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## GRANDMA GOT RUN OVER BY THE SUPREME COURT: SUGGESTIONS FOR A CONSTITUTIONAL NONPARENTAL VISITATION STATUTE AFTER *TROXEL* v. *GRANVILLE*

Eric B. Martin

*Abstract:* Every state in the Union has a statute allowing for court-ordered child visitation by non-parents. Until the summer of 2000, the U.S. Supreme Court had never ruled on the constitutionality of such statutes. When the Court finally tackled Washington's statute in *Troxel v. Granville*, the Court left the most significant questions unanswered, while casting doubt on the validity of Washington's statute. Prior to *Troxel*, the Washington Supreme Court had held Washington's nonparental visitation statute facially unconstitutional, finding that the statute violated the Fourteenth Amendment rights of parents. After granting certiorari, the U.S. Supreme Court held Washington's statute unconstitutional as applied and refused to reach the question of facial unconstitutionality. This Comment proposes three changes to Washington's nonparental visitation statute that would ameliorate the objections voiced by the U.S. Supreme Court regarding the application of the statute: the Washington Legislature should limit the classes of persons allowed to petition for visitation, codify the common law rebuttable presumption that a parent's decision regarding visitation is in the best interest of the child, and add a purpose section to the nonparental visitation statute. This Comment concludes that with these changes, Washington's nonparental visitation statute would be constitutional and Washington's lower courts would have the guidance needed to constitutionally apply the statute in a manner consistent with precedent.

Consider fourteen-year-old Riley. Riley's mother never got along with her parents-in-law, but Riley and his father visited them frequently, allowing Riley to develop strong emotional ties to those family members and their ethnic and religious traditions.<sup>1</sup> Riley's father recently died. Riley's mother now refuses her former in-laws permission to visit Riley. Alternatively, imagine a nine-year-old boy named Royce. Royce has an absentee father, who has never had any significant contact with his child. From the time Royce was two, his mother lived with her boyfriend Kevin, who served as a de facto parent<sup>2</sup> to Royce. Recently, his mother

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1. These scenarios are hypotheticals created by the author.

2. For purposes of this Comment, a de facto parent is a person who, while having no legal or biological relationship to the child, has nonetheless acted as a parent to the child, usually while in a relationship with one of the child's parents. De facto parents are increasingly common in homosexual relationships in which one of the partners has a biological child, but the other partner has not adopted, or legally cannot adopt, the child. See generally *Recent Case, E.N.O. v. L.L.M., 711 N.E.2d 886 (Mass.), Cert. Denied, 120 S. Ct. 500 (1999)*, 113 HARV. L. REV. 1551 (1999) [hereinafter *Recent Case*]; see also *In re B.G. v. San Bernardino County Welfare Dep't*, 523 P.2d 244, 253 n.18 (Cal. 1974).

and Kevin separated for reasons unrelated to Royce. Kevin would like to continue to see Royce and continue to provide him the parental guidance he has provided up to this point in time. However, Royce's mother does not want to see her ex-boyfriend and therefore will not allow Kevin to spend time with her son. In the case of both Royce and Riley, continued visitation with the non-parents would be in the best interest of the child.

In 1996, twenty-eight percent of U.S. children lived with only one parent and four million children lived with their grandparents.<sup>3</sup> People outside the traditional nuclear family are increasingly involved in the rearing of children.<sup>4</sup> In addition, although no state recognizes same-sex marriages,<sup>5</sup> an increasing number of same-sex partners are raising children.<sup>6</sup> Because one of the same-sex partners has no biological relationship with the child, statutory law may prevent that partner from adopting the child.<sup>7</sup> Finally, second marriages or subsequent non-marital relationships are increasingly common.<sup>8</sup> Often a stepparent does not legally adopt children from a partner's or spouse's previous relationship, perhaps because the child's other biological parent wishes to maintain a legal relationship, or because the stepparent simply does not see the value in completing the legal steps.

Until 1998, Washington law allowed a court to order visitation rights for non-parents if such visitation would be in the best interest of the child. However, a 1998 Washington Supreme Court holding, affirmed on other grounds by a 2000 U.S. Supreme Court decision, raised serious doubts regarding the law's validity.<sup>9</sup>

This Comment argues that the Washington State Legislature should amend Washington's nonparental visitation statute by authorizing only certain relatives and de facto parents to bring nonparental visitation actions. Also, the Legislature should require courts to apply a rebuttable

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3. *Troxel v. Granville*, 120 S. Ct. 2054, 2059 (2000) (to be published in U.S. Reports, summer 2001).

4. *Id.*; see also JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 8-16 (1996).

5. *But see* VT. STAT. ANN. tit. 15, §§ 1201-1204 (2000) (providing for homosexual civil unions similar to marriages).

6. Sonja Larsen, Annotation, *Adoption of Child by Same-Sex Partners*, 27 A.L.R.5th 54, 61 (1995) (noting that same-sex adoption cases are "relatively recent" development).

7. *Troxel*, 120 S. Ct. at 2059.

8. *Id.*

9. *Smith v. Stillwell-Smith*, 137 Wash. 2d 1, 969 P.2d 21 (1998), *aff'd on other grounds sub nom. Troxel v. Granville*, 120 S. Ct. 2054 (2000).

presumption that parental decisions regarding visitation are in the best interest of their children. Part I of this Comment provides an overview of the constitutional rights of parents, the tension between parental rights and the state's *parens patriae* power,<sup>10</sup> and the history of nonparental visitation laws, in particular Washington's law. Part II explores the conflict between the state's *parens patriae* power and the Constitutional rights of parents. Further, it analyzes the holdings of the cases—*In re Smith* in the Washington Supreme Court and *Troxel v. Granville* in the U.S. Supreme Court—that questioned the continuing validity of Washington's nonparental visitation law and explains the status of current state law in light of these two cases. Part III argues that three specific amendments to Washington's nonparental visitation statute would address the U.S. Supreme Court's concerns in *Troxel* and allow for the proper balance between the state's *parens patriae* power and parents' constitutional rights. This Comment concludes that, with these changes, Washington courts could constitutionally apply Washington's nonparental visitation statute and not misinterpret precedent in light of the *Smith* decision.

## I. CONSTITUTIONAL RIGHTS OF PARENTS, THE STATE'S *PARENS PATRIAE* POWER, AND NONPARENTAL VISITATION STATUTES

Parents' constitutional rights to control the upbringing of their children are liberty interests derived from the Fourteenth Amendment.<sup>11</sup> However, these rights are not unlimited. While the line of cases establishing parental rights is well-developed, the Court has not clearly explained the extent to which a state, through its *parens patriae* power to act in its citizens' interests, may interfere with these rights.<sup>12</sup> Reconciling these competing interests is necessary to evaluate properly nonparental visitation statutes.

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10. See *infra* Part I.B.

11. The amendment reads in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Parental rights stem from the liberty interest. *Meyer v. Nebraska*, 262 U.S. 399, 399–400 (1923).

12. *Troxel*, 120 S. Ct. at 2066 (Souter, J., concurring).

A. *Parents Have a Limited Right To Raise Their Children Without State Interference*

It is beyond question that parents have some right to direct the upbringing of their children. The U.S. Supreme Court has repeatedly affirmed this principle since *Meyer v. Nebraska*<sup>13</sup> in 1923. Yet the Court has limited these rights by allowing state involvement in the welfare of children where there is a compelling state interest since *Prince v. Massachusetts*<sup>14</sup> in 1944.

Parents' rights regarding the care and custody of their children are well-established,<sup>15</sup> but these rights are not unlimited. The U.S. Supreme Court articulated these rights in *Meyer, Pierce v. Society of Sisters*,<sup>16</sup> and subsequent cases.<sup>17</sup> In *Meyer*, the Court determined that the liberty interest guaranteed by the Fourteenth Amendment included at least a partial right to raise children as a parent sees fit.<sup>18</sup> Invalidating a state law prohibiting the teaching in schools of any language other than English, the Court said that the liberty interest denoted freedom "to engage in any of the common occupations of life, . . . [including bringing] up children."<sup>19</sup> Similarly, in *Pierce*, the Court held unconstitutional a statute requiring children to attend only public schools because it unreasonably interfered with the liberty of parents and guardians to direct the development of their children.<sup>20</sup> In striking down the law, the Court noted that constitutional rights may not be abridged by legislation that has no reasonable relation to some purpose within the state's regulatory competence.<sup>21</sup>

However, in *Prince*, the Court held that the family is not beyond state regulation.<sup>22</sup> While responsibility for "custody, care and nurture" resides

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13. 262 U.S. 390 (1923).

14. 321 U.S. 158 (1944).

15. See *Smith*, 137 Wash. 2d at 13, 969 P.2d at 27.

16. 268 U.S. 510 (1925).

17. See Judith L. Shandling, Note, *The Constitutional Constraints on Grandparent's Visitation Statutes*, 86 COLUM. L. REV. 118, 125-26 (1986); see also Wash. State Coalition for the Homeless v. Dep't of Soc. & Health Servs., 133 Wash. 2d 894, 929-32, 949 P.2d 1291, 1309-10 (1997).

18. See *Meyer*, 262 U.S. at 399-400.

19. *Id.* at 399.

20. See *Pierce*, 268 U.S. at 520; see also Kathleen S. Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 J. FAM. L. 393, 410 (1985).

21. See *Pierce*, 268 U.S. at 520.

22. *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

first in the parents of the child, the state has authority in matters affecting a child's welfare and thus has a broad range of powers to limit parental freedom and authority in those areas.<sup>23</sup> In *Prince*, the Court upheld an application of Massachusetts's child-labor law prohibiting girls under eighteen years of age from selling publications (here religious literature) on the streets.<sup>24</sup> Rejecting assertions of parental control and free exercise of religion, the Court held that the state's power to protect the child from harm does not depend on the presence or direction of the child's guardian.<sup>25</sup> The Court did not discuss the exact parameters of the state's power to intrude into parental rights and religious freedom.<sup>26</sup> Regarding the limits of state power, the Court held only that "the rightful boundary of [the state's] power has not been crossed in this case"<sup>27</sup> and noted that "[o]ur ruling does not extend beyond the facts the case presents."<sup>28</sup>

In later cases, the Court described the liberty interest as applying to the family unit instead of strictly to parents. In *Moore v. City of East Cleveland*,<sup>29</sup> a case involving living arrangements, the Court noted that:

[O]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. . . . Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization . . . that supports a larger conception of the family.<sup>30</sup>

Similarly, in *Quilloin v. Walcott*,<sup>31</sup> the U.S. Supreme Court upheld the termination of a father's parental rights based on the best interest of the

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23. *Id.*

24. *Id.*

25. *Id.*

26. After noting the "custody, care and nurture of the child reside first in the parents," the Court went on to hold that "neither rights of religion nor rights of parenthood are beyond limitation . . . the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Id.* at 166-67 (citations omitted).

27. *Id.* at 170.

28. *Id.* at 171.

29. 431 U.S. 494 (1977).

30. *Id.* at 504-05.

31. 434 U.S. 246 (1978).

child, even though there was no finding that the father was unfit or that the child suffered harm from the parental relationship.<sup>32</sup> *Quilloin* involved the termination of a biological father's parental rights in order to allow for the adoption of the child by the child's stepfather.<sup>33</sup> The stepfather had been involved in the child's life for eleven years and was married to the child's mother, while the father had taken little or no interest in the child and had never married the child's mother.<sup>34</sup> Likewise in *Lehr v. Robertson*,<sup>35</sup> the Court noted that a parent's liberty interests do not "spring full-blown from the biological connection between the parent and child. They require relationships more enduring."<sup>36</sup>

B. *The State's Parens Patriae Power Allows for Regulation of Child Welfare*

The *parens patriae* doctrine allows a state to protect its quasi-sovereign interests in the "health, comfort, and welfare of its citizens."<sup>37</sup> The doctrine of *parens patriae*, literally "parent of the country,"<sup>38</sup> comes from English common law.<sup>39</sup> Originally, the monarch assumed this role to act as a guardian for minors, incompetents,<sup>40</sup> and those "who have no other protector."<sup>41</sup> States have used this authority to pursue environmental, antitrust, and mass tort litigation, such as tobacco suits on behalf of citizens.<sup>42</sup> This authority is also used to pursue child-welfare cases.<sup>43</sup> The state's *parens patriae* power thus fits within the state's police power "to regulate public health and safety, maintain the peace, and provide for the general welfare."<sup>44</sup>

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32. *Id.* at 255–56.

33. *Id.* at 257.

34. *Id.*

35. 463 U.S. 248 (1983).

36. *Id.* at 260.

37. Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1847 (2000).

38. Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 381 (2000).

39. See Ratliff, *supra* note 37, at 1850.

40. See Clark, *supra* note 38, at 382.

41. See *id.* (quoting 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 445 (2d ed. 1968)).

42. See Ratliff, *supra* note 37, at 1848–49.

43. Clark, *supra* note 38, at 382; see also Ratliff, *supra* note 37, at 1847.

44. Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 857 (2000).

*Parens patriae* is the most common basis for state involvement in child-custody disputes.<sup>45</sup> In *In re Sumey*,<sup>46</sup> the Washington Supreme Court upheld the temporary residential placement of a child outside the home as a valid exercise of the state's *parens patriae* power, even though there was no assertion of parental unfitness or harm to the child.<sup>47</sup> Similarly, in *In re Welfare of Key*,<sup>48</sup> the court upheld the state's *parens patriae* power to hold a dependency hearing over the objection of the child's mother.<sup>49</sup> The court stated that the interest of the mother did not turn on her fitness, rather that "presence or absence of unfitness would seem to affect only the weight of the State's interest."<sup>50</sup> Even in child-custody decisions, courts exercise the *parens patriae* power to make decisions based on the best interests of the child.<sup>51</sup> Thus, although the right to custody, care, and nurturing of children resides first in their parents,<sup>52</sup> parents' power must give way to the child's best interest when the state exercises its *parens patriae* powers.<sup>53</sup>

The Washington Supreme Court has utilized *parens patriae* power in holding that the family is not beyond regulation in the public interest. The state utilizes a wide range of *parens patriae* power for limiting parental freedom and authority in matters affecting a child's welfare.<sup>54</sup> The Washington Supreme Court held in *Sumey* that:

[T]he liberty and privacy protections of the due process clause of the Fourteenth Amendment establish a parental constitutional right to the care, custody, and companionship of the child. . . . The parents' constitutional rights, however, do not afford an absolute protection against State interference with the family relationship. . . . [g]rowing concern for the welfare of the child and the disappearance of the concept of the child as property has led to a gradual modification in judicial attitude. It is now well established

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45. See William M. Hilton, *Parens Patriae or the Jurisdictional Brick Wall*, 21 WHITTIER L. REV. 231, 233 (1999).

46. 94 Wash. 2d 757, 621 P.2d 108 (1980).

47. *Id.* at 762-65, 621 P.2d at 110-12.

48. 119 Wash. 2d 600, 836 P.2d 200 (1992).

49. *Id.* at 610-13, 836 P.2d at 206-07.

50. *Id.* at 611, 836 P.2d at 206.

51. See *In re Marriage of Allen*, 28 Wash. App. 637, 646, 626 P.2d 16, 22 (1981).

52. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

53. *In re Cooper*, 631 P.2d 632, 637 (Kan. 1981).

54. *Prince*, 321 U.S. at 166-67.



that when parental actions or decisions seriously conflict with the physical or mental health of the child, the state has a *parens patriae* right and responsibility to intervene to protect the child.<sup>55</sup>

Similarly, in *State v. Koome*,<sup>56</sup> the court recognized that “although the family structure is a fundamental institution of our society, and parental prerogatives are entitled to considerable legal deference . . . they are not absolute and must yield to fundamental rights of the child or important interests of the State.”<sup>57</sup> The concept is again found in *In re K.R.*,<sup>58</sup> where the court accepted the application of the state’s *parens patriae* power to terminate parental rights without requiring an explicit finding of parental unfitness.<sup>59</sup> The court<sup>60</sup> stated that “when the rights of parents and the welfare of their children are in conflict, the welfare of the minor children must prevail.”<sup>61</sup>

### C. *The History of Nonparental Visitation Laws and Washington’s Nonparental Visitation Statute*

At common law, no legal right for nonparental visitation existed. However, every state has enacted some sort of nonparental visitation statute.<sup>62</sup> While the U.S. Supreme Court has not directly addressed the limits of parents’ constitutional rights in the context of nonparental visitation statutes,<sup>63</sup> the majority of state courts addressing the issue has

55. *In re Sumey*, 94 Wash. 2d 757, 762, 621 P.2d 108, 110 (1980) (internal citations and quotation marks omitted).

56. 84 Wash. 2d 901, 530 P.2d 260 (1975).

57. *Id.* at 907, 530 P.2d at 264.

58. 128 Wash. 2d 129, 904 P.2d 1132 (1995).

59. *Id.* at 146, 904 P.2d at 1141 (Madsen, J.).

60. The *In re K.R.* opinion was authored by Justice Madsen, who also authored the court’s opinion in *Smith. Id.*; *Smith v. Stillwell-Smith*, 137 Wash. 2d 1, 969 P.2d 21, *aff’d on other grounds sub nom.* *Troxel v. Granville*, 120 S. Ct. 2054 (2000).

61. *In re K.R.*, 28 Wash. 2d at 146, 904 P.2d at 1141.

62. While most statutes address grandparent visitation, some statutes allow for other nonparental visitation, including visitation by other relatives, non-relatives who have significant relationships with the child, including de facto parents, and, in the case of Washington’s statute, “any person.” See generally Phyllis C. Borzi, Note, *Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interests of the Child*, 26 CATH. U. L. REV. 387 (1977). While there may be different policy questions raised by the different statutes, the constitutional questions remain the same regardless of the parties permitted to petition for visitation. This Comment uses the term “nonparental visitation” to refer to all of these types of statutes.

63. See *infra* Part II.D.1.

found these statutes comport with the federal constitutional protections given to the liberty and privacy interests.<sup>64</sup>

1. *Nonparental Visitation Under the Common Law*

At common law, grandparents and other non-parents generally had no legal right to petition for visitation with children that were not their own.<sup>65</sup> Society recognized a grandparent's right to visitation with a child "as the custodial parent's moral obligation, but not an enforceable legal right."<sup>66</sup> The few exceptions to the common law rule were based on a custodial parent's voluntary relinquishment of exclusive control over the child.<sup>67</sup> As a result, those seeking visitation had no legal recourse other than to challenge the fitness of the parent.<sup>68</sup> If the custodial parent was found to be a fit parent, the party seeking visitation had to accept the decision of the parent.<sup>69</sup> The common law rule resulted in an ironic situation that made it easier to sue for custody of children, because that decision was predicated on the "best-interest-of-the-child" standard, than to petition for visitation, where the decision was based on the stricter "harm-to-the-child" standard.<sup>70</sup>

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64. See *infra* Part II.A.

65. See Timothy Collins, Note, *Grandparents' Statutory Right to Petition for Visitation: Vermont and the National Framework*, 10 VT. L. REV. 55, 57 (1985).

66. Sharon F. Ladd, Note, *Tennessee Statutory Visitation Rights of Grandparents and the Best Interests of the Child*, 15 MEMPHIS ST. U. L. REV. 635, 635 (1985).

67. See Collins, *supra* note 65, at 59; see also Henry H. Foster, Jr. & Doris Jonas Freed, *Grandparent Visitation: Vagaries and Vicissitudes*, 23 ST. LOUIS U. L.J. 643 (1979):

Exception to the usual common law rule is made in three instances: (1) when there was an agreement or stipulation as to visitation made, for example, incident to a divorce proceeding; (2) when the child has resided with the person seeking visitation, as for example, in a case in which, the child's custody originally having been awarded to a parent who lived with grandparents, the custodial parent died and the surviving parent seeks a change of custody; and (3) when it is demonstrated that the parent seeking custody is "unfit" under the prevailing notions at the time.

*Id.* at 645-46 (citations omitted).

68. Borzi, *supra* note 62, at 387.

69. See *id.*

70. See Foster & Freed, *supra* note 67, at 647.

## 2. *Nonparental Visitation Statutes*

In the late 1960s, state legislatures, seeking to provide visitation rights to grandparents, relatives, stepparents, de facto parents,<sup>71</sup> and others, began to enact nonparental visitation statutes.<sup>72</sup> Currently all fifty states have some form of nonparental visitation statute.<sup>73</sup> These statutes commonly give trial courts the discretion to award visitation rights to non-parents after a showing that it would be in the best interest of the child to do so.<sup>74</sup> Many states limit the jurisdiction of the court to certain circumstances such as divorce, death of a parent, or other pending custody or visitation action.<sup>75</sup> Many states also limit who may bring nonparental visitation actions to, for example, grandparents or other blood relatives, de facto parents, or stepparents.<sup>76</sup>

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71. For a definition of "de facto parent" see *supra* note 2.

72. See Borzi, *supra* note 62, at 392.

73. See ALA. CODE § 30-3-4 (1989); ALASKA STAT. § 25.24.150 (Michie 2000); ARIZ. REV. STAT. ANN. § 25-409 (West 1999); ARK. CODE ANN. § 9-13-103 (Michie 1998); CAL. FAM. CODE § 3104 (West 1994); COLO. REV. STAT. ANN. § 19-1-117 (West 1999); CONN. GEN. STAT. ANN. § 46b-59 (West 1995); DEL. CODE ANN. tit. 10, § 1031 (1999); FLA. STAT. ANN. § 752.01 (West Supp. 2001); GA. CODE ANN. § 19-7-3 (1999); HAW. REV. STAT. ANN. § 571-46(7) (Michie 1999); IDAHO CODE § 32-719 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/11-7.1 (West 1993); IND. CODE ANN. § 31-17-5-1 (West 1997); IOWA CODE ANN. § 598.35 (West Supp. 2000); KAN. STAT. ANN. § 38-129 (Supp. 1993); KY. REV. STAT. ANN. § 405.021 (Banks-Baldwin 1998); LA. CIV. CODE ANN. art. 136(B) (West 1998); ME. REV. STAT. ANN. tit. 19A, §§ 1801-1805 (West 1998); MD. CODE ANN., FAM. LAW § 9-102 (1999); MASS. ANN. LAWS ch. 119, § 39(D) (Law. Co-op. 2000); MICH. STAT. ANN. § 25.312(7b) (Michie 1991); MINN. STAT. ANN. § 257.022 (West Supp. 2000); MISS. CODE ANN. § 93-16-3 (1999); MO. ANN. STAT. § 452.402 (West Supp. 2000); MONT. CODE ANN. § 40-9-102 (1999); NEB. REV. STAT. ANN. § 43-1802 (Michie 1999); NEV. REV. STAT. ANN. 125C.050 (Michie 1998); N.H. REV. STAT. ANN. § 458-17-d (Supp. 2000); N.J. STAT. ANN. § 9:2-7.1 (West Supp. 2000); N.M. STAT. ANN. § 40-9-2 (Michie 1994); N.Y. DOM. REL. LAW § 72 (McKinney 1999); N.C. GEN. STAT. § 50-13.2 (1999); N.D. CENT. CODE § 14-09-05.1 (1997); OHIO REV. CODE ANN. §§ 3109.11 (Anderson 2000); OKLA. STAT. ANN. tit. 10, § 5 (West Supp. 2001); OR. REV. STAT. § 109.121 (1999); 23 PA. CONS. STAT. ANN. §§ 5311-5312 (West Supp. 1991); R.I. GEN. LAWS § 15-5-24.1 to -24.3 (Supp. 1999); S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. Supp. 2000); S.D. CODIFIED LAWS §§ 25-4-52 to -54 (Michie 1999); TENN. CODE ANN. § 36-6-302 (1996); TEX. FAM. CODE ANN. § 153.433 (Vernon Supp. 2001); UTAH CODE ANN. § 30-5-2 (Supp. 2000); VT. STAT. ANN. tit. 15, §§ 1011-1016 (1989); VA. CODE ANN. §§ 20-107.2, 20-124.1 (Michie 2000); WASH. REV. CODE § 26.09.160(3) (2000); W. VA. CODE ANN. § 48-2B-3 to -6 (Michie 1999); WIS. STAT. ANN. § 767.245 (West Supp. 2000); WYO. STAT. ANN. § 20-7-101 (Michie 1999).

74. See Borzi, *supra* note 62, at 392.

75. See Ladd, *supra* note 66, at 639; see also Collins, *supra* note 65, at 61.

76. See Stephen Hellman, *The Child, The Step Parent, and the State: Step Parent Visitation and the Voice of the Child*, 16 TOURO L. REV. 45 (1999).

Washington has two nonparental visitation statutes.<sup>77</sup> The one at issue in *Smith* and *Troxel* allows for visitation petitions to be brought by “any person” at “any time” so long as it is in the “best interest of the child.”<sup>78</sup> The other statute allows for a petition for visitation only upon a divorce proceeding, and requires that the judge make a determination that visitation would be in the “best interest of the child.”<sup>79</sup> However, the visitation statute at issue in *Smith* and *Troxel* provides no guidance for trial courts to use in determining the best interest of the child. In contrast, a trial court using the divorce statute is guided by several statutory factors:

- (a) The strength of the relationship between the child and the petitioner;
- (b) The relationship between each of the child’s parents or the person with whom the child is residing and the petitioner;
- (c) The nature and reason for either parent’s objection to granting the petitioner visitation;
- (d) The effect that granting visitation will have on the relationship between the child and the child’s parents or the person with whom the child is residing;
- (e) The residential time sharing arrangements between the parents;
- (f) The good faith of the petitioner;
- (g) Any criminal history or history of physical, emotional, or sexual abuse or neglect by the petitioner; and
- (h) Any other factor relevant to the child’s best interest.<sup>80</sup>

When the Washington Supreme Court was presented with the *Smith* case, it confronted not the divorce statute, but the other nonparental visitation statute. The court sought to reconcile parental constitutional rights and the state’s *parens patriae* power.

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77. WASH. REV. CODE §§ 26.09.240, .10.160.

78. *Id.* § 26.10.160(3) (“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 in circumstances.”); *Smith v. Stillwell-Smith*, 137 Wash. 2d 1, 5, 969 P.2d 21, 23 *aff’d on other grounds sub nom.* *Troxel v. Granville*, 120 S. Ct. 2054, 2057 (2000).

79. WASH. REV. CODE § 26.09.240(6).

80. *Id.*

## II. THE CONSTITUTIONALITY OF WASHINGTON'S NONPARENTAL VISITATION STATUTE UNDER THE *SMITH* AND *TROXEL* DECISIONS

At the heart of the constitutional question regarding nonparental visitation statutes is the inherent conflict between the constitutional rights of parents and the *parens patriae* power of the state. The Washington Supreme Court, in three consolidated cases, bucked the trend of other state courts and held in *Smith v. Stillwell-Smith* that Washington's nonparental visitation statute facially violated the U.S. Constitution.<sup>81</sup> The U.S. Supreme Court, without a majority opinion, affirmed the Washington Supreme Court's holding in *Troxel*, but only as applied.<sup>82</sup> In *Troxel*, the Court did not rule on the facial constitutionality of the interpretation given the statute by the Washington Supreme Court.<sup>83</sup> The constitutionality of nonparental visitation statutes therefore remains unaddressed by the ultimate arbiter of constitutionality.

### A. State Court Reactions to Nonparental Visitation Statutes

While the U.S. Supreme Court has yet to truly weigh in on the matter, a majority of the states faced with the question have framed the primary issue presented by nonparental visitation statutes as the tension between the state's *parens patriae* power and a parent's constitutional rights regarding child rearing.<sup>84</sup> Nonparental visitation statutes have generally met with acceptance by state courts.<sup>85</sup> The majority view accepts nonparental visitation statutes that are premised on the best interests of the child.<sup>86</sup>

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81. See *Smith*, 137 Wash. 2d at 5, 969 P.2d at 23.

82. See *Troxel v. Granville*, 120 S. Ct. 2054 (2000).

83. *Id.*

84. See *Smith*, 137 Wash. 2d at 28–30, 969 P.2d at 34–35 (1998) (Talmadge, J., concurring in part, dissenting in part).

85. See, e.g., *Sketo v. Brown*, 559 So. 2d 381 (Fla. Dist. Ct. App. 1990); *Sightes v. Barker*, 684 N.E.2d 224 (Ind. 1997); *Bailey v. Menzie*, 542 N.E.2d 1015 (Ind. Ct. App. 1989); *Spradling v. Harris*, 778 P.2d 365 (Kan. Ct. App. 1989); *King v. King*, 828 S.W.2d 630 (Ky. 1992); *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993); *Roberts v. Ward*, 493 A.2d 478 (N.H. 1985); *People ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049 (N.Y. 1981); *Deweese v. Crawford*, 520 S.W.2d 522 (Tex. App. 1975); *Campbell v. Campbell*, 896 P.2d 635 (Utah Ct. App. 1995); *In re Richardson*, No. HK 1364-A, 2000 WL 869450 (Va. Cir. Ct. June 23, 2000).

86. See, e.g., *King*, 828 S.W.2d at 631–32.

The few courts that have held nonparental visitation statutes unconstitutional have done so on state constitutional grounds.<sup>87</sup> For example, in *Beagle v. Beagle*,<sup>88</sup> the Supreme Court of Florida held that the state's nonparental visitation statutes violated the enhanced privacy rights found in article 1, section 23 of the Florida Constitution, which provides privacy protections "broader in scope" than the U.S. Constitution.<sup>89</sup> However, Washington's constitution affords no greater protection than the protections provided by the U.S. Constitution on matters of privacy, other than in the area of search and seizure.<sup>90</sup>

### B. State Court Proceedings in *Smith v. Stillwell-Smith*

The Washington Supreme Court's holding in *Smith v. Stillwell-Smith* is the result of three consolidated, somewhat typical,<sup>91</sup> nonparental visitation actions.<sup>92</sup> *Clay v. Wolcott*<sup>93</sup> involved the former male companion of the mother of a six-year-old boy.<sup>94</sup> The man had developed a close relationship with the child while living with the child's mother for the child's second through sixth years of life.<sup>95</sup> In *Smith v. Stillwell-Smith*, the parents of a child had filed for divorce.<sup>96</sup> While the divorce was pending, the maternal grandmother of the child shot and killed her son-in-law.<sup>97</sup> The father's surviving family petitioned for visitation with his child.<sup>98</sup> In *In re Visitation of Troxel*,<sup>99</sup> Tommie Granville and Brad Troxel

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87. See, e.g., *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996); *Hoff v. Berg*, 595 N.W.2d 285 (N.D. 1999); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993). But cf. *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995).

88. 678 So. 2d 1271 (Fla. 1996).

89. *Id.* at 1275-76.

90. *Ramm v. City of Seattle*, 66 Wash. App. 15, 27, 830 P.2d 395, 402 (1992); see also WASH. CONST. art. I, § 7.

91. See Brief for Petitioners at 3, *Troxel v. Granville*, 120 S. Ct. 2054 (2000) (No. 99-138), available at 1999 WL 1079965 (citing more than 700 reported cases).

92. *Smith v. Stillwell-Smith*, 137 Wash. 2d 1, 969 P.2d 21 (1998), *aff'd on other grounds sub nom. Troxel v. Granville*, 120 S. Ct. 2054 (2000).

93. 85 Wash. App. 468, 933 P.2d 1066 (1997).

94. *Smith*, 137 Wash. 2d at 5-6, 969 P.2d at 23-24.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 7, 969 P.2d at 24.

99. 87 Wash. App. 131, 940 P.2d 698 (1997).

had a long-term relationship that resulted in two daughters.<sup>100</sup> The couple separated in 1991.<sup>101</sup> At that time, Brad Troxel moved in with his parents Jenifer and Gary Troxel.<sup>102</sup> In 1993, two years after the separation, Brad Troxel committed suicide.<sup>103</sup> His parents continued to see their granddaughters on a regular basis after the death of their son.<sup>104</sup> However, in October 1993, Ms. Granville informed them that she wished to limit their visitation with her daughters.<sup>105</sup> The Troxels responded by filing a petition for visitation under Washington's nonparental visitation statute<sup>106</sup> in county superior court.<sup>107</sup> The trial court found that visitation was in the best interest of the children and issued an order granting the Troxels visitation.<sup>108</sup>

In a five-to-four decision, the Washington State Supreme Court held that Washington's relevant nonparental visitation statute<sup>109</sup> was contrary to the liberty interest of the Fourteenth Amendment; therefore, it held the statute facially unconstitutional.<sup>110</sup> The court relied primarily on the *Meyer-Pierce* line of cases describing the scope of parents' constitutional rights.<sup>111</sup> The court held that a parent's fundamental right to autonomy in child-rearing decisions is unassailable absent a showing of harm to the child.<sup>112</sup> Likewise, it held that the state cannot invoke its *parens patriae* power absent a showing of parental unfitness or harm to the child.<sup>113</sup> The court held that the only compelling state interests authorizing state intrusion on family life were protecting citizens from threats to health or safety or from injuries inflicted by third persons.<sup>114</sup> Thus, the decision, in addition to invalidating the statute, rejected as unconstitutional the best-

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100. *Smith*, 137 Wash. 2d at 6, 969 P.2d at 25-26.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. WASH. REV. CODE § 26.10.160(3) (2000).

107. *Smith*, 137 Wash. 2d at 5-6, 969 P.2d at 23-24.

108. *Id.*

109. WASH. REV. CODE § 26.10.160(3).

110. *Smith*, 137 Wash. 2d at 5, 969 P.2d at 23.

111. *See id.* at 13-18, 969 P.2d at 27-29; *supra* Part I.A.

112. *Smith*, 137 Wash. 2d at 19, 969 P.2d at 30.

113. *See id.* at 20, 969 P.2d at 30.

114. *See id.*

interest-of-the-child standard and thus sharply limited the *parens patriae* power of the state.

In addressing the *parens patriae* power of the state, the court held that there must first be harm to the child before the state may exercise this power.<sup>115</sup> It attempted to distinguish its previous holding in *In re Sumey*.<sup>116</sup> That case held that the state need not demonstrate unfitness of a parent before exercising its *parens patriae* power but instead must weigh the interest of the state action against the intrusion on the parent's rights.<sup>117</sup> The *Smith* court declined to use the *Sumey* balancing test, believing that the proper standard was only whether, absent visitation, there was harm to the children.<sup>118</sup> While this standard contradicted the precedent of *Sumey*, the *Smith* court indicated that the statute in question in *Sumey* involved potential harm to children.<sup>119</sup> While suggesting that the *Sumey* court improperly used the balancing test, the court went on to find that "[n]evertheless, the court's result was correct because the interests of the state in that case . . . were compelling and the statute was narrowly tailored to serve the state's interest."<sup>120</sup> This odd sidestep around the *Sumey* balancing test gave rise to the dissent's major disagreement with *Smith*.

Writing for a four-justice dissent, Justice Talmadge condemned the decision's "cruel and far-reaching effects on loving relatives."<sup>121</sup> The dissent contended that the majority opinion misinterpreted the U.S. Supreme Court's opinions dealing with parental rights.<sup>122</sup> In addition, the dissent questioned the majority's reliance on cases that involved other substantial infringements of parental or others' rights.<sup>123</sup> The dissent argued that the rights of parents are not unlimited and that "the state has a wide range of power for limiting parental freedom and authority in

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115. *See id.*

116. 94 Wash. 2d 757, 621 P.2d 108 (1980).

117. *Id.* at 763–65, 621 P.2d at 111–12.

118. *Smith*, 137 Wash. 2d at 19, 969 P.2d at 30.

119. *Id.* at 19 n.4, 969 P.2d at 30 n.4.

120. *Id.*

121. *Id.* at 23, 969 P.2d at 32 (Talmadge, J., concurring in part, dissenting in part).

122. *Id.* (Talmadge, J., concurring in part, dissenting in part).

123. *Id.* at 26–27, 969 P.2d at 33–34 (Talmadge, J., concurring in part, dissenting in part) (discussing *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise of religious beliefs); *Stanley v. Illinois*, 405 U.S. 645 (1972) (termination of parental rights); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (finding that parental authority to send children to private religious or military schools is otherwise acceptable)).



things affecting the child's welfare."<sup>124</sup> The dissent further averred that *Sumey* was controlling and that its balancing test was appropriate.<sup>125</sup>

### C. *Standards of Review Used in Reviewing State Nonparental Visitation Statutes*

When the U.S. Supreme Court reviews a challenge to a state statute based on the U.S. Constitution, the state's highest court and the U.S. Supreme Court have combined responsibility for resolving the issue.<sup>126</sup> The state court interprets the statute in question, and the U.S. Supreme Court rules on the constitutionality of that statute as interpreted.<sup>127</sup> However, even if the U.S. Supreme Court holds a statute as interpreted by the state supreme court unconstitutional, either facially or as applied, the state court may salvage the statute by either reconsidering the interpretation or severing the statute's unconstitutional language.<sup>128</sup>

The Court applies a strict scrutiny test when analyzing state legislation that may interfere with a family's liberty interest.<sup>129</sup> In order to survive strict scrutiny, the state government must show a compelling state interest in the area encompassed by the legislation.<sup>130</sup> In addition, the state must narrowly tailor legislation to obtain the results desired by the legislation and cause minimal infringement on fundamental rights.<sup>131</sup>

### D. *The U.S. Supreme Court's Holdings in Troxel v. Granville*

In *Troxel*, the Supreme Court accepted review of one of the three cases ruled on in *Smith*. The Court affirmed the Washington Supreme

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124. *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

125. *See Smith*, 137 Wash. 2d at 23, 969 P.2d at 32 (Talmadge, J., concurring in part, dissenting in part).

126. Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 283-84 (1994).

127. *Id.* at 284.

128. *Id.*

129. *See Roe v. Wade*, 410 U.S. 113, 155 (1973); *see also Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (analyzing family rights in First Amendment context).

130. *Roe*, 410 U.S. at 155.

131. *Id.* Additionally, the constitutionality of any standard for awarding visitation rights turns on the specific manner in which that standard is applied. *Troxel v. Granville*, 120 S. Ct. 2054, 2064 (2000). The constitutional protections in this area are best elaborated with care. *Id.* Because much state court adjudication in this context occurs on a case-by-case basis, the U.S. Supreme Court should be hesitant to hold specific nonparental visitation statutes per se unconstitutional. *See id.*

Court, finding the statute unconstitutional, but only as applied.<sup>132</sup> The Court specifically refused to rule on the facial constitutionality of the Washington statute.<sup>133</sup> While the Court's six opinions (three concurring, three dissenting) did not resolve the question of the constitutionality of nonparental visitation statutes,<sup>134</sup> two overriding principles may be gleaned from the opinions. Specifically, the Court indicated that the class of people allowed to bring nonparental visitation actions should be limited<sup>135</sup> and that courts must give parents a rebuttable presumption that their decisions with respect to visitation are in their child's best interest.<sup>136</sup>

### 1. *The Court's Opinions in Troxel v. Granville*

The U.S. Supreme Court decision in *Troxel* arrived in six separate opinions.<sup>137</sup> Justice O'Connor wrote the lead opinion, joined by Chief Justice Rehnquist, and Justices Ginsburg and Breyer.<sup>138</sup> Justices Souter and Thomas each concurred in the judgment and filed separate opinions.<sup>139</sup> Justices Stevens, Scalia, and Kennedy each dissented and filed separate opinions.<sup>140</sup> The Court held Washington's nonparental visitation statute unconstitutional only as applied to Tommie Granville in *In re Visitation of Troxel*.<sup>141</sup> The four justices represented by the O'Connor opinion declined to reach the question of whether a finding of harm is required prior to a court's granting visitation to non-parents.<sup>142</sup> Justice Souter believed the statute was unconstitutional on its face due to its overbreadth.<sup>143</sup> Justice Thomas concluded that nonparental visitation was not a compelling state interest, and therefore, beyond the state's *parens patriae* power to regulate.<sup>144</sup> Because these opinions sweep

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132. *Troxel*, 120 S. Ct. at 2064.

133. *Id.*

134. *Id.*

135. *See id.* at 2060–61.

136. *See id.* at 2062.

137. *Id.* at 2057.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 2064.

142. *Id.*

143. *See id.* at 2065–67 (Souter, J., concurring).

144. *See id.* at 2067–68 (Thomas, J., concurring).

broader than the O'Connor opinion, the plurality opinion is the narrowest opinion, and therefore the holding of the court.<sup>145</sup>

## 2. *Guidance Gleaned From the Troxel Opinions*

While the *Troxel* Court refused to address whether Washington's nonparental visitation statute violated the Fourteenth Amendment, the *Troxel* opinions provides several clues as to how the Court may treat nonparental visitation statutes in the future. Any future nonparental visitation statute must address two principle concerns raised by the U.S. Supreme Court opinions.

First, the O'Connor plurality and Souter concurrence questioned the "breathhtakingly broad"<sup>146</sup> sweep of the Washington statute. On its face, the statute allows for "any person" to petition for visitation at "any time."<sup>147</sup> The Washington Supreme Court interpreted this language strictly,<sup>148</sup> seemingly construing it to mean that complete strangers could petition to visit children.<sup>149</sup> Indeed, Washington's statute appears to be the only statute with such broad language.<sup>150</sup> Five Justices noted this breadth and found it troublesome.<sup>151</sup>

Second, several of the justices' decisions emphasized the level of deference accorded to a parental decision. The O'Connor plurality opined that the record in *Troxel* demonstrated that the trial court merely substituted its judgment for the judgment of an otherwise fit parent.<sup>152</sup> In fact, the trial court appeared to apply a presumption in favor of nonparental visitation.<sup>153</sup> Citing *Parham v. J.R.*,<sup>154</sup> the U.S. Supreme

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145. When lower courts face fractured decisions of the U.S. Supreme Court, the Court has decreed the use of the "Marks rule," derived from *Marks v. United States*, 430 U.S. 188 (1977). Under the *Marks* rule, when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell and Stevens, JJ.)). Washington courts have adopted the *Marks* rule. See *State v. Zakel*, 61 Wash. App. 805, 808, 812 P.2d 512, 514 (1991) (citing *Marks*, 430 U.S. at 193).

146. *Troxel*, 120 S. Ct. at 2061.

147. *Id.*

148. *See id.*

149. *See id.*

150. Compare WASH. REV. CODE § 26.10.160 (2000), with statutes cited in *supra* note 73.

151. *Troxel*, 120 S. Ct. at 2061 (opinion of O'Connor, J.), 2066 (Souter, J., concurring).

152. *Id.* at 2062.

153. *Id.*

Court stated that so long as a parent is fit, there is ordinarily no reason for the state to inject itself into the private realm of the family.<sup>155</sup> The plurality noted that the problem was not the fact that the trial court intervened in the parental decision,<sup>156</sup> but that the court granted no deference to the parental decision.<sup>157</sup> Dissenting Justices Stevens<sup>158</sup> and Kennedy<sup>159</sup> shared this concern, bringing the total to six justices,.

Nevertheless, the *Troxel* case leaves Washington and other states without explicit guidance as to whether nonparental visitation statutes are constitutional, and if so, what elements they require.<sup>160</sup> Thus, the Washington Supreme Court may feel constrained to follow its previous decision in *Smith*, or it may re-evaluate that holding based on the guidance (albeit limited) gleaned from the U.S. Supreme Court's *Troxel* decision.<sup>161</sup>

### III. THE WASHINGTON LEGISLATURE SHOULD AMEND ITS NONPARENTAL VISITATION STATUTE

To ensure that Washington courts fulfill the Legislature's intent, and, more important, to guarantee that courts apply the statute constitutionally, the Legislature should amend Washington's nonparental visitation statute. To address the concerns that the U.S. Supreme Court voiced in *Troxel v. Granville*,<sup>162</sup> the amendments should (1) specifically limit the class of persons permitted to petition for nonparental visitation to relatives and de facto parents, (2) codify a rebuttable presumption that a parental decision regarding visitation is in the best interest of the child,

154. 442 U.S. 584 (1979).

155. *Troxel*, 120 S. Ct. at 2061.

156. *Id.* at 2062.

157. *Id.*

158. *See id.* at 2073 (Stevens, J., dissenting).

159. *See id.* at 2075-76 (Stevens, J., dissenting).

160. *See* Philip Talmadge, *Grandparent Visitation Rulings Leave Unanswered Questions*, WASH. B. NEWS, Sept. 2000, at 30.

161. Because this Comment argues that the Legislature should amend the statute, it need neither address nor resolve this issue. However, it should be noted that every state that has considered nonparental visitation in light of *Troxel* has upheld the visitation statute as constitutional. *See* Jackson v. Tangreen, 18 P.3d 100 (Ariz. Ct. App. 2000); Lopez v. Martinez, 102 Cal. Rptr. 2d 71 (Cal. Ct. App. 2000); Rideout v. Riendeau, 761 A.2d 291 (Me. 2000); Gestl v. Frederick, 754 A.2d 1087 (Md. 2000); *In re* G.P.C., 28 S.W.3d 357 (Mo. Ct. App. 2000); Fitzpatrick v. Youngs, 717 N.Y.S.2d 503 (N.Y. Fam. Ct. 2000); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000).

162. 120 S. Ct. 2054 (2000).

and (3) articulate a purpose to guide courts in interpreting the amended statute.

The proposed amendments would address the constitutional concerns of the U.S. Supreme Court while recognizing the importance of non-traditional families and protecting the best interests of the child. The rebuttable presumption that a parental decision is in the best interest of the child has already been implicitly approved by the Court.<sup>163</sup> Furthermore, the amendments would properly balance the rights of parents and the *parens patriae* power of the state and ensure that Washington courts would properly apply existing precedent. Should the Washington Legislature adopt the proposed amendments, the resulting statute would be facially constitutional and would provide courts the guidance necessary to apply the statute constitutionally.

*A. The Washington Legislature Should Amend the Nonparental Visitation Statute To Comport with Constitutional Requirements*

To bring the statute in line with constitutional requirements and to ensure that courts constitutionally apply Washington's nonparental visitation statute, the Legislature should make three amendments. First, the Legislature should limit the class of persons who may petition for visitation. Second, the Legislature should mandate a rebuttable presumption that a parent's determination regarding visitation is in the best interest of the child. Finally, the Legislature should add an intent section to give interpretive guidance to the courts.

*1. The Amended Statute Should Limit the Class of Persons Who May Petition for Visitation*

Both to address the U.S. Supreme Court's concerns with the "breathtakingly broad"<sup>164</sup> scope of Washington's statute and to maintain the purpose of the nonparental visitation statute, the Washington Legislature should amend the "any person" language of the statute. It should narrowly define the phrase "any person," which occurs twice in the statute,<sup>165</sup> as "a relative or de facto parent."

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163. *See id.* at 2061.

164. *Id.*

165. WASH. REV. CODE § 26.10.160(3) (2000).

The first class of persons who should be allowed to petition for visitation is the child's relatives. For purposes of the statute, the Legislature should define "relative" as a "grandparent, aunt, uncle, or sibling." Most nonparental visitation statutes were originally enacted to address visitation by grandparents.<sup>166</sup> Indeed, several state statutes address only visitation by grandparent or other relatives.<sup>167</sup> This class of persons would include those who make up contemporary extended families, thereby recognizing the importance of family relations.

The second class of people who could seek visitation rights under the amended statute would be de facto parents. The Legislature should define a de facto parent as "any person who, while having no biological or other legal relationship to the child, has nonetheless acted as a parent to the child."<sup>168</sup> This category of people would include stepparents who have not adopted their stepchildren and unmarried partners who have acted as parents, including same-sex parents with no biological or legal relationship with the child. In some circumstances, these de facto parents are legally barred from adoption, either because of their same-sex status<sup>169</sup> or because the biological parent is alive and refuses permission.<sup>170</sup> These amendments would create two limited classes of persons with the ability to bring visitation actions,<sup>171</sup> classes that are not "breathhtakingly broad."

2. *The Amended Statute Should Require Trial Courts To Apply a Rebuttable Presumption that a Fit Parent's Decisions Are in the Best Interest of the Child*

The second proposed amendment would require trial courts to presume that a fit parent's decision regarding visitation is in the best interest of the child. In *Smith*, the Washington Supreme Court did not

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166. See Shandling, *supra* note 17, at 119.

167. See, e.g., COLO. REV. STAT. ANN. § 19-1-117 (West Supp. 1984), S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. 1985).

168. See Recent Case, *supra* note 2; see also *In re B.G. v. San Bernardino County Welfare Dep't*, 523 P.2d 244, 253 n.18 (Cal. 1974).

169. See Sonja Larson, Annotation, *Adoption of Child by Same-Sex Partners*, 27 A.L.R.5th 54 (1995).

170. See, e.g., *In re A.S.*, 65 Wash. App. 631, 634-36, 829 P.2d 791, 792-93 (1992). See generally WASH. REV. CODE § 26.33.160.

171. Consistent with current practice, these sections would be severable in order to protect the statute if any part of the statute was found to be unconstitutional. See, e.g., *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 228, 11 P.3d 762, 791 (2000).

require trial courts to adopt the traditional common law presumption<sup>172</sup> that a fit parent will act in the best interest of his or her child.<sup>173</sup> In order to reverse this interpretation, the Legislature should add a new section to Washington's nonparental visitation statute: "In any action arising under this section, the trial court shall apply a rebuttable presumption that a parent's decisions regarding visitation are in the best interest of the child."<sup>174</sup> The Legislature should further amend the statute to provide guidance to the courts in determining the best interests of the child when the petitioner attempts to rebut the parental determination. The Legislature should provide this guidance by adopting the standards found in Washington's other nonparental visitation statute.<sup>175</sup> The proposed standards section would read:

The court may consider the following factors when making a determination of the child's best interests:

- (a) The strength of the relationship between the child and the petitioner;
- (b) The relationship between each of the child's parents or the person with whom the child is residing and the petitioner;
- (c) The nature and reason for either parent's objection to granting the petitioner visitation;
- (d) The effect that granting visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
- (e) The residential time sharing arrangements between the parents;
- (f) The good faith of the petitioner;
- (g) Any criminal history or history of physical, emotional, or sexual abuse or neglect by the petitioner; and

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172. Arguably, in doing so the court may have abrogated its duty to interpret statutes in a constitutional manner and to avoid absurd or strained results. See *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 615 Wash. 2d 615, 632, 999 P.2d 602, 612 (2000).

173. *Troxel v. Granville*, 120 S. Ct. 2054, 2061 (2000).

174. In adopting this section, the Washington State Legislature would be overruling the interpretation the Washington Supreme Court gave to the existing nonparental visitation statute. The Legislature would not be overruling the court's determination that a specific interpretation of the statute is unconstitutional. The authority of the Legislature to act in this manner is well-accepted. See, e.g., *Marine Power & Equip. Co. v. Wash. State Human Rts. Comm'n Hearing Tribunal*, 39 Wash. App. 609, 612-17, 694 P.2d 697, 699-700 (1985).

175. WASH. REV. CODE § 26.09.240 (2000) (governing visitation requests in conjunction with divorce).

(h) Any other factor relevant to the child's best interest.<sup>176</sup>

3. *The Legislature Should Add an Appropriate Purpose Section to Washington's Nonparental Visitation Statute To Guide Courts in Interpreting the Statute*

The Washington Legislature should also provide guidance to the state courts in interpreting the nonparental visitation statute by adding a purpose section to the statute. A purpose section would provide guidance to courts for interpreting any part of the statute that might be vague. The section should set forth the Legislature's three underlying policies in enacting the statute: (1) parents have a right to control who visits their children; (2) visitation with other adults is often desirable and beneficial to children; and (3) in order to obtain visitation with a child against a parent's will, a petitioner must affirmatively demonstrate that it would be in the best interest of the child.

B. *The Proposed Amendments Would Address the U.S. Supreme Court's Concern that the Statute Is "Breathtakingly Broad"*

The proposed amendments would meet the constitutional requirements of the Fourteenth Amendment because they address the U.S. Supreme Court's concerns that the statute is "breathtakingly broad."<sup>177</sup> The Washington Supreme Court held that the nonparental visitation statute was unambiguous, and therefore read no qualifications into the "any person" language.<sup>178</sup> While this treatment was suspect,<sup>179</sup> under the rules of review<sup>180</sup> the U.S. Supreme Court had to analyze this interpretation.<sup>181</sup> Under the proposed amended statute, only two distinct classes of people would be permitted to bring visitation actions: relatives

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176. This is identical to the standard found in WASH. REV. CODE § 26.09.240(6).

177. *Troxel*, 120 S. Ct. at 2061.

178. *See Smith v. Stillwell-Smith*, 137 Wash. 2d 1, 12, 969 P.2d 21, 26 (1998), *aff'd on other grounds sub nom. Troxel v. Granville*, 120 S. Ct. 2054 (2000).

179. The court could have read the language in conjunction with the requirement that the visitation be in the best interest of the child, or in the greater context of child custody and visitation to limit the class of persons with standing to petition for visitation. This would have been consistent with the court's duty to avoid absurd or strained consequences. *See State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 615 Wash. 2d 615, 632, 999 P.2d 602, 612 (2000); *see also supra* Part II.B.

180. *See infra* Part III.C.

181. *See Troxel*, 120 S. Ct. at 2065.



and de facto parents. The amended statute would necessarily exclude a stranger from petitioning for visitation.<sup>182</sup>

These classes would be in line with the cases that indicate that child visitation is a family right.<sup>183</sup> The U.S. Supreme Court has long rejected the notion that a family is constitutionally defined as being only comprised of parents and their children.<sup>184</sup> Such cases suggest that the Fourteenth Amendment does not favor parental claims over those of other family members.<sup>185</sup> This distinction is particularly significant in the majority of nonparental visitation cases, which involve either relatives or de facto parents, both of whom courts could consider family members.<sup>186</sup> The U.S. Supreme Court, in other contexts, has extended family protections to grandparents,<sup>187</sup> aunts and nieces,<sup>188</sup> and de facto parents.<sup>189</sup> The proposed statute would narrow the class of people permitted to petition for visitation consistent with the fact that a parent's right with respect to total strangers is not identical to the interest with respect to others such as de facto parents.<sup>190</sup>

Furthermore, the proposed amendment would address Justice Kennedy's concern that a traditional family with two or even one permanent and caring parent is not a reality for many children.<sup>191</sup> It also addresses Justice Stevens's concern with protecting the child's interest in preserving relationships that serve the child's welfare and protection.<sup>192</sup> De facto parents have an important connection to their de facto children and may have a significant positive impact on these children's lives.<sup>193</sup> Thus, the proposed amendment would allow for the protection of the interests of the child in maintaining significant relationships<sup>194</sup> and would

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182. There are no reported cases in which a stranger has petitioned for visitation with a child.

183. See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); see also *Bean*, *supra* note 20, at 419–20.

184. *Moore v. City of E. Cleveland*, 431 U.S. 494, 500–02 (1977).

185. See Toni Eddy, Comment, *Grandparent Visitation Rights in Ohio When the Family is Intact*, 28 CAP. U. L. REV. 197, 203–04 (1999).

186. Cases like *Quilloin*, while weakening protection given to biological parents, arguably strengthen the protection given to the extended family. See *Bean*, *supra* note 20, at 417–18.

187. *Moore*, 431 U.S. at 505–06.

188. *Prince v. Massachusetts*, 321 U.S. 158, 159 (1944).

189. *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989).

190. *Troxel v. Granville*, 120 S. Ct. 2054, 2077–78 (2000) (Kennedy, J., dissenting).

191. *Id.* (Kennedy, J., dissenting).

192. *Id.* at 2071 (Stevens, J., dissenting).

193. See GOLDSTEIN ET AL., *supra* note 4, at 104–09.

194. See *Troxel*, 120 S. Ct. at 2071 (Stevens, J., dissenting).

encompass a broad concept of family.<sup>195</sup> Yet, by limiting the classes to those implicitly approved by U.S. Supreme Court opinions, the amendment would satisfy the “breathtakingly broad” concerns voiced by the O’Connor plurality.<sup>196</sup>

C. *The Proposed Amendments Would Address the U.S. Supreme Court’s Concern Regarding Deference to Parents by Codifying the Existing Common Law Presumption in Favor of Parental Decisions*

The U.S. Supreme Court has previously recognized a presumption that a fit parent will act in the best interest of his or her child.<sup>197</sup> The trial court’s failure to adopt this common law presumption (and the Washington Supreme Court’s failure to require the presumption) was one of the two major concerns of the justices in *Troxel*.<sup>198</sup> The proposed amendment would require courts to apply a rebuttable presumption that the decisions of the parents are in the best interest of the child. This amendment would also bring Washington in line with the majority of other states’ nonparental visitation statutes.<sup>199</sup>

After reviewing the record, the O’Connor plurality determined that the trial court merely substituted its determination of the best interest of the children without giving any deference to the parental decision.<sup>200</sup> According to the O’Connor plurality, this decision directly contravened the traditional presumption that parents act in the best interest of their children.<sup>201</sup> As the Court explained in *Parham*, it has been historically recognized that “natural bonds of affection lead parents to act in the best interests of their children.”<sup>202</sup> The proposed amendment would codify the common law presumption, removing the potential for trial courts to

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195. *See id.* at 2059.

196. *Id.* at 2061.

197. *See Parham v. J.R.*, 442 U.S. 584, 602 (1979).

198. *See Troxel*, 120 S. Ct. at 2061–62.

199. *See, e.g.*, CAL. FAM. CODE § 3104(e) (West 1994) (codifying rebuttable presumption that grandparent visitation is not in child’s best interest if parents agree that visitation should not be granted); ME. REV. STAT. ANN. tit. 19A, § 1803(3) (West 1998) (requiring that visitation not significantly interfere with parent-child relationship or with parent’s authority over child); R.I. GEN. LAWS § 15-5-24.3(a)(2)(V) (Supp. 1999) (codifying rebuttable presumption that parent’s decision to refuse visitation was reasonable).

200. *Troxel*, 120 S. Ct. at 2062.

201. *Id.*; *see also, e.g., Parham*, 442 U.S. at 602.

202. *Troxel*, 120 S. Ct. at 2061 (quoting *Parham*, 442 U.S. at 602).

interpret the statute in the manner adopted by the *Smith* court. The amendment would obviate Justice Souter's opinion that the Washington Supreme Court's controlling interpretation rejecting deference to parental decisions rendered the statute unconstitutional.<sup>203</sup> By employing a rebuttable presumption, the amendment would allow courts to constitutionally award visitation to foster parents and other caregivers, as advocated by Justice Stevens.<sup>204</sup>

*D. The Proposed Amendments Would Ensure Courts Will Apply Washington's Nonparental Visitation Statute Constitutionally by Properly Balancing the State's Parens Patriae Power with the Constitutional Rights of Parents*

The Legislature should amend the nonparental visitation statute to avoid the Washington Supreme Court's poor reasoning in *Smith* and provide clear guidance to lower courts applying the statute to balance constitutionally the state's *parens patriae* power and parental rights. Prior to *Smith*, in assessing the constitutionality of an infringement on a parent's rights, Washington courts sought the proper balance between the parent's constitutional rights and the state's *parens patriae* interest in protecting the best interests of the child.<sup>205</sup> Key to this balancing test was the degree of the abridgement of parental rights at issue.<sup>206</sup> The Washington Supreme Court had previously upheld the use of the state's *parens patriae* power without requiring a showing of harm to the child in *In re Sumey*, *In re Key*, and *State v. Steinbach*.<sup>207</sup> However, in *Smith*, the court rejected the *Sumey* balancing test and instead relied on U.S. Supreme Court precedent to hold that the nonparental visitation statute was facially unconstitutional because it relied on the "best-interest-of-the-child" standard rather than the "harm-to-the-child" standard.<sup>208</sup> The Legislature should amend the nonparental visitation statute because the *Smith* court misapplied its own precedent and misinterpreted U.S. Supreme Court precedent in reaching its conclusion.

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203. *Id.* at 2065-66 (Souter, J., concurring).

204. *Id.* at 2070 (Stevens, J., dissenting).

205. *See, e.g., In re Sumey*, 94 Wash. 2d 757, 762-65, 621 P.2d 108, 110-12 (1980).

206. *See id.*

207. 101 Wash. 2d 460, 679 P.2d 369 (1984). For a discussion of *In re Sumey* and *In re Key*, see *supra* Part I.B.

208. *Smith v. Stillwell-Smith*, 137 Wash. 2d 1, 20, 969 P.2d 21, 30 (1998) *aff'd on other grounds sub nom. Troxel v. Granville*, 120 S. Ct. 2054 (2000).

1. *Washington Courts Consistently Utilized the Sumey Balancing Test Before Smith*

The Legislature should amend the nonparental visitation statute because the Washington Supreme Court's position in *Smith*—absent a threshold finding of parental unfitness or harm to the child, the state, as *parens patriae* acting on the child's behalf, may not intrude on parental rights, no matter how slightly—cannot be reconciled with existing case law. The proposed amendments would reverse the Washington Supreme Court's insistence in *Smith* that a showing of harm to the child or parental unfitness is required before the state may exercise its *parens patriae* power<sup>209</sup> and restore the balancing test of *Sumey*. Without this amendment, lower courts will have little guidance when determining how to apply constitutionally the statute in the wake of *Smith* and *Troxel*.

In *Sumey*, the Washington Supreme Court contrasted temporary child placement with termination of parental rights.<sup>210</sup> The *Sumey* court upheld the placement of a child outside the home against the parent's wishes, reasoning that the degree of intrusion on the parent's rights was relatively minor because the parents retain custody over the child.<sup>211</sup> The substantial interests of the state and child were held sufficient to justify the limited infringement on the parent's rights.<sup>212</sup> *Key* involved a dependency proceeding, which the court held to be a more serious interference with the parent-child relationship.<sup>213</sup> Yet the *Key* court also followed the *Sumey* test.<sup>214</sup> In applying the *Sumey* best-interest-of-the-child test, the court explicitly rejected a requirement that there be a finding of parental unfitness or "harm to the child" in order to bring the state's *parens patriae* power to bear.<sup>215</sup>

Occasional, temporary visitation by grandparents and others, allowed only if it is in the best interest of the child, is a relatively minor interference with parental rights. Such visitation is certainly less intrusive than a dependency proceeding. Yet in *Smith*, the court required a showing of harm prior to awarding visitation, while *Key* rejected such a

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209. *See id.*

210. *Sumey*, 94 Wash. 2d at 762–65, 621 P.2d at 110–12.

211. *See id.*

212. *See id.*

213. *In re Welfare of Key*, 19 Wash. 2d 600, 602, 836 P.2d 200, 201 (1992).

214. *Id.* at 610–11, 836 P.2d at 205–06.

215. *Id.*

requirement in a dependency proceeding. The ruling in *Smith* returns the court to the common law paradox where it was easier to terminate rights than it was to obtain visitation rights.<sup>216</sup> Thus, the amendment would restore the *Sumey* test to balance parents' constitutional rights and states' *parens patriae* power by reaffirming the best-interest-of-the-child standard. The best-interest standard is the touchstone by which all other rights are tested and concerns addressed in various contexts dealing with children.<sup>217</sup> The decision by the *Smith* court calls into question all statutes relying on the best-interest-of-the-child standard.<sup>218</sup> If this result were allowed to stand, it would radically alter the long-standing basis by which child welfare cases are determined and overturn what was well-settled law.<sup>219</sup> As Justice Stevens pointed out, child welfare cases do not present simply a bipolar struggle between parents and the state: they also implicate the interests of the child in question.<sup>220</sup>

## 2. *The Smith Court Misapplied U.S. Supreme Court Precedent in Striking Down the Best-Interest-of-the-Child Standard*

The Legislature should amend the nonparental visitation statute to restore the best-interest-of-the-child balancing test of *Sumey*, correct the

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216. See *supra* Part I.C.1.

217. See, e.g., *Wash. State Coalition for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wash. 2d 894, 923, 949 P.2d 1291, 1306 (1997) ("As in all matters dealing with the welfare of children, the court must additionally act in the best interests of the child."); *In re Marriage of Littlefield*, 133 Wash. 2d 39, 51–52, 940 P.2d 1362, 1368–69 (1997) (noting that in absence of parental cooperation during post-separation action, trial court is given broad discretion to develop and order parenting plan according to guidelines set forth in WASH. REV. CODE § 26.09.187(3)(a) (2000) and based on best interests of children at time of trial); *In re Aschauer*, 93 Wash. 2d 689, 695, 611 P.2d 1245, 1249 (1978) ("This court has repeatedly said that the goal of a dependency hearing is to determine the welfare of the child and his best interests."); *In re Sego*, 82 Wash. 2d 736, 738, 513 P.2d 831, 832 (1973) ("[A] child's welfare is the court's primary consideration . . . when the rights of parents and the welfare of their children are in conflict, the welfare of the minor children must prevail."); *State ex rel. Campbell v. Cook*, 86 Wash. App. 761, 770–71, 938 P.2d 345, 350–51 (1997) (noting that best interests of child are paramount in paternity proceedings; and upholding trial court's denial of putative father's attempt to reopen and challenge paternity determination made thirteen years prior).

218. *Troxel v. Granville*, 120 S. Ct. 2054, 2068 n.5 (2000) (Stevens, J., dissenting) (noting ten Washington statutes invoking best-interest standard and 698 judicial opinions referencing best-interest standard).

219. Every state save Georgia predicates nonparental visitation on the best interest of the child standard. *Troxel*, 120 S. Ct. at 2078 (Kennedy, J., dissenting) (citing GA. CODE ANN. § 19-7-3(c) (1999)).

220. *Id.* at 2071 (Stevens, J. dissenting).

*Smith* court's misapplication of U.S. Supreme Court precedent, and ensure that Washington courts constitutionally apply the nonparental visitation statute. The line of U.S. Supreme Court cases relied on in *Smith* does not purport to eliminate the state's *parens patriae* power or the best-interest-of-the-child standard. Instead these cases involve substantial, rather than relatively minor, infringements on parental rights or other fundamental rights.<sup>221</sup>

The restoration of the *Sumey* best-interest-of-the-child balancing test comports with parents' Fourteenth Amendment liberty rights in raising their children. The *Smith* court cited *Wisconsin v. Yoder* for the proposition that "the Supreme Court cases which support the constitutional right to rear one's child and the right to family privacy indicate that the state may interfere only if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."<sup>222</sup> But this characterization goes too far. *Yoder* turns on the free exercise claim asserted by the child's Amish parents and the unique facts of that case.<sup>223</sup> The Court held where the interests of parents were combined with a free exercise of religion claim of the nature present in that case, the state must show a compelling interest in requiring Amish parents, contrary to their religious beliefs, to send their children to school beyond the eighth grade.<sup>224</sup> However, the *Yoder* Court did not hold that harm is a threshold requirement for any encroachment on parental rights,<sup>225</sup> as the *Smith* court implied in its rejection of the best-interest-of-the-child standard.<sup>226</sup>

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221. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 747 (1982) (termination of parental rights); *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) (religious freedom); *Stanley v. Illinois*, 405 U.S. 645, 646–47 (1972) (termination of parental rights); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 530–34 (1925) (religious freedom); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (upbringing and education of children).

222. *Smith v. Stillwell-Smith*, 137 Wash. 2d 1, 17, 969 P.2d 21, 27 *aff'd on other grounds sub nom.* *Troxel v. Granville*, 120 S. Ct. 2054 (2000) (internal quotation marks omitted). In fact, the cited case does not so hold. In *Yoder*, the Supreme Court held that the Free Exercise Clause of the First Amendment barred the application of compulsory school attendance law to Old Order Amish who did not send their children to school after the eighth grade because "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215.

223. See *Yoder*, 406 U.S. at 233–34.

224. See *id.*

225. See *id.*

226. See *Smith*, 137 Wash. 2d at 18, 969 P.2d at 29.

The *Smith* court further erred in concluding that in *Prince v. Massachusetts* the U.S. Supreme Court required that some harm threaten the child's welfare before the state could constitutionally interfere with a parent's rights by exercising its *parens patriae* power.<sup>227</sup> Although *Prince* indicates state intervention in areas of religious practices or parental control is appropriate to prevent harm to a child, that case does not suggest harm to a child is a threshold requirement for any and all types of state encroachment of parental rights.<sup>228</sup> Furthermore, *Prince* was specifically limited to the facts of that case.<sup>229</sup> Therefore, by amending the statute to include the *Sumey* best-interest-of-the-child standard, the Washington Legislature will ensure consistent application of both Washington Supreme Court and U.S. Supreme Court *parens patriae* and Fourteenth Amendment precedent.

*E. The Proposed Amendments Encompass Modern Family Situations and Provide Washington Courts with Familiar Tools for Applying Washington's Nonparental Visitation Statute*

As the purpose section would indicate,<sup>230</sup> the proposed amendments would also recognize the changing nature of modern families. They would recognize that legal or biological relationships do not always address the reality of modern family life and they would protect the interests of those legally prohibited from establishing a legal relationship with a child by permitting visitation outside of the traditional, strict parental visitation rules.

The amended statute would further give flexibility to the trial courts in fashioning visitation orders in cases presenting unique family structures. Furthermore, the statute would provide needed guidance to the trial courts because its language is familiar to trial courts. Because courts have successfully applied these guidelines to nonparental visitation during and after divorce proceedings,<sup>231</sup> they could easily be adapted to other nonparental visitation cases. The best-interest standard would retain the flexibility required by trial courts in addressing the infinite circumstances and possibilities that surround child welfare determi-

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227. *See id.*

228. *See Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

229. *Id.* at 170–71.

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

231. *See supra* Part I.C.2.

nations such as the nonparental visitation at issue in these cases.<sup>232</sup> The statute would also work to protect the relationships children develop with adults who play significant roles in the lives of these children. The state has a substantial interest in protecting children's significant relationships with adults, promoting healthy family relationships, and reinforcing the positive influences of significant relationships with relatives and de facto parents.

#### IV. CONCLUSION

The nature of the family unit often includes adults other than biological or legal parents who provide significant positive influences on children. These benefits include stronger family bonds, moral instruction, opportunities to observe healthy adult relationships, and additional educational opportunities. Under ordinary circumstances, a child's parents are best situated to determine the advisability of visitation with their minor children by other adults. However, in some circumstances the best interests of the child are better served by allowing visitation with certain adults against the wishes of the child's parents.

States have recognized this reality by enacting nonparental visitation statutes. By their very nature, these statutes represent a conflict between a parent's constitutional rights to raise a child as he or she sees fit and the state's *parens patriae* power. In *Troxel*, the U.S. Supreme Court suggested that the Washington Legislature and Washington Supreme Court failed to appropriately resolve this conflict in the statute and its application. To address the U.S. Supreme Court's concerns and ensure that courts constitutionally apply Washington's nonparental visitation statute, the Legislature should make two amendments to the statute and add a purpose section. The Legislature should both limit the class of persons permitted to petition for visitation to relatives and de facto parents, and codify a rebuttable presumption that a parent's decision regarding visitation is in the best interest of the child. In addition to

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232. See *Beagle v. Beagle*, 678 So. 2d 1271, 1275 (Fla. 1996). While finding the Florida grandparent visitation statute violated the state constitution, the Florida Supreme Court acknowledged other states had upheld their grandparent visitation statutes against federal constitutional challenges, noting: "[i]n those cases a best interest standard was deemed to be sufficient." *Id.* (citing *Lehrer v. Davis*, 571 A.2d 691 (Conn. 1990); *Bailey v. Menzie*, 542 N.E.2d 1015 (Ind. Ct. App. 1989); *Spradling v. Harris*, 778 P.2d 365 (Kan. Ct. App. 1989); *King v. King*, 828 S.W.2d 630 (Ky. 1992); *Hemdon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993); *Ridenour v. Ridenour*, 901 P.2d 770 (N.M. Ct. App. 1995)).



addressing the concerns of the U.S. Supreme Court, these amendments would ensure that Washington courts properly apply Washington Supreme Court and U.S. Supreme Court precedent. Parents have rights that must be respected. But children have a compelling interest in developing relationships with other caring adults. The state should act to protect all of these interests.