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BECAUSE I SAID SO: AN EXAMINATION OF PARENTAL NAMING RIGHTS

ASHLEY N. MOSCARELLO*

For parents, naming their new baby is one of the most exciting parts of welcoming a child into the world. Many parents spend months making this decision, looking through baby naming books, and asking family and friends for input. The name that parents give to their child will be with that child for his or her entire life, and it all starts with the parents' meaningful decision. That is why the mother of a seven-month-old boy in Newport, Tennessee was so surprised when a magistrate judge told her that the name she chose for her son was not allowed.¹ The mother, Jaleesa Martin, chose the name "Messiah DeShawn Martin" for her newborn son.² But, while appearing in front of Magistrate Lu Ann Ballew for a child support hearing, Jaleesa and the baby's father, Jawaan McCullough, found themselves in an unusual situation. Without either parent raising the given name as an issue before the court, Magistrate Ballew renamed their son.³ Magistrate Ballew declared that Messiah's name was improper, and instead, changed his name to "Martin DeShawn McCullough."⁴

Central to Magistrate Ballew's reasoning was the religious nature of the name "Messiah."⁵ She wrote in a separate "Statement of Facts and Reasons Supporting the Name Change" that "Messiah" means "Savior, Deliverer, the One who will restore God's Kingdom. 'Messiah' is a

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1. Kary Steinmetz, *From Messiah to Hitler, What You Can and Cannot Name Your Child*, TIME (Aug. 12, 2013), <http://nation.time.com/2013/08/12/from-messiah-to-hitler-what-you-can-and-cannot-name-your-child/>.

2. *Id.*

3. Dahlia Lithwick, *Can You Name Your Baby Messiah?*, SLATE (Aug. 13, 2013), http://mobile.slate.com/articles/double_x/doublex/2013/08/can_you_name_your_baby_messiah_a_judge_in_tennessee_says_no_changes_the.html?original_referrer=http%3A%2F%2Fdish.andrewsullivan.com%2F2013%2F08%2F16%2Fwhat-cant-you-name-your-kid%2F.

4. *Id.*

5. Findings & Recommendations at 4, *Martin v. McCullough*, No. 2013-CV-100, 2013 WL 5275800, at *4 (Tenn. Ch. Aug. 13, 2013).

title that is held only by Jesus Christ.”⁶ She concluded that “it is not in the child’s best interest to keep the first name, ‘Messiah,’”⁷ and also stated that the name placed “an undue burden on [the child] that as a human being, he cannot fulfill.”⁸ She concluded by saying that since Cocke County, Tennessee has such a large Christian population, “it is highly likely that he will offend many Cocke County citizens by calling himself ‘Messiah.’”⁹ This ruling by Magistrate Ballew was later vacated on appeal,¹⁰ but it still highlights the absurdity of government infringement on what names parents can give to their children.

Both in America and around the world, courts and legislatures regulate the names that parents can give to their children. Certain countries have strict laws against unusual names, with some creating lists of preapproved or prohibited names, while others have judges that order the name to be changed, like in Messiah’s case.¹¹ These solutions, both in America and abroad, raise questions about what rights parents have with respect to naming their children.

To answer these questions, this Note examines the rights guaranteed to parents by the First and Fourteenth Amendments of the United States Constitution. This Note focuses on a situation where, like in Messiah’s case, both parents agree about the child’s name, yet the government denies the name legal recognition. To what extent do parents have the right to name their child free from government regulation? Should judges and legislators be able to interfere with the name that is given to a child by his or her parents? And how should courts handle these issues when presented with names that might be offensive or inappropriate in a given community?

This Note argues that parents have rights to name their child either as fundamental rights protected by the Fourteenth Amendment or through the guarantee of freedom of speech in the First Amendment.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Order on appeal at 1, *Martin v. McCullough*, No. 2013-CV-100 (Tenn. Ch. Oct. 7, 2013) (vacating magistrate judge ruling). On appeal, the chancery court explained that the child’s first name was never at issue in the litigation, and also criticized Magistrate Ballew’s religious rationale for changing the name in the first place. The chancery judge found that the magistrate’s opinion did not pass the Establishment Clause test of whether a reasonable observer would believe a particular action constitutes an endorsement of religion by the Government. Opinion of the Court at 8, *Martin v. McCullough*, No. 2013-CV-100 (Tenn. Ch. Oct. 7, 2013).

11. For example, Portugal has a list of previously approved and rejected names that is available on the internet. See Carlton F. W. Larson, *Naming Baby: The Constitutional Dimensions of Parental Naming Rights*, 80 GEO. WASH. L. REV. 159, 171 (2011).

Either analysis would require states to show a compelling interest in order to regulate the names that parents give their children or before judges have the authority to change the name *sua sponte*. This Note further argues that the states' "best interest of the child" rationale is not an interest sufficiently compelling to infringe upon individuals' rights to name their child, but also acknowledges that parents' rights to name their child should not be without limitations.

Section I of this Note discusses examples of recent and popular strange names and introduces the problem of state legislators and courts regulating children's names. Section II discusses the background of the Fourteenth Amendment and proposes one solution to the problem, namely, that parents have fundamental rights to name their children under the Fourteenth Amendment and that states cannot infringe on this right without a compelling state interest. Section III proposes an alternative solution, stating that the First Amendment's guarantee of freedom of speech can be expanded to protect parents' rights to name their children. Section IV examines whether states have compelling interests in interfering with parents' rights to name. Finally, Section V suggests limits on parents' rights to name their children, and proposes a rule to aid courts in analyzing these cases.

I. REGULATION OF NAMES

There have always been unusual or eccentric baby names in America.¹² One book that examined American census records for "atrocious" baby names reveals peculiar names of the past such as "Dracula," "Tiny Hooker," "Toilet Queen," and "Acne Fountain."¹³ But over the past couple of decades especially, several notable naming cases have caught the media's attention. Not all of the recent, unusual names have resulted in legislators or courts regulating the child's atypical name; however, the public outcry and attention that these names received show the need for further discussion.

One of the more recent examples was the case of parents who named their son "Adolf Hitler."¹⁴ In 2008, the three-year-old made headlines when a New Jersey supermarket refused to write the child's

12. *Id.* at 194.

13. *Id.* (citing MICHAEL SHERROD & MATTHEW RAYBACK, *BAD BABY NAMES: THE WORST TRUE NAMES PARENTS SADDLED THEIR KIDS WITH—AND YOU CAN TOO!* 41 (2008)).

14. *3-year-old Hitler Can't Get Name on Cake*, NBC NEWS (Dec. 17, 2008), <http://www.nbcnews.com/id/28269290/>.

name on a birthday cake.¹⁵ Many people were upset and outraged at the parents for giving their son such an offensive and controversial name, which quite clearly alludes to Nazi Germany. Adding fuel to the fire were the names of their other two children, “JoyceLynn Aryan Nation Campbell” and “Honszlynn Hinler Jeannie Campbell.”¹⁶

Another unusual, but less incendiary, example is the Alabama college football fans who named their son “Crimson Tide Redd” as homage to their extreme admiration for the Alabama Crimson Tide college football team.¹⁷ This name was mostly thought to be good-natured, if not over-the-top, fandom.¹⁸

Messiah’s mother is not alone in experiencing courts or legislators regulating what parents can name their children. In 2012, a pastor who wanted to change his family’s last name from “Nwaiduko” to “ChristIsKing” was denied the opportunity to do so by a New York civil court judge.¹⁹ The judge based his ruling on the principle of separation of church and state.²⁰ Six years earlier, the Nwaidukos requested to change their son Jeremy’s name to “JesusIsLord,” which was likewise denied by the same civil court judge.²¹

One of the most peculiar names to be struck down by a court comes from outside the United States. In 2008, in New Zealand, a family court judge ruled that the parents could not name their daughter “Talula Does the Hula from Hawaii.”²² The judge emphasized the embarrassment that such a name would cause the nine-year old girl throughout her life, stating that the name would surely “make[] a fool” out of the child.²³ New Zealand has certainly seen its fair share of eccentric monikers;²⁴ while some names were allowed, like “Number 16 Bus Shelter” and “Violence,” many names, such as “Fish and Chips,”

15. *Id.*

16. *Id.*

17. Matt Hinton, *Crimson Tide Fans Welcome their New Son, Crimson Tide*, YAHOO! SPORTS (Mar. 21, 2013), http://sports.yahoo.com/ncaa/football/blog/dr_saturday/post/Crimson-Tide-fans-welcome-their-new-son-Crimson?urn=ncaaf-231447.

18. *Id.*

19. *Judge: Staten Island Couple Can't Change Name to 'ChristIsKing'*, CBS LOCAL (Oct. 16, 2012), <http://newyork.cbslocal.com/2012/10/16/judge-staten-island-couple-cant-change-name-to-christisking/> [hereinafter *ChristIsKing*].

20. *Id.*

21. *Id.*

22. *Talula Does the Hula a No-No Name: Judge*, SYDNEY MORNING HERALD, July 24, 2008, <http://news.smh.com.au/world/talula-does-the-hula-a-nono-name-judge-20080724-3kc4.html> [hereinafter *Talula*].

23. *Id.*

24. Larson, *supra* note 11, at 194.

“Yeah Detroit,” and “Sex Fruit,” have been blocked by registration officials.²⁵

In the United States, some states have also enacted legislation regulating names. Although this Note is not an empirical study documenting each states’ naming laws, it is helpful to understand how certain states are choosing to regulate parents’ rights to select their child’s name. Particular themes have developed from state laws, such as restrictions on possible surnames; restrictions on how long the name can be; requirements to have at least two names (first and last) as well as prohibitions of ideograms, pictograms, numerals, diacritical marks, and obscenities.²⁶ For example, in Tennessee, Messiah’s home state, the law requires married parents to select either the “surname of the natural father or the surname of the natural father in combination with either the mother’s surname or the mother’s maiden surname.”²⁷ In New Jersey, the state registrar can reject names that “contain numerals or a combination of letters, numerals, or symbols.”²⁸ In Illinois, numerals are prohibited “when used as the first character in a child’s name.”²⁹ In Massachusetts, the first, middle, and last names cannot exceed forty characters because of software limitations.³⁰

II. THE FOURTEENTH AMENDMENT

Given these various government regulations on parents’ freedom in selecting names, some parents have challenged the constitutionality of state regulations in this area. Parents arguably have fundamental rights to name their children, either through an extension of already established fundamental rights of parents, or through the right of privacy. The relevant part of the Fourteenth Amendment says, “nor shall any State deprive any person of life, liberty, or property, without due process of law.”³¹

25. ‘Number 16 Bus Shelter’, ‘Violence’ Among Kids Registered Names, N.Z. HERALD, July 24, 2008, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10523288.

26. Larson, *supra* note 11, at 165.

27. *Id.*

28. *Id.* at 169.

29. *Id.* at 168.

30. *Id.* at 169.

31. U.S. CONST. amend. XIV, § 1.

A. History of Fundamental Rights and the Fourteenth Amendment

The Supreme Court has held that certain liberties are so important, they should be considered “fundamental.”³² A right that is considered fundamental will be protected by strict scrutiny, which means that courts will uphold a law that infringes on that right only if the State can show that the law is narrowly tailored and promotes a compelling state interest.³³ Some examples of liberties that have been considered fundamental by the Supreme Court over the last century include the right to marry, the right to custody of one’s children, the right to keep the family together, the right to procreate, the right to purchase and use contraceptives, and the right to refuse medical treatment.³⁴ The constitutional basis for classifying these rights as fundamental has varied; most are protected under the due process clause of the Fifth or Fourteenth Amendments, while others rely on the equal protection clause of the Fourteenth Amendment.³⁵

There are several analyses that courts utilize to decide whether a right is fundamental. One method courts have used to make this determination is based on interpretive techniques of the Constitution.³⁶ For example, originalists argue that fundamental rights are “limited to those liberties explicitly stated in the text or clearly intended by the framers.”³⁷ The argument is that the only rights that are fundamental are those listed in the Bill of Rights, and nothing more.³⁸ Non-originalists, on the other hand, argue that courts can protect fundamental rights that are not explicitly enumerated in the Constitution or intended by the framers.³⁹

Another way courts decide if a right is fundamental is to look to history and tradition.⁴⁰ The Supreme Court often engages in analyzing whether a right is “deeply rooted in this Nation’s history and tradition.”⁴¹ If the right is “deeply rooted” in America’s history and tradition,

32. ERWIN CHERMERINKSY, *CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES* 812 (4th ed. 2011).

33. *Id.* at 813.

34. *Id.* at 812.

35. *Id.*

36. *Id.* at 815.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *See* *Washington v. Glucksberg*, 521 U.S. 702, 720–721 (1997).

then that right is considered to be fundamental.⁴² If it is not considered a traditional right, then it is not fundamental.⁴³

B. The History of the Right of Privacy

Another right that has been read into the Fourteenth Amendment is the right of privacy. Of the case law on parental naming rights, most naming cases have examined whether state regulations violate parents' rights of privacy. Although privacy is not explicitly mentioned in the Constitution, the right of privacy is considered to be a due process right derived from either the Fifth or Fourteenth Amendments.⁴⁴

The right of privacy was first held to be a fundamental constitutional right in the Supreme Court case *Griswold v. Connecticut*.⁴⁵ In *Griswold*, the Supreme Court struck down a Connecticut law that made the sale and possession of birth control devices a crime, holding that the law intruded upon the right of marital privacy.⁴⁶ The holding was based on the idea that "various guarantees" in the Bill of Rights create "zones of privacy."⁴⁷ In a subsequent Supreme Court case, the *Griswold* holding was expanded to include individuals, not just married couples, stating that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion."⁴⁸

The pinnacle of privacy cases came in 1973, when the Supreme Court decided *Roe v. Wade*.⁴⁹ At issue in *Roe* was a Texas law that banned abortions, except those necessary to save the life of the mother.⁵⁰ The Court described the history of the right of privacy, stating that "only personal rights that can be deemed 'fundamental' . . . are included in this guarantee of personal privacy."⁵¹ The Court held that:

42. *Id.*

43. *Id.* at 723. For example, the Supreme Court has held that the right to commit assisted suicide is not a fundamental right, since there is a "consistent and almost universal tradition that has long rejected" that right. *Id.*

44. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *See also* *Roe v. Wade*, 410 U.S. 113, 152 (1973) ("[A] right of personal privacy, or a guarantee of certain areas or zones of privacy does exist under the Constitution," continuing to say that the roots of privacy can be found in the First, Fourth, Fifth, and Ninth amendments, or in the concept of "liberty" guaranteed by Fourteenth Amendment).

45. 381 U.S. 479 (1965).

46. *Id.* at 485–86.

47. *Id.* at 484.

48. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

49. *Roe*, 410 U.S. at 113.

50. *CHEMERINKSY*, *supra* note 32, at 841.

51. *See Roe*, 410 U.S. at 152.

[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.⁵²

The Court then analyzed the Texas law, saying that the regulation must be justified by a compelling state interest.⁵³ The Court ultimately held that although a woman has a right of privacy to make decisions about her pregnancy, the right was not absolute.⁵⁴ The Court drew a distinction, holding that during the second trimester of the pregnancy, the state could create certain health regulations infringing on a woman's right, and while during the third trimester, the state could ban abortions entirely, since, after viability, it has a compelling interest in protecting potential human life.⁵⁵

This landmark case firmly established the right of privacy as a fundamental constitutional right for Americans. But how broadly does the right of privacy extend, and should it encompass the right to name one's child?

C. Fundamental Rights to Make Child-Rearing Decisions Generally

Additionally, the potential fundamental rights of parents to name their child arguably stems from earlier cases that held that parents have fundamental rights to make parenting and child-rearing decisions. One of the first in this line of cases is *Meyer v. Nebraska*.⁵⁶ In *Meyer*, a Nebraska statute prohibited teachers from teaching any subject in any language other than English in any school.⁵⁷ A teacher at a parochial school violated this law by teaching German to a ten-year-old child at his school.⁵⁸ The Supreme Court invalidated the Nebraska law under the Fourteenth Amendment.⁵⁹ The Court reasoned that "it is the natural duty of the parent to give his children education suitable to their station in life. . . . [Plaintiff's] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within

52. *Id.* at 153.

53. *Id.* at 155.

54. *Id.* at 163; CHEMERINKSY, *supra* note 32, at 841.

55. *See Roe*, 410 U.S. at 163.

56. 262 U.S. 390 (1923).

57. *Id.* at 397.

58. *Id.* at 396.

59. *Id.* at 399.

the liberty of the [Fourteenth] amendment.”⁶⁰ The Court held that the Fourteenth Amendment’s reference to “liberty” includes:

the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁶¹

Since a parent’s right to instruct his child how he sees fit was considered a fundamental right, Nebraska had the burden to show that it had a very important reason for the law.⁶² The justification that Nebraska gave for the statute was that it protected the health of children by limiting their mental activities.⁶³ The Court rejected Nebraska’s argument, and held that the statute applied “without reasonable relation to any end within the competency of the state.”⁶⁴ Thus, the statute was an unconstitutional intrusion into parents’ fundamental rights under the Fourteenth Amendment.⁶⁵

Another early case in this line of fundamental parental rights cases was *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*.⁶⁶ This case involved two suits, both seeking to enjoin the enforcement of Oregon’s Compulsory Education Act of 1922, which required attendance at *public* schools.⁶⁷ The Supreme Court held that this Act violated the Fourteenth Amendment by “unreasonably interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”⁶⁸ In so holding, the Court reasoned that “those who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”⁶⁹ Both of these cases established the existence of a fundamental right to make child-rearing decisions free from unwarranted

60. *Id.* at 400.

61. *Id.* at 399.

62. *Id.* at 401–03.

63. *Id.*

64. *Id.* at 400.

65. *Id.*

66. 268 U.S. 510 (1925).

67. *Id.* at 529–31.

68. *Id.* at 534–535.

69. *Id.* at 535.

governmental intrusion.⁷⁰ Parents also have fundamental rights to the custody, care, and management of their children.⁷¹

D. Surname Case Law

Have courts similarly held that the right to name a child is fundamental? Much of the case law centers around unusual surnames rather than first names. So far, there is a split amongst the lower courts across America as to whether parents have fundamental rights to give their child any surname they choose.

Initially, courts seemed to be ruling in favor of parents. In 1972, in the United States District Court for the District of Hawaii, parents challenged a Hawaiian statute that limited what surname they could give their child—either the father’s surname, or a hyphenated combination of both parents’ surnames.⁷² The parents in this case wanted to combine “Befurt,” the father’s last name, with “Jech,” the mother’s maiden name, to create the surname “Jebef” for their child.⁷³ The State Department of Health informed the Befurts that the name was impermissible, and changed the child’s surname to “Befurt.”⁷⁴ The district court disagreed with the State Department’s actions, and held that parents have a constitutionally protected right to give their child any surname they choose.⁷⁵ The court concluded that privacy, or the “right to be let alone,” applied, since parents have a common law right—protected by the Fourteenth Amendment—to give their child any name they wish.⁷⁶ The court also held that Hawaii’s stated interest in tracing relationships to determine the devolution of property and title to lands was not a purpose that was reasonably related to curtail the parents’ rights here.⁷⁷

In another early case, *Sydney v. Pingree*, the parents wanted to combine their respective surnames of “Ledbetter” and “Skylar” to give their son the surname “Skybetter.”⁷⁸ This violated a Florida statute that

70. *Henne v. Wright*, 904 F.2d 1208, 1214 (8th Cir. 1990).

71. *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents”).

72. *Jech v. Berch*, 466 F. Supp. 715–16 (D. Haw. 1979).

73. *Id.* at 715.

74. *Id.* at 716.

75. *Id.* at 721.

76. *Id.* at 718–19.

77. *Id.* at 721.

78. 564 F. Supp. 412, 413 (S.D. Fla. 1982).

prohibited giving a child born in wedlock any other surname but that of his father.⁷⁹ Basing its rationale on the Supreme Court's decision in *Roe v. Wade*, the District Court for the Southern District of Florida held that "the constitutional right of liberty and privacy is broad enough to include the right of parents to choose a name for their child."⁸⁰ The court reasoned that the right of parents to choose the name of their child flows from the established fundamental rights in certain matters of marriage and procreation.⁸¹ Therefore, Florida had to show a compelling justification for intruding on parents' rights, which it failed to do.⁸²

The more recent case law, however, takes a different direction. In 1990, in *Henne v. Wright*, the Eighth Circuit Court of Appeals held that a parent's right to give a child a surname with no legally established parental connection is not a fundamental right.⁸³ In *Henne*, two different mothers challenged the constitutionality of a Nebraska statute that restricted the surnames given to children at birth.⁸⁴ The first of these mothers, Debra Henne, wanted to give her newborn daughter the last name of the child's father, "Brinton," even though she was still legally married to her husband, Robert Henne (Debra and Robert had filed for divorce at the time of the child's birth).⁸⁵ The hospital informed Mrs. Henne that the child's name, per statute, had to be that of her husband, despite the fact that he was not the father of the child and they were separated.⁸⁶ The second case involved an unmarried woman, Linda Spidell, who wanted to give her daughter the last name "McKenzie," the surname of her other two children, but which otherwise bore no relation to herself, her family, or to the child's father.⁸⁷ Ms. Spidell explained that she just liked the name "McKenzie," and wanted her newborn to share the same surname as her other children.⁸⁸

The *Henne* court, in considering whether the right of these women to give their child an unrelated surname was fundamental, asked whether the right is "deeply rooted in this Nation's history and tradi-

79. *Id.*

80. *Id.* (citing *Jech*, 466 F. Supp. at 719).

81. *Id.*

82. *Id.*

83. 904 F.2d 1208, 1215 (8th Cir. 1990).

84. *Id.* at 1211.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

tion.”⁸⁹ The court concluded that the right to name is not deeply rooted in the Nation’s history and tradition, so the women in this case did not have a fundamental right to give their child their chosen surnames.⁹⁰ Ultimately, the court upheld the Nebraska statute, stating that the statute rationally furthered the legitimate state interests in promoting the welfare of children, insuring that the names of its citizens are not appropriated for improper purposes, and maintaining inexpensive and efficient record keeping.⁹¹

The circuit court in *Henne* emphasized that the holding was intended to be a narrow one, addressing the specific issue of naming when the child has “no legally recognized parental connection” to the proposed name.⁹² However, the rationale from *Henne* has since been applied more broadly. In 1991, in *Brill v. Hedges*, the District Court for the Southern District of Ohio considered the constitutionality of an Ohio statute that required children born to unmarried mothers to have their mother’s surname.⁹³ The plaintiff, Michelle Brill, was divorced from her husband, but retained his surname (“Brill”) for convenience—sake instead of switching back to her maiden name (“Walton”).⁹⁴ She subsequently had a son, and named him “Stephen James Walton.”⁹⁵ The Health Department informed Mrs. Brill that she must give her son her current surname of “Brill,” per state law.⁹⁶ One of Mrs. Brill’s arguments was that the statute’s limitation on her right to name her child violated due process of the Fourteenth Amendment.⁹⁷ In considering whether the right was a fundamental right, the court again considered whether the right of a parent to name a child is “deeply rooted in this Nation’s history and tradition.”⁹⁸ In making its determination, the court looked at whether any federal court had determined that the right was fundamental.⁹⁹ The court held that:

while a parent’s right to name a child is an important aspect of child rearing and one that ought not be impinged upon by the government without reasonable justification, such interest is not so ‘deeply root-

89. *Id.* at 1214.

90. *Id.* at 1215.

91. *Id.*

92. *Id.*

93. 783 F. Supp. 333 (S.D. Ohio, 1991).

94. *Id.* at 334–35.

95. *Id.* at 335.

96. *Id.*

97. *Id.*

98. *Id.* at 336.

99. *Id.*

ed in this Nation's history and tradition' as to be deserving of the highest scrutiny by this Court.¹⁰⁰

The court considered the previous case law (*Jech*, *Sydney*, and *Henne*) and decided that all these cases considered the naming right to be of "great importance," but in their view, none of these courts ever applied the highest level of scrutiny to the state laws.¹⁰¹ Since the court decided that parents' rights to name are not fundamental, it applied a rational basis test, meaning that the statute will be upheld if it "bears some reasonable relationship to a legitimate state interest."¹⁰² Ultimately, the court held that the statute is rationally related to Ohio's interests in preserving family life and in having an efficient record system.¹⁰³ These recent cases show a trend by lower courts to exclude parents' rights to name their child from the category of fundamental rights.

E. The Fourteenth Amendment Solution

Despite this recent trend, courts should consider the rights of parents to name their child fundamental. The first reason naming rights should be considered fundamental is because the line of cases dealing with the fundamental rights of marriage, procreation, and child-rearing can naturally extend to include parents' rights to name their child. It is not a far leap for courts to say that parental naming rights are fundamental, just as parents' rights to rear and educate their children are fundamental.¹⁰⁴ Giving a child a name is essentially the first step in raising the child, so it follows that the right to name would flow naturally from the rights that the Supreme Court has already held to be fundamental. It is logical to extend the right of parents to name their children from the already established fundamental rights of parents to make child-rearing decisions. The line of cases that focus on privacy and parents' rights to make decisions for their children without government interference fit well with parents' rights in being able to make a choice about what they want to name their child.

Parental naming rights also fit in with the autonomy justification of the fundamental right of privacy. The name that parents give their

100. *Id.* at 337.

101. *Id.* at 337–38.

102. *Id.* at 339.

103. *Id.* at 346. However, the court struck down the law as violating equal protection, as it treated unmarried and married mothers differently for arbitrary reasons. *Id.*

104. See *Santosky v. Kramer*, 455 U.S. 745 (1982); *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

child is a personal choice that has no effect on the government. It is a private and personal choice made by the parents and families. This again fits with the original rationale behind protecting the right of privacy. For example, in *Roe v. Wade*, what was at stake was a woman's right to make her own decision about highly personal matters, namely, whether to terminate her pregnancy or give birth.¹⁰⁵ So too here, in parental naming cases, the right of adults to make their own decisions about the personal matter of what to call their child is at issue. As mentioned at the outset of this article, choosing a child's name is perhaps one of the most exciting and highly-anticipated decisions when a baby is born. For some parents, their child's name represents carrying on familial ties or reflects the parents' interests, like the parents of Crimson Tide Redd. Parents should largely be left alone when it comes to giving their child a name because it is a personal decision that they should be allowed to make.

If parents' rights to name their child do not flow directly from an extension of the already fundamental rights to make child-rearing decisions, the rights ought to be fundamental because they are deeply rooted in this Nation's history and traditions. Nowhere in our Nation's history has the government been involved in naming newborn babies. That right has always been exercised by the parents, or at least by the mother or the family of the newborn. In fact, in early America, the names of children were not subject to any regulations at all.¹⁰⁶ This is especially clear if you look at the types of names that were given to children in the 1700s and 1800s.¹⁰⁷ The names range from the strange and bizarre, such as "Fear-Not;" "Encyclopedia Britannia;" and "Latrina"; to biblical names, such as "Zipporah" and "Epaphroditus"; and political names, like "State's Rights" and "Kansas Nebraska."¹⁰⁸ The government did not intervene or regulate any of these names.¹⁰⁹ Presumably, the lack of regulations also applied to last names as well, despite a desire to have continuity in last names for the purposes of lineage and efficiency. In fact, government regulation of names did not officially appear in America until the government introduced birth certificates in the late nineteenth and early twentieth centuries.¹¹⁰ It is

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

106. Larson, *supra* note 11, at 178.

107. *Id.* at 179.

108. *Id.* at 179-80.

109. *Id.* at 179.

110. *Id.* at 178.

clear that there is a deeply rooted tradition in America's history to allow parents to name their children whatever they see fit; thus, the rights of parents to name their children should be fundamental.

Finally, if parental naming rights are not, for some reason, seen to be fundamental as described above, the rights of parents to name can also be found to be protected through the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment. For substantive due process analysis, the Supreme Court has held that history and tradition are the starting point, but not the ending point.¹¹¹ Specifically, the Court has said that “[o]ur law affords constitutional protection to *personal decisions* relating to marriage, procreation, contraception, *family relationships, child rearing,* and education.”¹¹² The point is that “liberty” is *more* than just history and tradition—it can also include matters “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”¹¹³ The name that parents choose to give to their child fits into this special category of liberty that the Constitution was designed to protect. It is one of the most personal and important choices that parents can make for their child, and is a decision that the child cannot make for itself.

Some argue that parents' rights to name their child should not be considered fundamental rights, and should not be included as an extension of the family and parenting rights protected under the Fourteenth Amendment. They argue that naming is an important right, but not a fundamental right deserving the strictest judicial scrutiny.¹¹⁴ The *Brill* court adopted this view, admitting that “while parents have an important interest in naming their children, this interest does not rise to the level of a fundamental right.”¹¹⁵ One of the reasons people advocate for keeping parental naming rights out of the fundamental category is because allowing parents to name their children eccentric names encourages undesirable behavior. In order to incentivize parents to choose more traditional names, the argument goes, the government should have the ability to intervene without having to show compelling interests.

This view, however, is misguided. As previously mentioned, the rights of parents to name their children is a natural extension of the

111. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

112. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (emphasis added).

113. *Id.*

114. *Brill v. Hedges*, 783 F. Supp. 333, 340 (S.D. Ohio 1991).

115. *Id.* at 339.

other family-related fundamental rights that have already been protected by the court. Also, concluding that parents naming their children is not deeply rooted in America's history and traditions is incorrect. The states have always had a hands-off approach in child naming throughout history, until recently, and have largely left the common law rights of parents to name their children untouched. The fear about encouraging undesirable behavior is also unfounded, especially because in truly extreme circumstances, the government could still step in, thereby effectively monitoring the most undesirable behavior. Courts should take these extreme cases into account, while still allowing parents to make the personal decision of what to name their children.

III. THE FIRST AMENDMENT

In addition to the Fourteenth Amendment, parents may also find refuge from naming regulations under the First Amendment. Some argue, however, that the Fourteenth Amendment sufficiently addresses the problem, so the First Amendment is inapplicable and unnecessary. Considering precedent, all the current parental rights and surname jurisprudence is argued and decided in terms of the Fourteenth Amendment, so that should be the only analysis. Others maintain that the First Amendment is just as fair as the status quo; that is, that the First Amendment would not necessarily offer parents any more protections than the Fourteenth Amendment.

The truth of the matter is that the Fourteenth Amendment alone may not sufficiently address the problem. Some courts are hesitant to include anything that is not in the Bill of Rights, or closely related to it, into the "liberties" of the Fourteenth Amendment.¹¹⁶ Since privacy and the right to name are not enumerated in the Constitution, it is helpful to also include the First Amendment as a foundation for parents' rights. The First Amendment arguably gives parents broader and more assured rights to name their children whatever they see fit, within reason.

116. CHEMERINKSY, *supra* note 32, at 815.

A. The First Amendment and Free Speech

The relevant part of the First Amendment says “Congress shall make no law . . . abridging the freedom of speech.”¹¹⁷ This language on its face seems simple to comprehend and apply, but over the years, the Supreme Court has used the First Amendment in unexpected ways.¹¹⁸

Examining the language, the First Amendment forbids “Congress” specifically from acting in a certain way,¹¹⁹ but this prohibition was expanded to apply to state governments through the Fourteenth Amendment.¹²⁰ The Fourteenth Amendment’s language that no person should be deprived of liberty without due process includes the “liberty” of freedom of speech.¹²¹ Therefore, freedom of speech applies to the states.¹²² Second, courts have never held the First Amendment to be an *absolute* ban on speech regulations.¹²³ Finally, the First Amendment applies beyond spoken word, and has even been applied to electronic media and conduct that constitutes symbolic speech, like flag-burning.¹²⁴

B. The First Amendment and Naming Case Law

Currently, no cases deal specifically with parental naming rights in the context of freedom of speech. However, the dissenting judge in *Henne* discussed the possibility.¹²⁵ There, Judge Arnold disagreed with the ultimate holding of the Eighth Circuit Court in *Henne*, and argued that the fundamental right of privacy includes parents’ rights to name their children.¹²⁶ In dicta, Judge Arnold stated that these naming issues could very well be analyzed and decided on First Amendment

117. U.S. CONST. amend. I.

118. DANIEL A. FARBER, *THE FIRST AMENDMENT* 1 (3d ed. 2010).

119. U.S. CONST. amend. I.

120. FARBER, *supra* note 118, at 10.

121. *Id.* at 11; *see also* *Gitlow v. People of N.Y.*, 268 U.S. 652 (1925) (holding that the state of New York was within its police power to regulate the anti-government speech of defendant in that case. The Court reasoned that “the ‘liberty’ protected by the Fourteenth Amendment includes the liberty of speech and of the press.”).

122. FARBER, *supra* note 118, at 11; *see also* *Gitlow*, 268 U.S. at 666 (stating “we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

123. FARBER, *supra* note 118, at 1; *see also* *Gitlow*, 268 U.S. at 666 (stating, “the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish.”).

124. FARBER, *supra* note 118, at 1; *see also* *Texas v. Johnson*, 491 U.S. 397 (1989).

125. *Henne v. Wright*, 904 F.2d 1208, 1216 (8th Cir. 1990).

126. *Id.*

grounds.¹²⁷ He pointed out that “[w]hat I call myself or my child is an aspect of speech. When the State says I cannot call my child what I want to call her, my freedom of expression, both oral and written, is lessened.”¹²⁸ Judge Arnold went on to say that the State would need to show a compelling interest to override the fundamental guarantees of the First Amendment.¹²⁹

C. *The First Amendment Solution*

Like Judge Arnold suggested in *Henne*, courts should consider the naming of a child to be speech, the regulation of which is largely content-based, and subject to a strict scrutiny analysis.

In analyzing whether forms of speech are protected by the First Amendment, courts first consider whether the speech falls into a category of unprotected speech.¹³⁰ If not, courts will go on to consider whether the government regulation of the protected speech is content-based or content-neutral.¹³¹ The determination of whether the regulation is content-based or content-neutral dictates the level of scrutiny that will be applied to determine if the regulation is constitutional.¹³² A content-based regulation is subject to strict scrutiny, which means the government needs to show a compelling interest in order to regulate speech based on its content, and that regulation needs to be narrowly tailored.¹³³ On the other hand, if the government regulation is content-neutral, the government only needs to show that the restriction on speech is no greater than is essential to further a significant governmental interest, and that the regulation can be justified without reference to the content of the regulated speech.¹³⁴

1. Giving a Child a Name is Speech

Naming a child is a form of speech. Although a name is different from verbal speeches or written books, it still falls under the category of speech. As mentioned above, what falls into the category of “speech”

127. *Id.*

128. *Id.*

129. *Id.*

130. Categories of unprotected speech include obscenity, fighting words, defamation, and threats. See FARBER, *supra* note 118, at 20.

131. *Id.*

132. *Id.*

133. *Id.* at 22–23.

134. *Id.* at 24–25; see also *Ward v. Rock against Racism*, 491 U.S. 781, 803 (1989).

is fairly broad, and can even include symbolic acts.¹³⁵ In *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that the act of students wearing black armbands in protest of the Vietnam War was “the type of symbolic act that is within the Free Speech Clause of the First Amendment.”¹³⁶ This case established that an act can be speech.¹³⁷ Later, in 1995, the Supreme Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* noted that “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message’ . . . would never reach the unquestionably shielded painting of Jackson Pollock [and other clearly protected forms of speech].”¹³⁸ Speech does not necessarily always involve making an argument or even conveying a message.

Naming, which is an expressive act of the parents that usually does not (but sometimes may) convey any particular message or make a statement, should similarly be considered speech. Naming a child is an expressive act for parents. What someone is named can express their parents’ views on a particular topic, can be a sign of the times, or can be a simple identifier for the public who will be interacting with this person. For example, parents might decide to give their child a family name to express the importance of family and to carry on tradition. Parents may also give their child a name from their favorite movie, book, actor, or politician. Take, for example, a trend that occurred in 2011, when many parents were naming their children “Isabella,” “Bella,” and “Jacob” after the main characters of the popular young adult book series, *Twilight*.¹³⁹ Another example is Deontee Williams, who, in 2008, and inspired by Barack Obama’s recent election to the presidency, named her newborn son “Barack.”¹⁴⁰ Ms. Williams stated that she liked the name “Barack” because to her, it represented a blessing, and she wanted to express that her son was likewise a blessing.¹⁴¹ Similarly, there has been correlation between presidential elections and popularity in baby names dating back to the 1930s—“Franklin” became

135. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969).

136. *Id.*

137. *Id.*

138. 515 U.S. 557, 569 (1995).

139. Gael Fashingbauer Cooper, *Two of Top Baby Names are from ‘Twilight,’* NBC NEWS (Dec. 1, 2011), http://entertainment.nbcnews.com/_news/2011/12/01/9141987-two-of-top-baby-names-are-from-twilight.

140. Jennifer Lee, *Like the Dwights and Lyndons of Old, Baby Baracks All Over*, NY TIMES, Nov. 9, 2008, http://www.nytimes.com/2008/11/10/us/politics/10babies.html?_r=0.

141. *Id.*

popular in 1933; “Dwight” in the 1950s; “Lyndon” in the 1960s; and the ever popular “Lincoln,” “Kennedy,” and “Reagan” all remained so throughout the 1990s.¹⁴² Naming is an expressive act of the parents, even with seemingly “normal” names, and should fall within the category of speech.

2. Many Regulations on Naming are Content-Based

Since naming should be considered a form of “speech,” the next step is to determine whether state naming regulations are content-based or content-neutral. Regulations on naming should be considered content-based, and therefore subject to strict scrutiny.

Deciding whether a law is content-based or content-neutral is a difficult task. Nearly every approach taken by the Supreme Court has its own set of problems.¹⁴³ Generally, in order for a regulation of speech to be content-neutral, it must be both viewpoint neutral and subject matter neutral.¹⁴⁴ This means that the government cannot regulate based on the ideology of the message or based on the topic of the speech.¹⁴⁵ Take, for example, the famous “Son of Sam” serial killer case.¹⁴⁶ In that case, the Supreme Court considered the constitutionality of a New York statute that prohibited criminals, including the serial killer famously called “Son of Sam,” from profiting from books about their crimes.¹⁴⁷ The Court held that the statute was unconstitutional because it was based on the *content* of the book.¹⁴⁸ The Court reasoned that since a criminal could profit from writing a book on any other topic except for a book about his crime, the prohibition was content-based, and was therefore subject to strict scrutiny.¹⁴⁹ The Court, in applying strict scrutiny, found that the statute was overbroad, and did not further the state’s compelling interest of ensuring that criminals do

142. *Id.*

143. FARBER, *supra* note 118, at 27–28. Chief Justice Rehnquist considers whether the law would equally apply if no message was being communicated by conduct, but this approach can result in discrepancies between various media. Meanwhile, Justice Souter asks whether the persuasive effect of the message is the main reason the government is regulating, but justifications for a law are hard to find out and can change. The bottom line is that there is no one test that reveals a regulation as content-neutral or content-based.

144. CHEMERINKSY, *supra* note 32, at 962.

145. *Id.* at 962–63.

146. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (“Son of Sam” refers to the moniker given to David Berkowitz, who was responsible for six murders during the summers of 1976–77 in New York City).

147. FARBER, *supra* note 118, at 23.

148. *Id.*

149. *Id.*

not profit from their crimes.¹⁵⁰ Since the restriction was based on the topic of the book, the crimes a particular criminal committed, the regulation was considered content-based.¹⁵¹

Some state regulations of names, like restrictions on name length or a state law that requires a child to have a first name generally do not offend parents' rights to name, and may be analyzed with a lesser level of scrutiny. However, other state naming regulations are content-based regulations, and therefore must meet strict scrutiny. Such regulations include laws on what the child's name can be or include, like prohibiting numerals or symbols. A prime example of content-based limitations on what the child's name can be is Messiah's case. The Tennessee Magistrate that changed Messiah's name based her decision on the content of Messiah's name, and on the religious ideology that accompanies the name.¹⁵² This is clearly a content-based restriction. Also, when state laws limit what surname parents can give to their child (like only the father's surname or the unwed mother's maiden name), it is based on the content of the name itself, like the "ChristIsKing" court restrictions or statutory restrictions prohibiting the combination of "Skybetter."¹⁵³ These restrictions clearly limit parents' freedom of expression.

Some people argue that restrictions on surnames like "Skybetter" are more easily defended than would be a restriction of "ChristIsKing," since "ChristIsKing" is also a restriction on the parents' religious ideology. Surnames, as opposed to first names, they argue, implicate the added state interests of administrative convenience and tracing familial relationships that regulations of first names do not. However, these regulations are still infringing on parents' freedom of expression, and

150. *Id.*

151. *Id.* The Supreme Court also tried to delineate more clearly what it means for a law to be content-based in *United States v. Playboy Entertainment Group, Inc.* 529 U.S. 803 (2000). At issue in that case was the "signal bleed" of sexual images on television, which was prohibited by a section of the Telecommunications Act of 1996. *Id.* at 806. Cable television operators were required to "fully scramble or otherwise fully block" sexually-oriented programming, or show the sexually-oriented programming at late hours when children were unlikely to be viewing. *Id.* Playboy challenged the statute as restrictive, content-based legislation that violated its First Amendment rights. *Id.* at 807. The Court held that "[t]he speech in question is defined by its content; and the statute which seeks to restrict it is content based." *Id.* at 811. The statute only applied to programs that were sexually explicit or indecent. The Court declared, "[The statute] focuses *only* on the content of the speech and the direct impact it has on its listeners. . . . This is the essence of content-based regulation." *Id.*

152. Findings & Recommendations, *supra* note 5.

153. *Sydney v. Pingree*, 564 F. Supp. 412, 413 (S.D. Fla. 1982); *ChristIsKing*, *supra* note 19.

should be protected as such. Also, regulations like those in the “Skybet-ter” case propel a patriarchic notion of families and names.

Most naming regulations focus on the content of the name and the impact it has on those who hear it and use it. Many of the names discussed above were struck down or disallowed because they had the potential to offend people or to embarrass the child. “Offensiveness is usually considered a content-related characteristic, because the degree of offense is likely to relate to the conduct’s perceived meaning.”¹⁵⁴ Thus, naming should be considered speech, and courts should apply strict scrutiny to these content-based naming regulations.

IV. STRICT SCRUTINY ANALYSIS

Whether parents’ rights to name their children are held to be fundamental rights and thus afforded the protections of the Fourteenth Amendment, or are considered content-based speech, naming regulations must pass the most rigorous judicial analysis of strict scrutiny. As mentioned above, strict scrutiny requires the government to establish a truly significant or compelling reason for the regulation and demonstrate that the law is *necessary* to achieve the state’s objective.¹⁵⁵

A. States Lack Compelling Interests to Regulate Naming

States generally do not have compelling interests to regulate parents’ rights to name their children. The various reasons that states have given in previous cases in order to justify their naming legislation are not compelling reasons for the laws to infringe on such important parents’ rights. Some justifications states have given include tracing relationships for devolution of property,¹⁵⁶ promoting the welfare of children, inexpensive and efficient record keeping, and ensuring that names are not appropriated for improper purposes.¹⁵⁷ None of these reasons, mostly based on state convenience, are significant enough to infringe on the privacy of a family or parents’ freedom of expression.

The reasons courts have given for changing children’s names also fall short of the compelling interest standard. In Messiah’s case, Magistrate Ballew cited religious reasons for the change.¹⁵⁸ This not only

154. FARBER, *supra* note 118, at 27.

155. CHEMERINKSY, *supra* note 32, at 817.

156. *Jech v. Burch*, 466 F. Supp. 714, 720 (D. Haw. 1979).

157. *Henne v. Wright*, 904 F.2d 1208, 1215 (8th Cir. 1990).

158. Findings & Recommendations, *supra* note 5.

fails to be a compelling state interest, but it also flies in the face of other constitutional provisions, namely, the right of free exercise of religion of the First Amendment.¹⁵⁹ So too in the “ChristIsKing” case, the judge’s cited reasoning of separation of church and state for denying the surname is not a compelling state interest when it offends individuals’ rights to freely exercise their religion.¹⁶⁰

Another justification judges often give for regulating in this area is the state’s interest in doing what is in the child’s best interest. This standard is derived from child custody and juvenile cases, and asks judges, and sometimes legislators, to extrapolate what they think would be best for a child, based on certain factors, on a case-by-case basis.¹⁶¹ The “best interest of the child” standard is not deferential at all to the parents’ wishes and involves a high amount of court participation and judgment. However, this justification is not a compelling state interest either. Courts and legislators should not override parents’ judgment in deciding what is in their child’s best interest, especially when the parents agree on the name, as many of the parents in the above cases have. For a judge to step in and impose his or her judgment about whether a given name will cause the child embarrassment or difficulties in life or whether the community will respect the name is inappropriate.

B. Courts Should Presume that Parents Know What is Best to Name Their Child

Rather than allowing judges to insert their own judgment into family matters, courts should presume that parents are the best people

159. The First Amendment’s protection of freedom of religion may also be applicable to parents’ rights to name their children. Parents could challenge naming regulation as a violation of their freedom of religion if the name has a religious ideology or if the parents chose the name for religious reasons. For example, in the “ChristIsKing” case, the government action targets clearly religious expression, so the government action would need to meet the strict scrutiny standard. *ChristIsKing*, *supra* note 19.

160. *Id.*

161. *See, e.g.,* Sheppard v. Speir, 157 S.W.3d 583, 590 (Ark. Ct. App. 2004). In *Speir*, the Court of Appeals of Arkansas outlined the following factors to determine whether changing a child’s name is in the child’s best interest: (1) the child’s preference; (2) the effect of the name on the preservation and development of the child’s relationship with each parent; (3) the length of time the child has borne a given name; (4) the degree of community respect associated with the name; (5) the difficulties, harassment, or embarrassment that the child may experience from bearing the name; and (6) the existence of any parental misconduct or neglect. *Id.* at 492. Also note that *Speir* is somewhat different from the typical case this Note is considering in that the parents in *Speir* disagreed about their son’s surname. The course of action that a court should take when parents disagree, like in *Speir*, is not discussed in this Note and is an opportunity for further analysis.

to choose a name for their children, like they have in other cases. For example, in *Wisconsin v. Yoder*, the Supreme Court recognized that parents were best suited to make decisions about their children's religious upbringing when it held that the Amish children in the case were not subject to the State's Compulsory Education Law.¹⁶² There, the Court stated:

[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. . . . This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.¹⁶³

The Court reasoned that it was beyond the state's reach to regulate parents' decisions when it comes to education and religious choices for their children.¹⁶⁴ The Court unquestionably recognized the rights of parents to make the decisions that will be best for their children in those areas, even if the State ultimately disagrees with those decisions.¹⁶⁵

Similarly, in *Parham v. J.R.*, the Court considered the question of whether a minor's procedural due process rights were violated when his parents sought state-administered institutional mental health care for him.¹⁶⁶ The Court concluded, "[O]ur precedents permit the parents to retain a substantial, if not the dominant, role in the [voluntary commitment] decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply."¹⁶⁷ Giving parents plenary power to make medical decisions for their children should apply to parents' decisions in naming their child as well. Both are decisions that a child cannot make on his or her own. The law generally assumes that parents know what is best,¹⁶⁸ and it should continue to do so in this context. "Simply because the decision of a parent is not agreeable to the child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."¹⁶⁹ In the naming context, an extension of this principal would mean that regardless of whether the state or a judge agrees with the

162. 406 U.S. 205 (1972).

163. *Id.* at 232.

164. *Id.* at 232-33.

165. *Id.*

166. 442 U.S. 584, 587 (1979).

167. *Id.* at 604.

168. *Id.*

169. *Id.* at 603.

name or whether the name would be embarrassing for the child, it is ultimately the parents' decision to make.

Also, in *Prince v. Massachusetts*, the Court stated, "It is cardinal with us that the custody, care and nurture of the child reside *first* in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."¹⁷⁰ That case involved an aunt of a nine-year-old child who furnished her niece with religious magazines, knowing that she was going to sell them unlawfully on the street, contrary to state child labor laws.¹⁷¹ However, *Prince* also illustrates that this is not a *carte blanche* that allows parents to make any and all decisions without state intervention. The Court ultimately upheld the right of the state to regulate the hours that children were able to work.¹⁷² However, the Court first recognized the ability of the guardian to make decisions about the care of the child.

Finally, in *Troxel v. Granville*, the Court considered the constitutionality of a Washington statute that allowed any person to petition the court for child visitation.¹⁷³ There, the paternal grandparents petitioned for visitation of their grandchildren, even though the father of the children had died.¹⁷⁴ The visitation requested by the paternal grandparents was more than what the mother of the children thought was appropriate.¹⁷⁵ The Court held that the lower courts should have given "special weight" to the mother's determination of what would be in her children's best interest.¹⁷⁶ "[T]here will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."¹⁷⁷

These cases show a clear tendency of the Court to recognize that parents are in the best position to make decisions for their children. Similarly, with respect to naming rights, courts should weigh heavily the parents' wishes and judgment in the name they wish to give to their children, even if judges and legislators disagree in certain instances. Parents, not the state, are best equipped to know what is in their child's best interest, and therefore, the state should not be using

170. 321 U.S. 158 (1944) (emphasis added).

171. *Id.* at 161-62.

172. *Id.* at 170.

173. 530 U.S. 57, 60 (2000).

174. *Id.* at 60-61.

175. *Id.* at 71.

176. *Id.* at 69.

177. *Id.* at 68-69.

the “best interests of the child” standard as a justification for naming regulations.

An argument against recognizing parental rights to name their children is that the name mostly affects the child—as the child is the one who bears the name—so the state should step in and protect children from experiencing a difficult childhood if given a name that will undoubtedly be perceived as being “weird.” Early research tended to show that a person’s first name “could be ‘a determining factor in the development of personality, acquisition of friends, and, in all probability, in his success or failure in life.’”¹⁷⁸ Another study claimed that boys with feminine names generally had more disciplinary problems in middle school than their counterparts with masculine names, and women with more masculine names were more likely to be elected as judges than women with more feminine names.¹⁷⁹ Some studies have even concluded that children with odd names got worse grades, were less popular in elementary school, and were more likely to be emotionally disturbed and end up in prisons or as psychiatric wards later in life.¹⁸⁰ Given these concerning studies, people argue that children should have a say in what their names are or the state should have the ability to intervene on the child’s behalf, since their name can have a profound effect on their lives.

However, these studies are overstating the problem. Many other studies have come up with very different results. For example, one study interviewed adults with unusual names such as “Candy Stohr” and “Cash Guy” and found that these individuals were happy and experienced no trauma or detriment because of their names.¹⁸¹ Many participants were proud of their names, and said they were not bothered by the jokes or occasional “ribbing” while growing up.¹⁸² They thought their names helped them stand out and be unique.¹⁸³

While it is true that a person’s name is very important, and will be with them for life, that does not lead to the conclusion that the state necessarily should make determinations instead of the parents. Par-

178. Charles E. Joubert, *Personal Names as a Psychological Variable*, 73 PSYCHOL. REP. 1123, 1123 (1993) (quoting W.E. Walton, *The Affective Value of First Names*, 14 MIDWEST J. POL. SCI. 396 (1937)).

179. Larson, *supra* note 11, at 200.

180. J. Marion Tierney, *A Boy Named Sue, and a Theory of Names*, N.Y. TIMES, Mar. 11, 2008, <http://www.nytimes.com/2008/03/11/science/11tier.html?pagewanted=all&r=0>.

181. *Id.*

182. *Id.*

183. *Id.*

ents are in the best position to make this decision for their own children and can legitimately exercise significant discretion in raising children. Children are limited and immature in their cognitive powers and experience, which makes them prone to mistakes in judging their interests.¹⁸⁴ Seeing that someone must make decisions for them, it is natural to assign parents the right to do so, especially at birth.¹⁸⁵ Parents are best able to make a determination about what is in the best interest of their child, and should be able to give their child an unusual name if they desire.

V. LIMITS ON PARENTS' RIGHTS TO NAME THEIR CHILD

Courts and legislators should not abridge parents' rights to name their children unless there is a compelling reason. This is not to suggest that there will never be a compelling reason for a state to regulate. Certain names that parents could give to their children would cross the line of what should be permissible. Similar to how other constitutional and parental rights are not absolute, parents' rights to name should not be absolute.

The right to make parenting decisions itself has never been an absolute right. For example, as demonstrated in *Prince*, the Court held that the state, at times, could regulate child labor, even when religious activities were involved.¹⁸⁶ Even though the Court first deferred to the guardian's desires and opinions on how to religiously educate the child, it ultimately upheld the Massachusetts statute, which regulated the decisions parents or guardians could make for their children.¹⁸⁷ Massachusetts said that it had a child's welfare in mind when it restricted the hours that children could be on public streets, and what activities they could do thereon.¹⁸⁸ Also, of course, in cases of neglect or abuse, the state should step in. "The State's right—indeed, duty—to protect minor children through a judicial determination of their interests in a neglect proceeding is not challenged."¹⁸⁹ States have legiti-

184. Samantha Brennan & Robert Noggle, *The Moral Status of Children: Children's Rights, Parent's Rights, and Family Justice*, SOC. THEORY & PRAC. 1, 4 (1997).

185. *Id.* This Note does not address issues of older children or teenagers expressing a preference to have their name changed. If a child is old enough to express distaste for their name, it would be more reasonable for a court to consider that child's request, and perhaps change the name.

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

187. *Id.*

188. *Id.*

189. *Stanley v. Illinois* 405 U.S. 645, 649 (1972).

mate interests in removing children from the custody of their parents when their welfare or safety is in jeopardy.¹⁹⁰ The State is obligated to step in and regulate in extreme cases of neglect or abuse.

Similarly, the protections of the First Amendment are not absolute. “[T]he First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases.”¹⁹¹ The Supreme Court has carved out several categories of unprotected speech that are considered outside the scope of First Amendment protections.¹⁹² These categories include incitements to violence, defamation, obscenity, and fighting words.¹⁹³ If a name falls into one of these unprotected categories, such as obscenity or fighting words, it should not be subjected to the strict scrutiny analysis, and falls outside the scope of the parents’ protected rights.

One instance of a name being invalidated due to a “fighting words” concern was *Lee v. Superior Court*.¹⁹⁴ In that case, an African-American adult wanted to change his name to “Misteri Nigger.”¹⁹⁵ He wanted to change his name to try to combat racism and create a dialogue to discuss prejudice and race.¹⁹⁶ The Second District Court of Appeals would not approve the name, since it was a racial epithet that had the potential to be a “fighting word.”¹⁹⁷ “Fighting words” are those words which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace.¹⁹⁸ The court decided that “nigger” would most likely incite reasonable people to fight, and therefore, the state would not recognize his name.¹⁹⁹ Similarly, courts should consider if a child’s given name would cause reasonable people to fight or incite violence. If it would, courts are justified to step in and change the name.

This is a difficult distinction to make at times, however, as illustrated in *Cohen v. California*.²⁰⁰ In *Cohen*, the Supreme Court held that the defendant’s criminal conviction for wearing a jacket that read “Fuck the Draft” outside of a municipal courthouse violated defend-

190. *Id.* at 652.

191. *Cohen v. California*, 403 U.S. 15, 19 (1971).

192. FARBER, *supra* note 118, at 13.

193. *Id.*

194. 9 Cal. App. 4th 510 (2d Cir. 1992).

195. *Id.* at 513.

196. *Id.*

197. *Id.* at 518.

198. *Id.* at 517.

199. *Id.* at 518.

200. 403 U.S. 15 (1971).

ant's First Amendment rights.²⁰¹ The Court described the difficulty of when to intervene and stated “[w]hile the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric.”²⁰² Just because one person finds something offensive does not mean that the rights on the other side should be invaded. Courts also have a difficult task in considering all the interests at play in the naming context, from the parents, to the child, to others who have to use the name. Courts should consider whether the public who would have to use the name would suffer from an intolerable invasion on their own rights by having to use a certain name—this could potentially be a compelling interest that would satisfy strict scrutiny.

The right to name should be subject to regulations at times. If a court determines that a name is so absurd or offensive that it puts the child’s welfare in jeopardy, courts should step in and intervene. Although this is again a hard line to draw, courts would most likely know a psychologically abusive name when they saw one.²⁰³ For example, Messiah cannot be said to raise to this abusive level, especially when contrasted with a child named “I’m a Fucking Moron.” This example implies a level of dislike or hatred for a child by the parents so as to prompt a court to intervene; it also suggests that the child’s welfare may be in danger. Not even names like “Crimson Tide Redd”²⁰⁴ or “Talula Does the Hula from Hawaii,”²⁰⁵ even if embarrassing, rise to that level of mistreatment.

With all this in mind, the following rule could aid courts in making this determination: courts should generally presume that parents know best and recognize the rights of parents to name their child. However, in extreme cases of child neglect, abuse, or clear instances of offense, the court would be within its power to change the name. Courts could also consider the extent to which those who will use the name will be offended, but not without first weighing the parents’ wishes.

Examples of such names that would violate the above rule could include “Adolf Hitler” or a name including obscenities, like “Fuck You,”

201. *Id.* at 17.

202. *Id.* at 25.

203. Similar to Justice Stewart’s notions that instead of defining what he considers to be hard-core pornography, he stated that he will “know it when [he] see[s] it.” *Jacobellis v. State v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

204. Hinton, *supra* note 17.

205. *Talula*, *supra* note 22.

or the above example of “I’m a Fucking Moron.” These names would have a negative effect on society by forcing people to use the offensive name, and on the child to bear the name. If the name is likely to have such a detrimental and life-altering negative effect on the child, it would be appropriate for courts to step in. Also, if in addition to the bizarre name, the child is subject to forms of physical neglect or abuse, courts should intervene. For example, the parents of the child “Adolf Hitler” lost custody of their children because a court determined that a history of domestic violence created an unsafe environment for the children.²⁰⁶ In this instance, courts should intervene and consider the abuse as a compelling reason for the state to change the name of the child.

This might be considered unconstitutional viewpoint discrimination under the First Amendment analysis, if, for example, courts were to ban naming a child “Adolf Hitler” but allow a child to be named “Winston Churchill.” It could be seen as allowing some names but prohibiting others based on the favorable or unfavorable ideological content. However, this is a new problem for the courts in the context of names. Courts should carve out exceptions in these cases, and weigh the detrimental effect on both society and on the child, while keeping the rights of the parents at the forefront of the analysis. Nonetheless, courts and legislatures should allow many of the names discussed herein, including religious names like “Messiah” and “ChristIsKing.” Even some of the stranger names like “Talula Does the Hula from Hawaii” should be allowed, giving great weight to parents’ rights and expressive preferences.

CONCLUSION

Courts should consider parents’ rights to name their children fundamental rights that are protected by the Fourteenth Amendment, or consider naming within the guarantee of freedom of speech in the First Amendment. Either analysis would require states to show a compelling interest in order to regulate what parents can name their children. Further, most state interests fail to be compelling enough to justify infringing on individuals’ rights to name their children. However, there should be limits on parents’ rights to name their child, which include a

206. Barbara Goldberg, *New Jersey Couple Loses Custody of Son Named Adolf Hitler*, ABC NEWS (Aug. 6, 2010), <http://abcnews.go.com/us/parents-cannot-regain-custody-children-nazi-inspired/story?id=11334970>.

consideration of neglect or abuse while still remembering that generally parent's know what is in their children's best interest.

