530 U.S. 57 (2000)

TROXEL et vir
v.
GRANVILLE

No. 99-138.

United States Supreme Court.

Argued January 12, 2000.
Decided June 5, 2000.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

O'Connor, J., announced the judgment of the Court and delivered an opinion, in which Rehnquist, C. J., and Ginsburg and Breyer, JJ., joined. Souter, J., *post,* p. 75, and Thomas, J., *post,* p. 80, filed opinions concurring in the judgment. Stevens, J., *post,* p. 80, Scalia, J., *post,* p. 91, and Kennedy, J., *post.* p. 93, filed dissenting opinions.

Mark D. Olson argued the cause for petitioners. With him on the briefs was *Eric Schnapper.*

Catherine W. Smith argued the cause for respondent. With her on the brief was *Howard M. Goodfriend.*[*]

60 *60 Justice O'Connor announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Ginsburg, and Justice Breyer join.

Section 26.10.160(3) of the Revised Code of Washington permits "[a]ny person" to petition a superior court for visitation rights "at any time," and authorizes that court to grant such visitation rights whenever "visitation may serve the best interest of the child." Petitioners Jenifer and Gary **Troxel** petitioned a Washington Superior Court for the right to visit their grandchildren, Isabelle and Natalie **Troxel**. Respondent Tommie Granville, the mother of Isabelle and Natalie, opposed the petition. The case ultimately reached the Washington Supreme Court, which held that § 26.10.160(3) unconstitutionally interferes with the fundamental right of parents to rear their children.

I

Tommie Granville and Brad **Troxel** shared a relationship that ended in June 1991. The two never married, but they had two daughters, Isabelle and Natalie. Jenifer and Gary **Troxel** are Brad's parents, and thus the paternal grandparents of Isabelle and Natalie. After Tommie and Brad separated in 1991, Brad lived with his parents and regularly brought his daughters to his parents' home for weekend visitation. Brad committed suicide in May 1993. Although the Troxels at first
61 continued to see Isabelle and Natalie on a regular basis after their son's death, Tommie Granville informed *61 the Troxels in October 1993 that she wished to limit their visitation with her daughters to one short visit per month. *In re Smith,* 137 Wash. 2d 1, 6, 969 P. 2d 21, 23-24 (1998); *In re* ***Troxel,*** 87 Wash. App. 131, 133, 940 P. 2d 698, 698-699 (1997).

In December 1993, the Troxels commenced the present action by filing, in the Washington Superior Court for Skagit County, a petition to obtain visitation rights with Isabelle and Natalie. The Troxels filed their petition under two Washington statutes, Wash. Rev. Code §§ 26.09.240 and 26.10.160(3) (1994). Only the latter statute is at issue in this case. Section 26.10.160(3) provides: "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." At trial, the Troxels requested two weekends of overnight visitation per month and two weeks of visitation each summer. Granville did not oppose visitation altogether, but instead asked the court to order one day of visitation per month with no overnight stay. 87 Wash. App., at 133-134, 940 P. 2d, at 699. In 1995, the Superior Court issued an oral ruling and entered a visitation decree ordering visitation one

Ex. 1

weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays. 137 Wash. 2d, at 6, 969 P. 2d, at 23; App. to Pet. for Cert. 76a—78a.

Granville appealed, during which time she married Kelly Wynn. Before addressing the merits of Granville's appeal, the Washington Court of Appeals remanded the case to the Superior Court for entry of written findings of fact and conclusions of law. 137 Wash. 2d, at 6, 969 P. 2d, at 23. On remand, the Superior Court found that visitation was in Isabelle's and Natalie's best interests:

> "The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the
62 Petitioners *62 can provide opportunities for the children in the areas of cousins and music.
>
> ". . . The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens' *[sic]* nuclear family. The court finds that the childrens' *[sic]* best interests are served by spending time with their mother and stepfather's other six children." App. 70a.

Approximately nine months after the Superior Court entered its order on remand, Granville's husband formally adopted Isabelle and Natalie. *Id.*, at 60a—67a.

The Washington Court of Appeals reversed the lower court's visitation order and dismissed the Troxels' petition for visitation, holding that nonparents lack standing to seek visitation under § 26.10.160(3) unless a custody action is pending. In the Court of Appeals' view, that limitation on nonparental visitation actions was "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the care, custody, and management of their children." 87 Wash. App., at 135, 940 P. 2d, at 700 (internal quotation marks omitted). Having resolved the case on the statutory ground, however, the Court of Appeals did not expressly pass on Granville's constitutional challenge to the visitation statute. *Id.*, at 138, 940 P. 2d, at 701.

The Washington Supreme Court granted the Troxels' petition for review and, after consolidating their case with two other visitation cases, affirmed. The court disagreed with the Court of Appeals' decision on the statutory issue and found that the plain language of § 26.10.160(3) gave the Troxels standing to seek visitation, irrespective of whether a custody action
63 was pending. 137 Wash. 2d, at 12, 969 P. *63 2d, at 26-27. The Washington Supreme Court nevertheless agreed with the Court of Appeals' ultimate conclusion that the Troxels could not obtain visitation of Isabelle and Natalie pursuant to § 26.10.160(3). The court rested its decision on the Federal Constitution, holding that § 26.10.160(3) unconstitutionally infringes on the fundamental right of parents to rear their children. In the court's view, there were at least two problems with the nonparental visitation statute. First, according to the Washington Supreme Court, the Constitution permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child. Section 26.10.160(3) fails that standard because it requires no threshold showing of harm. *Id.*, at 15-20, 969 P. 2d, at 28-30. Second, by allowing "'any person' to petition for forced visitation of a child at `any time' with the only requirement being that the visitation serve the best interest of the child," the Washington visitation statute sweeps too broadly. *Id.*, at 20, 969 P. 2d, at 30. "It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a `better' decision." *Ibid.*, 969 P. 2d, at 31. The Washington Supreme Court held that "[p]arents have a right to limit visitation of their children with third persons," and that between parents and judges, "the parents should be the ones to choose whether to expose their children to certain people or ideas." *Id.*, at 21, 969 P. 2d, at 31. Four justices dissented from the Washington Supreme Court's holding on the constitutionality of the statute. *Id.*, at 23-43, 969 P. 2d, at 32-42.

We granted certiorari, 527 U. S. 1069 (1999), and now affirm the judgment.

II

The demographic changes of the past century make it difficult to speak of an average American family. The composition
64 of families varies greatly from household to household. While many children may have two married parents and *64

grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. U. S. Dept. of Commerce, Bureau of Census, Current Population Reports, 1997 Population Profile of the United States 27 (1998). Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children—or 5.6 percent of all children under age 18—lived in the household of their grandparents. U. S. Dept. of Commerce, Bureau of Census, Current Population Reports, Marital Status and Living Arrangements: March 1998 (Update), p. *i* (1998).

The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family. Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The States' nonparental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents. The extension of statutory rights in this area to persons other than a child's parents, however, comes with an obvious cost. For example, the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship. Contrary to Justice Stevens' accusation, our description of state nonparental visitation statutes in these terms, of course, is not meant to suggest that "children are so much chattel." *Post,* at 89 (dissenting opinion). Rather, our terminology is
65 intended to highlight the fact that these *65 statutes can present questions of constitutional import. In this case, we are presented with just such a question. Specifically, we are asked to decide whether § 26.10.160(3), as applied to Tommie Granville and her family, violates the Federal Constitution.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." *Washington v. Glucksberg,* 521 U. S. 702, 719 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.,* at 720; see also *Reno* v. *Flores,* 507 U. S. 292, 301-302 (1993).

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children— is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* 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." *Id.,* at 535. We returned to the subject in *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in
66 the parents, whose primary *66 function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.,* at 166.

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, *e. g., Stanley* v. *Illinois,* 405 U. S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children `come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); *Wisconsin* v. *Yoder,* 406 U. S. 205, 232 (1972) ("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"); *Quilloin* v. *Walcott,* 434 U. S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham* v. *J. R.,* 442 U. S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor

children. Our cases have consistently followed that course"); Santosky v. Kramer, 455 U. S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); Glucksberg, supra, at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the `liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

67 *67 Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, "*[a]ny person* may petition the court for visitation rights *at any time,* " and the court may grant such visitation rights whenever "visitation may serve *the best interest of the child.* " § 26.10.160(3) (emphases added). That language 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. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. The Washington Supreme Court had the opportunity to give § 26.10.160(3) a narrower reading, but it declined to do so. See, *e. g.*, 137 Wash. 2d, at 5, 969 P. 2d, at 23 ("[The statute] allow[s] 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.*, at 20, 969 P. 2d, at 30 ("[The statute] allow[s] `any person' to petition for forced visitation of a child at `any time' with the only requirement being that the visitation serve the best interest of the child").

68 *68 Turning to the facts of this case, the record reveals that the Superior Court's order was based on precisely the type of mere disagreement we have just described and nothing more. The Superior Court's order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters. To be sure, this case involves a visitation petition filed by grandparents soon after the death of their son—the father of Isabelle and Natalie—but the combination of several factors here compels our conclusion that § 26.10.160(3), as applied, exceeded the bounds of the Due Process Clause.

First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. As this Court explained in *Parham:*

> "[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . 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 required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." 442 U. S., at 602 (alteration in original) (internal quotation marks and citations omitted).

Accordingly, so long as a parent adequately cares for his or her children (*i. e.*, is fit), there will normally be no reason for
69 the State to inject itself into the private realm of the family to further question the ability of that parent to make the *69 best decisions concerning the rearing of that parent's children. See, *e. g.*, Flores, 507 U. S., at 304.

The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption. In reciting its oral ruling after the conclusion of closing arguments, the Superior

Court judge explained:

> "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. That certainly isn't the case here from what I can tell." Verbatim Report of Proceedings in *In re* ***Troxel,*** No. 93-3—00650-7 (Wash. Super. Ct., Dec. 14, 19, 1994), p. 213 (hereinafter Verbatim Report).

The judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughters. The judge reiterated moments later: "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.*, at 214.

The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit
70 parent will act in the best interest of his or her child. See *Parham, supra,* at 602. In that respect, the court's presumption *70 failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters. Cf., *e. g.,* Cal. Fam. Code Ann. § 3104(e) (West 1994) (rebuttable presumption that grandparent visitation is not in child's best interest if parents agree that visitation rights should not be granted); Me. Rev. Stat. Ann., Tit. 19A, § 1803(3) (1998) (court may award grandparent visitation if in best interest of child and "would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child"); Minn. Stat. § 257.022(2)(a)(2) (1998) (court may award grandparent visitation if in best interest of child and "such visitation would not interfere with the parent-child relationship"); Neb. Rev. Stat. § 43-1802(2) (1998) (court must find "by clear and convincing evidence" that grandparent visitation "will not adversely interfere with the parent-child relationship"); R. I. Gen. Laws § 15-5—24.3(a)(2)(v) (Supp. 1999) (grandparent must rebut, by clear and convincing evidence, presumption that parent's decision to refuse grandparent visitation was reasonable); Utah Code Ann. § 30-5—2(2)(e) (1998) (same); *Hoff v. Berg,* 595 N. W. 2d 285, 291-292 (N. D. 1999) (holding North Dakota grandparent visitation statute unconstitutional because State has no "compelling interest in presuming visitation rights of grandparents to an unmarried minor are in the child's best interests and forcing parents to accede to court-ordered grandparental visitation unless the parents are first able to prove such visitation is not in the best interests of their minor child"). In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

72 *71 Finally, we note that there is no allegation that Granville ever sought to cut off visitation entirely. Rather, the present dispute originated when Granville informed the Troxels that she would prefer to restrict their visitation with Isabelle and Natalie to one short visit per month and special holidays. See 87 Wash. App., at 133, 940 P. 2d, at 699; Verbatim Report 12. In the Superior Court proceedings Granville did not oppose visitation but instead asked that the duration of any visitation order be shorter than that requested by the Troxels. While the Troxels requested two weekends per month and two full weeks in the summer, Granville asked the Superior Court to order only one day of visitation per month (with no overnight stay) and participation in the Granville family's holiday celebrations. See 87 Wash. App., at 133, 940 P. 2d, at 699; Verbatim Report 9 ("Right off the bat we'd like to say that our position is that grandparent visitation is in the best interest of the children. It is a matter of how much and how it is going to be structured") (opening statement by Granville's attorney). The Superior Court gave no weight to Granville's having assented to visitation even before the filing of any visitation petition or subsequent court intervention. The court instead rejected Granville's proposal and settled on a middle ground, ordering one weekend of visitation per month, one week in the summer, and time on both of the petitioning grandparents' birthdays. See 87 Wash. App., at 133-134, 940 P. 2d, at 699; Verbatim Report 216-221. Significantly, many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party. See, *e. g.,* Miss. Code Ann. § 93-16-3(2)(a) (1994) (court

must find that "the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child"); Ore. Rev. Stat. § 109.121(1)(a)(B) (1997) (court may award visitation if the "custodian of the child has denied the grandparent reasonable opportunity to visit the child"); R. I. Gen. Laws §§ 15-5— *72 24.3(a)(2)(iii)—(iv) (Supp. 1999) (court must find that parents prevented grandparent from visiting grandchild and that "there is no other way the petitioner is able to visit his or her grandchild without court intervention").

Considered together with the Superior Court's reasons for awarding visitation to the Troxels, the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters. The Washington Superior Court failed to accord the determination of Granville, a fit custodial parent, any material weight. In fact, the Superior Court made only two formal findings in support of its visitation order. First, the Troxels "are part of a large, central, loving family, all located in this area, and the [Troxels] can provide opportunities for the children in the areas of cousins and music." App. 70a. Second, "[t]he children would be benefitted from spending quality time with the [Troxels], provided that that time is balanced with time with the childrens' *[sic]* nuclear family." *Ibid.* These slender findings, in combination with the court's announced presumption in favor of grandparent visitation and its failure to accord significant weight to Granville's already having offered meaningful visitation to the Troxels, show that this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests. The Superior Court's announced reason for ordering one week of visitation in the summer demonstrates our conclusion well: "I look back on some personal experiences . . . . We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out." Verbatim Report 220-221. As we have explained, the Due Process Clause
73 does not permit a State to infringe on the fundamental right *73 of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made. Neither the Washington nonparental visitation statute generally —which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted—nor the Superior Court in this specific case required anything more. Accordingly, we hold that § 26.10.160(3), as applied in this case, is unconstitutional.

Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." *Post,* at 101 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to
74 hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.[*] See, *e. g.*, *Fair-* *74 *banks v. McCarter,* 330 Md. 39, 49-50, 622 A. 2d 121, 126-127 (1993) (interpreting best-interest standard in grandparent visitation statute normally to require court's consideration of certain factors); *Williams* v. *Williams,* 256 Va. 19, 501 S. E. 2d 417, 418 (1998) (interpreting Virginia nonparental visitation statute to require finding of harm as condition precedent to awarding visitation).

Justice Stevens criticizes our reliance on what he characterizes as merely "a guess" about the Washington courts' interpretation of § 26.10.160(3). *Post,* at 82 (dissenting opinion). Justice Kennedy likewise states that "[m]ore specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself." *Post,* at 102 (dissenting opinion). We respectfully disagree. There is no need to hypothesize about how the Washington courts *might* apply § 26.10.160(3) because the Washington Superior Court *did* apply the statute in this very case. Like the Washington Supreme Court, then,
75 we are presented with an actual visitation order and the reasons why the Superior Court believed *75 entry of the order was appropriate in this case. Faced with the Superior Court's application of § 26.10.160(3) to Granville and her family, the Washington Supreme Court chose not to give the statute a narrower construction. Rather, that court gave § 26.10.160(3) a literal and expansive interpretation. As we have explained, that broad construction plainly encompassed the Superior Court's application of the statute. See *supra,* at 67.

There is thus no reason to remand the case for further proceedings in the Washington Supreme Court. As Justice Kennedy recognizes, the burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationsh p that the constitutional right of a custodlal parent to make certain basic determinations for the child's welfare becomes implicated." *Post,* at 101. In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial. As we have explained, it is apparent that the entry of the visitation order in this case violated the Constitution. We should say so now, without forcing the parties into additional litigation that would further burden Granville's parental right. We therefore hold that the application of § 26.10.160(3) to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her daughters.

Accordingly, the judgment of the Washington Supreme Court is affirmed.

It is so ordered.

Justice Souter, concurring in the judgment.

I concur in the judgment affirming the decision of the Supreme Court of Washington, whose facial invalidation of its own state statute is consistent with this Court's prior cases addressing the substantive interests at stake. I would say no more.
76 The issues that might well be presented by reviewing a decision addressing the specific application of the *76 state statute by the trial court, *ante,* at 68-73, are not before us and do not call for turning any fresh furrows in the "treacherous field" of substantive due process. *Moore* v. *East Cleveland,* 431 U. S. 494, 502 (1977) (opinion of Powell, J.).

The Supreme Court of Washington invalidated its state statute based on the text of the statute alone, not its application to any particular case.[1] Its ruling rested on two independently sufficient grounds: the failure of the statute to require harm to the child to justify a disputed visitation order, *In re Smith,* 137 Wash. 2d 1, 17, 969 P. 2d 21, 29 (1998); and the statute's authorization of "any person" at "any time" to petition for and to receive visitation rights subject only to a free-ranging best-interests-of-the-child standard, *id.,* at 20-21, 969 P. 2d, at 30-31. *Ante,* at 63. I see no error in the second reason, that because the state statute authorizes any person at any time to request (and a judge to award) visitation rights,
77 subject only to the State's particular bestinterests *77 standard, the state statute sweeps too broadly and is unconstitutional on its face. Consequently, there is no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections.

We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment. See, *e. g., Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (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). As we first acknowledged in *Meyer,* the right of parents to "bring up children," 262 U. S., at 399, and "to control the education of their own" is protected by the Constitution, *id.,* at 401. See also *Glucksberg, supra,* at 761 (Souter, J., concurring in judgment).

On the basis of this settled principle, the Supreme Court of Washington invalidated its statute because it authorized a contested visitation order at the intrusive behest of any person at any time subject only to a best-interests-of-the-child standard. In construing the statute, the state court explained that the "any person" at "any time" language was to be read literally, 137 Wash. 2d, at 10-11, 969 P. 2d, at 25-27, and that "[m]ost notably the statut[e] do[es] not require the petitioner to establish that he or she has a substantial relationship with the child," *id.,* at 20-21, 969 P. 2d, at 31. Although the statute speaks of granting visitation rights whenever "visitation may serve the best interest of the child," Wash. Rev. Code § 26.10.160(3) (1994), the state court authoritatively read this provision as placing hardly any limit on a court's discretion to
78 award visitation rights. As the court understood it, the specific best-interests provision in the *78 statute would allow a court to award visitation whenever it thought it could make a better decision than a child's parent had done. See 137 Wash. 2d, at 20, 969 P. 2d, at 31 ("It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a `better' decision").[2] On that basis in part, the Supreme Court of Washington invalidated the State's own statute: "Parents have a right to limit visitation of their children with third persons."

Id., at 21, 969 P. 2d, at 31.

Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child, but *Meyer*'s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by "any party" at "any time" a judge believed he "could make a `better' decision"[3] than the objecting parent had done. The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social companions is not essentially different from the designation of the adults who will influence the child in school. Even a State's considered
79 judgment about the preferable political and religious character of schoolteachers is not entitled *79 to prevail over a parent's choice of private school. *Pierce, supra*, at 535 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"). It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent.[4] To say the least (and as the Court implied in *Pierce*), parental choice in such matters is not merely a default rule in the absence of either governmental choice or the government's designation of an official with the power to choose for whatever reason and in whatever circumstances.

Since I do not question the power of a State's highest court to construe its domestic statute and to apply a demanding standard when ruling on its facial constitutionality,[5] see *Chicago v. Morales*, 527 U. S. 41, 55, n. 22 (1999) (opinion of Stevens, J.), this for me is the end of the case. I would simply affirm the decision of the Supreme Court of Washington that its statute, authorizing courts to grant visitation rights to any person at any time, is unconstitutional. I therefore respectfully concur in the judgment.

80 *80 Justice Thomas, concurring in the judgment.

I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision. As a result, I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day.[*]

Consequently, I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. Our decision in *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties. On this basis, I would affirm the judgment below.

Justice Stevens, dissenting.

The Court today wisely declines to endorse either the holding or the reasoning of the Supreme Court of Washington. In my opinion, the Court would have been even wiser to deny certiorari. Given the problematic character of the trial court's
81 decision and the uniqueness of the Washington statute, there was no pressing need to review a State Supreme *81 Court decision that merely requires the state legislature to draft a better statute.

Having decided to address the merits, however, the Court should begin by recognizing that the State Supreme Court rendered a federal constitutional judgment holding a state law invalid on its face. In light of that judgment, I believe that we should confront the federal questions presented directly. For the Washington statute is not made facially invalid either because it may be invoked by too many hypothetical plaintiffs, or because it leaves open the possibility that someone may

be permitted to sustain a relationship with a child without having to prove that serious harm to the child would otherwise result.

I

In response to Tommie Granville's federal constitutional challenge, the State Supreme Court broadly held that Wash. Rev. Code § 26.10.160(3) (Supp. 1996) was invalid on its face under the Federal Constitution.[1] Despite the nature of this judgment, Justice O'Connor would hold that the Washington visitation statute violated the Due Process Clause of the Fourteenth Amendment only as applied. *Ante*, at 65, 67, 73 (plurality opinion). I agree with Justice Souter, *ante*, at 75-76, and n. 1 (opinion concurring in judgment), that this approach is untenable.

The task of reviewing a trial court's application of a state statute to the particular facts of a case is one that should be performed in the first instance by the state appellate courts. In this case, because of their views of the Federal Constitution, the Washington state appeals courts have yet to decide whether the trial court's findings were adequate
82 under the *82 statute.[2] Any as-applied critique of the trial court's judgment that this Court might offer could only be based upon a guess about the state courts' application of that State's statute, and an independent assessment of the facts in this case—both judgments that we are ill-suited and ill-advised to make.[3]

83 *83 While I thus agree with Justice Souter in this respect, I do not agree with his conclusion that the State Supreme Court made a definitive construction of the visitation statute that necessitates the constitutional conclusion he would draw.[4] As I read the State Supreme Court's opinion, *In re Smith*, 137 Wash. 2d 1, 19-20, 969 P. 2d 21, 30-31 (1998), its interpretation of the Federal Constitution made it unnecessary to adopt a definitive construction of the statutory text, or, critically, to decide whether the statute had been correctly applied in this case. In particular, the state court gave no content to the phrase, "best interest of the child," Wash. Rev. Code § 26.10.160(3) (Supp. 1996)—content that might well be gleaned
84 from that State's own statutes or decisional law employing the same phrase in different contexts, *84 and from the myriad other state statutes and court decisions at least nominally applying the same standard.[5] Thus, I believe that Justice Souter's conclusion that the statute unconstitutionally imbues state trial court judges with "`too much discretion in *every* case,' " *ante*, at 78, n. 3 (opinion concurring in judgment) (quoting *Chicago v. Morales*, 527 U. S. 41, 71 (1999) (Breyer, J., concurring)), is premature.

We are thus presented with the unconstrued terms of a state statute and a State Supreme Court opinion that, in my view, significantly misstates the effect of the Federal Constitution upon any construction of that statute. Given that posture, I
85 believe the Court should identify and correct the two flaws in the reasoning of the state court's majority opinion, *85 and remand for further review of the trial court's disposition of this specific case.

II

In my view, the State Supreme Court erred in its federal constitutional analysis because neither the provision granting "any person" the right to petition the court for visitation, 137 Wash. 2d, at 20, 969 P. 2d, at 30, nor the absence of a provision requiring a "threshold . . . finding of harm to the child," *ibid.*, provides a sufficient basis for holding that the statute is invalid in all its applications. I believe that a facial challenge should fail whenever a statute has "a `plainly legitimate sweep,' " *Washington v. Glucksberg*, 521 U. S. 702, 739-740, and n. 7 (1997) (Stevens, J., concurring in judgment).[6] Under the Washington statute, there are plainly any number of cases—indeed, one suspects, the most common to arise—in which the "person" among "any" seeking visitation is a once-custodial caregiver, an intimate relation, or even a genetic parent. Even the Court would seem to agree that in many circumstances, it would be constitutionally permissible for a court to award some visitation of a child to a parent or previous caregiver in cases of parental separation or divorce, cases of disputed custody, cases involving temporary foster care or guardianship, and so forth. As the statute plainly sweeps in a great deal of the permissible, the State Supreme Court majority incorrectly concluded that a statute authorizing "any person" to file a petition seeking visitation privileges would invariably run afoul of the Fourteenth Amendment.

The second key aspect of the Washington Supreme Court's holding—that the Federal Constitution requires a showing of
86 actual or potential "harm" to the child before a court may *86 order visitation continued over a parent's objections—finds no support in this Court's case law. While, as the Court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State, see *infra* this page and 87-88, we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm.[7] The presumption that parental decisions generally serve the best interests of their children is sound, and clearly in the normal case the parent's interest is paramount. But even a fit parent is capable of treating a child like a mere possession.

Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.

It has become standard practice in our substantive due process jurisprudence to begin our analysis with an identification of the "fundamental" liberty interests implicated by the challenged state action. See, *e. g., ante,* at 65-66 (opinion of O'Connor. J.); *Washington v. Glucksberg,* 521 U. S. 702 (1997); *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U. S. 833 (1992). My colleagues are of course correct to recognize that the right of a parent to maintain a relationship with
87 his or her child is among the interests included *87 most often in the constellation of liberties protected through the Fourteenth Amendment. *Ante,* at 65-66 (opinion of O'Connor, J.). Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in doing so without the undue interference of strangers to them and to their child. Moreover, and critical in this case, our cases applying this principle have explained that with this constitutional liberty comes a presumption (albeit a rebuttable one) that "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J. R.,* 442 U. S. 584, 602 (1979); see also *Casey,* 505 U. S., at 895; *Santosky v. Kramer,* 455 U. S. 745, 759 (1982) (State may not presume, at factfinding stage of parental rights termination proceeding, that interests of parent and child diverge); see also *ante,* at 68-69 (opinion of O'Connor, J.).

Despite this Court's repeated recognition of these significant parental liberty interests, these interests have never been seen to be without limits. In *Lehr v. Robertson,* 463 U. S. 248 (1983), for example, this Court held that a putative biological father who had never established an actual relationship with his child did not have a constitutional right to notice of his child's adoption by the man who had married the child's mother. As this Court had recognized in an earlier case, a parent's liberty interests "'do not spring fullblown from the biological connection between parent and child. They require relationships more enduring.' " *Id.,* at 260 (quoting *Caban v. Mohammed,* 441 U. S. 380, 397 (1979)).

Conversely, in *Michael H. v. Gerald D.,* 491 U. S. 110 (1989), this Court concluded that despite both biological parenthood and an established relationship with a young child, a father's due process liberty interest in maintaining some connection with that child was not sufficiently powerful to overcome a state statutory presumption that the husband of the child's
88 mother was the child's parent. As a result of the *88 presumption, the biological father could be denied even visitation with the child because, as a matter of state law, he was not a "parent." A plurality of this Court there recognized that the parental liberty interest was a function, not simply of "isolated factors" such as biology and intimate connection, but of the broader and apparently independent interest in family. See, *e. g., id.,* at 123; see also *Lehr,* 463 U. S., at 261; *Smith v. Organization of Foster Families For Equality & Reform,* 431 U. S. 816, 842-847 (1977); *Moore v. East Cleveland,* 431 U. S. 494, 498-504 (1977).

A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae,* see, *e. g., Reno v. Flores,* 507 U. S. 292, 303-304 (1993); *Santosky v. Kramer,* 455 U. S., at 766; *Parham,* 442 U. S., at 605; *Prince v. Massachusetts,* 321 U. S. 158, 166 (1944), and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection, *Santosky,* 455 U. S., at 760.

89 While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established

familial or family-like bonds, 491 U. S., at 130 (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.[8] At a minimum, our prior cases recognizing *89 that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel. See *ante*, at 64-65 (opinion of O'Connor, J.) (describing States' recognition of "an independent third-party interest in a child"). The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.[9]

This is not, of course, to suggest that a child's liberty interest in maintaining contact with a particular individual is to be treated invariably as on a par with that child's parents' contrary interests. Because our substantive due process case law
90 includes a strong presumption that a parent will act *90 in the best interest of her child, it would be necessary, were the state appellate courts actually to confront a challenge to the statute as applied, to consider whether the trial court's assessment of the "best interest of the child" incorporated that presumption. Neither would I decide whether the trial court applied Washington's statute in a constitutional way in this case, although, as I have explained, n. 3, *supra*, I think the outcome of this determination is far from clear. For the purpose of a facial challenge like this, I think it safe to assume that trial judges usually give great deference to parents' wishes, and I am not persuaded otherwise here.

But presumptions notwithstanding, we should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a "person" other than a parent. The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily. It is indisputably the business of the States, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting
91 interests that give rise to disputes such as this.[10] Far from guaranteeing that *91 parents' interests will be trammeled in the sweep of cases arising under the statute, the Washington law merely gives an individual—with whom a child may have an established relationship—the procedural right to ask the State to act as arbiter, through the entirely well-known best-interests standard, between the parent's protected interests and the child's. It seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.

Accordingly, I respectfully dissent.

Justice Scalia, dissenting.

In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men . . . are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible
92 with the commitment to representative *92 democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children[1]—two of them from an era rich in substantive due process holdings that have since been repudiated. See *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 401 (1923); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534-535 (1925); *Wisconsin* v. *Yoder*, 406 U. S. 205, 232-233 (1972). Cf. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937) (overruling *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 (1923)). The sheer diversity of today's opinions

persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.

Judicial vindication of "parental rights" under a Constitution that does not even mention them requires (as Justice Kennedy's opinion rightly points out) not only a judicially crafted definition of parents, but also—unless, as no one
93 believes, *93 the parental rights are to be absolute—judicially approved assessments of "harm to the child" and judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents. If we embrace this unenumerated right, I think it obvious—whether we affirm or reverse the judgment here, or remand as Justice Stevens or Justice Kennedy would do—that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.[2]

For these reasons, I would reverse the judgment below.

Justice Kennedy, dissenting.

The Supreme Court of Washington has determined that petitioners Jenifer and Gary **Troxel** have standing under state law to seek court-ordered visitation with their grandchildren, notwithstanding the objections of the children's parent, respondent Tommie Granville. The statute relied upon provides:

> "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 § 26.10.160(3) (1994).

94 *94 After acknowledging this statutory right to sue for visitation, the State Supreme Court invalidated the statute as violative of the United States Constitution, because it interfered with a parent's right to raise his or her child free from unwarranted interference. *In re Smith*, 137 Wash. 2d 1, 969 P. 2d 21 (1998). Although parts of the court's decision may be open to differing interpretations, it seems to be agreed that the court invalidated the statute on its face, ruling it a nullity.

The first flaw the State Supreme Court found in the statute is that it allows an award of visitation to a nonparent without a finding that harm to the child would result if visitation were withheld; and the second is that the statute allows any person to seek visitation at any time. In my view the first theory is too broad to be correct, as it appears to contemplate that the best interests of the child standard may not be applied in any visitation case. I acknowledge the distinct possibility that visitation cases may arise where, considering the absence of other protection for the parent under state laws and procedures, the best interests of the child standard would give insufficient protection to the parent's constitutional right to raise the child without undue intervention by the State; but it is quite a different matter to say, as I understand the Supreme Court of Washington to have said, that a harm to the child standard is required in every instance.

Given the error I see in the State Supreme Court's central conclusion that the best interests of the child standard is never appropriate in third-party visitation cases, that court should have the first opportunity to reconsider this case. I would remand the case to the state court for further proceedings. If it then found the statute has been applied in an unconstitutional manner because the best interests of the child standard gives insufficient protection to a parent under the
95 circumstances of this case, or if it again declared the statute a nullity because the statute seems to allow any person *95 at all to seek visitation at any time, the decision would present other issues which may or may not warrant further review in this Court. These include not only the protection the Constitution gives parents against state-ordered visitation but also the extent to which federal rules for facial challenges to statutes control in state courts. These matters, however, should await some further case. The judgment now under review should be vacated and remanded on the sole ground that the harm ruling that was so central to the Supreme Court of Washington's decision was error, given its broad formulation.

Turning to the question whether harm to the child must be the controlling standard in every visitation proceeding, there is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the State, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment. See, e. g., *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 401 (1923); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534-535 (1925); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); *Stanley* v. *Illinois*, 405 U. S. 645, 651-652 (1972); *Wisconsin* v. *Yoder*, 406 U. S. 205, 232-233 (1972); *Santosky* v. *Kramer*, 455 U. S. 745, 753— 754 (1982). *Pierce* and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion. Their formulation and subsequent interpretation have been quite different, of course; and they long have been interpreted to have found in Fourteenth Amendment concepts of liberty an independent right of the parent in the "custody, care and nurture of the child," free from state intervention. *Prince*, *supra*, at 166. The principle exists, then, in broad formulation; yet courts must use considerable restraint, including careful
96 adherence to the incremental instruction *96 given by the precise facts of particular cases, as they seek to give further and more precise definition to the right.

The State Supreme Court sought to give content to the parent's right by announcing a categorical rule that third parties who seek visitation must always prove the denial of visitation would harm the child. After reviewing some of the relevant precedents, the Supreme Court of Washington concluded "`[t]he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process.' " 137 Wash. 2d, at 19-20, 969 P. 2d, at 30 (quoting *Hawk* v. *Hawk*, 855 S. W. 2d 573, 580 (Tenn. 1993)). For that reason, "[s]hort of preventing harm to the child," the court considered the best interests of the child to be "insufficient to serve as a compelling state interest overruling a parent's fundamental rights." 137 Wash. 2d, at 20, 969 P. 2d, at 30.

While it might be argued as an abstract matter that in some sense the child is always harmed if his or her best interests are not considered, the law of domestic relations, as it has evolved to this point, treats as distinct the two standards, one harm to the child and the other the best interests of the child. The judgment of the Supreme Court of Washington rests on that assumption, and I, too, shall assume that there are real and consequential differences between the two standards.

On the question whether one standard must always take precedence over the other in order to protect the right of the parent or parents, "[o]ur Nation's history, legal traditions, and practices" do not give us clear or definitive answers. *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997). The consensus among courts and commentators is that at least through the 19th century there was no legal right of visitation; court-ordered visitation appears to be a 20thcentury
97 phenomenon. See, e. g., 1 D. Kramer, Legal Rights of Children 124, 136 (2d ed. 1994); 2 J. Atkinson, Modern *97 Child Custody Practice § 8.10 (1986). A case often cited as one of the earliest visitation decisions, *Succession of Reiss*, 46 La. Ann. 347, 353, 15 So. 151, 152 (1894), explained that "the obligation ordinarily to visit grandparents is moral and not legal"—a conclusion which appears consistent with that of American common-law jurisdictions of the time. Early 20th-century exceptions did occur, often in cases where a relative had acted in a parental capacity, or where one of a child's parents had died. See *Douglass* v. *Merriman*, 163 S. C. 210, 161 S. E. 452 (1931) (maternal grandparent awarded visitation with child when custody was awarded to father; mother had died); *Solomon* v. *Solomon*, 319 Ill. App. 618, 49 N. E. 2d 807 (1943) (paternal grandparents could be given visitation with child in custody of his mother when their son was stationed abroad; case remanded for fitness hearing); *Consaul* v. *Consaul*, 63 N. Y. S. 2d 683 (Sup. Ct. Jefferson Cty. 1946) (paternal grandparents awarded visitation with child in custody of his mother; father had become incompetent). As a general matter, however, contemporary state-court decisions acknowledge that "[h]istorically, grandparents had no legal right of visitation," *Campbell* v. *Campbell*, 896 P. 2d 635, 642, n. 15 (Utah App. 1995), and it is safe to assume other third parties would have fared no better in court.

To say that third parties have had no historical right to petition for visitation does not necessarily imply, as the Supreme Court of Washington concluded, that a parent has a constitutional right to prevent visitation in all cases not involving harm. True, this Court has acknowledged that States have the authority to intervene to prevent harm to children, see, e. g., *Prince*, *supra*, at 168-169; *Yoder*, *supra*, at 233-234, but that is not the same as saying that a heightened harm to the child standard must be satisfied in every case in which a third party seeks a visitation order. It is also true that the law's
98 traditional presumption has been "that natural bonds of affection lead parents to act in the *98 best interests of their

children," *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979); and "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state," *id.*, at 603. The State Supreme Court's conclusion that the Constitution forbids the application of the best interests of the child standard in any visitation proceeding, however, appears to rest upon assumptions the Constitution does not require.

My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households. See, *e. g.*, *Moore* v. *East Cleveland*, 431 U. S. 494 (1977). For many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood. This may be so whether their childhood has been marked by tragedy or filled with considerable happiness and fulfillment.

Cases are sure to arise—perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto. See *Michael H.* v. *Gerald D.*, 491 U. S. 110 (1989) (putative natural father not entitled to rebut state-law presumption that child born in a marriage is a child of the marriage); *Quilloin* v. *Walcott*, 434 U. S. 246 (1978) (best interests standard sufficient in adoption proceeding to protect interests of natural father who had not legitimated the child); see also *Lehr* v. *Robertson*, 463 U. S. 248, 261 (1983) ("'[T]he importance of the familial relationship, to the individuals
99 involved *99 and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship' " (quoting *Smith* v. *Organization of Foster Families For Equality & Reform*, 431 U. S. 816, 844 (1977), in turn quoting *Yoder*, 406 U. S., at 231-233)). Some pre-existing relationships, then, serve to identify persons who have a strong attachment to the child with the concomitant motivation to act in a responsible way to ensure the child's welfare. As the State Supreme Court was correct to acknowledge, those relationships can be so enduring that "in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child," 137 Wash. 2d, at 20, 969 P. 2d, at 30; and harm to the adult may also ensue. In the design and elaboration of their visitation laws, States may be entitled to consider that certain relationships are such that to avoid the risk of harm, a best interests standard can be employed by their domestic relations courts in some circumstances.

Indeed, contemporary practice should give us some pause before rejecting the best interests of the child standard in all third-party visitation cases, as the Washington court has done. The standard has been recognized for many years as a basic tool of domestic relations law in visitation proceedings. Since 1965 all 50 States have enacted a third-party visitation statute of some sort. See *ante*, at 73-74, n. (plurality opinion). Each of these statutes, save one, permits a court order to issue in certain cases if visitation is found to be in the best interests of the child. While it is unnecessary for us to consider the constitutionality of any particular provision in the case now before us, it can be noted that the statutes also include a variety of methods for limiting parents' exposure to third-party visitation petitions and for ensuring parental decisions are
100 given respect. Many States *100 limit the identity of permissible petitioners by restricting visitation petitions to grandparents, or by requiring petitioners to show a substantial relationship with a child, or both. See, *e. g.*, Kan. Stat. Ann. § 38-129 (1993 and Supp. 1998) (grandparent visitation authorized under certain circumstances if a substantial relationship exists); N. C. Gen. Stat. §§ 50-13.2, 50-13.2A, 50-13.5 (1999) (same); Iowa Code § 598.35 (Supp. 1999) (same; visitation also authorized for great-grandparents); Wis. Stat. § 767.245 (Supp. 1999) (visitation authorized under certain circumstances for "a grandparent, great grandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child"). The statutes vary in other respects—for instance, some permit visitation petitions when there has been a change in circumstances such as divorce or death of a parent, see, *e. g.*, N. H. Rev. Stat. Ann. § 458:17—d (1992), and some apply a presumption that parental decisions should control, see, *e. g.*, Cal. Fam. Code Ann. §§ 3104(e)—(f) (West 1994); R. I. Gen. Laws § 15-5—24.3(a)(2)(v) (Supp. 1999). Georgia's is the sole state legislature to have adopted a general harm to the child standard, see Ga. Code Ann. § 19-7— 3(c) (1999), and it did so only after the Georgia Supreme Court held the State's prior visitation statute invalid under the Federal and Georgia

Constitutions, see *Brooks v. Parkerson*, 265 Ga. 189, 454 S. E. 2d 769, cert. denied, 516 U. S. 942 (1995).

In light of the inconclusive historical record and case law, as well as the almost universal adoption of the best interests standard for visitation disputes, I would be hard pressed to conclude the right to be free of such review in all cases is itself "'implicit in the concept of ordered liberty.' " *Glucksberg*, 521 U. S., at 721 (quoting *Palko v. Connecticut*, 302 U. S. 319, 325 (1937)). In my view, it would be more appropriate to conclude that the constitutionality of the application of the best
101 interests standard depends on more specific factors. In short, a fit parent's right vis-à-vis a complete *101 stranger is one thing; her right vis-à-vis another parent or a *de facto* parent may be another. The protection the Constitution requires, then, must be elaborated with care, using the discipline and instruction of the case law system. We must keep in mind that family courts in the 50 States confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise. Cf. *Ankenbrandt v. Richards*, 504 U. S. 689, 703-704 (1992).

It must be recognized, of course, that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated. The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. See, *e. g.*, American Law Institute, Principles of the Law of Family Dissolution 2, and n. 2 (Tent. Draft No. 3, Mar. 20, 1998). If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship. We owe it to the Nation's domestic relations legal structure, however, to proceed with caution.

It should suffice in this case to reverse the holding of the State Supreme Court that the application of the best interests of the child standard is always unconstitutional in thirdparty visitation cases. Whether, under the circumstances of this case, the order requiring visitation over the objection of this fit parent violated the Constitution ought to be reserved for further
102 proceedings. Because of its sweeping ruling requiring *102 the harm to the child standard, the Supreme Court of Washington did not have the occasion to address the specific visitation order the Troxels obtained. More specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself. Furthermore, in my view, we need not address whether, under the correct constitutional standards, the Washington statute can be invalidated on its face. This question, too, ought to be addressed by the state court in the first instance.

In my view the judgment under review should be vacated and the case remanded for further proceedings.

[*] Briefs of *amici curiae* urging reversal were filed for the State of Washington et al. by *Christine O. Gregoire*, Attorney General of Washington, and *Maureen A. Hart*, Senior Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Mark Pryor* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Earl I. Anzai* of Hawaii, *Carla J. Stovall* of Kansas, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *John J. Farmer, Jr.*, of New Jersey, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, and *Paul G. Summers* of Tennessee; for AARP et al. by *Rochelle Bobroff*, *Bruce Vignery*, and *Michael Schuster*; for Grandparents United for Children's Rights, Inc., by *Judith Sperling Newton* and *Carol M. Gapen*; for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley*; and for the Grandparent Caregiver Law Center of the Brookdale Center on Aging.

Briefs of *amici curiae* urging affirmance were filed for the American Academy of Matrimonial Lawyers by *Barbara Ellen Handschu* and *Sanford K. Ain*; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Colby May*, *Vincent McCarthy*, and *John P. Tuskey*; for the American Civil Liberties Union et al. by *Matthew A. Coles*, *Michael P. Adams*, *Catherine Weiss*, and *Steven R. Shapiro*; for the Coalition for the Restoration of Parental Rights by *Karen A. Wyle*; for the Institute for Justice et al. by *William H. Mellor*, *Clint Bolick*, and *Scott G. Bullock*; for the Center for the Original Intent of the Constitution by *Michael P. Farris*; for the Christian Legal Society et al. by *Kimberlee Wood Colby*, *Gregory S. Baylor*, and *Carl H. Esbeck*; for the Lambda Legal Defense and Education Fund et al.by *Patricia M. Logue*, *Ruth E. Harlow*, and *Beatrice Dohrn*; for the Society of Catholic Social Scientists by *Stephen M. Krason* and *Richard W. Garnett*; and for Debra Hein by *Stuart M. Wilder*.

Briefs of*amici curiae* were filed for the Center for Children's Policy Practice & Research at the University of Pennsylvania by *Barbara Bennett Woodhouse*; for the Domestic Violence Project, Inc./Safe House (Michigan) et al. by *Anne L. Argiroff* and *Ann L. Routt*; for the National Association of Counsel for Children by *Robert C. Fellmeth* and *Joan Hollinger*; and for the Northwest Women's Law Center et al.

by *Cathy J. Zavis.*

[*] All 50 States have statutes that provide for grandparent visitation in some form. See Ala. Code § 30-3—4.1 (1989); Alaska Stat. Ann. § 25.20.065 (1998); Ariz. Rev. Stat. Ann. § 25-409 (1994); Ark. Code Ann. § 9-13-103 (1998); Cal. Fam. Code Ann. § 3104 (West 1994); Colo. Rev. Stat. § 19-1—117 (1999); Conn. Gen. Stat. § 46b—59 (1995); Del. Code Ann., Tit. 10, § 1031(7) (1999); Fla. Stat. § 752.01 (1997); Ga. Code Ann. § 19-7—3 (1991); Haw. Rev. Stat. § 571-46.3 (1999); Idaho Code § 32-719 (1999); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Ind. Code § 31-17-5—1 (1999); Iowa Code § 598.35 (1999); Kan. Stat. Ann. § 38-129 (1993); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1990); La. Rev. Stat. Ann. § 9:344 (West Supp. 2000); La. Civ. Code Ann., Art. 136 (West Supp. 2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Md. Fam. Law Code Ann. § 9-102 (1999); Mass. Gen. Laws § 119:39D (1996); Mich. Comp. Laws Ann. § 722.27b (West Supp. 1999); Minn. Stat. § 257.022 (1998); Miss. Code Ann. § 93-16-3 (1994); Mo. Rev. Stat. § 452.402 (Supp. 1999); Mont. Code Ann. § 40-9—102 (1997); Neb. Rev. Stat. § 43-1802 (1998); Nev. Rev. Stat. § 125C.050 (Supp. 1999); N. H. Rev. Stat. Ann. § 458:17—d (1992); N. J. Stat. Ann. § 9:2-7.1 (West Supp. 1999-2000); N. M. Stat. Ann. § 40-9—2 (1999); N. Y. Dom. Rel. Law § 72 (McKinney 1999); N. C. Gen. Stat. §§ 50-13.2, 50-13.2A (1999); N. D. Cent. Code § 14-09-05.1 (1997); Ohio Rev. Code Ann. §§ 3109.051, 3109.11 (Supp. 1999); Okla. Stat., Tit. 10, § 5 (Supp. 1999); Ore. Rev. Stat. § 109.121 (1997); 23 Pa. Cons. Stat. §§ 5311-5313 (1991); R. I. Gen. Laws §§ 15-5—24 to 15-5—24.3 (Supp. 1999); S. C. Code Ann. § 20-7—420(33) (Supp. 1999); S. D. Codified Laws § 25-4—52 (1999); Tenn. Code Ann. §§ 36-6—306, 36-6—307 (Supp. 1999); Tex. Fam. Code Ann. § 153.433 (Supp. 2000); Utah Code Ann. § 30-5—2 (1998); Vt. Stat. Ann., Tit. 15, §§ 1011-1013 (1989); Va. Code Ann. § 20-124.2 (1995); W. Va. Code §§ 48-2B-1 to 48-2B-7 (1999); Wis. Stat. §§ 767.245, 880.155 (1993-1994); Wyo. Stat. Ann. § 20-7—101 (1999).

[1] The Supreme Court of Washington made its ruling in an action where three separate cases, including the Troxels', had been consolidated. *In re Smith*, 137 Wash. 2d 1, 6-7, 969 P. 2d 21, 23-24 (1998). The court also addressed two statutes, Wash. Rev. Code § 26.10.160(3) (Supp. 1996) and former Wash. Rev. Code § 26.09.240 (1994), 137 Wash. 2d, at 7, 969 P. 2d, at 24, the latter of which is not even at issue in this case. See Brief for Petitioners 6, n. 9; see also *ante*, at 61. Its constitutional analysis discussed only the statutory language and neither mentioned the facts of any of the three cases nor reviewed the records of their trial court proceedings below. 137 Wash. 2d, at 13-21, 969 P. 2d, at 27-31. The decision invalidated both statutes without addressing their application to particular facts: "We conclude petitioners have standing but, *as written*, the statutes violate the parents' constitutionally protected interests. These statutes allow 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.*, at 5, 969 P. 2d, at 23 (emphasis added); see also *id.*, at 21, 969 P. 2d, at 31 ("RCW 26.10.160(3) and former RCW 26.09.240 impermissibly interfere with a parent's fundamental interest in the care, custody and companionship of the child" (citations and internal quotation marks omitted)).

[2] As Justice O'Connor points out, the best-interests provision "contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge." *Ante*, at 67.

[3] Cf. *Chicago v. Morales*, 527 U. S. 41, 71 (1999) (Breyer, J., concurring in part and concurring in judgment) ("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications").

[4] The Supreme Court of Washington invalidated the broadly sweeping statute at issue on similarly limited reasoning: "Some parents and judges will not care if their child is physically disciplined by a third person; some parents and judges will not care if a third person teaches the child a religion inconsistent with the parents' religion; and some judges and parents will not care if the child is exposed to or taught racist or sexist beliefs. But many parents and judges will care, and, between the two, the parents should be the ones to choose whether to expose their children to certain people or ideas." 137 Wash. 2d, at 21, 969 P. 2d, at 31 (citation omitted).

[5] This is the pivot between Justice Kennedy's approach and mine.

[*] This case also does not involve a challenge based upon the Privileges and Immunities Clause and thus does not present an opportunity to reevaluate the meaning of that Clause.See *Saenz v. Roe*, 526 U. S. 489, 527-528 (1999) (Thomas, J., dissenting).

[1] The State Supreme Court held that, "as written, the statutes violate the parents' constitutionally protected interests." *In re Smith*, 137 Wash. 2d 1, 5, 969 P. 2d 21, 23 (1998).

[2] As the dissenting judge on the state appeals court noted, "[t]he trial court here was not presented with any guidance as to the proper test to be applied in a case such as this." *In re Troxel*, 87 Wash. App. 131, 143, 940 P. 2d 698, 703 (1997) (opinion of Ellington, J.). While disagreeing with the appeals court majority's conclusion that the state statute was constitutionally infirm, Judge Ellington recognized that despite this disagreement, the appropriate result would not be simply to affirm. Rather, because there had been no definitive guidance as to the proper construction of the statute, "[t]he findings necessary to order visitation over the objections of a parent are thus not in the record, and I would remand for further proceedings." *Ibid.*

[3] Unlike Justice O'Connor, *ante*, at 69-70, I find no suggestion in the trial court's decision in this case that the court was applying any presumptions at all in its analysis, much less one in favor of the grandparents. The first excerpt Justice O'Connor quotes from the trial court's ruling, *ante*, at 69, says nothing one way or another about *who* bears the burden under the statute of demonstrating "best interests." There is certainly no indication of a presumption *against* the parents' judgment, only a "'commonsensical' " estimation that, usually but not always, visiting with grandparents can be good for children. *Ibid.* The second quotation, "'I think [visitation] 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,' " *ibid.*, sounds as though the judge has simply concluded, based on the evidence before him, that visitation in this case would be in the best interests of both girls. Verbatim Report of Proceedings in *In re* **Troxel**, No. 93-3—00650-7 (Wash. Super. Ct., Dec. 14, 1994), p. 214. These statements do not provide us with a definitive assessment of the law the court applied regarding a "presumption" either way. Indeed, a different impression is conveyed by the judge's very next comment: "That has to be balanced, of course, with Mr. and Mrs. Wynn [a.k.a. Tommie Granville], who are trying to put together a family that includes eight children, . . . trying to get all those children together at the same time and put together some sort of functional unit wherein the children can be raised as brothers and sisters and spend lots of quality time together." *Ibid.* The judge then went on to reject the Troxels' efforts to attain the same level of visitation that their son, the girls' biological father, would have had, had he been alive. "[T]he fact that Mr. **Troxel** is deceased and he was the natural parent and as much as the grandparents would maybe like to step into the shoes of Brad, under our law that is not what we can do. The grandparents cannot step into the shoes of adeceased parent, per say *[sic]*, as far as whole gamut of visitation rights are concerned." *Id.*, at 215. Rather, as the judge put it, "I understand your desire to do that as loving grandparents. Unfortunately that would impact too dramatically on the children and their ability to be integrated into the nuclear unit with the mother." *Id.*, at 222-223.

However one understands the trial court's decision—and my point is merely to demonstrate that it is surely open to interpretation—its validity under the state statute as written is a judgment for the state appellate courts to make in the first instance.

[4] Justice Souter would conclude from the state court's statement that the statute "do[es] not require the petitioner to establish that he or she has a substantial relationship with the child," 137 Wash. 2d, at 21, 969 P. 2d, at 31, that the state court has "authoritatively read [the 'best interests'] provision as placing hardly any limit on a court's discretion to award visitation rights," *ante*, at 77 (opinion concurring in judgment). Apart from the question whether one can deem this description of the statute an "authoritative" construction, it seems to me exceedingly unlikely that the state court held the statute unconstitutional because it believed that the "best interests" standard imposes "hardly any limit" on courts' discretion. See n. 5, *infra*.

[5] The phrase "best interests of the child" appears in no less than 10 current Washington state statutory provisions governing determinations from guardianship to termination to custody to adoption. See, *e. g.*, Wash Rev. Code § 26.09.240(6) (Supp. 1996) (amended version of visitation statute enumerating eight factors courts may consider in evaluating a child's best interests); § 26.09.002 (in cases of parental separation or divorce "best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care"; "best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm"); § 26.10.100 ("The court shall determine custody in accordance with the best interests of the child"). Indeed, the Washington state courts have invoked the standard on numerous occasions in applying these statutory provisions—just as if the phrase had quite specific and apparent meaning. See, *e. g.*, *In re McDoyle*, 122 Wash. 2d 604, 859 P. 2d 1239 (1993) (upholding trial court "best interest" assessment in custody dispute); *McDaniels* v. *Carlson*, 108 Wash. 2d 299, 310, 738 P. 2d 254, 261 (1987) (elucidating "best interests" standard in paternity suit context). More broadly, a search of current state custody and visitation laws reveals fully 698 separate references to the "best interest of the child" standard, a number that, at a minimum, should give the Court some pause before it upholds a decision implying that those words, on their face, may be too boundless to pass muster under the Federal Constitution.

[6] It necessarily follows that under the far more stringent demands suggested by the majority in *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) (plaintiff seeking facial invalidation "must establish that no set of circumstances exists under which the Act would be valid"). respondent's facial challenge must fail.

[7] The suggestion by Justice Thomas that this case may be resolved solely with reference to our decision in *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925), is unpersuasive. *Pierce* involved a parent's choice whether to send a child to public or private school. While that case is a source of broad language about the scope of parents' due process rights with respect to their children, the constitutional principles and interests involved in the schooling context do not necessarily have parallel implications in this family law visitation context, in which multiple overlapping and competing prerogatives of various plausibly interested parties are at stake.

[8] This Court has on numerous occasions acknowledged that children are in many circumstances possessed of constitutionally protected rights and liberties. See *Parham* v. *J. R.*, 442 U. S. 584, 600 (1979) (liberty interest in avoiding involuntary confinement); *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights"); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 506-507 (1969) (First Amendment right to political speech); *In re Gault*, 387 U. S. 1, 13 (1967) (due process rights in criminal proceedings).

[9] Cf., *e. g.*, *Wisconsin* v. *Yoder*, 406 U. S. 205, 244-246 (1972) (Douglas, J., dissenting) ("While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition. It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. . . . It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny"). The majority's disagreement with Justice Douglas in that case turned not on any contrary view of children's interest in their own education, but on the impact of the Free Exercise Clause of the First Amendment on its analysis of schoolrelated decisions by the Amish community.

[10] See *Palmore* v. *Sidoti*, 466 U. S. 429, 431 (1984) ("The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court"); cf. *Collins* v. *Harker Heights*, 503 U. S. 115, 128 (1992) (matters involving competing and multifaceted social and policy decisions best left to local decisionmaking); *Regents of Univ. of Mich.* v. *Ewing*, 474 U. S. 214, 226 (1985) (emphasizing our "reluctance to trench on the prerogatives of state and local educational institutions" as federal courts are ill-suited to "evaluate the substance of the multitude of academic decisions that are made daily by" experts in the field evaluating cumulative information). That caution is never more essential than in the realm of family and intimate relations. In part, this principle is based on long-established, if somewhat arbitrary, tradition in allocating responsibility for resolving disputes of various kinds in our federal system. *Ankenbrandt* v. *Richards*, 504 U. S. 689 (1992). But the instinct against over regularizing decisions about personal relations is sustained on firmer ground than mere tradition. It flows in equal part from the premise that people and their intimate associations are complex and particular, and imposing a rigid template upon them all risks severing bonds our society would do well to preserve.

[1] Whether parental rights constitute a "liberty" interest for purposes of procedural due process is a somewhat different question not implicated here. *Stanley* v. *Illinois*, 405 U. S. 645 (1972), purports to rest in part upon that proposition, see *id.*, at 651-652; but see *Michael H.* v. *Gerald D.*, 491 U. S. 110, 120-121 (1989) (plurality opinion), though the holding is independently supported on equal protection grounds, see *Stanley*, *supra*, at 658.

[2] I note that respondent is asserting only, *on her own behalf*, a substantive due process right to direct the upbringing of her own children, and is not asserting, *on behalf of her children*, their First Amendment rights of association or free exercise.I therefore do not have occasion to consider whether, and under what circumstances, the parent could assert the latter enumerated rights.

Cite as 127 Nev. ___, 257 P.3d 396 (Nev. Adv. Opn. No. 49, Aug. 4, 2011

Supreme Court of Nevada.

Audrey RENNELS, Appellant,
v.
Roger RENNELS and Jennifer Rennels, Respondents.
No. 53872. | Aug. 4, 2011. | Rehearing Denied Sept. 13, 2011. | Reconsideration En Banc Denied Nov. 15, 2011.

Reversed and remanded.

Attorneys and Law Firms

***397** Hutchison & Steffen, LLC, and Michael K. Wall, Las Vegas, for Appellant.

Law Office of Daniel Marks and Daniel Marks, Las Vegas, for Respondents.

BEFORE SAITTA, HARDESTY and PARRAGUIRRE, JJ.

Opinion

OPINION

By the Court, HARDESTY, J.:

Grandparents and other nonparents are typically not entitled to visitation with a minor child as a matter of right because there is a recognized presumption that a parent's desire to deny visitation is in the best interest of the child. However, pursuant to NRS 125C.050, a grandparent or other nonparent may be granted judicially approved visitation rights in some instances. The first issue presented in this appeal is whether the stipulated visitation order between a parent and a grandmother was a final decree entitled to res judicata protections. We conclude that it was, so we must next examine whether the parental presumption continues to apply when a parent seeks to modify or terminate a nonparent's judicially approved visitation rights with a minor child. We conclude that the parental presumption applies at the time of the court's initial determination of a nonparent's visitation rights. However, when, as in this case, a parent seeks to modify or terminate the judicially approved visitation rights of a nonparent, the parental presumption is no longer controlling.

***398** In so concluding, we adopt the two-prong test enunciated in *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007), in circumstances where a party seeks to modify or terminate a nonparent's judicially approved visitation rights with a minor child, and we now hold that modification or termination of a nonparent's judicially approved visitation rights is only warranted upon a showing of a substantial change in circumstances that affects a child's welfare such that it is in the child's best interest to modify the existing visitation arrangement. *Id.* Applying the test to this case, we conclude that the district court failed to

EX. 2

articulate any substantial change in circumstances before it terminated appellant's nonparent visitation rights with her granddaughter and, therefore, it is not in the best interests of the child to terminate visitation. Thus, we reverse.

FACTS

Respondent Roger Rennels and Martha Contreras were married in 1994 and had a child, Martina, in 1999. In 2001, the couple divorced, and Roger received sole custody of Martina. Approximately two months after Roger and Martha divorced, Roger and Martina resided with Roger's mother, appellant Audrey Rennels, in northern California. They lived with Audrey for five months, during which time Martina and Audrey enjoyed a close relationship. After living with Audrey, Roger and Martina moved to Texas. Martina and Audrey remained close after the move. Audrey also visited Roger and Martina in Texas several times, and Martina visited Audrey for several weeks in 2002. In July 2003, Roger and Martina moved to Las Vegas. Thereafter, Roger married his current wife, respondent Jennifer Rennels, and Jennifer adopted Martina in June 2006.

According to Audrey, Roger disapproved of the frequent contact between Martina and Audrey, and he stopped allowing Martina to see Audrey in June 2004. In response, Audrey sought court-ordered nonparental visitation pursuant to NRS 125C.050, which allows a nonparent to seek visitation rights. Roger opposed Audrey's petition and also filed a motion to dismiss or for summary judgment.

The district court conducted a hearing in December 2005 and denied the motion to dismiss, noting that an evidentiary hearing was required because there is a rebuttable presumption that granting nonparental visitation over a parent's objection is not in the child's best interest. Before the evidentiary hearing occurred, however, the parties reached a settlement of the visitation issues. Pursuant to this settlement, the parties prepared and submitted to the court a stipulation and order in which they agreed that "all pending issues" between them were resolved and specified a detailed visitation schedule for Audrey. The district court approved the stipulation and issued a visitation order effecting its provisions.

The visitation order included the appointment of a guardian ad litem and allowed Audrey to have four supervised visits with Martina per year. The guardian ad litem was instructed to select a psychologist, and Audrey, Roger, and Martina were required to undergo counseling with the selected psychologist. The supervised visitation requirement was to be reviewed every six months by the guardian ad litem and the psychologist to determine whether supervision was still necessary. Under the visitation order, if the guardian ad litem and the psychologist concluded that Audrey could have unsupervised visits, Roger would abide by that determination. The order also provided that, before involving the district court again, the parties would attempt to mediate any visitation disputes with the guardian ad litem.

The parties apparently followed the visitation order until 2008. During this time, the psychologist, Dr. John Paglini, gave generally favorable reports regarding Audrey and Martina's visits, and he ultimately recommended unsupervised visitation. However, Roger refused to allow unsupervised visits. In December 2008, three months after Dr. Paglini recommended unsupervised visits, Audrey filed a motion to compel Roger to comply with the visitation order. In her motion, Audrey asserted that she was entitled to unsupervised visits based on the visitation order and Dr. Paglini's recommendation Roger and Jennifer

opposed Audrey's motion and, concurrently, filed a countermotion *399 to terminate Audrey's visitation rights altogether. They argued that the district court failed to comply with *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion), which held that parents have a due process right to make child rearing decisions, and this creates a presumption that a parent's wishes are in the best interests of the child. *Id.* at 69–70, 120 S.Ct. 2054. In reply, Audrey argued that the district court complied with *Troxel*, and that the parties stipulated to a visitation schedule. She further contended that the stipulated visitation order was a final judgment and therefore res judicata principles applied.

After hearing the parties' arguments on the motions, the district court denied Audrey's motion to compel Roger's compliance with the stipulated visitation order and terminated her visitation rights. The district court reasoned, in relevant part, that: (1) Audrey had no fundamental rights to visitation in light of the presumption that fit parents act in the best interest of the child, even with a prior visitation order in place; (2) acrimony between the parties had increased; and (3) continued visitation was not in Martina's best interest. This appeal followed.

DISCUSSION

In resolving this appeal, we must first determine whether the stipulated visitation order is a final order that precluded relitigation of Audrey's right to visitation with Martina. We then consider the proper standard for determining whether modification or termination of Audrey's judicially approved nonparental visitation rights was warranted.

Standard of review

[1] [2] [3] Generally, "[t]his court reviews the district court's decisions regarding custody, including visitation schedules, for an abuse of discretion," *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009), because child custody matters rest in the trial court's sound discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). The district court's factual findings will not be set aside if supported by substantial evidence. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007). However, "we will review a purely legal question ... de novo." *Waldman v. Maini*, 124 Nev. 1121, 1128, 195 P.3d 850, 855 (2008). Determining whether a stipulated visitation order is final is a question of law subject to de novo review.

The stipulated visitation order was final

[4] [5] There is strong public policy favoring the prompt agreement and resolution of matters related to the custody, care, and visitation of minor children. *See Rivero*, 125 Nev. at 429, 216 P.3d at 226–27 (recognizing that parties are free to contract regarding child custody and such agreements are generally enforceable); *Ellis*, 123 Nev. at 151, 161 P.3d at 243 (same). Therefore, we encourage voluntary resolution of these matters, and we will generally recognize the preclusive effect of such agreements if they are deemed final.[1] *See Castle v. Simmons*, 120 Nev. 98, 105, 86 P.3d 1042, 1047 (2004) (explaining that the "changed circumstances" factor, which is required to modify a primary physical custody arrangement, is based on res judicata principles); *see also Hopper v. Hopper*, 113 Nev. 1138, 1143–44, 946 P.2d 171, 174–75 (1997); *Mosley v. Figliuzzi*, 113 Nev. 51, 58, 930 P.2d 1110, 1114 (1997).

1 We recognize an exception to this rule when the moving party seeks to introduce evidence of domestic violence of which it was unaware at the time of the original custody decree. *Castle v. Simmons*, 120 Nev. 98, 105, 86 P.3d 1042, 1047 (2004). However, domestic violence is not at issue in this case.

[6] [7] An order is final if it "disposes of the issues presented in the case ... and leaves nothing for the future consideration of the court." *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994) (alteration in original) (internal quotations omitted). Finality is determined based on what the order "actually *does*, not what it is called." *Id.* In the family law context, the California Supreme Court has held that a "stipulated custody order is a final judicial custody determination ... if there is a clear, affirmative indication the parties intended such a result." ***400** *Montenegro v. Diaz*, 26 Cal.4th 249, 109 Cal.Rptr.2d 575, 27 P.3d 289, 295 (2001). It is irrelevant whether the order is the result of a stipulated agreement between the parties that is later judicially approved or it is achieved through litigation. *Id.* at 294. Instead, the relevant inquiry is whether the order fully resolved the issues between the parties.

[8] Once a final judgment is entered in a nonparental visitation matter, whether in a contested hearing or by stipulation, it has a preclusive effect on later litigation. *Ingram v. Knippers*, 72 P.3d 17, 22 (Okla.2003) ("A consent judgment is entitled to the same preclusive treatment as a contested judgment."). This serves to prevent parties from relitigating the same issues. *Id.*; *accord Rivero*, 125 Nev. at 431, 216 P.3d at 228; *Ellis*, 123 Nev. at 151, 161 P.3d at 243; *Castle*, 120 Nev. at 105, 86 P.3d at 1047; *Hopper*, 113 Nev. at 1143–44, 946 P.2d at 174–75; *Mosley*, 113 Nev. at 58, 930 P.2d at 1114.

Audrey's and Roger's actions, along with the specific language in the order, clearly demonstrate that they intended the stipulated visitation order to be final with regard to Audrey's visitation with Martina. The document signed by the parties and approved by the district court shows that the parties intended to resolve their visitation dispute through the order. For example, the parties introduced the terms of the stipulation by stating that "this matter, as well as all pending issues, shall be resolved with the following stipulations and agreements." The order memorializes the parties' agreement, sets forth the specific parameters for Audrey's visitation with Martina, and provides for modification of the visitation arrangements with the approval of the guardian ad litem and Dr. Paglini.

There is no indication that the parties intended the stipulated visitation order to be anything other than a final judgment, and neither party challenged the order for over two years. The parties also expressly intended to avoid further involvement with the district court as they stipulated to mediate any future disputes with the guardian ad litem. Only if they were unable to resolve the dispute through mediation with the guardian ad litem would the matter come back to the district court. Furthermore, as part of their stipulation, the parties vacated the evidentiary hearing that had been scheduled to resolve Audrey's visitation rights. Therefore, we conclude that the stipulated visitation order is a final judgment.

Because the stipulated visitation order in this case is a final judgment, it precludes relitigation of Audrey's right to visitation with Martina based on the same set of facts the district court already considered. Thus, we must next determine under what circumstances a nonparent's judicially approved visitation rights can be modified or terminated.[2] Specifically, we examine whether parents are entitled to the continued presumption that their desire to restrict visitation with a nonparent is in the best interest of the child when they seek to modify or terminate the judicially approved visitation rights of a nonparent. We conclude that parents are not entitled to this presumption when they seek to modify or terminate a judicially approved visitation arrangement, and we adopt the two-prong test from *Ellis* for assessing whether modifying or terminating court-ordered visitation is appropriate. 123 Nev. at 150, 161 P.3d at 242.

2 Roger maintains that there are differences between the nonparent visitation rights of grandparents and those of nongrandparents who have established a meaningful relationship with the child. However, all nonparents are similarly situated regarding custody and/or visitation because Nevada does not distinguish grandparents from other nonparents. *See* NRS 125C.050(2) (allowing any nonparent with whom a child has resided and has established a meaningful relationship to petition for reasonable visitation with the child).

The parental presumption

[9] [10] The United States Supreme Court has long recognized that "there is a presumption that fit parents act in the best interests of their children." *Troxel v. Granville*, 530 U.S. 57, 68, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion). Therefore, when a nonparent requests visitation with a child, courts "must accord at least some special weight" to the fit parents' wishes. *Id.* at 70, 120 S.Ct. 2054. Nevada's nonparent visitation statute also provides such deference to ***401** the parent, providing that after a parent has "denied or unreasonably restricted visits with the child, there is a rebuttable presumption that the [nonparent's] right to visitation ... is not in the best interests of the child." NRS 125C.050(4). NRS 125C.050(6) lists the threshold requirements for overcoming this presumption. The statute is silent on whether the same presumption applies when a parent seeks to modify or terminate visitation rights that the district court previously granted to a nonparent, but this court has previously determined that parents do not get the benefit of the presumption when nonparents obtain court-ordered custody of a child. *See Hudson v. Jones*, 122 Nev. 708, 713, 138 P.3d 429, 432 (2006). We now extend this holding to judicially approved nonparent visitation arrangements.

In *Hudson*, a grandmother obtained joint legal and primary physical custody of her grandchild after the child's mother was killed in a drive-by shooting related to the father's gang involvement. *Id.* at 709–10, 138 P.3d at 430. The court determined that the father was "an unfit parent and that sufficient extraordinary circumstances existed to overcome the parental preference." *Id.* at 710, 138 P.3d at 430. Ten years later, the father sought to modify the district court's order granting custody to the grandmother, contending that he had turned his life around and was fit to be a parent to his child. *Id.* The district court found that the father had indeed significantly changed his lifestyle. *Id.* Thus, the district court felt "bound to apply the parental preference presumption," and it granted the father's request to modify the custody arrangement with the child so that he would have sole legal and physical custody. *Id.*

We reversed the district court, holding that the parental presumption does not apply to a previously "litigated custody dispute" because "applying the parental preference to modifications would only 'weaken the substantial change requirement.' "[3] *Id.* at 713, 138 P.3d at 432 (quoting *C.R.B. v. C.C.*, 959 P.2d 375, 380 (Alaska 1998), *disagreed with on other grounds as stated in Evans v. McTaggart*, 88 P.3d 1078, 1085 (Alaska 2004)). We recognized that when there is a court-ordered custody arrangement, the nonparent has effectively rebutted the parental presumption, after which the child's need for stability becomes a paramount concern. *Id.* at 713–14, 138 P.3d at 432–33. Thus, we concluded that the same test should apply to requests to modify court-ordered parent-nonparent custody arrangements as to proposed modifications of parent-parent arrangements. *Id.* at 713, 138 P.3d at 432.

3 However, we held that the parental presumption continued to apply to temporary nonparent custody situations, such as temporary guardianships. *Hudson v. Jones*, 122 Nev. 708, 711–12, 138 P.3d 429, 431–32 (2006).

[11] We are persuaded that this rationale also applies to requests to modify or terminate judicially approved nonparent visitation.[4] When a nonparent obtains visitation through a court order or judicial approval, they have successfully overcome the parental presumption and are in the same position as a parent seeking to modify or terminate visitation. Declining to apply the parental presumption once the court has approved nonparental visitation not only gives deference to a court's order, but it also promotes the important policy goal of stability for the child. *Ellis*, 123 Nev. at 151, 161 P.3d at 243 (recognizing that stability is an important concern in making custody and visitation determinations); *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex.2000) (stating that "modification suits raise additional policy concerns such as stability for the child and the need to prevent constant litigation in child custody cases"). If parents can unilaterally modify or terminate visitation with nonparents, with whom a child has had an ongoing relationship, and which exists because the court has adjudicated and approved a visitation schedule, the order would serve no legal or policy purpose. Thus, we adopt the test we enunciated in *Ellis* for modifying custody arrangements among parents and apply it to modifying or terminating judicially approved nonparent visitation rights. In *Ellis*, we concluded that "modification of primary physical custody is ***402** warranted only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification." 123 Nev. at 150, 161 P.3d at 242. In applying this test, the district court should evaluate the two prongs without regard to the parental preference.[5]

4 Pursuant to NRS 125A.045, child custody determinations include visitation and modifications of visitation.

5 Other jurisdictions generally agree that *Troxel*'s parental presumption applies to the initial determination regarding visitation but not to a request to modify or terminate that agreement. In *Albert v. Ramirez*, the Court of Appeals of Virginia held that a "judicially sanctioned consent decree" setting forth custody and visitation for a nonparent gave the nonparent rights that are not subject to the *Troxel* parental best interest presumption. 45 Va.App. 799, 613 S.E.2d 865, 869–70 (2005). Therefore, a parent who wishes to change or terminate a judicially approved agreement must first demonstrate a material change in circumstances. *Id.* at 870. To hold otherwise, the court noted, "would render all such custody decrees void and unenforceable." *Id.* at 869–70. Similarly, the Court of Appeals of New Mexico held that "*Troxel* does not shift the burden [of establishing cause] away from a parent who seeks to modify an existing order granting grandparent visitation." *Deem v. Lobato*, 136 N.M. 266, 96 P.3d 1186, 1191 (Ct.App.2004); *see also Ingram v. Knippers*, 72 P.3d 17, 22 (Okla.2003) ("While a fit parent contesting grandparental visitation is entitled to a presumption that the parent will act in the best interest of the child, ... a court will not modify a valid visitation order without the moving party first showing a substantial change of circumstances." (internal citation omitted)); *In Interest of Ferguson*, 927 S.W.2d 766, 768 (Tex.App.1996) (" '[W]hatever effect [the parental] presumption may have in an original custody action, it cannot control a suit to change custody.' " (quoting *Taylor v. Meek*, 154 Tex. 305, 276 S.W.2d 787, 790 (1955))).

The Ellis test

Substantial change in circumstances affecting the welfare of the child

[12] [13] The requirement that a party requesting modification or termination of a judicially approved visitation arrangement demonstrate a substantial change in circumstances affecting the welfare of the child " 'is based on the principle of res judicata' and 'prevents "persons dissatisfied with custody decrees [from filing] immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts." ' " *Ellis*, 123 Nev. at 151, 161 P.3d at 243 (alteration in original) (quoting *Castle v. Simmons*, 120 Nev. 98, 103–04, 86 P.3d 1042, 1046 (2004) (quoting *Mosley v. Figliuzzi*, 113 Nev. 51, 58, 930 P.2d 1110, 1114 (1997))). In assessing whether circumstances have sufficiently changed to modify visitation, "courts should not take the [analysis of this]

prong lightly." *Id.* While we do not address what constitutes changed circumstances sufficient enough to modify or terminate a nonparent's visitation rights, we note that the existence of some hostility between the parent and nonparent is insufficient because obviously some animosity exists between a nonparent and a parent when one party must resort to litigation to settle visitation issues. *See* *Mosley*, 113 Nev. at 58, 930 P.2d at 1114 (concluding generally that the fact that parents cannot get along will not justify modifying custody); *Poppe v. Ruocco*, 22 Misc.3d 942, 869 N.Y.S.2d 767, 773 (Fam.Ct.2008) (recognizing that it is obvious that animosity between the parties exists when a grandparent must seek legal means to obtain visitation rights).

Here, neither the parties nor the district court addressed changed circumstances before the court terminated Audrey's visitation rights. Nowhere in Roger's countermotion did he contend that any change in circumstances had occurred since the district court entered its stipulated visitation order that justified reevaluating Audrey's visitation with Martina. Similarly, the district court never made specific findings regarding changed circumstances, but instead afforded deference to the parental presumption pursuant to *Troxel* and found that continued visitation with Audrey would not be in Martina's best interest. The court failed to explain what circumstances had changed and instead summarily stated that "acrimony between the parties ... remains and rather than diminish it appears said acrimony has increased." Such acrimony between a parent and a nonparent, by itself, is insufficient to demonstrate changed circumstances.

The best interests of the child

[14] The second prong of the test follows the statutory requirement that, in child custody ***403** determinations, " 'the sole consideration of the court is the best interest of the child.' " *Ellis*, 123 Nev. at 151–52, 161 P.3d at 243 (quoting NRS 125.480(1)); NRS 125A.045(1), (2). In evaluating whether a parent's request to modify or terminate a nonparent's judicially approved visitation is in the best interest of the child, courts should consider "the factors set forth in NRS 125.480(4) as well as any other relevant considerations."[6] *Ellis*, 123 Nev. at 152, 161 P.3d at 243. In applying these factors, the district court must consider that "custodial stability is ... of significant concern when considering a child's best interest." *Id.* at 151, 161 P.3d at 243. Accordingly, we reverse the district court's order granting Roger's motion to terminate Audrey's visitation rights and remand this matter to the district court for further proceedings consistent with this opinion. The stipulated visitation order shall remain in full force and effect until such time as the district court modifies or terminates it in a manner consistent with this opinion. Pursuant to the stipulated visitation order, visitation was not to be altered without input from both the psychologist and the guardian ad litem. It appears from the record that the appointed guardian ad litem was not involved in this matter after her initial selection of Dr. Paglini as the psychologist who would counsel the parties.[7] On remand, the district court shall appoint a new guardian ad litem before evaluating whether Audrey's supervised nonparental visitation rights should be modified based on the stipulated order entered by the district court or terminated under the two-prong test we have enunciated in this opinion.

6 We recognize that the factors in NRS 125.480(4) apply specifically to custody of a minor child. These factors also provide guidelines for assessing the best interest of a child in the context of nonparent visitation, and the district court should apply them accordingly.

7 In a September 2008 letter, Dr. Paglini noted that there was no guardian ad litem with whom he could consult regarding his assessment of the parties.

We concur: SAITTA and PARRAGUIRRE, JJ.

Hudson v. Jones, 122 Nev. ___, 138 P.3d 429 (Adv. Opn. No. 61, July 13, 2006)
Grandmother was awarded custody of minor child after mother was killed in a drive-by shooting, and the father was adjudicated unfit, overcoming the parental preference. Ten years later, the father moved to modify custody, requesting sole legal and physical custody, and claiming that he had turned his life around was living a productive, law-abiding lifestyle. The district court interviewed the minor, who expressed a desire to live with her father, and granted the custody change, finding that it was bound to do so under the parental preference. The Supreme Court reversed, holding that when a non-parent is granted joint legal and primary physical custody of a child, the doctrine does not apply in any later modification motion, but that the same rules that would apply to such a motion between parents govern the outcome.

Ex.3

NRS 125C.050 Petition for right of visitation for certain relatives and other persons.

1. Except as otherwise provided in this section, if a parent of an unmarried minor child:

(a) Is deceased;

(b) Is divorced or separated from the parent who has custody of the child;

(c) Has never been legally married to the other parent of the child, but cohabitated with the other parent and is deceased or is separated from the other parent; or

(d) Has relinquished his or her parental rights or his or her parental rights have been terminated,

Ê the district court in the county in which the child resides may grant to the great-grandparents and grandparents of the child and to other children of either parent of the child a reasonable right to visit the child during the child's minority.

2. If the child has resided with a person with whom the child has established a meaningful relationship, the district court in the county in which the child resides also may grant to that person a reasonable right to visit the child during the child's minority, regardless of whether the person is related to the child.

3. A party may seek a reasonable right to visit the child during the child's minority pursuant to subsection 1 or 2 only if a parent of the child has denied or unreasonably restricted visits with the child.

4. If a parent of the child has denied or unreasonably restricted visits with the child, there is a rebuttable presumption that the granting of a right to visitation to a party seeking visitation is not in the best interests of the child. To rebut this presumption, the party seeking visitation must prove by clear and convincing evidence that it is in the best interests of the child to grant visitation.

5. The court may grant a party seeking visitation pursuant to subsection 1 or 2 a reasonable right to visit the child during the child's minority only if the court finds that the party seeking visitation has rebutted the presumption established in subsection 4.

6. In determining whether the party seeking visitation has rebutted the presumption established in subsection 4, the court shall consider:

(a) The love, affection and other emotional ties existing between the party seeking visitation and the child.

(b) The capacity and disposition of the party seeking visitation to:

Ex. 4

(1) Give the child love, affection and guidance and serve as a role model to the child;

(2) Cooperate in providing the child with food, clothing and other material needs during visitation; and

(3) Cooperate in providing the child with health care or alternative care recognized and permitted under the laws of this State in lieu of health care.

(c) The prior relationship between the child and the party seeking visitation, including, without limitation, whether the child resided with the party seeking visitation and whether the child was included in holidays and family gatherings with the party seeking visitation.

(d) The moral fitness of the party seeking visitation.

(e) The mental and physical health of the party seeking visitation.

(f) The reasonable preference of the child, if the child has a preference, and if the child is determined to be of sufficient maturity to express a preference.

(g) The willingness and ability of the party seeking visitation to facilitate and encourage a close and continuing relationship between the child and the parent or parents of the child as well as with other relatives of the child.

(h) The medical and other needs of the child related to health as affected by the visitation.

(i) The support provided by the party seeking visitation, including, without limitation, whether the party has contributed to the financial support of the child.

(j) Any other factor arising solely from the facts and circumstances of the particular dispute that specifically pertains to the need for granting a right to visitation pursuant to subsection 1 or 2 against the wishes of a parent of the child.

7. If the parental rights of either or both natural parents of a child are relinquished or terminated, and the child is placed in the custody of a public agency or a private agency licensed to place children in homes, the district court in the county in which the child resides may grant to the great-grandparents and grandparents of the child and to other children of either parent of the child a reasonable right to visit the child during the child's minority if a petition therefor is filed with the court before the date on which the parental rights are relinquished or terminated. In determining whether to grant this right to a party seeking visitation, the court must find, by a preponderance of the evidence, that the visits would be in the best interests of the child in light of the considerations set forth in paragraphs (a) to (i), inclusive, of subsection 6.

8. Rights to visit a child may be granted:

(a) In a divorce decree;

(b) In an order of separate maintenance; or

(c) Upon a petition filed by an eligible person:

(1) After a divorce or separation or after the death of a parent, or upon the relinquishment or termination of a parental right;

(2) If the parents of the child were not legally married and were cohabitating, after the death of a parent or after the separation of the parents of the child; or

(3) If the petition is based on the provisions of subsection 2, after the eligible person ceases to reside with the child.

9. If a court terminates the parental rights of a parent who is divorced or separated, any rights previously granted pursuant to subsection 1 also must be terminated, unless the court finds, by a preponderance of the evidence, that visits by those persons would be in the best interests of the child.

10. For the purposes of this section, "separation" means:

(a) A legal separation or any other separation of a married couple if the couple has lived separate and apart for 30 days or more and has no present intention of resuming a marital relationship; or

(b) If a couple was not legally married but cohabitating, a separation of the couple if the couple has lived separate and apart for 30 days or more and has no present intention of resuming cohabitation or entering into a marital relationship.

(Added to NRS by 1979, 326; A 1985, 586; 1987, 1193; 1991, 1176; 1999, 726; 2001, 2712)

NRS 125.480 Best interests of child; preferences; presumptions when court determines parent or person seeking custody is perpetrator of domestic violence or has committed act of abduction against child or any other child.

1. In determining custody of a minor child in an action brought under this chapter, the sole consideration of the court is the best interest of the child. If it appears to the court that joint custody would be in the best interest of the child, the court may grant custody to the parties jointly.

2. Preference must not be given to either parent for the sole reason that the parent is the mother or the father of the child.

3. The court shall award custody in the following order of preference unless in a particular case the best interest of the child requires otherwise:

(a) To both parents jointly pursuant to NRS 125.490 or to either parent. If the court does not enter an order awarding joint custody of a child after either parent has applied for joint custody, the court shall state in its decision the reason for its denial of the parent's application.

(b) To a person or persons in whose home the child has been living and where the child has had a wholesome and stable environment.

(c) To any person related within the fifth degree of consanguinity to the child whom the court finds suitable and able to provide proper care and guidance for the child, regardless of whether the relative resides within this State.

(d) To any other person or persons whom the court finds suitable and able to provide proper care and guidance for the child.

4. In determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things:

(a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her custody.

(b) Any nomination by a parent or a guardian for the child.

(c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.

(d) The level of conflict between the parents.

(e) The ability of the parents to cooperate to meet the needs of the child.

(f) The mental and physical health of the parents.

(g) The physical, developmental and emotional needs of the child.

(h) The nature of the relationship of the child with each parent.

(i) The ability of the child to maintain a relationship with any sibling.

(j) Any history of parental abuse or neglect of the child or a sibling of the child.

(k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.

(l) Whether either parent or any other person seeking custody has committed any act of abduction against the child or any other child.

5. Except as otherwise provided in subsection 6 or NRS 125C.210, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and

(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

6. If after an evidentiary hearing held pursuant to subsection 5 the court determines that each party has engaged in acts of domestic violence, it shall, if possible, then determine which person was the primary physical aggressor. In determining which party was the primary physical aggressor for the purposes of this section, the court shall consider:

(a) All prior acts of domestic violence involving either party;

(b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence;

(c) The likelihood of future injury;

(d) Whether, during the prior acts, one of the parties acted in self-defense; and

(e) Any other factors which the court deems relevant to the determination.

Ê In such a case, if it is not possible for the court to determine which party is the primary

physical aggressor, the presumption created pursuant to subsection 5 applies to both parties. If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 5 applies only to the party determined by the court to be the primary physical aggressor.

7. A determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has committed any act of abduction against the child or any other child creates a rebuttable presumption that sole or joint custody or unsupervised visitation of the child by the perpetrator of the abduction is not in the best interest of the child. If the parent or other person seeking custody does not rebut the presumption, the court shall not enter an order for sole or joint custody or unsupervised visitation of the child by the perpetrator and the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of abduction occurred; and

(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other person from whom the child was abducted.

8. For purposes of subsection 7, any of the following acts constitute conclusive evidence that an act of abduction occurred:

(a) A conviction of the defendant of any violation of NRS 200.310 to 200.340, inclusive, or 200.359 or a law of any other jurisdiction that prohibits the same or similar conduct;

(b) A plea of guilty or nolo contendere by the defendant to any violation of NRS 200.310 to 200.340, inclusive, or 200.359 or a law of any other jurisdiction that prohibits the same or similar conduct; or

(c) An admission by the defendant to the court of the facts contained in the charging document alleging a violation of NRS 200.310 to 200.340, inclusive, or 200.359 or a law of any other jurisdiction that prohibits the same or similar conduct.

9. If, after a court enters a final order concerning custody of the child, a magistrate determines there is probable cause to believe that an act of abduction has been committed against the child or any other child and that a person who has been awarded sole or joint custody or unsupervised visitation of the child has committed the act, the court shall, upon a motion to modify the order concerning custody, reconsider the previous order concerning custody pursuant to subsections 7 and 8.

10. As used in this section:

(a) "Abduction" means the commission of an act described in NRS 200.310 to 200.340, inclusive, or 200.359 or a law of any other jurisdiction that prohibits the same or similar conduct.

(b) "Domestic violence" means the commission of any act described in NRS 33.018.

(Added to NRS by 1981, 283; A 1991, 980, 1175; 1995, 330; 2005, 1678; 2009, 218, 222)

The place – and limits – of federal pre-emption in a family law analysis:

> In [*Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed.2d 599 (1987)], the United States Supreme Court explained: "We have consistently recognized that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' [Citations.] 'On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "*positively required by direct enactment*" that state law be pre-empted.' [Citations.] Before a state law governing domestic relations will be overridden, it 'must do "major damage" to "clear and substantial" federal interests.'" (Italics added.) Express preemption arises when Congress has explicitly stated its intent in statutory language.

But: *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).

Boulter v. Boulter, 113 Nev. 74, 930 P.2d 112 (1997) Parties were divorced after marriage of 37 years. The decree merged a property settlement agreement signed by both parties, and required equalization of the Social Security payments received by each of them. Husband refused to apply for Social Security when he turned 65. Wife filed a motion. The district Court (Ames) held that there was no violation of federal law and that any ambiguity (apparently, as to whether payments were to begin at eligibility) should be construed against the Husband's attorney since he drafted the property settlement agreement.

The Supreme Court reversed. Under 42 U.S.C. 407(a) (1983), any state action is preempted by a conflicting federal law, such as the Social Security Act, under the Supremacy Clause (Article IV, Clause 2) of the United States Constitution. Citing various cases from around the country indicating that Social Security payments are "immune to adjustment" by state courts dividing property at divorce, and noting that certain spousal benefits are built in to the social security law itself, the Court noted the holding of the United States Supreme Court that section 407(a) imposes "a broad bar against the use of any legal process to reach all social security benefits," citing Philpott v. Essex County Welfare Bd., 409 U.S. 413, 417 (1973), and noting the holding of Hisquierdo v. Hisquierdo, 439 U.S. 572, 575-76 (1979), superseded in part by 45 U.S.C. 231m (1986). The Court then found that merging the property settlement agreement into the divorce decree constituted "state action."

The Court rejected the wife's argument that the agreement merely constituted an agreement between private individuals as to how to use Social Security proceeds once received (which is permissible), since it was actually a forbidden contract to transfer unpaid (future) benefits. For good measure, the Court ruled impermissible voluntary as well as involuntary transfers or assignments. Even a bank account consisting of benefit payments is exempt.

In its final word, however, the Court, having found the agreement to share the benefits unenforceable, remanded to the district court "with instructions to reconsider the property distribution to the parties, and the issue of attorney's fees and costs."

EX. 6

William and Mary Law Review

Volume 11 | Issue 3 Article 18

Constitutional Law - Right to Counsel - Not Limited to an Attorney - United States v. Tarlowski, 305 F. Supp. 112 (E.D.N.Y. 1969)

Robert B. Ingram

Ex. 7

Constitutional Law—Right to Counsel—Not Limited to an Attorney. *United States v. Tarlowski*, 305 F. Supp. 112 (E.D. N.Y. 1969).

During interrogation by special agents of the Internal Revenue Service for failure to file income tax returns, the agents conducting the investigation requested the defendant's accountant to leave. The agents led the defendant to believe that he could have his attorney present but not his accountant.[1]

The United States District Court for the Eastern District of New York granted defendant's motion to suppress the government's evidence on the ground that the denial of his accountant's assistance infringed upon the defendant's right of due process.[2]

The right to counsel as specifically incorporated in the sixth amendment, guarantees that a defendant may "have the Assistance of Counsel for his defense" in a criminal trial.[3] This right has protected an accused from being deprived of his life or liberty without the assistance of counsel during his trial.[4] The right to counsel is not limited to the sixth amendment, however, as the Supreme Court has recognized that the presence or absence of counsel at the trial is included in the *hearing* requirement which, along with *notice*, constitutes the basic elements of due process.[5] Thus, because of the nature of our adversary system, the complexity of legal proceedings, and the considerable forces of government that are arrayed against the defendant, the right to counsel has become one of the elements of due process of law under the fifth amendment.[6]

Originally limited to the presence of an attorney at trial,[7] the right to counsel has expanded, first under the sixth amendment, then under the fifth amendment, to the pretrial interrogation period. In *Escobedo v. Illinois*,[8] the Court stated that ". . . the right to use counsel at the

1. United States v. Tarlowski, 305 F. Supp. 112, 115 (E.D. N.Y. 1969).

2. "[A]n invasion of the individual's right to determine the conditions under which he will deal with agents of the federal government when under criminal investigation, as is present here, can be considered to be nothing less than a denial of liberty without due process of law." *Id.* at 123.

3. U.S. Const. amend. VI.

4. Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938); Powell v. Alabama, 287 U.S. 45, 69 (1932).

5. Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

6. Comment, *The Continuing Expansion of the Right to Counsel*, 41 U. Colo. L. Rev. 473, 478 (1969). *See also* Gideon v. Wainwright, 372 U.S. 335 (1963).

7. Johnson v. Zerbst, 304 U.S. 458 (1938).

8. 378 U.S. 478 (1964).

formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination." [9] In *Miranda v. Arizona*, the Court guaranteed the due process and self incrimination privileges to a defendant by establishing procedural safeguards and standards under which incriminating statements may be used at trial.[10]

> Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if defendant so desired.[11]

Throughout the development of the doctrine of right to counsel, however, whether under the sixth, fifth, or fourteenth amendment, the courts have assumed that the counsel with whom the defendant may consult would be an attorney. *Miranda*,[12] *Escobedo*,[13] and more recent cases[14] equate the definition of counsel with the defendant's attorney.[15] Moreover, the term "counsel" as used in relation to constitutional guarantees of federal or state governments has been construed as a duly licensed attorney.[16] One departure from that limitation was *United States ex rel. Caminito v. Murphy*,[17] where the court stated that the defendant's confession was not voluntary where he was denied access to relatives or friends.

In *United States v. Tarlowski*, the district court found that histori-

9. *Id.* at 487.

10. 384 U.S. 436 (1966).

11. *Id.* at 470.

12. Miranda v. Arizona, 384 U.S. 436 (1966).

13. Escobedo v. Illinois, 378 U.S. 478 (1964).

14. *See* United States v. Wade, 388 U.S. 218 (1967). In *Wade*, the defendant was denied the presence of his counsel during a "line-up" identification. The Court held that the absence of his attorney at this crucial stage of the proceedings denied the defendant's sixth amendment rights because of the inherently suggestive nature of an identification proceeding and the possibility of suggestive control by the police investigators over the witnesses. *Id.* at 224-25.

15. "[T]hat he has the right to the presence of an attorney . . . ." Miranda v. Arizona, 384 U.S. 436, 444 (1966); "the accused must be permitted to consult with his lawyer." Escobedo v. Illinois, 378 U.S. 478, 492 (1964).

16. People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957). This principle has been applied where the defendant's counsel was delinquent in paying his bar association dues. McKinzie v. Ellis, 287 F.2d 549 (5th Cir. 1961).

17. 222 F.2d 698 (2d Cir. 1955).

cally all persons have "the right to associate with others of one's own choice at any time . . ." and that right is protected by the fifth amendment.[18] If, therefore, the federal agent limits a person's freedom of association, "this constitutes an invasion of the liberties guaranteed by the due process clause . . ." of the fifth amendment.[19] Through the right of association, *Tarlowski* has expanded the doctrine of right to counsel to include the presence of an accountant during a tax investigation. This approach, however, overlooks the conflict between accountants and attorneys in the federal tax field.[20] In all probability, the presence of an accountant to advise and protect his client from his ignorance during a criminal investigation would be the unauthorized practice of law.[21] Notwithstanding, through the doctrine of right of association, a court has recognized that the right to counsel cannot be filled solely by attorneys and that other advisors must fill this need.[22]

ROBERT B. INGRAM

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18. 305 F. Supp. at 121.

19. *Id.* at 123.

20. Austin, *Relations Between Lawyers and Certified Public Accountants in Income Tax Practice*, 36 IOWA L. REV. 227 (1950).

> The public conflict . . . between two great professions over their respective functions in one of their fields of common interest—federal income taxation—has been as fruitless and injurious as it has been unedifying. . . . It has produced strife where there should be peace; accusation, distrust and suspicion where there should be understanding; recrimination . . . where there should be only cordial cooperation and harmony.

Id. at 227. *See also* E. Griswold, *We Can Stop the Lawyer-Accountant Conflict over Tax Practice Now: Four Recommendations*, 2 J. TAXATION 130 (1955); Comment, *Relations Between Lawyers and Certified Public Accountants in Federal Tax Practice*, 15 ALA. L. REV. 517 (1963).

21. Agran v. Shapiro, 127 Cal. 2d 807, 273 P.2d 619 (1954).

22. The legal profession and legal education have not caught up with the doctrine of right to counsel. There are not enough affordable lawyers to fulfill its promise. Even if such lawyers were available, they would not be intellectually prepared to render the type of legal service most appropriate for many of the non-trial stages of the criminal continuum. . . . Furthermore, the profession must give more consideration to the use of para-professionals to render routine legal service in the criminal justice continuum.

> These are the challenges of the doctrine of right to counsel.

Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 SW. L.J. 488, 523 (1969).