

PARENTHOOD BY ESTOPPEL? ASSESSING *BOSEMAN V. JARRELL* AND NORTH  
CAROLINA’S CHILD CUSTODY STANDARD\*

*One of the gravest responsibilities that can be placed upon a court—and one of the most heart searching—is to determine the proper custodian of a child. Courts should ever bear in mind that children are not chattels, but intelligent and moral beings, and their happiness and welfare is a matter of prime consideration.*

—Justice R. Hunt Parker<sup>1</sup>

INTRODUCTION

The Supreme Court of North Carolina’s recent decision in *Boseman v. Jarrell*<sup>2</sup> has the potential to invoke each of the chief taboos of polite public discourse: sex, politics, and religion.<sup>3</sup> However, it also centers on some of the most foundational elements of societal construction, the family and the well-being of children. The Supreme Court of the United States has explicitly and repeatedly acknowledged the significance of parental rights as “perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>4</sup> However, the core justification for parental rights also proves to be its most significant limitation. Since the state’s recognition of parental rights is based on an assumption that parents will act in the best interests of their children, the state may act pursuant to its *parens patriae* interest<sup>5</sup> and intervene contrary to the wishes of a legal parent if that parent is found to

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1. Wall v. Hardee, 240 N.C. 465, 467, 82 S.E.2d 370, 372 (1954).

2. 364 N.C. 537, 704 S.E.2d 494 (2010).

3. Jeffrey J. Ventrella, *Square Circles?!! Restoring Rationality to the Same-Sex “Marriage” Debate*, 32 HASTINGS CONST. L.Q. 681, 682 (2005).

4. Troxel v. Granville, 530 U.S. 57, 65 (2000).

5. See, e.g., *In re Walker*, 282 N.C. 28, 39, 191 S.E.2d 702, 709 (1972) (citing Cnty. of McLean v. Humphreys, 104 Ill. 378, 383 (1882)) (“The State must exercise its power as ‘*parens patriae*’ to protect and provide for the . . . well-being of such of its citizens as by reason of infancy . . . are unable to take care of themselves.”). *Black’s Law Dictionary* defines the *parens patriae* as “a sovereign in its capacity as provider of protection to those unable to care for themselves.” BLACK’S LAW DICTIONARY 1221 (9th ed. 2009).

be unfit or to have acted in a way that significantly deviated from the best interests of her child.<sup>6</sup>

While North Carolina's legal standards in the area of parental rights are generally consistent with the standards set forth by federal constitutional jurisprudence,<sup>7</sup> the Supreme Court of North Carolina's most recent venture into child custody analysis demonstrates that the state's custody standard has gradually deviated in a subtle, yet significant way from federal constitutional requirements. In *Boseman*, the court effectively terminated the parental rights of a fit, legal parent by granting joint custody to a non-legal parent who previously had no legal rights with respect to the child.<sup>8</sup> Considering the strong deference that federal jurisprudence affords to the parental rights of fit, legal parents,<sup>9</sup> North Carolina's acknowledgement of legal rights for "social parents"<sup>10</sup> appears to be at odds with constitutionally protected parental liberty interests.

This Recent Development demonstrates that the means by which the *Boseman* court effectively terminated the parental rights of a fit, legal parent is at odds with clear, long-standing constitutional standards and violates, even contradicts, compelling state policy interests. Part I provides a summary of the *Boseman* case and contextualizes North Carolina's "dual avenues"<sup>11</sup> custody standard within the admittedly amorphous realm of American state law regarding social parenthood. Part II proceeds to assess the multitude of problems with North Carolina's "dual avenues" standard. This Part will demonstrate that the dual avenues standard conflicts with explicit and implicit U.S. Supreme Court precedent, undermines core rationales for the parental liberty interest, and raises significant policy

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6. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997); *see also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (noting that parental rights are subject to limitation by the state).

7. *See, e.g., David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005); *Price*, 346 N.C. at 73, 484 S.E.2d at 531; *Petersen v. Rogers*, 337 N.C. 397, 400, 445 S.E.2d 901, 903 (1994).

8. *See generally Boseman v. Jarrell*, 364 N.C. 537, 704 S.E.2d 494 (2010) (upholding trial court's custody determination granting joint legal custody of a child to his biological mother and former same-sex domestic partner).

9. *See Troxel*, 530 U.S. at 68 ("[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family . . .").

10. This Recent Development defines a "social parent" as an individual who has established a parent-like relationship with a child, but who does not possess any legally protected relationship with the child. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b) (2002) (defining "parent by estoppel," which this Recent Development defines as "social parent"). A "legal parent," by contrast, is an individual legally recognized by the state as a parent to a child, whose legal status arises through natural birth or formal legal declaration, typically through an adoption decree. *Id.* § 2.03(1)(a).

11. *See infra* Part I.B.

concerns. Finally, Part III offers a possible legislative solution that addresses the problems discussed in Part II.

### I. *BOSEMAN*'S HOLDING & NORTH CAROLINA'S CUSTODY ANALYSIS

#### A. *Boseman v. Jarrell*

The factual context of *Boseman* is an increasingly common setting for custody disputes in the twenty-first century.<sup>12</sup> In May 2000, following approximately one year of living together as domestic lesbian partners, Julia Boseman and Melissa Jarrell decided to act on their desires to be parents.<sup>13</sup> The women informally agreed that Jarrell would conceive through artificial insemination and that they would jointly take part in parenting the child after its birth.<sup>14</sup> In October 2002, Jarrell gave birth to a boy.<sup>15</sup> Three years later, Boseman discovered what she thought was a way for her to become a legal parent to the child through North Carolina's adoption statutes.<sup>16</sup> Although section 48-1-106(c) of the North Carolina General Statutes stipulates that adoptions sever all parental rights of the prior legal parent or guardian,<sup>17</sup> the women requested that Boseman, as the new parent, be allowed to waive severance of Jarrell's parental rights.<sup>18</sup> The Durham County District Court allowed this arrangement, thus recognizing new parental rights for Boseman while allowing Jarrell to retain her current parental rights.<sup>19</sup> The parties ended their relationship nine months after the adoption decree was granted.<sup>20</sup> Shortly after the separation, Jarrell began to limit Boseman's access to the child, and Boseman consequently sued for joint legal custody.<sup>21</sup>

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12. See, e.g., *Jones v. Barlow*, 2007 UT 20, ¶¶ 3–6, 154 P.3d 808, 810; *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 3, 180 Vt. 441, 445, 912 A.2d 951, 956; *In re Parentage of L.B.*, 122 P.3d 161, 163–64 (Wash. 2005) (en banc).

13. *Boseman*, 364 N.C. at 539, 704 S.E.2d at 497.

14. *Id.* at 539–40, 704 S.E.2d at 497.

15. *Id.*

16. *Id.*

17. The one exception to this is stepparent adoption, where the spouse of the child's biological parent retains parental rights even though the stepparent also gains parental rights. N.C. GEN. STAT. § 48-4-103(c) (2011).

18. *Boseman*, 364 N.C. at 540–41, 704 S.E.2d at 497. The court accomplished this by allowing Boseman, as the adoptive parent, to decline signing the statutorily required acknowledgement of the severance of the former legal parent's parental rights. See § 48-3-606(9) (putting forth the requirement that the individual executing the consent of adoption acknowledge that the adoption terminates the legal relationship between the former parent or guardian and the adoptee).

19. *Boseman*, 364 N.C. at 540–41, 704 S.E.2d at 497.

20. *Id.* at 541, 704 S.E.2d at 497–98.

21. *Id.*

The litigation eventually arrived at the Supreme Court of North Carolina, presenting two primary issues. The first issue concerned the validity of the initial adoption decree granted by the district court.<sup>22</sup> Noting that “[t]he law governing adoptions in North Carolina is wholly statutory,”<sup>23</sup> the court found only three authorized methods for adoption of minor children under North Carolina law: “direct placement” adoption,<sup>24</sup> “agency placement” adoption,<sup>25</sup> and “stepparent” adoption.<sup>26</sup> Boseman and Jarrell had sought a modified version of direct placement adoption, so the central question before the court was whether the Durham trial court had discretion regarding whether to enforce the statutory provision for complete severance of the existing legal parent’s parental rights.<sup>27</sup> Despite the provision of section 48-1-100(d), which stipulates that adoption law should be “liberally construed,”<sup>28</sup> the court found that chapter 48 mandated severance of the legal parent’s rights.<sup>29</sup> In support of its decision, the court referenced section 48-1-106, which requires that an adoption decree have the effect of severance, and section 48-3-606(9), which explicitly states that severance is a “mandatory provision” of the required “content of consent.”<sup>30</sup> The court found that “[b]ecause the General Assembly’s chosen language in these statutes is clear and unambiguous, courts are without power to ‘liberally construe[]’ ” the severance provisions, and, as a result, the Durham County District Court had entered an adoption decree that was unavailable under chapter 48.<sup>31</sup> Since adoptions in North Carolina are restricted to those available under chapter 48,<sup>32</sup> the court held that the

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22. *See id.* at 542, 704 S.E.2d at 498.

23. *Id.* (citing *Wilson v. Anderson*, 232 N.C. 212, 215, 59 S.E.2d 836, 839 (1950)).

24. *Id.* at 543, 704 S.E.2d at 499 (citing N.C. GEN. STAT. § 48-3-202(a) (2011)). This type of adoption effects “a *complete* substitution of families,” creating full parental rights for the adoptive parents and terminating all parental rights of the former parents. *Id.* (emphasis added).

25. *Id.* (citing N.C. GEN. STAT. § 48-3-203 (2011)). Here, a court terminates the rights of a former, unfit parent and places the child in the custody of an agency who will then seek a permanent adoption for the child. *See id.*

26. *Id.* (citing N.C. GEN. STAT. § 48-4-100 (2011)). Under this form of adoption, the spouse of the child’s biological parent legally adopts the child without terminating the rights of the biological parent. *See* N.C. GEN. STAT. § 48-4-103 (2011).

27. *Boseman*, 364 N.C. at 542–43, 704 S.E.2d at 498–99.

28. § 48-1-100(d). In her dissent arguing that the court should uphold the adoption decree, Justice Hudson notes that “Chapter 48 should be ‘liberally construed and applied to promote its underlying purposes and policies,’ . . . such as ‘the integrity and finality of adoptions’ and the ‘prompt, conclusive disposition of adoption proceedings.’ ” *Boseman*, 364 N.C. at 561, 704 S.E.2d at 509–10 (Hudson, J., dissenting) (internal citations omitted).

29. *Boseman*, 364 N.C. at 544–45, 704 S.E.2d at 500 (majority opinion).

30. *Id.* at 544–45, 704 S.E.2d at 499–500.

31. *Id.*

32. *See id.* at 545, 704 S.E.2d at 501 (stating that only “[a] prospective adoptive parent,” someone who is attempting an adoption “provided in” Chapter 48 . . . may file an adoption petition” (internal citations omitted)) (citing N.C. GEN. STAT. § 48-2-301 (2011)).

adoption decree issued by the district court was void ab initio.<sup>33</sup> As such, the court's holding did not terminate the parental rights awarded to Boseman by the district court, but rather stipulated that because the Durham County District Court's decree was never valid Boseman never had parental rights to begin with.<sup>34</sup>

The second issue presented to the court was the constitutionality of the trial court's application of the best interest standard<sup>35</sup> over Jarrell's wishes regarding Boseman's suit for joint custody.<sup>36</sup> The court began by recognizing the constitutionally protected liberty interest that a parent has "in the companionship, custody, care, and control" of his or her children.<sup>37</sup> Following the standards it set forth in *Price v. Howard*<sup>38</sup> and *David N. v. Jason N.*,<sup>39</sup> the court noted that in North Carolina, a parent forfeits protection of this liberty interest when the parent is found to be unfit or to have acted inconsistently " 'with his or her constitutionally protected status.' "<sup>40</sup> Although the trial court found Jarrell to be a "fit parent with whom the minor child has a very loving and respectful relationship,"<sup>41</sup> the Supreme Court of North Carolina upheld the trial court's finding that Jarrell had acted inconsistently with her paramount parental status by "intentionally and voluntarily creat[ing] a family unit . . . without any expectation of termination."<sup>42</sup> As such, the court held that the trial court did not err in utilizing the best interest of the child standard in determining that Boseman should have joint custody of the child over the wishes of Jarrell.<sup>43</sup>

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33. *Id.* at 547, 704 S.E.2d at 501. Of note, the Supreme Court of the United States recently denied certiorari to parties appealing Louisiana's refusal to issue a birth certificate with the names of unmarried, same-sex partners as parents where the Fifth Circuit held that Louisiana's law of limiting adoption to married or single adults was rationally related to "a legitimate interest in encouraging a stable and nurturing environment" for adopted children. *Adar v. Smith*, 639 F.3d 146, 162 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 400 (2011).

34. *See Boseman*, 364 N.C. at 547, 704 S.E.2d at 501.

35. *See* N.C. GEN. STAT. § 50-13.2(a) (2011) ("An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child.").

36. *See Boseman*, 364 N.C. at 549, 704 S.E.2d at 502.

37. *Id.* at 549, 704 S.E.2d at 502-03 (citing *Price v. Howard*, 346 N.C. 68, 73, 484 S.E.2d 528, 531 (1997); *Petersen v. Rogers*, 337 N.C. 397, 400, 445 S.E.2d 901, 903 (1994)).

38. 346 N.C. 68, 484 S.E.2d 528 (1997).

39. 359 N.C. 303, 608 S.E.2d 751 (2005).

40. *Boseman*, 364 N.C. at 549, 704 S.E.2d at 503 (quoting *David N.*, 359 N.C. at 307, 608 S.E.2d at 753).

41. *Id.* at 550, 704 S.E.2d at 503 (internal quotation marks omitted).

42. *Id.* at 552-53, 704 S.E.2d at 504-05.

43. *Id.* at 553, 704 S.E.2d at 505.

Under the “dual avenues” standard utilized in *Boseman*, North Carolina trial courts assume discretion to apply the best interest of the child standard<sup>44</sup> against the wishes of a legal parent through one of two avenues: (1) when the parent has been found to be unfit *or* (2) when the parent has acted inconsistently “with his or her constitutionally protected status.”<sup>45</sup> Therefore, a court need not determine that a parent is unfit before it intervenes with the best interest of the child standard.<sup>46</sup> The *Boseman* court acknowledged that the standard for the second avenue is vague,<sup>47</sup> stating that while “unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status . . . [o]ther types of conduct can also rise to this level” and that conduct need not “ris[e] to the ‘statutory level warranting termination of parental rights.’”<sup>48</sup>

*Boseman* demonstrates one specific pattern of conduct that North Carolina courts have found to be inconsistent with a parent’s paramount interest.<sup>49</sup> The court describes this conduct as consisting of three elements: a parent (1) “brings a nonparent into the family unit,” (2) “represents that the nonparent is a parent,” and (3) “voluntarily gives custody of the child to

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44. See N.C. GEN. STAT. § 50-13.2 (2011) (designating the proper nature and scope of custody arrangements and outlining the elements that courts must consider in determining custody under the best interest standard). Notably, this statute contemplates only custody agreements between natural (i.e., biological) and adoptive parents, not custody arrangements between natural or adoptive parents and social parents. In fact, the statute may even suggest that the definition of “parent” is limited to those who have become parents through natural or adoptive means. See § 50-13.2(a) (“Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent.”); see also *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (holding that a social parent was not legally a parent under factual circumstances very similar to *Boseman*).

45. *Boseman*, 364 N.C. at 549, 704 S.E.2d at 503 (internal quotation marks omitted); see also *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005) (“[A] finding of defendant’s fitness . . . did not preclude [the court] from granting joint or paramount custody to plaintiffs, based upon [a] finding that defendant’s conduct was inconsistent with his constitutionally protected status.”).

46. See *Boseman*, 364 N.C. at 549, 704 S.E.2d at 503 (stating that, although defendant was a fit parent, the court must still determine whether she acted inconsistently with her paramount parental status); *David N.*, 359 N.C. at 307, 608 S.E.2d at 753 (noting that, although defendant was a fit parent, the trial court was not precluded from awarding joint custody to plaintiffs if defendant acted inconsistently with his paramount parental status).

47. *Boseman*, 364 N.C. at 549, 704 S.E.2d at 503 (“[T]here is no bright line beyond which a parent’s conduct meets this standard.”).

48. *Id.* at 549–50, 704 S.E.2d at 503 (citing *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534–35 (1997)).

49. Although *Boseman* is the first decision by the Supreme Court of North Carolina to employ this standard in the context of a same-sex couple, it is not the first case to establish the elements employed in *Boseman*. See *id.* at 550–52, 704 S.E.2d at 503 (analyzing *Price*, 346 N.C. at 83, 484 S.E.2d at 537, and *Mason v. Dwinnell*, 190 N.C. App. 209, 222–25, 660 S.E.2d 58, 67–68 (2008)).

the nonparent without creating an expectation that the relationship would be terminated.”<sup>50</sup> Based on the ensuing reliance on *Price* and *Mason v. Dwinnell*,<sup>51</sup> the court’s analysis appears to give exceptional weight to the expectation of an interminable parental relationship that the social parent derives from the legal parent’s conduct. Accordingly, when a legal parent’s conduct satisfies the three elements listed above, the court frames a suit for custody brought by a social parent as a custody dispute rather than a proceeding for the termination of parental rights.

In *Boseman*, the court found clear and convincing evidence that Jarrell voluntarily created a family unit with Boseman, held Boseman out as a co-parent of the child, and created no expectation that Boseman’s relationship with the child was temporary.<sup>52</sup> Finding that Jarrell acted inconsistently with her paramount parental interest, the Supreme Court of North Carolina treated the case as a custody dispute and upheld the trial court’s application of the best interest standard.<sup>53</sup> The court went on to hold that the trial court did not err in applying the best interest standard, noting that the trial court’s determination that joint custody was in the child’s best interest took priority over Jarrell’s wishes.<sup>54</sup> In other words, the court created legal parental rights for Boseman because she, with Jarrell’s consent, had developed a parent-like relationship with the child, and it was in the child’s best interest to afford the relationship legal protection.<sup>55</sup>

#### B. North Carolina’s “Dual Avenues” Standard and Social Parenthood

The legal standards constructed to deal with circumstances involving contested legal rights of social parents vary widely from state to state, and the differences have significant implications for the respective constitutional rights of legal and social parents.<sup>56</sup> Indeed, the various terms employed to describe the related legal doctrines are inconsistent.<sup>57</sup> For simplicity’s sake, this Recent Development will follow the lead of an article by Rena Lindevaldsen in defining the key legal doctrines dealing

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50. *Id.* at 550, 704 S.E.2d at 503.

51. 190 N.C. App. 209, 660 S.E.2d 58 (2008).

52. *Boseman*, 364 N.C. at 552–53, 704 S.E.2d at 504–05.

53. *Id.* at 549–50, 704 S.E.2d at 502–03.

54. *Id.* at 553, 704 S.E.2d at 505.

55. *See id.*

56. *See, e.g.,* Rena M. Lindevaldsen, *Sacrificing Motherhood on the Altar of Political Correctness: Declaring a Legal Stranger To Be a Parent over the Objections of the Child’s Biological Parent*, 21 REGENT U. L. REV. 1, 16–18 (2009) (discussing the conflicting results reached by state courts asked to determine the legal rights of social parents).

57. *See, e.g., id.* at 18–24 (discussing the common labels used by courts in analyzing parental status).

with social parenthood.<sup>58</sup> The “*de facto*” parenthood doctrine is a legal doctrine where the court treats a social parent as if she were a legal parent, “having effect even though not formally or legally recognized.”<sup>59</sup> Under the *de facto* doctrine, the court can determine that a social parent’s rights are on par with a legal parent’s rights if the social parent can prove that she developed a sufficient parenting relationship with the child prior to the legal parent’s decision to withdraw consent to the relationship.<sup>60</sup> Conversely, “*in loco parentis*” refers to a legal doctrine whereby the court does not consider a social parent to have durable parental rights even though the social parent has “assume[d] the role of a parent in a child’s life.”<sup>61</sup> Under the *in loco parentis* doctrine in some states, a legal parent may freely terminate the parental rights of the social parent at any time.<sup>62</sup> Because the court denied Jarrell the power to terminate Boseman’s relationship with the child, *Boseman*’s holding demonstrates that North Carolina’s dual avenues standard operates within the realm of the *de facto* doctrine when determining the standing of a social parent to sue for custody.

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58. *See id.*

59. *Id.* at 21 (citation omitted).

60. *See, e.g.,* KY. REV. STAT. ANN. § 403.270 (LexisNexis 2010) (requiring the court to apply the best interest of the child standard in a custody dispute between a legal parent and a social parent who has demonstrated clear and convincing evidence of being a child’s primary caregiver for a specified period of time based on the child’s age); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435–36 (Wis. 1995) (requiring a social parent seeking visitation rights to prove that the child’s legal parent consented to the formation of a parent-child relationship, that the social parent lived with the child, that the social parent assumed parental obligations, and that the relationship existed for a sufficient amount of time); *see also* Lindevaldsen, *supra* note 56, at 21 (noting that the Supreme Court of Kentucky denied custody to the adoptive mother’s former domestic partner because she could not establish by clear and convincing evidence that she was the primary caregiver for the child).

61. *See* Lindevaldsen, *supra* note 56, at 18.

62. *See, e.g., In re Agnes P.*, 800 P.2d 202, 205 (N.M. Ct. App. 1990) (“[W]e do not find that an *in loco parentis* status entitles [social parents] to parental termination proceedings. . . .”); *McDonald v. Texas Employers’ Ins. Ass’n*, 267 S.W. 1074, 1076 (Tex. Civ. App. 1924) (“[T]he relation existing between an adopting parent and the child is permanent, continuing, and cannot be abrogated by the parent; whilst the status of one *in loco parentis* is temporary, and may be abrogated at will by either the person thus standing *in loco parentis* or by the child.”); *Jones v. Barlow*, 2007 UT 20, ¶ 22, 154 P.3d 808, 813 (“[A] legal parent may freely terminate the *in loco parentis* status by removing her child from the relationship.”). *But see* *Jones v. Jones*, 884 A.2d 915, 917 (Pa. Super. Ct. 2005) (“[T]here [is] a presumption that primary custody should go to the biological parent rather than one *in loco parentis* . . . [but such presumption can be overturned] by clear and convincing evidence that it is in the best interests of the child[] to maintain that relationship [with the social parent].”); Lindevaldsen, *supra* note 56, at 18–20 (noting that courts vary significantly regarding when an *in loco parentis* relationship terminates).



Functionally, *de facto* parenthood operates with stark similarity to the legal doctrine of equitable estoppel.<sup>63</sup> *Black's Law Dictionary* defines estoppel as “[a]n affirmative defense alleging good-faith reliance on a misleading representation and an injury or detrimental change in position resulting from that reliance.”<sup>64</sup> Courts typically utilize equitable estoppel in the context of contract law, where one party has suffered an injury due to reliance on the promise of the breaching party and the only means of avoiding injustice is to judicially grant the non-breaching party’s expectation through specific performance.<sup>65</sup> Although this doctrine requires judicially compelled action on the part of the losing party, the burden that court-mandated performance places on human freedom is politically palatable because courts rarely invoke the doctrine and because the object of the compelled action is something of primarily economic value, such as money or property.<sup>66</sup> North Carolina does not employ equitable estoppel to award specific performance for personal services contracts.<sup>67</sup> The rationale behind this prohibition appeals primarily to public policy regarding human dignity: “there is a broad policy forbidding a man from contracting himself into slavery or unduly restricting his personal liberty.”<sup>68</sup>

*Boseman* provides a clear example of how North Carolina’s *de facto* parenthood doctrine utilizes estoppel-like rationales to grant legal parental status to a social parent. The court’s determination that Jarrell acted inconsistently with her constitutionally protected parental interest centers on the notion that she “voluntarily [gave] custody of the child to the nonparent” and that she “creat[ed no] expectation that the relationship

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63. *Cf.* *State v. Mendoza*, 481 N.W.2d 165, 175 (Neb. 1992) (“The doctrine of paternity by estoppel involves the application of established principles of equitable estoppel in the context of paternity determinations.”).

64. BLACK’S LAW DICTIONARY 629 (9th ed. 2009).

65. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

66. *See, e.g.,* *Cumbest v. Harris*, 363 So. 2d 294, 296–97 (Miss. 1978) (“[T]he general rule is that, ordinarily, specific performance will not be decreed . . . [except] (1) [w]here there is no adequate remedy at law; (2) [w]here the specific articles or property are of peculiar, sentimental or unique value; and (3) [w]here due to scarcity the chattel is not readily obtainable. These exceptions are partly founded on the principle of the inadequacy of a remedy at law and the remedy may . . . be allowed where damages are not readily ascertainable.” (citations omitted)).

67. *See Kadis v. Britt*, 224 N.C. 154, 163, 29 S.E.2d 543, 549 (1944). Personal service contracts refer to contracts that stipulate that an individual will complete a specific task, referring to the “intellectual or manual personal effort of an individual, as opposed to the salable product of the person’s skill.” *See* BLACK’S LAW DICTIONARY 1250–60 (9th ed. 2009). For example, if a homeowner and a painter enter into a personal services contract specifying that the painter will personally paint the house, the contract specifies that a particular person will paint the house, not merely that the house will be painted. Courts will not enforce such contracts.

68. *Kadis*, 224 N.C. at 164, 29 S.E.2d at 549 (quoting 5 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1646 (Rev. ed. 1938)).

would be terminated.”<sup>69</sup> By implication, Boseman’s parental rights were based on the fact that Boseman *relied* on Jarrell’s representation and altered her position in a manner that would prove *detrimental* if her *expectation* of a continued parental relationship with the child was terminated.<sup>70</sup> Thus, the court essentially invoked a legal maneuver fairly described as parental estoppel<sup>71</sup>—vesting previously nonexistent parental rights in a social parent based at least in part on her detrimental reliance on the legal parent’s conduct regarding the social parent’s relationship with the child. However, since Jarrell had not been found to be an unfit parent, parental estoppel as exercised in *Boseman* raises several significant constitutional concerns.<sup>72</sup> Further, public policy concerns regarding the human dignity of the child and the estoppel doctrine itself counsel against employing estoppel to determinations of child custody and parental rights.<sup>73</sup>

## II. DEFICIENCIES IN THE “DUAL AVENUES” STANDARD

Objective analysis of the North Carolina’s dual avenues standard demonstrates significant legal and practical deficiencies. First, the dual avenues standard conflicts with explicit constitutional precedent regarding the profound weight of parental liberty interests and the corresponding threshold for governmental interference with those interests.<sup>74</sup> Perhaps more significantly, the theoretical implications of the dual avenues standard threaten to undermine explicit constitutional rationales for parental rights.<sup>75</sup> Finally, a standard that allows adults to self-define the scope of their parenting opens up a host of policy problems that violate the wise and moral use of estoppel doctrine and ignore significant conclusions from social science.<sup>76</sup>

### A. *Conflicts with Constitutional Precedent*

In its most recent foray into the realm of parental rights, the Supreme Court of the United States noted that “the interest of parents in the care, custody, and control of their children[] is perhaps the oldest of the

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69. *Boseman v. Jarrell*, 364 N.C. 537, 550–51, 704 S.E.2d 494, 503 (2010).

70. *See id.* at 552–53, 704 S.E.2d at 504–05.

71. *See, e.g.*, AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. b, at 121 (2002).

72. *See infra* Parts II.A–B.

73. *See infra* Part II.C.

74. *See infra* Part II.A.

75. *See infra* Part II.B.

76. *See infra* Part II.C.

fundamental liberty interests recognized by this Court.”<sup>77</sup> Based on the language used by the Court over the years, it is difficult to overstate the foundational weight afforded to parental rights.<sup>78</sup> In *Wisconsin v. Yoder*,<sup>79</sup> for example, the Court noted that “[the] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”<sup>80</sup> The Court has also held that parental rights “undeniably warrant[] deference and, absent a *powerful* countervailing interest, protection.”<sup>81</sup> Successful actions terminating parental rights “work[] a unique kind of deprivation” and thus the Court has acknowledged that “[a] parent’s interest in the accuracy and injustice of the decision . . . is, therefore a commanding one.”<sup>82</sup> As such, the Court has fortified these interests with strong procedural safeguards to prevent the erroneous intrusion into the parent-child relationship.<sup>83</sup> By classifying parental rights as fundamental rights,<sup>84</sup> state action to terminate these rights is subject to the protection afforded by strict scrutiny analysis<sup>85</sup> and the requirements of clear and convincing evidence.<sup>86</sup>

Parental rights are not unlimited, however. In *Prince v. Massachusetts*,<sup>87</sup> the U.S. Supreme Court noted that “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare.”<sup>88</sup> Where state intrusion into the parent-child

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77. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (referring to the Supreme Court’s decisions in *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Prince v. Massachusetts*, 321 U.S. 158 (1944)).

78. *See, e.g., Pierce v. Soc’y of Sisters*, 268 U.S. 501, 534–35 (1925) (“The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

79. 406 U.S. 205 (1972).

80. *Id.* at 232.

81. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (emphasis added).

82. *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 27 (1981).

83. *See, e.g., id.* at 27 (applying the factors from *Mathews v. Eldridge*, 424 U.S. 329, 334–35 (1976), to determine what due process was owed to a parent facing the termination of her parental rights).

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

85. *See, e.g., Michael C. Dorf, Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1177–78 (1996) (“A law imposing a direct burden will be permitted to override a fundamental right only if the law is narrowly drawn to serve a compelling interest.” (footnote omitted)); *Id.* at 1199 (“[T]he Court could treat all incidental burdens in the same manner as it treats direct burdens on fundamental rights—that is, the Court could apply strict scrutiny.”). Justice O’Connor famously retorted that “[i]t is not true that strict scrutiny is strict in theory, but fatal in fact.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995). However, Justice Scalia is quick to remind us: “As is well known, strict scrutiny readily, and almost always, results in invalidation.” *Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004).

86. *See Santosky v. Kramer*, 455 U.S. 745, 769–70 (1982).

87. 321 U.S. 158 (1944).

88. *Id.* at 167.

relationship falls below the threshold of termination, the Court has entertained the notion that certain state interests may warrant overriding parental decision-making regarding a child.<sup>89</sup> The unfortunate reality that not all parents act in the best interests of their children and the profound consequences possible when they do not justify granting this discretion to courts.<sup>90</sup> Thus, if a court determines that a parent's conduct deviates from this assumption, the parent may lose his or her paramount status and have his or her decision regarding the child overridden by the court's determination of what is in the child's best interest.<sup>91</sup> Despite the seemingly broad language of *Prince*, however, the Court usually upholds parental decision-making in most actions by non-parents that challenge the decisions of legal parents.<sup>92</sup>

The U.S. Supreme Court has held non-parent actors to a demanding standard regarding what must be shown to justify interfering with parental decision-making of a child by repeatedly signaling that, absent neglect, parental decision-making warrants strong deference.<sup>93</sup>

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89. See *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (holding that while a parent "retain[s] a substantial, if not the dominant, role in the decision" to institutionalize his or her child, the child's own constitutional rights require that the ultimate authority in such a decision reside in "a physician's independent examination and medical judgment"). It is important to note, however, that *Parham* requires the parental liberty interest to submit to the child's liberty interests, not the interests of the state, a non-parent, or any other third party. See *id.* at 603–04.

90. See, e.g., *In re Hughes*, 254 N.C. 434, 436–37, 119 S.E.2d 189, 191 (1961) ("Because the law presumes parents will perform their obligations to their children, it presumes their prior right to custody, but this is not an absolute right. The welfare of the child is the crucial test. When a parent neglects the welfare and interest of his child, he waives his usual right of custody."); *Wall v. Hardee*, 240 N.C. 465, 467, 82 S.E.2d 370, 372 (1954) (noting that parental rights are not absolute and may be limited when the welfare of the child so demands); *infra* Part I.B.

91. See, e.g., *Wilson v. Wilson*, 269 N.C. 676, 677–78, 153 S.E.2d 349, 351 (1967) ("While it is true that a parent, if a fit and suitable person, is entitled to the custody of his child, it is equally true that where fitness and suitability are absent he loses this right. . . . [A] parent's right to custody of a child [is] forfeitable only by misconduct or by other facts which substantially affect the child's welfare." (internal citations omitted)).

92. See *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) ("[T]he First and Fourteenth Amendments prevent the State from compelling [legal parents] to cause their children to attend formal high school to age 16." (footnote omitted)); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) ("[W]e think it entirely plain that the Act [requiring children to attend public schools] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("[A teacher's] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] amendment.").

93. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 70 (2000) ("[I]f a fit parent's decision [regarding visitation rights of grandparents] becomes subject to judicial review, the court must accord at least some *special weight* to the parent's own determination." (emphasis added)); *Parham*, 442 U.S. at 603 (holding that giving preference to state interests over parental decision making "must be subjected to an exacting constitutional scrutiny").

[T]he best interests of the child is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of . . . the parents or guardians themselves.<sup>94</sup>

In *Troxel v. Granville*,<sup>95</sup> grandparents brought suit against their decedent son's widow for visitation rights concerning the children of the decedent and his widow.<sup>96</sup> The Court stated:

[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be *no reason* for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.<sup>97</sup>

This precedent safeguards parental rights against intrusion by courts unless the parent has failed to meet minimum standards for adequate provision for the child.<sup>98</sup> Accordingly, the best interest standard is not the measuring stick by which to assess the parent's fitness but rather the mechanism for making decisions in custody disputes between legal parents or *after* the legal parent has been found unfit.<sup>99</sup> Thus, while the assumption that parental decision-making coincides with the best interests of the child undergirds the rationale for deferring to parental rights, failure to actually act in the child's best interests is not, by itself, constitutionally adequate grounds for terminating parental rights.<sup>100</sup>

The *Troxel* holding did not offer concrete guidance regarding the evidence needed to demonstrate that a parent's provision for her child was inadequate.<sup>101</sup> However, as noted above in *Reno v. Flores*,<sup>102</sup> the Court has spoken of measuring a parent's conduct in terms of "minimum requirements."<sup>103</sup> In *Santosky v. Kramer*,<sup>104</sup> the Court explicitly held that

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94. *Reno v. Flores*, 507 U.S. 292, 304 (1993). This statement presents a distinct possibility for confusion considering the text corresponding to notes 147–52. However, the important thing to note is that while the assumption that parental decisions coincide with the best interest of the child *undergirds* the rationale for deferring to parental rights, a court's analysis as to what actually is in the child's best interest is not to be the measuring stick against which a parent's fitness is to be determined.

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

96. *Id.* at 60–61.

97. *Id.* at 68–69 (emphasis added) (citing *Flores*, 507 U.S. at 304).

98. *See id.*

99. *See id.*

100. *See id.*

101. *Id.* at 74.

102. *Reno v. Flores*, 507 U.S. 304 (1993).

103. *Id.* at 304.

parental liberty interests do “not evaporate simply because [the parents] have not been model parents or have lost temporary custody . . . to the State.”<sup>105</sup> With a few exceptions, the Court has provided reason to doubt whether the state can even assert an interest strong enough to override a parent’s wishes once that parent has been found to be fit and to have adequately provided for her child.<sup>106</sup> In *Stanley v. Illinois*,<sup>107</sup> for example, a father sought custody of his illegitimate children after their mother had died and the children had become wards of the state under state law.<sup>108</sup> The Court held that Illinois’ statutory presumption that unwed, natural fathers were “unsuitable and neglectful” violated the Due Process Clause of the Fourteenth Amendment because it did not afford him an individual hearing on his fitness as a parent.<sup>109</sup> The Court here recognized that this presumption effectively terminated the father’s parental rights and thus mandated a hearing on fitness prior to removing the child from the father’s custody.<sup>110</sup> The Court further reasoned that the state’s presumption “registers no gain towards [the State’s] declared goals when it separates children from the custody of fit parents”<sup>111</sup> because “[t]he State’s interest in caring for [the plaintiff’s] children is de minimis if [the plaintiff] is shown to be a fit father.”<sup>112</sup> In *Yoder*, the Court noted that “even [the State’s] paramount responsibility [in the education of its citizens] was . . . made to yield to the right of parents,” a state responsibility that the Court described as “the very apex of the function of a State.”<sup>113</sup>

*Boseman*’s use of North Carolina’s dual avenues standard reveals significant points of tension with the constitutional standards enumerated in federal constitutional jurisprudence.<sup>114</sup> One problem arises from the

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104. *Santosky v. Kramer*, 455 U.S. 745 (1982).

105. *Id.* at 753.

106. *But see supra* note 89 (demonstrating that certain state interests may warrant parental decision-making regarding a child).

107. 405 U.S. 645 (1972).

108. *Id.* at 646.

109. *See id.* at 654, 658.

110. *See id.* at 658.

111. *Id.* at 652. The Court goes on to say that “if [the plaintiff] is a fit father, the State spites its own articulated goals when it needlessly separates him from his family.” *Id.* at 652–53.

112. *Id.* at 657–58.

113. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925)).

114. Several other states that have been confronted with factual circumstances similar to *Boseman* have handled them differently. In *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶¶ 56–57, 180 Vt. 441, 465–66, 912 A.2d 951, 970, the Vermont Supreme Court granted parental rights to the biological mother’s former partner after the couple separated. A minority of states, such as Utah, have reached a contrary result. In *Barlow v. Jones*, 2007 UT 20, ¶ 39, 154 P.3d 808, 818, for example, the Utah Supreme Court declined to grant standing to the biological mother’s former same-sex partner after the couple separated. One commentator has noted, however, that no state

*Boseman* court's conceptualization of the dispute between *Boseman* and *Jarrell* as a custody dispute.<sup>115</sup> Indeed, the North Carolina General Statutes stipulate that "[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action [for custody]."<sup>116</sup> North Carolina courts have narrowed the apparent breadth of this statute by excluding total strangers from their interpretation of "other person."<sup>117</sup> However, the courts have construed this provision to allow social parents—who are *legal* strangers—to have standing to challenge for custody.<sup>118</sup> In other words, when a social parent brings a custody suit against a legal parent, North Carolina courts treat the case as a custody determination and utilize the best interest standard as if making a determination between two legal parents.<sup>119</sup> This process places a non-parent plaintiff on par with a legal parent, depriving the legal parent of the "special weight" required by the U.S. Supreme Court.<sup>120</sup>

The Supreme Court of the United States, however, has repeatedly framed custody cases between legal parents and non-parents as termination of parental rights cases.<sup>121</sup> While these cases are brought by individuals with legitimate interests at stake—usually by concerned family members<sup>122</sup>

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that has addressed such circumstances has done a proper constitutional analysis regarding the rights of the biological parent. See *Lindevaldsen*, *supra* note 56, at 4.

115. See *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010).

116. N.C. GEN. STAT. § 50-13.1(a) (2011).

117. In *Petersen v. Rogers*, 337 N.C. 397, 406, 445 S.E.2d 901, 906 (1994), the Supreme Court of North Carolina held that section 50-13.1 "was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers" due to concerns regarding constitutionally protected parental rights. See also *Ellison v. Ramos*, 130 N.C. App. 389, 392, 502 S.E.2d 891, 893 (1998) ("[I]n the context of a third party seeking custody of a child from a natural (biological) parent, our Supreme Court has indicated that there are limits on 'other persons' who can bring such an action.").

118. Persons who have assumed some parental obligations and have developed a parent-child relationship with a child through spending a significant amount of time with him or her have standing for custody. This right is assumed due to *sub silencio* treatment of the issue in *Peterson* and *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997). It is significant to note, however, that merely living in the same household with the child does not guarantee custody for the individual seeking custody. See, e.g., *Petersen*, 337 N.C. at 406, 445 S.E.2d at 906.

119. See generally *Boseman*, 364 N.C. 537, 704 S.E.2d 494 (framing a dispute between a natural mother and her ex-partner as a custody dispute and applying the best interest standard); *Price*, 346 N.C. 68, 484 S.E.2d 528 (framing a dispute between a biological mother and the purported father as a custody dispute and applying the best interest standard); *Best v. Gallup*, \_\_\_ N.C. App. \_\_\_, 715 S.E.2d 597 (2011) (framing a dispute between a legally adoptive mother and her former live-in boyfriend as a custody dispute and applying the best interest standard).

120. See *Troxel v. Granville*, 530 U.S. 57, 70 (2000).

121. See *Santosky v. Kramer*, 455 U.S. 745, 751–52 (1982); *Lassiter v. Dep't. of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 27–28 (1981); *Stanley v. Illinois*, 405 U.S. 645, 648 (1972).

122. See, e.g., *Troxel*, 530 U.S. at 60 (examining grandparents' claim for visitation rights).

or the state<sup>123</sup>—the Court has made it clear that cases involving the termination of parental rights are treated much differently than custody disputes between legal parents:

“The best interests of the child,” a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole *constitutional* criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would *best* provide for the child’s welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*. Similarly, ‘the best interests of the child’ is not the legal standard that governs parents’ or guardians’ exercise of their custody . . . .<sup>124</sup>

Because parental rights in the care, custody, and control of their children are protected as fundamental rights, the criteria mentioned in this excerpt refer to the protections of the Fourteenth Amendment.<sup>125</sup> Thus, rather than making an inquiry into the child’s best interests, a decision to terminate the rights of a legal parent is subject to due process analysis. To this end, the Supreme Court has noted that trial courts must find by clear and convincing evidence that the parent is unfit and has failed to adequately provide for the child’s needs.<sup>126</sup> Accordingly, when a court applies the best interest of the child standard in a suit for custody by a non-legal parent, it fails to afford legal parents the proper deference required by the Supreme Court.

*Boseman* provides a clear example of how North Carolina’s standards in circumstances involving a custody dispute between a parent and a non-parent fail to satisfy constitutional requirements. The court explicitly stated that *Boseman* was “not legally recognized as the minor child’s parent” because the adoption decree was void ab initio.<sup>127</sup> Therefore, the suit

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123. See, e.g., *Santosky*, 455 U.S. at 751 (examining state’s claim for termination of parental rights due to neglect).

124. *Reno v. Flores*, 507 U.S. 292, 303–04 (1993) (citation omitted).

125. See *supra* notes 101–13.

126. See *Santosky*, 455 U.S. at 747–48. This requirement has not gone unnoticed in North Carolina. See *Price v. Howard*, 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997) (“We stated that [the parental liberty] interest must prevail in a custody dispute with a nonparent, absent a showing of unfitness or neglect.”). However, the court subsequently found conduct inconsistent with the paramount parental interest to be sufficient for termination as well. See *id.* at 84, 484 S.E.2d at 537.

127. *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010).



brought by *Boseman* was between a parent and a non-parent, rather than two legal parents. The court's use of the best interest standard in the context of a custody dispute failed to properly frame the issue and to provide Jarrell sufficient protection of her fundamental parental rights.

In addition, a problem emerges where the court found Jarrell to be a fit parent despite simultaneously determining that she had acted inconsistently with her paramount parental interest.<sup>128</sup> *Troxel*'s treatment of parental rights suggests no constitutionally sufficient ground for this counter-intuitive holding. Instead, *Troxel* suggests that finding a parent to have acted inconsistently with her paramount interest to a degree sufficient to terminate her rights requires that the court find, at a minimum, the parent to be unfit or to have failed to provide adequately for her child.<sup>129</sup> In *Boseman*, the court found the opposite to be true of Jarrell's parenting, describing her not only as fit, but as having a "very loving and respectful relationship" with her child.<sup>130</sup> In this respect, it becomes quite clear that had the court applied the proper constitutional standards to its analysis, it would have been unable to justify a decision to terminate Jarrell's parental rights in favor of granting joint custody with *Boseman*. Additional North Carolina cases demonstrate that *Boseman* is not an anomaly. In *Price v. Howard*,<sup>131</sup> decided before *Boseman*, and *Best v. Gallup*,<sup>132</sup> decided after, North Carolina courts upheld the trial court's use of the best interest standard in custody suits by social parents even though the legal parents had not been found to be unfit.<sup>133</sup>

The highly subjective evidentiary inquiries upon which termination suits hinge are also problematic considering the clear and convincing evidence standard put forth by the Court in *Santosky*.<sup>134</sup> In *Jones v. Barlow*,<sup>135</sup> the Supreme Court of Utah acknowledged that determining whether a social parent has standing against a fit legal parent "rests upon ambiguous and fact-intensive inquiries into the [social] parent's

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128. See *id.* at 552, 704 S.E.2d at 505.

129. See *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) ("Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").

130. *Boseman*, 364 N.C. at 550, 704 S.E.2d at 503.

131. 346 N.C. 68, 484 S.E.2d 528 (1997).

132. \_\_\_ N.C. \_\_\_, 715 S.E.2d 597 (2011); see *infra* text corresponding to notes 172–73.

133. See generally *Price*, 346 N.C. 68, 484 S.E.2d 528 (upholding the trial court's application of the best interest standard in a custody dispute even though the parent's conduct inconsistent with her protected status did not rise to the statutory level warranting termination of parental rights); *Best*, \_\_\_ N.C. \_\_\_, 715 S.E.2d 597 (upholding the trial court's application of the best interest standard in a custody dispute even though the legal parent was not found to be unfit).

134. See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

135. 2007 UT 20, 154 P.3d 808.

relationship with a child and the natural parent's intent in allowing or fostering such a relationship."<sup>136</sup> Similar issues are present, if not amplified, where disputes proceed into full litigation.<sup>137</sup> A second problem arises because retroactively determining that a parent has acted inconsistently with his or her paramount parental interest seems to constitute an implicit waiver of one's constitutionally protected parental rights. Yet, "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights,<sup>138</sup> and "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."<sup>139</sup> One wonders how a parent described as fit, loving, and respectful can be judicially deemed to have acted in a manner that will implicitly waive his or her paramount parental interest.<sup>140</sup> The inherent subjectivity of North Carolina's custody standard ultimately undermines a court's ability to provide the constitutionally mandated procedural due process to a fit, legal parent.

Finally, the origins of the dual avenues standard reveal further reason to doubt its constitutionality. The case that first introduced the dual avenues standard into North Carolina jurisprudence, *Price v. Howard*, based the second avenue of the dual avenues standard on the Supreme Court of the United States's decision in *Quilloin v. Walcott*.<sup>141</sup> *Quilloin* upheld the use of the best interest standard over the wishes of a fit, biological father because he fathered the child out of wedlock and failed to legitimize his parental rights until eleven years after the child was born, when the child's stepfather attempted to adopt the child.<sup>142</sup> However, several reasons demonstrate the impropriety of utilizing *Quilloin* to justify the dual avenues standard. First, *Quilloin* should be read as consistent with *Troxel*'s strong deference to parental rights since *Troxel* cited *Quilloin* several times<sup>143</sup> and

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136. *Id.* ¶ 31, 154 P.3d at 816.

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

138. *Carnley v. Cochran*, 369 U.S. 506, 514 (1962) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Both of these cases apply the presumption within the context of the fundamental right to counsel in state criminal proceedings. Recognizing the clarity with which one must waive a fundamental right, the Supreme Court in *Carnley* also reaffirmed *Zerbst*'s holding that "we do not presume acquiescence in the loss of fundamental rights." *Id.*; *see also* *Hodges v. Easton*, 106 U.S. 408, 412 (1882) (remanding a proceeding in which it was unclear whether the defendant had effectively and intelligently waived his right to counsel).

139. *Brady v. U.S.*, 397 U.S. 742, 748 (1970) (holding that a voluntary guilty plea by the defendant constituted an effective waiver of the defendant's right to a trial by judge or jury).

140. While parental agreements may help clear some confusion, they present other problems. *See infra* Part II.B.

141. *See Price v. Howard*, 346 N.C. 68, 78–79, 484 S.E.2d 528, 533–34 (1997).

142. *See Quilloin v. Walcott*, 434 U.S. 246, 251 (1978).

143. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000).

since *Troxel* was decided over twenty years after *Quilloin*. In addition, significant factual differences between *Quilloin* and *Boseman* demonstrate that *Quilloin*'s legal rationale do not justify the court's result in *Boseman*. In *Quilloin*, the Court's holding justified *terminating* the parental rights of the unmarried, yet legal and biological father *in accordance with* the wishes of the child's fit, biological mother and the child himself.<sup>144</sup> In *Boseman*, by contrast, the court used the same standard to *grant* parental rights to a legal and biological stranger *in opposition to* the wishes of the child's fit mother.<sup>145</sup> A further, and perhaps more telling, distinction between these cases is the fact that the *Quilloin* court noted that its determination would have the effect of "giv[ing] full recognition to a family unit already in existence."<sup>146</sup> The court's determination in *Boseman*, by contrast, would contribute to further fracturing of the child's family environment by dividing the child's time between two homes.<sup>147</sup> Accordingly, *Price*'s reliance on *Quilloin* further weakens the continued viability of *Price* and North Carolina's dual avenues standard.

*B. Conflicts with Underlying Rationales for Parental Rights*

A second and perhaps more foundational problem with the dual avenues standard is that its provision for legal protection to social parents is fundamentally inconsistent with the primary rationale behind the constitutional parental rights regime. The Supreme Court's reasoning begins with the common sense notion that children are born without the ability to care for themselves, to make rational decisions based on their best interests, or to comprehend society and how to properly interact with it.<sup>148</sup> As such, by way of "the pages of human experience"<sup>149</sup> and acknowledging that the "natural bonds of affection lead parents to act in the best interests of their children,"<sup>150</sup> the Court has recognized<sup>151</sup> and entrenched the rights

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144. *Quilloin*, 434 U.S. at 252–53.

145. *Boseman v. Jarrell*, 364 N.C. 537, 553, 704 S.E.2d 494, 503 (2010).

146. *Quilloin*, 434 U.S. at 255. The effect of overriding the father's wishes would grant parental rights to the child's mother's new husband, thus legitimizing and stabilizing the family unit within which the child was living.

147. *See Boseman*, 364 N.C. at 549, 704 S.E.2d at 502.

148. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."); *see also* JENNIFER ROBACK MORSE, LOVE & ECONOMICS: WHY THE LAISSEZ-FAIRE FAMILY DOESN'T WORK 5 (2001) ("The family performs a crucial and irreplaceable social function. Inside a family, helpless babies are transformed from self-centered bundles of impulses, desires, and emotions to fully socialized adults.").

149. *Parham*, 442 U.S. at 602.

150. *Id.*

to provide for these needs as belonging to persons legally recognized as parents.<sup>152</sup> Federal courts have been explicit about this rationale: “The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, *coupled with the high duty*, to recognize and prepare him for additional obligations.”<sup>153</sup> North Carolina has incorporated this notion into its jurisprudence as well:

Because the law presumes parents will perform their obligations to their children, it presumes their prior right to custody, but this is not an absolute right. The welfare of the child is the crucial test. When a parent neglects the welfare and interest of his child, he waives his usual right of custody.<sup>154</sup>

Accordingly, the Court’s strong protection for *parental rights* presupposes that the individuals who possess those rights assume *parental duties*.

The Court has not been explicit, nor should it be, in providing too clear a definition of what constitutes parental duties. Assuming that intrusion on a fundamental right requires a compelling state interest, the duty of preparing a child for “additional obligations” may involve teaching a child how to interact with others and be a responsible citizen.<sup>155</sup> Yet because the Court describes the liberty interest in terms of care and companionship, parental duties presumably involve nurturing the comprehensive well-being of a child’s individual physical, emotional, mental, and spiritual well-being as well. Regardless of the specific parameters of parental duties, their existence demonstrates that parental rights are a liberty interest<sup>156</sup> that protects the freedom to do what one ought rather than what one wants.<sup>157</sup> Parents are not afforded the luxury of

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151. The use of the word “recognized” here is intentional. The parent-child relationship is a pre-political institution in the same way that marriage is. Thus, the state does not have the power to *create* rights over the care, custody, and guardianship of children, but rather only the power to *recognize, support, and regulate* those rights in order to ensure they are not abused. *See, e.g.,* Sherif Girgis, Ryan T. Anderson & Robert P. George, *Marriage: Merely a Social Construct? A Response to Northwestern Law Professor Andrew Koppelman*, PUB. DISCOURSE: ETHICS, L., & COMMON GOOD (Dec. 29, 2010), <http://www.thepublicdiscourse.com/2010/12/2263>.

152. *Parham*, 442 U.S. at 602 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*447) (“The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.”).

153. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (emphasis added).

154. *In re Hughes*, 254 N.C. 434, 436–37, 119 S.E.2d 189, 191 (1961) (citations omitted). Professor Suzanne Reynolds notes that the terms “best interest of the child” and “welfare of the child” are used interchangeably within North Carolina’s jurisprudence. 3 SUZANNE REYNOLDS, *LEE’S NORTH CAROLINA FAMILY LAW* § 13.3 (5th ed. 2002).

155. *See, e.g.,* MORSE, *supra* note 148, at 6.

156. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

157. For an explanation of this conception of liberty, *see* JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 2 (1996) (“I think that some actions are better than others. And *the whole point*

defining the scope of parenthood, but rather submit to the complete and unqualified duty to pursue the best interests of their child.

The nature of social parenthood, by contrast, is a parental relationship that is defined not by objective biological or legal circumstances, but by the subjective decisions and agreements of the child's legal and social parents. As North Carolina courts have recognized, social parenting arrangements of the sort in *Boseman* are carefully designed and constructed according to the wishes of the parental figures entering into the agreements.<sup>158</sup> For example, contractual parenting agreements, as found in *Mason v. Dwinnell*,<sup>159</sup> delegate responsibilities and duties among the social and legal parents on issues ranging from financial responsibilities, medical decisions, taxation assessments, and even "all major decisions regarding their child."<sup>160</sup> Yet, even if the parties to such agreements produce an arrangement that includes most or all of the traditional parenting duties, one should not confuse the *scope* of the resulting agreement with the *process* by which the agreement was reached. Instead of surrendering one's interests by assuming the unconditional duty to act in the best interests of the child, becoming a parent by way of a parenting agreement becomes a process by which an adult picks and chooses the duties that reflect what the parent desires to give and receive from the relationship.<sup>161</sup>

Social parenting arrangements also impose significant burdens on the courts that must interpret them.<sup>162</sup> While written parenting arrangements may provide fairly clear guidance to a court, many social parenting

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*of freedoms is to let us do these things.* The law leaves us free to do *x* because it is a good thing to do *x*. This might seem pretty obvious. But it inverts the first principle of liberalism—it makes the good prior to the right.” (emphasis added)); see also *A NEW WORLDLY ORDER: JOHN PAUL II AND HUMAN FREEDOM* 2–3 (George Weigel ed., 1992) (“The only true freedom, the only freedom that can truly satisfy, is the freedom to do what we ought as human beings created by God according to his plan.”).

158. *Boseman v. Jarrell*, 364 N.C. 537, 539–40, 704 S.E.2d 494, 497 (2010).

159. 190 N.C. App. 209, 660 S.E.2d 58 (2008).

160. *Id.* at 223, 660 S.E.2d at 67 (internal quotation marks omitted).

161. See, e.g., Lawrence M. Berger et al., *Parenting Practices of Resident Fathers: The Role of Marital and Biological Ties*, 70 J. MARRIAGE & FAM. 625, 634–35 (2008) (analyzing findings that social fathers demonstrate a greater level of involvement with the children of their partners and suggesting that the trend may be due to the father's self-interest in gaining trust, companionship, and intimacy with the child's mother rather than promoting the best interest of the child).

162. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (“[T]he burden of litigating a domestic relations proceeding can itself be ‘so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.’ ” (internal citations omitted)); *Jones v. Barlow*, 2007 UT 20, ¶ 31, 154 P.3d 808, 816 (Utah 2007) (expressing concern about the amount of litigation required in cases involving social parents).

arrangements, such as the arrangement in *Boseman*, are oral or implied.<sup>163</sup> In such circumstances, courts must assess and balance the highly subjective intentions, representations, and expectations of each party involved.<sup>164</sup> When parents can define, alter, or even transfer their parental duties, courts can never safely presume that parents have actually assumed all necessary duties to provide for the best interests of their children. As such, a court will always need to impose the best interest standard to assess the adequacy of the agreement struck by the various parental figures—legal or not.

Accordingly, legal recognition for self-defining conceptualizations of parenthood undermines the foundational rationales for the Supreme Court's jurisprudence on parental rights. As noted above, the dispositive assumption for the Court's acknowledgement of parental rights is that parents assume an unqualified duty to act in the best interests of their children.<sup>165</sup> Yet, when parents define their own parental duties, courts can no longer safely assume that those parents are acting in the best interests of their children. Hence, the state must scrutinize all such actions in light of the best interest standard in order to fulfill its *parens patriae* duty to protect children.<sup>166</sup> When a court must make a best interests determination for each case, any level of deference to parental decision-making vanishes and the entire rationale undergirding constitutional parental rights swiftly crumbles.<sup>167</sup> Thus, a constitutional regime based on a presumption that parents adhere to an unqualified notion of traditional parenting duties and responsibilities has no place for conceptualizations of parenting that allow parents to customize their parenting duties like assigning terms in a contract.

### C. Policy Problems with Self-Defined Parenthood

In addition to its multi-faceted departure from constitutional standards, North Carolina's dual avenues standard invokes at least two compelling public policy concerns. Primarily, the *Boseman* parental estoppel theory is

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163. See, e.g., *Boseman*, 364 N.C. at 539–40, 704 S.E.2d at 497 (discussing various agreements made between parties regarding parenting, but not official documentation).

164. See, e.g., *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (“[I]n custody cases, the trial court sees the parties in person and listens to all the witnesses . . . allow[ing] the trial court to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges.” (internal citations and quotation marks omitted)).

165. See *supra* text accompanying notes 148–54.

166. See *supra* notes 5–6 and accompanying text.

167. Another important point of distinction is necessary here. One should not confuse variation amongst how parents carry out their parental duties with variation amongst which duties parents actually assume. Variation within the former can only be expected and is assumed by the Court. When parents are found to have ignored fundamental duties, however, the Court has authorized invoking the best interest standard. See *supra* Part II.A.

fundamentally at odds with the significant limitations of estoppel doctrine in other contexts. North Carolina does not extend estoppel doctrine to injunctions that compel personal services because courts find it contrary to human dignity to allow an individual to contract himself into slavery or indentured servitude.<sup>168</sup> Similar concerns regarding human dignity are present in the context of parental estoppel because social parenting allows adults to essentially contract for the custody, care, and control of a child who has no say in the arrangement. These familial arrangements objectify and dehumanize children by treating parental rights like property rights and children like chattels, assigning various duties, rights, and responsibilities, and ensuring that each parental figure in the agreement can protect his or her interests and expectations.<sup>169</sup> Children are “intelligent, moral beings”<sup>170</sup> and thus parental rights are not rights over a child as property but rather rights to exercise one’s obligations as a counselor and steward of the child free from outside interference.<sup>171</sup> While one should not have to appeal to a legal doctrine to demonstrate the impropriety and immorality of treating children as property, estoppel doctrine’s inherent concern for protecting

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168. See *supra* notes 67–68 and accompanying text.

169. See, e.g., Terry Arendell, *Conceiving and Investigating Motherhood: The Decade’s Scholarship*, 62 J. MARRIAGE & FAM. 1192, 1196 (2000) (“Definitions of mothers and mothering are co-opted by scientific and medical experts and determined by legal contracts, and birth giving and motherhood are commodified.” (internal citations omitted)); Carter Dillard, *Future Children as Property*, 17 DUKE J. GENDER L. & POL’Y 47, 71–74 (2010) (maintaining that the most common notion of the right to procreate tends to treat future children largely as a class of property). Some may argue that custody agreements following the divorce of a child’s biological parents may have the same effect. However, analysis of the timing of these two agreements defeats this argument. Post-marital custody agreements are fundamentally *reactive* and *palliative* in nature. They are only contemplated after the dissolution of the parents’ relationship and their primary concern is the welfare of the child in maintaining a stable environment and preserving the child’s preexisting relationships to the greatest extent possible. See REYNOLDS, *supra* note 154, § 13.3. Even then, these arrangements are still subject to court approval. Parental agreements, on the other hand, are primarily *prescriptive* in nature. They are contemplated and designed in advance of their need and focus primarily on preserving the interests of the respective parents (since the interests of the children at the time of dissolution cannot be known). See, e.g., *Mason v. Dwinnell*, 190 N.C. App. 209, 212, 660 S.E.2d 58, 60–61 (2008) (listing the terms of the parties’ parenting agreement that focused primarily on the rights and desires of the parents); cf. Laura Nicole Althouse, *Three’s Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN’S L.J. 171, 172 (2008) (“[U]nlike heterosexually headed families where a stepparent may replace or *supplement* a biological parent based on how the biological parents’ relationship evolves, the three-parent structure in families headed by same-sex parents is *usually planned from birth*.” (emphasis added)). Whereas post-marital custody agreements involve parents who intended to raise the child together and now seek to share the baby, parental agreements operate like pre-nuptial agreements deciphering ahead of time how to split the baby. One may wonder how King Solomon would handle such circumstances. See 1 *Kings* 3:16–28.

170. *Wall v. Hardee*, 240 N.C. 465, 467, 82 S.E.2d 370, 372 (1954).

171. See *id.*; *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

human dignity counsels against extending its principles to social parenthood.

Fundamentally altering traditional parenting norms will also open the floodgates to a wide range of harmful familial models, leaving courts unable to make principled and consistent objections to any form of familial arrangements where parenthood is self-defined. Utilizing social parenthood as a legitimate legal basis for granting parental rights does not just involve the court in recognizing a slightly altered form of the traditional nuclear family. Rather, granting parental rights through social parenthood provides a court-sanctioned means for a legal stranger, in collusion with the child's legal parent, to redefine the scope and nature of parenthood altogether. Under that principle, courts will have no ability to object to a wide variety of familial arrangements without direct, explicit, and tangible evidence of harm to the child. Instances of legal strangers successfully gaining custody over the wishes of fit, legal parents are already appearing outside the context of same-sex households. In *Best*, mentioned above, the North Carolina Court of Appeals utilized the *Boseman* holding to reverse and remand a trial court's denial of joint custody to the boyfriend of the legally adoptive mother's child.<sup>172</sup> As such, the court granted an adult male custody rights to a female child to whom he had absolutely no legal or biological relation over the fit, legal mother's objection.<sup>173</sup>

The *Boseman* standard may authorize the recognition of familial structures well beyond the two-parent household as well. For example, assume that once *Boseman* and Jarrell have joint custody, Jarrell brings a new romantic partner into her home, holds out her new partner as a parent to the child, and voluntarily gives custody to the new partner without creating an expectation that the relationship may terminate.<sup>174</sup> Assume also that the relationship lasts for several years, that *Boseman* knows and consents to the arrangement, and that Jarrell's new partner and her child develop a strong parent-child relationship. Upon the dissolution of Jarrell's relationship with her new partner, would the new partner be entitled to share joint custody with *Boseman* and Jarrell?<sup>175</sup> Moreover, *Boseman* could

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172. *Best v. Gallup*, \_\_ N.C. App. \_\_, \_\_, 715 S.E.2d 597, 601 (2011). For another example of how the presumption afforded to legal parents is under attack in Canada, where alternate-sexuality rights have greater recognition than in the United States, see Bill Kaufman, *Groundbreaking Ruling in Gay Custody Case*, CALGARY SUN (Can.) (Oct. 19, 2011), <http://www.calgarysun.com/2011/10/19/groundbreaking-ruling-in-gay-custody-case>.

173. *Best*, \_\_ N.C. App. at \_\_, 715 S.E.2d at 601.

174. This would satisfy the three elements in *Boseman*. See *Boseman v. Jarrell*, 364 N.C. 537, 550–51, 704 S.E.2d 494, 503 (2010).

175. In North Carolina, adoption by a stepparent requires termination of the parental rights of the child's biological parent who is not the spouse of the adopting stepparent. N.C. GEN. STAT.



be simultaneously engaging in the same conduct. Although the harm and instability of these arrangements are clear,<sup>176</sup> such models are not mere hypotheticals.<sup>177</sup> In 2005, the State of Washington became the first state to recognize parental rights for three adults over a single child.<sup>178</sup> In *In re Parentage of L.B.*, a lesbian couple decided that one of the women would conceive a child, using the sperm of a male friend, and that the women would raise the child together.<sup>179</sup> When the couple split several years later, the biological mother married the man who had donated the sperm for her child.<sup>180</sup> The non-biological mother filed a petition for the establishment of parentage after her former partner limited the woman's contact with the child.<sup>181</sup> The Washington Supreme Court held that the non-biological mother had standing to petition for *de facto* parent status, thus legally recognizing the possibility for a child to have three adult parents.<sup>182</sup>

Multi-parent models are increasingly the subject of legal advocacy and often for reasons other than "resolving" messy custody disputes.<sup>183</sup> A document signed by dozens of academics in a variety of fields at some of

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§§ 48-4-102, -103(b) (2011). Thus, a stepfather cannot assume legal parental rights to a stepchild without a legal adoption decree affirming the consent of the child's current legal parent(s) to the severance of the parental rights of the child's biological parent who is not the spouse of the adopting parent. *See id.* While this may theoretically prevent the hypothetical noted above, it also undermines the concept of *de facto* parenthood by suggesting that a nonparent, even one married to the child's legal parent, cannot assume parental rights despite meeting the three elements stipulated in *Boseman*.

176. *See, e.g.,* Lindsay J. Rohlf, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define "Parent"?*, 94 IOWA L. REV. 691, 723 (2009) ("The psychological-parent and de facto-parent doctrines would not encourage [] stability because a child could end up in a confusing situation with multiple 'parents' and an ever-changing 'family.'").

177. *See, e.g.,* Jacob v. Schultz-Jacob, 923 A.2d 473, 476 (Pa. Super. Ct. 2007) (involving lesbian ex-partners litigating over custody of four children whom they had raised together for several years, including two children born biologically to one of the women and two nephews adopted by the same partner); N.R. Kleinfield, *And Baby Makes Four*, N.Y. TIMES, June 19, 2011, at L1.

178. *In re Parentage of L.B.*, 122 P.3d 161, 163 (Wash. 2005) (en banc).

179. *Id.* at 163–64.

180. *Id.* at 164.

181. *Id.*

182. *Id.* The court did not hold that the non-mother was a *de facto* parent but rather remanded the issue to the district court for a determination of whether the non-parent could establish that she was a *de facto* parent. *Id.* at 179.

183. *See, e.g.,* Althouse, *supra* note 169, at 173–75; Pamela Gatos, *Third-Parent Adoption in Lesbian and Gay Families*, 26 VT. L. REV. 195, 197–98 (2001); Laura T. Kessler, *Community Parenting*, 24 WASH U. J.L. & POL'Y 47, 49–50 (2007). One such reason is recognition within same-sex headed households of the value of having an opposite sex role model for children of a different gender than their homosexual parents. Althouse, *supra* note 169, at 174 ("[M]any same-sex couples desire to include a third social parent in their families because they place importance on their children's ability to have a connection with people who are biologically related to them or because they want to provide a role model of the opposite sex.").

the nation's top universities has argued for legal recognition of every mixture of dads, moms, and children imaginable, such as where "[q]ueer couples . . . decide to jointly *create* and raise a child with another queer person or couple, in two households."<sup>184</sup> However, these various arrangements are likely drafted or informally entered into with the interests of the would-be parents in mind—not the best interests of the children.<sup>185</sup> Yet, when courts provide legal rights for social parents, they entrench a concept of parenthood as fundamentally a fulfillment of parental desires to piece together a family rather than the creation of stable environments for children. Once these traditions become entrenched, courts will lose their ability to object to arrangements that deny children the rights to stable environments with their biological parents.

### III. WORKING TOWARD A SOLUTION

The significant constitutional and policy issues noted above make it imperative that the North Carolina General Assembly fill the gaps in its legislation that have resulted in the dual avenues standard employed by the court in *Boseman*. The *de facto* parenthood doctrine conflicts with explicit constitutional precedent, undermines essential rationales for constitutional parental rights, and legally authorizes familial arrangements that are not in the best interests of children.<sup>186</sup> While any viable solution must respect the importance of the great degree of discretion that trial courts have in custody

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184. *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, BEYONDMARRIAGE.ORG (July 26, 2006), [www.beyondmarriage.org/full\\_statement.html](http://www.beyondmarriage.org/full_statement.html) (emphasis added).

185. Many recent sociological studies have demonstrated that any deviations from the non-nuclear family model are less than ideal. Sometimes, with adoption, it seems as though certain familial models that deviate from the nuclear model are at least preferable to the child's alternatives. However, in many circumstances involving social parents, such as *Boseman*, children are knowingly, voluntarily, and purposefully created and brought into homes that deviate from the nuclear model by design. Such models reflect a decision by the parents to voluntarily deviate from the child's best interest in pursuit of their own. See, e.g., W. BRADFORD WILCOX, WHY MARRIAGE MATTERS: THIRTY CONCLUSIONS FROM THE SOCIAL SCIENCES 11–43 (3d. ed. 2011) (reviewing a broad range of social science data demonstrating that married, biological homes produce the best environment and outcomes for children); Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?* CHILD TRENDS RES. BRIEF (Child Trends, Washington, D.C.), June 2002, 1, at 1–2, 6 available at [http://www.childtrends.org/Files/Child\\_Trends-2002\\_06\\_01\\_RB\\_ChildsViewMarriage.pdf](http://www.childtrends.org/Files/Child_Trends-2002_06_01_RB_ChildsViewMarriage.pdf) (“[I]t is not simply the presence of two parents, as some have assumed, but the presence of *two biological parents* that seems to support children's development.”); Steve Doughty, *High Court Judge's Blast for Four Gay Parents Fighting Over Two Little Sisters*, DAILY MAIL (London) (Oct. 11, 2011), <http://www.dailymail.co.uk/news/article-2047671/High-Court-judges-blast-gay-parents-fighting-little-sisters.html#ixzz1buTCawCX> (discussing a judge's stark warning about the traumatic effects on children when complicated homosexual parenting arrangements unravel).

186. See *supra* Part II.

suits,<sup>187</sup> the legislature is well within its authority to change the trajectory of jurisprudential standards at odds with federal constitutional standards and legitimate public policy concerns.<sup>188</sup> As such, the North Carolina General Assembly should reformulate the legal standards for social parenthood by shifting from the *de facto* doctrine to the *in loco parentis* doctrine, thus limiting presumptive parental rights to fit natural and adoptive parents.

As noted above, the problems presented by the dual avenues standard arise primarily from North Carolina's broad statutory provision for standing in child custody cases. The statute stipulates that "[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action [for custody]."<sup>189</sup> Although North Carolina courts have excluded total strangers from obtaining standing in a custody suit,<sup>190</sup> allowing social parents<sup>191</sup>—who are legal strangers—to challenge custody under the *de facto* doctrine has proven problematic on a number of fronts.<sup>192</sup> The *in loco parentis* doctrine, by contrast, is a legal designation by which a non-legal parent "act[s] as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent."<sup>193</sup> As explained by the Utah Supreme Court, "an individual [who] stands *in loco parentis* to a child . . . has the 'same rights, duties, and liabilities as a parent' "<sup>194</sup> yet "a legal parent may freely terminate the *in loco parentis* status . . . thereby extinguishing all parent-like rights and responsibilities vested in the former surrogate parent."<sup>195</sup> Since the *de facto* doctrine is the source of the profound problems mentioned above, this is where the legislature should specifically focus its efforts to transition to the *in loco parentis* doctrine.

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187. REYNOLDS, *supra* note 154, § 13.3.

188. The Utah Supreme Court, when addressing an almost identical factual scenario as that presented in *Boseman*, stated that, "[a]s a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another. The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's." *Jones v. Barlow*, 2007 UT 20, ¶ 34, 154 P.3d 808, 817 (quoting *Van v. Zahorik*, 597 N.W.2d 15, 18 (Mich. 1999)).

189. N. C. GEN. STAT. § 50-13.1(a) (2011).

190. *See supra* note 117.

191. *See supra* note 118.

192. *See supra* Part II.

193. BLACK'S LAW DICTIONARY 858 (9th ed. 2009) (emphasis added).

194. *Jones v. Barlow*, 2007 UT 20, ¶ 13, 154 P.3d 808, 811 (quoting *Sparks v. Hinckley*, 5 P.2d 570, 571 (Utah 1931)) (emphasis added).

195. *Id.* ¶ 22, 154 P.3d at 813 (emphasis added); *see also* *Coons-Andersen v. Andersen*, 104 S.W.3d 630, 636 (Tex. App. 2003) ("The common law relationship is temporary and ends when the child is no longer under the care of the person in loco parentis.").

The differences between the *in loco parentis* doctrine and the *de facto* doctrine make the former preferable for several reasons. First, *in loco parentis* comports with constitutionally mandated respect for parental rights because it does not divest the legal parent of his or her paramount constitutional interest in parental control over the child. In fact, *in loco parentis* doctrine is logically consistent with the constitutional understanding of parental rights because the social parent's legal rights, responsibilities, and liabilities function as an extension of legal parent decision-making for the child.<sup>196</sup> In other words, after creating the *in loco parentis* relationship, courts can confidently assume that decisions made by the non-legal parent coincide with the wishes of the legal parent. If that were not the case, the legal parent could simply terminate the relationship. Thus, the *in loco parentis* doctrine allows social parents to assume responsibilities and duties regarding the child and recognizes that a parent makes this decision pursuant to the proper exercise of his or her paramount constitutional interest.<sup>197</sup> By restricting and limiting ultimate decision-making exclusively to fit legal parents, *in loco parentis* avoids deviating from constitutional precedent and undermining constitutional rationales for the parental liberty interest.

The *in loco parentis* doctrine also furthers the state's compelling *parens patriae*<sup>198</sup> interest in encouraging the optimal environment for children. A considerable amount of social science supports the notion that the traditional nuclear, biological family is the optimal familial structure for child development.<sup>199</sup> One reason for these findings is the evidence that

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196. *Jones*, 2007 UT ¶ 91, 154 P.3d at 832–33.

197. Decisions that a fit parent makes for his or her child, unless objectively harmful (i.e., abuse, neglect, or abandonment) require that a judge assume that the parent was acting in the best interest of the child and that the parent did not intend to forfeit his or her constitutional right to parent the child. *See Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534–35 (1997). Accordingly, a parent's decision to allow another adult to share in some or all of the parenting responsibilities is presumptively a decision that the parent most likely believes is consistent with the best interests of the child. Therefore, it is illogical, unjust, and unconstitutional to deem such a decision to be inconsistent with a constitutionally protected status that is based on the notion that the rights holder will act in the best interest of the child. Of course, parents cannot tell the future any better than judges can. Thus, if a parent decides to share parenting responsibilities with another, and then later determines that the relationship is not in the best interest of her child, that decision requires constitutional protection as well.

198. *See supra* notes 5–6, 164 and accompanying text.

199. *See, e.g., WILCOX, supra* note 185, 11–43; Gregory Acs, *Can We Promote Child Well-Being by Promoting Marriage?*, 69 J. MARRIAGE & FAM. 1326, 1339–41 (2007) (noting that children living with married biological/adoptive parents have better test scores, fewer behavioral problems, and better outcomes generally); Moore et al., *supra* note 185, 1–2, 6. *But see* Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. MARRIAGE & FAM. 3, 5–6, 17 (2010) (finding that five parental variables—number, gender, sexual identity, marital status, and biogenetic relationship—conflate studies which claim that children need both a mother and a father).

homes led by married, dual-sex parents who have solemnized a life-long commitment to each other foster the most stable environments for children to develop.<sup>200</sup> Nuclear biological familial models are also preferable because they provide children with the unique benefits of having a parent of both the male and the female sex.<sup>201</sup> Some scholars have even provided

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200. Regardless of what alternative form the familial model takes, such as single parent households, same-sex households, or cohabitating heterosexual households, social science provides strong evidence that homes led by heterosexual, married parents are generally the most stable familial arrangements because of the stability of the relationship between the adults. Regarding the stability of cohabitating relationships, see Scott T. Yabiku & Constance T. Gager, *Sexual Frequency and the Stability of Marital and Cohabiting Unions*, 71 J. MARRIAGE & FAM. 983, 997–98 (2009) (finding that cohabitating relationships have lower levels of commitment and emotional stability and that sexual frequency is a much more significant factor in determining the longevity of cohabitating relationships than marriages). Regarding the comparative stability and commitment within same-sex relationships, see MARY MENDOLA, *THE MENDOLA REPORT: A NEW LOOK AT GAY COUPLES* 53 (1980) (offering survey results indicating that only 26% of homosexuals believe commitment is the most important element of a marriage relationship); Michael W. Wiederman, *Extramarital Sex: Prevalence and Correlates in a National Survey*, 34 J. OF SEX RES. 167, 171 (1997) (finding married men and women self-reporting complete fidelity rates of 78% and 88%, respectively); Ryan Lee, *Gay Couples Likely To Try Non-Monogamy, Study Shows: Separate Research Shows Lack of “Gay-Boy Talk” Hampers Safe-Sex*, WASHINGTON BLADE (Aug. 22, 2003), <http://www.aegis.com/news/wb/2003/WB030811.html> (“Only 25 percent of [male homosexuals] interviewed reported being monogamous, with age and experience playing a major factor.”); Timothy J. Dailey, *Comparing the Lifestyles of Homosexual Couples to Married Couples*, FAM. RES. COUNCIL, <http://www.frc.org/get.cfm?i=IS04C02> (last visited Apr. 17, 2012) (noting that in Vermont in 2004, for example, only 21% of homosexual couples had entered into civil unions, whereas married heterosexual couples outnumbered cohabitating heterosexual couples by a margin of seven to one). Regarding norms of monogamy and fidelity within alternative familial structures, see ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 13 (1995) (“[M]ale homosexual culture has developed an ethic more of anonymous or promiscuous sex than of committed relationships.”); *Id.* at 202 (“[A]t times, among gay male relationships, the openness of the contract makes it more likely to survive than many heterosexual bonds . . . . [T]here is more likely to be greater understanding of the need for extramarital outlets between two men than between a man and a woman; and again, the lack of children gives gay couples greater freedom.”); Charles Kaiser, *For Gays, Cheers and Doubts About Marriage*, CNN.COM (June 26, 2011), [http://articles.cnn.com/2011-06-26/opinion/kaiser.gay.marriage/\\_1\\_gay-marriage-gay-community-modern-gay-movement/2?\\_s=PM:OPINION](http://articles.cnn.com/2011-06-26/opinion/kaiser.gay.marriage/_1_gay-marriage-gay-community-modern-gay-movement/2?_s=PM:OPINION) (noting that, after the passage of same-sex marriage in New York, one activist in New York City remarked, “I feel pretty ambivalent . . . . Of course there are many other kinds of relationships, especially within queer culture, whether it’s open relationships or nonsexual companionship or polyamorous relationships . . . . I do think all types of relationships should be honored”).

201. There is much evidence supporting the notion that male and female parents each provide unique benefits to children. See, e.g., Arendell, *supra* note 169, at 1192 (“Mothering is particularly significant because it is ‘the main vehicle through which people first form their identities and learn their place in society.’ ”); Bruce J. Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 CHILD DEV. 801, 818 (2003) (“The current research suggests that, in relation to daughters’ sexual development, the social address of father absence is important in its own right and *not just a proxy for its many correlates*.” (emphasis added)); Bruce J. Ellis, *Timing of Pubertal Maturation in Girls: An Integrated Life History Approach*, 130 PSYCHOL. BULL. 920, 945, 949 (2004)

evidence to demonstrate that children generally want to know and be raised by their biological parents.<sup>202</sup> To be clear, such evidence does not necessarily demonstrate that certain individuals are incapable of being good parents. Rather, what social science data does show is that environments deviating from the nuclear biological family—be they orphanages, single-parent homes, cohabitating homes, blended families, or other environments missing the elements of marriage or biology—consistently fall short of those which do have both of those elements.<sup>203</sup> As such, states have a compelling interest in declining to recognize or encourage parenting arrangements that voluntarily deviate from this standard both for the sake of children and for society in general.<sup>204</sup>

Finally, the *in loco parentis* doctrine is consistent with the aims of much of North Carolina's existing law regarding parenthood. Courts have

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(indicating that girls raised in homes without their biological father begin their periods earlier, an occurrence associated with earlier sexual activity and an increased risk for sexual abuse); William Marsiglio, *Scholarship on Fatherhood in the 1990s and Beyond*, 62 J. MARRIAGE & FAM. 1173, 1181–84 (2000) (finding that father involvement is beneficial to children in regard to behavior and social adjustment). *But see* Rachel H. Farr & Charlotte J. Patterson, *Transracial Adoption by Lesbian, Gay, and Heterosexual Couples: Who Completes Transracial Adoptions and with What Results?*, 12 ADOPTION Q. 187, 201 (2009) (finding that children in transracial adoptions were well-adjusted in both heterosexual and homosexual homes, but limiting the average age of the children studied to three-years-old, thus leaving doubt as to the durability of the conclusion); Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47 DEMOGRAPHY 755, 770–72 (2010) (finding that, after controlling for socioeconomic status, children who grow up in same-sex households demonstrated no difference in grade retention compared to children raised in any other familial models); Jennifer L. Wainwright, Stephen T. Russell, & Charlotte J. Patterson, *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 CHILD DEV. 1886, 1895–97 (2004) (finding that “on nearly all of a large array of variables related to school and personal adjustment, adolescents with same-sex parents did not differ significantly from a matched group of adolescents living with opposite-sex parents,” though noting that the “results do not support the view that adolescent development is shaped by parental sexual orientation” as much as they do “theories that emphasize the importance of adolescent relationships with parents”).

202. MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 35–36 (2005).

203. *See* WILCOX, *supra* note 185, at 11–43; Moore et al., *supra* note 185, at 1–2, 6.

204. *See, e.g.,* JOSEPH DANIEL UNWIN, *SEXUAL REGULATIONS AND CULTURAL BEHAVIOR* 31 (1969) (“[I]t is an extraordinary fact in the past sexual opportunity has only been reduced to a minimum by the fortuitous adoption of an institution I call absolute monogamy. This type of marriage has been adopted by different societies, in different places, and at different times. Thousands of years and thousands of miles separate the events; and there is no apparent connexion between them. In human records there is no case of an absolutely monogamous society failing to display great energy. I do not know of a case on which great energy has been displayed by a society that has not been absolutely monogamous.”); MORSE, *supra* note 148, at 5 (“The family performs a crucial and irreplaceable social function. Inside a family, helpless babies are transformed from self-centered bundles of impulses, desires, and emotions to fully socialized adults. . . . [F]ree political institutions, the foundations of a free society, require these attributes that only families can inculcate. Without loving families, no society can long govern itself.”). *See generally* Sherif Girgis et al., *What is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245 (2011) (arguing that the conjugal view of marriage is in the best interest of the state).

recognized that certain familial arrangements foster the best interests of children and that states can legitimately work toward this goal by restricting legally recognized forms of families and parent-child relationships.<sup>205</sup> North Carolina is no exception. Children raised in a home without legally married parents do not have the protection of the duty of support and the doctrine of necessities,<sup>206</sup> spousal immunity,<sup>207</sup> alimony and equitable distribution,<sup>208</sup> and even presumptive paternity.<sup>209</sup> North Carolina jurisprudence has also recognized the uniqueness of biological parenthood and presumptively vested the duty in biological parents to support children until their majority.<sup>210</sup> Of course, tragic realities such as divorce, death, and other circumstances often render the nuclear biological family unavailable to a child. As such, the North Carolina General Assembly provides for a legal transfer of these duties through adoption by a married couple, the stepparent of a child whose biological parent remarried, or a single adult.<sup>211</sup> Although these familial models deviate from the ideal, they are still fundamentally oriented to reflect the nuclear biological family as closely as possible by retaining the core elements of marriage and dual-sex parenting.<sup>212</sup> By refusing to endorse parenting relationships that voluntarily

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205. *See, e.g.,* *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451, 462–63 (Ariz. Ct. App. 2003) (“The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children. Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State’s interest in ensuring responsible procreation within committed, long-term relationships.”); *Morrison v. Sadler*, 821 N.E.2d 15, 27 (Ind. Ct. App. 2005) (“There was a rational basis for the legislature to draw the line between opposite-sex couples, who as a generic group are biologically capable of reproducing, and same-sex couples, who are not. This is true, regardless of whether there are some opposite-sex couples that wish to marry but one or both partners are physically incapable of reproducing.”); *Barker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (holding that a Minnesota statute restricting marriage to a man and a woman does not violate the First, Eighth, Ninth, or Fourteenth Amendments to the U.S. Constitution); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (“[M]arriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman.”).

206. *See* *N.C. Baptist Hosps. v. Harris*, 319 N.C. 347, 353, 354 S.E.2d 471, 474 (1987).

207. N.C. GEN. STAT. §§ 8-56, -57 (2011).

208. *See, e.g.,* *McIver v. McIver*, 92 N.C. App. 116, 125, 374 S.E.2d 144, 150 (1988).

209. *See, e.g.,* *Michael H. v. Gerald D.*, 491 U.S. 110, 119–20 (1989).

210. *See, e.g.,* *State v. Robinson*, 245 N.C. 10, 13, 95 S.E.2d 126, 128 (1956).

211. *See* §§ 48-3-202 to -203, 4-100 (permitting a single adult to adopt a child, but prohibiting two adults from adopting the same child unless they are married).

212. The one exception is the adoption by a single adult. While the wisdom of this model may warrant reconsideration, a single adult possesses the potential for marriage and single adult adoption may be necessary in circumstances involving adoption by biological relatives.

and inherently deviate from the traditional nuclear, biological family model, the *in loco parentis* doctrine comports better with these existing legal structures.

#### CONCLUSION

Despite the abstract, rhetorical appeal of applying libertarian, self-defining, “live and let live” principles to notions of family and parenthood, actually doing so will have profoundly negative legal and societal consequences on the interests of those whom legal marriage and family were designed to protect: children. As extended by the Supreme Court of North Carolina in *Boseman*, North Carolina’s *de facto* parenthood doctrine violates explicit federal constitutional standards, undermines constitutional rationales for strong parental rights, and affirms family law policy that is in contrast with the best interests of children. While recognizing that circumstances arise in which the best interests of a child call for a non-parent to assist in providing many of a legal parent’s traditional duties and obligations, North Carolina’s family law policy should prohibit such arrangements from vesting a social parent with rights that supersede even the rights of the legal parent herself. Rather, North Carolina should replace the *de facto* doctrine with the *in loco parentis* doctrine which preserves full legal rights and control over the child to the fit and loving parents where they belong.

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