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 the same unanswerable inquiry 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. The definition of “parent”, however, varies. According to Merriam–Webster, for example, a parent is “one that begets or brings forth offspring” or “a person who brings up and cares for another.” In contrast, Black’s Law Dictionary defines “parent” as the “lawful father or mother of someone.” Therefore, although we commonly understand a “parent” 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 a child’s parent by the law. Under the law, the child comes first, and the parent comes second.

A closer look at state parentage statutes also demonstrates that legal parents do not exist until after a child is born. In all fifty states, the child is a juridical

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1 See Merriam–Webster Collegiate Dictionary; Black’s Law Dictionary (defining child as a “person under the age of majority” or a “son or daughter of human parents”).
2 “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.” June Carbone & Naomi Cahn, Which Ties Bind?, 11 Wm. & Mary Bill Rts. J. 1011, 1015 (2003).
4 Furthermore, according to Black’s Law Dictionary, “a person ceases to be a legal parent if that person’s status as a parent has been terminated in a legal proceeding.” Black’s Law Dictionary 1222 (9th ed. 2009).
person with constitutional rights at the moment of birth. Exactly who will be the child’s legal parents, however, depends on the applicable state statutes. For example, consider a child born to a gestational carrier. 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 parents are, 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. If the child is born in Michigan, however, according to state statute the gestational carrier would be the child’s legal mother. In Minnesota, due to the absence of a state statute dealing with surrogacy, litigation and a court ruling is likely necessary to determine legal parentage. Therefore, although we 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.

Throughout this article, we use the term “parents” rather than “parent.” By doing so, we do not argue that every child must have two legal parents. Instead, 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” simplifies the text and reflects the fact that two parents are currently considered the norm in child rearing.

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).


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 husband must sign a form acknowledging his paternity. See Minn. Stat. § 237.55 (2008). In California he, or any other involved party, must obtain a court order to have blood tests conducted. See Cal. Fam. Code § 7551 (West 2009). In Mississippi, the genetic father would be the legal father only if the mother could prove non-access. See Ingalls Shipbuilding Corp. v. Neuman, 322 F. Supp. 1229 (D. Miss. 1970). In Louisiana, both the husband and the genetic father may be considered “dual parents.” See State ex rel. Munson v. Washington, 747 So. 2d 1245 (La. App. 2d Cir. Dec. 8, 1999). Determining legal paternity is even more varied when artificial insemination is the source of the genetic father’s tie. See Kyle C. Velte, Egg on Lesbian Maternity: The Legal Implications of Tri-Gametic In Vitro Fertilization, 7 AM. U.J. GENDER SOC. POL’Y & L. 431, 442-43 (1999) (“Of the thirty-four states that currently have legislation dealing with [artificial insemination by a known or
Recognition of this sequence of events — this time when a child exists, but legal parents do not — reveals the awesome power States wield in defining legal parentage and requires the rethinking of family law and parentage statutes in particular. If different people will 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, parentage statutes must be written with the child’s needs and rights in mind.

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

Part IV reconsiders the role of the State in drafting parentage statutes in light of the fact that those statutes determine who will exercise the fundamental right to raise one’s child. 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. More specifically, states are obligated to adopt parentage statutes that guarantee the child’s fundamental right to legal parents at birth.

Part V concludes with a discussion of how a state must guarantee the child’s fundamental right to legal parents at birth through its parentage statutes. 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 in this way will state parentage statutes be constitutional.

anonymous sperm donor], sixteen have statutes that address [it] only in the context of marriage.
}
II. CHILDREN’S CONSTITUTIONAL RIGHTS

Children are protected by the Constitution and possess constitutional rights from the moment they are born. As the Supreme Court has stated, “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.” Though the Court has, at times, limited children’s constitutional rights, it has clearly held that children are persons under the Fourteenth Amendment and are entitled to substantive due process, privacy, and the protection of their liberty. For instance, the Fourteenth Amendment protects minors’ constitutional rights to obtain an abortion and to use contraception. Indeed, in Carey v. Population Services International, the Court specifically stated that the right to privacy “extends to minors as well as to adults.”

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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).

See Francis Barry McCarthy, The Confused Constitutional Status and Meaning of Parental Rights, 22 GA. L. Rev. 975, 1011 (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. See Bellotti v. Baird, 443 U.S. 622, 634 (1979). These justifications do not apply to a child’s fundamental right to legal parents at birth because, unlike the rights in Belotti, the right to legal parents does not require an initial inquiry as to an existing comparative adult right. One scholar refers to the Court’s analysis of children’s constitutional rights under Belotti as an “adult-minus” orientation, wherein “the Court has routinely started with the specifics of adult rights and whittled down to children’s.” Emily Buss, Constitutional Fidelity Through Children’s Rights, 2004 SUP. CT. REV. 355 (2005). Buss argues 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.” Id.

See, e.g., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976) (extending to minors the constitutional right to obtain an abortion).

See id. at 74 (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”).

See Carey v. Pop. Services 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”).

Id. at 693.
Children hold constitutional rights not only under the Fourteenth Amendment, but pursuant to other provisions of the Constitution as well. The Court recognized children’s free speech rights in *Tinker v. Des Moines Independent Community School District*, stating that “[c]hildren are possessed of fundamental rights which the State must respect.” 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*. Notably, the *Barnette* Court did not distinguish between adults and children, holding that the constitutional right to free exercise of religion is protected regardless of age.

In the criminal context, the Court recognized children’s constitutional rights in the seminal case of *In Re Gault*. 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. Subsequent cases further extended children’s constitutional rights in criminal proceedings by applying the requirement of proof beyond a reasonable doubt and the prohibition of double jeopardy to child defendants.

In the various cases recognizing children’s rights, the Court did not require children to reach a certain age before they may exercise their constitutional rights.

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19 393 U.S. 503, 511 (1969) (holding 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”).

20 319 U.S. 624 (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 (2000) (finding that school-sponsored prayer violated students’ First Amendment right to free exercise of religious beliefs); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that a Wisconsin statute mandating public school attendance past the 8th grade interfered with the Amish religion’s freedom of religious expression); Prince v. 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”).

21 387 U.S. 1 (1967).

22 *Id.*

23 *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 reasonable doubt when they are charged with a violation of a criminal law”).

Rather, the Court recognized that children are born with constitutional rights. In other words, children possess these rights at birth, before their legal parents are even determined. While a parent’s fundamental right to raise one’s child is constitutionally protected and vitally important, until the applicable state statute grants that right, the extant constitutional rights of the child are paramount.

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. From *Meyer v. Nebraska* in 1923, to *Lawrence v. Texas* in 2003, the Court has 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. 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. The Court continued to protect privacy rights relating to marriage and parenting throughout the last half of the 20th Century. In procreation cases such as *Eisenstadt v. Baird* and *Roe v. Wade*, marriage cases such as *Loving v. Virginia*
and Zablocki v. Redhail,\footnote{434 U.S. 374 (1978) (holding that a Wisconsin statute requiring certain residents, specifically noncustodial parents of children for which they are obligated to support, to obtain a court order prior to receiving a marriage license is an interference with their constitutional right to marry).} parenting cases such as Stanley v. Illinois\footnote{405 U.S. 645 (1972) (holding an Illinois law that denied an unmarried father a hearing of parental fitness before the State took custody of his genetic child unconstitutional).} and Moore v. City of East Cleveland,\footnote{431 U.S. 494 (1976) (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).} and the most recent case of Lawrence v. Texas,\footnote{539 U.S. 558 (2003).} protecting the fundamental right to sexual intimacy; the Court reinforced the notion that intimate relationships and the family are constitutionally protected.\footnote{In fact, in most of these cases the court merely cited the prior case for support for this proposition. See e.g., id. (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S 833, 851 (1992), for the proposition that “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, 434 U.S. 374 (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 (1972) (citing Griswold v. Connecticut, 381 U.S. 479 (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 (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 (1888) (citing Adams v. Palmer, 51 Me. 481, 483 (1863), for the proposition that marriage is “the foundation of the family and of society”).} 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.\footnote{262 U.S. 390 (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); Meyer, 262 U.S. 390 (1925); Pierce, 268 U.S. 510 (1925).} More than fifty years later, in Santosky v. Kramer,\footnote{455 U.S. 745 (1982).} the Court extended the fundamental right to raise one’s child beyond the educational setting.\footnote{See Moore v. City of E. Cleveland, 431 U.S 494 (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 (1944) (holding that the aunt of a nine-year-old girl was the valid and lawful custodian and had rights equal to that of a parent).} 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.\footnote{539 U.S. 558 (2003).}
This constitutional “zone of privacy” protecting 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. 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 as well as the timing of that determination. It is commonly accepted that only the child’s legal parents exercise this right. What is not often considered, however, is how one becomes a legal parent. Legal parentage is a status that can only be conferred via state statute. Therefore, only when the State deems a person to be a legal parent can she exercise the fundamental right to raise a child. In this way, the State decides who may exercise the fundamental right to raise one’s child.

A. THE STATE DECIDES WHO CAN EXERCISE THE FUNDAMENTAL RIGHT TO RAISE ONE’S CHILD

Typically we think of privacy rights — such as the fundamental right to raise one’s child — as merely protecting us from government interference. What is not often considered, however, is the role state statutes play in enabling a person to exercise some fundamental rights. As an example, consider another privacy right, the right to marriage. Whether a person can get married in State A depends on State A’s marriage statute: Does the statute have an age or consanguinity requirement? Does the statute require a blood test before issuing a marriage license? Does the statute allow same–sex couples to marry? If a couple does not meet the requirements of the state statute, they cannot exercise their fundamental right to marriage or experience the constitutionally protected privacy that accompanies marriage.

* As recently as 1980 in *Troxel v. Granville*, the Supreme Court reaffirmed that parents have a fundamental constitutional right to direct the upbringing of their children. 530 U.S. 57 (2000).
* See NEB. REV. STAT. ANN. § 42-102 (requiring both male and female to be the age of seventeen or older to marry); IDAHO CODE ANN. § 32-206 (prohibiting marriage between first cousins).
* See Mont. Code Ann. § 40-1-203 (2007) (requiring females to have a blood test for rubella before obtaining a marriage license); MISS. CODE ANN. § 93-1-5 (West 2009) (requiring marriage license applicant to have a blood test to show applicant is free of syphilis).
* See MINN. STAT. ANN. § 517.03 (West 2009) (prohibiting a marriage between persons of the same sex); Vt. STAT. ANN. Tit. 15, § 8 (defining marriage as “the legally recognized union of two people” and eliminating previous language which limited marriage to one man and one woman).
* In a thoughtful essay, Professor David Meyer has suggested that this limited, though probably existent, constitutional protection of parental status may be analogous to the constitutional treatment of property; the Constitution forbids states from taking property even as it gives states the extensive
The Supreme Court addressed the role state statutes play in providing access to fundamental marriage rights in Loving v. Virginia,\(^7\) Zablocki v. Redhai,\(^8\) and Turner v. Safley.\(^9\) In each of these cases, the petitioners were unmarried persons who were not protesting any governmental interference in their marriage, but rather sought the right to marry in the first place. Petitioners argued that a state statute prohibited them from getting married in violation of their constitutional right.\(^{10}\) In challenging Virginia’s antimiscegenation law, the claimants in Loving did not ask the State to stop interfering in their marriage, but rather asked the State to recognize their relationship as a marriage.\(^{11}\) Similarly, the Wisconsin statute at issue in Zablocki prohibited individuals who owed child support from marrying. The petitioner, therefore, did not want the State to stop interfering in his marriage, he was instead asking the State to allow him to marry in the first place.\(^{12}\) Likewise, in Turner v. Safley, the constitutionality of a Missouri statute that required prisoners to gain approval from prison authorities before they could be married was challenged. In all three cases, the Court held that the State’s failure to provide a statutory mechanism for the petitioner to legally become married violated their fundamental right to marriage.\(^{13}\) Without access to marriage via state statute, the petitioners were unable to exercise their fundamental right to marriage.\(^{14}\) In none of the cases, however, did the Court question the State’s authority to determine who can access marriage or the State’s role in establishing qualifications for accessing this fundamental right. Like marriage, the State grants access to the fundamental right to raise one’s child when it determines legal parents via state statute.

\(^7\) 388 U.S. 1 (1967).
\(^8\) 434 U.S. 374 (1978).
\(^9\) 482 U.S. 78 (1987) (holding that a Missouri regulation which prohibited prison inmates from marrying without permission from the prison superintendent was unconstitutional).
\(^10\) Carlos Ball calls these the “failure to recognize” marriage cases as opposed to the “interference with marriage” cases of Skinner, Poe, and Griswold. Ball, supra note 30, at 1192–94.
\(^11\) Id. at 1197.
\(^12\) Id. at 1199.
\(^13\) 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 Ball, supra note 30, at 1198 (“[T]he failure of the state to act can constitute a violation of the fundamental right to marry.”).
\(^14\) These cases have led scholars like Carlos Ball to conclude that it “is state action that creates the very institution that makes the exercise of the fundamental right to liberty in the context of marriage possible.” Ball, supra note 30, at 1206 (emphasis added).
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 marriage. The State, through a state statute, determines who is a legal parent and therefore, who may access the fundamental right to raise one’s child.³⁵ *Stanley v. Illinois*³⁶ and *Caban v. Mohammed*³⁷ are two Supreme Court cases that dealt specifically with the inability of an adult to exercise his right to raise a 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.³⁸ According to Illinois law, unwed fathers were not legal parents and therefore did not have a constitutional right to raise their children.³⁹ As explained by the Court, although Stanley clearly met the common definition of “parent,”⁰⁰ he was not a legal parent pursuant to Illinois statute and was therefore a stranger to his children under Illinois law.⁰¹ Similarly, in *Caban v. Mohammed*, an unwed, genetic father objected to the adoption of his two children by the mother’s husband.⁰² The genetic father filed suit, arguing that the state statute denied him his constitutional right to raise his child. According to state statute, consent to an adoption was only required from a child’s legal parents and unwed fathers were not legal parents. Therefore, 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, the dispute concerned who the state statute recognized as a legal parent. Without the status of legal parent conveyed under

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³⁵ Carbone & Cahn, *supra* note 2, at 1015 (stating that “[t]he law draws bright line distinctions between parents and non–parents and attributes decision making power exclusively to the former”).
³⁶ 405 U.S. 645 (1972).
³⁷ 441 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 adoption).
³⁸ 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. 645.
³⁹ A person could be a legal parent only if they gave birth to the child, were married to the birth mother, or adopted the child. Stanley did not meet any of those statutory requirements. *Id.* at 648–49.
⁰⁰ “[O]ne who begets or brings forth offspring” or “a person who brings up and cares for another.” Merriam-Webster’s Collegiate Dictionary 842 (11th ed. 2003).
⁰¹ 405 U.S. at 648.
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, not all genetic fathers have fared so well. In Quilloin v. Walcott, for instance, a genetic father tried to exercise his fundamental right to raise his child by preventing the birth mother’s husband from adopting the child. The Court, however, held that the genetic father did not have a constitutional right to raise his child — and could not prevent the child from being adopted — because he was not the legal father. Although there was no dispute that Quillon was the child’s genetic father, he had never “legitimated” the child as required by state law. Therefore, the Court held that the mother was the child’s only legal parent and had “exclusive authority” to exercise the fundamental right to raise one’s child. The Court came to a similar conclusion in Lehr v. Robertson. In that case, a genetic father was denied the right to stop the adoption of his genetic child because he had not “ensured” his constitutional right by comporting with state law and signing a paternity registry. 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 his child from being adopted.

Similarly, a state statute determined who could access the fundamental right to raise one’s child in Michael H. v. Gerald D. In that case, the Court held that the genetic father was not the legal father of the child and, therefore, did not have a constitutional right to raise his child because the state statute provided that the birth mother’s husband was the legal father. The fact that Michael H. was the child’s

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

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

*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.

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

*The genetic mother never conceded that Lehr was the genetic father, but the Court assumed it for the purposes of the case. 463 U.S. at 250 n.3.

*The Court noted that “[i]t is self-evident that parent-child relationships are sufficiently vital to merit constitutional protection in appropriate cases,” *Id.* at 256. The State determines which relationships are “appropriate” and should be granted constitutional protection through State statutes. *Id.*

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

*The Court held that Michael did not have a “right to have himself declared the natural father and thereby to obtain parental prerogatives”* Michael H., 491 U.S. at 126 (emphasis in original). Under the
genetic father did not matter. The state statute determined legal parentage status and granted the right to raise the child to the genetic mother and her husband.\textsuperscript{71} According to the Court, “[a]s a matter of [state] law, [Michael] is not a ‘parent.’”\textsuperscript{72}

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

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 notion 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.\textsuperscript{73} In reality, this belief is untrue. The fundamental right to raise one’s child can only be exercised by a child’s legal parent — and it is the State that creates legal parent-child relationships. 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 can be surprising is because its operation is often invisible.\textsuperscript{74} In every state, for example, a parentage statute renders the woman who gives birth to a child that child’s legal mother.\textsuperscript{75}

California statute, natural fathers did not possess the fundamental right to raise one’s child. Rather, that right was granted by state statute to the husband of the child’s mother. \textit{Id.} The issue in \textit{Michael H.} was whether the marital presumption “infringes upon the due process rights of a man who wishes to establish his paternity.” \textit{Id.} at 113. The Court determined that Michael H. had no due process rights vis a vis his daughter because the State had not granted him the status of legal parent via state statute. According to the Court, “California declares it to be, except in limited circumstances, \textit{irrelevant} for paternity purposes whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband.” \textit{Id.} at 119 (emphasis in original).

\textsuperscript{71} \textit{Id.} at 133 (O’Connor, J., concurring).
\textsuperscript{72} \textit{See Dwyer, Constitutional Birthright, supra note 12, at 763 (“One might think it natural, even divinely ordained, that biological parents become the custodians of a baby.”)\textsuperscript{73} \textit{See Dwyer, Constitutional Birthright, supra note 12, at 762, 764 (acknowledging that the state’s role in creating legal parent-child relationships goes unnoticed and is often taken for granted).\textsuperscript{74} \textit{See James G. Dwyer, A Taxonomy of Children’s Existing Rights in State Decision Making About Their Relationships, 11 Wm. & Mary Bill Rts. J. 845, 859 n.28 (2008) [hereinafter Dwyer, Taxonomy] (providing an extensive list of state statutes that define the woman who gave birth to the child as the legal mother).
“expects” to have a fundamental right to raise one’s child is granted access to that right through state statute. This process happens so often that it has become automatic. The birth mother does not even realize the State’s role in creating a protected legal relationship between her and the child.

Similarly, every state has a statute providing a presumption that the birth mother’s husband is the legal father of the child. In most of the roughly sixty–percent of births in the United States that take place within a marriage, this is usually the desired outcome of the parties involved. 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 the state statute that recognized him as the child’s legal father.

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 genetic fathers were not aware that the fundamental right to raise one’s child was controlled by state statute. Furthermore, when children are conceived by means other than sexual reproduction, the power of state parentage statutes becomes even more apparent. In fact, many states do not even have applicable parentage statutes that designate parents for children conceived via assisted reproductive technology. As a result, the legal parents of such children often cannot be established unless the adults involved seek a court order determining parentage. Even then, courts face difficult decisions in determining who has the fundamental right to raise one’s child in the absence of a state statute. 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 has the constitutional right to raise the child. Therefore, under the law, it cannot be disputed that the child comes first and legal parents come second.

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5 States vary in the application of the presumption and the opportunity to rebut it. Carbone & Cahn, supra note 2, 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)).


8 Concepción by means other than sexual intercourse is covered under the blanket term of “assisted reproductive technology”, or ART. Black’s Law Dictionary defines the process as “[a]ny medical means of aiding human reproduction, especially through laboratory procedures.” Black’s Law Dictionary 139, (9th ed. 2009).
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 describes the fundamental right to raise one’s child as an “obligation” and a “duty” that the State may ultimately take away if not performed effectively. 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 these activities in a certain way even if they choose to exercise those rights. Similarly, a person can never lose the right to marry, even if they have married and divorced several times, nor can they lose the right to procreate, even if they have several children in the foster care system.

The fundamental right to raise one’s child, however, is different. When it comes to this right, the State both giveth and taketh away. If a state statute deems a person to be a legal parent, she is obligated to be the child’s legal parent. Her desire to take on that responsibility is irrelevant. A legal parent is financially responsible for their child and cannot walk away from the responsibilities that accompany that relationship without court approval.

Moreover, the fundamental right to raise one’s child comes with strings attached. The State creates certain legal duties that accompany this right. A person is not granted the fundamental right to raise one’s child so that they can do what they want with that child. Instead, the responsibility of raising a child is entrusted to the person the State presumes is most likely to perform parental duties effectively. In fact, the Court has said that parents have a fundamental right to raise their

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79 Maynard v. Hill, 125 U.S. 190, 211-212 (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”).
80 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”).
82 Francis Barry McCarthy, supra note 14, at 1018-20 (arguing that parental rights are justified on the basis that parents act in their child’s best interest).
children because they are the persons presumed to act in the best interests of the children.\textsuperscript{83}

As such, state parentage statutes create a mutual bargain of sorts. In exchange for fulfilling the duties of parentage, the parent gains the fundamental right to raise one’s child. The parent retains that right only as long as she acts in the best interests of the child by providing the child care and support.\textsuperscript{84} If a parent fails to fulfill her end of the bargain, the “contract” is considered breached and the State may rescind the fundamental right to raise one’s child. In other words, if a person is “obligated” to be a child’s legal parent and then fails to fulfill her parental “duties” to that child, legal mechanisms exist by which the parent will lose her fundamental right to raise one’s child.\textsuperscript{85}

The fundamental right to raise one’s child is an important right granted to the adults whom the State presumes will act in the child’s best interests. This right, however, can only be exercised by adults who are granted the status of legal parents via state statute. This reality begs the question, if states determine who will exercise the fundamental right to raise one’s child, what exactly should the State consider when making that determination?

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 child’s constitutional rights. The child holds those rights from the moment of birth. The child’s parents,

\textsuperscript{83} 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”).

\textsuperscript{84} These parental duties include providing food and housing for the child, as well as codified duties such as vaccinating the child and sending the child to school. See James G. Hodge, Jr. & Lawrence O. Gostin, School Vaccination Requirements: Historical, Social, and Legal Perspectives, 90 Ky. L. J. 831, 867 (2002).

\textsuperscript{85} If the parent stops acting in the best interests of the child resulting in neglect or harm to the 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. Ann. § 48.424 (2009) (stating that after a fact finding hearing, the court may terminate parental rights is 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 Yoder, for example, the Court stated that “[i]t is to 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).
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 full constitutional rights but no legal parent exists to exercise the fundamental right to raise the child — the State is responsible for protecting the child’s constitutional rights. As discussed below, the State obtains the authority to protect the child’s constitutional rights through the doctrine of *parens patriae*. Furthermore, under *parens patriae*, the State is obligated to adopt parentage statutes that guarantee every child’s fundamental 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.” As children are *per se*, unable to care for themselves, *parens patriae* gives the State the power “to protect and promote the welfare of children.” For instance, it is well-recognized that the State uses its *parens patriae* power when it breaks up existing parent-child relationships. Generally, once the State designates legal parents for a child, the legal parents may exercise the fundamental right to raise one’s child free from government interference. If the legal parents cease to act in the child’s best interests, however, the State may intervene in the parent-child relationship. In cases involving child neglect or custody determinations during divorce, the State uses its *parens patriae* power to act as the child’s agent. In this role, the State first examines whether continuing, limiting, or ending the parent-child relationship would be in the child’s

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* Black’s Law Dictionary 1144 (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)).


* 467 U.S. at 265.

* 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, 27-29 (2009) (noting that the State has authority to enforce a child’s liberty interest in freedom from incompetent parental care).
best interests. The State then makes a legal decision about parentage that corresponds with the child’s best interests.

*Parens patriae* not only empowers the State to break up extant parent–child relationships, it also enables the State to create such relationships in the first place. In adoption proceedings, for instance, the State exercises its *parens patriae* power to form legal parent–child relationships. Specifically, when approving adoptive parents for a child, the State again acts as the child's agent. For instance, the State interviews prospective parents, ensures that they meet specific qualifications, and then selects the optimal candidates. In making this life-changing decision for the child, the State is guided by its *parens patriae* obligation to act in the child’s best interests, as the child is incapable of advocating for herself.

In addition to determining parental fitness and approving adoptions, the State exercises its *parens patriae* power when it drafts statutes that determine who becomes a child’s legal parents in the first place. When a child is born she is a juridical person with constitutional rights but, to state the obvious, she is unable to exercise those rights or otherwise care for herself. As a result, at the moment of birth, the State’s *parens patriae* power makes it responsible for protecting and promoting the child’s best interests. The first and most profound act a state must take under *parens patriae* on a child’s behalf is to provide that child with legal

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* See Dwyer, RELATIONSHIP RIGHTS, supra note 90, at 197. 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*. In the infamous case of *Cruzan v. Director, Missouri Department of Health*, for instance, 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.” 497 U.S. 261, 266-67, 285-87, 315-16 (1990).
* Dwyer, *Taxonomy*, supra note 75, at 855 (noting that the state both creates and terminates legal parent-child relationships).
* Dwyer, *Child Protection*, supra note 5, at 412 (discussing state’s *parens patriae* role in adoption proceedings).
* Dwyer, RELATIONSHIP RIGHTS, supra note 90, at 132.
* Lofton v. Sec’y of the Dep’t of Children and Family Servs., 358 F.3d 804, 809-10 (11th Cir. 2004).
* Id.
parents. In other words, under *parens patriae*, the State must ensure a child’s well-being by adopting a dependable, self-executing parentage statute that assigns legal parents to every child. Once the State determines a child’s legal parents, those individuals then assume the responsibility of protecting the child’s welfare and constitutional rights and are required to act in the child’s best interests.

Although the State’s role in parental fitness and adoption proceedings is well-recognized, the State’s exercise of its *parens patriae* power in the formation of legal parent-child relationships 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. As experienced by Stanley, Caban, Lehr, Quilloin, and Michael H, however, absent the operation of the State’s *parens patriae* power, even genetic parents are legal strangers to their children.

It is our position that the State’s *parens patriae* power not only gives it the legal authority to create legal parent-child relationships in the child’s best interests, it also obligates the State to act in certain ways to secure a child’s best interests. Specifically, as discussed below, we argue that the State’s *parens patriae* power requires it to draft parentage statutes that guarantee every child’s fundamental right to legal parents at birth.

B. A 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 must exercise and protect them on her behalf. When a state drafts a parentage statute, it is obligated under *parens patriae* to ensure that the statute does not infringe or limit a child’s constitutional rights.

Specifically, every state’s parentage statute must guarantee a child’s fundamental right to legal parents at birth. To be clear, a child’s fundamental right to legal parents at birth is not new. The laws governing parentage, however, have

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*Dwyer, Child Protection, supra* note 5, 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).

*See infra Part III.A.2.*

until recently rarely required formal recognition of this right. Rather, state parentage statutes have historically provided the vast majority of children with legal parents at birth. Due to new advances in assisted reproductive technology, however, state statutes have proven ineffective at designating some children legal parents at birth. The resultant legal battles have exposed the inadequacy of current parentage statutes and, in so doing, have called for the formal recognition of children’s fundamental right to legal parents at birth. 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. In the right to privacy cases concerning marriage, parenting, procreation, and sexual intimacy, the Court has repeatedly held up the family as the paradigmatic example of an intimate relationship protected by the right to privacy. In so doing, the Court has recognized that the family is of central importance to an individual’s life experience. In fact, 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.”

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101 See id.
The central role family plays in a person’s life impacts children as well as adults. 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.” As a result, it is the parent-child relationship that the Court protects through the right to privacy. Therefore, when it comes to the family, the right to privacy is best understood not as an individual right, but as a relational right. All individuals — adults and children — have privacy rights that protect their intimate familial relationships. This constitutional protection extends to both persons so that they may form a private, intimate relationship with each other. The Constitution guarantees both the parent and the child the right to privacy by ensuring that each family member can form a relationship with the other. At birth the child has a substantive due process privacy right to form intimate, familial relationships. Under its parens patriae power, the state must guarantee this “precious” right of the child.

2. The Right to Intimate Association

In addition to the Substantive Due Process clause, the closely aligned right to intimate association also gives rise to a child’s fundamental right to legal parents at birth. The Supreme Court first recognized the right to intimate association in the seminal case, Roberts v. United States Jaycees. 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.”

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106 Radhika Rao, Reconceiving Privacy: Relationships and Reproductive Technology, 45 UCLA L. Rev. 1077, 1078 (1998) (“[The] right to privacy is not an individual right but a right to freedom within intimate relationships.”).
107 See Stanley, 405 U.S. at 651.
108 See Patel v. Scarles, 305 F.3d 130, 134 (2d Cir. 2002) (noting that United States Jaycees Court relied on substantive due process cases in support of right to intimate association); Nat’l Ass’n for Advancement of Psychoanalysis v. California Bd. of Psychology, 228 F.3d 1043, 1050 (9th Cir. 2000) (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) (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) (citing Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984)).
110 Id. at 629. 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 (noting that “familial relationships . . .
The Court provided two rationales for the 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. Second, the Court noted the central role that such relationships play in defining one’s identity. In so doing, the Roberts Court recognized that—like the fundamental right to marry and to raise one’s child—the right to intimate association derives from the Fourteenth Amendment’s protection of personal liberty.

Like children’s Substantive Due Process right to privacy, children are born with the right to intimate association. The state must protect both rights under its parens patriae power.

3. The Fundamental Right to Legal Parents at Birth

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.”(quoting Roberts, 468 U.S. at 620); Tillman v. City of West Point, Miss., 953 F. Supp. 145, 150 (N.D. Miss. 1996) (noting that friendships 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. Florida Highway Patrol, 928 F. Supp. 1153, 1158 (M.D. Fla. 1996) (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 distinct to family relationships.”); Louisiana Debating & Literacy Ass’n v. City of New Orleans, 42 F.3d 1483, 1496–99, n.23–38. (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 more and more willing to protect non-traditional relationships.

111 468 U.S. at 618.
112 Id. at 619.
113 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, in his seminal article, legal scholar Kenneth Karst argued 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,
At the moment of birth, a child possesses a Substantive Due Process right to privacy, which includes the right to form intimate, familial relationships, as well as a right to intimate association. When the State acts under its parens patriae power, it must protect both of these rights. As discussed supra, the first and most profound action a state takes under its parens patriae power is drafting parentage statutes. These statutes designate a child’s legal parents, thereby determining the child’s first intimate, familial relationships.

A child’s most important and intimate familial relationships is with her parents. Without parents, a child can neither subsist nor thrive. A child needs parents to preserve her liberty and protect her rights. Furthermore, parents are central to a child’s life experience. Without the emotional attachment that children derive from their relationship with their parents, children may experience difficulty defining their identity. As such, a child’s life and well-being is dependent upon having a stable and secure legal relationship with her parents. This is the most fundamental need a child has, giving rise to a substantive due process and intimate association right to legal parents at birth.

The State is obligated to protect a child’s fundamental right to legal parents at birth under its parens patriae power. To accomplish this task, the State must provide the child a legally protected parent–child relationship at birth. This obligation exists regardless of whether the child was born into a marriage or conceived though sexual reproduction or assisted reproductive technology. The State fulfills this obligation by creating a parentage statute that automatically designates a child’s legal parents at birth.

The next section discusses who a state must designate as a child’s legal parents. If the State is obligated to provide a parentage statute in order to protect a child’s fundamental right to legal parents at birth, is the State obligated to designate

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114 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 School Sys., 84 F. App’x 534, 544 (6th Cir. 2003) (noting that the right to intimate association attaches to familial relationships like those between father and daughter); Patel v. Scarles, 305 F.3d 130, 136 (2d Cir. 2002) (noting that the “parent child relationship [is] obviously among the most intimate . . . as to warrant the highest level of constitutional protection.”).

115 See Dwyer, Child Protection, supra note 5, at 416 (“[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.”).
any persons in particular as the child’s legal parents? We argue that because certain persons are better suited to fulfill a child’s constitutional rights, the State must create parentage statutes that select those persons to be a child’s legal parents.

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, including the fundamental right to legal parents at birth. In addition, the State, as parens patriae, is obligated to guarantee the child’s rights. The first act the State takes under its parens patriae obligation is to designate legal parents for every child at birth pursuant to its parentage statute. The State is not free, however, to designate anyone to be a child’s legal parent. The State cannot, for example, sell legal parentage status to the highest bidder or give it away in a lottery. Similarly, the State cannot grant legal parentage status to certain persons in an effort to bolster certain social mores or discourage relationships thought to be immoral. Instead, the State is obligated to guarantee the child’s fundamental right to legal parents at birth by designating those persons that the child would choose to be her legal parents if she was able to choose for herself as the child’s legal parents. In other words, the state must grant legal parentage to the persons that are most likely to act in the child’s best interests throughout her minority.

The idea that parentage statutes should designate the persons presumed most likely to act in the child’s best interests as legal parents is not new. Today,
state statutes provide legal parents at birth to most children and the Court has already said that legal parentage should be awarded to those most likely to act in the child’s best interests. The current system of determining legal parents fails, however, due to several reasons. First, it is not rooted in the child’s fundamental right to legal parents at birth. The current system is based on a series of presumptions that often serve to meet society’s values or adults’ expectations rather than to fulfill the child’s fundamental right. Second, one of the cornerstones of the current system — the marital presumption — is based on outdated social norms and, in some cases, results in parentage determinations that violate the child’s fundamental right to legal parents at birth. Third, the current system is not totally functional at the time of a child’s birth. Court dockets are filled with cases in which legal parentage is disputed, particularly in cases that involve children conceived through assisted reproductive technology. 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.

In order to address the failings of the current system and to guarantee every child’s fundamental right to legal parents at birth, we recommend three changes to state parentage statutes. First, all presumptions must be removed from parentage statutes. Guaranteeing every child’s fundamental right to legal parents at birth requires that only clear determinations of legal parentage be included in parentage statutes. Relying on presumptions to determine paternity results in a system that is subject to social pressure and judicial discretion in violation of the child’s fundamental right to legal parents at birth. Second, legal parentage of children conceived through sexual reproduction should be granted to the child’s genetic parents, who are the persons most likely to act in the child’s best interests throughout her minority. In addition, basing the legal parentage of children conceived through sexual reproduction on the determinative factor of a genetic relationship will eliminate any unnecessary doubt regarding parentage. Third, legal parentage of children conceived through assisted reproductive technology should be vested in the child’s intended parents. Just as genetic parents are most likely to act in the best interests of children conceived through sexual reproduction, the

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120 See supra Part III.B.
intended parents are most likely to act in the best interests of children conceived through assisted reproductive technology.

A. THE END OF PARENTAGE PRESUMPTIONS

Parentage statutes exist, in part, to avoid judicial proceedings and make the process of determining parentage as clear and efficient as possible at birth. Indeed, it would be impossible to hold a fact-specific hearing every time a child is born to decide who is most likely to act in that child’s best interests. 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 there to be a definitive, self-executing statutory system of determining a child’s legal parents that can be applied at birth for every child.

For this reason, states must eliminate presumptions for determining parentage. Such presumptions give rise to disputes in which courts must consider adult behavior and social custom rather than the child’s right when determining parentage. The Michael H. case presents a good example of the uncertainty such presumptions introduce into parentage determinations. When Michael H. was finally decided by the Supreme Court, Victoria — the child involved in the case — was eight years old and was living with her mother, Carol; her mother’s husband,

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122 No one would benefit from a system that would determine 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 MARK A. ROTHSTEIN ET AL. EDs., GENETIC TIES AND THE FAMILY 143, Johns Hopkins University Press (2005) (explaining that social science research demonstrates that children need permanent, nurturing parents beginning at early infancy); 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 issues later in life).

123 “Under this type of after-the-fact decision-making, parental status remains uncertain until the day of the decision.” June Carbone, The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity, 65 LA. L. REV. 1295, 1301 (2005).
Gerald, and her two half-siblings born to Carol and Gerald.\footnote{Michael H. v. Gerald D., 491 U.S. 110, 115 (1989).} Given these circumstances, it is not at all surprising that the Court determined that Gerald was Victoria’s legal father by applying the marital presumption. Consider, however, what would have happened if a court had determined Victoria’s legal father at or very near her birth. At that time, Carol was estranged from her husband Gerald and was living with Michael, the genetic father.\footnote{\textit{Id.} at 114.} A court faced with those facts could have just as easily applied the presumption favoring genetic fathers and determined Michael to be the legal father.\footnote{See Carbone & Cahn, \textit{supra} note 3, at 1049-50, for a further discussion of the possible different outcomes if Michael H. had been decided based on the societal ideals of different eras.} 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 legal limbo for eight years without a legal father.

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. In addition, the fundamental right to legal parents at birth requires the State to designate the persons most likely to act in the child’s best interests as her legal parents, since that is what the child would do if she could exercise her rights on her own behalf. In order to fulfill this constitutional obligation, state parentage statutes must award the genetic parents the status of legal parents for all children conceived through sexual reproduction, must eliminate the marital presumption, and must 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 for children conceived through sexual reproduction.\footnote{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 the subject.} In fact, all fifty states have a statute providing that the
woman who gives birth to a child is that child’s legal mother.\textsuperscript{128} 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 genetic mother and, thereby, became the legal mother as well.\textsuperscript{129}

The assumption that legal parentage should follow from a genetic relationship is also found in the paternity presumptions of every state. The grandfather of all paternity presumptions — the marital presumption — provides that the birth mother’s husband is the legal father.\textsuperscript{130} This determination is based on the presumption that the birth mother’s husband is the genetic father.\textsuperscript{131} Historically, the marital presumption could only be rebutted if it was found that the husband was “beyond the four seas” during the time when conception could have occurred and, therefore, could not have been the genetic father.\textsuperscript{132} The 1973 Uniform Parentage Act ushered in a number of additional presumptions allowing for genetic fathers of non–marital children to gain the status of legal parent.\textsuperscript{133} These additional


\textsuperscript{130} Marsha Garrison, \textit{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”).

\textsuperscript{131} Garrison, supra note 129, at 883 (describing the marital presumption as the “primary rule governing the parenthood of children born to a married woman”).

\textsuperscript{132} Carbone & Cahn, supra note 2, at 1050 (explaining that the marital presumption emerged when genetic ties to fathers were not provable).

\textsuperscript{133} 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. See Goodright v. Moss, 2 Cowp. 591, 98 Eng. Rep. 1257, 1258 (1777). See also Meyer, supra note 127, at 127 (describing the presumption as strong and only overcome if the husband and wife were apart during the likely period of conception).

\textsuperscript{134} The 1973 Uniform Parentage Act presumes paternity in five distinct relationship–based
presumptions, like the marital presumption, were meant to grant legal paternity to the man presumed to be the genetic father of the child.\textsuperscript{134}

Thus, throughout history every state has sought to award parental status to the genetic mother and father of children conceived through sexual reproduction. Although some commentators have questioned the over-riding role of genetics in determining legal parentage, there is wide agreement that genetic relationship is the most powerful factor determining whether an adult is likely to act in a child’s best interests throughout her minority. Social science also provides significant support for this proposition.

In light of these circumstances, 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.\textsuperscript{135} Acting as \textit{parens patriae}, the State can predict that a child conceived through sexual reproduction would choose her genetic parents to be her legal parents (if she could choose on her own behalf), since they are the persons most likely to act in her best interests. As a result, 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.\textsuperscript{136}

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 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(1)–(5) (1973).

\textsuperscript{134} See Meyer, \textit{supra} note 127, 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). 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.

\textsuperscript{135} 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 State designate the genetic parents as the legal parents is a definitive determination that is based on a 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.

\textsuperscript{136} 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
As for legal maternity, states can continue to use birth as proof of 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, therefore, should be designated the legal mother.\(^{137}\) As for legal paternity, the current presumptions seek to determine genetic paternity, but often fail to do so. Moreover, genetic testing provides a much more accurate and final determination of a genetic relationship between a man and child. Therefore, as argued \textit{infra}, the State must require proof of genetic relationship through DNA testing before awarding legal paternity.

2. The End of the Marital Presumption

It was argued \textit{supra} that parentage presumptions, including the marital presumption, are unconstitutional because they introduce uncertainty into the parentage system in violation of a child’s fundamental right to legal parents at birth. It was also argued \textit{supra} that states must designate the genetic parents of children conceived through sexual reproduction as the legal parents. Although these two reasons are enough to find the marital presumption unconstitutional, due to its history and widespread use, we address it here to demonstrate that the social goals of the marital presumption are no longer in the child’s best interests.

In the beginning, the marital presumption sought to protect the husband and his family from the specter of infidelity and social disapproval.\(^{138}\) The marital presumption, however, also served to protect the child from the harsh 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.\(^{139}\) Therefore, to the extent the marital

\(^{137}\) When a child is conceived through sexual reproduction, assigning a mother to a child at birth is a relatively clear legal proposition. The act of childbirth itself leaves little dispute as to who is the genetic mother of the child. \textit{See} Nguyen v. I.N.S., 533 U.S. 53, 62 (2001) (stating that when determining parentage of the mother, “the relation is verifiable from the birth itself.”); Meyer \textit{supra} note 127, 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”).

\(^{138}\) \textit{See} Theresa Glennon, \textit{Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity}, 102 W. Vir. L. Rev. 547, 563 (2000) (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.”).

\(^{139}\) MARY ANN MASON, \textit{FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS} (1994).
presumption protected the family unit by maintaining the image of marital fidelity — even when such harmony did not exist — it served the child’s best interests. 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 is in any way correlated to, much less a cause of, that positive outcome. Moreover, there is ample evidence that the marital presumption has been detrimental to countless children.

Today, more than fifty-percent of marriages fail, suggesting that the marital presumption no longer serves as a social balm to an ailing marriage. Pregnancy outside of marriage, divorce, and adultery are now common occurrences and,  

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140 Baker, supra note 46, at 23–24 (2004) (noting that 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 protections, the maintenance, and the education of the children should belong” (quoting 1 Blackstone Commentaries 446–47)). In 1824, Justice Story wrote: “As to the question of the right of the father to have 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 (C.C.R.I. 1824) (No. 15,256).

141 See, e.g., Wade Horn, Take a Vow to Promote Benefits of Marriage, WASHINGTON TIMES, Nov. 2, 1999. (“Even after controlling for differences in income, children who live with their married parents are two times less likely to fail at school, two to three times less likely to suffer an emotional or behavioral problem requiring psychiatric treatment, perhaps as much as twenty times less likely to suffer child abuse, and as adolescents they are less likely to get into trouble with the law, use illicit drugs, smoke cigarettes, abuse alcohol, or engage in early and promiscuous sexual activity. One is hard pressed to find a single indicator of child well-being which is not adversely impacted by divorce or being born out-of-wedlock.”).

142 See Carbone & Cahn, supra note 2, 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”).

143 See, e.g., Rothstein, supra note 122, at 133 (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).

arguably, socially accepted. This 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% 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.\(^{145}\)

It is our contention that the marital presumption, when applied today, protects the husband from social embarrassment, protects the wife from having to be honest with her husband about an extra-marital affair, and serves the State’s interest in propping up the two-married-parent 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 parent’s at birth.\(^{146}\) Today, a child’s primary need for a father is not to protect her from the stigma of illegitimacy at birth or even to ensure food and shelter during her youngest and most vulnerable years. Today, children need paternal support and nurturing throughout their eighteen years of minority and beyond. As argued supra, this support is more likely to come from a child’s genetic father than from the mother’s husband.

Therefore, the benefits of definitively 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 small number of marriages that must confront a woman’s infidelity just as a newborn child enters the world. First, eliminating the marital presumption will create a legal relationship between the child and a man who will always and forever be her genetic father. Second, clearing up any doubts as to paternity at birth will prevent later attempts to disclaim paternity upon divorce.\(^{147}\) Finally, there is also reason to believe that such clarity could result in greater commitment from the father.\(^{148}\) These arguments make it is difficult to


\(^{146}\) See Carbone & Cahn, supra note 2, at 1012 (arguing that “[i]dentifying the biological father at birth may undermine the mother’s existing partnership, but failing to inquire about paternity at birth may prevent the child from establishing a relationship with an adult who is committed to her and not just her mother. In an era of readily available divorce and DNA testing, we need to reexamine the policies likely to promote permanent ties between children and the adults in their lives”).

\(^{147}\) The seriousness of this issue is demonstrated by the fact that many states and the ALI’s Principles of the Law of Family Dissolution found 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 Meyer, supra note 127, at 137–38.

\(^{148}\) See, e.g., Meyer, supra note 127, at 127 (recognizing “recent scholarship in the field of
accept that a parent-child relationship that is based on a legal fiction is in the child’s best interests.¹⁴⁹

3. DNA Testing

In order to avoid the legal fiction sometimes created by paternity presumptions and to guarantee the fundamental right to legal parents at birth, states must recognize the genetic parents of children conceived through sexual reproduction as the legal parents. Although the current parentage system seeks to grant legal parentage to the genetic parents of children conceived through sexual reproduction, the system relies on a series of presumptions in which states assume certain people are the genetic parents. Using such unreliable and rebuttable presumptions is no longer warranted. Today, inexpensive genetic tests are available that can determine genetic relationship with an accuracy rate of ninety-nine percent.¹⁵⁰ As such, we no longer need to rely on presumptions as predictors of a genetic relationship. To be clear, we are calling for genetic testing to take place at, or as near as possible to, the time of birth to determine legal paternity. Although such testing may sound invasive, it is, in reality, not all that demanding. Certainly it is a less invasive and cumbersome method of proving a genetic relationship with a child than the mother must endure. Moreover, it will be relatively easy to implement.

For a father, the birth of his child is significant moment in his life and is an event many fathers refuse to miss.¹⁵¹ As a result, six in seven paternity determinations occur voluntarily — almost all of which are acknowledged at the evolutionary biology suggesting that parents may tend to invest more in the care of their own genetic offspring”).¹⁴⁹ See also Carbone & Cahn, supra note 2, 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”).¹⁵⁰ See Nancy E. Dowd, Parentage at Birth: Birthfathers and Social Fatherhood, 14 WM. & MARY BILL RTS. J. 909, 911 (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”).¹⁵¹ See Dowd, supra note 150, at 913. 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., New York University Press 1998).
hospital at the time of the child’s birth.\textsuperscript{132} Since so many men are present at that
momentous event and willing to immediately acknowledge their paternity, a simple
genetic test could be easily administered at the hospital. An inexpensive blood test
would take just minutes and would establish paternity right away. As social science
suggests, a man’s process of mentally assuming the role of a father is comprised of
ritualistic and ceremonious acts.\textsuperscript{133} In that respect, the introduction of a blood test
to solidify paternity may even further strengthen the father-child bond by creating a
clear and definite ritual for each father at the birth of his child.\textsuperscript{134}

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 its minority. Instead, it is the genetic
father who 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 then, 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.\textsuperscript{135}

C. CHILDREN CONCEIVED THROUGH ASSISTED REPRODUCTIVE
TECHNOLOGY

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

\textsuperscript{132} See Dowd, supra note 150, at 919–20 (discussing paternity establishment for non-marital
children).

\textsuperscript{133} 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 his co-workers. See
Richard K. Reed, Birthing Fathers 12-21 (Rutgers University Press 2005).

\textsuperscript{134} 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 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
2 at 1069.

\textsuperscript{135} Carbone & Cahn, supra note 3, at 1021 (explaining that the decision to bear children is no longer
tightly entwined with the decision to marry). \textit{Id.} 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).
children conceived through assisted reproductive technology (ART). First, each state must adopt statutory provisions that actually provide legal parents for ART children. Second, those statutory provisions must identify the intended parents as the legal parents of children conceived through ART.

1. **Comprehensive ART Parentage Statutes**

States must have clear parentage determinations at birth for all children, including those conceived through ART. Up to five parties may be involved in the ART process and any uncertainty regarding parentage often leads to lengthy litigation. Therefore, any delay in determining parentage due to the lack of a parentage statute that applies to ART children is a violation of a child’s fundamental right to legal parents at birth.

Currently, the states’ inclusion of ART children in their parentage statutes is grossly inadequate. Although many states have parentage statutes that designate the legal parents of children conceived through alternative insemination, these statutes apply to such a narrow set of circumstances, they actually provide legal parents to only some of the children conceived through alternative insemination. Even fewer states provide statutory mechanisms to determine legal parentage of children born to gestational carriers. Some states actually prohibit gestational carrier agreements altogether. It is beyond the scope of this article to take issue with states’ efforts to discourage surrogacy among adults; however, we do argue that all states are obligated to provide all children legal parents at birth — even those born to gestational carriers. Even the 2000 Uniform Parentage Act, which includes provisions for children conceived through ART, fails to provide legal parents for all ART children. As a result, ART children’s fundamental right to legal parents at birth goes unmet in a majority of states.

When ART children are born in states without adequate parentage statutes a variety of situations 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

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156 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 form sperm and egg donors. See e.g. *In re marriage of Buzzanca*, 61 Cal. App. 4th 1410 (1998).

— but, again, neither of those legal parents intend to raise the child. In cases where conception occurred through alternative inseminations, the birth/legal mother is likely to be the person who intends to raise the child, but her partner — who in every way performed the functions of a parent before conception and during gestation and intends to raise the child — 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 all-important parent-child relationship is at grave 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 those children’s legal parents. When most ART children are conceived, one or both of the people who intend to raise the child are not genetically related to the child. Indeed, anonymously donated gametes are often used with the intention that the identity of one or both of the genetic parents never be known. Instead, it is the intended parents who desired to have the child, who sought out ART to conceive the child, and planned to care for and protect the child throughout her minority. 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.

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158 As a result, where genetic relationship is the best predictor of a long-term relationship between a parent and child when the child is conceived through sexual reproduction, when children are conceived through ART genetic connections are less relevant. Lori B. Andrews, Assisted Reproductive Technology and the Challenge for Paternity Laws, in MARK A. ROTHSTEIN ET AL. EDS., GENETIC TIES AND THE FAMILY 219, Johns Hopkins University Press (2005) (noting that ART has causes states to rely less on genetics and more on the intent of the parties when determining the legal parents of ART children).

159 John Hill Lawrence, supra note 1, 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”).
States 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.

### IV. CONCLUSION

Under the law, there can be no doubt that the child comes first and legal parents come second. 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 the fundamental right to raise one’s child. The state, therefore, exercises an enormous amount of power and discretion when it drafts the parentage statutes that designate who may become a legal parent. The state’s powerful role in determining who exercises the fundamental right to raise one’s child, however, is not unprecedented. Rather, through statutes, states routinely create qualifications and other criteria that determine who exercises fundamental constitutional rights, as demonstrated by state statutes that govern who may marry.

Recognition of the state’s influential role in prescribing who may become a legal parent — and who may exercise the accompanying fundamental right to raise one’s child — requires careful review of states’ current methods of caring out this task. Indeed, an understanding of the state’s critical role provides legal scholars and others an important opportunity to suggest new, more effective, ways in which states may fulfill this role. We argue 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 craft parentage statutes that satisfy children’s fundamental right to legal parents at birth.

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. Therefore, when a state drafts the parentage statutes that create 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. Otherwise, state parentage statutes risk infringing upon the constitutional rights that protect children from the moment of birth.

The most important right that the state must consider when drafting its parentage statutes is children’s fundamental right to legal parents at birth. Although this right is not new, the state has been under no pressure to acknowledge it until recently, due to new developments in assisted reproductive technology. 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, protect her rights, and define her identity. Under its _parens patriae_ power, the state must ensure that its parentage statutes satisfy this right.

In order to guarantee children’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 who a child’s legal parents will be. Second, the state 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, the state 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.