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### Does Mother Still Know Best: In re Marriage of Harris and Its Impact on the Rights of Custodial Parents

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# **DOES MOTHER STILL KNOW BEST?: *IN RE MARRIAGE OF HARRIS* AND ITS IMPACT ON THE RIGHTS OF CUSTODIAL PARENTS**

## **I. INTRODUCTION**

On August 23, 2004, the California Supreme Court handed down *In re Marriage of Harris*,<sup>1</sup> in which it held that California's grandparent visitation statute, section 3104 of the California Family Code, did not violate a parent's fundamental right to direct the upbringing of her child.<sup>2</sup> Section 3104 allows courts to grant visitation rights to the grandparent of a minor child, even over the objection of the child's custodial parent, if: (1) the grandparent and child share a preexisting relationship "that has engendered a bond such that visitation is in the best interest of the child,"<sup>3</sup> and (2) the court balances the child's interest in visitation against the parent's right to exercise his or her parental authority.<sup>4</sup> The statute further requires the court to apply a rebuttable presumption that grandparent visitation is not in a child's best interest if the parent with sole legal custody opposes it.<sup>5</sup>

The court analyzed the facial and as-applied constitutionality of

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1. 96 P.3d 141 (Cal. 2004).

2. *Id.* at 154.

3. CAL. FAM. CODE § 3104(a)(1) (West 2004).

4. *Id.* § 3104(a)(2).

5. *Id.* § 3104 (e)–(f). Section 3104(e)–(f) provides in pertinent part:

(e) There is a rebuttable presumption that the visitation of a grandparent is not in the best interest of a minor child if the natural or adoptive parents agree that the grandparent should not be granted visitation rights.

(f) There is a rebuttable presumption affecting the burden of proof that the visitation of a grandparent is not in the best interest of a minor child if the parent who has been awarded sole legal and physical custody of the child in another proceeding or with whom the child resides if there is currently no operative custody order objects to visitation by the grandparent.

section 3104<sup>6</sup> and arrived at three conclusions. First, the court held that because the child's noncustodial father supported visitation, the custodial mother's constitutional rights had not been infringed by the visitation order.<sup>7</sup> Based largely on this finding, the court arrived at its second and third conclusions: that section 3104 had been constitutionally applied under the U.S. Constitution,<sup>8</sup> and that the statute was facially valid under the California Constitution.<sup>9</sup>

This Comment evaluates the soundness of the California Supreme Court's ruling, and addresses its possible impact on the fundamental rights of parents to raise their children free from unwarranted state interference. Part II presents the facts of *Harris* and summarizes the procedural background preceding the court's decision. Part III describes the state of parents' rights prior to the court's decision, with particular emphasis on the U.S. Supreme Court's holding in *Troxel v. Granville*<sup>10</sup> and select California cases. Part IV provides a synopsis of the issues addressed by the *Harris* court and the reasoning it employed to resolve those issues. Part V argues both that the *Harris* court unconstitutionally applied section 3104 under the Federal Constitution and that the statute is facially invalid under the California Constitution. Part VI discusses the potential ramifications of the court's holding. Finally, Part VII proposes two amendments to section 3104. First, the California legislature should insert a provision granting fit parents with sole legal custody the exclusive right to make visitation decisions. Second, the California legislature should modify section 3104(f) to explicitly require proof of harm or potential harm by clear and convincing evidence before allowing grandparent visitation over a fit custodial parent's objection.

## II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Karen Butler married Charles Harris on January 12, 1994.<sup>11</sup> The marriage was stormy from the outset and racked by constant turmoil

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6. See *Harris*, 96 P.3d at 153–54.

7. *Id.* at 152.

8. *Id.* at 154.

9. *Id.*

10. 530 U.S. 57 (2000).

11. *Harris*, 96 P.3d at 143.

and violence.<sup>12</sup> According to Karen, Charles physically abused her on numerous occasions; several of the violent incidents allegedly occurred while she was pregnant with their daughter, Emily.<sup>13</sup> The couple separated on October 16, 1994, ten days before Emily was born, and filed for divorce three months later, on January 18, 1995.<sup>14</sup> On July 21, 1995, the trial court dissolved the marriage and granted the mother “sole legal and physical custody” of Emily.<sup>15</sup> The sole legal custody award granted the mother “the exclusive ‘right and . . . responsibility to make the decisions relating to the health, education, and welfare of’ Emily,”<sup>16</sup> whereas the award of sole physical custody “placed Emily ‘under’ [her mother’s] exclusive ‘supervision.’”<sup>17</sup>

In the years following the divorce, several proceedings and court orders addressed the visitation rights of Emily’s paternal grandparents, Charles and Leanne Harris.<sup>18</sup> In August of 1995, the grandparents filed a motion for visitation with Emily.<sup>19</sup> The trial court granted the motion,<sup>20</sup> but imposed two conditions: (1) that the grandparents undergo counseling sessions to address the issue of abuse,<sup>21</sup> and (2) that the grandparents not allow Emily’s father to be present during the visits.<sup>22</sup>

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12. See *In re Marriage of Harris*, 112 Cal. Rptr. 2d 127, 130 n.2 (Ct. App. 2001), *opinion superseded by* 37 P.3d 379 (Cal. 2002), *aff’d in part*, 96 P.3d 141 (Cal. 2004).

13. During Karen’s pregnancy, Charles allegedly kicked Karen in the stomach, pushed her out of a boat into the San Diego Bay, and attempted to strangle her after she told him of her plans to leave him. *Id.* Charles denied these allegations, but admitted that he used and sold drugs, and that he on numerous occasions struck and bit Karen during incidents he described as “mutually combative.” See *Harris*, 96 P.3d at 144.

14. *Harris*, 96 P.3d at 143.

15. *Id.* at 144.

16. *Id.* at 157 (Chin, J., concurring and dissenting) (citing CAL. FAM. CODE § 3006 (West 2004)) (omission in original) (emphasis omitted).

17. *Id.* at 157–58 (Chin, J., concurring and dissenting) (citing CAL. FAM. CODE § 3007 (West 2004)) (emphasis omitted).

18. See *id.* at 144–46.

19. *Id.* at 144.

20. *Id.* The court granted visitation as follows: “four visits per year for up to seven days each in 1996, six visits per year for up to seven days each in 1997, and six visits per year for up to 10 days each in 1998.” *Id.*

21. *Id.* The mother requested these sessions because she believed that Emily’s paternal grandfather had abused his son Charles. *Id.*

22. *Id.*

In April of 1996, Karen filed a motion to terminate the grandparents' visitation rights, alleging that their visits earlier in the year "were extremely hostile and filled with conflict," and thus harmful to Emily.<sup>23</sup> She further asserted that "Emily had nightmares after the paternal grandparents' last visit, cried during her nap times, and clung to the mother 'for days after the visits,' all of which behavior was unusual for her."<sup>24</sup> The court again denied Karen's motion, but modified the previous visitation order to permit fewer visits per year.<sup>25</sup>

In February of 2000, Charles notified Karen that he had moved into his parents' home.<sup>26</sup> Nevertheless, Charles' parents, Emily's grandparents, indicated that Charles would have no contact with Emily during her visits to the house.<sup>27</sup> Three months later, the grandparents sought a visitation order that would allow them two weeks with Emily during August, one week during the Christmas and New Year holidays, one week during Easter, and one week in June.<sup>28</sup> Moreover, in association with these proposed visits the grandparents asked the court to order the mother to place six-year-old Emily alone on a plane and to send her from her new home in Utah to the grandparents' home in San Diego.<sup>29</sup> Finally, the grandparents requested that the court allow Charles to have supervised visits with Emily during her trips to California.<sup>30</sup>

Karen objected to the grandparents' requests.<sup>31</sup> In her responsive motion, she asked the court to end court-ordered visitation.<sup>32</sup> Karen claimed the visitation was "disruptive and intrusive to the Butler family,"<sup>33</sup> and that the grandparents' demands

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23. *Id.*

24. *Id.*

25. *See id.*

26. *Id.* at 145.

27. *Id.*

28. *Id.*

29. *Id.* at 158 (Chin, J., concurring and dissenting). By this time, Karen and Emily were living in Utah with Karen's new husband, Mark Butler, and his six children. *See id.* at 144.

30. *Id.* at 158.

31. *See id.* (Chin, J., concurring and dissenting).

32. *Id.* (Chin, J., concurring and dissenting).

33. *In re Marriage of Harris*, 112 Cal. Rptr. 2d 127, 132 (Ct. App. 2001).

for Emily's time risked destroying "the feeling of belonging that every child needs in order to feel safe and secure with her family in her home."<sup>34</sup>

The trial court once again granted the grandparents' visitation request despite the mother's objection.<sup>35</sup> In doing so, the court noted that it did not question the mother's motivation in seeking to end court-ordered visitation,<sup>36</sup> acknowledging that the mother "believes that it is best for this child if she provides the family unit and she makes the decisions as to what contact, if any, would exist between other people and this child."<sup>37</sup> The court, however, was of the "firm belief" that Emily could benefit from having a relationship with the grandparents,<sup>38</sup> and did not believe that the mother would encourage this relationship "in spite of what she [said]."<sup>39</sup> Though it acknowledged that its decision interfered with the mother's right to raise her children as she saw fit,<sup>40</sup> the trial court nevertheless concluded that visitation was in Emily's best interests, and ordered it to continue.<sup>41</sup>

The court of appeal reversed, finding that the visitation order violated Karen's due process rights under both the federal and California constitutions.<sup>42</sup> The court unanimously held that the visitation statute was facially unconstitutional under the state constitution unless the presumption mandated by section 3104(f) was construed to require "clear and convincing evidence that the child

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34. *Id.* at 132 n.4. The mother's declaration stated in part:

[The grandparents] complain if [Emily] shares her gifts with her siblings. We have every right to teach Emily our values and if sharing is one of our values, then so be it. . . . The Harrises constantly remind Emily she is a Harris, not a Butler. . . . It concerns me that my child feels that I have no control over what happens to her.

*Id.*

35. *Harris*, 96 P.3d at 146.

36. *Id.*

37. *Id.*

38. *See id.* at 158 (Chin, J., concurring and dissenting).

39. *Id.* (Chin, J., concurring and dissenting) (alteration in original).

40. *Id.* at 146 ("I do have to acknowledge that the grandparents are interfering to some degree with the mother's rights as a parent to the extent they exist to raise children . . .").

41. *Id.*

42. *See In re Marriage of Harris*, 112 Cal. Rptr. 2d 127, 142-43 (Ct. App. 2001).

will suffer harm or potential harm if visitation is not ordered.”<sup>43</sup> The court construed section 3104(f) in this manner to preserve its constitutionality.<sup>44</sup> The court also found, however, that the lower court applied “nothing more than . . . a bare-bones best interest test.”<sup>45</sup> Because it did not require the grandparents to prove harm or potential harm by clear and convincing evidence, the court held that section 3104 had been unconstitutionally applied to Karen.<sup>46</sup> The grandparents appealed, and the California Supreme Court granted review.<sup>47</sup>

### III. BACKGROUND ON PARENTAL RIGHTS

#### *A. Parental Rights Under the United States Constitution*

The Due Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>48</sup> The U.S. Supreme Court has long recognized that in addition to guaranteeing fair procedure the Clause includes “a substantive component” that provides heightened protection to those liberty interests deemed “fundamental.”<sup>49</sup> The High Court has regarded parents’ interest in “the care, custody, and control of their children [as] perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>50</sup>

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43. *Id.* at 141.

44. *See id.* at 140.

45. *Id.* at 142–43.

46. *Id.* at 144.

47. *See In re Marriage of Harris*, 96 P.3d 141, 143 (Cal. 2004).

48. U.S. CONST. amend. XIV, § 1.

49. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

50. *Id.*; *see also Glucksberg*, 521 U.S. at 720 (“In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one’s children . . .”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (explaining that “the fundamental theory of liberty” protects the “liberty of parents and guardians to direct the upbringing and education of children under their control,” free from unreasonable state interference).

The Supreme Court reaffirmed the fundamental nature of parents' rights to raise their children in the recent case of *Troxel v. Granville*.<sup>51</sup> The controversy in *Troxel* developed when the parents of a deceased father of two children petitioned for visitation under Washington's visitation rights statute.<sup>52</sup> The statute permitted any person to petition for visitation at any time, and allowed a court to grant visitation whenever it found that such visitation would serve the child's best interest.<sup>53</sup> The children's mother did not oppose all visitation, but wanted to limit visitation to once per month.<sup>54</sup> The trial court found that more extensive visitation would be in the children's best interest and therefore granted the grandparents' request despite the mother's objection.<sup>55</sup>

Although it declined to declare the Washington statute facially unconstitutional,<sup>56</sup> a plurality of the U.S. Supreme Court found that the trial court *unconstitutionally applied* the statute to the mother.<sup>57</sup> Three factors were critical to the verdict.<sup>58</sup> First, the Court noted that no one had proven, or even alleged, that the mother was an unfit parent.<sup>59</sup> This aspect of the case was crucial, the Court held, because "there is a presumption that fit parents act in the best interests of their children."<sup>60</sup> Second, the plurality noted that the trial court gave no "special weight" to the fit parent's determination of what was best for her children, but rather placed the burden on the mother to prove that visitation was not in her children's interests.<sup>61</sup> Finally, the Court observed that there had been "no allegation that Granville ever

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51. See *Troxel*, 530 U.S. at 66 ("[I]t cannot now be doubted that the Due Process Clause . . . protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

52. See *id.* at 60–61.

53. See WASH. REV. CODE ANN. § 26.10.160(3) (West Supp. 2005) ("Any person may petition the court for visitation rights at any time . . . The court may order visitation rights for any person when visitation may serve the best interest of the child . . .").

54. See *Troxel*, 530 U.S. at 61.

55. *Id.* at 61–62.

56. See *id.* at 73.

57. *Id.* at 67.

58. See *id.* at 68–73.

59. *Id.* at 68.

60. *Id.*

61. *Id.* at 69.



sought to cut off visitation entirely,"<sup>62</sup> and that the case thus involved a simple disagreement between a judge and a mother as to how much visitation would be best for the children.<sup>63</sup> The Court rejected the legitimacy of such a scenario, declaring that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a 'better' decision could be made."<sup>64</sup>

Thus, a distillation of the *Troxel* decision yields three factors crucial to the evaluation of whether a visitation statute has been constitutionally applied. The first factor is whether the court reviewing the visitation order assessed the fitness of the parent opposing visitation.<sup>65</sup> This finding is necessary because *Troxel* mandates the presumption in favor of a parent's child-rearing decision only if that parent is found fit.<sup>66</sup> Second, if the court finds that the parent is fit, then the court reviewing the visitation request must give "special weight" to the parent's determination of what is best for his or her child.<sup>67</sup> Finally, the *Troxel* plurality suggested that a court must give the parent opposing court-ordered visitation a chance to voluntarily negotiate a visitation plan.<sup>68</sup> Under *Troxel*, any court ruling on a visitation request without considering these factors risks having its decision reversed.

Although *Troxel* offered some guidance, the Court's deliberately narrow opinion also left important issues unresolved.<sup>69</sup> First, although the plurality held that deference to the fit parents' decisions

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62. *Id.* at 71.

63. *Id.* at 72.

64. *Id.* at 72-73.

65. *See id.* at 68.

66. *See id.* The Court stated:

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

*Id.* at 68-69.

67. *See id.* at 69.

68. *See id.* at 71; *see also* *Punsly v. Ho*, 105 Cal. Rptr. 2d 139, 145 (Ct. App. 2001) (relying on *Troxel* for the proposition that judges cannot ignore a competent custodial parent's "voluntary efforts for visitation").

69. *See In re Marriage of Harris*, 112 Cal. Rptr. 2d 127, 135 (Ct. App. 2001).

was required, it did not specify the standard of review that courts should apply in protecting those parents' rights.<sup>70</sup> While it reiterated that a parent's liberty interest in raising her children was fundamental, the plurality nevertheless abstained from applying strict scrutiny, the standard usually used to review laws that interfere with such rights.<sup>71</sup> Second, the Court expressly declined to consider whether due process requires a showing of harm or potential harm to the child before visitation is granted over a fit parent's objection.<sup>72</sup> Thus, in the wake of the plurality's narrow holding, "[s]tate courts have been left with the laborious task of filling in the gaps left open by the *Troxel* decision."<sup>73</sup>

*B. Parental Rights Under the California Constitution  
Before Harris*

Parents' child-rearing rights are also protected by Article I, section 1 of the California Constitution.<sup>74</sup> A custodial parent's fundamental right to raise her children resides within this constitution's privacy guarantee.<sup>75</sup> Recognizing the protected status of parental rights under both the federal and state charters, the California courts have rigorously scrutinized all statutes that significantly interfere with this fundamental liberty interest.<sup>76</sup>

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70. *See id.*

71. *See id.* Justice Thomas noted that "curiously," none of the plurality opinions articulated the "appropriate standard of review." *Troxel*, 530 U.S. at 80 (Thomas, J., concurring). Justice Thomas stated that the Court should adhere to its precedents and apply strict scrutiny to any law interfering with fundamental rights. *Id.* (Thomas, J., concurring).

72. *See Troxel*, 530 U.S. at 73.

73. Michael Varela, *All for the Love of a Child: The Current State of California's Grandparent Visitation Statute in Light of Troxel v. Granville*, 44 SANTA CLARA L. REV. 595, 605 (2004).

74. *See Harris*, 112 Cal. Rptr. 2d at 139. Article 1, section 1 of the California Constitution provides that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1.

75. *See In re Marriage of Harris*, 96 P.3d 141, 159 (Cal. 2004) (Chin, J., concurring and dissenting) (citing *In re Roger S.*, 569 P.2d 1286, 1289 (Cal. 1977)).

76. *See, e.g., People v. Silva*, 33 Cal. Rptr. 2d 181, 185 (Ct. App. 1994) ("Legislation which . . . impinges on the exercise of a fundamental right is

Each state, however, reserves the right to provide greater protection to its citizens than the Federal Constitution mandates.<sup>77</sup> The California courts have apparently seized this opportunity, safeguarding parents' child-rearing interests perhaps even more aggressively than their federal counterparts. While the federal courts have recently departed from their tradition of applying strict scrutiny to laws that significantly infringe on parental rights,<sup>78</sup> the California courts have declined to make a similar break from tradition. Accordingly, under the California Constitution, any legislation that significantly interferes with the fundamental right to parent will be struck down if it fails to meet strict scrutiny.<sup>79</sup>

Further, in a long line of decisions, the California courts have voiced a strong reluctance to meddle with family affairs absent compelling circumstances,<sup>80</sup> and have declared that parents' rights shall "only give[] way upon a showing of parental unfitness, detrimental to the child's welfare."<sup>81</sup> Recognizing the primacy of parental autonomy, the California Court of Appeal has declared that "[a] showing of harm or potential harm is constitutionally required to justify governmental interference with child rearing,"<sup>82</sup> and the California Supreme Court has provided that "[p]arenting is a fundamental right . . . disturbed only in extreme cases of persons acting in a fashion incompatible with parenthood."<sup>83</sup> In sum, the California courts' rulings evince a state policy of interfering with fundamental parenting rights only when state intervention is necessary to protect a child from potential harm.

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subject to strict scrutiny and will be upheld only if it is necessary to further a compelling state interest."); *accord* *Punsly v. Ho*, 105 Cal. Rptr. 2d 139, 145 (Ct. App. 2001).

77. *See Harris*, 112 Cal. Rptr. 2d at 139 ("The state's right to impose higher constitutional standards than those required under the United States Constitution cannot be seriously questioned.").

78. *See id.* at 135 (citing *Troxel v. Granville*, 530 U.S. 57, 73 (2000)).

79. *See Silva*, 33 Cal. Rptr. 2d at 185.

80. *See In re Marriage of Mentry*, 190 Cal. Rptr. 843, 848 (Ct. App. 1983) ("The concept of family privacy embodies not simply a policy of minimum state intervention but also a presumption of parental autonomy.").

81. *In re Marriage of Jenkins*, 172 Cal. Rptr. 331, 334-35 (Ct. App. 1981).

82. *Harris*, 112 Cal. Rptr. 2d at 140.

83. *In re Carmaleta B.*, 579 P.2d 514, 518 (Cal. 1978).

*C. Grandparents' Rights to Court-Ordered Visitation  
with Their Grandchildren*

Grandparents, by contrast, enjoy no constitutionally-based right to court-ordered visitation with their grandchildren.<sup>84</sup> Rather, any such rights emanate solely from state statutes.<sup>85</sup> Perhaps recognizing that close relationships with grandparents can benefit children, all fifty states have enacted laws providing for some form of grandparent visitation.<sup>86</sup> Nevertheless, it remains a fundamental precept of American jurisprudence that any statutory right must yield to those rights guaranteed by the state and federal constitutions.<sup>87</sup>

IV. THE CALIFORNIA SUPREME COURT'S  
ANALYSIS IN *HARRIS*

*A. The Mother's Claims Under the United States Constitution*

1. Section 3104 is not Facially Unconstitutional Under the  
United States Constitution

The *Harris* court first addressed the mother's claim that the statute was per se invalid under the Federal Constitution.<sup>88</sup> In addressing this issue, the court was mindful of the *Troxel* plurality's reluctance to declare visitation statutes facially unconstitutional.<sup>89</sup> The court also noted *Troxel*'s emphasis on the excessive breadth of the Washington statute and its failure to afford "special weight" to parents' child-rearing decisions as primary reasons for the statute's

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84. *Harris*, 112 Cal. Rptr. 2d at 136.

85. See *In re Marriage of Harris*, 96 P.3d 141, 146 (Cal. 2004) ("Grandparents' rights to court-ordered visitation with their grandchildren are purely statutory.").

86. Varela, *supra* note 73, at 596 n.3 (listing each of the fifty states' grandparent visitation statutes).

87. See *Katzberg v. Regents of Univ. of Cal.*, 58 P.3d 339, 359 (Cal. 2002) (Brown, J., concurring and dissenting) (stating that the California Constitution is the "supreme law of [the] state"); see *Harris*, 112 Cal. Rptr. 2d at 142 (stating that parents' constitutional rights are given more protection than grandparents' statutory rights).

88. See *Harris*, 96 P.3d at 149.

89. See *id.* at 150 ("[T]he constitutional protections in this area are best 'elaborated with care.'" (quoting *Troxel v. Granville*, 530 U.S. 57, 73 (2000))).

constitutional infirmity.<sup>90</sup>

With *Troxel*'s guidelines in mind, the court upheld the facial validity of section 3104.<sup>91</sup> In doing so, it observed that the statute is, in several respects, narrower than the Washington statute.<sup>92</sup> First, unlike the statute in *Troxel*, section 3104 does not grant all persons the right to petition for visitation; rather, it limits that right to the child's grandparents.<sup>93</sup> Second, section 3104 requires a "preexisting relationship between the grandparent and the grandchild that has engendered a bond such that visitation is in the best interest of the child" before visitation may be ordered.<sup>94</sup> Finally, section 3104(a)(2) requires the court to balance the child's interest in visitation against the parent's right to exercise his or her parental authority before ordering visitation.<sup>95</sup>

The court further found that, unlike the statute at issue in *Troxel*, section 3104 gave "special weight" to fit parents' child-rearing decisions.<sup>96</sup> The court noted that section 3104 protects parents' rights by mandating a rebuttable presumption against visitation if the parents agree that such visitation is not in their child's best interest<sup>97</sup> or if the parent with sole custody objects to it.<sup>98</sup> The court buttressed its conclusion by stating that section 3104(e) was "cit[ed] with approval" by the *Troxel* plurality.<sup>99</sup> Based on these findings, the court held that "section 3104 does not suffer from the constitutional infirmities that plagued the Washington statute considered in *Troxel*," and rejected the mother's argument that the statute was facially invalid.<sup>100</sup>

## 2. Section 3104 was not Unconstitutionally Applied to the Mother Under the United States Constitution

The court next considered the mother's complaint that section

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90. *Id.* at 150–51.

91. *Id.* at 151.

92. *Id.*

93. *See id.*

94. *Id.* (quoting CAL. FAM. CODE § 3104(a)(1) (West 2004)).

95. *Id.* (citing § 3104(a)(2)).

96. *Id.*

97. *Id.* at 151–52 (citing § 3104); *see supra* note 5.

98. *Id.* at 152 (citing § 3104); *see supra* note 5.

99. *Id.* at 151.

100. *Id.*

3104, as applied to her, violated the Federal Constitution.<sup>101</sup> First, the court distinguished the case at bar from *Troxel*, observing that the latter involved a visitation order being opposed by a sole surviving fit parent.<sup>102</sup> The present case, in contrast, involved *two* fit parents who disagreed over grandparent visitation.<sup>103</sup> In drawing this distinction, the court stressed that in the present case, at the time the visitation order was issued, the father's parental rights were not yet terminated.<sup>104</sup>

The court conceded that, under *Troxel*, "[c]ourt-ordered grandparent visitation over the objection of a sole surviving parent implicates that parent's right to the custody and control of his or her child."<sup>105</sup> Nonetheless, it rejected the mother's argument that her parenting rights were similarly infringed by the visitation order in the present case.<sup>106</sup> The court reasoned that "[n]othing in the decision in *Troxel* suggests that an order for grandparent visitation that is supported by one parent infringes upon the parental rights of the other parent."<sup>107</sup> Finding that the mother had not cited any authority to suggest that her parental rights were implicated by a visitation order the father supported, the court held that section 3104 had been constitutionally applied under the facts.<sup>108</sup>

### *C. The Mother's Claims Under the California Constitution*

Lastly, the court turned to the mother's assertion that section 3104 was unconstitutional—both facially and as-applied—under the state charter.<sup>109</sup> The mother claimed that the visitation statute impermissibly infringed upon her privacy right guaranteed by the California Constitution.<sup>110</sup>

The court disposed of the mother's state claims in the same

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101. *See id.* at 152.

102. *Id.*

103. *See id.*

104. *See id.* ("The mother had been awarded sole legal and physical custody of Emily, but this did not terminate the father's parental rights, nor did it terminate his due process interest in parenting.").

105. *Id.*

106. *See id.*

107. *Id.*

108. *Id.* at 152–54.

109. *See id.* at 153–54.

110. *See id.* at 153.

manner that it dismissed her federal challenges.<sup>111</sup> It first distinguished the cases the mother cited, reasoning that none of the cases addressed the privacy guarantee in a context similar to the present case.<sup>112</sup> Again finding that “[n]one of these cases support the mother’s argument that an order for grandparent visitation that is supported by one parent infringes upon the parental rights of the other parent,” the court held that section 3104 was valid both facially and in its application.<sup>113</sup>

#### V. ANALYSIS OF THE COURT’S DECISION

As the following analysis will demonstrate, the *Harris* court erred in concluding that the mother’s constitutional parenting rights were not infringed by the trial court’s visitation order. This erroneous holding led directly to the court’s subsequent failure to find that the application of section 3104 violated the mother’s fundamental parenting rights under *Troxel*. Finally, the court’s interpretation of section 3104(f), which does not require grandparents to prove by clear and convincing evidence that denying visitation may harm the child, renders the statute facially invalid under the California Constitution.<sup>114</sup>

##### *A. The Father’s Support for Visitation was Without Legal Effect, and Therefore did not Affect the Mother’s Constitutional Rights*

The primary basis upon which the court rejected the mother’s as-applied federal claim and the entirety of her state claim was that the father supported the visitation order.<sup>115</sup> The father’s support was crucial, the court reasoned, because nothing in *Troxel* or in the cases cited by the mother indicated “that an order for grandparent visitation that is supported by one parent infringes upon the parental rights of

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111. See *id.* at 153–54.

112. See *id.* (reasoning that the three cited cases dealt respectively with the privacy guarantee in the contexts of the right to refuse medical treatment, the right to obtain an abortion without parental consent, and the right to be free of compulsory drug testing).

113. *Id.* at 154.

114. This was the conclusion reached by a unanimous Court of Appeal. See *In re Marriage of Harris*, 112 Cal. Rptr. 2d 127, 140 (Ct. App. 2001).

115. See *Harris*, 96 P.3d at 152.

the other.”<sup>116</sup> The rule that the court has implicitly adopted, therefore, is that a sole custodial parent’s fundamental right to raise her child is never implicated by court-ordered grandparent visitation, even if he or she objects to it, as long as the noncustodial parent with parental rights assents to such visitation.<sup>117</sup> This holding has the problematic effect of allowing a noncustodial parent to nullify a custodial parent’s constitutional right to make child-rearing decisions, even though a noncustodial parent, by definition, has no legal authority to make such decisions in the first instance.<sup>118</sup>

Although the rule it adopted was unprecedented, the court provided little explanation for its holding, and it failed to cite any legal authority to support the new rule.<sup>119</sup> It made no attempt to articulate why a noncustodial father’s support for visitation should be permitted to affect, much less negate, a sole custodial parent’s statutory and constitutional right to raise her children.<sup>120</sup>

The court should not have relied upon the father’s support for the grandparents’ visitation request, because such support was without legal consequence.<sup>121</sup> As previously noted, the trial court’s award of sole legal custody gave Karen the *exclusive* right and responsibility to make all decisions relating to Emily’s upbringing,<sup>122</sup> which included the right to decide with whom Emily should associate.<sup>123</sup> It follows that Charles had *no legal right* to make

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116. *Id.*

117. *See id.* at 161 (Chin, J., concurring and dissenting).

118. *See id.* at 161 n.2 (Chin, J., concurring and dissenting) (“Ironically . . . although Charles himself has no right to visit Emily, his support for Grandparents’ visitation request completely negates Karen’s constitutional . . . protection against state interference with her parenting decisions as Emily’s sole custodian.”).

119. *Id.* at 156 (Baxter, J., concurring and dissenting) (“The majority’s categorical declaration that the mother has no federal or state constitutional interest at stake in this proceeding is bereft of legal authority . . .”).

120. *See id.* (Baxter, J., concurring and dissenting).

121. *See id.* at 161 (Chin, J., concurring and dissenting) (“Charles’s support for Grandparents’ visitation request is legally irrelevant . . .”); *id.* at 170 (Brown, J., concurring and dissenting) (“[A]t this point the father’s parental rights have been terminated, and hence his views regarding grandparent visitation are not relevant.”).

122. *See id.* at 157 (Chin, J., concurring and dissenting) (citing CAL. FAM. CODE § 3006 (West 2004)) (defining sole legal custody).

123. *See id.* at 159 (Chin, J., concurring and dissenting) (citing *Punsly v. Ho*,



similar decisions on Emily's behalf.<sup>124</sup> Thus, given the effect of the custody award, the court erred in allowing the father's legally inconsequential endorsement of the visitation request to abrogate the mother's fundamental right to parent. The court's only justification for the rule was that the cases cited by the mother did not support her position.<sup>125</sup> As Justice Chin observed in his concurring and dissenting opinion, however, "nothing in any of those decisions supports the majority's view, and the majority does not contend otherwise."<sup>126</sup>

Thus, because the noncustodial father's endorsement of the visitation order was legally immaterial, the court erred in holding that the mother's fundamental right to raise her child was nullified by such an endorsement. As a result, Karen Butler's parenting rights remained protected under the California and federal constitutions, and were infringed by the trial court's visitation order.

*B. The Application of Section 3104 to the Mother was  
Unconstitutional Under Troxel*

Because the mother's child-rearing rights remained protected by the Due Process Clause, the application of section 3104 in this case had to satisfy the three factors emphasized by the *Troxel* plurality in

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105 Cal. Rptr. 2d 139, 145 (2001)).

124. As the majority observed, noncustodial parents retain certain parental rights following an award of sole custody to the other parent. See *id.* at 152. For example, a noncustodial parent has the right to reasonable visitation with the child, CAL. FAM. CODE § 3100(a) (West 2004), and the right to access the child's medical and school records, CAL. FAM. CODE § 3025 (West 2004). However, the majority failed to cite any authority to suggest that the right to direct the child's upbringing (and the related right to make decisions regarding third-party visitation) is included among the rights retained by noncustodial parents. There is, however, authority to the contrary. See, e.g., *Burge v. City of San Francisco*, 262 P.2d 6, 12 (Cal. 1953) (opinion by Justice Traynor), (explaining that "[c]ustody embraces the sum of parental rights with respect to the rearing of a child, including its care. It includes the right . . . to direct his activities and make decisions regarding his care and control, education, health, and religion." (citation omitted)); see also *Lerner v. Superior Court*, 242 P.2d 321, 323 (Cal. 1952) (Justice Traynor arguing that "[t]he essence of custody is . . . the right to make decisions regarding [a child's] care and control, education, health, and religion").

125. See *Harris*, 96 P.3d at 153–54.

126. *Id.* at 163 (Chin, J., concurring and dissenting).

order to be valid.<sup>127</sup>

*Troxel* first requires the court reviewing a visitation request to determine whether the parent opposing visitation is *unfit*; that is, whether that parent provides less than adequate care for her child.<sup>128</sup> In the present case, just as in *Troxel*, no party to the proceeding ever questioned the mother's fitness.<sup>129</sup> Thus, because there was no finding of parental unfitness, Karen was entitled to the presumption that she was acting in Emily's best interest when she opposed grandparent visitation.<sup>130</sup>

Because the court deemed Karen fit, *Troxel* next required the court to grant *special weight* to her determination of Emily's best interests.<sup>131</sup> The trial court's decision clearly failed to meet this requirement. Both *Troxel* and section 3104(f)<sup>132</sup> directed the court to presume that visitation was not in Emily's best interests; however, the court did not defer in any way to her mother's child-rearing decision.<sup>133</sup> Instead, it applied a simple best interest test, without applying any presumption in favor of Karen's assessment of what was best for her daughter.<sup>134</sup> The trial court's failure to afford special weight to the mother's child-rearing choices directly contravened *Troxel*'s requirements.

Finally, *Troxel* suggested that a trial court must consider whether the parent is willing to allow any visitation, absent a court-order.<sup>135</sup> This consideration reflects the apparent rationale that courts should not intrude upon family affairs unless other options have been exhausted.<sup>136</sup> In the present case, just as in *Troxel*, the child's mother did not seek to terminate all grandparent visitation.<sup>137</sup> To the

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127. See *Troxel v. Granville*, 530 U.S. 57, 68–72 (2000).

128. See *id.* at 68–69 (defining “fitness”).

129. See *id.* at 68.

130. See *id.* at 68–69.

131. See *id.* at 70.

132. See CAL. FAM. CODE § 3104(f) (West 2004).

133. See *In re Marriage of Harris*, 96 P.3d 141, 146 (Cal. 2004). For an overview of the trial court's decision, see *supra* Part II.

134. See *supra* Part II.

135. See *Troxel*, 530 U.S. at 71.

136. See *id.* at 72–73.

137. See *id.* at 71; see also *Harris*, 96 P.3d at 170 (Brown, J., concurring and dissenting) (observing that Karen did not oppose all visitation, but merely “objected to the expansive order regarding her then five-year-old daughter”).

contrary, the mother stated in her responsive declaration to the grandparents' petition that "she never would prevent Emily from being with her paternal grandparents," but that she simply objected to having a court force Emily to leave her family to accomplish these visits.<sup>138</sup> Karen's amenability to voluntary visitation should have prevented the trial court from issuing its visitation order and interfering with her constitutional right to raise Emily as she saw fit. In violation of *Troxel's* guidelines, however, the trial court did not give due consideration to the mother's willingness to allow visitation, and in fact expressly disregarded it.<sup>139</sup>

Because it did not give special weight to the fit mother's parenting decision, and because it failed to give appropriate consideration to the mother's willingness to negotiate voluntary visitation, the trial court's application of section 3104 ran afoul of *Troxel's* mandates. Thus, the application of that statute denied Karen Butler due process under the Federal Constitution. Unfortunately, the California Supreme Court's conclusion that Karen's fundamental parenting rights were never implicated prevented the court from properly analyzing this issue.

*C. Section 3104 Fails Strict Scrutiny, and is Therefore Facially Invalid Under the California Constitution*

As the *Harris* court correctly observed, section 3104 is far narrower than the visitation statute at issue in *Troxel*.<sup>140</sup> Section 3104 allows only grandparents to petition for visitation, requires a preexisting bond between grandparent and child, and directs the court to balance the interests of the parent and child before a visitation order may be issued.<sup>141</sup> In contrast, the "breathhtakingly broad" Washington statute lacked all of these limitations.<sup>142</sup> Nevertheless, the *Troxel* plurality upheld its facial validity under the

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138. *Harris*, 96 P.3d at 145.

139. *See id.* at 146 (quoting the trial judge's remark that "[I do not believe] there is any realistic possibility that if I leave this to the mother's good graces . . . that she would do anything to encourage the relationship in spite of what she says").

140. *See id.* at 151.

141. *See id.* at 151-52.

142. *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

Federal Constitution.<sup>143</sup> It necessarily follows that the narrower California statute is also valid on its face.<sup>144</sup> Thus, the court properly rejected Karen's argument that section 3104 is invalid per se under the Federal Constitution.<sup>145</sup>

Still, the validity of section 3104 under the minimum mandates of the federal charter does not automatically constitute legitimacy under the California Constitution. In *Troxel*, the U.S. Supreme Court departed from its tradition of applying strict scrutiny to all laws that interfere with fundamental rights.<sup>146</sup> California has yet to make a similar break with precedent, however, and has consistently applied strict scrutiny to laws that severely infringe on fundamental liberties.<sup>147</sup> Therefore, any law that infringes the legally recognized fundamental right to raise one's children must, under California precedent, be narrowly tailored to achieve a compelling state interest.<sup>148</sup>

Accordingly, the first step in assessing the validity of section 3104 is to determine whether the statute serves a compelling government interest.<sup>149</sup> There is no doubt that the state has a compelling interest in preserving children's health and welfare.<sup>150</sup> California's precedents demonstrate that the state's need to interfere with parental autonomy only becomes compelling, however, when a child is threatened with harm.<sup>151</sup> It follows that the state may constitutionally intrude upon a fit parent's visitation preference only if depriving such visitation will potentially injure the child.<sup>152</sup> A

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143. See *id.* at 73.

144. See *In re Marriage of Harris*, 112 Cal. Rptr. 2d 127, 138 (Ct. App. 2001).

145. See *Harris*, 96 P.3d at 151.

146. See discussion *supra* Part III.A.

147. See discussion *supra* Part III.B.

148. See, e.g., *Punsly v. Ho*, 105 Cal. Rptr. 2d 139, 145 (Ct. App. 2001); *People v. Silva*, 33 Cal. Rptr. 2d 181, 185 (Ct. App. 1994).

149. See 16A AM. JUR. 2D *Constitutional Law* § 387 (1998).

150. See *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 819 (Cal. 1997).

151. See discussion *supra* Part III.B.

152. See *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (noting that the Washington statute, which did not require a showing of harm but merely required the petitioning party to show that visitation was in the child's best interests, "lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties")

court may not overrule a fit parent's child-rearing decision simply because it believes visitation would be more beneficial to the child.<sup>153</sup> The *Harris* court's interpretation of section 3104, which allows judicial intervention without proof of potential harm, impermissibly authorizes the state to invade on a fundamental right *before* any compelling state interest arises.<sup>154</sup> Thus, without a harm requirement, the statute does not satisfy the compelling interest standard and cannot withstand strict scrutiny.

Even assuming that section 3104 satisfies the compelling interest requirement, it is nevertheless unconstitutional because, as interpreted by the *Harris* court, it is not narrowly tailored to promote that interest.<sup>155</sup> The problem lies in the court's interpretation of section 3104(f).<sup>156</sup> This subsection directs the court considering a visitation petition to presume in favor of a fit parent's visitation preference.<sup>157</sup> The provision is silent as to the strength of the required presumption, however.<sup>158</sup> As construed by the *Harris* court, section 3104(f) does not require grandparents to rebut the presumption by producing clear and convincing evidence that the child will be harmed if visitation is denied.<sup>159</sup> Instead, the court's interpretation merely requires the grandparents to overcome a rebuttable presumption, affecting the burden of proof, that visitation is not in the child's best interest if the custodial parent objects.<sup>160</sup>

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(Thomas, J., concurring).

153. *See id.* at 72–73.

154. *See In re Marriage of Harris*, 96 P.3d 141, 154 (Cal. 2004) (remanding the case not to determine whether denying visitation would result in harm, but rather to determine whether it would serve the child's "best interest").

155. A statute is narrowly tailored only if the state cannot achieve its goal through any means less restrictive of the constitutional right at issue. 16A AM. JUR. 2D *Constitutional Law* § 387 (1998).

156. *See Harris*, 96 P.3d at 151.

157. *See* CAL. FAM. CODE § 3104(f) (West 2004).

158. *See id.* § 3104(f). Presumptions can vary widely in effect, ranging from conclusive presumptions to presumptions that are rebutted once any evidence contrary to the presumption is admitted. *See* Stephen A. Newman, *Five Critical Issues in New York's Grandparent Visitation Law After Troxel v. Granville*, 48 N.Y.L. SCH. L. REV. 489, 519 (2004).

159. *Harris*, 96 P.3d at 151.

160. Under the California Evidence Code, a presumption affecting the burden of proof "impose[s] upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." CAL. EVID. CODE § 606

So construed, section 3104(f) is not narrowly tailored because an equally effective alternative existed that would have infringed less on custodial parents' constitutional rights.<sup>161</sup> The narrower alternative would have been to require clear and convincing evidence that denying visitation will injure the child before allowing a court to override a fit parent's visitation preference.<sup>162</sup> This standard would have restricted government interference with fundamental parenting rights by limiting the circumstances under which a court may permissibly substitute its decision for the parent's.<sup>163</sup> Further, the standard would have been at least equally effective in protecting children's well-being.<sup>164</sup> It recognizes that fit parents, not courts, are usually best equipped to assess which relationships will serve a child's best interests, and accordingly leaves children's welfare in the hands of those who are best positioned to protect it.<sup>165</sup> Therefore, because section 3104(f) is unnecessarily broad with respect to the grounds on which visitation may be ordered,<sup>166</sup> it is not narrowly drawn and fails strict scrutiny.<sup>167</sup>

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(West 2004); see *Harris*, 96 P.3d at 165 (Chin, J., concurring and dissenting).

161. See 16A AM. JUR. 2D *Constitutional Law* § 387 (2004) ("If there are other, reasonable ways to achieve a compelling state purpose with a lesser burden on the constitutionally protected activity, the state may not choose the way of greater interference; if it acts at all, it must choose the less drastic means.").

162. See *Harris*, 96 P.3d at 166 (Chin, J., concurring and dissenting).

163. See *id.* at 168 (Chin, J., concurring and dissenting).

164. See *id.* (Chin, J., concurring and dissenting).

165. See *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000).

166. As Professors Harris and Teitelbaum have explained,

Statutes allowing visitation by grandparents (and others) may be broad or narrow in two respects. They may be broad or narrow with respect to the nonparents who may seek visitation and they may be broad or narrow as to the grounds on which visitation may be ordered. . . . [A] narrow statute would require showing a likelihood of harm should visitation be denied.

LESLIE J. HARRIS & LEE E. TEITELBAUM, *FAMILY LAW* 840 (2d ed. 2000).

167. On a final note, it has yet to be conclusively established that increased contact with grandparents is actually beneficial to children. See Elaine D. Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. VA. L. REV. 295, 299–301 (1985); see also HARRIS & TEITELBAUM, *supra* note 165, at 834 (noting that there is "considerable evidence that grandparents rarely are involved or deeply interested in their grandchildren's problems"). If grandparent visitation is neither a proven nor effective means of advancing children's health, the state is hard-pressed to assert that there is no way to

VI. THE POTENTIAL IMPLICATIONS OF *HARRIS*

The California Supreme Court's decision in *Harris* could have several far-reaching consequences for the authority of parents to make child-rearing decisions without undue state interference.

First, and perhaps most important, the court's holding deprives sole custodial parents of their fundamental parenting rights in situations where the noncustodial parent endorses grandparent visitation. The *Harris* outcome clearly illustrates this consequence. When Charles voiced his support for the grandparents' visitation bid, Karen was immediately stripped of any constitutionally-based objections to visitation.<sup>168</sup> Thus, the rule adopted in *Harris* allows noncustodial parents, who, by definition, have no legal rights to raise their children, to completely negate sole custodial parents' child-rearing rights. This illogical result unfairly denies a fit custodial parent her fundamental right and duty to make assessments regarding what will serve her child's best interests.

Additionally, the court's failure to protect custodial parents leaves such parents at the mercy of state power. As noted by Justice Chin, it is a fundamental principle of constitutional law that "due process protections do not apply if no state action implicates or infringes upon a constitutionally protected right or interest."<sup>169</sup> Thus, if a custodial parent's rights are never *implicated* by visitation orders that are supported by the noncustodial parent, the state may override the custodial parent's decisions without denying the parent's due process.<sup>170</sup> The court may, for example, issue a visitation order ex parte, without providing the custodial parent with notice or a hearing.<sup>171</sup> Such unchecked state power leaves custodial parents vulnerable to arbitrary deprivation of their fundamental child-rearing rights.<sup>172</sup>

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promote this interest in a manner less burdensome on parents' constitutional rights.

168. See *Harris*, 96 P.3d at 152.

169. *Id.* at 163 (Chin, J., concurring and dissenting).

170. See *id.* (Chin, J., concurring and dissenting).

171. See *id.* (Chin, J., concurring and dissenting).

172. See *id.* (Chin, J., concurring and dissenting). As Justice Chin observed, "[t]he state may also set any (or no) standard for granting such a [visitation] request or impose the burden of proof on a custodial parent to show why it should be denied." *Id.* (Chin, J., concurring and dissenting). Justice Baxter

Finally, the court's failure to require clear and convincing evidence of harm or potential harm not only renders section 3104 unconstitutional, but also subjects families to excessive state interference. Without a requirement of clear and convincing evidence that harm or potential harm will result, a parent may be haled into court anytime a grandparent disagrees with her decision to deny visitation, and would be forced to bear the burden and expense of defending her child-rearing decisions before a judge.<sup>173</sup> As noted by the Court in *Troxel*, the very act of having to litigate a visitation request "can itself be 'so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.'"<sup>174</sup> The court's decision, however, does nothing to insulate families from this burden, and leaves custodial parents' child-rearing decisions vulnerable to constant—and costly—second-guessing by the courts.

#### VII. A PROPOSED CURE FOR *HARRIS*'S INFIRMITIES

*Harris* strips a sole custodial parent of all constitutional parenting rights in situations where the noncustodial parent supports court-ordered grandparent visitation.<sup>175</sup> Left unaltered, *Harris* poses

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voiced similar concerns, stating:

[U]nder the majority's approach, a custodial parent would have no constitutional protection whatsoever if a state overrode that parent's objections and forced his or her child to go on visits with any third party—even with complete strangers, and even if such visitation was demonstrably harmful to the child—as long as the noncustodial parent acquiesced in the court order.

*Id.* at 156 (Baxter, J., concurring and dissenting).

173. *See id.* at 160 (Chin, J., concurring and dissenting). Justice Brown noted that "absent [a requirement of proof by clear and convincing evidence] parents would encounter not only unwarranted judicial intrusion into their private lives, but would also incur significant costs in seemingly unending litigation that would undermine their ability to care for the very children the statute is presumably intended to protect." *Id.* at 169 (Brown, J., concurring and dissenting).

174. *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (quoting *Troxel*, 530 U.S. at 101 (Kennedy, J. dissenting)). Justice Kennedy further observed that "[i]f a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future." *Id.* at 101 (Kennedy, J., dissenting).

175. *See discussion supra* Part VI.



a grave threat to parents' rights to raise their children free from governmental second-guessing and intrusion. Because the liberty interest in rearing one's children is fundamental, it merits protection commensurate with its fundamentality. It must not be nullified by the child-rearing choices of parents who lack legal authority to make such choices. Thus, the state should act to fill the void left by the court's decision and restore protection for custodial parents in situations such as that in *Harris*.

Therefore, this Comment posits that the California legislature should amend section 3104 to include a provision that explicitly grants sole custodial parents<sup>176</sup> the exclusive right to determine whether to grant or deny visitation privileges to grandparents. To ensure that the effects of *Harris* do not survive this amendment, the provision should unambiguously declare that a noncustodial parent's preference for grandparent visitation shall have no legal effect. This proposed provision will undo *Harris*'s potentially calamitous consequences and re-establish necessary safeguards for custodial parents' rights.

In amending section 3104, however, the California legislature should do more than merely mitigate *Harris*'s impact on sole custodial parents. Rather, it should do what the *Harris* court did not: enhance custodial parents' rights by replacing section 3104's "best interest" standard<sup>177</sup> with one that requires proof of harm by clear and convincing evidence before visitation may be ordered over a fit parent's objection.<sup>178</sup> Under this revised standard, judicial contravention of a fit parent's visitation preferences will only be permitted where the grandparent can prove, by clear and convincing evidence, that denying visitation would bring potential harm to the

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176. For the purposes of this provision, a "sole custodial parent" shall be defined as one who has been granted sole custody under section 3006 of the California Family Code. For further discussion of section 3006, see *supra* text accompanying note 16.

177. See CAL. FAM. CODE § 3104(f) (West 2004).

178. The Court of Appeals unanimously endorsed this standard, holding that section 3104 was facially unconstitutional without a harm requirement. See *In re Marriage of Harris*, 112 Cal. Rptr. 2d 127, 140 (Ct. App. 2001); see also discussion *supra* Part VI (discussing the potential implications of *Harris*). However, this standard was dismissed without discussion in the Supreme Court's majority opinion. See *Harris*, 96 P.3d at 149-54.

child.<sup>179</sup>

The proposed standard is superior to the existing one in numerous respects. First, requiring a showing of harm is more consistent with California's precedents than the current "best interest" standard. The California state courts have made it clear that interference with a fit parent's right to raise her children is justifiable only when intervention is necessary to protect the child from harm or potential harm.<sup>180</sup> The state may not usurp the child-rearing role of a fit parent simply because it feels that a better decision regarding the child's best interests can be made.<sup>181</sup> Requiring proof of potential harm to the child as a condition precedent to court-ordered visitation will limit the instances in which the state can interfere with parental rights, and will help ensure that judicial commandeering of parental authority does not needlessly occur.

Further, given the constitutional interests at stake in grandparent visitation proceedings, section 3104 should require proof by clear and convincing evidence rather than by a preponderance of the evidence.<sup>182</sup> Both the U.S. and California Supreme Courts have held that the preponderance standard applies only in cases where society has little interest in the outcome; civil suits for monetary damages are one example.<sup>183</sup> In cases where the "interests at stake . . . are . . .

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179. The "harm" standard has been endorsed by legal scholars and commentators. See, e.g., Michael Goldberg, *Survey of Illinois Law: Family Law — Grandparent Visitation*, 27 S. ILL. U. L.J. 785, 816 (2003). It has also been adopted by an increasing number of state courts. See, e.g., Joan Catherine Bohl, *Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm*, 48 DRAKE L. REV. 279, 331 (2000); see also *Beagle v. Beagle*, 678 So. 2d 1271, 1277 (Fla. 1996) (holding that there is no compelling state interest absent a showing of potential harm to the child). The clear and convincing evidence standard has found similar support among legal commentators. See, e.g., Newman, *supra* note 157, at 527–28; Varela, *supra* note 73, at 616.

180. For an overview of California precedent regarding the state's authority to intervene in family affairs, see discussion *supra* Part III.B.

181. *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000).

182. Under the *Harris* court's interpretation of the presumption mandated by section 3104(f), grandparents need only prove that visitation would "more likely than not" serve the child's best interests. *In re Marriage of Harris*, 96 P.3d 141, 165 (Cal. 2004) (Chin, J., concurring and dissenting).

183. See *Addington v. Texas*, 441 U.S. 418, 424 (1979); *Weiner v. Fleischman*, 816 P.2d 892, 898 (Cal. 1991).

more substantial than mere loss of money,"<sup>184</sup> however, the clear and convincing evidence standard governs. In section 3104 proceedings, parents' constitutional child-rearing rights are implicated. The low burden of proof imposed on grandparents by the preponderance standard creates too great a risk that a fit parent's constitutional rights will be unjustly deprived. Thus, the legislature should adopt the clear and convincing evidence standard to assure that appropriate judicial deference is accorded to a fit parent's estimation of what is best for her children.<sup>185</sup>

Most importantly, the proposed amendments to section 3104 will enable the state to promote children's health and welfare more effectively. First, the amendments give effect to *Troxel's* recognition that fit parents, not judges, are in the best position to determine what contact will serve a child's best interests.<sup>186</sup> Further, the heightened burden of proof will help insulate parents against protracted litigation that can, in and of itself, undermine a parent's capacity to care for her children.<sup>187</sup> Finally, while they enhance parental rights, the amendments simultaneously remain sensitive to situations where denying grandparent visitation may harm the child. An example of one such situation is where the grandparent has played an integral role in raising the child.<sup>188</sup> In such circumstances, where the grandparent has acted as the child's de facto parent, the grandparent should have little trouble producing clear and affirmative evidence that severing the relationship would have a detrimental impact on the child.<sup>189</sup>

## VIII. CONCLUSION

In *Harris*, the California Supreme Court veered from precedent and dealt a crippling blow to custodial parents' fundamental child-rearing rights. *Harris* decimates sole custodial parents' rights by subjecting their visitation preferences to veto by noncustodial parents

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184. *Addington*, 441 U.S. at 424.

185. *See Varela, supra* note 73, at 617.

186. *See Troxel*, 530 U.S. at 68-69.

187. *See Harris*, 96 P.3d at 169 (Brown, J., concurring and dissenting); *Troxel*, 530 U.S. at 75.

188. *See Troxel*, 530 U.S. at 98-100 (Kennedy, J., dissenting).

189. *See Harris*, 96 P.3d at 170 (Brown, J., concurring and dissenting).

who, by definition, have no legal authority to make parenting decisions. Further, the court's conclusion that a custodial parent's constitutional rights are never implicated when the noncustodial parent endorses visitation leaves custodial parents defenseless against a host of state abuses. Finally, the court's refusal to require clear and convincing evidence that denying visitation will harm the child subjects families to unwarranted and burdensome government intrusion.

The California legislature can, and should, reverse the damage done by the *Harris* decision. By amending section 3104 to (1) expressly grant sole custodial parents the exclusive right to permit or deny visitation, and (2) heighten the showing required to rebut the presumption in favor of parents' visitation preferences, the legislature can reestablish the primacy of custodial parents' rights to raise their children. Even more important, the proposed amendments, if adopted, will enhance the state's ability to protect the children that section 3104 was presumably designed to protect.

Few liberties are more fundamental than that of a custodial parent to raise her child as she sees best. This liberty interest includes the right to avoid relationships that the parent believes may harm her child. Because custodial parents are in the best position to assess what contact will harm or benefit their children, the courts must strive to respect these parents' visitation preferences in all but the most unusual of situations. *Harris* fails to defer to these principles. Therefore, the California legislature should act to mitigate the decision's damaging effects, and grant parental autonomy the protection it deserves.

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\* J.D. Candidate, December 2005. I am deeply grateful to the editors and staff of the *Loyola of Los Angeles Law Review*, who toiled tirelessly to bring this article to print. This Comment is dedicated to my parents, who sacrificed to enable my successes; to my brothers, for their good humor and steadfast support; and to Camly, for her love.

