

## Non-Parent Visitation in Louisiana: A Post-Troxel View of Article 136

### I. INTRODUCTION

A parent's right to control and direct the upbringing of a child is one of the oldest and most fundamental of the individual liberties afforded by the Constitution.<sup>1</sup> The United States Supreme Court has recognized this right within the Due Process Clause of the Fourteenth Amendment,<sup>2</sup> allowing parents the right to "establish a home and bring up children."<sup>3</sup> The right to make visitation decisions regarding the child—determining who can see the child and when they can do so—is inherent in the power to direct a child's upbringing.<sup>4</sup> On the other hand, governments have a legitimate interest in promoting and maintaining extended family relationships between children and their extended family.<sup>5</sup> To accomplish this legitimate purpose, state governments have enacted statutes that allow a child's grandparents or collateral relatives to petition for visitation rights in certain situations.<sup>6</sup> In passing such legislation, however, state legislatures must not unconstitutionally infringe on the parent's right to direct the rearing of the child. In sum, in order to withstand constitutionality challenges, grandparental and third party visitation statutes must strike a balance between the government's interest in maintaining extended family relationships and a parent's constitutional right to direct the "care, custody, and control of their children."<sup>7</sup>

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1. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). *See also* *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).

2. U.S. CONST. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.* (emphasis added).

3. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

4. *See Pierce*, 268 U.S. at 535 ("The 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.").

5. *Reinhardt v. Reinhardt*, 720 So. 2d 78, 80 (La. App. 1st Cir. 1998).

6. *See, e.g.*, LA. CIV. CODE ANN. art. 136 (1999); ARK. CODE ANN. § 9-13-103 (West 2004).

7. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

The Louisiana Legislature has addressed these two competing interests in the Louisiana Civil Code<sup>8</sup> and its revised statutes.<sup>9</sup> Enacted in 1993, both provisions provide a means for third party family members to petition for visitation rights to a child relative. Civil Code article 136 allows grandparents, step-grandparents, former step-parents, and relatives by blood or affinity to seek reasonable visitation rights.<sup>10</sup> The listed parties can be granted visitation rights in “extraordinary circumstances” and when the visitation is in the child’s best interest, and article 136 provides an illustrative list of five factors to be considered by a court in determining if the visitation is within the child’s best interest.<sup>11</sup> Alternatively, Louisiana Revised Statutes section 9:344 provides standing for a child’s grandparents and siblings to seek reasonable visitation in cases where one parent has died, has been interdicted, or has been incarcerated.<sup>12</sup> The statute allows visitation to those parties both when the child’s parents were married then divorced or separated and when the child’s parents lived in open concubinage before the death or incarceration of a parent.<sup>13</sup> Finally, in the case of a conflict between these two provisions, section C of article 136 defers to Louisiana Revised Statutes section 9:344.<sup>14</sup> The latter statute, therefore, applies where a parent is dead, interdicted, or incarcerated and the absent parent’s parent or a child’s sibling seeks visitation of the child. In other “extraordinary circumstances,”<sup>15</sup> article 136 provides any relative the right to petition for visitation.

Of the two legislative enactments, the first to come under constitutional attack was article 136. In *Reinhardt v. Reinhardt*, the Louisiana First Circuit Court of Appeal held that the article did not substantively intrude on a mother’s right to deny visitation to her child’s paternal relatives.<sup>16</sup> According to the majority, article 136 was narrowly drawn to allow visitation only in “set, restrictive conditions.”<sup>17</sup> Therefore, the article did not unduly infringe on the mother’s constitutional right.

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8. LA. CIV. CODE ANN. art. 136.

9. LA. REV. STAT. ANN. § 9:344 (2008).

10. LA. CIV. CODE ANN. art. 136(B).

11. *Id.*

12. LA. REV. STAT. ANN. § 9:344.

13. *Id.*

14. LA. CIV. CODE ANN. art. 136(C).

15. LA. CIV. CODE ANN. art. 136(B).

16. *Reinhardt v. Reinhardt*, 720 So. 2d 78, 80 (La. App. 1st Cir. 1998).

17. *Id.*

The *Reinhardt* decision, however, preceded the United States Supreme Court's landmark decision in *Troxel v. Granville*,<sup>18</sup> a case in which the Court struck down an overly broad Washington state statute providing standing for anyone to petition for visitation rights at any time.<sup>19</sup> Since *Troxel*, a number of state courts have addressed the constitutionality of their own grandparental and third party visitation statutes, including Louisiana.<sup>20</sup> However, Louisiana's appellate courts have only addressed Louisiana Revised Statutes section 9:344 in the post-*Troxel* context,<sup>21</sup> while no Louisiana court has directly examined article 136 after the 1998 *Reinhardt* decision. As recently as 2007, the Louisiana First Circuit has recognized the potential overbreadth of article 136, suggesting that the article may improperly infringe on a parent's substantive due process right.<sup>22</sup> The article is clearly more narrowly drawn than the all-inclusive Washington statute,<sup>23</sup> but it is also broader in scope than section 9:344, which more strictly limits both the class of persons permitted to seek visitation and the circumstances in which they can do so.<sup>24</sup> In order for article 136 to withstand a constitutional challenge, the Louisiana Supreme Court must both impose a heightened burden of proof on the petitioning party to show extraordinary circumstances and indulge a strong presumption that a parent's visitation decisions are made in the child's best interest.<sup>25</sup> Without observing these principles, the application of article 136 may lead to unconstitutional state court review of parents' fundamental child-rearing decisions.

This Note's purpose is two-fold: (1) to provide an overview of grandparental and third party visitation case law from Louisiana appellate courts, other state high courts, and the Supreme Court's *Troxel* decision, and (2) to address the facial constitutionality and the potential unconstitutional application of Louisiana Civil Code article 136 in light of the rulings from these courts. Part II of this

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18. *Troxel v. Granville*, 530 U.S. 57 (2000) (decided two years after the Louisiana first circuit opinion in *Reinhardt*).

19. *Id.*

20. *See infra* Part III.A–B.

21. *See Dupre v. Dupre*, 834 So. 2d 1272 (La. App. 3d Cir. 2002); *Galjour v. Harris*, 795 So. 2d 350 (La. App. 1st Cir.), *writ denied*, 793 So. 2d 1229 (La.), *cert. denied*, 534 U.S. 1020 (2001).

22. *Shaw v. Dupuy*, 961 So. 2d 5, 10–11 (La. App. 1st Cir. 2007) (Whipple, J., concurring) (holding that article 136 allows any relative to seek visitation by subjecting the parent's visitation decisions to state court review).

23. WASH. REV. CODE ANN. § 26.10.160(3) (West 1994).

24. LA. REV. STAT. ANN. § 9:344 (2008) (allowing only grandparents and siblings of a child to seek visitation, and limiting the situations to the death, interdiction, or incarceration of one parent).

25. *See infra* Part IV.B.

Note details the Supreme Court's *Troxel* decision. Part III presents Louisiana's jurisprudential reaction to *Troxel* concerning both Louisiana statutory sources for grandparental and third party visitation rights. Part IV examines post-*Troxel* state decisions in Pennsylvania, New York, and Minnesota, including a discussion of those states' respective visitation statutes in comparison with article 136. Part V analyzes article 136 in light of the decisions discussed in Parts II, III, and IV and provides constitutionally sound points of law for interpreting article 136.

## II. THE *TROXEL V. GRANVILLE* DECISION

### *A. Background: The Changing American Family*

In the decades leading up to the Supreme Court's decision in *Troxel*, the definition of the "traditional" American family drastically changed. An increase in broken families, a higher divorce rate, an increase in children living in grandparents' homes, and an increasingly mobile society have factored into the legislative move toward preventing the deterioration of the traditional family.<sup>26</sup> As part of that effort, grandparental and third party visitation statutes seek to foster and maintain the relationship between a child and the paternal or maternal relatives, an objective that courts have held is a legitimate governmental interest.<sup>27</sup> In fact, all fifty states eventually adopted statutes that provided some form of third party visitation.<sup>28</sup> However, the clash between state interests and parental fundamental rights eventually led to the constitutional challenge in *Troxel*, where a single mother fought against the visitation rights of her daughters' paternal grandparents.<sup>29</sup> The following section outlines the facts, arguments, and constitutional issues at play in that case.

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26. Mark Moody, *Constitutional Questions Regarding Grandparent Visitation and Due Process Standards*, 60 MO. L. REV. 195 (1995).

27. See Reinhardt v. Reinhardt, 720 So. 2d 78, 80 (La. App. 1st Cir. 1998) ("After the fragmentation of the children's primary family through divorce, the state has a legitimate and substantial interest in encouraging beneficial extended family relationships with children.").

28. See Robyn L. Ginsberg, *Grandparent's Visitation Rights: The Constitutionality of New York's Domestic Relations Law Section 72 After Troxel v. Granville*, 65 ALB. L. REV. 205, 205 n.2 (2001).

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

*B. The Supreme Court's Decision**1. Justice O'Connor's Plurality Opinion: Facts, Procedural History, and Judgment*

*Troxel's* facts are simple. Tommie Granville and Brad Troxel were involved in a relationship but remained unmarried.<sup>30</sup> The couple had two daughters, Isabella and Natalie.<sup>31</sup> After the relationship ended, Brad lived with his parents and frequently brought his daughters home for weekend visits until two years later when Brad committed suicide.<sup>32</sup> His parents (the plaintiffs) enjoyed visitation with their granddaughters on a regular basis for a period after Brad's death, but soon thereafter Tommie sought to limit their visitation to one visit per month.<sup>33</sup> Those circumstances led the plaintiffs to file a petition against Tommie in Washington state court, seeking greater visitation rights under Washington Revised Code sections 26.09.240 and 26.10.160(3).<sup>34</sup> In the trial court, the plaintiffs were awarded visitation with their granddaughters for one weekend per month, one week during the summer, and four hours on each of the plaintiffs' birthdays, a judgment which Tommie appealed.<sup>35</sup> After remanding the case back to the trial court for written findings of fact and conclusions of law, the Washington Court of Appeals reversed the visitation order, finding that the plaintiffs lacked standing because the action was not brought pursuant to a custody action.<sup>36</sup> The Washington Supreme Court granted review and consolidated the case with two other visitation cases,<sup>37</sup> holding first that the plaintiff grandparents had standing despite the lack of a custody proceeding.<sup>38</sup> Further, the Washington Supreme Court held that Washington Revised Statutes section 26.10.160(3)<sup>39</sup> (hereinafter "Washington statute")

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30. *Id.* at 60.

31. *Id.*

32. *Id.*

33. *Id.* at 60–61.

34. *Id.* at 61. Only the latter statute, Washington Revised Statutes section 26.10.160(3), was at issue in the Supreme Court's decision.

35. *Id.*

36. *Id.* at 61–62.

37. *In re Custody of Smith*, 969 P.2d 21 (Wash. 1998), *aff'd* *Troxel v. Granville*, 530 U.S. 57 (2000).

38. *Id.* at 26 ("By its plain language, [the statute] gives nonparents an avenue to obtain visitation rights with children outside of a custody proceeding.")

39. WASH. REV. STAT. ANN. § 26.10.160(3) (West 1994): "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when

was facially unconstitutional on two grounds. First, according to that Court, the Constitution allows court intervention in the parent's right to rear a child *only* in order to prevent harm to the child. Since the Washington statute contained no required showing of harm to the child, it failed that constitutional standard.<sup>40</sup> Second, the statute was grossly overbroad in allowing "any" third party the right to petition for visitation at "any time."<sup>41</sup> With four Washington Supreme Court justices dissenting, the United States Supreme Court granted certiorari.<sup>42</sup>

Justice O'Connor authored the plurality opinion in *Troxel*.<sup>43</sup> The opinion set out several important considerations that protect against an unconstitutional infringement on a parent's due process right. First, O'Connor argued, a fit parent's child-rearing decisions are presumed to be made in the best interest of the child.<sup>44</sup> Accordingly, such a child rearing decision should be afforded great deference by the courts, for a court's determination should not automatically prevail over a fit parent's estimation of a child's best interest.<sup>45</sup> The manner in which the Washington statute was drafted did not give any greater weight to the fit parent's decision than to a court's determination as to a child's best interest.<sup>46</sup> Second, the Washington statute allowed any visitation decision to be challenged and subjected to state court review by anyone at any time.<sup>47</sup> To allow challenges by any third party to potentially all decisions regarding a child's visitation would unconstitutionally infringe on the parent's right to make visitation decisions within the framework of the parental due process right.<sup>48</sup> Finally, a positive burden should be placed on the petitioner to prove that visitation would be in the best interest of the child.<sup>49</sup> The lower courts' interpretation of the Washington statute erroneously placed the burden on the fit parent to disprove that visitation would be in the child's best interest (in other words, to prove that visitation

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visitation may serve the best interest of the child whether or not there has been any change of circumstances."

40. *Smith*, 969 P.2d at 30.

41. *Id.* at 27-31.

42. *Troxel v. Granville*, 527 U.S. 1069 (1999) (granting certiorari).

43. *Troxel v. Granville*, 530 U.S. 57, 60-75 (2000).

44. *Id.* at 68. In the instant case, there was no allegation that defendant was not a fit parent.

45. *Id.* at 68-69.

46. *Id.* at 67.

47. *Id.*

48. *Id.*

49. *Id.* at 68.

would “adversely impact” the child).<sup>50</sup> This misplaced burden of proof undermines the above-mentioned deference<sup>51</sup> that should be given to the visitation decisions of fit custodial parents.

As applied to the facts, the Washington statute’s shortcomings infringed on the defendant’s parental rights. Tommie Granville’s decision to limit the plaintiffs’ visitation with her daughters was not given proper weight by the statute. As a fit parent, her visitation decisions—presumptively made in her daughters’ best interest—were subject to court review, and her determination of those interests was trumped by the Washington Supreme Court’s view. Her failure to show that the plaintiffs’ visitation negatively impacts her daughters ultimately factored against her in the trial court’s visitation order. Because of the Washington statute’s overbreadth, misplaced burden, and lack of parental presumption, Tommie’s fundamental parental rights were unduly affected.<sup>52</sup> Therefore, the Washington statute was held unconstitutional in its application in *Troxel*.<sup>53</sup>

## 2. *Concurring and Dissenting Opinions*

Justices Ginsburg, Breyer, and Rehnquist joined Justice O’Connor’s plurality opinion, while Justices Souter<sup>54</sup> and Thomas<sup>55</sup> wrote concurring opinions and Justices Stevens,<sup>56</sup> Scalia,<sup>57</sup> and Kennedy<sup>58</sup> dissented. The number of written opinions in *Troxel* illustrates both the conflicting issues and differing viewpoints on Justice O’Connor’s considerations. This section briefly examines those points emphasized by the concurring and dissenting opinions.

The two concurrences in *Troxel* demonstrate several other important considerations in a constitutional analysis of grandparental and third party visitation statutes. First, Justice Souter agreed with the Washington Supreme Court’s judgment that

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50. *Id.* at 69 (“In effect, the [Washington Supreme Court] judge placed on Granville, the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughters.”).

51. *Id.* at 67.

52. *Id.* at 75.

53. *Id.*

54. *Id.* at 75–79 (Souter, J., concurring).

55. *Id.* at 80 (Thomas, J., concurring).

56. *Id.* at 80–91 (Stevens, J., dissenting).

57. *Id.* at 91–93 (Scalia, J., dissenting). Justice Scalia believes that he, as a judge, has no power to deny legal effect to laws that seek to inhibit the parental right to control a child’s rearing. His opinion is not discussed further in this article.

58. *Id.* at 93–102 (Kennedy, J., dissenting).

the Washington statute at issue was unconstitutional *on its face*.<sup>59</sup> According to Justice Souter, the plain wording of the Washington statute, rather than its application to a particular set of facts, was the source of the statute's unconstitutional overbreadth.<sup>60</sup> Second, Justice Souter recognized the Washington Supreme Court's power to narrowly construe its own state statute when analyzing the statute's constitutionality.<sup>61</sup> Finally, Justice Thomas expressed the need to apply a strict standard of scrutiny to statutes that infringe on a parent's fundamental right to rear a child, a standard that the plurality failed to establish.<sup>62</sup>

Justice Stevens's dissenting opinion took exception to Justice Souter's concurring opinion. Justice Stevens stated that Justice Souter's finding of facial unconstitutionality required that the Washington statute be unconstitutional in *all* of its applications.<sup>63</sup> Since the Washington statute could be constitutionally applied in certain situations, the Washington courts had the responsibility of determining if the application of the statute was constitutional in this particular case.<sup>64</sup>

The plurality opinion, along with the concurring and dissenting opinions discussed in this section, present multiple issues bearing on the constitutionality of third party visitation statutes. The varying *Troxel* opinions are indications that the law on third party visitation statutes is far from settled. The following section provides an overview of these issues as well as a perspective on the impact the *Troxel* decision made on state visitation statutes.

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59. *Id.* at 75 (Souter, J., concurring). *See also supra* Part II.B.1.

60. *Troxel*, 530 U.S. at 76 (Souter, J., concurring).

61. As mentioned earlier, the Washington Supreme Court held its statute unconstitutional because it contained no threshold showing of harm to the child and allowed any person to petition for visitation under any circumstances. *See supra* Part II.B.1. In Justice Souter's opinion, imposing such requirements on the Washington statute was within the authority of that state's high court. *Troxel*, 530 U.S. at 79 (Souter, J., concurring).

62. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

63. *Id.* at 85 (Stevens, J., dissenting). According to this dissent, a myriad of circumstances exist where a relative seeking visitation was a primary caretaker of the child at one point, and allowing an action for visitation in those situations would not be unconstitutionally burdensome to the parent. *Id.*

64. *Id.* at 81–82 (Stevens, J., dissenting) (“The task of reviewing a trial court's application of a state statute to the particular facts of a case is one that should be performed in the first instance by the state appellate courts.”).

C. Summary: Open-Ended Issues from *Troxel*

1. Relevant Issues in Third Party Visitation

Several key issues emerged from *Troxel* that require consideration in a constitutional analysis of any grandparental or third party visitation statute. Although *Troxel* may not have settled all of these issues (in fact, one could argue that the Supreme Court opinion raised more issues than it settled), the considerations are important in distinguishing a constitutionally sound visitation statute from an overbroad, unconstitutional one.

There are several issues discussed in the plurality opinion,<sup>65</sup> the plurality's solutions to which were uncontroverted by the other justices. First, *Troxel* focuses on the presumption that a fit parent makes child-rearing decisions based on the parent's estimation of the child's best interest.<sup>66</sup> If a parent is found to be an adequate caretaker (as the defendant was in *Troxel*), the court has no interest in imposing its determination of the child's best interest in favor of the parent's decisions.<sup>67</sup> Without the presumption, *any* visitation decision by a parent, however reasonable, may be overruled after state court review, allowing a judge to decide a child's best interest despite the parent's superior position to judge those interests.<sup>68</sup> This presumption is crucial to the parental due process right.

Second, a heightened scrutiny standard is appropriate for considering statutes that tend to infringe on fundamental rights. The parental right to direct the "care, custody, and control"<sup>69</sup> is a fundamental right implicit in the Fourteenth Amendment.<sup>70</sup> Although the exact standard is unclear from the plurality in *Troxel*, Justice Thomas's concurrence states that strict scrutiny should be employed when examining statutes that impose on fundamental liberties—a standard that is uncontested by other *Troxel* opinions.<sup>71</sup> It is apparent from *Troxel*, however, that some form of heightened standard should be used when substantive due process rights are at issue.<sup>72</sup>

Third, the *Troxel* opinions recognize that statutory overbreadth, particularly with regard to the class of persons to which a third party visitation statute provides standing, will lead to

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65. *Id.* at 60–75 (plurality opinion).

66. *Id.* at 68 (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

67. *Id.* at 68–69.

68. *Id.* at 67.

69. *Id.* at 65.

70. U.S. CONST. amend. XIV, § 1.

71. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

72. *Id.* at 65 (plurality opinion).

unconstitutional infringement on parental rights. At the very least, one can learn from *Troxel* that a third party visitation statute that allows *any* person to petition for visitation rights is at a high risk of invalidity,<sup>73</sup> either on its face or in its application.

*Troxel* also raises two issues that divided the Supreme Court. First, regarding statutory overbreadth, *Troxel* found that the statute in question was unconstitutional in its application to the relevant facts.<sup>74</sup> The Washington Supreme Court, as well as Justice Souter, believed that the Washington statute was facially unconstitutional.<sup>75</sup> If a statute is facially unconstitutional, it is unconstitutional in all instances—no case-by-case inquiry is needed to determine if a parent's constitutional rights were violated in the particular circumstances. Since the *Troxel* judgment declined to find the Washington statute facially invalid, presumably all other third party visitation statutes more narrowly drawn than the Washington statute must be examined on a case-by-case basis. Depending on the particular circumstances, a case-by-case analysis may greatly differ from an analysis focusing solely on a statute's facial constitutionality.

Finally, *Troxel* brings to light certain issues regarding burdens of proof. According to the plurality, a burden of disproving that visitation is in the child's best interest should not be placed on the defendant seeking to deny or limit visitation.<sup>76</sup> Whether the party seeking visitation bears a burden of proving that the visitation is in the child's best interest is unclear from the *Troxel* decision.<sup>77</sup> The burden of proving the child's best interest corresponds with the fit parent presumption. Therefore, if a fit parent's visitation decision is presumed to be in the child's best interest, that parent should have no burden to prove that the decision was *in fact* made in the child's best interest. If such a presumption exists, the petitioning party bears the burden of rebutting that presumption. This Note will address these issues in the analysis of Louisiana Civil Code article 136.<sup>78</sup>

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73. *Id.* at 67.

74. *Id.* at 75 (“We therefore hold that the application of [section] 26.10.160(3) to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her daughters.”).

75. *In re Custody of Smith*, 969 P.2d 21 (Wash. 1998), *aff'd* *Troxel v. Granville*, 530 U.S. 57 (2000); *Troxel*, 530 U.S. at 76–77 (Souter, J., concurring).

76. *Troxel*, 530 U.S. at 69–70.

77. *Id.*

78. *See infra* Part IV.

## 2. *Troxel's Immediate Impact*

What effect does *Troxel* have on grandparental and third party visitation statutes? Quite simply, no state visitation statute is completely safe from constitutional challenge. Even if a statute is narrowly drawn to avoid facial invalidity, situations may exist where such a statute could unconstitutionally infringe on a parent's fundamental child-rearing right. Had the Supreme Court not struck down the Washington statute in *Troxel*, nearly all third party visitation statutes would appear constitutionally sound, given the blatant overbreadth of the Washington statute. *Troxel* appears to have set an extreme on one end of the spectrum of constitutionality, but it failed to draw a distinct line in the sand between narrowly drawn valid statutes and overbroad unconstitutional statutes.

The next section will attempt to find that fine line through an examination of the jurisprudence from Louisiana and other states. Louisiana's reaction to *Troxel* and recent state supreme court decisions shed some light on the constitutional viability of Civil Code article 136.

### III. STATE COURT INTERPRETATIONS OF NON-PARENT VISITATION STATUTES

In the wake of the *Troxel* decision in 2000, many state courts were confronted with constitutionality questions in reference to their respective grandparental or third party visitation statutes. The issues presented by *Troxel* have been addressed and tackled by numerous courts, including at least three state supreme courts in the very recent past.<sup>79</sup> In order to gauge the fallout from the first (and only) United States Supreme Court decision concerning the constitutionality of third party visitation statutes,<sup>80</sup> an examination of these recent state high court decisions and Louisiana's jurisprudence regarding both of its visitation provisions is in order. The subsequent sections will discuss Louisiana's pre- and post-*Troxel* jurisprudence with respect to Civil Code article 136<sup>81</sup> and Louisiana Revised Statutes section 9:344,<sup>82</sup> followed by recent

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79. See *infra* Part III.B. See, e.g., Soohoo v. Johnson, 731 N.W.2d 815 (Minn. 2007); E.S. v. P.D., 863 N.E.2d 100 (N.Y. 2007); Harrold v. Collier, 836 N.E.2d 1165 (Ohio 2005); Hiller v. Fausey, 904 A.2d 875 (Pa. 2006), *cert. denied*, 127 S. Ct. 1876 (2007).

80. *Troxel*, 530 U.S. 57.

81. LA. CIV. CODE ANN. art. 136 (1999).

82. LA. REV. STAT. ANN. § 9:344 (2008).

decisions by the high courts of Ohio, Pennsylvania, New York, and Minnesota.<sup>83</sup>

*A. Louisiana Appellate Jurisprudence*

*1. Pre-Troxel: Reinhardt v. Reinhardt*<sup>84</sup>

As discussed in Part I of this Note, Louisiana has two legislatively-enacted sources for grandparental and third party visitation rights: Civil Code article 136<sup>85</sup> and Louisiana Revised Statutes section 9:344.<sup>86</sup> In pertinent part, article 136 states: “Under extraordinary circumstances, a relative, by blood or affinity, or a former step[-]parent or step[-]grandparent, not granted custody of the child may be granted reasonable visitation rights if the court finds that it is in the best interest of the child . . . .”<sup>87</sup>

The article allows any *family* member to seek visitation of a child, but only under “extraordinary circumstances” and only if the visitation “is in the best interest of the child.”<sup>88</sup> In comparison to the Washington statute<sup>89</sup> at issue in *Troxel*, article 136 most noticeably limits the class of persons eligible to petition for visitation from “any person”<sup>90</sup> to “any relative by blood or affinity,” including former step-grandparents or grandparents.<sup>91</sup> Article 136 also limits the circumstances for bringing a visitation action from “any time”<sup>92</sup> in the Washington statute to only “extraordinary circumstances.”<sup>93</sup> At first glance, article 136 is obviously more narrowly drawn than the Washington statute that was found unconstitutional in *Troxel*.<sup>94</sup> Insightful Louisiana jurisprudence regarding article 136 is limited to *Reinhardt v. Reinhardt*,<sup>95</sup> a case decided by the Louisiana First Circuit Court of Appeal two years prior to *Troxel*.

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83. See *Soohoo*, 731 N.W.2d 815; *E.S.*, 863 N.E.2d 100; *Harrold*, 836 N.E.2d 1165; *Hiller*, 904 A.2d 875.

84. *Reinhardt v. Reinhardt*, 720 So. 2d 78 (La. App. 1st Cir. 1998).

85. LA. CIV. CODE ANN. art. 136. The constitutionality of this provision is the subject of the analysis portion of this article. See *infra* Part IV.

86. LA. REV. STAT. ANN. § 9:344.

87. LA. CIV. CODE ANN. art. 136(B).

88. *Id.*

89. WASH. REV. STAT. ANN. § 26.10.160(3) (West 1994).

90. *Id.*

91. LA. CIV. CODE ANN. art. 136(B).

92. WASH. REV. STAT. ANN. § 26.10.160(3).

93. LA. CIV. CODE ANN. art. 136(B).

94. See *Huber v. Midkiff*, 838 So. 2d 771, 778 (La. 2003) (Weimer, J., concurring).

95. *Reinhardt v. Reinhardt*, 720 So. 2d 78 (La. App. 1st Cir. 1998).

In *Reinhardt*, a mother appealed a trial court visitation order, seeking to terminate visitation between her children and their paternal relatives.<sup>96</sup> The appellant challenged the constitutionality of article 136, which was the only issue on appeal.<sup>97</sup> Applying a strict scrutiny test, Judge Fitzsimmons held that article 136 was constitutional, finding that the provision was narrowly drawn to allow visitation “only under set, restrictive conditions.”<sup>98</sup> The *Reinhardt* opinion, however, also announced a structure to ensure constitutional application of article 136. When determining a visitation order, Judge Fitzsimmons explained, the trial court should first find “extraordinary circumstances” required by the provision<sup>99</sup> and should include a detailed factual description of those circumstances in its written or oral reasons for judgment.<sup>100</sup> After this initial finding of extraordinary circumstances, the trial court must then determine if the sought-after visitation is in the child’s best interest, facts which should also be included in the court’s written reasons.<sup>101</sup> Finding extraordinary circumstances before examining the child’s best interest is critical to a constitutionally acceptable application of article 136, according to *Reinhardt*.<sup>102</sup> Finally, the burden of proving both the existence of “extraordinary circumstances” and that visitation serves the “best interest of the child” should be placed on the petitioning party to protect the parent’s due process right.<sup>103</sup> By setting forth a standard of application for article 136, the *Reinhardt* majority also recognized the potential unconstitutional application of the article in certain situations.<sup>104</sup> Failure to make these required findings in the correct order or misplacement of the dual burden of proof may lead to a visitation award that infringes on a parent’s fundamental right.<sup>105</sup>

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96. *Id.* at 79.

97. *Id.* Although the father was incarcerated, Louisiana Revised Statute section 9:344 was not applicable presumably—as the facts are incomplete—because the parties seeking visitation were not parents or siblings of the incarcerated father.

98. *Id.* at 79–80.

99. LA. CIV. CODE ANN. art. 136(B) (1999).

100. *Reinhardt*, 720 So. 2d at 80.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* (“To avoid an unconstitutional application of article 136B, the trial court must be protective of the parent’s fundamental right of privacy in child rearing and cognizant of the ‘extraordinary circumstances’ and ‘best interest’ codal requirements.”).

105. *Id.*

Judge Guidry dissented from the *Reinhardt* opinion.<sup>106</sup> In his opinion, he argued that the state interest in “fostering extended family relationships”<sup>107</sup> may be legitimate, but it does not reach the level of “compelling” to survive a strict scrutiny test.<sup>108</sup> The dissent postulated that a compelling state interest in article 136 would be to “protect the health and welfare of children,” an interest that would require a finding that a denial of visitation with the petitioning party would cause “substantial harm to the child.”<sup>109</sup> Without this heightened finding of substantial harm, the state interest in maintaining relationships between child and relatives is crushed by a parent’s constitutional right to direct the upbringing of a child.<sup>110</sup> Therefore, according to the *Reinhardt* dissent, article 136 is unconstitutional.<sup>111</sup>

Even before *Troxel* came down, the Louisiana first circuit was split on the constitutionality of article 136. Although holding the article constitutional, the majority in *Reinhardt* recognized the potential for unconstitutional infringement in the application of article 136,<sup>112</sup> and the *Reinhardt* dissent took issue with the provision’s *facial* constitutionality.<sup>113</sup> Using hindsight and the plurality opinion from *Troxel*,<sup>114</sup> a facial challenge to article 136 would be a long shot. The unconstitutional application of article 136, however, is still a viable argument in light of *Troxel*.

## 2. Post-Troxel: Louisiana Revised Statutes Section 9:344 and Shaw v. Dupuy<sup>115</sup>

Virtually all of Louisiana’s post-*Troxel* jurisprudence regarding the constitutionality of its grandparental and third party visitation statutes focuses on Louisiana Revised Statutes section 9:344.<sup>116</sup> Further, the Louisiana Supreme Court has yet to rule on the

106. *Id.* at 81 (Guidry, J., dissenting).

107. *Id.* (citing to Judge Fitzsimmons’ majority opinion).

108. *Id.*

109. *Id.*

110. *Id.* (“[T]he state’s interest here may be legitimate in fostering extended family relationships, but it is not compelling and clearly does not outweigh the parents’ constitutionally protected right to autonomy in child rearing decisions.”).

111. *Id.*

112. *Id.* at 80.

113. *Id.* at 81 (Guidry, J., dissenting).

114. *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (finding that Washington Revised Statutes section 26.10.160(3) was unconstitutional in its application to the circumstances and not facially invalid).

115. *Shaw v. Dupuy*, 961 So. 2d 5 (La. App. 1st Cir.), *writ denied*, 951 So. 2d 1092 (La. 2007).

116. LA. REV. STAT. ANN. § 9:344 (2008).

constitutionality of either article 136 or section 9:344, and nearly all of the Louisiana appellate decisions on this issue have been decided by the first circuit.<sup>117</sup> Louisiana Revised Statutes section 9:344 provides a child's grandparents and siblings the right to petition for visitation when one of the child's parents is deceased, interdicted, or incarcerated.<sup>118</sup> The principal case concerning the constitutionality of section 9:344 is *Galjour v. Harris*.<sup>119</sup>

In *Galjour*, the first circuit declined to apply the holding in *Troxel* to a court visitation order pursuant to Louisiana Revised Statutes section 9:344.<sup>120</sup> According to the majority opinion, Louisiana's statute was more narrowly drawn, limiting both the class of persons with standing (grandparents and siblings) and the circumstances in which visitation could be sought (death, interdiction, or incarceration of a parent).<sup>121</sup> Also, a grant of visitation under section 9:344 did not infringe on the parent's constitutional right or the parent's relationship with the child because the visitation must be "reasonable" and "in the best interest of the child."<sup>122</sup> In distinguishing Louisiana Revised Statutes section 9:344 from the Washington statute in *Troxel*,<sup>123</sup> the first circuit noted that the former was limited in scope to grandparents and siblings in distinct circumstances whereas the latter opened the door to anyone at anytime.<sup>124</sup> The Louisiana Legislature limited the scope of section 9:344,<sup>125</sup> most probably in an attempt to protect the parental right to direct a child's upbringing while promoting the state interest in "fostering extended family relationships"<sup>126</sup> in certain defined circumstances.

The *Galjour* rationale was applied again by the first circuit in *Wood v. Wood*.<sup>127</sup> In that case, the first circuit affirmed its decision in *Galjour* that Louisiana Revised Statutes section 9:344 was narrowly drawn to limit challenges to a fit parent's visitation

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117. The only other Louisiana appellate circuit to address the constitutionality of either provision is the third circuit in *Dupre v. Dupre*, 834 So. 2d 1272 (La. App. 3d Cir. 2002).

118. LA. REV. STAT. ANN. § 9:344.

119. *Galjour v. Harris*, 795 So. 2d 350 (La. App. 1st Cir.), writ denied, 793 So. 2d 1229 (La.), cert. denied, 534 U.S. 1020 (2001).

120. *Id.* at 358.

121. *Id.*

122. *Id.*; LA. REV. STAT. ANN. § 9:344.

123. WASH. REV. STAT. ANN. § 26.10.160(3) (West 1994).

124. *Id.*; *Galjour*, 795 So. 2d at 358.

125. *Galjour*, 795 So. 2d at 358.

126. See *Reinhardt v. Reinhardt*, 720 So. 2d 78, 81 (La. App. 1st Cir. 1998) (Guidry, J., dissenting).

127. *Wood v. Wood*, 835 So. 2d 568 (La. App. 1st Cir. 2002), writ denied, 840 So. 2d 565 (La. 2003).

decisions.<sup>128</sup> *Wood*, however, took *Galjour* a step further by requiring that the party seeking visitation under section 9:344 bear the burden of proving that the visitation is “reasonable” and in the child’s best interest.<sup>129</sup> This placement of a dual burden of proof on the nonparent seeking visitation reflects the rationale employed in *Troxel*, where the Supreme Court reversed the state court’s placement of a burden on the parent by placing a burden on the nonparent to show that a change in visitation would suit the child’s best interest.<sup>130</sup> The Louisiana third circuit also applied *Galjour*’s principles in *Dupre v. Dupre*,<sup>131</sup> where Louisiana Revised Statutes section 9:344 was again ruled constitutional based on its narrow statutory language.<sup>132</sup> Given the *Galjour*, *Wood*, and *Dupre* decisions, Louisiana Revised Statutes section 9:344, when compared to the Washington statute,<sup>133</sup> is drawn narrowly enough to avoid an unconstitutional infringement on parental due process rights.

After the *Reinhardt* decision in 1998, Louisiana courts have yet to decide on the constitutionality of article 136 in a post-*Troxel* setting. In the *Dupre* case, the Louisiana Third Circuit Court of Appeal stated—in dicta and without ruling on article 136 or examining the Article through the veil of *Troxel*—that article 136 had been challenged and upheld in *Reinhardt*.<sup>134</sup> In 2007, however, a concurring opinion in *Shaw v. Dupuy*<sup>135</sup> reignited the issue in the context of *Troxel*. Judge Whipple of the first circuit stated that a grandparental visitation order unconstitutionally violated a mother’s right to deny such visitation.<sup>136</sup> Particularly interesting, though, was the judge’s comparison of the facts in *Shaw* to the type of circumstances envisioned in *Troxel* in which a visitation statute could lead to an unconstitutional visitation order.<sup>137</sup> This concurring opinion, along with the incomplete case law regarding the constitutionality of article 136, hints at the possibility of unconstitutional application of that article—much akin to the *Troxel* majority’s reasoning for finding the Washington statute unconstitutional as applied.<sup>138</sup>

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128. *Id.* at 572–73.

129. *Id.* at 574; LA. REV. STAT. ANN. § 9:344 (2008).

130. *See supra* Part II.B.1.

131. *Dupre v. Dupre*, 834 So. 2d 1272 (La. App. 3d Cir. 2002).

132. *Id.* at 1280.

133. WASH. REV. STAT. ANN. § 26.10.160(3) (West 1994).

134. *Dupre*, 834 So. 2d at 1280.

135. *Shaw v. Dupuy*, 961 So. 2d 5, 10–11 (La. App. 1st Cir. 2007) (Whipple, J., concurring).

136. *Id.* at 11.

137. *Id.*

138. *See supra* Part II.C.1 for a discussion of the unconstitutional application and alleged facial invalidity of Washington Revised Statutes section 26.10.160(3).

### 3. Summary of Louisiana Issues and Considerations

Looking strictly at Louisiana jurisprudence, two endpoints emerge on the spectrum of constitutionality for grandparental and third party visitation rights. On one end sits the unconstitutional Washington statute in *Troxel*—a seemingly limitless visitation statute allowing anyone to petition for visitation rights at any time. On the other end is Louisiana Revised Statutes section 9:344, the constitutionality of which was upheld under the *Galjour-Wood* rationale. Article 136 falls somewhere in the middle, as it is clearly more narrowly drawn than the Washington statute<sup>139</sup> but arguably sweeps more broadly than section 9:344, as the article can be employed by any relative who can prove “extraordinary circumstances” (a term that is yet undefined in Louisiana visitation law).<sup>140</sup>

Several factors are at issue in this constitutional inquiry, including open-ended issues leftover from *Troxel*.<sup>141</sup> Issues unique to article 136 include the level of scrutiny and the government interest at stake, facial invalidity and unconstitutional application, the scope of standing and circumstances, and a double burden of proof.<sup>142</sup> These issues, along with constitutional issues discussed in the following section, will be discussed with regard to article 136 in Part IV of this Note.

#### B. Other States' Reactions to *Troxel*

Immediately after the *Troxel* decision, several state courts addressed their grandparental and third party visitation laws in light of that ruling.<sup>143</sup> Recently, four state supreme courts in particular have passed on the constitutionality of their respective visitation statutes, with varying results.<sup>144</sup> This section will examine those cases and their relevance to Louisiana's visitation statutes.

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139. WASH. REV. STAT. ANN. § 26.10.160(3) (West 1994).

140. LA. CIV. CODE ANN. art. 136(B) (1999).

141. See *supra* Part II.C.1.

142. See *infra* Part IV.

143. See, e.g., *Stacy v. Ross*, 798 So. 2d 1275 (Miss. 2001); *Brandon L. v. Moats*, 551 S.E.2d 674 (W. Va. 2001); *In re Paternity of Roger D.H.*, 641 N.W.2d 440 (Wis. Ct. App. 2002).

144. See *infra* Part III.B.1–3.

1. *Ohio Supreme Court: Harrold v. Collier*<sup>145</sup>

In *Harrold v. Collier*, Ohio's third party visitation statutes<sup>146</sup> (hereinafter "Ohio statutes") were found constitutional because of their narrow tailoring of the requirements for standing and the required predicate conditions for bringing a visitation claim.<sup>147</sup> The Ohio statutes allowed a wide class of relatives to petition for visitation in the case of a parent's death or in the case of a child born to unmarried parents.<sup>148</sup> However, because the Ohio statutes limited the situations in which this wide class of relatives could bring a visitation action to certain predicate conditions, the statute did not infringe on the parental due process right by allowing all relatives to challenge a parent's visitation decisions.<sup>149</sup>

The *Harrold* case is particularly important to an analysis of article 136 because of the Ohio Supreme Court's examination of standing and predicate condition requirements in conjunction. In *Troxel*, the Washington statute limited neither the class of persons nor the conditions for bringing a visitation petition.<sup>150</sup> The Ohio statutes limit standing to a child's relatives, a class obviously narrower than that allowed in the Washington statute. The Ohio Supreme Court did not state whether this narrower class of persons by itself renders the Ohio statute constitutionally narrow in scope. When read together with its limited conditions requirement, however, the Ohio statute's combination of narrow standing and circumstances allowed the provisions to pass constitutional muster.<sup>151</sup> Similarly, article 136 contains both a limited standing class (i.e. relatives) and limited predicate conditions (i.e. "extraordinary circumstances").<sup>152</sup> If read together, the article may

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145. *Harrold v. Collier*, 836 N.E.2d 1165 (Ohio 2005), *cert. denied*, 547 U.S. 1004 (2006).

146. OHIO REV. CODE ANN. §§ 3109.11–3109.12 (West 2005). *See also id.* § 3109.051; *Harrold*, 836 N.E.2d at 1171:

[Section] 3109.11, applies only in cases where the mother or father of the child is deceased and limits the persons who can petition for nonparental visitation to the parents and relatives of the deceased mother or father. Likewise, [section] 3109.12 applies only when a child is born to an unmarried woman and limits the persons who can petition for nonparental visitation to the parents and relatives of the unmarried mother and to the father and his parents or relatives, if the father has legally acknowledged paternity or a court has declared him to be the father.

147. *Harrold*, 836 N.E.2d at 1171.

148. *See* OHIO REV. CODE ANN. §§ 3109.11–3109.12.

149. *Harrold*, 836 N.E.2d at 1171.

150. *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

151. *Harrold*, 836 N.E.2d at 1171.

152. LA. CIV. CODE ANN. art. 136(B) (1999).

contain sufficiently narrow limitations to avoid unconstitutional overbreadth.

2. *Pennsylvania Supreme Court: Hiller v. Fausey*<sup>153</sup>

In August of 2006, the Pennsylvania Supreme Court decided *Hiller v. Fausey*,<sup>154</sup> upholding the validity of Pennsylvania Consolidated Statutes section 5311 (hereinafter “Pennsylvania statute”).<sup>155</sup> The Pennsylvania statute allowed a child’s grandparents or great-grandparents to petition for visitation rights when one of the child’s parents was deceased and only when such visitation would be in the child’s best interest and would not interfere with the child’s relationship with the surviving parent.<sup>156</sup> Finding the statute valid, the court focused on the limiting language of the Pennsylvania statute (limiting standing to grandparents and great-grandparents) and the presumption that a fit parent acts in a child’s best interest as adequate protections for the parental due process right.<sup>157</sup>

The Pennsylvania Supreme Court’s opinion in *Hiller* contained two important points. First, the court employed a strict scrutiny test as the standard of review for an asserted infringement on a parent’s due process right to make child-rearing decisions.<sup>158</sup> Second, the court recognized a judicially-created presumption in favor of a fit parent’s visitation decisions, the same presumption that the Washington Supreme Court failed to find in the Washington statute.<sup>159</sup> In the *Hiller* majority’s opinion, the presumption favoring the parent and the Pennsylvania statute’s limited standing

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153. *Hiller v. Fausey*, 904 A.2d 875 (Pa. 2006), *cert. denied*, 127 S. Ct. 1876 (2007).

154. *Id.*

155. 23 PA. CONS. STAT. ANN. § 5311 (West 2001):

If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the court upon a finding that partial custody or visitation rights, 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 deceased parent and the child prior to the application.

156. *Id.* The child’s grandparents or great-grandparents can also seek partial custody under the statute.

157. *Hiller*, 904 A.2d at 890.

158. *Id.* at 885 (also recognizing that the plurality in *Troxel* did not articulate such a standard). *See id.* at 885 n.18 (citing cases where other states have applied the strict scrutiny standard when examining third party visitation).

159. *Id.* at 887–88; *Troxel v. Granville*, 530 U.S. 57, 69 (2000).

class were sufficient for the statute to stand against a *Troxel* challenge.<sup>160</sup>

The dissenting judge in *Hiller*, however, believed that a showing of harm or potential harm to the child absent visitation should be required in order to prove a compelling state interest.<sup>161</sup> Without a showing of harm or potential harm, according to the dissent, a court's finding that visitation would be "better or more desirable" for a child would be enough to supersede a parent's opinion regarding visitation.<sup>162</sup> This type of court-ordered visitation would directly contravene the parent's right to make visitation decisions, causing the Pennsylvania statute to be unconstitutional in application in situations where a court's opinion of a child's best interest is favored over the decisions of a fit parent.<sup>163</sup> However, the plurality opinion in *Troxel* declined to examine whether third party visitation statutes must contain such a showing of harm in order to adequately protect parental visitation decisions.<sup>164</sup> The Washington statute contained no harm requirement, and Justice Kennedy's dissent stated that such a requirement was not warranted in every determination of a child's best interest.<sup>165</sup> Viewing the *Hiller* dissent in light of *Troxel*, then, the lack of a harm requirement alone will not invalidate a visitation statute.

The *Hiller* decision makes two points that are critical to a constitutional examination of Civil Code article 136. First, strict scrutiny, the standard mentioned by Justice Thomas's concurrence in *Troxel*,<sup>166</sup> should be the standard of review for challenges to the parental due process right.<sup>167</sup> Second, a showing of harm to the child by denying visitation is not required when a visitation statute is narrow in scope and contains sufficiently high hurdles to overcome the presumption in favor of the parent.<sup>168</sup> According to the rationale from *Hiller*, article 136 must sufficiently limit the

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160. *Hiller*, 904 A.2d at 890.

161. *Id.* at 904 (Cappy, C.J., dissenting).

162. *Id.*

163. *Id.* at 904–05.

164. *Troxel*, 530 U.S. at 73 (“[W]e do not consider the primary constitutional question passed on by the Washington Supreme Court[—]whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.”).

165. *Id.* at 86 (Kennedy, J., dissenting).

166. *Id.* at 80 (Thomas, J., concurring).

167. *Hiller*, 904 A.2d at 885.

168. *Id.* at 890. The dissent disagrees that express requirements in the Pennsylvania statute alone suffice to protect the parental due process right. *Id.* at 904 (Cappy, C.J., dissenting).

class of persons with standing and contain safeguards<sup>169</sup> to protect the presumption that a parent acts in a child's best interest.

3. *Court of Appeals of New York: E.S. v. P.D.*<sup>170</sup>

Six months after the *Hiller* decision, the Court of Appeals of New York decided *E.S. v. P.D.*,<sup>171</sup> a case that confirmed the constitutionality of New York's grandparental visitation statute, New York Domestic Relations Law section 72(1) (hereinafter "New York statute").<sup>172</sup> The New York statute, in pertinent part, allows the parents of a deceased parent (child's grandparents) to seek visitation when such visitation is in the child's best interest and when "circumstances show that conditions exist which equity would see fit to intervene."<sup>173</sup> Much like the state court cases discussed in this Note *supra*,<sup>174</sup> the Court of Appeals of New York declined to find its statute unconstitutional in light of *Troxel* because the New York statute was narrowly tailored and contained a judicially-imposed presumption giving due weight to a parent's visitation decision.<sup>175</sup> The decision in *E.S.* also illustrated an instance where the presumption favoring the fit parent was overcome by a party seeking visitation.<sup>176</sup> The petitioning grandmother, who had acted as a live-in mother for the child between ages four and seven, was able to prove circumstances that

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169. The safeguards in article 136 include the requirements of "extraordinary circumstances" and that visitation be "reasonable." LA. CIV. CODE ANN. art. 136(B) (1999). For a discussion of the adequacy of these safeguards, *see infra* Part IV.A–B.

170. *E.S. v. P.D.*, 863 N.E.2d 100 (N.Y. 2007).

171. *Id.*

172. N.Y. DOM. REL. LAW § 72(1) (McKinney Supp. 2008):

Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to the family court pursuant to subdivision (b) of section six hundred fifty-one of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.

173. *Id.*

174. *See supra* Part III.A–B.

175. *E.S.*, 863 N.E.2d at 105–06.

176. *Id.*

warranted visitation despite the father's decision to deny her visitation.<sup>177</sup>

The *E.S.* decision showed that a presumption in favor of the parent can be read into a visitation statute by a court in order to ensure the statute's constitutional application.<sup>178</sup> In *Troxel*, the Supreme Court recognized that the Washington state courts failed to impose a similar presumption but acknowledged that the state courts could have read a presumption into the statute, possibly making the statute's application constitutional.<sup>179</sup> In *E.S.*, however, the New York state courts correctly observed and weighed the parental presumption before issuing a visitation order under conditions that overcame that presumption.<sup>180</sup> Using this rationale, a visitation order will be upheld, and a visitation statute may be constitutional, if the trial court observes a presumption in favor of a fit parent's visitation decisions.

In the context of Civil Code article 136, the *E.S.* case demonstrates two important points regarding presumptions. First, the *existence* of a presumption favoring the parent's discretion is critical to the constitutional application of a grandparental or third party visitation statute.<sup>181</sup> Second, constitutionally sound drafting does not require that the presumption be expressly included in the text of a visitation statute. State courts have the authority to impose a presumption favoring the parent when applying visitation statutes to help protect the parent's constitutional rights.<sup>182</sup> Therefore, although a presumption that a parent acts in a child's best interest is essential to a visitation statute's constitutionality, the presumption may be absent from the statutory text, as is the case with article 136.<sup>183</sup>

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177. The considerations bearing upon the child's best interest were "the reasonableness of father's objections to grandmother's access to the child, her caregiving skills and attitude toward father, the law guardian's assessment, [and] the child's wishes." *Id.* at 160–61.

178. *Id.* at 159–60.

179. *Troxel v. Granville*, 530 U.S. 57, 69–70 (2000).

180. *E.S.*, 863 N.E.2d at 106.

181. *Id.* at 105 ("[I]f a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least *some special weight* to the parent's own determination." (citing *Troxel*, 530 U.S. at 70)).

182. *See id.* at 106; *Troxel*, 530 U.S. at 69–70.

183. LA. CIV. CODE ANN. art. 136(B) (1999) (statute contains no expression of presumption favoring parent).

4. *Minnesota Supreme Court: Soohoo v. Johnson*<sup>184</sup>

Finally, in May of 2007 the Minnesota Supreme Court invalidated a section of its grandparental visitation statute in *Soohoo v. Johnson*.<sup>185</sup> The ruling struck down subdivision 7 of Minnesota Statutes section 257C.08 (hereinafter “Minnesota statute”), which allowed for the denial of visitation rights if, after a hearing, the court determined that such visitation would interfere with the parent-child relationship.<sup>186</sup> The Minnesota Supreme Court interpreted subdivision 7 of the Minnesota statute as placing the evidentiary burden on the parent denying visitation in an “interference” hearing.<sup>187</sup> First, according to *Soohoo*, the placement of the evidentiary burden on the parent violated the parental due process right by failing to recognize the presumption that a fit parent acts in a child’s best interest.<sup>188</sup> Second, the preponderance of evidence standard expressed in subdivision 7 of the Minnesota statute was insufficient to protect the parental presumption even if the burden were correctly placed on the petitioning party.<sup>189</sup>

As to this second point (the need for a heightened burden of proof), the Minnesota Supreme Court stated that a clear and convincing evidentiary standard is required when the interests at stake in any given proceeding are “particularly important” and “more substantial than mere loss of money.”<sup>190</sup> The Minnesota Supreme Court also recognized, and this Note has also stated,<sup>191</sup> that the parental right to direct a child’s upbringing is one of the most fundamental liberties afforded by the Constitution.<sup>192</sup> Therefore, a clear and convincing evidentiary standard is warranted to protect this sacred right.<sup>193</sup>

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184. *Soohoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007).

185. *Id.* at 824.

186. MINN. STAT. ANN. § 257C.08(7) (West 2007), entitled Establishment of Interference with Parent and Child Relationship: “The court may not deny visitation rights under this section based on allegations that the visitation rights would interfere with the relationship between the custodial parent and the child unless after a hearing the court determines by a preponderance of the evidence that interference would occur.”

187. *Soohoo*, 731 N.W.2d at 824.

188. *Id.*

189. *Id.*

190. *Id.* at 823 (citing *Santosky v. Kramer*, 455 U.S. 745, 756 (1982)).

191. *See supra* Part I.

192. *Soohoo*, 731 N.W.2d at 823. *See also* *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).

193. *Soohoo*, 731 N.W.2d at 824.

In sum, the *Soohee* decision mandated the clear and convincing evidentiary standard for a petitioning party to show circumstances justifying a visitation order. A preponderance of evidence standard does not adequately protect the fundamental right at stake in visitation proceedings. Employing such a low evidentiary standard and placing the evidentiary burden on the parent objecting to the visitation violates that right and effectively nullifies the presumption that the parent is acting in the child's best interest.<sup>194</sup> Therefore, the higher burden of proof and requiring the petitioning party to bear the burden are necessary to prevent an unconstitutional infringement.

Civil Code article 136 contains no express standard of proof. In the absence of statutory language to the contrary, the default evidentiary standard in Louisiana is preponderance of evidence.<sup>195</sup> However, article 136 contains other hurdles that may suffice in lieu of an elevated evidentiary standard.<sup>196</sup> Part IV of this Note will address this issue in more detail.

### *C. Guideposts for Constitutional Considerations*

Common themes emerge when investigating the constitutionality of grandparental and third party visitation rights in both Louisiana case law and that of other states. In conducting such an analysis, a non-parent visitation statute must be written and construed in a manner that will not unconstitutionally infringe on a parent's right to make visitation decisions on behalf of a child. Only then will a visitation statute have a consistent constitutional application. In light of that consideration, and from the cases examined *supra*, this author recognizes two guideposts for judging the constitutionality of a visitation statute in general: (1) A visitation statute must be sufficiently narrow in scope by limiting both the class of persons with standing to seek visitation and the circumstances in which visitation can be sought.<sup>197</sup> (2) A visitation statute must provide heightened burdens of proof, including the

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194. *Id.*

195. See FRANK L. MARAIST, EVIDENCE AND PROOF § 4.2, in 19 LOUISIANA CIVIL LAW TREATISE 48 (2006) [hereinafter MARAIST § 4.2] ("In a civil case the burden of persuasion generally is a 'preponderance of the evidence,' i.e., evidence from which reasonable minds could conclude, more probably than not, the existence of the essential facts.").

196. See *infra* Part IV.B.2.

197. See *Troxel v. Granville*, 530 U.S. 57, 67 (2000); *Shaw v. Dupuy*, 961 So. 2d 5, 10–11 (La. App. 1st Cir. 2007) (Whipple, J., concurring); *Galjour v. Harris*, 795 So. 2d 350, 358 (La. App. 1st Cir.), *writ denied*, 793 So. 2d 1229 (La.), *cert. denied*, 534 U.S. 1020 (2001).

presumption that a parent acts in a child's best interest, to adequately protect the parental due process right.<sup>198</sup>

Supported by pre- and post-*Troxel* state court decisions, these guideposts, along with the overarching consideration that a third party visitation statute be constitutionally applied, provide a roadmap for the following inquiry into the validity of Civil Code article 136. With these conclusions in mind, the following section of this Note specifically examines the constitutionality of Civil Code article 136.

#### IV. ANALYSIS OF ARTICLE 136

The following analysis discusses the constitutional standards and shortcomings of article 136. Subsections A through C examine the article against the guideposts listed in the preceding section. Subsection D provides this author's conclusions of law for a constitutionally sound reading of the article.

##### *A. Statutory Scope*

###### *1. Class of Persons with Standing*

In *Troxel*, part of the majority's reasoning for finding the Washington statute "breathhtakingly broad" was that the provision allowed any third party to petition for visitation rights to a child, regardless of the petitioner's relationship with the child.<sup>199</sup> According to Justice O'Connor's majority opinion, the Washington statute left the door open for any person to subject a parent's visitation decisions to state court review.<sup>200</sup> As mentioned earlier in this Note, *Troxel* provides the extreme example of unconstitutional statutory overbreadth in the context of grandparental and third party visitation rights.<sup>201</sup> On the other end of the spectrum, Louisiana Revised Statutes section 9:344 and similar state statutes discussed in Part III.B represent visitation statutes that provide sufficiently narrow standing.

Paragraph B of Civil Code article 136—the part of the provision applicable to third party visitation—limits standing to "a relative, by blood or affinity, or a former step-parent or step-

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198. See *Troxel*, 530 U.S. at 69–70; *Soohee*, 731 N.W.2d at 824; *Wood v. Wood*, 835 So. 2d 568, 575 (La. App. 1st Cir. 2002), *writ denied*, 840 So. 2d 565 (La. 2003).

199. WASH. REV. CODE ANN. § 26.10.160(3) (West 1994); *Troxel*, 530 U.S. at 67.

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

201. See *supra* Part III.A.3.

grandparent, not granted custody of the child.”<sup>202</sup> This class of persons clearly falls in the gray area between the unconstitutional Washington statute and Louisiana Revised Statutes section 9:344.<sup>203</sup> At least one Louisiana appellate court has recognized the concern that article 136 may be unconstitutionally broad in allowing any relative and select former relatives to seek visitation.<sup>204</sup> According to Judge Whipple’s concurrence in *Shaw*, article 136 improperly allows any *relative* to seek visitation and subject a parent’s child-rearing decisions to judicial review.<sup>205</sup> Arguably, however, as the Louisiana First Circuit’s pre-*Troxel* opinion in *Reinhardt* suggests, article 136 contains sufficiently narrow standing when combined with the article’s other requirements.<sup>206</sup>

To further understand the breadth of article 136, Ohio’s third party visitation statutes are helpful in examining the article’s standing requirement. Ohio Revised Code section 3109.051(B)(1) allows a court to grant visitation in certain circumstances to “any grandparent, any person related to the child by consanguinity or affinity, or any other person other than a parent,”<sup>207</sup> a class of persons that extends beyond mere family members to all third parties. The Ohio Supreme Court stated in *Harrold*, however, that the Ohio statute was not unconstitutionally broad because the statute required certain “predicate events” that limited the instances in which any third party could bring a visitation action.<sup>208</sup> This opinion suggests that a visitation statute’s broad standing requirement may be offset by narrow predicate circumstances expressed in the statute. Similarly, Louisiana Civil Code article 136 has an “extraordinary circumstances” requirement which may ensure its constitutionality by compensating for its relatively large standing base.<sup>209</sup> The following section contains a further examination of the “extraordinary circumstances” requirement.

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202. LA. CIV. CODE ANN. art. 136(B) (1999).

203. Louisiana Revised Statutes section 9:344 provides standing to a child’s grandparents and siblings in certain situations, namely the death, interdiction, or incarceration of one of the child’s parents.

204. See *Shaw v. Dupuy*, 961 So. 2d 5, 10 (La. App. 1st Cir. 2007) (Whipple, J., concurring).

205. *Id.*

206. *Reinhardt v. Reinhardt*, 720 So. 2d 78, 80 (La. App. 1st Cir. 1998).

207. OHIO REV. CODE ANN. § 3109.051(B)(1) (West 2005).

208. OHIO REV. CODE ANN. § 3109.051; *Harrold v. Collier*, 836 N.E.2d 1165, 1171 (Ohio 2005).

209. LA. CIV. CODE ANN. art. 136(B) (1999).

## 2. Predicate Conditions

The first circumstantial requirement for initiating an action under article 136 is evidenced by its placement in the Louisiana Civil Code. Article 136 appears in the section governing divorce in the Louisiana Civil Code.<sup>210</sup> Using a *pro subjecta materia* argument,<sup>211</sup> the article is only applicable in instances where a child's parents are divorced or involved in a divorce proceeding.<sup>212</sup> Therefore, unlike the unconstitutional Washington statute, a family member may not petition for visitation under article 136 "at any time."<sup>213</sup>

The second circumstantial requirement of article 136 is much less certain in definition. According to the article, the relative (or former step-parent or step-grandparent) may only seek visitation "[u]nder extraordinary circumstances."<sup>214</sup> This threshold finding of "extraordinary circumstances" is critical to a proper application of article 136, as stated by Louisiana's First Circuit in *Reinhardt*.<sup>215</sup> Unlike Louisiana Revised Statutes section 9:344—which allows the visitation petition only in case of the death, interdiction, or incarceration of a parent—article 136 (and the comments thereto) neglect to define "extraordinary circumstances" in the visitation context. Further, Louisiana courts have yet to establish a clear idea of what circumstances rise to this level.

The first circuit in *Shaw* vaguely defined "extraordinary circumstances" in the context of article 136 as a "highly unusual set of facts . . . not commonly associated with a particular thing or event."<sup>216</sup> Despite the ambiguity of "extraordinary circumstances," Louisiana courts have found those circumstances only in extreme

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210. *Id.* The article appears in Book I. Of Persons, Title V. Divorce of the Louisiana Civil Code.

211. In a civilian context, an argument *pro subjecta materia* takes into account "the place that the interpreted norm occupies in the given juridical text," presuming that the location of a Civil Code article provides clues to its meaning and interpretation. KENNETH M. MURCHISON & J.-R. TRAHAN, WESTERN LEGAL TRADITIONS AND SYSTEMS: LOUISIANA IMPACT 172 (La. State Univ. Publ'ns 2003). Since article 136 appears in the "Divorce" title of the Louisiana Civil Code, it may be inferred that the article only applies in divorce situations despite the article's lack of that express language. *See* LA. CIV. CODE ANN. art. 136.

212. *See Reinhardt v. Reinhardt*, 720 So. 2d 78, 80 (La. App. 1st Cir. 1998).

213. *See* WASH. REV. CODE ANN. § 26.10.160(3) (West 1994).

214. LA. CIV. CODE ANN. art. 136(B).

215. *Reinhardt*, 720 So. 2d at 80.

216. *Shaw v. Dupuy*, 961 So. 2d 5, 7 (La. App. 1st Cir. 2007), *writ denied*, 951 So. 2d 1092 (La. 2007) (citing Justice Weimer's concurrence in *Huber v. Midkiff*, 838 So. 2d 771, 778 (La. 2003) (Weimer, J., concurring), which adopted the definition of "extraordinary circumstance" from the seventh edition of Black's Law Dictionary).

factual situations. For instance, Louisiana's third circuit declined to find "extraordinary circumstances" in a case where a fourth cousin allegedly enjoyed a relationship with a child, was the trustee of a trust created for the child's benefit, and would have facilitated a relationship between the child and other family members.<sup>217</sup> Louisiana courts have also declined to find such circumstances in cases where the parent denying visitation is not shown to be unfit.<sup>218</sup> However, Louisiana's third circuit has held that "extraordinary circumstances" exist for relatives when a parent is deceased, as the natural conduit for maintaining a relationship between the child and the deceased parent's family is missing.<sup>219</sup> These opinions provide little clarity to the definition of "extraordinary circumstances." The only common theme among these cases is summarized by the only Louisiana Supreme Court pronouncement on the issue, a statement curiously circular: "Not every unique set of circumstances will justify imposing visitation, only those circumstances which are truly extraordinary."<sup>220</sup> Whatever these circumstances entail, they are clearly narrower in scope than the Washington statute in *Troxel*.<sup>221</sup>

The relatively broad standing base allowed by article 136 is complemented by the arguably narrow circumstances in which the article may be employed. If the Louisiana Supreme Court were to use the same rationale as the Ohio Supreme Court,<sup>222</sup> article 136 should be sufficiently narrow to avoid subjecting nearly all parental visitation decisions to legal challenge. Although the definition of "extraordinary circumstances" is questionable at best, the circumstantial requirements of divorce and "highly unusual"<sup>223</sup> circumstances balance the concern for allowing any relative to subject *all* parental visitation decisions to state court review.<sup>224</sup> This sliding-scale approach—balancing the breadth of standing with circumstantial requirements—would allow Civil Code article

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217. See *Sterling v. Shirley*, 832 So. 2d 1179, 1182 (La. App. 3d Cir. 2002).

218. See, e.g., *Flack v. Dickson*, 843 So. 2d 1261, 1265 (La. App. 3d Cir. 2003); *State ex rel. Satchfield v. Guillot*, 820 So. 2d 1255, 1264–65 (La. App. 3d Cir. 2002).

219. See *Ray v. Ray*, 657 So. 2d 171, 173 (La. App. 3d Cir. 1995). The petitioners in this case were a great-grandfather and aunt of the child; therefore, Louisiana Revised Statutes section 9:344 was inapplicable. *Id.*

220. *Huber*, 838 So. 2d at 778 (Weimer, J., concurring).

221. WASH. REV. CODE ANN. § 26.10.160(3) (West 1994) (allowing petitioners to bring a visitation action "at any time").

222. See *supra* Part IV.A.1; *Harrold v. Collier*, 836 N.E.2d 1165, 1171 (Ohio 2005).

223. See *Sterling v. Shirley*, 832 So. 2d 1179, 1182 (La. App. 3d Cir. 2002).

224. See, e.g., *Shaw v. Dupuy*, 961 So. 2d 5, 10 (La. App. 1st Cir. 2007) (Whipple, J., concurring).

136 to survive a facial constitutionality challenge despite its large standing class. In sum, whether article 136 meets the requirement of the first guidepost<sup>225</sup> will depend on how narrowly (or broadly) Louisiana courts construe “extraordinary circumstances.”

### *B. Burdens of Proof and the Parental Presumption*

Civil Code article 136 provides two major requirements for allowing a non-parent third party visitation to a child. The first of these requirements, “extraordinary circumstances,” was discussed in the preceding section.<sup>226</sup> The second requirement is that sought-after visitation must be in “the best interest of the child.”<sup>227</sup> The burdens and presumption relating to these article 136 requirements are visited in this section.

#### *1. Extraordinary Circumstances*

The threshold burden of proof for bringing a visitation action pursuant to article 136 (assuming the party seeking visitation qualifies as a relative with standing)<sup>228</sup> is a showing that “extraordinary circumstances” exist to justify the petition for visitation.<sup>229</sup> The burden of proving such circumstances falls on the party seeking visitation—not on the parent denying visitation.<sup>230</sup> As mentioned, however, what circumstances qualify as “extraordinary” is still an unclear issue in Louisiana case law.<sup>231</sup> At a bare minimum, “extraordinary circumstances” means that a relative, former step-parent, or former step-grandparent will not be allowed to petition for visitation based solely on their legal relationship with the child.<sup>232</sup> The non-parent petitioner must therefore supply evidence sufficient in weight to show that circumstances exist, other than the petitioner’s familial relationship with the child, that amount to a “highly unusual set of facts.”<sup>233</sup> Louisiana courts have recognized several facts that may be

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225. See *supra* Part III.C.

226. See *supra* Part IV.A.2.

227. LA. CIV. CODE ANN. art. 136(B) (1999).

228. See *supra* Part IV.A.1.

229. *Reinhardt v. Reinhardt*, 720 So. 2d 78, 80 (La. App. 1st Cir. 1998).

230. *Id.*

231. See *supra* Part IV.A.2.

232. “The mere status of the mover for visitation as a grandparent, relative, or step-relation is not sufficient to meet the requirements of article 136B.” *Reinhardt*, 720 So. 2d at 80.

233. See *Shaw v. Dupuy*, 961 So. 2d 5, 7 (La. App. 1st Cir.), *writ denied*, 951 So. 2d 1092 (La. 2007).

introduced by a petitioner in an attempt to overcome the “extraordinary circumstances” hurdle, including, but not limited to, the fitness of the custodial parent,<sup>234</sup> any previous history of petitioner and child living together,<sup>235</sup> the impossibility of petitioner maintaining a relationship with the child due to death or absence of a parent,<sup>236</sup> and any caregiving responsibilities performed by the petitioner on behalf of the child.<sup>237</sup>

Article 136 does not express an evidentiary burden for proving the existence of “extraordinary circumstances,” so by default the standard of proof is by preponderance of evidence.<sup>238</sup> As seen in *Soofoo*, the Minnesota Supreme Court found the preponderance of evidence standard to be insufficiently low for protecting a parent’s due process right in visitation proceedings.<sup>239</sup> However, as the vague yet judicially-adopted definition of “extraordinary circumstances” requires, “highly unusual” facts must be presented to meet the threshold evidentiary burden in article 136.<sup>240</sup> Therefore, a party seeking visitation must present more convincing evidence than the simple “more probable than not”<sup>241</sup> standard in order to prove the existence of circumstances warranting a visitation order.

## 2. Child’s Best Interest

After clearing the hurdle of proving “extraordinary circumstances,” article 136 requires a second burden of proof. Article 136 allows a court to grant visitation rights to a petitioning non-parent only “if the court finds that [visitation] is in the best

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234. See *Huber v. Midkiff*, 838 So. 2d 771, 778 (La. 2003) (Weimer, J., concurring).

235. See *Ray v. Ray*, 657 So. 2d 171, 173 (La. App. 3d Cir. 1995) (citing trial judge’s written reasons for judgment).

236. *Id.*

237. See *Henry v. Henry*, 704 So. 2d 793, 796 (La. App. 1st Cir. 1997).

238. See MARAIST § 4.2, *supra* note 195, at 67. “In a civil case the burden of persuasion generally is a ‘preponderance of the evidence,’ i.e., evidence from which reasonable minds could conclude, more probably than not, the existence of the essential facts.” *Id.*

239. See *Soofoo v. Johnson*, 731 N.W.2d 815, 824 (Minn. 2007). For a discussion of the inadequacy of the preponderance of evidence standard, see *supra* Part III.B.4.

240. See *Shaw v. Dupuy*, 961 So. 2d 5, 7 (La. App. 1st Cir.), *writ denied*, 951 So. 2d 1092 (La. 2007).

241. “In Louisiana civil cases, proof by a preponderance of the evidence is defined as evidence, when taken as a whole, shows that the fact or cause to be proven is more probable than not.” WILLIAM E. CRAWFORD, TORT LAW § 6.2, in 12 LOUISIANA CIVIL LAW TREATISE 114 (2007).

interest of the child.”<sup>242</sup> Paragraph B of the article also contains five factors that the court is required to consider when determining the child’s best interest.<sup>243</sup> These elements of article 136 are examined in the following section of this Note.

*a. The Parental Presumption and Petitioner’s Burden*

The first and most critical consideration for applying non-parent visitation statutes is the presumption that a fit parent acts in the best interest of a child.<sup>244</sup> This parental presumption affords great deference to a parent’s decisions to allow or deny visitation to a child.<sup>245</sup> Although Civil Code article 136 does not contain express language requiring a court to apply the parental presumption, this requirement can be inferred from Louisiana First Circuit decisions which require the same standard for a proceeding under Louisiana Revised Statutes section 9:344.<sup>246</sup> The parental presumption accomplishes two objectives. First, the presumption lends “special weight” to a parent’s decisions regarding child visitation,<sup>247</sup> protecting the parent’s due process right against a court-ordered visitation when such visitation may be merely “better” for the child.<sup>248</sup> Second, the presumption places the burden of persuasion on a party seeking visitation to show that visitation is in the child’s best interest despite the wishes of the custodial parent.<sup>249</sup> These two elements are essential to a constitutional application of article 136.

Because article 136 contains no express evidentiary standard, one might assume that a mere preponderance of the evidence is sufficient to satisfy the “best interest” requirement. In considering a child’s best interest, a preponderance of the evidence standard would lend ultimate weight to a trier of fact’s opinion regarding a child’s welfare. In nearly all instances, a *parent*, not a court, is in the best position to make decisions regarding a child’s best interest. The low preponderance standard arguably would fail to

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242. LA. CIV. CODE ANN. art. 136(B) (1999).

243. LA. CIV. CODE ANN. art. 136(B)(1)–(5).

244. *See Troxel v. Granville*, 530 U.S. 57, 67–69 (2000).

245. *Id.* at 66–67.

246. *See Barry v. McDaniel*, 934 So. 2d 69, 76 (La. App. 1st Cir. 2006); *Wood v. Wood*, 835 So. 2d 568, 575 (La. App. 1st Cir.), *writ denied*, 835 So. 2d 568 (La. 2002).

247. *Wood*, 835 So. 2d at 575.

248. *See Troxel*, 530 U.S. at 72; *Hiller v. Fausey*, 904 A.2d 875, 904 (Pa. 2006) (Cappy, C.J., dissenting).

249. *See Troxel*, 530 U.S. at 68–69; *Reinhardt v. Reinhardt*, 720 So.2d 78, 80 (La. App. 1st Cir. 1998).

ensure a parent's due process right from unconstitutional infringement, as evidenced in *Soofoo*.<sup>250</sup> However, a Louisiana court may observe a higher evidentiary standard despite the default preponderance of the evidence standard when certain rights are at stake.<sup>251</sup> As seen in *Troxel*, a state court has the authority to read heightened standards into its own state statutes.<sup>252</sup> Along with a judicially-imposed clear and convincing standard of proof, a presumption favoring a parent's visitation decisions would force a trial court not only to consider the wishes of the parent but also to give weighted deference to those decisions when the parent is not shown to be unfit.

By giving parental visitation decisions presumptive weight, the burden then falls on the petitioner to prove that visitation is in the child's best interest.<sup>253</sup> Again, this burden cannot be met by a simple preponderance of the evidence—a greater evidentiary showing is required.<sup>254</sup> In any event, the onus is on the petitioner to provide strong evidence to justify a court order to disrupt the child's current visitation situation.

The parent's due process right may also require a showing that denying visitation would cause harm to the child.<sup>255</sup> The plurality opinion and Justice Souter's concurrence mentioned the issue of harm in *Troxel*, but both opinions declined to decide whether a showing of harm was necessarily within the scope of the parental due process right.<sup>256</sup> In Louisiana's first circuit, at least one pre-*Troxel* dissenting opinion considered the need for a harm requirement to facilitate a "compelling" state interest for scrutiny purposes.<sup>257</sup> Apparently, the showing of harm may be crucial when a visitation statute does not employ the parental presumption, for if the presumption is recognized, the resulting burden of rebuttal should protect the parental due process right from constant or arbitrary challenges. As article 136 contains neither an express parental presumption nor harm requirement, Louisiana courts must

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250. See *Soofoo v. Johnson*, 731 N.W.2d 815, 824 (Minn. 2007).

251. See, e.g., *Succession of Lyons*, 452 So. 2d 1161 (La. 1984) (employing a clear and convincing standard where policy considerations disfavor the use of a preponderance of evidence standard). The "policy" consideration in this analysis (the fundamental parental right to direct a child's upbringing) may necessitate the use of a clear and convincing standard.

252. See *Troxel*, 530 U.S. at 79 (Souter, J., concurring).

253. *Soofoo*, 731 N.W.2d. at 824.

254. *Id.*

255. See *Reinhardt v. Reinhardt*, 720 So. 2d 78, 81 (La. App. 1st Cir. 1998) (Guidry, J., dissenting).

256. *Troxel*, 530 U.S. at 73 (plurality opinion); *id.* at 77 (Souter, J., concurring).

257. *Reinhardt*, 720 So. 2d at 81 (Guidry, J., dissenting).

decide how to construe article 136 to heighten the “best interest of the child” burden.

*b. Best Interest Factors*

Paragraph B of article 136 lists five factors to be considered by a trier of fact when determining a child’s best interest:

- (1) The length and quality of the prior relationship between the child and the relative.
- (2) Whether the child is in need of guidance, enlightenment, or tutelage which can best be provided by the relative.
- (3) The preference of the child if he is determined to be of sufficient maturity to express a preference.
- (4) The willingness of the relative to encourage a close relationship between the child and his parent or parents.
- (5) The mental and physical health of the child and the relative.<sup>258</sup>

These five issues are required considerations in a trial court’s initial visitation order.<sup>259</sup> By expressing five distinct “best interest” factors, article 136 provides semi-objective<sup>260</sup> considerations in place of the sole subjective discretion of a trial court judge. To some extent, then, the factors help define the scope of the “best interest” determination, but they do little to strengthen the petitioner’s burden of persuasion. Conspicuously absent from these factors is any reference to a presumption that a parent acts in a child’s best interest. As one commentator noted, the lack of express deference to a parent’s wishes may present a problem for article 136,<sup>261</sup> potentially subjecting the article to unconstitutional application.

In brief, for Civil Code article 136 to comply with the second guidepost for constitutionally sound visitation statutes,<sup>262</sup> key points must be observed by Louisiana courts applying the article. A trier of fact must recognize the strong presumption that a parent

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258. LA. CIV. CODE ANN. art. 136(B)(1)–(5) (1999).

259. “In determining the best interest of the child, the court *shall* consider . . . .” LA. CIV. CODE ANN. art. 136(B) (emphasis added).

260. The factors still warrant the subjectivity of a trier of fact. For example, a judge must still determine whether the child is in need of “guidance, enlightenment, or tutelage” and whether the party seeking visitation can best provide these. LA. CIV. CODE ANN. art. 136(B)(2).

261. See ROBERT C. LOWE, LOUISIANA DIVORCE § 7:71, *in* LOUISIANA PRACTICE SERIES (2007).

262. See *supra* Part III.C.

makes visitation decisions in a child's best interest and afford great deference to those parental determinations in order to prevent judicial infringement on a parent's due process right to make child-rearing decisions.<sup>263</sup> Courts applying article 136 must also impose two burdens on the party seeking visitation to prove both that "extraordinary circumstances" exist and that the desired visitation is in the child's "best interest."<sup>264</sup> These separate burdens must require a heightened evidentiary standard beyond mere preponderance of evidence,<sup>265</sup> standards that can be achieved by requiring "highly unusual"<sup>266</sup> circumstances and by imposing a strong parental presumption. The constitutionality of article 136 will be adequately protected only with the parental presumption and elevated burdens of proof.

### *C. Facial Validity and Constitutional Application*

As mentioned, the central consideration in an analysis of a third party visitation statute is the statute's ability to be consistently constitutionally applied.<sup>267</sup> Facial validity is the initial inquiry into the constitutionality of a non-parent visitation statute. As a general matter, statutes carry a presumption of constitutionality<sup>268</sup> but will be found facially invalid if statutory overbreadth leads to unconstitutional results in all applications.<sup>269</sup> As noted by Justice Souter, the plurality's judgment in *Troxel* declined to hold the Washington statute facially unconstitutional, despite that statute's "breathtakingly broad" standing and circumstance requirements.<sup>270</sup> Considering *Troxel*, and given the comparatively narrow language of Civil Code article 136 in comparison to the Washington statute, the article is sufficiently

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263. See *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

264. See *Reinhardt v. Reinhardt*, 720 So. 2d 78, 80 (La. App. 1st Cir. 1998). The burden on the petitioner to show "best interest" is inherent in the recognition of the presumption that a parent acts in a child's best interest.

265. See *Sooahoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007).

266. See *Shaw v. Dupuy*, 961 So. 2d 5, 7 (La. App. 1st Cir.), writ denied, 951 So. 2d 1092 (La. 2007).

267. See *supra* Part III.C.

268. *Reinhardt*, 720 So. 2d at 79.

269. See generally *City of Chicago v. Morales*, 527 U.S. 41, 70–73 (1999) (Breyer, J., concurring) (stating that an ordinance that allows police to enjoy too much discretion in every case is facially invalid because the ordinance is unconstitutional in all applications).

270. *Troxel v. Granville*, 530 U.S. 57, 75–79 (2000) (Souter, J., concurring) (stating the Washington statute was facially unconstitutional). See WASH. REV. CODE ANN. § 26.10.160(3) (West 1994).

written to avoid unconstitutionality in all circumstances.<sup>271</sup> Almost assuredly, therefore, article 136 is not unconstitutional on its face.

The main inquiry involved in an analysis of article 136 is the potential for unconstitutional application of the provision. The article must contain sufficient safeguards to shield the fundamental parental right at stake in non-parent visitation statutes. The parental due process right to direct the upbringing of a child, including the right to make visitation decisions regarding the child and third parties, “is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court.”<sup>272</sup> In turn, such an important and sacred parental right necessitates a strict level of scrutiny for laws that interfere with that right.<sup>273</sup> To pass a strict scrutiny test, a visitation statute must further a compelling state interest to foster relationships between children and relatives.<sup>274</sup> According to *Reinhardt*, state encouragement of “beneficial extended family relationships with children” is both a legitimate *and* substantial state interest.<sup>275</sup> Therefore, the purpose of article 136 is constitutional.

Given the valid governmental interest advanced by article 136, the constitutional application of the article depends on its scope, the parental presumption, and the heightened burdens of proof required by the two guideposts for visitation statute constitutionality.<sup>276</sup> Constitutional application requires Louisiana courts to distinguish a narrow set of “extraordinary circumstances” for bringing a visitation action, to recognize a strong parental presumption by giving deference to parental visitation decisions, and to impose heightened burdens on a party seeking visitation to show “extraordinary circumstances” and “best interest.”<sup>277</sup> These safeguards are necessary to protect the fundamental parental right of child-rearing against improper infringement. Hence, the recognition of these factors in practice should guarantee the constitutional application of article 136 in every factual situation.

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271. Compare *Huber v. Midkiff*, 838 So. 2d 771, 778 (La. 2003) (Weimer, J., concurring) with *E.S. v. P.D.*, 863 N.E.2d 100, 106 (N.Y. 2007) (“If the United States Supreme Court did not declare the ‘breath-takingly broad’ Washington statute to be facially invalid, then certainly the more narrowly drafted New York statute is not unconstitutional on its face.”).

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

273. See *id.* at 80 (Thomas, J., concurring); *Hiller v. Fausey*, 904 A.2d 875, 885 (Pa. 2006), *cert. denied*, 127 S. Ct. 1876 (2007); *Reinhardt*, 720 So. 2d at 79–80.

274. See *Reinhardt*, 720 So. 2d at 80.

275. *Id.*

276. See *supra* Part IV.A–B.

277. Again, by definition, the parental presumption places the burden on the petitioner to show “best interest.”

*D. Conclusions of Law*

Based on the court opinions, statutes, and issues examined in this Note and the preceding analysis, this author finds three main points of law necessary to secure the validity of Civil Code article 136.

First, Louisiana trial courts must narrowly construe “extraordinary circumstances.” This threshold predicate circumstance must tightly limit the exposure of parental visitation decisions to compensate for the comparatively broad standing afforded to all relatives. In the alternative, the Louisiana Legislature may amend Paragraph B of article 136 to limit the class of relatives with standing to a child’s ascendants and collateral relatives within the fourth degree. Either of these options may sufficiently narrow the scope of article 136.

Second, Louisiana trial courts must acknowledge the existence of the presumption that a fit parent always acts in a child’s best interest *and* respect that presumption by deferring to the parent’s visitation decisions whenever plausible. As discussed earlier, Louisiana courts have the authority to narrowly construe article 136 to require such a presumption. Also, a strong parental presumption will rightly place the burden of proof on the party seeking visitation to show that the visitation is in the child’s best interest.

Finally, Louisiana trial courts must place two heightened evidentiary burdens on a non-parent seeking visitation. The non-parent must bear the burden of showing “extraordinary circumstances” and “best interest” to a degree beyond the inadequate preponderance of evidence standard. The latter burden of proof is created by the recognition of a parental presumption. The heightened evidentiary standard may be judicially imposed by a Louisiana court reading a clear and convincing standard into article 136 or by legislative amendment.

## V. CONCLUSION

The United States Supreme Court decision in *Troxel* cast doubt and uncertainty over grandparental and third party visitation statutes in every state. Louisiana appellate courts have affirmed the validity of Louisiana Revised Statutes section 9:344, but those same courts have yet to rule on the constitutionality of Louisiana Civil Code article 136. Further, precluding one concurring opinion, the Louisiana Supreme Court has yet to address a constitutional

challenge to either provision.<sup>278</sup> In light of three very recent state supreme court rulings interpreting *Troxel*, article 136 is ripe for another constitutional attack at the Louisiana appellate and Supreme Court levels. By tweaking the article, Louisiana courts may be able to adequately protect the parental due process right *and* further the substantial state interest in fostering “beneficial extended family relationships with children.”<sup>279</sup> Only then will Louisiana courts have the tools needed to protect the respective roles that parents and other relatives play in a child’s life. After all, Louisiana’s best interest depends on the future of its children.

*William Bradley Kline\**

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278. See *Huber v. Midkiff*, 838 So. 2d 771, 777–78 (La. 2003) (Weimer, J., concurring).

279. *Reinhardt*, 720 So. 2d at 80.

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