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Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons

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A CONSTITUTIONAL BIRTHRIGHT: THE STATE, PARENTAGE, AND THE RIGHTS OF NEWBORN PERSONS

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State parentage laws, dictating who a newborn child's first legal parents will be, have been the subject of constitutional challenges in several U.S. Supreme Court and many lower court decisions. All of those decisions, however, have focused on constitutional rights of adults (especially unwed biological fathers) who wish to become, or to avoid becoming, legal parents. Neither courts nor legal scholars have considered whether the children have any constitutional rights that constrain legislatures and courts in deciding which adults will be their legal parents. If a state enacted a parentage law that said, for example, that any child born to a birth mother who already had two children would be placed in a parent-child relationship at birth with applicants for adoption rather than with the birth mother, would that infringe on any constitutional right of the child? Or would the birth mother be the only person with standing to challenge the law? Such a law would be purely hypothetical in the U.S. (though not far from reality in some other parts of the world). But the actual current parentage laws in the United States, which confer legal parent status in almost all instances on biological parents, with no regard for fitness, also have a seriously adverse affect on a subset of children—specifically, children whose birth parents are manifestly unfit to raise children, as evidenced by serious child maltreatment histories, criminal records, substance abuse, mental illness, and/or imprisonment. This Article is the first to consider whether states violate a constitutional right of some children when their parentage laws consign the children to legal relationships with, and into the custody of, adults whom the state knows to be unfit. It identifies opportunities for children's advocates to advance constitutional challenges to state parentage laws as applied to newborn offspring of adults unfit to parent, and it presents a robust legal theory to underwrite such challenges.

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INTRODUCTION

A significant percentage of children are born to birth parents who are unfit to raise children—evidenced by histories of serious child abuse, violent felonies, mental illness, and/or chronic substance abuse—and who are highly unlikely to become fit within a reasonable period after their offspring's birth.[1]

1. Estimating the percentage or number of birth parents who fall under the description "manifestly unfit" is difficult. Because states do not seek to identify such birth parents, they do not amass such statistics, and no private organization or individual has done so either. However, several relevant figures suggest that the number is substantial. Roughly 40 percent of the 300 million U.S. population is of reproducing age. *See* U.S. CENSUS BUREAU, 2006 AMERICAN COMMUNITY SURVEY, tbl. S0101. Age and Sex, http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2006_EST_G00_S0101 (listing 42.2 percent of the population as being between the ages of 15 and 44). In 2007, an estimated 9.3 million people in the U.S. used illicit drugs other than marijuana. SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., DEP'T OF HEALTH AND HUMAN SERV., RESULTS FROM THE 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 17, http://www.oas.samhsa.gov/nsduh/2k7nsduh/2k7Results.pdf. In 1999, researchers estimated

Congress has, in the past dozen years, pushed states to be more proactive in protecting these babies from maltreatment by conditioning certain federal grants on states making various changes to their child protection laws. In particular, Congress has pushed states to terminate parental rights immediately, without first undertaking extensive rehabilitation efforts, in the worst cases of birth parent unfitness, so that the babies can enter good adoptive homes.[2]

However, state legislatures have not enacted all the statutory provisions necessary to accomplish this aim, and the state institutions charged with administering child protection laws—namely, child protection agencies and juvenile courts—are highly resistant to terminating parental rights before children incur serious maltreatment and/or prolonged foster care stays.[3] In addition, following the Supreme Court's decision in *Deshaney v. Winnebago County Department of Social Services*,[4] which rejected on state action grounds a constitutional tort suit against a negligent child protection agency, there is no constitutional lever to force child protection agencies to act more aggressively, pursuant to child maltreatment laws, to protect newborns at high risk of maltreatment. In short, the problem of protecting babies born to grossly unfit parents appears intractable.

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that several million children have parents who are drug addicts and twenty-eight million have alcoholic parents. *See, e.g.*, NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE, COLUMBIA UNIV., NO SAFE HAVEN: CHILDREN OF SUBSTANCE-ABUSING PARENTS, at ii (1999), http://www.casacolumbia.org/absolutenm/articlefiles/379-No%20Safe%20Haven.pdf. Roughly 1 percent of all American adults are in prison. *See* PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf. A 2000 report estimated that over half of State and Federal prisoners are parents of minor children. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN 2 (2000), http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf. It is estimated that roughly forty thousand women enter prison each year, 5 percent of whom, or two thousand women, are pregnant at the time of entry. *See* Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES, March 2, 2006, *available at* http://www.nytimes.com/2006/03/02/national/02shackles.html. Child protective services agencies identify almost a million maltreated children each year. *See* ADMIN. ON CHILDREN, YOUTH AND FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERV., CHILD MALTREATMENT 2006, at 25 (2008), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm06/chapter3.htm#subjects. In 2006, roughly fifteen hundred children died of abuse or neglect. *Id.* at 65. Almost 14 percent of the fatalities were caused by parents who had been subject to child protection intervention in the prior five years. *Id.* at 67.

2. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (2008) (codified in 42 U.S.C. §§ 673b, 678, 679b (2000)). For presentation of the empirical literature on parental unfitness and the effects of maltreatment on infants, and for discussion of state and federal laws governing child protection and their shortcomings, see James G. Dwyer, *The Child Protection Pretense: States' Continued Consignment of Babies to Unfit Parents*, 93 MINN. L. REV. 407 (2008).

3. For presentation of the studies documenting social worker and judicial resistance to termination of parental rights, see *id.* at 146–51, 159–61.

4. 489 U.S. 189 (1989).

What legal advocates for children and legal scholars have overlooked, however, is the potential for attacking the problem further upstream, by advancing a constitutional challenge not to child protection laws or agency inaction, but to parentage statutes. Enactment and enforcement of state statutes conferring legal parent status on biological parents without regard to fitness, thereby forcing a substantial number of newborn babies to be in intimate associations with people the state knows to be unfit to parent, clearly constitutes state action and is the root cause of great harm to these children. Newborn babies must have a constitutional right against state legislatures placing them into legal family relationships with adults whom the state knows (by virtue of state child abuse and criminal registries, reports of fetal drug exposure, and prison records) to be dangerous to them.

In fact, much legal scholarship and judicial decisionmaking has been devoted to the constitutionality of parentage laws. But almost all of it has focused on the constitutional rights of adults: either adults who want to be legal parents but are denied the opportunity, or adults who do not want to be legal parents yet have that status thrust upon them.[5] What little consideration there has been of children's constitutional rights in connection with parentage has been limited to older children who seek but are denied legal protection for an already established and healthy social parent-child relationship that they have with an adult who is not a legal parent.[6] There has been no consideration of whether newborn children have any constitutional rights in connection with this legal action that largely determines the fundamental quality of their entire lives, including a right to avoid a legal parent-child relationship that is very bad for them, leaving them free to enter into a legal relationship with adults who would be good caregivers. This Article is the first to do so.

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5. *See, e.g.*, Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 453–66 (2007); Kari E. Hong, *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 63–76 (2003); David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753 (1999); Scott A. Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 SETON HALL LEGIS. J. 363 (1996); Philip S. Welt, *Adoption and the Constitution: Are Adoptive Parents Really "Strangers Without Rights?,"* 1995 ANN. SURV. AM. L. 165; Amy Wilkinson-Hagen, *The Adoption and Safe Families Act of 1997: A Collision of Parens Patriae and Parents' Constitutional Rights*, 11 GEO. J. ON POVERTY L. & POL'Y 137 (2004).

6. Several court decisions sparked such scholarly discussion. For example, in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion), Justice Scalia's plurality opinion tersely dismissed a claim on behalf of a child in a paternity case that she had a right to receive legal recognition for her relationship with her biological father, as against a state law creating an irrebuttable presumption that her mother's husband was the sole legal father. *Id.* at 130–31. In cases where biological fathers whose parental rights were not properly terminated petitioned to undo an adoption, state courts have entertained and rejected arguments that the child in question had a constitutional right to remain in a relationship with and in the custody of the adoptive parents. *See* Petition of Kirchner, 649 N.E.2d 324, 338–39 (Ill. 1995); *In re* Baby Girl Clausen, 502 N.W.2d 649, 665 (Mich. 1993).

So imagine this case: Michele was just born. Her birth mother Jane has struggled with a serious mental illness for many years and has mostly lived on the street or in abandoned buildings. Four months ago a court terminated her parental rights as to two other children, because she had abused and neglected them and then failed to respond to rehabilitative services provided by the local child protection agency. She is no better prepared to parent today; in fact, the termination threw her into a state of deep despondency and suicidal ideations. Michele's biological father John went to prison six months ago to serve a three year sentence for sexually molesting Michele's older sister when the sister was four years old. He has been drug addicted for many years, and his rights with respect to that older sister were terminated. Jane's and John's extended family members live in the drug- and crime-infested neighborhood where Jane and John grew up, and many of them are addicts also. The local adoption and social services agencies have long lists of highly qualified couples wanting to adopt a newborn baby.

The question this Article addresses is whether a state violates a constitutional right of Michele by enacting and implementing a law that places her at the outset of her life into a legal parent-child relationship with Jane and John rather than with one of the couples who has qualified for adoption. That is, in fact, what would happen in any state today.[7] State statutes would also confer on Jane and John, as Michele's legal parents, a presumptive right to physical custody of her, thus requiring birthing facility personnel to hand over the baby to Jane (rather than to an adoption agency) for her to take home, absent child protection agency intervention.[8] Thus empowered by state statutes, Jane would almost certainly take Michele from the hospital to live with her, and Michele would then be at great risk for serious abuse and neglect.[9]

Moreover, after forcing Michele to be in this dependent relationship with someone demonstrably unfit to parent, the state will do little or nothing to prevent or mitigate the expected damage to her. Most likely the local child protection agency would not even be aware of Michele's birth, and even if it were aware it would have no clear legal authority to do anything to protect Michele until after she incurs abuse and/or neglect.[10] And so, as a result of the

7. *See infra* Part I. The existence of a better alternative set of parents is important to my assessment of the state's placement of a baby into a legal and custodial relationship with unfit parents. I assume throughout the article that demand for adoption of newborns would remain high. Were the demand to evaporate, the assessment would differ in significant respects. However, the basic idea that babies have a constitutional right that constrains state decisionmaking about their parentage and custody, requiring the state to act solely as agent for the children in making these decisions, would still apply.

8. *See infra* Part I.

9. *See* Dwyer, *supra* note 2, at 442–47.

10. *See id.*

state's statutes consigning her to a legal relationship with Jane and John and to the custody of Jane, Michele will likely experience material and affective deprivation, the trauma of abuse, and the travails of foster care, in turn depriving her of a secure attachment with a consistent, nurturing caregiver and causing her to suffer serious neurological, psychological, emotional, and social damage.[11] This early damage from deficient parenting, coupled with growing up in an inhospitable and unstable environment, will severely undermine Michele's life prospects. Her childhood, adolescence, and adulthood will likely be marred by numerous dysfunctions, such as cognitive impairment, delayed language acquisition, poor school performance, chronic illness, emotional withdrawal, indiscriminate socializing, hyperactivity, lack of impulse control, failure to internalize moral norms, depression, anxiety, juvenile delinquency, running away from home, suicide, substance abuse, teen pregnancy, prostitution, adult criminality, unemployment, incurring or inflicting partner violence, and/or maltreatment of her own children.[12]

Thus, current state parentage statutes dictating the family lives of babies born to manifestly unfit birth parents predictably and substantially endanger babies' wellbeing and severely undermine their chances for a happy and fulfilling life. States do this to babies even though they could avoid doing so without great difficulty and could in addition save taxpayers a lot of money by leaving such children free for family formation with different, fit parents at the outset.[13] Might it be unconstitutional for the state to do this to babies?

As noted above, legal scholars have not asked this question. The Supreme Court has addressed numerous types of constitutional claims on behalf of adults in connection with parenthood—rights to have adult consensual sex,[14] to conceive or not to conceive children while having sex,[15] to prevent a child once conceived from being born,[16] to become a legal parent to one's offspring,[17] to

11. On the effects of attachment failure and child maltreatment, see *id.* at 415–24. On the correlation between particular parental characteristics and child maltreatment, see *id.* at 424–27.

12. *See id.* at 423–24.

13. *See infra* Parts III.C and IV.

14. *See* Lawrence v. Texas, 539 U.S. 566 (2003) (finding the right to adult consensual sexual activity to be protected by the Fourteenth Amendment).

15. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (establishing the right of unmarried individuals to purchase contraceptives); Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing the right of married couples to purchase contraceptives); Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating on equal protection grounds a state law authorizing sterilization of certain criminals).

16. *See* Gonzales v. Carhart, 127 S. Ct. 1610 (2007); Roe v. Wade, 410 U.S. 113 (1973).

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

maintain a relationship with a foster child,[18] to control a child's life after becoming a legal parent,[19] and to remain a child's parent even after abusing or neglecting the child.[20] Lower courts have addressed constitutional rights of adults in connection with adoption.[21] Yet throughout the judicial system, federal and state statutory law, and legal scholarship, there is no discussion of whether children have a constitutional right against the state's placing them into parent-child relationships with adults who are unfit to parent. This is so even though it is now well established that children are persons under the Constitution and that they can and do possess substantive rights under the Fourteenth Amendment Due Process Clause.[22] It is so even though parentage decisions generally impact children far more than they impact the adults involved, because children's fundamental formation of personhood is at stake.[23] And it is so even though there is widespread recognition that some birth parents pose a very high risk to the basic well being of their offspring.[24] Consideration of whether children have a constitutional right against the state forcing them to be in very bad parent-child relationships is long overdue.

Part I of this Article describes prevailing parentage laws, which are indifferent to parental fitness, and states' child protection laws and practices, which are predominantly reactive rather than proactive in addressing parental unfitness. Part II identifies and illustrates broader constitutional principles concerning persons' rights in connection with relationship formation and intimate association by examining existing statutory and doctrinal law governing state creation of legal relationships and control over intimate associations in other contexts.

Part III then considers doctrinal and theoretical bases for attributing constitutional rights to newborn children with respect to states' creation of legal parent-child relationships. It concludes that courts should recognize a substantive due process right of newborn babies against states placing them into legal relationships with and the custody of birth parents who have known

18. *See* Smith v. Org. of Foster Families for Equal. & Reform (OFFER), 431 U.S. 816, 845 (1977).

19. *See* Troxel v. Granville, 530 U.S. 57 (2000); Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

20. *See* Santosky v. Kramer, 455 U.S. 745 (1982); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

21. *See, e.g.*, Lofton v. Sec'y of Dep't of Children & Family, 358 F.3d 804, 809 (11th Cir. 2004) (rejecting a challenge to a state's refusal to allow homosexuals adoption rights).

22. *See infra* note 130 and accompanying text.

23. *See* McDaniels v. Carlson, 738 P.2d 254, 262 (Wash. 1987) ("'[I]t is the child who has the most at stake in a paternity proceeding.'" (quoting State v. Santos, 702 P.2d 1179, 1180 (Wash. 1985))).

24. Such recognition motivated Congress to pass the Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115 (codified in 42 U.S.C. §§ 673b, 678, 679b (2000)), and the Keeping Children and Families Safe Act of 2003, Pub. L. 108-36, 117 Stat. 800. *See* Dwyer, *supra* note 2, at 435–41.

histories or current conditions that indicate unfitness, absent demonstration by such birth parents that they presently are or soon can be fit to parent. Recognizing such a right would not require overturning any constitutional precedents. It also would not require courts or agencies to do anything with respect to individual children that is unprecedented as a practical matter, because today child protection agencies do on rare occasion assume custody of newborns and immediately place them for adoption despite birth parents' objection. It would, however, effect a paradigm shift in the way state actors and the public view family formation, and it would result in many more babies being spared from maltreatment. Significantly, Part III shows that common beliefs as to the established constitutional rights of adults to raise their biological offspring are mistaken; existing Supreme Court doctrine actually suggests that *unfit* biological parents have no substantive constitutional right to be in a legal parent-child relationship with their offspring.

Part IV explains how in practical terms a guardian ad litem or local child protection agency attorney could advance the constitutional claim this Article articulates and defends, and it identifies the amendments to state law that are needed for states to avoid violating this constitutional right of newborns.

I. HOW THE STATE CREATES PARENT-CHILD RELATIONSHIPS

To appreciate the appropriateness and importance of a child-focused constitutional rights analysis of parentage law, one must understand the state's integral role in family formation, the indifference of current parentage laws to parental unfitness, and the dim legal prospects for undoing a bad parentage assignment before it seriously damages a child.

A. The State's Role in Family Formation

Newborns' entry into legal relationships with and physical custody of biological parents is so taken for granted that the state's role goes unnoticed. But it is only because state statutes make biological parents the legal parents of a newborn child and give legal parents presumptive custody rights that birth parents have legal permission to do what would otherwise be kidnapping—that is, to take a person to their home and confine the person there without that person's consent.[25] This is something the law does not allow anyone else to do

25. For examples of statutes granting custody to birth parents, see GA. CODE ANN. § 16-5-45(a)(3) (2007) ("'Lawful custody' means that custody inherent in the natural parents, that custody awarded by proper authority as provided in Code Section 15-11-45, or that custody awarded to a parent, guardian, or other person by a court of competent jurisdiction."); OHIO REV. CODE ANN. § 2111.08 (LexisNexis 2007) ("The wife and

to a baby, even though there are many other people (for instance, those on adoption waiting lists) who would like to do so. If a doctor who delivered a baby attempted to keep the baby, rather than handing the baby over to the birth mother or father, the state could prosecute the doctor criminally, because the state has given legal rights to the birth parents and not to the doctor.

One might think it natural, even divinely ordained, that biological parents become the custodians of a baby. However, if someone other than the biological parents tried to stop birth parents from taking a baby home from the hospital or tried to take the baby home themselves, it is not an invocation of human nature or religious texts that would enable birth parents to ensure that they and no one else assume custody of the baby. Rather, it would be statutes that a legislature has passed and imposed on the citizenry—namely, parentage laws, child custody laws, and kidnapping laws. Part III below considers whether the state should recognize and rest its decisionmaking on assumptions about natural law or on a right of biological parents to receive such statutory protection, but even if that were so, it would still be state action (legislative enactment and executive and judicial implementation of those laws) that directly creates the parent-child relationship as a legal and social entity, and that state action must be subject to constitutional scrutiny.

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husband are the joint natural guardians of their minor children and . . . have equal powers, rights, and duties . . . ."). For examples of statutes prohibiting persons without state-conferred legal parent status from taking possession of a child, see ARIZ. REV. STAT. ANN. § 13-1302(A)—(A)(1) (2001) ("A person commits custodial interference if, knowing or having reason to know that the person has no legal right to do so, the person . . . [t]akes, entices or keeps from lawful custody any child . . . who is entrusted by authority of law to the custody of another person . . . ."); COLO. REV. STAT. ANN. § 18-3-302(2) (West 2008) ("Any person who takes, entices, or decoys away any child not his own under the age of eighteen years with intent to keep or conceal the child from his parent or guardian . . . commits second degree kidnapping."); GA. CODE ANN. § 16-5-45(b)(1)—(b)(1)(A) (2007) ("A person commits the offense of interference with custody when without lawful authority to do so the person . . . [k]nowingly or recklessly takes or entices any child . . . away from the individual who has lawful custody of such child . . . ."); IDAHO CODE ANN. § 18-4501—(4) (2004) ("Every person who willfully . . . [l]eads, takes, entices away or detains a child under the age of sixteen (16) years, with intent to keep or conceal it from its custodial parent, guardian or other person having lawful care or control thereof, . . . is guilty of kidnapping."); LA. REV. STAT. ANN. § 14:45(A)—(A)(2) (2007) (Simple kidnapping is . . . [t]he intentional taking, enticing or decoying away, for an unlawful purpose, of any child not his own and under the age of fourteen years, without the consent of its parent or the person charged with its custody."); MD. CODE ANN., CRIM. LAW § 3-503(a) (LexisNexis Supp. 2008) ("A person may not, without color of right: (i) forcibly abduct, take, or carry away a child under the age of 12 years from: 1. the home or usual place of abode of the child; or 2. the custody and control of the child's parent or legal guardian; . . . or (iii) with the intent of depriving the child's parent or legal guardian, or any person lawfully possessing the child, of the custody, care, and control of the child, knowingly secrete or harbor a child under the age of 12 years. (2) In addition to the prohibitions provided under paragraph (1) of this subsection, a person may not, by force or fraud, kidnap, steal, take, or carry away a child under the age of 16 years.").

The state's essential involvement in formation of all parent-child relationships is a plain and important fact courts and scholars have generally overlooked. For example, the U.S. Supreme Court expressed skepticism in addressing a claim by foster parents against the state severing their relationship with children in their care because of what it saw as a categorical distinction between foster care relationships and the "natural family." The Court stated that, whereas the foster parent-child relationship "has its source in state law," the relationship between the child and the parents to whom the state aimed to return them has "its origins entirely apart from the power of the [s]tate."[26] Similarly, in rejecting a challenge by gay persons to a Florida law precluding them from adopting children, the Eleventh Circuit Court of Appeals stated: "Unlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state."[27] The Eleventh Circuit also aimed to distinguish adoption by characterizing it as a "public act," asserting that "would-be adoptive parents are asking the state to confer official recognition—and, consequently, . . . insulation from subsequent state interference . . . on a relationship . . . ."[28]

In each instance, the distinction the courts drew was either the wrong distinction or an illusory distinction. If the distinction is truly between biological parentage and legal adoption, it is the wrong distinction to make. Biological parentage, which is indeed a private act occurring independently of any state action, in and of itself has no effect on a child's family situation after birth. Biological parentage has a connection to children's family lives today only because the state (in the form of legislatures and/or courts) makes it determinative of legal parenthood and state-protected custody. The state clearly could do otherwise, as is evident from the history of the law's treatment of unwed biological fathers, which for most of American history was to treat them as simply nonparents.[29] Were the state today to cease giving legal effect

26. Smith v. Org. of Foster Families for Equal. & Reform (OFFER), 431 U.S. 816, 845 (1977).

27. Lofton v. Sec'y of Dep't of Children & Family, 358 F.3d 804, 809 (11th Cir. 2004); *see also id.* at 817 ("Here . . . [t]he relevant state action is . . . grant of a statutory privilege [a]nd the asserted liberty interest is . . . the affirmative right to receive official and public recognition."); *In re* Baby Girl Clausen, 502 N.W.2d 649, 665 (Mich. 1993) (quoting *OFFER*, 431 U.S. 816, 845–46 (1977), in support of distinction between biological parents and would-be adoptive parents); Lindley for Lindley v. Sullivan, 889 F.2d 124, 131 (7th Cir. 1989) ("Because of its statutory basis, adoption differs from natural procreation in a most important and striking way.").

28. *Lofton*, 358 F.3d at 810.

29. *See* Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 331 (2005) ("The common law principle that fatherhood would only be recognized within marriage remained the law until the late twentieth century when the law began to recognize unmarried fathers . . . ."); *id.* at 332 ("If a child was born to an unmarried woman, the

and protection to any biological parents' desire to raise their offspring, that desire could be frustrated at any time by any state or private actors who wished to take possession of a child.

The legally relevant distinction would instead be that between legal parentage predicated upon biology on the one hand, and, on the other hand, legal parentage predicated upon a desire to parent and/or past caretaking. But then the distinction the courts attempt to draw is illusory, for it is nonsensical to say that legal parentage predicated upon anything precedes and transcends the state. It is the state that creates laws and therefore creates legal parentage in every instance. Legal parentage necessarily has its origins in the power of the state regardless of what motivates state actors to create it or what fact—procreation or qualification or caregiving—state actors choose to make determinative. Legal parentage predicated on biology is somewhat less visible, because in a majority of cases it happens by virtue of a statute and routine agency action (issuance of a birth certificate) rather than by individualized court determinations. But the state is creating the legal parent-child relationship whether it is doing so by statutes that cover a large number of children or by judicial decisions involving one child at a time. And in a substantial minority of cases legal parentage based on biology does arise by individualized court action—namely, paternity suits. Moreover, birth parents' filing of a birth certificate and/or an acknowledgement of paternity with a state agency is just as much a public act seeking official recognition as is filing an adoption petition.[30] That the state action involved in biologically-based legal parentage is generally unobserved and taken for granted does not make such parentage private. Creation of legal parent-child relationships is always state action, and the state can and should be held accountable in every case for predictable consequences of that action.

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child had no father."); *id.* at 333–37. I address whether doing otherwise would be consistent with current doctrine regarding the constitutional rights of biological parents in Part III below.

30. The *Lofton* court supported characterization of adoption as a public act by maintaining that "these prospective adoptive parents are electing to open their homes and their private lives to close scrutiny by the state," and that "a person who seeks to adopt is asking the state to conduct an examination into his or her background." *Lofton*, 358 F.3d at 810–11. This is fanciful and question-begging. Only under a peculiar definition of "electing" and "asking" do adoption applicants elect and ask for state inspection. They accept it because the state makes it a condition of applying. If the state required inspection of biological parents, we would not say that by filing a birth certificate biological parents "ask" to be inspected. In fact, all parents, biological and adoptive, are to some degree under state scrutiny; child maltreatment laws apply to all parents, all are susceptible to being reported to a state agency at any time for maltreatment, and the state investigates all colorable claims of child maltreatment whether parents are biological or adoptive. That there is a kind of state scrutiny before investiture of legal parenthood in the case of adoption and not in the case of biologically-based parentage reflects simply the state's choices, not any real public/private distinction.

This does not make children creatures of or owned by the state. A newborn baby is no one's creature or property. It is simply the case that people enter the world unowned yet incapable of caring for themselves or choosing caretakers for themselves, so there must be binding and enforceable rules as to who will assume custody and care of babies. The state is the only plausible candidate for establishing and enforcing such rules. The state acts vis a vis every newborn baby in a "protective and provisional role,"[31] pursuant to its long-recognized *parens patriae* authority,[32] just as it does vis a vis adults who become incompetent, in establishing and enforcing rules for creating guardian-ward relationships. Incompetent adults do not become creatures of the state by virtue of guardianship laws, even though the state steps in to make a vital and analogous decision about their private lives.

B. The Content of Parentage Laws

What, then, do existing state parentage laws say? With respect to birth mothers, the rules are fairly uniform and simple; the state makes the woman who gives birth to a child the legal parent of that child.[33] Nothing more than giving birth is a necessary condition for the state making one a legal parent.

In recent decades, some states have carved out two exceptions to the rule that the birth mother is always a child's first legal mother. First, a few states recognize surrogacy arrangements, in which the birth mother is neither a genetic mother nor an intending mother—that is, a woman who wishes and intends to raise the child, and they invest initial legal motherhood instead in the woman who contracts with the surrogate.[34] Second, most states now have "safe haven"

31. The *Lofton* court characterized in this way the state's role in creating parent-child relationships through adoption law. *Id.* at 809. The Supreme Court has observed that "juveniles, unlike adults, are always in some form of custody," *Schall v. Martin*, 467 U.S. 253, 265 (1984), and that "where the custody of the parent or legal guardian fails, the government may (indeed, we have said must) either exercise custody itself or appoint someone else to do so." Reno v. Flores, 507 U.S. 292, 302 (1993); *see also Schall*, 467 U.S. at 265 ("[I]f parental control falters, the State must play its part as *parens patriae*"). One might say, then, that conceptually children enter the world in government custody and the state subsequently, via parentage and custody laws, assigns them to the custody of private parties.

32. *See* O'Connor v. Donaldson, 422 U.S. 563, 583 (1975) ("States are vested with the historic *parens patriae* power, including the duty to protect 'persons under legal disabilities to act for themselves.'" (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972))).

33. *See* James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decisionmaking About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 859–60 (2003).

34. *See* Brian Bix, *Domestic Agreements*, 35 HOFSTRA L. REV. 1753, 1769 (2007). Now with the possibility of egg donation, a woman might become the legal mother of a child she bears even if she is not the genetic mother. *See generally* Kira Horstmeyer, *Putting Your Eggs in Someone Else's Basket: Inserting Uniformity Into the Uniform Parentage Act's Treatment of Assisted Reproduction*, 64 WASH. & LEE L. REV. 671, 687–88 (2007).

laws, authorizing birth parents to leave a newborn baby at a designated facility and walk away from parenthood, and these laws could operate in some cases to enable a birth mother to prevent legal parent status from ever investing in her.[35] So there has been some movement away from the idea that the birth mother must always be the first legal mother, and also away from the idea that a genetic connection is all important, though principally in the rare case in which the birth mother and the genetic mother are not the same person or in which a birth mother whose legal maternity is not yet established wishes to abandon her baby.

Crucially, no state takes into account in its parenthood-conferring statutes that a birth mother might be grossly unfit to parent a child, as might be evidenced by her having had parental rights as to other children terminated recently and/or by her having a severe drug addiction or mental illness. At best, as discussed below, the state will attempt to divest an unfit birth mother of legal parenthood after conferring it and only after the child has suffered harm, through a lengthy termination of parental rights (TPR) process.

With respect to fathers, the rules are more complicated, though biological paternity is ultimately controlling in nearly all cases for fathers just as for mothers. Across the U.S., there is effectively a presumption that a birth mother's husband is the biological father,[36] but in nearly all states another man who believes he is the biological father can petition to rebut the presumption and claim legal fatherhood, using genetic tests.[37] In a substantial minority of states—those that have adopted the 1973 Uniform Parentage Act (UPA)—additional circumstances give rise to a presumption of paternity, such as holding out a child as one's own (telling people a child is one's offspring), living with the mother and child, or signing an acknowledgment of paternity form.[38] But in nearly all these states as well, any such presumption

35. *See* Child Welfare Information Gateway, Infant Safe Haven Laws (2007), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/safehaven.cfm. Typically, a birthing facility enters a birth mother's name on an application for a birth certificate and sends it to the state vital records office; thus, if the birth mother left the baby at a safe haven, she would become the initial legal parent but then be divested of legal parenthood. *See* Dwyer, *supra* note 2, at 481. But a woman might give birth at home and bring the baby to a safe haven, and in that case never be officially recognized as a legal parent.

36. *See* Dwyer, *supra* note 33, at 868–69, 879–80. The marital presumption might be explicit in paternity rules or implicit in statutory rules for filing birth certificates, which in some states say a birth mother's husband presumptively should be listed as the father. *Id.*

37. *See id.* at 869–70.

38. *See, e.g.*, ALA. CODE § 26-17-5(a)(4) (LexisNexis 1992 & Supp. 2007); COLO. REV. STAT. ANN. § 19-4-105 (1)(d) (2008); DEL. CODE. ANN. tit. 13, § 8-204(a)(5) (Supp. 2006); TEX. FAM. CODE ANN. § 160.204 (Vernon 2002 & Supp. 2008).

can be rebutted with genetic tests showing it was actually another man who procreated with the mother.[39]

Even more so than in the case of maternity, though, paternity law and practice reflect some disentangling of biological and legal parenthood. The marital and holding out presumptions of paternity are today seen more as indicative of the existence of a family unit or of psychological parenthood that warrants protection on welfare grounds, rather than as indicative of biological parenthood.[40] Courts in a few states have held that a man believing himself to be the biological father may not challenge a presumption if a court believes rebutting the presumption would be contrary to the child's interests, with the focus typically on a child's interest in continuity of relationships with other adults.[41] In a few cases, courts in UPA states have considered a child's interests along with other policy considerations in choosing between two paternity petitioners, each of whom has a statutory presumption in his favor, even when they know which man is the biological father.[42] In addition, most states today exclude from legal parenthood men who donate sperm for artificial insemination of a woman who is not their wife, instead conferring legal fatherhood on the woman's husband, if he consented to the procedure.[43] As with maternity laws, however, paternity laws generally ignore whether a man is fit to parent.

Adoption laws also create parent-child relationships, generally after the state terminates a legal parent's child-rearing rights. These sometimes operate soon after a child's birth, though almost exclusively when the child's biological parents choose to give up the rights that parentage laws confer on them, either formally (by executing a relinquishment document) or informally

39. *See, e.g.*, ALA. CODE § 26-17-5(b) (LexisNexis 1992 & Supp. 2007); COLO. REV. STAT. ANN. § 19-4-105(2)(a) (2008); DEL. CODE ANN. tit. 13, § 8-631 (Supp. 2006); TEX. FAM. CODE ANN. § 160.631(b) (Vernon 2002). *But see* S.D. CODIFIED LAWS § 25-8-57 (2004) (restricting standing to challenge marital presumption to husband, wife, and child); Lisa I. v. Superior Court, 34 Cal. Rptr. 3d 927 (Ct. App. 2005) (holding that state statute does not confer standing on putative fathers to challenge marital presumption, even if mother later becomes unmarried).

40. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion); Murphy, *supra* note 29, at 337.

41. *See, e.g.*, McDaniels v. Carlson, 738 P.2d 254, 262 (Wash. 1987); *see also* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 574–75 (2000).

42. *See* Dwyer, *supra* note 33, at 874–75; Glennon, *supra* note 41, at 576.

43. *See* Horstmeyer, *supra* note 34, at 684–92; *see, e.g.*, 750 ILL. COMP. STAT. ANN. 40/3-3(a) (West 1999). *But cf. In re* K.M.H., 169 P.3d 1025, 1037 (Kan. 2007) (discussing state court decisions finding sperm donors to have a substantive due process right to legal parenthood if they agreed as such in writing with mother).

(by abandonment).[44] Sometimes birth mothers select adoptive parents, and other times the local child protective services (CPS) agency qualifies and chooses adoptive parents.[45] In either case, the state's statutory rules for conferring legal parenthood by adoption reflect a vastly different mindset relative to maternity and paternity laws. Adoption law attributes no entitlement to prospective parents, even though they generally have a very strong desire to parent, but rather requires applicants to qualify for parenthood by showing not merely that they are not grossly unfit, but that their becoming legal parents would be in the child's best interests.[46] The state conducts background checks on the would-be adoptive parents, makes them fill out a lengthy application, and supervises them with the baby in their home for six months or more.[47] It is inconceivable that an adoption agency or court would permit Jane and John, from the case described above in the Introduction, to adopt a child. Any agency that placed in their custody a child who was not their biological offspring would undoubtedly be subject to vehement public protest, legislative condemnation, and punitive damages in a lawsuit on behalf of the child.

Absent relinquishment or abandonment, however, the state, with rare exception, confers on biological parents legal parenthood and a statutory right to physical custody of newborn babies, with no prior assessment of their fitness, and thereby empowers them to take the babies to their homes under their exclusive control and without supervision, unless and until someone reports them for committing serious maltreatment.[48] As discussed in the next subsection, the state does occasionally take protective custody of newborns, but only in a very small percentage of all cases in which birth parents pose a danger to a baby, and then it typically consigns the baby to a lengthy period of multiple foster care placements.[49]

C. Prospects for Undoing a Bad Parentage Decision

There is today the theoretical possibility of the state terminating the legal parenthood of some unfit biological parents immediately after birth, before

44. *See, e.g.*, IDAHO CODE ANN. § 16-2005(1), (4) (Supp. 2008) (authorizing the termination of parental rights (TPR) based on abandonment and on execution of relinquishment form set forth in statute).
45. *See* Dwyer, *supra* note 33, at 888–89.
46. *See id.* at 882–83, 886–88.
47. *See id.* at 885–86.
48. *See id.* at 940–41, 944–46.
49. *See* Dwyer, *supra* note 2, at 410, 413, 428 n.86.

those parents have had a chance to harm the child, even when the biological parents assert their rights. However, this almost never happens.

The law creates the theoretical possibility in two ways. First, spurred by the federal Adoption and Safe Families Act of 1997 (ASFA),[50] states today can authorize involuntary TPR at any time in a child's life, without attempts to reform the parents, based on a parent's past conduct toward other children—specifically, maltreatment sufficiently serious to result in TPR and/or criminal felony charges as to a prior child.[51] So in Michele's case, because the state had terminated Jane and John's rights as to an older sibling, a court could terminate their rights as to Michele immediately after Michele's birth, making her available for adoption. If a court did so, if the child protection agency immediately placed Michele with a couple seeking adoption, and if courts expeditiously finalized the TPR and adoption, the practical consequences would not be much different from denying legal parentage to Jane and John in the first instance.

Second, some states ostensibly authorize adoption of a child over the objection of a biological father, even though this terminates his parental rights or forestalls his paternity, without having to go through the usual state-initiated process for TPR. These circumstances include: the biological father's failure to put his name on a putative father registry,[52] the biological father's failure to support the mother during pregnancy,[53] the adoption court finding that the biological father is unfit,[54] the child's having been conceived by the biological father's raping of the mother,[55] and even a finding that the biological father is simply withholding consent contrary to the best interests of the child.[56] This last type of provision has been subject to constitutional challenges several times, but courts have generally rejected the biological fathers' claims.[57]

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50. Pub. L. 105-89, 111 Stat. 2115 (codified in 42 U.S.C. §§ 673b, 678, 679b (2000)).

51. *See* 42 U.S.C. § 671(a)(15)(D) (2000).

52. *See* Laura Oren, *Thwarted Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 FAM. L.Q. 153, 170–75 (2006).

53. *See, e.g.*, KAN. STAT. ANN § 59-2136(h)(1)(D), (E) (Supp. 2007); *In re* Adoption of Baby E.A.W, 658 So. 2d 961 (Fla. 1995).

54. *See, e.g.*, KAN. STAT. ANN. § 59-2136(h)(1)(B) (Supp. 2007).

55. *See, e.g.*, ALASKA STAT. § 25.23.180(c)(3) (2006); IDAHO CODE ANN. § 16-2005(2)(a) (Supp. 2008); IND. CODE ANN. § 31-19-9-8(a)(4) (LexisNexis 2007); KAN. STAT. ANN. § 59-2136(h)(1)(F) (Supp. 2008); WYO. STAT. ANN. § 1-22-110(a)(viii) (2007).

56. *See, e.g.*, ALASKA STAT. § 25.23.180(c)(2) (2006).

57. *See Rights of Unwed Father to Obstruct Adoption of His Child by Withholding Consent*, 61 A.L.R.5th 151, § 9 (2008). The only exception noted is *Nale v. Robertson*, 871 S.W.2d 674 (Tenn. 1994).

A couple of states even authorize an adoption that terminates the birth mother's parental rights over her objection. In Indiana, this is the case if a court finds either that her reasons for refusing consent are not in the best interests of the child or that she is unfit and the adoption would be in the child's best interests.[58] In Missouri, courts can approve an adoption over the objection of any birth "parent who has a mental condition which is shown by competent evidence either to be permanent or such that there is no reasonable likelihood that the condition can be reversed and which renders the parent unable to knowingly provide the child the necessary care, custody and control."[59]

These rules relating to TPR and adoption create the potential for a somewhat less blunt state assignment of newborns to parents, and they constitute further evidence that there is no ironclad cultural assumption that biological parents must always have the opportunity to raise the children they produce. However, these rules create only narrow exceptions to the default rule of assigning children to biological parents, and in practice they have very little effect.

The new TPR grounds based on child maltreatment history omit a substantial range of cases in which biological parents are not fit to raise a child—in particular, cases in which a parent has had other children in foster care for a long period and the prognosis for rehabilitation is very poor, cases in which parents have a severe drug addiction or mental illness at the time their first child is born, and cases in which a parent is in prison or a juvenile detention facility. In addition, states have generally not backed up these new TPR rules with any mechanism for identifying at the time of birth those biological parents who have serious maltreatment histories, nor with any legal authorization for agencies to intervene at the time of birth on the basis of such history.[60] Thus, in practice, they are only used after biological parents have already taken a baby home for some time and abused or neglected the baby, in which case the child's development has likely already been seriously compromised.

The rules authorizing adoption without consent of the biological father exist in only a minority of states,[61] generally apply only when the birth mother wants the child to be adopted, and, if reported court decisions are

58. IND. CODE ANN. § 31-19-9-8(a)(10)–(11) (LexisNexis 2007).

59. MO. ANN. STAT. § 453.040(6) (West 2003).

60. *See* Dwyer, *supra* note 2, at 447–52.

61. *Cf. In re* B.G.C., 496 N.W.2d 239 (Iowa 1992) (holding that a biological father could prevent adoption, despite his "poor performance record as a parent," because state statutes required TPR under child protection statutory provisions prior to the adoption petition in order to obviate his consent).

indicative, are rarely employed.[62] There are no reported decisions applying Missouri's "mental condition" provision[63] or Indiana's provision for overriding a mother's objection when her reasons are not in the child's best interests.[64] Some private party would need to initiate an adoption proceeding, and most likely very few people are aware of these laws authorizing adoption over maternal objection without CPS involvement.

The overall picture, then, is that the state routinely places many newborn babies into legal and intimate social relationships with adults who are manifestly unfit to parent and who typically live in environments inhospitable to children. This state action predictably causes many children to incur developmental damage that seriously undermines their potential to live flourishing lives. Though the state cannot know in every instance which biological parents are very likely to abuse or neglect a baby, the state does now maintain records of people who have committed extreme child maltreatment in the past, people who have committed violent or drug-related felonies, people who have been committed to psychiatric facilities, and people who are in prison. And all births are reported to a state agency. The state currently does not put these two sets of information—parental history and children's births—together in order to identify high-risk birth parents. But it could do so with little difficulty, and this cross-checking of records could enable the state to stop placing babies in harmful relationships.

One type of high-risk situation that does regularly come to CPS's attention is maternal drug addiction. As a result of the federal Keeping Children and Families Safe Act of 2003,[65] hospitals now must report to the local child protective agency detection of drug exposure in newborns.[66] Drug addiction accounts for a very large percentage of child maltreatment cases,[67] so this reporting creates the potential for preventive action at the time of birth for many at-risk newborns. However, no state requires birthing facilities to perform toxicology screening of newborns, few require reporting of fetal alcohol exposure, and only a few authorize immediate TPR on the basis of a

62. *See* 61 A.L.R.5th 151, at § 9 (listing only a dozen reported decisions since 1978 in the entire U.S. invoking best interests basis for obviating unwed father's consent to adoption).

63. MO. ANN. STAT. § 453.040(6).

64. IND. CODE ANN. § 31-19-9-8(a)(10)–(11).

65. Pub. L. 108-36, 117 Stat. 800.

66. *See* 42 U.S.C. § 5106a(b)(2)(A)(ii) (Supp. 2005).

67. *See* Amy D'Andrade & Jill Duerr Berrick, *When Policy Meets Practice: The Untested Effects of Permanency Reforms in Child Welfare*, 33 J. SOC. & SOC. WELFARE 31, 37 (March 2006) ("[E]stimates of the proportion of children placed in foster care at least in part due to substance abuse issues of the parents range from 50%–80%.").

parent's substance abuse, no matter how severe and chronic.[68] If CPS takes any protective action in such cases, it is almost always to place the babies in temporary but long-term foster care, which is itself likely to impair their development.[69]

D. Summary

It is an indisputable fact that the state now forces a lot of newborn babies to be in intimate relationships that pose a grave danger to them, relationships that are much worse for them than would be alternative relationships available to those babies at the time of their birth. The state does this even though it knows or has ample reason to know of that danger. Long overdue is an examination of whether it is constitutionally permissible for the state to do this.

II. GENERAL PRINCIPLES FOR STATE CONTROL OVER PERSONAL RELATIONSHIPS

The state action of placing children into legal family relationships fits within a broad conceptual category that might be characterized as state action affecting intimate association, and with the conceptual subcategories of a) state action creating legal family relationships and b) state action controlling private association. It is a form of state action controlling private association because legal parent status, unlike some other legal relationships between private parties, such as that between spouses, entails a custodial right. This Part identifies a set of general principles that courts and legislatures have established in these two subcategories of cases. These principles will inform the analysis in Part III of children's substantive due process rights in family formation.

A. State Creation of Legal Family Relationships

The state creates many kinds of legal family relationships. In addition to the parent-child relationship, the state creates guardianships, legal marriages, and legal relationships between siblings, between grandparents and grandchildren, between aunts/uncles and nieces/nephews, among cousins, among in-laws, and among other extended family members. Statutes and constitutional doctrine relating to all these relationships suggest some general

68. *See* Dwyer, *supra* note 2, at 444–45, 447–51.
69. *See id.* at 426–28; Dwyer, *supra* note 33, at 952–66.

principles as to when the state may create a legal relationship without the consent of both parties and when it may refuse to create a legal relationship requested by one or more private parties.

1. Legal Relationships Without Mutual Consent

With the exception of spousal relationships, all the relationships just identified typically arise without the consent of both parties. Guardian-ward relationships similarly arise without the wards themselves giving present actual consent, precisely because the ward has been deemed incompetent. The other relationships arise without the consent of either party, even when all are competent adults; they arise incidentally from other people becoming parents and spouses and thereby creating legal family lines. Thus, while one might think chosen personal associations paradigmatic of legal family relationships, in fact most are unchosen for at least one member of the relationship, created by the state even in the absence of mutual express consent.

On the surface, this might seem incompatible with notions of limited state authority over private life and respect for personhood, notions clearly reflected in legal rules governing marriage. There is no constitutional doctrine in the U.S. on state involvement in nonconsensual marriage, precisely because the idea is anathema in western society, so the state never attempts to involve itself in such a thing.[70] Instead, one sees U.S. courts deciding whether the danger of state-sanctioned forced marriage in a non-western country for an alien present here is great enough that the alien should receive asylum, because forced marriage is widely recognized as a human rights violation.[71] And one hears criticism of the government in states where polygamy is covertly practiced for not doing more to prevent it, mainly because of concerns about coerced marriages, and especially about children being forced into harmful relationships.[72] State laws excluding minors under a certain age from legal marriage are based on an assumption that autonomous consent is not possible for them and that state

70. A small minority of U.S. states do confer marital status on some couples who have not manifested consent through a wedding ceremony, through rules of what is commonly called common law marriage. Those rules, however, require that both parties have manifested a consent to marry in other ways. *See, e.g.*, Whyte v. Blair, 885 P.2d 791, 794–95 (Utah 1994).

71. *See* United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Dec. 10, 1962, art. 1(1), 521 U.N.T.S. 231, 234 (entered into force Dec. 9, 1964); Cara Goeller, *Forced Marriage and the Granting of Asylum: A Reason to Hope After* Gao v. Gonzales, 14 WM. & MARY J. WOMEN & L. 173 (2007) (discussing a Second Circuit decision overturning denial of asylum to women who had been sold into marriage in China).

72. *See* Richard A. Vasquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 230 (2002).

creation of the relationship could be harmful to them, because of the rights, liabilities, and expectations that accompany state conferral of the legal status. The Supreme Court has pronounced broadly in dicta that "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse."[73] Yet many other kinds of legal family relationships arise without explicit free, reciprocal choice. How can we explain this?

With respect to most of the relationships that arise without mutual express consent—namely, those other than guardianship and the parent-child relationship—the likely explanation is that their only effect is to confer benefits on the parties, which they are free to decline; the legal relationships do not prejudice the private parties in any way. Their primary relevance is for inheritance when decedents have not executed a will; intestacy rules give legal relatives waivable claims to wealth and aim to effectuate what the decedent most likely wanted.[74] Some unchosen legal relationships also ensure priority consideration in fiduciary appointments or in end-of-life decisionmaking for incompetent persons,[75] and some—particularly the grandparent relationship—give rise to standing to petition for custody of or visitation with a child.[76] From the perspective of incompetent adults or of children whose nonparent relatives might petition for a court-ordered role in their lives, there is no prejudice from creating these extended family legal relationships, because state laws uniformly require courts to find that granting such a petition would be in the incompetent adult's or the child's best interests.[77]

The guardian-ward and parent-child relationships, though, can prejudice or adversely affect the welfare of participants, because they entail substantial rights and responsibilities. These two types of relationships are in fact similar in many ways, and contrasting the laws governing them is illuminating.

As to both, actual consent to formation of the relationship by both parties is not possible because one party is incapable of giving it. Both relationships preclude one of the parties from having a legal relationship of the same sort with other persons. Like a parent, the guardian of an incompetent

73. Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984).

74. *See, e.g.*, TENN. CODE ANN. § 31-2-104 (2007).

75. *See* discussion of guardianship *infra* text accompanying notes 80–81.

76. *See* Westlaw 50 State Statutory Surveys: *Child Custody* (2008) (discussing grandparent visitation); Troxel v. Granville, 530 U.S. 57, 73 (2000) (citing visitation statutes in 50 states); Dwyer, *supra* note 33, at 966–69 (discussing laws protecting siblings' interest in remaining together after parents' divorce or after state removal from parental custody).

77. *See* discussion of guardianship *infra*, and Dwyer, *supra* note 33, at 972–84. If a custodial parent objects to visitation with a child, a court might further require a showing that denying visitation would harm the child. *Id.* at 979–80, 982. Thus, visitation with a non-parent is never forced on a child contrary to the child's welfare, but in some cases a child might be deprived of visitation even though the child would be better off if the visitation occurred.

adult is charged with primary responsibility for the welfare of the ward and receives substantial powers to direct the life of the ward. A guardian is less likely than a parent to live with the person under care, but many guardians do so. Depending on how much direct care a guardian provides, the guardian role can be more or less burdensome than parenthood typically is. The guardian role might usually be less satisfying than parenthood, because a ward's life trajectory is typically one of continual decline rather than growth and increasing independence, yet it is not uncommon for some family members of an incompetent adult to have a very strong desire to serve as guardian. Thus, the roles of guardian and parent usually entail significantly different experiences, but they are structurally similar, entail similar rights and responsibilities, and are both sought after enough to give rise to conflicts that end up in courts. One might therefore expect the laws governing formation of the two types of relationships to be fairly similar.

With respect to the caregiver, the rules governing formation of the two relationships are effectively the same, despite a surface disparity. In the case of guardianship, there is always consent on the part of the caretaker; the law does not force anyone into the role of legal custodian and caregiver for an incompetent adult.[78] In contrast, the law does sometimes impose legal parenthood on unwilling persons. However, birth parents can exit the parent-child relationship immediately after birth if both agree to place the child for adoption, and even when exit is not possible, a legal parent need take on no parenting burden other than financial support. The state does not force legal parents to take custody of or even visit their children, nor to participate in decisionmaking about a child.[79] If the state does anything in response to a legal parent's choice to have nothing to do with a child other than paying child support, it would be to terminate the legal parent-child relationship in order to free the child legally for adoption by others. Thus, imposing a legal parent-child relationship on a nonconsenting birth parent does not greatly prejudice the parent, and the one burden it does entail—financial obligation—is arguably justifiable in quasi-tort terms as payment for consequences of voluntary behavior. In fact, one might view an adult's choice to engage in heterosexual sex as entailing implicit consent to a legal parent-child relationship and attendant support duty should that conduct happen to produce a child.

78. *See, e.g.*, MO. ANN. STAT. § 475.050(1) (West 1992 & Supp. 2008) ("[T]he court shall consider the suitability of appointing any of the following persons who appear to be *willing* to serve." (emphasis added)).

79. *See* Dwyer, *supra* note 33, at 937.

With respect to the incompetent person in the relationship, on the other hand, there is a striking, substantive disparity between the law governing creation of guardian-ward relationships and the law governing creation of parent-child relationships. In appointing a guardian for an incompetent adult, the state respects that individual's personhood by insisting that the relationship arise exclusively on the basis of a finding that the ward chose it before becoming incompetent, in an advance directive of some kind, or that the ward would now choose it if able.[80] In other words, the law makes the state decisionmaker a surrogate for the incompetent adult, directing the appointing court effectively to give proxy consent to a legal relationship on behalf of the nonautonomous person.

When an incompetent adult has not given an advance directive as to who should be the guardian, or has named someone who now declines appointment or appears unsuitable, that proxy consent amounts to a "best interests" determination—that is, an assessment of which competent adult, among those willing to serve, would be the best caregiver for the incompetent adult. Typically statutes list categories of interested parties who have presumptive priority in appointment, but the list reflects assumptions as to whom wards generally would prefer to have care for them, and the presumption is rebuttable by showing that some other choice would better serve the ward's interests.[81] Importantly, satisfying an applicant's desire for the position, no matter how intense, is not a permissible aim in selecting a

80. *See, e.g.*, IND. CODE ANN. § 30-5-3-4 (LexisNexis 2000) (authorizing persons to designate in advance a guardian for themselves should they be found in need of one); MO. ANN. STAT. § 475.050 (West Supp. 2008) ("Before appointing any other eligible person as guardian of an incapacitated person, or conservator of a disabled person, the court shall consider the suitability of appointing any . . . eligible person nominated in a durable power of attorney executed by the incapacitated or disabled person . . . before the inception of the person's incapacity . . . ."); S.D. CODIFIED LAWS § 59-7-2.4 (2004) (authorizing persons to designate in advance a guardian for themselves should they be found in need of one); *In re* Estate of Salley, 742 So. 2d 268, 270 (Fla. Dist. Ct. App. 1997) ("Where a ward's preference as to the appointment of a guardian is capable of being known, that intent is the polestar to guide probate judges in the appointment of their guardians. A ward's nominee, of course, may be rejected when unfit or unsuitable . . . ."); *In re* Estate of Doyle, 838 N.E.2d 355, 364 (Ill. App. Ct. 2005) ("In determining who shall be a disable person's guardian, the disabled person's personal preferences as to who should be his or her guardian is outweighed by what is in the disabled person's best interest."); *In re* Guardianship of Macak, 871 A.2d 767, 772 (N.J. Super. A.D. 2005) (stating that in appointing a guardian, "the court should consider . . . the wishes of the incapacitated person if expressed" and that "[i]f there is a significant issue as to the appropriate choice of guardian, the court may appoint a guardian ad litem to advise the court as to the person's best interests.").

81. *See, e.g.*, *In re* Guardianship of Quindt, 396 So. 2d 1217 (Fla. App. 1981) (upholding the appointment of a neighbor rather than the daughter because it was in the ward's best interest).

guardian.[82] Moreover, a judge aware of something rendering particular applicants unfit to serve as guardian would not appoint them. A judge would not put the ward into a legal relationship with them, regardless of any statutory presumption in their favor. For example, a number of states categorically preclude convicted felons from becoming guardians.[83] And a court would certainly refuse to appoint an applicant who had previously served in a guardian role for an incompetent adult and had been removed from that role because he or she abused the ward.

In contrast, parentage laws are not understood as effecting a proxy consent for children. Rather, they are viewed principally as satisfying a proprietary interest of parents. Certainly one could characterize existing parentage laws as effectuating in most cases what newborn children would choose if able, in terms of who their legal parents will be, just as statutory priorities for appointing a guardian effectuate in most cases what an incompetent adult would choose if able. It is pretty universally believed that, all else being equal, children are better off being raised by their biological parents. But unlike guardianship laws, maternity and paternity laws do not contain an overarching best interests standard that controls when statutory priorities are inconsistent with it. As explained in Part I, children generally cannot avoid the state assigning them to legal family relationships with birth parents who want to be their legal parents, even if the birth parents are manifestly and grossly unfit. Moreover, once the state has created a legal relationship between a newborn baby and birth parents, it is quite difficult for the child to exit the relationship, no matter how horrible the birth parents are, unless the birth parents themselves wish to sever the relationship.

Thus, in the case of a relationship between adults that is structurally similar to the parent-child relationship, with one person of greater capacity in a caregiving role *vis a vis* the other, the law aims to mirror the paradigmatic case of a mutually consensual relationship between two private parties, simply substituting proxy consent for actual consent in the case of a person unable to give actual consent. But in creating parent-child relationships, the state does not go very far in aiming to do so, insofar as it considers only biological relation and gives no consideration to birth parents' suitability for the parental role. Yet a baby is at much greater risk of harm in a parent-child relationship than

82. *See, e.g.*, Matter of Crist, 732 S.W.2d 587, 590 (Mo. Ct. App. 1987) ("Preference is given a particular petitioner, not because the petitioner wants the position, but because the ward would want the petitioner appointed."); Estate of Salley, 742 So. 2d 268, 270 (Fla. Dist. Ct. App. 1997) (faulting the trial court for aiming to placate family members in selecting guardian).

83. *See* JOHN PARRY & ERIC Y. DROGIN, MENTAL DISABILITY: LAW, EVIDENCE AND TESTIMONY 145 (2007).

a ward typically is in a guardian-ward relationship. Parents who choose to take custody of a child have plenary power, not limited by a best-interest standard, over children's social experience, cognitive formation, and material wellbeing. Custodial parents are generally left undisturbed unless and until someone reports them to CPS for threatening the safety or basic physical health of a child. At the same time, parents are practically free to give a child very little of their attention, even though infants require a great deal of nurturing attention for their healthy development.[84] The state thus puts children in an extremely vulnerable position when it places them in legal parent-child relationships and confers custodial rights, yet when the placement is with biological parents the state does so with no regard for the parents' fitness to act as caregivers.

Courts have not addressed constitutional challenges to guardianship laws. Undoubtedly this is because the substituted-judgment/best interests approach prevails, so that any objection to an appointment on behalf of the ward can rest entirely on the governing statute, and because no one is deemed to have a constitutional right to become a guardian for an incompetent adult. However, constitutional decisionmaking concerning incompetent adults in other contexts has established as a general principle that they possess constitutional rights equal or equivalent to those of competent adults and that state decisionmaking about fundamental aspects of their lives should aim first and foremost at exercising those rights on behalf of the incompetent adults, under the *parens patriae* authority of the state.[85]

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84. Emotional neglect is a recognized and serious form of maltreatment. *See, e.g., In re* Custody & Parental Rights of D.S., 122 P.3d 1239 (Mont. 2005) (upholding the termination of parental rights of a methamphetamine-addicted mother based on chronic and severe emotional neglect). However, child protection agencies almost never intervene on that basis alone.

85. *See, e.g.*, Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 271 (1990) (noting with approval state court reasoning that "an incompetent person retains the same rights as a competent individual 'because the value of human dignity extends to both'"); *id.* at 273 (noting with approval state court reasoning that "the right of self-determination should not be lost merely because an individual is unable to sense a violation of it" and that such a right could be "exercised by a surrogate decision maker" relying on evidence of what the person wanted when competent and/or on objective evidence of best interests); *id.* at 279–80 (recognizing that a competent adult has "a constitutionally protected right to refuse lifesaving hydration and nutrition" and that an incompetent adult's identical right "must be exercised for her, if at all, by some sort of surrogate"); *id.* at 315–16 (Brennan, J., dissenting) (asserting that the state's only legitimate interest in connection with cessation of treatment was "a *parens patriae* interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances"); Youngberg v. Romeo, 457 U.S. 307 (1982) (holding that a mentally retarded individual involuntarily committed to state institution had a constitutionally protected liberty interest to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and minimally adequate training).

The overall picture, therefore, is that the state never creates family legal relationships that could prejudice the private parties involved without their free and informed consent, or their imputed consent, or a proxy decision in their behalf based on what is best for them, *except* when it places newborn babies into legal parent-child relationships. Because the state assiduously respects the personhood of adults by requiring actual or proxy consents before creating such relationships for them, one simply does not find constitutional challenges to the state's creation of those relationships.

2. State Refusal to Create Legal Relationships

The constitutional challenges that have arisen, rather, have mostly involved the state refusing to create a legal relationship or to afford legal protection to a social relationship when certain private parties have requested it. Judicial responses to those challenges, as well as state law exclusions that have not been challenged, are of some relevance here insofar as they suggest general principles about necessary and sufficient constitutional conditions for the state creating relationships.

States have refused requests for legal relationships by biological fathers, foster parents, homosexuals seeking a relationship with a child, and various types of couples wishing to marry. State law governing unwed biological fathers has shifted from a regime in which they could not be legal parents even if they wished, to one in which they are routinely made legal parents even if they do not wish. Common law imported from England simply excluded unwed fathers from legal paternity, reflecting an assumption that such men were unfit to raise children and/or unwelcome intruders into the lives of mothers and children.[86] Conclusive marital presumptions applied to offspring of married women, and offspring of unmarried women simply had no father as far as the state was concerned.[87]

After a series of Supreme Court decisions beginning in 1972 (discussed further in Part III) created a constitutional right to legal parenthood for *fit* biological fathers who demonstrated commitment to the parental role,[88] all states made it possible for unwed fathers to become legal parents in most circumstances. The "biology plus commitment plus fitness" test, insofar as it made assumption of responsibilities and fitness necessary conditions for having a

86. *See* Stanley v. Illinois, 405 U.S. 645, 654 (1972) ("It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents."); *id.* at 666 (Burger, J., dissenting) ("[U]nwed fathers rarely burden either the mother or the child with their attentions.").

87. *See* Murphy, *supra* note 29, at 331–37.

88. *See infra* notes 237–242 and accompanying text.

constitutional right, suggests consideration of parental deservingness and suitability in conferring constitutional rights. State laws authorizing adoption over a biological father's objection when he has failed to support or visit a baby or to enter his name in a putative father registry, or when the adoption court finds him unfit, mirror this test. But paternity statutes now go much farther than constitutional doctrine requires, conferring legal father status solely on the basis of biology.

In contrast, when adults who are not biological parents have cared for a child and then sought a legal relationship with the child, courts have generally declined to attribute to such caregivers any constitutional right to be in such a relationship. Foster parents protesting removal of a child from their home lose out, because their claim usually competes with rights attributed to legal parents.[89] When initial legal parents are out of the picture, on the other hand, judicial review of state laws denying a legal parent-child relationship to adults who want it generally focuses on the state's child-welfare justification for the denial. This was true, for example, of the Eleventh Circuit decision upholding Florida's exclusion of homosexuals from adoption; the court's analysis focused on the effect on children of having homosexual parents.[90] In addition, as noted in Part I, state statutes and regulations across the country deny entry into adoptive parent-child relationships on grounds of unfitness. Thus, with respect to any adults who are not biological parents, statutory law and constitutional doctrine relating to formation of legal parent-child relationships reflect an assumption that the state should not force children to be in parent-child relationships that are bad for them.

With respect to legal marriage, the most prominent example in recent years of state refusal to create that relationship even when there is mutual consent has been with respect to same-sex couples. The Supreme Court has yet to address the same-sex marriage issue, but in earlier times the Court addressed challenges to state laws refusing to allow polygamous marriages,[91] marriages to prison inmates,[92] marriages to child support delinquents,[93] and inter-racial marriages.[94] Those challenges principally rested on equal protection claims, but the Court also spoke at times in substantive due process terms of a constitutional right to freedom in choosing whom one marries, and the Court has invalidated such laws absent a showing that they protected someone from

89. *See* Smith v. Org. of Foster Families for Equal. & Reform (OFFER), 431 U.S. 816, 846–47 (1977).
90. *See, e.g.*, Lofton v. Sec'y of Dep't of Children & Family, 358 F.3d 804, 818–26. (11th Cir. 2004).
91. *See* Reynolds v. United States, 98 U.S. 145 (1878).
92. *See* Turner v. Safley, 482 U.S. 78 (1987).
93. *See* Zablocki v. Redhail, 434 U.S. 374 (1978).
94. *See* Loving v. Virginia, 388 U.S. 1 (1967).

harm. In *Loving v. Virginia*,[95] the Court invalidated a prohibition on interracial marriage and explained that the Due Process Clause protects the "liberty" to marry, because "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[96] In this context, as well as in the context of extended family members sharing a household, the Court has specifically rejected as illegitimate a state aim of endeavoring to impose a single, popularly preferred model of family relationships.[97] Exclusions from marriage on grounds of consanguinity, age, incompetence to consent, and pre-existing marriage (polygamy) are generally accepted today, because plausible welfare justifications exist.

Judicial review of state refusal to create legal relationships thus reflects the principles (1) that the state may not interfere with private choices on arbitrarily discriminatory grounds, which would include a bare desire to make all families conform to a traditional model, and (2) that the state may refuse to create a relationship when doing so is likely to cause harm to a private party and should decline to create a relationship when one party is incompetent and the state has reason to believe that creating the relationship would be detrimental to that party or simply not beneficial. This lends further support to a conclusion that current parentage laws, insofar as they create legal relationships without regard for possible harm to a child, are anomalous and contrary to basic and well-established general constitutional and moral principles concerning state involvement in creating family relationships.[98]

95. 388 U.S. 1 (1967).

96. *Id.* at 12; *see also Zablocki*, 434 U.S. at 383–87 (citing numerous cases in which the Court had spoken of freedom of choice in marriage as a fundamental right).

97. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 506 (1977) (plurality opinion) ("[T]he Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.").

98. Current biology-based parentage laws might appear consistent with, or at least not incompatible with, constitutional doctrine in other contexts—in particular, Supreme Court decisions relating to sexual privacy and reproductive freedom. As discussed further below, a right to raise one's biological offspring does not necessarily follow from a right to have sex or a right to conceive children, as is evident from the Court's unwed father cases. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 260 ("'Parental rights do not spring full-blown from the biological connection between parent and child.'" (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979))). Thus, the Court could establish a right of newborns to avoid a relationship with unfit birth parents without overturning its precedents establishing those other rights. In any event, those precedents gave no consideration to the future personhood of children who might be created by exercise of the rights to sexual and reproductive freedom, so extrapolation from their analysis to conclusions about persons' constitutional entitlement to raise offspring they produce would be unwarranted.

B. State Control of Private Association

When the state places a newborn into a legal parent-child relationship with particular adults and confers custodial rights on those adults, it effectively compels the child to associate closely with those adults.[99] From this perspective as well, because it fails to guard against association that endangers a child, state practice regarding the relational lives of newborn children is inconsistent with principles reflected in the law governing other relationships. That law relates to state-compelled association and state-prohibited association.

1. State-Compelled Association

As a general matter, individuals have a constitutionally-protected right to freedom of association, which entails both the freedom to associate and the freedom not to associate with others as one chooses.[100] There is thus a constitutional presumption against the state compelling any private person to associate with another, and the presumption is especially strong with respect to intimate association.[101] There is little constitutional doctrine explicitly addressing state-compelled intimate association, and what doctrine there is principally concerns large social organizations. In that context, the Supreme Court has held that the state may constitutionally prohibit such organizations from excluding persons from membership on the basis of race or sex, based on an assumption that persons' interest in controlling with whom they associate is much weaker in such social settings than it is in a family context.[102] This assumption enabled the Court to conclude that state interests in promoting race and gender equality are sometimes sufficient justification for limiting persons' freedom not to associate.[103] The Court

99. State laws declare legal parents presumptive custodians of children. *See, e.g.*, D.C. CODE ANN. § 21-101 (LexisNexis 2001); FLA. STAT. ANN. § 744.301 (West Supp. 2008); R.I. GEN. LAWS § 33-15.1-1 (1995).

100. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate.").

101. *See id.* at 620 ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.").

102. *See id.* at 619–21.

103. *See id.* The Court has also held, though, that such organizations have a First Amendment right against compelled association that would "affect[ ] in a significant way the group's ability to advocate public or private viewpoints," absent a compelling state interest. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (holding state "public accommodation" law's anti-discrimination law unconstitutional as applied to the Boy Scouts of America's policy of excluding homosexuals from leadership positions).

implied that there is, as a general matter, a much greater constitutional obstacle to state-compelled intimate association.

There are, however, several types of routine state action other than creation of parent-child relationships that do amount to compelled intimate association. Though some involve other aspects of law governing parent-child relationships, some involve only adults. With respect to competent adults, compelled association today is largely limited to imprisonment, which does not aim directly at compelled inter-personal association (indeed, states might prefer prisoners not associate with each other at all), but rather at punishment and separation of convicted criminals from the general population. Yet it does entail forcing people to live in fairly cramped quarters with strangers, and can certainly impact their basic welfare. There is, however, strong constitutional protection against the state putting people in prison, overcome by the state showing it necessary to protect public safety. Moreover, the state is constitutionally obligated to protect inmates to some degree from harm that might result from the forced association.[104]

Two centuries ago, in America and elsewhere, there was another form of compelled association among competent adults, one involving family life and not involving criminals. Under coverture laws of marriage, the state gave husbands a legal right to cohabitation with their wives, and the state stood ready forcibly to return a wife who abandoned her husband.[105] States eliminated such laws well before the twentieth century, and no doubt if a state today tried to force a wife to live with her husband, a court would find that this violates the wife's right to liberty under the Due Process Clause, especially if the husband's known history or characteristics indicated the wife would be in danger.

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104. *See* Sandin v. Conner, 515 U.S. 472, 484 (1995) (holding that segregated confinement did not implicate due process liberty interests, but indicating that inmates retain a substantive due process right that a state might violate by "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life"); Smith v. Wade, 461 U.S. 30, 56 (1983) (holding that a prison guard could be assessed punitive damages in a § 1983 claim stemming from prison attack, for reckless indifference to the safety of prisoners); Bell v. Wolfish, 441 U.S. 520, 542 (1979) (holding that housing two pre-trial detainees in a room intended for one did not violate due process rights, but stating in dictum that "confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause"); Hutto v. Finney, 437 U.S. 678, 689 (1978) (holding that the district court's award of attorney's fees to be paid out of the Department of Corrections' funds was supported by bad faith and did not violate the Eleventh Amendment when conditions of prison isolation cells constituted cruel and unusual punishment).

105. *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1390–91 (2000) ("A husband could also, with only modest limitations, legally restrict his wife's movements in the nineteenth century—could conclusively determine where the couple would live, could physically restrain his wife to prevent her from leaving that household, and could retrieve her if she did stray, particularly if she had left to go to another man.").

Today the only persons compelled to associate with other members of their legal family are children. The law does not require any competent adults to associate with other adults with whom they stand in some form of legal family relationships, and the law never compels any adults to associate with any children.[106]

With respect to incompetent adults, there is a kind of compelled association in involuntary commitment of mentally ill or mentally disabled persons to residential treatment facilities. As with imprisonment, the compelled association with other persons so committed might not be the state's aim, but rather an unavoidable incident of confinement. There is often some intended compulsory association with non-residents, insofar as an institution might require patients to meet with treatment professionals. As in the case of imprisonment, though, there is strong constitutional protection against commitment, requiring the state to show a compelling interest served by it,[107] and against the institutions rendering patients vulnerable to harm.[108] The Supreme Court stated in *Youngberg v. Romeo*: "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."[109] Yet the state routinely confines newborn babies in unsafe conditions when it places them into legal relationships with and the physical custody of unfit birth parents.

In addition, there is a situation closely analogous to the parent-child situation in which the state directly and intentionally compels incompetent adults to associate with another adult—namely, when the state creates a guardian-ward relationship. A personal guardian is the legal custodian of the ward and accordingly has authority to decide where the ward lives, pursuant to which guardians can elect to have a ward live with them. It is not quite apt to characterize this as compelled association, though, because the

106. *See* Dwyer, *supra* note 33, at 937. Parents may not abandon their children in a manner that endangers them—for example, by leaving a child in a dumpster. But a birth mother could walk out of a hospital without the child and never see the child again, yet incur no penalty; if anything, the state would just eventually terminate her legal relationship with the child. *See supra* note 35 and accompanying text.

107. *See* Vitek v. Jones, 445 U.S. 480, 491–92 (1980) (recognizing due process rights of prisoners regarding transfers to mental hospital); Addington v. Texas, 441 U.S. 418, 432–33 (1979) (holding that the state must prove the need for involuntary commitment of an adult by clear and convincing evidence); *cf.* Parham v. J.R. 442 U.S. 584, 638 (1979) (holding that minors whose parents seek to place them in a mental hospital have a procedural due process right as to the neutral fact finder's independent evaluation of whether statutory criteria for admission are satisfied).

108. *See* Youngberg v. Romeo, 457 U.S. 307, 314–19 (1982) (holding that persons involuntary committed to a state institution for the mentally retarded have a substantive due process right to safe conditions, freedom from unreasonable bodily restraint, and minimally adequate training).

109. *Id.* at 315–16.

appointment of the guardian reflects a proxy consent on behalf of the ward, and the law requires the guardian to act in the best interests of the ward.[110] A family member who thought it contrary to a ward's welfare to live with the guardian could file an objection with the appointing court, and the court could order a different residential situation for the ward based on a best interests finding or substituted judgment in behalf of the ward. This presumptively makes guardians' decisions to have a ward live with them a situation in which an actual, free choice by one party in the relationship (the guardian) is reciprocated with a proxy choice for the other party (the ward).

Thus, as to adults' association with each other, the state never directly compels association except pursuant to an imputed, hypothetical choice on the part of an incompetent adult, and it compels association incidentally only when it must confine dangerous individuals in institutions. The substantive due process rights of competent and incompetent adults constrain the state in this context. In contrast, the state does not base its legislative decision to place children in the custody of birth parents without regard to fitness on a legislative finding that this is best for all children, or on any other finding that could be viewed as proxy consent for those whose birth parents are unfit. Such compelled association obviously is not necessary for public safety, and sometimes it is quite dangerous for children. Moreover, the state does not require parents to make residential choices or other parenting decisions based on the best interests of the child.[111] And the state stands ready to return to the parents any child who attempts to leave or whom other private parties attempt to remove.

There are also several situations, other than initial creation of the parent-child legal relationship, in which state law impacts the associational lives of children. One is when a child protective agency returns a child to parental custody after having taken custody following a maltreatment report. This kind of situation produced the constitutional tort claim against a child protective agency in *Deshaney v. Winnebago County Department of Social Services*[112] on behalf of a child left permanently and severely brain damaged after the agency returned the child to an abusive father. In that decision, discussed further in Part III

110. *See* PARRY & DROGIN, *supra* note 83, at 146; *cf. In re* Seyse, 803 A.2d 694, 700 (N.J. Super. Ct. App. Div. 2002) (assuming a guardian's relocation of a ward to be proper if consistent with the ward's best interests, citing court holdings in other jurisdictions that the guardian's choice of residence must be in ward's best interests).

111. *See* Reno v. Flores, 507 U.S. 292, 304 (1993) ("'[T]he best interests of the child' is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.").

112. 489 U.S. 189 (1989).

below, the Court did not reach the question of what substantive due process right the child had against being forced to live with an abusive father, because a majority concluded that there was no state action. It arrived at that conclusion by focusing not on the agency's return of the child to paternal custody but rather on the agency's failure to remove the child again.[113] The state agency, in the Court's view, had simply failed to act to protect one private party from another private party, which the state generally is not constitutionally obligated to do.[114]

In the similar context of placing children in the custody of foster parents, however, children do receive constitutional protection. Courts have established that the state is acting when it places a child in a foster care relationship and that the state, while not precluded from placing children into such unchosen associations, is constitutionally required to do so with some care. Some courts apply a "professional judgment" standard, whereas others impose liability on an agency that acts with "deliberate indifference" to dangers the placement might pose for the child.[115] Thus, were a state to select foster parents with the same disregard for child maltreatment history, drug addiction, or severe mental illness that it shows when making birth parents legal parents (for example, by choosing the first person to respond to a newspaper ad), courts would conclude that it violated a constitutional right of any children harmed as a result. Accordingly, state statutes require child protection agencies to investigate any applicants for foster parent positions and require that courts find foster parents fit and qualified prior to placing a child with them.[116]

An additional context in which the state compels intimate association for children is when parents do not live together. The decision as to who will be a custodial parent following divorce, when two parents with presumptively equal rights compete with each other, is ostensibly based on children's best interests.[117] Once a court has assigned primary custody to one parent, however, the noncustodial parent is deemed to have a constitutional right to visitation with the child, and courts will require a child to visit that parent absent a

113. *Id.* at 201.

114. *Id.* at 196–97.

115. *See* Nicini v. Morra, 212 F.3d 798, 809–12 (3d Cir. 2000) (adopting a "deliberate indifference" standard and citing decisions of other courts applying similar standard); Clark K. v. Guinn, No. 2:06-CV-1068-RCJ-RJJ, 2007 U.S. Dist. WL 1435428, at *15 (D. Nev. May 14, 2007) (adopting a professional judgment standard and citing decisions of other courts that had done so); Kenny A. v. Perdue, No. 1:02-CV-1686-MHS, 2004 U.S. Dist. WL 5503780, at *3–4 (N.D. Ga. Dec. 13, 2004) (adopting a professional judgment standard).

116. *See* Survey, *Standards for Foster Care Families*, Westlaw 50 State Statutory Surveys (2006).

117. *See* Dwyer, *supra* note 33, at 907–11.

showing that it would be seriously harmful to the child; showing just that it would on balance be better for the child not to associate with the noncustodial parent is legally insufficient.[118] On the other side, courts never order an indifferent noncustodial parent to visit a child.[119]

A final form of compelled intimate association is between siblings. Parents legally can compel association between siblings while they are minors, as an aspect of parents' state-conferred control over each child's life.[120] Only when the siblings' parents live apart might a court decide, on the basis of each child's best interests, that the children should not have to live with each other or even interact with each other.[121] Generally, though, it is in siblings' best interests to live with and interact with each other, and the state does protect that interest in divorce and foster care contexts.[122]

2. State-Prevented Association

Conversely, states have at times endeavored to preclude association between some competent persons who wish to have a relationship. Texas, for instance, prosecuted a couple for violating its anti-sodomy laws, but the Supreme Court, in *Lawrence v. Texas*,[123] recognized that anti-sodomy laws are about much more than sex, that they in fact amount to denying freedom of choice in forming and maintaining intimate relationships.[124] The Court announced a general, constitutionally protected right to enjoy such freedom absent harm to others.[125] In a different context, the Court has given local governments substantial freedom to control residential patterns for various reasons, but has invalidated some zoning provisions because they interfered with private parties' freedom to carry on healthy family-like relationships with persons of their choosing.[126]

Lastly, states sometimes prohibit certain people from associating at all with certain others. This could be because the parties were previously partners in crime. More commonly it is because the former might do harm to the latter; courts impose protective orders requiring persons who have been violent or who appear likely to commit violence to stay away from past or potential victims,

118. *See id.* at 932–37.
119. *See id.* at 937.
120. *See id.* at 970.
121. *See id.* at 967.
122. *See id.* at 966–69.
123. 539 U.S. 558 (2003).
124. *See id.* at 567.
125. *Id.* at 567, 574 (referring to "the respect the Constitution demands for the autonomy of the person in making these choices"—namely, "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education").
126. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 504–05 (1977) (plurality opinion).

most commonly wives or girlfriends.[127] Such orders effectuate a right of adults to avoid unwanted and harmful associations. Significantly, adults who have committed sexual or violent offenses against a child will commonly be prohibited from associating at all with any children—*other than their own offspring*.[128] Ironically, this is true even if the prior victim was their own offspring! A sex offender must register with local police and in many jurisdictions may not live near a school or other place where children regularly congregate.[129] An adult identified with a child maltreatment history typically will not be permitted to work in a school in any capacity or even to serve as a coach for a youth sports team.[130] Yet the state generally allows sexual predators and adults with horrible child maltreatment histories to associate in the most private and unsupervised of settings with any later offspring they have.

The law governing state efforts denying association between private parties thus reflects the principles (a) that persons have a constitutional right to associate with others on the basis of mutual consent unless their doing so poses some danger and, correspondingly, (b) that states may prohibit association when it has a compelling welfare justification for doing so. State laws precluding babies born to unfit parents from immediately forming family relationships with other adults who are prepared to be good parents arguably (if one accepts that a hypothetical or imputed choice on the part of the child could substitute for actual consent) are inconsistent with principle (a), and principle (b) suggests that courts should find no constitutional obstacle to a state deciding no longer to confer legal parenthood on unfit birth parents.

C. Summary

In sum, there is a constitutional presumption against the state compelling any private person to associate with another, a presumption especially strong

127. *See, e.g.*, GA. CODE ANN. § 19-13-4 (2004 & Supp. 2008); OHIO REV. CODE ANN. § 2919.26 (West 1994 & Supp. 2008).

128. *See, e.g.*, VA. CODE ANN. § 18.2-370.2 (1950 & Supp. 2008).

129. *See* Katie Zezima, *After Rape, Calls to Limit Where Sex Offenders Go*, N.Y. TIMES, Feb. 18, 2008, at A9 (discussing calls for local ordinances to prohibit sex offenders from libraries and other public places). *See generally* Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3 (2008); Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1 (2006).

130. *Cf.* National School Safety and Security Services, School Employee & School Teacher Background Checks, http://www.schoolsecurity.org/resources/teacher_background_checks.html (last visited Feb. 15, 2009) (encouraging schools to conduct more thorough background checks); USA Track & Field (USATF), Criminal Background Check Program, Frequently Asked Questions, http://www.usatf.org/about/programs/backgroundChecks/FAQ.asp (last visited Feb. 15, 2009) (providing information regarding a screening program for youth coaches).

in connection with intimate association. Accordingly, in most contexts, the state must have strong justification when it does compel intimate association. Public safety justifies imprisoning criminals and involuntarily committing some mentally ill persons. A best interests finding is a necessary and sufficient condition for assigning custody of an incompetent adult to a guardian. Even with respect to children, the law recognizes a constitutional constraint in some contexts, such as foster care, on the state's power to compel them to associate in intimate settings with others, a constraint that is violated if the state has reason to know the association would threaten a child's welfare. Again, maternity and paternity laws, coupled with child custody laws, stand out as anomalies, inconsistent with general constitutional and moral principles applied in every other domain of intimate life. Part III.C below considers whether there is something unique about state parentage decisionmaking that justifies this inconsistency.

Significantly, many federal and state legislators are well aware that some birth parents pose a real danger to their offspring, and some have publicly decried the continued consignment of newborn babies to the legal and physical custody of unfit birth parents, as an injustice to the children as well as a quite costly public policy.[131] They have mustered enough political will to take some modest steps toward avoiding this injustice and social cost (examples include the Adoption and Safe Families Act of 1997[132] and the Keeping Children and Families Safe Act of 2003[133]), but not enough to make meaningful change. It is precisely in a situation such as this, where the political process fails to protect the most vulnerable citizens from the worst harms, that constitutional protection is most needed and appropriate. Child welfare advocates have not yet articulated and asserted a constitutional right of newborn babies against the state forcing them into legal relationships with unfit parents. The remainder of this Article demonstrates how they could do so.

III. CHILDREN'S DUE PROCESS RIGHT AGAINST BAD PARENTAGE DECISIONS

As an initial matter, a newborn baby clearly can and does possess constitutional rights against the state. The Supreme Court has made clear that children are persons who have rights under the federal Constitution.[134] Thus,

131. *See* Dwyer, *supra* note 2, at 435–37.

132. Pub. L. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. §§ 673b, 678, 679b (2000)).

133. Pub. L. 108-36, 117 Stat. 800.

134. *See, e.g.*, Reno v. Flores, 507 U.S. 292 (1993) (adjudicating a non-fundamental right of juvenile aliens to be held in a private custodial setting); *id.* at 316 (O'Connor, J., concurring)

were a state's laws to declare, for example, that doctors must euthanize babies born with particular physical deformities, no one would doubt that the state thereby violated a constitutional right of those babies. Some might say the state violates a right of the babies' parents, but they would be hard pressed to deny that the state violates some right of the babies as well. Likewise, if a state's laws dictated that babies with red hair be shipped immediately to Ireland, all would perceive a violation of those babies' constitutional rights, even though the babies themselves would not protest. And if a state's parentage statutes directed that the first legal parent for any newborn left at a safe haven depository shall be an unmarried male sex-offender just released from prison, we would charge the state with an atrocious abuse of state power and a violation of the abandoned babies' rights against the state. It would not matter that legislators were motivated in passing such laws by compassion for such men, who were likely abused as children themselves and who might otherwise never have an opportunity to raise a child, given that they are relatively unattractive to women as potential partners. The Constitution simply does not permit legislatures to use babies in that way to ease the suffering of adults. This is so even though we recognize that the state must establish some legal rules as to who will be the legal parents and custodians of newborn children. That the state inevitably must intrude into babies' intimate lives to the extent of choosing legal and custodial parents for them does not mean that it is constitutionally unconstrained in how it does so.

The most fitting articulation of a constitutional right of newborns against the state in relation to parentage statutes would be in terms of the Fourteenth Amendment Due Process Clause, which commands that no State may "deprive any person of life, liberty, or property, without due process of law." Federal courts lump most allegations of state-inflicted injury other than killing or property confiscation under the deprivation of liberty rubric, regardless of

("Children, too, have a core liberty interest in remaining free from institutional confinement. In this respect, a child's constitutional '[f]reedom from bodily restraint' is no narrower than an adult's." (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992))); Parham v. J.R., 442 U.S. 584, 600 (1979) ("It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment."); Ingraham v. Wright, 430 U.S. 651, 674 (1977) ("[W]here school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated."); Roe v. Wade, 410 U.S. 113, 157 (1973) (indicating that the multiple uses of "person" in the Constitution apply to humans following birth); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (upholding First Amendment speech rights of public high school students); Levy v. Louisiana, 391 U.S. 68, 71–72 (1968) (recognizing an equal protection right of illegitimate children against being denied wrongful death action as to parent).

whether the alleged injury amounts to denial of free choice or action. The Supreme Court has stated that the Due Process Clause "guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint."[135] The Clause serves the broader purpose "'to secure the individual from the arbitrary exercise of the powers of government.'"[136] Courts have thus included under the heading of "liberty" several other rights that do not fit the usual understanding of liberty, including a right against incursions on one's bodily integrity; a power to make controlling decisions about the life of another human being—namely, one's legal child; and a right to compel the state to establish a legal relationship between adult intimate partners.[137] Indeed courts have addressed state action affecting children and incompetent adults in other contexts under this heading, including potentially harmful custodial placements.[138] In those contexts, courts have construed the protection of liberty to require not just that the state stay out of certain private realms altogether, but also that when the state must enter into a private realm, because an individual is incapable of self-determining choices and actions, it not do so arbitrarily or in a manner that disrespects the personhood of that individual.[139]

Having established that newborn children can possess substantive due process rights against the state, the next question is what sort of state actions in fact do so. Not every state law or action or decision by a state actor that substantially impacts a newborn baby's life is such a violation. For example, the state would do no wrong to abandoned babies by creating a parent-child relationship between them and biologically unrelated persons who apply to a state agency to become parents, who pass through a rigorous qualifying process, and who are the best available parents for the children, because doing so would cause the babies no injury. What is needed are basic principles

135. Washington v. Glucksberg, 521 U.S. 702, 719 (1997).

136. Daniels v. Williams, 474 U.S. 327, 331 (1986) (quoting Hurtado v. California, 110 U.S. 516, 527 (1884)).

137. *See generally* Susan E. Lawrence, *Substantive Due Process and Parental Rights: From* Meyer v. Nebraska *to* Troxel v. Granville, 8 J.L. & FAM. STUD. 71 (2006).

138. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 314–19 (1982) (holding that persons involuntarily committed to a state institution for the mentally retarded have a substantive due process right to safe conditions, freedom from unreasonable bodily restraint, and minimally adequate training); Vitek v. Jones, 445 U.S. 480, 491–92 (1980) (holding that the involuntary transfer of a prisoner to a mental hospital implicates a liberty interest protected by the Due Process Clause); *Ingraham*, 430 U.S. at 673 (upholding the practice of corporal punishment in public schools, but acknowledging that the Due Process Clause guards the "right to be free from and to obtain judicial relief, for unjustified intrusions on personal security"); *Tinker*, 393 U.S. at 506 (stating in dicta that school regulations can infringe a liberty interest of students protected by the Due Process Clause).

139. *See, e.g.*, *Youngberg*, 457 U.S. at 315–16; *Ingraham*, 430 U.S. at 674.

by which to judge when a particular state action toward babies is a constitutional wrong, given that some state actions clearly would violate substantive due process rights of newborn babies while other state actions clearly would not. The principles distilled from statutory and doctrinal law relating to state creation of legal relationships and state-compelled association in Part II provide some guidance, which I incorporate in this Part into a step-by-step application of the Supreme Court's basic approach to recognizing and applying substantive due process rights.

A. The State Action Question

As a preliminary matter, there can be no violation of babies' substantive due process rights if there is no state action. As explained above, initial legal parenthood arises by statute and, in a substantial percentage of cases, by court decree. Legislating, executive implementation of statutes, and judicial decisionmaking are obviously state actions. A challenge to the constitutionality of state parentage decisionmaking should therefore have no difficulty satisfying the state action requirement. A legal representative for a newborn whose birth parents are unfit would assert that the state's parentage statute, as applied and enforced with respect to this child, violates the child's Fourteenth Amendment rights, and it would be implausible for the state to respond that its application of its statutes does not constitute state action.

However, to constitutional law scholars, a complaint about the state's decision to place a child into a legal relationship with and in the custody of an unfit birth parent will be reminiscent of the complaint in *Deshaney*[140] about the state's failure to protect a child from an abusive parent, so it is worth emphasizing why *Deshaney* does not pose a problem for the claim developed here. In *Deshaney*, the Court held that a county child protection agency did not violate the constitutional rights of a boy whose father beat him to the point of causing severe brain damage, by failing to remove the boy from his father's custody even though the agency had reason to believe the boy was in danger. The basis for the Court's rejection of the § 1983 claim was that there was no state action, but rather only a failure to act.

The *Deshaney* Court's analysis is subject to serious challenge on its own terms. In particular, the Court failed to acknowledge the state's role in creating the situation in which Joshua Deshaney was harmed—that is, by the child protection agency repeatedly removing Joshua from a safe foster home and depositing him in his abusive father's home, and by the legislature

140. 489 U.S. 189 (1989).

conferring legal parent status on Randy Deshaney in the first place. More importantly for present purposes, the *Deshaney* decision is also readily distinguishable. The attorney retained by Joshua Deshaney's mother directed the complaint only against the child protection agency, alleged only a failure to act, and mistakenly conceded that the State played no part in creating the danger to the boy.[141] Accordingly, the Court treated the claim as one to state agency protection from a private harm that the state played no role in creating, and held that the Constitution does not confer such positive rights to state assistance.[142] The Court indicated that the outcome would likely be different if Joshua's attorney had shown that the state had by affirmative conduct created a danger or vulnerability for the child.[143] Following *Deshaney*, most circuit courts of appeal have adopted a "state-created danger" rule for a § 1983 claim that is based on harmful private conduct, and the most common articulation of the rule requires a plaintiff to show that state actors assisted in creating or increasing danger of private harm when they knew or should have known of the danger.[144]

A challenge to parentage laws, in contrast, would focus directly on affirmative conduct by the state—namely, the legislature's passage of state statutes determining every child's first legal relationships and bestowing custodial rights on the adult parties to that relationship, state agencies' implementation of those statutes, and courts' application of those statutes in individual cases. The initial creation of a legal and custodial parent-child relationship is as much state action as is creating a guardian-ward relationship, whether it occurs by operation of a statute over a large number of cases or by judicial decision in an individual case. Similarly, if a state passed a statute declaring that any two adults who live in the same household are *ipso facto* legally married, and are therefore subject to all the legal duties that marriage entails, no one would

141. "Petitioner sued respondents claiming that their failure to act deprived him of his liberty . . . ." *Id.* at 191. "The complaint alleged that respondents had deprived Joshua of his liberty . . . by failing to intervene" after they had undertaken "to protect Joshua from this danger—which petitioners concede the State played no part in creating." *Id.* at 193–97.

142. *Id.* at 196 (asserting that the purpose of the Due Process Clause is "to protect the people from the State, not to ensure that the State protected them from each other" and that the Clause "confer[s] no affirmative right to government aid"); *id.* at 197 ("[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."); *id.* at 201 (referring to "a danger it concededly played no part in creating"); *id.* at 203 ("The most that can be said of the state functionaries in this case is that they stood by and did nothing . . . .").

143. *See id.* at 200–02.

144. *See* Matthew D. Barrett, *Failing to Provide Police Protection: Breeding a Viable and Consistent 'State-Created Danger' Analysis for Establishing Constitutional Violations Under Section 1983*, 37 VAL. U. L. REV. 177, 188–210 (2002).

have difficulty seeing the state action, even though it comprised automatic operation of a statutory rule over a large number of cases. Further, state creation of legal and custodial parent-child relationships is a state action that, in the case of unfit parents, creates a danger for the child that would not otherwise exist, because those adults would not otherwise be legally free to take the child into their household and assume control over the child's life.[145] And, because of the exclusivity and plenary power that the state injects into legal parenthood, such state action entails cutting off potential private sources of protection, including assumption of custody by other adults who are prepared to provide a very nurturing upbringing. Analogously, if the state gave legal effect to private marriage ceremonies between men and ten-year-old girls, few would have difficulty perceiving how this state action endangers and potentially violates constitutional rights of the children, because of the liberties and rights that marriage would confer on the men.

Few people would have difficulty seeing how creation of a legal parent-child relationships constitutes potentially wrongful state action in the case of adoption—that is, if a social services agency and court were to grant adoption of a newborn to persons the state knew to be grossly unfit to parent. Imagine an adult, reported in the newspapers today for throwing a crying baby against a brick wall, going tomorrow to a local social services agency and applying to adopt any available baby. Were the agency and a court to approve such an adoption, we would readily discern state action and would ascribe responsibility to the state if that adult then threw the adopted baby against the same brick wall. Creating a legal parent-child relationship between a newborn and birth parents who are grossly unfit is no less state action. It is certainly more clearly state action than is a state agency declining to create a legal relationship desired by private parties, such as a legal marriage between persons of the same sex, yet courts have unhesitatingly treated such refusal to create a legal relationship as state action.

145. I assume here the existence of kidnapping prohibitions, which should preclude any adults without special legal license from taking possession of a child and holding the child in their home. In the absence of such prohibitions, and in the absence of laws conferring legal parent status on other persons, unfit birth parents might be legally free to take and retain possession of their offspring. However, without state-conferred legal parent status and the powers it entails, they could not invoke the assistance of the state in preventing others from taking the child instead, because others would also be legally free to do so, and others might be especially motivated to take possession of a baby if they perceived the birth parents' unfitness. Such state-of-nature speculation is not especially illuminating, in my view, because the notion of a society devoid of parentage and kidnapping laws is utterly unrealistic, so the more likely alternative is that the state would assign legal parent status to other persons who are fit to parent. Relative to that alternative, a state decision to confer legal parent status and physical custody rights on unfit birth parents creates a danger that otherwise would not exist.

B. Establishing the Substantive Right

The greater obstacle to establishing a substantive due process right of newborns against the state forcing them into parent-child relationships with unfit parents is this: If it is a new constitutional right, federal courts would apply a fairly strong presumption against recognizing it as a fundamental right triggering strict constitutional scrutiny—that is, trumping legislation that is not narrowly tailored to serve a compelling state interest.[146] A nonfundamental (i.e., less important or weighty) substantive due process right might also trump a parentage law, if that law does not have a "reasonable fit" with a legitimate government purpose,[147] but one who alleges a substantive due process violation is in a far weaker position if the claim rests on what the Court deems only a nonfundamental right.[148] And the Supreme Court, concerned with excessive restriction on democratic decisionmaking and with judges injecting their personal policy preferences into constitutional interpretation, has stated that courts should "exercise the utmost care whenever asked to break new ground" in the field of fundamental substantive due process rights.[149]

There are at least two reasons, however, why in this context the Court might be less reluctant to recognize a new right or to apply an old right in a new way. First, the democratic process is less likely in this context than in others to ensure full legislative consideration of the private interests most affected by state action.[150] The persons most affected—newborn babies—have no direct voice. Ordinarily parents might represent children's interests in the political process, but unfit birth parents might have desires at odds with their offsprings' welfare. Other adults need not worry about ever becoming part of this class, so have no self-regarding incentive to advocate for this class's rights. In contrast, those who are competent adults now might someday enter into a different class of incompetent persons—namely, incompetent adults in need

146. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1970).

147. *See* Reno v. Flores, 507 U.S. 292, 305–06 (1993).

148. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 417 (2006) (noting that the application of strict scrutiny depends in part on the designation of a right as fundamental, and that the applied level of scrutiny is likely to determine the outcome of the case).

149. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (quoting Collins v. City of Harker Heights, Tex., 503 U.S. 115, 125 (1992)); *see also* Ferguson v. Skrupa, 372 U.S. 726, 729–30 (1963) ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.").

150. *See* Rebecca L. Brown, *The Logic of Majority Rule*, 9 U. PA. J. CONST. L. 23, 28–29 (2006) ("[W]hen the Court has concerns about the integrity of legislative process, it consistently responds with aggressive interpretations of substantive constitutional standards that are within its sphere of enforcement, such as individual rights provisions."); *id* at 31–32 (explaining that two of the three principal rationales typically given for majority rule are that it ensures consideration of every person's interests or preferences and that it produces government based on the consent of the governed).

of a guardian. Accordingly, the democratic process has produced statutory protections for that class. In terms of the basic rationale for having constitutional rights against majoritarian decisionmaking, it is thus ironic that courts have attributed to incompetent adults but not to newborn babies constitutional rights regarding state creation of relationships and custodial placement.

Simply put, the legislative process does not naturally respect and reflect the equal personhood of babies born to unfit parents and is especially likely to produce outcomes that are unjustifiable from the standpoint of those children.[151] Only rigorous judicial review, forcing legislatures to provide convincing reasons for their decisions as to the fate of vulnerable newborns, can effectuate the most basic political right of those children to treatment as equal citizens. For the Court to announce that the political process is the proper recourse for babies consigned by states to lives with drug addicts or violent child abusers would be disingenuous.

The second reason why the Court should be less reluctant to recognize this new right is that the kind of state decision the right would constrain—namely, choosing family members for a person—is one the state presumptively should never be making in the first place. Such a decision is an extreme incursion into a citizen's private life. The state makes it solely because the newborn's incompetence and vulnerability necessitate some entity making decisions for them about their family relationships. Incapacity and vulnerability do not necessitate and do not justify the state using their lives to serve the common good or to gratify the wishes of other private parties (namely, unfit birth parents). Just as the self-determining choices we adults make about our intimate relationships, in the pursuit of our own happiness, receive constitutional protection from majoritarian preferences and prejudices, choices made on behalf of newborns to advance their welfare and enhance their prospects for a happy life should receive such protection as well. No doubt, if some state changed its guardianship rules to eliminate the best interests standard for guardian appointment and began appointing personal guardians without regard to fitness, courts would recognize a fundamental substantive due process right of adults against the state placing them in the custody of persons grossly unfit as caretakers—for example, persons known to have severely abused another incompetent adult.

151. *Cf. id.* at 33–35 (explaining that an assumption of universal equal personhood underlies all the main justifications for majoritarian decisionmaking); Frank I. Michelman, *Unenumerated Rights Under Popular Constitutionalism*, 9 U. PA. J. CONST. L. 121, 143 (2006) ("At the core of the constitutional-contractarian approach to the justification of political coercion stands a liberal's insistence on the normative primacy—that is, as objects of moral concern—of notionally free and equal individuals; hence the demand that potentially coercive political acts be acceptable from the standpoints of each . . . of countless persons among whom conflicts of interest and vision abound." (emphasis omitted)).

The Supreme Court has taken two approaches to identifying constitutionally protected fundamental rights under the substantive due process rubric. The Court's most recent major substantive due process decision, *Lawrence v. Texas*,[152] appeared to adopt and apply them both.[153] Under the "history and tradition" approach, which has predominated in recent decades, the Court demands "a careful description of the asserted right"[154] and then examines whether it is among the "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[155] Based on this conservative approach to rights recognition, the Court has in the past refused to recognize as a fundamental liberty a right to physician-assisted suicide,[156] a right of unwed biological fathers to challenge a marital presumption of paternity,[157] and a right of consenting adults to engage in homosexual activity.[158]

The main alternative is the "reasoned judgment"[159] approach, under which the Court aims to strike a proper balance between individual liberty and "'the demands of organized society.'"[160] It has done this in part by taking into account the importance of the interests at stake, and in part by "'having regard to what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke.'"[161] The Court sometimes measures the importance of private interests in welfare terms (for instance, the material burdens of pregnancy and child-rearing) and sometimes in metaphysical terms (for instance, the importance that defining one's own concept of existence has to enjoying a flourishing human life).[162] The more

152. 539 U.S. 558 (2003).

153. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 117–21 (2006). Conkle discerns in Lawrence a third approach to identification of fundamental rights, which he terms a "theory of evolving national values." *Id.* at 67–68. However, the Court might better be viewed as simply making recent history more relevant to the "history and tradition" inquiry than earlier history.

154. Reno v. Flores, 507 U.S. 292, 302 (1993).

155. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citations omitted).

156. *See id.* at 728.

157. *See* Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1989) (plurality opinion).

158. *See* Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

159. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992).

160. *Id.* at 850 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J. dissenting)).

161. *Id.*; *see also* David D. Meyer, *Self-Definition in the Constitution of Faith and Family*, 86 MINN. L. REV. 791, 805–06 (2002).

162. *See* Gonzalez v. Carhart, 127 S. Ct. 1610, 1640 (2007) (Ginsburg, J., dissenting) (invoking "the centrality of 'the decision whether to bear . . . a child' to a woman's 'dignity and autonomy,' her 'personhood' and 'destiny,' her 'conception of . . . her place in society'"); Conkle, *supra* note 153, at 101 (discussing the majority's analysis in *Roe*); *id.* at 104–05 (discussing *Casey*).

central the interest is to human well-being or flourishing, the more likely Justices who take this approach are to categorize it as a fundamental interest warranting rigorous substantive due process protection. This approach does not disregard tradition, but views it as an evolving or "living thing," and finds significance both in society adhering to long-standing practices and in its explicit rejection or simple abandonment of once-prevailing practices.[163]

Justice Kennedy's majority opinion in *Lawrence* captures this outlook:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke principles in their own search for greater freedom.[164]

Using this latter approach, the Court has established fundamental rights to use birth control,[165] to have an abortion,[166] and to engage in homosexual conduct,[167] rights that relate to the most intimate aspects of life but that did not find much support in American history and tradition.

I assess below the prospects under each approach for a fundamental right of newborn babies against the state consigning them to family relationships with unfit birth parents, and then, supposing the right were to be recognized, I consider what justifications a state might offer for infringing it. Though the reasoned judgment approach presents the clearer case, the case for establishing such a right is actually strong under both approaches.

1. Grounding a Newborn's Right in History and Tradition

The Court has not made clear what it means to give a "'careful description' of the asserted fundamental liberty interest" prior to looking for a tradition of protecting it.[168] Justice Scalia's prescription for defining the interest or right has the virtue of making the historical investigation as manageable as possible; he

163. *Casey*, 505 U.S. at 850 (quoting Poe v. Ullman, 367 U.S. at 542 (Harlan, J., dissenting)).

164. Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

165. *See* Griswold v. Connecticut, 550 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972) (involving birth control for unmarried persons).

166. *See* Roe v. Wade, 410 U.S. 113 (1970) (involving abortion for adults); Bellotti v. Baird, 443 U.S. 622, 642 (1979) (involving abortion for minors).

167. *See Lawrence*, 539 U.S. at 578–79 (involving homosexual conduct).

168. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

advocates articulating the right at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[169] Other members of the Court have objected that this allows too little room for extension of basic principles to new contexts, but they have not articulated a clear alternative approach or clear principles by which judges might gauge the appropriate level of specificity.[170]

Two such principles come readily to mind. One is that the asserted right should not be so vague that its pronouncement would invite a flood of challenges to state action that cripple government,[171] or would make too unpredictable what state actions courts would deem to run afoul of it.[172] By that principle, the Court has been correct to reject such formulations of fundamental rights as a right to "'self-sovereignty'" or freedom in "'basic and intimate exercises of personal autonomy,'"[173] a right to "freedom from physical restraint,"[174] and a "right to be let alone."[175]

A second principle, aimed at avoiding too specific an articulation, would be that courts should not characterize the right so narrowly that they make morally irrelevant facts determinative and simply perpetuate a societal practice of arbitrarily denying to some disfavored or powerless group of persons a kind of legal protection generally afforded to others.[176] Unless a group's salient charac-

169. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion).

170. *Compare id.* at 127–28 n.6 (plurality opinion) ("[T]he dissent has no basis for the level of generality it would select"), *with id.* at 132 (O'Connor, J., concurring in part) ("On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available. . . . I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.").

171. *See* Randy E. Barnett, *Who's Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. 1, 17 (2006) ("If all liberty was protected equally, regulation would cease and, with it, most government functions . . . .").

172. *See Michael H.*, 491 U.S. at 128 n.6 (plurality opinion) ("[L]eaving judges free to decide as they think best when the unanticipated occurs . . . is no rule of law at all.").

173. *Glucksberg*, 521 U.S. at 724.

174. Reno v. Flores, 507 U.S. 292, 302 (1993).

175. Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

176. *See In re* Marriage Cases, 43 Cal. 4th 757, 183 P.3d 384 (Cal. 2008) ("None of the foregoing decisions—in emphasizing the importance of undertaking a 'careful description' of the asserted fundamental liberty interest' ([*Glucksberg*, 521 U.S. at 721])—suggests, however, that it is appropriate to define a fundamental constitutional right or interest in so narrow a fashion that the basic protections afforded by the right are withheld from a class of persons . . . who historically have been denied the benefit of such rights. . . . In this regard, we agree with . . . Chief Judge Kaye of the New York Court of Appeals in her dissenting opinion in *Hernandez v. Robles*, [855 N.E.2d 1, 23 (N.Y. 2006)]: '[F]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.' (*Cf. Taylor v. Louisiana* [419 U.S. 522, 537 (1975)] ["it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male . . . . If it was ever the case that women were unqualified to sit on juries or were so

teristic is a plausible basis for maintaining that its members are less deserving or needful than other persons of the protection sought, the characteristic is morally irrelevant and description of the right should not make reference to the group or to the particular context in which its members would exercise the right. This principle finds support in the Fourteenth Amendment's equal protection dimension; characterizing the claims of disfavored, politically powerless groups in unduly narrow terms, to ensure that the claim finds no support in tradition, smacks of invidious discrimination. This principle makes sense also because the substantive due process quest is supposed to be for a protected liberty, not for a protected group.

Based on this second principle, it would have been improper for the Supreme Court in *Meyer v. Nebraska*,[177] for example, to characterize the interest of the parents involved as "an interest in having one's children instructed in German," an interest that would likely have failed the history test. The parents' being of German heritage rather than some other was not morally relevant. Of course, whether a group's characteristic is morally relevant will sometimes be contested, as is evident in the Court's decisions concerning anti-sodomy laws,[178] but other times it will be fairly clear. The most forceful proponent of the "history and tradition" approach on the current Court, Justice Scalia, has sometimes applied it in a manner consistent with this principle. For example, in his *Michael H.* plurality opinion, he specified the right claimed as a right of a biological unwed father to claim legal parenthood as to a child being raised by a mother and her husband, and he noted the morally relevant fact that the biological father's claim would have the effect of disrupting a functional family.[179] Scalia thereby left open the possibility that an

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situated that none of them should be required to perform jury service, that time has long since passed"]."); *cf.* Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion) ("[H]istory counsels caution and restraint. But it does not counsel abandonment, nor does it require . . . cutting off any protection of family rights at the first convenient, if arbitrary boundary . . . .")). A similar, third principle might be that the articulation of the right should not be so narrow as to preclude application of well-established constitutional norms to novel contexts that arise as society evolves, absent constant amendment of the Constitution. New forms of state action occasioned by medical advances are an example. It was proper for the Court in *Cruzan v. Missouri Department of Health* to characterize the interest at stake as an "interest in refusing unwanted medical treatment," 497 U.S. 261, 278 (1990), rather than as something like "an interest in not receiving hydration while in a persistent vegetative state."

177. 262 U.S. 390 (1923).

178. *See* Conkle, *supra* note 153, at 92–93.

179. *See* Michael H. v. Gerald D., 491 U.S. 110, 125 (1989) (plurality opinion) ("We have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man."); *id.* at 129 n.7 ("[I]t is at least possible that our traditions lead to a different conclusion with regard to adulterous fathering of a child whom the marital parents do not wish to raise as their own.").

unwed father might have a protected interest if the mother were also unmarried at the time of the paternity action.

With respect to newborn children, a description of their right relating to parentage at the vague end of the spectrum might be something like a fundamental right against the state diminishing one's welfare, or a right against the state forcing one into a bad situation. Those clearly would be unworkable. At the specific end of the spectrum might be something like a fundamental right of newborns not to be made the legal child of a birth parent who has previously had rights terminated as to another child (or who is addicted to methamphetamines, etc.). That formulation of a right could be quite feasible to implement, but historical records are unlikely to contain much mention of such specific circumstances.

An articulation of the right just a bit more general than this and the one I have used throughout the article—that is, "a right of newborn children against the state placing them into legal relationships with and the physical custody of unfit birth parents"—might satisfy even Justice Scalia. For one can find substantial historical evidence of states reacting to what they viewed as parental unfitness, in many cases by denying legal parent status in the first instance to birth parents deemed unfit. The evidence supports recognition of this right of children to a much greater extent than one unfamiliar with the history of child protection might suppose.

In fact, "[e]fforts to protect children from abuse and neglect are as old as maltreatment itself."[180] Before the sixteenth century, these efforts were mostly exerted by private institutions and principally entailed exhortation and assistance; the Christian church prohibited members from mistreating children in certain ways and charities offered services to help parents care for children.[181] But for at least the past four centuries, the state in the English-speaking world has exerted extensive *parens patriae* authority over child rearing and has endeavored to ensure that children are not raised by unfit parents.[182]

The practice of denying legal parenthood in the first instance to biological parents is most clearly evidenced by the law's treatment of unwed fathers. As noted in Part II, for most of American history the state deemed unwed fathers per se unfit and accordingly denied them legal parent status.[183] In other cases

180. JOHN E. B. MYERS, A HISTORY OF CHILD PROTECTION IN AMERICA 19 (2004).

181. *See* CHILD WELFARE LAW AND PRACTICE 116–17 (Marvin Ventrell & Donald N. Duquette eds., 2005).

182. *See generally* JOHN E.B. MYERS, CHILD PROTECTION IN AMERICA: PAST, PRESENT, AND FUTURE 101–103 (2006); JOSEPH M. HAWES, THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION 1–7 (1991).

183. *Cf.* Stanley v. Illinois, 405 U.S. 645, 647 (1972) ("The State continues to respond that unwed fathers are presumed unfit to raise their children . . . .").

where officials separated birth parents from their offspring, it is less clear from the historical record to what extent this entailed a refusal to confer legal parent status in the first place or rather a termination of that status after conferring it, and it is also unclear to what extent the state proactively severed connections between children and unfit parents, before those parents maltreated the children, rather than only after maltreatment. What is clear is that the practice of state intervention to separate children from birth parents considered unfit dates back at least to the Elizabethan Poor Laws, which colonists imported to America.[184]

The Elizabethan Poor Laws ascribed unfitness principally on the basis of birth parents being among the "idle poor," and the state's motivation for taking custody of children in the seventeenth and eighteenth centuries was more often to protect society from the breeding of more idle poor and criminals rather than to effectuate a moral right of children.[185] There was little appreciation before the nineteenth century of a child's personhood or of how children might be harmed by parental violence. However, there were also interventions to prevent "cruelty,"[186] and colonists did believe children were entitled to be free from excessive abuse or neglect.[187] Local officials were quite intrusive in family matters by today's standards, and their authority to intervene to prevent abuse of children was widely accepted.[188]

During the nineteenth century, practices and attitudes began to evolve toward what we know today, in large part due to social life becoming less communal and more family-based, larger cities forming, and psychology emerging as a field of scientific study.[189] Beginning in the 1820s, states explicitly began to authorize removal of children from family settings deemed unsuited to a decent upbringing, and their subsequent placement in almshouses and orphanages.[190] Parental unfitness was still mostly tied to poverty and personal attributes

184. *See* MYERS, *supra* note 182, at 11–12; CHILD WELFARE LAW AND PRACTICE, *supra* note 181, at 118–22. As such, there is stronger evidence of a tradition of recognizing a somewhat more generally articulated right of children to avoid being in a legal relationship with unfit birth parents. But there clearly has been a tradition of denying legal parent status in the first instance to some birth parents deemed unfit (at a minimum, unwed fathers), and that might be sufficient for the Court to recognize a right of children at the level of specificity I have used.

185. CHILD WELFARE LAW AND PRACTICE, *supra* note 181, at 118–21.

186. *See* MYERS, *supra* note 182, at 12–13.

187. *See* HAWES, *supra* note 182, at 1–2. For example, the Massachusetts "Body of Liberties of 1641," *reprinted in* A BIOGRAPHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY FROM 1630 TO 1686, at 51 (William H. Whitmore ed., Rockwell & Churchill 1890), proscribed "unnaturall severitie" toward one's children in the "Liberties of Children" section and gave children "free libertie to complaine to the Authoritie for redresse." *Id.* at 5.

188. *Id.* at 2, 6–7; LEROY ASHBY, ENDANGERED CHILDREN: DEPENDENCY, NEGLECT, AND ABUSE IN AMERICAN HISTORY 7 (1997).

189. *See* ASHBY, *supra* note 188, at 51.

190. CHILD WELFARE LAW AND PRACTICE, *supra* note 181, at 124–26.

assumed to coincide with poverty, which would usually be apparent at the time of a child's birth and which could have led to separation of children from birth parents before any maltreatment occurred. Increasingly there was talk of saving children from unsuitable birth parents as a matter of children's moral right and of a corresponding duty on the part of public officials to prevent neglect of and cruelty toward children.[191] Courts upheld such removal laws as part of the state's legitimate *parens patriae* authority, as the ultimate parent of society's children, viewing birth parents' custodial status as just a state-conferred privilege.[192] A Pennsylvania court in 1839 explained that when parents "are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance?"[193]

Recognition of the personhood of children and their moral right to be spared from parental cruelty and deprivation truly became widespread in the latter part of the nineteenth century, particularly after the emergence of an awareness that children could be harmed by physical brutality.[194] The first child protection agency began operations in 1874 in New York City, and by the end of the nineteenth century there were over 160 "societies" for the prevention of "cruelty" to children.[195] These agencies, though private, exercised legal authority to remove children from birth parents deemed unfit, even at birth, and judgments of parental unfitness now rested principally on actual incapacities to provide proper care for children, such as chronic drunkenness or on grounds that parents had abused or neglected a child, rather than on them simply being "idle poor."[196] In the early 1900s, these agencies were consciously limiting removal to the children whose birth parents more seriously imperiled the children's welfare and who were deemed incapable of reform, taking a social work approach with the less serious cases and offering assistance to parents thought capable of overcoming problems.[197] During this Progressive

191. *Id.* at 116, 128, 133; MYERS, *supra* note 182, at 13, 19.

192. *See* CHILD WELFARE LAW AND PRACTICE, *supra* note 181, at 126–28.

193. *Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1839) (per curiam); *see also* CHILD WELFARE LAW AND PRACTICE, *supra* note 181, at 127 ("[I]n a series of cases involving delinquent and dependent children . . . courts adopted the *Crouse* policy that the state's *parens patriae* duty and authority permitted seemingly unlimited intervention into family autonomy.").

194. *See* CHILD WELFARE LAW AND PRACTICE, *supra* note 181, at 128–32; MYERS, *supra* note 182, at 34–37, 44, 58; JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION 71, 78 (1998) ("Protecting children as an end in itself has been an explicit goal for more than a century."); Hong, *supra* note 5, at 14–25.

195. *See* MYERS, *supra* note 182, at 34–35, 37; CHILD WELFARE LAW AND PRACTICE, *supra* note 181, at 132; WALDFOGEL, *supra* note 194, at 71. *See generally* MYERS, *supra* note 182, at 37–41.

196. *See* CHILD WELFARE LAW AND PRACTICE, *supra* note 181, at 132; MYERS, *supra* note 182, at 35–36, 44–45; WALDFOGEL, *supra* note 194, at 71–72.

197. *See* MYERS, *supra* note 182, at 39–40, 48.

Era of the late nineteenth and early twentieth centuries, states also created juvenile courts to adjudicate charges of parental unfitness and child maltreatment and reposed in them the power to order removal of children and termination of parental rights.[198] State laws creating those courts included among conditions justifying separation of children from birth parents the parents' maintenance of an "unfit" home and "vicious" treatment of children.[199] That parent-child ties could be severed based on a judgment of parental incapacity or of an unfit home environment suggests that the law effectively attributed to children a right to avoid a relationship that presented a high risk of harm, without having to wait until maltreatment actually occurred.

Indicative of a more general belief in children's right to a humane upbringing, in the early twentieth century states also enacted child labor laws and compulsory education laws, which also constrained parental choices and conduct, as well as public welfare programs targeted at children and struggling single mothers.[200] Throughout the twentieth century, the federal government played an expanding role in child welfare. The Supreme Court affirmed the *parens patriae* authority of states to intervene in family life to protect children in a series of decisions beginning in the 1920s, most significantly by upholding a child labor-related ordinance in the 1944 case of *Prince v. Massachusetts*.[201] In several decisions after World War II, the Court firmly established the constitutional personhood and rights-bearing status of children, decisions that transformed public education, juvenile delinquency practice, and other aspects of children's lives in which the state played a significant role.[202]

The second half of the twentieth century was also marked by expanding Congressional efforts to push states to be more responsive to child endangerment and maltreatment, motivated in large part by new child development research, studies revealing that physical abuse—of babies, in particular—was much more prevalent than had been supposed, and advocacy growing out of the civil rights movement for recognition of children's rights.[203] Beginning in 1980, Congress encouraged achieving permanent family situations for

198. *See id.* at 64–67, 69; CHILD WELFARE LAW AND PRACTICE, *supra* note 181, at 114–15, 133–34.

199. *See* CHILD WELFARE LAW AND PRACTICE, *supra* note 181, at 133.

200. *See* MYERS, *supra* note 182, at 54–55, 60–61, 64.

201. 321 U.S. 158, 162, 166, 170 (1944) (upholding the conviction of a guardian for allowing a child to distribute religious tracts in the streets at night, stating that "the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways," and citing numerous prior decisions).

202. *See* HAWES, *supra* note 182, at 96–97, 105–09.

203. *See* MYERS, *supra* note 182, at 81–103; CHILD WELFARE LAW AND PRACTICE, *supra* note 181, at 136–37; WALDFOGEL, *supra* note 194, at 72; *cf.* Lawrence v. Texas, 539 U.S. 558, 571–72 (2003) (suggesting that looking back just a half century could suffice in the search for a relevant tradition).

maltreated children as early as possible, as recognition grew of the vital importance of positive early childhood experience and continuity of parental care to healthy development.[204] Since the mid-90s, Congress has pushed child protection agencies to identify unfit parents and terminate their rights before they abuse or neglect children, based on a belief that children have a right to receive such preventive protection.[205]

This brief historical account reveals that the state practice of keeping children out of legal relationships with and custody of unfit birth parents is centuries old in this country, that since at least the nineteenth century this practice has been widely understood to effectuate a moral right of children, and that to some degree this practice has entailed denying legal parent status in the first instance to birth parents deemed unfit. The conceptual understanding of "unfitness" and the typical alternatives to birth parents (principally adoptive parents) are different today from what they were originally (principally orphanages), but developing attitudes and scientific research have continually pushed the state toward denying legal parent status to birth parents who pose real dangers to children's basic welfare, even before the birth parents have an opportunity to maltreat the children, and toward placing children in nurturing alternative family settings at the earliest possible time.

On the whole, the historical record does support a finding that a right of newborn children not to be placed into relationships with unfit parents is deeply rooted in this country's traditions, much more clearly than the historical record presented in *Lawrence* supported a right to sexual freedom for homosexuals.[206] Certainly there is no evidence of society explicitly rejecting this right of children, as there is with society rejecting the right to engage in homosexual sodomy and with society rejecting the right to abortion.[207]

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204. *See* MYERS, *supra* note 182, at 74, 91, 100; CHILD WELFARE LAW AND PRACTICE, *supra* note 181, at 137–38.

205. *See* Dwyer, *supra* note 2, at 435–41.

206. At times the *Lawrence* Court articulated the right at stake as the broader right to personal autonomy. *See, e.g.*, 539 U.S. at 573–74. And the Court did not rest its decision entirely on a history-and-tradition inquiry. But the Court also asserted the more specific "right of homosexual adults to engage in intimate, consensual conduct," *id.* at 560, and it did spend a significant portion of its analysis examining the historical record of the criminal law's treatment of sodomy, *id.* at 568–70.

207. *See* WALDFOGEL, *supra* note 194, at 72 ("[T]he proposition that children should not be abused or neglected is not a controversial one."); *cf.* Michael H. v. Gerald D., 491 U.S. 110, 122 n.2 (1989) (plurality opinion) (stating that, for purposes of due process, an interest denominated as a "liberty" must be, inter alia, an interest "traditionally protected" by our society and that "[t]he protection need not take the form of an explicit constitutional provision or statutory guarantee, but it must at least exclude . . . a societal tradition of enacting laws *denying* the interest"); *id.* at 127–28 n.6 (stating "[i]f, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions

There have never been laws proscribing interference with unfit birth parents' relationships with their offspring, and consigning babies to unfit parents has never been a matter of moral principle, the way prohibition of sodomy has been. At worst, there has been state indifference to the plight of some children. The historical record more robustly supports a finding that a somewhat more broadly characterized right is rooted in our traditions—namely, a right of children not to be in a legal relationship with unfit parents (which might be effectuated by denying legal parent status in the first instance *or* by removing it after conferral). And an advocate for a newborn child could mount an as-applied challenge to a state's parentage laws on the basis of that broader right. But there is significant support in the historical record for recognizing the more specific right that I have formulated.

In light of this history, one might wonder why the state today does continue to confer parenthood on unfit parents. The explanation likely lies in some combination of the following: Children's rights, while easy to espouse, are also easy to ignore and somewhat costly in the short term to effectuate.[208] At least since the civil rights era, liberals have been very sympathetic to poor and minority race adults and highly sensitive to government measures that adversely affect them. Warren Court equal protection and privacy decisions further encouraged such sympathy and sensitivity. Thus, poverty law groups and civil rights groups often oppose legislation that would lead to greater child protective intervention.[209] In addition, many people simply do not care what happens to other people's children.

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regarding natural fathers in general" and noting that the Court's prior decisions recognizing a right to purchase and use contraceptives had not found any "longstanding and still extant societal tradition withholding the very right pronounced to be the subject of a liberty interest").

208. *Cf.* HAWES, *supra* note 182, at 109–13 (discussing difficulties in enforcing children's rights and child welfare laws); MYERS, *supra* note 182, at 72–73, 79–80 (noting that progress toward comprehensive and properly tailored child protection efforts were derailed for much of the twentieth century by the Great Depression, World War II, the Korean War, and the Cold War).

209. *See, e.g.*, Brief of Amicus Curiae ACLU Supporting Plaintiffs-Appellees Subclass a and Supporting Affirmance, Nicholson v. Scoppetta, 116 Fed. App'x 313 (2nd Cir. 2004) (Nos. 02-7079 (L) 02-7119, 02-7329, 02-7419, 02-7086, 02-7412, 02-7088, 02-7414), 2002 WL 32903156 (C.A.2) (opposing a New York City policy of removing children from the custody of domestic violence victims, based on the policy's impact on women's equality); Dwyer, *supra* note 2 at 470–75 (discussing scholarly arguments against child welfare policies that have a disparate adverse impact on poor and minority race parents); ACLU Submits Brief in Texas FLDS Case Saying State Can't Separate Families Based Solely on Beliefs (May 29, 2008), http://www.aclu.org/religion/gen/ 35468prs20080529.html; High Court Weighs Government Right to Interfere With Parents' Child Rearing Decisions (Jan. 12, 2000), http://www.aclu.org/womensrights/parenting/13229prs20000112.html; ACLU Nebraska Legal Program—Religious Liberty, http://www.aclunebraska.org/ religious_liberty.htm (discussing the ACLU's opposition to state law requiring metabolic screening of all newborns).

Further, legislators absorb new social scientific knowledge rather slowly, and child maltreatment and early child development have not been subjects of robust research for very long.[210] Only recently have legislators come to understand the vital importance for babies of attachment, bonding, and freedom from trauma and, correspondingly, the seriously adverse effects on infants of both indifferent or abusive parenting *and* foster care.[211] When legislators do authorize child protection agencies and courts to take more proactive measures, social workers and judges do not fully use them, because both actors sympathize with parents and because social workers are trained to fix dysfunctional people rather than to make sound permanency decisions for children.[212] Faith in the possibility and power of redemption is widespread, and few people are aware of the dismal statistics on parental rehabilitation outcomes.[213] Significantly, the explanations do not include a widespread belief that unfit birth parents are entitled to raise their offspring. At most there is a belief, primarily among liberals, that the state owes struggling parents assistance in becoming fit so long as that does not entail sacrificing the welfare of children, coupled with an unawareness of or reluctance to admit the damage instability can have on an infant.[214]

In any event, it should be unnecessary to mount a historical case that western society has long recognized "a right of babies against the state placing them into relationships with unfit parents," or even the broader "right of children not to be in relationships with unfit parents," because articulating the right at a level of specificity that entails reference to a persons' age violates the second principle set forth above. Newborn babies' interest in the state not forcing them into a harmful parent-child relationship is one instance of a more general interest every person has in not being forced to enter into intimate relationships harmful to them, and there is no rational basis for thinking newborn babies have that interest to a lesser extent than do other people or are less morally deserving of its protection. Babies have an interest at least as strong as that of adult women in not being compelled to live with someone who is likely to cause them bodily harm or be indifferent to their well-being. Certainly a fundamental right against the state forcing one to be in a legal relationship and intimate association likely to be quite harmful is a right deeply rooted in our history as a free society and our tradition of limited government. Part II above showed that laws relating to marriage and to the

210. *See* MYERS, *supra* note 182, at 89.
211. *See* Dwyer, *supra* note 2, at 452–57.
212. *See* MYERS, *supra* note 182, at 219–20; Dwyer, *supra* note 2, at 452–57.
213. *See* Dwyer, *supra* note 2, at 431–32.
214. *See id.* at 452–56.

formation of guardian-ward relationships reflect such a right. To deny newborn children this right by insisting on a much more specific right-description, one containing reference to their stage of life and the particular type of relationship that would harm them, would be arbitrary and morally unjustifiable.

This somewhat more general articulation of the right so that it is one newborn children share with older persons, competent and incompetent, is more specific than others the Supreme Court has recognized as fundamental in substantive due process analysis, such as a right to make "'personal decisions relating to marriage, procreation, contraception, family relationship, child rearing, and education,'"[215] "the right to make certain decisions regarding sexual conduct,"[216] and "the right of a woman to make certain fundamental decisions affecting her destiny."[217] It is limited to instances in which the state directly and profoundly impacts intimate associations, and to a type of situation in which actions of the political branches of government must be subject to judicial review in order to protect the basic welfare of citizens. It is a long-established, if rarely invoked, basic right that simply needs to be applied in a way that might seem novel but that is in fact consistent with centuries-old practices and attitudes.

2. Grounding a Newborn's Right in Reasoned Judgment

This alternative approach to identifying fundamental rights for substantive due process protection makes more sense as a linguistic matter, because it looks to the importance of the interests at stake, tying rights to protection of the most basic and important interests. Several members of the Supreme Court have over time endorsed Justice Harlan's statement in *Poe v. Ullman*[218]:

> This 'liberty' . . . is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[219]

215. Washington v. Glucksberg, 521 U.S. 702, 726 (1997) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

216. Lawrence v. Texas, 539 U.S. 558, 565 (2003).

217. *Id.* (citing Roe v. Wade, 410 U.S. 113 (1973)).

218. 367 U.S. 497 (1963).

219. *Id.* at 543 (Harlan, J., dissenting) (citations omitted) (opinion dissenting from dismissal on jurisdictional grounds), *cited favorably in Casey*, 505 U.S. at 848; Hodgson v. Minnesota, 497 U.S. 417, 446 (1990) (opinion of Stevens, J., announcing judgment of the Court); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion); Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

This approach to defining fundamental interests and rights often comes under attack for inviting unconstrained, subjective, value-laden judgments by judges.[220] However, an interest's importance in welfare terms is in principle susceptible to scientific demonstration; courts can look to empirical evidence of how much people suffer when a given interest is thwarted. An interest's importance in metaphysical terms might be substantiated by examining the extent to which political majorities or elites endeavor to secure it for themselves legislatively, which might be implicit in existing law or explicit in documents and statements issued in support of existing laws or practices. Such contemporary social scientific investigations might be more objective and reliable than the historical investigation prescribed by the tradition-based approach.

Under this second approach, it would be difficult to find many better candidates for a fundamental right than the right of a baby not to be placed into a legal relationship and compelled intimate association with unfit parents. Apart from executions, there might be nothing more damaging that the state does to people. As noted above, the parenting children receive, especially in the first year of life, has an enormous impact on their fate in life. Even more than physical harm, being deprived of consistent and attentive nurturance in a stable environment during infancy typically produces seriously adverse life-long consequences.[221] State statutes or court decisions causing some children to experience such deprivation clearly impact the children's fundamental interests. This is so whether the state is placing children with biological parents through parentage laws or with nonbiological parents through adoption laws.

The Court has often cautioned that the state must tread especially carefully when its actions impact intimate family relationships, and has indicated that the primary reason family relationships receive constitutional protection is that they typically provide positive emotional attachments, which are the basis of identity, self-worth, and happiness.[222] This supports the conclusion that every person has a right against the state denying them an opportunity to form such positive emotional attachments, especially at the outset of life. Persons' early relational experience with parents likely has a greater

220. *See, e.g.*, Conkle, *supra* note 153, at 111–13.

221. *See* Dwyer, *supra* note 2, at 415–28.

222. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984) ("[T]he constitutional shelter afforded [highly personal] relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others . . . . The personal affiliations that exemplify these considerations . . . are those that attend the creation and sustenance of a family."); Smith v. Org. of Foster Families for Equal. & Reform (OFFER), 431 U.S. 816, 843–44 (1977); *Moore*, 431 U.S. at 503–05.

impact on emotional development, identity formation, sense of self, and happiness than do their relationships as adults.[223]

In addition to the scientifically documented adverse welfare effects of child maltreatment, unfit parents thwart children's development of autonomy, which Supreme Court decisions in several contexts have treated as central to human flourishing.[224] The Court has also been more inclined to recognize substantive due process rights against state action that threatens substantially to undermine a person's life prospects. For example, the Court has rested the right to an abortion in large part on the connection between women's ability to control their reproductive lives and their "ability to realize their full potential."[225] Again, apart from killing a person, there is not much a state can do that more undermines persons' life prospects than consigning them at the outset of life to the custody of adults who abuse or neglect them, or depriving them of healthy attachment with permanent caregivers by depositing them into the troubled foster care system. Any theory of rights predicated upon the importance of interests would therefore have to attribute to babies a fundamental right against the state making them the legal children of unfit parents.

C. State Justifications for Infringing the Right

If babies have a fundamental substantive due process right against the state placing them in family relationships with unfit parents, then a challenge to maternity and paternity laws as applied to a newborn whose birth parents are manifestly unfit would put the state in the position of having to show that such laws, without exceptions for unfitness, are narrowly tailored to serve a compelling state interest. The state would need to demonstrate that placing newborn babies into legal and custodial relationships with birth parents without regard to fitness is necessary to avoid some other great and overriding cost.

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223. On the lifelong impact of early childhood experience, see Dwyer, *supra* note 2, at 415–30.

224. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1641 (2007) ("[L]egal challenges to undue restrictions on abortion procedures . . . center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."); Lawrence v. Texas, 539 U.S. 558, 574 (2003); *Roberts*, 468 U.S. at 619 (noting that constitutional protection of intimate relationships "safeguards the ability independently to define one's identity that is central to any concept of liberty"); JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 140–60 (2006) (discussing the impact of children's family life on their development of autonomy).

225. *Carhart*, 127 S. Ct. at 1641 (Ginsburg, J., dissenting) ("As Casey comprehended, at stake in cases challenging abortion restrictions is a woman's 'control over her [own] destiny.'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) (plurality opinion))).

Importantly, avoiding additional administrative costs would not be sufficient justification.[226] Even if it were, the reality is that there would be little additional administrative burden from identifying presumptively unfit parents at the time of birth rather than after they have damaged a child. To identify birth parents presumptively unfit by virtue of past conduct, state-level child protection agencies need simply install a computer program that cross-checks databases the state already possesses—namely, birth records and records of past child maltreatment or violent felonies. To identify birth parents presumptively unfit by virtue of current substance abuse, states need only mandate testing of all newborns for drug or alcohol exposure, which some hospitals already routinely do. States already require birthing facilities that do test newborns to report positive drug toxicology results to the local child protective agency and could easily expand that mandate to include alcohol as well. Any court proceeding triggered by such identification, aimed at preventing assignment of children at birth to unfit parents (or, when likely to be effective quickly, providing services to rehabilitate the parents), would likely substitute for and obviate the need for the several court proceedings that ordinarily ensue after unfit parents maltreat children. Prevention would be much easier and cheaper for the state than would remediation.

A truly compelling state interest might be avoiding substantial and unwarranted injury to society generally or to other individuals. Given the enormous social cost of child maltreatment, and given that the state already severs many children's legal relationship with unfit parents (though only after maltreatment occurs), it would be implausible to suggest that limited pre-parentage screening aimed at preventing child maltreatment would on the whole harm societal interests. Rather, the most obvious candidate for a compelling state interest is avoiding the impact on biological parents who wish to be the legal parents of their offspring but are denied their wish because they are unfit. In this subpart, I therefore focus principally on the competing claim of biological parents.

1. Birth Parents' Constitutional Right to Be Legal Parents

Many people speak as if there is a well-recognized constitutional right of biological parents per se to become legal parents. In reality, the U.S. Constitution contains not a word about parenthood, and the Supreme Court

226. *Cf.* Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974) (stating that "[t]he conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement" on use of the county's hospital, because the requirement "severely penalizes exercise of the right to freely migrate and settle in another State").

has never held that there is such a right. In fact, as discussed below, the Court has implied that unfit parents have no such right. This subsection explains why the notion of an unfit birth parent having a right to be the legal parent of an offspring has no basis in constitutional doctrine, morality, or natural law.

a. Doctrine

The Court has recognized a right to "be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child,"[227] but only in the contexts of prohibitions on contraception or abortion and of forced sterilization, which all have to do with procreation rather than status as a legal parent. One might think it follows naturally from a right to procreate that one has a right to raise the child created, but the two activities are distinct: the former does not logically entail the latter, and the Court has never held that the latter follows from or is contained within the former as a matter of constitutional law.[228]

The Court has also at times pronounced a "fundamental right of parents to make decisions concerning the care, custody, and control of their children,"[229] but only in the contexts of state regulation of child-rearing choices and proceedings to terminate parental rights, after biological parents have already been in a legal and social relationship with a child.[230] In addition, to the extent

227. *Casey*, 505 U.S. at 851 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)); *see also* Skinner v. Oklahoma, 316 U.S. 535, 536–37, 541 (1942) (striking down legislation which provided for the sterilization of "habitual criminal[s]"; strict scrutiny applies to sterilization laws because they involve procreation, "one of the basic civil rights of man"). While the notion of a right to have sex without creating a baby is entirely plausible as a moral matter, the notion of a moral right to create another human being while having sex is quite suspect. Rights, in their origin and in prevailing contemporary usage, protect individuals' personal integrity and self-determination, not their desires as to the existence or life course of other persons. *See* James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1405–23 (1994). Nevertheless, I take for granted in this Article that adults have a constitutionally-protected right of some scope to procreate. Its scope as a matter of positive law is uncertain; the Supreme Court upheld involuntary sterilization of "feeble-minded" persons in state institutions in *Buck v. Bell*, 274 U.S. 200, 205–08 (1927), but has not had occasion in recent decades to decide whether that decision is still good law.

228. Indeed the Court has noted the obvious fact that biological parenthood is not identical with social or legal parenthood. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 261 (1983) ("[T]he mere existence of a biological link does not merit equivalent constitutional protection."); *cf.* Smith v. Org. of Foster Families for Equal. & Reform (OFFER), 431 U.S. 816, 843 (1977) (noting that "biological relationships are not exclusive determination of the existence of a family").

229. Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion).

230. *Id.* at 65–67 (plurality opinion) (citing precedents); *cf. id.* at 88 (Stevens, J., dissenting) ("A parent's rights with respect to her child . . . are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family."). In its most recent decision involving parents' child rearing rights, the Court implicitly treated them

the Court has offered any justification for attributing this unenumerated constitutional right to parents, it has principally been that parental authority over and continued relationship with children is conducive to the children's healthy development,[231] and its decisions upholding parental control rights have emphasized that the parents were fit and not endangering their children.[232] By implication, even the control rights the Court has recognized would not apply when parents are unfit or when they would operate to undermine children's healthy development.

The most relevant Supreme Court precedents concern unwed biological fathers' substantive due process right to be legal parents. The Court established in four pre-Rehnquist Court decisions that constitutional protection attaches to a fit biological father's interest in legal paternity if and only if he "demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child."[233] Biology alone does not give rise to a constitutional right to be a legal parent.[234] In two of those cases, the

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as less than fundamental, applying a level of scrutiny less than strict. *See* David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857, 875 (2006).

231. *See, e.g.*, *Troxel*, 530 U.S. at 68 (plurality opinion) ("[H]istorically [the law] has recognized 'that natural bonds of affection lead parents to act in the best interests of their children.'" (quoting Parham v. J.R., 442 U.S. 584, 602 (1979))); Bellotti v. Baird, 443 U.S. 622, 637–38 (1979) (plurality opinion) ("[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. . . . This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens."); Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) ("The duty [of parents] to prepare the child for 'additional obligations' . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925))); *id.* at 233–34 ("To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."); *id.* at 535 ("[T]hose who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

232. *See, e.g.*, *Troxel*, 530 U.S. at 68 ("[T]he Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. . . . Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family . . . ."); *id.* at 60–61, 69–70, 72 (plurality opinion) (finding that the lower court failed to accord appropriate weight to a fit parent's determination to limit her children's visitation with their grandparents); Yoder, 406 U.S. at 230 ("This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. . . . His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment."); *see also Troxel*, 530 U.S. at 80 (Thomas, J., concurring) ("Washington lacks even a legitimate governmental interest . . . in second-guessing a fit parent's decision . . . .").

233. *Lehr*, 463 U.S. at 261.

234. *See* Meyer, *supra* note 230, at 870–72.

Court held that the biological father had no constitutional right to prevent another man from becoming the legal father of his offspring, because he had not demonstrated a commitment.[235] Importantly, as with the parental control cases, in none of these unwed fathers' rights cases was there an allegation that the adult asserting rights was unfit to be a parent, and the Court implied that unfitness would be a proper basis for denying the right.[236] This is an aspect of the unwed father cases that family law scholars have overlooked. In *Stanley v. Illinois*,[237] the Court in fact suggested that the state could constitutionally require a hearing on an unwed father's fitness prior to conferring on him legal parental status, and indeed could put the onus on the biological father to initiate the proceeding.[238]

On the other hand, the Court also hinted that a state could not deny legal parenthood to a committed biological father absent an unfitness finding—in other words, that unfitness is a necessary as well as a sufficient condition for denying parentage to a biological father who assumes child rearing responsibilities. The Court stated in *Quilloin v. Walcott*:[239]

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[240]

This statement, however, is dictum. In addition, it presupposes the prior existence of family relationships that would be broken up, so is not pertinent to the parentage decision at the time of birth (the Court emphasized that the biological father in that case had never had custody of the child), and it actually suggests that the state is constitutionally forestalled from breaking up a family only if the child as well as the parent objects.

In any event, it provides no support for the proposition that unfit biological parents have a positive constitutional right to the state granting them legal parent status as to their offspring at the time of birth. Lower courts relying on the early fathers' rights cases have consistently indicated that unfitness

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235. *Lehr*, 463 U.S. at 248, 261–62, 266–67; Quilloin v. Walcott, 434 U.S. 246, 254–56 (1978).

236. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 652–53 (1972) ("We do not question the assertion that neglectful parents may be separated from their children . . . . What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular case?").

237. 405 U.S. 645.

238. *Id.* at 656–57 & n.9, 658.

239. 434 U.S. 246 (1978).

240. *Id.* at 255 (quoting Smith v. Org. of Foster Families for Equal. & Reform (OFFER), 431 U.S. 816, 862–63 (1976) (Stewart, J., concurring)).

obviates a biological parent's claim to a constitutional right to a relationship.[241] The Supreme Court suggested in the last of its early unwed father cases that biological parentage alone affords a man "an opportunity" to demonstrate commitment to parenthood,[242] but did so in dictum, without making clear whether it was referring to an opportunity conferred by state statue or guaranteed by the Constitution. Later court decisions discussed below have rejected the notion that biology alone gives rise to any constitutional right of an unwed father.

Courts might come to a different conclusion with respect to mothers, but cases have not arisen to test that possibility. The Supreme Court might well hold that pregnancy entails sacrifice sufficient to show commitment to parental responsibility, so that any fit birth mother per se has a constitutional right to become her offspring's legal parent. But there is no reason to suppose that the Court would hold that fitness is irrelevant with respect to mothers. In fact, constitutional norms of gender equality presumptively would require the Court to hold that unfit birth mothers, as much as unfit biological fathers, have no constitutional right to become legal parents and custodians of their offspring.

Two doctrinal developments in more recent years further support a conclusion that birth parents deemed unfit by the state have no constitutional right to be in a legal relationship with or to raise their offspring. One is the ascendancy of the history and tradition approach to identifying fundamental rights,[243] given that the historical record of state parentage laws and child protection efforts described in the prior subsection reveals a clear and widespread rejection of such an entitlement.[244] Under the reasoned judgment approach to identifying substantive due process rights as well, a claim to a constitutional right to be a parent despite unfitness would have little plausibility. While all humans might have a strong interest in being in family relationships

241. *See, e.g.*, Adoption of Kelsey S., 823 P.2d 1216, 1236 (Cal. 1992) (en banc); *In re* Kirchner, 649 N.E.2d 324, 334, 339 (Ill. 1995); *In re* Baby Girl Clausen, 502 N.W.2d 649, 666–67 (Mich. 1993); *In re* Raquel Marie X., 559 N.E.2d 418, 424 (N.Y. 1990).

242. Lehr v. Robertson, 463 U.S. 248, 262 (1983) ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.").

243. *See* Meyer, *supra* note 161, at 805–06 (noting that the "history and tradition" approach has been relied on especially in recent Supreme Court decisions); *id.* at 809 (characterizing the traditional-recognition test for substantive due process rights as "the Court's dominant methodology in the family-privacy context").

244. *See* Hong, *supra* note 5, at 14–24. The proper level of specification in the case of parents' rights would include reference to parents and unfitness, because it is clearly morally relevant, in a way that weakens the asserted claim, that the relationship is one of custody over a helpless and quite vulnerable person and that the individual asserting the right is known to present a danger to that helpless, vulnerable person.

that generate emotional, psychological, and physical goods, they do not have a strong interest in being in dysfunctional and destructive relationships that are likely to be disrupted. Additionally, it is not part of human flourishing to be in a parental role but fail miserably at it and damage one's child.

Second, the Court's constitutional jurisprudence relating to the family has shifted emphasis somewhat from biological relationships to social relationships that generate emotional and psychological benefits for their members. In particular, the most recent Supreme Court decision analyzing a claim to a constitutional right to be a parent, *Michael H. v. Gerald D.*,[245] rejected such a claim by a biological parent who had an established relationship with the child in question, and upheld a California law that established an irrebuttable presumption of paternity in favor of a mother's husband.[246] Justice Scalia's plurality opinion explicitly denied that biology plus commitment are sufficient to generate a constitutional right, concluding that the Court's precedents instead established constitutional protection for "the relationships that develop within the unitary family," not for biological relationships.[247] The three dissenters in *Michael H.* would have applied the biology-plus-commitment test, but they also rejected the notion that biology alone gives rise to constitutional protection, stating that "although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so."[248]

Consistent with this emphasis on family relationship as social rather than merely biological or legal, courts have generally accorded less weight to an interest in initiating a relationship than to an interest in maintaining an already-established social family relationship.[249] This has included courts being

245. 491 U.S. 110 (1989) (plurality opinion).

246. *See id.* at 113–17, 129. The four dissenters in that case—Justices Brennan, Marshall, Blackmun, and White—are now all gone from the Court. *Id.* at 136, 157.

247. *Id.* at 123–24. Some lower courts nevertheless continue to apply the "biology plus" test established by the earlier unwed father cases. *See, e.g.*, *In re* St. Vincent's Servs., 841 N.Y.S.2d 834, 848–852 (N.Y. Fam. Ct. 2007).

248. *Michael H.*, 491 U.S. at 142–43 (Brennan, J., dissenting); *see also id.* at 143 n.2 ("[A] mere biological connection is insufficient to establish a liberty interest on the part of an unwed father."); Smith v. Org. of Foster Families for Equal. & Reform (OFFER), 431 U.S. 816, 844 (1977) (stating that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association" and noting that for a child who has never known his biological parents, a relationship with other caregivers "should hold the same place in the emotional life of the . . . child, and fulfill the same socializing functions, as a natural family"); *id.* at 845 n.53 ("The legal status of families has never been regarded as controlling . . . .").

249. *See* Meyer, *supra* note 230, at 878 (indicating that a birth parent's interest in becoming a legal parent might receive less constitutional protection than the interest of someone who has

less solicitous of the desires of adults—even biological parents—to enter into legal relationships with children than of adults' interest in maintaining a relationship with a child once they have been in one and formed attachments. For example, in 1998 the California Supreme Court rejected an unwed father's claim to constitutional guarantee of an opportunity to demonstrate commitment to parenthood—the sort of opportunity alluded to in *Lehr v. Robertson*[250]—joining other state courts in concluding from the plurality and dissenting opinions in *Michael H.* that "a biological father's mere desire to establish a personal relationship with the child is not a fundamental liberty interest protected by the Due Process Clause."[251]

With adults who are not biological parents, there are many more examples of courts differentiating continuation of an existing relationship from a desire to initiate a relationship. One is the Ninth Circuit's decision in *Mullins v. Oregon*,[252] rejecting a biological grandmother's claim to a constitutional right to priority in adopting the children of her son, whose parental rights were involuntarily terminated.[253] The court emphasized that "this is not a case about breaking up an extant family unit . . . [as] there never has been any familial relationship," but rather about "creating a new family unit where none existed before."[254] The court held that an interest "in a potential, still undeveloped familial relationship . . . does not rise to the level of a fundamental liberty interest."[255] Significantly, the court observed that a claim to state conferral of parental status is a claim to a positive right, rather than to the sort of

already served for a time as a child's legal parent (whether a biological parent or an adoptive parent) in remaining in that role); David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 VILL. L. REV. 891, 891–95 (2006) (showing that as a general matter the Supreme Court has interpreted the privacy right to protect already existing familiar relationships from government interference and not as a right to state's affirmative assistance in forming relationships).

250. 463 U.S. 248 (1983).

251. Dawn D. v. Superior Court, 952 P.2d 1139, 1144–45 (Cal. 1998); *see also* Lisa I. v. Superior Court, 34 Cal. Rptr. 3d 927, 937 (Ct. App. 2005) ("[W]hen there is no existing relationship between the claimed biological father and the child, courts must defer to legislative choices reflected in paternity statutes."); Callender v. Skiles, 591 N.W.2d 182, 188 (Iowa 1999) (citing decisions in numerous other states refusing to recognize a due process right on the basis of biological fatherhood). Some state courts have held that biological fathers per se have a protected liberty interest under state constitutions. *See id.* at 187–90 (concluding that there is such a right under Iowa's state constitution and citing similar decisions in Colorado and Texas).

252. 57 F.3d 789 (9th Cir. 1995).

253. *Id.* at 791.

254. *Id.* at 793–94.

255. *Id.* at 794. The court distinguished *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), on the grounds that "*Moore* was a case about breaking up an existing family unit, not a case about creating an entirely new one." *Mullins*, 57 F.3d at 794.

"negative right to be free of governmental interference" that the Constitution more clearly confers.[256]

In addition to denying biological fathers per se constitutional protection of their interest in being legal and social parents to their offspring, the Supreme Court has as a constitutional matter declined to require states to apply any particular substantive legal standard of parental fitness when they sever such a relationship, even after a legal parent-child relationship exists with a mother or father. The Court has established a constitutional right of legal parents to certain procedural protections in connection with termination of parental rights proceedings—namely, that the state must prove by clear and convincing evidence that a parent meets the state's unfitness standard, whatever that standard happens to be, and that in some cases the court must supply a lawyer for indigent parents.[257] But the Court has never indicated that the state must find misconduct of a particular kind or severity in order to sever such a relationship. This further undermines any attempt by a state to justify infringing newborns' due process rights relating to legal parentage on the grounds that it is respecting birth parents' constitutional rights.

In sum, a state would not infringe any established constitutional right of biological parents by changing its parentage statutes to exclude unfit biological parents from legal parenthood, at least so long as birth parents have opportunity for a hearing on their fitness and adequate assistance in presenting their case, including state-funded legal representation if they are poor. If a biological parent asserted a right to become a child's legal parent regardless of fitness, there is ample basis in the Supreme Court's prior decisions for assuming the Court would reject such a claim. And even if the Court did conclude that some constitutional right exists for biological parents per se with respect to legal parentage, its statement in numerous contexts that protecting the welfare of children is a compelling state interest suggests that it would find no violation of such a right in a state excluding from legal parenthood birth parents whom the state has good reason to suppose will seriously damage a child.[258] Significantly, lower courts have uniformly rejected constitutional

256. *Mullins*, 57 F.3d at 794; *see* also *id.* at 796.

257. *See* Santosky v. Kramer, 455 U.S. 745, 769 (1982) (applying a clear and convincing evidence standard); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (noting the right to an appointed attorney).

258. *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens."); *Lassiter*, 452 U.S. at 27 (1981) ("[T]he State has an urgent interest in the welfare of the child . . . ."); Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (accepting for the sake of analysis that protecting the welfare of children is a "substantial interest[ ]"); Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (describing ways in which, "[a]cting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the

challenges to state laws that authorize TPR on the basis of a parent's prior TPR as to another child.[259] The Indiana Supreme Court explained that such a provision

> is narrowly tailored to include only those parents who have had at least one chance to reunify with a different child through the aid of governmental resources and have failed to do so. As the California Court of Appeals has pointed out, "[e]xperience has shown that with certain parents . . . the risk of recidivism is a very real concern. Therefore, when another child of that same parent is adjudged a dependent child, it is not unreasonable to assume that reunification efforts will be unsuccessful."[260]

b. The Moral Basis for State Creation of Families

When the state decides who will be a child's legal and custodial parents, it acts in a special role in which it should be unconstrained by, and in fact should not defer to, alleged rights of other private parties. The sole moral justification for the state getting involved in such a quintessentially private decision as who someone's family members will be is that the person is unable to make that decision for herself. The state has for many centuries assumed responsibility for acting on behalf of such persons, as a proxy, pursuant to a *parens patriae* power and obligation.[261] And if the only justification for the state presuming to step into the lives of private parties and make choices about

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parent's control"). Lower courts have said this many times as well. *See, e.g.*, *In re* Sheneal W. Jr., 728 A.2d 544, 552 (Conn. Super. Ct. 1999) ("[I]t is beyond debate that the state has a compelling interest in protecting children."); G.B. v. Dearborn County Div. of Family and Children, 754 N.E.2d 1027, 1032 (Ind. Ct. App. 2001) ("[T]he state has a compelling interest in protecting the welfare of children."); *In re* K.M., 653 N.W.2d 602, 609 (Iowa 2002) (referring to "the State's compelling interests in identifying parents who pose a risk to the safety and well being of their children and providing such children with the nurturing care and treatment they have a right to expect").

259. *See, e.g.*, *In re* Custody and Parental Rights of A.P., 172 P.3d 105 (Mont. 2007); Renee J. v. Superior Court, 28 P.3d 876, 878, 886 (Cal. 2001); *In re* Baby Boy H., 73 Cal. Rptr. 2d 793, 796, 799 (Ct. App. 1998); G.B., 754 N.E.2d at 1030–32; State *ex rel.* Children, Youth & Families Dep't v. Amy B., 61 P.3d 845 (N.M. Ct. App. 2002); *cf. Sheneal W. Jr.*, 728 A.2d at 546, 552 (holding that the retroactive application of a statute providing for termination of parental rights when a parent has intentionally assaulted another child of the parent did not violate the parent's due process rights); Winnebago County Dep't of Soc. Servs. v. Darrell A., 534 N.W.2d 907, 909–10 (Wis. Ct. App. 1995) (holding that the termination of parental rights pursuant to a statute making intentional homicide of parent grounds for termination did not constitute ex post facto law, did not violate the father's due process or equal protection rights, and did not constitute double jeopardy).

260. G.B., 754 N.E.2d at 1032.

261. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (referring to "the State's long-recognized interests as *parens patriae* and, critically, the child's own complimentary interest in preserving relationships that serve her welfare and protection" and citing several Court precedents).

their intimate relationships is that the private parties are incapable of self-determination and need decisions to be made for them, the state's authority to make such decisions should extend no further than doing for the private parties what they would do for themselves if able.

Thus, the usual police power justifications for state action—namely, furthering the common good or protecting rights of other individuals[262]—should be viewed as inapposite in this context. The state certainly could not invoke its police power to select spouses for competent adults. It could not compel one adult to marry another, on the grounds that, by refusing to marry, the former is making the latter intensely unhappy, or on the grounds that the latter has a fundamental right to marry, or on the grounds that compelling them into marriage would serve some broad societal purpose. Likewise, the state cannot legitimately invoke its police power to decide who a child's parents will be and thereby base its decisions on a balancing of the child's welfare against the desires or interests of the birth parents or against the interests of the rest of society. The *parens patriae* power, not the police power, is the sole appropriate basis for the state making such a decision about a person's life.

The Eleventh Circuit, in *Lofton v. Secretary of the Department of Children and Family Services*,[263] manifested agreement with this view in the context of adoption. The court explained that the State of Florida, in selecting adoptive parents for children, was acting not in a police power role, but rather acting in a *parens patriae* role as a surrogate for the child, making for the child a kind of decision private parties usually make on their own without state involvement, but that someone must make on behalf of a child because of the child's incapacity. The court went on to state that in that special, proxy role, the state is not constitutionally constrained in the same ways or to the same degree as it is when it is regulating the conduct of or mediating disputes between autonomous persons.[264] In particular, the court intimated that private parties other than the child (in that case, adult applicants for adoption) have less constitutional basis for objecting to what the state does than they might in another context, such as distribution of welfare benefits, in which the state acts in a police power role.

The best explanation for this view is that when the state acts merely as proxy or agent for a private party, making a decision ordinarily within the realm

262. *See* Brown, *supra* note 150, at 42 ("[T]he Constitution has required legislatures, when seeking to restrict important liberties of their people, to provide reasons that relate to the demands of organized society, generally referred to as the police power.").

263. 358 F.3d 804 (11th Cir. 2004).

264. *Id.* at 809–10 ("Because of the primacy of the welfare of the child, the state can make classifications for adoption purposes that would be constitutionally suspect in many other areas.").

of private life, its decisionmaking should replicate that of an autonomous private party making a similar decision. Assuming that autonomous persons ordinarily act, or at least are entitled to act, solely to further their own well being, the state's proxy decisionmaking should not entail sacrificing the interests of the nonautonomous person in order to serve the interests or desires of other parties. It should not entail even considering other's interests, and no rights should be attributed to other persons. No one has a legal or moral right to be chosen as a spouse, and likewise no one should be deemed to have a right to be chosen as a parent.[265] Other adults have a right to decline a relationship with us, but no right to force us into one with them, regardless of how strongly they desire it, regardless of what connection they might feel to us, and regardless of what disparate societal impact our decision might have. Likewise, no one, not even biological parents, should be viewed as having a right to be in a parent-child relationship with a newborn child that constrains the state's surrogate decisionmaking on behalf of the child.

This view—that when the state acts in a *parens patriae* role other private parties have no rights that constrain how the state carries out that role—finds expression in the law governing decisionmaking for incompetent adults. In *Cruzan v. Director, Missouri Department of Health*,[266] the Supreme Court rejected a suggestion by parents of an adult in a persistent vegetative state that they had a constitutional right to make the decision to terminate their daughter's life support. The Court stated that, regardless of how strongly the parents felt about the matter, only the incompetent adult herself had any constitutional rights in the matter that could properly be considered.[267] As discussed in Part II, state laws governing appointment of guardians for incompetent adults also reflect this view.

Thus, in establishing and applying parentage laws, the state should be seen as acting in a quasi-private *parens patriae* capacity, solely as an agent for the newborn child, driven by rights of the child but otherwise stepping outside of the Constitution.[268] Biological parents should be viewed as not having constitutional rights relating to state parentage decisions any greater than they would have relating to another private party's self-determining

265. For an extended argument in support of this proposition, see generally DWYER, *supra* note 224, at 68–122.

266. 497 U.S. 261 (1990).

267. *Id.* at 266–67, 285–87 (1990); *see also id.* at 315–16 (Brennan, J., dissenting) (asserting that the state's only legitimate interest in connection with cessation of treatment was "a *parens patriae* interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances").

268. For an extended explanation and defense of this idea of stepping outside the Constitution, see DWYER, *supra* note 224, at 188–203.

relationship decisions. Thus, they might have an equal protection-type right against a state that entirely and arbitrarily excludes them from consideration as potential legal parents, just as any adult would have a right against a state arbitrarily and categorically precluding them from ever becoming anyone's spouse. And if it is best for a newborn to be in a parent-child relationship with her biological parents, as it is in most cases, such that the state's surrogate choice of parents on behalf of the newborn should be in favor of the biological parents, then both the biological parents and the baby might be said to have a constitutional right against the state preventing them from forming a relationship. But courts should conclude that biological parents have no constitutional right to use state power to force their association on a child or to be in a relationship with a child even in the absence of a reciprocal, proxy choice, just as adults have no moral or legal right to state assistance in forcing their association on another adult against the latter's actual or surrogate choice.

c. Natural Law

Though existing constitutional doctrine and moral reasoning do not support attribution of a constitutional right to legal parenthood for biological parents per se, some might suppose that natural law does, and that the state, in its parentage laws, is simply recognizing and respecting the natural order of human life. Whether natural law thinking is at all coherent or plausible has been the subject of much philosophical debate. I will not rehearse or wade into that debate here, but rather will simply suggest that it could not justify infringing the right of newborns I have formulated.

Defenders of the current practice of predicating parentage in the first instance on biology alone might contend that it is an aspect of human nature to care about one's biological offspring, more so than would other adults, and that natural law therefore dictates that biological parents should always raise their children.

Anyone who believes that syllogism to be decisive, however, cannot have given it much thought. For the very problem I address is that a significant percentage of adults are not disposed to care for their offspring, or even if disposed are incapable of doing so adequately. In many cases, birth parents demonstrate by conduct toward other children that their nature is actually to abuse their offspring. A natural law proponent ought to say that it violates natural law for parents to abuse or neglect their offspring and, if it is the state's place to enforce natural law, that the state should therefore act to keep offspring out of relationships with and custody of such birth parents.

Further, observation of human behavior might reveal that there is something natural about biologically unrelated persons caring about and for vulnerable persons who do not have an adequate caregiver,[269] and something quite unnatural about knowingly thrusting vulnerable persons into dangerous or grossly unhealthy situations, as we collectively do now through our parentage laws. It is not difficult to construct a natural law argument for effectuating our compassion toward helpless newborns through state laws ensuring that they enter into parent-child relationships only with adults who will give them a good childhood and prepare them for flourishing lives. Correspondingly, turning a blind eye to the danger unfit birth parents pose to babies is patently inconsistent with the nobler part of human nature.

2. Parents' Interests

Apart from any constitutional or natural law claim biological parents might have, there is the simple and undeniable fact that many biological parents who are denied legal parent status of their offspring will thereby experience a great sense of loss and emotional suffering. Not all will; a substantial percentage of parents in the child protective system manifest surprising indifference.[270] But many would suffer emotionally and psychologically. The state might defend infringing children's constitutional right against state-compelled harmful associations by asserting that existing law, making biological parents the legal parents of their offspring without regard to fitness but allowing for termination of that legal relationship after maltreatment occurs, is on the whole a scheme narrowly tailored to serving the state's compelling interest in avoiding such suffering on the part of birth parents.[271] There are several reasons why a court should reject this argument.

First, the practical difference between the current regime and the one I propose is substantial for children but not for parents. The practical difference for children arises from the fact that states currently react to parental unfitness typically only after a child is harmed. When states do identify unfit parents at birth, they almost never seek immediate TPR and adoption even when legally

269. *See, e.g.*, JOHN BOSWELL, THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE (1988).

270. *See* Dwyer, *supra* note 2, at n.97.

271. David Meyer argues, from a parents' rights standpoint, that the greater intensity of a birth parent's interest in becoming a legal parent, relative to, for example, a legal parent's interest in not having to allow a grandparent to visit a child, would lead courts to scrutinize relatively rigorously a parentage law that excluded some birth parents. Meyer, *supra* note 230, at 879 ("[T]he total loss of even an expectancy of a parent-child relationship remains a very substantial imposition on the individual, increasing the appropriate degree of scrutiny.").

they could, but rather either send the baby home with his or her unfit parents or place the baby in foster care. Further, current TPR rules do not cover many cases of parental unfitness.[272] The typical result for children under the current regime is either maltreatment by parents or attachment problems because of delayed permanence, which in either case is likely to cause serious life-long harm.[273]

The benefit to unfit parents of the current regime, on the other hand, is slight or illusory compared to denying them legal parent status in the first instance. First, whatever psychological and emotional experience parents have as a result of being denied a relationship with their biological offspring does not affect fundamental interests in the way that damage to a baby does. The frequent assertion that biological parents have a fundamental interest in raising their offspring is empirically unsupportable. Raising a child is not something basic to everyone's welfare, as attested by the fact that many adults happily choose not to do it. Not everything that some people strongly desire is a fundamental interest. In contrast, receiving attentive, loving, competent nurturing in the first years of life is as fundamental and universal as human interests get, outdone perhaps only by the interest in simply remaining alive.

Second, the difference for the parent between earlier or later termination of parental rights is not great. If a child is removed at birth and prospects for parental rehabilitation are slim, parents gain little by the state's efforts to reform them during a period when they have little or no contact with the baby. They will have a chance to try, but having had that chance and failed will not necessarily feel better than never having had the chance. If the child is instead sent home with them and incurs abuse or neglect, the parents might then be subject not only to civil maltreatment proceedings but also to criminal proceedings and incarceration. In addition, if they do in fact care about their offspring, they will likely experience the suffering of knowing that they damaged the child. Opponents of child welfare interventions often suppose simplistically that all parents are always better off having custody of their offspring rather than not, but that ignores the real costs to parents of the state putting them in a position to damage their offspring and also ignores, on the other hand, the consolation birth parents can experience if the child they create is adopted before being damaged and goes on to live a healthy, flourishing life.[274]

272. *See* Dwyer, *supra* note 2, at 461–64.
273. *Id.* at 412–28.
274. *See* DWYER, *supra* note 224, at 186–88.

In short, the interests at stake for the newborn child in the initial parentage decision are greater than the interests at stake for unfit biological parents, so even if a balancing were appropriate, the child's constitutional right should trump the parental interest. As argued above, however, because the state properly acts solely as proxy for the child in choosing legal parents, consideration of others' interests is out of bounds. Gratifying birth parents' desire to have a relationship with a child is not even a legitimate state interest in this context; it is not a proper basis for infringing a child's right to avoid a bad family relationship. It is difficult to say for certain, because the question simply does not present itself to courts, but it seems likely that if a state were to compel some other category of persons to be in a legal relationship without their consent and manifestly contrary to their welfare, it could not plausibly assert in its defense that it wanted to gratify the intense desire of the other person to be in the relationship. In some instances, forcing one adult to be in a relationship with another might on the whole be utility-maximizing, but we would deem it a great insult to the personhood of the former to force them into the relationship based on such a calculation.

3. Birth Parents' Privacy Rights

The state might also assert a privacy rationale in defending its failure to screen for unfit birth parents. To exclude unfit birth parents from legal parentage, it would have to identify them, which would entail collecting and using personal information. But as noted above, the state already collects the relevant information, and no court has deemed this to be an unconstitutional invasion of privacy. States already use such information to sever parent-child relationships after it has created them. And obviously the state has a compelling interest in identifying birth parents who are at very high risk of damaging any baby the state might place in their custody.

Moreover, background checks are now routine for certain jobs and volunteer activities that involve interaction with children yet which pose much less risk of harm.[275] States today collect employment, banking, and other private information for the less compelling purpose of enforcing child support orders.[276] An interesting recent legislative development in an analogous context is the International Marital Broker Regulation Act of 2005, which

275. *See, e.g.*, Pennsylvania Department of Public Welfare, Pennsylvania Child Abuse History Clearance Forms, http://www.dpw.state.pa.us/PartnersProviders/ChildWelfare/003671038.htm (last visited Aug. 4, 2008) (setting forth requirements in Pennsylvania).

276. *See* Kristen Campbell Johnson, Comment, *Uncle Sam's Cure for Deadbeat Parents*, 20 J. AM. ACAD. MATRIM. LAW. 311, 320 (2007).

requires agencies that facilitate marriage-anticipating relationships between American men and foreign women to conduct a criminal background check on their U.S. clients and to report the results to the women.[277] That Act has thus far withstood constitutional challenge.[278] In light of these other constitutionally permissible incursions on individual privacy, adults' privacy rights should also pose no barrier to effectuating babies' substantive due process rights in connection with parentage.

4. Popular Discomfort

Opposition to the disqualification from legal parenthood that the constitutional right under consideration would entail might rest simply on a discomfort with departing from existing practices.[279] There is no constitutional purchase, however, to an objection that "we just don't like it." The Supreme Court has recognized in several contexts, especially those relating to family life, that "regulation of constitutionally protected decisions . . . must be predicated on legitimate state concerns other than disagreement with the choice the individual has made . . . . Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity."[280] Desegregation was downright frightening to great numbers of people, but that discomfort was not a legitimate basis for denying equal protection claims against de jure segregation.

5. Adverse Maternal Reactions

The most persuasive objection to excluding some birth parents from legal parenthood relates to child welfare—a concern that it could make children on the whole worse off. Specifically, some might conjecture that fear of having their babies taken away from them could cause some pregnant women to act in ways they otherwise would not. One of those ways might be entirely salutary: some might take greater steps to prevent further pregnancy

277. Pub. L. No. 109-162, §§ 831–33, 119 Stat. 2960, 3066 (2006) (codified in scattered sections of 8 U.S.C.).

278. *See* European Connections & Tours, Inc. v. Gonzales, 480 F. Supp. 2d 1355, 1369, 1380 (N.D. Ga. 2007).

279. *Cf.* David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857, 879 (2006) ("[C]ourts are likely to demand something more than simply the state's discernment of a marginal advantage to a child from shifting parentage away from a figure widely regarded as a parent by social consensus.").

280. Hodgson v. Minnesota, 497 U.S. 417, 435 (1990) (citing decisions of the Court relating to prisoners' right to marry, inter-racial marriage, and abortion); *see also id.* at 452 ("[A] state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designed ideal, is not a legitimate state interest at all.").

after having rights terminated as to a child or if they are substance abusers. Other possible reactions, though, would be undesirable from anyone's perspective. Women who do become pregnant and who fear being deemed unfit when they give birth might for that reason (a) have an abortion, (b) fail to get prenatal care because they fear medical facilities will report them to child protective services, or (c) give birth secretly in conditions unsafe for them and the baby. A court might plausibly find that the state has a compelling interest in avoiding these things. The question would then be whether making unfit parents the legal parents and custodian of babies is an appropriate and narrowly tailored means of furthering that interest.

As a matter of constitutional doctrine, the Supreme Court has manifested reluctance to allow expectations of adverse private conduct to compromise individuals' constitutional rights. For example, in *Palmore v. Sidoti*,[281] the Court ruled that state trial courts, when deciding post-divorce child custody, may not consider the likelihood that a child would, if placed in the custody of a parent in an inter-racial relationship, suffer as a result of adverse community and peer reaction (for instance getting beat up on the school yard).[282] A court might readily distinguish *Palmore*, however, on the grounds that it involved race discrimination and the Court was concerned about the state giving effect to racist views. In contrast, taking into account adverse reactions by pregnant women would not create an impression that the state is condoning illicit behavior or attitudes; the state would simply be trying to do what is best, on the whole, for babies.

If it is proper in this context to base a legislative choice on fear of such reactions, then the constitutionality of current parentage laws might well depend on what level of scrutiny courts apply, and accordingly whether children's right not to be consigned to unfit parents is fundamental. Under rational basis review, the courts would give legislatures the freedom to balance the competing considerations of babies' well being before and at birth with babies' well being after birth, without second guessing a legislature's evidentiary support, wisdom, or carefulness. Under strict or rigorous scrutiny, however, courts should insist that states provide evidentiary support for the assumption that women will react in the feared ways, and demonstrate that they could not feasibly deter such reactions by means that do not entail infringing constitutional rights of babies after birth. Without meaning to suggest that this is a simple matter or that there is an obvious conclusion to be drawn, I will offer reasons for believing that states could not meet this burden.

281. 466 U.S. 429 (1984).
282. *Id.* at 430, 433.

First, the concern as stated draws no connection between harm to fetuses and denying legal parenthood to biological fathers, and it is quite unlikely a state could establish such a connection. This justification therefore could not save existing paternity laws from invalidation on constitutional grounds. It is not plausible to suggest that men concerned about being denied parental status would coerce expectant mothers to have an abortion, avoid prenatal care, or give birth in secret. Secrecy would in fact do little good for an unwed father, who would need the state to recognize him as the legal father before he could claim the rights and privileges of legal parenthood, and who is much less likely than a birth mother to be able to have a social relationship with a child absent such legal recognition.

Second, concern that the possibility of being denied legal motherhood will alter pregnant women's behavior is mere speculation and has little or no evidentiary support. It is easy to find examples of people predicting or assuming that taking various legal actions against pregnant drug addicts will cause them to avoid health care facilities, but not so easy to find evidence demonstrating this actually to be true. Recall that, under current law, states sometimes do something with respect to newborns that, from the parents' perspective, is not much different from denial of parentage. Each year thousands of babies in the U.S. are taken into custody immediately after birth and placed in foster care, usually because of maternal drug addiction.[283] Though this is only a small fraction of the children who are at high risk of maltreatment, it is common enough that women at risk of losing custody are likely to be aware of the possibility. Most such newborns are never placed in birth parents' custody, and many who are placed in a birth parent's custody are later removed.[284] So the practical effect for the mother is similar to being denied legal parenthood in the first instance, the main difference being that hope of having custody of the child someday is held out for a longer period of time. Yet there is no reported evidence of women having abortions, avoiding prenatal care providers, or giving birth in secret because of this CPS practice.

The legislative proposal I offer in the final part of the Article would change practices in three principle ways: (1) It would ensure CPS awareness of a greater number of at-risk babies. (2) It would preclude the state from investing legal parent status or custody in certain birth parents unless those birth parents initiate a fitness hearing and make a sufficient showing of their fitness. (3) If both birth parents are presumptively unfit, the state would, unless and until a birth parent initiates and succeeds in a fitness hearing, act on the

283. Dwyer, *supra* note 2, at 445.
284. *See id.*

assumption that the babies in question have no legal parents and will not enter into a relationship with their birth parents—in other words, that they are available for an initial legal relationship with other adults immediately at birth. These changes would make a substantial difference for children, but, as explained above, likely would not be so different for birth parents relative to current practices as to trigger a significant change in maternal behavior.

Third, there are ways other than forcing newborns to be in relationships with unfit parents by which the state can serve its interests in minimizing the number of abortions and in ensuring that pregnant women receive prenatal care and give birth in licensed birthing facilities. A court applying strict scrutiny should insist that states try those other means instead, rather than infringing the rights of babies not to be consigned to unfit parents. One alternative way of addressing all three concerns would be to make rehabilitation services available to pregnant women even if they do not currently have a child in the child protective system and to make the availability of those services known, by requiring abortion clinics to provide information to their patients about such services and by having CPS agencies publicize their availability. The availability of those services would signal to pregnant women that the social services agency stands ready to help them achieve parental fitness before giving birth, which would give them greater hope of avoiding or succeeding in a fitness hearing.

In addition, states could alter pregnant women's incentive structures by including in civil and/or criminal definitions of child neglect failure to secure prenatal care and giving birth to a child in unsafe conditions. Such a failure could also be a factor weighing against a parent in a fitness hearing at the time of birth, so that if dysfunctional pregnant women were in fact as aware of the law and as strategic as some suppose, this might counteract any effect from fearing detection. A few states now treat prenatal drug exposure as civil or criminal child abuse or neglect,[285] so it would not be unprecedented to attach legal consequences to prebirth maternal behavior.

Discussion of altering the incentives for pregnant women raises concern about an additional adult right—namely, pregnant women's personal freedom. However, the proposal I advance would not burden a woman's choice to have an abortion; indeed, the concern is that it would induce abortions, and the remedy I propose for that is simply to make services available to women contemplating abortion. The constitutional right to an abortion therefore would not be implicated. The abortion rights cases are nevertheless

285. *See, e.g.*, ARK. CODE ANN. § 12-12-503(12)(B)(i)(a)–(b) (Supp. 2007); COLO. REV. STAT. § 19-1-103(1)(a)(VII) (2008).

relevant, because they establish that the state is permitted to limit pregnant women's freedom to some degree in order to further the state's legitimate interest in the health and safety of babies before their birth.[286] Indeed, if the state may force women to remain pregnant once they enter the third trimester, then surely it may require them to visit a clinic a few times during a pregnancy and to give birth in a licensed facility. Doing so does not directly interfere with the procreative choice itself and is not a substantial burden on freedom; it is certainly much less of a burden than the responsibilities the law imposes on parents after a child is born.

D. Summary

States are not justified by any concern for adults' constitutional rights, natural law, or birth parents' interests in infringing the substantive due process right of newborn children not to be forced into relationships that are likely to be quite harmful to them, and concerns about adverse material reaction to an unfitness exception to maternity rules are unsubstantiated and better addressed by means other than ignoring unfitness. States can do much better than they currently are in effectuating children's rights with respect to parentage, and courts should require them to do so. The final Part of this Article briefly considers what a better approach to initial legal parentage might look like.

IV. IMPLEMENTING THE RIGHT: A CONSTITUTIONAL SCHEME OF PARENTAGE

What, concretely, would it mean to effectuate the constitutional right of newborn babies that this Article has developed? The state cannot reasonably be expected to avoid every bad parentage decision. Courts should hold, however, that the constitutional rights of newborns require states at least to avoid the worst ones. Some fairly simple modifications to parentage statutes and related laws could address the vast majority of those cases. Addressing them properly requires both identifying them and responding appropriately to them.

First, courts should require states to modify their parentage statutes to incorporate an unfitness exception for maternity and paternity and to allow for conferral of initial parentage on nonbiological parents. The unfitness exception would prevent the state from bestowing legal parentage on certain categories

286. *See, e.g.*, Gonzales v. Carhart, 127 S. Ct. 1610, 1619 (2007) (upholding a ban on partial birth abortions); Roe v. Wade, 410 U.S. 113, 150, 164–65 (1973) (upholding the right to abortion prior to a woman's third trimester but affirming the state's interest in the life of the fetus even prior to that time).

of birth parents, but also give those birth parents a statutory right to a fitness hearing. Precisely what sort of history or current conditions should be the basis for an exception could be worked out legislatively using the best available empirical information, but always from the perspective of respecting babies' constitutional right against the state forcing them into relationships with birth parents who the state knows present a substantial danger to a baby. For example, the maltreatment history bases might be limited to TPR or felony child maltreatment convictions within the past three years. The current condition bases might be limited to, for example, abuse of certain debilitating drugs or alcohol beyond a certain minimum amount, involuntary psychiatric commitment within the past two years, and imprisonment expected to last more than two years after a child's birth.[287]

The statute would also direct courts in conducting fitness hearings, perhaps providing a list of factors to consider in assessing current fitness. Who carries what evidentiary burden in such hearings should be analyzed in terms of most effectively protecting the substantive interests and effectuating the rights of the children, not in terms of the rights of parents. Given the seriousness of the factual triggers for a hearing, and assuming that the babies will be from the outset of life in the custody and care of other adults who wish to be their legal parents, the children's interests most likely point in favor of putting the burden on birth parents to show by a preponderance of evidence that they are now fit and willing to care for the child. The Supreme Court held in *Santosky v. Kramer*[288] that in TPR proceedings states must bear the burden of proving unfitness by clear and convincing evidence. However, that ruling rested on assumptions that the parents involved are already in a relationship with a child and that the state is attempting to sever an existing parent-child bond,[289] which would not be the case with a pre-parentage fitness

287. An alternative approach to effectuating newborn children's substantive due process right as to parentage, and one more consistent with the traditional mindset and so more comfortable for courts and legislatures, would be to invest legal parent status in birth parents, as is currently done, but to require child protective services agencies to respond to the cross-checking and substance abuse reporting by immediately petitioning for TPR, thereby shifting the onus of initiating a fitness hearing from birth parents to the state. If a court orders the TPR, then the state-selected caregivers for the child would, correspondingly, petition for adoption under existing adoption laws rather than, as proposed below, for initial legal parenthood under amended parentage statutes. This approach is less desirable from the newborn's perspective because it continues to stack the deck unduly in favor of birth parents, and it invokes procedures associated conceptually with parental rights rather than children's rights, thus encouraging the human actors involved to continue to identify more with the birth parents than with the children, contrary to their proper role as proxies for the children, and thereby making more likely bad decisions and delays.

288. 455 U.S. 745 (1982).

289. *Id.* at 760, 769.

hearing. In addition, as noted in Part III, the Court has never presumed to dictate what constitutes parental unfitness, and proving by clear and convincing evidence the existence of the history or current condition that triggers the hearing under this proposal could itself be treated, consistent with *Santosky*, as a prima facie showing of unfitness that shifts the burden to the birth parents. Courts applying the Adoption and Safe Families Act-driven provisions for TPR without rehabilitation efforts have taken that approach.[290] Parentage laws should instruct courts that if a parent fails to meet this burden, they must deny the birth parents' petition for legal parent status, leaving the child's current caregivers free to petition to be the child's first legal parents.

Second, states must take steps to ensure that they do not inadvertently confer legal parenthood on easily identifiable unfit parents. Assuming states will continue to establish legal parent-child relationships as to all newborns, they must create mechanisms for timely identification (before birth parents leave the birthing facility with a child) of the birth parents in the designated categories. This will require slight modification to birth reporting practices. Currently, birthing facilities report all births to a health or vital records agency of the state, but do so after birth occurs, sometimes weeks after. Instead, they should report expected births when expectant mothers arrive, and they should convey birth parent information to an agency that can cross-check that information against databases for past child maltreatment, criminal convictions, and involuntary commitments to psychiatric facilities. Creating electronic reporting and cross-checking computer systems should not be difficult or costly. In addition, states should require universal testing for and reporting of newborn exposure to illegal drugs or alcohol.

Third, states will need to create statutory mechanisms for dealing appropriately with newborns whose parents they identify as presumptively unfit through the reporting and cross-checking process. Statutes should direct whichever agency performs the cross-check to immediately notify the birthing facility of the parents' status, direct birthing facilities not to put those birth parents' names on the birth certificate application, and direct CPS agencies or birthing facilities to assume custody of the child (perhaps keeping the child in the hospital nursery). To ensure that identified birth parents who are in fact fit are not mistakenly precluded from legal parenthood, states might also implement measures to ensure that birth parents are informed of the need and opportunity for a fitness hearing if they wish to become legal parents to the child, of their right to be represented by an attorney, of contact

290. *See, e.g.*, State ex rel. Children, Youth & Families Dep't v. Amy B., 61 P.3d 845, 849 (N.M. Ct. App. 2002).

information for experienced local attorneys, and of the state's willingness to pay for their attorney if they are poor.

Though these changes would make a profound difference in the lives of thousands of children, they would not require great effort from, or additional resources for, agencies or courts. As noted above in Part III.C, effectuating children's constitutional rights relating to parentage would simply require these institutions to take action much earlier in the lives of children born to unfit parents than they currently do. This earlier intervention would obviate the need for much more complex, prolonged, and costly interventions later in the children's lives. And it would substantially reduce the number of children who become damaged by maltreatment and thereafter drain the resources of the social welfare and criminal justice systems.

One final question remains: How could the constitutional right argued for here ever be effectuated? After all, babies are in no position to assert a constitutional right against flawed parentage statutes. It would actually be easy. A facial challenge to parentage laws would not make sense, as courts would likely deem such laws consistent with babies' welfare in the vast majority of cases.[291] However, an as-applied challenge should induce states to amend their parentage statutes to exclude the clearest cases of birth parent unfitness, as discussed above.[292] The challenge could come in at least two forms.

First, the guardian ad litem appointed to represent a child in a serious maltreatment case, or some other person or entity acting on behalf of a child who has been abused or neglected, could bring a claim for damages under 42 U.S.C. § 1983, not against the child protection agency for failing to protect them (the sort of claim that failed in *Deshaney*), but against the state for enacting and implementing statutes that consigned the child to a life with birth parents known at the time of the child's birth to be unfit and likely to abuse the child. Damages would not be awarded until the right had become clearly established, because of state actors' qualified immunity, but courts would analyze the claim even in a test case.[293]

An alternative and cleaner avenue for advancing the constitutional right developed here would be for a representative of a baby just born or about to be born to petition for injunctive relief against application of the state's parentage

291. *Cf. Carhart*, 127 S. Ct. at 1639 (stating that a plaintiff advancing a facial challenge to a statute must establish that "no set of circumstances exists under which the Act would be valid" (quoting Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 514 (1990))).

292. *Cf.* Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (stating that "a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question").

293. *Cf.* County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).

statute to that baby. Social service agency workers are sometimes aware when an adult who previously had parental rights terminated as to another child is pregnant again, and some such persons might be motivated to ask the juvenile court to order guardian ad litem representation of the baby before (if state statutes allow for appointment to represent an unborn child) or immediately upon birth. Alternatively, one parent could seek to represent the child and advance the claim against the other parent, or any other relative or a child advocacy organization that is aware of the pending birth could seek "next friend" representative status and file suit. Such a claim for prospective relief, charging that the state will act unconstitutionally if it places the newborn baby into a legal family relationship with the birth parents, might make the best test case, because the question it would pose for a court would simply be "is this birth parent unfit to raise a child," rather than (as would be the case with a damages claim) "did state legislators act with deliberate indifference to the known unfitness of some birth parents (including this one)."

CONCLUSION

For the state to force any persons into intimate relationships that are very likely to be seriously detrimental to them is an unconstitutional abuse of state power, and never more so than when those persons are in the developmentally crucial period of infancy. Courts should recognize that newborn babies, much more clearly than birth parents, have fundamental interests at stake in the state's selection of legal parents and, therefore, a much stronger claim to constitutional protection. Attributing to newborns a substantive due process right against the state placing them into relationships with manifestly unfit birth parents would not require child protection agencies to do something entirely unprecedented as a practical matter. It would, however, force states to do something they have proven very resistant to doing—namely, to identify at the time of birth those babies at highest risk of maltreatment and to act expeditiously to ensure that better parentage decisions are made for them, thereby dramatically improving the infants' life prospects. Recognizing and effectuating this constitutional right of newborn children should also transform public attitudes and understandings about family formation, by highlighting the state's role in that process and its responsibility for the outcomes.