

provide sufficient protection to parental due process rights.²⁶⁸ Reversing, the Maine Supreme Court ruled that even absent an allegation that a parent is unfit, the parent's due process rights may be restricted if the state advances a compelling state interest and the intrusion is sufficiently narrowly tailored.²⁶⁹

The court continued its analysis by expressly ruling that the best interests of the child do not alone constitute a compelling interest:



An element of "harm" in the traditional sense is not, however, the only compelling state interest extant when matters relating to the welfare of children are under scrutiny. For example, the State's compelling interest in requiring school attendance or restricting child labor does not derive exclusively from the state's interest in preventing "harm," but instead stems from the State's broader parens patriae interest in the well-being of the child. . . . We agree with the trial court, however, that something more than best interests of the child must be at stake to establish a compelling state interest.²⁷⁰

The *Rideout* court also reasoned that by characterizing the grandparents as "primary caregivers," the resulting relationship might trigger the state's "parens patriae authority on behalf of the child and provide a compelling basis for the state's intervention in an intact family with fit parents."²⁷¹ The *Rideout* court expressly recognized that both a parent and a child may advance competing interests: "A parent's fundamental liberty interest must be balanced against a [child's] interest . . ."²⁷² So by characterizing the state's interest in preserving a child's right to continue parent-like relationships as compelling, the Maine statute survived constitutional review.²⁷³

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While the Maine Supreme Court reached the right result, perhaps it did so for the wrong reason. It arrived at this outcome despite expressly ruling that something more than the best interests of the child is required to advance a sufficiently compelling state interest. In reality, the child's fundamental right to preserve parent-like relationships should prevail in a custody dispute, or at least be recognized and weighed against the legal or biological parent's constitutional right to family privacy. The haze surrounding the BICS lifts when it is understood that the child has a separate and fundamental right to continue existing parent-like relationships, and the BICS applies factors designed to identify the existence of such relationships and protects the child's right to preserve them. Clearly, the child is a direct stakeholder in the outcome. In this manner, all third-party custody claims could be resolved by



268. *Id.* at 294.

269. *Id.* at 302.

270. *Id.* at 300-01.

271. 761 A.2d 291, 302 (Me. 2000).

272. *Id.*

273. *Id.*

considering the substantive due process relationship rights of both the parent and the child.

Despite the cautionary rule of *Troxel*, other jurisdictions have not embraced the detriment standard and have permitted third-party visitation over a fit parent's objection. In *Department of Social & Rehabilitation Services v. Paillet*,²⁷⁴ the court ruled that the Kansas statute requiring the existence of a substantial relationship and a showing that visitation would further the best interests of the child satisfied constitutional muster.²⁷⁵ The court reached this conclusion without explanation: "Neither requirement is called into question by the Supreme Court's decision in *Troxel*."²⁷⁶

Troxel also creates uncertainty regarding the constitutionality of recognizing quasi-parent standing under the guise of parent by estoppel or de facto parent, concepts embodied in the ALI Principles of Family Law.²⁷⁷ A number of recent cases have permitted third-party standing in reliance upon the ALI standard, or a similar standard, thus further clouding the proper application of *Troxel*. For example, the Illinois Court of Appeals reversed a trial court's decision to dismiss a married father's custody claim for lack of standing after DNA established that he was not the father.²⁷⁸ The court reasoned that the relevant time for determining standing was at the time the presumption of fatherhood attached rather than the time following the court-ordered DNA test.²⁷⁹ Thus, the court protected this third-party custody claim based upon the existing loving parent-like relationship.²⁸⁰

A similar result was reached by a Virginia court, applying the BICS, in which the court granted standing in a custody dispute to a married father who raised a child as his own for three years despite knowing that he was not the biological father.²⁸¹ Likewise, a New Jersey court ruled that once a third-party established "psychological parenthood," then he or she "stands in parity" with

274. 16 P.3d 962, 971 (Kan. 2001).

275. *Id.*

276. *Id.* at 971. See also, *Zeman v. Stanford*, 789 So.2d 798, 803-04 (Miss. 2001) (noting that the "best interest of the child" is a paramount consideration); *West Virginia ex rel. Brandon L. v. D. Moats*, 551 S.E.2d 674, 684-85 (2001) (concluding that the two-pronged standard of best "interest of child and lack of substantial interference" with parents' rights meets *Troxel* requirements).

277. ALI PRINCIPLES, *supra* note 136, § 2.18.

278. *In re Marriage of Casey*, 867 N.E.2d 555, 558-59 (Ill. App. 3d. 2007).

279. *Id.*

280. *Id.*

281. *O'Rourke v. Vuturo*, 638 S.E.2d 124, 130-31 (Va. Ct. App. 2006); *but see Janice M. v. Margaret K.*, 948 A.2d 73, 93 (Md. 2008) (reversing and remanding a grant of de facto parent standing with instructions that trial court must find either mother was unfit or "whether, based on all the facts, significant exceptional circumstances exist" to overcome mother's due process liberty interest).

the legal parent.²⁸² This survey of state case law demonstrates that some state courts continue to apply the BICS to third-party custody claims, despite *Troxel*. In these cases, the third-party assumed a parent-like relationship with the child, triggering the BICS.

Post-*Troxel* third-party custody claims demonstrate the tension created when courts are forced to determine custody disputes between a parent and a third party. The decision is particularly difficult if the third party enjoys a parent-like relationship with the child. In fact, one court expressly relegated the child's relationship right to a secondary status.²⁸³ The vague directive of *Troxel* creates confusion at the state level and devalues the fundamental relationship rights of the child.

IV. STATES PAVE THE WAY FOR RECOGNITION OF THE CHILD'S RIGHT TO A BICS DETERMINATION

Some state court decisions endeavor to protect the constellation of fundamental relationship rights enjoyed by children, encompassed within the "liberty" principle of the Fourteenth Amendment.²⁸⁴ These courts have done so by characterizing the BICS as a compelling state interest,²⁸⁵ trumping the

282. *P.B. v. T.H.*, 851 A.2d 780, 786 (N.J. 2004). The court affirmed an award of custody to a neighbor where the psychological parent relationship arose with the consent of the parent, the third party and the child lived together, the third party assumed significant child-rearing obligations, and sufficient time had passed to establish a bonded relationship. *Id.* at 781–82.

283. *Rideout v. Riendeau*, 761 A.2d, 291, 297 (Me. 2000) (holding the BICS is insufficient to intervene in the decision making of competent parents).

284. *See, e.g., In re D.M.G.*, 951 P.2d 1377, 1383 (Mont. 1998) (quoting *In re Marriage of Cole*, 729 P.2d 1276, 1280–81 (Mont. 1986)); *LaChapelle v. Mitten*, 607 N.W.2d 151, 163 (Minn. Ct. App. 2000) (noting that protection of the best interests of the child is a compelling state interest justifying deprivation of fundamental right to travel, in order to raise one's child); *Watt v. Watt*, 971 P.2d 608, 615–16 (Wyo.1999):

The right of travel enjoyed by a citizen carries with it the right of a custodial parent to have the children move with that parent. This right is not to be denied, impaired, or disparaged unless clear evidence before the court demonstrates another substantial and material change of circumstance and establishes a detrimental effect of the move upon the children.

See also Clark v. Atkins, 489 N.E.2d 90, 100 (Ind. Ct. App. 1986) ("The law has few objectives more compelling than protecting the interests of children. Where families have suffered the trauma of divorce those interests include not only the care and custody of the child but its right and obligation to know and visit with a noncustodial parent."); *Ziegler v. Ziegler*, 691 P.2d 773, 780 (Idaho Ct. App. 1985) ("Providing and assuring the maximum opportunities for parental love, guidance, support, and companionship is a compelling state interest that . . . warrants reasonable interference with the constitutional right of travel when necessary.").

285. *In re D.M.G.*, 951 P.2d at 1383 (quoting *In re Marriage of Colè*, 729 P.2d at 1280–81 ("[T]he best interests of a child . . . may constitute a compelling state interest worthy of reasonable interference with the right to travel interstate.")); *LaChapelle*, 607 N.W.2d at 163; *Clark*, 489 N.E.2d at 100. Throughout this paper, I have elected to characterize the BICS as

fundamental rights asserted by parents, even after the *Troxel* plurality decision²⁸⁶

A. *Pennsylvania's Justice Newman Recognizes the BICS as a Fundamental Right.*

In *Hiller v. Fausey*,²⁸⁷ the Pennsylvania Supreme Court upheld the constitutionality of the Pennsylvania Grandparent Visitation Act under the *Troxel* standard.²⁸⁸ Justice Newman wrote a separate concurrence, calling for the recognition of the BICS as a fundamental right belonging to every child involved in a custody, visitation, or termination proceeding.²⁸⁹ Justice Newman made the following call for change:

I join the well-reasoned opinion of the Majority in this matter but write separately to indicate the strength of my conviction that even greater movement in this area of children's rights is required. Security, continuity and stability in an ongoing custodial relationship, whether maintained with a biologic or adoptive parent and/or with a grandparent is vital to the successful personality development of a child. The law finally needs to recognize that the child, as the focus in various types of proceedings, has the same inalienable rights to the pursuit of life, liberty, and happiness as an adult. Therefore, I write to emphasize that it is time to regard the best interests of the child as a fundamental and momentous right.²⁹⁰

Justice Newman's eloquent words recognize that children, like adults, enjoy fundamental relationship rights.

Justice Newman further recognized that when the constitutional rights of parents are implicated, the court must determine that the interference is narrowly tailored to achieve a compelling state interest and then weigh the interests of the parties, including the state's interest in ensuring the emotional and physical health of the its minor citizens.²⁹¹ But primary weight must be given to the BICS.²⁹² Justice Newman described the child's fundamental rights to include the right to be "cared for by an adult who will provide protection, companionship and upbringing."²⁹³

furthering the child's relationship rights, rather than as the fundamental right at issue. This is because I view the BICS as protecting and advancing the fundamental right at issue.

286. *Troxel v. Granville*, 530 U.S. 57 (2000).

287. *Hiller v. Fausey*, 904 A.2d 875 (Pa. 2006) (Newman, J., concurring).

288. *Id.* at 903.

289. *Id.* at 890-91.

290. *Id.* at 890-91.

291. *Id.* at 897.

292. *Hiller*, 904 A.2d at 898.

293. *Id.* at 897.

The opinion concludes by calling for courts and legislatures to give fundamental protection to the child's right to a best interests of the child determination in any case dealing with children:

It is on this basis that I advocate that we finally legitimize the right of the child to have his or her best interests considered as a fundamental right. This interest is expressed in a variety of statutes and proceedings, ranging from the complete severance of parental rights on a judge's finding of parental unfitness, to the limitation of parental choices in the areas, for example, of education, health care, and safety. Thus, I believe that the instant matter involves a situation that burdens two fundamental rights—the right of a fit father to make parenting decisions for the child and the right of the child to have its best interests considered. . . . If any balancing of interests is necessary, the interests of the child must prevail.²⁹⁴

This call for strict scrutiny to protect the rights of the child in custody disputes follows the lead of several other states, such as California, where courts have recognized the fundamental nature of the BICS. In *In re Bridget*,²⁹⁵ a California court ruled:

[A]s a matter of simple common sense, the rights of children in their family relationships are at least as fundamental and compelling as those of their parents. If anything, children's familial rights are more compelling than adults', because children's interests in family relationships comprise more than the emotional and social interests which adults have in family life; children's interests also include the elementary and wholly practical needs of the small and helpless to be protected from harm and to have stable and permanent homes in which each child's mind and character can grow, unhampered by uncertainty and fear of what the next day or week or court appearance may bring.²⁹⁶

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In re Bridget acknowledges the fundamental right of a child to be protected from harm and to have a stable and permanent home as an interest that outweighs the parent's fundamental decision-making rights.

Similarly, another California court reversed the trial court's removal of a child from grandparent custody because the court failed to consider factors associated with the child's best interests, including the child's special needs, wishes, and stability.²⁹⁷ Other jurisdictions also elevate a child's relationship

294. *Id.*

295. 49 Cal. Rptr. 2d 507 (Cal. App. 1996).

296. *Id.* at 521–22 (citing *In re Jasmon O.*, 878 P.2d 1297 (Cal. 1994)).

297. *In re H.G. v. Mary H.*, 52 Cal. Rptr. 3d 364, 370–72 (Cal. App. 2006). In this case, the child was placed with the grandparents under the dependency statute. *Id.* at 367, 370–71. The California grandparent visitation statute, imposing a rebuttable presumption against grandparent visitation, was thus inapplicable. *Id.* at 371; *see also* CAL. STAT. ANN. §3104 (2009) (“There is a rebuttable presumption that the visitation of a grandparent is not in the best interest of a minor child if the natural or adoptive parents agree that the grandparent should not be granted visitation”).

rights to a fundamental status and protect them by applying the BICS. In a Kentucky case, the appellate court remanded the matter to determine whether a third party qualified as a de facto custodian entitled to custody based upon the BICS.²⁹⁸ In Minnesota, a trial court applied the BICS and avoided the presumption of parental fitness to solidify grandparent sole custody.²⁹⁹ The court ruled that once lost, the presumption of parental fitness is not automatically restored.³⁰⁰

Some jurisdictions recognize a child's fundamental right to a safe home. For example, the Rhode Island Supreme Court recognized that children possess fundamental rights in *In re Brooklyn M.*,³⁰¹ where the court upheld the removal of the child from the mother despite a loving relationship: "As we have previously observed, 'a parent's genuine love for [the] child, or an existence of a bond between parent and child, is not sufficient to overcome the child's fundamental right to a safe and nurturing environment.'"³⁰² And in an Illinois parental termination case, the court recognized the fundamental right of a child to a stable home:

In the instant case, respondent had a history of not cooperating with referrals for psychological evaluation, psychological services, and medication assessment. Examination, evaluation, and assessment could go on indefinitely, particularly if as in the instant case, the parent refused to be examined or refused to cooperate. Such delay would defeat the child's fundamental right to a stable nurturing home.³⁰³

In both Rhode Island and Illinois, the courts recognized and protected the child's fundamental right to a safe home.³⁰⁴ The most salient aspect of a safe and nurturing home, arguably, is the presence of a loving and nurturing parent-like adult.

So it seems that some state courts recognize the constitutional magnitude of the child's relationship rights and that these rights are, perhaps, even superior to the corresponding parental relationship rights. Some states, like Pennsylvania and California, have paved the way to identify and protect the

rights."); *Harris v. Harris*, 96 P.3d 141, 151-52 (Cal. 2004) (upholding constitutionality of the California grandparent visitation statute).

298. *Baker v. Combs*, 248 S.W.3d 581, 584 (Ky. Ct. App. 2008).

299. *In re Child of Evenson*, 729 N.W.2d 632, 637 (Minn. Ct. App. 2007).

300. *Id.*

301. *In re Brooklyn M.*, 933 A.2d 1113, 1122 (R.I. 2007).

302. *Id.* (citing *In re Brianna D.*, 798 A.2d 413, 415 (R.I. 2002)).

303. *In re Bernice B.*, 815 N.E.2d 778, 788 (Ill. App. Ct. 2004). See also *K.N. v. R.P.*, No. 2007-CA-000181-MR., 2008 WL 275106 at *15 (Ky. App. 2008) (acknowledging that children have a fundamental right to a safe home; but holding parents' failures and drug problems were not enough to force the parents to relinquish their claim to the child).

304. See *supra* notes 301-03 and accompanying text.

fundamental relationship rights of children in third-party custody cases by requiring the application of the BICS.

B. States Should Look Backwards to Shape the Future

American courts formerly applied the BICS to disputes between fit parents and third parties. For example, the Tennessee Supreme Court affirmed the application of the BICS to award custody to a third party over the father's objection in 1925:

As it affects the custody of infants, the writ of habeas corpus rests on the assumption of a right in the state, paramount to parental or other claim, to dispose of such children as their best interests require. The legal rights of a parent are very gravely considered, but are not enforced to the disadvantage of the child.³⁰⁵

A similar result was reached by the Virginia Supreme Court in affirming the application of the BICS to order the third party to return the child to the mother in 1852.³⁰⁶ In both cases, the third party had established a loving and nurturing relationship with the child and had custody of the children. Thus, as early as 1854, American state courts in Virginia, Iowa, Texas, and Indiana inherently recognized that when the interests of the parent and child diverged in third-party custody claims brought by adults enjoying a parent-like relationship, the BICS controlled the outcome in each instance.³⁰⁷

The BICS has historically provided to the courts a shorthand way to secure a child's constitutional right to preserve existing loving and nurturing parent-like relationships. The characterization of the BICS as achieving a compelling state interest justifies limiting the relationship rights of legal and biological parents. The BICS, therefore, provides one legal standard that adequately protects the fundamental rights of both parents and children, so long as the standard is sufficiently narrowly tailored, recognizing that the best interests and welfare of the child always constitutes a compelling state interest.

305. *State ex rel. Jones v. West*, 201 S.W. 743, 744-45 (Tenn. 1925); see also *Luellen v. Younger*, 143 N.E. 163, 164 (Ind. 1924) (requiring award of custody to foster parents over a fit father's objection under BICS); *Greene v. Walker*, 199 N.W. 695, 697 (Mich. 1924) (citing *In re Gould*, 140 N.W. 1013, 1015 (Mich. 1913) (requiring award of custody to foster parents over a fit father's objection under BICS)).

306. *Armstrong v. Stone*, 9 Gratt. 102, 103 (Va. 1852).

307. See *Fonts v. Pierce*, 19 N.W. 854, 854-55 (Iowa 1884) (applying BICS to affirm custody in third party over fit mother's claim); *Keesling v. Keesling*, 85 N.E. 837, 839 (Ind. App. 1908) (applying BICS to affirm custody in grandfather over fit parental claims); *LeGate v. LeGate*, 29 S.W. 212, 214 (Tex. 1894) (applying BICS to affirm custody in third party over fit mother's claim).

V. RECOGNIZING A CHILD'S FUNDAMENTAL RIGHT TO A LOVING AND NURTURING PARENT-LIKE RELATIONSHIP AND CREATING A FRAMEWORK TO PROTECT IT.

Law has a life of its own and is in constant flux in order to survive and remain relevant. The law changes to reflect the values of the society and its aspirations. After time, women gained freedom from the discriminatory laws that deprived them of personhood upon marriage and rendered them invisible to the law. Now, children are poised for similar legal emancipation when courts decide third-party custody claims without regard to the biological or legal status of the adults, but rather, based upon evidence of loving and nurturing parent-like relationships, guided by the BICS.

Although the Supreme Court has not addressed third-party custody since *Troxel*, state courts have continued to deal regularly with the faulty family privacy parental presumption and the contorted reasoning it causes. As the laboratories of democracy, state courts often pave the way for a national standard.³⁰⁸ The ability of states to implement policy through creating and interpreting the law permits other states and the federal government to monitor the success of the law in terms of achieving the desired policies and improving upon them.³⁰⁹ Additionally, many state constitutions have been interpreted to provide even greater protection for individuals than required under the United States Constitution.³¹⁰

A. *A Child Enjoys a Fundamental Right to a Loving and Nurturing Parent-like Relationship Protected by the BICS.*

The child's fundamental right to continue existing loving and nurturing relationships is recognized and protected through the parens patriae power of the state to determine custody based on the BICS. The BICS is a creature of common law, existing from time immemorial and has become the bedrock of our state custody statutory law as an outgrowth of early English common law. In fact, the BICS can be characterized as a right that is "so rooted in the

308. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

309. Judith Olans Brown & Wendy E. Parmet, *The Imperial Sovereign: Sovereign Immunity & The ADA*, 35 U. MICH. J.L. REFORM 1 (2002) ("Thus, the experiments of a few states in educating children with disabilities refracted to the national level, leading to federal legislation mandating such rights even in those states that had failed to provide them. Without federal lawsuits, federal legislation and the federal money that came with it, however, it is doubtful that all states would have routinely educated the severely disabled children.").

310. Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Individual Rights Under the United States and Minnesota's Constitution*, 70 ALB. L. REV. 865, 869-70 (2007).

traditions and conscience of our people as to be ranked as fundamental or implicit in the concept of ordered liberty."³¹¹

At its core, the BICS is designed to identify and reinforce the child's fundamental right to a loving and nurturing parent-like relationship. This is evident in the BICS. With its focus upon the child's physical, psychological, and moral development, it is designed to identify and solidify the child's relationship with parents and parent-like adults. By expanding the parental privacy presumption in an attempt to limit state intervention into the realm of the family, the Supreme Court has diminished one aspect of children's constitutional rights by rendering the child unseen and unheard in the constitutional debate of third-party custody claims. Typically, the child's right in custody cases is recognized and protected by the application of the BICS, which is rendered irrelevant under the *Troxel* third-party standing analysis so long as a legal parent is fit.³¹² By failing to recognize the role that the BICS plays in securing a child's fundamental relationship rights, the state violates the substantive due process right of the child to continue existing loving and nurturing parent-like relationships.

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B. In Third-Party Custody Disputes, States Should Apply a Weighted Balancing Test—Deferring Always to the BICS to Protect the Fundamental Rights of Children.

When a jurisdiction recognizes the child's right to have the BICS applied in matters related to third-party custody and visitation, then a weighted balancing test must be employed.³¹³ It follows that cases involving the competing rights of fit parents, parent-like adults, and children require an approach that permits the court to consider the fundamental rights of the parents and the child involved in each dispute. In such cases, the courts are called upon to balance the burden to constitutional rights³¹⁴ experienced by each of the harmed individuals.

311: *Michael H. v. Gerald H.*, 491 U.S. 110, 127 n.6 (1989) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

312. See *Troxel v. Granville*, 530 U.S. 57, 67–70 (2000) (rejecting the notion that any third party seeking visitation has standing and shall be granted visitation if in the child's best interest, holding instead that courts should defer to the parents' decision).

313. See e.g., Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).

314. Scholars have commented on the absence of such balancing. See, e.g., Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377, 1388 (1994):

[W]ithin any constitutional analysis, there is the possibility of conflicting individual constitutional rights. So it is possible that the parent's constitutional rights would conflict with the child's constitutional rights, necessitating a balancing of rights. However, this approach has been relatively rare, perhaps because the state is invested with *parens*