a period of at least six months or have commenced and continued a proceeding to dissolve their marriage."[105]

If the standing requirement is met, the second step of the bifurcated proceeding requires the court to determine whether grandparent visitation would be appropriate in a given case.[106] When grandparents have established standing under Section 5325(2), Section 5328(c)(1) provides:

> [T]he court shall consider the following [in determining appropriateness of grandparent visitation]: (i) the amount of personal contact between the child and the party prior to the filing of the action; (ii) whether the award interferes with any parent-child relationship; and (iii) whether the award is in the best interest of the child.[107]

While the constitutionality of Section 5328 remains unchallenged, Section 5325's standing requirements have been scrutinized and held partially invalid by the Pennsylvania Supreme Court.[108]

3. *D.P. v. G.J.P.*

The constitutionality of the amended grandparent visitation statute, Section 5325, was brought before the Pennsylvania Supreme Court in *D.P. v. G.J.P.*[109] In *D.P.*, the paternal grandparents of three minor children sought partial custody of the children under Section 5325.[110] The children's parents lived separately, but had privately agreed to all custody matters involving the children, including the decision to discontinue

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> standing is absent. . . . [S]uch litigation can itself impinge upon parental rights, especially if it becomes protracted through the appellate process.

Id.; *see also* Troxel v. Granville, 530 U.S. 57, 101 (2000) (Kennedy, J., dissenting) (discussing the burden of domestic relations litigation and its toll on the parent-child relationship); Rideout v. Riendeau, 761 A.2d 291, 302–03 (Me. 2000) ("[The standing requirement] provides protection against the expense, stress, and pain of litigation . . . .").

104. 23 PA. CONS. STAT. § 5325. Section 5325(1) provides standing "where the parent of the child is deceased," while Section 5325(3) provides standing "when the child has, for a period of at least 12 consecutive months, resided with the grandparent or great-grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents . . . ." *Id.*

105. *Id.*

106. *See* 23 PA. CONS. STAT. § 5328.

107. *Id.* Section 5328(c)(1) also applies when grandparents establish standing under Section 5325(1). Section 5328(c)(2), which eliminates the personal contact factor, is used when grandparents establish standing under Section 5325(3). *Id.*

108. *See D.P.*, 146 A.3d 216–17 (holding the first half of Section 5325(2) unconstitutional).

109. *D.P.*, 146 A.3d at 205.

110. *Id.*

contact between the children and their paternal grandparents.[111] The parties had not sought court intervention on any matters concerning their minor children or their separation in general.[112] The grandparents did not suggest that the parents were unfit in any way, but relied on Section 5325 to claim that they had standing as a result of the parents' separation.[113]

The trial court concluded that the statute was unconstitutional because it implicitly presumed the parents to be unfit based solely on their separation and found that there was no constitutional basis to support such a classification.[114]

On appeal to the Supreme Court of Pennsylvania,[115] the issue was whether the conferral of standing to grandparents based solely on parents' separation constituted a violation of the parents' due process and equal protection rights.[116] Regarding the due process claim, the parents pointed out that case law plainly establishes their fundamental right to raise their children, which warrants the protection of the strict scrutiny test.[117] The grandparents, however, believed that the parents' due process rights were protected by Section 5328, which requires a showing that visitation will serve the best interests of the child before it is granted.[118]

Regarding the equal protection claim, the parents first argued that the facts before the court were distinguishable from those in *Schmehl*, as in that case, the parents were divorced and already subject to a custody order.[119] The parents argued that the classification of Section 5325(2) is arbitrary, as there are many couples who live together and make poor parenting choices.[120] The parents further argued that no allegation was made that they were less capable of making decisions for their children's

111. *Id.*
112. *Id.*
113. *See id.* at 206.
114. *See* Ponko v. Ponko, No. 1750 of 2014-D, 2015 Pa. Dist. & Cnty. Dec. LEXIS 191, at *15 (Pa. Ct. Com. Pl. Sept. 8, 2015).
115. The matter was transferred to the Supreme Court from its initial appeal to the Superior Court. *See D.P.*, 146 A.3d at 207 n.3; 42 PA. CONS. STAT. § 722(7) (1975) (stating that the Supreme Court of Pennsylvania shall maintain exclusive jurisdiction over final orders from the court of common pleas involving "[m]atters where the court of common pleas has held invalid as repugnant to the Constitution . . . any statute, of this Commonwealth").
116. *See D.P.*, 146 A.3d at 205. The statute's infringement on the parents' fundamental right to control access to their children implicates the Due Process Clause of the U.S. Constitution. *See id.* at 218 (Baer, J., concurring and dissenting). The statute's unequal treatment of intact and non-intact families implicates the Equal Protection Clause of the U.S. Constitution. *See* Schmehl v. Wegelin, 927 A.2d 183, 185 (Pa. 2007).
117. *See D.P.*, 146 A.3d at 208–09.
118. *See id.* at 208.
119. *See id.* at 209.
120. *See id.* at 209–10.

wellbeing than parents who lived together.[121] The parents relied on Chief Justice Cappy's dissent in *Schmehl*, claiming that "separation and divorce are not valid proxies for ascertaining which parents might cause harm to their children."[122] However, the grandparents argued that the court should defer to the *Schmehl* majority, reject the equal protection claim, and justify the classification within Section 5325(2) based on the "breakdown of the nuclear family."[123]

In Justice Saylor's majority opinion, the court acknowledged that the parents had a fundamental right concerning the custody, care, and control of their children, which was burdened by Section 5325.[124] Therefore, in order for the statute to be constitutional, it had to withstand a strict scrutiny analysis.[125] Under the Due Process Clause,[126] a statute withstands a strict scrutiny analysis if the government's infringement on a fundamental right is necessary to serve a compelling governmental interest,[127] while under the Equal Protection Clause,[128] the classification set forth in the statute must be necessary to serve that interest.[129] In this case, the grandparents argued that the state's compelling interest was the protection of children's health and wellbeing pursuant to its *parens patriae* power.[130]

The *D.P.* court rejected the grandparents' application of the *Schmehl* analysis, which did not consider the scenario of separated parents, and justified differentiating the present case from *Schmehl* "by emphasizing that, unlike with intact families, '[t]he state must oversee a divorce action, and arrange for custody, support[,] and visitation in some cases.'"[131] Conversely, the parents in *D.P.*—as with other separated but married parents—had not sought court involvement in their family affairs; they were able to privately agree to all custody matters, including the decision to eliminate contact between the children and their paternal

121. *See id.* at 209.
122. *Id.* at 210.
123. *Id.* at 208, 210.
124. *See id.* at 210.
125. *See id.*; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16–17 (1973) (explaining that, in order to withstand a strict scrutiny test, a statute must be "structured with 'precision,' and [be] 'tailored' narrowly to serve legitimate objectives and that it [must have] selected the 'less drastic means' for effectuating its objectives") (citing Dunn v. Blumstein, 405 U.S. 330, 343 (1972)).
126. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law").
127. *See D.P.*, 146 A.3d at 210.
128. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").
129. *See D.P.*, 146 A.3d at 210.
130. *See id.* at 211.
131. *Id.* at 212 (quoting Brief for Appellants, Schmehl v. Wegelin, 927 A.2d 183 (Pa. 2007) (No. 87 MAP 2005), 2005 WL 5713971, at *23 (alteration in original)).

grandparents.[132] In refusing to apply the *Schmehl* analysis to the present case, the *D.P.* court differentiated between divorce and separation by stating that the empirical studies relating to the effects of divorce on children do not necessarily apply in cases of mere separation.[133]

The *D.P.* court applied a due process analysis to answer the question of "whether the state may exercise its interest in fostering grandparent-grandchild relationships over the objection of presumptively fit parents solely on the basis that they have been separated for at least six months."[134] The court began with the well-established family law presumption that parents act in the best interests of their children.[135] The *D.P.* court acknowledged that grandparent visitation does help achieve the state's compelling interest in protecting children's welfare when families are experiencing major disruptions such as abuse, neglect, drug and alcohol abuse, mental illness, or abandonment.[136] However, the court also found that such an interest is substantially diminished where these disruptions are not present and there has not been a reason to suspect that the parents are unfit or are not acting in their children's best interests.[137] The court did not address the equal protection issue, presumably because an equal protection analysis is not necessary after the statute has been found to be unconstitutional under a due process analysis.[138]

For these reasons, the Pennsylvania Supreme Court held that Section 5325 violated the parents' due process rights, as it was not narrowly tailored to serve a compelling state interest.[139] The court concluded that "the fact of a parental separation for six months or more does not render the state's *parens patriae* interest sufficiently pressing to justify potentially disturbing the decision of presumptively fit parents."[140] The court reasoned that mere separation should not justify court intrusion in custody matters, as some separated parents do not seek court involvement in their family affairs, and the potential for reconciliation remains.[141] In these cases, it may be in the best interests of the children to be shielded

132. *See id.*
133. *See id.*
134. *Id.* at 214.
135. *See* Parham v. J.R., 442 U.S. 584, 602 (1979) ("[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children.").
136. *See D.P.*, 146 A.3d at 214.
137. *See id.* at 214 (citing Conlogue v. Conlogue, 890 A.2d 691, 694 (Me. 2006) ("[S]omething more than the best interest of the child must be at stake in order to establish a compelling state interest . . . .")).
138. *See* Reed, *supra* note 40, at 1541 ("[T]he Due Process Clause offers the most direct basis for challenging third-party visitation statutes . . . .").
139. *See D.P.*, 146 A.3d at 216.
140. *Id.* at 215.
141. *See id.*

from participation in court proceedings and the knowledge that the government has intruded in their family lives.[142] The court concluded that "any court-mandated association with such third parties [is rendered] more intrusive to the parents' constitutional prerogatives than in a context where the parents have already invoked the court's oversight."[143]

While the *D.P.* court held that the parents' fundamental rights were infringed by Section 5325(2), the holding remains narrow and does not invalidate Section 5325(2) in its entirety.[144] Section 5325(2) provides standing for grandparents in two separate situations: (1) where the parents have been separated for six or more months, and (2) where the parents have commenced and continued a dissolution proceeding.[145] The *D.P.* court insisted on severing the statute and refused to extend its finding of unconstitutionality to the second part of the statute, involving divorcing parents.[146]

However, Justice Baer and Justice Wecht each issued their own opinion in *D.P.*, concurring in part and dissenting in part.[147] Both Justices agreed with the majority that the first part of Section 5325(2) was an unconstitutional infringement of parents' fundamental rights; however, both Justices further argued that Section 5325(2) should not have been severed but should instead have been stricken in its entirety.[148]

In Justice Baer's opinion, he argued that the second part of Section 5325(2) is unconstitutional because the state does not have a compelling interest to which the statute may be narrowly tailored, as the harm children suffer as a result of their parents' divorce or separation is not necessarily rectified through increased visitation with their grandparents.[149] Justice Baer advocated for a requirement that grandparents show that they are being denied visitation with their grandchildren and that the grandchildren

142. *See id.*
143. *Id.*
144. *See id.* at 216.
145. *See id.* ("[I]t is possible for parents who have not been separated for at least six months to commence and continue a dissolution proceeding. Thus, the difficulties apparent in the first half of [Section 5325(2)] do not imply that the second half . . . is also problematic.").
146. *See id.* at 216–17; *see also* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006) (explaining that a solution should be limited to the problem when confronting a question of a statute's constitutionality, and that the statute's remainder should be left intact when possible). For the Pennsylvania statute concerning severability, see 1 PA. CONS. STAT. § 1925 (2016) ("The provisions of every statute shall be severable. If any provision of any statute . . . is held invalid, the remainder of the statute . . . shall not be affected thereby . . . .").
147. *See D.P.*, 146 A.3d at 217–19 (Baer, J., concurring and dissenting); *id.* at 220–21 (Wecht, J., concurring and dissenting).
148. *See id.* at 217–221.
149. *See id.* at 217–19 (Baer, J., concurring and dissenting).

will suffer harm as a result.[150] He argued that grandparents should not be permitted to "force parents into court to litigate their custody decisions without pleading (and proving) the harm to the child necessary to justify infringement on a parent's fundamental right."[151]

Justice Wecht's opinion's disagreement with the majority's decision dealt with its distinction between separated parents and divorced parents.[152] Justice Wecht argued that the two should not be distinguished merely on the grounds that divorced parents have already sought judicial involvement by virtue of their dissolution proceedings, while separated parents have not sought judicial involvement.[153] He argued that "[t]his is a thin divergence upon which to rest a differential and consequential classification of fundamental liberty interests"[154] because the distinction between separated and divorced parents is opaque.[155] He reasoned that judicial interference in family life is not limited to cases with divorcing parents, and that marital status is not a proxy for parental fitness.[156] Finally, Justice Wecht concluded that the entirety of Section 5325(2) fails both an equal protection analysis and a due process analysis.[157]

Although the majority in *D.P.* refused to invalidate Section 5325(2) in its entirety, the statute remains vulnerable to constitutional challenges to the second half of Section 5325(2) under similar facts involving divorcing parents.

III. ANALYSIS

While the Pennsylvania Supreme Court reached the correct result in invalidating the first part of Section 5325(2) in *D.P.*,[158] this Comment advocates for an invalidation of Section 5325(2) in its entirety. *Schmehl* should be overturned[159] because using parental divorce as grounds for judicial involvement in custody matters is an unconstitutional governmental intrusion.[160] This section will advocate for a complete invalidation of Section 5325(2) in its entirety as a violation of both the

150. *See id.* at 219.
151. *Id.*
152. *See id.* at 220–21 (Wecht., J., concurring and dissenting).
153. *See id.* at 220.
154. *Id.*
155. *See id.*
156. *See id.* at 220–21.
157. *See D.P.*, 146 A.3d at 220–21.
158. *See id.* at 216.
159. *See* Schmehl v. Wegelin, 927 A.2d 183, 188–90 (Pa. 2007) (holding that the statute's classification, which grants standing to grandparents of children with divorced parents, is narrowly tailored and does not violate the Equal Protection Clause).
160. *See D.P.*, 146 A.3d at 217–19 (Baer, J., concurring and dissenting); *id.* at 220–21 (Wecht, J., concurring and dissenting).

Due Process and Equal Protection Clauses, which will be consistent with *D.P.*'s reasoning for invalidating the first half of 5325(2).[161]

If Section 5325(2) remains severed, with the first half of the provision invalidated and the second half untouched, the statute will continue to allow grandparents and the state to unconstitutionally infringe on the fundamental rights of divorced and divorcing parents. *D.P.* has opened the door for constitutional challenges against the remainder of Section 5325(2) to be brought to the Pennsylvania Supreme Court.[162] In the event the Supreme Court hears such a case, it should invalidate Section 5325(2) entirely as both a violation of divorced parents' due process and equal protection rights.

A. Section 5325(2) Violates Divorced Parents' Due Process Rights

It has been plainly established that Section 5325(2) implicates parents' fundamental liberty interest in raising their children as they see fit.[163] The infringement of a fundamental right automatically triggers strict scrutiny under the Due Process Clause of the U.S. Constitution.[164]

After determining that a fundamental right is being infringed, the first step under a due process strict scrutiny analysis is to determine whether a compelling state interest exists.[165] The state's compelling interest in Section 5325(2) is to diminish the harm experienced by children in non-intact families by fostering grandparent-grandchild relationships and increasing contact between grandparents and their grandchildren.[166] As can be seen by the mountain of case law involving grandparent visitation statutes, courts have accepted the validity of a state's interest in "protecting" children,[167] and it is undisputed that many children benefit

161. *See id.* at 205–17.

162. *See id.* at 217. The court in *D.P.* declared:

> [A]ny such judgment should be left for a future controversy in which the issue is squarely presented, the Court has the benefit of focused adversarial briefing, and the Attorney General is apprised that the constitutional validity of the second half of Section 5325(2) has been called into question and is given an opportunity to defend it.

Id.

163. *See id.* at 208 (explaining that both parties agreed that the statute implicated a fundamental right).

164. *See D.P.*, 146 A.3d at 218 (Baer, J., dissenting); Hiller v. Fausey, 904 A.2d 875, 885 (Pa. 2006).

165. *See D.P.*, 146 A.3d at 218 (Baer, J., dissenting); *Hiller*, 904 A.2d at 885–86.

166. *D.P.*, 146 A.3d at 210.

167. *See Hiller*, 904 A.2d at 886 (providing a brief summary of cases recognizing "the state's longstanding interest in protecting the health and emotional welfare of children" as a compelling state interest for purposes of a strict scrutiny analysis); *see also Schmehl*, 927 A.2d at 189 (applying "the *parens patriae* interest in the child's wellbeing and heightened risk of harm arising from the breakdown of a marriage") (emphasis added).

greatly from developing strong ties with their grandparents.[168] However, the state's compelling interest only exists when the children in these families are experiencing harm; without some kind of harm, there is nothing to "protect" them from.[169]

The second and final step of the due process analysis involves determining that the statute in question is narrowly tailored to a compelling state interest.[170] Again, Section 5325(2) does not satisfy this requirement. The second half of Section 5325(2), which infringes on divorced parents' fundamental rights, is not narrowly tailored to serve the state's interest of protecting the wellbeing of children in non-intact families from harm, because not all children in non-intact families experience harm.[171] By using Section 5325(2) to open the door to litigation over children's best interests, the state ignores the presumption that, unless found to be unfit, parents are acting in the best interests of their children.[172] The United States Supreme Court stated in *Troxel*:

> [S]o 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.[173]

In the interests of adhering to this presumption, "[courts] cannot allow the State to use its power to impose its judgment that visitation may be better for the grandchildren over the joint decision of two fit parents who have determined that the visitation should not occur."[174] In these cases, imposing a visitation or custody order on a family that does not want one may do more harm than good to the children's sense of stability and unity in the midst of an already traumatic upheaval in their lives, such as the divorce or separation of their parents.[175]

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168. *See generally* AARP Brief, *supra* note 45 (describing the many benefits of strong relationships between grandparents and grandchildren).

169. *See D.P.*, 146 A.3d at 218–19 (Baer, J., concurring and dissenting) (advocating for a showing of harm before parents' rights are infringed because "'protecting . . . children' implies there is something we are protecting them from").

170. *See D.P.*, 146 A.3d at 218–19 (Baer, J., dissenting); *Hiller*, 904 A.2d at 886.

171. *See* Blixt v. Blixt, 774 N.E.2d 1052, 1075–82 (Mass. 2002) (Sosman, J., dissenting) (providing many examples of children with non-traditional, non-intact families who are not suffering any kind of harm which necessitates judicial interference in the family's custody matters).

172. *See* Parham v. J.R., 442 U.S. 584, 602–03, 624 (1979) (explaining the presumption that parents make decisions that are in the best interests of their children, which may be rebutted by a showing of parental unfitness).

173. Troxel v. Granville, 530 U.S. 57, 68–69 (2000).

174. Lulay v. Lulay, 739 N.E.2d 521, 534 (Ill. 2000).

175. *See* Brooks v. Parkerson, 454 S.E.2d 769, 773 (Ga. 1995) (finding little evidence that children benefit from a grandparent-grandchild bond, and expressing concern that "the

On the other hand, there are children who would benefit greatly from grandparent visitation who do not fall within the reach of the statute because their parents are either not divorcing or were never married to begin with. To be sure, there are plenty of children who live with both parents and need stable relationships with their grandparents.[176] Living with and being raised by "both biological parents does not serve to insulate a child from trauma, loss, or genuine disruption."[177]

For these reasons, the statute is both too broad, as it provides grandparent visitation standing for children with fit, but divorced, parents, and too narrow, as it fails to provide grandparent visitation standing for children with unfit, but married or cohabitating, parents. A statute that so clearly misses its mark cannot be considered narrowly tailored, and therefore violates the due process rights of divorced and divorcing parents.[178]

B. Section 5325(2) Violates Divorced Parents' Equal Protection Rights

An equal protection analysis, while similar to the due process analysis,[179] is also appropriate for Section 5325(2) because the statute creates a classification by distinguishing between families with divorced parents and those with married or cohabitating, and now separated, parents.[180] While the Due Process Clause alone is enough to invalidate Section 5325(2), the Equal Protection Clause can be used as a vehicle to gain recognition from the courts that alternatives to the nuclear family, such as single, widowed, and step-parent families, are valid and deserve the same constitutional protections as nuclear families.[181] This recognition

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impact of a lawsuit to enforce maintenance of the bond over the parents' objection can only have a deleterious effect on the child"); Eakett v. Eakett, 579 S.E.2d 486, 489 (N.C. Ct. App. 2003) (finding that while court-mandated grandparent visitation could potentially "produce a stronger grandparent-grandchild relationship, it . . . could disrupt a stable family where no disruption previously existed").

176. *See Blixt*, 774 N.E.2d at 1082 (Sosman, J., dissenting).

177. *Id.*

178. *See* Commonwealth v. Scott, 878 A.2d 874, 880 (Pa. Super. Ct. 2005). The court in *Scott* defined the narrowly tailored requirement by stating:

> [A] regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less . . . restrictive alternative; all that is required [to meet the narrowly tailored standard] is that the means chosen not be substantially broader than necessary to achieve the government's interest.

Id.

179. *See* Schmehl v. Wegelin, 927 A.2d 183, 187 n.5 (Pa. 2007) (acknowledging the "substantial overlap in the application of" due process and equal protection principles).

180. *See* D.P. v. G.J.P., 146 A.3d 204, 220 (Pa. 2016) (Wecht, J., concurring and dissenting).

181. *See* Reed, *supra* note 40, at 1541.

of the equality of both traditional and non-traditional families is important in order to "prevent state legislatures from creating laws like nonparental [sic] visitation statutes that are based on outdated notions of how families should be, rather than on current realities of how families actually operate."[182]

A strict scrutiny analysis under the Equal Protection Clause of the U.S. Constitution[183] is differentiated from a strict scrutiny analysis under the Due Process Clause because when evaluating the former, the court asks whether the classification within the statute, rather than the statute itself, is narrowly tailored to serve a compelling state interest.[184] In other words, in order for Section 5325(2) to survive an equal protection analysis, the court must find that the classification of parents by marital status is necessary to protect the wellbeing of children by fostering grandparent-grandchild relationships.[185]

The Equal Protection Clause seeks to ensure that individuals who are similarly situated are treated alike.[186] However, because *D.P.* invalidated the first part of Section 5325(2), which gave grandparents standing to seek visitation and custody when parents were separated,[187] the application of 5325(2) now leads to inequitable results for families in which the parents of the child "have commenced and continued a proceeding to dissolve their marriage,"[188] because similarly situated families will not be given the same treatment under the law due to the minute factual differences between separation and divorce.

Take, for example, a family with unmarried parents who cohabitated as a cohesive unit for their child's entire life. The parents may part ways and amicably distribute property and assets, and the children's grandparents will not have standing to file a petition for custody or visitation under Pennsylvania law[189] because no divorce proceeding will be necessary. However, an identical family but with married parents would be vulnerable to court interference in the form of court-ordered grandparent visitation or custody solely on the grounds that they had been married and are now divorcing. The result would be unequal treatment of

182. *Id.*

183. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (explaining that a strict scrutiny analysis, rather than a rational basis or intermediate scrutiny analysis, should be applied where the statute implicates a fundamental liberty interest).

184. *See D.P.*, 146 A.3d at 210.

185. *See id.*

186. *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (stating that under the Equal Protection Clause, "all persons similarly circumstanced shall be treated alike").

187. *See D.P.*, 146 A.3d at 217.

188. *See* 23 PA. CONS. STAT. § 5325(2) (2010).

189. *See id.*

similarly situated families, which is the kind of unequal treatment the Equal Protection Clause seeks to prevent.[190]

As another example, the arbitrary nature of the *D.P.* court's severing of Section 5325 can be illustrated by the facts of *D.P.*[191] Separated couples, like the parents in *D.P.*, are now shielded from court intrusion for the duration of their separation, but separation is rarely permanent and usually culminates in either reunification or divorce.[192] If the parents eventually choose to dissolve their marriage, the invalidation of the first half of Section 5325(2) would be moot.[193] Even if the parents planned to continue with the shared custody arrangement, the grandparents would immediately qualify for standing to file for visitation by virtue of the fact that the parents' status shifted from "separated for a period of at least six months" to "commenced and continued a proceeding to dissolve their marriage."[194]

Sadly, if the grandparents in *D.P.* would file a second petition for partial physical custody, the parents would be burdened with the choice to either continue the litigation over the constitutionality of the grandparents' standing under the second part of Section 5325(2), or surrender the battle over standing and proceed to court to litigate the merits of the dispute based on the children's best interests pursuant to Section 5328(c)(1).[195] The former option could become tremendously expensive if the parties chose to litigate the matter through the state appellate courts a second time, while the latter option would open the door for judicial interference into their private lives, a result they have been fighting to avoid since the commencement of the action in 2014.[196] The fact that the parents in this case would be treated very differently if they filed for divorce is only one

190. *See F.S. Royster Guano Co.*, 253 U.S. at 415.

191. The parents in *D.P.*, who had been separated for more than six months, mutually decided to discontinue contact between their three children and their paternal grandparents, who sought court-ordered visitation under Section 5325(2). *See D.P.*, 146 A.3d at 205–07.

192. *See* CASEY E. COPEN ET AL., NAT'L HEALTH STATS. REPS., FIRST MARRIAGES IN THE UNITED STATES: DATA FROM THE 2006–2010 NATIONAL SURVEY OF FAMILY GROWTH 9 (2012), https://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf ("[M]ost separated women and men made the transition to divorce from first marriage within 5 years."); *see also* MATTHEW D. BRAMLETT & WILLIAM D. MOSHER, NAT'L CTR. FOR HEALTH STATS., COHABITATION, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE UNITED STATES, 21–22 (2002), https://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf (citing statistics for the likelihood of separation ending in divorce among various demographics).

193. The parents in *D.P.* finalized their divorce in May of 2016, four months before the Supreme Court issued its appellate decision on the grandparent custody matter. *See* Divorce Decree, Ponko v. Ponko, 16DO00293 (Pa. Ct. Com. Pl. May 24, 2016). Essentially, the Supreme Court's holding was moot because it did not extend to divorced parents the same protections it extended to separated parents, and the *D.P.* parents were divorced by the time the decision was issued. *See id.*

194. 23 PA. CONS. STAT. § 5325(2) (2010).

195. 23 PA. CONS. STAT. § 5328(c)(1) (2010) (providing the factors the court should consider to determine when a party has standing under Section 5325(2)).

196. *See D.P.*, 146 A.3d at 205.

demonstration of how *D.P.*'s severed holding yields a blatant violation of the Equal Protection Clause.

IV. RECOMMENDATION

This Comment advocates for changes to the Pennsylvania grandparent visitation law so the law complies with the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution. To effectuate this change, the Pennsylvania Supreme Court should find, upon appropriate challenge, Section 5325(2) to be unconstitutional in its entirety. Preferably, the Pennsylvania legislature should repeal and replace Section 5325(2) with a statute that requires a showing of harm to the child before grandparents will be granted standing to file for custody and visitation.

A. The Pennsylvania Supreme Court Should Invalidate Section 5325(2) in Its Entirety

A finding by the Pennsylvania Supreme Court that Section 5325(2) violates the Due Process Clause would be consistent with its recent precedent, as the logical extension of *D.P.*[197] is that Section 5325(2) deprives divorced parents of their fundamental rights in the same way it deprives separated parents of their fundamental rights. Of course, the Pennsylvania Supreme Court can only act in response to a challenge to the constitutionality of Section 5325(2) on an appeal from a lower court ruling in a pending case.[198] Should such an appeal arise, the Pennsylvania Supreme Court should declare Section 5325(2) unconstitutional.

Such a holding would also be consistent with precedent from other jurisdictions.[199] The Supreme Court of Iowa's decision in *In re Marriage of Howard*[200] best illustrates the proper application of a due process

197. *Id.* at 215 (finding that the first part of Section 5325(2) deprived separated parents of their fundamental rights because the statute was not narrowly tailored to a compelling state interest).

198. *Id.* at 217 ("It would be premature—and thus improper—to make a wide-reaching constitutional declaration along these lines . . . [when] no challenge to the standing requirements relative to divorced parents [has] been raised or briefed.").

199. *See, e.g.*, Brooks v. Parkerson, 454 S.E.2d 769, 774 (Ga. 1995) (holding that the state may only grant visitation to grandparents over the parents' objections upon a showing of harm to the child should such visitation be denied); Lulay v. Lulay, 739 N.E.2d 521, 534 (Ill. 2000) (holding that the grandparent visitation statute infringes on the parents' fundamental rights when both fit parents object to grandparent visitation); Steward v. Steward, 890 P.2d 777, 782–83 (Nev. 1995) (finding that it is not in the child's best interests to grant visitation to a grandparent over the objection of the child's natural parents); Craig v. Craig, 253 P.3d 57, 64 (Okla. 2011) (holding that a showing of harm is required before a court may compel a parent to relinquish custody and control of the child to a third-party).

200. *In re* Marriage of Howard, 661 N.W.2d 183 (Iowa 2003).

analysis to a statute permitting grandparent visitation in cases of divorce.[201] In *Howard*, the Supreme Court of Iowa held that a divorce requirement in the grandparent visitation statute was unconstitutional, and found that the Due Process Clause of the U.S. Constitution requires a threshold finding of parental unfitness before visitation will be granted to grandparents.[202] The Iowa Supreme Court reasoned that the fundamental interest of parents in making caretaking decisions is not diminished by divorce, and divorce alone "does not make parents unfit to make decisions in the best interest of their children."[203] Because the statute failed to require a finding of parental unfitness, the court concluded that it was not narrowly tailored to a compelling state interest.[204]

However, a potential Pennsylvania Supreme Court holding that Section 5325(2) violates the Equal Protection Clause would be inconsistent with the precedent set in *Schmehl v. Wegelin*.[205] As a result, the Pennsylvania Supreme Court should overturn *Schmehl* so as to ensure that Section 5325(2) complies with the mandates of equal protection. For the reasons explained above, the majority opinion in *Schmehl* was wrong at the time it was decided.[206] Chief Justice Cappy was correct in his dissent when he said that, "the fact of divorce or separation alone is not a proxy for determining which parents might cause their children harm."[207] Parents are not inherently less fit to raise and make decisions for their children by virtue of their marital status.[208]

Additionally, the factual distinction between separated parents and divorced parents is miniscule, as evidenced by the Pennsylvania General Assembly's choice to group them together into one category within Section 5325.[209] This grouping serves as evidence that, while the compelling interest of the state remains virtually the same for both factual scenarios, the stakes are vastly higher for families with divorced parents because they are exposed to court imposition into their private lives under the surviving portion of Section 5325(2), while similarly situated separated parents are now protected from such an imposition after the

201. *See id.* at 187–92.
202. *See id.* at 192.
203. *Id.* at 188.
204. *See id.* at 192.
205. *See* Schmehl v. Wegelin, 927 A.2d 183, 190 (Pa. 2007) (applying an equal protection strict scrutiny analysis and explaining that classifying parents by marital status is valid).
206. *See supra* Part II.D.1.
207. *Schmehl*, 927 A.2d at 192 (Cappy, C.J., dissenting).
208. *See id.*
209. The statute separates the different factual categories providing standing to grandparents into three distinct subsections. 23 PA. CONS. STAT. § 5325 (2010). The provisions for standing for grandparents where the parents are divorcing and where the parents are separated appear in a single subsection. *Id.* § 5325(2).

holding in *D.P.* and are presumed to be acting in their children's best interests.[210]

Any argument that judicial interference is less of an imposition when the parents have already begun divorce proceedings should be rejected. First, divorce proceedings do not always implicate custody matters.[211] Parents may file, negotiate, and finalize a divorce without ever raising the issue of child custody. Second, individuals seek judicial intervention in their lives for countless other reasons. Therefore, divorce proceedings should not be set apart as the one kind of voluntary court proceeding that constitutes an invitation for a judicial invasion into all other aspects of the parties' family lives.[212] In his dissent in *D.P.*, Justice Wecht argued:

> Application of the divorced/separated dichotomy becomes problematic, the distinction opaque. Every year, thousands of separated Pennsylvanians seek court intervention, whether in support, in custody, or in protection from abuse. Judicial involvement emphatically is not limited to divorcing or divorced parents. No divorce filing is required for entry into family court.[213]

In closing his dissent, Justice Wecht implored the legislature to "[move] beyond assumptions and biases against divorced parents, most of whom strive in the face of adversity to be the best parents they can be."[214]

B. The Pennsylvania Legislature Should Revise Section 5325(2) in Order to Comply with the Due Process and Equal Protection Clauses

In light of Section 5325(2)'s violation of the Due Process and Equal Protection Clauses of the U.S. Constitution, the Pennsylvania General Assembly should repeal Section 5325(2) and replace it with a revised statute that requires a showing of parental unfitness before grandparents have standing to seek custody or visitation and a court may summon the child's parents to make a determination of the child's best interests under Section 5328.[215] Without a showing of parental unfitness, the statute

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210. *See* D.P. v. G.J.P., 146 A.3d 204, 215 (Pa. 2016).

211. Divorce and custody are separate causes of action. While both actions *may* be filed together, the filing of one action does not necessitate the filing of the other. *See* PA. R. C. P. 1915.3(c) (providing the procedure for joining a claim for custody with a divorce action).

212. *See D.P.*, 146 A.3d at 220 (Wecht, J., dissenting).

213. *Id.*

214. *Id.* at 221.

215. Some states require the moving party to rebut the presumption that the parents are acting in their children's best interests. *See*, *e.g.*, GA. CODE ANN. § 19-7-3 (1976) (granting visitation to family members if the petitioner proves "by clear and convincing evidence that the health or welfare of the child would be harmed unless such visitation is granted").

continues to violate the Due Process Clause because it is not narrowly tailored to a compelling state interest.[216]

To make a showing of parental unfitness, the statute should require the grandparent to make a showing that the child is suffering harm or would suffer harm if custody or visitation with the grandparent is denied. The court in *Howard* explained why harm is a necessary element of the constitutional analysis:

> [S]ome form of harm to a child has traditionally been necessary under the Due Process Clause to support interference by the state in this sensitive area. . . . Harm not only has been the prevailing standard of intervention, but it is most suitable in analyzing a grandparent visitation statute. It is consistent with the essential presumption of fitness accorded a parent and is stringent enough to prevent states from meddling into a parental decision by simply making what it believes is a better decision.[217]

Justice Baer strongly advocated for the requirement of a showing of harm in his *D.P.* dissent.[218] Justice Baer argued that Section 5325(2) "is unconstitutional on its face because it is not narrowly tailored in that it allows for grandparents to force parents into court to litigate their custody decisions without pleading (and proving) the harm to the child necessary to justify infringement on a parent's fundamental right."[219] Requiring a showing of harm would resolve Justice Baer's concern by ensuring that infringement on the parent's fundamental right is necessary, thereby satisfying a due process strict scrutiny analysis.[220]

Additionally, in order to remedy the present statute's equal protection violation, the Pennsylvania General Assembly should eliminate classifications based on marital status in its grandparent visitation statute. To satisfy an equal protection strict scrutiny analysis, the classification within the statute must be necessary to achieve the state's compelling interest.[221] For the reasons explained above, a classification based on marital status does not achieve the state's interest in protecting children.[222]

In Justice Wecht's dissent in *D.P.*, he stated, "I find untenable and archaic [a] holding that divorce, without more, suffices to permit outside

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216. *See In re* Marriage of Howard, 661 N.W.2d 183, 191–92 (Iowa 2003) ("The failure of the statute to give the presumption of fitness to parents renders it unconstitutional on its face.").

217. *Id.* at 189–90.

218. *D.P.*, 146 A.3d at 217–19.

219. *Id.* at 219.

220. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16–17 (1973) (defining the due process strict scrutiny analysis).

221. *See D.P.*, 146 A.3d at 210.

222. *See supra* Part II.D.3; *see also D.P.*, 146 A.3d at 220–21 (Wecht, J., concurring and dissenting).

intervention in the child-rearing decisions of otherwise fit parents."[223] Justice Wecht further argued that "[t]o maintain [the classification] of Section 5325(2) is to deny societal reality, to consign roughly half the population to second-class status, and to stigmatize these citizens and their children."[224] Eliminating a classification based on marital status would ensure that the new legislation does not unconstitutionally discriminate between intact and non-intact families.

V. CONCLUSION

As our society continues to evolve and accept more non-traditional family structures,[225] it is imperative that our laws evolve to accommodate these changes by treating all families equally and fairly. The Pennsylvania Supreme Court did so in *D.P.* by invalidating part of Section 5325(2).[226] However, by limiting its holding to only the first part of Section 5325(2), the Supreme Court permitted the remaining portion of Section 5325(2) to stand, thereby subjecting divorcing parents to disparate treatment in grandparent visitation and custody actions.[227] The remaining portion of the statute continues to stand in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[228]

The Pennsylvania Supreme Court's holding in *D.P.* invites further litigation over the remaining portion of Section 5325(2).[229] Therefore, in the event that the court hears a relevant case, it should invalidate Section 5325(2) completely.[230]

Invalidating Section 5325(2) would be consistent with the due process analyses of Pennsylvania courts and other jurisdictions, but would also require the court to overturn its equal protection analysis in *Schmehl*.[231] Alternatively, Pennsylvania's legislature should revise the statute to (1) require a showing of harm so the statute complies with the Due Process Clause, and (2) eliminate the classification based on marital status to comply with the Equal Protection Clause.[232] By so doing, Pennsylvania's grandparent visitation rule will no longer allow for the disparate treatment of non-intact families in grandparent visitation and custody actions.

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223. *D.P.*, 116 A.3d at 220.
224. *Id.* at 221.
225. *See supra* Part II.B.
226. *See supra* Part II.D.3.
227. *See supra* Part III.
228. *See supra* Part III.
229. *See supra* Part III.
230. *See supra* Part IV.
231. *See supra* Part IV.A.
232. *See supra* Part IV.B.