NONPARENT VISITATION RIGHTS v. FAMILY AUTONOMY: AN ABRIDGEMENT OF PARENTS' CONSTITUTIONAL RIGHTS?

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I. INTRODUCTION

The United States Supreme Court has long recognized the fundamental right of parents to raise their children as they see fit. Dating back to 1923, in *Meyer v. Nebraska*,[1] the Court proffered that parents' rights to direct the upbringing of their children are protected under the "liberty" guaranteed by the Fourteenth Amendment.[2] Since that time, courts have developed further protections for parents' and children's rights. Recently, the United States Supreme Court addressed the tension that exists between parents' rights, the interests of third parties, and the best interests of children.[3]

Notwithstanding the consistent recognition of parents' rights, these rights are currently under attack by third parties seeking a role in a child's life. Recently, and in growing numbers, nonparents are challenging the traditional notions of family law by seeking visitation rights with children with whom they have formed a bond. The current state of our nation's family structures have a portion of the population up in arms, calling for the state legislatures and courts to enforce visitation orders for nonparents, such as grandparents and other relatives, step parents, or third parties, some of whom may have fulfilled the role of a psychological parent at a previous time. This growing phenomena, the pursuit by nonparents to have the courts award orders of child visitation, forces the courts and legislatures to determine whether parents' rights are contingent upon their marital status and whether their rights can be infringed by the demands of outsiders.

This Comment addresses the issues implicated by the increase in petitions for nonparent child visitation rights. Part II of this Comment explores in detail the

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[1] 262 U.S. 390 (1923).

[2] *See id.* at 399. "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

[3] *See* Troxel v. Granville, 120 S. Ct. 2054 (2000).

history of the constitutional rights of parents, children, and family autonomy. Part III of this Comment surveys various theories on the origination of the traditional nuclear family. Further, Part IV examines the derivation and development of visitation rights. Part V contains a more thorough analysis of the current, principal types of nonparent visitation statutes. More specifically, in Part VI, the approaches of different states are detailed, including the approaches of New York, New Jersey, and Washington. Additionally, Part VI explores the United States Supreme Court's review of Washington's visitation statutes in *Custody of Smith v. Stillwell*,[4] currently before the United States Supreme Court. The approaches are also delineated in Part VI. Finally, Part VII of this Comment consists of the author's analysis, addressing the threat to the constitutional rights of parents in nontraditional family structures.

II. HISTORY OF THE CONSTITUTIONAL RIGHTS OF PARENTS, CHILDREN, AND FAMILY AUTONOMY

With the exception of the sporadic family law case accepted by the United States Supreme Court that presents a constitutional challenge, family law is governed by the states.[5] Within the context of family law, parents have the constitutionally protected rights to free association,[6] privacy,[7] and interstate travel.[8]

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[4] 969 P.2d 21 (Wash. 1998), *cert. granted sub nom.* Troxel v. Granville, 120 S. Ct. 11 (1999).

[5] *See* Katharine B. Silbaugh, Comment, Miller v. Albright: *Problems of Constitutionalization in Family Law*, 79 B.U.L. REV. 1139, 1139 (1999).

[6] *See* 3 CHILD CUSTODY & VISITATION LAW & PRACTICE § 16.02[1][a], at 16-11 (John P. McCahey ed. 1983); Michael v. Hertzler, 900 P.2d 1144, 1147 (Wyo. 1995) ("The right to associate with one's family is a fundamental constitutional right").

[7] *See id.* (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 926 (1992) ("Throughout this century, this Court also has held that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as procreation, childrearing, marriage, and contraceptive choice.") (citation omitted)). The Fifth Circuit opined that "[t]he rights to conceive and to raise one's children have been deemed essential, basic civil rights of man." Morris v. Dearborne, 181 F.3d 657, 667 (5th Cir. 1999) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)). "[T]his circuit recognized the m o st essential and basic aspect of familial privacy—the right of the family to remain together without the coercive interference of the awesome power of the state." *Id.* (quoting Hodorowski v. Ray, 844 F.2d 1210, 1216 (5th Cir. 1988) (citation omitted)); "The parental interest in direction and control of a child's education is central to the family's constitutionally protected privacy rights." Brantley v. Surles, 718 F.2d 1354, 1358 (5th Cir. 1983) (citing Meyer v. Nebraska, 262 U.S. 390, 401 (1923)).

[8] *See* CHILD CUSTODY & VISITATION LAW & PRACTICE , *supra* note 6, § 16.02[1][a], at

When it comes to issues of family life, freedom of personal choice is a fundamental right protected by the "liberty" guarantee of the Fourteenth Amendment.[9] A more recent phenomenon is the courts' acknowledgement of the rights of children.[10] Children are entitled to the "right and privilege of getting to know, love and respect both parents,"[11] "the right to the love, companionship and guidance of both parents,"[12] "the right to a stable home,"[13] and "the right to effective and proper parental control and care."[14] Any limit placed upon parents' or children's constitutionally protected rights raises questions of the constitutionality of such constraints.[15]

A brief examination of the development of parents' rights commences with *Meyer v. Nebraska*, when parents' rights were first acknowledged by the United States Supreme Court.[16] The Court acknowledged that the liberty guaranteed by

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16-11. The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. An individual can not be deprived of the right to travel without due process of the law. *See, e.g.*, Kent v. Dulles, 357 U.S. 116, 125 (1958) (declaring the right to travel to be within the "liberty" of the Fifth Amendment of the federal Constitution); Murnane v. Murnane, 552 A.2d 194, 198 (N.J. Super. Ct. App. Div. 1989) (addressing the constitutional protection of the right to travel).

[9] *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982) (citing Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977); Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40 (1974); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. the Society of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[10] *See* CHILD CUSTODY & VISITATION LAW & PRACTICE, *supra* note 6, § 16.02[1][b], at 16-12. *See generally* John E. Coons and Robert H. Mnookin, *Toward a Theory of Children's Rights, in,* THE CHILD AND THE COURTS 391 (Ian F.G. Baxter & Mary A. Eberts eds., 1978).

[11] CHILD CUSTODY & VISITATION LAW & PRACTICE , *supra* note 6, § 16.02[1][b], at 16-12 to 16-13 (citing *In re* Marriage of Wahl, 246 N.W.2d 268 (Iowa 1976)).

[12] *Id.* § 16.02[1][b], at 16-13 (citing Warren v. Warren, 528 P.2d 1088, 1089 (Or. App. 1974)).

[13] *Id* (citing *In re* Male L., 369 N.Y.S.2d 273, 276 (Surr. Ct. 1975)).

[14] *Id.* (citing *In re* Appeal in Maricopa County, Juvenile Action No. J 75482, 536 P.2d 197, 199 (Ariz. 1975)).

[15] *See id.* § 16.02[1][a], at 16-11.

[16] 262 U.S. 390 (1923). The plaintiff challenged his conviction under a Nebraska law prohibiting the teaching of foreign languages to students prior to their successful completion

the Fourteenth Amendment[17] represents more than mere freedom from bodily restraint.[18] In *Meyer*, a school teacher was convicted of unlawfully teaching the German language to a student who had not yet completed the eighth grade, a misdemeanor crime under Nebraska law.[19] The pertinent act in Nebraska, concerning the teaching of foreign languages, condoned the teaching of a language other than English only to students that had successfully completed the eighth grade.[20] While the State Supreme Court held the law to be a proper exercise of the state's police power, the United States Supreme Court declared Nebraska's law unconstitutional under the Fourteenth Amendment.[21] The Court enumerated that liberty, protected under the Fourteenth Amendment, includes the right "to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[22] Accordingly, the Court held that the right of parents to retain the plaintiff to instruct their children in a foreign language was protected under the liberty of the Fourteenth Amendment.[23]

The principle proclaimed in *Meyer* was unequivocally reaffirmed in *Pierce v. Society of Sisters*.[24] In *Pierce*, an Oregon law that required children between the ages of eight and sixteen who have not completed the eighth grade be sent to public school was challenged.[25] The Court in *Pierce* followed the doctrine established in *Meyer* by holding that Oregon's Compulsory Education Act of 1922 "unreasonably interfere[d] with the liberty of parents and guardians to direct the

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of the eighth grade. *See id.* at 396-97.

[17] *See* U.S. CONST. amend. XIV, § 1 ("Nor shall any State deprive any person of life, liberty, or property, without due process of law . . .").

[18] *See Meyer*, 262 U.S. at 399.

[19] *See id.* at 396-97.

[20] *See id.* at 397.

[21] *See id.* at 403.

[22] *Id.* at 399.

[23] *See id.*

[24] *See* John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 383-84 (1998) (citing Pierce v. the Society of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925)).

[25] *See* Pierce v. Society of Sisters, 268 U.S. 510, 529-30 (1925).

upbringing and education of children under their control."[26] In so holding, the Court further stated that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[27] Parents are free to control where their children are educated, be it private or public schools.

Family autonomy and parental authority were further bolstered when the United States Supreme Court reaffirmed these principles in *Wisconsin v. Yoder*.[28] In *Yoder*, Amish parents convicted of violating Wisconsin's compulsory school attendance law challenged the law's constitutionality under the Free Exercise Clause of the First Amendment.[29] Wisconsin's law mandated school attendance until the age of sixteen.[30] However, belonging to the Old Order Amish religion, the respondents refused to send their children to school after they completed the eighth grade, believing it to be disagreeable with their religion and the Amish way of life.[31] Invalidating the parents' convictions under the First and Fourteenth Amendments, the *Yoder* Court stated that the "history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[32]

III. ORIGINATION THEORIES OF THE TRADITIONAL

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[26] *Id.* at 534-35.

[27] *Id.* at 535.

[28] *See* Gregory, *supra* note 24, at 383 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

[29] *See Yoder*, 406 U.S. at 208-09.

[30] *See id.* at 207.

[31] *See id.* at 207, 209.

[32] *Id.* at 232. However, while autonomy in family life is protected by the Constitution, it is not an absolute right. *See* Hurndon v. Tuhey, 857 S.W.2d 203, 207 (Mo. 1993) (citing Ginsberg v. New York, 390 U.S. 629, 639 (1968) (noting the state's authority to regulate the well-being of children); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (recognizing the state's ability to limit parental freedom by mandating school attendance and regulating child labor)). Moreover, the Court declared in *Stanley v. Illinois* that parents have a right to "the companionship, care, custody, and management of his or her children." Stanley v. Illinois, 405 U.S. 645, 651 (1972) (addressing an unwed father's right to a hearing on his parental fitness before his children could be deemed dependents of the state after the death of the children s mother).

"NUCLEAR" FAMILY

The popularity of nonparent visitation rights among some courts and legislatures stems from a desire to compel non-traditional families to conform as closely as possible to the historical family norm. The prevalent notion in society that there is a crisis in the structure of our country's families has developed from the ideal and nostalgia for the traditional two-parent family. Notions of "family" have traditionally consisted of a mother, father, and those related by blood. Not surprisingly, the 1981 White House Conference on Families adopted the National Pro-Family Coalition's definition of family, consisting solely of "persons who are related by blood, marriage or adoption."[33]

The traditional "nuclear" family is comprised of a heterosexual married couple living as a family unit under one roof with their biological or adopted children.[34] While multiple theories have struggled to explain the origination of the traditional nuclear family,[35] this comment is not capable of thoroughly portraying the vast literature on this topic. Nonetheless, an attempt to outline a few salient hypotheses follows. One of the earliest prominent arguments was that each child requires extensive caretaking and thereby mandates an identifiable mother and father.[36] It was hypothesized that the subsequent pairing of men and women to determine paternity of offspring and responsibility for children was a naturally occurring phenomenon resulting in family units.[37] Opposing theories hypothesized that the traditional family developed in response to capitalistic needs.[38] Under this theory, instead of fulfilling emotional or material needs, the nuclear

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[33] Kris Franklin, Note, *"A Family Like Any Other Family:" Alternative Methods of Defining Family Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027, 1029 (1990/1991) (citing *National Pro-Family Coalition on the White House Conference on Families, in* NATIONAL ORGANIZATIONS RESOURCE BOOK (1981)). Under this definition of family, heterosexuality is intrinsically implied in marriage. *See id.* at 1078 n.7.

[34] *See id.* at 1031.

[35] *See id.* at 1033-1039.

[36] *See id.* at 1034 (citing Keller, *Does the Family Have a Future?*, *in* FAMILY IN TRANSITION: RETHINKING MARRIAGE, SEXUALITY, CHILD REARING, AND FAMILY ORGANIZATION 520 (A. Skolnick & J. Skolnick, 5th ed. 1986) at 8-9 [hereinafter FAMILY IN TRANSITION]; B. Malinowski, A SCIENTIFIC THEORY OF CULTURE 91-119 (1944)).

[37] *See id.* at 1034-35 (citing Skolnick & Skolnick, *Introduction: Family in Transition*, *in* FAMILY IN TRANSITION, *supra* note 36, at 8-9).

[38] *See id.* at 1034 (discussing theories on the development of the nuclear family by Karl Marx & Frederick Engels).

family was designed to protect private property interests by promoting monogamy and thereby ensuring the paternity of children and the proper descent of property through the generations.[39]

Alternative theories attributed the development of the nuclear family to the shift from agrarian life, dominated by the extended family,[40] to the industrial revolution.[41] Villages in seventeenth-century New England were composed of self-sufficient family units, where survival depended upon cooperation and each member was interdependent upon the other.[42] Men, women, and children farmed the land, while the home was a workplace for processing raw farm materials into food for the family, clothing, soap, and other necessities.[43] As wage labor became more prevalent in the nineteenth century through capitalism and trading of goods, the self-sufficient household dissipated into a capitalist system of free labor.[44]

Adding to these analyses, functional theories of the family emerged, proclaiming that the contemporary nuclear family was inevitable due to separate gender roles.[45] The functionalists agreed that the nuclear family evolved from the extended family with the introduction of industrialization.[46] Additionally, the functionalist theory proposed a shift in the purpose and function of the family, maintaining that the home is a place to raise children and to prepare them for life outside the home, as well as a place for caring for the adults employed in the

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[39] *See* Franklin, *supra* note 33, at 1034.

[40] *See id.* at 1035 (citing *See, e.g.*, J. SHAFFER, FAMILY AND FARM: AGARIAN CHANGE AND HOUSEHOLD ORGANIZATION IN THE LOIRE VALLEY, 1500-1900, at 4-12 (1982) (land-tenure system mandated the joint family system).

[41] *See id.* at 1035-36 (citing M. GORDON, THE NUCLEAR FAMILY IN CRISIS: THE SEARCH FOR AN ALTERNATIVE 2 (1972)). Large family units were not necessary for work within industry. *See id.* (citing Hareven, *American Families in Transition: Historical Perspectives on Change*, *in* FAMILY IN TRANSITION, *supra* note 36, at 44-46).

[42] *See* John D. Emilio, *Capitalism and Gay Identity*, *in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 100, 102-106, 108-109 (Ann Snitow *et al.* eds., 1983).

[43] *See id.*

[44] *See id.*; *see also* Franklin, *supra* note 33, at 1036.

[45] *See* Franklin, *supra* note 33, at 1036 (citing T. PARSONS & R. BALES, FAMILY, SOCIALIZATION AND INTERACTION PROCESS (1955)).

[46] *See id.* at 1037.

industrial world.[47]

In response to the numerous theories of the development of the nuclear family, multiple criticisms have surfaced, most notably within the province of feminism.[48] Regardless of its inception, the idea that everyone should conform to the construct of the nuclear family is prevalent in our society.[49]

IV. VISITATION

A. DERIVATION AND DEVELOPMENT OF VISITATION RIGHTS

Faced with the decline of the traditional family unit and the desire to retain some semblance of the nuclear family, visitation rights evolved from within the constitutional body of parental rights, specifically, from the right of custody. [50] Though not absolute, natural parents have a constitutionally-protected right to the custody of their minor children.[51] In a further attempt to preserve the parent-child bond in the aftermath of divorce, visitation rights developed in response to the separate households and the division of the child's time between parents who no longer lived together. In both custody and visitation determinations, courts consider the same legal principles: the best interests and welfare of the child.[52]

Parental visitation rights will be granted to parents who are denied custody of their children ("noncustodial parents") unless it is against the best interests of the child[53] or it would jeopardize the welfare of the child.[54] Accordingly, a parent's

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[47] *See id.* (citing PARSONS, THE AMERICAN FAMILY: ITS RELATIONS TO PERSONALITY AND TO THE SOCIAL STRUCTURE, in id. at 3-9).

[48] *See generally* THE FEMINIST PAPERS: FROM ADAMS TO DE BEAUBOIR (1973); C. GILMAN, WOMEN AND ECONOMICS: A STUDY OF THE ECONOMIC RELATION BETWEEN MEN AND WOMEN AS A FACTOR IN SOCIAL EVOLUTION (1989); *see also* Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 LAW & HIST. REV. 25 (1990)

[49] *See* Franklin, *supra* note 33, at 1032.

[50] *See* 59 AM. JUR. 2D *Parent and Child* 36 (1987) (citing Jackson v. Fitzgerald, 185 A.2d 724, 726 (D.C. 1962); Julien v. Gardner 628 P.2d 1165, 1166 (Okla. 1981)).

[51] *See In re* Jeffrey, 435 S.E.2d 162, 170 (W. Va. 1993) (citing *In re* Carlita B., 408 S.E.2d 365, 376 (1991); *In re* Scottie D., 406 S.E.2d 214, 218 (1991); Nancy Viola R. v. Randolph W., 356 S.E.2d 464, 466 (1987); *In re* Darla B., 331 S.E.2d 868, 870 (1985)).

[52] *See* 59 AM. JUR. 2D, *supra* note 50 (citing Lo Presti v. Lo Presti, 355 N.E.2d 372 (N.Y. 1976) (citations omitted)).

[53] *See id.* (citing *In re* Two Minor Children, 173 A.2d 876, 879 (Del. 1961); Raysor v.

visitation rights may only be denied if the noncustodial parent has relinquished his or her right of visitation by some action or if the parent's visitation would be adverse to the child's welfare.[55] Determining whether a noncustodial parent's visitation should be limited or denied involves the evaluation of numerous factors.[56] These factors include violence by the parent, the visitation's effect upon the emotional development of the child, the child's preference, parental interference with the child's relationship with the other parent, sexual misconduct, mental illness of the parent, drug and alcohol abuse, and if the parent maintains minimal contact with the child.[57]

In contrast, nonparent visitation rights are less firmly established in our judicial system. At common law, parents were afforded the right to control with whom their children associated[58] and nonparents were infrequently granted visitation rights over parental objections.[59] The courts were reluctant to infringe upon a parent's right "to exclusive custody and control of minor children"[60] and

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Gabbey, 395 N.Y.S.2d 290, 295 (N.Y. App. Div. 1977)).

[54] *See id.* (citing Griffin v. Griffin, 75 S.E.2d 133 (N.C. 1953); Petraglia v. Petraglia, 392 N.Y.S.2d 697 (N.Y. App. Div. 1977)).

[55] *See* CHILD CUSTODY & VISITATION LAW & PRACTICE, *supra* note 6, § 16.01[1], at 16-4.

[56] *See id.*

[57] *See id.* at § 16.02[3][a]-[3][i], at 16-21 to 16-37.

[58] *See* Michael v. Hertzler, 900 P.2d 1144, 1146 (Wyo. 1995); CHILD CUSTODY & VISITATION LAW & PRACTICE, *supra* note 6, § 16.03[1], at 16-49 (presupposing that the parents properly perform their duties to the child).

[59] *See* CHILD CUSTODY & VISITATION LAW & PRACTICE, *supra* note 6, § 16.03[2], at 16-50; *See* 59 AM. JUR. 2D, *supra* note 50 (citing Ross v. Powell, 359 So. 2d 803 (Ala. Civ. App. 1978); Odell v. Lutz, 177 P.2d 628 (Cal. Dist. Ct. App. 1947); Jackson v. Fitzgerald, 185 A.2d 724 (D.C. 1962) (citations omitted)). However, at times grandparent visitation has been awarded over a custodial parent's objection. *See In re* Marriage of Spomer, 462 N.E.2d 724 (Ill. App. Ct. 1984) (by statute); Krieg v. Glassburn, 419 N.E.2d 1015 (Ind. Ct. App. 1981); Looper v. McManus, 581 P.2d 487 (Okla. Ct. App. 1978). Visitation rights have also been extended to people other than natural parents or grandparents. *See* Gotz v. Gotz, 80 N.W.2d 359 (Wis. 1957) (blood relatives); Carter v. Brodrick, 644 P2d 850 (Alaska 1982) (citations omitted) (stepparents); Wills v. Wills, 399 So. 2d 1130 (Fla. Dist. Ct. App. 1981) (citations omitted) (interested third parties).

[60] CHILD CUSTODY & VISITATION LAW & PRACTICE, *supra* note 6, § 16.01[2], at 16-5.

many courts denied requests for nonparent visitation for a number of reasons.[61]

Today however, many courts have rejected the common law rule and have awarded nonparent visitation rights in the name of the child's best interests, even over the objections of a fit parent. This judicial departure from common law, permitting third parties to petition for visitation rights, centers around the best interests of the child standard.[62] While the standard for permitting visitation rights of nonparents is less stringent than the standard used in custody determinations,[63] the child's best interests remains the deciding factor.[64] Third parties

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[61] *See id.* § 16.03[1], at 16-50. Requests for grandparent visitation, in particular, have been denied under various rationales, such as:

> 1. Ordinarily the parents' obligation to allow the grandparent to visit the child is moral, and not legal;
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> 2. The judicial enforcement of grandparent visitation rights would divide proper parental authority, thereby hindering it;
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> 3. The best interests of the child are not furthered by forcing the child into the midst of a conflict of authority and ill feelings between the parent and grandparent;
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> 4. Where there is a conflict as between grandparent and parent, the parent should be the judge without having to account to anyone for the motives in denying the grandparent visitation; and
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> 5. The ties of nature are the only efficacious means of restoring normal family relations and not the coercive measures which follow judicial intervention.

Id.

[62] *See* CHILD CUSTODY & VISITATION LAW & PRACTICE, *supra* note 6, § 16.03[2], at 16-51. "Courts have found that where exceptional circumstances exist, they have the inherent authority to order visitation for a nonparent where such visitation is in the child's best interests." *Id.*

[63] *See Visitation Rights of Persons Other than Natural Parents or Grandparents*, 1 A.L.R.4th 1270, § 2 (1980).

[64] *See id.*; Primary consideration in any determination involving a visitation dispute is the child s best interests. *See* CHILD CUSTODY & VISITATION LAW & PRACTICE, *supra* note 6, § 16.01[1], at 16-4. Controlling consideration in both visitation and custody cases are best interest and welfare of the child. *See* 59 AM. JUR. 2D, *supra* note 50 (1987) (citations omitted)

seeking child visitation rights must demonstrate sufficient reasons to subjugate the *prima facie* parental right to uninterrupted custody.[65] For an award of visitation rights, a third party generally needs to show only that it is in the child's best interest to allot a portion of the child's time to visits with the petitioner, whereas in a custody case, the third party must persuade the court that it is in the child's best interest to remove custody from a parent completely and award it to a third party.[66] Factors considered by the courts when granting visitation rights under principles of equityinclude prior continuous contact,[67] death of a parent,[68] and *in loco parentis* status.[69]

As our nation's core definition of "family" is stretched to embrace the modern reality of divorced households, single parents, and alternative lifestyles, statutes

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[65] *See Visitation Rights of Persons Other than Natural Parents or Grandparents*, *supra* note 63, § 2.

[66] *See id.* (citing Commonwealth *ex rel.* Williams v. Miller, 385 A.2d 992 (Pa. Super. Ct. 1978)).

[67] *See id.* § 16.03[2][a], at 16-51 (instructing that it is the grandparents' burden to prove the child's best interests are served by continuing contact between the grandparents and the child.) Grandparents who have provided a home to the child are favored, though evidence of this is not dispositive. *See id.* Courts often require a showing that the grandparent and child share a close and loving relationship, or that the grandparents' house is considered home to the child. *See id.* (citing Michael L. Allen, Note, *Visitation Rights of a Grandparent Over the Objection of a Parent: The Best Interests of the Child*, 15 J. Fam. L. 51, 63-63 (1976-77)). *See also id.* § 16.03[2][b], at 16-51 to 16-52.

[68] *See id.* § 16.03[2][b], at 16-51 (John P. McCahey ed. 1983). Grandparent visitation rights have been granted over a custodial parent's objections after the grandparent's child is deceased. *See id.* Some courts have the sole requirement that visitation be found in the child's best interests. *See id.* However, other courts have required more compelling justifications, such as an existing close relationship between the grandparent and child, evidence that a denial of visitation rights would eliminate the child's contact with one side of the family, that the child may gain financially or emotionally from visitation with the grandparents, or the possibility that the child's custodian may no longer be capable of taking care of the child. *See id.* (footnotes omitted). *See also id.* § 16.03[2], at 16-54 to 16-56.

[69] *See id.* § 16.03[2][c], at 16-51. Both grandparents and other nonparents have been granted visitation rights after the nonparent has shown 1) an *in loco parentis* relationship to the child, and 2) that visitation between the child and the nonparent serves the child's best interests. *See id.* (citing *In re* Melissa M., 421 N.Y.S.2d 300 (Fam. Ct. 1979)). *In loco parentis* status entails both the assumption of parental status as well as the performance of parental duties. *See id.* (citing Spells v. Spells, 378 A.2d 879 (Pa. Super. 1977)). After a nonparent establishes *in loco parentis* status, a hearing is usually held to determine whether it is in the best interests of the child to award visitation rights. *See id.* (footnote omitted). *See also id.* § 16.03[2][c], at 16-54 to 16-56.

have been enacted in all fifty states to provide nonparents, particularly grandparents, with visitation rights.[70] These changes in modern society, such as the increase in the number of divorces,[71] geographical expansion between family members, and the increasing scarcity of the traditional family unit,[72] are reflected in the increase in number of visitation disputes.[73] Furthermore, the growing

[70] *See id.* § 16.03[3], at 16-51. The trend since the 1970 s has been for the majority of states to enact legislation permitting nonparent visitation. *See id.* Proposed reasons for the legislative action include the rising divorce rate, the growing number of children born out-of-wedlock, and the resulting distortion of the traditional nuclear family. *See id.* (citing Howard G. Zaharoff, *Access to Children: Towards a Model Statute for Third Parties,* 15 Fam. L.Q. 165 (1981)). Additionally, some courts have considered the benefits derived from the unique relationship between grandparents and their grandchildren. *See id.* (citing Mimkon v. Ford, 332 A.2d 199 (N.J. 1975)). *See also id.* 16.03[3], at 16-56 to 16-57. *See* Erica L. Strawman, *Grandparent Visitation: The Best Interests of the Grandparent, Child, and Society*, 30 U. TOL. L. REV. 31, 33-34 (1998). In addition to statutes granting grandparents visitation rights, some statutes have granted visitation rights to nonparents, including blood relatives, *see* Gotz v. Gotz, 80 N.W.2d 359 (Wis. 1957), stepparents, *see* Carter v. Brodrick, 644 P2d 850 (Alaska 1982) (citations omitted), and interested third parties, *see* Wills v. Wills, 399 So. 2d 1130 (Fla. Dist. Ct. App. 1981) (citations omitted).

[71] There are many proposed harbingers to the increase in divorces, such as the rise of feminism, the late 1960 s to mid 1970's "sexual revolution," and the division of sex and marriage, and the increased acceptance of homosexuality. *See* Franklin, *supra* note 33, at 1043. As a result of the increase in divorces, often followed by remarriage, new families of "husbands, wives, ex-husbands, ex-wives, step-children, half-siblings, and other variations on this theme have exploded the previously uniform membership of the nuclear family." *Id.* at 1044 (citing W. BEER, RELATIVE STRANGERS: STUDIES OF STEPFAMILY PROCESSES ix-x (1988) (finding a 75% remarriage rate of divorced persons and that 50% of those who remarry have children less than 18 years of age)).

[72] In addition to the increase in divorce rate and mothers who opt for single parenthood, even women who enter traditional nuclear families may continue to work after marriage in order to contribute monetarily to the home, to secure financial independence for herself should the marriage end in divorce, and for the fulfillment and independence associated with a career. *See id.* (citing Sokoloff, *Motherwork and Working Mothers*, *in* FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN 262 (2d ed. 1984)). Additionally, as the divorce rate increases, many people have opted to live together without marrying, having lost faith in the institution of marriage and its purported stability. *See id.* at 1045.

[73] *See* Naomi Karp, *Introduction*, *in* GRANDPARENT VISITATION DISPUTES: A LEGAL RESOURCE MANUAL 1, 1 (Ellen C. Segal & Naomi Karp eds., 1989). Adding to the increasing number of controversies, the United States Supreme Court extended the protection of family privacy in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), when a housing ordinance was held unconstitutional for its limitation upon the definition of family. Hawk v. Hawk, 855 S.W.2d 573, 578-79 (Tenn. 1993). The Court protected the right of families to define its members, restating that "the Constitution protects the sanctity of family." *Id.* at 579 (quoting Moore, 431 U.S. at 503).

prominence of the issue of grandparent visitation may also reflect demographic and political changes.[74] Influencing factors include America's aging population and the increased articulation of issues of concern to the senior population which are recognized by legislators and policy makers.[75] However, these visitation statutes do not provide grandparents with an absolute right to visit their grandchildren, but rather a possibility that a court will order visitation privileges if it is determined to be in the best interests of the children.[76]

B. PREDOMINANT FRAMEWORKS OF NONPARENT VISITATION STATUTES

Throughout the country, most visitation statutes embody variations of a few main statutory constructions. The two fundamental issues in visitation legislature concern whether there must be a showing of harm prior to permitting interference with parental autonomy and whether this consideration is altered when the child is no longer part of a traditional nuclear family. The latter concern presents itself as a threshold distinction among various nonparent visitation statutes and can be phrased as a question of whether there must be an initial showing of a disruption to the family unit. Some state statutes require a showing of family unit disruption, such as a divorce or the death of a parent, before the state may intrude by granting nonparent visitation rights.[77]

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[74] *See* Karp, *supra* note 73, at 1.

[75] *See id.*

[76] *See* Ellen C. Segal & Jody George, *State Law on Grandparent Visitation: An Overview of Current Statutes*, *in* GRANDPARENT VISITATION DISPUTES: A LEGAL RESOURCE MANUAL 1, 5 (Ellen C. Segal & Naomi Karp eds., 1989).

[77] *See, e.g.*, 59 AM. JUR. 2D, *supra* note 50 (citing Barry v. Barrale, 598 S.W.2d 574 (Mo. Ct. App. 1980); Globman v. Globman, 386 A.2d 390 (N.J. Super. Ct. App. Div.), *cert. denied*, 391 A.2d 507 (N.J. 1978)); *In the United States Supreme Court*, 11 DIVORCE LITIG. 206, 206-07 (1999) (recognizing that many grandparent visitation statutes permit grandparents to seek a visitation order from the courts after "the parents have divorced, one parent has died, or the parent-child relationship has otherwise been affected or established, as by adoption, termination of parental rights, or by paternity proceedings"). While some statutes provide for grandparent visitation rights only upon the death of the grandparent's child, others also provide for visitation where any divorce or custody proceeding has been heard by the court. *See* CHILD CUSTODY & VISITATION LAW & PRACTICE, *supra* note 6, § 16.03[3][a], at 16-57. *See also* Strawman, *supra* note 63, at 37 (enumerating three types of family disruptions that may lead to an award of grandparent visitation: divorce, death, and adoption). However, even when the family is disrupted, a number of state statutes have denied visitation when both parents voiced objections. *See* Steward v. Steward, 890 P.2d 777, 780 (Nev. 1995) (citing IND. CODE § 31-1-11.73 (1993); MISS. CODE ANN. § 93-16-1 (1993); VT. STAT. ANN. tit. 15 § 1012 (1993); W. VA. CODE § 48 48-2B-2 (1993)).

However, even when the family unit has been disrupted by divorce, some visitation statutes have been interpreted to deny grandparents visitation rights when the divorced parents objected to the visitation request because they believed it was not in the child's best interests.[78] In *Steward v. Steward*, the court held that absent clear and convincing evidence to the contrary, allowing a statute to grant visitation rights to a nonparent over the objection of divorced parents retaining legal rights to their children "would have the absurd result of permitting the state to intrude solely because the parties are divorced, regardless of the fact that both parents are in agreement as to what was in the best interests of their child."[79] Courts have also denied grandparent visitation within the setting of a disrupted family when the grandparent's child, the noncustodial parent, had visitation rights.[80] The court reasoned that it would "seldom, if ever, be in the best interests of the child to grant visitation to the grandparents when their child, the parent, has such rights. . . . otherwise the child might have four, or even six people competing for his company: father, mother, paternal grandparents and maternal grandparents."[81]

Contrasting the visitation statutes that have a threshold requirement of family disruption, some statutes are drafted broadly with a more expansive reach, permitting nonparents[82] to attain visitation rights even when the child's family is intact.[83] This breed of statute contains no prerequisite of family disruption and

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[78] *See* Steward v. Steward, 890 P.2d 777, 782 (Nev. 1995) (interpreting statute to contain a presumption against granting visitation to grandparents over the objection of divorced parents who possess full legal rights to their children). The legislative intent behind statutes that do not address the effect of parental objections have been interpreted by several states not to provide visitation rights when there is an objection by both parents or an objection is made by the grandparent's child. *See id.* at 780 (citing Olds v. Olds, 36 N.W.2d 571, 574 (Iowa 1984)).

[79] *Id.* at 782.

[80] *See In re* Adoption of a Child by M., 355 A.2d 211, 213 (N.J. Super. Ct. Ch. Div. 1976).

[81] *Id.*

[82] Standing may be limited to grandparents, depending on the particular statute. *Compare* KY. REV. STAT. ANN. § 405.021 (Michie 1999) (granting standing for visitation rights to grandparents only), *with* WASH. REV. CODE ANN. § 26.09.240 (West 1997) (permitting any "person other than a parent" to petition for visitation rights).

[83] *See* Herndon v. Tuhey, 857 S.W.2d 203, 209 (Mo. 1993) (holding statutes granting grandparent visitation rights where the sole criteria was the best interests of the child constitutional since the infringement on parents constitutional rights was "less than substantial encroachment on a family"); King v. King, 828 S.W.2d 630 (Ky.), *cert. denied*, 506 U.S. 941

permits a court to grant visitation rights with the sole inquiry being the child's best interests.[84] These statutes rely upon the assumption that maintaining contact with grandparents serves the best interests of children.[85] However, such legislation has been deemed unconstitutional by some courts under state and Federal Constitutions.[86]

Moving beyond the threshold distinction and focusing on the issue of harm, current approaches to nonparent visitation differ on what standards should be used when determining whether or not to grant nonparent visitation. Two distinctions appear in the forefront. Numerous courts have interpreted state statutes to require a showing of harm, a threat of harm to the child, or parental unfitness prior to permitting state interference in family life.[87] These courts cite a line of

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(1992)). Courts have even granted visitation rights to nonparents over the objections of both parents of an intact family. *See also* King, 828 S.W.2d at 632. *But cf., e.g.*, Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996) (finding the imposition of grandparent visitation over the objection of a parent of an intact family to be impermissible absent a showing of harm to the child).

[84] For example, section 405.021 of the Kentucky Revised Statutes provides in part: "REAONABLE VISITATION RIGHTS TO GRANDPARENTS. (1) The Circuit Court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interests of the child to do so." KY. REV. STAT. ANN. § 405.021 (Michie 1999).

[85] *See* 59 AM. JUR. 2D, *supra* note 50 (citing Globman v. Globman, 386 A.2d 390 (N.J. Super. Ct. App. Div.), *cert. denied*, 391 A.2d 507 (N.J. 1978)). *But see In re* Griffiths, 353 N.E.2d 884, 887 (Ohio Ct. App. 1975) (denying grandparents visitation rights provided by statute due to intense resentment and dislike by child of grandparents.)

[86] *See In the United States Supreme Court*, 11 DIVORCE LITIG. 206, 207 (1999); Brooks v. Parkerson, 454 S.E.2d 769, 774 (Ga. 1995) (declaring statute unconstitutional under both state and federal constitutions since it was not clear that it furthered the welfare or health of the child and did not require evidence of harm prior to permitting state interference with the family); Steward v. Steward, 890 P.2d 777, 782 (Nev. 1995) (concluding that if the state statute were interpreted to permit grandparent visitation rights over the objections of divorced parents with full legal rights, it would infringe upon the parents' constitutional right to the care and custody of their children); Hawk v. Hawk, 855 S.W.2d 573, 575 (Tenn. 1993) (holding Tenn. Code Ann. 36-6-301, which permits courts to award grandparent visitation if within the best interests of the child, unconstitutional under the privacy rights guaranteed by the Tennessee Constitution).

[87] *See Hawk*, 855 S.W.2d at 579 (holding that "without a substantial danger of harm to the child, a court may not constitutionally impose its own subjective notions of the "best interests of the child" when an intact, nuclear family with fit, married parents is involved"); Jackson v. Fitzgerald, 185 A.2d 724, 725 (D.C. 1962) ("In the absence of any charge of unfitness or misconduct, there was plainly no basis for disturbing the father's right to custody. And, logically, the same must be said as to the claim for visitation rights.").

cases from the United States Supreme Court to support this requirement. In *Meyer v. State of Nebraska*, the Court pointed to the fact that teaching a foreign language is "not injurious to the health, morals or understanding of the ordinary child" when it struck down a law prohibiting foreign languages to be taught to children who have not yet completed the eighth grade, finding that the law infringed upon parental rights.[88] Additionally, in *Wisconsin v. Yoder*, the Court rejected the state's allegation that it properly exercised its *parens patriae*[89] power to require secondary education for children irrespective of parents' wishes.[90] The Court specified that the case involved no "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare."[91]

In contrast, some state statutes have been interpreted to merely require a demonstration that the visitation would be in the best interest of child, finding that this alone serves a compelling state interest, without a showing of harm or unfitness.[92] How a state legislature comes out on these principal issues will determine the permissible degree of infringement upon parental rights. The best interests of the child standard, existing alone without the additional requirement that there be a threat of harm to the child or parental unfitness, condones the greatest intrusion upon the family unit. Moreover, conditioning standing to petition for nonparent visitation upon a family disruption, in essence, uses the marital status of a parent to determine third parties' abilities to petition the court for visitation rights and unfairly disadvantages single parents. Absent a showing of harm, a threat of harm to the child, or parental unfitness, the state should not be authorized to intrude upon family autonomy, regardless of whether there has been a disruption of the traditional family structure or not.

V SPECIFIC STATE STATUTORY APPROACHES TO NONPARENT VISITATION

Throughout the country, nonparent visitation statutes vary amongst jurisdictions. Prior to the recent United States Supreme Court ruling, states independently enacted legislation to govern child visitation rights within their respective

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[88] 262 U.S. 390, 402 (1923).

[89] *See infra* text accompanying notes 119-122.

[90] *See* Wisconsin v. Yoder, 406 U.S. 205, 222 (1972).

[91] *Id.* at 229.

[92] Some courts consider severing the grandparent-grandchild relationship as a harm in and of itself. *See* Strawman, *supra* note 70, at 38-39 (citing Parks v. Crowley, 253 S.W.2d 561 (Ark. 1952)).

borders. Subsection A of this Part of the comment will identify the current state of law in New York concerning nonparent visitation with children. New Jersey's approach to nonparent visitation is explicated in Subsection B. Subsection C will delve into the Washington State statutes and the case recently granted *certiorari* by the United States Supreme Court. Finally, the Court's recent examination of the Washington State case is explored in Part D.

A. NEW YORK NONPARENT VISITATION STATUTORY LAW

New York visitation law for nonparents extends only to grandparents and requires a threshold determination of standing prior to applying the best interest of the child standard. Historically, New York common law did not recognize the rights of grandparents to petition for visitation over objections of a custodial parent.[93] Legislation was first enacted in New York in 1966 to allow grandparents standing to petition for visitation rights.[94] This initial version of section 72 of the Domestic Relations Law[95] only extended to grandparents whose child had died.[96] The statute was amended in 1975 to extend standing to grandparents whenever "equity would see fit to intervene" based upon the present circumstances, regardless of whether a parent was deceased.[97] Thus, the current state of law in New York enables grandparents to apply to the court for forced visitation with a child when the child's parent is deceased or when circumstances show that equity demands intervention.[98]

New York courts have interpreted the statute to require a showing of "a sufficient existing relationship with [the] grandchild, or in cases where that has been frustrated by the parents, a sufficient effort to establish one" such that "equity would see fit to intervene."[99] Courts are granted the discretion to examine the

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[93] *See* Emanuel S. v. Joseph E., 577 N.E.2d 27, 28 (N.Y. App. Div. 1991) (finding that grandparents have standing to petition for visitation rights with a grandchild over the objections of parents of an intact family) (citing Lo Presti v. Lo Presti, 355 N.E.2d 372, 375 (N.Y. 1976) (citations omitted)).

[94] *See id.*

[95] N.Y. DOM. REL. LAW 72 (McKinney 1966) (amended 1988).

[96] *See Emanuel S.*, 577 N.E.2d at 28. The grandparents' rights were not independent, existing only by way of the deceased parent. *See id.* at 28-29.

[97] *See id.* (quoting N.Y. DOM. REL. LAW 72 (McKinney 1966) (L. 1975, ch. 431, § 1, as amended)).

[98] *See id.*

[99] *Id.* at 30; Wenskoski v. Wenskoski, 699 N.Y.S.2d 150, 151 (N.Y. App. Div. 1999); Lo

relevant facts in making a determination on standing. Considerations include the basis for parental objection if the child's family is intact, "the nature and extent" of the relationship between the child and grandparent, or the presence of a good faith effort to establish a relationship.[100]

After the court determines that a grandparent has standing, New York courts must then evaluate whether it is in the best interests of the child to grant visitation rights to the grandparent.[101] This determination requires the courts to apply a totality of the circumstances approach and to weigh all relevant factors of the case.[102]

New York's approach to visitation permits grandparents to petition for visitation without explicitly requiring any showing of harm to the child or parental unfitness. However, New York does require the court to find that equity demands intervention before commencing its analysis of the best interest of the child. Unfortunately, the court's interpretation of circumstances that warrant state intervention and the granting of visitation rights leaves the door open for intruding upon the family even when the facts do not rise to the level of a threat of harm to the child or parental unfitness.

While grandparents in New York may petition for visitation irrespective of whether the child's family is intact or disrupted, this may be taken into consideration under the statute's terminology granting standing whenever "equity would see fit to intervene."[103] On its face, New York's approach does not distinguish on the basis of whether the traditional nuclear family remains intact, but in practice, this still plays a role under the broad discretion granted to the

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Presti v. Lo Presti, 355 N.E.2d 372, 375 (N.Y. 1976)). Grandparents will be unable to show circumstances where "equity would see fit to intervene" if they have not previously established a relationship with the child notwithstanding available opportunities. *Emanuel S.*, 78 N.Y.2d at 182-83. However, if a grandparent's efforts to visit have been thwarted by the child s parents the lack of an established relationship with the child should not be held against the petitioner. *See* Agusta v. Carousso, 617 N.Y.S.2d 189, 190 (N.Y. App. Div. 1994) (finding an immediate and concerted effort by the grandparent to contact his grandchild through means of letters, gifts, telephone calls, visits, and the help of third parties weighed in the grandparent's favor and created standing).

[100] *Emanuel S.*, 577 N.E.2d at 29-30.

[101] *See id.* at 29. *See e.g.*, Hanna v. Hanna, 700 N.Y.S.2d 532, 533 (N.Y. App. Div. 1999) ("It is axiomatic that in adjudicating custody and visitation rights, the most important factor to be considered is the best interest of the child.") (citation omitted); Coulter v. Barber, 632 N.Y.S.2d 270, 270 (N.Y. App. Div. 1995).

[102] *See Hanna*, 700 N.Y.S.2d at 533 (citations omitted).

[103] *Emanuel S.*, 577 N.E.2d at 29.

courts.[104]

B. NEW JERSEY NONPARENT VISITATION STATUTORY LAW

In New Jersey, visitation rights have been granted to persons other than natural parents under the authority of both the New Jersey Legislature[105] and general principles of equity.[106] New Jersey's current visitation statute grants standing to grandparents and siblings to petition the court for an order of child visitation.[107] This statute places a preponderance of the evidence burden on the petitioner to show that it is in the child's best interests to grant visitation and provides a list of factors that the court must consider when making its determination.[108] Furthermore, the statute declares that if a petitioner shows that he or she was a full-time caretaker for the child then it is *prima facie* evidence that the best interest of the child would be served by awarding visitation.[109]

Even absent statutory authority, New Jersey courts have permitted nonparents who are neither a grandparent nor a sibling to petition for visitation rights if they have performed the role of a parent. [110] Again, the standard for determining

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[104] *See id.* at 30.

[105] *See* N.J. STAT. ANN. 9:2-7.1 (West 1999) (establishing visitation rights for grandparents and siblings).

[106] *See V.C.*, 725 A.2d at 22 (citing Klipstein v. Zalewski, 553 A.2d 1384, 1386 (N.J. Super. Ct. Ch. Div. 1988)).

[107] *See* § 9:2-7.1.

[108] *See* § 9:2-7.1 a - b. Factors included within the list are the relationship between the applicant and child, the relationship between the custodian and the applicant, the length of time since applicant last had contact with the child, as well as the effect the visitation will have upon the relationship between the custodian and the child. *See* § 9:2-7.1.b.(1) - (8). Other factors include the existing time arrangements between the child and the parents if they are separated or divorced, the good faith of the applicant, any history of abuse or neglect, as well as any other factors relevant to determining the best interests of the child. *See id.*

[109] *See* § 9:2-7.1 c.

[110] *See* Watkins v. Nelson, 729 A.2d 484, 491 (N.J. Super. Ct. App. Div. 1999). To determine whether a true parent-type relationship exited between a third party and the child for purposes of determining visitation rights when there is no statutory authority, New Jersey adopted the test established in *In Custody of H.S.H-K. v. Knott*, 533 N.W.2d 419, 421 (Wis. 1995). *H..S.H.-K.* laid out four elements that petitioner must prove:

> that the biological or adoptive parent consented to, and fostered, the petitioner's for-

whether to grant visitation is the best interests of the child.[111] Interestingly, New Jersey's statutory definition of "parent" includes "*when not otherwise described by the context*, ["parent"] means a natural parent or parent by previous adoption."[112] Accordingly, when a third party establishes a parental relationship to the child, the standard applied for determining both custody and visitation rights should be the child's best interest.[113] This flexible definition is consistent with the diverse family structures that exist in modern society.[114]

New Jersey courts have recognized that "[w]hen social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment."[115] The approach adopted by New Jersey places a strong emphasis on whether the petitioning nonparent fulfilled the role of a parent in the child's life, acknowledging the modern structures of many families. Recognizing the crucial role contemporary relationships can serve in children's lives helps balance the interests and rights of both the child and the parent by narrowing the breadth of standing granted to potential petitioners.

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mation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Id.

[111] *See id.* at 490.

[112] *See* N.J. STAT. ANN. 9:2-13(f) (West 1999) (emphasis added); *Watkins*, 729 A.2d at 491 (quoting V.C. v. M.J.B., 725 A.2d 13, 19 (N.J. Super. Ct. App. Div. 1999) (Wecker, J., concurring and dissenting)). The Legislature conceded that someone other than a natural parent might fall within the category of "parent" depending upon the context. *Id.*

[113] *See Watkins*, 729 A.2d at 492 (quoting Zack v. Fiebert, 563 A.2d 58, 62 (N.J. Super. Ct. App. Div. 1989)).

[114] *See id.* at 491-92 (quoting V.C., 725 A.2d at 27 (Wecker, J., concurring and dissenting)).

[115] V.C., 725 A.2d at 19 (quoting Adoption of Two Children by H.N.R., 666 A.2d 535, 540 (N.J. Super. Ct. App. Div. 1995) (quoting Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993)).

C. WASHINGTON STATE NONPARENT

VISITATION LAW: THE *STILLWELL* DECISION

The issue of nonparent visitation rights was recently addressed by the United States Supreme Court in *Troxel v. Granville.*[116] This Washington Supreme Court case, previously named *Custody of Smith v. Stillwell,* consolidated three cases to examine Washington State statutes, sections 26.10.160(3)[117] and former 26.09.240[118] of the Revised Code of Washington, to determine 1) whether petitioners had standing under the statutes[119] and 2) whether the statutes violated parents' constitutionally protected right to raise their children without state interference.[120] The Washington Supreme Court held that the statutes violated the constitutionally protected interests of the parents because the statutes, as written, permit "any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm."[121] The first of the three consolidated cases[122] involved a nonpar-

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[116] Custody of Smith v. Stillwell, 969 P.2d 21, 23 (Wash. 1998), *cert. granted sub nom.* Troxel v. Granville, 120 S. Ct. 11 (1999).

[117] Section 26.10.160(3) of the Washington Revised Code provides that: "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 visitation may serve the best interest of the child whether or not there has been any change of circumstances." WASH. REV. CODE ANN. § 26.10.160(3) (West 1997).

[118] Until the 1996 amendment, section 26.09.240 of the Washington Revised Code provided:

> The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances. A person other than a parent may petition the court for visitation rights at any time. The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

Stillwell, 969 P.2d at 24 (quoting former WASH. REV. CODE ANN. § 26.09.240 (West 1997)).

[119] *See id.* at 23. The court held that petitioners had standing. *See id.* at 27 (Due to length constraints, this aspect will not be discussed further in this Comment.)

[120] *See Stillwell*, 969 P.2d at 23.

[121] *Id.*

ent who sought visitation rights under section 26.10.160(3)[123] after having lived with the child and the child's mother for four years prior to his relationship ending with the mother.[124] The second consolidated case[125] concerned the rights of paternal grandparents to visit their grandchildren born out-of-wedlock.[126] The last of the consolidated cases addressed the visitation rights of the family of a deceased parent.[127]

Writing for the majority, Justice Madsen initiated the inquiry of the constitutionality of the state's nonparent visitation statutes[128] by acknowledging that parents have an undisputed "fundamental right to autonomy in child rearing decisions" without interference from the state.[129] The majority noted that this constitutionally protected interest was defined in *Stanley v. Illinois*[130] and has

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[122] Clay v. Wolcott, 933 P.2d 1066 (Wash. Ct. App. 1997).

[123] WASH. REV. CODE ANN. 26.10.160(3) (West 1997).

[124] *See Stillwell*, 969 P.2d at 23 (case dismissed because petitioner "lacked standing to seek visitation because he is not related to [the child] and no custody action was pending").

[125] *In re* the Visitation of Troxel, 940 P.2d 698 (Wash. Ct. App. 1997).

[126] *See Stillwell*, 969 P.2d at 23-24. After parents who never married separated, the father moved in with his parents, the Troxels, and the children visited there. *See id.* The father committed suicide and shortly thereafter the mother limited the children's visitation with the paternal grandparents. *See id.* The court held that "nonparents lack standing to seek visitation unless a custody action is pending." *Id.*

[127] *See id.* at 24. The child, Sara, was conceived through artificial insemination using donor sperm other than Brian Smith's, the parent. *See id.* The mother sought to end the marriage and both parents sought custody. *See id.* The maternal grandmother shot Smith at his home and was killed herself when Smith shot back at her. *See id.* Subsequently, Smith's surviving family petitioned for visitation rights with Sara. *See id.* The trial court awarded visitation and established a schedule. *See id.* The mother appealed and her motion to transfer the case to the Supreme Court of Washington was granted. *See id.*

[128] WASH. REV. CODE ANN. § 26.10.160(3) (West 1997); former WASH. REV. CODE ANN. 26.09.240 (prior to 1996 amendments).

[129] *Stillwell*, 969 P.2d at 27 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. the Society of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534 (1925); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Wisconsin v. Yoder, 406 U.S. 205, 235-36 (1972); Santosky v. Kramer, 455 U.S. 745, 753 (1982)).

[130] 405 U.S. 645, 651 (1972) (declaring a presumption that fathers of illegitimate children are unfit to have custody of their children after the death of the children's mother was deemed a violation of equal protection under the Fourteenth Amendment). The court noted that "[t]he State's interest in caring for Stanley's children is de minimis if Stanley is shown to

been accepted as a fundamental "liberty" interest deriving its protections from the Fourteenth Amendment and from privacy rights inherent in the Constitution.[131] Accordingly, the court recognized that state interference with the fundamental right of parents to rear their children is subject to strict scrutiny, mandating that the state put forth a compelling interest and show that the interference is narrowly drawn to achieve only that compelling state interest.[132]

The majority commenced its strict scrutiny analysis by focusing on whether the State of Washington had a compelling interest to justify interfering in family life.[133] The court enumerated two possible sources of state power.[134] First, Justice Madsen addressed the state's police power that provides the authority to protect the health and safety of its citizens, in addition to protecting citizens from injuries imposed by third parties.[135] The justice stressed that within the realm of family life, states may override parental decisions that would harm a child.[136] Justice Madsen identified that a second source of state authority exists in its *parens patriae* power.[137] In the role of *parens patriae*, the court explained that the state acts "from the viewpoint and in the interests of the child."[138] The majority reasoned that under both police power and *parens patriae* power, the state has authority to act on behalf of children who lack "the guidance and protection of fit parents of their own,"[139] but only when a child has suffered harm or is subject to

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be a fit father." *Id.* at 657-58.

[131] *See Stillwell*, 969 P.2d at 28.

[132] *See id.* (citations omitted).

[133] *See id.*

[134] *See id.*

[135] *See id.* For example, States have the power to mandate vaccination of children against communicable diseases, regardless of parent's objections. *See* Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944).

[136] *See Stillwell*, 969 P.2d at 28. In *Prince*, the Supreme Court acknowledged an exception to parents' constitutional right to child-rearing autonomy and held legislation prohibiting parents from permitting minor children to sell merchandise on public streets held valid. *See Prince*, 321 U.S. at 168-69.

[137] *See Stillwell*, 969 P.2d at 28.

[138] *Id.*

[139] *Id.*

a threat of harm.[140] The court pointed to *Yoder*, where the United States Supreme Court held that states could not mandate that Amish children be sent to public school after the eighth grade.[141] The *Yoder* Court contrasted the facts of its case to those that were present in *Prince v. Massachusetts*, noting that *Yoder* was "not one in which any harm to the physical or mental health of the child or the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."[142]

In an effort to promote the best interests of the child standard, petitioners in *Stillwell* argued that a compelling interest exists when visitation with nonparents serves the best interests of the child, whether or not there are allegations of parental unfitness, a threat of harm, or actual harm to the child.[143] The Washington Supreme Court rejected this argument, citing a line of United States Supreme Court cases that support state interference only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[144] The majority acknowledged that Washington courts have followed the lead of the United States Supreme Court by tolerating state interference with parental rights to rear children only when it is to prevent harm to a child or a risk thereof.[145] In contrast, Justice Madsen found no such com-

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[140] *See id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 206 (1972)).

[141] *See id.* at 28-29.

[142] *See id.* at 29 (quoting *Yoder*, 406 U.S. at 230; discussing Prince v. Massachusetts, 321 U.S. 158 (1944)). In *Prince*, the state was authorized to protect children from the harm associated with child labor. *See id.*

[143] *See Stillwell*, 969 P.2d at 29.

[144] *Id.* (quoting *Yoder*, 406 U.S. at 234; citing Pierce v. the Society of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534 (1952) (state interference not permitted since parents' decisions to school their children in private schools was not inherently harmful); Meyer v. Nebraska, 262 U.S. 390, 402-03 (1923) (state's interest in fostering a homogeneous population was not a sufficiently compelling interest to justify state interference since teaching a foreign language was "not injurious to the health, morals or understanding of the ordinary child."); Stanley v. Illinois, 405 U.S. 645, 645 (1972) (parental neglect must be shown prior to revoking parental rights of unwed father); Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (court upheld conviction of parent who permitted her child to sell magazines and approved state interference aimed at preventing "psychological or physical injury to the child.")).

[145] *See Stillwell*, 969 P.2d at 29-30 (citing *In re* the Welfare of Sumey, 621 P.2d 108 (Wash. 1980)). The *Sumey* court held that the state acted within its parens patriae power under the former Washington Revised Code section 13.32 when it temporarily denied custody to the parents. *See Sumey*, 622 P.2d at 111-12. The statute was enacted to protect "the mental and emotional health of the child by removing him or her from a situation of family conflict that is so extreme that the parents and child are unable to live together even with the aid of counsel-

pelling state interest in *Stillwell* because the statutes involved did not contemplate harm or a threat of harm to children as a requirement for granting third party visitation.[146] In fact, the court found no justification under the statutes for state interference with parental rights under either state police or *parens patriae* powers.[147] The majority further admonished that "[t]he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process."[148]

Justice Madsen did acknowledge that there could be situations where the denial of visitation of third parties with a substantial relationship to the child would result in severe psychological harm to the child.[149] However, the court took issue with the fact that the Washington statutes permitted any person to petition at any time for visitation, provided that it was in the best interest of the child.[150] Specifically, Justice Madsen found no statutory requirement that a petitioner must show that harm would result if the visitation petition was denied.[151] The majority further reasoned that without requiring, at a minimum, a demonstration of potential harm, the best interests standard would permit the state to interfere with families solely by determining what the court believes to be "better" for the children.[152] Justice Madsen asserted that the best interests of the child standard

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ing." *Id.* at 111 (citations omitted).

[146] *See Stillwell*, 969 P.2d at 30.

[147] *See id.*

[148] *Id.* (quoting Hawk v. Hawk, 855 S.W.2d 573, 580 (Tenn. 1993)). The court further stated that:

> For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all. "You may do whatever you choose, so long as it is what I would choose" also does not constitute a delegation of authority.

Hawk, 855 S.W.2d at 580 (quoting Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. LOUISVILLE J. FAM. L. 393, 441 (1985-86)).

[149] *See Stillwell*, 969 P.2d at 30.

[150] *See id.*

[151] *See id.* Unless the best interest of the child was shown to be to prevent harm, the standard is insufficient and does not rise to the level of a compelling state interest that would justify overruling parental rights. *See id.*

[152] *See id.* at 30-31.

is an insufficient justification for overriding parents' fundamental rights and does not rise to the level of a compelling state interest.[153] Additionally, the court admonished that the statutes created an increased possibility of frivolous claims for visitation and disapproved of the lack of protections afforded to families under the statute.[154] Concluding that Washington's visitation statutes were unconstitutional, the court held that the statutes "impermissibly interfere[d] with a parent's fundamental interest in the 'care, custody and companionship of the child.'"[155]

Separately concurring and dissenting, Justice Talmadge agreed that petitioners had standing under Washington law, yet diverged from the majority's holding to find that visitation would not constitutionally infringe parental rights.[156] The justice proclaimed that preventing the statute from providing limited visitation rights to nonparents would have "cruel and far-reaching effects on loving relatives."[157] Attributing the majority's error to two underlying flaws, the justice proffered that parents' rights to autonomy in raising their children are not absolute and that the State's *parens patriae* power can be used to protect children's welfare absent any evidence of harm.[158] While conceding that the care and custody of children is a well established right of parents, Justice Talmadge pointed out that it is equally well-established that the right is not absolute.[159] Suggesting that the majority's reliance on *Prince*, when stating that the "custody, care and nurture of the child reside first in parents" was askew, the justice focused on additional statements in *Prince* that "the family itself is not beyond regulation in the public interest . . . [a]nd neither rights of religion nor rights of parenthood are beyond limitation."[160] The justice put forth that the constitutional issue before

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[153] *See id.* at 30.

[154] *See id.* at 31. The court specifically noted that there was no requirement that petitioner show a substantial relationship with the child and that the statutes do not instruct courts to consider parents' reasons for limiting visitation. *See id.*

[155] *Stillwell*, 969 P.2d at 31 (quoting *In re* the Welfare of Sumey, 621 P.2d 108, 111 (Wash. 1980) (citation omitted)).

[156] *Stillwell*, 969 P.2d at 32 (Talmadge, J., concurring /dissenting). Justice Talmadge concurred with the majority's holding that petitioners had standing under Washington Revised Code section 26.10.160(3) and former section 26.09.240 to seek a visitation order. *See id.*

[157] *Id.*

[158] *See id.*

[159] *See id.*

[160] *Id.* (quoting Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944)).

the court requires addressing and balancing the rights of the child and the state, as well as those of the parents.[161]

Justice Talmadge first cited *In re the Welfare of Sumey*,[162] where the Washington Supreme Court previously addressed the parameters of a state's *parens patriae* powers and parental rights.[163] Under a broad interpretation of the state's *parens patriae* power, the *Sumey* court held that temporary residential placement of a child under the direction of a state statute was constitutional.[164] The *Sumey* court heralded the need to obtain a proper balance between the constitutional rights of parents and the constitutionally protected state interest in protecting the best interests of children under the doctrine of *parens patriae*.[165]

In the dissenting portion of the opinion, Justice Talmadge articulated that the essential consideration of the balancing test in *Sumey* was "the degree of abridgment of parental rights."[166] The court in *Sumey* contrasted the residential placement issue that was before the court with the severity of abridgment of rights that resulted when a termination of parental rights was sought.[167] When an extreme abridgment of parental rights is being contemplated, the *Sumey* court discerned that there must be a "commensurately grave circumstance of harm (physical, mental or emotional) to the child resulting from the parent's conduct."[168] Justice Talmadge compared the *Sumey* court's analysis of temporary residential placement to the issue of awarding visitation to nonparents.[169] Finding the granting of visitation to be a lesser abridgment of parental rights than temporary residential placement out of the home, Justice Talmadge reasoned that when granted under the statutes in question, visitation is a minor and permissible infringement on pa-

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[161] *See id.*

[162] 621 P.2d 108 (1980).

[163] *See Stillwell*, 969 P.2d at 32 (Talmadge, J., concurring /dissenting).

[164] *See id.* (citing WASH. REV. CODE ANN. § 13.32 (West 1999)).

[165] *See id.* at 33 (Talmadge, J., concurring /dissenting) (quoting *In re* the Welfare of Sumey, 621 P.2d 108, 110 (Wash. 1980)).

[166] *Id.*

[167] *See id.*

[168] *Id.*

[169] *See Stillwell*, 969 P.2d at 33 (Talmadge, J., concurring /dissenting) (noting that the *Sumey* court found that temporary residential placement did not to infringe as severely upon constitutional rights as a termination of parental rights).

rental rights.[170]

The justice further noted that in the cases relied upon by the majority, greater infringements of constitutional rights were involved.[171] Distinguishing those cases from the lesser infringement associated with visitation awards, Justice Talmadge pointed to the substantial threats involved in the cases relied upon by the majority,[172] such as parents' free exercise of religion,[173] parents' ability to raise their children and select whether to send them to religious or military school,[174] and a presumption that allowed the termination of an unwed father's parental rights.[175] Justice Talmadge proposed that, under *Sumey*, the minor abridgment of parental rights associated with the Washington statutes is permissible.[176]

Justice Talmadge next focused on the state's *parens patriae* power.[177] The justice challenged the majority's claim that there must be evidence of parental unfitness or harm to the child before the state may exercise its *parens patriae* power.[178] Supporting this challenge, Justice Talmadge again underscored the *Sumey* case, emphasizing that while there was no claim of harm or parental unfitness, a child's temporary residential placement by the state outside of the home was deemed a permissible exercise of *parens patriae* power.[179] Moreover, the

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[170] *See id.* These statutes authorize visitation to be granted if in furtherance of the best interests of the child. *See id.*

[171] *See Stillwell*, 969 P.2d at 33-34 (Talmadge, J., concurring /dissenting).

[172] *See Stillwell*, 969 P.2d at 34 (Talmadge, J., concurring /dissenting).

[173] *See id.* (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

[174] *See id.* (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925)).

[175] *See id.* (citing Stanley v. Illinois, 405 U.S. 645 (1972)).

[176] *See id.* Justice Talmadge quoted the Indiana Appellate Court s response to the same argument as made by the current majority, where that court upheld a grandparent visitation act: Unlike these significant infringements, visitation rights by grandparents as defined by the Act are less than a substantial encroachment on the parent's fundamental rights or the autonomy of the nuclear family. *Id.* (quoting Sightes v. Barker, 684 N.E.2d 224, 230 (Ind. Ct. App.), *transfer denied*, 690 N.E.2d 1187 (Ind. 1997)).

[177] *See id.*

[178] *See Stillwell*, 969 P.2d at 34 (Talmadge, J., concurring /dissenting).

[179] *See id.* (citing *In re* the Welfare of Sumey, 621 P.2d 108, 111 (Wash. 1980)).

justice recounted that the Washington Supreme Court previously held that even in a dependency proceeding, threatening a more severe abridgment of constitutional rights, it is not necessary to find unfitness prior to making a determination.[180] Furthermore, Justice Talmadge noted a previous Washington custody case and again urged that parental unfitness is not a prerequisite for the state to act under its *parens patriae* authority and emphasized that the best interest of the child is also the governing standard in child custody cases where the court's determination significantly infringes upon at least one parent's constitutional rights.[181] Instead of using parental unfitness as a threshold requirement for the state to exercise its *parens patriae* power, the justice proposed that a showing of parental unfitness or harm to a child relates to the extent that the state may infringe upon parental rights.[182]

Justice Talmadge criticized the majority's claim that the United States Supreme Court cases support the proposition that the state may only interfere with parental rights to rear their children if there is a threat of harm to the child or the potential for substantial social burden.[183] The justice intimated that the cases cited by the majority stand for principles different from what the majority has portrayed.[184] In *Wisconsin v. Yoder*,[185] compulsory school attendance law was barred from being applied to the Older Order Amish under the First Amendment's Free Exercise Clause.[186] *Yoder* is based on a claim of free exercise of religion by the Amish and the case's unique facts.[187] Under those circumstances,

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[180] *See Stillwell*, 969 P.2d at 35 (Talmadge, J., concurring /dissenting) (citing *In re* the Welfare of Key, 836 P.2d 200, 206 (Wash. 1992), *cert. denied*, 507 U.S. 927 (1993)).

[181] *See id.* (citing *In re* Marriage of Allen, 626 P.2d 16 (Wash. Ct. App. 1981) (awarding custody to a nonparent requires more than a showing of the best interests of a child, but less than parental unfitness)). "Precisely what might outweigh parental rights must be determined on a case-by-case basis. But unfitness of the parent need not be shown." *Allen*; 626 P.2d at 23.

[182] *See id.*

[183] *See id.*

[184] *See Stillwell*, 969 P.2d at 35-36 (Talmadge, J., concurring /dissenting).

[185] 406 U.S. 205 (1972).

[186] *See Stillwell*, 969 P.2d at 35 (Talmadge, J., concurring /dissenting) (citing *Yoder*, 406 U.S. at 215). "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. CONST. amend. I.

[187] *See Stillwell*, 969 P.2d at 36 (Talmadge, J., concurring /dissenting).

the *Yoder* Court required a compelling state interest, but warned that parental rights would be limited even when there was a free exercise claim if there was a threat of harm to the child or the potential for substantial social burdens.[188] Justice Talmadge explained that the Supreme Court did not require that harm be established prior to interference with parental rights, as proposed by the majority's assertion in the case at bar.[189] To the contrary, Justice Talmadge clarified that *Yoder* denoted that even when heightened protections exist for parental rights,[190] interference would be justified under the extreme circumstances of harm to a child.[191]

Justice Talmadge also found error with the majority's reliance on *Prince* to support the view that there must be evidence of harm before the state can interfere with parental rights.[192] The justice repeated the *Prince* Court's holding, stating that when the child labor law at issue was upheld against challenges under the First Amendment and parents' right to raise their children, the Court held that "the rightful boundary of [the state's] power has not been crossed in this case" and that "[o]ur ruling does not extend beyond the facts the case presents."[193] While the majority interpreted *Prince* to establish a requirement that harm must be present before state interference is permissible, Justice Talmadge construed *Prince* in a more narrow fashion.[194] The justice explained that when the state sought to prevent harm to a child, state interference with parental rights was appropriate.[195] Justice Talmadge suggested that evidence of harm was not necessary in all circumstances of state interference in family life.[196]

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[188] *See id.* (quoting *Yoder*, 406 US. at 233-34).

[189] *See id.*

[190] In *Yoder*, the parents' claims of constitutional protection as parents were magnified by their claims under the Free Exercise clause of the First Amendment. *See Yoder*, 406 U.S. at 207.

[191] *See Stillwell*, 969 P.2d at 36 (Talmadge, J., concurring /dissenting).

[192] *See id.* (citing Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).

[193] *See id.* (quoting *Prince*, 321 U.S. at 170-71). Justice Talmadge proposed that while Prince shows that state interference in religious practices or parental authority is proper to protect a child from harm, the case does not indicate that harm is a threshold requirement for state interference in all circumstances. *Id.*

[194] *See id.*

[195] *See id.*

[196] *See id.*

Justice Talmadge examined, but dismissed, the two cases cited by the majority, addressing the constitutionality of grandparent visitation statutes in light of their intrusion on parental rights.[197] The justice noted that the first case mentioned by the majority was *Hawk v. Hawk*, where the visitation statute was held unconstitutional under a state constitution.[198] Justice Talmadge argued the inapplicability of *Hawk* to the present case in view of the fact that *Hawk* was decided under Florida's Constitution, which provides greater privacy protection than the Federal Constitution.[199] The justice warned of the slight precedential value of *Hawk* in the state of Washington since Washington's constitution provides no greater protection than that offered by the Federal Constitution, outside of search and seizure matters.[200] The justice conceded that the second case addressed by the majority, *Brooks v. Parkerson*, concerned a grandparent visitation statute that was held unconstitutional under both state and federal constitutions.[201] However, Justice Talmadge stressed that the *Brooks* court rested its holding upon the premise that any infringement upon parental rights, however slight, was unconstitutional.[202] The justice repeated that such approach was rejected in *Sumey*.[203]

Moreover, Justice Talmadge found fault with the majority for only addressing the minority view and failing to acknowledge that the majority of states uphold grandparent visitation statutes.[204] Quoting the Utah Court of Appeals which upheld Utah's Grandparent Visitation Statute as constitutional, Justice Talmadge stressed that "the vast majority of courts that have addressed the constitutionality of grandparent visitation statutes authorizing visitation if in the best interest of the child, have upheld those statutes as constitutional."[205] As additional evidence

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[197] *See Stillwell*, 969 P.2d at 36 (Talmadge, J., concurring/dissenting) (citing Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993); Brooks v. Parkerson, 454 S.E.2d 769 (Ga.), *cert. denied*, 516 U.S. 942 (1995)).

[198] *See id.* (citing *Hawk*, 855 S.W.2d at 582).

[199] *See id.*

[200] *See id.* (citing Ramm v. City of Seattle, 830 P.2d 395 (Wash. Ct. App. 1992)).

[201] *See Id.* at 37 (Talmadge, J., concurring /dissenting) (citing *Brooks*, 454 S.E.2d at 774 n.6).

[202] *See id.* (citing *Brooks*, 454 S.E.2d at 774 n.6).

[203] *See Stillwell*, 969 P.2d at 37.

[204] *See id.*

[205] *Id.* (quoting Campbell v. Campbell, 896 P.2d 635, 644 n.18 (Utah App. 1995) (citations within quotation omitted). "To date, only Georgia has declared a statute permitting

of the constitutionality of these statutes, the justice highlighted the denial of *certiorari* by the United States Supreme Court to hear the Kentucky case, *King v. King*.[206] In *King*, a statute permitting visitation in the best interest of the child by nonparents was held constitutional under a Federal Constitution challenge.[207] Justice Talmadge alluded to the fact that the denial of *certiorari* suggested that the Kentucky case was decided correctly and therefore the statute did not impermissibly infringe upon parental rights under the Federal Constitution.[208] Correspondingly, the justice argued that since the Washington Constitution affords the same protection as the Federal Constitution in this area,[209] the Washington statute presently under consideration should similarly withstand a constitutional challenge.[210]

Justice Talmadge next turned to cases where the courts, as an instrumentality of the state, have awarded visitation rights under an exercise of *parens patriae* power, even absent specific statutory authority.[211] The justice recounted the rationale in *Roberts v. Ward*[212] where, under the court's equitable powers, grandparents were awarded visitation rights over the objections of a natural parent.[213] The justice quoted the *Roberts* court's analysis of parental rights and the modern family, when it submitted:

> [p]arental autonomy is grounded in the assumption that natural parents raise their own children in nuclear families, consisting of a married couple and their children . . . .The realities of modern living, however, demon-

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court-ordered grandparent visitation, if in the best interest of the child, to be unconstitutional under the United States Constitution." *Id.*

[206] 828 S.W.2d 630 (Ky.), *cert. denied*, 506 U.S. 941 (1992).

[207] *See Stillwell*, 969 P.2d at 37 (Talmadge, J., concurring /dissenting).

[208] *See id.*

[209] *See id.* (citing Ramm v. City of Seattle, 830 P.2d 395, 402 (Wash. Ct. App.), *review denied*, 844 P.2d 437 (1992)).

[210] *See Stillwell*, 969 P.2d at 37-38 (Talmadge, J., concurring /dissenting).

[211] *See Stillwell*, 969 P.2d at 38-39 (Talmadge, J., concurring /dissenting) (citing Roberts v. Ward, 493 A.2d 478 (N.H. 1985) (awarding visitation rights to grandparents despite a parent s objection)).

[212] 493 A.2d 478 (N.H. 1985).

[213] *See Stillwell*, 969 P.2d at 38 (Talmadge, J., concurring /dissenting).

> strate that the validity of according almost absolute judicial deference to parental rights has become less compelling as the foundation upon which they are premised, the traditional nuclear family, has eroded . . . .[214]

Justice Talmadge continued to quote the *Roberts* court's opinion, finding that due to the decline of the traditional nuclear family, children are more likely to become attached to people not within their immediate families and to have non-parents perform the role of psychological parents when the family is not intact.[215] The justice pointed to the necessity, as suggested by the court in *Roberts*, to acknowledge the intricacy of the modern family and to recognize that children have the right to maintain close relationships formed with people outside the family when their family lacks the traditional nuclear family structure.[216] Justice Talmadge transcribed a portion of the *Roberts* holding, articulating that the court must accept that it is the child's right to know her grandparents that is being protected and not the grandparents' interests.[217]

Justice Talmadge next addressed the majority's denouncement of the best interest standard.[218] The justice clarified that the Washington statute's standard of the best interests of the child embodies the very items the majority found lacking in the statutes.[219] Enumerating factors such as a relationship between the petitioner and the child and any incidents of abuse in the past, the justice explained that such factors are considered in the case-by-case approach inherent in the best interests standard.[220] Justice Talmadge maintained that case law concerning the welfare of children in Washington supports the use of a best interests standard.[221] Declaring that the standard of best interests of the child "lacks nothing in its brevity," the justice underscored the flexibility retained by the standard to ad-

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[214] *Id.* (quoting *Roberts*, 493 A.2d at 481 (citations omitted)).

[215] *See id.* (quoting *Roberts*, 493 A.2d 478, 481 (citations omitted)).

[216] *See Stillwell*, 969 P.2d at 38-39 (Talmadge, J., concurring /dissenting) (quoting *Roberts*, 493 A.2d 478, 481) (citations omitted)).

[217] *See Stillwell*, 969 P.2d at 39 (Talmadge, J., concurring /dissenting).

[218] *See id.*

[219] *See id.*

[220] *See id.* Justice Talmadge explicated that statutes containing enumeration of such best interest factors are often included only as examples and are not exclusive. *See id.* at 39 n 5.

[221] *See Stillwell*, 969 P.2d at 41 (Talmadge, J., concurring /dissenting).

dress the myriad of circumstances that must be considered when making determinations that concern a child's welfare, such as visitation rights.[222] Justice Talmadge highlighted that this standard "remain[s] the touchstone by which all other rights are tested and concerns addressed in various contexts dealing with children."[223]

Similarly, Justice Talmadge dismissed the majority's concern that the statutes in question lacked protection against frivolous visitation petitions as unfounded.[224] The justice was confident that courts are sufficiently capable of deterring such abuses through means of sanctions and by awarding attorney fees and costs.[225]

Justice Talmadge concluded by restating an objection to the majority's holding that parental rights are impermissibly infringed when visitation is awarded based upon a determination of the best interests of a child.[226] Justice Talmadge found the majority's conclusion unsound and irreconcilable with previous decisions that held abridgments of parental rights of greater magnitude to be constitutional.

Statutes analogous to those addressed in *Stillwell* are found throughout the country. The United States Supreme Court granted certiorari and forayed into the area of family law, offering some direction to state legislatures and courts for deciding the permissible reach of the state's authority into family life.

D. THE UNITED STATES SUPREME COURT'S VOICE: *TROXEL V. GRANVILLE*

The United States Supreme Court released a plurality decision on June 5, 2000 limiting its holding to the Washington State statute's validity as applied to the facts of the case before it.[227] Justice O'Connor was joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer in announcing the Court's judgment affirming the Washington State Supreme Court's holding.[228] The Court reviewed the procedural history, noting that the Washington Court of Appeals re-

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[222] *Id.*

[223] *Id.* (footnote omitted).

[224] *See Stillwell*, 969 P.2d at 42 (Talmadge, J., concurring /dissenting).

[225] *See id.* (citations omitted).

[226] *See id.*

[227] *See Troxel v. Granville*, 120 S. Ct. 2054 (2000).

[228] *See id.* at 2057, 2059.

versed the Superior Court's order of visitation and dismissed the petition for visitation under the belief that "nonparents lack standing to seek visitation under § 26.10.160(3) unless a custody action is pending."[229] While the Washington Supreme Court affirmed the Court of Appeals, it did so on different grounds, finding that the Troxels did have standing under the plain language of the Washington statute, but that the statute was an unconstitutional infringement upon fundamental rights of parents to raise their children.[230]

In affirming the Washington State Supreme Court's judgment, the plurality took notice of the changing demographics of the average American family.[231] Justice O'Connor reasoned that the universal enactment of nonparent visitation statutes is an acknowledgment of the changing structures of the modern family.[232] Appreciating that a price is paid in exchange for the expansion of statutory rights to nonparents, the Plurality identified that a "substantial burden [can be placed] on the traditional parent-child relationship" and that constitutional questions may be raised.[233] Justice O'Connor next defined narrowly the question before the Court: whether section 26.10.160(3) of the Revised Code of Washington violates the Federal Constitution as it was applied to the Granville family.[234]

Discussing the Due Process guarantees of the Fourteenth Amendment, the Plurality proclaimed the existence of a substantive component protecting certain fundamental rights.[235] Justice O'Connor identified the fundamental liberty interest implicated in the case to be a parents' interest in the "care, custody, and control of their children" and recognized it as being one of the oldest liberty interests recognized by the United States Supreme Court.[236] Declaring the Washington

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[229] *Id.* at 2058.

[230] *See id.*

[231] *See id.* at 2059 (remarking on the increased number of children being raised in single-parent households or by grandparents).

[232] *See id.*

[233] *Troxel*, 120 S. Ct. at 2059.

[234] *See id.*

[235] *See id.* at 2059-60 (quoting Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997))

[236] *Id.* at 2060 (citing Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944)). The plurality also noted that this fundamental right of parents has been recognized more recently, as well. See id. (citing Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978)).

statute "breathtakingly broad," Justice O'Connor clearly stated that section 26.10.160(3), as applied to the present case, is an unconstitutional infringement upon the parent's, Tommie Granville's, fundamental right to make decisions pertaining to the care, custody and control of her children.[237]

The Plurality first examined the breadth of the statute before applying the law to the facts of the case.[238] The language of the statute "effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review."[239] The Plurality posited that once a parent's decision was before a judge, it was accorded no deference and the determination of the child's best interests would rest solely with the judge.[240]

Significantly, Justice O'Connor declared that the Washington Supreme Court declined to read section 26.10.160(3) narrowly.[241] The Plurality pointed to the Superior Court's holding as evidence that a broad interpretation of the statute results in outcomes based on mere disagreements in opinions between parents and judges on what is in the child's best interests.[242] Justice O'Connor continued on, noting that there were no special factors justifying the state's interference with the fundamental right of a parent to direct the rearing of her children.[243]

Again proclaiming that section 26.10.160(3), as applied to the facts of the case, violated the Due Process Clause, Justice O'Connor delineated factors supporting this finding.[244] The Plurality first posited that there were no allegations or findings of parental unfitness on the part of Granville, stressing the import of

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[237] *Id.* at 2060-61.

[238] *See id.* at 2061.

[239] *Troxel*, 120 S. Ct. at 2061. "According to the statute's text, '[a]ny person may petition the court for visitation rights at any time,' and the court my grant such visitation rights whenever 'visitation may serve the best interest of the child.'" *Id.* (citing WASH. STAT. § 26.10.160(3)).

[240] *See id.*

[241] *See id.* To the contrary, the Washington Supreme Court interpreted the statute to permit "any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm." *Id.* (citing *Custody of Smith v. Stillwell*, 969 P.2d 21, 30 (Wash. 1998)).

[242] *See id.* at 2061.

[243] *See id.*

[244] *See id.* at 2061-64.

this due to the existing presumption that "fit parents act in the best interests of their children."[245] The second factor considered by the Plurality is that the Superior Court gave no special weight to Granville's opinion regarding the best interest of her children.[246] To the contrary, Justice O'Connor stressed that the Superior Court judge's comments were indicative of a presumption in opposition to the traditional approach.[247] The Plurality interpreted the lower court judge's comments as a presumption that requests for grandparent visitation should be awarded unless the fit custodial parent showed there would be an adverse impact on the children, placing the burden upon the fit parent.[248] Justice O'Connor criticized the Superior Court's failure to provide protection for a parent's fundamental right to direct the rearing of her children.[249] Finding this particularly troublesome since the statute was interpreted to subject parental decisions to judicial review, the Plurality reiterated that the courts must attach some modicum of special weight to parents' determinations.[250]

Addressing the last factor that lead the Plurality to find that the statute unconstitutionally infringed Tommie Granville's fundamental rights, Justice O'Connor noted that Granville never tried to eliminate visitation completely.[251] Once again, the Plurality commented on the fact that the court gave no weight to the fact that Granville agreed to permit visitation before the grandparents petitioned the court, and instead the court ordered a visitation schedule that it considered to be middle ground, rejecting Granville's proposal.[252] Justice O'Connor implied

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[245] *Id.* at 2061.

[246] *See Troxel*, 120 S Ct. at 2062.

[247] *See id.* The Plurality quoted the Superior Court's explanation that "[the burden is to show that it is in the best interest of the children to have some visitation and some quality time with their grandparents. I think in most situations a commonsensical approach [is that] it is normally in the best interest of the children to spend quality time with the grandparent, unless the grandparent, [sic] there are some issues or problems involved wherein the grandparents, their lifestyles are going to impact adversely upon the children. . . . I think [visitation with the Troxels] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children." *Id.* (citation omitted).

[248] *See id.*

[249] *See id.*

[250] *See id.*

[251] *See id.* at 2062-63.

[252] *See Troxel*, 120 S. Ct. at 2063. The Superior Court ordered "one weekend of visitation per month, one week in the summer, an time on both the petitioning grandparents' birth-

that there is another statutory option that exists, namely statutes that prohibit visitation "unless a parent has denied (or unreasonably denied) visitation to the concerned third party."[253]

Reiterating its finding that the court's visitation order unconstitutionally infringed upon Granville's fundamental right to decide upon the care, custody and control of her children, the Plurality repeated that this case merely concerned a disagreement between Granville and the Washington Superior Court in determining the best interests of her children and that the Due Process Clause does not entitle a state "to infringe on the fundamental right of parents to make child-drearing decisions simply because a state judge believes a 'better' decision could be made."[254]

Justice O'Connor concluded by acknowledging the limited guidance provided by the United States Supreme Court, and that the constitutional question of whether the Due Process Clause mandates nonparent visitation statutes to require a showing of "harm or potential harm to the child" prior to awarding visitation rights was not addressed.[255] Furthermore, the Plurality affirmed the Washington Supreme Court and declined to remand the case due to the disruptive nature of litigating domestic relations proceeding, both on the parent-child relationship and on the finances of Granville.[256]

While concurring in the judgment, Justice Souter would have affirmed the Washington Supreme Court's invalidation of the statute and declined to review and limit the holding to the specific application of the statute to the facts of the case.[257] Justice Souter found no error with one of the Supreme Court of Washington's grounds for invalidating the statute, namely that the statute is too broad and therefore unconstitutional since visitation rights could be petitioned by any person at any time under the statute, subject only to the best interests of the child standard.[258]

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days," as opposed to Granville's suggestion proposal of one short visit per month and special holidays.

[253] *Id.* (citing Miss. Code Ann. § 93-16-3(2)(a) (1994); Ore. Rev. Stat. § 109.121(1)(a)(B) (1997); R.I. Gen. Laws § 15-5-24.3(a)(2)(iii)-(iv) (Supp. 1999)).

[254] *Id.* at 2063-64.

[255] *Id.* at 2064 ("We do not, and need not, define today the precise scope of the parental due process right in the visitation context.")

[256] *See id.* at 2065.

[257] *See id.* at 2065 (Souter, J., concurring)

[258] *See Troxel*, 120 S. Ct. at 2065-66 (Souter, J., concurring).

Accordingly, Justice Souter did not find it necessary to consider the Supreme Court of Washington's other ground for invalidating the statute, that the statute failed to require harm prior to entertaining a visitation request.[259] The Justice's concurrence recognized the protection afforded parents in "the nurture, upbringing, companionship, care and custody of children."[260]

In addition, Justice Souter warned that this principle would be a "sham" without protecting parents from "judicially compelled visitation by 'any party' at 'any time' a judge believed he 'could make a 'better' decision."[261] The Justice concluded by recognizing that a state's highest court has the power to interpret its own domestic statute and to utilize a demanding standard when determining its constitutionality.[262]

Separately concurring in the judgment, Justice Thomas opined that the standard of review to be applied to infringements of fundamental rights was strict scrutiny.[263] The Justice deciphered that Washington lacked a mere legitimate governmental interest "to say nothing of a compelling one - in second-guessing a fit parent's decision regarding visitation with third parties."[264]

Leading the multiple dissenting opinions, Justice Stevens posited that certiorari should never have been granted.[265] However, since the case is before the Court, the Justice proposed that the federal questions be examined.[266] Justice Stevens agreed with Justice Souter's opinion that a review of the Superior Court's application of the statute to the facts of the case at bar is unwarranted.[267]

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[259] *See id.*

[260] *Id.* at 2066 (Souter, J., concurring) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Society of Sisters,, 268 U.S. 510 535 (1925); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Parham v. J.R., 442 U.S. 584, 602 (1979); Santosky v. Kramer, 455 U.S. 745, 753 (1982); Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

[261] *Id.* at 2066-67 (Souter, J., concurring).

[262] *See id.* at 2067 (Souter, J., concurring).

[263] *See id.* at 2068 (Thomas, J., concurring).

[264] *Troxel*, 120 S. Ct. at 2068 (Thomas, J., concurring).

[265] *See id.* at 2068 (Stevens, J., dissenting) (noting the troublesome character of the Superior Court's decision and the uniqueness of the statute at issue).

[266] *See id.*

[267] *See id.* Justice Stevens determined that in light of the Washington Supreme Court s

Finding the Washington Supreme Court's reasoning flawed, Justice Stevens recommended that the Court correct the errors and remand the case for proper review of the Superior Court's determinations.[268]

First, the Justice viewed the State Supreme Court's basis for invalidating the statute insufficient under federal constitutional analysis.[269] According to Justice Stevens, neither the provision granting "any person" standing to petition nor the absence of a requirement that harm be shown invalidates the statute in all its applications.[270] Therefore, the Justice disagreed with the State Supreme Court's conclusion that the statute "would invariably run afoul of the Fourteenth Amendment" since within the scope of the statute lies circumstances where the statute would be constitutional.[271] Second, Justice Stevens declared the that Washington Supreme Court was unsupported in its interpretation that the Federal Constitution requires a finding of harm or potential harm prior to granting visitation over a parent's objection.[272]

While assenting to the Plurality's analysis of parents' fundamental right under the Fourteenth Amendment to maintain the parent-child relationship, Justice Stevens articulated that this right exists within limits and is not absolute.[273] Moreover, the Justice expanded his analysis to contemplate children's interests in preserving intimate relationships.[274] Balancing the child's interest as an addi-

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invalidation based upon the Federal Constitution, the state court of appeals did not have the opportunity to review the Superior Court's finding, and as such, the United States Supreme Court should not be doing so. *See id.*

[268] *See id.* at 2070 (Stevens, J., dissenting).

[269] *See id.*

[270] *See Troxel*, 120 S. Ct. at 2070 (Stevens, J., dissenting).

[271] *Id.*

[272] *See id.* Justice Stevens recognized that the parent-child relationship is protected by the Constitution from arbitrary State interference. *See id.* at 2070-71 (Stevens, J., dissenting). However, the Justice clarified that this parental right is not so absolute that a "rigid constitutional shield" exists to protect every parental decision from challenges where a showing of harm is lacking. *Id.* at 2071 (Stevens, J., dissenting).

[273] *See id.* at 2071-72 (Stevens, J., dissenting). For example, Justice Stevens discussed *Lehr v. Robertson*, 463 U.S. 258 (1983), where a parent-child relationship was required before a biological parent is afforded constitutional protections as a parent. *See id.* at 1072 (Stevens, J., dissenting). However, this Court has held that both biology and an established relationship was insufficient to instill parental rights and overcome a state statutory presumption that a child's father is the husband of the child's mother. *See id.*

[274] *See id.* at 1072 (Stevens, J., dissenting).

tional factor, Justice Stevens proposed that the protection of parental rights against arbitrary state interference should not prevent the protection of children from the "arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child."[275] The required balancing of interests, the Justice instructed, should be tackled by the states, not federal courts applying a national standard.[276] Justice Stevens concluded by proclaiming that the states have the ability to evaluate the "impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child" under the Due Process Clause of the Fourteenth Amendment.[277]

Separately dissenting, Justice Scalia suggested that he supported the argument that states should not have the power to interfere with parental rights to direct the rearing of their children.[278] However, since this right remains unenumerated, the Justice did not find support in the Constitution to invalidate a law contrary to this interest.[279] Furthermore, Justice Scalia believed the diversity of opinions on parental rights diminished any argument for the application of stare decisis or the expansion upon its underlying theory.[280] Admonishing the protection of the unenumerated parental right under the auspices of the Federal Constitution, the Justice forecasted the need for judicial initiative to define "parents," "other persons" who may qualify to petition for visitation, and "harm to the child."[281] Justice Scalia cautioned that the result would be judicially and federally prescribed family law.[282]

Justice Kennedy prepared the last dissent in response to the Plurality's opinion. Justice Kennedy commenced by criticizing the Washington Supreme Court's decision that it was an error for the statute not to require a showing that

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[275] *Id.*

[276] *See Troxel*, 120 S. Ct. at 2073 (Stevens, J., dissenting).

[277] *Id.* at 2074 (Stevens, J., dissenting).

[278] *See id.* at 2074 (Scalia, J., dissenting).

[279] *See id.*

[280] *See id.*

[281] *Id.*

[282] *See Troxel*, 120 S. Ct. at 2075 (Scalia, J., dissenting). Justice Scalia took issue with subjecting family law to a federal regime since the federal judiciary is no better suited that the state legislatures to shape this area of the law. Additionally, the Justice found reason to keep this area for the states since any harm would be more limited in scope and more easily corrected at the state level, not to mention the peoples' ability to remove the legislators. *See id.*

harm to the child would result if visitation were to be denied.[283] Positing that the state supreme court's theory was too broad, the Justice interpreted it to imply that the best interests of the child standard would be inappropriate in any visitation case.[284] Under this view, Justice Kennedy proposed that the appropriate recourse is to vacate and remand, in order to allow the Washington Supreme Court to reconsider the case and correct its overly broad formulation of a harm requirement.[285]

Justice Kennedy initially analyzed whether a showing of harm must be present in every visitation petition by recognizing the constitutional right of parents to determine "without undue interference by the state, how best to raise, nurture, and educate" their children.[286] The Justice clarified that the Washington State Supreme Court's attempted to further define this parental right by requiring third parties petitioning for visitation to establish that harm would result to the child if visitation was denied.[287] Justice Kennedy questioned whether the State Supreme Court's reasoning rested on an underlying assumption that parents objecting to visitation requests were the child's primary caregiver and that third parties petitioning for visitation were without established relationships with the child.[288] Finding this assumption to rest upon the concept of the conventional nuclear family, the Justice articulated that this is not the predominant structure in many families today.[289]

Justice Kennedy challenged the State Supreme Court's rationale and predicted that cases will arise in which an absolute parental veto would be inappropriate due to a third party's substantial role in the child's life, such as a third party who fulfills the role of a caregiver.[290] Contrary to the State Supreme Court's conclusion that use of the best interests of the child standard is prohibited

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[283] *See id.* at 2075 (Kennedy, J., dissenting).

[284] *See id.*

[285] *See id.* at 2075-76 (Kennedy, J., dissenting).

[286] *Id.* at 2076 (Kennedy, J., dissenting).

[287] *See id.* The Washington Supreme Court viewed the best interests of the child standard to be an inadequate reason for the state to override parents' fundamental rights.

[288] *See Troxel*, 120 S. Ct. at 2076.

[289] *See id.* Justice Kennedy recognized that many children are raised without two parents regardless of whether their upbringing consisted of tragedy or happiness. *Id.*

[290] *See id.*

under the Constitution in visitation proceedings, the Justice argued that when dealing with certain relationships, states should be permitted to utilize the best interests of the child standard in order to avoid harm.[291] Moreover, as a result of the limited history of cases granting third parties visitation,[292] and in light of the "almost universal adoption of the best interests standard for visitation disputes," Justice Kennedy considered it unlikely that there is any right to be free in all cases from courts applying the best interests standard.[293] Instead, Justice Kennedy suggested that the decision whether the application of the best interests standard is constitutional should be decided after examining the specific facts of the case.[294] Agreeing with Justices Stevens and Scalia, Justice Kennedy identified the state courts as being best qualified to sort through the issues arising in family law cases.[295]

Finding that the Washington Supreme Court did not evaluate the specific visitation order in this case due to its "sweeping ruling" that the best interest standard always results in an unconstitutional ruling, Justice Kennedy determined that the proper recourse is to vacate the judgment and remand the case for further consideration.[296]

VI ANALYSIS

Faced with the deterioration of the "nuclear" family and motivated by the desire to insure a proper environment consisting of the close ties attributed to the traditional nuclear family, our judiciary has been forced to consider whether children's needs and rights should trump parental rights. When we contemplate

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[291] *See id.* at 2078 (Kennedy, J., dissenting). Justice Kennedy pointed to other methods of protecting parents from excessive third-party visitation petitions, such as statutory limitations on who has standing to petition, such as grandparents, or by requiring the third party to demonstrate that a substantial relationship exists with the child. *See id.*

[292] *See id.* at 2076-77 (Kennedy, J., dissenting). "The consensus among court and commentators is that at least through the 19th century there was no legal right of visitation; court-ordered visitation appears to be a 20th century phenomenon." *Id.* at 2077 (citations omitted).

[293] *Id.* at 2079 (Kennedy, J., dissenting).

[294] *See Troxel*, 120 S. Ct. at 2079 (Kennedy, J., dissenting). The court's conclusion would vary depending upon whether a stranger is petitioning for visitation over a fit parent's objection as opposed to determining visitation for another parent or someone fulfilling the role of a parent. *Id.*

[295] *See id.*

[296] *Id.*

the best interests of the child, it is tempting to conclude that they are paramount to parents' rights to privacy and autonomy in raising their children. Indeed, some courts have held this to be so.[297] However, both the welfare of children and parents' rights will be protected if, prior to the inquiry of the child's best interests, there is a required showing of harm to a child, a threat of harm, or parental unfitness. Permitting the sole criteria for state interference to be the court-decided best interests of the child, absent a finding of harm or parental unfitness, condones the diminution of parents' rights and family autonomy without requiring any compelling state interest.

Constitutional rights of parents[298] are threatened by two aspects of the non-parent visitation case law. First, the level of protection afforded to parental rights should not be dependent upon marital status. As the face of the traditional "nuclear" family changes, we must decide whether this equates to a dilution of parents' constitutional rights. Case law shows that in some jurisdictions, standing for nonparents to petition for visitation is contingent upon whether the child's family is disrupted.[299] Statutes permitting state intrusion more easily upon disrupted families than upon intact families should not be tolerated.

Allowing the state to intrude more easily upon parental rights simply because the traditional family unit is no longer intact is an impermissible infringement upon parents' Constitutional rights to raise their children. Statutes that distinguish between disrupted and intact families send a message that parents must choose between staying in an unhappy marriage or loosing their constitutional rights as parents.

Whether a man or woman chooses to leave a marriage, chooses to bring a child into the world as a single parent, is left by a spouse or becomes widowed, the same protections should be afforded under the Constitution as to parents who are fortunate enough to maintain a marriage that comports with society's traditional definition of "family." When the United States Supreme Court enunciated that "[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment,"[300] they did not limit the freedom to mar-

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[297] Two states have held the valid state interest in the welfare of children is paramount to the rights of the parent to direct the upbringing of his or her child. *See* CHILD CUSTODY & VISITATION LAW & PRACTICE, *supra* note 6, § 16.02[1][a], at 16-11 to 16-12 (citing See Simmons v. Sheridan, 414 N.Y.S.2d 83 (N.Y. Sup. Ct. 1979); DeWeese v. Crawford, 520 S.W.2d 522 (Tex. Civ. App. 1975)).

[298] Women are particularly affected by this issue since in the majority of custody battles, the children are awarded to the mother.

[299] *See infra* note 78 and accompanying text.

[300] Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977).

ried individuals, but specifically stated that it was a *personal* freedom. Moreover, the Due Process Clause of the Fourteenth Amendment, under which parental rights are derived, states that "[n]o State shall . . . deprive any *person* of life, liberty or property, without due process of law."[301] An individual's rights are not contingent upon his or her marital status. It is undeniable that as a society we must be concerned with protecting children's safety and well-being, but absent a showing of at least a threat of such harm, a parent's liberty must not be truncated.

The second threat to parents' constitutional rights arises when the sole criteria used for determining visitation rights of nonparents is the best interests of the child standard. Whether a family is intact or disrupted, courts should require petitioners to establish a more compelling reason for ordering visitation than merely submitting that visitation would be in the child's best interests. Relying on the best interests standard alone permits the courts, grandparents, and other third parties to propose what they believe is "better" for a child and impermissibly interferes with family autonomy as established under the Constitution. Irrespective of whether there is a disruption to the traditional family unit, a showing of harm or parental unfitness should be required prior to any state interference with parental rights.

While noble in heart, court attempts to "strengthen familial bonds" [302] by granting nonparent visitation rights result in judges substituting their own judgment in personal family relations with a limited understanding of the circumstances and the ramifications of state intrusion upon that particular family. This is evidenced by the court's reasoning in *King v. King*, where the court denied the wishes of married parents that their children not be visited by their grandparents.[303] The court rationalized that "[t]here is no reason that a petty dispute between a father and son should be allowed to deprive a grandparent and grandchild of the unique relationship that ordinarily exists between those individuals. One of the main purposes of the statute is to prevent a family quarrel of little significance to disrupt a relationship which should be encouraged rather than destroyed."[304] To have courts with demanding dockets and little personal knowledge of the parties involved dictating when and how disagreements may occur within families is a far cry from family autonomy. As quoted previously:[305]

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[301] U.S. CONST. amend. XIV, § 1 (emphasis added).

[302] King v. King, 828 S.W.2d 630, 632 (Ky.), *cert. denied*, 506 U.S. 941 (1992)).

[303] *See id.*

[304] *Id.*

[305] *See supra* note 130 and accompanying text.

> For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all. 'You may do whatever you choose, so long as it is what I would choose also does not constitute a delegation of authority.'"[306]

The best interests standard leaves open questions as to what is in the "best interest" of the child and who defines the best interest of the child. More is needed than a belief or "feeling" that another alternative would best serve the child's interests. Unless parental unfitness is established, a child's parent has always been considered to be in the best position to make such decisions. Parents' rights enable them to restrict visitation of nonparents with their children and "the law's concept of the family rests 'on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment . . . .'"[307]

Without a showing of harm or the presence of such a threat, the state has no compelling interest to justify an intrusion upon family autonomy.[308] As stated in *Stillwell*, "[s]tate intervention to better a child's quality of life through third party visitation is not justified where the child's circumstances are otherwise satisfactory."[309] If the best interests of the child is the sole criteria used to determine whether state interference is warranted, then the family autonomy may be challenged repeatedly by third parties purporting to know what is best or even better for the child. Not only will third parties trespass upon parental rights, but the courts will enter the business of determining what is "better" for children. Absent at least a threat of harm, it is not within the state's province to base decisions affecting family life upon a belief they could "make a 'better' decision."[310] While a shocking suggestion, the *Stillwell* court warned that "[t]o suggest otherwise would be the logical equivalent to asserting that the state has the authority to break up stable families and redistribute its infant population to provide each

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[306] Custody of Smith v. Stillwell, 969 P.2d 21, 30 (Wash. 1998) *cert. granted sub nom.* Troxel v. Granville, 120 S. Ct. 11 (1999) (quoting Hawk. v. Hawk, 855 S.W.2d 573, 580 (Tenn. 1993) (quoting Bean, *supra* note 148, at 441)).

[307] *Id.* at 31 (quoting Brooks v. Parkerson, 454 S.E.2d 769, 772 (Ga. 1995)(citation omitted)).

[308] *See id.* at 31; *Hawk*, 855 S.W.2d at 582 (quoting *King*, 828 S.W.2d at 633-34 (Lambert, J., dissenting)).

[309] *Stillwell*, 969 P.2d at 30.

[310] *Id.* at 31.

child with the 'best family.'"[311] Ultimately, for the courts to impose an order of visitation based upon its own determination of the child's best interests, the court merely "impose[s] its own notion of the children's best interests over the shared opinion of the[ir] parents, stripping them of their right to control in parenting decisions."[312]

Equal protection of the constitutional rights of parents, whether part of an intact or disrupted family, will protect the sanctity of the family and the ability of parents to be the primary authority in raising their children and protecting their children's welfare. Furthermore, by requiring an initial showing of harm or parental unfitness before the best interests standard is evoked, parents' childrearing decisions will be subject to minimal judicial second-guessing[313] and the family autonomy protected by the Constitution will retain its intended integrity.

While the United States Supreme Court's decision in *Troxel v. Granville* is helpful in securing parental rights, it stops short of addressing instrumental questions within the area of third party visitation rights. The plurality's concern with the lack of special weight afforded to parents' determinations on what is in a child's best interest may help strengthen support for parents' decisions in the raising of their children. Additionally, the plurality keenly recognized the petty disagreements that may arise in the future between parents, third parties, and the courts as to what is "better" for a child.[314] However, the plurality's failure to address whether a showing of harm is required under the Due Process Clause provides little instruction to state legislatures and courts. Furthermore, in declining to define the scope of rights within the visitation context and instead leaving the determination of whether a visitation order unconstitutionally infringes upon parental rights to case-by-case analysis, the Court leaves the door open to great variation in decisions on visitation and room for abuse of discretion by the state courts.

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[311] *Id.* at 30-31.

[312] *Hawk*, 855 S.W.2d at 582 (concerning the scenario of an intact family).

[313] *See id.* at 581.

[314] *See id.* at 2061.