

IS IT TIME FOR THE COURT TO ACCEPT
THE *O.F.F.E.R.*? APPLYING *SMITH V.*
ORGANIZATION OF FOSTER FAMILIES
FOR EQUALITY AND REFORM TO
PROMOTE CLARITY, CONSISTENCY,
AND FEDERALISM IN THE WORLD OF
DE FACTO PARENTHOOD

STEVEN W. FITSCHEN* AND ERIC A. DEGROFF**

I. INTRODUCTION

As every United States Supreme Court advocate and watcher knows, the Court is fond of letting important legal issues “percolate” in state and lower federal courts before it grants certiorari.¹ Following this trend, it appears to be just a matter of time before the Court will grant certiorari to one of the many cases raising one of the most urgent questions of parental rights in contemporary American society. It is an issue that is commonly associated with the culture wars in our arguably post-heterosexual-married-parents-normative culture: what rights, if any, do non-birth mothers who have separated from their former lesbian partners *qua* so-called *de facto*, or psychological, parents possess vis-à-vis birth mothers? Many other situations have raised, and will continue to raise, this and similar issues

* President, The National Legal Foundation; Formerly, Research Professor of Law, Regent University School of Law; B.S., B.S.F., North Carolina State University; M.A., M.Div., J.D., Regent University.

** Professor and Associate Dean, Regent University School of Law; B.A., University of Kansas; Master of Public Administration, University of Southern California; J.D., Regent University School of Law.

1. *See, e.g.*, *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (“We have in many instances recognized that when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court. *See, e.g.*, *McCray v. New York*, 461 U.S. 961, 961, 963, (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) (‘My vote to deny certiorari in these cases does not reflect disagreement with Justice Marshall’s appraisal of the importance of the underlying issue . . . In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.’)).

involving *de facto*, or psychological, parents, and the Court could grant certiorari in a case involving any number of fact patterns.

Before looking at some likely scenarios that could end up in front of the Court, we pause here to define a *de facto*, or psychological, parent. These terms were imported into the law from the discipline of psychology, and most prominently from psychoanalytic child psychology. *Beyond the Best Interests of the Child*,² a book by Joseph Goldstein, Anna Freud, and Albert J. Solnit, led to the widespread use of both terms. While the book explicitly used the term “psychological parent,”³ courts quickly applied *both* terms to Goldstein, Freud, and Solnit’s concept.⁴ The crux of the concept is found in this passage:

Whether an adult becomes the psychological parent of a child is based thus on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.⁵

We return now to scenarios that could squarely present the Court with the issue of what rights a *de facto*, or psychological, parent may possess. One can begin by examining prior cases in which the Supreme Court has tangentially or superficially addressed the issue or in which the Court has been asked by parties or *amici curiae* to address the issue more directly or fully but has declined to do so.

The first time the term “*de facto* parent” or “psychological parent” appeared in a Supreme Court opinion was in 1977’s *Smith v. Organization of Foster Families for Equality and Reform* (otherwise known as “*O.F.F.E.R.*”), which covered four consolidated cases.⁶ These cases, before

2. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973). The book was preceded by a law review note, Anna Freud, *Alternatives to “Parental Right” in Child Custody Disputes Involving Third Parties*, 73 *YALE L.J.* 152 (1963). One of Anna Freud’s biographers describes the relationship between the note and the book: “In legal circles, the stage had been set for the appearance of *Beyond the Best Interests of the Child* by a Yale Law Journal Note by Goldstein’s group” ELISABETH YOUNG-BRUEHL, *ANNA FREUD: A BIOGRAPHY* 505 n.56 (2d ed. 2008).

3. See, e.g., GOLDSTEIN, FREUD & SOLNIT, *supra* note 2, at 17.

4. See, e.g., *M. v. Catholic Guardian Soc.*, 352 N.Y.S. 2d 319, 322–23 (Fam. Ct. 1973) (citing *BEYOND THE BEST INTERESTS OF THE CHILD* even prior to its publication as the source of the term “psychological parent”). *Vlasta Z. v. San Bernardino Cnty. Welfare Dept. (In re B. G.)*, 523 P.2d 244, 253 n.18 (Cal. 1974) (citing *BEYOND THE BEST INTERESTS OF THE CHILD* for the definition of *de facto* parent).

5. GOLDSTEIN, FREUD & SOLNIT, *supra* note 2, at 19.

6. 431 U.S. 816 (1977).

the Court under its appellate jurisdiction, raised the issue of whether a New York law governing the removal of foster children from foster homes violated the Fourteenth Amendment's procedural due process protections.⁷ Reversing a three-judge district court panel, the Court held that the law did not violate these protections.⁸

As summarized by the Court, the case involved three competing interests: the interests of foster parents, the natural parents, and the children:

The appellees' basic contention is that when a child has lived in a foster home for a year or more, a psychological tie is created between the child and the foster parents which constitutes the foster family the true "psychological family" of the child. That family, they argue, has a "liberty interest" in its survival as a family protected by the Fourteenth Amendment. Upon this premise they conclude that the foster child cannot be removed without a prior hearing satisfying due process. Appointed counsel for the children, appellants in No. 76-5200, however, disagrees, and has consistently argued that the foster parents have no such liberty interest independent of the interests of the foster children, and that the best interests of the children would not be served by procedural protections beyond those already provided by New York law. The intervening natural parents of children in foster care, appellants in No. 76-5193, also oppose the foster parents, arguing that recognition of the procedural right claimed would undercut both the substantive family law of New York, which favors the return of children to their natural parents as expeditiously as possible, and their constitutionally protected right of family privacy, by forcing them to submit to a hearing and defend their rights to their children before the children could be returned to them.⁹

Although the Court cited the Goldstein, Freud & Solnit book several times in an extensive discussion of psychological parenthood¹⁰ (in fact, it was one of the citations omitted in the prior quotation), it ultimately declined to rule on that issue, noting that "this case turns, not on the disputed validity of any particular psychological theory, but on the legal consequences of the undisputed fact that the emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those existing in biological families."¹¹

7. *Id.* at 818–21.

8. *Id.* at 822–23.

9. *Id.* at 839–40 (citations omitted).

10. *Id.* at 839, 844 n.52, 854.

11. *Id.* at 844 n.52.

In *Michael H. v. Gerald D.*, the terms “*de facto* father” and “*de facto* relationship” appeared, but only in the Court’s description of the facts and procedural history;¹² they formed no part of the Court’s analysis. Instead, in this contest between a presumptive father and a biological father (and the child’s related attempt to retain a legally recognized relationship with both), the Court upheld California’s presumption of paternity statute against procedural and substantive due process and equal protection challenges without resort to the *de facto* parent doctrine.¹³

The third time the concept showed up was in *Troxel v. Granville*, mentioned by Justice Kennedy in his dissent.¹⁴ At issue was a Washington state statute that permitted “[a]ny person” to petition a superior court for visitation rights “at any time,” and authorize[d] that court to grant such visitation rights whenever “visitation may serve the best interest of the child.”¹⁵ The Court held the statute violated the Fourteenth Amendment’s substantive due process protections, and Justice Kennedy dissented because he read the opinion below from the Washington Supreme Court to have declared the statute unconstitutional on its face.¹⁶ Justice Kennedy was not persuaded that there were not instances in which the statute could be constitutionally applied, noting that “a fit parent’s right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a *de facto* parent may be another.”¹⁷

However, these three cases do not exhaust the possible scenarios in which the doctrine could be presented to the Court. Numerous parties have brought the issue to the Court’s attention in their certiorari petition-stage briefing, merits-stage briefing, or both.¹⁸

As mentioned at the outset of this Article, one key arena for the psychological parent issue has been cases involving former same-sex partners. And of this category, the litigation with the highest profile to date has been that between Lisa Miller and Janet Jenkins. They have engaged in litigation in Virginia and Vermont over custody and visitation issues

12. *Id.* at 110, 114, 116.

13. *Id.* at 121, 130–32.

14. *Troxel v. Granville*, 530 U.S. 57, 101 (2000). (Kennedy, J., dissenting).

15. *Id.* at 60 (citations omitted).

16. *Id.* at 94 (Kennedy, J., dissenting).

17. *Id.* at 100–01 (Kennedy, J., dissenting).

18. In addition, various amici curiae have supplemented party briefing or have introduced the issue even when the parties themselves have not. This Article will not canvass those efforts.

surrounding Isabella, Miller's biological daughter.¹⁹ The first certiorari petition filed by Miller succinctly explained the genesis of the litigation:

Lisa and Janet lived together in Virginia in the late 1990s. In December 2000, while Virginia residents, they traveled to Vermont to enter into a Vermont civil union and immediately returned to Virginia. In 2001, Lisa was artificially inseminated in Virginia, by a Virginia doctor, with sperm from an anonymous donor. Janet did not provide any genetic material for the insemination.

Lisa gave birth to IMJ in Virginia in XX/XX/2002 and is the sole parent listed on IMJ's Virginia birth certificate. In XX/XX/2002, Lisa, Janet, and IMJ moved to Vermont. When her relationship with Janet ended in September 2003, Lisa returned home to Virginia with IMJ. Janet continued to live in Vermont.

Wanting to dissolve her civil union, in November 2003, Lisa *pro se* filed forms in Vermont to dissolve the civil union. Vermont was the only place she could dissolve the civil union because no other state recognized a Vermont civil union as valid. The *pro se* complaint form asked whether there were "biological or adoptive children of said civil union." Lisa, who gave birth to IMJ during the civil union, listed IMJ in response to that question. Janet counterclaimed, seeking full custody of Lisa's biological child, absent any allegation that Lisa was an unfit mother.

On June 17, 2004, the Vermont court entered a "temporary order re: parental rights and responsibilities." Over Lisa's objection, and without deciding whether Janet was a parent to IMJ, the court awarded Lisa "legal and physical responsibility" of her child, but granted Janet temporary "parent child contact." Lisa was ordered to give Janet one week each month of unsupervised visitation with then two-year old IMJ in Vermont beginning in August 2004. On July 1, 2004, Lisa filed a petition in a Virginia circuit court asking the court to declare her IMJ's sole parent pursuant to Virginia's assisted fertilization statute.²⁰

Lisa's effort to reverse the Vermont court's ruling and subsequent Vermont rulings, and Janet's effort to have them enforced, resulted in five certiorari petitions: two directed towards to the Vermont Supreme Court,²¹

19. Petition for Writ of Certiorari, *Miller-Jenkins v. Miller-Jenkins*, 550 U.S. 918 (2007) (No. 06-1110), 2007 WL 432468, at *2. The facts detailed in the remainder of this paragraph come from the same source. *Id.* at *2-5.

20. *Id.* at *2-3 (citations to the cert. petition appendix and footnote omitted; redactions in the original).

21. *Id.*; Petition for Writ of Certiorari, *Miller-Jenkins v. Miller-Jenkins*, 555 U.S. 888 (2008) (No. 08-178), 2008 WL 3540290.

two directed towards the Virginia Supreme Court,²² and one directed toward the Virginia Court of Appeals.²³ This protracted litigation involved equal protection and due process challenges,²⁴ but also involved the interplay between the Parental Kidnapping Prevention Act, the Defense of Marriage Act, and the Full Faith and Credit Clause of the Constitution.²⁵ When Lisa had ultimately exhausted her legal remedies and lost to Janet, she fled the country, taking Isabella with her.²⁶

Lower profile petitioners and respondents have also raised the psychological parent issue in the same-sex partner context.²⁷ Similarly, the psychological parent issue has arisen in the context of the rights of grandparents in cases other than *Troxel*, involving either visitation²⁸ or custody.²⁹ And the foster care context has also appeared in cases other than *O.F.F.E.R.*, involving adoption³⁰ or placement.³¹ Other cases, however,

22. Petition for Writ of Certiorari, *Miller-Jenkins v. Miller-Jenkins*, 555 U.S. 1069 (2008) (No. 08-306), 2008 WL 4143111; Petition for Writ of Certiorari, *Miller v. Jenkins*, 131 S. Ct. 568 (2010) (No. 10-177), 2010 WL 3068080.

23. Petition for Writ of Certiorari, *Miller-Jenkins v. Miller-Jenkins*, 552 U.S. 1166 (2008) (No. 07-672), 2007 WL 4142618.

24. See, e.g., *Petition for Writ of Certiorari, Miller-Jenkins*, 2008 WL 3540290, at *2.

25. See, e.g., *Petition for Writ of Certiorari, Miller-Jenkins*, 2007 WL 432468, at *i.

26. Wilson Ring, *Pastor Appeals Conviction in Same-Sex Custody Case*, RUTLAND HERALD, July 25, 2013, <http://rutlandherald.com/apps/pbcs.dll/article?AID=/20130725/NEWS03/707259918?template=printart>. This in turn led to the conviction of a pastor who had aided Lisa and Isabella in leaving the country. *Id.*

27. Petition for Writ of Certiorari, *Crandall v. Wagner*, 528 U.S. 1056 (1999) (No. 99-678), 1999 WL 33640915 at *27-29; Brief in Opposition to Petition for Writ of Certiorari, *L.M.M. v. E.N.O.*, 528 U.S. 1005 (1999) (No. 99-531), 1999 WL 33640824 at *i; Reply Brief, *L.M.M. v. E.N.O.*, 528 U.S. 1005 (1999) (No. 99-531), 1999 WL 33640826 at *i; Petition for a Writ of Certiorari, *M.J.B. v. V.C.*, 531 U.S. 926 (2000) (No. 00-41), 2000 WL 33999566 at *3; Brief of Respondent Debra H. in Opposition, *Janice R. v. Debra H.*, 131 S.Ct. 908 (2011) (No. 10-441), 2010 WL 4902257 at *11; Petition for Writ of Certiorari, *Kristina S. v. Charisma R.*, 559 U.S. 938 (2010) (No. 09-677), 2009 WL 4726611 at *2; Petition for Writ of Certiorari, *Sharon S. v. Annette F.*, 547 U.S. 1149 (2006) (No. 05-1313), 2006 WL 993754 at *6; Petition for a Writ of Certiorari, *Britain v. Carvin*, 547 U.S. 1143 (2006) (No. 05-974), 2006 WL 263544 at *2; Petition for Writ of Certiorari, *Clark v. McLeod*, 545 U.S. 1111 (2005) (No. 04-1392), 2005 WL 899481 at *7.

28. Petition for Writ of Certiorari, *Nawrocki v. Nawrocki*, 555 U.S. 944 (2008) (No. 08-180), 2008 WL 3540292 at *12; Petition for a Writ of Certiorari, *Sunderland v. Wash. Dep't of Soc. & Health Servs.*, 555 U.S. 815 (2008) (No. 07-1384), 2008 WL 1969303 at *14; Petition for Writ of Certiorari, *Lamont v. O'Donnell*, 543 U.S. 1050 (2005) (No. 04-449), 2004 WL 2213559 at *6-7; Petition for Writ of Certiorari, *Sherfey v. Sherfey ex rel Sherfey*, 537 U.S. 1110 (2003) (No. 02-723), 2002 WL 32133620 at *7.

29. Brief in Opposition, *Seitz v. Speagle*, 536 U.S. 923 (2002) (No. 01-1509), 2002 WL 32134734 at *7.

30. Brief in Opposition on Behalf of the Cradle Society, Legal Guardian of M.A.G. aka M.A.B., *Sharen G. v. Huron Cty. Dep't of Jobs & Family Servs.*, 552 U.S. 1040 (2007) (No. 07-401), 2007 WL 3196726 at *12-13; Petition for a Writ of Certiorari with Appendix, *Baker v. Shao-Qiang He (In re*

have involved numerous other contexts, such as adoption beyond the foster care setting³² (including one that implicated the Indian Child Welfare Act³³), conflicts between biological parents and step-parents (or non-marital partners),³⁴ a dispute over whether a child is covered by a federal statute,³⁵ a constitutional challenge to the tort of alienation of affection,³⁶ a challenge to lack of relief from child support by a *de facto*, non-biological father,³⁷ the rights of psychological parents under the federal Education for All Handicapped Children Act,³⁸ attempts to avoid deportation due to putative psychological parent status,³⁹ and the enforceability of a contract requiring the destruction of frozen embryos.⁴⁰

The fact patterns presented above do not cover all the conceivable situations in which the psychological parent issue could reach the Court. Given that, as of this writing, twelve states—Arkansas, California, Connecticut, Hawaii, Illinois, Maine, Nevada, Ohio, Oregon, Virginia, Washington, and Wisconsin—have statutes allowing *any* person to seek

AMH), 551 U.S. 1146 (2007) (No. 06-1503), 2007 WL 1434963 at *2–3; Petition for a Writ of Certiorari, *Rodriguez v. McLoughlin*, 532 U.S. 1051 (2001) (No. 00-1314), 2001 WL 34116815 at *2; Petition for a Writ of Certiorari, *Dep't of Soc. Servs. v. J.C. (In re A.L.C.)*, 474 U.S. 971 (1985) (No. 85-364), 1985 WL 695173 at *7–9.

31. Petition, *A.C. v. Iowa*, 485 U.S. 1008 (1988) (No. 87-1432), 1988 WL 1093637 at *5–6; Brief for Respondent-Intervenors, Mr. & Mrs. John Balogh, Foster Parents for the Child Jed Sandosky, *Santosky v. Kramer*, 455 U.S. 745 (1982) (No. 80-5889), 1981 WL 389934 at *1–4.

32. Petition for Writ of Certiorari, *Vaughn v. Wyrembek (In re Adoption of G.V.)*, 131 S. Ct. 1610 (2011) (No. 10-882), 2011 WL 63547 at *13–14; Petition, *Robert C. v. Miguel T.*, 498 U.S. 984 (1990) (No. 90-597), 1990 WL 10058497 at *5–6; Petition, *Bringle v. Washington State Dep't of Soc. & Health Servs.*, 490 U.S. 1019 (1989) (No. 88-868), 1988 WL 1094888 at *3–4; Appellant's Brief, *Caban v. Mohammed*, 441 U.S. 380 (1979) (No. 77-6431), 1978 WL 207155 at *2.

33. James R.'s & Collette R.'s Brief in Opposition to Petition for Writ of Certiorari, *Dry Creek Rancheria v. Bridget R.*, 520 U.S. 1181 (1997) (No. 96-828), 1997 WL 33561259 at *i.

34. Petition for Writ of Certiorari, *E.S.H. v. K.D.*, 131 S. Ct. 597 (2010) (No. 10-204), 2010 WL 3183991 at *2; Petition for a Writ of Certiorari, *Amy G. v. M.W.*, 550 U.S. 934 (2007) (No. 06-1190), 2007 WL 683955 at *10; Petition Brief, *Dittler v. Robey (In re Custody of Dittler)*, 528 U.S. 824 (1999) (No. 98-2047), 1999 WL 33639431 at *10.

35. Petition for Writ of Certiorari, *Jordan v. U.S. Dep't of Labor*, 560 U.S. 940 (2010) (No. 09-1201), 2010 WL 2771720 at *2.

36. Petition for Writ of Certiorari, *Fitch v. Valentine*, 552 U.S. 1100 (2008) (No. 07-569), 2007 WL 3196730 at *16–17.

37. Petition for Writ of Certiorari, *Smith v. Odum*, 536 U.S. 905 (2002) (No. 01-1520), 2002 WL 32134792 at *6.

38. Petition, *Reardon v. Miller*, 488 U.S. 1031 (1989) (No. 88-894), 1988 WL 1093362 at *26–27. In this hard-to-follow *pro se* petition, Reardon variously claims to be a natural father, a father by court order, a father pursuant to various statutes, not a father, and a psychological father.

39. Petition, *INS v. Hector*, 479 U.S. 85 (1986) (No. 86-21), 1986 WL 767003 at *6; Petition for a Writ of Certiorari, *Katsoulis v. INS*, 522 U.S. 1027 (1997) (No. 97-279), 1997 WL 33557824 at *2–3.

40. Reply Brief to Brief in Opposition to Granting the Writ of Certiorari, *Roman v. Roman*, 552 U.S. 1258 (2008) (No. 07-926), 2008 WL 534803 at 2–3.

visitation with a child,⁴¹ the scenarios are endless. Furthermore, under the persuasive principles of the American Law Institute's *American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations*, one parent under certain circumstances can "allow another person to be a de facto parent without the knowledge or consent of the other parent."⁴² Only time will tell how many states may adopt this approach.

Given the above situations and the issues they create, it is imperative for the Court to adopt a test that will serve American society and its families well. The purpose of this Article is to propose such a test.

One argument is that no matter how tragic or complicated the facts of a case are, the only appropriate approach is to hold that the rights of biological and adoptive parents trump the rights of anyone else, absent a finding of unfitness. That is tantamount to saying that the concept of psychological, or *de facto*, parenthood ought to be rejected, and in cases of conflict, a biological or adoptive parent's rights are always superior to a *de facto* parent's rights.⁴³ This Article will not make that argument, however. Rather, in the face of the existing legal landscape, we presume that a non-bright line test is likely to be adopted by the Court, or by lower courts until the Court grants certiorari and rules on the issue.

In pursuit of a non-bright line test that would serve the legitimate interests of all, this Article will first, in Part II, document the current disparity in treatment of psychological and *de facto* parents by different states. Part II concludes by noting that this disparity implicates both issues of state and federal constitutional law. Furthermore, the Court's opinion in *O.F.F.E.R.* provides principles that would both protect federalism and vindicate the constitutional rights of everyone involved in psychological parent cases.⁴⁴ This Article, therefore, suggests that if the Court were to address this issue, it should apply the analytical construct already provided in *O.F.F.E.R.* and, so to speak, accept the *O.F.F.E.R.* Part III demonstrates how this test would accomplish these goals.

41. Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 *Fam. L.Q.*, 1, 8 Spring 2013 (compiling statutes).

42. William C. Duncan, *Waxing State, Waning Family: The Radical Agenda of the American Law Institute*, *FAM. AM.*, Winter 2010, at 21.

43. Indeed, this approach is followed in at least twelve states. *See infra* notes 4 7, 51–62 and accompanying text.

44. *See supra* notes 6–11 and accompanying text.

2015]

Is it Time for the Court to Accept The O.F.F.E.R.?

427

II. THE NEED FOR FURTHER CLARITY—DISPARITY AMONG THE STATES

As noted in Part I, there are many circumstances in which the status of psychological parents has been litigated. Virtually all of these cases have a single issue in common: the extent to which a fit legal parent has the right to influence the development of his or her own minor child. As this question has worked its way through the courts, the states have effectively served, as Justice Stevens suggested they should, as judicial “laboratories.”⁴⁵ In the process, substantial disparity has developed among the states regarding the legitimacy and nature of psychological parent status.⁴⁶

If the range of state court decisions were viewed as a spectrum, at one end would be at least twelve states that have expressly rejected the notion of *de facto*, or psychological, parenthood.⁴⁷ In seven additional jurisdictions, although not addressing this specific issue, courts have held that the rights of a fit natural or adoptive parent are fundamental; most of those jurisdictions have stated explicitly that challenges to those rights are subject to strict scrutiny.⁴⁸ At the opposite end of the spectrum, at least eighteen jurisdictions have adopted doctrines including *de facto* or psychological parenthood that would justify an award of custody or visitation to third parties over the objection of a fit legal parent.⁴⁹

45. *McCray v. New York*, 461 U.S. 961, 963 (1983).

46. The categories of jurisdictions discussed in this part of the article have been based upon a comprehensive review of cases addressing the issue of *de facto* or psychological parenthood at the time of this writing. States or territories not listed have been omitted from this discussion because their courts either have not addressed the issue in a context relevant to this discussion, or have addressed the issue in such a way that the jurisdictions do not fall clearly within any of the selected categories.

47. Arizona, Illinois, Iowa, Maryland, Missouri, New York, North Carolina, Ohio, Tennessee, Texas, Utah, and Virginia have expressly rejected the doctrine of *de facto* or psychological parenthood. *See infra* notes 51–62 and accompanying text.

48. Courts in Alabama, Florida, Hawaii, Kansas, Maine, Mississippi, and South Carolina have explicitly stated that the rights of a fit natural parent are fundamental, and are therefore subject only to concerns of a compelling nature and to actions or provisions that are narrowly tailored to accomplish that interest. *See infra* notes 66–72 and accompanying text.

49. Arkansas, California, Colorado, Delaware, Indiana, Kentucky, Massachusetts, Minnesota, New Jersey, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin, as well as the District of Columbia, have all followed this apparent trend. *See infra* notes 74–91 and accompanying text.

This list may actually understate the degree to which states have been transitioning away from the traditional common law emphasis on biological relationships. In Idaho, for example, the courts do not appear to have adopted the *de facto* or psychological parent doctrine, but do seem to be moving toward a “best interests” standard in which biological relationships are merely one of many factors. *Compare Andersen v. Crapo (In re Anderson)*, 589 P.2d 957, 966 (Idaho 1978) (criticizing other states

Somewhere toward the middle of the spectrum are courts in at least six states that have adopted a formula giving “preference” to legal parents in disputes over custody or visitation, but no express finding that the parents’ rights are fundamental.⁵⁰

for elevating the rights of psychological parents over the rights of biological parents), *with DeBernardi v. Steve D.* (*In re Steve D.*), 723 P.2d 829, 834 (Idaho 1986) (overturning *Anderson* and criticizing the *Anderson* majority for “focusing unduly on the rights of . . . natural parents” only eight years later).

Other states that appear to be shifting away from the traditional common law approach, but without expressly adopting the *de facto* parent doctrine, include Nebraska and Nevada. In Nebraska, a former domestic partner sought custody and visitation rights after she and the child’s natural mother separated. Finding no statutory basis for standing, the Nebraska Supreme Court nevertheless overturned the district court’s dismissal of the former partner’s petition. The court did not address the question of *de facto* or psychological parent status, but held that the plaintiff could establish standing based on the doctrine of *in loco parentis*. With regard to Nevada, the state Supreme Court in 1984 considered a consolidated appeal in which the parental rights of four couples had been terminated. Describing the rights of natural parents as “sacred,” the court criticized what it saw as a trend by courts in other states to “diminish the value of parental autonomy” and shift the focus toward the interests of the child. Disparaging the influence of Goldstein, Freud, and Solnit and the emerging emphasis on psychological parent status, the court opined that the interests of children should not “displace established liberty interests of natural parents.” *See Champagne v. Welfare Div.*, 691 P.2d 849, 854, 857 n.6 (Nev. 1984). The Champagne case, however, was later superseded, and in 1997, a dissenting opinion in *Gonzales v. Dep’t of Human Res.* (*In re Parental Rights of Gonzales*), 933 P.2d 198, 208 (Nev. 1997) (Springer, J., dissenting), complained that the Nevada Supreme Court was now guilty of “spouting pop psychology” and adopting “a new, unconstitutional standard for terminating parental rights” where the children have “bonded” with their foster parents

50. These states include Alaska, Connecticut, Georgia, Louisiana, Michigan, and South Dakota. *See, e.g., Elton H. v. Naomi R.*, 119 P.3d 969, 976–77 (Alaska 2005) (holding that a parent is entitled to a custodial preference over a non-parent, which can be overridden only by clear and convincing evidence that the parent is unfit or the welfare of the child requires the child to be placed in the custody of a non-parent); *Fish v. Fish*, 939 A.2d 1040, 1052 (Conn. 2008) (explaining that in disputes between parents and non-parents, the parent receives the benefit of a rebuttable presumption unless parental custody would clearly be detrimental to the child); *Clark v. Wade*, 544 S.E.2d 99, 106–07 (Ga. 2001) (holding that parents have a constitutional right under both the United States and Georgia Constitutions to the care and custody of their children, with which the state may interfere only if the biological parent is unfit or parental custody would result in harm to the child); *Gill v. Bennett*, 82 So.3d 383, 390 (La. Ct. App. 2011) (holding that there is no authority in Louisiana, “statutory or otherwise, which establishes a ‘de facto’ parental status”); *Black v. Simms*, 12 So. 3d 1140, 1143 (La. 2009) (awarding visitation rights to non-biological parents, but construing narrowly the circumstances under which such rights might be awarded to nonparents); *Heltzel v. Heltzel*, 638 N.W.2d 123, 135–36 (Mich. Ct. App. 2001) (citing *Troxel*, and holding that custody with a fit natural parent is in the best interests of the child); *Cooper v. Merkel*, 470 N.W.2d 253, 255–56 (S.D. 1991) (absent extraordinary circumstances, visitation rights may not be granted to a non-parent against the wishes of a fit natural parent).

Louisiana law is somewhat challenging to categorize, but the courts in that state have generally shown a high regard for the rights of fit legal parents. In one recent case, a child’s natural father brought an action seeking custody of the child, born out of wedlock, while the child’s maternal grandmother claimed custody as a *de facto* parent. Awarding joint custody to both natural parents and visitation rights to the grandmother, the court explained that it had “found no Louisiana authority, statutory or otherwise, which establishes a ‘de facto’ parental status.” The court stated further, however, that there had been litigation “over the years” “between ‘psychological parents’ and parents regarding custody

With regard to the first group of states, the notion of *de facto*, or psychological, parent status has been expressly rejected by appellate courts in Arizona,⁵¹ Illinois,⁵² Iowa,⁵³ Maryland,⁵⁴ Missouri,⁵⁵ New York,⁵⁶ North

and visitation.” *Gill*, 82 So. 3d at 390. The court stated that “where there is a conflict between parents and nonparents, the parent has a paramount right to custody of the child, and may only be deprived of that right for compelling reasons.” *Id.* Two years earlier, a former lesbian partner had petitioned the court for sole custody or joint custody with the child’s biological mother along with reasonable visitation. *Black*, 12 So.3d at 1140. The Louisiana Supreme Court in that case affirmed the trial court’s dismissal of the petition. Citing *Troxel*, the court described the “special liberty interest of parents in the care, custody, and control of their children as one of the fundamental liberty interests protected by the Due Process Clause of the Fourteenth Amendment.” *Id.* at 1143. Noting that the Louisiana legislature had adopted a statute under which nonparents may acquire visitation rights, the court stated that visitation for nonparents as opposed to parents can still “only occur in rare circumstances.” *Id.*

51. *Egan v. Fridlund-Horne ex rel Cnty. of Coconino*, 211 P.3d 1213, 1221 (Ariz. Ct. App. 2009) (noting that “Arizona has not adopted the *de facto* parent doctrine”). Note, however, that the Arizona courts, in applying the state’s statutory law, have granted visitation rights to a party standing *in loco parentis* despite the objections of the child’s fit legal parent who was still caring for the child. *See Riepe v. Riepe*, 91 P. 3d 312, 318 (Ariz. Ct. App. 2004).

52. *A.B. v. H.L. (In re Visitation with C.B.L.)*, 723 N.E.2d 316, 320–21 (Ill. App. Ct. 2012) (declining to recognize the concept of *de facto* parent in a case involving the former lesbian partner of the biological mother).

53. *In re Ash*, 507 N.W.2d 400, 405 (Iowa 1993) (refusing to redefine parenthood to accommodate the wishes of a nonparent, despite the fact that the nonparent had assumed fatherly responsibilities since the child’s birth and had continued providing financial support for years after his relationship with the mother ended). *See also Wurpts v. Iowa Dist. Ct. for Sioux Cnty.*, 687 N.W.2d 286, 289 (Iowa 2004) (describing a “parent’s interest in the care, custody, and control of his or her child” as “perhaps the oldest of the fundamental liberty interests”).

54. *Janice M. v. Margaret K.*, 948 A.2d 73, 86, 93 (Md. 2008) (referencing *Troxel* in a dispute between an adoptive mother and former lesbian partner, and holding that *de facto* parent status is not recognized in Maryland; denying former partner’s petition for custody or visitation in the absence of proof that the legal mother was unfit or other exceptional circumstances prevailed).

55. *White v. White*, 293 S.W.3d 1, 14–15 (Mo. Ct. App. 2009) (in a dispute between the child’s natural mother and a former lesbian partner, finding that there were no Missouri cases recognizing or adopting the concept of *de facto* or equitable parent). The court also declined to follow the reasoning in *Rubano* and construe the Missouri Uniform Parentage Act in a gender-neutral way. For a brief discussion of the Rhode Island Supreme Court decision in *Rubano*. *See infra* notes 158, 160–62 and accompanying text.

56. *See, e.g., Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991). In *Alison D.*, a former lesbian partner of the child’s natural mother sought visitation rights as a *de facto* parent following the couple’s separation. Affirming the lower court’s dismissal of her claim, the Court of Appeals held that the New York Domestic Relations Law did not authorize visitation by nonparents “absent grievous cause or necessity.” *Id.* at 29. “Traditionally in this State it is the child’s mother and father who, assuming fitness, have the right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parents’ consent To allow the courts to award visitation—a limited form of custody—to a third person would necessarily impair the parents’ right to custody and control.” *Id.* Though the Court of Appeals has had numerous opportunities to overturn *Alison D.* over the years, it has steadfastly declined to do so. *See, e.g., Debra H. v. Janice R.*, 930 N.E.2d 184, 194 (N.Y. 2010) (declining to overturn *Alison D.*, but holding that a former lesbian partner could acquire joint custody of, or visitation with, her former partner’s child, under the doctrine

Carolina,⁵⁷ Ohio,⁵⁸ Tennessee,⁵⁹ Texas,⁶⁰ Utah⁶¹ and Virginia.⁶² In at least nine of those states, the courts have specifically considered the relative rights of biological or adoptive parents and same-sex partners.⁶³ In each of those cases, the courts determined that the childrearing choices of legal parents should control absent a finding of unfitness or a compelling state interest. Both the Virginia Supreme Court and Maryland Court of Appeals based their decisions, at least in part, upon guidance provided by the Court's opinion in *Troxel*.⁶⁴ The Arizona court, by contrast, found *Troxel* not controlling under the dictates of a unique state statute. Nevertheless, the Arizona Supreme Court expressed its position as follows:

[W]e sharply disagree with the bold pronouncement of the Washington Supreme Court [in *In re Parentage of L.B.*] that, if a person can establish standing as a *de facto* parent, then that person has a fundamental liberty interest in the care, custody, and control of the child, to the same extent as

of comity, based upon the couple's legal marriage in Canada). While carving out this narrow exception based on the partners' marital status, the court emphasized the importance of maintaining understandable and predictable legal rules to guide individual behavior, and deferred to the legislature for any adjustment in the relative rights of parents and nonparents. *Id.* at 194.

57. *Estroff v. Chatterjee*, 660 S.E.2d 73, 76 (N.C. Ct. App. 2010) (noting that the *de facto* parent doctrine had not been recognized by the North Carolina courts). *But see* *Mason v. Dwinell*, 660 S.E.2d 58 (N.C. Ct. App. 2008) (in a case decided the same day as *Estroff*, the court granted custody to a former lesbian partner where the biological mother had voluntarily taken significant steps to create a family with her child and her same-sex partner).

58. *In re Bonfield*, 773 N.E.2d 507 (Ohio 2002) (expressly refusing to apply the *de facto* parent test used by courts in a number of other states). *See also In re Jones*, 2002-Ohio-2279 (Ohio Ct. App. May 10, 2002), available at 2002 WL 940195 (declaring that custody may not be awarded to a nonparent absent a finding that the parent is "unsuitable").

59. *White v. Thompson (In re Thompson)*, 11 S.W.3d 913 (Tenn. Ct. App. 1999) (in consolidated appeals by former same-sex partners seeking visitation, noting the narrow definition of "parent" in the Tennessee Code and rejecting the notion of "de facto" parenthood).

60. *Coons-Andersen v. Andersen*, 104 S.W.3d 630, 636 (Tex. App. 2003) (denying visitation rights to a former same-sex partner with a child born to her partner during their relationship).

61. *Jones v. Barlow*, 154 P.3d 808, 816 (Utah 2007) (declining to adopt the doctrine of *de facto* or psychological parent).

62. *Stadter v. Siperko*, 661 S.E.2d 494, 498-99 (Va. Ct. App. 2008) (citing *Troxel*, and declining to adopt the *de facto* or psychological parent doctrine).

63. *Egan v. Fridlund-Horne ex rel Cnty. of Coconino*, 211 P.3d at 1215. *See also* *A.B. v. H.L. (In re Visitation with C.B.L.)* 723 N.E.2d 316, 317 (Ill. App. Ct. 2012); *Janice M.*, 948 A.2d 73, 74-75 (Md. 2008); *White v. White*, 293 S.W.3d 1, 6 (Mo. Ct. App. 2009); *Debra H. v. Janice R.*, 930 N.E.2d at 186 (N.Y. 2010); *Estroff v. Chatterjee*, 660 S.E.2d 73, 75 (N.C. Ct. App. 2010); *In re Thompson*, 11 S.W.3d at 913; *Coons-Andersen*, 104 S.W.3d at 632; *Jones*, 154 P.3d at 810.

64. *Janice M.*, 948 A.2d at 79 (citing *Troxel* for the proposition that the right of a parent "to make decisions concerning the care, custody, and control of her children" is "fundamental"); *Stadter*, 661 S.E.2d at 497 (citing *Troxel* as affirming the "[P]resumption that fit parents act in the best interests of their children").

the legal parent We find that Arizona has not adopted the *de facto* parent doctrine or any similar common law doctrine.⁶⁵

While not expressly rejecting the concept of *de facto* or psychological parenthood, the courts in Alabama,⁶⁶ Florida,⁶⁷ Hawaii,⁶⁸ Kansas,⁶⁹ Maine,⁷⁰ Mississippi,⁷¹ and South Carolina⁷² have held that the rights of fit natural or adoptive parents are fundamental, and that demands by

65. *Egan*, 211 P.3d at 1221 (citing *Finck v. O'Toole*, 880 P.2d 624 (Ariz. 1994)). *See infra* notes 178–84 and accompanying text (discussing the clash between more recent notions of rights for psychological parents and the more traditional common law principles respecting the rights of fit legal parents).

66. *Beck v. Beck*, 865 So.2d 446, 449 (Ala. Civ. App. 2003).

67. *Kazmierczak v. Query*, 736 So.2d 106, 109 (Fla. Dist. Ct. App. 1999) (holding, in a custody and visitation dispute between the child's natural parent and a former same-sex partner, that "[T]he state cannot intervene into a parent's fundamental or constitutionally protected right of privacy, either via the judicial system or legislation, absent a showing of demonstrable harm to the child").

68. *Doe v. Doe*, 172 P.3d 1067, 1079 (Haw. 2007) (holding that a state grandparent visitation statute amounted to an incursion on the fundamental right of a parent to direct the upbringing of his or her child, and that any alleged violation of such right was subject to strict scrutiny and must be narrowly tailored to serve a compelling state interest). That Hawaii has not completely rejected the notion of psychological parenthood is reflected, however, in *Inoue v. Inoue*, 185 P.3d 834, 849 (Haw. Ct. App. 2008). In that case, the birth mother met the man she would later marry when she was two months' pregnant with the child in question. After the couple married, they added the husband's name to the child's birth certificate as the "father." The husband took the child into his home with the mother, and behaved in all respects as the child's father until the couple divorced seven years later. By allowing her husband to assume the role of father, and representing to him that he had "adopted" the child by allowing his name to be placed on her birth certificate, the Hawaii Court of Appeals held that the mother, "by her own words and conduct . . . rendered her parental rights . . . less exclusive and less exclusory," and the court characterized the husband as the child's "psychological parent."

69. *Reynolds v. Creach* (In re Matter of Creach), 155 P.3d 719, 720 (Kan. Ct. App. 2007) (citing *Troxel* as authority for the presumption that fit parents act in the best interests of their children). *But see Frazier v. Goudschaal*, 295 P.3d 532, 556–58 (Kan. 2013) (opining that enforcement of multiple co-parenting contracts between the biological mother and her same-sex partner did not violate *Troxel*, but rather vindicated the biological parent's exercise of her parental rights).

70. *Davis v. Anderson*, 953 A.2d 1166, 1171 (Me. 2008) (citing *Troxel*, and affirming that parents have a fundamental right to direct the care, custody and control of their children). *But see Philbrook v. Theriault*, 957 A.2d 74, 76 (Me. 2008) (noting that a party may be considered a *de facto* parent under the law of Maine if he or she was understood and acknowledged by the child and the child's other parent to be a parent). *See also C.E.W. v. D.E.W.*, 845 A.2d 1146, 1151–52 (Me. 2004) (concluding that a same-sex partner had rights as a *de facto* parent where the child lived with the partner, rather than the biological mother, for several years after the couple's separation, and the biological mother and former partner had signed parenting agreements both before and after their separation calling for equal parenting rights and responsibilities).

71. *See, e.g., Davis v. Vaughn*, 126 So. 3d 33, 37–38 (Miss. 2013) (rejecting the concept of *de facto* parent, and noting that "[N]ature gives to parents that right to the custody of their children which the law merely recognizes and enforces [This parental right] is scarcely less sacred than the right to life and liberty, and can never be denied save by showing the bad character of the parent, or some exceptional circumstances which render its enforcement inimical to the best interests of the child").

72. *Marquez v. Caudill*, 656 S.E.2d 737, 747 (S.C. 2008).

nonparents for visitation or custody are subject to heightened scrutiny. The following statement by the South Carolina Supreme Court exemplifies the views of these courts:

[P]arents have a protected liberty interest in the care, custody, and control of their children and that this is a fundamental right protected by the Due Process Clause A court considering grandparent visitation over a parent's objection must allow a presumption that a fit parent's decision is in the child's best interest *Parental unfitness must be shown by clear and convincing evidence.*⁷³

In stark contrast to these nineteen jurisdictions, a growing number of courts and state legislatures have adopted the doctrine of *de facto*, psychological, or equitable parenthood. Many of those jurisdictions have applied these doctrines in derogation of the rights of legal parents. Jurisdictions falling at this end of the spectrum include Arkansas,⁷⁴ California,⁷⁵ Colorado,⁷⁶ Delaware,⁷⁷ Indiana,⁷⁸ Kentucky,⁷⁹ Massachusetts,⁸⁰ Minnesota,⁸¹ New Jersey,⁸² New Mexico,⁸³ North

73. *Id.* (emphasis added).

74. *Robinson v. Ford-Robinson*, 208 S.W.3d 140, 143–44 (Ark. 2005) (holding that the *Troxel* presumption that a fit legal parent acts in a child's best interests did not apply and that the rights of a stepparent were equivalent to those of a fit biological parent under the *in loco parentis* doctrine).

75. *Charisma R. v. Kristina S.*, 44 Cal.Rptr.3d 332, 338 (Cal. Ct. App. 2006) (remanding case to the trial court to determine whether a former lesbian partner could establish a parent-child relationship with a child born to her former partner during the domestic partnering relationship).

76. *C.R.S. v. T.A.M. (In re Custody of C.C.R.S.)*, 892 P.2d 246, 257 (Colo. 1995) (holding that the "best interests of the child" standard, without a showing of parental unfitness, is the appropriate test for resolving a custodial dispute between a natural parent and a psychological parent).

77. *Smith v. Smith*, 893 A.2d 934, 937 (Del. 2006) (treating former lesbian partner as a *de facto* parent and awarding joint custody with the child's biological mother, but noting that the biological mother had sought child support from her former partner based on her *de facto* parent status).

78. *King v. S.B. (In re Parentage of A.B.)*, 837 N.E.2d 965, 967 (Ind. 2005) (awarding parental rights to former same-sex partner).

79. *Nicely v. Smith*, No. 2008-CA-001684-ME, 2009 WL 874508 at *3 (Ky. Ct. App. April 3, 2009) (finding that Kentucky statutory law provides for *de facto* custodians, but only under limited circumstances).

80. *Smith v. Jones*, 868 N.E.2d 629, 633 (Mass. App. Ct. 2007) (affirming that a biological or adoptive parent's Fourteenth Amendment liberty interest can be superseded by a court's determination that it is in the child's best interests to maintain a relationship with a *de facto* parent).

81. *C.B. v. M.M.C.*, No. A05-1626, 2006 WL 1229643 at *1–2 (Minn. Ct. App. May 9, 2006) (finding that a state statute provides for *de facto* parent status, but only under limited circumstances).

82. *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000) (holding that a psychological parent stands "in parity with the legal parent" and that, when a psychological parent is in the equation, custody and visitation questions are resolved under a "best interests" standard).

83. *Debbie L. v. Galadriel R. (In re Guardianship of Victoria R.)*, 201 P.3d 169, 177 (N.M. Ct. App. 2008) (holding that psychological parent status is sufficient to rebut the presumption favoring a biological parent).

Dakota,⁸⁴ Oregon,⁸⁵ Pennsylvania,⁸⁶ Rhode Island,⁸⁷ Vermont,⁸⁸ West Virginia,⁸⁹ Wisconsin,⁹⁰ and the District of Columbia.⁹¹

Even within this category, however, case decisions reflect substantial diversity. At least three states have held that *de facto* parent status is sufficient to place a third party in parity with a legal parent in terms of constitutional protection; “[O]nce a third party has been determined to be a psychological parent to a child . . . , he or she stands in parity with the legal parent” and “custody and visitation issues between them are to be

84. See, e.g., *McAllister v. McAllister*, 779 N.W.2d 652, 664–65 (N.D. 2010); *Bredeson v. Mackey*, 842 N.W.2d 860, 864 (N.D. 2014). The North Dakota Supreme Court has repeatedly asserted that parents have a “paramount and constitutional right to the custody and companionship of their children superior to that of any other person.” *Bredeson*, 842 N.W.2d at 864. Nevertheless, the court has expressly recognized the status of “psychological parent,” has defined that term loosely to include any party who “provides a child’s daily care and . . . develops a close bond and parental relationship with the child,” and has applied the concept liberally to grant custody or visitation rights contrary to the wishes of fit legal parents. The court has held specifically that it need not determine whether a natural parent is unfit before awarding custody or visitation to a nonparent. See *McAllister*, 779 N.W.2d at 656, 659.

85. *Jensen v. Bevard*, 168 P.3d 1209, 1214 (Or. 2007) (adopting psychological parent doctrine, but limiting its application only to those who have “resided with” the child).

86. *Jacob v. Shulz-Jacob*, 923 A.2d 473, 480 (Pa. 2007) (elevating the rights of a psychological parent to the same level as a fit legal parent).

87. *Resendes v. Brown*, 966 A.2d 1249, 1254 (R.I. 2009) (affirming Rhode Island’s adoption of the four-part *de facto* parent test used by the State of Washington and the power of the courts to supersede the rights of legal parents based on the perceived emotional bonds between a psychological parent and the child).

88. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 972 (Vt. 2006) (holding that a same-sex partner engaged in a civil union with the biological mother at the time of conception had acted “in loco parentis” and held parental rights equivalent to those of a step-parent).

89. *Clifford K. v. Paul S. ex rel Z.B.S.*, 619 S.E.2d 138, 160 (W.Va. 2005) (adopting the same four-part test articulated by the Wisconsin Supreme Court in finding that the mother’s lesbian partner was a *de facto* parent, and holding that the *de facto* parent’s rights outweighed the fundamental right of the biological father to direct his child’s care).

90. *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419, 658–59 (Wis. 1995), cert. denied, *Knott v. Holtzman*, 516 U.S. 975 (1995) (holding that nonparent meets a four-factor *de facto* parent test and demonstrates “interference” by the legal parent with the relationship between the child and the nonparent may be granted custody or visitation rights over the objection of the legal parent).

91. The District of Columbia Safe and Stable Homes for Children and Youth Act of 2007 expressly recognizes the status of *de facto* parent, but in the event of conflict with a *de facto* parent over custody or visitation, the District of Columbia courts apply a strong presumption in favor of the biological parent. See, e.g., *W.H. v. D.W.*, 78 A.3d 327, 338 (D.C. Ct. App. 2013) (awarding custody of minor children to an older brother and maternal grandmother rather than the biological father where the father had essentially abandoned his parental role, but quoting *Troxel* for the proposition that “[p]arents have a ‘fundamental right . . . to make decisions concerning the care, custody and control of their children’”). See also *Fields v. Mayo*, 982 A.2d 809, 814–15 (D.C. Ct. App. 2009) (finding that the child’s maternal aunt qualified as a *de facto* parent under the D.C. statute, but awarding custody to the biological father in view of the “fundamental liberty interest of natural parents in the care, custody, and management of their child”).

determined on a best interests standard.”⁹² In at least three additional states, the doctrine of *de facto* parenthood has been created and defined by statute, so that the judicial opinions reflect the diversity of choices made by the legislative bodies in those states.⁹³

Other decisions in which third party interests have prevailed over those of legal parents have involved unique and controlling factual circumstances. In one case, for example, the child’s biological parent sued for child support from her former same-sex partner, while at the same time objecting to the former partner’s request for joint custody.⁹⁴ The mother’s receipt of financial support clearly influenced the court’s final award of custody to the former partner.⁹⁵ In another case, the child had lived alone with the former partner, rather than with his biological mother, for several years following the couple’s separation.⁹⁶ In addition, the biological mother and her partner had signed multiple parenting agreements both before and after their separation, affirming the natural mother’s wish to share parenting rights and responsibilities equally with her former partner.⁹⁷ When the biological mother later changed her mind and demanded sole custody, the court rejected her petition.⁹⁸

Finally, a number of courts have addressed the relative rights of biological and psychological parents in such a fact-dependent way that it is difficult to predict how such courts would resolve a dispute with different factual predicates. The Indiana Supreme Court, for example, has declined to apply *Troxel* or any apparent presumption favoring a legal parent,

92. *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000). *See also* *Debbie L. v. Galadriel R. (In re Guardianship of Victoria R.)*, 201 P.3d 169, 177 (Ct. App. N.M. 2008) (holding psychological parent status sufficient to rebut the presumption favoring a biological parent); *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. 2007) (granting equal rights to a psychological parent).

93. *See* CAL. ST. FAM. JUV. RULE 5.502 (2014); *see* KY. REV. STAT. ANN. § 403.270 (West 2014); *see* MINN. STAT. ANN. § 257C.01 (West 2014). In at least one state, Montana, neither the legislature nor the courts have adopted the *de facto* parent doctrine, but the courts have construed amendments to the state’s nonparental statute to provide broad rights for parties other than biological or adoptive parents. *See* *Filpula v. Ankney (In re Parenting of L.F.A.)*, 220 P.3d 391, 395 (Mont. 2009) (entering a shared parenting plan on behalf of a former same-sex partner over the objections of the child’s natural mother); *see* *Kulstad v. Maniaci*, 220 P.3d 595, 610 (Mont. 2009) (finding, in light of the 1999 amendments to the state’s parenting statute, no need to rely on the *de facto* parent doctrine in awarding a former lesbian partner a parental interest despite the objections of the child’s natural mother).

94. *Smith v. Smith*, 893 A.2d 934, 937 (Del. 2006).

95. *Id.* at 937. *See infra* notes 210–13 and accompanying text.

96. *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004). *See infra* notes 214–16 and accompanying text.

97. *Id.* at 1147.

98. *Id.* at 1152.

suggesting that the question of parental rights entails “innumerable social, psychological, cultural, and biological considerations,” and that the determination of relative rights is essentially based upon *the court’s determination* of the child’s best interests.⁹⁹ Massachusetts courts have similarly held that a legal parent’s liberty interest may be outweighed by *the court’s determination* of the child’s best interests.¹⁰⁰

Given the degree of disparity that now exists among the states, it has been suggested that the right of biological or adoptive parents to make basic decisions for their children’s care and welfare largely “depend[s] on what State the parent finds himself or herself in.”¹⁰¹ If this were strictly a state concern, there would be little reason for the Court to intervene. The issue, however, raises fundamental questions about the nature and future of the family in America and implicates important constitutional rights.¹⁰² Clarification by the Court is therefore warranted.¹⁰³

The key for the Court in bringing clarity to this issue is to both respect federalism and enforce applicable constitutional safeguards. This Article suggests that these twin goals can be accomplished by applying the principles the Court articulated when it first addressed this issue in

99. *King v. S.B. (In re Parentage of A.B.)*, 837 N.E.2d 965, 267 (Ind. 2005). This Article does not question the court’s responsibility to decide in the best interests of the child. What we note in this case is the absence of any presumption by the court that a fit legal parent would act in the child’s best interests. By declining to exercise even a rebuttable presumption favoring parental discretion, and instead creating its own list of factors on a case-by-case basis, the court essentially substitutes its own judgment for that of the child’s parent.

100. *Smith v. Jones*, 868 N.E.2d 629, 633 (Mass. App. Ct. 2007). Again, in the absence of any presumption favoring the parent, the court arguably inserts itself improperly into the parental role.

101. *Petition for Writ of Certiorari, Clark v. McLeod*, (No. 04-1392), 2005 WL 899481 at *20, *cert. denied*, 545 U.S. 1111 (2005).

102. With respect to the constitutional issues inherent in this issue, *see, e.g.*, *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 838 (1977). (noting that appellees had asserted liberty and property interests within the Fourteenth Amendment’s protection); *Procopio v. Johnson*, 994 F.2d 325, 328 (7th Cir. 1993). (noting the relevance of Fourteenth Amendment due process claims); *Lofton v. Sec’y of the Dep’t of Children and Family Servs.*, 358 F.3d 804, 811–13 (11th Cir. 2004). (addressing the parties’ due process and equal protection concerns); *Miller v. Cal. Dep’t of Soc. Servs.*, 355 F.3d 1172, 1175–77 (9th Cir. 2004) (responding to the parties’ claims of substantive due process rights in the maintenance of family integrity).

103. The state courts are not alone in reflecting the need for clarification. Both the First and Seventh Circuit Courts of Appeal have noted that “the appropriate framework for analyzing claims alleging a violation of [parental interests in the care, custody and control of children] is less than clear” (quoting *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005)). *See also Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (observing that the Supreme Court “has yet to decide whether the right to direct the upbringing and education of one’s children is among those fundamental rights whose infringement merits heightened scrutiny”).

*O.F.F.E.R.*¹⁰⁴ Part III will suggest how the factors presented in *O.F.F.E.R.* might apply in disputes over child custody and visitation rights between former same-sex partners.

III. APPLYING *O.F.F.E.R.* TO CLARIFY AND RESOLVE THE
DE FACTO PARENT ISSUE

A. THE RELEVANCE OF *O.F.F.E.R.*

1. *Court Acceptance of O.F.F.E.R.'s Principles*

As will be documented momentarily, this Article is not alone in suggesting that the Court should formally adopt its analysis in *O.F.F.E.R.* to resolve and clarify the *de facto* parent issue. Recall that, as noted in Part I, the Court discussed the question of *de facto* parenthood for the first time in the *O.F.F.E.R.* decision.¹⁰⁵ The cases consolidated in *O.F.F.E.R.* involved challenges by an organization of foster parents to procedures governing the removal of children from the homes of their foster parents under New York law.¹⁰⁶ Although the Court ultimately rejected the organization's assertion of Fourteenth Amendment due process rights on more narrow grounds, it carefully considered the question of whether foster parents whose interests conflicted with those of fit natural parents could claim due process protection in a continuing relationship with the child.¹⁰⁷ While declining to resolve that question definitively, the Court articulated a set of factors applicable when making such a determination.¹⁰⁸

Justice Brennan, writing for the Court, suggested that the due process rights of a party who is not the biological parent of a child should be based upon (1) whether the purported quasi-parent relationship "stems from the emotional attachments that derive from the intimacy of daily association"; (2) the degree to which the relationship is created and its contours are determined by state law; and (3) whether the asserted right would derogate from the substantive liberty interest of the child's natural parent.¹⁰⁹

104. See *supra* notes 7–11 1 and accompanying text.

105. 431 U.S. at 844 n.52, 857.

106. See *supra* notes 7–9 and accompanying text.

107. 431 U.S. at 847 (concluding that even if the foster parents could assert a Fourteenth Amendment liberty interest, the procedures followed by the State in the pre-removal process were sufficient to pass constitutional muster).

108. *Id.* at 843–47.

109. *Id.*

Given the Court's careful consideration of this issue, and the explicit list of factors it presented, it is not surprising that various courts agree with this Article's view that *O.F.F.E.R.*'s test is relevant, despite courts not always treating it as controlling. At least three federal circuit courts, as well as federal district courts in two circuits, have applied *O.F.F.E.R.* in determining the relative rights of biological parents and a variety of other caregivers. The Seventh, former Fifth, and Eleventh Circuits have all followed *O.F.F.E.R.* in evaluating the competing legal claims of foster parents and natural parents. In *Procopio v. Johnson*, the Seventh Circuit considered an appeal by foster parents of the state's decision to return a child born to an active drug addict to the child's natural parents.¹¹⁰ In holding that the foster family did not have a liberty interest under the Fourteenth Amendment, the court, citing *O.F.F.E.R.*, emphasized that any interest the foster parents might claim under state law "must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."¹¹¹

In *Drummond v. Fulton County Department of Family & Children's Services*,¹¹² the Fifth Circuit likewise addressed a challenge by foster parents against the removal of a child from their home for permanent placement. The Fifth Circuit, citing the Court's "helpful" discussion in *O.F.F.E.R.*, held that the foster parents did not have a cognizable liberty interest in maintaining their relationship with the child.¹¹³ Similarly, in *Lofton v. Secretary of the Department of Children & Family Services*,¹¹⁴ the Eleventh Circuit considered the claims of homosexual foster parents who were denied the right to adopt under Florida law. In an extensive discussion of *O.F.F.E.R.*, the court explicitly noted the Supreme Court's historic emphasis on biological family relationships, and ultimately rejected the assertion that foster parents could claim a liberty interest in the preservation of the foster family unit.¹¹⁵

Thus, the federal courts have consistently followed *O.F.F.E.R.* in evaluating foster family relationships and contrasting them with the more substantial rights of biological parents. However, the guidance in

110. *Procopio v. Johnson*, 994 F.2d 325, 329 (7th Cir. 1993).

111. *See supra* note 7 and accompanying text.

112. *Drummond v. Fulton Cnty. Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1206 (5th Cir. 1977) (*en banc*).

113. *Id.* at 1206.

114. *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 808 (11th Cir. 2004).

115. *Id.* at 812–15.

O.F.F.E.R. is not limited in its relevance to foster family relationships. The Fifth Circuit, for example, referred to *O.F.F.E.R.* in weighing the relative rights of a child's biological mother versus those of custodial caregivers to whom the mother had entrusted the child for two-and-a-half years.¹¹⁶ The mother, Pam Strong, moved from Mississippi to California in 1979, leaving her fourteen-month-old daughter Misty with J.D. and Margaret Franks.¹¹⁷ She returned to Mississippi almost three years later, having visited Misty only once during her absence.¹¹⁸ Nevertheless, at Strong's request, local law enforcement officers removed Misty from the Franks' home and returned her to her mother. When the Franks challenged Misty's removal as a violation of their Fourteenth Amendment due process rights, the Fifth Circuit upheld the district court's summary dismissal.¹¹⁹ Following *O.F.F.E.R.*, the Fifth Circuit found that the Franks had no legally cognizable interest in maintaining their social unit, despite having served as the child's sole caregivers during the mother's almost three-year absence. Though the ties they had developed with Misty were acknowledged by the court to be "important," they were nonetheless "emotional only" and "simply . . . not sufficient to create a legal interest against Misty's biological parent."¹²⁰

More recently, in *J.R. v. Utah*, a federal district court in the Tenth Circuit was asked to weigh the relative rights of biological parents and a surrogate mother with whom the parents had contracted to carry their twins to term.¹²¹ At issue was a Utah statute prohibiting surrogate parenthood agreements and providing conclusively that the surrogate mother under such an arrangement was the mother of the child for all legal purposes.¹²² Citing *O.F.F.E.R.* and other landmark Supreme Court decisions affirming the inherent integrity of biological bonds, the district court granted the children's natural parents summary judgment and declared the statute unconstitutional.¹²³

The federal district court for the Southern District of Indiana, similarly, has determined that even an unwed father has a "constitutional right to family relations" with a biological minor child for whom he has

116. Franks v. Smith, 721 F.2d 153, 154 (5th Cir. 1983).

117. *Id.*

118. Franks v. Smith, 717 F.2d 183, 184 (5th Cir. 1983).

119. 721 F.2d at 154.

120. *Id.* at 155.

121. *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1273 (D. Utah 2002).

122. *Id.* at 1271–72.

123. *Id.* at 1275–78.

paid child support and maintained visitation rights.¹²⁴ The child was removed from the mother's custody when both the mother and her newborn baby tested positive in the hospital for amphetamines.¹²⁵ Both children were placed in foster care despite the father's request for custody of his child—the newborn was not his biological child. After three months, the father, Bartholomew McHugh, brought suit, claiming, among other things, violation of his Fourteenth Amendment due process rights.¹²⁶ The court granted defendants' motion for summary judgment under the doctrine of absolute quasi-judicial immunity.¹²⁷ It found, however, that McHugh had presented substantial evidence that his substantive due process right to family relations with his son was violated, and declined to grant summary judgment to defendants *on the merits* of that claim,¹²⁸ stating that “[i]t is one thing for a father to agree that a child should be in the custody of the mother, as McHugh had when E.M. was an infant. The situation is entirely different when the state removes the child and puts him in foster care.”¹²⁹

2. *Precedential Value of the O.F.F.E.R. Factors*

This Article suggests that the principles articulated in *O.F.F.E.R.* could be more broadly applied by the Court to protect both the principles of federalism and the legitimate concerns of parties involved in a wide range of psychological parent cases. First, however, this Article must address whether, and to what extent, the *O.F.F.E.R.* decision is worthy of precedential value with respect to this issue. As previously noted, the three factors enumerated in *O.F.F.E.R.* were not necessary to the Court's decision. The state's removal of the children from their foster homes was upheld on other grounds. Nevertheless, the Court carefully analyzed this issue and would be justified in considering that portion of its discussion in *O.F.F.E.R.* precedential or near precedential.

This Article suggests that the passage in which the *O.F.F.E.R.* factors were presented reflects sufficiently careful and thorough analysis by the Court that it could at least be considered judicial *dictum*. *Dictum* has been

124. McHugh v. Ind. Family and Soc. Servs. Admin., No. 4:06-cv-164-DFH-WGH 2008 WL 2225638 at *7 (S.D. Ind. May 27, 2008). *But see* *Lehr v. Robertson*, 463 U.S. 248 (1983) (holding that an unwed biological father who had never provided child support nor established a substantial relationship with his child had no constitutional right to challenge an adoption proceeding for lack of notice).

125. *Id.* at *2.

126. *Id.* at *7.

127. *Id.* at *14–15.

128. *Id.* at *12, *14.

129. *Id.* at *10.

defined as “[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of adjudication”¹³⁰ While *dictum* is generally not controlling in future cases, some authorities have suggested a distinction between *obiter dicta* and judicial *dicta* in assessing its precedential weight.¹³¹ The former are opinions expressed by the court in passing and are widely, if not universally, viewed as carrying relatively little persuasive value.¹³² The latter, by contrast, reflects a “court’s reasoned consideration and elaboration upon a legal norm” and thus may carry much greater precedential weight in future cases.¹³³

The distinction between *obiter dictum* and judicial *dictum* is not a bright line, and the two may be better thought of as lying along a continuum.¹³⁴ The Third Circuit has explained that the degree of deference given *dicta* by later courts depends upon the extent to which the issue involved was argued and evaluated, finding that “[a] . . . distinction has been drawn between ‘judicial *dictum*’ and ‘*obiter dictum*’: judicial *dicta* are conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to a decision. A judicial *dictum* may have great weight.”¹³⁵

Judicial *dicta* are of sufficient consequence that they can be, and sometimes have been, given precedential value. Indeed, some courts consider judicial *dicta* issued by supreme courts to be binding precedent. As noted in an opinion by the Third Circuit Court of Appeals, “A Wisconsin court has stated it thus: ‘When a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not [merely] a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision.’”¹³⁶ Even more to the point, the Supreme Court has given considerable weight to judicial *dicta* in its own previous decisions. As the Court stated in *County of Allegheny v. ACLU*, the “principle of *stare*

130. Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 710 (1999).

131. *Id.* at 712–13.

132. *Id.* at 713.

133. *Id.* at 713–14.

134. *Id.* at 717–18, 740.

135. *Cerro Metal Prods. v. Marshall*, 620 F.2d 964, 978 n.39 (3d Cir. 1980) (citation omitted).

136. *Id.*

decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.”¹³⁷

The discussion in *O.F.F.E.R.* regarding factors determinative of due process rights for non-biological parents could well be considered judicial *dictum*, and thus be accorded substantial weight since the issue was thoroughly briefed and carefully considered. The Court’s analysis, as reflected in both the opinion of the Court¹³⁸ and Justice Stewart’s concurring opinion,¹³⁹ clearly demonstrates the significance the Court attached to its consideration of the issue. Examination of the briefs submitted to the Court by the parties and amici confirms that the Court’s thoughtful analysis in *O.F.F.E.R.* followed an equally thorough and careful briefing of the issue by the parties.¹⁴⁰

Though the *O.F.F.E.R.* factors were not essential to the Court’s ultimate decision, the issue of due process rights for non-biological parents was thoroughly briefed and the Court intentionally took up the issue and discussed it at length. The Court explicitly articulated a set of factors that it

137. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989).

138. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 838–47 (1977).

139. *Id.* at 857–63 (Stewart, J., joined by Burger, C. J. & Rehnquist, J., concurring in the judgment).

140. Motion of the Puerto Rican Family Institute, Inc. et al. for Leave to File Brief Amici Curiae and Brief Amici Curiae, *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (Nos. 76-180, 76-183, 76-5200), 1976 WL 194574 at *6 (arguing that “the foster parent-child relationship under the circumstances presented [was] not a protected interest within the meaning of the Due Process Clause of the Fourteenth Amendment”); Amicus Curiae Brief of the National Juvenile Law Center, *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (Nos. 76-180, 76-183, 76-5200), 1976 WL 194577 at *7–17 (addressing the contours of rights protected by the Fourteenth Amendment in the context of foster family relationships); Brief for the Legal Aid Society of the City of New York, Juvenile Rights Division, *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (Nos. 76-180, 76-183, 76-5193, 76-5200), 1976 WL 181145 at *19 (claiming that the foster care relationship was a liberty interest giving rise to due process protection); Motion of a Group of Concerned Persons for Children for Leave to File Brief Amici Curiae & Brief Amici Curiae, *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (Nos. 76-180, 76-183, 76-5193, 76-5200), 1977 WL 189097 at *5–9 (also asserting that “the relationship between foster children and their long term foster parents [was] a liberty interest protected by the Due Process Clause”); Reply Brief of Appellants Naomi Rodriguez; Mary Robins; Dorothy Nelson Shabazz; & Lillian Collazo, *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (Nos. 76-180, 76-183, 76-5193, 76-5200), 1977 WL 205079 at *72–77 (asserting that a hearing requirement prior to removal of a child from foster care would “impermissibly infringe on the constitutionally protected family unit”); and Reply Brief for State Appellants, *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (Nos. 76-180, 76-183, 76-5193, 76-5200), 1977 WL 189095 at *7–10 (summarizing the disparate positions argued by the parties and amici on the issue of due process rights, and arguing that “no liberty interest [in a continuing foster family relationship] can co-exist with society’s long held belief in the primacy of the natural family”).

then applied in assessing the foster parents' assertions that they "[had] a constitutionally protected liberty interest."¹⁴¹ The Court could therefore justify giving those factors precedential or near-precedential weight in a future case.

Ultimately, of course, the Court does not have to concern itself with whether the *O.F.F.E.R.* test is *dictum*. Unlike lower courts, it can simply adopt the test, regardless of its view of whether it is already bound to do so. Thus, the above discussion of dicta may be of more benefit to lower courts than to the Supreme Court. The question then becomes how the *O.F.F.E.R.* factors would apply in disputes over custody and visitation between biological parents and the parents' former partners.

B. THE APPLICATION OF O.F.F.E.R.

Factor 1—The Degree of Deference Owed to Fit Legal Parents

As to the first *O.F.F.E.R.* factor, the Court suggested that "biological relationships are not the exclusive determination of the existence of a family," and instead argued that "the importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association."¹⁴² This language is a large factor as to why this Article has not attempted to make the case for a bright line approach in which courts would completely reject the psychological, or *de facto*, parent doctrine, or automatically rule in favor of a fit biological or adoptive parent. It clearly suggests the possibility of constitutional protection for familial relationships beyond those that are purely biological or legal. Absent a direct and successful challenge to a *de facto* parent statute or court holding, *O.F.F.E.R.*'s first factor must be considered.

Seizing on this language alone, plaintiffs in numerous jurisdictions have asserted a right to "family integrity," seeking judicial protection for foster relationships, guardianships and other personal arrangements.¹⁴³ In the Eleventh Circuit, for example, homosexual couples challenged the constitutionality of a Florida law that prohibited their adoption of children.¹⁴⁴ Having served for years as foster parents and guardians, plaintiffs asserted that they and the children in their custody constituted "psychological families" based upon their "mutual feelings of love and

141. *Smith*, 431 U.S. at 842.

142. *Id.* at 843–44.

143. *See generally supra* Part I.

144. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 808 (11th Cir. 2004).

dependence.”¹⁴⁵ Pointing to the language from *O.F.F.E.R.* quoted above, plaintiffs argued that they were entitled to the same constitutional liberty interests as natural or adoptive parents.¹⁴⁶ On appeal, the court acknowledged that *O.F.F.E.R.* had raised the possibility of protected familial interests beyond traditional biological or adoptive relationships.¹⁴⁷ In an extensive discussion of the *O.F.F.E.R.* decision, however, the Eleventh Circuit emphasized that the Court had historically made “important distinctions between the foster family and the natural family.”¹⁴⁸ Considering the *O.F.F.E.R.* decision as a whole, the court rejected the notion that *O.F.F.E.R.* had suddenly eradicated those distinctions.¹⁴⁹

Other courts, however, have found that the same language in *O.F.F.E.R.* may extend the concept of *de facto* parent status beyond what the Court may have intended. Rather than follow *O.F.F.E.R.*’s three-pronged analytical framework, these courts have focused exclusively on the single phrase quoted above from *O.F.F.E.R.*’s first factor. For example, at about the same time the Eleventh Circuit was rendering its opinion limiting the impact of *O.F.F.E.R.*, the Colorado Court of Appeals considered a petition by a former domestic partner for equal parenting time with a child’s adoptive mother after the couple’s relationship had ended.¹⁵⁰ Without explicitly defining the concept of “psychological parent,” the Colorado court held that preserving the child’s emotional bonds with the former partner constituted a compelling state interest, justifying the court in overriding the adoptive parent’s desire to remove the child from her former partner’s influence.¹⁵¹ In its only reference to the *O.F.F.E.R.* opinion, the Colorado court opined that constitutional protection for familial relationships had now been extended beyond merely biological ties.¹⁵² The court concluded that parental unfitness was no longer a prerequisite for the state’s intervention in the biological family unit.¹⁵³

145. *Id.* at 813.

146. *Id.* at 812.

147. *Id.* at 813.

148. *Id.*

149. *Id.* at 812–13.

150. *In re E.L.M.C.*, 100 P.3d 546, 546–50 (Colo. App. 2004).

151. *Id.* at 556 (concluding that a fit legal parent’s constitutional rights could be subordinated to the claim of a non-biological caregiver based upon the child’s emotional ties to the caregiver, and rejecting the natural parent’s contention that a showing of unfitness was required before parental responsibilities could be allocated to a non-parent).

152. *Id.*

153. *Id.* at 557.

The Supreme Court of New Jersey, in *V.C. v. M.J.B.*, likewise considered a petition by a mother's former same-sex partner who sought joint legal custody and visitation with the mother's biological children.¹⁵⁴ Citing *O.F.F.E.R.* solely for the proposition that constitutional interests may reside in caring adults that are not biological parents,¹⁵⁵ the court granted plaintiff's petition for visitation rights as the "presumptive rule."¹⁵⁶ The court, however, denied the partner's claim for legal custody, acknowledging that "[t]he legal parent's status is a significant weight."¹⁵⁷

Other state courts that have focused solely on *O.F.F.E.R.*'s first factor in their analysis include the Rhode Island Supreme Court in *Rubano v. DiCenzo*¹⁵⁸ and the Wisconsin Supreme Court in *Custody of H.S.H.-K.*¹⁵⁹ In *Rubano*, a former same-sex partner petitioned the state's Family Court to determine her *de facto* parent status and enforce a visitation agreement that she and the child's biological mother had signed upon their separation.¹⁶⁰ Uncertain about its jurisdiction and how to resolve the matter, the Family Court certified the issues to the Rhode Island Supreme Court.¹⁶¹ In its sole reference to *O.F.F.E.R.*, the Rhode Island Supreme Court emphasized the centrality of emotional attachments in determining the existence of familial relationships, and it suggested that a ruling in favor of the former partner would not violate the constitutional rights of the child's mother.¹⁶² In *Custody of H.S.H.-K.*, the former partner of a child's biological mother appealed from a circuit court order dismissing her petition for custody or visitation rights.¹⁶³ Despite noting that the state visitation statute was intended to apply only to the dissolution of a marriage—and acknowledging that the child had not been born of a marriage—the Wisconsin Supreme Court held that visitation could be granted "in the best interest of the child."¹⁶⁴ Citing *O.F.F.E.R.* solely for the proposition that

154. 748 A.2d 539, 550 (N.J. 2000) (noting the importance of "emotional bonds" as a basis for determining the rights of psychological parents).

155. *Id.*

156. *Id.* at 554.

157. *Id.*

158. *Rubano v. DiCenzo*, 759 A.2d 959, 972–73 (R.I. 2000).

159. 533 N.W.2d 419, 436 (Wis. 1995), *cert. denied* 116 S. Ct. 475 (1995).

160. 759 A.2d at 961–62.

161. *Id.* at 963.

162. *Id.* at 972. In a firm dissent, Justice Bourcier and Chief Justice Weisberger questioned the majority's use of *O.F.F.E.R.* and noted that the court's decision would "permit[] and recognize[] that a minor child whose biological mother engages in same-sex unions may legally have as many mothers as the biological mother chooses to cohabit with." *Id.* at 978, 989.

163. 533 N.W.2d at 420.

164. *Id.* at 429–30.

familial relationships may extend beyond biological bonds,¹⁶⁵ the court held that it had equitable power to order visitation over the objection of a fit natural parent if the petitioner established that she had a “parent-like relationship with the child and that a significant triggering event justify[ed] state intervention.”¹⁶⁶ In his dissent, Justice Day noted that the Supreme Court had emphasized elsewhere in *O.F.F.E.R.* the importance of biological relationships.¹⁶⁷ He opined that, in view of the Court’s historical focus on legal parentage, the Wisconsin Supreme Court had violated the parent’s rights, writing in his dissent, “[A]lthough the majority states that it was ‘mindful of preserving a biological or adoptive parent’s constitutionally protected interests,’ . . . in reaching its conclusion, the majority nevertheless trammels those rights.”¹⁶⁸

Reflecting upon decisions such as those cited above, the Eleventh Circuit has suggested that divorcing the language in *O.F.F.E.R.* referencing a broader meaning for “family” from its context, gives undue weight to *O.F.F.E.R.*’s first factor:

The [Supreme] Court itself has noted that “the usual understanding of ‘family’ implies biological relationships, and most decisions treating the relation between parent and child have stressed this element.” Appellants, however, seize on a few lines of *dicta* from [*O.F.F.E.R.*], in which the Court acknowledged that “biological relationships are not [the] exclusive determination of the existence of a family,” and noted that “[a]doption, for instance, is recognized as the legal equivalent of biological parenthood.” Extrapolating from [*O.F.F.E.R.*], appellants argue that parental and familial rights should be extended . . . and that the touchstone of this liberty interest is not biological ties or official legal recognition, but the emotional bond that develops between and among individuals as a result of shared daily life. We do not read [*O.F.F.E.R.*] so broadly.¹⁶⁹

In contrast to the courts that have focused narrowly on *O.F.F.E.R.*’s first factor are those that have seemingly ignored this factor altogether. The Washington Supreme Court in *Carvin v. Britain*, for example, characterized Carvin as a *de facto* parent despite the lack of any compelling emotional bond between her and Britain’s child.¹⁷⁰ Britain noted in her

165. *Id.*

166. *Id.* at 435–36. Remarkably, the only thing necessary to constitute a “significant triggering event” is an objection by the child’s legal parent to the visitation requested. *Id.* at 436.

167. *Id.* at 445–46 (Day, J., dissenting) (citing *Smith*, 431 U.S. 816, 843).

168. *Id.* at 440.

169. 358 F.3d at 812–13 (quoting *Smith*, 431 U.S. at 842, 843, 844 n.51).

170. 122 P.3d 161. In discussing the issue of *de facto* parent status and Fourteenth Amendment liberty interests in this case, the Washington Supreme Court did not even cite

brief that the child was only “five years old when Britain ended her relationship with Carvin,”¹⁷¹ and the child’s therapist had concluded that the child quickly adjusted to Carvin’s absence after Carvin left the home.¹⁷² Indeed, the child had explicitly asked not to be returned to Carvin’s home or to be left alone with Carvin during their court-imposed visits.¹⁷³ Britain acknowledged that Carvin lived in the home with her and the child during the child’s early years, and that Carvin jointly cared for the child during that time.¹⁷⁴ Carvin, however, never attempted to adopt the child while she and Britain were living together, and the child clearly had no need or desire to remain in contact with Carvin at the time the case was heard.¹⁷⁵ Thus, contrary to the court’s decision, to the extent that familial emotional attachments were relevant to the question of Carvin’s status as a *de facto* parent, that factor arguably should have operated against Carvin.

Similarly, in *Charisma R. v. Kristina S.*, the California Court of Appeals found Kristina S.’s former domestic partner to be a “second mother” on the basis that (1) the parties had been registered as domestic partners in California at the time of the child’s birth, (2) the former partner was present at delivery, and (3) the former partner assisted with child care during the first few months of the child’s life.¹⁷⁶ The couple, however, separated following that brief initial period of life together, and Kristina S.’s former partner did not see the child for the next five years until a court-imposed “reunification plan” was put in place.¹⁷⁷

Case law at this point, then, shows considerable confusion with regard to the first *O.F.F.E.R.* factor, particularly among the state courts. The language from *O.F.F.E.R.* suggests that parties other than legal parents may be entitled to a form of constitutional protection in the parent-child relationship. But the relevant language pertains to only one of the three factors that the Court considered in evaluating the parties’ rights.

Some courts have arguably erred by placing undue weight, if not exclusive weight, on this factor; others appear to be ignoring *O.F.F.E.R.*

O.F.F.E.R. as relevant, let alone expressly consider the factors discussed by the Court. See *In re the Matter of the Parentage of L.B.*, 155 Wash.2d 679,702–12 (2005).

171. Petition for a Writ of Certiorari at 2, *Britain v. Carvin* (No. 05-974), 2006 WL 263544.

172. *Id.* at 4.

173. Draft Petition for a Writ of Certiorari at 4, *Britain v. Carvin* (on file with the authors) [hereinafter *Draft Petition*].

174. Petition for a Writ of Certiorari at 2, *Britain v. Carvin* (No. 05-974), 2006 WL 263544.

175. *Draft Petition*, *supra* note 173, at 2–4.

176. *Charisma R. v. Kristina S.*, 96 Cal. Rptr. 3d 26, 33–37 (Cal. Ct. App. 2009).

177. *Id.*

altogether. Further guidance from the Court would help clarify the degree of weight that should be accorded the existence of emotional bonds between a putative parent and a child in light of the other two factors.

Factor 2—The Extent to which the Putative Parent’s Status is a Creation of State Law

The bright line approach is again deemphasized when one turns to *O.F.F.E.R.*’s second factor. After all, the Court’s discussion stressed the clear distinction between the ancient and abiding bonds of biological family ties and the recent creation by courts and some state legislatures of *de facto*, or “psychological,” family relationships.¹⁷⁸ It is not a coincidence that “[h]istorically, th[e] Court’s family and parental-rights holdings have involved biological families.”¹⁷⁹ As noted in *O.F.F.E.R.*, the privacy rights associated with natural families are “older than the Bill of Rights”¹⁸⁰ and have their source, “not in state law, but in intrinsic human rights.”¹⁸¹ The decision further holds that “biological parentage . . . precedes and

178. The nation’s common law tradition has long reflected a strong sense of respect for the rights of parents and the integrity of the family. It is not clear at precisely what point this feature developed, but Justice O’Connor was certainly correct when she characterized parental rights as “perhaps the oldest of the fundamental liberty interests recognized by the Court.” *Troxville v. Granville*, 530 U.S. 57, 65 (2000) (plurality). The core principles and values of this cultural and legal heritage have been in place for hundreds of years. By the time of Henry de Bracton, in the thirteenth century, many of the modern legal norms relating to children and parents were already present, and before the writing of Sir Edward Coke, the English jurist of the late-sixteenth and early-seventeenth centuries, this area of the law had become quite sophisticated. See 4 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 299 (Samuel E. Thorne, ed., 1997) (1260); 1 J. H. THOMAS, A SYSTEMATIC ARRANGEMENT OF LORD COKE’S FIRST INSTITUTE OF THE LAWS OF ENGLAND 109 (1836).

Nor was respect for the rights and responsibilities of parents limited to the English common law. Seventeenth century legal philosophers Samuel von Pufendorf and Hugo Grotius, who figured prominently in the development of the civil law, shared many of the views of the common lawyers concerning the legal role of parents. See SAMUEL PUFENDORF, THE WHOLE DUTY OF MAN, ACCORDING TO THE LAW OF NATURE 184 (Ian Hunter & David Saunders eds., Andrew Tooke & David Saunders, trans. 2003) (1673); 1 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 211–12 (Richard Tuck ed., 2005) (1625). A similar respect for the parent-child relationship was apparent in the early canon law tradition, as evidenced by the records of medieval ecclesiastical courts. See R.H. Helmholtz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63. VA. L. REV. 431, 434–35, 437, 446 (1977).

Given the responsibility placed upon parents under all of these legal traditions, they were viewed as having the correlative right to determine for themselves how to nurture and educate their children and a right to be left alone to do so, assuming they had not abandoned their role or abused the child. Thus, parents today who claim a fundamental right to direct the care and nurture of their children free from interference by totally unrelated civil magistrates, do so in reliance upon firmly established and long-recognized legal principles, as Justice O’Connor suggested.

179. *Lofion*, 358 F.3d at 812.

180. 431 U.S. at 845 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

181. *Id.* (footnote omitted).

transcends formal recognition by the state”¹⁸² and “exist[s] independent[ly] of [state] power”¹⁸³ because “the natural family . . . has ‘its origins entirely apart from the power of the State’”¹⁸⁴ *O.F.F.E.R.*’s second factor thus contrasts the natural bonds of biological families with relationships created merely by state law.

Although a *de facto* parent-child relationship may not be a creature of state law in the same sense as a foster family unit created entirely by contract, the concept of *de facto* relationships is still essentially a product of state common law or statutory law—and a recent one at that. While *O.F.F.E.R.*, *Procopio*, *Drummond*, and *Lofton*, all involved the rights of foster parents, which arose from and were determined by the parties’ contractual relationship with the state, nothing in *O.F.F.E.R.* suggests that this factor applies only to foster family relationships.

That *de facto* parent status is fundamentally a creation of state law is evident from the split among the states regarding its legitimacy. As illustrated in Part II of this Article, at least nineteen states expressly reject *de facto* parenthood altogether or apply the *Troxel* presumption that fit parents act in their children’s best interests.¹⁸⁵ A minimum of eighteen states, in direct contrast, expressly recognize the status of *de facto* parents and, in a number of cases, have granted rights to *de facto* parents equal to those of fit natural parents.¹⁸⁶

Not only is *de facto* parent status itself a creation of state law, its precise contours are defined by state law. Even among jurisdictions that recognize *de facto* parent status, the rights of such parties vis-à-vis natural or adoptive parents, vary considerably. In Vermont, for example, in the high profile case *Miller-Jenkins v. Miller-Jenkins*, the state Supreme Court granted visitation rights to a same-sex partner who had entered into a civil union with the child’s mother in that state, but had no biological or adoptive relationship with the child.¹⁸⁷ The decision was based upon the court’s subjective assessment of the parties’ interactions and expectations.¹⁸⁸ Having assumed the role of a “parent” in the court’s view, the partner could then seek custody or visitation over the objection of the

182. *Lofton*, 358 F.3d at 809.

183. *Id.* at 814.

184. *Id.* at 809 (quoting *Lindley v. Sullivan*, 889 F. 2d 124, 131 (7th Cir. 1989)).

185. *See supra* notes 47–48 and accompanying text.

186. *See supra* note 49 and accompanying text.

187. 912 A.2d 951 (Vt. 2006).

188. *Id.* at 966–68.

child's legal parent, if the court determined that it was in the child's best interests or that "extraordinary circumstances" existed.¹⁸⁹ The court concluded in this case that the best interests of the child required the presence of a second "parent" figure. The court explicitly acknowledged, however, that the partner's status as a parent was nothing more than a creation of the court, or, in other words, a "creation of state law."¹⁹⁰ Accordingly, given the recent changes in cultural and relational norms, "courts are left to vindicate the public interest . . . by *developing theories of parenthood, so that 'legal strangers' who are de facto parents may be awarded custody or visitation or reached for support.*"¹⁹¹

The Wisconsin Supreme Court, though recognizing *de facto* parent status, has, by contrast, created a more objective, four-part test to determine whether *de facto* parent status has been established. In *In re Custody of H.S.H.-K.*, the court held that a party not legally related to a child could establish a "parent-like relationship" only by proving that (1) the biological or adoptive parent consented to, and fostered, the establishment of a parent-like relationship; (2) the child and the party lived in the same household; (3) the party assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development, including financial support; and (4) the party remained in a parent-like role for a length of time sufficient to have established with the child "a bonded, dependent relationship parental in nature."¹⁹² Parties establishing "parent-like relationships" under this test are accorded rights equal to those of a fit legal parent. Establishing a "significant triggering event justifying state intervention" into the family unit requires nothing more than proving that the natural or adoptive parent has "interfered substantially" with the party's relationship with the child.¹⁹³

The California courts have gone farther than most to accommodate the interests of parties unrelated to a child. In *Charisma R. v. Kristina S.*, the California Court of Appeal accorded Kristina S.'s former same-sex partner parental rights equal to those of Kristina, the natural mother, even though the couple had no formal parenting agreement, Charisma R. and the child did not live together for any prolonged period of time, and she seldom

189. *Id.* at 966–67.

190. *Id.* at 969.

191. *Id.* at 969 (emphasis added).

192. 533 N.W.2d 419, 421 (Wis. 1995).

193. *Id.*

visited the child after the couple's break-up.¹⁹⁴ Despite extremely limited interaction between Charisma and the child over the course of the child's life, the court accorded Charisma parenting rights co-extensive with those of the child's legal mother. Moreover, having determined that Charisma held status as a "parent," the court suggested that *Troxel* did not apply because it was not according rights to a non-parent in derogation of those of a parent.¹⁹⁵

The disparate treatment of *de facto* parent status among the states clearly demonstrates that *de facto* parenthood and its correlative rights are fundamentally creatures of state law, in contrast to the rights of biological parents, which—as recognized by the Court—originate independently of the state and are simply recognized—not created—by state law.¹⁹⁶ Under the second *O.F.F.E.R.* factor, the extent that a party's status as a *de facto* parent is more a creation of state law than not should, in many cases at the very least, diminish such a party's claims when pitted against the liberty interests of a child's fit natural parent, just as the Court found to be true with the foster families in *O.F.F.E.R.*.

Factor 3—The Extent to Which the Interest Asserted by De Facto Parents Conflicts with, and Derogates from, the Substantive Liberty Interest of Fit Natural Parents

As previously mentioned, the case can be made that, even if the psychological, or *de facto*, parent concept is entertained, the better approach is always to derogate the interest of psychological, or *de facto*, parents to those of fit biological or adoptive parents in cases of conflict. Assuming as this Article has, however, that such a bright line approach is unworkable in the current legal landscape, it is worth noting the following: *O.F.F.E.R.*'s first factor, as a matter of principle, suggests the possibility of according constitutional protection beyond the ambit of legal parenthood. The second factor, similarly straightforward, substantially restricts the circumstances in which such protection should be afforded. *O.F.F.E.R.*'s third factor, in contrast with both preceding prongs, calls for a fact-intensive, case-by-case assessment of the parties' relative claims. The issue considered by this factor is to what degree the interests claimed by a party unrelated to a child should circumvent the legitimate interests of the child's natural or adoptive parent.

194. *Charisma R. v. Christina S.*, 96 Cal. Rptr. 3d 26, 32, 50 (Cal. Ct. App. 2009).

195. *Id.* at 50.

196. *See supra* note 178.

In one respect, such conflict is inherent in this type of litigation. If no disagreement exists between the child's legal parent and the competing party, then there is no legal dispute. Thus, the alleged rights of the claimant will always conflict with those of the child's legal parent when the dispute reaches litigation. Whenever the dispute involves a biological or adoptive parent and his or her former partner, the child's parent will virtually always have agreed to the partner's presence in the life of the child at some point in the past. The question, then, is really whether the desires of a fit legal parent should prevail over those of a party unrelated to the child after the partnership has ended. The third factor suggests that the answer should depend, in part, on the extent to which the legal parent has encouraged the formation of parental bonds between the child and his or her partner or has otherwise sought to maintain the partner's involvement in the child's life. Consistent with common law principles that have protected the autonomy of the biological family for centuries, courts should apply a strong presumption that a fit natural or adoptive parent acts in the best interests of the child.¹⁹⁷ As explained in greater detail below and in Part IV of this Article, that presumption should be overcome only when the legal parent has regularly encouraged and facilitated the other party's involvement in the child's life over a significant period of time. The following examples illustrate how this approach might work.

In *Carvin v. Britain*, the Washington Supreme Court arguably violated the third prong of *O.F.F.E.R.* and wrongly decided the case.¹⁹⁸ The child's (L.B.'s) natural parents, Britain and the man she ultimately married, strenuously objected to Carvin's contact with L.B. after Carvin's relationship with Britain ended. Both at trial and on appeal, Britain stated that she had become "increasingly concerned about Carvin's choice of activities and care for L.B.," and believed that Carvin's association with L.B. had a negative impact on the child.¹⁹⁹ Britain and her husband Auset, L.B.'s natural father, were newly married and wanted to provide a stable family environment for L.B.²⁰⁰ Auset "continue[d] to play a vital role in L.B.'s life," and Britain believed that L.B. needed her father.²⁰¹ Accordingly, Britain desired to join Auset, with the child, overseas where

197. See *supra* note 178.

198. See *Carvin v. Britain*, 122 P.3d 161, 177 (2005).

199. Petition for a Writ of Certiorari, *Britain v. Carvin*, 547 U.S. 1143 (2006) (No. 05-974), 2006 WL 263544.

200. *Id.* at 3-4.

201. *Id.* at 3.

Auseth was then employed.²⁰² Britain and Auseth wished to raise L.B. according to their own values and faith, as one would expect natural parents to do.²⁰³

Britain had been found to be “a loving, fit parent,”²⁰⁴ and Carvin’s demand for visitation was precluding her and Auseth from accomplishing their legitimate goals and creating the type of family environment they wished to provide. The decision by the Washington Supreme Court effectively granted Carvin what the Supreme Court described in *O.F.F.E.R.* as a “sort of squatter’s rights in another’s child.”²⁰⁵

Other cases have involved similar decisions by state courts to insert themselves into the family unit despite the strong objections of a fit natural or adoptive parent. In *Charisma R. v. Kristina S.*, for example, Kristina and her infant child, A.S., left Charisma’s home when the child was only three months old. Charisma saw the child only twice over the next five years, yet the California Court of Appeal affirmed the trial court’s implementation of a “reunification” plan over Kristina’s strenuous objections, thereby forcing Charisma back into the family unit after several years of absence.²⁰⁶ In another case, *Sharon S. v. Superior Court*, the child’s natural mother, Sharon, initially agreed for her same-sex partner, Annette, to begin adoption proceedings.²⁰⁷ She later withdrew her approval after experiencing domestic violence at Annette’s hands.²⁰⁸ The couple separated, but Annette insisted on moving forward with the adoption. The California Court of Appeal overrode the biological parent’s judgment, holding that the adoption of Sharon’s child by Annette—a legal stranger to the child—could be forced upon the family.²⁰⁹

Circumstances certainly exist in which the actions of a legal parent could tip the scales in favor of a putative *de facto* parent under *O.F.F.E.R.* In Delaware, for example, a former same-sex partner filed a petition for joint legal and physical custody of four children born to the defendant

202. *Id.*

203. *Id.* at 4.

204. *Id.* at i.

205. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 857 (1977).

206. *Charisma R. v. Kristina S.*, 96 Cal. Rptr. 3d 26, 32–33, 54 (Cal. Ct. App. 2009).

207. *Sharon S. v. Superior Court*, 73 P.3d 554, 558 (Cal. 2003).

208. *Id.* at 559.

209. *Id.* at 574 (declining to address the lower court ruling that Sharon failed to withdraw consent timely, but reversing the appellate court holding that the adoption could not proceed where the consenting parent did not relinquish all parental rights).

during the couple's partnership.²¹⁰ The couple had lived together since 1994 and jointly cared for the children since 1997. When the mother informed her partner in August 2003 that she no longer wished to continue the relationship, they executed an agreement that designated the partner as a "residual parent" and provided the partner generous visitation rights.²¹¹ Four months later, however, the mother changed her mind. *After* a ruling from the court that the partner had standing to seek joint custody and visitation, the mother sought and received monthly child support payments.²¹² Under the "acceptance of the benefits" doctrine, the state appellate court rendered judgment for the partner on appeal.²¹³ Having accepted the benefit of their arrangement in the form of child support, the mother was estopped from denying on appeal the existence of a *de facto* parent relationship.

Likewise, in Maine, an expectant mother and her same-sex partner both changed their last names in anticipation of establishing a family unit with the child.²¹⁴ When the child was seven years old, the birth mother, D.E.W., moved out of the family home, leaving the child with her partner. Both before and after their separation, the parties signed parenting agreements committing themselves to share equally in all childcare responsibilities, decisionmaking, and expenses. At trial, the court found that the child, who was nine years old at the time of litigation, had clearly bonded with C.E.W., who had served as the child's primary caregiver.²¹⁵ C.E.W. filed a complaint, seeking a declaration of parental rights. The appellate court unanimously held for the former partner, noting the parties' multiple parenting agreements, the fact that C.E.W. had been given primary physical custody by the child's natural parent for two years, and that pursuant to the parenting agreements C.E.W. had cared equally for the child as her own.²¹⁶

Other cases are less clear in their application of *O.F.F.E.R.* In *In the Interest of E.L.M.C.*, for example, a domestic partnership between Drs. Clark and McLeod ended after eleven years, and Clark wished to make adjustments she considered appropriate for herself and her seven-year-old

210. Smith v. Smith, 893 A.2d 934, 935 (Del. 2006).

211. *Id.* at 936.

212. *Id.*

213. *Id.* at 937.

214. C.E.W. v. D.E.W., 845 A.2d 1146, 1147 (Me. 2004).

215. *Id.*

216. *Id.* at 1152.

adopted daughter.²¹⁷ Clark had left the lesbian lifestyle, returned to the faith in which she had been raised, and wished to limit the amount of time her daughter spent alone in McLeod's presence.²¹⁸ Clark agreed to allow continued visitation, but McLeod insisted that she be allowed to maintain equal parental privileges.²¹⁹ The Colorado Court of Appeals granted McLeod's request. Though stating that the rights of parents are fundamental and that infringements on those rights are subject to strict scrutiny, the court concluded that compelling state interests justified its interfering with Clark's parental preferences.²²⁰ While the decision directly conflicted with the interests of the child's natural mother at the time of trial, it was not surprising that the court considered Clark's voluntary, long-term practice of sharing parental responsibilities and privileges with McLeod in reaching its decision.²²¹

IV. CONCLUSION

Given the disparity of approaches among the states and the fundamental social and constitutional implications of the psychological-parent issue, it is likely that the Court will eventually grant certiorari to help clarify the rights of natural and adoptive parents versus those of *de facto* or psychological parents. If or when it does, it is important that the Court adopt a test that both affirms the principle of federalism and protects the constitutional rights of the parties involved. This Article believes that *O.F.F.E.R.* provides such a test and that the Court should formally adopt it.

With respect to the principle of federalism, nothing in the *O.F.F.E.R.* decision prohibits state legislatures or courts from either adopting or opposing the principle of *de facto* parenthood. It only requires that the statute or judicial opinion pass muster under the factors discussed in this Article. The laws of Kentucky,²²² Minnesota,²²³ and the District of

217. *In re E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004).

218. Petition for Writ of Certiorari, *Clark v. McLeod*, 545 U.S. 1111 (2005) (No. 04-1392), 2005 WL 899481 at *4.

219. *Id.*

220. 100 P.3d at 555.

221. *Id.* at 549–51 (noting that (1) the parties had traveled together to China to facilitate the child's adoption; (2) the parties had filed a joint petition for custody under state law, indicating their intent to establish a family together; (3) they had shared financial costs and all major parenting decisions, including the provision of daycare; (4) they had lived together and been known as a family for six years after the adoption before their relationship began to fail; and (5) both parties had cooperated voluntarily in each of these matters).

222. KY. REV. STAT. ANN. § 403.270 (West 2014).

223. MINN. STAT. ANN. § 257C.01 (West 2014).

Columbia²²⁴ are examples of statutes that clearly comport with the principles of *O.F.F.E.R.* All three jurisdictions recognize the status of *de facto* parenthood. Consistent with established principles of common law and constitutional due process,²²⁵ they define that status in a way that gives deference to a fit legal parent who is actively engaged in the care and nurture of his or her child.²²⁶

Under Kentucky law, the status of “*de facto* custodian” is limited to one who has been the child’s primary caregiver and financial supporter, and who has resided with the child for a minimum of six months or a year, depending on the age of the child.²²⁷ Even then, a court may not grant visitation or custody of the child to a *de facto* custodian unless it finds that the child’s parents are unfit or that “other compelling circumstances exist.”²²⁸

The Minnesota statute defines *de facto* custodian even more narrowly, including only those who: (1) are “related to a child within the third degree of consanguinity”; (2) have been the “primary caretaker and primary

224. District of Columbia Safe and Stable Homes for Children and Youth Act of 2007, D.C. CODE §§ 16–831.01–.03 (2009).

225. See *supra* note 178 and accompanying text (discussing common law principles supportive of parental rights). With regard to parents’ constitutional safeguards, a majority of the Supreme Court has never explicitly classified the right of parents to direct the nurture and upbringing of their children as “fundamental,” but the Court has traditionally recognized such rights as historical and foundational. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (noting the due process interest of parents in the “liberty . . . [to] bring up children” and “control the education of their own”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (referring to the liberty of parents “to direct the upbringing and education of children under their control”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (noting that the “custody, care and nurture of the child reside first in the parents”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (acknowledging the right of parents to fulfill the “primary role” in the “nurture and upbringing of their children”); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (discussing the right of parents to the “companionship, care, custody, and management” of their children); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (speaking of a “fundamental liberty interest of parents in the care, custody, and management of their child[ren]”); *Troxel v. Granville*, 530 U.S. 57, 65–66, 87, 91 (2000) (referring to parental rights as “fundamental” or “unalienable” in the plurality opinion and dissenting opinions of Justices Stevens and Scalia).

226. The statutory schemes discussed in this part of the article are not the only relevant statutes, but represent examples of laws that would surely comport with—or arguably be subject to challenge under—the test presented in *O.F.F.E.R.* In addition to Kentucky, Minnesota, the District of Columbia, and California; Idaho, Indiana, and South Carolina have *de facto* custodian statutes. IDAHO CODE § 15–5–213 (2014); IND. CODE § 31–9–2–35.5 (2013); S.C. CODE ANN. § 63–15–60 (2014). Delaware has a *de facto* parent statute. DEL. CODE tit. 13, § 8–201 (2014). New Mexico has two statutes that deal with terminating parental rights that use the term “psychological parent-child relationship” without defining the term. N.M. STAT. § 32A–4–28 (2013); N.M. STAT. § 32A–5–15 (2013).

227. KY. REV. STAT. ANN. § 403.270(A) (West 2014).

228. *Id.* § 403.270(C).

financial supporter of such child”; and (3) have resided with the child for a minimum of six months or a year, depending on the age of the child, “without a parent present and with a lack of demonstrated consistent participation by a parent.”²²⁹ For a parent to exhibit a lack of consistent participation, he or she must have “refuse[d] or fail[ed] to comply with the duties imposed upon the parent by the parent-child relationship.”²³⁰

The District of Columbia statute defines a *de facto* parent as one who (1) has lived with the child in the same household at the time of the child’s birth or adoption, taken on full and permanent responsibilities as the child’s parent, and held himself or herself out as the child’s parent with the agreement of the child’s [legal] parent(s); or (2) has lived with the child in the same household for a requisite period of time, formed a “strong emotional bond” with the child with the encouragement and intent of the parent, taken on full responsibilities as the child’s parent, and held himself or herself out as the child’s parent with the agreement of the parent(s).²³¹ Even if an individual qualifies as a *de facto* parent under the statute, a biological parent enjoys a strongly favored presumption in disputes with a *de facto* parent.²³²

By contrast, provisions of the California Code could be challenged using the *O.F.F.E.R.* test, at least to the extent to which the state’s courts have used the code as a means to force a distant *de facto* parent back into the life of a parent’s child. California law loosely defines “*de facto* parent” as one “who has . . . assumed, on a day-to-day basis, the role of parent, fulfilling both the child’s physical and psychological needs for care and affection” for “a substantial period.”²³³ Nowhere is the term “substantial period” defined. The specific elements necessary to establish status as a *de facto* parent are that the party must have (1) had “the support and consent of the child’s parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the *de*

229. MINN. STAT. ANN. § 257C.01(1)(a)–(b) (West 2014).

230. *Id.* § 257C.01(1)(c).

231. District of Columbia Safe and Stable Homes for Children and Youth Act of 2007, D.C. CODE §§ 16–831.01(1) (2009).

232. *See, e.g.,* W.H. v. D.W., 78 A.3d 327, 338 (D.C. Ct. App. 2013) (quoting *Troxel* for the proposition that “[s]o long as a parent adequately cares for his or her children . . . , 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 the parent to make the best decisions concerning the rearing of that parent’s children” and that “*natural parents* do not lose their constitutionally-protected right to care for, have custody of, and manage their children ‘simply because they have not been model parents’”) (emphasis added) (quoting *In re C.M.*, 916 A.2d 169, 179 (D.C. 2007)) (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

233. CAL. R. CT. 5.502.

facto parent”; (2) “exercised parental responsibilities for the child”; and (3) done so long enough “to have established a bonded and dependent relationship with the child.”²³⁴ Once an individual acquires the status of *de facto* parent, a rebuttable presumption exists that the best interest of the child requires a continuing relationship with the *de facto* parent.²³⁵ In addition, California’s Uniform Parentage Act²³⁶ provides that a man is presumed to be the father of a child if he “receives the child into his home and openly holds out the child as his natural child.”²³⁷ California courts have applied this provision in a gender-neutral manner to declare a biological mother’s former same-sex partner to be a “parent,” without regard for the fact that the domestic partnership and co-parenting arrangement may have existed only briefly.²³⁸

The California Court of Appeal has applied these provisions to find a biological mother’s former same-sex partner to be a “parent,” despite the absence of any written parenting agreement between them, the fact that the domestic partner resided in the family home for only the first three months of the child’s life, and the fact that the child’s mother thereafter took all possible steps over the next five years to “prevent an inference of a parental relationship between [the former partner and the child].”²³⁹ Having found the former partner to be a “parent” despite all possible efforts to the contrary by the mother, the court denied that its forced reunification plan violated the due process rights of the child’s mother in any way.²⁴⁰

Regarding respect for constitutional and common law rights of the parties involved in these disputes, the *O.F.F.E.R.* test would appropriately recognize and vindicate the presumption that a fit legal parent acts in the best interests of his or her child. If the parent was declared unfit or had demonstrated a desire to share parenting responsibilities with his or her former partner clearly, voluntarily, and over an extended period of time,

234. *Id.*

235. CAL. FAM. CODE § 3041(d) (West 2007) (appearing to presume that it would be detrimental to place the child in the custody of his or her parent, and that the best interest of the child requires custody by the *de facto* parent).

236. CAL. FAM. CODE §§ 7600–7670 (West 2014).

237. *Id.* § 7611(d).

238. See *Elisa B. v. Superior Court*, 117 P.3d 660, 663–64, 668 (Cal. 2005). See also *Charisma R. v. Kristina S.*, 96 Cal. Rptr. 3d 26, 32 (Cal. Ct. App. 2009).

239. Petition for Writ of Certiorari, *Kristina S. v. Charisma R.*, 559 U.S. 938 (2010) (No. 09-677), 2009 WL 4726611 at *19.

240. *Charisma R.*, 96 Cal. Rptr. 3d at 46–53.

458 *Southern California Interdisciplinary Law Journal* [Vol. 24:419

then visitation or even custody rights for the partner would seem appropriate under *O.F.F.E.R.*'s third factor.²⁴¹

With domestic relationships in our culture clearly in transition, we should expect further guidance from the Court at some point concerning the rights of the parties involved. Since the bright line approach in which fit biological and adoptive parents always prevail over putative *de facto* parents is very likely not viable, the best way to bring consistency and balance to the issue is for the Court to accept the offer presented by the *O.F.F.E.R.* test.

241. *See supra* Part III. B, Factor 3.