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Best Interest of the Child Should Not Be an Ambiguous Term

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Judge Carl Funderburk[*]

I. Introduction

There is no possible way to determine on any given day of the week the number of court rulings that affect children. In every state's juvenile and family court systems, the "best interest of the child" standard is used to protect children, but there is no concrete definition of this elusive standard.[1] The "best interest of the child" is a noble concept, yet it is unbelievably complicated to define, and even more difficult to put into practice.[2] The notion of "best interest" does not lead to a neutral investigation that points to an obvious result. The "best interest" standard involves decision makers who are interested in the best outcome for children. Each decision maker, however, comes with his or her own set of values, thoughts, and practices regarding child-rearing, and may never see the child whom their decisions affect. Ask anyone who deals with children within the legal system what "best interest" is, and often they will respond, "whatever

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[1] Raymie H. Wayne, *The Best Interests of the Child: A Silent Standard – Will You Know It When You Hear It?*, 2 J. PUB. CHILD WELFARE 33, 34 (2008).

[2] Dana E. Prescott, *The AAML and a New Paradigm for "Thinking About" Child Custody Litigation: The Next Half Century*, 24 J. AM. ACAD. MATRIM. L. 107, 110 (2011).

the judge says it is." The intent of this Article is to propose a structure in determining the definition of "best interest" within the legal system and how the standard should be applied.

The discussion must first begin by explaining the authority of the court, which must be determined in order to understand the court's boundaries. If the court only deals with rights, it stands to reason that the best interest of the child equates to the rights of the child. In applying and balancing the rights of the child, the court should approach this in a common sense manner as set forth by scholars Samantha Brennan and Robert Noggle.[3] This method requires recognizing that children have rights[4] and those rights are equal to the rights of adults.[5] However, the child's rights are applied in a more limited manner because of a child's immaturity and inability to knowingly exercise his or her rights. But once a child matures, either demonstrated prior to reaching adulthood, or upon reaching adulthood, the child is able to exercise their rights for themselves. Until such time, the parents have oversight in protecting their child's rights. When the rights of the child begin to conflict with the rights of the parents, the government may then step in and protect the rights of the child as in the juvenile court system when a child is removed from his or her parents after allegations of abuse or neglect.

This Article will argue that "best interest of the child" is the constitutional right of the child. The court's authority is found in Article III of the U.S. Constitution and the Judiciary Act of 1789.

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[3] *See generally* Samantha Brennan & Robert Noggle, *The Moral Status of Children: Children's Rights, Parents' Rights, and Family Justice*, 23 SOC. THEORY & PRAC. 1 (1997) (observing that children are afforded the same rights that adults have simply by virtue of being a person; therefore, children have the same moral consideration as adults, although they can be treated differently from adults).

[4] *See, e.g.*, Matter of T.M.H., 613 P.2d 468 (Okla. 1980) (reasoning that where a child is to be questioned, there is a requirement for a parent, guardian, attorney, or legal custodian to be present, and the child shall be fully advised of his or her constitutional and legal rights, including the right to be represented by an attorney); *see also* N.J. v. T.L.O., 469 U.S. 325 (1985) (holding that the Fourth Amendment protects children from unreasonable search and seizures conducted by public school officials); *In re* Gault, 387 U.S. 1 (1967) (stating that juveniles have due process rights against compulsory self-incrimination).

[5] Brennan & Noggle, *supra* note 3, at 22.

Based upon this authority, all courts deal in the rights of the individual. These rights are afforded to all individuals, demanding the inclusion of the constitutional rights of the child when interpreting the best interest of a child. The court, in applying the best interest of the child, must therefore balance the constitutional rights of the child against the constitutional rights of the parents. Where the rights of the child are in conflict with the rights of the parent, the court can limit the parental authority over how the parent raises the child.[6]

Part II of this Article posits that the term "best interest" should not be ambiguous—as it is frequently described—and outlines the steps to assist in defining the concept. Part III of this Article argues that the authority of the court only deals with rights, excluding the personal values, morals, and social bias of the judge. Part IV argues that if the authority of the court is to deal in "rights," then the "best interest" of the child must be the rights of the child as opposed to simply what is good for the child. Part V describes that the court reconciles children having rights by recognizing that they are equal rights as to all individuals. Part VI goes on to explain that while those rights may be equal as to all individuals, they are limited during the age of minority of the child. Finally, Part VII emphasizes that during the age of minority, the government, in balancing the rights of the child with those of the parent, may step in when the child's rights conflict with those of the parent.

II. Best Interest of The Child Should Not be an Ambiguous Term

"Best Interest of the child" is often quoted within the hallowed halls of juvenile and domestic courtrooms. The term is almost exclusively used when dealing with the care of children.[7] But

[6] Parham v. J.R., 442 U.S. 584, 631-32 (1979) (Brennan, J., concurring).

[7] Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that parents have the liberty right and obligation to raise and care for their children, which in turn serves the interest of the children). It is not the role of the court system to interfere with this right unless the actions of the parents rise to the level of abuse or neglect. Skrapka v. Bonner, 187 P.3d 202, 214 (Okla. 2008). When the court is required to

what exactly is the "best interest of the child"? Its definition, at best, is ambiguous and left to be defined by that particular court. The term often follows the findings and instructions from the court on the care of a child.[8] "Best interest" becomes a term of art that justifies a court's order for certain conduct, or cessation of certain conduct, for a child's caregiver.[9] In the end, though, the best interest standard should be less discretionary.

A. Defining "best interest"

"Best interest" should be interpreted as the constitutional right of the child, equal to parental rights over that child,[10] with both rights being applied in a limited manner and protected from governmental intrusion by the court. "Best interest" should not be based upon the government or court's standards and values.[11] When this particular term is used in court, it is common for individuals affected by it to search for a definition or guideline for clarification. The court has

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act in order to protect and care for children in place of their parents, it is to be guided by the "best interest of the child." *Id.* at 210.

[8] For example, every finding involving children under Title 10A and Title 43 of the Oklahoma Statutes require the court to make determinations in its rulings that they are in the best interest of the children. The approach is consistent with those found in other jurisdictions. *See In re* Foshee v. Foshee, 247 P.3d 1162, 1167 (Okla. 2010); Murrell v. Cox, 226 P.3d 692, 700 (Okla. 2009); *In re* M.W., 292 P.3d 1158, 1163 (Colo. App. 2012); Sparks v. Sparks, 75 So. 3d 861, 862 (Fla. Dist. Ct. App. 2011); *In re* Welfare of the Child of D.L.D., 771 N.W.2d 538, 546 (Minn. Ct. App. 2009); *In re* Tanghe, 672 N.W.2d 623, 625 (Minn. Ct. App. 2003); Campise v. Campise, 671 N.Y.S.2d 980, 981 (App. Div. 1998).

[9] For example, in hearings to relocate with children, the court is to determine if the request is made in good faith. If the request is made in good faith, then the burden shifts to the non-relocating party to show it is not in the best interest of the children. *See* OKLA. STAT. ANN. tit. 43, § 112.3 (West 2013); *In re* Adoption of C.A., 137 P.3d 318, 319 (Colo. 2006) (en banc); Fredman v. Fredman, 960 So. 2d 52, 58 (Fla. Dist. Ct. App. 2007).

[10] Troxel v. Granville, 530 U.S. 57, 91 (2000) (Stevens, J., dissenting) (explaining that when the rights of the child are in conflict with the rights of the parents, the child's rights should be protected first).

[11] *See* Josh Gupta-Kagan, *Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 43, 95 (2008) (describing the vague, subjective application of the "best interest" standard seen when a court awarded custody to a child's grandparents based on the "Bohemian lifestyle" of the child's father).

struggled in the past with defining terms and the exercise of constitutional rights. Much like the term "obscenity" in 1964, the "best interest of the child" standard is "subjective, difficult to articulate, and differs based upon the unique facts of each case."[12] Justice Stewart will always be remembered for his definition of "obscenity" in *Jacobellis v. Ohio*, when he stated:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that.[13]

After the ruling in *Jacobellis*, it took nine years for the definition of obscenity to develop under the law, and for the courts to feel compelled enough to establish a definition with the *Miller* test.[14] Today, however, we still do not have a working definition of "best interest" as it relates to the precious lives of children and their families.

The "best interest of the child" standard is still applied in an "I know it when I see it" fashion.[15] In fact, "[t]he term is so difficult to define that it has been omitted from the sixth edition of *Black's Law Dictionary* (1990) and from other reference tools designed to translate the law from legalese to a common language understood by those who are affected by the law."[16] Further, "[t]he 'best interest of the child' standard often operates as a fiction to soothe the

[12] Wayne, *supra* note 1, at 36.
[13] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (emphasis added).
[14] *See* Miller v. California, 413 U.S. 15, 25 (1973) (finding obscenity is not protected under the First Amendment and going on to define obscenity as when "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . whether the work depicts or describes, in a patently offensive way, sexual conduct . . . and . . . taken as a whole, lacks serious literary, artistic, political, or scientific value").
[15] Wayne, *supra* note 1, at 36.
[16] *Id.*

conscience of judges, lawyers, and parents who invoke it as a mantra without meaning."[17] This oft-quoted fiction is created by imposing outside values into the family combined with the lack of a working definition of "best interest."

Essentially, all those courts that interact with children have a tendency to overlook the fundamental rights of both the child and parents when applying their own good judgment in the decision making process.[18] A court's order should contain more than, "I find it in the best interest of the child" when ordering how the parent will or will not perform his or her parental duties. There needs to be a balancing of identified rights of both the parents and child.[19]

B. Balancing the rights of parents against the rights of children

Lawyers, parents, and social workers often argue that being in the "best interest" of a child is what that person truly believes is good for the child. Each person's view of what is good for the child is as diverse as the individuals involved. This concept of what is good for the child is not synonymous with what is in the "best interest" of the child. According to the U.S. Constitution, the court should not use the standard that determines what is good for the child, but instead should use the narrower standard that looks to what is in the "best interest" of the child. In other words, "best interest" should protect the rights of the child.[20] The court is only authorized to act based upon the "best interest" of the child; it simply does not have the

[17] *Id.* at 37.

[18] *Id.* at 41 (describing the potential for abuse of the "best interest" standard based on a judge's lack of understanding of available community resources and the complexity of the social problems affecting parties).

[19] *See* OKLA. STAT. ANN. tit. 10A, § 1-1-102 (West 2013) (recognizing that parents have a natural, legal, and moral right, as well as a duty, to care for and support their children, that a child has a right to be raised free from physical and emotional abuse or neglect, and that the State should only intervene when necessary to protect a child from harm or threatened harm).

[20] Due process protections preclude the State from exercising power over persons without appropriate consideration of and preservation of an individual's rights. U.S. CONST. amend. XIV, § 1.

authority to do what is basically good for the child.[21] What is "good" for the child is a much more expansive idea than what is in the "best interest" of a child. What is good for a child is subjective and requires a value decision. Determining the "best interest" of a child requires weighing and balancing the individual constitutional rights of the parents and the child.

Part of the determination of what is good for the child includes an application of a standard of care. Good is a relative term whose weight can only be interpreted by the speaker. Therefore, it is the speaker's interpretation of good, and as such is the speaker's standard of good—meaning good care. But the question is, "*whose* standard of good care should we use?" Often, it is the standard of care of the court itself.[22] Imposing a standard of care does not require a balancing of interests; it merely incorporates the values, thoughts, and desires of the court.[23] This imposition of the court's standard of care upon the parents is paramount to governmental intrusion into

[21] For example, it might be "good" for the court to act out of general concern for the health of an overweight child where the parents were not taking action. However, determining the "best interests" of the child would involve determining the specific needs of the overweight child and whether the parents were attentive to them, including any weight-related medical conditions. The court's authority to demand certain behaviors of the parents must be grounded in an objective determination of the risks the child faces, not upon a subjective, value-based reaction to what the judge thinks the parents are doing "wrong."

[22] Wayne, *supra* note 1, at 37. "The legal literature does not offer much guidance in understanding the meaning of the best interests of the child as a legal standard. One, perhaps cynical, author stated, 'the best interests of the child standard often operates as a fiction to soothe the conscience of judges, lawyers, and parents who invoke it as a mantra without meaning.'" *See also* Nancy Neraas, Comment, *The Non-Lawyer Guardian Ad Litem in Child Abuse and Neglect Proceedings: The King County, Washington, Experience*, 58 WASH. L. REV. 853, 867-68 (1983) (stating that there is no consensus on the meaning of the term "best interests of the child"). These articles represent popular beliefs that the standard is void of content.

[23] A standard of care is subjective and based upon personal values and preferences in how a child should be raised. It is possible for there to be as many as three standards of care in a family matter: the parent, the community, and the judge. The standard of care could best be described as: under a given set of circumstances, what would be a reasonable, prudent person's actions? The less defined the criteria for determining reasonable and prudent, the higher the risk that it is left up to the subjective thoughts of the fact finder.

family life.

In contrast, when acting in the best interest of the child, the court must balance the rights of the parents and the rights of the child. Parents have a constitutional right to due process before the government may intrude upon their parental rights.[24] It is not a matter of the degree of governmental intrusion that invokes the constitutional provisions of due process. Even if the court's intrusion is minimal, due process still is unlikely to be waived.[25] If one right applies, then all rights must apply, including the rights of the children. In recognizing the rights of the parent, the court should not overlook the rights of the child. After all, the court is balancing the rights of the parent with the rights of the child, and where the rights of the child are in conflict with the rights of the parent, the rights of the child should prevail.

C. The need for an objective standard

Parents have a constitutional right to raise their child as they see fit.[26] How can this constitutional right of the parent be weighed against something as elusive as the "best interest" of the child? In light of the difficulty that comes with addressing this question, "there is a fear that judges, either intentionally or unintentionally, will apply their own personal values and preferences to the lives of the families that come before them . . . ."[27] It has been argued, due to the vagueness or lack of criteria of the best interest standard, that decision makers are vulnerable to social biases.[28] In order to balance the constitutional rights of the parent with the best interest of the child, the decision should be based on as objective a standard as

[24] Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 n.12 (1977) (commenting on *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972), noting that the Court rested its holding in part on the constitutional right of parents to assume the primary role in decisions concerning the rearing of their children); *see also* Troxel v. Granville, 530 U.S. 57, 66 (2000) (finding that absent a finding of unfitness, parents are the primary decision makers in raising their children).

[25] *See* Verheydt v. Verheydt, 295 P.3d 1245, 1251 (Wyo. 2013) (noting that a waiver of due process "occurs when there is an intentional relinquishment of a known right manifested in an unequivocal manner").

[26] *Troxel*, 530 U.S. at 69, 71.

[27] Wayne, *supra* note 1, at 41.

[28] *Id.*

possible, rather than on vague and subjective standards of the fact finder.[29] Next, it is important to consider how the authority of the court relates to this fluid definition of "best interest."

III. Authority of the Court

The authority of the courts comes from the United States Constitution and the Judiciary Act of 1789.[30] The U.S. Constitution is a living, historical document allowing the courts to deal only with the rights of the people as opposed to imposing the court's opinion regarding what is merely good for the people. Dealing with the rights of the people includes interpreting rights,[31] enforcing rights,[32] defining rights,[33] limiting rights,[34] protecting rights from intrusion,[35]

[29] BLACK'S LAW DICTIONARY 1413 (7th ed. 1999) (defining standard as "A model accepted as correct by custom, consent, or authority"; "A criterion for measuring acceptability, quality, or accuracy." Further defining objective standard as "A legal standard that is based on conduct and perceptions external to a particular person").
[30] Holmes v. Jennison, 39 U.S. 540, 545 (1840) (answering the question of the authority of the state in depriving an individual's personal liberty, Chief Justice Taney stated, "[W]here is drawn in question, among other subjects, the validity of an authority exercised under any state, on the ground of such authority being repugnant to the Constitution or laws of the United States, and the decision of the state Court is in favour of the validity of such authority").
[31] Abbott v. Abbott, 130 S. Ct. 1983, 1992-93 (2010) (interpreting the rights of a custodial parent under the Hague Convention).
[32] Gonzaga Univ. v. Doe, 536 U.S. 273, 288 (2002) (holding that the Family Educational Rights and Privacy Act (FERPA) creates no personal rights to enforce under Section 1983, barring a former university student's claims under that section).
[33] McDonald v. City of Chi., Ill., 130 S. Ct. 3020, 3020 (2010) (holding that the Second Amendment right to bear arms is fully applicable to the States by virtue of the Fourteenth Amendment).
[34] Blair v. City of Chi., 201 U.S. 400, 457-58 (1906) (limiting the rights to use the Chicago streets for street railway purposes based upon the Court's interpretation of the actions between the parties).
[35] The Civil Rights Cases, 109 U.S. 3, 17 (1883) (finding that rights and privileges are secured by the Fourteenth Amendment by way of prohibition against state laws and proceedings affecting such rights and privileges).

and giving consequences when rights are violated.[36] Therefore, the court is required to interpret and define "best interest" of the child as the rights of the child. When the parental rights come into conflict with the rights of the child, the court may protect the child's rights by limiting the parent's conduct or enforcing the child's rights by removing the child from the parents' care. But until there is a balancing of rights between the parents and child, the court should protect the rights of the parents from governmental intrusion.

A. Constitutional limits on actions by the courts

Today's court system was authorized such that the judicial power "shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."[37] The Judiciary Act of 1789 set up the court structure, with each court's authority arising under the Constitution.[38] In a speech at Georgetown University on October 25, 1985, Justice William Brennan Jr. stated, "The Constitution on its face is, in large measure, a structuring text, a blueprint for government. And when the text is not prescribing the form of government it is limiting the powers of that government."[39] The Constitution limits the authority and power of the executive and judicial branches of government to interfere into the private life of the home.

Therefore, the government's limitation is based upon the rights of the individuals.[40] The more intrusive government action in the private life of the family becomes, the greater the need to protect the individual rights within the family unit and avoid judgments that

[36] Willson v. Black-Bird Creek Marsh Co., 27 U.S. 245, 252 n.1 (1829) (addressing the question of public use of land and proper compensation regarding rights of individual property owners).
[37] U.S. CONST. art. III, § 2.
[38] Matter of Steamboat Josephine, 39 N.Y. 19, 21 (1868).
[39] Justice William J. Brennan, Jr., Speech at the Text and Teaching Symposium, Georgetown University, Wash. D.C. (Oct. 12, 1985) [hereinafter Justice Brennan, Jr., Speech], *transcript available at* http://www.pbs.org/wnet/supremecourt/democracy/sources_document7.html.
[40] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 636-37 (1943) (stating that government power is limited in favor of individual freedom).

may temporarily appear to be the "public good."[41] Life within the home is in need of the utmost protection due to its private nature.[42] The governmental entities that yield power over individuals must recognize the constitutional limitations to act. "The challenge is essentially, of course, one to the capacity of our constitutional structure to foster and protect the freedom, the dignity, and the rights of all persons within our borders, which it is the great design of the Constitution to secure."[43] The court must scrutinize and limit any governmental action that hinders family interaction. However, when the court does intervene into the affairs of the family, court intervention should necessarily protect the rights of the family, which involves balancing the individual rights of each family member.

B. Balancing the rights of all involved

A judge must carefully balance the rights of all family members involved and not exercise his or her own authority according to his or her own morals and values.[44] Justice Brennan quoted Justice Robert Jackson in stating, "the burden of judicial interpretation is to translate 'the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century.'"[45] These restraints should be exercised as courts interpret and protect the rights of the entire family. However, this "concrete restraint" fell to the wayside as complicated family issues were presented before the court. Courts now fashion remedies to everyday issues within the family, claiming to act in the "best interest" of the child. Yet, because of the court's subjective definition of "best interest," this encroaches the court's standards and values on raising a family into someone else's home.

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[41] Justice Brennan, Jr., Speech, *supra* note 39 ("As government acts ever more deeply upon those areas of our lives once marked 'private,' there is an even greater need to see that individual rights are not curtailed or cheapened in the interest of what may temporarily appear to be the 'public good.'").
[42] Poe v. Ullman, 367 U.S. 497, 550 (1961) (Harlan, J., dissenting).
[43] Justice Brennan, Jr., Speech, *supra* note 39.
[44] Wayne, *supra* note 1, at 41.
[45] Justice Brennan, Jr., Speech, *supra* note 39 (quoting Justice Robert Jackson in *Barnette*, 319 U.S. at 639).

In defining "best interest" as the rights of the child, the court must determine which rights its orders protect, thus restraining the court from imposing its own version of "good" in the name of "best interest."

It has long been recognized that parents have a fundamental constitutional right to the upbringing of their children. In *Pierce v. Society of the Sisters*, the U.S. Supreme Court ruled that the Fourteenth Amendment provides a liberty interest in a parent's or guardian's right to decide the mode in which his or her children are educated.[46] The state may not usurp this right when the questioned legislation does not reasonably relate to a viable state interest.[47] The Court, in declining to give an exact definition of the liberties guaranteed under the Fourteenth Amendment in *Meyer v. Nebraska*, did recognize that included within the Fourteenth Amendment is the freedom from governmental interference in the private home, particular regarding child rearing.[48] This Constitutional protection can only be guaranteed when protecting and balancing all individual rights of each family member.

Another example of the protection of the private family unit is illustrated in the Court's ruling in *Wisconsin v. Yoder*. The Supreme Court held that a Wisconsin law that compelled parents to send their children to public school until the age of sixteen was unconstitutional as applied because it impermissibly interfered with the plaintiff's Amish religious beliefs.[49] Soon after this decision, the rights afforded to children began to evolve as courts dealt with family issues. It is in

[46] Pierce v. Soc'y of Sisters, 268 U.S. 510, 533-34 (1925).
[47] *Id.* at 534 (quoting Meyer v. Nebraska, 262 U.S. 390 (1923) and stating that parents have a liberty interest in the upbringing of children). The Supreme Court further found that the legislation prohibiting parents from choosing private education for children unreasonably interfered with liberty of parents to direct upbringing of children. *Id.*
[48] *Meyer*, 262 U.S. at 398.
[49] *See generally* Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) (stating that a state's interest in universal education, however highly ranked, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those protected by the free exercise clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children).

such complex family cases, while balancing individual rights, that courts need to retain the essence of the Constitution and not impose their own substantive values over the rights of the individual.

The Thirteenth and Fourteenth Amendments, adopted in 1865 and 1868 respectively, were a response to the deprivation of rights by the states,[50] declaring that no person can be deprived of life, liberty, or property without the due process of law.[51] The Supreme Court emphasized, in *Parham v. J.R.*,[52] the necessity of balancing "the family as a unit with broad parental authority over minor children" and "children hav[ing] a substantial and protectable liberty interest."[53] The family and each of its members are constitutionally protected from governmental intrusion. As a result, "the Court concluded that parents retain a 'substantial, if not dominant, role in the decision . . . absent a finding of neglect or abuse.'"[54] Consequently, courts must carefully weigh the constitutional rights of the family and not impose their own values and morals onto the upbringing of the children.

Even the best interest standard, without a balancing of rights, can be devoid of objective value in visitation disputes as well.[55] Without a balancing of rights, there is concern that a judge will impose his or her subjective values and bias.[56] So, some judges put

[50] Several southern states were not willing to enforce the Thirteenth Amendment abolishing slavery and involuntary servitude. *See* Gordon Leidner, *The Thirteenth Amendment*, GREAT AM. HIST., http://www.greatamericanhistory.net/amendment.htm (last visited May 28, 2013). The Fourteenth Amendment acknowledged a constitutional right and provided, for those affected, a cause of action against the states that refused to enforce the Thirteenth Amendment. The Civil Rights Cases, 109 U.S. 3, 11 (1883).
[51] U.S. CONST. amend. V.
[52] Parham v. J.R., 442 U.S. 584, 631-32 (1979) (Brennan, J., concurring).
[53] Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 80 (2011).
[54] *Id.*
[55] *See* Alessia Bell, Note, *Public and Private Child:* Troxel v. Granville *and the Constitutional Rights of Family Members*, 36 HARV. C.R.-C.L. L. REV. 225, 254 (2001) ("In the name of the child's best interests, courts have denied custody based on a parent's sexual orientation, race, financial status, or presumed promiscuity.").
[56] *Id.*

forth the mantra of "best interest" as if this lessens the subjectivity of imposing their own values. All decisions regarding the life of a child must be in the "best interest" of the child. The judge often begins his or her ruling with "I find it in the best interest of the child to . . . " and then proceeds to announce how the child will be raised. Often, it is never mentioned how the ruling is in the "best interest" of the child, thus leaving it up to whatever the judge says it is. Award or denial of parental visitation often amounts to little more than a good faith guess based on a judge's personal experience and preference about what best serves the child.[57] For example, in *Troxel v. Granville*, the trial judge ordered visitation to the child's grandparents based on the judge's own memories of childhood vacations with his grandparents.[58] In overturning the trial judge's decision, however, the Supreme Court nonetheless refused to question more broadly—beyond an as-applied analysis—the constitutionality of the best interests standard.[59]

Clearly, when a judge imposes his or her own standards and values in decisions affecting the family, this action invades into private family life, thus violating the constitutional guarantee against governmental intrusion. The Fourteenth Amendment cannot be disregarded or diluted with judicial determination as to the "best interest" standard. Justice Brennan warned of weakening the Constitution in this way when he stated: "the Fourteenth Amendment by a process of absorption . . . has had its source in the belief that neither liberty nor justice would exist if [those guarantees] . . . were sacrificed."[60] Even during the Constitutional Convention, it was argued that "[t]he Judiciary ought to have an opportunity of remonstrating [against] projected encroachments on the people as well as on themselves. It had been said that the Judges, as expositors

[57] *Id.*
[58] *Id.*
[59] *Id.* (noting that the "*Troxel* plurality recognized the best interests trap [that the standard is devoid of objective value in visitation disputes] but failed to escape its grasp" and go beyond the case before the court in attempting to define 'best interest').
[60] Justice Brennan, Jr., Speech, *supra* note 39 (quoting Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 326 (1937).

of the Laws would have an opportunity of defending their constitutional rights."[61] Without an objective "best interest" standard, there are no checks and balances on the encroachments into the family that the executive and judicial branch of government may conceive.

Therefore, under the U.S. Constitution, it is the role of the court to limit governmental intrusion into the life of the family. Interference in family life should only occur if there is a compelling state interest or to protect the rights of individual family members against one another. This includes the rights of children. The court should recognize and balance the rights of each family member before the court determines the need to interfere into the family.

IV. Rights Encompass All Individuals

While rights have evolved over time, children's rights have not always been clearly recognized. For many years, children constituted "property" under the authority of their fathers, ignoring any constitutional rights of the mother.[62] This viewpoint eventually gave way to the "tender years" doctrine, which found that, all things equal, young children should primarily be in the care and custody of their mothers.[63] It appears that the effects of the movement to recognize women's rights included the area of family law. And during this time, the courts continued to act with an ambiguous definition of "best interest of the child"; hence, family issues continued to come before the court, subject to the standards and values of the judge.

A. Protecting the rights of the family

The ultimate protection in limiting governmental intrusion

[61] James Wilson, Debate from the Constitutional Convention Regarding the Function of the Judiciary (July 21, 1787), *transcript available at* http://www.pbs.org/wnet/supremecourt/democracy/sources_document5.html.
[62] Mercein v. People *ex rel.* Barry, 25 Wend. 64, 64 (N.Y. 1840); *see also* Com. v. Briggs, 33 Mass. (16 Pick.) 203, 205 (1834) (holding that the father, in general and by law, is entitled to the custody of his child).
[63] OKLA. STAT. ANN. tit. 30, § 11 (repealed 1983); *see* ROBERT G. SPECTOR, OKLAHOMA FAMILY LAW: THE HANDBOOK 314 (2011-2012 ed. 2011).

into the family can only be done through the courts of justice. As stated before, it is the role of the court to protect the constitutional rights of each family member. "Without this, all the reservations of particular rights or privileges would amount to nothing."[64] Accordingly, the courts are designed to protect the rights of the people and, when it comes to family law, the rights of the family. As previously discussed, governmental intrusion is only appropriate to protect the rights of a family member as balanced against one another. Based upon the role of the court, the use of the "best interest" definition must be limited so as not to infringe on the constitutionally protected rights of all family members.

With this understanding, the Constitution does not allow judges to impose their own standards and values into the private lives of families. As Alexander Hamilton, a Founding Father of the United States, stated, "[t]hey (being judges) ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."[65] The court's role is to protect the personal rights of individuals guaranteed by the Constitution without imposing personal judicial standards and values. "The protection of individual rights through judicial review remains an irreplaceable protection for individual freedom in the United States."[66] The safeguarding of personal rights of the family members is better protected when determining best interest requires recognizing and balancing the rights of parents and children.

It has been suggested that the "legislatures and courts have defined and re-defined the contours of factfinding [sic] and the scope of judicial authority in child custody litigation by adjusting the century-old mantra 'best interest of the child.'"[67] The phrase "best interest" implicates a range of public policy and personal values potentially as divergent and numerous as there are judges.[68] But best for whom? If it is best for the child, why and how so? If it is best for

[64] THE FEDERALIST NO. 78 (Alexander Hamilton).
[65] *Id.*
[66] RALPH C. CHANDLER ET AL., CONSTITUTIONAL LAW DESKBOOK: INDIVIDUAL RIGHTS 8 (2d ed. 1993).
[67] Prescott, *supra* note 2, at 110.
[68] *Id.* at 110.

the family, it seems this would necessitate defining the why and how for each family member. This implies, in and of itself, a balancing of interest between all family members. Whose standard shall apply to raising a child? If the best interest standard is left to the court's discretion, how does this allow for a "judicial [system] that is predictable, determinate, and knowledge-based"?[69]

B. Protecting children under the *Parens Patriae* doctrine

To provide some guidance for determining the best interest of the child, the government's role has been labeled *parens patriae*.[70] The *parens patriae* doctrine grants the state with inherent power and authority to protect persons who are legally unable to act on their own behalf, such as children.[71] The law presumes that parents act in the best interest of their children.[72] However, when the state believes that parents are not acting in the best interest of the child, the state may intercede on behalf of the child under the *parens patriae* doctrine. Thus, the doctrine creates a state actor who imposes its own morals and viewpoints upon parents who have the right to raise their children as they see fit. The Constitution limits these intrusions into

[69] *Id.* at 119.

[70] Mahmoodjanloo v. Mahmoodjanloo, 160 P.3d 951, 956 (Okla. 2007) (Kauger, J., concurring) (acknowledging that the State of Oklahoma has a right in the role of *parens patriae* to preserve and promote the welfare of children).

[71] Sauro v. Sauro, 42 A.3d 227, 237-38 (N.J. Super. Ct. App. Div. 2012) (noting that the *parens patriae* doctrine authorizes the Family Court to modify freely negotiated arbitration clauses concerning child custody and parenting time, by imposing judicial oversight to prevent an adverse impact or harm to the child); *see also* Sizemore v. Pickett, 76 So. 3d 788, 795 (Miss. Ct. App. 2011) (raising issues pertaining to the child's welfare and parental fitness and finding that the court possesses a duty to determine the best interest as *parens patriae*).

[72] *In re* Bordalo, 55 A.3d 982, 984 (N.H. 2012) (recognizing the parents' fundamental liberty interest in raising their children and this does not go away simply because the parents have not been model parents); *see also* Norrod v. Norrod, 165 P.3d 366, 370 (Okla. Civ. App. 2007) (holding that to obtain custody in a divorce proceeding over the objection of a parent, a grandparent must show the parent's unfitness by evidence that is clear and conclusive, and makes the necessity for doing so appear imperative; the unfitness may not be demonstrated by a mere comparison between what is offered by the competing parties, but only by a showing that the parent cannot reasonably be expected to provide for the child's ordinary comfort or intellectual and moral development).

the family. Judicial oversight is required for the government to infringe upon the family's rights. Without a judicial determination of neglect or abuse, there is no legal basis for intruding into the family.

Parens patriae in America came from the British rule that granted the royal prerogative of the King to act in his capacity as *parens patriae*, or universal trustee.[73] In *McIntosh v. Dill*, the Oklahoma Supreme Court held that "well-organized and civilized government requires the power to control the persons and property of . . . infants, lunatics, and those held incompetent," under *parens patriae*.[74] *Parens patriae* is meant to promote action in the best interest of the child.[75] Judge Cardozo described the doctrine in *Finlay v. Finlay* as the judge putting:

> [H]imself in the position of a 'wise, affectionate and careful parent' and mak[ing] provision for the child accordingly. . . . He 'interferes for the protection of infants, . . . by virtue of the prerogative which belongs to the [state] as parens patriae.' The 'paramount consideration for the court at the time of divorce, or at the time of a requested alteration of a decree regarding custody, is the present and future welfare and well-being of the child.'[76]

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[73] Dollar Sav. Bank v. United States, 86 U.S. 227, 239 (1873); *see also* United States v. Wittek, 337 U.S. 346, 359 n.16 (1949) ("The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him (the King of England) in the least, if they may tend to restrain or diminish any of his rights and interests. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts.").

[74] Jones v. Jones, 680 S.W.2d 118, 121 (Ark. Ct. App. 1984) (holding that the state should not interfere with parental rights to their children unless there is a failure to discharge the parental duty); McIntosh v. Dill, 205 P. 917, 917 (Okla. 1922); *see also In re* G.W., 977 N.E.2d 381, 385 (Ind. Ct. App. 2012) (noting that the state has a compelling interest in protecting children and the authority to intervene when parents abuse, neglect, or abandon their children (citing G.B. v. Dearborn Cnty. Div. of Family & Children, 754 N.E.2d 1027, 1032 (Ind. Ct. App 2001) *trans. denied* (2002)).

[75] Prescott, *supra* note 2, at 123.

[76] *Id.* at 122 (internal quotations omitted).

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But *parens patriae* does not supersede the Constitution,[77] consequently bringing into question the standard used in making provisions for a child. Under the Constitution, does a judge have the authority to place him or herself in an "affectionate and careful" position when dealing with children? The courts are concerned "about diminished capacity of youth," and "the Court has consistently recognized the State's need to adjust its legal system to account for the unique role of the family and the vulnerability and special needs of the minor."[78] But this adjustment of the legal system has led the courts to do what is good for the child, not what is in the "best interest" of the child. What is good for the child is much more expansive and subjective than what are the rights of the child as in "best interest."

Judges should consider the fundamental constitutional rights of all family members rather than simply applying their own judgment over that of the parents. The Constitution provides a very narrow scope for allowing intervention into the family. The judge's authority to act in the best interest of the child is based upon evidence of abuse, neglect, or abandonment. When court intervention is necessary, it demands the balancing of the rights of the parent with those of the child. The court must respect the parental standard of care for the child unless the parents' conduct rises to the level of abuse or neglect, affecting the child's health, welfare, safety, or creating a risk of imminent harm.

V. Rights of the Child

Parents are not the only persons who have rights under the Fourteenth Amendment; children do as well. Since *In re Gault*, the court system has begun recognizing children as having constitutional

[77] *In re G.W.*, 977 N.E.2d at 384-85 (holding that the Fourteenth Amendment protects a parent's fundamental right to raise a child, but that said right was not unlimited; the state has a compelling interest in protecting the welfare of children and, where there is neglect, abuse, or abandonment of the children, the state has authority under *parens patriae* to intervene).

[78] Henning, *supra* note 53, at 83.

rights.[79] Because children are recognized as having constitutional rights, state intrusion into the family requires the child's rights to be recognized in the balancing of all family members' rights before state action can begin. *In re Gault*, a landmark U.S. Supreme Court decision, held that juveniles accused of crimes in a delinquency proceeding must be afforded the same due process rights as adults, such as the right to timely notification of the charges, the right to confront witnesses, the right against self-incrimination, and the right to counsel.[80] *In re Gault* recognized children's rights for the first time, noting that the Fourteenth Amendment and the Bill of Rights did not apply exclusively to adults.[81] However, in establishing that children were guaranteed rights under the Fourteenth Amendment, the *Gault* Court noted:

> The Court's concerns for the vulnerability of children is demonstrated in its decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State. With respect to many of these claims, we have concluded that the child's right is virtually coextensive with that of an adult.[82]

In other words, the Court recognized that children have rights to be protected, but left the questions as to how the child's rights stood against those of the parents, and when a child should be allowed to exercise these rights. The Court answered these questions in a subsequent case, *Bellotti v. Baird*.

In *Bellotti v. Baird*, the Supreme Court continued to recognize a child's rights as being protected by the same constitutional guarantees as adults, but allowed the state to take into account "children's vulnerability and their needs for 'concern, . . . sympathy,

[79] Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 230 (1973) (Powell, J., concurring) (recognizing that all children everywhere in the nation are protected by the Constitution and could seek redress from the courts if those constitutional rights were violated).
[80] *In re* Gault, 387 U.S. 1, 13 (1967).
[81] Henning, *supra* note 53, at 62 (quoting *In re Gault*, 387 U.S. at 13).
[82] Bellotti v. Baird, 443 U.S. 622, 634 (1979).

and . . . paternal attention.'"[83] The state could account for these concerns by adjusting its legal system, due to the fact that children "lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[84] As only the child's vulnerability may be taken into account, it follows that the state's adjustment of its legal system does not include disregarding the parental rights to the upbringing of their children. Short of abuse or neglect, parents continue to have a constitutional right in raising their children based upon the parents' standards and values, not the state's standards and values.[85] The Supreme Court in *Bellotti*, for example, recognized the crucial right of parents to control the nurturing and direction of their child's destiny.[86] It was viewed as the role and obligation of the parents to instill moral standards and religious beliefs as they prepared their child for active citizenship.

The Constitution protects the rights of parents to exercise their standard for raising a child against governmental intrusion, except for abuse or neglect that affects the child's health, welfare, or safety.[87] The court should not override the parents' standard of care with its own.[88] When a court does not distinguish between what is best for the child and what is in the best interest of the child, the court therefore begins to delve into childrearing, which is prohibited by the Constitution. The Supreme Court in *Bellotti* recognized the constitutional rights of parents to determine the upbringing of their children without interference by acknowledging liberty and freedom

[83] *Id.* at 635 (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971)).
[84] *Id.*
[85] *See In re* G.W., 977 N.E.2d 381, 385 (Ind. Ct. App. 2012) (noting that the state has a compelling interest in protecting children and the authority to intervene when parents abuse, neglect, or abandon their children).
[86] *Bellotti*, 443 U.S. at 637-38.
[87] *See supra* Part III.
[88] Parham v. J.R., 442 U.S. 584, 623-25 (1979) (Stewart, J., concurring) (discussing the rebuttable presumption that parents act in the best interest of their children, recognizing a child's rights under the Fourteenth Amendment, noting the balancing of the parents' and child's rights, and the state's authority for intervention only in the event of abuse or neglect); *see* Troxel v. Granville, 530 U.S. 57, 70 (2000) (ruling in favor of the grandparents based upon the judge's own relationship with his grandparents growing up).

of choice in raising a child based upon the parents' "ethical, religious," and "political beliefs" that "the state can neither supply nor hinder."[89]

Given this information, how is the court to recognize, interpret, and protect the rights of the child? As the Court in *Bellotti* stated, "if the child shows that she is 'mature enough and well enough informed' to understand the procedure and to make an intelligent assessment of her circumstances, she is entitled to exercise her right . . . without interference by her parents."[90] This reasoning underscores the fact that the law does not change, but the child's understanding and maturity transforms, entitling him or her to more fully exercise his or her rights. The lady holding the scales of justice is blindfolded for a reason. The law is applied to all equally; race, religion, gender, and age are not contributing factors. The facts change from one case to the next, but the application of the law to those facts should not change.

As noted in *Bellotti*, it is the child's ability to understand and make an intelligent assessment of his or her rights that determines his or her ability to exercise those rights, though balanced against the parents' right in raising their child.[91] And it is the Constitution that protects the private lives of families from court intrusion.[92] Accordingly, "the entry . . . into a home, for whatever purpose, represents the greatest governmental intrusion into an individual's privacy."[93] Most often, these types of intrusions dictate and affect the parents' standard of care.[94] But this "standard of care" is constitutionally protected from governmental intrusion within the

[89] *See Bellotti*, 443 U.S. at 638 (describing the state's dedication to individual freedom and freedom of choice as the basis for refraining from dictating the way parents should raise their children).
[90] *Id.* at 643.
[91] *Id.* at 633-34.
[92] *Troxel*, 530 U.S. at 65-66.
[93] Henning, *supra* note 53, at 89. This entry into the home may include, for example, state intervention, a parenting coordinator's decision, or a court order limiting or denying parent conduct. *Troxel*, 530 U.S. at 68.
[94] *Troxel*, 530 U.S. at 68-69.

home, with an exception for abuse and neglect.[95] A parent's right to raise his or her child according to his or her standard of care must be recognized when interpreting the "best interest of the child."[96]

Over time, the courts have recognized the constitutionally protected interest in parents' rights to raise their children as they deem appropriate, with minimal government interference.[97] This is as fundamental as the parents' right to establish their home, which includes the raising of their children.[98] After all, the courts begin with the presumption that parents act in the child's best interest. Due process requires the balancing of the rights of parents and children before the government may interfere in the family. Due process also protects the constitutional rights of the individual family members through the presumption that parents act in the best interest of their children.[99] This governmental interference includes the court's decisions regarding the choice of educational needs, religion, medical care, discipline, recreational activities, and so forth.[100] If the courts are going to recognize, and hold accountable to some limited degree, the parents' responsibility to raise their children, then parents "are

[95] Gates v. Tex. Dep't of Protective & Regulatory Servs., 537 F.3d 404, 429 (5th Cir. 2008).
[96] *Id.*
[97] *Troxel*, 530 U.S. at 79 (Souter, J., concurring).
[98] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[99] Henning, *supra* note 53, at 74; *see also* Donald C. Hubin, *Parental Rights and Due Process*, 1 J.L. & FAM. STUD. 123, 132 (1999) (stating that the rights of the parents to raise their children is fundamental and protected by the Fifth and Fourteenth Amendments, that due process protections are invoked when governmental action threatens parents' rights to the custody of their children, and that parents may not be deprived of the right to raise their children absent a strong governmental interest); *see also US Supreme Court Upholds Parental Rights in* Troxel v. Granville—*June 2000*, FAM. CT. VALUES BLOG (Apr. 12, 2009, 1:31 PM), http://familycourtvalues.blogspot.com/2009/04/us-supreme-court-upholds-parental.html (noting that without a finding of parental unfitness, courts infringe upon parental rights if they make decisions contrary to parental determinations of what is in their child's "best interest"); *Who Really Guards the Bill of Rights? Its Not Conservatives*, FAM. CT. VALUES BLOG (Apr. 8, 2009, 7:51 AM), http://familycourtvalues.blogspot.com/2009/04/who-really-guards-bill-of-rights-its.html.
[100] *Meyer*, 262 U.S. at 399.

entitled to the support of laws designed to aid discharge of that responsibility."[101] There are legal restrictions placed on children in recognition of parental roles that are vital to the child's opportunity for growth and maturity, and which uphold our free society.[102] "Thus, both legislative and judicial deference to parental control and instruction prepares children to live independently and advances individual freedoms and liberty in society."[103] Governmental interference within the home requires a compelling state interest.[104] A decision involving the home affects all family members.[105] The Constitution applies equally to both parent and child and "the court should balance those rights."[106]

VI. Parental Rights Versus Children's Best Interest

Once it is established that all family members have constitutional rights, the task in defining and protecting those same rights results from balancing them. This requires three considerations: these rights are equal; the child's rights may be treated as unequal, balanced against the rights of the parents; and the state, in balancing the child's rights, can limit the parents' rights.[107]

A. Equal consideration

The fact that they are children does not support the idea that their rights are inferior to the rights of their parents.[108] "Although it is virtually undisputed that children have some Fourth Amendment rights independent of their parents, it is equally clear that [in some

[101] Henning, *supra* note 53, at 75.
[102] *Id.*
[103] *Id.*
[104] Croft v. Westmoreland Cnty. Child. & Youth Servs., 103 F.3d 1123, 1125 (3d Cir. 1997).
[105] *See, e.g.*, CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 4-5 (2012), https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf (noting the importance of maintaining sibling and other close family bonds when children are removed from their homes).
[106] Brokaw v. Mercer Cnty., 235 F.3d 1000, 1019 (7th Cir. 2000).
[107] Brennan & Noggle, *supra* note 3, at 3.
[108] *Id.*

circumstances youth will receive] less constitutional protection than adults."[109] When determining constitutional rights, it has been argued that children should have equal consideration.[110] The difference is, as in *Bellotti*, the child's ability to fulfill their role in appreciating and applying those rights.[111] This equal consideration theory is based upon a common sense approach of three equal theses: Equal Consideration Thesis, Unequal Consideration Thesis, and Limited Parental Rights Thesis.[112] It has been further argued that equal consideration should be given to everyone due to his or her moral status.[113] The equal consideration theory should be applied to the rights of individuals. Children are entitled to moral consideration simply because they are persons.[114] The Constitution, under this same premise, protects rights of all individuals without exception.[115] Because children are persons, they are entitled to the same constitutional protections as any adult.[116] In order to deny this assertion, one would need to argue either that individuals do not derive their rights from their status as persons, or that children are not individuals.[117]

Therefore, by virtue of "being," the same rights protected for

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[109] Henning, *supra* note 53, at 59.
[110] Brennan & Noggle, *supra* note 3, at 2.
[111] *Bellotti*, 443 U.S. at 634.
[112] Brennan & Noggle, *supra* note 3, at 3 (offering a rights-based theory of the moral status of children that the authors claim both meets the constraints that define the commonsense position and resolves the internal conflicts the three theses may propose). By "distinguishing basic rights to which all persons are entitled from constructed rights that depend on factors besides one's status as a person, and by thinking of parental rights as stewardship rights and thus as right with thresholds, we can reconcile the three claims that make up the commonsense position with regards to the moral status of children." *Id.* at 13.
[113] *Id.* at 2.
[114] *Id.*
[115] *See* U.S. CONST. amend. XIV, § 1 ("*All* persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .") (emphasis added).
[116] Brennan & Noggle, *supra* note 3, at 3.
[117] *Id.*

adults also belong to children.[118] Those rights "include the rights to life, liberty, property, and freedom from deliberate harm."[119] But when do rights become protected by the Constitution and enforceable through the courts? As far as the right to life, it attaches to the child at a certain term *in utero*.[120] The right to liberty is up for debate since *Roe v. Wade*[121] as to when the court can take action, balancing the rights of the woman and a viable unborn child. One of the challenges is seen in *Bellotti* with the exercise of a minor's right to obtain an abortion without parental consent.[122] In another instance, regarding the right to property, it is a matter of determining age and maturity in order for the child to act based upon his or her own best interest.[123] The right to freedom from deliberate harm attaches immediately at birth and is enforceable by the courts without question.[124]

It is not when the rights attach to the child that matters; it is when these rights can be exercised by the child and balanced within the framework of the parental rights and best interest of the child.[125] According to the *Bellotti* court, a child may exercise his or her rights independently of his or her parents when the child understands,

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[118] *Id.*
[119] *Id.* at 6.
[120] As the Court struggles with the issue of abortion, they have found that states have an interest in the unborn child at the point of being viable. The state argues it has an interest over the privacy rights of the mother to regulate in a limited manner the issue of abortion on behalf of the fetus. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 520 (1989).
[121] Roe v. Wade, 410 U.S. 113 (1973).
[122] *Bellotti*, 443 U.S. at 640-41.
[123] Pavlides v. Niles Gun Show, Inc., 637 N.E.2d 404, 409 (Ohio Ct. App. 1994) (stating minors are prohibited from purchasing guns or ammunition); *see* Berg v. Traylor, 56 Cal. Rptr. 3d 140, 146-47 (Ct. App. 2007) (placing a limitation on minors signing contracts); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 588-89 (2001) (Thomas, J., concurring) (stating that every state prohibits the sale of alcohol to those under age twenty-one).
[124] R.W.D. v. Walker Cnty. Dep't of Human Res., 808 So. 2d 46, 48 (Ala. Civ. App. 2001) (removing a child that tested positive for cocaine at birth from the care of the parents); *see also In re* C.L.G., 956 A.2d 999, 1005 (Pa. Super. Ct. 2008) (involuntarily terminating the parental rights of a mother who was incarcerated).
[125] *Bellotti*, 443 U.S. at 635.

appreciates, and can intelligently exercise those rights.[126] But until that time, the parents are responsible for preparing their child for adulthood.[127] The responsibility of that parent is to raise a child with the values and morals that align with the family, whether or not the court agrees with those values and morals.[128] This responsibility falls on the parent, until such time that the child can either intelligently exercise his or her broad constitutional right, as well as statutorily acknowledged rights, such as driving a car, voting, or purchasing firearms. Such statutory rights may be curtailed in ways that otherwise could not constitutionally be limited in the case of an adult.[129]

The right to abortion is another example of a right that depends on the maturity of the child who is exercising the right. Before a child may obtain an abortion without parental consent, she must demonstrate the ability to intelligently and knowingly exercise that right. For some rights, however, the court has upheld that the only requirement for this determination is the age of the child. An eighteen-year-old does not need to demonstrate that he or she can intelligently vote for a candidate, as age is the only legal requirement. But before the child may exercise his or her right, the child may be treated differently than adults. Until the child can demonstrate the above criteria, there is the unequal treatment of the child in exercising the constitutional right to privacy.[130] Requiring the legal process for a minor to petition the court for an abortion without parental consent allows the rights of the child to be recognized as equal, but subject to the parents' oversight and standards. When a judge determines a child has met her burden of proof to obtain an abortion without parental consent, that child has equally recognizable rights as the parental rights. But without a court order, the exercise of

[126] After taking testimony from the juvenile, a judge must determine whether or not the juvenile has demonstrated the necessary criteria based upon *Bellotti* and the statutes to grant her request to have an abortion without parental consent. *Id.* at 633-34.
[127] *Id.*
[128] Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).
[129] *Bellotti*, 443 U.S. at 634.
[130] *Id.*

the child's rights can be limited. This is the unequal treatment of the child's rights, which leads to the next proposition.

B. Unequal thesis: parental authority over their children's rights

There are certain activities adults may freely participate in that would neither be in the child's "best interest," nor appropriate for someone under the age of eighteen. While it would be unconstitutional to prohibit an adult from participating in these activities, children can be prohibited from participating in them by the executive and judicial branches of government.

> The Unequal Treatment Thesis: Children – at least at certain ages – can be legitimately prevented from doing certain things that it would be illegitimate to prevent adults from doing. Most of us accept this thesis. Well-known and plausible examples of things we allow adults but not children to do are voting, driving cars, owning firearms, signing contracts, and drinking alcohol.[131]

Even though children may have rights, the ability to exercise those rights is legitimately prevented until either of two occurrences. As in *Bellotti*, the child must first be able to demonstrate that he or she is mature enough to exercise those rights;[132] and second, the child must be able to exercise those rights upon reaching the appropriate age. The legislature has limited the exercise of certain rights until reaching what has been deemed a permissible age, for example, to vote or enter into a contract.[133] It is permissible to limit a person's right to enter into a binding contract until he or she reaches the age of eighteen. If a child is emancipated before the age of eighteen, however, a court has determined that the child has demonstrated the maturity to exercise the right to contract. "A person can have a role-

[131] Brennan & Noggle, *supra* note 3, at 3.
[132] *Bellotti*, 443 U.S. at 633-34.
[133] KAN. STAT. ANN. § 38-101 (West 2013) (stating that eighteen is age of majority, except that persons sixteen or over who are or have been married are considered to be of age for all matters relating to contract, property rights, liabilities, and capacity to sue and be sued); Brennan & Noggle, *supra* note 3, at 7.

dependent right only if she can fill the role in question. When rights depend on roles, if you can't play the role, then you don't get the right."[134] Legislation has declared children incapable of exercising certain rights, presumably because children do not have the requisite level of intellect necessary to make rational decisions in exercising those rights.[135] As long as the parents act in the best interest of their children, parents have "stewardship rights."[136] It is suggested that 'parent-as-steward' carries with it duties toward the child. Those duties include "not violating the rights of the child," not allowing others to do so, and promoting "the interest of the child."[137]

This presumption of parental duty over the exercise of the child's rights is not the same as balancing the rights of the parent and the rights of the child.[138] This difference is considered under the Limited Parental Rights Thesis in which "[p]arents can legitimately exercise limited but significant discretion in raising children."[139] The Constitution and various statutes[140] acknowledge the parent's responsibility and the right of the child to be raised in a mentally, physically, and emotionally healthy atmosphere.[141] This is the start of

[134] Brennan & Noggle, *supra* note 3, at 7. An example would be when a child petitions the court for emancipation. A finding of emancipation allows the minor to become "role-dependent" in ability to contract. *Id.*

[135] For example, anyone under the age of eighteen cannot marry without parental consent, or get a tattoo, and under most circumstances, those who enter into contract with a minor may not be able to enforce it against said minor due to age. *See, e.g.*, Daubert v. Mosley, 487 P.2d 353, 357 (Okla. 1971) (finding that an emancipated minor by way of marriage could not disavow the contract due to his age).

[136] Brennan & Noggle, *supra* note 3, at 11.

[137] *Id.* at 12.

[138] Parham v. J.R., 442 U.S. 584, 624 (1979) (Stewart, J., concurring).

[139] Brennan & Noggle, *supra* note 3, at 4.

[140] *E.g.*, OKLA. STAT. ANN. tit. 10A, § 1-1-102 (West 2013) (stating that parents have a natural, legal, and moral right, as well as a duty, to care for and support their children and such rights are protected by state and federal laws as well as the Constitution). In practice, where family circumstances threaten the safety of a child, the state's interest in the welfare of the child takes precedence over the natural rights and authority of the parent to the extent that it is necessary to protect the child and assure that the best interests of the child are met.

[141] *Parham*, 442 U.S. at 604.

the slippery slope where courts begin to use the phrase "best interest" when in fact the court is dealing with what it believes is good for the child.[142] As previously observed, when courts deal with what is good for a child, the court usually thrusts its subjective values and standards into the privacy of the home.[143]

As a hypothetical example, no court would personally approve of a parent raising their child to adopt the radical religious views of a white supremacy group. Could it be argued that being brought up with these views can be emotionally and mentally harmful? Such an argument has been made,[144] but constitutionally, the standard should be based upon the parents' standard and not that of the court, short of abuse or neglect.[145]

It is the opinion of this author that, absent evidence of mental or emotional abuse, the issue is whether the parents have a right to raise their child in this manner. Even though this author would not wish to see such a radical view imposed upon a child, its harm cannot be measured in such a way as to intrude upon the parents' rights in raising their child. This would be tantamount to forbidding a parent to such a practice and would be based upon a value standard. If there was a measure of significant harm to the child, this could be a basis for removing the child from the home. Yet child welfare has not removed children based upon these circumstances. When considering the best interest of the child, there needs to be a finding that the parents' behavior is detrimental to the child physically, emotionally, or mentally before the court should act.[146] When there is such a

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[142] *Bellotti*, 443 U.S. at 634.
[143] *Id.*
[144] Jarrell v. Jarrell, No. W2011–00578–COA–R3–CV, 2012 WL 1066398, at *3 (Tenn. Ct. App. Mar. 28, 2012) (holding that courts must maintain strict neutrality involving religious disputes between divorced parents unless it threatens the health and well-being of the child); *see also* Harrison v. Tauheed, 256 P.3d 851, 864 (Kan. 2011) (differentiating between a parent's religious beliefs and religiously motivated actions or conduct that affects the best interest of the child).
[145] Gates v. Tex. Dep't of Protective & Regulatory Servs., 537 F.3d 404, 429 (5th Cir. 2008).
[146] Ervin R. v. Phina R., 717 N.Y.S.2d 849, 856-57 (Fam. Ct. 2000). Here the court found that both parents' hostility toward each other was not due to religious beliefs or practices, but rather were the parties using their religion to interfere with the

finding, the government, acting through the court system, has a duty to intercede on behalf of the child.[147] The courts have had a tendency to impose their morals and values into homes where the parents lack education and scarce means of support and to inform these parents that they are inadequate based upon the best interest of the child standard.[148] The parents have the right and "the responsibility to nurture and protect the child, and the authority to exercise [their] own judgment in doing so on a day-to-day basis."[149] Parents have been assigned the right to raise their children, protected from governmental intrusion—except for instances of abuse and neglect—in such a way as deemed proper according to the parents' standard of care—not the standard of care of the court.[150] The right of parents to raise their children free from governmental intrusion[151] creates a rebuttable presumption that parents act in the best interest of their child. In order for the government to rebut this presumption, the balancing of individual rights must occur. The evidence must be sufficient before the government may intervene. In balancing the rights of the parents and the child, where there is a conflict, the

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relationship between the child and the non-custodial parent. *Id.* The court ruled the custodial parent determines the appropriate level of religious beliefs and the parent receiving visitation must honor it. *Id. See also* Friederwitzer v. Friederwitzer, 432 N.E.2d 765, 767 (N.Y. 1982) (finding a mother to be less fit and changing primary custody where the original decree stated the children would be brought up in the parents' faith because the mother's conduct was found to be "flagrantly violating those tenets which 'confused the children and was contrary to their religious beliefs and detrimental to their religious feeling'").

[147] *See Gates*, 537 F.3d at 429.

[148] *Troxel*, 530 U.S. at 78-79 (Souter, J., concurring) (stating that parents should be "free of judicially compelled visitation" because "a judge believed he 'could make a better decision' than the objecting parent had done"); Wayne, *supra* note 1, at 41 (arguing that without an articulated standard, the fear is that judges "apply their own personal values and preferences"); *see also* Bell, *supra* note 43, at 254 (arguing that without an "objective value," findings amount to a "good faith guess" and are based upon a judge's personal experiences).

[149] Brennan & Noggle, *supra* note 3, at 4.

[150] *See Gates*, 537 F.3d at 429.

[151] *Troxel*, 530 U.S. at 65.

child's rights prevail.[152] This leads to the third and final thesis.

C. Third thesis: best interest of the child may outweigh parental rights

The third thesis is the "Limited Parental Rights Thesis" and is described as parental rights with *thresholds*.[153] Under this thesis, parental rights may be infringed upon under two conditions: first, when there is a conflict between the best interest (i.e., rights) of the child and the rights of the parent; and second, if doing so will bring about a large enough benefit to the child.[154]

As applied to parental rights versus children's rights, usually both of the above overriding conditions are present. When a child is initially removed from the home in a juvenile case, the executive branch of the government—the Department of Human Services or the District Attorney's office—must prove to the court that there is a reasonable suspicion that the child's health, welfare, or safety may be in imminent danger.[155] An example would be the use of corporal punishment. It is a general consensus among judges that if the corporal punishment rises to the level of leaving bruises or lacerations, then the child's right outweighs the right of the parents to discipline their child because of the abuse and neglect exception to parental rights.[156] Unless the use of corporal punishment raises a

[152] Matter of Welfare of Tarango, 595 P.2d 552, 555 (Wash. Ct. App. 1979) (holding that when the rights of the parent and the welfare of the child are in conflict, the welfare of the child must prevail); *see also* S.C. Dep't of Soc. Servs. v. Roe, 639 S.E.2d 165, 168 (S.C. Ct. App. 2006) (holding that the interest of the child shall prevail if the child's interest and the parental rights conflict).

[153] Brennan & Noggle, *supra* note 3, at 8.

[154] *Id.* at 8-9. This condition is met when the child's needs are not being met, which leads to or potentially could lead to imminent harm or danger to the child. "So long as the child is not being harmed, parental rights are generally not to be infringed merely to provide some marginal benefit for the child." *Id.*

[155] *See, e.g.*, Arce v. Cnty. of L.A., 150 Cal. Rptr. 3d 735, 746 (Ct. App. 2012); Idaho Dep't of Health & Welfare v. Doe, 244 P.3d 247, 250 (Idaho Ct. App. 2010); N.J. Div. of Youth & Family Servs. v. R.D., 23 A.3d 352, 354 (N.J. 2011).

[156] Judges may not believe in corporal punishment. Some may not have raised their children with the use of corporal punishment. This is a valid value judgment on behalf of any parent. However, to date this author is unaware of any statutes or court findings where the use of corporal punishment alone rises to the level of state

reasonable suspicion that the child's health, welfare, or safety would be at issue, the parents have a right to discipline their child, which overrides any child's right in this situation.[157] The parents have the right to discipline their child—as long as it does not rise to level of physical or mental abuse—because this brings about a greater benefit to society and also outweighs any rights the child may have, if any, to being punished as the parents see fit. "Thus for the parent who respects the spirit of the basic rights of the child, and who is willing to infringe them only when necessary and only to the degree necessary, the rights of the child will generally not interfere with the effective nurturing of the child."[158] This illustration demonstrates the difference between a parent spanking the child in a disciplinary way versus just walking up and slapping the child upside the head because the parent is angry. "[T]he fact that parents do have rights [suggests] that so long as the child is not being harmed, parental rights are generally not to be infringed merely to provide some marginal benefit for the child."[159] "Discipline literally means training that is expected to produce a specific character or pattern of behavior"[160]

The right of parents to raise their child as they see fit becomes more complicated when the court is dealing with separated parents who choose to raise their child differently, such as in the case of

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intervention in child abuse cases. However, a judge who handles divorce and paternity cases is more likely to intervene based upon his or her valued belief.

[157] G.C. v. R.S., 71 So. 3d 164, 166 (Fla. Dist. Ct. App. 2011) (reversing a finding of domestic violence when the father used corporal punishment in non-excessive manner and recognizing "a parent's right to administer reasonable and non-excessive corporal punishment to discipline their children"); *see also* Hamilton *ex rel.* Lethem v. Lethem, 270 P.3d 1024, 1031 (Haw. 2012) (reversing a lower court decision and stating that "parents have a fundamental right to discipline their child under the United States and Hawaii Constitutions that includes a right to employ corporal punishment"); *cf.* Griffith v. Latiolais, 70 So. 3d 71, 79-80 (La. Ct. App. 2011) (granting joint custody and an order prohibiting corporal punishment by either parent).

[158] Brennan & Noggle, *supra* note 3, at 17.

[159] *Id.* at 9.

[160] William Carmichael, SEVEN HABITS OF A HEALTHY HOME: PREPARING THE GROUND IN WHICH YOUR CHILDREN CAN GROW 92 (Lynn Vanderzalm ed., 1997). "[G]ood discipline is applied as an external boundary. The goal is to keep external boundaries in place until children develop their own external boundaries." *Id.* at 95.

divorce or paternity actions. Both parents have an equal constitutional right to raise their child when in their home.[161] However, when a parent has sole legal custody, these rights change if they pertain to certain major decisions related to raising a child.[162] The court may only interfere if the action rises to the level of significant harm to the child's rights or upon a showing of a change of circumstances sufficient to warrant custody modification.[163]

Courts start with the presumption that parents will act in the best interest of their children. "This stewardship conception of parental rights allows us to posit parental rights – and thus keep the state from meddling too much in family affairs – without treating the child as property of the parent."[164] And who better to exercise this stewardship than the child's parents? In doing so, parents are

[161] *In re* Adoption of Ta'Niya C., 8 A.3d 745, 754 n.13 (Md. 2010) (noting that when it comes to "custody (and visitation) disputes," neither parent "has any preference over the other" and making a distinction between a parent and a third party, stating "there is a legal preference" and that "we have recognized that parents have a fundamental, Constitutionally-based right to raise their children free from undue and unwarranted interference on the part of the State, including its courts"); McDermott v. Dougherty, 869 A.2d 751, 770 (Md. 2005) ("In a situation in which both parents seek custody, each parent proceeds in possession . . . of a constitutionally-protected fundamental parental right. Neither parent has a superior claim to the exercise of this right to provide 'care, custody, and control' of the children. Effectively, then, each fit parent's constitutional right neutralizes the other parent's constitutional right . . . ."); *see also* Rico v. Rodriguez, 120 P.3d 812, 817 (Nev. 2005) ("In a custody dispute between two fit parents, the fundamental constitutional right to the care and custody of the children is equal.").

[162] A.G.R. *ex rel.* Conflenti v. Huff, 815 N.E.2d 120, 125 (Ind. Ct. App. 2004) (finding the custodial parent enjoys the right to determine the religious training of the child as long as the custodial parent does not use it as a means to interfere with the noncustodial parent's parenting time and there is no showing of substantial harm affecting the child's physical health or emotional development); *see also Hamilton*, 270 P.3d at 1027 (holding that the non-custodial parent retains the right to discipline his child for conduct that occurs while under the supervision of the non-custodial parent); Baldwin v. Baldwin, 710 A.2d 610, 616 (Pa. Super. Ct. 1998) (Brosky, J., dissenting) (stating that the non-custodial parent has an interest in sharing in the rearing and love of the child).

[163] *See, e.g.*, Fridley v. Fridley, 748 N.E.2d 939, 941 (Ind. Ct. App. 2001); Shade v. Wright, 805 N.W.2d 1, 4-5 (Mich. Ct. App. 2010).

[164] Brennan & Noggle, *supra* note 3, at 13.

presumed to be looking not only to the present health and welfare of the child, but also to maximize the future health and welfare of the child.[165]

When courts begin weighing parents' rights versus children's rights, "it requires that judges have a standard of well-being by which to assess children's interests. As a policy, the best interest guides judges by requiring that they decide what is in the children's best interest, but it leaves open to interpretation what is in a child's interest."[166] The standard of well-being courts should use to assess a child's interest should be that of the parents if there is no evidence of harm to the child's health, welfare, or safety that rises to the level of abuse or neglect. Parents' rights to decide without interference are still subject to some limits, though, and must be balanced against the constitutional rights and well-being of the child.[167] The presumption that parents act in the best interest of their children[168] may be overcome by evidence of harm to the children, the risk of error in the parents' judgment, or conflicts in the home that likely undermine the ability of parents to act in their children's best interest.[169]

When dealing with the family, the court should recognize the rights of each family member and how the relief requested affects each right. Next, the court should balance each of those rights and where the parents' rights are in conflict with the rights of the child (i.e., best interest), the child's rights should prevail.[170]

VII. Limiting Parental Authority Over the Rights of the Child

[165] *Id.* at 18.
[166] *Id.*
[167] Doan-Uyen Thi Le v. Thang Q. Nguyen, 241 P.3d 647, 652 (Okla. Civ. App. 2010) ("[U]ltimately, custodial decisions, even those involving termination of joint custody, are dependent upon the best interests of the child."); *see also In re* Paternity of C.A.S., 468 N.W.2d 719, 727 (Wis. 1991) ("The best interests of the children are the ultimate and paramount considerations.").
[168] *Troxel*, 530 U.S. at 71.
[169] Henning, *supra* note 53, at 79.
[170] *Doan-Uyen Thi Le*, 241 P.3d at 652.

Best Interest of the Child Should Not Be an Ambiguous Term

Recently, the Supreme Court has begun to limit the parental authority over the rights of the child. This can be seen in the abortion context.[171] "The Court was more willing to impose more comprehensive judicial procedures to protect the fundamental rights of minors."[172] Once the child could express an intelligent and mature basis for wanting to exercise her rights apart from her parents, the court has allowed the child to exercise her individual Fourteenth Amendment rights.[173] "[T]he Court concluded in *Bellotti v. Baird* that society's interest in safeguarding parental authority and preserving family unity was outweighed by the rights of mature minors to obtain an abortion without their parents' consent."[174] Some determinations deeming children mature enough and capable of exercising their rights intelligently are defined in statutes based on age, such as when they may drive a vehicle, vote in federal and state elections, or drink alcoholic beverages. To deny the exercise of these rights to an adult would not be permissible. "In mediating conflict between the rights and interests of children and their parents, the Court has often imposed procedural safeguards that vary with the nature of the interest at stake and has recognized the maturity of some minors to make their own decisions and protect their own interests."[175]

However, in protecting the integrity of the family, the courts must balance the rights of the entire family.[176] "The state must guard not only [children's] current liberty, but also their future liberty. It must deny all others, including parents, the right to deprive the young either of their basic liberty during their immaturity, or their ability to

[171] *Bellotti*, 443 U.S. at 633-34.
[172] Henning, *supra* note 53, at 81.
[173] *Id.*
[174] *Id.*
[175] *Id.* at 82.
[176] OKLA. STAT. ANN. tit. 10A, § 1-1-102 (West 2013). The Oklahoma Children's Code provides the foundation and process for state intervention into the parent-child relationship whenever the circumstances of a family threaten the safety of a child and to properly balance the interests of the parties stated herein.

develop the capacity to exercise their future liberty."[177] This is the best interest of the child. The courts must commit to this never-ending balancing act that plays out in the courtroom. The state cannot overlook the rights of the parents, nor can it overlook the rights of the child in determining the best interest of the child. Even more so when courts are asked to intervene, especially after the breakdown of the family, courts must understand that there are individual rights attributable to both parents *and* the child that must be taken into consideration before they can impose what they deem to be in the best interest of the child.

The job of the court is to protect rights and enforce laws. In the context of the family, this protection does not come with a license to intrude upon the family, thus violating the parents' right to decide how their child should be raised, unless necessary to protect the rights of the child.[178] "Best interest" *is* the rights of the child. The child's parents, based upon their standards, values, and morals, initially guide these rights. Governmental intrusion should only be exercised to protect the child's right to live free from parental abuse or neglect that could cause harm to the child's health, welfare, or safety.[179] Based upon the authority of the court in balancing the constitutional rights of the parents and child, it may override the parental rights to protect the rights of the child when the parents' duty is not being met.[180]

Interpreting "best interest" as the constitutional rights of the child protects the child and the family from government imposition of its own standards and values upon the family. "As the Supreme Court has stated, values, morality, and religion are things 'the State can neither supply nor hinder.'"[181] In order to assure that courts do not infringe upon the rights of the family, a standard for the best

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[177] Marcia Zug, *Should I Stay or Should I Go: Why Immigrant Reunification Decisions Should Be Based on the Best Interest of the Child*, 2011 BYU L. REV. 1139, 1152 (2011).
[178] *Meyer*, 262 U.S. at 399.
[179] Gates v. Tex. Dep't of Protective & Regulatory Servs., 537 F.3d 404, 429 (5th Cir. 2008).
[180] *Bellotti*, 443 U.S. at 640-41.
[181] Zug, *supra* note 177, at 1158.

interest of the child must be determined and applied in every courtroom where these rights are being affected. Defining best interest of a child as the constitutional rights of the child allows the court to stay within its authority.

Family issues are complex and case-specific, but balancing the rights of each family member provides some consistency to the court's involvement into the family. This assures the family that decisions are made with as little personal judicial preference and with an emphasis on the rights of all family members. The only time the court should limit the rights of a parent is when those rights are outweighed by the rights of the child, thus taking much of the ambiguity out of what would be in the best interests of the child.