
NOTES

THIRD-PARTY VISITATION STATUTES: WHY ARE SOME FAMILIES MORE EQUAL THAN OTHERS?

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I. INTRODUCTION

*“Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family.”*¹

Over the last quarter-century, the definition of the American family has transformed from a clearly defined image of mother, father, and natural offspring to a kaleidoscopic vision of adoptive families, extended families, gay and lesbian families, stepparent families, and single-parent families. Although a vast body of law limits the state’s ability to impinge on the parental decisionmaking of intact, biological families,² nontraditional families are finding that their legal right to select the persons with whom their children associate is far less protected and even subject to state court review.

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1. *Moore v. City of E. Cleveland*, Ohio, 431 U.S. 494, 504 (1977).

2. *See Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (holding that a state cannot force Amish parents to send their children to school after the eighth grade due to the fundamental right to parental autonomy); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535–36 (1925) (affirming the liberty interest of parents to direct the upbringing and education of their children); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (same); MARTIN GUGGENHEIM, ALEXANDRA DYLAN LOWE & DIANE CURTIS, *THE RIGHTS OF FAMILIES* 89 (1996).

The family, which was once a standardized structure, has diversified substantially because of liberal no-fault divorce rules,³ social acceptance of nonmarital sexuality and cohabitation, and tolerance of same-sex relationships. Detractors assert that America is in the midst of a social breakdown;⁴ however, the structure of the American family, rather than disintegrating, is merely evolving into something new.

The evolution of the family has not been free of growing pains. All fifty states have reacted to the diversification of families and the emergence of an elder generation with less access to their grandchildren and more time for political activism⁵ by passing statutes that grant standing to certain third parties to seek visitation⁶ with a child over a parent's objection.⁷ Third-party visitation statutes generally condition standing on circumstances that indicate a child is not part of a traditional, nuclear family.⁸ For instance, many visitation statutes, including California's, provide that third parties can only seek visitation over a legal parent's objection if the child's parents

3. "In 1970, California passed the first law in the Western world that totally abolished fault in divorce." NAOMI MILLER, *SINGLE PARENTS BY CHOICE: A GROWING TREND IN FAMILY LIFE* 108 (1992). Divorce became a private decision rather than the moral issue it had been previously. The justification for passing the no-fault divorce laws came from the "recognition of the growing equality of women" and the realization that "divorce is sometimes inevitable and unavoidable." *Id.*

4. Brief of Amici Curiae of AARP and Generations United in Support of Petitioners at 6, *Troxel v. Granville*, 530 U.S. 57 (2000) (No. 99-138) [hereinafter AARP Brief] ("Grandparent visitation statutes have been enacted as a national response to increasing rates of parental drug use, teen pregnancies, divorce, single-parent households, crime, and child abuse.").

5. Michael Hamlin, Note, *Blakely and Missouri's Grandparent Visitation Statute*, 68 MO. L. REV. 691, 693 (2001) ("Grandparental lobbying groups, such as the American Association of Retired Persons (AARP), played a significant role in convincing legislators to enact these statutes."). See also *Ability of Grandparents to Visit with Grandchildren: Analysis of S.B. 306 Before the S. Comm. on Judiciary*, 1993-94 Leg., Reg. Sess. 1 (Cal. 1993), available at http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_0301-0350/sb_306_cfa_930217_141821_sen_comm [hereinafter *Assemb. Analysis of S.B. 306*] (listing grandparental lobbying groups as the visitation bill's supporters). See also Laurence C. Nolan, *Beyond Troxel: The Pragmatic Challenges of Grandparent Visitation Continue*, 50 DRAKE L. REV. 267, 289 (2002) (noting that although protecting the best interests of children is the asserted policy reason for grandparent visitation legislation, "some believe these statutes were the result of an intense political movement by grandparents").

6. "Visitation is really a lesser form of custody. . . . When the child is in your care you are free to do whatever you want with respect to caring for them . . . you may associate with whom you choose . . ." JACQUELINE D. STANLEY, *UNMARRIED PARENTS' RIGHTS* 85, 95 (2d ed. 2003).

7. *Troxel v. Granville*, 530 U.S. 57, 73-74 (2000) (listing state visitation statutes); *Punsly v. Ho*, 105 Cal. Rptr. 2d 139, 143 (Ct. App. 2001) (noting that "all 50 states have enacted grandparent visitation statutes in some form in an attempt to protect the vital role grandparents often play in children's lives").

8. GUGGENHEIM ET AL., *supra* note 2, at 19 (concluding that most statutes "permit grandparents to petition the court for visitation" only when the nuclear family has been disrupted in some way, for example, through divorce or death). *Petition for Writ of Certiorari* at 4 n.1, *Blixt v. Blixt*, 774 N.E.2d 1052 (Mass. 2002), *cert. denied*, 537 U.S. 1189 (2003) (No. 02-0847) (listing and summarizing state visitation statutes).

are divorced, separated, widowed, or were never wed.⁹ Not only do these laws intrude into the historically protected realm of family privacy,¹⁰ so as to micromanage basic parental decisions, but also, they draw a qualitative distinction between intact, married families and all other family forms.

Although state courts have been grappling with third-party visitation statutes for the past quarter-century, the Supreme Court addressed the issue only recently in *Troxel v. Granville*.¹¹ In a plurality opinion, the court found that visitation statutes are not unconstitutional per se under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution (“Due Process Clause”), so long as parental decisions are given appropriate deference and the state statutes themselves are not overly broad.¹²

While many scholars since the Supreme Court’s holding in *Troxel* have examined the constitutionality of visitation statutes through the lens of the Due Process Clause,¹³ this Note will focus instead on the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution (“Equal Protection Clause”). In particular, this Note will stress the social importance of extending the application of the constitutional barriers that protect the nuclear family’s right to child rearing autonomy to single, widowed, separated, and divorced parents. Two of California’s nonparental visitation statutes, one of which the *Troxel* plurality cited approvingly for attempting to protect parental due process rights,¹⁴ will serve as the focus of this

9. CAL. FAM. CODE § 3102 (West 2004) (granting close relatives of a deceased parent standing to petition a surviving parent for visitation with a child); *id.* § 3104 (West 2004) (granting standing to grandparents to seek visitation with any child residing with a single parent or with married parents not currently cohabiting).

10. See *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535–36 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

11. *Troxel*, 530 U.S. 57.

12. *Id.* at 72–73.

13. See, e.g., Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337 (2002); Sally F. Goldfarb, *Visitation for Nonparents After Troxel v. Granville: Where Should States Draw the Line?*, 32 RUTGERS L.J. 783 (2001); Solangel Maldonado, *When Father (or Mother) Doesn’t Know Best: Quasi-parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865 (2003); Alessia Bell, Note, *Public and Private Child: Troxel v. Granville and the Constitutional Rights of Family Members*, 36 HARV. C.R.-C.L. L. REV. 225 (2001); Michael Varela, Comment, *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 (2004).

14. *Troxel*, 530 U.S. at 70 (citing CAL. FAM. CODE § 3104). *But see* *Butler v. Harris*, 96 P.3d 141, 165 (Cal. 2004) (Chin, J., concurring and dissenting) (arguing that the citation to section 3104 was not “with approval,” but merely an acknowledgment that “section 3104 provides at least some protection”).

Note's equal protection analysis. This assessment will reveal that both statutes violate the Equal Protection Clause.

In recent years, both the United States Supreme Court and the California Supreme Court have refused to review equal protection challenges that nonnuclear families have brought against third-party visitation statutes.¹⁵ In December 2003, the California Supreme Court denied review of *Fenn v. Sherriff*,¹⁶ a case examining the law's unequal treatment of two nuclear families formed through stepparent adoption. In *Fenn*, California's Third Appellate District held that families made up of one natural, widowed parent and one adoptive stepparent can be subject to visitation statutes without violating equal protection, despite the fact that families made up of one natural, nonwidowed parent and one adoptive stepparent are not subject to visitation statutes.¹⁷ The right to make basic parental decisions should not rest upon a family's form; rather, fundamental parenting "rights must fit the people, not the people the rights."¹⁸

This Note will challenge the findings of *Fenn v. Sherriff* and will argue that a valid distinction cannot be drawn between the fundamental parenting rights of married, cohabiting parents, and the rights of single, widowed, separated, and divorced parents. Nonparental visitation statutes, like California's, which subject parents to third-party visitation petitions on the basis of widowhood, marital status, and living arrangements, should be found unconstitutional under the Equal Protection Clause.¹⁹

Part II of this Note will discuss how the traditional concept of the nuclear American family has evolved over the past half-century, engendering a need for courts to examine the scope of nonparental visitation legislation, leading up to the Supreme Court's decision in *Troxel*. Part III will detail the confusion that the *Troxel* plurality decision created, as well as the resilience third-party visitation statutes have shown in the face of post-*Troxel* due process and equal protection challenges. Part IV will examine and apply recent state court decisions, which lay the

15. *Blixt v. Blixt*, 774 N.E.2d 1052 (Mass. 2002), *cert. denied*, 123 U.S. 1259 (2003); *Fenn v. Sherriff*, 1 Cal. Rptr. 3d 185 (Ct. App. 2003), *rev. denied*, No. S117900, 2003 Cal. LEXIS 6937 (Oct. 15, 2003).

16. *Fenn*, 1 Cal. Rptr. 3d at 185.

17. *Id.* at 187-89.

18. William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1211 (quoting *Nat'l Coalition for Gay & Lesbian Equal. v. Minister of Justice* 1998 (1) BCLR 1517 (CC) (S. Afr.) (Sachs, J., separate opinion)).

19. The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the Equal Protection of the laws." U.S. CONST. amend. XIV, § 1.

groundwork for more successful equal protection contests, in order to challenge *Fenn v. Sherriff*'s findings. This Note asserts that the Third Appellate District's unorthodox application of the undue burden analysis to justify the use of rational basis review was inappropriate because third-party petition procedures constitute a significant interference with parents' fundamental right to make decisions regarding the care, custody, and control of their children. Further, no compelling state interest exists to regulate parental decisions regarding visitation based on the widowhood of a biological parent. Equal protection violations under sections 3102 and 3104 of the California Family Code²⁰ will also be discussed outside of the limited facts of *Fenn*. After establishing that third-party visitation laws like California's violate equal protection, Part V will examine public policy considerations in favor of abolishing such statutes. By failing to recognize the basic rights of alternative families to decide who will shape their children's lives, legislatures and courts not only destabilize the alternative family structure, but further reinforce the stigmas alternative families face, and thus ultimately create the very harm the legislature and courts wish to prevent. Part VI will conclude that authorizing third parties to petition nonnuclear families for visitation with their children against their will while exempting biological nuclear families from such petitions violates the Equal Protection Clause. Public policy would best be served if the right of alternative families to raise their children without intrusive state regulation were recognized.

II. EMERGING UNREST

Nonparental visitation rights have no foundation in the common law and are purely creatures of statute.²¹ Prior to 1965, third parties, including close family relatives, had no legal right to associate with children over the parents' objections.²² American common law held that visiting with extended family was essentially a moral obligation, not a legal one.²³

In the mid-1960s, however, when America saw a rise in divorce rates, state legislatures became concerned with the fate of America's youth and began granting relatives standing to seek visitation in custody and marriage dissolution proceedings.²⁴ At that time, the nuclear family remained

20. CAL. FAM. CODE §§ 3102, 3104 (West 2004).

21. *White v. Jacobs*, 243 Cal. Rptr. 597, 597 (Ct. App. 1988).

22. GUGGENHEIM ET AL., *supra* note 2, at 19.

23. *See* Succession of Reiss, 15 So. 151, 152 (La. 1894).

24. AARP Brief, *supra* note 4, at 6. Rising divorce rates indicate a rise in the number of female-headed households, which are primarily the ones that are regulated by third-party visitation statutes.

America's "standard, 'socially approved' model because its structure perfectly fitted the needs of [American] society."²⁵

The nuclear family, at its core, consisted of a series of unspoken economic contracts. One such contract existed between a boss and a family's male breadwinner. In return for focusing his energies on his occupation, the family's breadwinner would have a secure job. There was also an unspoken contract between a husband and a wife. In return for focusing her energies on child rearing, the wife received her share of her husband's resources.²⁶

But as the economic contracts that made the nuclear family a viable institution began to unravel, so did the nuclear family itself. In the last quarter-century, America's new economy has eroded job security,²⁷ and rising divorce rates²⁸ have made it increasingly risky for women to invest time in child rearing, as opposed to developing their own economic skills.²⁹ States have treated the unraveling of the family as primarily a moral disintegration, rather than a socioeconomic phenomenon. This viewpoint has allowed states to enact laws such as the nonparental visitation statutes, which shift attention to the insufficiencies of alternative families rather than to the state's lack of institutional support for the new realities of family life.³⁰ As one scholar noted, "The biggest problem facing most families in the United States at the outset of the new century is not that our families have changed too much, but that our institutions have changed too little."³¹

25. Marleen O'Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1255, 1282 (2004) (quoting ALVIN TOFFLER, *THE THIRD WAVE* 44–45 (1980)).

26. The nuclear family created a form of specialized labor which did not exist in America's early agricultural years, when family members labored together on family farms. Nuclear families were "nuclear" only in name as fathers were relegated to factories, disengaged from their children, while mothers, now separated from the extended family of the agricultural age, took on the sole responsibility of rearing America's next generation. *See id.* at 1279–85.

27. *Id.* at 1287–88.

28. No-fault divorce sent divorce rates skyrocketing. WILLIAM ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 10 (2002).

29. Full-time mothering has become an economic peril because women face a fifty percent chance of divorce. O'Connor-Felman, *supra* note 25, at 1288–89.

30. *Id.* at 1269.

31. Stephanie Coontz, *The American Family: Where We Are Today?*, U.S. SOC'Y & VALUES, Jan. 2001, <http://usinfo.state.gov/journals/itsv/0101/ijse/scoontz.htm>.

As the traditional concept of the American family has changed,³² so has the composition of America itself. The baby boom generation has aged, and American society has seen a rapid increase in the number of citizens who are grandparents.³³ The majority of two-parent households now send both parents into the labor force,³⁴ and in the absence of greater parental support programs, such as parental leave and child care policies,³⁵ families have created alliances with grandparents to help meet the demands of contemporary life.³⁶ These alliances, however, have provided “additional opportunities for friction within the contemporary family,”³⁷ as lines of adult authority, once so clearly demarcated by the traditional family’s hierarchical structure, are now frequently tangled and obscured.

By the 1990s, a generation of elders who were “healthier, more educated, and more affluent than any generation before them,”³⁸ began to aggressively seek legislation that would give them access to their grandchildren.³⁹ But in most states, the constitutional barriers that protected the integrity of the nuclear family proved insurmountable.⁴⁰ The

32. See generally JASON FIELDS, U.S. CENSUS BUREAU, CHILDREN’S LIVING ARRANGEMENTS AND CHARACTERISTICS: MARCH 2002 (2003) (discussing various characteristics of children’s home life, including the presence of grandparents and “stay at home” fathers).

33. The United States has seen a rapid growth in its elderly population during the twentieth century. The number of Americans aged sixty-five and older climbed to thirty-five million in 2000, compared with 3.1 million in 1900. For the same years, the ratio of elderly Americans to the total population jumped from one in twenty-five to one in eight. U.S. Society, *Census & Demographics*, <http://www.usembassy.de/society-demographics.htm> (last visited May 16, 2005). See Michael Goldberg, *Survey of Illinois Law: Family Law—Grandparent Visitation*, 27 S. ILL. U. L.J. 785, 786 (2003) (estimating that ninety-eight million Americans will be grandparents in 2001, up from fifty-eight million in 1991).

34. FIELDS, *supra* note 32, at 9 (finding that sixty-two percent, or thirty-one million, children living with two parents have both parents in the labor force).

35. O’Connor-Felman, *supra* note 25, at 1321–22 (detailing the lack of parental support programs in corporate America).

36. Douglas Besharov, *Reflections on Family*, 6 U.S. SOC’Y & VALUES, Jan. 2001, <http://usinfo.state.gov/journals/itsv/0101/ijse/besharov.htm> (stating that the diverse presence of grandparents, stepparents, single parents, and other nontraditional family members is best termed “alliances”).

37. *Id.* (noting that in the past, “[g]randparents always thought they knew better how to raise kids, but at some level, they realized the parents had ‘first say’ in what happened with the children,” while modern grandparents lack such clear boundaries).

38. AARP Brief, *supra* note 4, at 4 (quoting ARTHUR KORNHABER, *CONTEMPORARY GRANDPARENTING* 11 (1996)).

39. Goldberg, *supra* note 33, at 788 (noting that “the elderly lobby has stepped up to make grandparent visitation a priority on their Senators’ and Representatives’ agenda.”). See CHARLES R. MORRIS, *THE AARP* xii (1996) (referring to AARP as “the eight-hundred-pound gorilla in Washington politics”).

40. See, e.g., *Reed v. Glover*, 889 S.W.2d 729, 732 (Ark. 1994) (stating that “[a]t one point in its evolution,” Arkansas’s visitation statute “provided grandparents with the right to seek visitation regardless of the marital status of the parents. However, the General Assembly later added the

right of parents to make decisions concerning the upbringing of their children “is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court].”⁴¹ At the core of this right is the right of parents to determine “who will be instrumental in the development of their child’s personality and character.”⁴²

Consequently, proponents of nonparental visitation statutes placed the contemporary generation’s tendency toward “divorce, out-of-wedlock births, teen pregnancy, drugs, AIDS, child abuse and neglect”⁴³ at the forefront of their movement and used America’s deep-rooted fear of the family’s breakdown⁴⁴ to their advantage. In the early 1990s, the Senate Subcommittee on Aging held hearings that centered on stories of drug-addicted parents, abused children, and single parents’ “participation in the drug scene.”⁴⁵

In California, grandparent lobbying groups used similar scare tactics to convince the state legislature that it was necessary to expand the circumstances under which grandparents and other extended family members could seek court-ordered visitation with children.⁴⁶ The American Association for Retired Persons (“AARP”) made predictions that “with a drug epidemic, poverty and rising single parenthood,”⁴⁷ the number of grandparents raising children in California would double, and that these children might be snatched away by their parents without notice or opportunity for further contact.⁴⁸ By the mid-1990s, AARP and similar groups successfully lobbied all fifty states to enact legislation that granted grandparents and other relatives standing to seek court-ordered visitation

conditions involving the severance of marriage in order to avoid bestowing upon grandparents rights greater than those given to parents.”).

41. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Under the Fourteenth Amendment, parents have a constitutionally protected interest in raising their children without undue interference from the state. *Id.*

42. *Lulay v. Lulay*, 739 N.E.2d 521, 531 (Ill. 2000).

43. AARP Brief, *supra* note 4, at 7. *See also* *Santi v. Santi*, 633 N.W.2d 312, 318–19 (Iowa 2001).

44. The family’s breakdown has “‘haunted American society’ from ‘early settlers in Plymouth to modern reformers and social scientists.’” GILBERT Y. STEINER, *THE FUTILITY OF FAMILY POLICY* 4 (1981) (quoting Tamara K. Harevan, *Family Time and Historical Time*, *DAEDALUS*, Spring 1977, at 57, 69).

45. AARP Brief, *supra* note 4, at 13. *See Grandparents’ Rights: Preserving Generational Bonds: Hearing Before the Subcommittee on Human Services of the Select Comm. on Aging, H.R.*, 102d Cong. 2–9 (1991).

46. The majority of letters received by the state legislature in support of expanded visitation rights for California’s grandparents detailed “instances of possible neglect or abuse by the parents.” *Assemb. Analysis of S.B. 306*, *supra* note 5, at 3.

47. AARP Brief, *supra* note 4, at 14.

48. *Id.*

with children over their parents' objections. As California's Assembly Committee on Judiciary noted, however, nonparental visitation statutes, when used to protect children from neglect and abuse, merely provide "a legal band-aid" for "a problem that is a gaping wound."⁴⁹

As the twentieth century came to a close, nearly one-third of America's children were growing up in single-parent families,⁵⁰ and it became clear that "[w]hile the traditional norms of the family, such as marriage, parenting and family life," continued to be valued, it was "no longer the case that the majority of Americans live[d] in such a family for the major portion of either their childhood or their adult lives."⁵¹ As alternative families became less of an anomaly, grandparent legislation began to lose its urgency, if not its constitutionality. Congressman Daniel J. Burke (D-Ill.), an original supporter of his state's visitation law, stated that in retrospect there was "no real urgency to legislate grandparent visitation."⁵² He reasoned that "[g]randparents can apply for custody when the parents are unfit—there's no need to give grandparents exclusive rights."⁵³

In the late 1990s, a minority of states began to diverge from the national trend toward implementing nonparental visitation legislation, finding their grandparent visitation statutes facially unconstitutional under the Due Process Clause.⁵⁴ These early cases involved visitation statutes that infringed on the rights of nuclear families.⁵⁵ It was not until 2000, however, that the Supreme Court addressed the issue of third-party visitation statutes and signaled its concern over intrusive micromanagement of fit families. In *Troxel v. Granville*, an unwed mother attempted to limit visitation between her two daughters and their paternal grandparents after the children's father committed suicide.⁵⁶ Despite the fact that the mother had not sought to cut off grandparent visitation entirely, the paternal grandparents filed a visitation petition under a Washington statute that

49. *Assemb. Analysis of S.B. 306*, *supra* note 5, at 34.

50. *Troxel v. Granville*, 530 U.S. 57, 64 (2000).

51. MILLER, *supra* note 3, at 1.

52. Annie Hsia, *About Grandma's Visits . . .*, NAT'L L.J., Oct. 14, 2002, at A1, *available at* Westlaw, 10/14/02 NLJ A1, (Col. 2).

53. *Id.*

54. *See, e.g., Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998) (finding Florida's grandparent visitation statute facially unconstitutional).

55. Julie E. Nichols, Note, *Grandpa Take Me Home: The Unconstitutionality of the Michigan Grandparent Visitation Statute Under the Due Process Clause*, 43 WAYNE L. REV. 1887, 1910 (1997). *See, e.g., Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993) (finding a visitation statute unconstitutional as applied to nuclear families).

56. *Troxel v. Granville*, 530 U.S. 57, 60–61 (2000).

allowed *anyone at anytime* to petition a parent for visitation with his or her children.⁵⁷ A state trial court judge, after reminiscing on his own childhood memories, awarded the paternal grandparents overnight visits and one entire week during the summer, despite the fact that the children were still very young.⁵⁸

On appeal, the Washington Supreme Court overruled the trial court, holding that Washington's third-party visitation statute was facially unconstitutional.⁵⁹ The United States Supreme Court granted certiorari, and in a 6-3 plurality opinion with two concurrences, the court found that the "breathtakingly broad" statute, rather than being facially unconstitutional, was merely unconstitutional as applied to the circumstances of *Troxel*.⁶⁰ The Supreme Court rebuked the trial court for presuming visitation was in the best interest of the Granville children and for failing to afford the determination of a fit mother any deference.⁶¹ These actions, the Supreme Court held, violated the mother's constitutionally protected right to raise her children without undue state interference.

Following the Supreme Court's decision, a tidal wave of due process claims challenged third-party visitation statutes across America. As state courts struggled to apply the *Troxel* plurality holding to their own visitation statutes, it became evident that the Supreme Court had raised more questions than it had answered.

III. TROXEL'S LEGACY OF CONFUSION

The Supreme Court's holding in *Troxel* affirmed a longstanding tradition in American law that parents have a fundamental right to make decisions regarding the care and custody of their children. In the 1920s, the Supreme Court recognized the right of parents to make unconventional educational choices in the process of raising their children, thereby safeguarding children's development "from state-imposed homogeneity of thought and spirit."⁶² In *Meyer v. Nebraska*⁶³ and *Pierce v. Society of Sisters*, the Court established that a child is "not the mere creature of the

57. *Id.* at 60.

58. *Id.* at 61.

59. *Id.* at 63.

60. *Id.* at 67-73.

61. *Id.* at 67-68.

62. Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 379 (1997).

63. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

State.”⁶⁴ It is a parent’s right to “direct the upbringing and education of children,” for parents alone have “the high duty, to recognize and prepare [children] for additional obligations.”⁶⁵

Nearly two decades later, the Court acknowledged in *Prince v. Massachusetts* that “the 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.”⁶⁶ Later, in *Wisconsin v. Yoder*, the Court affirmed that parents’ primary role “in the upbringing of their children was established beyond debate as an enduring American tradition.”⁶⁷

Despite reaffirming parents’ fundamental right to make decisions regarding the care and custody of their children, the *Troxel* plurality left states room to enact third-party visitation statutes as long as those statutes address the plurality’s constitutional concerns. Unfortunately, the Court never actually defined what provisions would adequately address its constitutional concerns. In particular, the plurality failed to define both the level of deference parental decisions should be accorded and the appropriate standard of review to apply when a statute is challenged, thus adding confusion to an area of law desperately seeking clarity.⁶⁸

In order to protect parents’ fundamental right to the care, custody, and control of their children from the “unfettered value judgment” of a trial court, the Supreme Court called for deference or “special weight” to be given to a fit parent’s decision to deny visitation, as well as to a parent’s decision to allow limited visitation prior to petition.⁶⁹ But the Supreme Court did not define the level of deference state courts must show.⁷⁰ State

64. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

65. *Id.* at 534–35. *See also Meyer*, 262 U.S. at 400.

66. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (holding that the state had the right to protect Jehovah’s Witness children from the dangers of preaching religion on the highway).

67. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (holding that the State of Wisconsin could not compel Amish parents to send their children to formal high school until age sixteen).

68. Application of the court’s holding was further complicated for state courts by the fact that the Washington visitation statute at issue in *Troxel* was a poor example of the vast majority of state visitation laws. Washington’s statute was uncommonly broad, allowing any third party to seek visitation at any time over the objection of a child’s fit parent based only on a trial judge’s best interest determination. *See Troxel v. Granville*, 530 U.S. 57, 60 (2000). Most statutes are more limited and define a specific set of circumstances under which a specific group of relatives can seek visitation. *See supra* note 8.

69. *Troxel*, 530 U.S. at 69.

70. *Id.* at 73. *See Nolan, supra* note 5, at 269.

courts can, therefore, label their own procedures with the vague term “special weight” and thereby evade due process challenges.⁷¹

California’s most permissive visitation statute,⁷² which grants grandparents independent standing to petition for visitation with children in nonnuclear families at any time, was among those statutes the *Troxel* plurality cited approvingly for attempting to give special weight to a fit parent’s decision to deny visitation.⁷³ Section 3104 of the California Family Code provides for a rebuttable presumption that grandparent visitation is not in a child’s best interest if both parents object to visitation or if a parent with sole legal custody objects to visitation.⁷⁴ The presumption is simply rebutted, however, by a grandparent presenting evidence suggesting visitation *is* in the child’s best interest. Thus, special weight is an infirm barrier. Furthermore, when special weight is paired with the equally vague phrase “best interests of the child,” the protections afforded a parent by even a “constitutional” statute appear to be exceedingly slim and easy to overcome.⁷⁵

The Supreme Court, in *Troxel*, not only failed to define the level of deference courts must accord parental decisions, but, to Justice Thomas’s dismay, also failed to specify the appropriate level of scrutiny state appellate courts should apply when reviewing third-party visitation statutes.⁷⁶ Consequently, state courts have split on the issue of review,⁷⁷

71. For example, in *Blixt v. Blixt*, 774 N.E.2d 1052, 1073 (Mass. 2002), Justice Sosman’s dissenting opinion accused the court of “simply making it up.” Justice Sosman went on to say that “today’s opinion merely takes all of the principles of *Troxel* and reads them into the very ‘best interest’ standard that *Troxel* found constitutionally inadequate.” *Id.* at 1071.

72. CAL. FAM. CODE § 3104 (West 2004).

73. The Supreme Court declined to address whether harm was necessary, noting “we do not consider . . . whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.” *Troxel*, 530 U.S. at 73.

74. *Butler v. Harris (In re Marriage of Harris)*, 96 P.3d 141 (Cal. 2004); *Zasueta v. Zasueta*, 126 Cal. Rptr. 2d 245, 254 (Ct. App. 2002) (finding that “the burden is on the grandparents, not the parent, to show visitation is in a child’s best interest”); *Kyle O. v. Donald R.*, 102 Cal. Rptr. 2d 476, 487 (Ct. App. 2000) (noting that the “grandparents had the burden to show that [the father’s] preference for nonscheduled visitation was not in [the child’s] best interest”).

75. A lone California appellate court recently broke precedent and held in *In re Marriage of Harris* that in order to make special weight meaningful, a more stringent harm standard is required. The California Supreme Court, however, failed to institute the appellate court’s standard on review. *See In re Marriage of Harris*, 34 Cal. 4th 210.

76. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring) (recommending strict scrutiny). The use of rational basis review has been an effective method of circumventing valid equal protection claims. *See id.*

77. For a selection of state cases applying strict judicial scrutiny, see *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996), *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995), and *Hawk v. Hawk*, 855 S.W.2d

which has led to a lack of uniformity both across state lines and, even more disconcertingly, within states themselves.⁷⁸

A. THIRD-PARTY VISITATION STATUTES AND THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause demands a reasonable basis for state action that impinges on the rights of one class of persons while not impinging on the rights of others. Third-party visitation statutes generally condition standing on circumstances that indicate a child is not part of a nuclear family. Married, cohabiting parents are not subject to visitation petitions and cannot be forced to deliver their children to third parties.⁷⁹ Thus, persons challenging a visitation statute as a violation of their due process rights are also the victims of an equal protection violation.

Although the Due Process Clause offers the most direct basis for challenging third-party visitation statutes, only the Equal Protection Clause can provide recognition that single, widowed, and stepparent families are socially valid alternatives to the traditional nuclear family and that the constitution affords both single parents and married parents the same right to oversee relationships between their children and their children's relatives and acquaintances. Recognizing that parents' right to control the upbringing of their children applies equally to alternative families and traditional two-parent families would prevent state legislatures from creating laws like nonparental visitation statutes that are based on outdated notions of how families should be, rather than on current realities of how families actually operate.⁸⁰

Furthermore, in California, the Due Process Clause will provide little help to litigants mounting facial challenges against third-party visitation statutes. The California Supreme Court recently held in *Butler v. Harris*

573 (Tenn. 1993). For a selection of state cases applying rational basis review, see *Fenn v. Sherriff*, 1 Cal. Rptr. 3d 185 (Ct. App. 2003), and *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993).

78. California appellate courts, for example, have applied conflicting levels of review to third-party visitation challenges without correction from the State Supreme Court. See *Herbst v. Swan*, 125 Cal. Rptr. 2d 836, 840 (Ct. App. 2002) (applying strict scrutiny review); *Punsly v. Ho*, 105 Cal. Rptr. 2d 139, 145 (Ct. App. 2001) (same). *But see Fenn*, 1 Cal. Rptr. 3d at 204 (applying rational basis review because the petition procedure does not constitute significant interference).

79. *Lopez v. Martinez*, 102 Cal. Rptr. 2d 71, 74 (Ct. App. 2000) (finding that the Family Code does not confer standing on grandparents to file a petition for visitation while parents are married and cohabiting). See *Blixt v. Blixt*, 774 N.E.2d 1052 (Mass. 2002).

80. Cf. MARTIN CARNOY, SUSTAINING THE NEW ECONOMY: WORK, FAMILY, AND COMMUNITY IN THE INFORMATION AGE 106–09 (2000) (discussing the evolution of family structure in light of the changing roles of men and women in the work force).

that California's most permissive visitation statute does not facially violate the Due Process Clause.⁸¹ The court adopted the view that a lesser degree of scrutiny is required in cases "involving a divorced family with two parental decision-makers who have different opinions on the scope of their [child's] visitation with [the child's] grandparents."⁸²

Equal protection challenges, however, often have limited utility when it comes to effecting true change. When alternative families argue that they have been treated unequally, they must show that their situation is sufficiently similar to that of married, cohabiting families and therefore "claim that they are 'like' the majority in relevant respects."⁸³ If the similarities required by an equal protection challenge are narrowly defined, then an alternative family's "posture . . . is intrinsically assimilationist."⁸⁴ In essence, "[t]he norm of the two-parent marital heterosexual nuclear family dominates" if all other family forms are required to "do the same things as well as that type of family," excluding "differences that enrich and expand our understanding of family function."⁸⁵ Do we want to require all families to function in a particular way? Diversified family structures have created positive changes in people's attitudes toward raising children. While the traditional nuclear family was parent-centered, emphasizing strictness and obedience to parental authority,⁸⁶ single-parent families tend to be cooperative and less hierarchical, placing value on juvenile autonomy and thinking for oneself.⁸⁷ Furthermore, in single-parent homes, mothers and fathers are liberated from the constraints of the nuclear family's gender-based roles and thus provide children with strong nongendered role models—fathers who nurture and mothers who excel in the working world.

81. *Butler v. Harris (In re Marriage of Harris)*, 96 P.3d 141 (Cal. 2004) (internal quotations omitted).

82. *Id.* at 161–62.

83. ESKRIDGE, *supra* note 28, at 7. William Eskridge states:

Formal equality is a false hope: formal equality for a minority group presents itself as improving the status of the group, but that improvement rests upon the minority's acquiescing in the norms of the majority; such acquiescence is acceptable to that portion of the minority that is already most like the majority; ergo, formal equality has the consequence of debasing the minority insofar as its people give up part of their uniqueness and of splitting the minority into those advantaged by assimilation and those who find themselves even more marginalized.

Id. at 205.

84. *Id.* at 7.

85. NANCY E. DOWD, *IN DEFENSE OF SINGLE-PARENT FAMILIES* 155 (1997).

86. *See* TOM W. SMITH, *THE EMERGING 21ST CENTURY AMERICAN FAMILY* 6 (1999) ("[P]eople have become less traditional over time with a shift from emphasizing obedience and parent-center families to valuing autonomy for children.") (internal citation omitted).

87. *Id.* at 6 ("From 1986 to 1998 a majority . . . of Americans selected thinking for oneself as the most important trait for a child to learn . . .").

Children raised in this environment are often more independent and tend to set higher goals for themselves than children in nuclear families.⁸⁸ It has even been suggested that children in single-parent families receive “undivided attention”⁸⁹ as parents become more child-focused.⁹⁰

Unfortunately, equal protection challenges can pit alternative family against alternative family as each vies to be “more like” a nuclear family.⁹¹ Supporters of same-sex families, for example, often use studies that show children are better off in same-sex families than they are in single-parent homes to bolster their legitimacy as parents. Also, although one would assume that if the Supreme Court expanded gay and lesbian couples’ privacy rights, those couples would in turn become more interested in seeking their corresponding parenting rights,⁹² that is not necessarily the case. If states sanction gay marriage, same-sex families will have no need to seek parenting rights because those same-sex families will fit the formulaic requirements of a nuclear family. One-parent families may, therefore, find themselves even more marginalized once same-sex families are legally recognized.⁹³

Finally, equal protection challenges are most successful when social acceptance of the petitioning minority groups has strengthened to the point that the law is an embarrassment to the legislature.⁹⁴ As one equal protection scholar noted, “[T]he Equal Protection Clause was no great friend to women, people from Asia, and the freed slaves and their descendants so long as there was a national consensus that women belonged at home rearing children, Asians were an alien race, and blacks

88. DOWD, *supra* note 85, at 104–10.

89. *Id.*

90. Ulrich Beck notes that divorce makes parents more child-focused, resulting in greater “idolization” of children. ULRICH BECK, *RISK SOCIETY: TOWARD A NEW MODERNITY* 106 (1992). *See also* O’Connor-Felman, *supra* note 25, at 1309.

91. *See* ESKRIDGE, *supra* note 28, at 171 (offering support for same-sex families through studies showing that children in two-mother households are better adjusted than children raised in single-mother households).

92. Third-party visitation statutes disproportionately affect nonheterosexual households because homosexual parents are denied the right to marry in most states and are thus forced to be single parents in the eyes of the law.

93. *See supra* note 83.

94. Eskridge, *supra* note 18, at 1186, 1190. Eskridge explains:

[E]volutive equal protection . . . offers such groups the possibility that, if traditional norms against them weaken, the judiciary will force the political process to clean up remaining exclusionary policies on a wholesale level [I]t took the Court two generations to reject *Plessy*, and only after apartheid had become a national embarrassment to whites and the national government.

Id.

were morally and intellectually inferior to whites.”⁹⁵ Popular culture and the arts have long recognized and legitimized nonnuclear families in films,⁹⁶ plays, novels,⁹⁷ and television.⁹⁸ The political arena, however, continues to debate family form as a moral choice rather than a socioeconomic consequence of modern society. Family law codes in particular are “so infused with social policy and moral belief” that they are often a “favorite playground of legislators.”⁹⁹ Although recent estimates find that nearly “one-half of mothers with young children will become single parents by age thirty-five . . . , one out of three children is born out of wedlock,”¹⁰⁰ and “sixty percent of children will spend some time in a single-parent family,”¹⁰¹ the stigma reinforced by conservative politicians¹⁰² may suggest that social consensus still favors “saving” the nuclear family and disfavoring other family forms. The solutions conservatives offer to remedy modern day family conflicts center on a return to traditional gender roles.¹⁰³ Thus, “[t]alking about the positive

95. *Id.* at 1214.

96. Disney Films rarely have nuclear families. For examples of single fathers raising children, see *ALADDIN* (Walt Disney Pictures 1992), *BEAUTY AND THE BEAST* (Walt Disney Pictures 1991), *FINDING NEMO* (Walt Disney Pictures 2003), *THE LITTLE MERMAID* (Walt Disney Pictures 1989), and *POCAHONTAS* (Walt Disney Pictures 1995). For examples of single mothers raising children, see *FREAKY FRIDAY* (Walt Disney Pictures 2003), *MRS. DOUBTFIRE* (20th Century Fox 1993), *ONE FINE DAY* (20th Century Fox 1996), *TOY STORY* (Walt Disney Pictures 1995), *TOY STORY II* (Walt Disney Pictures 1999), *TARZAN* (Walt Disney Pictures 1999), and *TREASURE PLANET* (Walt Disney Pictures 2002).

97. See generally CATHERINE TOWNSEND HORNER, *THE SINGLE-PARENT FAMILY IN CHILDREN'S BOOKS: AN ANNOTATED BIBLIOGRAPHY* (1988) (discussing a selection of children's books about single-parent families).

98. For examples of television shows with nonnuclear families, see *Murphy Brown* (CBS Television 1988–1998), *Full House* (Warner Brothers Television 1987–1995), and *Eight Simple Rules* (American Broadcasting Co. 2002–2005).

99. James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL OF RTS. J. 845, 847 (2002).

100. O'Connor-Felman, *supra* note 25, at 1288.

101. *Id.* at 1289.

102. Both homosexuality and single motherhood are targeted by Christian churches and secular conservative rhetoric as a threat to social well-being. GAIL REEKIE, *MEASURING IMMORALITY: SOCIAL INQUIRY & THE PROBLEM OF ILLEGITIMACY* 179 (1998). As one commentator notes:

I know hundreds of single mothers—some divorced or widowed, some never married. Many have earned my admiration for the way they have managed to raise strong, decent children with solid values. I would be appalled if anyone suggested withholding from these admirable women any opportunity or privilege based solely on their status as single mothers. And yet I'd worry about any policy that seemed likely to produce very many more.

Id. (quoting William Raspberry, *Courage to Say the Obvious*, WASH. POST, Apr. 5, 1993, at A1).

103. See Katherine Boo, *The Marriage Cure: Is Wedlock Really a Way out of Poverty?*, THE NEW YORKER, Aug. 18 & 25, 2003, at 104. Boo's article explores an Oklahoma initiative supported by the Bush Administration, which seeks to seed marriage-promotion programs nationwide and uses federal money to raise the marriage rate among the poor working classes. *Id.* at 107. An Oklahoma pastor charged with convincing single black mothers and young women in a poor community to get married

aspects of single-parent families is very threatening” because it challenges “the social, cultural, political and ideological position of the heterosexual marital family.”¹⁰⁴ In such a climate, the court system is hesitant to confer constitutional entitlement on single parents for fear of upsetting those “whose status or values depend on discriminating against the minority group.”¹⁰⁵

For these reasons, very few equal protection claims have been raised as a means of challenging third-party visitation statutes. As single-parent and alternative families continue to steadily increase in number,¹⁰⁶ the volume and strength of their equal protection challenges will likely increase as well.¹⁰⁷ Despite the obstacles alternative families face in filing equal protection claims, only the Equal Protection Clause can ensure that families are treated as individual units rather than “as part of a pariah class.”¹⁰⁸ There are good nuclear families and bad nuclear families; there are good single parents and bad single parents. It is not the form of the family that determines its function, however. “No particular family form guarantees success, and no particular form is doomed to fail.”¹⁰⁹

B. WHY HAVE EQUAL PROTECTION CHALLENGES BEEN UNSUCCESSFUL?

Although all family formations, whether single-parent, two-parent, or reconstructed, serve to provide a child on a continuous basis “with an environment that serves [that child’s] numerous physical, mental, and emotional needs,”¹¹⁰ pre-*Troxel* courts generally found that divorced, widowed, and single-parent homes were not similarly situated to the nuclear family and therefore did not merit similar protection.¹¹¹ In *Ward v.*

states that it is an “unavoidable fact that women are this social policy’s beasts of burden.” *Id.* at 109. The idea that “a committed relationship with a man would rescue a woman from poverty” was difficult for the community’s women to believe. *Id.* One woman noted, “I wear my white uniform, guys around here know I’m working and chase me down the street to get my paycheck.” *Id.* Yet, under the conservative policy, it “is up to [the women] to go out and teach the men.” *Id.* at 110.

104. DOWD, *supra* note 85, at 115 (noting the “pressure to return to traditional, known, ‘safe’ gender roles,” as a way to solve modern work/family conflicts).

105. Eskridge, *supra* note 18, at 1217.

106. In 2002, twenty-eight percent of American families were single-parent households. See FIELDS, *supra* note 32, at 3.

107. “As more couples raise children together without the legal sanction of marriage, fewer courts are likely to find such families detrimental to a child’s best interests.” GUGGENHEIM ET AL., *supra* note 2, at 261.

108. Eskridge, *supra* note 18, at 1215.

109. Coontz, *supra* note 31.

110. JOSEPH GOLDSTEIN ET AL., THE BEST INTEREST OF THE CHILD 10 (1996).

111. Compare *Reed v. Glover*, 889 S.W.2d 729 (Ark. 1994) (finding that nuclear and nonnuclear families do not warrant similar protection), *Ward v. Ward*, 537 A.2d 1063 (Del. Fam. Ct. 1987) (same),

Ward, a Delaware family court cited the divorced family's inability to protect a child's best interest because of personal animosity as a rationalization for the burden placed on divorced parents by third-party visitation petitions.¹¹² In *Hollingsworth v. Hollingsworth*, an Ohio state court also relied on out-dated notions of divorced people's capabilities, finding that the state had an interest in ensuring that children from "broken marriage[s]" got the care and concern they would have received if their families' breakups had not "drastically altered" their lives.¹¹³

Grandparents who filed equal protection claims against state statutes that discriminated between grandparents of legitimate children and grandparents of illegitimate children were likewise unsuccessful.¹¹⁴ Grandparents generally do not succeed in equal protection cases because they do not have a fundamental right to see their grandchildren, and therefore, their concerns are addressed by the deferential standard of rational basis review.

Some state courts sensed the inherent equal protection problem presented by visitation statutes that apply only to nonnuclear families. These courts found that their nonparental visitation statutes violated the Due Process Clause, or alternatively, violated state privacy laws, when applied to nuclear families, and then did not alter their constitutional analysis when nonnuclear families came before the court. In 1993, the Tennessee Supreme Court held in *Hawk v. Hawk* that overriding the decision of fit married parents to disassociate themselves and their children from grandparents required a showing of substantial danger of harm.¹¹⁵ In 1995, the Tennessee Supreme Court extended this ruling to nonnuclear families in *Simmons v. Simmons*, finding that the "relationship between an adoptive parent and child is no less sacred than the relationship between a natural parent and child, and that relationship is entitled to the same legal protection."¹¹⁶ A Tennessee appellate court later held in *Floyd v. McNeely*

Lockhart v. Lockhart, 603 N.E.2d 864 (Ind. Ct. App. 1992) (same), Hedrick v. Hedrick, 368 S.E.2d 14 (N.C. Ct. App. 1988) (same), and Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993) (same), with Frances E. v. Peter E., 479 N.Y.S.2d 319, 322 (Fam. Ct. 1984) (acknowledging that differentiating between intact and non-intact families violates the Fourteenth Amendment), and Fisher v. Gaydon, 477 S.E.2d 251 (N.C. Ct. App. 1996) (same).

112. *Ward*, 537 A.2d at 1071.

113. *Hollingsworth v. Hollingsworth*, 516 N.E.2d 1250, 1253 (Ohio Ct. App. 1986).

114. *Frame v. Nehls*, 550 N.W.2d 739, 747 (Mich. 1996) (finding that the Michigan State Legislature had a rational basis for implementing a visitation statute's classifications); *Reed*, 889 S.W.2d at 16 (holding that a visitation statute that differentiated between unwed parents and married but divorced parents did not violate equal protection, as the law was not "utterly arbitrary and capricious").

115. *Hawk*, 855 S.W.2d at 579.

116. *Simmons v. Simmons*, 900 S.W.2d 682, 684 (Tenn. 1995).

that a mother's right to "parent her children as she sees fit, including a decision regarding a relationship between them and their grandmother, is no less greater than the right afforded to the married natural parents . . . despite the death of her children's father and her subsequent remarriage."¹¹⁷

Florida's high court likewise held early on that the state's visitation statute was unconstitutional because it violated the State Constitution's right of privacy. In *Beagle v. Beagle*, the Florida Supreme Court declared a section of the state visitation statute that applied to children living with both natural parents facially unconstitutional.¹¹⁸ In the 1998 case *Von Eiff v. Azicri*, a second section of the statute, which concerned grandparent visitation when one or both parents are deceased, was found unconstitutional.¹¹⁹ The court held that the statute was unconstitutional because there was "no difference between the rights of privacy of a natural parent in an 'intact family' such as the family in *Beagle* and the rights of a widowed parent such as the parent in *Von Eiff*."¹²⁰

Post-*Troxel* courts have been more willing to admit that alternative families are similarly situated, but these courts are also more likely to employ either rational basis review or, if strict scrutiny is applied, to argue that the state has a compelling interest in regulating alternative families. Recently in *Seagrave v. Price*, the Arkansas Supreme Court applied rational basis review to an equal protection challenge against the state's nonparental visitation statute.¹²¹ In *Seagrave*, a divorced mother unsuccessfully argued that the state's visitation law violated the Equal Protection Clause because it treated divorced parents differently than married parents, and under a strict scrutiny analysis there was no compelling state interest in treating unmarried parents differently than married parents.¹²² The Arkansas Supreme Court harkened back to its 1994 equal protection analysis in *Reed v. Glover*, a case in which a grandmother, who did not have a fundamental right to the care and custody of her grandchildren, lost her equal protection battle because the legislature had a rational basis for differentiating between grandchildren born out of wedlock and grandchildren born into nuclear families.¹²³ The Arkansas

117. *Floyd v. McNeely*, No. 02A01-9408-CH-00187, 1995 WL 390954, at *4 (Tenn. Ct. App. July 5, 1995).

118. *Beagle v. Beagle*, 678 So. 2d 1271, 1272 (Fla. 1996).

119. *Von Eiff v. Azicri*, 720 So. 2d 510, 510-11 (Fla. 1998).

120. *Saul v. Brunetti*, 753 So. 2d 26, 28 (Fla. 2000) (citing *Von Eiff*, 720 So. 2d at 515).

121. *Seagrave v. Price*, 79 S.W.3d 339 (Ark. 2002).

122. *Id.* at 343.

123. *Reed v. Glover*, 889 S.W.2d 729, 732 (Ark. 1994).

Supreme Court completely glossed over the fact that the classification at issue impinged on a fundamental right. The court applied rational basis review despite the fact that laws impinging on fundamental rights require more than simply “showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose.”¹²⁴ The *Seagrave* Court, however, held that the state legislature “might have” had a legitimate purpose for limiting petitions to divorced families who are already in the litigation arena.¹²⁵

Some states, including Illinois, Iowa, North Carolina, and Florida, have recently laid the groundwork for more successful equal protection arguments. Although these states found their third-party visitation statutes unconstitutional based on due process and privacy claims, they did so one section (or one category) at a time, and thus, the states affirmed that parents who are single, widowed, divorced, or separated are all entitled to the same “constitutional liberty in decisions concerning the care, custody and control of their children” as married, cohabiting parents.¹²⁶ In *Lulay v. Lulay*, the Illinois Supreme Court held that Illinois’s third-party visitation statute was unconstitutional as applied to divorced parents who made a joint decision to deny grandparent visitation.¹²⁷ In 2002, this holding was extended by *Wickham v. Byrne* to a single parent’s decision concerning visitation with a deceased spouse’s parents, where the court noted that the Supreme Court does not limit the fundamental right to make child rearing decisions to joint parents.¹²⁸ The court stated, “[W]e . . . reject any argument that single parents are entitled to less constitutional liberty in decisions concerning the care, custody, and control of their children.”¹²⁹

In 2001, the Iowa Supreme Court heard *Santi v. Santi* and ruled that Iowa’s grandparent visitation statute, as applied to married parents in an intact nuclear family, was unconstitutional on its face because it did not require a threshold finding of unfitness or harm.¹³⁰ In *Howard v. Howard*,¹³¹ the Iowa Supreme Court extended this holding to divorced parents, finding that “[d]ivorce does not diminish the parent’s fundamental

124. *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965); Nichols, *supra* note 55, at 1913 n.153.

125. *Seagrave*, 79 S.W.3d at 343.

126. *Wickham v. Byrne*, 769 N.E.2d 1, 6 (Ill. 2002).

127. *Lulay v. Lulay*, 739 N.E.2d 521, 533 (Ill. 2002).

128. *Wickham*, 769 N.E.2d at 6.

129. *Id.*

130. *Santi v. Santi*, 633 N.W.2d 312, 321 (Iowa 2001).

131. In *Howard*, paternal grandparents petitioned a divorced mother for overnight visits with her one year old daughter. *Howard v. Howard*, 661 N.W.2d 183, 185–86 (Iowa 2003).

interest in parenting and does not make them less capable parents.”¹³² Finally, in *Lambert v. Lillig*, decided in the latter half of 2003, the Iowa Supreme Court once again clarified that the parental right to control the care and custody of a child is not lessened “by the marital status of [an] otherwise fit [parent],” and held that *Santi*’s holding applied to a widowed father.¹³³

In 2000, Florida’s Supreme Court likewise extended its earlier ruling in *Von Eiff v. Azicri*¹³⁴ to a section of Florida’s visitation statute pertaining to parents of a child born out of wedlock. In *Saul v. Brunetti*, Florida’s high court found that the fact that parents were “never married should not change [the] Court’s analysis of the constitutionality of this statute.”¹³⁵ In 2003, a North Carolina Court of Appeals in *Eakett v. Eakett* affirmed that a single mother and her child can constitute an “intact family” for the purpose of North Carolina’s third-party visitation statute.¹³⁶ The court further noted that interfering with a single-parent family, while “produc[ing] a stronger grandparent-grandchild relationship . . . could disrupt a stable family where no disruption previously existed.”¹³⁷

One of the most recent challenges to a third-party visitation statute on equal protection grounds took place in Massachusetts’s highest court. In *Blixt v. Blixt*, a mother of a child born out of wedlock challenged Massachusetts’s visitation statute on the grounds that “its classifications impermissibly burden[ed] parents of ‘non-traditional families’ with litigation,” while exempting biological parents who live together.¹³⁸ In *Blixt*, both parents, though never married and living apart, agreed that visitation between the paternal grandfather and their child should not take place.¹³⁹ The lower court held that the Massachusetts visitation statute was unconstitutional, and consequently, that the grandfather could not petition for visitation.¹⁴⁰ The grandfather’s appeal of that determination brought the family before the State Supreme Court.¹⁴¹

132. *Id.* at 192.

133. *Lambert v. Lillig*, 670 N.W.2d 129, 132 (Iowa 2003).

134. *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998).

135. *Saul v. Brunetti*, 753 So. 2d 26, 28 (Fla. 2000).

136. *Eakett v. Eakett*, 579 S.E.2d 486, 489 (N.C. Ct. App. 2003).

137. *Id.*

138. *Blixt v. Blixt*, 774 N.E.2d 1052, 1062 (Mass. 2002). Massachusetts’s visitation statute is actually more progressive than California’s, as the Massachusetts statute protects the decisions of unwed parents as long as they reside together. *See id.* at 1055. California, however, requires that parents be cohabiting *and* wed. *See* CAL. FAM. CODE § 3104(b) (West 2004).

139. *Blixt*, 774 N.E.2d at 1080.

140. *Id.* at 1056.

141. *Id.* at 1055–56.

Blixt highlights the power social consensus plays in equal protection challenges to visitation statutes. The Massachusetts Supreme Court found that the state had a compelling interest in keeping “children safe from the kinds of physical or emotional trauma that may scar a child’s ‘health and . . . development’ well into adulthood.”¹⁴² The court then determined that the “traumatic loss” of a grandparent relationship “may fall most heavily on [a] child whose unmarried parents live apart.”¹⁴³ This presumption was “drawn from social experience,”¹⁴⁴ and the fact that “[s]uch a child may already be vulnerable” because of feelings of “inadequacy . . . that our society still often visits on those children whose family structure departs from an idealized two-parent norm.”¹⁴⁵ Given current family statistics, however, it is likely that a child in a one-parent family does not feel inadequate until a court like this one makes the child feel inadequate. Popular culture and much of society already recognize the diversity of the American family experience. Disney films, in particular, frequently focus on nonnuclear families.¹⁴⁶

In a blistering dissent, Justice Sosman noted that “the [Massachusetts Supreme] Court resorts to vague generalizations verging on pure stereotypes” to justify its treatment of all families that are not biological, nuclear families.¹⁴⁷ Justice Sosman’s dissent, joined by one other justice, delineated the overinclusive and underinclusive nature of the Massachusetts statute and observed with disapproval the deferential nature of the court’s strict scrutiny review.¹⁴⁸ Although the equal protection challenge mounted in *Blixt* was unsuccessful, the case established that the appropriate level of review for equal protection challenges in the context of visitation statutes is strict scrutiny, just as it is in due process claims.¹⁴⁹

C. CALIFORNIA: ONE STEP FORWARD, TWO STEPS BACK

The history of California’s visitation laws mirrors the pattern seen across the nation. Beginning in the 1960s, California enacted a narrow visitation statute, which was followed by a more liberal and expansive

142. *Id.* at 1064.

143. *Id.* at 1065.

144. *Id.* at 1064.

145. *Id.* at 1065.

146. *See supra* note 96.

147. *Blixt*, 774 N.E.2d at 1079 (Sosman, J., dissenting).

148. *Id.*

149. *Id.* at 1062 (majority opinion) (noting that because the statute’s classifications implicate fundamental parental rights, “strict scrutiny” analysis is again appropriate to evaluate the mother’s equal protection challenge).

statute in the 1990s. In 1967, the California Legislature enacted its first visitation statute, granting standing to close relatives to petition the court for visitation with a minor whose parent had died.¹⁵⁰ In 1982, two more statutes extended petition rights to divorce proceedings¹⁵¹ and child custody proceedings.¹⁵² Throughout the 1980s, however, extended family members continued to await triggering events to gain standing. As the California Court of Appeal noted in *White v. Jacobs*, “The number and specificity of statutes providing for adjudication of grandparents’ rights of visitation belie any general or inherent rights of grandparents or authority of superior courts to mandate visitation with a grandchild over that child’s parents’ objection.”¹⁵³

Although opposed by the State Bar, in 1994, the California Legislature heeded the call of its elderly citizens¹⁵⁴ and enacted section 3104 of the California Family Code, authorizing an independent cause of action for grandparent visitation based on marital status and living arrangements. The California Court of Appeal noted that “section 3104 closes a gap in prior law under which grandparents had no avenue to obtain court-granted visitation unless one of the parents had died or a marital action between the parents was before the court.”¹⁵⁵ Although an Assembly Bill Analysis cautioned that basing grandparent visitation rights on a parent’s marital status or living arrangements likely violated equal protection,¹⁵⁶ the bill passed through the state legislature virtually unopposed.

Today, sections 3102, 3103, and 3104 of the California Family Code are the three statutes that authorize third parties to seek visitation with children against their parents’ will. Section 3102 allows certain relatives to seek visitation with a child after one of the child’s parents dies.¹⁵⁷ Section 3103 allows grandparents to seek visitation with a child in a pending

150. CAL. CIV. CODE § 197.5 (repealed 1992).

151. CAL. FAM. CODE § 3101 (West 2004).

152. *Id.* § 3103 (West 2004).

153. *White v. Jacobs*, 243 Cal. Rptr. 597, 597–98 (Ct. App. 1988).

154. “The express purpose of the proposed section 3104 was to expand the situations in which grandparents may come into court to seek a visitation order with their grandchildren.” *Fenn v. Sherriff*, 1 Cal. Rptr. 3d 185, 193 (Ct. App. 2003).

155. *Id.* at 192 n.3.

156. “This bill treats married parents differently than parents who are unmarried, separated or divorced. . . . It is questionable whether there is any compelling state interest in treating parents who are married differently than parents who are not, as provided for in this bill.” *Assemb. Analysis of S.B. 306*, *supra* note 5, at 3–4.

157. CAL. FAM. CODE § 3102 (West 2004). This statute often leaves a vulnerable family in the crossfire of multiple lawsuits.

dissolution proceeding or other custody proceeding.¹⁵⁸ Section 3104, the most permissive of the three statutes,¹⁵⁹ creates an independent action for grandparents, allowing them to seek visitation with a child at any time, if they have a prior relationship with the child and the child's parents are not married and cohabiting.¹⁶⁰ California courts continue, however, to have no power to award visitation over the objection of two married, biological parents living together in the same household.

Prior to *Fenn v. Sherriff*,¹⁶¹ at least four post-*Troxel* California appellate opinions found section 3102 unconstitutional.¹⁶² California appellate courts appeared to be following the logic of states like Florida and Illinois, citing to *Von Eiff* and *Lulay* to establish that the death of one parent does not affect the rights of the surviving parent. In *Fenn v. Sherriff*, a California trial court granted summary judgment to a widowed father in a visitation proceeding in which he and his children's adoptive mother uniformly objected to visitation with his deceased wife's parents.¹⁶³ On appeal, California's Third Appellate District overturned the trial court, finding that neither the Due Process Clause nor the Equal Protection Clause provided grounds for summary judgment.¹⁶⁴ The recent decision of *Fenn* and the California Supreme Court's denial of review of that case represent a serious step backward in the fight for equal parental rights for diverse families.

IV. LEGAL ANALYSIS OF *FENN V. SHERRIFF*

Of the relatively few equal protection challenges brought against third-party visitation statutes, most argue that parents in nonnuclear families are similarly situated to parents in nuclear families and, therefore, should receive like treatment and be exempt from third-party visitation petitions. The power of *Fenn* is that it examines two nuclear families created as a result of stepparent adoption, identical in form and function, and differing only in the fact that one parent is a widow, and is thus subject

158. *See id.* § 3103 (West 2004).

159. The express purpose of section 3104 is to "authorize grandparents to petition the court for visitation rights in any situation" unless the parents are married and living together. *Assemb. Analysis of S.B. 306*, *supra* note 5, at 2.

160. CAL. FAM. CODE § 3104 (West 2004).

161. *Fenn v. Sherriff*, 1 Cal. Rptr. 3d 185 (Ct. App. 2003).

162. *Zasueta v. Zasueta*, 126 Cal. Rptr. 2d 245 (Ct. App. 2002); *Herbst v. Swan*, 125 Cal. Rptr. 2d 836 (Ct. App. 2002); *Punsly v. Ho*, 105 Cal. Rptr. 2d 139 (Ct. App. 2001); *Kyle O. v. Donald R.*, 102 Cal. Rptr. 2d 476 (Ct. App. 2000).

163. *Fenn*, 1 Cal. Rptr. 3d at 190.

164. *Id.* at 191.

to visitation petitions until the child reaches the age of majority. This narrow and focused evaluation of the law's unequal treatment of identical two-parent families, equally warranting constitutional protection, brings into sharp relief the irrationality of looking at parental rights from a formula-based position and denying rights to families based on qualitative labels that do not reflect how families function.

In August of 2000, Kathryn and Robert Sherriff were in the process of obtaining a divorce when Kathryn committed suicide.¹⁶⁵ Kathryn's parents, the Fenns, filed a petition for visitation with their two grandsons within five weeks of their daughter's death.¹⁶⁶ Robert Sherriff had allowed the Fenns to visit the children after Kathryn's death, but Kathryn had told Robert that her father had physically and emotionally abused her throughout her life,¹⁶⁷ so visitation occurred at Sherriff's discretion and on his terms.¹⁶⁸ One year later, as litigation continued, Robert Sherriff remarried and his new wife adopted his two sons.¹⁶⁹ Sherriff, having created a nuclear family both in form and function, filed a motion for summary judgment, requesting that he and his wife be granted complete discretion on the subject of visitation with the Fenns.¹⁷⁰ Sherriff's attempt to regain his parental rights by "recreating" a nuclear family was modeled after the successful actions of the appellant-mother in *Lopez v. Martinez*.¹⁷¹

In *Lopez v. Martinez*, the appellant, Elizabeth Martinez, conceived a child out of wedlock with her live-in boyfriend.¹⁷² The boyfriend left prior to the child's birth and did not contact Elizabeth ever again. Elizabeth subsequently moved in with her parents who supported her and her son until she married Hector Martinez four years later. Elizabeth and her parents had a turbulent relationship, ultimately leading to Elizabeth ending all contact between her parents and her child.¹⁷³ Although Elizabeth, her husband Hector, and her son now formed a nuclear family, Elizabeth's parents still had standing to petition for visitation with their grandchild over Elizabeth's objection because Hector had not formally adopted the child

165. Brief for Respondent at 2-3, *Fenn*, 1 Cal. Rptr. 3d 185 (No. C041899).

166. *Fenn*, 1 Cal. Rptr. 3d at 190.

167. Brief for Respondent, *supra* note 165, at 5.

168. *Fenn*, 1 Cal. Rptr. 3d at 190-200. Sherriff allowed one-hour supervised visits every two and one-half months during which the grandparents were prohibited from gift-giving, videotaping the children, or discussing the mother's death. *Id.*

169. *Id.* at 189-90.

170. *Id.* at 190.

171. *Lopez v. Martinez*, 102 Cal. Rptr. 2d 71, 72 (Ct. App. 2000).

172. *Id.*

173. *Id.* at 72-73.

and sealed the gap left by the absent biological father.¹⁷⁴ In order to preserve the integrity of Elizabeth's parental decision, Elizabeth and Hector initiated adoption proceedings.¹⁷⁵ Once Hector's adoption of Elizabeth's child was complete, the state was willing to recognize their family as a unit and honor Elizabeth's decision by barring the grandparents' petition for visitation.¹⁷⁶

In *Fenn*, the Third Appellate District found Sherriff's reliance on *Lopez* misplaced. Under section 3104 of the California Family Code,¹⁷⁷ single parents, as well as separated and married parents not living in the same household, are subject to petitions for visitation with their children over their objection at any time. If a change of circumstances occurs, however, such as a stepparent adoption or the return of a spouse, then full parental rights are reinstated and courts have no power "to award grandparent visitation over the objection of both parents living together in a family unit."¹⁷⁸ But Robert Sherriff was not a single parent. He was a widowed parent, and section 3102 of the California Family Code grants close relatives of deceased spouses the right to petition their widowed spouses for visitation over their objection.¹⁷⁹ Unlike section 3104, section 3102 leaves a parent exposed to visitation petitions until a child reaches the age of majority, regardless of subsequent stepparent adoption.

The equal protection challenge Sherriff advanced argued that for all intents and purposes these two types of families are identical, except in their treatment by the law. Both are composed of one natural parent and one stepparent living together with their children in a nuclear family.¹⁸⁰ The only difference between stepparent families that are exempt from visitation petitions under section 3104, and stepparent families, like Sherriff's, that are subject to visitation petitions under section 3102, is that a biological parent has died. The Third Appellate District found these two groups sufficiently similar "to merit application of some level of scrutiny."¹⁸¹

174. *Id.* at 73.

175. *Id.*

176. *Id.* at 75.

177. Natural parent/stepparent families are formed under section 3104 when the other natural parent is "alive, but has surrendered, lost, or forfeited his or her parental rights." *Fenn v. Sherriff*, 1 Cal. Rptr. 3d 185, 202 (Ct. App. 2003).

178. *Id.* at 193 (internal quotation omitted).

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

180. *Id.* at 201–02.

181. *Id.* at 203.

In reviewing an equal protection challenge, a court will either apply rational basis review, which is a deferential test that usually finds a law to be valid if any rational relationship exists between the purpose of the law and the classification at issue, or the more stringent strict scrutiny test, which invalidates the law absent a compelling state interest. Strict scrutiny is generally reserved for cases involving racial classifications or fundamental rights.

In the instant case, while the Third Appellate District recognized that Sherriff's fundamental right to make parenting decisions was at stake, the court posited that "[n]ot every classification involving a fundamental right warrants strict scrutiny."¹⁸² The court justified the use of rational basis review by finding that "[t]he mere fact that defendant and his wife are *subject to a visitation petition . . . is not 'a real and appreciable impact on, or significant interference with the exercise of their fundamental right to make parenting decisions.'*"¹⁸³ The court argued that if the trial court did not ultimately order visitation, then the classification at issue would have no real impact on the fundamental parenting rights of Sherriff and his wife.¹⁸⁴

The court's logic in *Fenn* appears to have been resurrected from the 1993 Missouri Supreme Court case *Herndon v. Tuhey*.¹⁸⁵ *Herndon* introduced the new "undue burden" standard, which the Supreme Court created in *Planned Parenthood v. Casey*,¹⁸⁶ to the context of grandparent visitation.¹⁸⁷ Under the undue burden standard, a law must "infringe substantially" on a fundamental right before strict scrutiny will be applied.¹⁸⁸ In *Herndon*, the court found that the state statute, which allowed a court to grant visitation to any grandparent who had been "unreasonably" denied visitation with his or her grandchild for more than ninety days, was

182. *Fenn*, 1 Cal. Rptr. 3d at 203. The court's rationalization appears to be somewhat akin to the idea of "undue burden" in the Supreme Court's most recent abortion case, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

183. *Fenn*, 1 Cal. Rptr. 3d at 203-04.

184. *Id.*

185. *Herndon v. Tuhey* involved parents and grandparents in such serious conflict that physical confrontations between all members had led to severe injuries. *Herndon v. Tuhey*, 857 S.W.2d 203, 205 (Mo. 1993). The grandparents had two other actions in addition to their visitation petition pending against the child's parents, one for repayment of a loan and another for the return of cattle. *Id.* at 206. *Herndon* aptly illustrates the logic of the Florida Supreme Court's admonition that "there may be many beneficial relationships for a child, but it is not for the government to decide with whom the child builds these relationships." *Von Eiff v. Azicri*, 720 So. 2d 510, 516 (Fla. 1998).

186. *Casey*, 505 U.S. 833.

187. *Herndon*, 857 S.W.2d at 211.

188. *Id.* at 208.

constitutional under the Due Process Clause because such visitation constituted “only a minimal intrusion on the family relationship.”¹⁸⁹

Interestingly, the *Fenn* opinion makes no reference to *Casey* or to the fact that the court is applying the undue burden analysis. The court’s application of this standard outside of the abortion context is unpersuasive and contradicts the sounder logic of California’s Fourth Appellate District and the high courts of Massachusetts, Florida, Iowa, and Illinois.¹⁹⁰ In *Punsly v. Ho*, California’s Fourth Appellate District rejected the proposition that a trial court does not place a burden on a widowed parent when a visitation petition is filed but no litigation regarding visitation actually occurs.¹⁹¹ The court found that a parent’s “constitutional rights as a custodial parent became implicated” the moment a child’s grandparents “filed their petition under 3102.”¹⁹² The court cited the Illinois Supreme Court decision in *Lulay v. Lulay*, which found the mere procedure of hauling parents into court, and presumably forcing them to hire an attorney and present evidence to defend their decision¹⁹³ was a significant interference regardless of whether visitation was actually ordered.¹⁹⁴ As the court stated in *Lulay*: “To hold that [this statute] is not a significant interference with the fundamental right of parents to raise their children would be to effectively obliterate that fundamental right.”¹⁹⁵

Exposure to litigation does place a substantial burden on families. Litigation is an expensive, intrusive, time consuming, and emotionally fatiguing experience. Litigation is a risk that is so disruptive to the lives of litigants that it is insured against in the private sector¹⁹⁶ and often avoided entirely by government officials.¹⁹⁷ Justice Kennedy found

189. *Id.* at 210.

190. *Belair v. Drew*, 770 So. 2d 1164 (Fla. 2000); *Saul v. Brunetti*, 753 So. 2d 26 (Fla. 2000); *Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998); *Lulay v. Lulay*, 739 N.E.2d 521 (Ill. 2000); *In re Marriage of Howard*, 661 N.W.2d 183,188 (Iowa 2003); *Blixt v. Blixt*, 774 N.E.2d 1052 (Mass. 2002).

191. *Punsly v. Ho*, 105 Cal. Rptr. 2d 139, 146 (Ct. App. 2001).

192. *Id.*

193. In order to avoid visitation, a parent often must expose family dysfunction. *DiBerardino v. DiBerardino*, 645 N.Y.S.2d 848 (App. Div. 1996). Although evidence establishing deep-rooted animosity, alcoholism, sexual impropriety, and other elements of a dysfunctional family can help a family avoid court ordered visitation, the price is often the family’s dignity.

194. *Punsly*, 105 Cal. Rptr. 2d at 146 (citing *Lulay*, 739 N.E.2d at 531–32).

195. *Lulay*, 739 N.E.2d at 531.

196. Families insure against the risk of litigation through homeowner policies, which include liability insurance. Businesses insure against the risk of litigation with commercial liability policies.

197. As noted in the *Blixt* Writ of Certiorari, “one purpose of qualified immunity doctrine is to avoid ‘[subjecting] government officials either to the costs of trial or to the burdens of broad-reaching discovery.’” *Petition for Writ of Certiorari* at 14 n.5, *Blixt v. Blixt*, 537 U.S. 1189 (2003) (No. 02-847) (internal citation omitted).

intergenerational litigation to 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.”¹⁹⁸ The *Troxel* plurality seemed to agree with this position when it noted that there was no reason to remand the case for further proceedings as additional litigation would only further burden the Granvilles’ parental rights.¹⁹⁹ Even California’s Third Appellate District, in *Kyle O. v. Donald R.*, stated that “remand for further proceedings on the question of visitation is inappropriate,” as it would “forc[e] the parties into additional litigation that would further burden . . . parental right[s].”²⁰⁰ Furthermore, litigation diverts time and financial resources from the child to the court battle. Exposing widowed parents to litigation only increases the economic insecurity of one-parent homes²⁰¹ and disproportionately encourages struggling families who do not have the resources necessary for extended litigation to settle.²⁰²

There is also an unquantifiable cost to parents when courts second-guess their decisions. The Illinois Supreme Court found that parental “authority over . . . children is necessarily diminished by this procedure,”²⁰³ and California’s Fourth Appellate District found that the California Legislature’s decision to limit standing “shows the Legislature’s recognition [that] such proceedings can put a child through much hardship and trauma.”²⁰⁴ Finally, when family members are using litigation to gain access to a child, there is usually a complex history of discord between the parties; often defending a parental decision involves being forced to expose painful family secrets and furthers the breakdown of interpersonal relationships.²⁰⁵

198. *Id.* at 10 (internal quotation omitted).

199. *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (“In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this court are without a doubt already substantial.”).

200. *Kyle O. v. Donald R.*, 102 Cal. Rptr. 2d 476, 487 (Ct. App. 2000) (internal quotation and citation omitted).

201. While only fifteen percent of children living in two-parent families lived on a family income of less than \$30,000, sixty-five percent of children in single-mother families and forty-five percent of children in single-father families lived on a family income of less than \$30,000. FIELDS, *supra* note 32, at 13.

202. Nolan, *supra* note 5, at 272 n.31 (“[T]he average cost of defending a grandparent visitation suit can range from \$70,000 to \$100,000.”) (internal citation omitted).

203. *Lulay v. Lulay*, 739 N.E.2d 521, 5325 (Ill. 2000).

204. *Lopez v. Martinez*, 102 Cal. Rptr. 2d 71, 76 (Ct. App. 2000).

205. Under section 3102’s predecessor, section 197.5 of the California Civil Code, the California Supreme Court found that when the relationship between stepparent families and a deceased spouse’s family devolves to “bitter-friction,” then the best interest of the child is served by giving parents

In *Fenn*, the Third Appellate District defended its decision to use rational basis review by highlighting the fact that the trial court's accordance of "special weight"²⁰⁶ to Sherriff and his wife's visitation decision "adequately protected" the fundamental right at issue.²⁰⁷ The appellate court, however, had not taken a deferential tone with Sherriff's decision, stating that it was "far from obvious" that Sherriff had offered the Fenns "'meaningful' visitation," and the court cited with disapproval Sherriff's declaration, which stated that he did not believe contact with the children's grandfather was good for the children.²⁰⁸

Accordingly, it appears that under the Third Appellate District's reading, special weight protects only those parents who already believe that it is in their child's best interest to associate with a petitioning relative.²⁰⁹ The concept of meaningful visitation only creates another layer of judicial discretion, as evidenced by the fact that the Fourth Appellate District found in *Punsly* that visitation less frequent than the visitation Sherriff originally offered was in fact "meaningful visitation." Earlier California appellate court decisions had indicated it was unconstitutional for a court to order mandatory visitation with a child when a parent had voluntarily offered some visitation and a suit was filed to merely secure more time with the child.²¹⁰

Given the magnitude of the right at stake, strict scrutiny clearly was warranted. The Fourth Appellate District reached this exact conclusion, holding that the standard to be applied in reviewing the constitutionality of

"complete discretion to determine the nature and extent of future grandparental visits if any." *In re Adoption of Berman*, 118 Cal. Rptr. 804, 810 (Ct. App. 1975).

206. No presumption is expressly required by section 3102. To comply with *Troxel*, however, section 3102 must be read as though it contains such a provision. *Fenn v. Sherriff*, 1 Cal. Rptr. 3d 185, 195 n.4 (Ct. App. 2003).

207. *Id.* at 203.

208. *Id.* at 199.

209. California's Fifth Appellate District addressed this very issue when it found section 3102 unconstitutional as applied in *Zasueta v. Zasueta*, stating "we do not read [*Troxel*] to mean that, whenever a parent expresses opposition to grandparent visitation, this opposition should automatically be considered a factor in favor of visitation." *Zasueta v. Zasueta*, 126 Cal. Rptr. 2d 245, 254 (Ct. App. 2002).

210. As the *Zasueta* court explained:

[W]e do not read this to mean that, whenever a parent expresses opposition to grandparent visitation, this opposition should automatically be considered a factor in favor of visitation. Such an interpretation contradicts *Troxel's* central holding that a fit parent's decision regarding visitation should be given deference, and that the burden is on the grandparents, not the parent to show visitation is in a child's best interest.

Zasueta, 126 Cal. Rptr. 2d at 254. *See also* *Punsly v. Ho*, 105 Cal. Rptr. 2d 139, 145 (Ct. App. 2001) ("We construe *Troxel's* emphasis on a parent's voluntary efforts for visitation to mean that before a court may intervene, the parent must be given an opportunity to voluntarily negotiate a visitation plan.").

section 3102 is strict scrutiny.²¹¹ The *Fenn* court inappropriately avoided application of strict scrutiny by applying the unorthodox undue burden test. The court clearly did not submit the state's interest of preserving intergenerational bonds to heightened review because it would not have survived strict scrutiny. The court posited that section 3102 was the state's only "means of maintaining the child's link with his or her paternal or maternal family, including their ancestry, heritage, culture, traditions and medical history."²¹² Although this interest was able to pass rational basis review, access to family history does not provide compelling justification for denying the parents in a stepparent family the fundamental right to raise their children as they see fit. The Illinois Supreme Court found this interest insufficient in *Lulay v. Lulay*,²¹³ as did California's Second Appellate District in *Lopez v. Martinez*.²¹⁴ This interest does not justify protracted litigation and the insertion of the state into the family.

Further, such a state interest is counterintuitive when one considers that the effect of an adoption is to terminate all legal relationships and all rights and duties between the adopted child and the child's relatives. Sherriff's new wife's adoption of Sherriff's two sons was indicative of the State of California's determination that having both Sherriff and his new wife in charge of parental decisions would serve the children's best interest.²¹⁵ Further, the Sherriff children now had two parents and two sets of legal grandparents, plus the option, if not the right, to stay in touch with a third set of grandparents. Allowing stepparent families to decide who may associate with their children "does not mean that the natural grandparents can never visit their grandchildren."²¹⁶ It merely means that "whether such visitation is to occur is a decision left to the natural parent and the adopting parent, just as it is left to the natural parents when they are both alive."²¹⁷

211. *Punsly*, 105 Cal. Rptr. 2d at 145, at 1107 (finding, in review of a due process challenge, that "infringement of this fundamental right requires the court to apply a strict scrutiny test").

212. *Fenn*, 1 Cal. Rptr. 3d at 204.

213. *Lulay v. Lulay*, 739 N.E.2d 521, 534 (Ill. 2000).

214. *Lopez v. Martinez*, 102 Cal. Rptr. 2d 71, 76 (Ct. App. 2000).

215. *See Lopez*, 102 Cal. Rptr. at 76 (finding that adoption was a signal that the state found the child's best interest would be served with both a natural and a stepparent in charge of parenting decisions). *But see* *Roquemore v. Roquemore*, 80 Cal. Rptr. 432 (Ct. App. 1969) (finding that a probate code that limits succession to legal grandparents, not natural grandparents, does not hinder section 3102's predecessor, section 197.5, from allowing natural grandparents of an adopted child to maintain an action to obtain visitation).

216. *Bikos v. Nobliski*, 276 N.W.2d 541, 545 (Mich. Ct. App. 1979).

217. *Id.*

There is no valid distinction between the reconstructed families in *Fenn* and *Lopez*. A child's interest in the strength and solidarity of his or her new family outweighs a relative's interest in bestowing on that child a sense of familial history, regardless of whether a parent has died. The differences the *Fenn* court constructed between identical stepparent families, based solely on one parent's widowhood, are reminiscent of the purportedly "very real differences" the State of Illinois found "between the married father and the unmarried father" in its justification of an Illinois law that made children of unwed fathers wards of the state after their mothers died.²¹⁸ In *Stanley v. Illinois*, the state court used "history and culture" to support the fact that single unwed fathers did not have the same interest in their children as single widowed fathers and therefore should not be protected similarly by the law.²¹⁹ The Supreme Court, however, found such stereotypes insufficient in light of the fundamental right at stake.²²⁰

Although protecting the best interests of children is the asserted policy reason for grandparent visitation legislation, a child's interest in maintaining contact with relatives remains constant whether a parent is deceased or has lost parental rights. Therefore, nonparental visitation statutes do not act on behalf of children. The only difference between a stepparent family formed after the death of a parent and one formed after a parent has lost parental rights is the level of culpability assignable to the former biological parent and the level of sympathy one might have for the former grandparents. Although one may have sympathy for a grandparent, there are higher constitutional concerns to be considered. As Justice Sosman observed in *Blixt*: "No one has a 'right' to associate with other people's children, and the mere fact that a person is a blood relative of those children does not confer any such 'right.'"²²¹

The Third Appellate District's use of rational basis review buffered section 3102 from a valid equal protection claim and allowed the court to avoid piecemeal invalidation of California's third-party visitation statutes. Had strict scrutiny been applied, the court would have been forced to find that maintaining family history was not a compelling state interest and that the death of one biological parent does not diminish the surviving parent's

218. *Stanley v. Illinois*, 405 U.S. 645, 653 n.5 (1972) ("We submit that both based on history or . . . culture the very real differences . . . between the married father and the unmarried father, in terms of their interests in children and their legal responsibility for their children, that the statute here fulfills the compelling governmental objective of protecting children . . ." (alterations in original) (quoting Transcript of Oral Argument at 31, *Stanley*, 405 U.S. 645 (No. 70-5014)).

219. *Id.*

220. *Id.* at 657-58.

221. *Blixt v. Blixt*, 774 N.E.2d 1052, 1070 n.1 (Mass. 2002) (Sosman, J., dissenting).

fundamental right to decide with whom the child will associate. Such a finding would effectively abolish section 3102 of the California Family Code and further, since widowed parents are essentially single parents, such a finding would provide a basis for divorced parents and single-parent families to mount their own equal protection challenges against California's most permissive third-party visitation statute, section 3104. This section provides grandparents with an independent cause of action to seek visitation with children anytime the child's parents are not married *and* cohabiting.

Fenn v. Sherriff illustrates how visitation statutes violating the Equal Protection Clause can influence the behavior of nonnuclear families. A state may, in effect, compel legal parents to seek adoptive parents for their children after the death of a spouse in order to regain parenting rights that the surviving parent should have possessed in the first place. Thus, visitation statutes force families to make unnecessary and artificial alterations in their status toward one another to ensure parental control over their children. This can be emotionally harmful to children, especially children who are still grieving over the loss of a parent and who are not ready to accept a new parent.

Although two California appellate districts have previously established that unequal treatment of similarly situated families based on the widowhood of a biological parent is unjustifiable, in each case there appears to be a fundamental flaw in how the courts defined unequal treatment. In 2000, the Third Appellate District itself cited to *Von Eiff*²²² and found that a parent's death does not diminish the surviving parent's rights. Further, in 2001, California's Fourth Appellate District stated that "[n]othing in the unfortunate circumstance of one biological parent's death affects the surviving parent's fundamental right to make parenting decisions concerning their child's contact with grandparents."²²³ The Fourth Appellate District stated that "to avoid a facial constitutional challenge, we can only interpret section 3102 to confer upon the blood relatives of a deceased parent standing to seek court ordered visitation."²²⁴ As discussed above, however, the mere fact that relatives have standing infringes on a surviving parent's fundamental right to raise his or her children. In California, courts have a "long-standing inclination . . . to

222. In *Von Eiff v. Azicri*, a statute similar to section 3102 of the California Family Code was found unconstitutional under the Florida Constitution's guarantee of privacy. *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998).

223. *Punsly v. Ho*, 105 Cal. Rptr. 2d 139, 144 (Ct. App. 2001) (citing *Von Eiff*, 720 So. 2d 510).

224. *Id.* at 144 n.6.

defer to the jointly expressed wishes of the parents except in the most unusual and extreme cases.”²²⁵ While widowhood is tragic, it does not constitute either an unusual or an extreme circumstance warranting a state’s intrusion into the historically protected realm of the family.

A. CONDITIONS NECESSARY FOR A SUCCESSFUL EQUAL PROTECTION CHALLENGE AGAINST SECTIONS 3102 AND 3104 OF THE CALIFORNIA FAMILY CODE

As described in the *Fenn* analysis above, stepparent families present the strongest equal protection challenge against visitation statutes that draw distinctions between biological, nuclear families and all other family forms. This is because stepparent families mimic nuclear families both in form and function. Hence, stepparent families highlight the counterintuitive and illogical nature of impinging on basic parenting rights because of family composition.

The illogical nature of impinging on parental rights because of family composition extends beyond the limited facts of *Fenn*. The right of a fit parent to determine who will influence his or her child’s personality and character without state interference should be the norm, irrespective of whether a parent is divorced, separated, widowed, or unwed. Visitation statutes, by impinging on the fundamental rights of parents to protect their children from associations they feel are unhealthy and by forcing parents to litigate because of their marital status and living arrangements violate the Equal Protection Clause.²²⁶ The following discussion will examine three conditions that are necessary to mount a successful equal protection claim against a permissive visitation statute that conditions third-party standing on the living arrangements and marital status of a child’s parents, like section 3104 of the California Family Code.²²⁷

The first condition necessary to mount a successful equal protection challenge against section 3104 and similar statutes is the court’s acceptance of a definition of a “similarly situated family” that focuses on the *function* of the family rather than the *component parts* of the family. All families, including widows, single parents, unwed parents, and married parents, are charged with the same child rearing obligations. Parents’ primary function

225. *Lopez v. Martinez*, 102 Cal. Rptr. 2d 71, 76 (Ct. App. 2000) (quoting *In re Marriage of Gayden*, 280 Cal. Rptr. 862, 867 (Ct. App. 1991)).

226. “[R]esort[ing] to vague stereotypes to justify . . . classification[s]” is “insufficient to justify invasion of constitutional rights.” *Blixt*, 774 N.E.2d at 1067–68 (Sosman, J., dissenting).

227. CAL. FAM. CODE § 3104 (West 2004).

is the historically protected duty to prepare their children “for obligations the state can neither supply nor hinder.”²²⁸ They must raise their children, share their resources, oversee their children’s education and health care, and prepare their children for citizenship. All family formations, whether consisting of a single parent or two parents, must provide continuously “an environment that serves [a child’s] numerous physical, mental, and emotional needs.”²²⁹ Hence, all fit parents are similarly situated to each other in terms of the functions they must perform.

Eakett v. Eakett serves as an example of how courts can look beyond formulaic conceptions of parental rights.²³⁰ In *Eakett*, the court recognized that a single mother and her child can constitute an “intact family” for the purpose of a third-party visitation statute, and that nontraditional families may nonetheless be stable, adjusted families.²³¹ The state’s purpose in creating parental classifications in the context of visitation is to ensure the well-being of children.²³² The state must realize that devotion to a spouse does not translate into devotion to a child, which is what truly matters—the fact that a marriage did not start does not mean that a family did not start.²³³

Second, courts must recognize that strict scrutiny is the appropriate standard of review for visitation statutes, regardless of whether a due process challenge or an equal protection claim is before the court. At the core of the fundamental right to parent is the right to decide who will influence a child and who will shape the child’s character. The undue burden standard is inappropriate in the third-party visitation context considering the Supreme Court’s emphasis in *Troxel* on the fundamental and historical nature of the right to parent in America. Even under the undue burden standard, however, it is clear that exposure to litigation significantly impinges on a parent’s fundamental right to make parental decisions. Moreover, statutes that subject classes of parents to third-party petition procedures should draw heightened review because the very

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

229. *GOLDSTEIN ET AL.*, *supra* note 110, at 10.

230. *Eakett v. Eakett*, 579 S.E.2d 486 (N.C. Ct. App. 2003).

231. *Id.* at 554. Children living in low-conflict divorced families have been shown to be better off than children in high-conflict intact families. MILLER, *supra* note 3, at 128. “[R]esearch suggests that interpersonal conflicts, rather than the separation or divorce per se, are the major causes of behavioral problems in children.” *Id.* Although the first year following a divorce has been shown to be the most difficult for children, if a child subsequently lives in a stable and conflict-free home, the child’s behavior will stabilize over the second year. *Id.*

232. *Lopez v. Martinez*, 102 Cal. Rptr. 2d 71, 76 (Ct. App. 2000).

233. *See O’Connor-Felman*, *supra* note 25.

process of being hauled into court to defend one's parenting decisions is an expensive, time consuming, and emotionally exhausting procedure that negatively impacts the parent-child relationship.

Third, courts must recognize that providing children with meaningful relationships with their extended relatives is not a compelling state interest. In *Stanley v. Illinois*, the Supreme Court established that parents' decisions regarding the "care, custody, and control" of their children "warrant[] deference and, absent a powerful countervailing interest, protection."²³⁴ One-third of America's children are part of one-parent homes.²³⁵ In light of the prevalence of one-parent families, allowing courts to treat being raised by a single parent as a "powerful countervailing interest" appears to be a significant intrusion on the rights of parents.²³⁶ As Justice Sosman stated, "Mere improvement in quality of life is not a compelling state interest."²³⁷ Rather, a compelling state interest is protecting children from neglect, abandonment, and physical and sexual abuse. As stated by the Illinois Supreme Court, grandparent visitation "does not involve a threat to the health, safety, or welfare of children."²³⁸ Furthermore, prior to passing section 3104, a California Assembly Bill Analysis admitted that it was "questionable whether there [was] any compelling state interest in treating parents who are married differently than parents who are not, as provided for in this bill."²³⁹

Section 3104's requirement that petitioning grandparents have a preexisting relationship with a grandchild indicates that the legislature, in enacting third-party visitation statutes, was concerned with protecting a child from emotional harm.²⁴⁰ Even if protection from emotional harm by loss of a grandparental relationship qualified as a compelling state interest, the statute would still have to be narrowly tailored to serve that interest. Since the form of a family does not determine the family's ability to function,²⁴¹ any statute that relies on a parent's marital status or living arrangements to tailor its reach to those who are at risk is both underinclusive and overinclusive.

234. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

235. See *FIELDS*, *supra* note 32, at 3.

236. See *Stanley*, 405 U.S. at 651.

237. *Blixt v. Blixt*, 774 N.E.2d 1052 (Mass. 2002) (Sosman, J., dissenting) (quoting *King v. King*, 828 S.W.2d 630, 634 (Ky. 1992) (Lambert, J., dissenting)).

238. *Wickham v. Byrne*, 769 N.E.2d 1, 6 (Ill. 2002).

239. *Assemb. Analysis of S.B. 306*, *supra* note 5, at 4.

240. See *In re Marriage of Howard*, 661 N.W.2d 183, 190-91 (Iowa 2003).

241. Stephanie Coontz explains, "How a family functions on the inside is more important than how it looks from the outside." Coontz, *supra* note 31.

Marital status should not be used as a proxy for a family's psychological well-being. Instead, "the presence of harm must be at the center of a grandparent visitation statute, not the mere marital status of parents."²⁴² As noted by the Iowa Supreme Court, basing standing on the marital status of a child's parent "either assumes harm occurs in all families touched by divorce when there is no grandparent visitation or it embraces a standard short of harm,"²⁴³ which does not justify state intervention.

Section 3104 is based on marital status and cohabitation and, therefore, is overly broad. This statute encompasses children in single-parent homes who are not in need of grandparent visitation to stabilize their lives. Some families begin without marriage and continue on that way, only experiencing disruption when grandparents initiate litigation.²⁴⁴ Furthermore, the statute encompasses unwed parents who reside together as a stable family. Studies show that children who have at least one parent who they can love and who makes them feel "loved, valued, and wanted by that person, will develop a healthy self-esteem."²⁴⁵ In *Stanley v. Illinois*, a case cited by the *Troxel* plurality in support of fundamental parenting rights, the father argued that he had been deprived of the equal protection of the laws when his children were declared wards of the state upon their mother's death solely because he was an unwed father.²⁴⁶ The Supreme Court ultimately reviewed the law under the Due Process Clause, but it noted:

It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children.²⁴⁷

Nonnuclear families are likewise individual in nature and should not be swept together into a pariah class whose fundamental parenting rights are assailable at will.²⁴⁸

242. *In re Marriage of Howard*, 661 N.W.2d at 190.

243. *Id.*

244. "There is no 'disruption' of the child's family at all if the parents never lived together, or did so only at a time when the child was too young to remember . . ." *Blixt v. Blixt*, 774 N.E.2d 1052, 1080 (Mass. 2002).

245. GOLDSTEIN ET AL., *supra* note 110, at 13.

246. *See Stanley v. Illinois*, 405 U.S. 645, 646 (1972).

247. *Id.* at 654 n.7.

248. Section 3102 makes a similar error and could also be construed as overly broad because it encompasses widowed-parent families that have long since stabilized themselves. Under section 3102, a surviving parent is subject to visitation petitions until children reach the age of eighteen. *See CAL. FAM. CODE* § 3102 (West 2004). A parent could have died eight years ago and, although the child is now

Section 3104 is also underinclusive. California's Fourth Appellate District stated that nonparental visitation statutes have been enacted to "protect the vital role grandparents often play in children's lives."²⁴⁹ There are children in need of the stabilizing effect of a grandparent relationship in two-parent homes as well as one-parent homes, however. Classifications based on marital status are underinclusive because they exempt from petition seemingly stable nuclear families composed of incompatible parents who do not provide a stable home and who deny grandparent visitation. With the general demise of the single-income household,²⁵⁰ even married mothers are working mothers. In fact, in the majority of two-parent households, both parents are in the labor force.²⁵¹ When the working wife comes home she has a "second shift" of housework not generally shared by her husband.²⁵² As such, "parental involvement may be so minimal, even in a complete family, that the child's emotional demands remain unfulfilled,"²⁵³ in which case, grandparent visitation may be equally necessary.

Another constitutional concern regarding section 3104 is its disproportionate effect on women. In 2002, "16.5 million children were living with a single mother" while only 3.3 million children were living with a single father.²⁵⁴ Children are more than four times as likely to live with a single mother than with a single father.²⁵⁵ Section 3104, therefore, overwhelmingly regulates female households.

Elevation of the nuclear family serves "to reinforce[] a long legal tradition supporting patriarchy."²⁵⁶ When the patriarchal institution of

stabilized, a suit may nonetheless be filed. The Massachusetts statute reviewed in *Blixt* likewise lacked a "temporal relation between the disruption and the visitation complaint . . ." See *Blixt*, 774 N.E.2d at 1081 (Sosman, J., dissenting).

249. Punsly v. Ho, 105 Cal. Rptr. 2d 139, 143 (Ct. App. 2001).

250. MILLER, *supra* note 3, at 192.

251. FIELDS, *supra* note 32, at 9 (finding that of children living with two parents, sixty-two percent or thirty-one million had both parents in the labor force).

252. ESKRIDGE, *supra* note 28, at 175.

253. STEINER, *supra* note 44, at 8.

254. FIELDS, *supra* note 32, at 5.

255. *Id.*

256. DOWD, *supra* note 85, at 157. "Husbands were considered legally responsible for financially supporting their families, while wives were expected to take care of the domestic duties." MILLER, *supra* note 3, at 107. Prior to the Industrial Revolution, fathers were customarily awarded custody of children because by common law they were his property. *Id.* "Wives were also considered property and were not entitled to any control over their children . . ." *Id.* "Traditionally, women lost their legal personhood when they got married, and husbands held near-absolute sway over wives' bodies as well." ESKRIDGE, *supra* note 28, at 4. Even after the liberalization of marriage in the 1970s husbands "remained practically and often legally immune from most charges of rape, beating, and economic manipulation." *Id.*

marriage is disrupted, or never forms in the first place, the court paternalistically steps in to review female visitation decisions, thereby replicating patriarchy. As commentators have noted, “Since colonial times, the American states have discriminated against women, and those discriminations have been challenged ever since the Fourteenth Amendment was adopted.”²⁵⁷ *Griswold v. Connecticut*²⁵⁸ gave women the right to access birth control, while *Roe v. Wade*²⁵⁹ secured women’s right to abortion. If women can choose when to have a child, why can’t they choose how to raise that child?

Furthermore, of the women regulated by section 3104, the vast majority are African-American. Nearly fifty percent of African-American children live with a single mother.²⁶⁰ Thus, “[a]ny legal structure that privileges nuclear marital families has a disproportionate racial impact.”²⁶¹ Furthermore, African-American children living in their grandparents’ households, regardless of the presence of their biological parents, tend to live with only one grandparent, their grandmother.²⁶² Therefore, section 3104 appears to grant privileges to families that take a form that in the African-American community fails to dominate even in the elder generations, as grandmothers are also single parents. The elder generation of African-American single mothers had the opportunity to raise their children and decide which relatives would have access to their children; the present generation deserves no less.²⁶³

One-parent families do not need the financially crippling prospect of state court litigation hanging over their decisions. As one family scholar noted, when it comes to family arrangements, “[n]ecessity is the mother of all invention.”²⁶⁴ Single parents need support networks and they will develop them out of necessity and in a manner most beneficial to themselves and their children. Who will be a part of that network is best left to the judgment of the primary caregiver.

257. Eskridge, *supra* note 18, at 1198.

258. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

259. *Roe v. Wade*, 410 U.S. 113 (1973).

260. FIELDS, *supra* note 32, at 6.

261. DOWD, *supra* note 85, at 158.

262. FIELDS, *supra* note 32, at 6.

263. For a contrasting point of view, see Maldonado, *supra* note 13, at 897–905 (arguing that the law’s deference to parental decisions “reflects a dominant White, middle class, nuclear family” because distinctions between grandparental and parental roles are less distinct in African-American and Latino families).

264. See DOWD, *supra* note 85, at 113.

V. PUBLIC POLICY ANALYSIS: HOW FAR ARE WE WILLING TO GO TO ELEVATE THE NUCLEAR FAMILY?

In 2002, the Massachusetts Supreme Court found that children from nonnuclear homes are most in need of grandparent visitation because such children “may already be vulnerable to the feelings of loss, inadequacy and insecurity that our society still often visits on those children whose family structure departs from an idealized two-parent norm.”²⁶⁵ It is not society, however, that is preserving the “mythical superiority”²⁶⁶ of the nuclear family; rather it is the law itself that creates a negative social view of single parents and reconstituted families by allowing greater intrusion into family life. Children who have always lived in single-parent homes do not know their homes are “broken” or “disrupted” until a judge tells them so. While visitation statutes are designed to mitigate what the legislature sees as family dysfunction,²⁶⁷ when the law asserts that some families are not as equal as others, all members of an alternative family are hurt, including the children. From a public policy perspective, there are a number of considerations in favor of abolishing sections 3104 and 3102 of the California Family Code.

By removing stigma from alternative families, and recognizing them as equals, courts will aid America in catching up with other advanced economies,²⁶⁸ which have realized that it is not families but institutions that have failed.²⁶⁹ Allowing third-party visitation statutes to differentiate between family forms unjustly focuses on the shortcomings of families instead of focusing on the shortcomings of the social institutions that have failed to provide comprehensive child care programs and parental leave

265. *Blixt v. Blixt*, 774 N.E.2d 1052, 1065 (Mass. 2002).

266. *See* DOWD, *supra* note 85, at 1–15.

267. Since prior restraint on family formation is almost unknown in democratic society, policy has been designed to mitigate rather than “forestall family dysfunction.” STEINER, *supra* note 44, at 9.

268. O’Connor-Felman, *supra* note 25, at 1319–21. Marleen O’Connor-Felman explains:

Other peer nations, such as Germany, France, Sweden, Denmark, and Norway, have taken greater steps to transition to flexible labor markets. These countries also have moved away from the traditional, nuclear family as the norm. Specifically, these countries have both high rates of divorce and high rates of women’s workforce participation. Although these countries have more flexible labor markets and diversified forms of family life, they have greater parental support programs that may offset the negative effects upon children’s human capital development. These government support programs for parents take two forms: (1) parental leave and (2) child care policies.

Id. at 1319 (internal footnotes omitted).

269. America will not create “institutional supports for the new systems of work and family life,” as long as society can speak of alternative families on moral terms instead of as a result of socioeconomic forces beyond the control of individual parents. *Id.* at 1269.

programs to meet the needs of one-parent homes.²⁷⁰ These statutes divert our attention from developing real solutions to the challenges of modern day society.

Furthermore, the state is ill-equipped to handle this type of intrafamilial dispute. When it comes to the delicate matters of family, the law is a crude instrument for solving what are often complex intergenerational conflicts. Litigating a family dispute over child visitation often involves bearing painful family secrets²⁷¹ and attempting to untangle years of animosity. It is important to note that the “[g]overnment has no mechanism to enforce love, affection and concern,”²⁷² and mandatory visitation orders only exacerbate the bitter family friction that brought the parties to the courtroom in the first place.²⁷³ As the Illinois Supreme Court noted, visitation statutes often involve disputes over the way a parent is raising his or her child. This “human conflict has no place in the courtroom . . . even where the intrusion is made in good conscience.”²⁷⁴ As family scholar Douglas Besharov noted, “Based on the last 100 years, one would have to say that families would be better off if the government kept its hands off, period. I don’t know too many examples of situations or policies in which government has helped families.”²⁷⁵

Besharov concludes that “state interference should only occur when the health, safety or welfare of a child is at risk.”²⁷⁶ If a child is in harm’s way or if a child’s parents are unfit, then grandparents should be encouraged to seek guardianship—not visitation. The vast majority of grandparents who sent letters to the California legislature in support of a visitation statute granting them independent standing to seek visitation with their grandchildren cited the possible neglect or abuse of their grandchildren.²⁷⁷ These grandparents were “either unwilling or unable” to

270. The United States provides far less support than other nations to families during critical stages of children’s development. *Id.* at 1321. Canada, for example, “provides six months of parental leave, paid at fifty-five percent of earnings.” *Id.* at 1320.

271. See *Blixt v. Blixt*, 774 N.E.2d 1052, 1076 n.8 (Mass. 2002) (Sosman, J., dissenting).

272. STEINER, *supra* note 44, at 8.

273. See, e.g., *Wilson v. Wallace*, 622 S.W.2d 164, 165 (Ark. 1981) (ending a grandparent visitation order as it resulted in such bitter friction between family members that it was not in the best interest of the children to continue); *Wilson v. McGlinchey*, 760 N.Y.S.2d 577, 578–80 (App. Div. 2003) (holding that visitation with grandparents should be discontinued as the level of animosity and dysfunction between the family members was against child’s best interest).

274. *Wickham v. Byrne*, 769 N.E.2d 1, 8 (Ill. 2002).

275. Besharov, *supra* note 36.

276. *Id.* at 317.

277. *Assemb. Analysis of S.B. 306*, *supra* note 5, at 3.

report the child's parents to Child Protective Services.²⁷⁸ But if visitation statutes are used to gain intermittent custody of abused children, then the law "provid[es] nothing more than a smokescreen behind which the negligent parent can continue in his or her neglectful ways."²⁷⁹

It is also unreasonable for society to support the choices that create alternative families and yet fail to support the families themselves. The single-parent family is left to reconcile the contradictory attitudes of a society that has relaxed the rules governing family life, but feels unease with the diverse family patterns that have emerged. While society has encouraged and normalized liberal no-fault divorce rules,²⁸⁰ which make it easier to exit a marriage, and extramarital sexuality, which encourages some couples never to enter marriage, society deems the results of such options, namely unmarried parenthood, unsatisfactory.²⁸¹

Additionally, nonparental visitation statutes encourage intergenerational litigation that is costly, emotionally draining, and destabilizing to the parent-child relationship. Through visitation statutes, the state paradoxically places greater burdens on the very families it identifies as most fragile. When alternative families are petitioned for visitation, time and resources are diverted from the family's children to litigation. Statutes like section 3104 not only add to the economic insecurity of alternative families,²⁸² but also have a "deleterious effect"²⁸³ on children. These statutes create conflict between family members, and studies have shown that parental conflict—not living in a one-parent home—creates emotional trauma in children.²⁸⁴ The California Bar

278. *Id.* at 4.

279. *Id.* It is also interesting to consider who uses a statute like section 3104 of the California Family Code. Who can afford extensive litigation when success is not a monetary reward? It is most likely affluent grandparents, not economically challenged, inner-city grandparents charged with raising their grandchildren because of their own children's drug addictions.

280. "In 1970, California passed the first law in the Western world that totally abolished fault in divorce." MILLER, *supra* note 3, at 108. Divorce was no longer a moral issue but a private decision. The justification for passing this law came from the "recognition of the growing equality of women" and the realization that "divorce is sometimes inevitable and unavoidable." *Id.*

281. *Cf.* REEKIE, *supra* note 102, at 172 ("Unwed mothers . . . were expected to do what society was not able to do itself: reconcile the contradictory attitudes toward illicit coition and illicit pregnancy. The cause of unmarried motherhood (illicit coition) was encouraged, while its result (illicit pregnancy) was condemned.") (internal citation omitted).

282. *See supra* note 122.

283. *Lulay v. Lulay*, 739 N.E.2d 521, 533 (Ill. 2000).

284. Conduct problems in children of divorce are more a function of parental conflict than father absence or living in a single-parent family. PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS 115 (Lois A. Weithorn ed., 1987). Recent studies "report . . . those [children] from high-conflict intact households manifested more problems than those from low-conflict divorced households." *Id.* Furthermore, "[h]igh levels of parent-child contact in difficult or hostility-laden circumstances not only

opposed enactment of section 3104 because it “simply increases the chaos into which custody battles can degenerate.”²⁸⁵ Authorizing grandparents to instigate their own custody battles “creates confusion, enhances litigation, and cannot be in the best interests of children.”²⁸⁶ Furthermore, the court’s own time and resources are better spent on children truly at risk. Children who are abused, neglected, or abandoned are better depositories of the court’s time than children who have lost a supplemental relationship with a relative.²⁸⁷

Finally, it is vital “for a child to be secure in the feeling that her parents are in charge and in control.”²⁸⁸ Third-party visitation statutes “increase[], not decrease[], the instability and insecurity in a child’s life,” as they deprive a child of “any competent adult with complete authority and control.”²⁸⁹ If the legal system cannot trust these parents to meet the child’s ever-changing needs, then why should the child trust the parents? As one mother embroiled in visitation litigation stated, “It concerns me that my child feels that I have no control over what happens to her.”²⁹⁰ Section 3104 and statutes like it act as a “psychic penalty”²⁹¹ not only on single parents but also on their children. The most the law should decide is who should be in charge of parenting a child, not how that person should parent the child.²⁹²

VI. CONCLUSION

Authorizing third parties to petition nonnuclear families for visitation with their children against their will, while exempting biological, nuclear families, violates the Equal Protection Clause. The Supreme Court has established beyond doubt that parents have a fundamental right to make

may hinder more than help the child’s adaptive efforts, but also may reduce the parenting effectiveness of the primary caretaker . . .” *Id.* Thus, “a stable, single-parent household may be better for a child than . . . a conflict-filled intact family . . .” *Id.*

285. *Assemb. Analysis of S.B. 306, supra* note 5, at 2.

286. *Id.* at 7.

287. “This bill should increase the number or length of contested custody/visitation cases, which would result in some unknown increase in court costs.” *Id.* at 1.

288. GOLDSTEIN ET AL., *supra* note 110, at 224.

289. *Assemb. Analysis of S.B. 306, supra* note 5, at 3.

290. *In re Marriage of Harris*, 112 Cal. Rptr. 2d 127 (Ct. App. 2001), *rev. granted and opinion superseded by* 115 Cal. Rptr. 2d 191 (Ct. App. 2002).

291. Dowd uses the term “psychic penalties” to describe social policies and laws that regulate single-parent homes. Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN’S L.J. 19, 20 (1995).

292. Judges should not confuse the child “by acting like the parent they are not.” GOLDSTEIN ET AL., *supra* note 110, at 224.

decisions concerning the care, custody, and control of their children. The right to determine who will shape a child's character lies at the core of this fundamental right. Therefore, constitutional protection should not hinge on a family's form. Parental rights must adapt with the changing face of the family so that the rights "fit the people, not the people the rights."²⁹³ Buffering state visitation statutes from valid equal protection claims through the use of rational basis review harms children and is counterproductive. Although Disney movies may tell children that families come in all shapes and sizes and that a family may be "small and broken" but "still good,"²⁹⁴ nonparental visitation statutes tell our children a different story. These statutes intrusively regulate and micromanage nontraditional families in a manner that brands the families as inferior, leads family members to make unnecessary and artificial alterations in their status toward each other, and injures the family psyche.

Grandparents have proven to be an invaluable resource for parents struggling to meet the challenges of a modern day society that lacks comprehensive parental support programs. The value of extended family members is lost, however, when intergenerational relationships must be held together not by love, affection, and need but rather by mandatory court decree. When faced with the complexity of family bonding, the limits of the legal system must be recognized. Determining who will be a part of a family's support network is best left to a child's parent "in the first instance,"²⁹⁵ regardless of the parent's marital status, living arrangements, or widowhood. Legislators must not attempt to micromanage supplemental family relationships, for too frequently "there is attributed to the law . . . a magical power—a power to do what is far beyond [its] means. While the law may claim to regulate parent-child relationships, it can at best do little more than give them recognition and provide an opportunity for them to develop."²⁹⁶

293. Eskridge, *supra* note 18, at 1211.

294. LLO AND STITCH (Walt Disney Pictures 2002).

295. Troxel v. Granville, 530 U.S. 57, 70 (2000).

296. GOLDSTEIN ET AL., *supra* note 110, at 46.