EFFECTIVELY DEALING WITH NON-PARENTS IN SAPCRs WITHOUT BEING *TROXELLED*

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I. INTRODUCTION. This article deals with possible constitutional issues arising in connection with non-parent involvement in suits affecting the parent-child relationship in Texas. The article examines the U.S. Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000), and subsequent cases in Texas and other states discussing the constitutional issues relating to the right of parents to control the access that grandparents and others have to their children. The questions involve not only grandparent access, but also appointment of non-parents as sole managing conservator, joint managing conservators, and possessory conservator. The case law developing in other states would suggest that the Texas Family Code, as historically applied, is unconstitutional. The few Texas appellate cases on point are divided as to unconstitutionality.

II. THE *TROXEL* DECISION. When the U.S. Supreme Court handed down its decision in *Troxel v. Granville*, to the surprise of many the Court invoked the substantive due process of law concept to strike down a state statute permitting non-family members to petition a court for visitation with minor children. The statute permitted the court to grant a right of access if the court believed that to be in the children's best interest.

The U.S. Supreme Court was not sufficiently unified in its views to generate a majority opinion. As a result, to understand the import of the case it is necessary to compare the court's plurality opinion to various concurring opinions and dissenting opinions to "triangulate" the precedential import of the decision. The *Troxel v. Granville* opinion is attached as Appendix I.

A. JUSTICE O'CONNOR'S PLURALITY OPINION. "The Due Process Clause does not permit a State to infringe on the fundamental rights of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 2064, 147 L.Ed.2d 49 (2000). That statement is the crux of the plurality opinion of Justice Sandra Day O'Connor supporting a decision to declare unconstitutional "as applied" a Washington state statute permitting trial courts to grant non-relatives access to children. Justice O'Connor's Opinion was joined by C.J. Rehnquist, Justice Ginsberg, and Justice Breyer. Because a majority of the Court did not join in the Opinion, the Opinion does not constitute stare decisis. Justice O'Connor wrote:

> 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:
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> > "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, 113 S.Ct. 1439.
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> The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. See *Parham, supra*, at 602, 99 S.Ct. 2493. In that respect, the court's presumption 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. *Id.* 69-70.

Justice O'Connor goes on to state:

> 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 2079 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter. [FN*] See, *e.g., Fairbanks* ****74*** *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). *Troxel v. Granville*, pp. 73-74.

B. JUSTICE SOUTER'S CONCURRING OPINION. Justice Souter wrote a concurring opinion in which he noted that the Washington Supreme Court had invalidated the statute in question as "facially invalid," and that it was not necessary for the U.S. Supreme Court to consider the precise scope of a parent's rights, and whether harm must be shown as a prerequisite for non-parent access. Justice Souter agreed with the Washington Supreme Court's ruling that the statute was facially invalid, because it permitted "any person" at "any time" to see court-ordered access to children.

C. JUSTICE THOMAS'S CONCURRING OPINION. Justice Thomas wrote a concurring opinion in which he said that no one had argued that substantive due process analysis is not viable, and so his opinion on that score was not brought to bear. He said likewise the plurality opinion did not address that underlying issue. Justice Thomas indicated that "strict scrutiny" should be applied to all fundamental rights, and that the Washington statute lacks even a legitimate governmental interest, much less a compelling interest that would be required by strict scrutiny analysis.

D. JUSTICE STEVENS' DISSENTING OPINION. Justice Stevens wrote a dissenting opinion in which he stated his opinion that the Washington state statute was not "facially invalid." Justice Stevens further rejected the Washington Supreme Court's idea that a non-parent must show harm in denying access before access can be ordered. Justice Stevens also raised the issue of what rights the children have in such a fight.

E. JUSTICE SCALIA'S DISSENTING OPINION. Justice Scalia wrote a dissenting opinion in which he rejected the whole idea of substantive due process, which draws support from three prior cases, as a basis for invalidating legislation. Justice Scalia also said that 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."

F. JUSTICE KENNEDY'S DISSENTING OPINION. Justice Kennedy wrote a dissenting opinion in which he disagreed with the Washington Supreme Court's view that best interest of the child is never the appropriate standard for court-ordered non-parent access, and that harm must be shown to warrant court intervention.

III. DECISIONS FROM OTHER STATES REGARDING *TROXEL*.

1. Alabama. In *R.S.C. v. J.B.C.*, 2001 WL 996065, *7 (Ala. Civ. App. Aug. 31, 2001) (not yet released for publication), the Alabama intermediate court of appeals held the Alabama grandparent access statute unconstitutional. The statute provided a legal presumption in favor of grandparent visitation. The opinion is especially notable, however, because it not only rejects the presumption favoring grandparent visitation, but also holds that permitting grandparent visitation on a "best interest" showing is also unconstitutional. The Opinion states:

> Consistent with Troxel, we hold that the rebuttable presumption stated in Ala.Code 1975, § 30-3-4.1(e), in favor of grandparental visitation is unconstitutional.

* * *

> Our holding today, however, is not limited to the unconstitutionality of the statute's presumption in favor of grandparental visitation. Even if there were no such presumption, and the statute's prescribed burden of proving the child's "best interests" were placed on the grandparents, this would not be a sufficient showing to overcome a parent's fundamental liberty interest in making decisions regarding the care, custody, and control of his or her child.

* * *

> The fundamental right of a fit parent to decide the issue of unsupervised grandparental visitation, in the absence of harm or potential harm to the child if such visitation is not allowed, requires more respect for the parent's initial decision than is achieved by allowing a trial court to decide what is in the "best interests" of the child and then to substitute its decision for the parent's decision. To discard the parent's decision as to what is in his or her child's best interests merely because that decision is not the same as the one the state would make would be to deny the fundamental nature of the parent's right to make that decision in the first place. We therefore hold that § 30-3-4.1 is unconstitutional as applied in this case.

2. Arizona. The Arizona Court of Appeals ruled before *Troxel*, in 1999, that Arizona's grandparent visitation statute, A.R.S. § 25-409, did not unconstitutionally infringe upon a parent's fundamental right to control child rearing. *Graville v. Dodge*, 195 Ariz. 119, 125, 985 P.2d 604, 610 (App. 1999). The Court revisited that issue after *Troxel* came down, and in *Jackson v. Tangreen*, 199 Ariz. 306, 18 P.3d 100, 103-04 (App. 2000), the Court of Appeals again held that the Arizona statute did not violate the Due Process of Law clause of the Fourteenth Amendment. The court said:

> . . . A.R.S. section 25-409 is much more narrowly drawn than the Washington statute in Troxel. In contrast to the Washington law, Arizona's nonparental visitation statute is limited to grandparents and great- grandparents. A.R.S. § 25-409(A), (B). In addition, the court may order visitation over parental objections only if the marriage of the parents has been dissolved for at least three months, one of the parents of the child is deceased or missing, or the child was born out of wedlock. Id. at (A)(1)- (3). Further, the statute requires the court to evaluate "all relevant factors" as well as five specific factors to determine if visitation serves the best interests of the child. Id . at (C)(1)-(5). Thus, A.R.S. section 25-409 stands in stark contrast to the "breathtakingly broad" Washington statute. Troxel, 530 U.S. at 67, 120 S.Ct. at 2061.
>
> Nevertheless, the Jacksons argue that certain language in Troxel compels a finding that A.R.S. section 25-409 violates their fundamental due process right to make decisions concerning the raising of their children. We disagree and conclude that Arizona's statute satisfies the due process concerns articulated in Troxel.

However, in *McGovern v. McGovern*, 33 P.3d 506, 508-09 (App. Oct. 11, 2001), the Arizona Court of Appeals ruled that the Arizona grandparent visitation statute was unconstitutional as applied in that case:

> The Court finds that its application of the grandparent visitation statute in this case violated the mother's fundamental right to parent her child without state interference as guaranteed by the Due Process Clause of the Fourteenth Amendment. See Troxel, [530 U.S. 57,] 120 S.Ct. 2054 [, 147 L.Ed.2d 49] (2000). There was no proof that the mother was unfit. She should have been presumed to be a fit parent whose decisions regarding her child were in

> the child's best interest. Once the matter proceeded to trial, the burden of proof should have been on the grandparents to show that the mother's decision was not in the child's best interest. The mother's decision regarding visitation should have been given special weight.

3. California. In *Kyle O. v. Donald R.*, 102 Cal.Rptr.2d 476, 85 Cal.App.4th 848 (2000), the California Court of Appeal, held that under *Troxel* the trial court's order granting grandparents scheduled visitation violated father's "parent rights guaranteed by the due process clause of the Fourteenth Amendment." Id., 85 Cal.App.4th at 864, 102 Cal.Rptr.2d 476. The court reasoned that the father was a fit parent who had not sought to end all grandparent visitation, and the dispute was basically over the amount of visitation grandparents would have. Thus, the court concluded that father "had the fundamental right as a parent to prefer flexible unscheduled visitation that would not interfere too much with his quality parenting time ..." Id. at 863-864, 102 Cal.Rptr.2d 476.

In *Punsly v. Ho*, 105 Cal.Rptr.2d 139, 147, 87 Cal.App.4th 1099, 1110 (2001), the California Court of Appeal concluded that the trial court's application of California's nonparental visitation statute over the mother's objections violated the mother's fundamental parental rights where the mother was fit and was willing to voluntarily schedule visitation and the trial court applied an erroneous presumption that visitation with the paternal grandparents was in the child's best interest.

In the case of *In re Marriage of Harris*, 92 Cal.App.4th 499, 509, 518, 112 Cal.Rptr.2d 127, 135, 142-43 (2001), the California Court of Appeals saved the constitutionality of the California grandparent visitation statute by reading into it a requirement that the need for grandparent visitation must be shown by clear and convincing evidence:

> [W]e conclude section 3104 does not infringe upon a parent's fundamental liberty interest under the California Constitution if subdivision (f) of the statute is read to require a grandparent seeking visitation rights over the objection of a fit parent to show by clear and convincing evidence that the parent's decision would be detrimental to the child.
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> * * *
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> Although a statute is facially constitutional, it nevertheless may have been unconstitutionally applied to a specific individual under particular circumstances, unduly infringing upon that person's protected right. (Boddie v. Connecticut (1971) 401 U.S. 371, 379-380, 91 S.Ct. 780, 28 L.Ed.2d 113; Lammers v. Superior Court (2000) 83 Cal.App.4th 1309, 1328, 100 Cal.Rptr.2d 455.) The application of section 3104 to Butler here violated her due process rights under both the United States and California Constitutions because the trial court did nothing more than apply a bare-bones best interest test and did not accord the child rearing decision of Butler, a fit parent, any deference or material weight. Because there were no allegations or findings that Butler was an unfit parent, Butler is entitled to a presumption that she will act in her child's best interest and her decisions regarding visitation must be given deference. (Troxel, supra, 530 U.S. at pp. 68, 70, 120 S.Ct. at pp.2061, 2062.) [FN14] The trial court's best- interest analysis was in contravention of constitutional principles and the statutory mandates of section 3104.

4. Florida. In *Belair v. Drew*, 776 So.2d 1105, 1107 (Fla. App. 2001), Florida's Fifth District Court of Appeals discussed Troxel and held that Florida's grandparent visitation statute is facially unconstitutional under the privacy rights protected by Florida's Constitution.

5. Illinois. In *Lulay v. Lulay*, 193 Ill.2d 455, 250 Ill.Dec. 758, 739 N.E.2d 521, 534 (2000), the Supreme Court of Illinois concluded that Illinois' grandparent visitation statute as applied to the facts of the case, where both parents agreed that visitation with the child's paternal grandmother was not in the

child's best interest, did not serve a compelling state interest and therefore, unconstitutionally infringed on the parents' fundamental rights to raise their children.

6. Iowa. In *Santi v. Santi*, 633 N.W.2d 312, 320-321 (Iowa Sept. 6, 2001), the Iowa Supreme Court held the Iowa grandparent access statute unconstitutional. The Court gave the following analysis:

> Turning to the Iowa statute before us, we note that while it does not suffer from the patently unconstitutional scope of the Washington statute, it nevertheless fails to accord fit parents the presumption deemed so fundamental in Troxel. Section 598.35(7) places the best interest decision squarely in the hands of a judge without first according primacy to the parents' own estimation of their child's best interests. Without a threshold finding of unfitness, the statute effectively substitutes sentimentality for constitutionality. It exalts the socially desirable goal of grandparent-grandchild bonding over the constitutionally recognized right of parents to decide with whom their children will associate. The district court wisely recognized the statute's infirmity. The court refused to substitute its judgment about the reasonableness of Mike and Heather's decision about visitation, even though--applying its own parental instincts--the court believed that withholding visitation with Joe and Lois was unreasonable and not in Taylor's best interest. It reasoned that it should not assume a parens patrie role without a threshold finding that the parents were unfit to make the visitation decision confronting them. As another state supreme court observed in this context, [a]n approach requiring a court to make an initial finding of harm to the child before evaluating the "best interests of the child" works ... to prevent judicial second-guessing of parental decisions. Hawk, 855 S.W.2d at 581.
>
> Joe and Lois rightly argue that the district court here, unlike the plurality in Troxel, rested its decision on the conclusion that substantive due process requires a finding of substantial harm to the child before grandparent visitation may be ordered over the parents' opposition. The court in Troxel declined to reach that question and, on our de novo review, so do we. We believe the analysis is unnecessary because of the historic presumption that fit parents' decisions will benefit their children, not harm them. See Troxel, 530 U.S. at 68, 120 S.Ct. at 2061, 147 L.Ed.2d at 58.
>
> We believe that section 598.35(7) is fundamentally flawed, not because it fails to require a showing of harm, but because it does not require a threshold finding of parental unfitness before proceeding to the best interest analysis. It is true that a consideration of potential harm to the child would customarily be included in any best-interest analysis. See Iowa Code § 598.1 (defining "[b]est interest of the child" to include opportunity for maximum visitation with both parents "unless direct physical or significant emotional harm to the child may result from this contact"). But, unlike the other subsections of section 598.35 which contemplate some breakdown between parents before a judge is authorized to make a difficult choice for them, section 598.35(7) permits the court to usurp that judgment over the joint decision of two fit parents. In other words, rather than narrowly tailoring the statute to serve the needs of children with disputing parents, the legislature has broadly swept even fit parents and intact families under the court's wing. Given the liberty interests at issue, it cannot be permitted to do so. As the Troxel court stated, "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." Troxel, 530 U.S. at 72-73, 120 S.Ct. at 2064, 147 L.Ed.2d at 61. We hereby interpret article I, sections 8 and 9 of the Iowa constitution to afford fit parents that same protection.
>
> VI. Conclusion.

> We are convinced that fostering close relations between grandparents and grandchildren is not a sufficiently compelling state interest to justify court-ordered visitation over the joint objection of married parents in an intact nuclear family. Because Iowa Code section 598.35(7), on its face, permits such state intrusion on fit parents' fundamental liberty interest in childrearing, we find it facially unconstitutional under article I, sections 8 and 9 of the Iowa Constitution. We therefore affirm the district court's dismissal of the grandparents' petition.

7. Kansas. In *Dept. of Social and Rehabilitation Services v. Paillet*, 16 P.3d 962 (Kan.2001), the Kansas Supreme Court held that although Kansas' nonparental visitation statute was not facially unconstitutional, it was unconstitutional as applied to the facts of the case. Kansas' statute limits visitation to grandparents and thus is narrower than the statute in Troxel. *Id*. at 969. The court noted that the statute's requirements, that the trial court find that visitation is in the best interest of the child and that a substantial relationship existed between the child and the grandparent, were not called into question by the Troxel decision. *Id*. at 971. However, the court concluded that within these considerations, the trial court failed to apply the presumption that the mother acted in her children's best interest in deciding not to allow visitation. *Id*.

8. Maryland. In *Brice v. Brice*, 133 Md. App. 302, 309, 754 A.2d 1132 (2000), based on Troxel, the Court of Special Appeals of Maryland reversed the trial court's grant of grandparent visitation under Maryland's grandparent visitation statute. The court concluded that the statute was unconstitutional as applied to the facts of the case, noting that mother was not alleged to be unfit, and that she had allowed grandparents some visitation. Id. However, the court did not find Maryland's statute to be facially unconstitutional because Maryland's statute is narrower than the Washington statute in *Troxel*.

9. Michigan. The case of *Heltzel v. Heltzel*, 2001 WL 1269245, 9-11 (Mich. App. Oct. 23, 2001), involved "a fit natural mother seeking a change of her child's custody from an established custodial environment with third persons." Under applicable Michigan statutes, the court can modify an existing court-ordered placement only upon clear and convincing evidence that the change would be in the best interest of the child. *See* Michigan Compiled Laws § 722.27(1)(c). But Michigan also has a parental presumption statute. Under the *Rummelt* case, the conflicting burdens of proof were resolved by placing the ultimate burden of persuasion on the parent challenging an established custodial environment with a third party. In *Heltzel*, in light of *Troxel*, the Michigan Court of Appeals said that:

> In light of the recent Supreme Court decision emphasizing the fundamental constitutional right of parents to raise their children and make decisions regarding visitation, and necessarily custody, we find the instant trial court's determination of the child's custody, premised on Rummelt, supra, constitutionally infirm. Even though the trial court did not view defendant as an abusive or neglectful parent or a threat to the child, the court nonetheless in its analysis failed to accord defendant's fundamental interest in raising the child any special weight. According to the Rummelt panel's analysis of the interplay between the natural parent presumption, subsection 5(1), and the established custodial environment factor, subsection 7(1)(c), and as the Supreme Court in Troxel found constitutionally offensive, id. at 68-70, the trial court placed on defendant the ultimate burden of persuading the court that the child belonged in the custody of her natural mother. Furthermore, the trial court's application of the simple preponderance of the evidence standard set forth in Rummelt for reaching a decision regarding the child's best interests plainly and unconstitutionally invited the court to enforce its own judicial opinion regarding what custody situation best would serve the child's interests, irrespective of the natural mother's wishes. [Emphasis added]

The Court of Appeals went on to note:

> The Legislature has decreed that in any custodial dispute the child's best interests, described within section 3, must prevail. Eldred v. Ziny, 246 Mich.App 142, 150; 631 NW2d 748 (2001). In every custody dispute involving the natural parent of a child and a third person custodian, the strong presumption exists, however, that parental custody serves the child's best interests. We hold that, to properly recognize the fundamental constitutional nature of the parental liberty interest while at the same time maintaining the statutory focus on the decisive nature of an involved child's best interests, custody of a child should be awarded to a third party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within section 3, taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person. [FN17] Only when such a clear and convincing showing is make should a trial court infringe on the parent's fundamental constitutional rights by awarding custody of the parent's child to a third person. [FN18] We reiterate the Supreme Court's warning that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made," Troxel, supra at 72-73, and remind trial court's considering competing custody claims of a noncustodial natural parent and a third person custodian that it is not sufficient that the third person may have established by clear and convincing evidence that a marginal, though distinct, benefit would be gained if the children were maintained with him. Henrikson, supra at 253. [Emphasis added]

10. New Jersey. In *Wilde v. Wilde*, 341 N.J.Super. 381, 775 A.2d 535 (Superior Court of New Jersey, Appellate Division June 22, 2001) (not for publication), a mother took an interlocutory appeal of the denial of her motion to dismiss a grandparent visitation proceeding, based on *Troxel*. The mother also challenged a trial court order requiring her to engage in "therapeutic mediation with a psychologist." The appellate court reversed the trial court, sustaining the mother's "as applied" attack on the grandparent visitation statute, and further overturned the order requiring mediation as an invasion of the mother's constitutional rights.

11. New York. In *Hertz v. Hertz*, 717 N.Y.S.2d 497, 500, 186 Misc.2d 222, 226 (2000), the trial court ruled that New York's grandparent visitation statute violated parents' substantive due process rights because it allowed the trial judge to solely determine best interest and accorded parents' decision of children's best interest no presumption of validity. However, in *Fitzpatrick v. Youngs*, 717 N.Y.S.2d 503, 186 Misc.2d 344, 349 (2000), the trial court denied a motion to dismiss petition for grandparent visitation based on *Troxel*, noting that New York's statute is not as broad as the statute in Troxel. In *Smolen v. Smolen*, 713 N.Y.S.2d 903, 185 Misc.2d 828, 835 (2000), the trial court denied a motion to dismiss petition for grandparent visitation prior to evidentiary hearing. And the New York grandparent visitation statute passed constitutional attack at the trial court level in *Davis v. Davis*, 188 Misc.2d 81, 83-84, 725 N.Y.S.2d 812 (Family Court March 19, 2001):

> [A] venerable canon of construction, endorsed by the Court of Appeals, requires that a "statute should be construed when possible in [a] manner which would remove doubt of its constitutionality." People v. Barber, 289 N.Y. 378, 385, 46 N.E.2d 329 (1943). Here, courts can remove doubt as to the constitutionality of DRL Sec. 72 by requiring that special weight be accorded the preference of parents. If a parent opposes grandparent visits, this preference must be respected absent extraordinary circumstances.

> Troxel explicitly contemplates that a state may permit grandparent visitation, over the objections of a parent, in extraordinary circumstances. 120 S.Ct. at 2061-64. As long as DRL Sec. 72 is interpreted to give special weight to the wishes of parents, and permit grandparent visitation over parental objection only in extreme cases, the statute conforms to the Supreme Court decision. This approach not only comports with federal law, but also finds support in our Court of Appeals. In Bennett v. Jeffreys, 40 N.Y.2d 543, 545, 387, N.Y.S.2d 821, 356 N.E.2d 277 (1976), the Court held that, in custody disputes between a biological parent and someone else, the biological parent must be afforded custody "absent extraordinary circumstances." Our interpretation of DRL Sec. 72 achieves the same dual effect as Bennett v. Jeffreys: It recognizes the primacy of parents, while leaving open the rare case where such primacy must give way.

12. North Dakota. In *Hoff v. Berg*, 1999 N.D. 115, 595 N.W.2d 285, 291-92 (1999), the Supreme Court of North Dakota held that state's grandparent visitation statute to be unconstitutional, even before *Troxel* was decided by the U.S. Supreme Court. The Court in *Hoff v. Berg* said:

> As amended in 1993, N.D.C.C. § 14-09-05.1 provides grandparents of an unmarried minor must be given visitation rights to the minor child unless the district court finds visitation is not in the best interests of the minor, and visitation rights of grandparents are presumed to be in the best interests of the minor child.
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> * * *
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> Deciding when, under what conditions, and with whom their children may associate is among the most important rights and responsibilities of parents. Promoting grandparental visitation with grandchildren is a legitimate public purpose, and we are not insensitive to the plight of grandparents who are not allowed the visitation they desire with their grandchildren. However, we conclude neither the Hoffs nor the Attorney General have demonstrated the State has a 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. Methods to promote grandparental visitation can be more narrowly tailored and still reasonably accomplish the legislative purpose behind N.D.C.C. § 14-09-05.1. We conclude N.D.C.C. § 14-09-05.1, as amended in 1993, is unconstitutional to the extent it requires courts to grant grandparents visitation rights with an unmarried minor unless visitation is found not to be in the child's best interests, and presumes visitation rights of grandparents are in a child's best interests, because it violates parents' fundamental liberty interest in controlling the persons with whom their children may associate, which is protected by the due process clause of our state and federal constitutions.

In *Love v. DeWall*, 598 N.W.2d 106 (N.D. 1999), the Supreme Court of North Dakota held that the exceptional circumstances warranted the trial court's granting visitation to a child's "psychological parents" over the objection of the parents.

13. Oklahoma. In *Neal v. Lee*, 14 P.3d 547 (Okla. 2000), the Oklahoma Supreme Court found that pursuant to *Troxel*, the award of grandparent visitation under Oklahoma's grandparent visitation statute violated the parents' federal constitutional rights since the parents objected to visitation and the grandmother made no showing of harm.

IV. CONSTITUTIONAL ANALYSIS. There are principles of law that must be considered when evaluating the constitutionality of a state statute.

A. 14th AMENDMENT TO U.S. CONSITUTION.

> **Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; . . . Enforcement**
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> [Sections 2, 3, and 4 omitted]
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The San Antonio Court of Appeals explained the 14th Amendment Due Process Clause in the following way:

> First, the Clause incorporates many of the protections set forth in the Bill of Rights including a state official's violation of freedom of speech. Second, the Clause contains a substantive component, sometimes referred to as "substantive due process." Id. Substantive due process bars arbitrary governmental actions regardless of the fairness of the procedures used to implement them. Id. The Clause also guarantees fair procedure. Procedural due process requires that a state not deprive its citizens of life, liberty and property without first providing appropriate procedural safeguards. Id.

Levine v. Maverick County Water Control, 884 S.W.2d 790, 795 (Tex. App.--San Antonio 1994, writ denied).

B. DUE COURSE OF LAW UNDER TEXAS CONSTITUTION.

> **Art. I, § 19. Deprivation of life, liberty, etc.; due course of law**
>
> No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

C. TEXAS CODE CONSTRUCTION ACT. The Texas Code Construction Act contains the following provisions that bear upon the constitutional claims involved in a *Troxel* analysis.

> **§ 311.021. Intention in Enactment of Statutes**
>
> In enacting a statute, it is presumed that:
>
> (1) compliance with the constitutions of this state and the United States is intended;
>
> (2) the entire statute is intended to be effective;
>
> (3) a just and reasonable result is intended;

(4) a result feasible of execution is intended; and

(5) public interest is favored over any private interest.

§ 311.023. Statute Construction Aids

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

(1) object sought to be attained;

(2) circumstances under which the statute was enacted;

(3) legislative history;

(4) common law or former statutory provisions, including laws on the same or similar subjects;

(5) consequences of a particular construction;

(6) administrative construction of the statute; and

(7) title (caption), preamble, and emergency provision.

§ 311.032. Severability of Statutes

(a) If any statute contains a provision for severability, that provision prevails in interpreting that statute.

(b) If any statute contains a provision for nonseverability, that provision prevails in interpreting that statute.

(c) In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.

§ 312.001. Application

This subchapter applies to the construction of all civil statutes.

§ 312.005. Legislative Intent

In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy.

§ 312.006. Liberal Construction

(a) The Revised Statutes are the law of this state and shall be liberally construed to achieve their purpose and to promote justice.

(b) The common law rule requiring strict construction of statutes in derogation of the common law does not apply to the Revised Statutes.

§ 312.013. Severability of Statutes

(a) Unless expressly provided otherwise, if any provision of a statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.

(b) This section does not affect the power or duty of a court to ascertain and give effect to legislative intent concerning severability of a statute.

D. PRINCIPLES OF JUDICIAL REVIEW OF CONSTITUTIONALITY OF STATUTES.

1. Legislation Up To Constitutional Limits. As stated in *State v. Texas Mun. Power Agency*, 565 S.W.2d 258, 271 (Tex. Civ. App.--Houston [1st Dist.] 1978, writ dism'd):

> The Texas legislature may make any law not prohibited by the Constitution of the State of Texas or that of the United States of America.

2. Due Course of Law Attack Only For Constitutionally-Protected Right. In asserting a due course of law claim, the complaining party must establish that his interest is constitutionally protected. *In re J.W.T.*, 872 S.W.2d 189, 190 (Tex.1994).

3. Complaining Party Must Be Injured. Courts will not pass on the constitutionality of a statute upon that complaint of one who fails to show he is injured by its operation. *See Friedrich Air Conditioning & Refrigeration Co. v. Bexar Appraisal Dist.*, 762 S.W.2d 763, 771 (Tex. App.--San Antonio 1988, no writ) (citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1935)). When challenging the constitutionality of a statute, a defendant [in a criminal case] must show that in its operation, the statute is unconstitutional as applied to him in his situation; that it may be unconstitutional as to others is not sufficient. *Bynum v. State*, 767 S.W.2d at 769, 774 (Tex. Crim. App.1989).

4. Limit Inquiry to Record in Case. Constitutional issues will not be decided upon a broader basis than the record requires. *State v. Garcia*, 823 S.W.2d 793, 799 (Tex. App.--San Antonio 1992, pet. ref'd).

5. Presumption of Validity. An analysis of the constitutionality of a statute begins with a presumption of validity. *HL Farm Corp. v. Self*, 877 S.W.2d 288, 290 (Tex. 1994)*; Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 558 (Tex. 1985). "The burden of proof is on those parties challenging this presumption." *General Services Com'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 598 (Tex. 2001). The same requirements are applied under the Texas Constitution as under the United States Constitution. *Reid v. Rolling Fork Pub. Util. Dist.*, 979 F.2d 1084, 1089 (5th Cir.1992); *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 846 (Tex.1990).

6. Interpret to Avoid Unconstitutionality. "When possible, we are to interpret enactments in a manner to avoid constitutional infirmities." *General Services Com'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 598 (Tex. 2001); *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex.1996); *Texas State Bd. of Barber Examiners v. Beaumont Barber Coll., Inc.*, 454 S.W.2d 729, 732 (Tex.1970). "Legislative enactments will not be held unconstitutional and invalid unless it is absolutely necessary to so hold. " *Texas State Bd. of Barber Examiners v. Beaumont Barber College,*

Inc., 454 S.W.2d 729, 731 (Tex.1970). The statute must be upheld if a reasonable construction can be ascertained which will render the statute constitutional and carry out the legislative intent. *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App.1979). "Before a legislative act will be set aside, it must clearly appear that its validity cannot be supported by any reasonable intendment or allowable presumption." *Ex parte Austin Indep. Sch. Dist.*, 23 S.W.3d 596, 599 (Tex. App.--Austin 2000, no pet.).

7. "Facial Invalidity." A statute can be challenged for unconstitutionality based upon "facial invalidity." A statute is not facially invalid unless it could not be constitutional under any circumstances. *See Appraisal Review Bd. of Galveston County v. Tex-Air Helicopters, Inc.*, 970 S.W.2d 530, 534 (Tex. 1998). A statute need not be declared unconstitutional simply because it might be unconstitutional as applied to the facts of another case. *See Weiner v. Wasson*, 900 S.W.2d 316, 332 (Tex. 1995). *See Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454, 463 (Tex.1997) ("We may not hold the statute facially invalid simply because it may be unconstitutionally applied under hypothetical facts which have not yet arisen.").

8. Unconstitutional "As Applied." As noted in 12A TEX. JUR. 3d *Constitutional Law* § 38 (1993):

> A statute otherwise constitutional may be declared unconstitutional in its operation as applied to particular persons, circumstances, or subject matter.

The Austin Court of Appeals explained an "as applied" challenge as follows:

> In an "as applied" constitutional challenge, the challenger must show the statute in issue is unconstitutional when applied to the challenger because of the challenger's particular circumstances. See Texas Workers' Compensation Comm'n v. Garcia, 893 S.W.2d 504, 518 (Tex.1995). To so do, the challenger could show either that (1) the circumstances complained of exist under the facts of the particular case or (2) such circumstances necessarily exist in every case, so that the statute always acts unconstitutionally when applied to the challenger. It is not enough to show that the statute may operate unconstitutionally against the challenger or someone in a similar position in another case.

Texas Workers Compensation Com'n v. Texas Mun. League Intergovernmental Risk Pool, 38 S.W.3d 591, 599 (Tex. App.–Austin 2000, review granted).

9. Determine Legislative Intent. It is not the function of the courts to judge the wisdom of a legislative enactment. *State v. Spartan's Industries, Inc.*, 447 S.W.2d 407 (Tex. 1969). The cardinal rule of statutory construction is to ascertain and follow the legislature's intent. *Citizens Bank v. First State Bank, Hearne*, 580 S.W.2d 344, 348 (Tex.1979). Courts ascertain that intent by initially looking at the language used in the statute. *Jones v. Del Andersen & Assocs.*, 539 S.W.2d 348, 350 (Tex.1976). The words in the statute should be interpreted according to their ordinary meaning; they are not to be interpreted in an exaggerated, forced, or strained manner. *Howell v. Mauzy*, 899 S.W.2d 690, 704 (Tex.App.--Austin 1994, writ denied). Courts need not analyze extrinsic evidence of legislative intent if the intent is apparent from the language of the statute. *Minton v. Frank*, 545 S.W.2d 442, 445 (Tex.1976). The goal of statutory construction is to give effect to the intent of the legislature. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex.1994). If language in a statute is unambiguous, this Court must seek the intent of the legislature as found in the plain and common meaning of the words and terms used. *Id.*

10. Challenges Based on Texas Vs. Federal Constitution. In *University of Texas Medical School v. Than*, 901 S.W.2d 926, 929 (Tex.1995) (a *procedural* due process case), the Texas Supreme Court stated that:

> The Texas due course clause is nearly identical to the federal due process clause, which provides: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . U.S. CONST. amend. XIV, § 1. While the Texas Constitution is textually different in that it refers to "due course" rather than "due process," we regard these terms as without meaningful distinction. Mellinger v. City of Houston, 68 Tex. 37, 3 S.W. 249, 252-53 (1887). As a result, in matters of procedural due process, we have traditionally followed contemporary federal due process interpretations of procedural due process issues. . . . Although not bound by federal due process jurisprudence in this case, we consider federal interpretations of procedural due process to be persuasive authority in applying our due course of law guarantee.

However, in *Davenport v. Garcia*, 834 S.W.2d 4, 20 (Tex. 1992), the Texas Supreme Court differentiated constitutional attacks based on the Texas Constitution from attacks based on the U.S. Constitution:

> In interpreting our constitution, this state's courts should be neither unduly active nor deferential; rather, they should be independent and thoughtful in considering the unique values, customs, and traditions of our citizens. With a strongly independent state judiciary, Texas should borrow from well-reasoned and persuasive federal procedural and substantive precedent when this is deemed helpful, [FN53] but should never feel compelled to parrot the federal judiciary. [FN54] With the approach we adopt, the appropriate role of relevant federal case law should be clearly noted, in accord with Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476- 77, 77 L.Ed.2d 1201 (1983) (presuming that a state court opinion not explicitly announcing reliance on state law is assumed to rest on reviewable federal law). A state court must definitely provide a "plain statement" that it is relying on independent and adequate state law, [FN55] and that federal cases are cited only for guidance and do not compel the result reached. Id. at 1040-41, 103 S.Ct. at 3476-77. See also William J. Brennan, The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U.L.Rev. 535, 552 (1986). Long offers further reason for developing state constitutional law, since now courts, rather than merely adjudicating state constitutional claims, must be prepared to defend their integrity by both quantitatively and qualitatively supporting their opinion with state authority." Duncan, State Courts, at 838. Consistent with this method, we may also look to helpful precedent from sister states in what New Jersey Justice Stewart Pollock has described as "horizontal federalism." Stewart G. Pollock, Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts, 63 Tex.L.Rev. 977, 992 (1985). [Footnotes omtted]

11. A Substantive Due Process Challenge. A “substantive due process” of law challenge was described in the case of *In re B--M--N--*, 570 S.W.2d 493, 503 (Tex.Civ.App.--Texarkana 1978, no writ), as follows:

> In substantive due process cases, the courts balance the gain to the public welfare resulting from the legislation against the severity of its effect on personal and property rights. A law is unconstitutional as violating due process when it is arbitrary or unreasonable, and the latter occurs when the social necessity the law is to serve is not a sufficient justification of the restriction of the liberty or rights involved.

12. Must Raise Constitutional Challenge in Trial Court. Constitutional challenges not expressly presented to the trial court by written motion, answer or other response will not be considered by the appellate courts as grounds for reversal. *City of San Antonio v. Schautteet*, 706 S.W.2d 103, 104 (Tex. 1986).

13. Avoid Constitutional Ruling if Other Grounds Are Available. In *San Antonio General Drivers, Helpers Local No. 657 v. Thornton*, 156 Tex. 641, 299 S.W.2d 911 (1957), the Supreme Court said that "[a] court will not pass on the constitutionality of a statute if the particular case before it may be decided without doing so."

E. THE TEXAS ATTORNEY GENERAL AS PARTY. The Texas Civil Practice and Remedies Code requires that the Attorney General be joined as a party to any declaratory judgment proceeding attacking the constitutionality of a Texas statute.

Tex. Civ. Pract. & Rem. Code § 37.006. Parties

(a) When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding.

(b) In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard.

V. VARIOUS TEXAS FAMILY CODE PROVISIONS DEALING WITH NON-PARENT RIGHTS.

1. § 101.007. Clear and Convincing Evidence

"Clear and convincing evidence" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

In the case of *In Interest of G.M.*, 596 S.W.2d 846, 847 (Tex.1980), the Texas Supreme Court held that the "clear and convincing evidence" standard of proof would be required in all proceedings for involuntary termination of the parent-child relationship. The Texas Legislature now so provides in Texas Family Code § 161.001. As noted in the case of *In re B.L.D.*, 56 S.W.3d 203, 210 (Tex. App.--Waco 2001, no pet. h.), it is "[b]ecause the parent-child relationship enjoys constitutional protection [that] the standard of proof in a termination proceeding is elevated from 'preponderance of the evidence' to 'clear and convincing evidence.'" The question arises whether the constitutional protection of parents to be free from state interference on non-parent access issues similarly requires an elevated standard of proof before the court can order non-parent access. The *Troxel* plurality opinion requires that the parent's decision be given "some special weight." Does that mean a starting presumption in favor of the parent's decision, or does that mean an elevated burden of proof on the non-parent? *In re Marriage of Harris*, the California case cited on page 5 above, ruled that clear and convincing evidence is required.

2. § 101.009. Danger to Physical Health or Safety of Child

"Danger to the physical health or safety of a child" includes exposure of the child to loss or injury that jeopardizes the physical health or safety of the child without regard to whether there has been an actual prior injury to the child.

3. § 101.016. Joint Managing Conservatorship

"Joint managing conservatorship" means the sharing of the rights and duties of a parent by two parties, ordinarily the parents, even if the exclusive right to make certain decisions may be awarded to one party.

Texas courts have permitted grandparents to be appointed as joint managing conservators along with one parent. *See Brook v. Brook*, 881 S.W.2d 297 (Tex.1994); *Connors v. Connors*, 796 S.W.2d 233 (Tex. App.--Fort Worth 1990, writ denied).

4. § 102.003. General Standing to File Suit

(a) An original suit may be filed at any time by:

(1) a parent of the child;

(2) the child through a representative authorized by the court;

(3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;

(4) a guardian of the person or of the estate of the child;

(5) a governmental entity;

(6) an authorized agency;

(7) a licensed child placing agency;

(8) a man alleging himself to be the father of a child filing in accordance with Chapter 160, subject to the limitations of that chapter, but not otherwise;

(9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition;

(10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161 or to whom consent to adoption has been given in writing under Chapter 162;

(11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition;

(12) a person who is the foster parent of a child placed by the Department of Protective and Regulatory Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition; or

(13) a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter 573, Government Code, if the child's parents are deceased at the time of the filing of the petition.

(b) In computing the time necessary for standing under Subsections (a)(9), (11), and (12), the court may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit.

5. § 102.004. Standing for Grandparent

(a) In addition to the general standing to file suit provided by Section 102.003(13), a grandparent may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that:

(1) the order requested is necessary because the child's present environment presents a serious question concerning the child's physical health or welfare; or

(2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.

(b) An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter.

(c) Access to a child by a grandparent is governed by the standards established by Chapter 153.

6. § 102.005. Standing to Request Termination and Adoption

An original suit requesting only an adoption or for termination of the parent-child relationship joined with a petition for adoption may be filed by:

(1) a stepparent of the child;

(2) an adult who, as the result of a placement for adoption, has had actual possession and control of the child at any time during the 30-day period preceding the filing of the petition;

(3) an adult who has had actual possession and control of the child for not less than two months during the three-month period preceding the filing of the petition; or

(4) another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so.

7. § 102.006. Limitations on Standing

(a) Except as provided by Subsection (b), if the parent-child relationship between the child and every living parent of the child has been terminated, an original suit may not be filed by:

(1) a former parent whose parent-child relationship with the child has been terminated by court order;

(2) the father of the child; or

(3) a family member or relative by blood, adoption, or marriage of either a former parent whose parent-child relationship has been terminated or of the father of the child.

(b) The limitations on filing suit imposed by this section do not apply to a person who:

(1) has a continuing right to possession of or access to the child under an existing court order; or

(2) has the consent of the child's managing conservator, guardian, or legal custodian to bring the suit.

8. § 153.131. Presumption That Parent to be Appointed Managing Conservator

(a) Subject to the prohibition in Section 153.004 [history of domestic violence], unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.

(b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection.

A question arises as to whether a grandparent can be appointed a joint managing conservator over the objection of a parent, based merely upon a best interest determination. Several out-of-state cases cited above require clear and convincing evidence to permit just grandparent access–which is far less intrusive than custody. And who has the favorable starting presumption when a grandparent is seeking to be joint managing conservator with both parents? What happens when parents disagree about the appointment of grandparents as joint managing conservators?

In the case of *In re V.L.K.*, 24 S.W.2d 338 (Tex. 2000), the Texas Supreme Court ruled as a matter of statutory interpretation that the parental presumption does not apply to modification proceedings. Does *Troxel* change who has what burden in a modification case. In the *Heltzel* case, discussed on p. 7 above, the Michigan Court of Appeals ruled that *Troxel* protections apply to custody decisions, and that it is unconstitutional to put the burden of proof on a parent seeking to modify a prior custodial award to a non-parent.

9. § 153.191. Presumption that Parent to be Appointed Possessory Conservator

The court shall appoint as a possessory conservator a parent who is not appointed as a sole or joint managing conservator unless it finds that the appointment is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child.

10. § 153.373. Voluntary Surrender of Possession Rebuts Parental Presumption

The presumption that a parent should be appointed or retained as managing conservator of the child is rebutted if the court finds that:

(1) the parent has voluntarily relinquished actual care, control, and possession of the child to a nonparent, licensed child-placing agency, or authorized agency for a period

of one year or more, a portion of which was within 90 days preceding the date of intervention in or filing of the suit;

and

(2) the appointment of the nonparent or agency as managing conservator is in the best interest of the child.

11. § 153.374. Designation of Managing Conservator in Affidavit of Relinquishment

(a) A parent may designate a competent person, authorized agency, or licensed child-placing agency to serve as managing conservator of the child in an unrevoked or irrevocable affidavit of relinquishment of parental rights executed as provided by Chapter 161.

(b) The person or agency designated to serve as managing conservator shall be appointed managing conservator unless the court finds that the appointment would not be in the best interest of the child.

12. § 153.376. Rights and Duties of Nonparent Possessory Conservator

(a) Unless limited by court order or other provisions of this chapter, a nonparent, licensed child-placing agency, or authorized agency appointed as a possessory conservator has the following rights and duties during the period of possession:

(1) the duty of care, control, protection, and reasonable discipline of the child;

(2) the duty to provide the child with clothing, food, and shelter; and

(3) the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child.

(b) A nonparent possessory conservator has any other right or duty specified in the order.

13. § 153.377. Access to Child's Records

A nonparent possessory conservator has the right of access to medical, dental, psychological, and educational records of the child to the same extent as the managing conservator, without regard to whether the right is specified in the order.

14. § 153.431. Grandparental Appointment as Managing Conservators

If the parents are deceased, the grandparents may be considered for appointment as managing conservators, but consideration does not alter or diminish the discretionary power of the court.

15. § 153.432. Suit for Access

(a) A biological or adoptive grandparent may request access to a grandchild by filing:

(1) an original suit; or

(2) a suit for modification as provided by Chapter 156.

(b) A grandparent may request access to a grandchild in a suit filed for the sole purpose of requesting the relief, without regard to whether the appointment of a managing conservator is an issue in the suit.

16. § 153.433. Possession of and Access to Grandchild

The court shall order reasonable access to a grandchild by a grandparent if:

(1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent's parental rights terminated; and

(2) access is in the best interest of the child, and at least one of the following facts is present:

(A) the grandparent requesting access to the child is a parent of a parent of the child and that parent of the child has been incarcerated in jail or prison during the three-month period preceding the filing of the petition or has been found by a court to be incompetent or is dead;

(B) the parents of the child are divorced or have been living apart for the three-month period preceding the filing of the petition or a suit for the dissolution of the parents' marriage is pending;

(C) the child has been abused or neglected by a parent of the child;

(D) the child has been adjudicated to be a child in need of supervision or a delinquent child under Title 3;

(E) the grandparent requesting access to the child is the parent of a person whose parent-child relationship with the child has been terminated by court order; or

(F) the child has resided with the grandparent requesting access to the child for at least six months within the 24-month period preceding the filing of the petition.

This statute was described in *Lilley v. Lilley*, 43 S.W.3d 703, 705 (Tex.App.--Austin 2001, no pet.), as follows:

> Under certain circumstances, a grandparent may petition a trial court for access to a grandchild. Tex. Fam.Code Ann. § 153.433 (West Supp.2001). Section 153.433 provides that a trial court shall allow the grandparent reasonable access to the grandchild if such access is in the best interest of the grandchild and the grandparent's child is a parent of the grandchild and is deceased. Id. § 153.433(2)(A).

17. § 153.434. Limitation on Right to Request Access

A biological or adoptive grandparent may not request possession of or access to a grandchild if:

(1) each of the biological parents of the grandchild has:

(A) died;

(B) had the person's parental rights terminated; or

(C) executed an affidavit of waiver of interest in child or an affidavit of relinquishment of parental rights under Chapter 161 and the affidavit designates an authorized agency, licensed child-placing agency, or person other than the child's stepparent as the managing conservator of the child; and

(2) the grandchild has been adopted, or is the subject of a pending suit for adoption, by a person other than the child's stepparent.

VI. TEXAS COURT DECISIONS REGARDING *TROXEL* AND NON-PARENT RIGHTS.

1. In re T.J.K. In the case of *In re T.J.K.*, 2001 WL 1423602 (Tex. App.--Texarkana Nov. 15, 2001), a custodial father filed a motion to modify a prior agreed order whereby the maternal grandmother was given grandparent access to a child. One ground for the motion to modify was the U.S. Supreme Court's decision in *Troxel v. Granville*. The trial court rejected the constitutional attack on the grounds that by entering into the agreed order the father waived any constitutional complaint he may have had. The Texarkana Court of Appeals rejected this view, and said that the father was not precluded by his earlier agreement from seeking to modify by elimination the earlier order. The appellate court also held that a finding that the Texas statute is unconstitutional would be a material change that could support the requested modification. The case was remanded to the trial court to consider the constitutional challenge.

2. Lilley v. Lilley. In the case of *Lilley v. Lilley*, 43 S.W.3d 703, 710- 713 (Tex. App.--Austin April 12, 2001, no pet.), the Austin Court of Appeals considered the substantive due process invalidity of Texas Family Code § 153.433, providing for grandparent access. The Court upheld the Texas statute, noting the following:

(1) the Washington statute [in *Troxel v. Granville*] did not require a trial court to give any validity to the parent's decision, placing the best-interest determination solely in the hands of the trial judge, who "gave no special weight at all to Granville's determination of her daughters' best interests" and "placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters." In the *Lilley* case, the appellate court noted that "[t]here is no indication that the district court here made any such presumptions or required Wendy [the mother] to show S.M.L. [the child] would be harmed by visitation with Ray [the paternal grandfather]. *Lilley*, 43 S.W.3d at 712.

(2) Section 153.433 of the Texas Family Code is not "breathtakingly broad," as was the Washington statute in *Troxel*. Section 153.433 allows only grandparents, under particular circumstances, to petition for access to a child, provided it is in the child's best interest. *Lilley*, 43 S.W.3d at 712.

(3) The Texas grandparent access statute has already been examined and held to be constitutional. *Deweese v. Crawford*, 520 S.W.2d 522, 526 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ ref'd n.r.e.), overruled on other grounds by *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex.1989) ("The state has sufficient interest in the family relationship to permit legislation in this area."). *Lilley*, 43 S.W.3d at 712.

(4) "[I]n Troxel the parents were never married and the State had not been invited to intervene in the family relationship; the Troxels had enjoyed regular visitation with their grandchildren for two and a half years before their son's suicide and petitioned for access about seven months

later. Troxel, 120 S.Ct. at 2057. In our cause, Wendy and Clay sought the State's intervention into their family's relationships when they filed to dissolve their marriage. When Clay committed suicide in the midst of an unpleasant divorce with parental access issues, the State was already involved in making visitation arrangements for S.M.L. Ray filed his petition during an emotionally charged situation with the daughter-in-law he partially blamed for his son's recent suicide." *Lilley*, 43 S.W.3d at 712.

(5) "Perhaps the most important distinction between Troxel and this cause is that Granville never sought to deny visitation to the grandparents as Wendy does on this appeal; Granville's consistent position was that she wanted shorter and fewer visits than those requested by the Troxels. Id. at 2062-63. Wendy, on the other hand, has taken inconsistent positions about Ray's access to S.M.L. She stated multiple times that she believed it would be in S.M.L.'s best interest to have a relationship with her grandfather. . . . On appeal, she now takes the position that Ray should be allowed no visitation because he poses "a serious threat to [S.M.L.'s] safety and well being," and is not fit to have authority over her. Given her earlier agreements and the eighteen months of successful visitation, Wendy's argument on appeal that visitation with Ray is suddenly not in S.M.L.'s best interest appears disingenuous." *Lilley*, 43 S.W.3d at 712-13.

The Austin Court of Appeals later made the following comment about its holding in *Lilley v. Lilley*:

> Sailor contends by her first issue that the visitation order and the statute authorizing it, Family Code section 153.433, violate her due process right to autonomy in child-rearing decisions. Considering a similar argument shortly after Sailor filed her brief, this Court held that neither section 153.433 nor an order requiring grandparent visitation violated the parents' due-process rights under the Fourteenth Amendment. Lilley v. Lilley, 43 S.W.3d 703, 710-713 (Tex. App.--Austin 2001, no pet.). We find no reason to alter our decision regarding the facial constitutionality of the statute.

Although the Austin Court of Appeals sees the *Lilley* case as a "facial invalidity" case, the court's analysis suggests both a "facial invalidity" analysis and an "as applied" analysis.

3. Sailor v. Phillips. In the case of *Sailor v. Phillips*, 2001 WL 1379923, *2 (Tex. App.--Austin Nov. 8, 2001) (not for publication), the Austin Court of Appeals again rejected a "facial invalidity" attack on the grandparent access statute, Tex. Fam. Code § 53.433, and then proceeded to consider and reject an "as applied" attack, based on substantive due process of law. The Court mentioned *Troxel*, then discussed the wide discretion given to trial judges in visitation decisions, and meshed the two together in this way:

> A trial court has broad discretion in determining the best interest of a child in visitation decisions. Gillespie v. Gillespie, 644 S.W.2d 449, 451 (Tex. 1982); G.K. v. K.A., 936 S .W.2d 70, 72 (Tex. App.--Austin 1996, writ denied); see Dennis v. Smith, 962 S.W.2d 67, 68 (Tex. App.--Houston [1st Dist.] 1997, pet. denied). We will reverse a trial court's order only if the trial court abused its discretion--i.e., acted unreasonably, arbitrarily, or without reference to any guiding principles. G.K., 936 S.W.2d at 72. There is no abuse of discretion if the decision is supported by sufficient, competent evidence. Gillespie, 644 S.W .2d at 451; Dennis, 962 S.W.2d at 68. A trial court does not necessarily abuse its discretion by deciding an issue differently than an appellate court would. Wright v. Wright, 867 S.W.2d 807, 816 (Tex. App.--El Paso 1993, writ denied). The trial court, as fact finder, resolves conflicts in the evidence and determines the weight and credibility to give to witness testimony. Schneider v. Schneider, 5 S.W.3d 925, 931 (Tex. App.--Austin 1999, no pet.). A fact finder's decision on conflicts in the evidence is generally conclusive. Id. These standards apply to orders for grandparent visitation. Lilley, 43 S.W.3d at 705-06. *In applying these principles to grandparent access, the trial court must accord some special*

> *weight to the parent's determination of what access is reasonable. See Troxel v. Granville*, 530 U.S. 57, 70 (2000) (4-2-3 decision, O'Connor, J. writing for the four-member plurality). However, when the parent denies all grandparent access in circumstances governed by section 153.433, the trial court must determine what access is reasonable. *See Lilley*, 43 S.W.3d at 712-713; *see also Troxel*, 530 U.S. at 71. [Emphasis added]

4. In re Aubin. In the case of *In re Aubin*, 29 S.W.3d 199, 203-4 (Tex. App.--Beaumont 2000, no pet.), the appellate court considered a mandamus challenge to an order from an ex parte Texas writ of attachment directing sister-state officials to take custody of children from their temporary-managing-conservator mother (Aubin) and deliver the children into the possession of non-parents (the Burks) who were designated under temporary orders as possessory conservators of the children. The Court noted:

> Absent a finding, supported by evidence, *that the safety and welfare of the children is significantly impaired by the denial of the Burks' visitation*, Aubin's decision regarding whether the children will have any contact with the Burks is an exercise of her fundamental right as a parent. That right is shielded from judicial interference by the Due Process clause of the United States Constitution. Texas Family Code Section 105.001, is unconstitutional as applied to Aubin in the trial court's June 15, 1998, and June 29, 1998, temporary restraining orders [FN5] and the trial court's November 2, 1998, temporary order. The trial court clearly abused its discretion in appointing the Burks as temporary possessory conservators. We direct the Honorable Chap Cain, Judge of the 253rd District Court of Liberty County, Texas, to vacate the November 2, 1998, temporary orders. [Emphasis added]

5. Clark v. Funk. In *Clark v. Funk*, 2000 WL 1203942 (Tex. App.--El Paso Aug. 24, 2000, no pet.) (not for publication), the El Paso Court of Appeals upheld the appointment of a mother, a father, and two paternal grandparents, as joint managing conservators of children. When the mother and father disagreed about management of the children, the paternal grandparents had the final say-so. The El Paso Court of Appeals rejected the mother's *Troxel* attack, saying:

> The Texas statute upon which Clark bases her claim is, unlike the Washington visitation statute in Troxel, very limited in its application and does not simply depend upon a best interest of the child finding. Moreover, and again unlike the situation in Troxel, the record before us clearly reflects that the trial court's order was based, not merely on its singular determination of the best-interest question, but was firmly founded upon special factors that justify the imposition of a tie breaking role for the grandparents that imposes a limited restriction of both parent's fundamental right to make decisions concerning the raising of their children.
>
> A parent appointed conservator of a child has certain rights, privileges, duties, and powers, unless a written finding by the court determines it would not be in the best interest of the child. See Tex.Fam.Code Ann. § 14.02(b). [FN7] When a court appoints both parents conservators, the court shall specify the rights, privileges, duties, and powers that are to be retained by both parents, that are to be exercised jointly, and that are to be exercised exclusively by one parent. See Tex.Fam.Code Ann. § 14.02(a). [FN8] The court allocated the parental rights, privileges, duties, and powers between Clark and Glenn Funk and his parents, for the most part treating Glenn Funk and his parents as a unit. For example, no rights, privileges, duties, or powers are to be exercised exclusively by Glenn Funk but rather exclusively by Glenn Funk and his parents, John and Dorothy Funk.
>
> We do not view the court's actions as depriving Clark of her managing conservatorship powers. The court had the power to grant certain rights, privileges, duties, and powers exclusively to Glenn Funk but did not. Instead, the court attempted to allocate the rights,

privileges, duties, and powers between Clark and the Funks and gave the grandparents controlling say only when Clark and Glenn Funk could not reach agreement if disputes arise. The court further found that such an arrangement was in the best interest of the boys. The trial court did not abuse its discretion. We overrule Clark's third appellate issue.

VII. APPENDIX–THE *TROXEL V. GRANVILLE* OPINIONS.

120 S.Ct. 2054
147 L.Ed.2d 49, 68 USLW 4458, 00 Cal. Daily Op. Serv. 4345, 2000 Daily Journal D.A.R. 5831, 13 Fla. L. Weekly Fed. S 365
(Cite as: 530 U.S. 57, 120 S.Ct. 2054)

<YELLOW FLAG>

Supreme Court of the United States

Jenifer TROXEL, et vir., Petitioners,
v.
Tommie GRANVILLE.

No. 99-138.

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

Paternal grandparents petitioned for visitation with children born out-of- wedlock. The Superior Court, Skagit County, Michael Rickert, J., awarded visitation, and mother appealed. The Court of Appeals, 87 Wash.App. 131, 940 P.2d 698, reversed, and grandparents appealed. The Washington Supreme Court, Madsen, J., affirmed. Certiorari was granted. The Supreme Court, Justice O'Connor, held that Washington statute providing that any person may petition court for visitation at any time, and that court may order visitation rights for any person when visitation may serve best interest of child, violated substantive due process rights of mother, as applied to permit paternal grandparents, following death of children's father, to obtain increased court-ordered visitation, in excess of what mother had thought appropriate, based solely on state trial judge's disagreement with mother as to whether children would benefit from such increased visitation.

Affirmed.

Justice Souter concurred in judgment and filed opinion.
Justice Thomas concurred in judgment and filed opinion.

Justice Stevens dissented and filed opinion.

Justice Scalia dissented and filed opinion.

Justice Kennedy dissented and filed opinion.

West Headnotes

[1] Constitutional Law k252.5
92k252.5

[1] Constitutional Law k254.1
92k254.1

Due Process Clause of the Fourteenth Amendment, like its Fifth Amendment counterpart, guarantees more than fair process; it also includes substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. U.S.C.A. Const.Amends. 5, 14.

[2] Child Custody k22
76Dk22
(Formerly 285k2(2))

Custody, care and nurture of child reside first with parents, whose primary function and freedom include preparing for obligations the state can neither supply nor hinder. (Per Justice O'Connor, with the Chief Justice and two Justices concurring, and with two Justices concurring in result.)

[3] Constitutional Law k274(5)
92k274(5)

Due Process Clause of the Fourteenth Amendment protects fundamental right of parents to make decisions as to care, custody, and control of their children. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law k274(5)
92k274(5)

[4] Child Custody k473
76Dk473
(Formerly 285k2(17))

Washington statute providing that any person may petition court for visitation at any time, and that court may order visitation rights for any person when visitation may serve best interest of child, violated substantive due process rights of mother, as applied to permit paternal grandparents, following death of children's father, to obtain increased court-ordered visitation, in excess of what mother had thought appropriate, based solely on state trial judge's disagreement with mother as to whether children would benefit from such increased visitation; at minimum, trial judge had to accord special weight to mother's own determination of her children's best interests. U.S.C.A. Const.Amend. 14; West's RCWA 26.10.160(3). (Per Justice O'Connor, with the Chief Justice and two Justices concurring, and with two Justices concurring in result.)

[5] Child Custody k455
76Dk455
(Formerly 285k2(8))

There is presumption that fit parents act in best interests of their children. (Per Justice O'Connor, with the Chief Justice and two Justices concurring, and with two Justices concurring in result.)

[6] Parent and Child k2.5
285k2.5
(Formerly 285k2(2))

As long as parent adequately cares for his or her children, i.e., is fit, there will normally be no reason for state to inject itself into private realm of the family, in order to further question ability of that parent to make best decisions as to rearing of that parent's children. (Per Justice O'Connor, with the Chief Justice and two Justices concurring, and with two Justices concurring in result.)

[7] Child Custody k286
76Dk286
(Formerly 285k2(17))

Whether it will be beneficial to child to have relationship with grandparent is, in any specific case, a decision for parent to make in first instance, and if a fit parent's decision becomes subject to judicial review, court must accord at least some special weight to parent's own determination. (Per Justice O'Connor, with the Chief Justice and two Justices concurring, and with two Justices concurring in result.)

[8] Constitutional Law k274(5)
92k274(5)

Due Process Clause does not permit state to infringe on fundamental right of parents to make child-rearing decisions simply because state judge believes a "better" decision could be made. U.S.C.A. Const.Amend. 14. (Per Justice O'Connor, with the Chief Justice and two Justices concurring, and with two Justices concurring in result.)

****2055** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

***57** Washington Rev.Code § 26.10.160(3) permits "[a]ny person" to petition for visitation rights "at any time" and authorizes state superior courts to grant such rights whenever visitation may serve a child's best interest. Petitioners Troxel petitioned for the right to visit their deceased son's daughters. Respondent Granville, the girls' mother, did not oppose all visitation, but objected to the amount sought by the Troxels. The Superior Court ordered more visitation than Granville desired, and she appealed. The State Court of Appeals reversed and dismissed the Troxels' petition. In affirming, the State Supreme Court held, *inter alia*, that § 26.10.160(3) unconstitutionally infringes on parents' fundamental right to rear their children. Reasoning that the Federal Constitution permits a State to interfere with this right only to prevent harm or potential harm to ****2056** the child, it found that § 26.10.160(3) does not require a threshold showing of harm and sweeps too broadly by permitting any person to petition at any time with the only requirement being that the visitation serve the best interest of the child.

Held: The judgment is affirmed.

137 Wash.2d 1, 137 Wash.2d 1, 969 P.2d 21, affirmed.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice GINSBURG, and Justice BREYER, concluded that § 26.10.160(3), as applied to Granville and her family, violates her due process right to make decisions concerning the care, custody, and control of her daughters. Pp. 2059-2065.

(a) The Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," *Washington v. Glucksberg,* 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772, including parents' fundamental right to make decisions concerning the care, custody, and control of their children, see, *e.g., Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551. Pp. 2059-2061.

(b) Washington's breathtakingly broad statute effectively permits a court to 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 interest. A parent's estimation of the child's best interest is accorded no deference. The State Supreme Court had the opportunity, ***58** but declined, to give § 26.10.160(3) a narrower reading. A combination of several factors compels the conclusion that § 26.10.160(3), as applied here, 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. There is a presumption that fit parents act in their children's best interests, *Parham v. J. R.,* 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101; there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children, see, *e.g., Reno v. Flores,* 507 U.S. 292, 304, 113 S.Ct. 1439, 123 L.Ed.2d 1. The problem here is not that the Superior Court intervened, but that when it did so, it gave no special weight to Granville's determination of her daughters' best interests. More importantly, that court appears to have applied the opposite presumption, favoring grandparent visitation. In effect, it placed on Granville the burden of *disproving* that visitation would be in her daughters' best interest and thus failed to provide any protection for her fundamental right. The court also gave no weight to Granville's having assented to visitation even before the filing of the petition or subsequent court intervention. These factors, when considered with the Superior Court's slender findings, show that this case involves nothing more than a simple disagreement between the court and Granville concerning her children's best interests, and that the visitation order was an unconstitutional infringement on Granville's right to make decisions regarding the rearing of her children. Pp. 2060-2063.

(c) Because the instant decision rests on § 26.10.160(3)'s sweeping breadth and its application here, there is no need to consider the question 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 or to decide the precise scope of the parental due process right in the visitation context. There is also no reason to remand this case for further proceedings. The visitation order clearly violated the Constitution, and the parties should not be forced into additional litigation that would further burden Granville's parental right. Pp. 2063-2065.

****2057** Justice SOUTER concluded that the Washington Supreme Court's second reason for invalidating its own state statute--that it sweeps too broadly in authorizing any person at any time to request (and a judge to award) visitation rights, subject only to the State's particular best-interests standard--is consistent with this Court's prior cases. This ends the case, and there is no need to decide whether harm is required or to consider the precise scope of a parent's right or its necessary protections. Pp. 2065- 2067.

***59** Justice THOMAS agreed that this Court's recognition of a fundamental right of parents to direct their children's upbringing resolves this case, but concluded that strict scrutiny is the appropriate standard of review to apply to infringements of fundamental rights. Here, the State lacks a compelling interest in second-guessing a fit parent's decision regarding visitation with third parties. Pp. 2067-2068.

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., and THOMAS, J., filed opinions concurring in the judgment. STEVENS, J., SCALIA, J., and KENNEDY, J., filed dissenting opinions.

Mark D. Olson, for petitioners.

Catherine W. Smith, Howard Goodfriend, for respondent.

For U.S. Supreme Court Briefs See:

1999 WL 1272929 (Reply.Brief)

1999 WL 1146868 (Resp.Brief)

1999 WL 1079965 (Pet.Brief)

1999 WL 1399087 (Amicus.Brief)

1999 WL 1211755 (Amicus.Brief)

1999 WL 1204477 (Amicus.Brief)

1999 WL 1186752 (Amicus.Brief)

1999 WL 1186741 (Amicus.Brief)

1999 WL 1186740 (Amicus.Brief)

1999 WL 1186738 (Amicus.Brief)

1999 WL 1186737 (Amicus.Brief)

1999 WL 1186735 (Amicus.Brief)
1999 WL 1186734 (Amicus.Brief)

1999 WL 1186733 (Amicus.Brief)

1999 WL 1128258 (Amicus.Brief)

1999 WL 1050035 (Amicus.Brief)

1999 WL 1034464 (Amicus.Brief)

1999 WL 1034463 (Amicus.Brief)

1999 WL 1034462 (Amicus.Brief)

For Transcript of Oral Argument See:

2000 WL 41235 (U.S.Oral.Arg.)

***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 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 ****2058** 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 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 and Natalie's best interests:

"The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the 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 was pending. 137 Wash.2d, at 12, 969 P.2d, ***63** 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, ****2059** 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 21, 969 P.2d, at 32-42.

We granted certiorari, 527 U.S. 1069, 120 S.Ct. 11, 144 L.Ed.2d 842 (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 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 2072 (dissenting opinion). Rather, our terminology is 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.

[1] 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, ****2060** 719, 117 S.Ct. 2258 (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, 117 S.Ct. 2258; see also *Reno v. Flores,* 507 U.S. 292, 301-302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

[2] 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, 43 S.Ct. 625, 67 L.Ed. 1042 (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, 45 S.Ct. 571, 69 L.Ed. 1070 (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, 45 S.Ct. 571. We returned to the subject in *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (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 the parents, whose primary ***66** function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.,* at 166, 64 S.Ct. 438.

[3] 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, 92 S.Ct. 1208, 31 L.Ed.2d 551 (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, 92 S.Ct. 1526, 32 L.Ed.2d 15 (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, 98 S.Ct. 549, 54 L.Ed.2d 511 (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, 99 S.Ct. 2493, 61 L.Ed.2d 101 (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, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg, supra,* at 720, 117 S.Ct. 2258 ("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** Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental ****2061** 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").

[4] ***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.

[5][6] 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, 99 S.Ct. 2493 (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 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, 113 S.Ct. 1439.

****2062** 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, 113 S.Ct. 1439.

[7] The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. See *Parham*, *supra*, at 602, 99 S.Ct. 2493. 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.

***71** Finally, we note that there is no allegation that Granville ever sought to cut off ****2063** 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 § 15-5-24.3(a)(2)(iii)-(iv) ***72** (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").

[8] 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, ****2064** the Due Process Clause does not permit a State to infringe on the fundamental right ***73** of parents to make childrearing 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 2079 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter. [FN*] See, *e.g.*, *Fairbanks ***74** 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).

FN* 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 (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).

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 2068-2069. 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 2079. We respectfully disagree. ****2065** 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, 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 2060-2061.

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 relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated." *Post* at 2079. 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. 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 2061-2064, 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, 97 S.Ct. 1932, 52 L.Ed.2d 531 (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. [FN1] Its ruling rested on two independently sufficient grounds: the ****2066** 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 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 2058-2059, 969 P.2d 21. 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, subject only to the State's particular best- interests ***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.

FN1. 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 2057-2058, 969 P.2d 21. 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)).

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, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Wisconsin v. Yoder,* 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Quilloin v. Walcott,* 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Parham v. J. R.,* 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Washington v. Glucksberg,* 521 U.S. 702, 720, 117 S.Ct. 2258 (1997). As we first acknowledged in *Meyer,* the right of parents to "bring up children," 262 U.S., at 399, 43 S.Ct. 625, and "to control the education of their own" is protected by the Constitution, *id.,* at 401, 43 S.Ct. 625. 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, at 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 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"). [FN2] 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.

FN2. 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 2061, 969 P.2d 21.

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 ****2067** he "could make a 'better' decision" [FN3] 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 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, 45 S.Ct. 571 ("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. [FN4] 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.

FN3. Cf. *Chicago v. Morales*, 527 U.S. 41, 71, 119 S.Ct. 1849, 144 L.Ed.2d 67 (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").

FN4. 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).

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, [FN5] see *Chicago v. Morales*, 527 U.S. 41, 55, n. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (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.

FN5. This is the pivot between Justice KENNEDY'S approach and mine.

***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. [FN*]

FN* 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, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999) (THOMAS, J., dissenting).

****2068** 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, 45 S.Ct. 571, 69 L.Ed. 1070 (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 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. [FN1] 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 2059-2060, 2060-2061, 2063-2064. I agree with Justice SOUTER, *ante,* at 2065, and n. 1 (opinion concurring in judgment), that this approach is untenable.

FN1. 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).

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 under the ***82** statute. [FN2] 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, ****2069** and an independent assessment of the facts in this case--both judgments that we are ill-suited and ill-advised to make. [FN3]

FN2. 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.*

FN3. Unlike Justice O'CONNOR, *ante,* at 2061-2062, 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 2061-2062, 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, *ante,* at 2062, " 'I think [visitation] would be in the best interest of the children and I haven't been shown that it is not in [the] best interest of the children,' " 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 a deceased 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.

***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. [FN4] 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 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. [FN5] Thus, ****2070** 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 2067, n. 3, 969 P.2d 21 (opinion concurring in judgment) (quoting *Chicago v. Morales*, 527 U.S. 41, 71, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (BREYER, J., concurring)), is premature.

FN4. 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," *In re Smith*, 137 Wash.2d 1, 21, 969 P.2d 21, 31 (1998), 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 2066, 969 P.2d 21 (SOUTER, J., 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.*

FN5. 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 McDole*, 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.

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 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, 117 S.Ct. 2258 (1997) (STEVENS, J., concurring in judgment). [FN6] 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.

FN6. It necessarily follows that under the far more stringent demands suggested by the majority in *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (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.

The second key aspect of the Washington Supreme Court's holding--that the Federal Constitution requires a showing of 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 ****2071** the Court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State, see *infra*, at 2071-2072 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. [FN7] 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.

FN7. 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, 45 S.Ct. 571, 69 L.Ed. 1070 (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.

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 2059-2061 (opinion of O'CONNOR, J.); *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258 (1997); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). My colleagues are of course correct to recognize that the right of a parent to maintain a relationship with his or her child is among the interests included ***87** most often in the constellation of liberties protected through the Fourteenth Amendment. *Ante*, at 2059-2061 (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, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); see also *Casey*, 505 U.S., at 895, 112 S.Ct. 2791; *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (State may not presume, at factfinding stage of parental rights termination proceeding, that interests of parent and child diverge); see also *ante*, at 2061-2062 (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, 103 S.Ct. 2985, 77 L.Ed.2d 614 (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 full-blown from the biological connection between parent and child. They require relationships more enduring.' " *Id.*, at 260, 103 S.Ct. 2985 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979)).

****2072** Conversely, in *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (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 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, 109 S.Ct. 2333; see also *Lehr*, 463 U.S., at 261, 103 S.Ct. 2985; *Smith v. Organization of Foster Families For Equality & Reform*, 431 U.S. 816, 842-847, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 498-504, 97 S.Ct. 1932, 52 L.Ed.2d 531 (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, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); *Santosky v. Kramer*, 455 U.S., at 766, 102 S.Ct. 1388; *Parham*, 442 U.S., at 605, 99 S.Ct. 2493; *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection, *Santosky*, 455 U.S., at 760, 102 S.Ct. 1388.

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, 109 S.Ct. 2333 (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. [FN8] 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 2059-2060 (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. [FN9]

FN8. 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, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (liberty interest in avoiding involuntary confinement); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d

788 (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, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (First Amendment right to political speech); *In re Gault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (due process rights in criminal proceedings).

FN9. Cf., *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 241-246, 92 S.Ct. 1526, 32 L.Ed.2d 15 (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 school- related decisions by the Amish community.

****2073** 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 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 interests that give rise to disputes such as this. [FN10] 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. ****2074** 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.

FN10. See *Palmore v. Sidoti*, 466 U.S. 429, 431, 104 S.Ct. 1879, 80 L.Ed.2d 421 (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. City of Harker Heights*, 503 U.S. 115, 128, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (matters involving competing and multifaceted social and policy decisions best left to local decisionmaking); *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226, 106 S.Ct. 507, 88 L.Ed.2d 523 (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, 112 S.Ct. 2206, 119 L.Ed.2d 468 (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.

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 farther 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 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 [FN1] --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, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 232-233, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Cf. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937) (overruling *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (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.

FN1. 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, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), purports to rest in part upon that proposition, see *id.*, at 651-652, 92 S.Ct. 1208; but see *Michael H. v. Gerald D.*, 491 U.S. 110, 120-121, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (plurality opinion), though the holding is independently supported on equal protection grounds, see *Stanley, supra*, at 658, 92 S.Ct. 1208.

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 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 ****2075** 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. [FN2]

FN2. 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.

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** 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 non-parent 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 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 ****2076** 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, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651-652, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232-233, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Santosky v. Kramer*, 455 U.S. 745, 753- 754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (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, 64 S.Ct. 438. The principle exists, then, in broad formulation; yet courts must use considerable restraint, including careful 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.' " *In re Smith*, 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." *In re Smith, supra,* 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, 117 S.Ct. 2258 (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 20th-century phenomenon. ****2077** 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 688 (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, 64 S.Ct. 438; *Yoder, supra*, at 233-234, 92 S.Ct. 1526, 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 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, 99 S.Ct. 2493, 61 L.Ed.2d 101 (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, 99 S.Ct. 2493. 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, 97 S.Ct. 1932, 52 L.Ed.2d 531 (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, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (putative natural father not entitled to rebut state law presumption that child born in a ****2078** marriage is a child of the marriage); *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (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, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) (" '[T]he importance of the familial relationship, to the individuals 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, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) (in turn quoting *Yoder*, 406 U.S., at 231-233, 92 S.Ct. 1526))). 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," *In re Smith*, 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 2064, 969 P.2d 21, 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 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, greatgrandparent, 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, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995).

****2079** 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, 117 S.Ct. 2258 (quoting *Palko v. Connecticut*,

302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937)). In my view, it would be more appropriate to conclude that the constitutionality of the application of the best interests standard depends on more specific factors. In short, a fit parent's right vis-a-vis a complete ***101** stranger is one thing; her right vis-a-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, 112 S.Ct. 2206, 119 L.Ed.2d 468 (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 (Tentative 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 third-party 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 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.

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