

## THE FUNDAMENTAL TRUTH ABOUT BEST INTERESTS

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The child's right to be reared by loving parents or loving parent-like adults shapes this paper.<sup>1</sup> The child's right is defined, not in biological or legal terms, but in familial and relationship terms. This Article advocates legal recognition of the right of a child, who has established a loving parental relationship or a loving relationship with a parent-like adult, to continue that relationship. The relationship arises over time and is characterized by continuing, predictable, and nurturing care. It results in an emotional bond leading to healthy physical, psychological, and emotional development.<sup>2</sup>

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1. This article was inspired by and builds upon the scholarship that precedes it. See JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (2006); Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships With Parent-Like Individuals*, 53 MD. L. REV. 358 (1994); David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J., 1117, 1137 (2003) ("The denomination of children's associational interest as rights might lead some judges to give greater credence to the emotional losses suffered by children when important familial bonds are severed."); David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857, 858 (2006) ("States enjoy considerable latitude to reorient parentage law in a child-centered direction."); David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1466 (2006) ("The constitutional protection of parental rights is always necessarily qualified by the competing interests of other family members."); Lawrence Schlam, *Third-Party "Standing" and Child Custody Disputes in Washington: Non-Parent Rights—Past, Present, and . . . Future?*, 43 GONZ. L. REV. 391, 459 (2007–08) ("The best interests of children in custody is a compelling state interest."); Deborah Parach, *The Orphaning of Underprivileged Children: America's Failed Child Welfare Law & Policy*, 8 J.L. & FAM. STUD. 119, 158 (2006) (suggesting that courts should always consider the "best interests of the child" before terminating parental rights).

2. By definition, the term distinguishes between relationships of short duration, relationships in which the adult is paid to care for the child, and relationships that lack a continuing care-taking attribute. It does not include neighbors, teachers, day-care providers, or strangers.

This right is not new. It has historically been recognized through the application of the Best Interests of the Child Standard (“BICS”).<sup>3</sup> Nevertheless, this right has been largely ignored by the Supreme Court in its recent custody decisions regarding parents’ fundamental rights. It is now time to recognize the traditional role of the BICS and to afford children their constitutional right to preserve existing, loving, and nurturing parent and parent-like relationships.<sup>4</sup> This Article, therefore, proposes that a child’s right to enjoy loving and nurturing parent-like relationships should be formally recognized as a constitutionally protected fundamental right. Additionally, courts should evaluate this right as one aspect of the substantive due process rights belonging to a child in a third-party dispute concerning custody of the child.<sup>5</sup>

Departing from the initial definition of a “person” afforded rights under the Constitution, landowning male citizens of Anglo-Saxon descent,<sup>6</sup> the Supreme Court has gradually expanded the definition to include black men,<sup>7</sup> Native

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3. I use the acronym “BICS” to refer to the best interests of the child standard throughout this paper. DWYER, *supra* note 1, at 23 (“A complete account of children’s relationship rights against the state, therefore, requires identifying not only those legal rules that explicitly confer such rights but also legal rules that, though not speaking in terms of rights, implicitly confer rights upon children by imposing upon state officials a duty owed to children to respect their wishes, to make or act on an individualized assessment of their best interests or to take particular actions deemed to be generally conducive to their welfare.”). *See also id.* at 123–69 (providing a theoretical justification for extending the relationship rights of children).

4. I struggled with how best to refer to this conception of a child’s fundamental right to continue such relationships and settled on the term “loving and nurturing parent-like relationships.” *See* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregivers and Caregiving*, 94 VA. L. REV. 385 (2008). Murray explores the possibility of creating a legally recognized status of caretaker to promote “[a] theory that acknowledges the degree to which parents function as parts of caregiving networks in discharging their caregiving obligations . . .” *Id.* at 435.

5. Custody refers to court awards of physical custody or visitation, without regard to the amount of time awarded.

6. *See* Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482, 1531 (1985). Simon writes, “Even with respect to constitutional provisions as to which originalist interpretation has appeal, strong justification may exist for alternative interpretations. The clearest cases of this kind are those in which originalism would perpetuate the Constitution as a bargain struck by propertied, white males based at least partly on narrow grounds of self-interest or on that group’s arguably parochial interpretation of the deep consensus.” *Id.*

7. Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860–1870*, 17 CARDOZO L. REV. 2153, 2153 (1996):

One of the most important outcomes of the Civil War was the establishment of a new constitutional order. Under this new order, African Americans, a people whose essential human rights had been denied under the old constitutional order, were constitutionally emancipated from slavery and recognized as American citizens. They received the privileges and immunities that white Americans had automatically assumed. Male black Americans also received the right to vote.

Americans,<sup>8</sup> nonfreeholders,<sup>9</sup> women<sup>10</sup> and children.<sup>11</sup> Under the Constitution, the Supreme Court synthesized the meaning of “all men are created equal”<sup>12</sup> and “the state shall not deprive any person of life, liberty or property without

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*Compare* Scott v. Sandford, 60 U.S. 393, 404, 407 (1856) (holding neither those persons who were imported as slaves nor their descendants are included in the definition of “people of the United States” or “citizens” entitled to the rights and privileges under the Constitution), *with* The Slaughter-House Cases, 83 U.S. 36, 73 (1872) (explaining the Fourteenth Amendment “overturn[ed] the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States”).

8. Native Americans were not fully franchised by the federal government until Congress extended citizenship to all Native Americans in 1924. *See* Act of June 2, 1924, ch. 233, 43 Stat. 253 (current version at 8 U.S.C. § 1401(b) (2000)).

9. *See* Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1509–10 (2002) (“Property supplied independence; those without property were presumed to be economically dependent on and subservient to others. As a result, they would be subject to political manipulation and control by their economic patrons and social betters. The propertyless, with the rest of the community, would be better off with virtual representation by the propertied.”).

10. *Frontiero v. Richardson*, 411 U.S. 677, 685 (1974) (Bradley, J., concurring):

As a result of [stereotypical] notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself ‘preservative of other basic civil and political rights’—until adoption of the Nineteenth Amendment half a century later.

(quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)) (citation omitted); *see* *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969)). *See also* Henry Foster & Doris Jonas Freed, *Life with Father: 1978*, 11 FAM. L.Q. 321 (1978), reprinted in *FATHERS, HUSBANDS AND LOVERS: LEGAL RIGHTS AND RESPONSIBILITIES* 321–22 (Sanford N. Katz & Monroe L. Inker eds., 1979) (“As long as feudalism or its relics remained, the wife was not a legal person in the eyes of the law, and her role as mother merely entitled her to respect but not to authority.”) (citing I BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 453 (1783)); *Ex Parte Hewitt*, 11 Rich. 326, 329 (S.C. 1858) (“By common law the legal existence of a woman is suspended during marriage.”).

11. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1969) (discussing freedom of speech); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74, 78 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of maturity. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (discussing equal protection); *Goss v. Lopez*, 419 U.S. 565 (1975) (discussing due process). *See infra*, notes 153–66 and accompanying text related to the recognition and expansion of the constitutional rights of children.

12. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

due process of law”<sup>13</sup> by extending due process rights without regard to race, gender, or class.<sup>14</sup>

Through precedent, the Supreme Court continues to extend and refine the interpretation of rights afforded individuals under the Due Process Clause.<sup>15</sup> Children possess many of these recently recognized rights.<sup>16</sup> The Court, however, has not afforded children’s relationship rights strict protection. Despite this lack of Supreme Court leadership, state courts are beginning to recognize the fundamental nature of the child’s right to have third-party custody claims determined by the BICS.<sup>17</sup> This Article examines the interrelationship between the child’s fundamental right to continue existing parent-like relationships and the BICS.<sup>18</sup>

13. U.S. CONST. amend. XIV, § 1; *see also* U.S. CONST. amend. V.

14. *See* William M. Wiecek, *The Emergence of Equality as a Constitutional Value: The First Century*, 82 CHI.-KENT L. REV. 233, 243 (2007):

Embedded in Sections 1 and 5 of the Fourteenth Amendment were ideas propounded by innovative abolitionist lawyers and publicists before the war, including equality before the law. Abolitionists demanded this not as some abstract ideal, not as a vague statement or aspiration of antebellum social conditions, but as the actual realization of the promise of the Declaration of Independence for *all* people. Dismissed in its time (and after) as impractical, utopian, otherworldly, radical, or unreal, abolitionist thought truly was the stone rejected by the builders that became the cornerstone, not least in its vision of equality.

(citations omitted).

15. U.S. CONST. amend. V; U.S. CONST. amend. IX; U.S. CONST. amend. XIV, § 1; *see also* Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 602 (2005):

The expansion of regulatory power at the time of the New Deal required a concomitant reduction in the Court’s previously broad interpretation of liberty under the Due Process Clause. After 1937, the issue became how to reconstruct that liberty in light of the New Deal Court’s general deference to the political process. In particular, having limited due process liberty to the rights listed in the text of the Bill of Rights, the New Deal Court had to decide whether all of the Bill of Rights should be incorporated against the states. It was here that the traditional doctrine of the Ninth Amendment made its last stand. Applying a rule of construction based on the Ninth and Tenth Amendments, the Supreme Court initially resisted incorporation claims in order to preserve the states’ retained rights to establish local rules of criminal procedure. As the Court gradually incorporated most of the Bill of Rights, this final application of the traditional Ninth Amendment also faded away.

16. *See* cases cited *supra* note 12 and accompanying text. Critics of the increasing constitutionalization of family law argue that it creates both “bad constitutional law” and “bad family law.” *See* David D. Meyer, *The Constitutionalization of Family Law*, FAM. L.Q. 529, 552 (2008).

17. *See infra* text accompanying notes 167–217.

18. *See, e.g.*, Wendy Anton Fitzgerald, *Maturity, Difference and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 20 (1994) (“Demonstrating how both constitutional and family law jurisprudence . . . exclude children’s personhood.”).

State legislatures have universally adopted the BICS<sup>19</sup> and applied it to determine custody and visitation disputes. In contrast, the BICS is sparingly applied in third-party custody claims.<sup>20</sup> Although sometimes the subject of scholarly critique,<sup>21</sup> courts variously refer to the BICS standard as “paramount”<sup>22</sup> and “compelling,”<sup>23</sup> descriptive language associated with state

19. See, e.g., ALA. CODE §§ 30–3–1 (LexisNexis 2009); ALASKA STAT. § 25.20.060 (2009); ARIZ. REV. STAT. §§ 25–403 (LexisNexis 2009); Ariz. Legis. Serv. 25,403, 25,409 (West 2009); ARK. CODE ANN. § 9–13–103 (West 2009); CAL. FAM. CODE §§ 3000, 3080, 3100(a) (West 2009); CAL. FAM. CODE §§ 3102–3104 (Deering 2009); COLO. REV. STAT. §§ 14–10–123.5, 14–10–124, 19–1–117 (2009); CONN. GEN. STAT. ANN. § 46b–59 (West 2009); DEL. CODE ANN. tit. 13, §§ 727–728 (2009); D.C. CODE ANN. §§ 16–911 (a)(5), 16–914 (LexisNexis 2009); FLA. STAT. ANN. §§ 61.13(2), (6–7) (West 2009); GA. CODE ANN. § 19–9–3(A)–(D) (West 2008); HAW. REV. STAT. §§ 571–46.1, 571–46.2 (2009); IDAHO CODE ANN. §§ 32–717B, 32–719 (2009); 750 ILL. COMP. STAT. ANN. 5/601, 5/602, 5/602.1, 5/607, 5/607(b)–(e) (2009); IND. CODE ANN. §§ 31–17–1–1–5, 31–17–2–8 (LexisNexis 2009); IOWA CODE ANN. § 598.41 (West 2009); KAN. CIV. PRO. CODE ANN. § 60.1610 (West 2009); KY. REV. STAT. ANN. §§ 403.270, 405.021 (West 2008); ME. REV. STAT. tit. 19A, §1651–1654 (2009); MD. CODE ANN. FAM. LAW §§ 5–203, 5–203(D)(2) (West 2009), 9–102 (LexisNexis 2009); MASS. GEN. LAWS ANN. ch. 119, § 39D (West 2009), MASS. ANN. LAWS ch. 208, § 28, 208, § 31, 209C, § 10 (LexisNexis 2009); MICH. COMP. LAWS ANN. §§ 722.26(a), 722.27(b) (West 2009); MINN. STAT. ANN. §§ 518.17, 518.175, 257C.08 (West 2009); MISS. CODE ANN. §§ 93–5–24, 93–16–1 (West 2009); MO. REV. STAT. § 452.402 (West 2009); MONT. CODE ANN. §§ 40–4–212, 40–9–102 (2009); NEB. REV. STAT. §§ 42–364, 43–1802 (2009); NEV. REV. STAT. ANN. §§ 125C.050, 125.465, 125.480, 480.490 (West 2009); N.H. REV. STAT. ANN. § 461–A:6 (2009); N.J. STAT. ANN. §§ 9:2–1, 9:2–4(c), 9:2–7.1 (West 2009); N.M. STAT. ANN. §§ 40–9–1, 40–9–2, 40–9–3, 40–9–4 (West 2009); N.Y. DOM. REL. LAW § 240 (McKinney 2009); N.C. GEN. STAT. §§ 50–11.2, 50–13.2 (2009); N.D. CENT. CODE § 14–09–06 (2009); OHIO REV. CODE ANN. §§ 3109.04, § 3109.051 (LexisNexis 2009); OKLA. STAT. ANN. tit. 43 § 112 (West 2009); OR. REV. STAT. ANN. §§ 107.105(1), 107.169; 109.119 (West 2009); 23 PA. CONS. STAT. ANN. §§ 5301, 5303–5304, 5311–5312 (2009); R.I. GEN. LAWS §§ 15–5–16, 15–5–24.1 to 24.3 (2009); S.C. CODE ANN. §§ 20–3–160, 20–7–420 (2008); S.D. CODIFIED LAWS, §§ 25–4–45, 25–4–52, 25–5–7.1 (2009); TENN. CODE ANN. §§ 36–6–101, 36–6–106 (West 2009); TEX. FAM. CODE ANN. §§ 153.005, 153.007 (Vernon 2009); UTAH CODE ANN. § 30–3–10 (West 2009); VT. STAT. ANN. tit. 15, § 665 (2009); VA. CODE ANN. §§ 20–107.2, 20–124.3 (West 2009); WASH. REV. CODE ANN. §§ 26.09.050, 26.09.002 (West 2009); W. VA. CODE ANN. § 48–9–101 (West 2009); WIS. STAT. ANN. §§ 767.41, 767.451 (West 2009); WYO. STAT. ANN. § 20–2–201 (2009).

20. Erin E. Wynne, *Children’s Rights and the Biological Bias in Biological Parent Versus Third-Party Custody Disputes*, 27 CHILD PSYCHIATRY & HUM. DEV. 179, 182 (1997).

21. See Jonathan Todres, *Rights Relationships and the Experience of Children Orphaned by AIDS*, 41 U.C. DAVIS L. REV. 417, 438 n.95 (2007) (“Although the best interests of the child standard has been utilized by courts and governments for over 100 years, it is not without its critics.”). For an analysis of the standard, see CLAIRE BREEN, *THE STANDARDS OF THE BEST INTERESTS OF THE CHILD: A WESTERN TRADITION IN INTERNATIONAL AND COMPARATIVE LAW* (2002); Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in CHILDREN’S RIGHTS VOL. II, at 183 (Michael D.A. Freeman ed., 2004).

22. See *infra* note 249 and accompanying text.

23. See *infra* note 229–30 and accompanying text.

interests weighty enough to limit fundamental rights.<sup>24</sup> The Supreme Court, though, inconsistently characterizes the BICS as sometimes “important” and other times of “constitutional importance.”<sup>25</sup> Surprisingly, scholars have paid scant attention to whether a court may properly rely upon the BICS as advancing a sufficiently compelling state interest to justify the limitation of a parent’s fundamental right in matters of child-rearing.<sup>26</sup>

One reason to characterize the BICS as a compelling interest is to protect the child’s underlying fundamental right to preserve existing parent-like relationships.<sup>27</sup> Some state courts already implicitly recognize the child’s right as fundamental and protect the right by applying the BICS.<sup>28</sup> It is time that courts and legislators expressly recognize the child’s underlying fundamental right to preserve existing loving and nurturing parent-like relationships and protect them by applying the BICS in all custody cases, including third-party claims.

Part I of this Article traces the origins and historical evolution of the BICS standard as it emerged to become the guardian of a child’s relationship rights. Part II examines the modern evolution of the BICS and its recognition of a child’s right to preserve existing parent-like relationships. Part III first analyzes Supreme Court precedent, recognizing the unenumerated right to family privacy and the related presumption that parents act in the best interests of their children, and then concludes that this concept fails children by subordinating their interests to those of their parents—silencing their voices. Part IV discusses Supreme Court treatment of the BICS and explores the

24. See *infra* note 216 and accompanying text.

25. See *infra* note 221–41 and accompanying text.

26. David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1150 (2001).

27. Eric G. Anderson, *Children, Parents, and Nonparents: Protected Interests and Legal Standards*, 1998 BYU L. REV. 935, 940 (1998).

28. See *infra* note 207–08 and accompanying text. Some scholars have noted that interests need not always rise to the level of a legally protected right. See Anderson, *supra* note 27, at 939–40:

The phrase “interests of the child” or “best interests of the child” is commonplace in the law. It appears in the legislation and case law dealing with children in various legal settings, such as adoption, child protective services, and custody disputes between divorcing parents. Its deceptively smooth surface covers something quite complex for, as typically used, it refers not to one person’s (i.e., a child’s) interests, but to a legal standard. In unpacking that standard one finds the very collection of competing goals and interests discussed in this article.

. . . .

A conclusion reached by some children’s advocates is that the child’s interest should be represented not merely by granting it weight in the competition with other interests, but by enshrining it as a right.  
(citation omitted).

resulting state court confusion as to the proper application in third-party custody disputes, turning to early BICS precedent for guidance. Part V proposes a constitutional framework to recognize and protect a child's fundamental right to continue existing loving and nurturing parent-like relationship.

I. THE COMMON LAW ORIGIN AND BIRTH OF THE BICS EVIDENCES THE CHILD'S FUNDAMENTAL RIGHT TO A "WISE, AFFECTIONATE, AND CAREFUL PARENT."<sup>29</sup>

The BICS, a standard universally embraced by American state courts in custody matters,<sup>30</sup> was born in the English common law tradition.<sup>31</sup> The BICS extended protections afforded to orphaned and abandoned children, flowing from the *parens patriae* authority of the state, to children involved in custody disputes.<sup>32</sup> One way to understand the BICS is to view it as a lens that continues to define and refine the relationship of the rights and duties existing between parents, child, and state.<sup>33</sup> Sometimes courts rely on the BICS to resolve disputes in which the state, acting as *parens patriae* on behalf of the child, sues a parent it deems unfit.<sup>34</sup> In other instances, courts apply the BICS to resolve private custody disputes.<sup>35</sup>

Before the Norman Conquest in 1066, a woman enjoyed the right to exit a marriage taking her children and half of the marital property under Anglo-Saxon law.<sup>36</sup> But with the rise of feudalism in England, women were increasingly denied the status of personhood.<sup>37</sup> Feudalism eviscerated female identity, in part, by eliminating a mother's right to retain real and personal property and her right to custody of her children upon separation or divorce.<sup>38</sup> Fathers enjoyed presumptive and absolute hegemony in the feudal family hierarchy.<sup>39</sup> This presumption, perhaps, worked in cases where fathers provided sufficient physical, financial, and emotional support within the family, but it raised difficult moral and legal questions in the absence of a benign patriarch.

29. *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925).

30. See sources cited *supra* note 19.

31. *Blissets Case*, (1774) 98 Eng. Rep. 899, 899 (K.B.) (awarding custody to mother because it was "best for the child"); *Powel v. Cleaver*, (1789) 29 Eng. Rep. 274, 277 (Ch.) (protecting child's legacy from testator, absent father's claim of guardianship).

32. *Wynne*, *supra* note 20, at 180–82.

33. See *infra* text accompanying notes 167–217.

34. *Wynne*, *supra* note 20, at 181.

35. *Id.* at 182.

36. *Foster & Freed*, *supra* note 10, at 139.

37. *Id.*

38. *Id.*

39. *Id.* at 140.

English common law recognized the father's right to control matters of custody of children as a matter of natural law.<sup>40</sup> Some scholars relate the patrilineal custody presumption to the hierarchical structures of the church and the state.<sup>41</sup> When parents were absent or deemed unfit, the state exercised its *parens patriae* authority to determine guardianship matters.<sup>42</sup> In these instances, the state initiated the legal action.<sup>43</sup> Thus, the *parens patriae* authority of the court predates and presages the development and application of the BICS at early common law.<sup>44</sup> When faced with difficult facts and unhappy parties filing private custody actions, courts relied upon the BICS as one way to resolve custody disputes.<sup>45</sup> As parents and relatives of children turned to courts to determine private custody disputes, courts extended the *parens patriae* power to justify state intervention and described the applicable legal standard in terms of the child's best interests.<sup>46</sup>

#### A. *The Parens Patriae Doctrine Fosters the BICS*

The phrase *parens patriae* means "parent of the country," referring "traditionally to [the] role of [the] state as sovereign and guardian of persons under legal disability, such as juveniles."<sup>47</sup> Historically, the doctrine supported

40. See, e.g., *In re Agar-Ellis*, (1883) 24 Ch.D. 317, 337–38 (U.K.) ("[I]t is not the benefit to the infant as conceived by the court, but it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can."). This is particularly interesting because in the 19th century, American courts relied upon natural law to support the award of young children to the mother. See, e.g., *Mercein v. People ex. rel. Barry*, 21 Wend. 64, 104 (N.Y. 1840) (granting custody of daughter to mother because "the law of nature has given to her an attachment for her infant offspring which no other relative will be likely to possess in an equal degree").

41. Foster & Freed, *supra* note 10, at 139–40.

42. Note, *State Interests in the Family*, 93 HARV. L. REV. 1198, 1222 (1980).

43. *Id.* at 1224.

44. *Id.* at 1221–22.

45. Arguably, a different standard was needed because the *parens patriae* authority could be exercised only to prevent harm to the individual. Lynne Mairie Kohm, *Tracing the Foundation of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 346 (2008).

46. HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 195 (2000). "In 1839 Joseph Story defended the American conception of equity jurisdiction over child custody." *Id.* Judge Story wrote that the court had a responsibility to protect children from fathers "guilty of gross ill-treatment or cruelty, . . . drunkenness, . . . debauchery, . . . [or] domestic associations [that] tended to the corruption and contamination of [the child]." *Id.* (citing JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA* 529–33 (London A. Maxwell, 2d ed. 1839)).

47. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).



the King's right to determine wardship of orphans,<sup>48</sup> a potentially valuable benefit conferred by the crown upon the ward if the child had inherited wealth.<sup>49</sup> William Blackstone described the King, when exercising *parens patriae* authority, as "the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom."<sup>50</sup>

As an example, the English Crown exercised its *parens patriae* authority in 1620 by authorizing the Virginia Company to remove one-hundred street children from London, to "do whatever necessary to force the children into the ships," and to transport them to Virginia to become apprentices.<sup>51</sup> Destitute children, wards of the English state, became indentured servants abroad.<sup>52</sup> This practice provided much needed labor to the New World and relieved the English government of its moral and economic responsibility to care for the indentured children abroad.<sup>53</sup> So children, like women, suffered a chattel-like status, owing labor in exchange for room and board to the combined patriarchal powers of state and father.<sup>54</sup>

In addition to determining the custody of street children, England also removed children from the custody of impoverished parents.<sup>55</sup> The state adopted a minimum standard of acceptable care and summarily placed poor children in involuntary apprenticeships without a BICS determination.<sup>56</sup> This minimum standard of acceptable care excused the state from policing parents and from securing the best or most optimal familial circumstances.<sup>57</sup> The state

48. Christine Steib Stickler, *In re S.G.: Parens Patriae and Wardship Proceedings—Exactly Who in the State Should Determine the Best Interests of the Child?*, 7 WIDENER J. OF PUB. L. 377, 380 (1998).

49. *Id.* at 380–81. Historians disagree as to whether the King's determination of custody should accurately be characterized as the exercise of *parens patriae* power given the monetary value of the determination, as well as the debt owed to the crown flowing from the determination. *Id.* at 381.

50. WILLIAM BLACKSTONE, *THE STUDENT'S BLACKSTONE: COMMENTARIES ON THE LAWS OF ENGLAND* 285 (Robert Malcolm Ker ed., John Murray 1865).

51. MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 1 (1994).

52. *Id.* at 2.

53. *Id.* Mason notes that "[m]ore than half of all persons who came to the Colonies south of New England were indentured servants" between the ages of fourteen and sixteen. *Id.*

54. *Id.* at 14–15.

55. Janet Dolgin, *Transforming Childhood: Apprenticeship in American Law*, 31 NEW ENG. L. REV. 1113, 1122 (1997). Under the English Poor Law, town officials were charged to seek apprenticeships for the children of the poor. *Id.*

56. *Id.* ("Almost from the start, however, this system for establishing voluntary apprenticeships co-existed alongside another system which established involuntary apprenticeships for impoverished children.").

57. Donald N. Duquette, *Child Protection Legal Process: Comparing the United States and Great Britain*, 54 U. PITT. L. REV. 239, 279 (1992):

instead assured the children a bare minimum of food and shelter.<sup>58</sup> *Parens patriae* authority has thus been described as “a slim reed” upon which to entrust the welfare of a child, providing only a minimum degree of safety and protection.<sup>59</sup>

American state courts originally relied upon the *parens patriae* authority of the state to remove children from custody of their parents if the children were incorrigible or if the parents were “incompetent or corrupt.”<sup>60</sup> In 1836, Justice Story interpreted the states’ *parens patriae* authority to supersede the parents’ rights:

[P]arents are entrusted with the custody of the persons and the education, of their children, yet this is done upon the natural presumption, that the children will be properly taken care of . . . and that they will be treated with kindness and affection. . . . But whenever . . . a father . . . acts in a manner injurious to the morals or interests of his children—in every case, the Court of Chancery will interfere.<sup>61</sup>

Justice Story defined the American court’s expanded concept of *parens patriae* to embrace a BICS:

The use of this individualized power was supported in tradition by the English courts’ increasing use of chancery courts to determine the welfare and property of minors under the doctrine of *parens patriae*. . . .

In America the equitable tradition of chancery court was gradually extended by judges to consider the best interests of the children against those of their parents, even where there was not gross abuse.<sup>62</sup>

Justice Story traced the origins of the BICS to the English *parens patriae* doctrine and recognized the implicit balancing of familial rights required by the BICS. Currently, U.S. courts exercise two types of *parens patriae*

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The language of the statutes generally allow intervention based on physical abuse, abandonment, failure to provide proper food, clothing, shelter, or parental care and supervision, sexual abuse, emotional abuse, educational and medical neglect, and failure to protect a child reasonably from physical or sexual abuse. Although the “best interests of the child” is not the proper legal standard for initial adjudication, it is the most common test for framing dispositional orders.

58. *Id.*

59. See, e.g., *In re T.L.*, 1996 WL 393521, at \*3 (Mo. Cir. 1996) (citing *Allen v. Allen*, 626 P.2d 16, 23 (Wash. App. 1981) (“The ‘best interests’ test does not adequately protect a biological parent’s primary right to custody and the ‘parental unfitness’ test does not sufficiently protect a minor child’s welfare, and therefore, the Court adopts the ‘actual detriment to the child’ test.”)).

60. *Ex Parte Crouse*, 4 Whart. 9, 9–10 (Pa. 1839).

61. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 676 (Melville M. Bigelow ed., Little, Brown, and Co. 13th ed. 1886).

62. MASON, *supra* note 51, at 58.

authority: public and private.<sup>63</sup> A developing cannon of Supreme Court family privacy case law limits the states' public *parens patriae* authority to remove children to cases in which children are declared delinquent by courts, or parents are deemed unfit,<sup>64</sup> and thus, deemed to have lost the constitutional right to the care, custody, and control of their children.<sup>65</sup> In private custody disputes between fit parents, the BICS controls.<sup>66</sup> Traditionally, the state becomes involved only upon the request of the petitioning party, and it exercises its limited decision-making authority within the parameters of the BICS.

### B. *The BICS Comes of Age*

The BICS emerged in England as early as 1733 and offered a new custody standard designed to avoid the pitfalls of the paternal presumption.<sup>67</sup> In 1774, Lord Mansfield decided *Blissets Case* and awarded custody to the mother, over the father's objection, in order to further the child's education and welfare.<sup>68</sup> Because the father was "bankrupt, abusive and improper," according to the court, "the public right of the community to superintend the education of its members, and to disallow what for its own security and welfare it should see good to disallow, went beyond the rights and authorities of the father."<sup>69</sup> In the next century, English courts expressly identified and applied the BICS based upon customary law existing from "time immemorial."<sup>70</sup> Courts initially applied the BICS in deciding matters of the custody of orphans and then

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63. See Note, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1223–24 (1980) [hereinafter *Developments in the Law*]:

Most late nineteenth century courts thus acknowledged that the child's welfare, not the parent's legal right, was the determinative factor in private custody decisions under the *parens patriae* power.

In the public custody context, by contrast, courts expanded and distorted the *parens patriae* power by invoking it to uphold broad child neglect and delinquency statutes that provided for state-initiated intervention into the family. The vague and sweeping clauses in these statutes gave the courts discretionary power to decide which children were in need of the state's supervision.

(footnotes omitted).

64. Anderson, *supra* note 27, at 936. While the fitness rule as applied in abuse and neglect cases may be appropriate, the BICS is better suited for third-party custody and visitation cases which more closely resemble a traditional custody dispute, not a removal proceeding. *Id.*

65. *Id.*

66. *Developments in the Law*, *supra* note 63, at 1202.

67. Kohm, *supra* note 40, at 354.

68. *Id.* (citing *Blissets Case*, (1774) 98 Eng. Rep. 899, 899 (K.B.)).

69. *Blissets Case*, (1774) 98 Eng. Rep. 899, 899 (K.B.).

70. Kohm, *supra* note 45, at 360. This suggests little distinction between the BICS and the *parens patriae* doctrine in the formative stages of the BICS.

extended it to custody disputes between parents.<sup>71</sup> So as early as 1733, some English courts rejected the tradition of patriarchal supremacy in favor of the BICS.<sup>72</sup>

The trajectory of the BICS, however, was uneven and lacked predictability. Approximately seventy years later, in the case of *DeManneville v. DeManneville*,<sup>73</sup> an English court reinforced the paternal presumption, without any reference to *Blissets Case*<sup>74</sup> or the application of the BICS, holding, “The law is clear, that the custody of a child, of whatever age, belongs to the father, if he chooses.”<sup>75</sup> But the court allowed the mother access to the child “as is consistent with its [the child’s] happiness . . . .”<sup>76</sup> Thus, despite some early precedent employing the BICS standard, the English courts preferred the feudal paternal presumption to award custody to the father, tempered by an award to the mother of “unrestrained physical access.”<sup>77</sup> Patriarchal supremacy, crowning fathers as “the guardian of his child by nature and by nurture,” remained firmly embedded in English common law, accompanied by an emerging focus upon the child’s best interests.<sup>78</sup>

Both the BICS and the paternal presumption crossed the seas with the English immigrants and emerged in American case law.<sup>79</sup> In colonial America during the 1700s, the life of a child likely included work from a very young age.<sup>80</sup> Parents often depended on children to assist in the grueling day-to-day tasks of tending to crops, animals, and other daily chores associated with survival in the newly settled lands.<sup>81</sup> As previously noted, orphaned children were sent from England to America to become indentured servants.<sup>82</sup> The demand for older children to assist with the burdens of daily survival showed

71. *Developments in the Law*, *supra* note 63, at 1221–22:

When the English chancery courts exercised the power delegated to them by the sovereign to act as ‘general guardian of all infants, idiots, and lunatics,’ they were bound to use this power solely on behalf of the state ward and not to benefit others. Initially, chancery courts refused to exercise their *parens patriae* power to override the custody rights of a child’s natural parents. Instead, they sought primarily to ensure an orderly transfer of feudal duties between generations after a propertied minor’s parents had died.

72. *Id.* at 1223.

73. *DeManneville v. DeManneville*, (1804) 32 Eng. Rep. 762 (Ch.).

74. *Blissets Case*, (1774) 98 Eng. Rep. 899, 899 (K.B.).

75. *DeManneville*, 32 Eng. Rep. at 764.

76. *Id.* at 767–68.

77. *Id.*

78. *Wellesley v. Duke of Beaufort*, (1827) 38 Eng. Rep. 236, 243 (Ch.). *See also*, *Developments in the Law*, *supra* note 63, at 1223.

79. MASON, *supra* note 51, at xiii.

80. *Id.* at 2.

81. *Id.* at 3–4.

82. *Id.* at 2.

the valuable role children played in colonial homes.<sup>83</sup> In some cases, if resources were scarce, children were “bound out” to neighbors.<sup>84</sup> Wages were paid directly to the father, and children became a direct source of income.<sup>85</sup> The child constituted a valuable asset and, under the *parens patriae* doctrine, the child’s earnings and earning capacity belonged to the father.<sup>86</sup>

In 1837, Judge Nelson justified the preferred status of fathers over mothers in matters of custody by writing:

“[T]he law makes the father the guardian of his child by nature and by nurture;” . . .

. . . The interference of the court with the relation of father and child, by withdrawing the latter from the natural affection, kindness and obligations of the former, is a delicate and strong measure; and the power should never be exerted except for the most sound and solid reasons. In this country, the hopes of the child in respect to its education and future advancement, is mainly dependent upon the father; for this he toils and struggles through life; the desire of its accomplishment operating as one of the most powerful incentives to industry and thrift.<sup>87</sup>

The product of the child’s industry was owed to the father in exchange for the legal obligation to support the child.<sup>88</sup> One explanation for the persistent paternal preference is that the child’s economic future depended upon a father’s support.<sup>89</sup> So the court employed a paternal custody presumption to secure the economic relationship between fathers and their children. In essence, American courts equated best interests with economic security and, thus, applied the paternal preference.

The BICS, rooted in the concept of *parens patriae* and the authority of the state to protect those unable to protect themselves, afforded the court more flexibility and some relief from the unsatisfactory analogy between property and children that had inexorably ended in paternal custody. As early as the nineteenth century, some courts even applied the BICS to support the award of custody to a third party.<sup>90</sup> One court relied upon the BICS in a private custody action to confirm custody in the maternal grandmother over the objection of the father.<sup>91</sup> In another case, *Chapsky v. Wood*,<sup>92</sup> Justice Brewer relied upon the BICS to resolve a custody dispute between the father and a third party:

83. *Id.* at 51.

84. Dolgin, *supra* note 55, at 1123.

85. *Id.* at 1126.

86. Wynne, *supra* note 20, at 181–82.

87. *The People ex rel. I. Nickerson*, 19 Wend. 16, 17, 19 (N.Y. Sup. Ct. 1837).

88. *Id.* at 7.

89. MASON, *supra* note 51, at 53.

90. *See supra* notes 56–59 and accompanying text.

91. *Verser v. Ford*, 37 Ark. 27, 30 (1881). In custody dispute between maternal grandmother and father court must “act as humanity, respect for parental authority and respect for

[W]hen reclamation is not sought until a lapse of years, when new ties have been formed and a certain current given to the child's life and thought, much attention should be paid to the probabilities of a benefit to the child from the change. It is an obvious fact, that ties of blood weaken, and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel.<sup>93</sup>

American courts enjoyed flexibility and were able to rely upon either strain of English common law to resolve custody disputes. This helps to explain the divergent and competing custody precedent in early American custody cases. Some courts applied the BICS and others the paternal presumption.

As society changed with industrialization, a middle-class emerged, precipitating legal change. By the late 1800s, some American courts began preferring mothers to fathers in custody matters. Without expressly rejecting the patriarchal right to custody, state courts borrowed and applied the *Blissetts Case* rule.<sup>94</sup> This change is sometimes attributed to the shift away from an agrarian society to an industrial society requiring unskilled workers, educated managers, and professionals.<sup>95</sup> Men moved freely into the industrial workplace of the public sphere.<sup>96</sup> Women were inducted into the "cult of true womanhood"<sup>97</sup> where "women were to preserve the home as a refuge where altruism would prevail over greed, where piety and conscience would flourish"<sup>98</sup>—and "childrearing became the middleclass reason for being."<sup>99</sup> Women assumed control over the private sphere, including control over children.<sup>100</sup> Given the division of labor, with fathers working away from the home and mothers in the home taking care of children,<sup>101</sup> courts began to award custody of children to fit mothers.<sup>102</sup>

Some trial courts determining custody disputes continued to rely upon platitudes and stereotypes, simply replacing the presumption favoring paternal

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the infant's best interests may prompt" while at the time applied a presumption favoring fathers because of "his greater ability and knowledge of the world" and his "primary obligation . . . to maintain, educate and promote the happiness of the child . . . ." *Id.*

92. *Chapsky v. Wood*, 26 Kan. 650 (1881).

93. *Id.* at 653.

94. MASON, *supra* note 51, at 81.

95. June R. Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 966 (1991).

96. *Id.* at 967.

97. *Id.*

98. *Id.* at 968.

99. *Id.* at 969.

100. MASON, *supra* note 51, at 14.

101. *Id.* at 50–52.

102. *Id.* at 53, 58.

custody with favoritism for maternal custody.<sup>103</sup> Other courts embraced a presumption recognizing the “natural right”<sup>104</sup> of a mother to the custody of her children under the Tender Years presumption.<sup>105</sup> Both gendered presumptions suffer from the same critique: neither identifies a custody standard comprised of criteria to determine the best placement for the individual child. Instead, both rely upon gender as a proxy for caretaking. Indifferent to the limitations of custody by presumption, courts continued to prefer the Tender Years presumption or the paternal presumption over the arduous task of identifying and applying a relevant set of criteria to reach a fact-driven “best result” for the child. Courts remained tempted by the certainty and economy afforded by gender-driven presumptions.

In time, American courts gravitated toward the BICS standard, subject still to the Tender Years presumption as a factor favoring mothers before fathers in custody disputes.<sup>106</sup> In this way, the patriarchal presumption in favor of fathers began to wane.<sup>107</sup> In a period of less than two hundred years, the American view of the child as a miniature wage-earner was replaced by an emerging recognition of childhood as a period of development and growth from absolute dependence into adulthood.<sup>108</sup> The mother became the center of the home and

103. *Id.* at 50–51.

104. The term “natural rights” is hard to define in relationship to custody. Some scholars base the paternal presumption on natural law and others base the maternal presumption on it. *See, e.g., Dolgin, supra* note 55, at 1155:

Within a half-century, alternative understandings of maternal, as compared with paternal, status and authority, though still sometimes competing with older understandings, had become conventional. Generally courts reserved these new understandings for middle-class mothers, but sometimes even poor mothers, involved in disputes with their children’s masters or employers, benefitted from the century’s evolving conception of maternal status and authority. In one such case, *Osborn v. Allen*, decided in 1857, the New Jersey Supreme Court declared that maternal authority, though not as extensive as paternal authority, was predicated on the same understanding of parentage: “The authority and rights of parents over their children result from their duties.” The Court’s Chief Justice further explained that, Blackstone’s eighteenth-century view of maternity notwithstanding, the proposition that mothers enjoy no legal power with regard to their children “is not consistent with the principles of natural law, with the rules of the common law, or with the dictates of sound public policy.”

(footnotes omitted).

105. Kohm, *supra* note 45, at 346.

106. *Id.* at 347.

107. *But see* *State v. Stigall*, 22 N.J.L. 286, 288 (N.J. 1847) (applying paternal presumption to custody case).

108. Kohm, *supra* note 45, at 347. The importance of child-developmental theory, particularly attachment theory, plays a critical role in identifying the appropriate content of the BICS and the status of third parties who parent children. Shelley A. Riggs, *Is the Approximation Rule in the Child’s Best Interests? A Critique from the Perspective of Attachment Theory*, 43 FAM. CT. REV. 481, 490 (2005).

hearth, charged with the rearing of children.<sup>109</sup> The father replaced the family unit as the primary source of monetary support.<sup>110</sup> Thus, the gendered division of work emerged between the world of home, populated by uncompensated women, and the world of business, populated by compensated men.<sup>111</sup>

The accompanying idealization of motherhood is reflected in the cases of the era dealing with the proper place and responsibilities of women. In *United States v. Bradwell*,<sup>112</sup> the Supreme Court relied upon the “divinely created” characteristics of women as child-bearers to block Myra Bradwell’s appeal for admittance to the Illinois bar.<sup>113</sup> Thus, children became central to the idealized sphere of home and hearth managed by mothers.<sup>114</sup>

By the early twentieth century, the paternal presumption in determining matters of custody was uniformly waning.<sup>115</sup> Judge Cardozo is sometimes credited with embracing and defining the American approach to the BICS.<sup>116</sup> As previously noted, Judge Cardozo linked the state’s authority to regulate custody to the state’s obligation to “protect the incompetent or helpless” and described the judge’s obligation in custody disputes between parents to act:

[A]s parens patriae to do what is best for the interest of the child. He is to put himself in the position of a ‘wise affectionate and careful parent’, and make provision for the child accordingly. . . . He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not

109. MASON, *supra* note 51, at 59. While the cult of motherhood protected the mother-child relationship, it did not grant equality in matters of other marital rights and responsibilities. *Id.*

110. *Id.* at 52.

111. *Id.* at 52–53.

112. *Id.* at 53 (discussing *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring)).

113. *Bradwell*, 83 U.S. at 141.

114. Reva B. Siegel, *Home as Work: The First Women’s Rights Claims Concerning Wives’ Household Labor*, 103 YALE L.J. 1073, 1087–88 (1994):

[W]ives earned income from home-based labor in order to combine their market activities with household work and childcare. Keeping boarders was a common way to do this. A married woman who kept boarders performed the work of the household for her family and for the market; indeed, in this period, when much of the service sector was still embedded in the household, boarding appears to have been a more lucrative form of employment than many other types of wage work available to women. Outside urban and industrial areas, wives still performed the traditional work of spinning, weaving, milking, foraging, gardening, and producing cheese and butter.

115. *E.g.*, *Helms v. Franciscus*, 2 Bland. 544, 563 (Md. 1830). The court recognized form of the Tender Years Presumption: “The father is the rightful and legal guardian of all his infant children; . . . [y]et even a court of common law will not go so far as to hold nature in contempt, and snatch helpless, puling [sic] infancy from the bosom of an affectionate mother, and place it in the course hands of the father.” *Id.*

116. *See, e.g.*, Vanessa A. Lavelly, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 263 (2007).



determining rights ‘as between a child and a parent,’ or as between one parent and another. He ‘interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*.’<sup>117</sup>

Judge Cardozo builds upon Justice Story’s protective approach by declaring concern for the welfare of the child as controlling.<sup>118</sup> The foregoing quote expressly acknowledges the relationship between the *parens patriae* authority and the BICS, both deemed rules of “settled and ancient origin.”<sup>119</sup> Arguably, children enjoy a customary right to have custody matters determined based on the BICS.

The common law development of the BICS in America can be explained by the transition from an agrarian society to an industrial society, the changing concept of women and children from chattel to autonomous individuals, the emergence of the separate spheres of public and private activity, and the replacement of the *parens patriae* paternal presumption by the maternal preference,<sup>120</sup> followed by a gender-neutral presumption,<sup>121</sup> favoring the primary care-giving parent over others.<sup>122</sup> The BICS evidences the independent existence of a child’s relationship rights and creates a framework to protect them.

## II. CURRENT INCARNATION OF THE BICS

An examination of the current standard adopted to implement the BICS in the United States reveals that they are strikingly similar across state lines.<sup>123</sup> The BICS is typically statutorily defined in two parts. The first formulation identifies the BICS in general terms and requires that custody decisions be made in the child’s best interests to advance and protect the child’s physical,

117. *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925) (internal citations omitted).

118. *See supra* note 61 and accompanying text.

119. *MASON*, *supra* note 51, at 61.

120. Women slowly gained the *de jure* right, if not the *de facto* right, to the same property and personhood rights enjoyed by men. Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL’Y & L. 581, 604–05 (1997). This process was advanced, in part, by relying upon the equal protection clause of the Constitution and by recognizing the need to employ intermediate scrutiny to gendered statutory language. *Id.* Many of the same stereotypes applied to children, were formerly applied to justify the disparate treatment of women as less intelligent, too emotional, psychologically weak, lacking in business expertise and in need of protection, are used to justify the secondary importance assigned to the interests of minors, without regard to age or maturation. *Id.* Just as American law and society moves toward gender equality to promote a just and fair treatment of women, the law of the child is in need of a similar reform to elevate as fundamental the rights of children in custody and visitation disputes.

121. Phyllis P. Bookspan, *From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? Should It?*, 8 BYU J. PUB. L. 75, 79 (1993).

122. *Id.* at 83–84.

123. *See infra* note 284 and accompanying text.

mental, social, and moral well-being.<sup>124</sup> The BICS is further solidified through statutory criteria to give shape to the guiding polestar.<sup>125</sup>

Clearly, physical safety advances a fundamental right enjoyed by citizens.<sup>126</sup> Mental well-being recognizes the importance of psychological welfare in addition to physical welfare.<sup>127</sup> Social well-being recognizes the importance of a child's relationship not only with parents, but with other family members, children in the family and outside the family, and adults in the community.<sup>128</sup> Moral well-being, related to social well-being, recognizes the vital importance of inculcating children with values and the ability to discern right from wrong.<sup>129</sup> The BICS, at its core, is designed to identify the parent to whom the child is most attached and solidify custody in that parent while maintaining the bond with the other parent.

The factors discussed above reflect the fundamental importance of raising children well in the context of families, the greater community, and U.S. democracy. An examination of the existing model custody rules reveals a factored focus upon advancing a child's right to a loving and nurturing relationship with parent-like adults, despite the absence or collapse of marriage, through the application of the BICS.

#### A. *Model BICS Rules*

Despite the introduction of a factored approach, scholars continued to critique the BICS standard as indeterminate. Drafters of the Uniform Marriage and Divorce Act (UMDA)<sup>130</sup> introduced a third-party standing requirement to

124. See, e.g., DWYER, *supra* note 1, at 41.

125. *Id.*

126. *Mapp v. Ohio*, 367 U.S. 643, 656–57 (1960).

127. See, e.g., Vanessa L. Warzynski, *Termination of Parental Rights: The "Psychological Parent" Standard*, 39 VILL. L. REV. 737, 765–66 (1994). Contrary to the presumption applied by many courts today, the best interests of a child are not always served by the care of the biological parent, even where that parent is judicially deemed fit, because the child may suffer severe psychological damage when removed from his or her "psychological" parents. *Id.* Rather, the best interests of the child are assured only by protecting the child's psychological well-being as well as the child's physical well-being. *Id.*

128. DWYER, *supra* note 1, at 67.

129. Stanley Ingber, *Socialization, Indoctrination, or the 'Pall of Orthodoxy': Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 19–20 (1987) ("Society must indoctrinate children so they may be capable of autonomy. They must be socialized to the norms of society while remaining free to modify or even abandon those norms. Paradoxically, education must promote autonomy while simultaneously denying it by shaping and constraining present and future choices.").

130. UNIF. MARRIAGE & DIVORCE ACT § 401 (amended 1971 & 1973), 9A U.L.A. 281 (1970) [hereinafter UMDA]. Following the release of the initial draft of the UMDA in 1970, as of 1989, six states had adopted some form of the UMDA custody approach. C. Gail Vasterling, *Child Custody Modification Under the Uniform Marriage and Divorce Act: A Statute to End the*

protect traditional parental custody rights. Section 401(d)(1) limits the right of a third-party nonparent to initiate a custody action to instances where the child is not within the physical custody of one parent.<sup>131</sup> The standing limitation protects the parental due process right to care for a child; but the standing bar entirely ignores the child's interests.<sup>132</sup> After satisfying the standing requirement, the third party then faces the presumption favoring parental claims over third-party claims as part of the BICS.<sup>133</sup> The standing requirement can be characterized as a legislative attempt to channel third-party custody claims, limiting them to cases in which the child resides with neither parent, suggesting a total breakdown of the parent-child relationship.<sup>134</sup>

The UMDA also incorporates the best interests standard:

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

1. The wishes of the child's parent or parents as to his custody.
2. The wishes of the child as to his [or her] custodian.
3. The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests. (emphasis added).
4. The child's adjustment to his home, school, and community.
5. The mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.<sup>135</sup>

The UMDA adopts the BICS and identifies these five factual areas of inquiry, noted above, to assist the court in protecting the child's underlying right to

*Tug-of-War?*, 67 WASH. U. L.Q. 923, 936 n.76 (1989). Vasterling cites the following citations as versions of the UMDA "best interests" provision governing initial custody decisions of § 402: COLO. REV. STAT. § 14-10-124 (1987); DEL. CODE ANN. tit. 13, § 772 (1981); KY. REV. STAT. ANN. § 403.270 (Michie 1984); MINN. STAT. ANN. § 518.17 (West Supp. 1989); MONT. CODE ANN. § 40-4-212 (1986); OHIO REV. CODE ANN. § 3109.04(C) (Anderson Supp. 1987).

131. UMDA § 401(b)(2).

132. Schlam, *supra* note 1, at 425-26. See also UMDA §401(d). States that adopted § 401(d) of the Act include: ARIZ. REV. STAT. § 25-331 (Supp. 1982); COLO. REV. STAT. § 14-10-123 (1973); ILL. STAT. ANN. ch. 40, § 601 (West's Smith-Hurd 1980); IND. CODE ANN. § 31-1-11.5-20 (LexisNexis 1980); KY. REV. STAT. ANN. § 403.260 (West 1981); MINN. STAT. § 518.156 (Supp. 1982); and, WASH. REV. CODE § 26.09.180 (1981).

133. Schlam, *supra* note 1, at 447-48. Schlam argues the standing requirement is unnecessary because the parental presumption adequately protects parents who have maintained strong relationships. *Id.* With respect to those parents who have not done so, psychological "parents should at least be able to be heard as to custody on an equal footing with natural or adoptive parents." *Id.*

134. *Id.* at 425.

135. UMDA § 403.

maintain parental relationships. Thus, the UMDA attempts to reign in judicial discretion by statutorily defining narrow third-party standing rules; but once standing is acquired, the standard retains the flexibility afforded by the BICS.

In an attempt to cure the twin-ills of judicial bias and outcome uncertainty while recognizing third-party claims, the ALI proposes an alternative uniform custody approach by adopting the following version of the BICS:

- (1) The primary objective of Chapter 2 is to serve the child's best interests, by facilitating all of the following:
  - (a) Parental planning and agreement about the child's custodial arrangements and upbringing;
  - (b) Continuity of existing parent-child attachments;
  - (c) Meaningful contact between the child and each parent;
  - (d) Caretaking relationships by adults who love the child, know how to provide for the child's needs, and place a high priority on doing so;
  - (e) Security from exposure to conflict and violence;
  - (f) Expeditious, predictable decision-making and the avoidance of prolonged uncertainty respecting arrangements for the child's care and control.<sup>136</sup>

In determining standing, the ALI recognizes that, in some instances, a third party assumes a parent-like status and is entitled to be heard under limited circumstances.<sup>137</sup> A parent by estoppel is a third party who "has acted as a parent under certain specified circumstances which serve to estop the legal parent from denying the individual's status as a parent."<sup>138</sup> In a secondary

136. A.L.I., ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 107 (2002) [hereinafter ALI PRINCIPLES].

137. *Id.* at 120. Historically, parentage depended upon a biological tie to the child or adoption. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 130 (2006). Changing demographics have challenged courts and legislatures to recognize a growing array of parents and parent-like adults based upon best interests considerations including: "genetics, caregiving, marital ties and parenting intentions." *Id.* at 141. Elizabeth Bartholet advocates a parent-picking approach that advances the child's right to receive responsible parenting in the context of "an ongoing, stable, nurturing relationship." Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 344 (2004).

138. ALI PRINCIPLES, *supra* note 136, at 120–21. In keeping with the possibility of multiple parents, Susan Appleton advocates legal recognition of the number of parents commensurate with a child's experience. Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 69 (2008) ("Put differently, allowing recognition of more than two parents offers benefits for some individual children and opens up family law's channeling efforts by increasing and diversifying the valid paths for others to follow."). Others, however, remain critical of the multi-parent possibility recognized under the ALI custody provisions. *See, e.g.*, Emily Buss,

category is a de facto parent, who undertakes parental responsibilities with the permission of the legal parent or “because of a complete failure or inability of any legal parent to perform caretaking functions.”<sup>139</sup> Thus, the ALI recognizes that third parties who assume parent-like status and parental obligations should have standing in custody disputes.<sup>140</sup> This recognition advances the child’s fundamental right to preserve an existing, loving, and nurturing parent-like relationship. The ALI also recognizes the child’s interests as superior to those of the adults involved by delineating not only when third parties have standing, but also by identifying the BICS factors to determine custody based on the child’s actual experiences and relationships rather than on stereotypes or hypothetical presumptions.<sup>141</sup> The ALI custody principles provide guideposts to parties and the courts in defining best interests, eliminating some of the indeterminacy and the resulting strategic behavior that harms the child.<sup>142</sup> The ALI also introduces the approximation rule to address criticisms that the BICS is too uncertain.<sup>143</sup>

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“Parental” Rights, 88 VA. L. REV. 635, 680 (2002). Buss advocates broad state authority to identify parents, both traditional and nontraditional and narrow authority to interfere in parental decision-making once the parents are identified. *Id.*

139. ALI PRINCIPLES, *supra* note 136, at 130. Another concern is the all or nothing approach to parenting that couples parenting rights with financial responsibility. *See, e.g.,* Bartholet, *supra* note 137, at 339:

Obviously it is problematic from the child’s perspective to be given a father who has no interest in the nurturing piece of parenting simply because the man might have wages available to be garnished. If there is another man available who seems suitable for the nurturing piece of parenting, we should consider him for the parent role regardless of whether he can take care of financial support responsibilities.

140. David Meyer has argued that the ALI definitions of parent by estoppel and de facto parent may satisfy the *Troxel* plurality standard if the case is interpreted narrowly to reveal, “a glimmer of hope that the court will be willing to redefine family.” *See* David D. Myer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution*, 2001 BYU L. REV. 1075, 1102–03 (2001). A less forgiving interpretation of *Troxel* might characterize the case as laying the groundwork for a very narrow exception to parent hegemony in custody and visitation matters pregnable only by third parties who can establish harm to the child if visitation is denied.

141. ALI PRINCIPLES, *supra* note 136, at 104.

142. *Id.* at 95.

143. The rule requires courts to consider the past care-taking arrangements in determining custody. While facially appealing, this approach may lead to unintended consequences by placing primary caretaking responsibilities with the less capable parent, thus unintentionally undermining the best interests of the child. *See* Riggs, *supra* note 108, at 490:

However, the approximation rule is flawed and incomplete. Until a better alternative that is more consistent with the developmental research is developed, the best interests standard may be the courts’ only reasonable guideline. After all, the imprecise nature of the best interests standard accurately reflects the complex nature of the human family, which is always unique and ever changing, making it highly unlikely that a universal standard can be developed that will be appropriate for all cases at all points of time in the individual and family life cycles.

Both model approaches reject custody by presumption. Presumptions favoring either the mother or the father clearly left drafters uneasy. So they were jettisoned in favor of a gender-blind caretaker focused application of the BICS.<sup>144</sup> This approach affords flexibility to courts in matters of custody to achieve the governmental interest of protecting and advancing the child's welfare based on the existing circumstances of each case.

### B. *The BICS Critiqued*

Despite attempts to promote uniformity, the BICS is often criticized as malleable,<sup>145</sup> too easily manipulated, and subject to judicial whim. Some might even characterize the standard as an excuse for the state to interfere in private family matters, rarely advancing the welfare of the child. Despite the broad discretion afforded to courts and the potential for misuse, the aspirational goal of the BICS to advance the rights and welfare of the child should not be ignored. Family law scholars Henry Foster and Doris Freed write:

At least to some measure, the central problem has been, and still is, that in custody cases there is no substitute for hard and meticulous fact-finding by the trial court. The great jurists who have had something to say about child custody have recognized this and have avoided over-generalization and absolutes.<sup>146</sup>

The BICS identifies and protects the underlying fundamental right enjoyed by a child to continue loving and nurturing parent-like relationships. Despite its weaknesses, the BICS remains the best alternative available in custody disputes due to its fact-driven focus.<sup>147</sup>

144. See, e.g., *Cunningham v. Cunningham*, No. 1281, 1986 WL 12951, at \*5 (Ohio App. Nov. 17, 1986) (Grey, J., dissenting) (favoring restoring custody with mother consistent with the tender years presumption, now “couched in modern day jargon of ‘primary care giver’”).

145. Riggs, *supra* note 108, at 489; see also Robert Mnookin & R. Szwed, *The Best Interests Syndrome and the Allocation of Power in Child Care*, in PROVIDING CIVIL JUSTICE FOR CHILDREN 8 (H. Geach & E. Szwed, eds., 1983) (criticizing the BICS as “flawed because what is “best for any child . . . is often indeterminate and speculative and requires a highly individualized choice between alternatives”); Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 6 (1987) (criticizing the BICS as indeterminate, unjust, litigious and subject to public policy concerns); Pamela Laufer-Ukles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 19 (2008) (complaining the BICS considerations are “extremely broad and allow for the expression of particular judicial prejudice”).

146. Foster & Freed, *supra* note 10, at 331. The approaches listed *supra* note 115 may, in fact, be described as an unsatisfactory substitute for “meticulous fact-finding.” *Id.*

147. See Elster, *supra* note 145, at 39–43 (explaining some alternatives include awarding custody to the primary caretaker in all instances, awarding custodians equal time, or flipping a coin).

### III. TENSION BETWEEN THE CHILD'S FUNDAMENTAL RIGHT TO A LOVING AND NURTURING PARENT-LIKE RELATIONSHIP AND THE FAMILY PRIVACY/PARENTAL PRESUMPTION

The common law doctrine of family privacy, like the BICS, is arguably rooted in the *parens patriae* authority of the state, transferred from the state to the husband/father as the leader of the family.<sup>148</sup> Early American divorce law reveals this focus on the husband. Property was divided by title, residency was determined by the husband, wages earned by wives and children belonged to the husband and father, corporal punishment of wives and children was legally permitted, and married women lacked the capacity to contract, and, thus, to manage their financial estates.<sup>149</sup> The doctrine of family privacy is built upon this patriarchal foundation.

The early constitutionalization of parental privacy recognized a parent's right to bring up children without state interference,<sup>150</sup> so long as the parent did not compromise the safety or welfare of the child.<sup>151</sup> This early recognition of the unenumerated right to family privacy is a double-edged sword. While guarding against the standardization of the family,<sup>152</sup> it shields some parents from the consequences of poor parenting, fosters secret maltreatment, and ultimately undermines the welfare of some children. State legislation limiting state oversight to monitor only unfit parents and their children entrenches the power of the parent without regard to the child's best interests.<sup>153</sup> The threat of the state's intrusive arm reaching into matters of family decision-making must be balanced against the harm created by a rule of law enabling batterers to use the familial right of privacy to shield bullying and abusive behavior from state or private intervention—further entrenching a patriarchal order based on superior strength and intimidation.<sup>154</sup> As the foundation of patriarchy ebbs, the related law and theory must likewise subside.

148. *Jones v. West*, 139 Tenn. 522, 526–27 (1925) (“Under the change of government from a monarchy to a republic, the functions of the *parens patriae* did not cease to exist. Such authority passed from the king to the government of the state or sovereign people, and it may be called into exercise by the Legislature, the representatives of the people, and delegated by the Legislature to other functionaries.”).

149. 1 WILLIAM BLACKSTONE, COMMENTARIES 447.

150. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

151. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Fathers historically risked losing children only upon failure to adequately train the child as a laborer. MASON, *supra* note 51, at 4.

152. *Moore v. East Cleveland*, 431 U.S. 494, 506 (1977).

153. Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 995, 1001 (1992). Dailey notes that “the law in areas as diverse as criminal, estate law, taxation, insurance law, labor law, contract law, tort law, and property law, indirectly, but profoundly, affect the structure of family law.” *Id.* at 1001–02.

154. *Id.* at 1016–17.

One of the foundational principles of family privacy is the presumption that the parent will act in the best interests of the child.<sup>155</sup> Its source may be traced to the decision of *Meyer v. Nebraska*, in which the court recognized the parental right to educate children in German.<sup>156</sup> In *Meyer*, the Court reversed the conviction of a teacher who violated the English-only education statute as an unconstitutional violation of the parents' "liberty interest to establish a home and bring up children."<sup>157</sup> Twenty-one years later, the Court upheld a statute prohibiting children from selling pamphlets on the street against a challenge by the child's aunt and custodian.<sup>158</sup> While recognizing that the "custody, care and nurture of the child resides first with the parents whose primary function and freedom include preparations for obligations the state can neither supply nor hinder," the Court also acknowledged the overriding interest of the state to protect the welfare of the child.<sup>159</sup> Thus, by recognizing the competing interests of the parent, the state, and the child, *Prince* is one of the earliest Supreme Court cases to recognize the separate existence of the child's rights and interests. From the broad language of parental control in *Meyer*, tempered only slightly by the explicit recognition of the child as a stakeholder in *Prince*, the presumption that parents act in the best interests of a child, shielded from examination by the veil of family privacy, emerged as an unenumerated constitutional right.<sup>160</sup>

The presumption is often used to justify the state's doctrine of non-intervention. For example in *HL v. Matheson*, Justice Stevens observed:

My conclusion, in this case and in *Danforth*, that a state legislature may rationally decide that most parents will, when informed of their daughter's pregnancy, act with her welfare in mind is consistent with the "pages of human experience that teach that parents generally do act in the child's best interests" relied upon by the Court in *Parham v. J. R.* It is also consistent with Justice Brennan's opinion in *Parham*, which I joined.

As the Court noted in *Parham*, the presumption that parents act in the best interests of their children may be rebutted by "experience and reality." However, when parents decide to surrender custody of their child to a mental hospital and thereby destroy the ongoing family relationship, that very decision raises an inference that parental authority is not being exercised in the child's best interests.<sup>161</sup>

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

156. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

157. *Id.*

158. *Prince*, 321 U.S. at 166.

159. *Id.* at 167. Although the adult involved was an aunt, not a parent, the court framed its rule in terms of parental rights.

160. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 69 (2000).

161. *H.L. v. Matheson*, 450 U.S. 398, 424 (1981) (internal citations omitted).



Thus, in matters dealing with the separation of the unitary family, even when fit parents are involved, the parental presumption may be an unreliable one.

Nevertheless, the presumption typically survives in third-party custody disputes unless the parent is deemed unfit.<sup>162</sup> The definition of parental fitness is typically satisfied absent evidence of neglect or abuse.<sup>163</sup> Thus, the intervention often occurs too late to protect the child's best interests or to preserve meaningful relationships.<sup>164</sup> In fact, once a parent is deemed unfit, children are often removed and parental rights terminated in accordance with state and federal law.<sup>165</sup> If in every disputed custody matter, the child is entitled a BICS determination, and the child's right to have a relationship with loving and nurturing parent-like adults is honored, then the standard of care is raised and relationships are preserved. While fit parents certainly enjoy a fundamental right to the care, custody, and control of their children,<sup>166</sup> it follows that children enjoy a corollary: A fundamental right to be loved and nurtured by parent-like adults.<sup>167</sup>

162. *Parham v. J.R.*, 442 U.S. 584, 602–03 (1979).

163. In 2006, the most recent year with statistics available at the time of writing this Article, the U.S. Department of Health and Human Services, Administration of Children, Youth and Families, reported that 867,253 children were reported as abused or neglected within the United States. Such data, concerning child abuse and neglect, is available from the National Data and Analysis System. NDAS: Data Reports, [http://ndas.cwla.org/data\\_stats/access/predefined/home.asp?MainTopicID=1&SubTopicID=68](http://ndas.cwla.org/data_stats/access/predefined/home.asp?MainTopicID=1&SubTopicID=68) (last visited Jan. 10, 2010).

164. James G. Dwyer, *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 408–09 (2008).

165. *Id.*

166. See *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (describing the “primary role” of parents in raising their children as “an enduring American tradition”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing a “private realm of family life which the state cannot enter”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (describing the right of parents to bring up their children “as essential to the orderly pursuit of happiness by free men”).

167. Another option explored by Kevin Frankel is to extend the presumption that a parent acts in the best interests of a child to include extended family members, thus eliminating the BICS from the determination of foster placement. Kevin B. Frankel, *The Fourteenth Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members*, 40 COL. J. LAW & SOC. PROBS. 301, 328 (2007). The use of presumptions favoring family caretakers suffers from the same weakness as does the parental presumption: It fails to consider the child's fundamental right to preserve existing loving and nurturing parent-like relationships.

A. *The Weakness of the Family Privacy/Parental Presumption Approach*

The family privacy/parental presumption does not sufficiently protect the child's rights. The weakness of this presumption may be visualized as a Venn diagram:

The very center of the diagram represents the unitary family when the interests of the parents, child, and state are in harmony. The three intersecting circles demonstrate that while the three interests may sometimes be perfectly aligned, the interests of one, two, or all interested entities more often diverge—challenging the presumption that the interests of the parent, child, and state are identical and may be adequately advanced by the family privacy/parental presumption without state intrusion.

Although there is recent statistical evidence preferring biological parents as caretakers,<sup>168</sup> the presumption that all parents will consistently act in the best interests of the child lacks support in social science research. Parenting skills do not develop naturally because they are not innate; rather they must be learned.<sup>169</sup> And the absence of a sound parental role model, along with the stress of raising a child, can cripple the learning process.<sup>170</sup> Thus, the family privacy doctrine can isolate the family rather than empowering it, resulting in a cycle of poor parenting that spans generations.<sup>171</sup> But the Supreme Court persistently applies the family privacy presumption, foreclosing the custody and visitation claims of those already serving in parent-like roles: Those who have formed an attachment, those who can best care for the child, and those

168. See Patricia G. Schnitzer & Bernard G. Ewigman, *Child Deaths Resulting from Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics*, 116 PEDIATRICS 687, 687 (2005) ("Children residing in households with unrelated adults were nearly 50 times as likely to die of inflicted injuries than children residing with 2 biological parents . . . Children in households with a single parent and no other adults in residence had no increased risk of inflicted-injury death . . .").

169. Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 594 (1992). But see, e.g., W. Bradford Wilson & Robin Fretwell Wilson, *Bringing up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883, 904 (2006) ("[S]tudies suggest that children are significantly more likely to be abused or neglected in a household headed by a cohabiting couple than a household headed by a single parent.").

170. McMullen, *supra* note 169, at 595.

171. *Id.*

who can best model parenting skills for the next generation. These cross-generational negative consequences demonstrate that the family privacy presumption is failing children.<sup>172</sup>

The most startling examples of the family privacy/parental presumption at work arise in parentage cases in which the natural father is relegated to third-party status as a result. In *Michael H. v. Gerald D.*,<sup>173</sup> the Court upheld the statutory presumption that a child born to a married woman is legitimate and trumps the natural father's right to continue a close relationship with his biological child.<sup>174</sup> This presumption is rebuttable only by the parents.<sup>175</sup> Similarly, in *Lehr v. Robertson*,<sup>176</sup> the natural father's custodial rights were terminated because he did not assert his rights by filing a postcard with the paternity registry in a timely fashion.<sup>177</sup>

The dissenters in *Lehr*<sup>178</sup> and *Michael H.*<sup>179</sup> recognized that the presumption parents will act in the best interests of their children is helpful only in cases where the interests of parents and children do not conflict. It is wholly inappropriate in cases where these interests might diverge. In the biology-plus cases, the Supreme Court instructs that "biology alone does not give rise to parental rights, but requires a relationship more enduring."<sup>180</sup> But even considering evidence of an enduring relationship<sup>181</sup> and of fraudulent interference,<sup>182</sup> the Supreme Court majority applied the family privacy/parental presumption without considering the child's relationship rights.

Although both of the foregoing cases addressed parental status and are distinguishable from third-party custody cases, they remain instructive.<sup>183</sup> In

172. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979):

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this.

173. 491 U.S. 110 (1989).

174. *Id.* at 120.

175. *Id.*

176. 463 U.S. 248 (1983).

177. *Id.* at 250–51.

178. *Id.* at 268–70 (White, J., dissenting).

179. *Michael H.*, 491 U.S. at 136 (Brennan, J., dissenting).

180. *Lehr*, 463 U.S. at 260.

181. *Michael H.*, 491 U.S. at 136 (1989).

182. *Lehr*, 463 U.S. at 262.

183. This tension is further illustrated by the cases in which the high courts in Illinois, Michigan, and New Mexico preferred a biological parent's claim over the third-party adoptive parents' claims due to procedural errors in the adoption process without applying the BICS. See *In re Doe*, 638 N.E.2d 181 (Ill. 1994); *DeBoer v. Schmidt*, 502 N.W.2d 649 (Mich. 1993); Roth

both cases, a child was denied a hearing under the BICS to determine whether a parent-like relationship should be allowed to develop, as in the case of *Lehr*, or to continue, as in the case of *Michael H.* By casting the dispute as between legal parents and third parties, the Court denied both children a voice in the outcome. In such cases, the family privacy/parental presumption fails children when the interests of the legally recognized parent and the child diverge.

*B. Scholarly Critique of the Family Privacy/Parental Presumption Approach*

Margaret Brinig, a scholar exploring the boundaries of family privacy in relationship to autonomy, writes about the legal disenfranchisement of children.<sup>184</sup> In considering the Supreme Court precedent treating the right to family intimacy as the property of parents only, Brinig suggests that the Court deprives children of participation and personhood rights in life-altering custody determinations.<sup>185</sup> In considering the focus upon parental rights secured by presumption and the protective veil of family privacy, Professor Brinig observed, “I have been wondering whether the court might not have reached the end of this trajectory and returned to celebrating the intimate relationships as opposed to the rights, particularly reinforcing relationships between parent and child.”<sup>186</sup> Brinig finds encouragement in the recent Supreme Court decisions recognizing that “in families with children, the children’s interests do need to be considered, and will not always mirror their parents.”<sup>187</sup> Difficulty arises, however, when courts attempt to identify the competing interests and calibrate the scale to weigh them.<sup>188</sup> Even if the Court has refocused constitutional attention on the parent-child relationship, when parents and children disagree, it fails to give trial courts clear guidance to resolve these conflicts.

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v. Bookert, 894 P.2d 994 (N.M. 1995). Other courts, however, are moving toward a best interests analysis in parentage cases as well. See, e.g., Meyer, *supra* note 137, at 139:

In 2004, the California Supreme Court held that when multiple adults qualify as potential parents, based either on biology or past caregiving, judges should simply choose among them “weighing considerations of policy and logic” in determining the most “appropriate” parent. This amounts of course to assigning parenthood based upon a “best interests of the child” finding, much like the standard used in parent-versus-parent custody disputes . . . .

(citing *In re Jesusa V.*, 10 Cal. Rptr. 3d 205, 218–19 (Cal. 2004)).

184. Margaret Brinig, *From Family to Individual and Back Again*, 51 HOW. L.J. 1, 4–5 (2007).

185. *Id.*

186. *Id.* at 3.

187. *Id.* at 14.

188. *Id.* at 13 n.80 (“While our vocabulary of rights has ample ways of resolving conflicts between an individual right-holder and the state, it has no way of resolving such conflicts between rights holders.”) (quoting Carl Schneider, *Religion and Child Custody*, 25 U. MICH. J.L. REFORM 879, 906 (1992)).

The creation of a parent-centered privacy interest in the care and custody of a child, by definition, results in the diminution of the child's right to autonomy.<sup>189</sup> Martha Fineman suggested that this "ideology of non-intervention is rooted in idealization, but also references the perceived pragmatics of family relationships and the acknowledged limitations of legal, particularly judicial systems, as substitutes for family decision-making."<sup>190</sup> Specifically, in relationship to the privacy of the parent-child relationship, Fineman observes:

The privacy of the parent-child relationship has also occupied the attention of state courts. Parental conduct, be it discipline or decision-making, is generally protected unless it constitutes abuse or neglect of the child. Courts consistently reiterate the common law presumption that parents act in the best interest of their children. The legal construct of the family is based upon the presumption that "parents possess what a child lacks in maturity, experience, and capacity for judgment."<sup>191</sup>

Other scholars have also recognized the dangers inherent in the idealization of the parent and child relationship, emphasizing the disparate treatment of child abusers within the criminal justice system.<sup>192</sup> While a stranger will be criminally prosecuted for child abuse,<sup>193</sup> a parent who abuses a child is far more likely to receive therapeutic intervention.<sup>194</sup> Moreover, strangers face more stringent criminal sanctions and are convicted at a much higher rates.<sup>195</sup> Thus, the idealized fiction that parents will always treat their children as fiduciaries is false and places children at risk without the certainty of swift consequences when abuse occurs. Recognizing that parents, as a group, may be more likely than not to act in the best interests of the child does not justify

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189. Dailey, *supra* note 153, at 955, 987–91 (suggesting limitation of child's liberty interest is justified due to child's immaturity, inexperience, and lack of judgment and protects the child's future liberty interest). Dailey advocates a shift in focus to the family as a public institution "subject to state regulation and public control." *Id.* She also advocates the adoption of "heightened scrutiny" to analyze laws that impact the family but she postpones the determination of what constitutes "just" family relations for a later day. *Id.* at 994, 1029 n.262, 1031.

190. Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1214 (1999).

191. *Id.* at 1215 (footnotes omitted).

192. Jennifer M. Collins, *Lady Madonna Children at Your Feet: The Criminal Justice System's Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131, 166 (2007).

193. *Id.* at 144.

194. *Id.* at 141.

195. *Id.* at 151 ("Police referred 79% of the cases involving stranger perpetrators to the [district attorney]'s office compared to only 52% of the cases involving parent/stepparent alleged offenders. . . . [I]f prosecuted, [parents] often received little or no incarceration and surprisingly short periods of probation." (quoting Delores D. Stroud, Sonja L. Martens & Julia Barker, *Criminal Investigation of Child Sexual Abuse: A Comparison of Cases Referred to the Prosecutor to Those Not Referred*, 24 CHILD ABUSE & NEGLECT 689, 694, 697 (2000))).

the parental presumption, which is based upon this idealized stereotype and exposes some children to harm.

The weakness of this presumption is further illustrated in the most recent wave of BICS reform in Florida and other states.<sup>196</sup> The movement toward parenting plans<sup>197</sup> is designed to focus on the shared enterprise of raising children. The new statutory language, however, contains provisions designed to improve the parents' behavior by prohibiting parents from abusing drugs or alcohol, abusing the child, or interfering with the other parent's access to the child.<sup>198</sup> The bulk of the plan is designed to curb recurrent parental conflicts by requiring the parents to compromise when schedule changes are requested, to consider the child's needs before their own, to refrain from criticizing the former spouse in the presence of the child, and to avoid discussing custody and divorce issues in the child's presence.<sup>199</sup> When a parental code of conduct is deemed necessary, shifting the focus from the BICS to grown-up disciplinary rules, the presumption that all parents act in the best interests of their children is severely undermined.

In summary, the family privacy or parental presumption is often justified on the basis that most parents act in the best interests of their children; thus, state oversight is unnecessary and, perhaps, even unconstitutional. Unfortunately, this presumption is overinclusive, underinclusive, and irrational. It is overinclusive because it sometimes favors neglectful parents. It is underinclusive because it often dismisses the custody claims of similarly situated parent-like adults.<sup>200</sup> It fails children entirely by removing the BICS from the determination. A case-by-case approach is typically required in every custody hearing. Recognizing third-party standing arguably creates little additional administrative cost and advances a paramount state interest. The parental presumption, used to summarily dispose of third-party custody cases, creates bad results for the child and bad legal precedent. It should be discarded in exchange for a careful review of the facts of each custody case according to

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196. FLA. STAT. ANN. § 61.046(13) (West 2009).

197. According to the Florida statute, a "parenting plan" means a document created to govern the relationship between the parties relating to the decisions that must be made regarding the minor child and shall contain a time-sharing schedule for the parents and child. The issues concerning the minor child may include, but are not limited to, the child's education, healthcare, and physical, social, and emotional well being. In creating the plan, all circumstances between the parties, including the parties' historic relationship, domestic violence, and other factors must be taken into consideration. The parenting plan shall be developed and agreed to by the parents and approved by a court or, if the parents cannot agree, established by the court. *Id.*

198. ALI PRINCIPLES, *supra* note 136, § 2.11.

199. *Id.*

200. Permitting third-party actions is unlikely to lead to a wave of added litigation because only those who can allege facts demonstrating a loving and nurturing parent-like relationship can survive summary judgment.

the BICS. For the same reasons courts rejected determining the merits of custody disputes by presumption, preferring instead the BICS, preference for legal and biological parents as custodians should, likewise, be discarded in favor of proceeding according to the BICS in third-party custody actions.

C. *The Recognition of Parental Rights to the Exclusion of the Child's Fundamental Right to a Loving and Nurturing Parent-Like Relationship Protected by the BICS Is Out of Step with the World Community*

Despite the expanding list of fundamental rights enjoyed by American children, the United States is not a signatory to the United Nations Convention on the Rights of the Child.<sup>201</sup> This leaves the United States at odds with the world consensus that children enjoy a fundamental right to have their best interests considered in matters related to their autonomy.<sup>202</sup> Barbara Woodhouse suggested that the United States' reluctance to sign the Convention could be attributed to the vestiges of the child as property tradition:

The tenacious power of this property theory is not surprising. The concept of human property, of which slavery was the most notorious vestige, has ancient roots. The notion of children as their father's property flowed naturally from the story of procreation as told by a patrilineal society; according to the ancients, it was the father's "seed" which, once planted in the mother's womb, grew into his likeness within the woman's body. Flesh of their father's flesh, children rightly belonged to the patriarch, to be worked, traded and given in marriage in exchange for money.<sup>203</sup>

Woodhouse further notes, "Of all the rights of the child, the child's right to be raised by a loving parent is surely the linchpin."<sup>204</sup> The Convention protects this right and requires the state to balance the rights of the child against those of the parent when such rights conflict.<sup>205</sup> The Supreme Court's reluctance to recognize the substantive due process right of the child to a BICS in cases of custody and visitation may be linked to the traditional child as property precedent, reinforced by the rigid family privacy doctrine.

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201. Convention on the Rights of the Child, G.A. Res. 44/25, 44 U.N. GAOR Supp. No. 49, at 165, U.N. Doc. A/44 736 (1989) [hereinafter CRC]; Susan Kilbourne, *US Failure to Ratify the UN Convention on the Rights of the Child: Playing Politics with Children's Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 437, 438 (1996).

202. See generally Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parent's Rights*, 5 GEO. J. ON FIGHTING POVERTY 313 (1998). See also Resolutions Adopted on the Reports of the Third Committee, G.A. Res. 1386 (XIV), U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959). [hereinafter Declaration of the Rights of the Child] ("[T]he best interests of the child shall be the paramount consideration.").

203. Woodhouse, *supra* note 202, at 313.

204. *Id.* at 316.

205. *Id.* at 318.

The European Community continues to expand the protection afforded to the family and to children, particularly. In determining whether a pediatrician owed a common law duty to both the parents as well as to the child patient in a child-protection action under Article 8 of the European Convention for the Protection of Human Rights, the court ruled that when “the child’s interests are in potential conflict with the interests of the parents . . . we consider that there are cogent reasons of public policy for concluding that, where child care decisions are being taken, no common law duty of care should be owed to the parents.”<sup>206</sup> This case, with its recognition of the child’s right to a best interests analysis, is but one example of the international focus on the rights of the child specifically.

In 1989, the United Nations adopted the Convention on the Rights of the Child (CRC).<sup>207</sup> The CRC is a comprehensive statement of the civil and economic rights of the child. Article 3 of the CRC provides, “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>208</sup> Although 189 nations have ratified the CRC, the United States has not.<sup>209</sup>

#### IV. THE SUPREME COURT’S RECENT TREATMENT OF BICS LEADS TO STATE COURT CONFUSION

The Supreme Court has yet to expressly recognize the BICS as protecting a child’s fundamental right to a loving and nurturing parent-like relationship. The foundation for such recognition, however, has been laid. Thus far, the Court has recognized that children enjoy other fundamental rights, such as the right to education,<sup>210</sup> procedural and substantive due process,<sup>211</sup> freedom of speech,<sup>212</sup> search and seizure protections,<sup>213</sup> abortion<sup>214</sup> and healthcare decision-making.<sup>215</sup> The state has a compelling state interest in protecting

206. *Lawrence v. Pembrokeshire CC*, EWHC 1029 (QB) (2006).

207. U.N. Doc. A/44/736 (1989).

208. *Id.* at Art. 3.

209. Susan Kilbourne, *supra* note 201, at 488. Critics within the United States oppose the transfer of parental authority to the state, vesting rights in children that suggest children may eschew parental guidance and the potential sanction of parents who violate these rights. *Id.* While 189 states ratified, only the United States, the Cook Islands, Switzerland and Somalia failed to ratify this convention. *Id.* at 437.

210. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

211. *In re Gault*, 387 U.S. 1, 14 (1967).

212. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

213. *New Jersey v. T.L.O.*, 469 U.S. 325, 358 (1985).

214. *Bellotti v. Baird*, 443 U.S. 622, 642–43 (1979).

215. *Parham v. J.R.*, 442 U.S. 584, 584–85. (1979).



children from abuse and neglect,<sup>216</sup> justifying state termination of a parent's fundamental right to the care and custody of a child.<sup>217</sup> Even though children undergo a gradual maturation process, minority status should not deprive them of the most basic associational rights enjoyed by all citizens. Regarding these nascent and evolving rights that reach fruition upon the age of majority,<sup>218</sup> one scholar notes:

As the child grows older . . . the value of parental control weakens, as it confronts a conflicting value. Children must . . . also develop a capacity for autonomous action within existing norms. A child who does not learn to make choices within our cultural framework is plainly unable to perform the adult role in society.<sup>219</sup>

The expanding list of fundamental rights possessed by minors suggests a trend toward greater legal respect and protection. Certainly, a child's right to continue valued parental and parent-like relationships is entitled to constitutional protection. It is time for legislators and courts to recognize that the constitutional protection surrounding the family includes the child's right to continue loving and nurturing parent-like relationships, among other fundamental rights.<sup>220</sup>

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216. While a child's right to be free from abuse and neglect has been recognized as a compelling state interest, and as fundamental under California's constitution, the right has not yet been specifically recognized as fundamental by the Supreme Court. See *Conley v. Roman Catholic Archbishop of San Francisco*, 85 Cal. App. 4th 1126, 1132 (2000) (holding the compelling state interest in protecting children from child abuse justified any burden on the pastor's religious practice). The state interest, however, has been characterized as a compelling one, thus justifying the removal of a child from the custody of a neglectful or abusive parent, and in some cases, the termination of parental rights. *Id.*

217. *Id.*

218. Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 2 (1986) (arguing inconsistent treatment of minors in matters related to marriage, the commission of crimes, the age to both vote and contract creates a theory of variable competencies without a coherent rational).

219. Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799, 821, 819–23 (1999). While the BICS and the child's preference may not always coincide, the child's preference is entitled to consideration. Cynthia Starnes, *Swords in the Hands of Babes: Rethinking Custody Interviews After Troxel*, 2003 WIS. L. REV. 115, 121 (2003). With respect to the relationship between the child's age and the importance of the child's preference, the ALI has recommended accommodating the preferences of older children. See ALI PRINCIPLES, *supra* note 136, § 2.08 (“[T]he court should accommodate the firm preferences of a child who has reached a specific age.”).

220. For the constitutional protection surrounding family relationships, see DWYER, *supra* note 1, at 105 (“Legislative bodies and courts throughout the western world have recognized [the importance of personal relationships] in affording constitutional protection to family relationships.”). See also *Stanely v. Illinois* 405 U.S. 645, 657–58 (1972) (recognizing “the important interests of both parent and child” in holding the biological father has a Constitutional right to judicial consideration regarding his fitness for child custody).

### A. *Supreme Court Treatment of the BICS*

The Supreme Court has described the BICS in a variety of ways. For example, in *Palmore v. Sidoti*,<sup>221</sup> the Court described “the goal of granting custody based on the best interests of the child” as a “substantial governmental interest for purposes of the Equal Protection Clause.”<sup>222</sup> In reviewing the trial court’s reliance upon the threat of discriminatory future treatment the child might receive because her white mother married a black man, the Supreme Court was asked to assess whether the state’s interest in protecting the child from the threat of societal scorn through the application of a racially discriminatory criteria was sufficiently tailored for constitutional purposes.<sup>223</sup> This allowed the Court to address the correct standard of review to apply to BICS challenges.<sup>224</sup> The Court characterized the state’s interest in protecting the child as “substantial,” rather than compelling.<sup>225</sup> Thus, the Court expressly rejected the trial court’s custody determination as it had relied exclusively upon impermissible racial classifications.<sup>226</sup>

Perhaps the *Palmore* Court deemed its characterization of the BICS as “indisputably a substantial government interest,” rather than a compelling government interest, as essential in order to reverse the trial court’s unjustified reliance upon racial bias.<sup>227</sup> The Court cited no authority in support of its choice to characterize the state’s interest as merely “substantial,” rather than compelling.<sup>228</sup> It instead preferred to entirely foreclose any future question of using racial criteria to determine custody disputes. The Supreme Court’s decision to equate the BICS with furthering substantial state interests, rather than compelling interests, curiously ignored the underlying Florida state court precedent characterizing the best interests of the child as “paramount,” and “of the utmost importance,”<sup>229</sup> words typically associated with a compelling state

221. 466 U.S. 429 (1984).

222. *Id.* at 433. *Palmore* can be read narrowly to characterize the state’s interest in the best interests of the child as substantial only in relationship to the equal protection claim raised by mother, leaving open the question of whether a child enjoys the fundamental right to have the court apply the BICS in any custody or visitation case.

223. *Id.* at 431–32.

224. *Id.* at 431.

225. *Id.* at 433.

226. *Palmore*, 466 U.S. at 432. *See also*, *Grutter v. Bolinger*, 539 U.S. 306, 352 (2003) (citing *Palmore* for proposition that “even the best interests of a child did not constitute a compelling state interest that would allow a state court to award custody to the father because the mother was in a mixed-race marriage”).

227. *Palmore*, 466 U.S. at 433.

228. *Id.*

229. *See, e.g.*, *Seibert v. Seibert*, 436 So. 2d 1104, 1105 (Fla. Dist. Ct. App. 1983) (“[T]hat the issue of child custody is still subject to determination based upon the paramount consideration of the best interest of the children.”); *Grooms v. Harvey*, 418 So. 2d 467, 468 (Fla. Dist. Ct. App. 1982) (“[T]he best interest and the ultimate welfare of the child are paramount over the ‘rights’ of

interest.<sup>230</sup> The *Palmore* Court could have recognized the state's interest in advancing the best interests of the child to be compelling and still have reversed the trial court because the state's reliance upon race as a factor was insufficiently narrowly tailored in relationship to the BICS given the absence of any evidence linking parenting ability to race. This alternative reasoning seems preferable because it both recognizes the fundamental nature of the child's relationship interests and rejects race as a sufficiently compelling basis upon which to determine custody.

In *Santosky v. Kramer*,<sup>231</sup> the Supreme Court addressed the degree of constitutional protection that must be afforded to a parent in a termination proceeding with respect to the evidentiary standard.<sup>232</sup> The New York Appellate Court affirmed the legislation requiring a preponderance standard:

The sole contention upon this appeal is that section 622 of the Family Court Act is unconstitutional because the standard of proof required by the statute, a fair preponderance of the evidence, is so low that it deprives them of due process of law. In *Matter of Anthony L.L.*, this court held that the level of proof required by section 622 was constitutional. In adhering to our decision, we note that the permanent neglect statute recognizes and seeks to balance rights possessed by the child with those of the natural parents. Accordingly, application of the preponderance of evidence standard in such a proceeding involving these often conflicting rights is proper and constitutional.<sup>233</sup>

The United States Supreme Court reversed and held that the state must prove a parent unfit by clear and convincing evidence in a termination proceeding.<sup>234</sup> Dissenting Justices Rehnquist, White, and O'Connor recognized the state's interest in protecting the child to be urgent, and rejected the majority's authority to supplant the legislature's evidentiary rule with its own skewed standard to protect parental rights.<sup>235</sup>

The *Santosky* majority invalidated state legislation designed to balance the interests of the parent, the child, and the state, with instructions that parental rights require preferential treatment.<sup>236</sup> Although the case does not expressly

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the other parties to the proceeding."); *Delancey v. Booth*, 400 So. 2d 1268, 1270 (Fla. Dist. Ct. App. 5th 1981) ("The paramount consideration in . . . a custody determination, of course, is the best interest of the child . . .").

230. A more satisfying analysis might have balanced the interests of each parent, the child's best interests, and the state's obligation to eradicate state-sanctioned racial discrimination. While the outcome would likely remain unchanged, balancing the competing constitutional interests more accurately reflects the rights at stake and the court's reasoning process.

231. 455 U.S. 745 (1982).

232. *Id.*

233. *In re John AA*, 427 N.Y.S.2d 319, 320 (N.Y. App. Div. 1980) (citations omitted).

234. *Santosky*, 455 U.S. at 769.

235. *Id.* at 766.

236. *Id.* at 767.

address the right of the child to be raised by loving parents,<sup>237</sup> it raises the question of when, if ever, the state may elevate the relational rights of children to at least the same level of constitutional protection enjoyed by the parents.

In construing the *Santosky* Court's characterizations of the BICS as serving substantial or, alternatively, urgent interests, the Supreme Court in *Reno v. Flores*<sup>238</sup> noted:

“The best interests of the child” is likewise not an absolute and exclusive constitutional criterion for the government's exercise of the custodial responsibilities that it undertakes, which must be reconciled with many other responsibilities.<sup>239</sup>

In this passage, the Court characterized the BICS as one, among numerous constitutional criteria, justifying the state's assertion of custodial power over a child.

*Palmore*, *Santosky*, and *Reno* demonstrate that a majority of the Supreme Court is not yet ready to recognize that the BICS affords both justification to recognize the relational rights of children and a means of balancing these rights in relationship to those asserted by fit parents. In this way, the Court anticipates and negates the criticism that courts should not be in the business of measuring the quality of a child's potential home, schooling, or healthcare against a hypothetical “best” scenario.<sup>240</sup> At the same time, a bright-line rule protecting legal and biological parental decision-making is unworkable when the interests of the parents and the child diverge. The bright-line test also fails children when a parent-like third party's claim is dismissed on standing grounds. In contrast, application of the BICS affords to the parents and the child an in-depth factual determination of the best result for the child under the circumstances existing at the time of the hearing.

*Palmore*, *Santosky*, and *Reno* raise the following question: When, if ever, does the application of the BICS advance the state's substantial or even compelling interests which, if appropriately narrowly tailored, may justify state limitation of a parent's custodial rights? To date, the Supreme Court has, perhaps purposefully, avoided answering the question and created confusion by characterizing the BICS as related to “substantial interests,” “urgent interests,” and “one among numerous constitutional criteria,” depending upon the nature of the state action at issue.<sup>241</sup> In this way, the Court avoids expressly acknowledging that the BICS recognizes and protects a child's fundamental relationship rights.

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237. See *supra* note 2–5 and accompanying text.

238. 507 U.S. 292 (1993).

239. *Id.* at 304.

240. *Id.*

241. *Palmore v. Sidoti* 466 U.S. 429, 433 (1984); *Santosky*, 455 U.S. at 746; *Reno*, 507 U.S. at 301–02.

Despite the Supreme Court's deference to parental autonomy and family privacy, the strong voice of dissent illuminates an alternative analysis that recognizes the child as a stakeholder and party possessing a corollary fundamental relationship right protected by the BICS, designed to achieve the compelling state interest of protecting the child's welfare.<sup>242</sup> Justice Brennan, joined by Justices Marshall and Blackmun, gave voice to the child's liberty interest by characterizing the relationship at interest in *Michael H.* as belonging to both the natural father and the child—noting that the majority's "pinched conception of 'the family,' crucial as it is in rejecting Michael and Victoria's claim of a liberty interest, is jarring in light of our many cases preventing the States from denying important interests or statuses to those whose situations do not fit the government's narrow view of the family."<sup>243</sup>

The rights of a parent and the rights of a child collided again in a 2003 case. The Supreme Court, in *Troxel v. Granville*,<sup>244</sup> revealed division among the justices regarding whether the BICS standard constitutes a sufficiently compelling state interest to subordinate parental rights.<sup>245</sup> The Court invalidated the Washington state visitation statute because it was too broad and permitted any person to file a claim for visitation.<sup>246</sup> Additionally, the statute violated a fit parent's due process right to control the care and upbringing of a child by failing to grant special weight to the parental decision to deny visitation rights to third parties,<sup>247</sup> thus shifting the burden to the parent to disprove that visitation would be in the child's best interest.<sup>248</sup> Many state court decisions describe the best interests of the child as paramount,<sup>249</sup>

242. *Michael H. v. Gerald D.*, 491 U.S. 110, 136 (1989).

243. *Id.* at 145.

244. 530 U.S. 57 (2000).

245. *Id.* at 59. Justice Stevens dissented and argued, "The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child." *Id.* at 89 (Stevens, J., dissenting).

246. *Id.* at 67 (majority opinion).

247. *Id.* at 68–69.

248. *Id.*

249. *Warmuth v. Koski*, No. A07-1350, 2008 WL 4224470, at \*4 (Minn. Ct. App. Sept. 16, 2008) ("[T]he court's 'paramount commitment' is to the best interests of the child."); *In re BTW*, 195 P.3d 896, 908 (Okla. 2008) ("[T]he paramount consideration remains the best interest of the child."); *In re Marriage of Reed*, No. 99,392, 191 P.3d 1136 (Table), 2008 WL 4239036, at \*3 (Kan. Ct. App. Sept. 12, 2008) ("[T]he paramount consideration . . . is the . . . best interests of the child."). See also Resolutions Adopted on the Reports of the Third Committee, G.A. Res. 1386 (XIV), U.N. GAOR Supp. (No. 16), at 19, U.N. Doc. A/4354 (1959):

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for his purpose, the best interests of the child shall be the paramount consideration.

primary,<sup>250</sup> and of the utmost importance.<sup>251</sup> The *Troxel* plurality relegated the BICS to a secondary status, subordinating the right of a child to have custody and visitation claims determined by the BICS to the right of a fit parent to the “care, custody, and management”<sup>252</sup> of a child.

The *Troxel* plurality agreed that the Washington state statute, embracing the BICS standard to determine a visitation claim brought by any persons, violated a fit parent’s fundamental right to control the custody and visitation rights of third parties in relationship to a child.<sup>253</sup> The Court failed, however, to consider the question of whether the child had a parallel fundamental right to protect existing parent-like relationships and how best to honor this right.

Some scholars have praised the *Troxel* Court’s restraint, demonstrated by its narrow holding, limited to its facts.<sup>254</sup> For example, David Meyer describes *Troxel* as adopting a standard short of strict scrutiny to analyze third-party custody statutes.<sup>255</sup> An alternative reading leads to a very different conclusion. In *Troxel*, the Supreme Court could be characterized as operating in its least legitimate zone by invalidating state legislation based on substantive due process principles without carefully identifying and analyzing competing rights and interests of all of the stakeholders, including the child’s rights.<sup>256</sup> Such an analysis of ways and means requires at least a cursory review of the state’s asserted interests. Typically, the BICS advances the welfare of children and protects the child’s fundamental interests. Thus, *Troxel* might just as easily be

250. See, e.g., DWYER, *supra* note 1.

251. *Id.*

252. *Troxel v. Granville*, 530 U.S. 57, 62 (2000).

253. *Id.* at 75.

254. See Meyer, *Lochner Redeemed*, *supra* note 26, at 1150 (noting the Court’s restraint reflected a lack of confidence about the Court’s intervention into the family and the dread of a misstep). See also *id.* at 1141 (“In this, crucially, the Justices seemed to be opening the door to a new, more flexible analysis that would permit the Court to balance the competing privacy interests of other family members—in much the same way that relaxed scrutiny in the abortion context permits the courts to take into account potentially conflicting private interests.”). But see Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279, 323–24 (2000). Buss writes that:

Affording constitutional protection to parents’ control over the upbringing of their children means, at a minimum, that we should leave such associational decisions to parents. If, on the other hand, we disapprove of affording parents such deference, then we should abandon the pretense of affording their decisions the protection of a fundamental right. In embracing the right, while abandoning the deference, *Troxel* takes the authority for the sorting away from both parents and legislatures, leaving the courts with a mess they are ill equipped to clean up.

*Id.*

255. See Meyer, *Lochner Redeemed*, *supra* note 26, at 1152 (“[T]he approaches followed by a majority of the Justices suggested that their failure to mention strict scrutiny was not a curious oversight, but an implicit rejection.”).

256. *Pollack v. Farmers Loan & Trust Co.*, 157 U.S. 429, 652 (1895) (White, J., dissenting).

characterized as an unsatisfactory opinion because it fails to identify the proper test to apply to third-party visitation claims. Rather, the plurality invalidated the Washington statute because it failed to provide *any* weight to a fit parent's child-rearing decision.<sup>257</sup> By entirely foregoing the analysis of whether affording third-party standing might advance a child's fundamental rights or whether the BICS itself constitutes a compelling state interest of the magnitude necessary to overcome a parent's fundamental right to custody, *Troxel* raises more questions than it answers.

By invalidating the Washington statute on the basis that it did not afford special consideration and weight to the parent's wishes,<sup>258</sup> without providing to courts and legislatures more specific guidance, the *Troxel* decision casts doubt on whether the best interests of the child may *ever* justify the award of custody or visitation to a third-party over a fit parent's objection. While recognizing parental rights as fundamental, the plurality failed to appreciate the equally fundamental nature of the child's relationship rights at stake. Thus, the opinion ignores the fundamental right of a child to preserve existing loving and nurturing parent-like relationships, a right recognized and advanced by the BICS.

The state court trends following *Troxel* suggest that, absent evidence that the court afforded special weight to the parent's preference and required a showing of harm to the child if the third-party relationship is severed, the third-party claim will be dismissed without regard to the BICS. Although not mandated by the *Troxel* decision, the Court implied that the detriment standard satisfied constitutional muster.<sup>259</sup> The question arises in third-party custody cases: May the BICS *ever* be substituted for the detriment standard?<sup>260</sup> Is the child's fundamental right to continue existing loving and nurturing parent-like relationships sufficiently weighty to subordinate a legal or biological parent's fundamental due process right to deny third-party custody claims? The *Troxel* Court's failure to provide guidance regarding this question has left legislative

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257. *Troxel*, 530 U.S. at 67, 69–70.

258. *Id.* at 75.

259. The detriment standard emerged from the Washington Supreme Court ruling in *Troxel*, in which the court ruled the statute unconstitutional because it did not require a threshold showing that a parent's visitation decision was harmful to the child and because the statute's any person provision swept too broadly. See generally, *In re Custody of Smith*, 969 P.2d 21, 27–31 (Wash. 1998) (holding the statute undermined parents' "fundamental right to autonomy in child rearing decisions"). The Supreme Court plurality reserved for another day "the primary constitutional question . . . [of] whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Troxel*, 530 U.S. at 73.

260. *Troxel*, 530 U.S. at 73.

and judicial confusion across the nation. The role of the BICS in third-party custody disputes, if any, is uncertain.<sup>261</sup>

*B. The Absence of Clear Supreme Court Precedent Recognizing the Child's Fundamental Right to Continue Existing Loving and Nurturing Parent-Like Relationships Creates Confusion and Disparate Results.*

Although describing the children's best interests as the guiding "polestar," of "utmost importance," and "of paramount importance," few state courts have expressly recognized that the child's fundamental relationship rights are advanced and protected through application of the BICS. The *Troxel* Court ignored the relationship of the BICS to the child's constitutional rights. Absent evidence of harm to the child or that a parent is unfit, the Court treated the BICS as irrelevant. State courts have followed suit. For example, in *Roth v. Weston*,<sup>262</sup> the court invalidated the Oklahoma grandparent visitation statute because it did not require a showing of harm to the child or parental unfitness before the state could establish a sufficiently compelling interest to limit a parent's fundamental rights.<sup>263</sup> The *Roth* court rejected the BICS as a compelling state interest:

The constitutional issue, however, is not whether children should have the benefit of relationships with persons other than their parents or whether a judge considers that a parent is acting capriciously. In light of the compelling interest at stake, the best interests of the child are secondary to the parents' rights. Otherwise, "[the best interest] standard delegates to judges authority to apply their own personal and essentially unreviewable lifestyle preferences to resolving each dispute."<sup>264</sup>

So instead of the BICS, the *Roth* court adopted the harm standard based on its reading of *Troxel*.<sup>265</sup>

Similarly, in *Rideout v. Riendeau*,<sup>266</sup> the Maine Supreme Court reversed and remanded a trial court decision dismissing the grandparent's visitation claim and invalidating the Maine statute with instructions to hear the petition.

<sup>267</sup> The trial court invalidated the Maine custody statute because it failed to

261. See Solangel Maldonado, *When Father or Mother Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 881–82 (2003) ("Justice Kennedy recognized that, under certain circumstances, the BICS standard may be applied in a third party visitation dispute.").

262. 789 A.2d 431 (Conn. 2002).

263. *Id.* at 452–53.

264. *Id.* at 443–44 (internal citations omitted).

265. 789 A.2d 431, 444–45 (adopting *Troxel's* rejection of judicial scrutiny of parental decisions, and but acknowledging that persons acting in a parent-type capacity for an extended period of time have stronger visitation rights).

266. 761 A.2d 291 (Me. 2000).

267. *Id.* at 301–02.



provide sufficient protection to parental due process rights.<sup>268</sup> Reversing, the Maine Supreme Court ruled that even absent an allegation that a parent is unfit, the parent's due process rights may be restricted if the state advances a compelling state interest and the intrusion is sufficiently narrowly tailored.<sup>269</sup> The court continued its analysis by expressly ruling that the best interests of the child do not alone constitute a compelling interest:

An element of "harm" in the traditional sense is not, however, the only compelling state interest extant when matters relating to the welfare of children are under scrutiny. For example, the State's compelling interest in requiring school attendance or restricting child labor does not derive exclusively from the state's interest in preventing "harm," but instead stems from the State's broader *parens patriae* interest in the well-being of the child. . . . We agree with the trial court, however, that something more than best interests of the child must be at stake to establish a compelling state interest.<sup>270</sup>

The *Rideout* court also reasoned that by characterizing the grandparents as "primary caregivers," the resulting relationship might trigger the state's "parens patriae authority on behalf of the child and provide a compelling basis for the state's intervention in an intact family with fit parents."<sup>271</sup> The *Rideout* court expressly recognized that both a parent and a child may advance competing interests: "A parent's fundamental liberty interest must be balanced against a '[child's] interest . . .'"<sup>272</sup> So by characterizing the state's interest in preserving a child's right to continue parent-like relationships as compelling, the Maine statute survived constitutional review.<sup>273</sup>

While the Maine Supreme Court reached the right result, perhaps it did so for the wrong reason. It arrived at this outcome despite expressly ruling that something more than the best interests of the child is required to advance a sufficiently compelling state interest. In reality, the child's fundamental right to preserve parent-like relationships should prevail in a custody dispute, or at least be recognized and weighed against the legal or biological parent's constitutional right to family privacy. The haze surrounding the BICS lifts when it is understood that the child has a separate and fundamental right to continue existing parent-like relationships, and the BICS applies factors designed to identify the existence of such relationships and protects the child's right to preserve them. Clearly, the child is a direct stakeholder in the outcome. In this manner, all third-party custody claims could be resolved by

268. *Id.* at 294.

269. *Id.* at 302.

270. *Id.* at 300–01.

271. 761 A.2d 291, 302 (Me. 2000).

272. *Id.*

273. *Id.*

considering the substantive due process relationship rights of both the parent and the child.

Despite the cautionary rule of *Troxel*, other jurisdictions have not embraced the detriment standard and have permitted third-party visitation over a fit parent's objection. In *Department of Social & Rehabilitation Services v. Paillet*,<sup>274</sup> the court ruled that the Kansas statute requiring the existence of a substantial relationship and a showing that visitation would further the best interests of the child satisfied constitutional muster.<sup>275</sup> The court reached this conclusion without explanation: "Neither requirement is called into question by the Supreme Court's decision in *Troxel*."<sup>276</sup>

*Troxel* also creates uncertainty regarding the constitutionality of recognizing quasi-parent standing under the guise of parent by estoppel or de facto parent, concepts embodied in the ALI Principles of Family Law.<sup>277</sup> A number of recent cases have permitted third-party standing in reliance upon the ALI standard, or a similar standard, thus further clouding the proper application of *Troxel*. For example, the Illinois Court of Appeals reversed a trial court's decision to dismiss a married father's custody claim for lack of standing after DNA established that he was not the father.<sup>278</sup> The court reasoned that the relevant time for determining standing was at the time the presumption of fatherhood attached rather than the time following the court-ordered DNA test.<sup>279</sup> Thus, the court protected this third-party custody claim based upon the existing loving parent-like relationship.<sup>280</sup>

A similar result was reached by a Virginia court, applying the BICS, in which the court granted standing in a custody dispute to a married father who raised a child as his own for three years despite knowing that he was not the biological father.<sup>281</sup> Likewise, a New Jersey court ruled that once a third-party established "psychological parenthood," then he or she "stands in parity" with

274. 16 P.3d 962, 971 (Kan. 2001).

275. *Id.*

276. *Id.* at 971. *See also*, *Zeman v. Stanford*, 789 So.2d 798, 803–04 (Miss. 2001) (noting that the "best interest of the child" is a paramount consideration); *West Virginia ex rel. Brandon L. v. D. Moats*, 551 S.E.2d 674, 684–85 (2001) (concluding that the two-pronged standard of best "interest of child and lack of substantial interference" with parents' rights meets *Troxel* requirements).

277. ALI PRINCIPLES, *supra* note 136, § 2.18.

278. *In re Marriage of Casey*, 867 N.E.2d 555, 558–59 (Ill. App. 3d. 2007).

279. *Id.*

280. *Id.*

281. *O'Rourke v. Vuturo*, 638 S.E.2d 124, 130–31 (Va. Ct. App. 2006); *but see* *Janice M. v. Margaret K.*, 948 A.2d 73, 93 (Md. 2008) (reversing and remanding a grant of de facto parent standing with instructions that trial court must find either mother was unfit or "whether, based on all the facts, significant exceptional circumstances exist" to overcome mother's due process liberty interest).

the legal parent.<sup>282</sup> This survey of state case law demonstrates that some state courts continue to apply the BICS to third-party custody claims, despite *Troxel*. In these cases, the third-party assumed a parent-like relationship with the child, triggering the BICS.

Post-*Troxel* third-party custody claims demonstrate the tension created when courts are forced to determine custody disputes between a parent and a third party. The decision is particularly difficult if the third party enjoys a parent-like relationship with the child. In fact, one court expressly relegated the child's relationship right to a secondary status.<sup>283</sup> The vague directive of *Troxel* creates confusion at the state level and devalues the fundamental relationship rights of the child.

#### IV. STATES PAVE THE WAY FOR RECOGNITION OF THE CHILD'S RIGHT TO A BICS DETERMINATION

Some state court decisions endeavor to protect the constellation of fundamental relationship rights enjoyed by children, encompassed within the "liberty" principle of the Fourteenth Amendment.<sup>284</sup> These courts have done so by characterizing the BICS as a compelling state interest,<sup>285</sup> trumping the

282. *P.B. v. T.H.*, 851 A.2d 780, 786 (N.J. 2004). The court affirmed an award of custody to a neighbor where the psychological parent relationship arose with the consent of the parent, the third party and the child lived together, the third party assumed significant child-rearing obligations, and sufficient time had passed to establish a bonded relationship. *Id.* at 781–82.

283. *Rideout v. Riendeau*, 761 A.2d, 291, 297 (Me. 2000) (holding the BICS is insufficient to intervene in the decision making of competent parents).

284. *See, e.g., In re D.M.G.*, 951 P.2d 1377, 1383 (Mont. 1998) (quoting *In re Marriage of Cole*, 729 P.2d 1276, 1280–81 (Mont. 1986)); *LaChapelle v. Mitten*, 607 N.W.2d 151, 163 (Minn. Ct. App. 2000) (noting that protection of the best interests of the child is a compelling state interest justifying deprivation of fundamental right to travel, in order to raise one's child); *Watt v. Watt*, 971 P.2d 608, 615–16 (Wyo.1999):

The right of travel enjoyed by a citizen carries with it the right of a custodial parent to have the children move with that parent. This right is not to be denied, impaired, or disparaged unless clear evidence before the court demonstrates another substantial and material change of circumstance and establishes a detrimental effect of the move upon the children.

*See also Clark v. Atkins*, 489 N.E.2d 90, 100 (Ind. Ct. App. 1986) ("The law has few objectives more compelling than protecting the interests of children. Where families have suffered the trauma of divorce those interests include not only the care and custody of the child but its right and obligation to know and visit with a noncustodial parent."); *Ziegler v. Ziegler*, 691 P.2d 773, 780 (Idaho Ct. App. 1985) ("Providing and assuring the maximum opportunities for parental love, guidance, support, and companionship is a compelling state interest that . . . warrants reasonable interference with the constitutional right of travel when necessary.").

285. *In re D.M.G.*, 951 P.2d at 1383 (quoting *In re Marriage of Cole*, 729 P.2d at 1280–81 ("[T]he best interests of a child . . . may constitute a compelling state interest worthy of reasonable interference with the right to travel interstate.")); *LaChapelle*, 607 N.W.2d at 163; *Clark*, 489 N.E.2d at 100. Throughout this paper, I have elected to characterize the BICS as

fundamental rights asserted by parents, even after the *Troxel* plurality decision<sup>286</sup>

A. *Pennsylvania's Justice Newman Recognizes the BICS as a Fundamental Right.*

In *Hiller v. Fausey*,<sup>287</sup> the Pennsylvania Supreme Court upheld the constitutionality of the Pennsylvania Grandparent Visitation Act under the *Troxel* standard.<sup>288</sup> Justice Newman wrote a separate concurrence, calling for the recognition of the BICS as a fundamental right belonging to every child involved in a custody, visitation, or termination proceeding.<sup>289</sup> Justice Newman made the following call for change:

I join the well-reasoned opinion of the Majority in this matter but write separately to indicate the strength of my conviction that even greater movement in this area of children's rights is required. Security, continuity and stability in an ongoing custodial relationship, whether maintained with a biologic or adoptive parent and/or with a grandparent is vital to the successful personality development of a child. The law finally needs to recognize that the child, as the focus in various types of proceedings, has the same inalienable rights to the pursuit of life, liberty, and happiness as an adult. Therefore, I write to emphasize that it is time to regard the best interests of the child as a fundamental and momentous right.<sup>290</sup>

Justice Newman's eloquent words recognize that children, like adults, enjoy fundamental relationship rights.

Justice Newman further recognized that when the constitutional rights of parents are implicated, the court must determine that the interference is narrowly tailored to achieve a compelling state interest and then weigh the interests of the parties, including the state's interest in ensuring the emotional and physical health of the its minor citizens.<sup>291</sup> But primary weight must be given to the BICS.<sup>292</sup> Justice Newman described the child's fundamental rights to include the right to be "cared for by an adult who will provide protection, companionship and upbringing."<sup>293</sup>

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furthering the child's relationship rights, rather than as the fundamental right at issue. This is because I view the BICS as protecting and advancing the fundamental right at issue.

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

287. *Hiller v. Fausey*, 904 A.2d 875 (Pa. 2006) (Newman, J., concurring).

288. *Id.* at 903.

289. *Id.* at 890–91.

290. *Id.* at 890–91.

291. *Id.* at 897.

292. *Hiller*, 904 A.2d at 898.

293. *Id.* at 897.

The opinion concludes by calling for courts and legislatures to give fundamental protection to the child's right to a best interests of the child determination in any case dealing with children:

It is on this basis that I advocate that we finally legitimize the right of the child to have his or her best interests considered as a fundamental right. This interest is expressed in a variety of statutes and proceedings, ranging from the complete severance of parental rights on a judge's finding of parental unfitness, to the limitation of parental choices in the areas, for example, of education, health care, and safety. Thus, I believe that the instant matter involves a situation that burdens two fundamental rights—the right of a fit father to make parenting decisions for the child and the right of the child to have its best interests considered. . . . If any balancing of interests is necessary, the interests of the child must prevail.<sup>294</sup>

This call for strict scrutiny to protect the rights of the child in custody disputes follows the lead of several other states, such as California, where courts have recognized the fundamental nature of the BICS. In *In re Bridget*,<sup>295</sup> a California court ruled:

[A]s a matter of simple common sense, the rights of children in their family relationships are at least as fundamental and compelling as those of their parents. If anything, children's familial rights are more compelling than adults', because children's interests in family relationships comprise more than the emotional and social interests which adults have in family life; children's interests also include the elementary and wholly practical needs of the small and helpless to be protected from harm and to have stable and permanent homes in which each child's mind and character can grow, unhampered by uncertainty and fear of what the next day or week or court appearance may bring.<sup>296</sup>

*In re Bridget* acknowledges the fundamental right of a child to be protected from harm and to have a stable and permanent home as an interest that outweighs the parent's fundamental decision-making rights.

Similarly, another California court reversed the trial court's removal of a child from grandparent custody because the court failed to consider factors associated with the child's best interests, including the child's special needs, wishes, and stability.<sup>297</sup> Other jurisdictions also elevate a child's relationship

294. *Id.*

295. 49 Cal. Rptr. 2d 507 (Cal. App. 1996).

296. *Id.* at 521–22 (citing *In re Jasmon O.*, 878 P.2d 1297 (Cal. 1994)).

297. *In re H.G. v. Mary H.*, 52 Cal. Rptr. 3d 364, 370–72 (Cal. App. 2006). In this case, the child was placed with the grandparents under the dependency statute. *Id.* at 367, 370–71. The California grandparent visitation statute, imposing a rebuttable presumption against grandparent visitation, was thus inapplicable. *Id.* at 371; *see also* CAL. STAT. ANN. §3104 (2009) (“There is a rebuttable presumption that the visitation of a grandparent is not in the best interest of a minor child if the natural or adoptive parents agree that the grandparent should not be granted visitation”).

rights to a fundamental status and protect them by applying the BICS. In a Kentucky case, the appellate court remanded the matter to determine whether a third party qualified as a de facto custodian entitled to custody based upon the BICS.<sup>298</sup> In Minnesota, a trial court applied the BICS and avoided the presumption of parental fitness to solidify grandparent sole custody.<sup>299</sup> The court ruled that once lost, the presumption of parental fitness is not automatically restored.<sup>300</sup>

Some jurisdictions recognize a child's fundamental right to a safe home. For example, the Rhode Island Supreme Court recognized that children possess fundamental rights in *In re Brooklyn M.*,<sup>301</sup> where the court upheld the removal of the child from the mother despite a loving relationship: "As we have previously observed, 'a parent's genuine love for [the] child, or an existence of a bond between parent and child, is not sufficient to overcome the child's fundamental right to a safe and nurturing environment.'"<sup>302</sup> And in an Illinois parental termination case, the court recognized the fundamental right of a child to a stable home:

In the instant case, respondent had a history of not cooperating with referrals for psychological evaluation, psychological services, and medication assessment. Examination, evaluation, and assessment could go on indefinitely, particularly if as in the instant case, the parent refused to be examined or refused to cooperate. Such delay would defeat the child's fundamental right to a stable nurturing home.<sup>303</sup>

In both Rhode Island and Illinois, the courts recognized and protected the child's fundamental right to a safe home.<sup>304</sup> The most salient aspect of a safe and nurturing home, arguably, is the presence of a loving and nurturing parent-like adult.

So it seems that some state courts recognize the constitutional magnitude of the child's relationship rights and that these rights are, perhaps, even superior to the corresponding parental relationship rights. Some states, like Pennsylvania and California, have paved the way to identify and protect the

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rights."); *Harris v. Harris*, 96 P.3d 141, 151–52 (Cal. 2004) (upholding constitutionality of the California grandparent visitation statute).

298. *Baker v. Combs*, 248 S.W.3d 581, 584 (Ky. Ct. App. 2008).

299. *In re Child of Evenson*, 729 N.W.2d 632, 637 (Minn. Ct. App. 2007).

300. *Id.*

301. *In re Brooklyn M.*, 933 A.2d 1113, 1122 (R.I. 2007).

302. *Id.* (citing *In re Brianna D.*, 798 A.2d 413, 415 (R.I. 2002)).

303. *In re Bernice B.*, 815 N.E.2d 778, 788 (Ill. App. Ct. 2004). *See also* *K.N. v. R.P.*, No. 2007-CA-000181-MR., 2008 WL 275106 at \*15 (Ky. App. 2008) (acknowledging that children have a fundamental right to a safe home; but holding parents' failures and drug problems were not enough to force the parents to relinquish their claim to the child).

304. *See supra* notes 301–03 and accompanying text.

fundamental relationship rights of children in third-party custody cases by requiring the application of the BICS.

*B. States Should Look Backwards to Shape the Future*

American courts formerly applied the BICS to disputes between fit parents and third parties. For example, the Tennessee Supreme Court affirmed the application of the BICS to award custody to a third party over the father's objection in 1925:

As it affects the custody of infants, the writ of habeas corpus rests on the assumption of a right in the state, paramount to parental or other claim, to dispose of such children as their best interests require. The legal rights of a parent are very gravely considered, but are not enforced to the disadvantage of the child.<sup>305</sup>

A similar result was reached by the Virginia Supreme Court in affirming the application of the BICS to order the third party to return the child to the mother in 1852.<sup>306</sup> In both cases, the third party had established a loving and nurturing relationship with the child and had custody of the children. Thus, as early as 1854, American state courts in Virginia, Iowa, Texas, and Indiana inherently recognized that when the interests of the parent and child diverged in third-party custody claims brought by adults enjoying a parent-like relationship, the BICS controlled the outcome in each instance.<sup>307</sup>

The BICS has historically provided to the courts a shorthand way to secure a child's constitutional right to preserve existing loving and nurturing parent-like relationships. The characterization of the BICS as achieving a compelling state interest justifies limiting the relationship rights of legal and biological parents. The BICS, therefore, provides one legal standard that adequately protects the fundamental rights of both parents and children, so long as the standard is sufficiently narrowly tailored, recognizing that the best interests and welfare of the child always constitutes a compelling state interest.

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305. State *ex rel.* Jones v. West, 201 S.W. 743, 744–45 (Tenn. 1925); see also Luellen v. Younger, 143 N.E. 163, 164 (Ind. 1924) (requiring award of custody to foster parents over a fit father's objection under BICS); Greene v. Walker, 199 N.W. 695, 697 (Mich. 1924) (citing *In re Gould*, 140 N.W. 1013, 1015 (Mich. 1913) (requiring award of custody to foster parents over a fit father's objection under BICS)).

306. Armstrong v. Stone, 9 Gratt. 102, 103 (Va. 1852).

307. See Fonts v. Pierce, 19 N.W. 854, 854–55 (Iowa 1884) (applying BICS to affirm custody in third party over fit mother's claim); Keesling v. Keesling, 85 N.E. 837, 839 (Ind. App. 1908) (applying BICS to affirm custody in grandfather over fit parental claims); LeGate v. LeGate, 29 S.W. 212, 214 (Tex. 1894) (applying BICS to affirm custody in third party over fit mother's claim).

V. RECOGNIZING A CHILD'S FUNDAMENTAL RIGHT TO A LOVING AND NURTURING PARENT-LIKE RELATIONSHIP AND CREATING A FRAMEWORK TO PROTECT IT.

Law has a life of its own and is in constant flux in order to survive and remain relevant. The law changes to reflect the values of the society and its aspirations. After time, women gained freedom from the discriminatory laws that deprived them of personhood upon marriage and rendered them invisible to the law. Now, children are poised for similar legal emancipation when courts decide third-party custody claims without regard to the biological or legal status of the adults, but rather, based upon evidence of loving and nurturing parent-like relationships, guided by the BICS.

Although the Supreme Court has not addressed third-party custody since *Troxel*, state courts have continued to deal regularly with the faulty family privacy parental presumption and the contorted reasoning it causes. As the laboratories of democracy, state courts often pave the way for a national standard.<sup>308</sup> The ability of states to implement policy through creating and interpreting the law permits other states and the federal government to monitor the success of the law in terms of achieving the desired policies and improving upon them.<sup>309</sup> Additionally, many state constitutions have been interpreted to provide even greater protection for individuals than required under the United States Constitution.<sup>310</sup>

A. *A Child Enjoys a Fundamental Right to a Loving and Nurturing Parent-like Relationship Protected by the BICS.*

The child's fundamental right to continue existing loving and nurturing relationships is recognized and protected through the *parens patriae* power of the state to determine custody based on the BICS. The BICS is a creature of common law, existing from time immemorial and has become the bedrock of our state custody statutory law as an outgrowth of early English common law. In fact, the BICS can be characterized as a right that is "so rooted in the

308. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

309. Judith Olans Brown & Wendy E. Parmet, *The Imperial Sovereign: Sovereign Immunity & The ADA*, 35 U. MICH. J.L. REFORM 1 (2002) ("Thus, the experiments of a few states in educating children with disabilities refracted to the national level, leading to federal legislation mandating such rights even in those states that had failed to provide them. Without federal lawsuits, federal legislation and the federal money that came with it, however, it is doubtful that all states would have routinely educated the severely disabled children.").

310. Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Individual Rights Under the United States and Minnesota's Constitution*, 70 ALB. L. REV. 865, 869-70 (2007).



traditions and conscience of our people as to be ranked as fundamental or implicit in the concept of ordered liberty.”<sup>311</sup>

At its core, the BICS is designed to identify and reinforce the child’s fundamental right to a loving and nurturing parent-like relationship. This is evident in the BICS. With its focus upon the child’s physical, psychological, and moral development, it is designed to identify and solidify the child’s relationship with parents and parent-like adults. By expanding the parental privacy presumption in an attempt to limit state intervention into the realm of the family, the Supreme Court has diminished one aspect of children’s constitutional rights by rendering the child unseen and unheard in the constitutional debate of third-party custody claims. Typically, the child’s right in custody cases is recognized and protected by the application of the BICS, which is rendered irrelevant under the *Troxel* third-party standing analysis so long as a legal parent is fit.<sup>312</sup> By failing to recognize the role that the BICS plays in securing a child’s fundamental relationship rights, the state violates the substantive due process right of the child to continue existing loving and nurturing parent-like relationships.

*B. In Third-Party Custody Disputes, States Should Apply a Weighted Balancing Test—Deferring Always to the BICS to Protect the Fundamental Rights of Children.*

When a jurisdiction recognizes the child’s right to have the BICS applied in matters related to third-party custody and visitation, then a weighted balancing test must be employed.<sup>313</sup> It follows that cases involving the competing rights of fit parents, parent-like adults, and children require an approach that permits the court to consider the fundamental rights of the parents and the child involved in each dispute. In such cases, the courts are called upon to balance the burden to constitutional rights<sup>314</sup> experienced by each of the harmed individuals.

311. *Michael H. v. Gerald H.*, 491 U.S. 110, 127 n.6 (1989) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

312. *See Troxel v. Granville*, 530 U.S. 57, 67–70 (2000) (rejecting the notion that any third party seeking visitation has standing and shall be granted visitation if in the child’s best interest, holding instead that courts should defer to the parents’ decision).

313. *See e.g.*, Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).

314. Scholars have commented on the absence of such balancing. *See, e.g.*, Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377, 1388 (1994):

[W]ithin any constitutional analysis, there is the possibility of conflicting individual constitutional rights. So it is possible that the parent’s constitutional rights would conflict with the child’s constitutional rights, necessitating a balancing of rights. However, this approach has been relatively rare, perhaps because the state is invested with *parens*

The best approach might be to treat the child's fundamental right to the application of the BICS as trumping, in every instance, a parent's fundamental right to custody.<sup>315</sup> This approach focuses on the child and is consistent with state law custody precedent. It elevates the best interests of the child above the interests of all others. This approach advances the child's right to continue loving and nurturing parent-like relationships with a parent, or parent-like adult to the level of a paramount right protected by the BICS.

Alternatively, third-party custody cases could be viewed as presenting competing fundamental right claims between a parent and a child. Courts might then choose to apply a hybrid test. For example, Justice Scalia has recognized that in "hybrid" cases, the statutes at issue although facially neutral, could upon application, substantially burden multiple constitutionally protected rights.<sup>316</sup> For example, statutes compelling school attendance,<sup>317</sup> license plate

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*patriae* status to assert the child's rights or possibly because the lesser status of minors' constitutional rights insure that any parental fundamental right would dominate.

Fallon notes that:

In view of the differences among these interpretations, it is little exaggeration to say that there are three strict scrutiny tests, not one, though all bear the same label. Not surprisingly, uncertainty and confusion have arisen about which version the Court will apply in cases in which the differences among the tests would result in different outcomes. Indeed, the coexistence of three versions of strict scrutiny has not infrequently occasioned confusion among the justices themselves.

Fallon, *supra* note 313, at 1303.

315. Meyer, *The Constitutional Rights of Non-Custodial Parents*, *supra* note 1, at 1479.

316. Justice Scalia referred to cases involving more than one constitutional right as "hybrid" cases. Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 881-82 (1990). Citing a variety of case law, Justice Scalia acknowledge the right of parents in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and to direct the education of their children in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which invalidated compulsory school-attendance laws "as applied to Amish parents who refused on religious grounds to send their children to school." Scalia went on to write:

Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ('An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed').

*Dept. of Human Res.*, 494 U.S. at 881-82.

317. *Yoder*, 406 U.S. at 234 (holding that First and Fourteenth Amendments prevent the state from compelling the parents to cause their children to attend school through age sixteen).

display,<sup>318</sup> and flag salute<sup>319</sup> violated free speech, free association, and privacy rights. Although in many of the hybrid cases identified by Justice Scalia, the statutes at issue burdened multiple fundamental rights possessed by one individual, the Court has occasionally employed a hybrid balancing approach to determine the constitutionality of statutes burdening the rights of multiple stakeholders, as in *Prince*,<sup>320</sup> *Meyer*,<sup>321</sup> and *Yoder*.<sup>322</sup>

The recognition that constitutional harm cannot be analyzed in a vacuum—but requires, instead, a hybrid analysis—applies with equal force to third-party custody claims in relationship to the stakeholders: the parent, child, and state. The traditional, unitary, and isolated analysis of third-party custody disputes, focusing solely on the constitutional rights of the legally recognized parents, ignores the fundamental relationship rights of the child that would otherwise be protected and championed through the BICS.

Some of the Supreme Court Justices have recognized the utility of a balancing approach in parental termination cases. For example, in *Santosky*, Justices Rehnquist, White, and O'Connor dissented.<sup>323</sup> Each would have upheld the preponderance of the evidence standard to terminate parental rights under New York law.<sup>324</sup> The dissenters argued that the interests of the child and the state must be balanced against those of the parent:

When, in the context of a permanent neglect termination proceeding, the interests of the child and the State in a stable, nurturing home life are balanced against the interests of the parents in the rearing of their child, it cannot be said that either set of interests is so clearly paramount as to require that the risk of error be allocated to one side or the other. Accordingly, a State constitutionally may conclude that the risk of error should be borne in roughly equal fashion by use of the preponderance-of-the-evidence standard of proof. This is precisely the balance which has been struck by the New York Legislature: “It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the

318. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (holding State may not compel appellees to display the state motto on their vehicle license plates).

319. *Barnette*, 319 U.S. 624, 642 (1943) (holding that compelling the flag salute and pledge in schools violates the First Amendment).

320. *Prince v. Massachusetts*, 321 U.S. 158, 158–64 (1944) (finding rights of religion and parental rights are at issue where mother supplied nine-year-old daughter with religious magazines instructing her to distribute them in violation of state law). Here, the Court held the First Amendment religious freedom did not exempt the mother and her daughter from state law prohibiting magazine distribution by minor children. *Id.* at 169–71.

321. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (rejecting a state statute that prohibited teaching modern foreign languages to school children).

322. *Yoder*, 406 U.S. at 234.

323. *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting).

324. *Id.* at 791.

best interests, needs, and rights of the child by terminating the parental rights and freeing the child for adoption.<sup>325</sup>

Perhaps, the proper question courts should ask whether the legislature has struck a constitutional balance between the fundamental rights of the parent and of the child, in light of the state interests involved. In third-party custody claims, legal constructions related to standing, evidentiary burdens, and family-privacy presumptions<sup>326</sup> substantially interfere with the fundamental relationship rights of the child and should be discarded and replaced by the BICS.<sup>327</sup>

Custody disputes have a substantial impact on the fundamental rights of both the parent and the child. State legislators should consider amending custody statutes to permit fit third parties who can establish the existence of loving and nurturing parent-like relationships to assert a claim for custody or visitation to advance the child's fundamental relationship rights. In some cases, the justification for a legal parental preference has arguably been lost by permitting third-party relationships to flourish. This approach is further buttressed by the state's compelling interest in securing a child's fundamental right to continue existing loving and nurturing parent-like relationships. The child's relationship rights are secured and advanced by applying the BICS.

Even if the BICS is not deemed to be a paramount and compelling state interest, trumping the rights of legal and biological parents, the child's relationship rights are at least equivalent to a parent's rights and should be afforded equal weight and consideration in third-party custody disputes. Because the child's fundamental right to continue existing loving and nurturing parent-like relationships is raised in third-party custody disputes, the court should proceed with a BICS and undertake a weighted balancing test to adequately protect the fundamental rights of all stakeholders.<sup>328</sup>

325. *Id.* (citations omitted).

326. Arguably, third parties reduce the justification for biological or legal parent custody presumptions if they voluntarily establish a parent-like relationship with the child with the consent of the legal or biological parent.

327. An evidentiary presumption is one way a legislature redistributes the risk of error. For example, in criminal matters, the defendant is presumed innocent and the state bears a heavy burden of proof, beyond a reasonable doubt, to secure conviction. *Martin v. Ohio*, 480 U.S. 228, 230 (1987). In contrast, the legislature may equally assign the burden of proof by rejecting presumptions and heightened burdens of proof. Moreover, presumptions of proof may help regulate the process of proof. RONALD J. ALLEN ET AL., *EVIDENCE: TEXT, PROBLEMS, AND CASES* 744 (4th ed.).

328. Assuming the child's right to a relationship with a parent or parent-like individual is recognized as fundamental, the further constitutionalization of family law results, in fact, in a return to careful fact-finding based upon a complete record designed to secure the child's welfare, free from presumptions related to genetic, marital, social, or gender presumptions. See Meyer, *The Constitutionalization of Family Law*, *supra* note 16, at 572 (noting that constitutionalization "is beginning to resemble the discretionary, fact-intensive family law of old").

### CONCLUSION

The ancient concept of *parens patriae* explains the state's initial involvement in public child custody determinations. The state relies upon the BICS to carry out its protective role in private custody disputes between fit parents. An examination of the BICS reveals its purpose: To protect and nurture the child's well-being, including the parent-like relationships enjoyed by the child. The most recent ALI principles recognize that, in some instances, this parent-like relationship has developed between a child and a third party, and the child's right to continue the relationship is preeminent. The cannon of unenumerated constitutional rights has expanded over the century, with a focus on individual and family privacy. The presumption that all fit parents act in the best interests of their children is sometimes factually inaccurate; nevertheless, it effectively silences the voice of the child in third-party custody actions and is, therefore, unjust. As American society evolves and changes, so must the legal standards defining the rights and obligations of minors.

Therefore, courts should recognize that the BICS gives succor to the child's fundamental right to continue existing loving and nurturing parent-like relationship. The BICS should be applied in third-party custody cases to insure that the child's fundamental right to continue existing loving and nurturing parent-like relationships is treated as paramount, or at least balanced against a parent's fundamental right to assert family privacy.

