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Which Came First the Parent or the Child?

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Which Came First the Parent or the Child?

Abstract

From the moment a child is born, she is a juridical person endowed with constitutional rights. A child's parents, however, do not become legal parents until a state statute grants them the fundamental right to raise one's child. The state, therefore, exercises considerable power and discretion when it drafts the parentage statutes that determine who becomes a legal parent. This article asserts that the state, through its *parens patriae* power, has a duty to act as an agent for children when it drafts its parentage statutes. In particular, the state must adopt parentage statutes that satisfy children's fundamental right to legal parents at birth. This right derives from the Substantive Due Process privacy right to form intimate, familial relationships, as well as the right to intimate association and ensures that a child may develop the parent-child relationships necessary to preserve her liberty, protect her rights, and define her identity.

To guarantee children's fundamental right to legal parents at birth, states must reform their current parentage statutes. This article argues that states must first replace all presumptions in parentage statutes with clear determinations of legal parentage at birth. Next, states must grant legal parentage of children conceived through sexual reproduction to the child's genetic parents. For children conceived through assisted reproductive technology, states must grant legal parentage to the intended parents. By adopting statutes that assign children parents from these respective groups, states ensure that the persons who are most likely to act in the child's best interest become the child's legal parents. In so doing, the state fulfills its *parens patriae* obligation to guarantee every child's fundamental right to legal parents at birth.

Keywords

Assisted reproductive technology, constitutional law, fundamental rights, substantive due process, right to intimate association, paternity, maternity, parentage, marital presumption, children's rights

Disciplines

Civil Rights and Discrimination | Family Law | Fourteenth Amendment

Comments

This article is co-authored by Jenni Vainik Ives.

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WHICH CAME FIRST THE PARENT OR THE CHILD?

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I. INTRODUCTION

Which came first, the chicken or the egg? For centuries people have debated this question, which, although simple, raises complex issues of how life began. It cannot be that the chicken came first, as a chicken comes from an egg. Yet, it cannot be that the egg came first, because an egg comes from a chicken.

Which came first, the parent or the child? At first glance, this question appears to present an inquiry as unanswerable as the chicken-and-egg conundrum. Under the law, however, this question does not require philosophical or theological interpretation. Instead, it has a clear legal answer: the child comes first, and legal parents come second.

While it may seem surprising that, under the law, the child comes first and the parent comes second, this reality is commonly accepted. Consider, for instance, the dictionary definitions of “child” and “parent.” The definition of child is the same whether you consult a common English dictionary or a legal dictionary.¹ The definition of “parent,” however, varies. For example, according to Merriam–Webster, a parent is “one that begets or brings forth offspring” or “a person who brings up and cares for another.”² In contrast, Black’s Law Dictionary defines “parent” as “[t]he *lawful* father or mother of someone.”³ Therefore, although we commonly understand a “parent”

1. See MERRIAM–WEBSTER’S COLLEGIATE DICTIONARY 214 (11th ed. 2003) (defining child as “a person not yet of age” or “a son or daughter of human parents”); BLACK’S LAW DICTIONARY 271 (9th ed. 2009) (defining child as “[a] person under the age of majority” or “[a] son or daughter”).

2. MERRIAM–WEBSTER’S COLLEGIATE DICTIONARY 214 (11th ed. 2003).

3. BLACK’S LAW DICTIONARY 271 (9th ed. 2009) (emphasis added). Furthermore, according to *Black’s Law Dictionary*, “a person ceases to be a legal parent if that

to be someone who “begets offspring” or “cares for another,” a person is not a “parent” in the legal sense until she is determined to be by the law.⁴ Under the law, the child comes first and the parent comes second.

A closer look at state parentage statutes further demonstrates that legal parents do not exist until after a child is born. In all fifty states, the child is a juridical person with constitutional rights at the moment of birth. Exactly *who* will be the child’s legal parents, however, depends on the applicable state statute.⁵ For example, consider a child born to a gestational carrier.⁶ Regardless of whether that child is born in Illinois, Michigan, or Minnesota, the moment she is born, she is a legal person endowed with constitutional rights that do not vary based on the state of her birth. Who the legal mother is, however, varies widely depending on geography. If the child is born in Illinois, the applicable state statute would make the intended mother the legal mother of the child.⁷ If the child is born in Michigan, however, the gestational carrier would be the child’s legal mother according to state statute.⁸ In Minnesota, due to the absence of a state statute dealing with surrogacy, a court ruling is likely necessary to determine legal parentage.⁹ Therefore, although we

person’s status as a parent has been terminated in a legal proceeding.” *Id.*

4. James G. Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 411 (2008) [hereinafter Dwyer, *Child Protection*] (noting that “[a] parent-child relationship is a legal relationship” that creates “an opportunity for a social relationship to arise”); June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1015 (2003) (“Discussions of parentage often assume an answer, and when they do, they most often assume that the word ‘parent’ refers to a child’s biological progenitors. The law is more varied and complex. The definition of legal parent varies not only over time and culture but also by jurisdiction.”).

5. Throughout this Article, we use the term “parents” rather than “parent.” By doing so, we do not assert that every child must have two legal parents. In fact, our argument is that the fundamental right to legal parents at birth requires the State to provide at least one legal parent for every child. Our use of “parents” merely simplifies the text and reflects the fact that two parents are currently considered the norm in child rearing.

6. A gestational carrier is “[a] woman who carries out the gestational function and gives birth to a child for another . . . and who relinquishes any parental rights she may have upon the birth of the child.” BLACK’S LAW DICTIONARY 1106 (9th ed. 2009).

7. 750 ILL. COMP. STAT. 47/15 (2010) (stating that in cases of gestational surrogacy, the intended parents shall be the legal parents).

8. See MICH. COMP. LAWS § 722.855 (2010) (stating that surrogacy contracts shall be void as a matter of public policy). However, if a custody dispute arises between the surrogate and the biological parents, the court will decide who the legal parents are by considering the child’s best interests. *Id.* § 722.861.

9. The only statute in Minnesota regarding assisted reproductive technology

may never agree on whether the chicken or the egg came first, in every state, the child comes first and the state decides who the legal parents are second.¹⁰

Recognition of this sequence of events – the time when a child exists, but legal parents do not – reveals the awesome power which states wield in defining legal parentage and requires the rethinking of family law, and parentage statutes in particular. If different people would become legal parents depending on the state where a child is born, we can no longer view parentage statutes as recognizing an inherent relationship between an adult and a child, or as a means of guaranteeing an adult's pre-existing constitutional right to raise a child. Instead, because the child comes first and the legal parents come second, we contend that parentage statutes must be written with the child's needs and rights in mind. More specifically, we argue that parentage statutes must guarantee a child's fundamental right to legal parents at birth.

In Part II, this Article reviews the key Supreme Court decisions regarding the constitutional rights of children. These cases demonstrate that children are juridical persons and have constitutional rights from the moment of birth. Part III discusses the fundamental right to raise one's child. Relying on Supreme Court

addresses artificial insemination. See MINN. STAT. § 257.56 (2010) (stating that the husband of a woman who is artificially inseminated with another man's sperm is the child's legal father). Minnesota has one unpublished opinion regarding surrogacy. In that case, the court upheld the surrogacy contract. *In re Paternity & Custody of Baby Boy A.*, No. A07-452, 2007 WL 4304448, at *9 (Minn. Ct. App. Dec. 11, 2007). Specifically, the court found the gestational-surrogacy agreement was a valid contract and not contrary to public policy. *Id.* at *5-7.

10. Determination of paternity is also affected by the applicable state's law. For example, if a married woman gives birth to a child that is not her husband's, whether the genetic father will be the legal father depends on the state in which the child is born. In Minnesota, both the genetic father and the mother must sign a form acknowledging the genetic father's paternity, and then prove by clear and convincing evidence that the husband is not the child's father, or else obtain the husband's written consent. MINN. STAT. § 257.55(l)(e), (2) (2010). In California, the genetic father, or any other involved party, must obtain a court order to have blood tests conducted. CAL. FAM. CODE § 7551 (West 2009). In Mississippi, the genetic father is the legal father only if the mother proves non-access by, or the impotency of, her husband. *Ingalls Shipbuilding Corp. v. Neuman*, 322 F. Supp. 1229, 1237 (S.D. Miss. 1970). In Louisiana, both the husband and the genetic father may be considered "dual parents." *Munson v. Washington*, 747 So. 2d 1245, 1247 (La. Ct. App. 1999). Determining legal paternity is even more varied when artificial insemination is the source of the genetic father's tie. See Kyle C. Velte, *Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic In Vitro Fertilization*, 7 AM. U.J. GENDER SOC. POLY & L. 431, 442-43 (1999) ("Of the thirty-four states that currently have legislation dealing with [artificial insemination], sixteen have statutes that address [it] only in the context of marriage.").

precedent, this Part shows that only *legal* parents have a fundamental right to raise one's child. In other words, only those persons granted the legal status of parentage by state statute *after* the child is born have a fundamental right to raise a child.

Recognizing that state parentage statutes determine who will exercise the fundamental right to raise one's child, Part IV reconsiders the role of the State in drafting those statutes. This Part argues that because a child has constitutional rights at the moment of birth and the legal parents have yet to be determined, the State is obligated to consider the needs and rights of the child when drafting its parentage statutes. In particular, states must adopt parentage statutes that guarantee the child's fundamental right to legal parents at birth. Part IV defines and explains this right.

Part V concludes with a discussion of how states guarantee the fundamental right to legal parents at birth. Part V argues that at the moment of a child's birth, state statutes must recognize the genetic parents as the legal parents of children conceived through sexual reproduction, and the intended parents as the legal parents of children conceived through assisted reproductive technology. Only by guaranteeing the child's fundamental right to parents at birth through this designation of parental rights will state parentage statutes be constitutional.

II. CHILDREN'S CONSTITUTIONAL RIGHTS

Children are protected by the Constitution and possess constitutional rights from the moment they are born.¹¹ As the Supreme Court has stated, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹² Though the Court has, at times, limited children's constitutional rights,¹³ it has clearly held

11. James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. Rev. 755, 790 (2009) [hereinafter Dwyer, *Constitutional Birthright*] ("[C]hildren are persons who have rights under the federal Constitution.").

12. *In re Gault*, 387 U.S. 1, 13 (1967) (holding that children have due process rights in criminal proceedings including the right to appropriate notice, counsel, confrontation and cross-examination of witnesses, and against self-incrimination).

13. See Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 1013-14 (1988). The three justifications put forth by the Supreme Court for not fully extending some constitutional rights to children are: "the peculiar vulnerability of children; [children's] inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979). The Court's analysis of children's constitutional rights under *Belotti* can be understood as an "adult-minus" approach, wherein the Court starts with the "specifics of adult rights and whittle[s] them] down to children's." Emily Buss, *Constitutional Fidelity Through Children's*

that children are persons under the Fourteenth Amendment and are entitled to substantive due process, privacy, and protection of their liberty.¹⁴ For instance, the Fourteenth Amendment protects minors' constitutional rights to obtain an abortion¹⁵ and to use contraception.¹⁶ Indeed, in *Carey v. Population Services International*, the Court specifically stated that the right to privacy "extends to minors as well as to adults."¹⁷

Children hold constitutional rights under other provisions of the Constitution, in addition to the Fourteenth Amendment. For instance, the Court recognized children's free speech rights in *Tinker v. Des Moines Independent Community School District*, stating that children are "possessed of fundamental rights which the State must respect."¹⁸ The Court has also acknowledged children's right to religious freedom under the First Amendment in a number of well-known decisions, including *West Virginia State Board of Education v. Barnette*.¹⁹ Notably, the *Barnette* Court did not distinguish between

Rights, 2004 SUP. CT. REV. 355, 355-56 (2005) (arguing that this traditionally-accepted approach is deeply flawed and that the "special circumstances of childhood [should] change how . . . constitutional principles are best achieved, whether that means greater, lesser, or simply different rights for children"). The Court's justifications for limiting children's rights do not apply to the fundamental right to legal parents at birth that we advocate for in this Article. The fundamental right to legal parents at birth is a right held by children at birth and is not an adult right that can be "whittled down." Moreover, the right specifically addresses the three concerns articulated by the Court in *Belotti*.

14. See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

15. *Id.* (holding that a state "may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy").

16. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977) (holding that "[s]ince the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed").

17. *Id.* at 693.

18. 393 U.S. 503, 511 (1969). In this case, the Court held that within a school, student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." *Id.* at 513.

19. 319 U.S. 624, 642 (1943) (defending two minors' refusals to salute the flag by asserting that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein"). Cf. *Santa Fe Ind. School Dist. v. Doe*, 530 U.S. 290, 317 (2000) (finding that school-sponsored prayer violated students' First Amendment right to free exercise of religious beliefs); *Wisconsin v. Yoder*, 406 U.S. 205, 218-19 (1972) (holding that a Wisconsin statute mandating public school attendance past the eighth grade interfered with freedom of religious expression of the Amish plaintiffs); *Prince v.*

adults and children, effectively extending the constitutional right to free exercise of religion without regard to age.²⁰

In the criminal context, the Court recognized children's constitutional rights in the case of *In re Gault*.²¹ According to the *Gault* Court, children have due process rights, including the right to appropriate notice, counsel, confrontation and cross-examination of witnesses, and against self-incrimination.²² Subsequent cases further extended children's constitutional rights in criminal proceedings by applying the requirement of proof beyond a reasonable doubt²³ and the prohibition of double jeopardy to child defendants.²⁴

In the various cases recognizing children's rights, the Court did not require that children reach a certain age before they exercise their constitutional rights. Rather, the Court recognized that children are *born* with constitutional rights.²⁵ In other words, children possess these rights at birth, *before* their legal parents are even determined.

III. THE FUNDAMENTAL RIGHT TO RAISE ONE'S CHILD

Although the Constitution never mentions marriage or parenting, the Supreme Court has a long history of recognizing constitutional rights in the context of the family.²⁶ From *Meyer v. Nebraska*²⁷ in 1923 to *Lawrence v. Texas*²⁸ in 2003, the Court has

Massachusetts, 321 U.S. 158, 165 (1944) (acknowledging "[t]he rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it").

20. The *Barnette* Court did not mention age at all. See 319 U.S. 624. Further, the Court stated, "If there are any circumstances which permit an exception [to religious freedom], they do not now occur to us." *Id.* at 642.

21. See 387 U.S. 1 (1967).

22. *Id.* at 30-57.

23. See *In re Winship*, 397 U.S. 358 (1970) (holding that the reasonable doubt standard of criminal law has constitutional stature and that juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with a violation of a criminal law).

24. See *Breed v. Jones*, 421 U.S. 519 (1975); see also *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 n.14 (1977) (noting that minors can access "a variety of rights of defendants in criminal proceedings").

25. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.").

26. In *Moore v. City of East Cleveland*, the Court stated that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." 431 U.S. 494, 503 (1977).

27. 262 U.S. 390 (1923) (holding that a Nebraska statute forbidding students

protected familial privacy from unnecessary governmental intrusion. In 1965, in *Griswold v. Connecticut*, the Court first articulated the “zone of privacy” that surrounds the family.²⁹ Although *Griswold* concerned the right to use contraceptives, the Court’s holding suggested that decisions involving marriage and child rearing are inherently private and must be protected against government intrusion.³⁰ Indeed, throughout the twentieth century, the Court has protected privacy rights relating to marriage and parenting. In procreation cases such as *Eisenstadt v. Baird*³¹ and *Roe v. Wade*;³² marriage cases such as *Loving v. Virginia*³³ and *Zablocki v. Redhail*;³⁴ parenting cases such as *Stanley v. Illinois*³⁵ and *Moore v. City of East Cleveland*,³⁶ and the most recent case of *Lawrence v. Texas*³⁷ protecting the fundamental right to sexual intimacy, the Court has reinforced the notion that intimate relationships and the family are constitutionally protected.³⁸

below the eighth grade from being taught in any language other than English interfered with the constitutional right of parents to raise their children).

28. 539 U.S. 558 (2003) (holding that a Texas law which prohibited sexual acts between same-sex couples was a violation of the constitutional right to privacy).

29. 381 U.S. 479, 484 (1965) (holding that a Connecticut law that prohibited the use and distribution of contraceptives was an unconstitutional violation of the right to privacy).

30. *Id.* at 484-86.

31. 405 U.S. 438 (1972) (holding that a Massachusetts statute that prohibited distribution of contraceptives to unmarried persons was a violation of the Fourteenth Amendment).

32. 410 U.S. 113 (1973) (holding that a woman’s right to choose to terminate her pregnancy prior to viability is protected by the Fourteenth Amendment of the Constitution).

33. 388 U.S. 1 (1967) (holding that a Virginia antimiscegenation statute which prohibited whites from marrying non-whites violated the fundamental right to marry protected by the Fourteenth Amendment).

34. 434 U.S. 374 (1978) (holding that a Wisconsin statute requiring certain residents, specifically noncustodial parents of children for whom they are obligated to support, to obtain a court order prior to receiving a marriage license interferes with their constitutional right to marry).

35. 405 U.S. 645 (1972) (holding an Illinois law that denied an unmarried father a hearing on parental fitness before the State took custody of his genetic child unconstitutional).

36. 431 U.S. 494 (1977) (holding unconstitutional a zoning restriction that limited occupation to single families and defined “family” in such a way as to exclude a grandmother living with her son and two grandsons).

37. 539 U.S. 558 (2003).

38. In fact, in most of these cases the Court merely cited prior decisions for support of this proposition. *See, e.g., id.* at 573-74 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) for the proposition that the “liberty” provision of the Due Process Clause protects a zone of privacy that includes “marriage, procreation, contraception, family relationships, child rearing, and education”); *Zablocki v. Redhail*,

The constitutional protection of the family includes the fundamental right to raise one's child. In *Meyer v. State of Nebraska* and *Pierce v. Society of Sisters*, the Court held that parents have a right to determine the language in which their children are educated and whether their children attend a private or public school.³⁹ In *Santosky v. Kramer*, the Court extended the fundamental right to raise one's child beyond the educational setting.⁴⁰ Furthermore, in *Prince v. Massachusetts* and *Moore v. City of East Cleveland*, the Court held that the fundamental right to raise one's child can be granted to a person other than a genetic parent.⁴¹ As such, the constitutional "zone of privacy" that protects the fundamental right to raise one's child is firmly rooted in Supreme Court doctrine, and this Article takes no issue with its existence or scope.⁴² It is the goal of this Article, however, to draw attention to the powerful role the State plays in determining *who* can exercise the fundamental right to raise one's child.

It is commonly accepted that only a child's legal parents can exercise the fundamental right to raise that child. What is not often considered, however, is how a person becomes a legal parent. Legal parentage is a status that is conferred by a state statute. Therefore, before a person can exercise the fundamental right to raise one's child, the State must deem that person to be a legal parent. In this way, we argue, it is the State that actually decides who may exercise the fundamental right to raise one's child.

A. *The State Decides Who Can Exercise the Fundamental Right*

434 U.S. 374, 384 (1978) (citing *Maynard v. Hill*, 125 U.S. 190, 205 (1888) for the proposition that marriage is "the most important relation in life"); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) for the proposition that the right to procreate is a "fundamental" decision); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citing *May v. Anderson*, 345 U.S. 528, 533 (1953) for the proposition that the fundamental right to raise one's child is a right "far more precious. . . than property rights"); *Maynard*, 125 U.S. 190, 210 (1888) (citing *Adams v. Palmer*, 51 Me. 481, 483 (1863) for the proposition that marriage is "the foundation of the family and of society").

39. 262 U.S. 390, 400, 403 (1923); 268 U.S. 510 (1925) (holding that an Oregon statute requiring that children be educated in public schools violated the constitutional right of parents to raise their children).

40. See generally 455 U.S. 745, 753 (1982).

41. See *Moore v. City of East Cleveland*, 431 U.S. 494, 505-06 (1977) (holding that the grandmother of two young boys was a legal custodian and possessed the same rights as a parent); *Prince v. Massachusetts*, 321 U.S. 158, 161 (1944) (assuming that the aunt of a nine-year-old girl was the valid and lawful custodian and had equivalent rights to those of a parent).

42. In *Troxel v. Granville*, the Supreme Court reaffirmed that parents have a fundamental right to direct the upbringing of their children. 530 U.S. 57, 66 (2000).

to Raise One's Child

Typically, privacy rights are thought of as merely protecting us from government interference. What is not often considered, however, is the role state statutes play in actually deciding who can exercise some fundamental rights. We argue that it is actually the State, through state statutes, and not the U.S. Constitution alone, that determines who can exercise the fundamental right to raise one's child. Although this may sound surprising, it is a role that is routinely accepted when it comes to another privacy right — the fundamental right to marriage.

For instance, whether a person can get married in State A depends on State A's marriage statute. State A's marriage statute may have an age or consanguinity requirement,⁴³ require a blood test before issuing a marriage license,⁴⁴ or prohibit same-sex couples from marrying.⁴⁵ If a couple does not meet the requirements of the state statute, they cannot exercise the constitutionally protected right to marriage or experience the privacy that accompanies marriage.

The Supreme Court addressed the role state statutes play in providing access to fundamental marriage rights in *Loving v. Virginia*,⁴⁶ *Zablocki v. Redhail*,⁴⁷ and *Turner v. Safley*.⁴⁸ In each of those cases, the petitioners did not protest governmental interference in their marriage. Rather, the petitioners sought access to the right to marry.⁴⁹ In challenging Virginia's antimiscegenation law, the claimants in *Loving* did not ask the State to stop interfering in their

43. See NEB. REV. STAT. ANN. § 42-102 (LexisNexis 2005) (requiring both male and female to be the age of seventeen or older to marry); IDAHO CODE ANN. § 32-206 (2008) (prohibiting marriage between first cousins).

44. See MONT. CODE ANN. § 40-1-203 (2009) (requiring females to have a blood test for rubella before obtaining a marriage license); MISS. CODE ANN. § 93-1-5(e) (West 2010) (requiring marriage license applicant to have a blood test to show applicant is free of syphilis).

45. See MINN. STAT. ANN. § 517.03 (West 2010) (prohibiting "a marriage between persons of the same sex"); VT. STAT. ANN. tit. 15, § 8 (2009) (defining marriage as "the legally recognized union of two people" and eliminating previous language that limited marriage to one man and one woman).

46. 388 U.S. 1 (1967).

47. 434 U.S. 374 (1978).

48. 482 U.S. 78 (1987) (holding that a Missouri regulation that prohibited prison inmates from marrying without permission from the prison superintendent was unconstitutional).

49. Professor Carlos Ball calls these the "failure to recognize" marriage cases as opposed to the "interference with marriage" cases of *Skinner*, *Poe*, and *Griswold*. Carlos Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1192-1203 (2004).

marriage, but rather asked the State to recognize their relationship as a marriage.⁵⁰ Similarly, the Court struck down the Wisconsin statute that prohibited individuals who owed child support from marrying in *Zablocki*,⁵¹ and the Missouri statute in *Turner* that required prisoners to gain approval from prison authorities before they could marry.⁵² In both cases, the Court held that the State's failure to provide a statutory mechanism for the petitioners to access marriage violated their fundamental rights.⁵³ In other words, without a statute allowing them to marry, they were unable to experience the "zone of privacy" that protects married couples from governmental interference.⁵⁴

Although the Court struck down the statutes at issue in these cases, the Court neither questioned the State's authority to determine who can access marriage nor the State's role in adopting statutes that establish qualifications for accessing the fundamental right to marriage. We argue that the State exercises the same authority and plays the same role with regards to the fundamental right to raise one's child. Like marriage, the State grants access to the fundamental right to raise one's child when it determines who can become a legal parent via state statute.

1. Only *Legal* Parents Have a Fundamental Right to Raise One's Child

The fundamental right to raise one's child functions in the same way as the fundamental right to marriage. The State, through a state statute, determines who is a legal parent and, therefore, who can exercise the fundamental right to raise one's child.⁵⁵ *Stanley v. Illinois*⁵⁶ and *Caban v. Mohammed*⁵⁷ are two Supreme Court cases

50. *Id.* at 1197.

51. *Id.* at 1198-99.

52. *Id.* at 1200-03.

53. In other words, without a state statute providing access to marriage, civil marriage cannot exist. Therefore, a state's failure to provide statutory access to marriage can, in and of itself, constitute a violation of the fundamental right to marry. *See id.* at 1198 ("[T]he failure of the state to act can constitute a violation of the fundamental right to marry.").

54. These cases have led scholars like Carlos Ball to conclude that "[i]t is *State action* that creates the very institution that makes the exercise of the fundamental right to liberty in the context of marriage possible." *Id.* at 1206 (emphasis added).

55. Carbone & Cahn, *supra* note 4, at 1014 (stating that "[t]he law draws bright line distinctions between parents and non-parents and attributes decision-making power exclusively to the former").

56. 405 U.S. 645 (1972).

57. 441 U.S. 380 (1979) (holding invalid a New York statute that did not require consent from the genetic father before a child born out of wedlock could be placed for

that dealt specifically with the inability of an adult to exercise his right to raise his child because he was not a legal parent pursuant to state statute. In *Stanley v. Illinois*, the unwed, genetic father of two children challenged the denial of his constitutional right to raise his children.⁵⁸ According to Illinois law, unwed fathers were not legal parents and therefore had no constitutional right to raise their children.⁵⁹ As explained by the Court, although Stanley clearly met the common definition of “parent,”⁶⁰ he was not a legal parent pursuant to Illinois statute and was, therefore, “a stranger to his children” under Illinois law.⁶¹ Similarly, in *Caban v. Mohammed*, an unwed, genetic father objected to the adoption of his two children by the mother’s husband.⁶² According to state statute, consent to an adoption was only required from a child’s legal parents, and unwed fathers were not legal parents.⁶³ Caban filed suit, arguing that the state statute denied him his constitutional right to raise his children.⁶⁴ In both *Stanley* and *Caban*, there was no dispute as to whether the petitioner was the genetic father or whether he had a parental relationship with his children. Instead, both disputes concerned who the state statute recognized as a legal parent.⁶⁵ Without the status of legal parent conveyed under state statute, the genetic father did not have a fundamental right to raise his children.

Although the Court ultimately recognized Stanley and Caban as legal parents, thereby granting them the right to raise their children,⁶⁶ not all genetic fathers have fared so well. In *Quillion v. Walcott*, for instance, a genetic father tried to exercise his fundamental right to raise his child by preventing the birth mother’s

adoption).

58. The children lived with their genetic mother and, intermittently, with their genetic father. The mother and father never married. After the mother died, the children became wards of the State and were removed from Stanley’s custody. *Stanley*, 405 U.S. at 646-47.

59. A person could be a legal parent only if he or she gave birth to the child, was married to the birth mother, or adopted the child. Stanley did not meet any of these statutory requirements. *Id.* at 648-50.

60. The common definition of parent is “one that begets or brings forth offspring” or “a person who brings up and cares for another.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 900 (11th ed. 2003). The legal definition for parent, however, is the “lawful father or mother of someone.” BLACK’S LAW DICTIONARY 1222 (9th ed. 2009).

61. 405 U.S. at 648.

62. 441 U.S. 380 (1979).

63. *Id.* at 385-87.

64. *Id.* at 381-82.

65. *Stanley*, 405 U.S. at 646-47; *Caban*, 441 U.S. at 385.

66. *Stanley*, 405 U.S. at 658; *Caban*, 441 U.S. at 308.

husband from adopting the child.⁶⁷ The Court held that the genetic father did not have a constitutional right to raise his child because he was not the legal father.⁶⁸ Although there was no dispute that Quillion was the child's genetic father, he had never "legitimated" the child as required by state law.⁶⁹ As a result, the Court held that the mother was the child's only legal parent and had "exclusive authority" to exercise the fundamental right to raise the child.⁷⁰

The Court reached a similar conclusion in *Lehr v. Robertson*.⁷¹ In that case, a genetic father was denied the right to stop the adoption of his child because he had not "ensured"⁷² his constitutional right by comporting with state law and signing a paternity registry.⁷³ The Court held that because state law did not recognize Lehr as a legal parent, he did not have a constitutional right to raise his child and was thus unable to prevent the adoption of his child.⁷⁴

Similarly, a state statute determined who could access the fundamental right to raise one's child in *Michael H. v. Gerald D.*⁷⁵ In that case, the Court held that the genetic father was not the legal father of the child and did not have a constitutional right to raise his child because the state statute identified the birth mother's husband as the legal father.⁷⁶ The fact that Michael H. was the child's genetic father did not matter. The state statute determined legal parentage status and granted the right to raise the child to the genetic mother

67. 434 U.S. 246 (1978).

68. The state statute provided the means for a natural father of a nonmarital child to legitimate his child. *Id.* at 248. Because Quilloin failed to legitimize his child, the Court held that he was not a legal father and did not have right to prevent the adoption. *Id.* at 255.

69. *See id.* at 253-54.

70. *Id.* at 249. According to the Court, "any constitutionally protected interest appellant might have had was lost by his failure to petition for legitimation." *Id.* at 254.

71. 463 U.S. 248 (1983).

72. *See id.* at 266.

73. *Id.* at 251. The genetic mother never conceded that Lehr was the genetic father, but the Court assumed it for purposes of the case. *Id.* at 250 n.3.

74. The Court noted that although "[i]t is self-evident that [parent-child relationships] are sufficiently vital to merit constitutional protection in appropriate cases," states are allowed to determine which relationships are "appropriate" through state statutes. *Id.* at 256-57.

75. 491 U.S. 110 (1989).

76. The Court held that Michael did not have a "right to have himself declared the natural father and thereby to obtain parental prerogatives." *Id.* at 126 (emphasis in original). Under the California statute, genetic fathers did not possess the fundamental right to raise one's child. *Id.* at 117. Rather, that right was granted by state statute to the husband of the child's mother. *Id.*

and her husband.⁷⁷ According to the Court, “as a matter of [state] law, [Michael] is not a ‘parent.’”⁷⁸

Similar to marriage, the Supreme Court has not questioned the State’s authority in determining who can access legal parentage and the accompanying fundamental right to raise one’s child. Although the Court has, at times, struck down state parentage statutes as unconstitutional, the Court has repeatedly recognized and reinforced the State’s role in determining who can exercise the fundamental right to raise one’s child.

2. Recognizing the Role State Statutes Play in Determining Parentage

For some, the idea that the State has a role in defining who we can marry is more palatable than the fact that the State determines whether we can parent our children. We are not raised believing that we can marry whomever we want, but we certainly grow up thinking we will be able to raise our genetic children.⁷⁹ The fundamental right to raise one’s child, however, can only be exercised *after* the State creates a legal parent–child relationship. As a result, we only get to raise the children whom the State deems to be our legal children.

The reason the State’s role in determining legal parentage is surprising is because its operation is often invisible. For example, in every state, a self-executing parentage statute identifies the woman who gives birth to a child as that child’s legal mother.⁸⁰ In the overwhelming majority of births, this is the expected outcome. The person who “expects” to have a fundamental right to raise the child is granted that right by state statute. This process is so automatic that the birth mother does not even realize the State’s role in creating the protected legal relationship between her and the child.⁸¹

77. According to the Court, “California declares it to be, except in limited circumstances, *irrelevant* for paternity purposes whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband.” *Id.* at 119 (emphasis in original).

78. *Id.* at 133 (Stevens, J., concurring).

79. See Dwyer, *Constitutional Birthright*, *supra* note 11, at 763 (“One might think it natural, even divinely ordained, that biological parents become the custodians of a baby.”).

80. See James G. Dwyer, *A Taxonomy of Children’s Existing Rights in State Decision Making About Their Relationship*, 11 Wm. & Mary Bill Rts. J. 845, 859 n.28 (2003) [hereinafter Dwyer, *Taxonomy*] (providing an extensive list of state statutes that define the woman who gave birth to the child as the legal mother).

81. See Dwyer, *Constitutional Birthright*, *supra* note 11, at 762, 764 (acknowledging that the state’s role in creating legal parent-child relationships goes unnoticed and is often taken for granted).

Similarly, every state has a statute presuming that the birth mother's husband is the legal father of the child.⁸² In the roughly 60 percent of births in the United States that take place within a marriage,⁸³ this is typically the desired outcome. The husband is assumed to be — and quite often is — the genetic father of the child and expects to have a fundamental right to raise the child. Here again, the operation of the state statute is so automatic that the man is rarely aware that the right to raise the child was bestowed on him by state statute.

When children are born outside of marriage, the role of state statutes in determining legal parentage becomes more visible. Cases like *Stanley*, *Caban*, *Quilloin*, *Lehr*, and *Michael H.* arose because the state statute did not identify the genetic father as the legal father.⁸⁴ These men assumed they had a constitutional right to raise their children from birth. Once they tried to exercise that right, however, they realized that the State chooses who possesses the fundamental right to raise one's child, and that the state did not choose them. When children are conceived by means other than sexual reproduction, the power of state parentage statutes becomes even more apparent.⁸⁵ Many states do not even have parentage statutes that designate parents for children conceived via assisted reproductive technology.⁸⁶ As a result, the legal parents of these children are often established by a court order.⁸⁷ Absent a state statute, courts often have difficulty determining who possesses the

82. States vary in the application of the presumption and the opportunity to rebut it. Carbone & Cahn, *supra* note 4, at 1051 (citing Diane S. Kaplan, *Why Truth Is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69, 73, 76, 79 (2000)).

83. JOYCE A. MARTIN ET AL., BIRTHS: FINAL DATA FOR 2003, 54 NAT'L VITAL STAT. REP. 48–49 (2005), http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_02.pdf.

84. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

85. Conception by means other than sexual intercourse is referred to as assisted reproductive technology or ART. Black's Law Dictionary defines ART as "[a]ny medical means of aiding human reproduction." BLACK'S LAW DICTIONARY 139 (9th ed. 2009).

86. See discussion *infra* Part V.C.

87. See *Elisa B. v. Superior Court of El Dorado County*, 117 P.3d 660 (Cal. 2005) (holding that the children born to a lesbian couple during a domestic partnership have two legal mothers); *Smith v. Brown*, 718 N.E.2d 844, 846 (Mass. 1999) (permitting a pre-birth order issued by the Probate and Family Court determining paternity in the case of a gestational surrogacy arrangement to stand); *Belsito v. Clark*, 67 Ohio Misc. 2d 54, 65 (Ohio Ct. Com. Pl. 1994) (determining by court order that individuals who provide the genes for a child are the natural parents of the child); *Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993) (holding that the genetic mother of a child born using a gestational surrogate was the "natural" mother).

fundamental right to raise the child.⁸⁸ So, although a child has constitutional rights from the moment of birth, it takes a state statute – and sometimes a court order—to determine who can exercise the constitutional right to raise the child. Therefore, under the law, the child comes first and the legal parents come second.

B. The Conditional Fundamental Right to Raise One's Child

The powerful role of the State in controlling who can exercise the fundamental right to raise one's child is further demonstrated by the fact that the right is granted on a conditional basis. Unlike other family privacy rights, the fundamental right to raise one's child comes with a set of expectations. The Court has described the fundamental right to raise one's child as an "obligation"⁸⁹ and a "duty"⁹⁰ that the State may ultimately take away if not performed adequately.⁹¹ The Court does not use similar language when discussing other privacy rights such as procreation or marriage. People are not "obligated" to procreate or marry and do not have a "duty" to perform those rights in a certain way. Furthermore, people never lose the right to marry or the right to procreate.⁹²

The fundamental right to raise one's child, however, is different. If

88. Charles P. Kindregan, Jr. & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproduction Technology*, 42 FAM L. Q. 203, 204, 209 n.23 (arguing that the lack of guidance regarding parentage of children conceived through ART has caused courts to request legislation from state legislatures offering the necessary guidance); *see also In re Buzzanca*, 61 Cal. App. 4th 1410, 1428 (Cal. Ct. App. 1998) ("Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction.").

89. *Maynard v. Hill*, 125 U.S. 190, 211-12 (1888) (stating that in the relationship "of parent and child, the obligations . . . arise not from the consent of concurring minds, but are the creation of the law itself" (quoting *Adams v. Palmer*, 51 Me. 480, 485 (1863))).

90. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (stating that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (stating that "it is the natural duty of the parent to give his children education suitable to their station in life").

91. *See, e.g., WIS. STAT. § 48.424* (West 2010) (describing the procedure for a fact-finding hearing "to determine whether grounds exist for the termination of parental rights").

92. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that a statute authorizing compulsory sterilization of habitual criminals is unconstitutional); GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 172 (1991) (examining the increasing regularity of divorce and remarriage); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1997) (stating that "[t]he decision whether or not to beget or bear a child is at the very heart of . . . constitutionally protected choices").

a state statute deems a person to be a legal parent, she is “obligated” to be the child’s legal parent, regardless of her desire to take on that responsibility.⁹³ Moreover, a person is not granted the fundamental right to raise one’s child so that she or he can do what he or she wants with that child. Instead, the responsibility of raising a child is entrusted to the person the State presumes is most likely to perform the parental “duties” effectively.⁹⁴ In fact, the Court has said that parents have a fundamental right to raise their children *because* they are the persons presumed to act in the best interests of the children.⁹⁵

As a result, state parentage statutes create a mutual bargain. In exchange for fulfilling the duties of parentage, the parent gains the fundamental right to raise the child. The parent retains that right only as long as she acts in the best interests of the child. If a parent fails to fulfill her part of the bargain, the “contract” is breached and the State may rescind the fundamental right to raise the child. In other words, if a person is “obligated” to be a child’s legal parent, but fails to fulfill her parental “duties,” legal mechanisms exist by which the State can rescind the parent’s fundamental right to raise the child.⁹⁶

The fundamental right to raise one’s child is an important right granted to the adults whom the State presumes will act in a child’s best interests. This right, however, can only be exercised by the adults who are granted the status of legal parents by a state statute. This reality gives rise to an important question: what exactly should the state consider when it decides who will exercise the fundamental right to raise one’s child?

IV. THE FUNDAMENTAL RIGHT TO LEGAL PARENTS AT BIRTH

In drafting the parentage statutes that determine who a child’s legal parents will be, the State’s foremost consideration must be the

93. See Dwyer, *Constitutional Birthright*, *supra* note 11, at 762-63.

94. McCarthy, *supra* note 13, at 1018-20 (asserting that parental rights are justified on the basis that parents act in their child’s best interest).

95. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (stating that the Court has protected the fundamental right to raise one’s child because the “natural bonds of affection lead parents to act in the best interests of their children”).

96. If a parent neglects or harms a child, the State can remove the child from the parent’s custody and can even terminate the parent’s right to raise the child. See, e.g., WIS. STAT. § 48.424 (2010) (stating that after a fact-finding hearing, the court may terminate parental rights if the parent is found unfit). Therefore, the ability to exercise the fundamental right to raise one’s child is dependent on *gaining* and *keeping* the status of *legal* parent as determined by state statute. In *Wisconsin v. Yoder*, for example, the Court stated that “[t]o be sure, the power of the parent . . . may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child.” 406 U.S. 205, 233–34 (1972).

child's constitutional rights. The child holds those rights from the moment of birth. The child's parents, however, do not obtain the fundamental right to raise the child until a state statute designates them as legal parents. During this discrete period of time – when a child has constitutional rights, but no legal parent has been designated to exercise the fundamental right to raise the child—the State is solely responsible for protecting the child's constitutional rights.

It is well accepted that, pursuant to the doctrine of *parens patriae*, states are obligated to care for vulnerable children. We argue that the *parens patriae* power also obligates states to protect children's constitutional rights. Furthermore, we argue that states must protect children's constitutional rights by adopting parentage statutes that guarantee their First and Fourteenth Amendment right to legal parents at birth.

A. *The State's Parens Patriae Power*

Pursuant to the common law doctrine of *parens patriae*, the State is the protector of “those unable to care for themselves.”⁹⁷ As such, the State must “protect and promote the welfare of children.”⁹⁸ The State most commonly exercises its *parens patriae* power when it breaks up existing parent-child relationships.⁹⁹ Generally, once the State designates legal parents for a child, the legal parents may exercise the fundamental right to raise the child free from government interference.¹⁰⁰ If the legal parents cease to act in the child's best interests, however, the State, under *parens patriae*, may

97. BLACK'S LAW DICTIONARY 1221 (9th ed. 2009). Historically, children and persons with mental or physical disabilities warranted state protection under *parens patriae*. See *O'Connor v. Donaldson*, 422 U.S. 563, 583 (1975) (“The classic example of [the State's *parens patriae*] role is when a State undertakes to act as ‘the general guardian of all infants, idiots, and lunatics.’” (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972))).

98. *Moe v. Dinkins*, 533 F. Supp. 623, 629 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir. 1982); see also *Schall v. Martin*, 467 U.S. 253, 265 (1984) (“Children, by definition, are not assumed to have the capacity to take care of themselves.”); Dwyer, *Constitutional Birthright*, *supra* note 11, at 766 (“The state acts vis a vis every newborn baby in a ‘protective and provisional role’, pursuant to its long-recognized *parens patriae* authority”) (internal quotations omitted); Ruth Arlene W. Howe, *Race Matters in Adoption*, 42 FAM. L.Q. 465, 467 n.10 (2008) (noting that in the United States, *parens patriae* refers to the State's role as protector of the interests of children).

99. Howe, *supra* note 98, at 467 (pointing out that under *parens patriae*, parents “may have their parental rights terminated”).

100. See *Schall*, 467 U.S. at 265 (“[Children] are assumed to be subject to the control of their parents”).

intervene in the parent–child relationship.¹⁰¹ For instance, in cases involving child neglect or custody determinations during a divorce, the State acts as the child’s agent pursuant to its *parens patriae* power and makes a legal decision about parentage that corresponds with the child’s best interests.¹⁰²

Parens patriae not only empowers the State to break up existing parent–child relationships, it also enables the State to create such relationships.¹⁰³ In adoption proceedings, for instance, the State exercises its *parens patriae* power to form legal parent–child relationships.¹⁰⁴ Specifically, when approving adoptive parents for a child, the State acts as the child’s agent in selecting parents that will act in the child’s best interest.¹⁰⁵

It is our contention that, in addition to determining parental fitness and approving adoptions, the State exercises its *parens patriae* power when it drafts statutes that determine who will become a child’s legal parents. When a child is born she is a juridical person with constitutional rights, but is unable to care for herself or exercise her constitutional rights. Therefore, the first and most profound act a state takes under *parens patriae* is providing the child with legal parents.¹⁰⁶ In other words, under *parens patriae*, the State ensures a child’s well–being by adopting a dependable, self–executing parentage statute that assigns legal parents to every child at birth. Once the State determines a child’s legal parents, those individuals assume the responsibility of protecting the child’s welfare and

101. See *id.*; see also Tanya M. Washington, *Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 HASTINGS RACE & POVERTY L.J. 1, 29 (2009) (noting that the State has authority “to enforce a child’s liberty interest in freedom from incompetent parental care”).

102. See JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 173, 197 (2006). Similarly, in situations where the rights of incompetent individuals are contested, the State acts as a proxy decision maker for the individual under *parens patriae*. *Id.* at 197. In the infamous case of *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 315 (1990), the Supreme Court determined that the State’s only interest in connection with the cessation of medical treatment was a “*parens patriae* interest in providing . . . Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances.”

103. Dwyer, *Taxonomy*, *supra* note 80, at 855 (noting that the state both creates and terminates legal parent-child relationships).

104. Dwyer, *Child Protection*, *supra* note 4, at 412 (discussing state’s *parens patriae* role in adoption proceedings).

105. *Id.*

106. *Id.* at 411 (arguing that a justification for the state’s creation of legal family relationships for a newborn child is that children need caregivers but cannot choose those persons themselves); Carbone & Cahn, *supra* note 4, at 1014-15 (calling parentage determinations the “most important legal determination affecting children” and the “centerpiece in the protection of children’s interests”).

constitutional rights.

Although the State's role in parental fitness and adoption proceedings is well-recognized, the State's exercise of its *parens patriae* power when forming legal parent-child relationships at birth is not often acknowledged. As discussed *supra*, when children are born, most genetic parents assume they will be the child's legal parents and are unaware of the State's role in creating legal parent-child relationships.¹⁰⁷ As experienced by Stanley, Caban, Lehr, Quilloin, and Michael H., however, absent the operation of the State's *parens patriae* power in adopting proper parentage statutes, some parents are legal strangers to their children.

It is our position that the State's *parens patriae* power not only gives it the authority to create legal parent-child relationships at birth, it *obligates* the State to do so. Specifically, as discussed *infra*, we argue that the State's *parens patriae* power requires it to draft parentage statutes that guarantee every child's substantive due process and intimate association right to legal parents at birth.

B. *The State's Obligations Under Parens Patriae*

Under the law, children have constitutional rights at birth. Due to a child's minority, however, she is unable to exercise those rights and the State, under *parens patriae*, must exercise and protect them on her behalf. Therefore, when a state drafts a parentage statute, it is obligated as the child's agent to ensure that the statute protects her constitutional rights. Specifically, every state's parentage statute must guarantee a child's fundamental right to legal parents at birth.

A child's fundamental right to legal parents at birth is not a new right.¹⁰⁸ The laws governing parentage, however, have not required formal recognition of this right until recently.¹⁰⁹ This is because state parentage statutes have historically provided the vast majority of children with legal parents at birth.¹¹⁰ Due to new advances in assisted reproductive technology, however, state statutes have proven ineffective at designating legal parents at birth for all children.¹¹¹ The resulting legal battles have exposed the inadequacy

107. See *supra* Part III.A.2 (discussing the role that state statutes play in determining parentage).

108. In 1989, the United Nations Convention on the Rights of the Child recognized children's fundamental right to legal parents at birth and the State's obligation to assure the formation of a parent-child relationship. See Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989).

109. See Dwyer, *Constitutional Birthright*, *supra* note 11, at 762.

110. *Id.*

111. See Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive*

of current parentage statutes and the need to formally recognize the fundamental right to legal parents at birth.¹¹² This constitutional right arises out of the substantive due process protection that the Court has traditionally afforded the family, as well as the right to intimate association protected by the First Amendment.

1. Substantive Due Process

As discussed *supra*, the Supreme Court has long recognized the importance of protecting the family under substantive due process.¹¹³ In the right to privacy cases concerning marriage, parenting, procreation, and sexual intimacy, the Court has repeatedly held up the family as the paradigmatic intimate relationship protected by the right to privacy.¹¹⁴ According to the Court, matters involving the family are among “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”¹¹⁵

The Court’s substantive due process decisions protecting family privacy have consistently focused on the importance of familial *relationships*. As such, when it comes to the family, the right to privacy is best understood not as an individual right, but as a relational right.¹¹⁶ These protected family relationships are not only between adults, but also between adults and children.¹¹⁷ Indeed,

Technology, 45 UCLA L. REV. 1077, 1079-80 (1998).

112. It is important to emphasize the temporal quality of the fundamental right to legal parents *at birth*. We do not argue that children have a fundamental right to legal parents throughout their minority. Rather, we argue that this right exists at the time the child is born and terminates once the State designates the child’s legal parents. If the child later loses those legal parents for some reason, the State has no duty to provide the child legal parents again, although the State does have an obligation under *parens patriae* to take the child under its care. See, e.g., *Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989) (“[T]here is no fundamental right to adopt.”). The fundamental right to legal parents at birth is not the only fundamental right that terminates at a certain point. The fundamental right to raise one’s child, for example, terminates when the child reaches the age of majority.

113. See Part III; see also *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

114. See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education.”); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (noting that the *Meyer* and *Pierce* decisions “have respected the private realm of family life which the state cannot enter”) (quoting *Prince*, 321 U.S. at 166).

115. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

116. Rao, *supra* note 111, at 1078 (explaining that the right to privacy is not an individual right but a right to freedom within intimate relationships).

117. See *id.* at 1093.

children are even more dependent than adults on the “emotional attachments” created by familial relationships and the important role those attachments play in “promoting [the child’s] way of life.”¹¹⁸ The Constitution guarantees the right to privacy to both the parent and the child by ensuring that each can form a relationship with the other.¹¹⁹ Therefore, from the moment of birth, the child has a substantive due process privacy right to form intimate, familial relationships.¹²⁰ Under its *parens patriae* power, the State is obligated to guarantee this “precious” right of the child.¹²¹

2. The Right to Intimate Association

In addition to the Substantive Due Process Clause, the closely aligned First Amendment right to intimate association protects the relationship between a child and her parents.¹²² The Supreme Court first recognized the right to intimate association in *Roberts v. United States Jaycees*.¹²³ In *Roberts*, the Court defined an “intimate association” as a close and familiar personal relationship with another that is in some significant way comparable to a marriage or a family relationship.¹²⁴ The Court provided two rationales for the

118. See *Lehr v. Robertson*, 463 U.S. 248, 256-57 (1983).

119. Rao, *supra* note 111, at 1102-05.

120. See *id.*

121. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *May v. Anderson*, 345 U.S. 528, 533 (1953)).

122. See *Patel v. Searles*, 305 F.3d 130, 135 (2d Cir. 2002) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984)) (noting that *United States Jaycees* Court relied on substantive due process cases in support of the right to intimate association); *Nat’l Ass’n for the Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000) (citing *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1193 (9th Cir. 1988)) (noting that Fourteenth Amendment protections extend to close-knit relationships); *Trujillo v. Bd. of County Comm’rs*, 768 F.2d 1186, 1188 (10th Cir. 1985) (citing *Roberts*, 468 U.S. at 620) (noting that the Supreme Court “identified the freedom of intimate association as an intrinsic element of personal liberty” that is a substantive due process right).

123. 468 U.S. at 622.

124. *Id.* at 619-20. Notably, relationships that qualify as “intimate associations” need not be based on genetics or marital status. Rather, the right to intimate association protects any relationship that resembles that of a family. See *Trujillo*, 768 F.2d at 1189 n.5 (quoting *Roberts*, 468 U.S. at 620) (“Familial relationships . . . do not form the outer limits of protected intimate relationships . . . ‘a broad range of human relationships . . . may make greater or lesser claims to constitutional protection . . .’”); *Tillman v. City of West Point, Miss.*, 953 F. Supp. 145, 150 (N.D. Miss. 1996) (quoting *Wallace v. Tex. Tech. Univ.*, 80 F.3d 1042, 1051 (5th Cir. 1996) (noting that relationships that entail “deep attachments and commitments to the necessary few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life,” are entitled to the protection of the right of intimate association); *White v. Fla. Highway*

constitutional protection of intimate associations. First, the Court recognized that a person's ability to freely engage in intimate associations is an intrinsic element of personal liberty that must be guarded against state intrusion.¹²⁵ Second, the Court noted the central role that such relationships play in defining one's identity.¹²⁶ In drawing these conclusions, the Court in *Roberts* cited the family privacy cases and recognized that the right to intimate association derives, in part, from the Fourteenth Amendment's protection of personal liberty.¹²⁷

Based on the Courts' holdings in the privacy cases under the Fourteenth Amendment and the intimate association cases under the First and Fourteenth Amendments, we assert that the Court has already constitutionally protected the intimate relationship that a child forms with her legal parents. Our only addition to this well-settled constitutional doctrine is that the right belongs to the child as well as her parents and that it begins at the moment of birth. As a result, the state is obligated to protect that right when it drafts its parentage statutes.

Patrol, 928 F. Supp. 1153, 1158 (M.D. Fla. 1996) (quoting *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994) (noting that while the right of intimate association necessarily protects familial relationships, it also extends to other relationships to the extent "those attachments share the qualities distinctive to family relationships"); *La. Debating & Literacy Ass'n v. City of New Orleans*, 42 F.3d 1483, 1496-99 nn.23-32. (5th Cir. 1995) (noting that the right to intimate association protects relationships small in size, restrictive in membership, that seek to remain isolated, and are located "on the spectrum of personal attachments . . . near those that are 'most intimate'").

Furthermore, although the *Lawrence* Court did not cite intimate association as support for its recognition of an adult's right to engage in private, consensual sexual activity, commentators have since argued that *Lawrence* implicitly validated the right of intimate association. See Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. CIV. RTS. L.J. 269 (2006). Like the analysis employed by the *Roberts* Court, the *Lawrence* Court emphasized the necessity of protecting intimate relationships from state intrusion. See *Lawrence v. Texas*, 539 U.S. 558 (2003). The expansion of intimate association protections to non-genetic relationships, provided those relationships demonstrate a certain amount of intimacy and seclusion, indicates that courts are increasingly willing to protect non-traditional relationships.

125. *Roberts*, 468 U.S. at 618.

126. *Id.* at 619.

127. In support of these positions, the *Roberts* Court cited the familiar Fourteenth Amendment substantive due process cases, including *Pierce*, *Zablocki*, *Moore*, *Yoder*, and *Griswold*. See *id.* Similarly, legal scholar Kenneth Karst argues that the right to intimate association stems from the Constitution's First Amendment, equal protection and substantive due process protections. See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 625, 655-66 (1980).

3. The Fundamental Right to Legal Parents at Birth

At the moment of birth, a child possesses a First and Fourteenth Amendment right to form intimate, familial relationships. As a child's first intimate, familial relationship is with her legal parents, the child has a fundamental right to legal parents at birth. The State, as *parens patriae*, is obligated to protect a child's constitutional rights at birth. Thus, we argue that the first and most profound action a state takes as *parens patriae* is to adopt a statute that determines children's legal parents at birth. Moreover, we argue that the state is obligated to adopt parentage statutes that guarantee every child's fundamental right to legal parents at birth.

A child's most important and intimate familial relationship is with her parents.¹²⁸ Parents are central to a child's life experience. Without parents, a child can neither subsist nor thrive. Moreover, a child needs parents to preserve her liberty and protect her rights.¹²⁹ A child's life and well-being is therefore dependent upon legal familial relationships that are stable and secure. In other words, a child has a fundamental right to legal parents at birth.

The State, as *parens patriae*, must protect a child's constitutional rights at birth.¹³⁰ Therefore, the State is obligated to protect a child's fundamental right to legal parents at birth. To accomplish this task, the State must adopt parentage statutes that provide every child with a legally protected parent-child relationship at birth. The State fulfills this obligation by adopting a self-executing parentage statute that automatically designates a child's legal parents at the moment of birth.

The next section discusses *who* a state must designate as a child's legal parents. Since the State is obligated to provide a parentage statute that protects the fundamental right to legal parents at birth, the next question is whether the State is obligated to designate particular people as the child's legal parents? We argue that in order to guarantee the child's fundamental right to legal parents at birth, the state must designate specific persons as the child's legal parents.

128. See *United States v. Smith*, 436 F.3d 307, 310 (1st Cir. 2006) (noting that the parent-child relationship is constitutionally protected); *Henley v. Tullahoma City Sch. Sys.*, 84 F. App'x 534, 543 (6th Cir. 2003) ("[T]he right of intimate association attaches to familial relations like those between father and daughter."); *Patel v. Searles*, 305 F.3d 130, 136 (2d Cir. 2002) ("[P]arent/child relationships are obviously among the most intimate . . . [a]s to warrant the highest level of constitutional protection.").

129. See Dwyer, *Child Protection*, *supra* note 4, at 415 ("[T]he state's creation of parent-child relationships effectively determines the basic life prospects of persons and the likelihood of their experiencing happiness and fulfillment.").

130. See *id.* at 411-15.

V. HOW THE STATE GUARANTEES THE CHILD'S FUNDAMENTAL RIGHT TO LEGAL PARENTS AT BIRTH

At the moment of birth, a child has constitutional rights and the State, as *parens patriae*, is obligated to guarantee those rights. To fulfill the child's fundamental right to legal parents at birth, the State must adopt a self-executing parentage statute that designates legal parents for every child at birth. The State cannot, however, undertake this responsibility in an arbitrary manner.¹³¹ The State cannot, for example, sell legal parentage status to the highest bidder or give it away in a lottery.¹³² Similarly, the State cannot grant legal parentage status to certain persons in an effort to bolster specific social mores or discourage relationships thought to be immoral.

Although current parentage statutes are self-executing and provide legal parents for most children at birth,¹³³ the current system fails for several reasons. First, current methods of parentage determination are not based on the child's fundamental right to legal parents at birth. Rather, the current method uses a series of presumptions that are aimed at imposing social values or satisfying the expectations of adults. Second, a cornerstone of the current system — the marital presumption — is derived from outdated social norms and can create legal parentage designations that violate the fundamental right to legal parents at birth. Third, current methods do not definitively determine legal parents at birth for every child. Rather, court dockets are filled with cases in which legal parentage is disputed, particularly in situations that involve children conceived through assisted reproductive technology (ART). Many of these disputes — and the resulting uncertainty for the children involved — could be avoided if legal parentage was determined at birth for all children. To address the failings of the current system and guarantee every child's fundamental right to legal parents at birth,

131. See e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (stating that the State's *parens patriae* power is not "all-encompassing," but limited to what is in the best interest of the child overall).

132. See Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 454 (2007) (stating that the Constitution protects family privacy rights "precisely to prevent the state from distributing babies according to its own standards"); Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 687 (2001) (comparing state parentage statutes based on genetic relation to more arbitrary or discretionary parentage schemes, such as a lottery or a "best-fit parent" system).

133. Birth mothers are legal mothers at birth, and husbands of birth mothers are legal fathers at birth, due to self-executing statutes. See *infra* text accompanying note 140.

we recommend three changes to state parentage statutes.¹³⁴ The following paragraphs summarize these changes, which we discuss in detail below.

First, all presumptions must be removed from parentage statutes. Guaranteeing every child's fundamental right to legal parents at birth requires clear determinations of legal parentage at the moment of birth. Presumptions are subject to social pressure and judicial discretion and often give rise to lengthy legal disputes. The resulting lack of clarity and litigation violate the child's fundamental right to legal parents at birth. To avoid this result, states must adopt self-executing statutes that make consistent, definitive determinations of parentage at birth for every child.

Second, legal parentage of children conceived through sexual reproduction should be granted to the child's genetic parents. Basing legal parentage of children conceived through sexual reproduction on a genetic relationship eliminates any unnecessary doubt regarding parentage and places the child with the persons most likely to act in the child's best interest.¹³⁵

Third, legal parentage of children conceived through ART should be vested in the child's intended parents. Doing so would remove unnecessary doubt as to the legal parents of ART children, which often leads to litigation.¹³⁶ In addition, like the genetic parents for children conceived through sexual reproduction, the intended parents are the people who are most likely to act in the child's best interest.¹³⁷

A. *The End of Parentage Presumptions*

Parentage statutes exist, in part, to make the process of determining legal parentage as clear and efficient as possible at

134. Given their long history, changing parentage statutes may sound daunting, but "states enjoy considerable latitude to reorient parentage law in a child-centered direction." David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857, 858 (2006).

135. Once legal parents are determined, those adults then have the legal duty and obligation to act in the child's best interest and are protected from state interference in those decisions by the fundamental right to raise one's child. Dwyer, *Child Protection*, *supra* note 4, at 412. It follows then, that state parentage statutes must designate those persons most likely to act in the child's best interest as the legal parents. *Id.* In other words, the State's obligation to the child under *parens patriae* — the obligation to act in the child's best interest — is transferred from the State to the legal parents. *Id.* (noting that state parentage laws should place children in parent-child relationships with the adults who would best promote the child's welfare).

136. See *supra* notes 87-88 and accompanying text (discussing questions over parentage of ART children and ensuing litigation).

137. See discussion *infra* Part IV.C.2.

birth, thereby avoiding litigation.¹³⁸ Indeed, it would be impossible to hold a fact-specific hearing every time a child is born to decide who is best suited to be the child's legal parents.¹³⁹ In fact, the fundamental right to legal parents at birth, by definition, prohibits factual inquiries into an individual child's needs or family situation since such determinations can take months, if not years. Instead, the fundamental right to legal parents at birth requires that states enact a definitive, self-executing statutory system that designates legal parents for every child at the moment of birth.

For this reason, states must eliminate the presumptions currently used to determine parentage. Such presumptions give rise to disputes in which courts consider adult behavior and social customs to determine parentage, rather than the child's fundamental right. *Michael H. v. Gerald D.* provides an example of the uncertain and arbitrary results created by such presumptions.¹⁴⁰ When *Michael H.* was finally decided by the Supreme Court, the child whose parentage was at issue in the dispute, Victoria, was eight years old and lived with her mother, Carole; her mother's husband, Gerald; and her two half-siblings born to Carole and Gerald.¹⁴¹ Given these circumstances, it is not surprising that the Court determined Gerald was Victoria's legal father by applying the marital presumption.¹⁴² Consider, however, what the outcome of a case would have been had the Court decided who Victoria's legal father was at or very near the date of her birth. At that time, Carol was estranged from Gerald and lived with Michael, Victoria's genetic father.¹⁴³ Faced with those facts, a court could have applied the presumption favoring genetic fathers and determined Michael to be

138. No one would benefit from a system that determined legal parents based on a case-by-case, fact-intensive inquiry of the individual newborns' needs. The case load would be unmanageable and the child would suffer the loss of the important bonding that occurs between a child and parents in the early days, weeks, and months of life. See Elizabeth Bartholet, *Guiding Principles for Picking Parents*, in *GENETIC TIES AND THE FAMILY* 132, 143 (Mark A. Rothstein et al. eds., 2005) (explaining that social science research demonstrates that children need permanent, nurturing parents beginning at early infancy); see also John Hill Lawrence, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 *N.Y.U. L. REV.* 353, 402-03 (1991) (citing studies that claim infants who fail to form bonds with adults early in infancy have developmental problems later in life).

139. June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 *LA. L. REV.* 1295, 1300 (2005) ("Under this type of after-the-fact decision-making, parental status remains uncertain until the day of the decision.").

140. 491 U.S. 110, 110 (1989).

141. *Id.* at 115.

142. *Id.* at 130-32.

143. See *id.* at 114 (Carole and Michael lived together for significant periods of time shortly after Victoria's birth).

the legal father.¹⁴⁴ A system that preserves a child's fundamental right to legal parents at birth must provide for clear and final determinations of parentage at birth. Doing so will ensure that children like Victoria are not left in limbo for eight years without a legal father.

It is true that removing presumptions from parentage statutes requires the State to choose one factor by which to determine parentage for all children, regardless of the circumstances of their birth. We argue that this is the only way to guarantee every child's fundamental right to legal parents at birth. Providing legal parents at birth for every child, however, does not foreclose third-parties from seeking parentage rights through the courts after the child is born. The current legal system provides numerous mechanisms for courts to evaluate legal parentage and, in certain circumstances, to reassign those rights. The fundamental right to legal parents at birth does not disturb that system in any way. Providing a clear determination of legal parentage at birth will merely mean that in circumstances where legal parentage is disputed, the child will have legal parents throughout the litigation and will, at no point, be left without legal parents.

B. Children Conceived Through Sexual Reproduction

The fundamental right to legal parents at birth requires that state parentage statutes clearly and definitively determine the legal parents of every child at birth. A critical issue, then, is what one factor should determine legal parentage. Remembering that the factor chosen must guarantee the *child's* fundamental right to legal parents at *birth*, states must choose a factor that is both determinative at birth and grants legal parentage to the people who are most likely to care for the child and protect her rights – that is, the persons most likely to act in her best interest. It is our contention that, in order to guarantee the fundamental right to legal parents at birth for children conceived through sexual reproduction, state parentage statutes must award the genetic parents the status of legal parents. In addition, states must eliminate the marital presumption and require DNA testing to determine genetic paternity before assigning legal paternal rights.

1. Why the Genetic Parents?

The current parentage system is founded on the assumption that the genetic mother and father should be the legal parents of children

144. See Carbone & Cahn, *supra* note 4, at 1049-50, for a further discussion of the possible outcomes if *Michael H.* had been decided earlier in Victoria's life.

conceived through sexual reproduction.¹⁴⁵ All fifty states have statutes providing that the woman who gives birth to a child is the legal mother.¹⁴⁶ At the time these statutes were codified the only way to conceive a child was through sexual reproduction. As a result, every woman who gave birth to a child was the child's genetic and legal mother.¹⁴⁷

The assumption that legal parentage should be based on a genetic relationship is also found in every state's paternity presumptions. The marital presumption, for instance, provides that the birth mother's husband is the legal father.¹⁴⁸ This presumption is founded on the belief that the birth mother's husband is the genetic father.¹⁴⁹ The 1973 Uniform Parentage Act created a number

145. It is beyond the scope of this Article to address whether or not a child may have more than two legal parents. Our argument is that the fundamental right to legal parents at birth requires the State to provide at least one legal parent for every child. Several other scholars have addressed whether a child should be able to have more than two legal parents. See, e.g., Laura Nicole Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN'S L.J. 171 (2008); R. Alta Charo, *And Baby Makes Three – Or Four, Or Five, Or Six: Redefining the Family After the Reprotech Revolution*, 15 WIS. WOMEN'S L.J. 231 (2000); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309 (2007); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 126 (2006) [hereinafter Meyer, *Parenthood*] (“Proposals to expand the numerical boundaries of parenthood, so that a child might have at once three, four, or even more parents, now carry the imprimatur of the United States’ most influential law-reform organization.”); Brian H. Bix, *The Bogeyman of Three (or More) Parents* (Minn. Legal Studies Research Paper No. 08–22, Aug. 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1196562. It is worth noting that scholars that advocate for allowing more than two legal parents advocate for a process whereby legal rights in third-parties would be determined by a court after the child is born. Presumably, that is, after the child's first two legal parents are determined. See, e.g., Melanie Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809 (2006).

146. See, e.g., MINN. STAT. ANN. § 257.54 (West 2007); TEX. FAM. CODE ANN. § 160.201 (Vernon 2007).

147. Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 912 (2000) (explaining that “[b]ecause pregnancy and birth are relatively public and undisputed, the law has rarely confronted the question of legal motherhood at all”).

148. *Id.* at 883 (describing the marital presumption as the “primary rule governing the parentage of children born to a married woman”).

149. Carbone & Cahn, *supra* note 4, at 1050 (explaining that the marital presumption emerged when genetic ties to fathers were not provable). As early as 1777, with the articulation of Lord Mansfield's Rule, the marital presumption was difficult to rebut. The rule required proof that the husband did not have access to his wife at any point during the time of possible conception. Typically, the only rebuttal to the marital presumption was that the husband was beyond “the four seas” during the

of additional presumptions that allowed genetic fathers of non-marital children to gain legal parentage status.¹⁵⁰ These presumptions, like the marital presumption, were meant to grant legal paternity to the genetic father of the child.¹⁵¹ Thus, throughout history, every state has awarded parental status to the genetic mother and father of children conceived through sexual reproduction.¹⁵²

Under *parens patriae*, the State acts as the child's agent and must do for the child what she cannot do for herself – that is, choose the person most likely to care for her and protect her rights throughout her minority. Therefore, a state should guarantee a child's fundamental right to legal parents at birth by designating the genetic parents of children conceived through sexual reproduction as the legal parents.¹⁵³

time when conception could have occurred and, therefore, could not be the genetic father. See *Goodright v. Moss*, (1777) 98 Eng. Rep. 1257, 1258 (K.B.); see also Meyer, *Parenthood*, *supra* note 145, at 127 (describing the presumption as strong and only overcome if the husband and wife were apart during the likely period of conception).

150. The 1973 Uniform Parentage Act presumes paternity in five relationship-based circumstances: (1) the child is born during the man's marriage to the natural mother; (2) before the child is born, the man and the natural mother attempt to marry, but the marriage is declared invalid; (3) the man and the child's natural mother marry or attempt to marry after the child's birth; (4) while the child is under the age of majority, "the man receives the child into his home and openly holds out the child as his natural child"; and (5) the man acknowledges his paternity in writing, promptly informs the natural mother, and she does not dispute his acknowledgement within a reasonable time after notification. UNIFORM PARENTAGE ACT §§ 4(a)(1)–(5) (1973).

151. Although none of the presumptions state that the man seeking legal paternity must be the genetic father, they are all founded on the premise that the only person willing to meet the requirements of the presumptions would be the genetic father. See Meyer, *Parenthood*, *supra* note 145, at 130 (concluding that through its set of presumptions, the Uniform Parentage Act attempts to identify the man who is the genetic father of the child, which is consistent with the intention of the traditional common law marital presumption).

152. Although some commentators have questioned the overriding role of genetics in determining legal parentage, a genetic relationship remains a powerful indicator of whether an adult is likely to act in a child's best interests throughout her minority. MARY LYNDON SHANLEY, *MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS* 63 (2001) (stating that "since biological parents have a variety of incentives to care for their children to the best of their ability, assigning custody to them tends to protect children's interests"); Marjorie Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 319 (1990) (stating "legal assignment of parental status has, typically drawn legitimacy from its reflection of and alignment with biological givens"); see also Appell, *supra* note 132, at 685-86 (defending a system that bases legal parentage, at least in part, on genetic relationship).

153. To be clear, this is not merely a "presumption" in favor of genetic parents similar to the presumption found in the current system. The requirement that the

To the extent that current parentage statutes allow persons other than the genetic parents to gain the status of legal parents at birth, they are unconstitutional.¹⁵⁴ With regards to legal maternity, states can continue to use birth as proof of a genetic relationship between the woman and the child. When a child is conceived through sexual reproduction, the birth mother is without a doubt the genetic mother and should be designated the legal mother.¹⁵⁵ As for determining legal paternity, while current presumptions seek to determine genetic paternity, they often fail to do so. Today, genetic testing provides an accurate and final determination of a genetic relationship between a man and child. Therefore, as will be argued *infra*, the State must require proof of a genetic relationship through DNA testing before awarding legal paternity.

2. The End of the Marital Presumption

As stated *supra*, parentage presumptions – including the marital presumption – are unconstitutional because they introduce uncertainty into parentage determinations, thus violating a child's fundamental right to legal parents at birth. We also argued *supra* that states must designate the genetic parents of children conceived through sexual reproduction as the legal parents. Although these two arguments are sufficient to find the marital presumption unconstitutional, due to its history and widespread use, we address it again to also demonstrate that the social goals of the marital presumption no longer advance the child's best interests.¹⁵⁶

State designate the genetic parents as the legal parents is a definitive determination that is based on the reasoned prediction that the genetic parents will act in the child's best interest. In contrast, currently-used presumptions create a variety of ways for the State to infer who is a genetic parent.

154. We are not suggesting that in each and every case genetic parents will act in their child's best interests. We are merely arguing that the child has a fundamental right to legal parents at birth and the genetic parents may reasonably be assumed to act in their child's best interest the vast majority of the time. Determinations of parentage at birth must be based on a prediction of future actions – specifically those of the genetic parents. If a genetic parent fails to act in the best interest of the child, or if another adult would also, or more likely act, in the child's best interest, our argument in no way prohibits states from making such legal determinations after the child is born.

155. When a child is conceived through sexual reproduction, assigning a legal mother to a child at birth is a relatively clear proposition. The act of childbirth itself leaves little dispute as to who is the genetic mother of the child. See *Nguyen v. INS*, 533 U.S. 53, 62 (2001) (stating that when determining parentage of the mother, "the relation is verifiable from the birth itself"); Meyer, *Parenthood*, *supra* note 145, at 127 (noting that assignment of parental status to mothers "was typically a straightforward matter and legal motherhood followed childbirth as a matter of course").

156. Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital*

The marital presumption initially served to protect the husband and his family from the specter of infidelity and social disapproval.¹⁵⁷ In addition, the marital presumption protected the child from the stigma of illegitimacy. At the time the marital presumption was codified, children of married parents earned significant social and financial benefits, whereas non-marital children suffered severe hardships.¹⁵⁸ Therefore, to the extent the marital presumption protected the family unit by maintaining the image of marital fidelity — even when such harmony did not exist with the family — it served the child's best interests.¹⁵⁹ Even today, the benefits to children who are raised in a household consisting of two married parents are well-documented. It is not at all clear, however, that the marital presumption correlates to or causes that positive outcome.¹⁶⁰ Rather, there is reason to conclude that the marital presumption harms children.¹⁶¹

Presumption of Paternity, 102 W. VA. L. REV. 547, 587 (2000) (discussing historical importance of the marital presumption).

157. See *id.* at 563 (stating that the marital presumption was not based on the best interests of the child “but on society’s need for stability and certainty in family relationships at a time when property, and therefore often a family’s livelihood, was dependent on clear rules concerning patrilineal succession”).

158. See MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS 85-87 (1994).

159. Blackstone perceived the goals of the marital presumption as focusing on the child’s needs when he stated: “[T]he main end and design of marriage [is] to ascertain and fix upon some certain person to whom the care, the protection, the maintenance, and the education of the children should belong.” WILLIAM BLACKSTONE, 1 COMMENTARIES 455 (1765). In 1824, Justice Story wrote: “As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education.” *United States v. Green*, 26 F. Cas. 30, 31 (D.C. Cir. 1824).

160. See Carbone & Cahn, *supra* note 4, at 1066 (noting that “[g]iven the impermanence of marriage and the relative ease of genetic testing, relationships based on falsehood are unlikely to last”).

The rationale for the [marital] presumption, judges explain, is that public policy opposes bastardization of a child and protects the integrity of the marital family. With the Supreme Court’s erosion of distinctions between legitimate and illegitimate children, however, these old public policy arguments, which formerly cushioned the child against loss of her functional family relationships, are losing their vitality.

Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 CARDOZO L. REV. 1747, 1791 (1993) (citing Justice Brennan’s dissent in *Michael H.* questioning the utility of examining “tradition . . . in a world in which . . . the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did”).

161. See, e.g., ROTHSTEIN, *supra* note 138, at 143; see also *Michael H.*, 491 U.S. at

Today, more than 50 percent of marriages fail, suggesting that the marital presumption no longer serves as a social balm to an ailing marriage.¹⁶² Pregnancy outside of marriage, divorce, and adultery are common occurrences and, arguably, socially accepted. This reality calls into serious doubt the long-term benefits of forming a legal relationship between a child and a man who is not her genetic father. If the mother and her husband have a 50 percent chance of ending their relationship before the child turns eighteen, it is questionable whether creating a legal relationship between the child and her mother's husband is in the child's best interests.¹⁶³

It is our contention that the marital presumption, when applied today, protects husbands from social embarrassment, prevents wives from having to disclose an extramarital affair, and serves the State's interest in propping up the two-married-parents household as the social norm. The marital presumption, however, is not in the child's best interest and does not guarantee the child's fundamental right to legal parents at birth.¹⁶⁴ Today, a child does not need a father to protect her from the stigma of illegitimacy at birth. Rather, children need paternal support and nurturing throughout their eighteen years of minority and beyond.

The benefits of determining genetic paternity at birth – rather than relying on a presumption in favor of the mother's husband – outweigh the potential conflicts that may arise in the few marriages forced to confront a woman's infidelity just as a newborn child enters the world. Eliminating the marital presumption will create a legal relationship between the child and the man who will always be her genetic father. Furthermore, clearing up doubts as to paternity at birth will prevent later attempts to disclaim paternity.¹⁶⁵ Finally,

115 (noting that before *Michael H.* reached the Court, and despite the Court's eventual holding to the contrary, a California court-appointed psychologist recommended that Michael be allowed continued contact with Victoria).

162. BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2003, 52 NAT'L VITAL STAT. REP. NO. 22, at 1 (2004), http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_22.pdf; see also Carbone & Cahn, *supra* note 3, at 1066–67 (noting that one of every two marriages fails and over half of modern American children spend some part of their childhood in a family headed by a single parent).

163. See, e.g., Larry Bumpass, *Children and Marital Disruption: A Replication and Update*, 21 DEMOGRAPHY 71–82 (1984).

164. See Carbone & Cahn, *supra* note 4, at 1012 (arguing that the marital presumption can “prevent the child from establishing a relationship with an adult who is committed to her and not just her mother”).

165. The seriousness of this issue is demonstrated by the fact that many states and the ALI's Principles of the Law of Family Dissolution find it necessary to allow husbands to rebut the marital presumption only for a limited period of time, after which – even if it is shown that he is not the genetic father – courts are unable to revoke his status and the accompanying duties and obligations as the legal father. See

such clarity may result in greater commitment from the father.¹⁶⁶ These arguments make it difficult to accept that a parent-child relationship that is based on a legal fiction is in the child's best interests.¹⁶⁷

3. DNA Testing

To avoid the legal fiction created by paternity presumptions and guarantee the fundamental right to legal parents at birth, states must recognize the genetic father of children conceived through sexual reproduction as a legal parent. Although the current parentage system seeks to grant legal parentage to the genetic fathers of such children, the system relies on a series of presumptions to decide whether certain people are the genetic parents. Using these unreliable and rebuttable presumptions is no longer necessary. Today, inexpensive genetic tests can establish a genetic relationship with an accuracy rate of 99 percent.¹⁶⁸ Genetic testing should take place at, or as close as possible to, the child's birth. Although such testing may sound invasive, in reality it is not that demanding and is relatively easy to implement.

The birth of a child is a significant moment in a father's life and is an event many fathers refuse to miss.¹⁶⁹ As a result, six in seven paternity acknowledgments occur voluntarily at the hospital when the child is born.¹⁷⁰ Since so many men are present at this momentous event and willing to immediately acknowledge their paternity, a simple genetic test could easily be administered at the hospital. An inexpensive blood test would take just minutes and

Meyer, *Parenthood*, *supra* note 145, at 137-38.

166. See, e.g., *id.* at 137 (recognizing "recent scholarship in the field of evolutionary biology suggesting that parents may tend to invest more in the care of their own genetic offspring").

167. See also Carbone & Cahn, *supra* note 4, at 1067 (stating that "[f]athers are more likely to remain committed to their children if they are either certain of paternity, or they have, with or without the formality of adoption, knowingly accepted responsibility for someone else's child").

168. See Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 911-12 (2006); see also Michael H. v. Gerald D., 491 U.S. 110, 161 (1989) (White, J., dissenting) (stating that "we have now clearly recognized the use of blood tests as an authoritative means of evaluating allegations of paternity").

169. See Dowd, *supra* note 168, at 919. Men take on a "paternal identity" when they recognize their biological fatherhood, and the birth of their child is a critical moment in creating a bond between father and child. WILLIAM MARSIGLIO, PROCREATIVE MAN 6-7 (Tim Bartlett ed., 1998).

170. See Dowd, *supra* note 168, at 919-20 (discussing paternity establishment for non-marital children).

would establish paternity immediately.¹⁷¹ Social science suggests that a man's process of mentally assuming the role of a father is comprised of ritualistic and ceremonious acts.¹⁷² In that respect, the introduction of a blood test to solidify paternity may further strengthen the father-child bond by creating a clear and definite ritual for each father at the birth of his child.¹⁷³

The State infringes upon a child's fundamental right to legal parents at birth when it grants paternity rights based on outdated and inaccurate presumptions. The birth mother's husband or partner is not necessarily the most likely person to care for and protect the child throughout her minority. Instead, the genetic father is most likely to fulfill this role. Certainly, in the majority of cases the birth mother's husband or partner is the child's genetic father. He will be the legal father in accordance with the child's rights and the adults' expectations. In cases when the husband or partner is not the genetic father, however, the State's obligation to the child requires that it designate the genetic father as the child's legal father.

C. Children Conceived Through Assisted Reproductive Technology

Children conceived through ART also have a fundamental right to legal parents at birth that must be fulfilled by a clear, definitive, self-executing statute. Few states, however, provide such statutes for ART children. Accordingly, the vast majority of states must make two changes to their parentage statutes in order to guarantee the fundamental right to legal parents at birth to children conceived through ART. First, each state must adopt statutory provisions that provide legal parents for ART children. Second, those statutory provisions must identify the intended parents as the legal parents of children conceived through ART.

171. See generally American Pregnancy Association, Paternity Testing, <http://www.americanpregnancy.org/prenataltesting/paternitytesting.html> (last visited Mar. 4, 2010).

172. These rituals include things like cutting the umbilical cord, holding his child for the first time, counting fingers and toes, signing a birth certificate, even handing out cigars to co-workers. See RICHARD K. REED, BIRTHING FATHERS 12-21 (2005).

173. Of course, if the genetic father is found to be unfit, there are legal mechanisms through which his parental rights can be terminated. If a genetic father is unknown or cannot be located, mechanisms also exist for another man to be granted legal rights to the child. "By providing certainty when a child is born, a mandatory paternity or second-parent determination precludes subsequent denials of responsibility for a child. It does not necessarily, however, preclude subsequent terminations of responsibility once another person is willing to assume responsibility." Carbone & Cahn, *supra* note 4, at 1069.

1. Comprehensive ART Parentage Statutes

States must make clear parentage determinations at birth for all children, including those conceived through ART. Up to five parties may be involved in the conception of a child through ART and uncertainty regarding legal parentage often leads to lengthy litigation.¹⁷⁴ Any delay in determining parentage due to the lack of an applicable parentage statute violates a child's fundamental right to legal parents at birth.

Currently, however, inclusion of ART children in state parentage statutes is grossly inadequate.¹⁷⁵ Even the 2000 Uniform Parentage Act, which includes provisions for children conceived through ART, fails to provide legal parents for all ART children.¹⁷⁶ Although many parentage statutes include provisions pertaining to children conceived through alternative insemination, these statutes only apply in narrow circumstances.¹⁷⁷ As a result, these statutes provide legal parents to only some children conceived through alternative insemination. Even fewer states provide statutory mechanisms to determine legal parentage of children born to gestational carriers,¹⁷⁸ and some states prohibit gestational carrier agreements

174. For instance, a gestational carrier may agree to gestate a child for two intended parents and the gametes used to conceive the child may be procured from sperm and egg donors. See, e.g., *In re Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

175. See Kira Horstmeyer, Note, *Putting Your Eggs in Someone Else's Basket: Inserting Uniformity into the Uniform Parentage Act's Treatment of Assisted Reproduction*, 64 WASH. & LEE L. REV. 671, 684-91 (2007) (identifying the different approaches each state has taken in regards to assisted reproduction by categorizing each state's statutes regarding assisted reproduction, and lack thereof).

176. Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN'S L.J. 163, 173-77 (2007).

177. Although about two-thirds of states have parentage statutes determining parentage of children conceived through alternative insemination, most of these provisions are very narrow and fail to provide legal parents to all children conceived through alternative insemination. See Horstmeyer, *supra* note 176, at 690. For example, the Minnesota statute dealing with artificial insemination creates paternity under only specific circumstances: "If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the biological father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The consent must be retained by the physician for at least four years after the confirmation of a pregnancy that occurs during the process of artificial insemination." MINN. STAT. § 257.56 (2010).

178. See Darra L. Hofman, *"Mama's Baby, Daddy's Maybe: A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 454-60 (2009) (discussing the differences in surrogacy laws from state to state). It is worth noting that only thirteen states have explicit statutory language regarding gestational carriers. *Id.*

altogether.¹⁷⁹ It is beyond the scope of this Article to take issue with states' efforts to discourage surrogacy. We argue, however, that states are obligated to provide all children legal parents at birth, including those born to gestational carriers.¹⁸⁰

When ART children are born in states without adequate parentage statutes, a variety of outcomes may result. In some cases, the child will have one legal parent — the birth mother. In the case of surrogacy, however, the birth/legal mother has no intention of raising the child. If the gestational carrier is married, the child will have a legal mother and a legal father at birth — based on the marital presumption — but, again, neither of those legal parents intends to raise the child. In cases where conception occurred through alternative insemination, the birth/legal mother is likely to be the person who intends to raise the child, but her partner is often denied any legal relationship with the child due to the non-existence of an applicable parentage statute. As a result, the child's primary intimate, familial relationships are not legally recognized and the child's ability to form and maintain the parent-child relationship is at risk. Furthermore, the wrong adults — or no adults — have the duty and obligation to act in the child's best interests. Therefore, any state parentage statute that fails to provide legal parents for all children at birth — including those conceived through ART — does not guarantee a child's fundamental right to legal parents at birth and is unconstitutional.

2. Why Intended Parents?

Not only must states adopt parentage statutes that provide legal parents for ART children, those statutes must designate the intended parents as the legal parents. When a child is conceived through ART, one or both of the persons who intend to raise the child may not be genetically related to the child. Indeed, intended parents often

179. See, e.g., MICH. COMP. LAWS §§ 722.851-861 (2010) (identifying “surrogate parentage contracts . . . as contrary to public policy”); see also Hofman, *supra* note 179, at 454-60.

180. The Court has held on several instances that a state cannot punish a child based upon disapproval of the actions or status of the child's parents. See *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (stating “[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice”); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (invalidating a section of the Social Security Act that prohibited some non-marital children from receiving benefits); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-76 (1972) (“Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth.”).

use anonymously donated gametes with the desire that the identity of one or both of the genetic parents never be known.¹⁸¹ The intended parents, however, are the persons who desired to have the child, used ART to conceive the child, and plan to care for and protect the child.¹⁸² The intended persons, therefore, are most likely to act in the child's best interests. It is with these persons that the child would most likely desire to form an intimate, familial relationship and, therefore, would likely choose as her legal parents if she could exercise the fundamental right to legal parents at birth on her own behalf.

States, therefore, fulfill their role as *parens patriae* by adopting parentage statutes that recognize the constitutionally-protected relationship between ART children and their intended parents. For children conceived through sexual reproduction, state parentage statutes must designate the genetic parents as the child's legal parents. By adopting parentage statutes that assign children parents from these respective groups, states ensure that every child's fundamental right to legal parents at birth is guaranteed from the moment they are born.

VI. CONCLUSION

Under the law, there can be no doubt that the child comes first and legal parents come second.¹⁸³ At the moment a child is born, she is a juridical person fully endowed with constitutional rights. In contrast, a child's parents do not become legal parents until a state statute grants them that status.¹⁸⁴ The State, therefore, exercises an enormous amount of power when it drafts the parentage statutes that designate who becomes a legal parent. The State's historic *parens patriae* power obligates it to protect and guarantee the constitutional rights of those persons, especially children, who are incapable of exercising their constitutional rights on their own.¹⁸⁵ Therefore, when a State drafts the parentage statutes that create

181. As a result, while a genetic relationship is the best predictor of a long-term relationship between a parent and child when the child is conceived through sexual reproduction, genetic connections are less relevant when children are conceived through ART. Lori B. Andrews, *Assisted Reproductive Technology and the Challenge for Paternity Laws*, in *GENETIC TIES AND THE FAMILY* 186, 198 (Mark L. Rothstein et al. eds., 2005) (noting that ART has caused states to rely less on genetics and more on the intent of the parties when determining the legal parents of ART children).

182. Lawrence, *supra* note 138, at 414 (stating "[t]he intended parents are, so to speak, the 'first cause' of the procreative relationship; they are the ones who have engineered the birth of the child").

183. See *supra* notes 1-4 and accompanying text.

184. See *supra* text accompanying note 10.

185. See *supra* notes 97-98.

legal parent-child relationships, it is obligated under *parens patriae* to ensure that those statutes guarantee the child's constitutional rights. In other words, when drafting the statutes that will determine who a child's legal parents will be, the State's foremost consideration must be the child's constitutional rights.

The most important right that the State must consider when drafting its parentage statutes is the child's fundamental right to legal parents at birth. The fundamental right to legal parents at birth derives from the substantive due process privacy right to form intimate, familial relationships, as well as the right to intimate association. This right ensures that a child may develop the parent-child relationships necessary to preserve her liberty and protect her rights. Under its *parens patriae* power, the State must ensure that its parentage statutes satisfy this right.

In order to guarantee the child's fundamental right to legal parents at birth, states must reform their current parentage statutes in three ways. First, states must replace all presumptions in parentage statutes with clear determinations that definitively decide a child's legal parents at birth. Second, states must grant legal parentage to children conceived through sexual reproduction to the child's genetic parents, since they are the persons most likely to act in the child's best interests. Third, states must grant legal parentage to children conceived through assisted reproductive technology to the intended parents, who are also the persons most likely to act in the child's best interests. By adopting statutes that assign children parents from these respective groups, states guarantee every child's fundamental right to legal parents at birth.
